Karazdic[5] or the daughter of former President Marcos of the Philippines who was in charge of military intelligence personnel alleged to have kidnapped and murdered the son of a plaintiff in an action brought in California.[6] But liability is not imposed against states themselves, because that would require amendment of the Foreign Sovereign Immunities Act, which was not contemplated when the Torture Victim Protection Act was being considered.[7]

One might ask why the Alien Tort Statute was not simply repealed. The answer is that while the proponents were able to find international consensus and Congressional concurrence on the specific offenses as defined, they looked to emerging consensus on other violations of the law of nations, such as forced disappearances, or terrorism that might in the future be met by universal condemnation.[8] It is also true that, unlike the Alien Tort Statute, the new legislation contains an exhaustion of local remedies requirement, while the 1789 act does not. In fact, litigation in this area subsequent to the Torture Victim Protection Act has largely proceeded under the Alien Tort Statute, under the amendments to the Foreign Sovereign Immunities Act, and under the Anti-Terrorism Act, 18 U.S.C. § 2331–38, quoted in pertinent part at p. ___ below.

B. AMENDING THE FOREIGN SOVEREIGN IMMUNITIES ACT

In 1996, as part of the Antiterrorism and Effective Death Penalty Act,(AEDPA[1]) Congress enacted § 1605(a)(7) of the FSIA, to provide that foreign states shall not be immune from jurisdiction of U.S. courts for personal injury or death caused by torture, extra-judicial killing, aircraft sabotage (as in Pan Am 103), hostage taking or assisting such acts if engaged in by an official of the state within the scope of his or her employment.[2] In the same bill, Congress enacted a companion provision, § 1610(a)(7), providing that commercial property shall not be immune from attachment in aid of execution upon a judgment relating to a claim under § 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim was based.[3]

In response to the objection, pressed by the State Department, that the legislation would open up United States courts to persons who suffer

5. See the brief discussion by Judge Newman of whether the Srpska Republic qualifies as a state, p. ___ supra.

6. See *Trajano v. Ferdinand E. Marcos and Imee Marcos-Manotoc*, 978 F.2d 493 (9th Cir.1992), cert. denied, 508 U.S. 972, 113 S.Ct. 2960, 125 L.Ed.2d 661 (1993).

7. Note that the provision in the Alien Tort Statute stating "The district courts shall have original jurisdiction" is not necessary, because any action stating a claim under the Torture Victim Protection Act would clearly be within federal question jurisdiction under 28 U.S.C. § 1331.

8. See, e.g., statement of Alice Henkin, Chair of the Committee on International Human Rights of the Assn. of the Bar of the City of New York before Hearing and Markup on H.R. 1417, The Torture Victim Protection Act, House Comm. on Foreign Affairs, 100th Cong. 2d Sess. pp. 36–37 (1988).

1. Pub. L. 104–132, § 221(a), 110 Stat. 1214, 1241 (April 24, 1996).

2. See Documents Supplement pp. ___

3. Pub. L. 104–132 § 221(b), Documents Supplement p. ___ Whether this amendment had the effect of reversing the result in *Letelier v. Republic of Chile*, p. ___ supra, remained to be seen.

human rights violations anywhere in the world, the 1996 Act was made applicable only if the claimant or the victim is a United States national.[4] Moreover, since the amendments go well beyond the restrictive theory of sovereign immunity as understood in the United States and elsewhere,[5] immunity is lifted only if the foreign state is or has previously been designated by the Secretary of State as a state sponsor of terrorism. As of the date of passage of the Act, April 1996, seven states had been so designated—Cuba, Iran, Iraq, Libya, North Korea, Syria, and Sudan.[6] Also, in text that requires reading more than once, § 1605(a)(7)(B) provides that the foreign state does not lose its immunity if the act occurred in its territory and the claimant has not made an offer to arbitrate the claim under accepted international rules of arbitration.[7]

Five months after passage of the amendments to the FSIA contained in AEDPA, Congress adopted another statute, which came to be known as the Flatow Amendment, after the New Jersey lawyer who had urged its passage following the death of his daughter in a terrorist attack (see below). The Flatow amendment expressly created a private right of action in favor of victims of terrorism against officials, agents, and employees of states designated as state sponsors of terrorism for money damages including pain and suffering and punitive damages if the acts were among those described in § 1605(a)(7) of the FSIA.[8] It said nothing about suits against foreign states directly.

Thus as of 1996 four statutes were relevant to claims in United States courts on behalf of victims of human rights abuse. Under the *Alien Tort Statute of 1789*—not repealed—only aliens could bring suit, and only individuals could be defendants. Depending on whether the *Filartiga* or the *Tel-Oren* view of the Statute prevailed, the range of offenses could be very wide or quite narrow.[9] Under the *Torture Victim Protection Act*, both aliens and citizens could be plaintiffs, but only on

4. See § 1605(a)(7)(B)(ii).

5. See Chapter VII, section I.

6. As of mid-year 2005, the same group of states (except for Iraq) remained on the list. See 31 C.F.R. § 596.201. Interestingly enough, though Afghanistan was subject to numerous sanctions, some imposed before and some after September 11, 2001, it was never put on the list of state sponsors of terrorism, apparently on the theory that the United States did not recognize the Taliban as the legitimate government of that country. Also, Saudi Arabia, which many persons in the United States regarded as bearing at least some responsibility for the assault on the World Trade Center and the Pentagon on 9/11/2001, would not lose its immunity unless it were designated as a state sponsor of terrorism, which is in the control of the Secretary of State and very unlikely. Iraq was removed from the list by Presidential Determination shortly after the U.S. invasion of Iraq and mobilization of Iraqi assets for purposes of reconstruction of that country. See Pres. Determination No. 2003-23 of May 7, 2003, 68 Fed. Reg. 26,459 (May 16, 2003); *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), cert. denied 542 U.S. —, 125 S.Ct. 1928, 161 L.Ed.2d 792 (2005).

7. Section 1605(f), like the Torture Victim Protection Act, contains a ten-year statute of limitations, but the period does not run during the period when the state would have been immune, i.e.,prior to the passage of the amendment.

8. The Amendment, formally entitled *Civil Liability for Acts of State Sponsored Terrorism*, was included as a rider to the Omnibus Consolidated Appropriations Act of 1997, Pub. L. 104-208, § 101©). It is codified at 28 U.S.C. § 1605 note, and reproduced in the Documents Supplement at p. 350.

9. This statement is correct so far as it goes, because § 1330 of the FSIA provides that district courts have shall have original

the basis of a few defined offenses, and also only against individual defendants over whom personal jurisdiction could be obtained. Under the amendments to the *Foreign Sovereign Immunities Act*, only U.S. nationals could bring suit, on the basis of a larger but still-limited group of offenses—notably including hostage taking.[10] But only states could be defendants, and then only if they were designated as state sponsors of terrorism. Finally, under the *Flatow Amendment*, U.S. nationals could bring suit against officials of states designated as sponsors of terrorism, including economic damages, solatium,[11] pain and suffering, and punitive damages, but whether such suit could include the states themselves was not clear.

The question remained whether actual compensation could be secured under any of these provisions, as contrasted with satisfaction for the human rights movement. For cases like *Filartiga* and *Karadzic*, there was no realistic hope for enforcement of judgments, and indeed, as mentioned above, no final judgments were entered. A different group of plaintiffs, however, thought they had a chance.

C. THE SEARCH FOR ASSETS[1]

Once states were made amenable to suit—at least those on the State Department's list of sponsors of terrorism, the prospect of real and substantial recovery opened up for American citizens. But while § 1610(a) of the FSIA had been amended to remove for American nationals the requirement that the property on which judgments against foreign states could be executed be related to the claim on which the claim was based (compare § 1610(a)(2)-(5) with § 1610(a)(7)[2]), execution was still limited to "property used for a commercial activity." Diplomatic property remained immune from attachment or execution, consistent, as the State Department maintained, with the 1961 Vienna Convention on Diplomatic Relations.[3] A group of plaintiffs, led by the lawyer whose daughter had been killed in a terrorist attack in Israel, were determined to translate the immunity from suit achieved in the 1996 amendments into actual—and very substantial—recoveries.

1. *The Iran Cases: Flatow et al.*

On April 9, 1995, a suicide bomber drove a van loaded with explosives into a bus passing through the Gaza strip, killing seven Israeli

jurisdiction against a foreign state as to any claim with respect to which the foreign state is not entitled to immunity. Whether a separate cause of action must be established as well was not clear, as shown later on in this chapter.

10. Compare the discussion of the pendulum in section II(A), supra.

11. Solatium is a common law remedy available in different jurisdictions in different scope, affording damages for loss of companionship and support for injury or death of parents, spouses, and possibly other family members.

1. This section relies in part on successive instalments of *Contemporary Practice of the United States Relating to International Law*, edited by Sean D. Murphy, 93 Am. J. Int'l L. 181(1999); 94 Id. 117 (2000); 95 Id. 134 (2001); 96 Id. 463, 964 (2002); 97 Id. 966 (2003); 98 Id. 349).

2. Documents Supplement p. 347.

3. 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95, esp. Articles 22, 25, and 30. See also the Foreign Missions Act, 22 U.S.C. § 4301 et seq.; Restatement (Third) of the Foreign Relations Law of the United States §§ 460, 466 (1987).

soldiers and a twenty-year-old American college student, Alisa Flatow. A faction of Palestine Islamic Jihad, a terrorist group sponsored by Iran, claimed responsibility for the attack. Following passage of the amendment to the FSIA for which he had lobbied strenuously, Ms. Flatow's father brought suit for wrongful death against Iran and several of its leaders in the District of Columbia. Since the United States and Iran did not have diplomatic relations, service was made with the assistance of the Swiss Embassy in Teheran.

No appearance was made on behalf of Iran. After noting defendant's default and making further inquiry as required by § 1608(e),[4] Judge Lamberth entered judgment for plaintiff on March 11, 1998.[5] The judge found that § 1605(a)(7) and the Flatow Amendment must be read together, that therefore the court had jurisdiction and that the plaintiff had stated a claim upon which relief could be granted. Finding that Iran was responsible for the death of Ms. Flatow, he awarded compensatory and punitive damages totaling $247.5 million.[6]

To satisfy this judgment, Mr. Flatow moved to attach three properties owned by Iran in Washington, D.C.—the former Iranian embassy and the residences of the Minister for Cultural Affairs and the Military Attaché of the Embassy. The district court initially granted the motion, but then issued a stay pending submission of a Statement of Interest from the U.S. government. The government urged that the attachment be vacated, emphasizing that it was not acting on behalf of Iran, but in implementation of the international obligations of the United States (the Vienna Convention), and U.S. law—the Foreign Missions Act[7] and the Foreign Sovereign Immunities Act.[8]

By this time Mr. Flatow was not alone in his campaign. Two U.S. nationals associated with the American University of Beirut and a third U.S. national who had operated two private schools in that city had been kidnapped in May 1985 by Hezbollah, another group that receives support from Iran. One of the men, David Jacobsen, had been released after a year and a half; another, Frank Reed, had been held for three and a half years; and the third, Joseph Cicippio, had been held for more than five years. All had been held in extreme conditions and subjected to torture. They too brought suit against Iran, and in August of 1998 obtained a judgment for $65 million in compensatory damages.[9]

4. Documents Supplement p. 346.

5. Flatow v. Islamic Republic of Iran, 999 F.Supp. 1 (D.D.C. 1998).

6. The damages as found by the court consisted of:

$1.5 million in economic damages based on Ms. Flatow's earning potential;

$1 million for pain and suffering in the three to five hours between the explosion and Ms. Flatow's death;

$20 million for loss of society of Ms. Flatow's parents, three sisters, and a brother; and

$225 million in punitive damages, based on three times the annual expenditure by Iran for terrorist activities.

7. See note 3 supra.

8. The Statement of Interest is quoted at length in 93 Am. J. Int'l L., note 7 supra at 182–85 and reprinted in full in Mealey's Int'l Arb. Rep., Aug. 1998 at B–2—B–7.

9. *Cicippio et al. v. Islamic Republic of Iran*, 18 F. Supp.2d 62 (D.D.C.1998).

T Then there was Terry Anderson, a well known correspondent for the Associated Press in the Middle East, who had been kidnapped in Beirut, imprisoned and occasionally beaten for six and a half years, also by Hezbollah. Anderson obtained a judgment against Iran for $340 million in compensatory and punitive damages.[10] Other suits were filed and judgments rendered against Iran based on bus bombing in Israel, and other kidnappings in Lebanon including abduction and murder of a U.S. Marine colonel assigned to a UN peacekeeping mission in Lebanon,[11] and a victim of a car bomb at the U.S. Embassy in Beirut.[12] In nearly every case, the court awarded substantial compensatory damages and punitive damages in the 300 million dollar range.

T As these various actions had either gone to judgment or were in progress in the District of Columbia before the court had responded to the government's Statement of Interest in the *Flatow* case, Congress adopted another amendment to the FSIA, § 1610(f), stating that:

TH > Notwithstanding any other provision of law ... any property with respect to which financial transactions are prohibited or regulated pursuant to [the Trading with the Enemy Act, the Foreign Assistance Act of 1961, and the International Emergency Economic Powers Act or any order issued pursuant thereto] shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state ... claiming such property is not immune under § 1605(a)(7).[13]

T The property in question, essentially, was property of Iran frozen under the Iranian Assets Control Regulations adopted at the time of the Iranian Hostage Crisis of 1979–81, plus, according to Mr. Flatow, sums due to Iran pursuant to a judgment of the Iran–U.S. Claims Tribunal ordering the United States to pay an award that Iran had been unable to collect from a private American party.[14] The 1998 legislation also amended—several months after Judge Lamberth's judgment—the provision in § 1606 of the FSIA that excluded punitive damages against a foreign state, to add the words "except in any action under section 1605(a)(7) or 1610(f)."[15] However, the amendment contained a provision authorizing a waiver by the President, and President Clinton issued a waiver proclamation at the same time as he signed the legislation.[16]

FN 10. *Anderson v. Islamic Republic of Iran*, 90 F.Supp.2d 107 (D.D.C.2000).

FN 11. *Higgins v. Islamic Republic of Iran*, 2000 WL 33674311 (D.D.C.2000).

FN 12. *Eisenfeld*, 172 F.Supp.2d 1 (D.D.C. 2000); *Sutherland*, 151 F.Supp.2d 27 (D.D.C.2001), *Jenco*, 154 F.Supp.2d 27 (D.D.C.2001), *Weinstein*, 175 F.Supp.2d 13 (D.D.C.2001), *Wagner*, 172 F.Supp.2d 128 (D.D.C.2001).

FN 13. § 117(a) of the Omnibus Consolidated Appropriations Act of 1999, Pub. L. 105–277, 112 Stat. 2681, (Oct. 21, 1998), enacting FSIA § 1610(f), Documents Supplement p. 348.

FN 14. The amendment applied also to sums claimed by Cuba involved in the *Alejandre* case described below.

FN 15. § 117(b) of the Omnibus Consolidated Appropriations Act, note 13 supra.

FN 16. Presidential Determination No. 99–1, Oct. 21, 1998, 34 Weekly Comp. Pres. Docs. 2108, 2113 (Oct. 23, 1998); 63 Fed. Reg. 59201, (November 2, 1998). As Congress has done in other contexts, it attached the section to the basic governmental appropriation bill, which was essentially veto-proof. The condition for such unrelated riders, in this instance as in others, is to

As of the close of 1998, the claimants had not recovered any money, though Congress had adopted four amendments intended to help the American victims of terrorist acts receive compensation. The campaign went on, however, with the claimants and their Congressional backers on one side, the Administration on the other. Meanwhile another litigation, also much discussed in the press and in Congress, was in progress in Miami.

2. *The Cuba Case: Alejandre et al*

On February 24, 1996, two light planes flown by a Cuban–American anti-Castro organization based in Florida were blown up over international waters in the Florida Strait by missiles launched by MIG 23 and MIG 29 planes of the Cuban Air Force, apparently on standing orders of President Fidel Castro.[17] All of the occupants of the two planes were members of a Miami-based human rights organization known as *Hermanos al Rescate* (Brothers to the Rescue), and all were killed. Three of the four had become American citizens, and following passage of the amendments to the Foreign Sovereign Immunities Act, their families brought suit against Cuba in federal court in Miami.[18] No appearance was made on behalf of Cuba, and the district court, holding that the 1996 amendment to the FSIA could be applied retroactively, entered judgment in favor of the plaintiffs for $49.9 million in compensatory damages (three families) and $137.7 million in punitive damages. *Alejandre v. Republic of Cuba*, 996 F.Supp. 1239, at 1249, 1253 (S.D.Fla.1997).

Cuban assets in the United States had been blocked since February 1962, but direct telecommunications services between the United States and Cuba had been permitted since 1993. AT & T and other American telecommunications carriers were permitted, upon receiving a license from the U.S. Treasury, to make payments for services rendered to Empresa de Telecomunicaciones de Cuba, S.A. (ETECSA), a corporation majority-owned by the Cuban government. The *Alejandre* plaintiffs now sought to enforce their judgments against Cuba by garnishing and executing on debts from eleven U.S.-based telecommunications carriers to ETECSA.[19] Plaintiffs sought to rely on § 1610(f) as adopted in 1998,[20] and the garnishees, supported by the U.S. government, pointed out that

provide a waiver authority, subject to various findings—"national interest," "national security," etc.—that Presidents typically recite when granting the relevant waiver.

17. See *Time*, March 11, 1996 p. 38, quoting from an interview with President Castro, quoted in A. Lowenfeld, "Congress and Cuba: The Helms–Burton Act," 90 Am. J. Int'l L. 419 (1996). Apart from the death of the pilots, one consequence of the attack was that President Clinton signed the Helms–Burton Act, Publ. L. 104–114, 110 Stat. 785 (1996) designed (inter alia) to inhibit firms based in third countries from doing business in or with Cuba, which he had earlier indicated that he would veto.

18. Neither the fourth man killed nor his immediate family could qualify under § 1605(a)(7)(B)(ii), which, as mentioned above, lifts sovereign immunity in terrorism suits only on behalf of American citizens.

19. Recall that the device of attaching debts due to a debtor as in *Harris v. Balk* was preserved for purposes of execution on judgments in footnote 36 of *Shaffer v. Heitner*. See Chapter III, p. ___ and p. ___ question 1.

20. See p. ___ at note 13 supra.

that section carried authority for a Presidential waiver that President Clinton had exercised.[21]

The District Judge held (1) that the President's waiver authority did not extend to § 1610(f)(1) but only to (f)(2),[22] and (2) that payments due to ETECSA were, at least for purposes of this case, attributable to the Government of Cuba. Accordingly, in March 1999 the court ordered that judgment be entered against the telecommunications carriers in the amount of their outstanding debts to ETECSA, for a total of about $6.2 million.[23]

On appeal from the garnishment order, the Court of Appeals for the Eleventh Circuit quashed the writs of garnishment.[24] It expressed "no opinion" on the scope of the President's waiver authority. But citing *First National City Bank v. Banco Para El Comercio Exterior (Bancec)*, pp. __–__ supra, the court held that the plaintiffs had not overcome the presumption that government instrumentalities enjoy a separate juridical status vis-à-vis the foreign government to which they are related:

> While the district court's concern about the injustice of preventing plaintiffs from collecting their judgment is understandable, this concern is present in every case in which a plaintiff seeks to hold an instrumentality responsible for the debts of its related government. Allowing the *Bancec* presumption of separate juridical status to be so easily overcome would effectively render it a nullity. We recognize that the district court made an effort to distinguish this case based upon the gravity of the underlying violation of international law. Given the absence of any evidence that ETECSA was involved in the violation, however, we fail to see how this distinction is relevant to the question of whether ETECSA'S separate juridical status should be overcome.[25]

Thus as of fall 1999, the families of the Brothers to the Rescue, like the victims of Iran-sponsored terrorism, had not recovered any money, despite their massive judgment.

3. *Breaking the Impasse: Ad Hoc Legislation*

Senator Mack of Florida on behalf of the *Alejandre* plaintiffs and Senator Lautenberg of New Jersey on behalf of Flatow and the other victims of terrorism sponsored by Iran sought once more to amend the law to enable the holders of judgments rendered pursuant to § 1605(a)(7) to collect. In October 1999 they introduced a "Justice for Victims of Terrorism Act,"[26] to break through the separate entity problem and to eliminate the waiver authority with respect to blocked assets.

21. See text at note 16 supra.

22. See Documents Supplement pp. 346–47.

23. *Alejandre v. Republic of Cuba*, 42 F. Supp.2d 1317, 1343 (S.D.Fla.1999).

24. *Alejandre v. Telefonica Larga Distancia de Puerto Rico*, 183 F.3d 1277 (11th Cir.1999).

25. 183 F.3d at 1286–87.

26. S. 1796, 106th Cong. 1st Sess. (1999).

The proposed legislation received substantial support in Congress, but the Administration vigorously opposed it.[27]

In October 2000, a compromise was reached, that enabled the Administration to maintain (more or less) its position on immunity of diplomatic assets and on the exclusion of punitive damages against foreign states, while providing substantial sums to the particular claimants. Section 2002 of the Victims of Trafficking and Violence Prevention Act of 2000[28] provided relief for claimants (i) who had obtained a final judgment against Iran or Cuba as of July 20, 2000 (i.e., for Alejandre $41.2m; Flatow, $26m; Cicippio, $73m; Anderson, $47.3m, and Eisenfeld, $27.4m[29]) or (ii) who had filed suit on one of five specified dates and received a final judgment after that date (Higgins, Sutherland, Polhill, Jenco, and Wagner[30]). These claimants—but only these claimants—were given three options. They could receive from the U.S. Treasury 110 percent of the compensatory damages awarded by judgment of the U.S. court, plus post-judgment interest, if they relinquished all claims to compensatory and punitive damages; alternatively, they could receive 100 percent of the compensatory damages awarded by a U.S. court plus interest if they relinquished their claims to compensatory damages and the right to attach or execute against the properties described in § 1610(f) as amended in 1998[31], but reserved their claims to punitive damages; or, finally, they could reject either option and continue to attempt to collect their judgments in full without assistance from the U.S. government.[32] However, the 1998 amendment to § 1606 of the FSIA permitting punitive damages against foreign states in terrorism claims (which had been covered by President Clinton's waiver in 1998)[33] was repealed.[34]

The 2000 statute provided that the President should vest and liquidate funds of Cuba that had been blocked since 1962 and thereafter, up to the amount needed to pay the claimants against Cuba, i.e., the *Alejandre* parties.[35] For the payments to the claimants against Iran, the statute provided that payments were to be made first from rental payments accrued on Iranian diplomatic and consular properties in the United States, and if that were not sufficient, from funds in the Iran

27. For an extensive excerpt from the testimony of Deputy Treasury Secretary Stuart E. Eizenstat before the Senate Judiciary Committee, see 94 Am. J. Int'l L. 117 at 123. (2000). For some of the Administration's arguments, see question 0, p. ___ infra.

28. Pub. L. 106–386, 114 Stat. 1541, (Oct. 28, 2000), Documents Supplement p. 384.

29. The figures are for the amounts paid, including interest. Source: Congressional Research Service, *Suits against Terrorist States*, CSR Report to Congres Jan. 25, 2002). Under § 2002, punitive damages were not paid.

30. See note 17 supra.

31. See text at note 19 supra.

32. Figuring all this out is not easy. The relevant statutory provisions, § 2002(a)(1) and (2), do not appear in the U.S. Code, as they are applicable only to the persons eligible on the dates specified. For the state of the permanent provisions of the FSIA as of mid-year 2005, see p. ___ infra.

33. See text at note 22 supra.

34. § 2002(f)(2).

35. § 2002(b)(1).

Foreign Military Sales Trust Fund.[36] The 2000 statute permitted the President to waive the application of § 1610(f)(1) (the 1998 amendment) that would have permitted attachment and execution against blocked funds, and President Clinton did so at the same time as he signed the bill into law, on the ground that attachment or execution against such funds "would impede the ability of the President to conduct foreign policy in the interest of national security."[37] The substance of the 2000 compromise was not made subject to waiver.

The Office of Foreign Assets Control of the U.S. Treasury Department promptly published a notice on how claimants were to proceed for purposes of making their election and collecting the amounts due.[38] Eventually, the claimants against Cuba received about $97 million, and the claimants against Iran received about $289 million, including $26 million to the Flatow family, and $47 million to Terry Anderson. In all, the sums paid out by the U.S. Treasury went to 14 victims or their families.[39]

D. MORE LAWSUITS, MORE THEORIES, MORE QUESTIONS

Efforts to secure compensation for the many victims of terrorism in the Middle East continued in the years after the *Flatow* litigation, both in Congress and in the courts. even when there were no obvious assets out of which judgments could be satisfied. Generally the U.S. district courts followed the precedent set in the cases cited at notes ___ supra, though it was only in those cases that Congress had expressly provided for compensation to be paid, either out of frozen assets (the Cuba cases), or out of the U.S. Treasury. Courts upheld actions against United States-based organizations alleged to have "aided and abetted" terrorist acts carried out abroad through the raising of funds, e.g., *Boim v. Quranic Literacy Institute and Holy Land Foundation for Relief and Development*, 291 F.3d 1000 (7th Cir.2002), and they denied status as a foreign state to the Palestinian Authority and the Palestine Liberation Organization, alleged to have carried out terrorist attacks in Israel resulting in the death of U.S. citizens. *Ungar v. Palestine Liberation Organization*, 402 F.3d 274 (1st Cir. 2005). In both of these cases and others like them, jurisdiction was based not on the various statutes and amendments focused on states or their agents, but on the Anti–Terrorism Act of 1990, which provides, in relevant part,

> Any national of the United States in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate

36. § 2002(b)(2).

37. Presidential Determination No 2001–03 to Waive Attachment Provisions Related to Blocked Property of Terrorist States, Oct. 28, 2000, 36 Weekly Comp. Pres. Docs. 2671, (Nov. 6, 2000), 65 Fed. Reg. 66483 (2000).

38. 65 Fed. Reg. 70382 (Nov. 22, 2000).

39. See Statement of William H. Taft IV, Legal Adviser of the State Department before Sen. Comm. on Foreign Relations on S. 1275, "Benefits of for Victims of International Terrorism Act", 108th Cong. 1st Sess. July 17, 2003. A detailed breakdown appears in *Suits Against Terrorist States*, Congressional Research Service Report RL331258, Jan. 25, 2002.

district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit including attorney's fees.[1]

The most interesting decision, and most troubling to advocates for the victims, as well as their supporters in Congress, came in response to an effort by the relatives of Joseph Cicippio, the official of the American University in Beirut (p. ___ supra), to recover for their injuries as a result of the kidnaping and torture of their father and brother, who had been kept hostage for over five years.

CICIPPIO-PULEO v. ISLAMIC REPUBLIC OF IRAN

United States Court of Appeals, District of Columbia Circuit, 2004.
353 F.3d 1024.

Before: EDWARDS, RANDOLPH, and GARLAND, CIRCUIT JUDGES.

HARRY T. EDWARDS, CIRCUIT JUDGE:

This case involves a lawsuit brought against the Islamic Republic of Iran ("Iran") under the terrorism exception, 28 U.S.C. § 1605(a)(7), to the Foreign Sovereign Immunities Act ("FSIA"). The plaintiffs in the suit are the adult children and siblings of Joseph J. Cicippio, a victim of terrorist hostage-taking. Joseph Cicippio was abducted in 1986 by Hizbollah, an Islamic terrorist organization that receives material support from Iran. He was held hostage until 1991, confined in inhumane conditions and frequently beaten. In 1996, Joseph Cicippio and his wife sued Iran for the tortious injuries they sustained as a result of Mr. Cicippio's kidnaping, imprisonment, and torture. Iran failed to respond to the complaint and default was entered on November 13, 1997. The case was tried *ex parte* and, on August 27, 1998, the District Court entered judgment against Iran in favor of Mr. and Mrs. Cicippio in the amount of $30 million. No appeal was taken.

In 2001, Joseph Cicippio's children and siblings sued Iran for the intentional infliction of emotional distress and loss of solatium they suffered as a result of Mr. Cicippio's ordeal. The Iranian defendants failed to respond to the complaint and the District Court entered default on January 2, 2002. The Cicippios filed a motion for summary judgment on January 10, 2002. Subsequently, on January 24, 2002, plaintiffs moved to consolidate their suit with Mr. and Mrs. Cicippio's case, which by then had been closed. On June 21, 2002, the District Court denied the motions for summary judgment and consolidation. The court also *sua sponte* dismissed the Cicippios' complaint under Federal Rules of Civil Procedure 12(b)(6) and 12(h)(3), holding that "the FSIA, as amended, does not confer subject matter jurisdiction upon it to entertain claims for emotional distress and solatium brought by claimants situated as are these plaintiffs upon the allegations of their complaint." Joseph Cicippio's children and siblings now appeal. Responding to our request, the Justice Department has filed a brief as *amicus curiae* stating the position

1. 18 U.S.C. § 2333.

05252077●01●LT05.LOWENFLD.RV●INITIAL●RAMLOW2●9/9●9:04●Rev. 7.1 (TOS)
Job Name ALFLOW4●Job# 12230●Reg# 0-3318-8●Pg Ranges (1,1079)●Pg# 869

of the United States. The Government's position is that neither section 1605(a)(7) of the FSIA nor the Flatow Amendment, 28 U.S.C. § 1605 note, creates a private cause of action against foreign governments for acts of hostage taking or torture.

We affirm the judgment of the District Court. Section 1605(a)(7) of the FSIA abrogates foreign sovereign immunity and provides jurisdiction in specified circumstances, but it does not create a private cause of action. By its clear terms, the Flatow Amendment provides a private right of action only against individual officials, employees, and agents of a foreign state, but not against a foreign state itself. Plainly, neither section 1605(a)(7) nor the Flatow Amendment, separately or together, establishes a cause of action against foreign state sponsors of terrorism. Therefore, the Cicippios' suit cannot proceed on these grounds. However, because the Cicippios' suit was filed in the wake of judgments in favor of Mr. and Mrs. Cicippio and other hostage victims, they may have been misled in assuming that the Flatow Amendment afforded a cause of action against foreign state sponsors of terrorism. We therefore affirm the judgment of the District Court, but remand the case to allow plaintiffs an opportunity to amend their complaint to state a cause of action under some other source of law. We reserve judgment, however, on whether the Cicippios have any viable basis for an action against Iran, leaving that issue to the District Court in the first instance.

I. Background

A. *Facts*

On the morning of September 12, 1986, Joseph. J. Cicippio was kidnaped in Beiruit, Lebanon, by the terrorist group Hizbollah, an agent of Iran's Ministry of Information and Security ("MOIS"). At the time of his abduction, Mr. Cicippio was comptroller of the American University of Beirut. Hizbollah held him hostage for 1,908 days. During that time, he was randomly beaten, confined in rodent- and scorpion-infested cells, and bound by chains. He suffered from numerous medical problems emanating from the inhumane treatment that he experienced during his captivity. At some point after Mr. Cicippio was taken hostage, he was forced to undergo major surgery for an unidentified abdominal condition that has left a ten-inch scar on his abdomen.

In 1996, Joseph Cicippio filed suit against Iran under the "terrorism exception" to the FSIA, 28 U.S.C. § 1605(a)(7), and the Flatow Amendment, 28 U.S.C. § 1605 note. His lawsuit was joined by his wife, Elham Cicippio, two other hostage victims, and the wife of one of the other victims. The Iranian defendants did not respond to the complaint and were found in default. The case was tried *ex parte* and, on August 27, 1998, the District Court rendered a judgment for Joseph Cicippio in the amount of $20 million in damages for lost wages and opportunities and compensatory damages for pain and suffering and mental anguish, and $10 million for Mrs. Cicippio in damages for loss of her husband's society and companionship and mental anguish. *See Cicippio*, 18 F.Supp.2d at

64, 70. Iran never entered an appearance in the case and no appeal was taken from the judgment of the District Court.

The instant case arises from a lawsuit brought in 2001 by Joseph Cicippio's seven adult children and seven siblings against Iran and MOIS for the intentional infliction of emotional distress and loss of solatium they sustained as a result of Mr. Cicippio's ordeal. The suit was based on claims purporting to arise under section 1605(a)(7) and the Flatow Amendment. On January 2, 2002, after Iran failed to respond to the complaint, the District Court entered a default judgment for the Cicippio children and siblings. On January 10, 2002, the Cicippios filed a motion for summary judgment. They subsequently filed a motion to consolidate their case with Mr. and Mrs. Cicippio's lawsuit against Iran, which by then had been closed. The motion for summary judgment included affidavits from the children and siblings establishing that Mr. Cicippio's captivity caused them to suffer from emotional distress by virtue of the harm done to him.

B. The Statutory Framework

[The court summarizes the FSIA, the addition of § 1605(a)(7), and the passage of the Flatow Amendment.]

It is undisputed that the Flatow Amendment permits U.S. nationals to pursue a private right of action for terrorism against officials, employees, and agents of designated foreign states acting in their personal capacities. At issue here is whether section 1605(a)(7) and the Flatow Amendment similarly provide a cause of action against a *foreign state*.

C. The District Court's Judgment

The District Court assumed that plaintiffs' factual allegations were true, but denied both their motion to consolidate their case with Mr. and Mrs. Cicippio's case and their motion for summary judgment. The court also *sua sponte* dismissed the Cicippios' complaint under Federal Rules of Civil Procedure 12(b)(6) and 12(h)(3), concluding that "the FSIA, as amended, does not confer subject matter jurisdiction upon it to entertain claims for emotional distress and solatium brought by claimants situated as are these plaintiffs upon the allegations of their complaint." Noting that a foreign state is "liable in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. § 1606, the District Court held that the plaintiffs could not recover under the prevailing common law rule governing third party claims for outrageous conduct causing severe emotional distress. *Cicippio-Puleo*, Civ. No. 01–1496, slip op. at 3–4, App. 5–6. The District Court cited the Restatement (Second) of Torts for the proposition that a third party claimant must be present at the scene of the victim's torment in order to state a claim for intentional infliction of emotional distress. *Id.* (citing Restatement (Second) of Torts § 46 (1986)). The District Court also held that solatium damages were unavailable to Mr. Cicippio's adult children and siblings, because "another generally observed rule of American common law has refused to recognize a right to recover damages for loss of 'society and

companionship' by other than spouses for injury to a third party—even a relative—not resulting in third party's death."

. . .

The Cicippios now appeal the District Court's dismissal of their claims.

D. The Appointment of *Amicus Curiae* and the Issues on Appeal

Because Iran has never entered an appearance in this litigation, the court appointed the Georgetown University Law Center's Appellate Litigation Program as *amicus curiae* to present arguments in support of the District Court's judgment.*

The court also ordered the parties to brief and argue, *inter alia*, the following issues:

> " 'Whether the FSIA creates a federal cause of action for torture and hostage taking against foreign states,' or only against their 'official[s], employee[s] or agent[s]' as specified in the [Flatow] Amendment," an issue raised but not decided in *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C.Cir.2002).
>
> Whether Cicippio's children and siblings may sue for intentional infliction of emotional distress and loss of solatium.
>
> Whether appellants who seek to recover for emotional distress based on conduct directed at a third party must have been present at the time of the offending conduct, and, if so, whether appellants satisfied this "presence" requirement.

E. THE APPEARANCE OF THE UNITED STATES AS *AMICUS CURIAE*

On November 6, 2003, the court issued [an] order soliciting the views of the United States:

. . .

After receiving a two-day extension of time in which to submit its position, the United States filed a brief as *amicus curiae* on December 3, 2003, stating the firm view that the Flatow Amendment does not provide a private right of action against a foreign state:

> Neither Section 1605(a)(7) nor the Flatow Amendment, nor the two considered in tandem, offers any indication that Congress intended to take the more provocative step of creating a private right of action against foreign governments themselves. Such a move could have serious adverse consequences for the conduct of foreign relations by the Executive Branch, and therefore an intent to do so

* As they have done in the past, see *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 332 note * (D.C. Cir.2003), the advocates from the Appellate Litigation Program responded admirably on very short notice in assisting the court with an outstanding brief and oral argument.

TI1 should not be inferred—it should be recognized only if Congress has acted clearly in that direction.

TCCS II. ANALYSIS

TCI *A. Standard of Review*

T In denying plaintiffs' motion for summary judgment and in *sua sponte* dismissing their complaint pursuant to Rule 12 (b)(6), the District Court assumed that plaintiffs' factual allegations were true.... Because we hold that the Flatow Amendment does not authorize a cause of action against foreign states, it is clear that plaintiffs can allege no facts in their lawsuit against Iran that would entitle them to relief under the Flatow Amendment. Therefore, we affirm the District Court's dismissal for failure to state a claim under section 1605(a)(7) and the Flatow Amendment.

TCI *B. The Limited Cause of Action under the Flatow Amendment*

T Section 1605(a)(7) waives the sovereign immunity of a designated "foreign state" in actions in which money damages are sought for personal injury or death caused by one of the specified acts of terrorism, if the act of terrorism 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." 28 U.S.C. § 1605(a)(7). 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. However, the Flatow Amendment, 28 U.S.C. § 1605 note, undoubtedly does provide a cause of action against "[a]n official, employee, or agent of a foreign state designated as a state sponsor of terrorism" "for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under section 1605(a)(7)." The question here is whether the Flatow Amendment, which does not refer to "foreign state," may be construed, either alone or in conjunction with section 1605(a)(7), to provide a cause of action against a foreign state.

T3LP . . .

T We now hold that neither 28 U.S.C. § 1605(a)(7) nor the Flatow Amendment, nor the two considered in tandem, creates a private right of action against a foreign government. Section 1605(a)(7) merely waives the immunity of a foreign state without creating a cause of action against it, and the Flatow Amendment only provides a private right of action against officials, employees, and agents of a foreign state, not against the foreign state itself. Because we hold that there is no statutory cause of action against Iran under these provisions, we affirm the District Court's judgment without deciding whether the evidence presented by the plaintiffs is sufficient to recover for intentional infliction of emotional distress or loss of solatium.

T3AC * * *

The language of section 1605(a)(7) and the Flatow Amendment—the only provisions upon which plaintiffs rely—is clear. In declaring that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States . . . ," 28 U.S.C. § 1605(a)(7) merely abrogates the immunity of foreign states from the jurisdiction of the courts in lawsuits for damages for certain enumerated acts of terrorism. It does not impose liability or mention a cause of action. The statute thus confers subject matter jurisdiction on federal courts over such lawsuits, but does not create a private right of action.

As noted above, the Flatow Amendment imposes liability and creates a cause of action. But the liability imposed by the provision is precisely limited to "an official, employee, or agent of a foreign state designated as a state sponsor of terrorism." "Foreign states" are not within the compass of the cause of action created by the Flatow Amendment. In short, there is absolutely nothing in section 1605(a)(7) or the Flatow Amendment that creates a cause of action against foreign states for the enumerated acts of terrorism.

We also agree with the United States that, insofar as the Flatow Amendment creates a private right of action against officials, employees, and agents of foreign states, the cause of action is limited to claims against those officials in their *individual*, as opposed to their official, capacities:

* * *

The plaintiffs and *amicus curiae* dispute both the meaning and relevance of the legislative history of the FSIA or the Flatow Amendment in support of their competing arguments to the court. The legislative history is largely irrelevant, however, because the statutory language is clear—nothing in section 1605(a)(7) or the Flatow Amendment establishes a cause of action against *foreign states*. And, as we explain below, there is nothing in the legislative history that raises any serious doubts about the meaning of the statute.

In 1976, the House Judiciary Committee Report explained that the FSIA was "not intended to affect the substantive law of liability." H.R.Rep. No. 94–1487, at 12 (1976). It stated that the statute was intended to preempt other federal or state law that accorded sovereign immunity, and to discontinue the practice of judicial deference to suggestions of immunity from the executive branch. But the statute was not intended to affect "the attribution of responsibility between or among entities of a foreign state; for example, whether the proper entity of a foreign state has been sued; or whether an entity sued is liable in whole or in part for the claimed wrong."

When Congress passed section 1605(a)(7), the Conference Committee report explained:

> This subtitle provides that nations designated as state sponsors of terrorism under section 6(j) of the Export Administration Act of 1979 will be amenable to suit in U.S. courts for terrorist acts. It

> permits U.S. federal courts to hear claims seeking money damages for personal injury or death against such nations and arising from terrorist acts they commit, or direct to be committed, against American citizens or nationals outside of the foreign state's territory, and for such acts within the state's territory if the state involved has refused to arbitrate the claim.

H.R. Conf. Rep. No. 104–518, at 112 (1996).

It is noteworthy that the legislative history does not say that section 1605(a)(7) imposes liability against foreign states or create a cause of action against them.

When Congress later passed the appropriations bill that included the Flatow Amendment, there was very little legislative history purporting to explain the enactment. The Conference Report said: "The conference agreement inserts language expanding the scope of monetary damage awards available to American victims of international terrorism. The conferees intend that this section shall apply to cases pending upon enactment of this Act." H.R. Conf. Rep. No. 104–863, at 987 (1996). As the United States notes in its brief, "[o]n its face, that statement addresses only issues of damages and retroactivity, not the question whether foreign states are proper defendants in the first place." We agree. Thus, the legislative history of the Flatow Amendment is not inconsistent with the clear terms of the statute.

Subsequent enactments by Congress providing for the payment or enforcement of judgments entered against foreign states in cases brought under § 1605(a)(7) fail to establish that Congress created a cause of action against foreign states. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub.L. No. 106–386, § 2002, 114 Stat. 1464, 1541–43; Terrorism Risk Insurance Act of 2002, Pub.L. No. 107–297, § 201, 116 Stat. 2322, 2337–39. As we explained in *Roeder*, these statutes merely provide for payment "*if* an individual has a judgment against Iran," but they do not address or resolve the anterior question "whether plaintiffs are legally entitled to such a judgment." 333 F.3d at 239 (emphasis added). It is entirely plausible for Congress to direct the United States to compensate victims of terrorism without purporting to establish or support a cause of action against foreign state sponsors of terrorism.

* * *

There is nothing anomalous in Congress's approach in enacting the Flatow Amendment. As we noted in *Price*, the passage of § 1605(a)(7) involved a delicate legislative compromise. While Congress sought to create a judicial forum for the compensation of victims and the punishment of terrorist states, it proceeded with caution, in part due to executive branch officials' concern that other nations would respond by subjecting the American government to suits in foreign countries. *See Price*, 294 F.3d at 89 (citing John F. Murphy, *Civil Liability for the*

T *Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARV. HUM. RTS. J. 1, 35–37 (1999)).

T The plaintiffs suggest that our construction of the Flatow Amendment "w[ill] mean that what Congress gave with one hand in section 1605(a)(7) it immediately took away with the other in the Flatow Amendment." *See Cronin*, 238 F.Supp.2d at 232. We disagree. Section 1605(a)(7) does not purport to grant victims of terrorism a *cause of action* against foreign states, or against officials, employees, or agents of those states acting in either their official or personal capacities. Therefore, the Flatow Amendment's authorization of a limited cause of action against officials, employees, and agents acting in their personal capacities takes nothing away from § 1605(a)(7). What § 1605(a)(7) does is to make it clear that designated foreign state sponsors of terrorism will be amenable to suits in United States courts for acts of terrorism in cases in which there is a viable cause of action.

T Clearly, Congress's authorization of a cause of action against officials, employees, and agents of a foreign state was a significant step toward providing a judicial forum for the compensation of terrorism victims. Recognizing a federal cause of action against foreign states undoubtedly would be an even greater step toward that end, but it is a step that Congress has yet to take. And it is for Congress, not the courts, to decide whether a cause of action should lie against foreign states. Therefore, we decline to imply a cause of action against foreign states when Congress has not expressly recognized one in the language of section 1605(a)(7) or the Flatow Amendment.

T3AC * * *

T Although we affirm the District Court's dismissal of plaintiffs' complaint for failure to state a claim under section 1605(a)(7) and the Flatow Amendment, we will nonetheless remand the case. The Cicippios' suit was filed in the wake of judgments in favor of Mr. and Mrs. Cicippio and other hostage victims, so they may have been misled in assuming that the Flatow Amendment afforded a cause of action against foreign state sponsors of terrorism. We will therefore remand the case to allow plaintiffs an opportunity to amend their complaint to state a cause of action under some other source of law, including state law, as the Kilburn *amici* have suggested.

T In remanding, we do not mean to suggest, one way or the other, whether plaintiffs have a viable cause of action. The possibility that an alternative source of law might support such a claim was addressed only by *amici*, and we do not ordinarily decide issues not raised by parties. Accordingly, we will leave it to the District Court in the first instance to address any amended complaint that is offered by plaintiffs.

TCCS III. CONCLUSION

T For the foregoing reasons, we affirm the judgment of the District Court dismissing plaintiffs' complaint for failure to state a claim upon

which relief can be granted, and remand the case for further proceedings consistent with this opinion.

Final Notes and Questions

1. (a) The *Cicippio-Puleo* case illustrates starkly the conflict between Congress and the executive branch throughout the effort to seek recovery for the American victims of Middle East terrorism. The executive branch—Democrat as well as Republican—seeks to limit such actions, while Congress seeks to expand the plaintiffs' remedies.[1] The courts, initially supportive of the plaintiffs, gradually are persuaded by the government, as in this case. How do you account for the split?

(b) The resolution in the 2000 Justice for Victims of Terrorism Act was to use assets blocked by the U.S. government under various programs of economic sanctions. The Administration opposed using these assets to settle particular claims, on the ground, among others, that the funds should be available as foreign policy tools, as occurred, for instance, in the negotiations for release in 1981 of the American hostages held in Iran, and might occur in some future negotiation with Cuba. Is that argument persuasive?

(c) Among other arguments put forward by the Administration was that using the blocked assets for the benefit of the particular claimants referenced in the legislation would come at the expense of other claimants, many of whom had waited for years to be compensated by Cuba and Iran for loss of property and loss of loved ones. Is this argument persuasive? Or are Flatow, Anderson, Higgins, and the families of the Brothers to the Rescue entitled to a preferred position?

2.(a) There is no doubt that in adopting § 1605(a)(7) and the Flatow Amendment, Congress meant to provide remedies—i.e., private causes of action and access to defendants' assets—to victims of terrorism and their families. Is the outcome, as the court in *Cicippio-Puleo* sees it, simply the result of bad lawyering or bad drafting? Or bad decision-making? Should any judgments pursuant to the Flatow amendment that have not yet been fully paid now be re-opened?

(b) In awarding punitive damages in the *Flatow* case, Judge Lamberth considered the issue that defeated plaintiffs in *Cicippio-Puleo*, that § 1606 of the FSIA provides that a foreign state "shall be liable [only] in the same manner and to the same extent as a private individual under like circumstances," but shall not be liable for punitive damages. He wrote:

> Even if 28 U.S.C. § 1606 applies to causes of action brought directly against a foreign state pursuant to the state sponsored terrorism exception to immunity and the Flatow Amendment, a foreign state sponsor of

1. See, for instance, the following statement by Senator Orrin Hatch, chairman of the Senate Judiciary Committee, during the debate over the Justice for Victims of Terrorism Act (p. ___ supra):

> Unfortunately for the families of the "Brothers to the Rescue" victims and the family of Alisa Flatow, the Administration continues to fight the victims' efforts in court—in effect taking a seat next to the terrorist states at the defense table in defending these actions. Now, not only must these families fight the terrorist states–they must also fight the Administration that had promised to support their efforts to obain just compensation.