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Robert C. Mirone

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## BRINGING SUIT AGAINST A FOREIGN SOVEREIGN\*

*Robert C. Mirone*<sup>†</sup>

### *I. Introduction*

Though it may be surprising to some, the question of who has a right of action against a foreign sovereign is still being debated. Presently, an appeal<sup>1</sup> is pending in the Second Circuit in which the Second Circuit is being asked to review the Memorandum and Order of Judge Platt, dated April 25, 2004.<sup>2</sup> In that Memorandum and Order, Judge Platt found, in part, that relatives other than those who are the personal or estate representative of a victim do not have a right to share in the settlement agreed to by Libya and the Plaintiffs' Committee,<sup>3</sup> which acted on behalf of all the wrongful death claimants of the PanAm 103 (or Lockerbie) disaster. The issue of the standing of the non-representative Plaintiffs may be raised in this appeal.

### *II. Basis of the Cause of Action or Claim for Relief*

The starting point of any examination of the viability of a claim against a foreign sovereign begins with *Argentine Republic v. Amarata Hess Shipping Corp.*, which held that the Foreign Sovereign Immunities Act (FSIA) is the sole jurisdictional predicate to bring such an action.<sup>4</sup>

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\* Presented at the War Crimes Research Symposium: "Terrorism on Trial" at Case Western Reserve University School of Law, sponsored by the Frederick K. Cox International Law Center, on Friday, Oct. 8, 2004.

<sup>†</sup> Lead Defense Counsel for Libya, Pan Am 103 proceedings.

<sup>1</sup> *Rein v. Socialist People's Libyan Arab Jamahiriya*, 995 F. Supp. 325 (E.D.N.Y. 1998), appeal docketed, No. 04-3264(L)-CV (2nd Cir. May 19, 2004).

<sup>2</sup> *MacQuarrie v. Socialist People's Libyan Arab Jamahiriya*, No. CR-96\_2077(TCP)(MLO)(E.D.N.Y. Apr. 25, 2004) (memorandum and order denying any right of relatives other than personal or estate representatives to share in the settlement agreed to by defendant and the Plaintiff's Committee).

<sup>3</sup> The Plaintiffs' Committee consists of James P. Kreindler of the firm of Kreindler & Kreindler; Michel Baumeister of the firm of Baumeister & Samuels; Frank Granito, Jr. and Frank Granito, III, of the firm of Speiser, Krause, Nolan & Granito; Douglas E. Rosenthal of the firm of Sonnenschein, Nath & Rosenthal L.L.P.; and Stanley M. Chesley of the firm of Waite, Schneider, Bayless & Chesley Co., L.P.A. Steven Pounian of the Kreindler firm has been appointed Liaison Counsel.

<sup>4</sup> 488 U.S. 428, 434 (1989). For the provisions of the Foreign Sovereign Immunities Act (FSIA), see 28 U.S.C. §1602 et. seq.

Essentially, in the terrorism context, a foreign sovereign and its agencies and instrumentalities loses immunity and comes within the jurisdiction of the United States courts<sup>5</sup> in a suit for money damages “against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . 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.”<sup>6</sup> However, even if the foreign state was designated as a state sponsor of terrorism under either the Export Administration Act of 1979 or the Foreign Assistance Act of 1961, the court must decline to hear the claim if neither the claimant nor the victim is or was a United States national.<sup>7</sup> Of course, there are other instances which are not germane to the terrorism context in which a waiver of immunity is available, e.g. having an explicit or implicit waiver, engaging in a commercial activity within the United States, or enforcing a maritime lien. This language in the FSIA, however, does not stop the inquiry, because who may bring the action and against whom the action may be brought must be determined.

It has been clearly stated that the FSIA is jurisdictional only.<sup>8</sup> Thus, a foreign sovereign which has lost its immunity and is also listed under either the Export Administration Act of 1979<sup>9</sup> or the Foreign Assistance Act of 1961<sup>10</sup> as a State Sponsor of Terrorism comes within the power of the courts of the United States. Interestingly, the only foreign sovereign who has actually opposed a suit brought in the United States courts is Libya. The remainder of the decided actions, the bulk of which are against the Islamic Republic of Iran, have not been contested. Several actions are presently pending against the Kingdom of Saudi Arabia. These actions are in the early stages and largely either grow out of the September 11, 2001 World Trade Center horror or come from different settings involving supporters of Al Qaeda.

### *III. Who May Bring an Action*

Having determined that a foreign sovereign is within the jurisdiction of the courts of the United States, the next question presented is who is a

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<sup>5</sup> 28 U.S.C. §1330(a) (2000). Such actions are nonjury and without regard to the amount in question.

<sup>6</sup> 28 U.S.C. § 1605(a)(7) (2000).

<sup>7</sup> 28 U.S.C. § 1605(a)(7)(B)(ii) (2000).

<sup>8</sup> *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d. 1024, 1032 (D.C. Cir. 2004).

<sup>9</sup> *See* 50 U.S.C. §2405(j) (2000).

<sup>10</sup> *See* 22 U.S.C. §2371 (2000).

proper plaintiff. To answer this question, the Flatow Amendment<sup>11</sup> provides guidance. The Flatow Amendment defines a proper plaintiff as a United States national or the national's legal representative. Though there is no case directly in point, it appears that the plain language of the statute limits the class of plaintiffs. Of course, unless death, incapacity, or a minor is involved, the term "legal representative" would be superfluous. Consequently, in actions brought on behalf of the estate or of an incapacitated person or minor, the plaintiff would have a "legal representative." Some have urged that use of the word "*solatium*" in Paragraph (a) of the Flatow Amendment<sup>12</sup> expands the class of plaintiffs to include relatives, and even more distant relatives who are not United States nationals. However, the word "*solatium*" is part of the entire paragraph which defines the damages that may be sought. Thus, emotional injury for the loss of a loved one is compensable, but not as a separate cause of action. A look at the very sparse legislative history confirms this reading.<sup>13</sup>

The majority of cases under the FSIA have been brought in the District of Columbia. Though these cases are pre-*Cicippeo*, they are mentioned for the purpose of demonstrating the number of cases brought in the District of Columbia.<sup>14</sup> These cases also involve abductions, hostage taking, and torture, but not death. Consequently, the District of Columbia has had the greatest opportunity to review the issues such claims bring. In doing so, the

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<sup>11</sup> 28 U.S.C. §1605 note. The term "Flatow Amendment" refers to a separate provision of the statute that was named in recognition of the family of Alisa Flatow, who died in a terrorist bombing. The Flatow Amendment states the requirements for conduct described in the terrorism exception of the FSIA. See also *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998) (case brought by Flatow for a wrongful death which was based on a state-sponsored terrorism amendment to the FSIA).

<sup>12</sup> Paragraph (a) of the Flatow Amendment reads: "An official, employee, or agent of a foreign state designated as a state sponsor of terrorism designated under ... the Export Administration Act of 1979 ... while acting within the scope of his or her office, employment, or agency shall be liable to a United States national or the national's legal representative for personal injury or death caused by acts of that official, employee, or agent for which the courts of the unites states may maintain jurisdiction under section 1605(a)(7) of title 28 ... for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in section 1605(a)(7)." 28 U.S.C. §1605 note.

<sup>13</sup> H.R. REP. NO. 104-863, at 985 (1996) ("The conference agreement inserts language expanding the scope of monetary *damage awards* available to American victims of international terrorism." (emphasis added).

<sup>14</sup> See, e.g., *Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27 (D.D.C. 2001) *aff'd. sub nom.* *Bettis v. Islamic Republic of Iran*, 315 F. 3d. 325 (D.C. Cir. 2003); *Stethem v. Islamic Republic of Iran*, 201 F. Supp. 2d 78 (D.D.C. 2002); *Sutherland v. Islamic Republic of Iran*, 151 F. Supp. 2d. 27 (D.D.C. 2001).

District of Columbia Circuit Court has reaffirmed its holding in *Cicippeo* in *Acree v. Republic of Iran*.<sup>15</sup>

#### *IV. Against Whom May Recovery be Obtained*

Even though a foreign sovereign may be subject to the jurisdiction of the United States courts, the remaining question is against whom may recovery be had. Again, the Flatow Amendment, along with the *Cicippeo* and *Acree* cases provide guidance. The Flatow Amendment specifically limits recovery to officials, employees, and agents of foreign states, and to such officials, employees and agents in their individual as distinguished from their official capacity. The *Cicippeo* and *Acree* cases found no favor with the argument of State liability based on the doctrine of *respondeat superior* or vicarious liability.

#### *V. Conclusion*

As the law presently stands, a foreign state, though subject to the jurisdiction of the United States courts, for specified acts, is still removed from a judgment and such judgment may only be recovered against an official, employee, or agent of a foreign state in his or her individual capacity. Doubtlessly, there will be continued litigation and further legislation on these points.

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<sup>15</sup> 370 F.3d 41 (D.C. Cir. 2004).