Suing State-Sponsors of Terrorism Under the Foreign Sovereign Immunities Act: Giving Life to the Jurisdictional Grant After *Cicippio-Puleo*

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I. Introduction

U.S. citizens are frequently, and tragically, the targets of international acts of terrorism. Without even including the victims of September 11, 2001, or the ongoing bloodshed in Iraq, approximately 700 Americans have been killed and 1,600 wounded by international terrorist attacks since 1970.[1] In 1996, Congress enacted legislation to allow American citizens harmed by terrorist acts to use the U.S. courts to seek money damages from the responsible state sponsors of terrorism.[2] During the years immediately following its passage, there was little doubt that this legislation provided both a grant of jurisdiction and a statutory cause of action to allow U.S. victims of terrorism to seek money damages directly against the foreign state sponsors of terror.[3]

Proponents of civil suits against state-sponsors of terrorism assert that the war on terrorism can be won in the "orderly confines of the courtroom."[4] They argue that civil actions against terrorist states not only supply an important weapon in the fight against interna-

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1. *American Victims of Mid-East Terrorism*, compiled by the American-Israeli Cooperative Enterprise, *available at* http://www.us-israel.org/jsource/Terrorism/usvictims.html (last visited Nov. 16, 2004).

2. The Foreign Sovereign Immunities Act of 1976 (FSIA), Pub. L. No. 104-132, § 221(a), 110 Stat. 1214 (Apr. 24, 1996) (codified in 28 U.S.C. §§ 1330, 1441(d), 1602-1611).

3. *See infra* note 15 and accompanying text.

4. Jennifer Senior, *A Nation Unto Himself: Intruders in the House of Saud, Part II*, N.Y. TIMES MAG., Mar. 14, 2004, § 6 at 36.

tional terrorism but also provide redress to injured victims.[5] Other policy-makers and scholars have warned of the dangers that civil actions brought by private parties against foreign states can pose to the Executive branch's ability to effectively conduct foreign relations, particularly in the realm of fighting terrorism where shifting political alliances are common, negotiations more sensitive, and national security concerns loom large.[6]

Notwithstanding the potential risks of allowing civil suits against terrorist states, in April 1996, Congress added section 1605(a)(7) to the Foreign Sovereign Immunities Act (FSIA) in order to "give American citizens an important economic and financial weapon against . . . outlaw states."[7] Despite Executive branch resistance, this amendment to the FSIA was passed as part of the comprehensive Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) in order to provide American citizens and their families the opportunity to seek money damages against state-sponsors of terrorism.[8] The plain language of section 1605(a)(7) waives foreign sovereign immunity and provides jurisdiction over suits against foreign states designated by the Executive branch as state-sponsors of terrorism when U.S. nationals are injured by the delineated terrorist acts.[9] Specifically, the statute provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . not otherwise covered by [the commercial activity exception], in which money damages are sought 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."[10]

This paper explores this issue of whether and how this jurisdictional grant for suits by U.S. citizens against foreign state-sponsors of terrorism can be given its full effect.

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5. Hamish Hume & Gordon Dwyer Todd, *Ambulance Chasing for Justice: How Private Lawsuits for Civil Damages Can Help Combat International Terror*, The Federalist Society, National Security White Papers, *available at* http://www.fed-soc.org/Publications/Terrorism/ambulancechasing.htm (last visited Nov. 16, 2004).

6. *See, e.g.*, Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, FOREIGN AFF. 102, (Sept/Oct 2000); Daveed Gartenstein-Ross, *A Critique of the Terrorism Exception to the Foreign Sovereign Immunities Act*, 34 N.Y.U. J. INT'L L. & POL. 887 (2002); Jack L. Goldsmith & Ryan Goodman, *U.S. Civil Litigation and International Terrorism*, *in* CIVIL LITIGATION AGAINST TERRORISM (John Norton Moore, ed., forthcoming 2002), *at* http://ssrn.com/abstract_id=312451 (last visited Nov. 16, 2004) (Goldsmith & Goodman offer a balanced view of the costs and benefits of permitting civil actions against international terrorist (state and non-state) defendants).

7. H.R. REP. No. 104-383, at 62 (1995).

8. *See* John F. Murphy, *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARV. HUM. RTS. J. 1, 35-36 (1999) (describing the opposition of the U.S. Departments of Justice and State to the provisions of AEDPA that amended the FSIA.)

9. Foreign states currently designated by the Secretary of State as state sponsors of terrorism are Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria. *See* 22 C.F.R. § 126.1(d) (2002); 31 C.F.R. § 596.201 (2002). Although Iraq technically remains on the list, President Bush recently exercised authority granted to him by Congress and has made section 1605(a)(7) inapplicable with respect to Iraq. Presidential Determination No. 2003-23, 39 WEEKLY COMP. PRES. DOC. 559 (May 7, 2003). The effect of this determination on suits against Iraq was one of the issues raised in *Acree v. Republic of Iraq*, 370 F.3d 41, 43 (D.C. Cir. 2004).

10. 28 U.S.C. § 1605(a)(7) (2003). The section goes on to state that "the court shall decline to hear a claim under this paragraph—(A) if the foreign state was not designated a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 . . . and (B) even if the foreign state is or was so designated, if—(i) . . . claimant has not afforded the foreign state a reasonable opportunity to arbitrate . . . (ii) neither the claimant nor the victim was a national of the United States . . . when the act upon which the claim is based occurred." *Id.*

Five months after section 1605(a)(7) was passed, the same Congress enacted a separate provision titled Civil Liability for Acts of State Sponsored Terrorism.[11] This provision, more commonly known as the Flatow Amendment, was codified as a note to section 1605.[12] The Flatow Amendment, by its terms, is narrower than the terrorist-state exception to sovereign immunity. It confers a federal statutory cause of action that largely echoes the language of the immunity waiver provided by section 1605(a)(7), with the one glaring exception that only individual state actors (as opposed to foreign state defendants *qua* states) are subject to liability when the substantive standards for jurisdiction are met.[13] The text of the amendment reads, in pertinent part:

> An official, employee, or agent of a foreign state designated as a state sponsor of terrorism . . . 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 United States may maintain jurisdiction under section 1605(a)(7) . . . 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).[14]

Since the 104th Congress passed section 1605(a)(7) and the Flatow Amendment in 1996, federal district courts had consistently read these two provisions in *pari materia* to allow U.S. victims of state-sponsored terrorism to bring suit against foreign state defendants (*i.e.* the governments of foreign states accused of sponsoring terrorism) in addition to individual state actors under the federal cause of action created by the Flatow Amendment.[15] In these suits, punitive damages, which would otherwise be unavailable in actions brought pursuant to the FSIA, have been awarded against individual state officials and at times were also awarded against the foreign states themselves through the application of *respondeat superior* principles.[16]

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11. Omnibus Consolidated Appropriations Act, 28 U.S.C.A. § 1605 (1996).

12. *Id.*

13. *Id.*

14. *Id.* (citing Pub. L. 104-208, Div. A, Title I, § 101(c) [Title V, § 589], Sept. 30, 1996, 110 Stat. 3009-172).

15. *See, e.g.*, Flatow v. Islamic Republic of Iran, 999 F. Supp. 1 (D.D.C. 1998); Cronin v. Islamic Republic of Iran, 238 F. Supp. 222 (D.D.C. 2002); Regier v. Islamic Republic of Iran, 281 F. Supp. 2d 87 (D.D.C. 2003); Kilburn v. Republic of Iran, 277 F. Supp. 2d 24 (D.D.C. 2003). *See also* Alejandre v. Republic of Cuba, 996 F. Supp. 1239 (S.D.FL.1997) (applying Flatow cause of action as an enforcement provision to § 1605(a)(7), finding that proving agent's liability also proves the state's under *respondeat superior* principles); Smith v. Islamic Emirate of Afghanistan, 262 F. Supp. 2d 217, 228 (S.D.N.Y, 2003) (reviewing the D.C. District Court cases and finding that "[w]hile not free from doubt, the better view in my opinion is that the Flatow Amendment likely provides a cause of action against a foreign state."). Note that *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004) subsequently held that the Flatow Amendment does not provide a cause of action against foreign state defendants, thus denying legal effect to lower court decisions in that district that found liability based on the Flatow Amendment, although leaving open the possibility of liability against foreign states pursuant to some other cause of action (discussed in more detail at notes 17-20, *infra*).

16. *Compare* Alejandre, 996 F. Supp. at 1239 (finding the Cuban Air Force liable for punitive damages for extrajudicial killing of U.S. citizens, but Cuba *qua* state liable only for compensatory damages), *with* Flatow, 999 F. Supp. at 1 (finding the Republic of Iran liable for punitive damages for sponsoring extrajudicial killing of U.S. citizen). A summary of damages awarded in actions pursuant to section 1605(a)(7) is provided in Kristine Cordier Karnezis, Annotation, *Award of Damages under State-Sponsored Terrorism Exception to Foreign Sovereign Immunities Act* (28 U.S.C.A. § 1605(a)), 182 A.L.R. Fed. 1 (2002) [hereinafter Karnezis].

Such expansive interpretations of the terrorism amendments to the FSIA were recently put to a halt by the D.C. Circuit Court of Appeals in *Cicippio-Puleo v. Islamic Republic of Iran*, when the court held that the 1996 amendments to the FSIA do not create a private right of action against foreign state defendants.[17] Specifically, the *Cicippio-Puleo* court held:

> [N]either 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.[18]

Although acknowledging that suits against foreign governments would better further the statutory purpose of compensating victims for horrific losses (than would personal capacity suits against individual state officials), the *Cicippio-Puleo* court nonetheless found the allowance of such claims to be "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."[19] While denying the existence of a statutory cause of action, *Cicippio-Puleo* expressly left open the question of what alternative grounds—beyond those contained in the 1996 amendments to the FSIA—might still be available to bring claims against foreign state defendants pursuant to the jurisdictional grant provided by section 1605(a)(7). In an unusual posture, the D.C. Circuit affirmed the district court's *sua sponte* dismissal for the plaintiff's failure to state a claim against foreign state defendants under the Flatow Amendment, yet simultaneously remanded, holding that plaintiffs "were entitled to remand so that they would have opportunity to amend their complaint to state a cause of action under some other source of law, including state law."[20]

The court did not offer such a reprieve to the plaintiffs in *Acree v. Republic of Iraq*, where the D.C. Circuit relied on their finding in *Cicippio-Puleo* to deny recovery to seventeen U.S. soldiers held as prisoners of war by the Iraqi Government while serving in the Gulf War in early 1991.[21] The *Acree* court found that the appellees failed to offer "any other coherent alternative causes of action" (other than the Flatow Amendment) to give effect to the jurisdictional grant provided in section 1605(a)(7), and accordingly vacated the judgment below and dismissed the lawsuit.[22] The D.C. Circuit further clarified their position that a plaintiff proceeding under the terrorism exception to the FSIA against foreign states, *qua* states, must "identify a particular cause of action arising out of a specific source of law" and that "generic common law cannot be the *source* of a federal cause of action."[23]

17. *Cicippio-Puleo*, 353 F.3d at 1024.

18. *Id.* at 1033.

19. *Id.* at 1036.

20. *Id.* at 1025. The court went on to clarify: "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." *Id.* at 1036. The court *was* willing, however, to decide that the Flatow Amendment cause of action was limited to personal capacity suits against state actors, even though that issue was not briefed by the parties, but only by the United States as *amicus curiae*. *Id.* at 1034.

21. Acree v. Republic of Iraq, 370 F.3d 41, 43 (D.C. Cir. 2004) ("Our recent decision in *Cicippio-Puleo* . . . makes it plain that the terrorism exception to the FSIA is merely a jurisdictional provision and does not provide a cause of action against foreign states.") (internal citations omitted).

22. *Id.*

23. *Id.* at 59 (emphasis in original).

This paper evaluates the availability and appropriateness of other sources of law that might give rise to claims for money damages for Americans injured by state-sponsored terrorism and entitled to jurisdiction against foreign state defendants when the substantive requirements of the state-sponsored terrorism exception to the FSIA are met. Following this introduction, Part II explores the legislative history and debate surrounding the passage of section 1605(a)(7) and the Flatow Amendment, establishing that the Flatow Amendment cannot be read to limit, or impliedly repeal, the jurisdictional grant of section 1605(a)(7). To the contrary, it is readily demonstrated that the Flatow Amendment was passed in order to expand, rather than contract, the scope of potential remedies available to U.S. citizens injured by state-sponsored terrorist acts.[24] Accordingly, even if the Flatow Amendment is narrowly construed to create a private right of action only for personal capacity claims against individual state officials, the grant of jurisdiction provided by section 1605(a)(7) against foreign state defendants *qua* states survives and opens the door to U.S. courts for other claims.

Part III examines the potential sources of law that can be contemplated under the surviving jurisdictional grant of section 1605(a)(7). The case is first made for the existence of a federal statutory claim embodied in the text of the jurisdictional provision itself, an alternative cursorily rejected by the *Cicippio-Puleo* court, but, as I argue, one worthy of further explanation. Alternatively, the argument is made that common law claims sounding in tort may be brought pursuant to section 1605(a)(7). Options under the common law include state tort law, customary international law, and federal common law. I evaluate the arguments for and against each of these sources of common law, as well as the relationship between them. Drawing in part upon the Supreme Court's recent decision in *Sosa v. Alvarez-Machain*,[25] I conclude that federal common law, incorporating principles of both state tort law and international law, is the most appropriate choice of law for civil suits brought against state-sponsors of terrorism pursuant to section 1605(a)(7). I further argue that the need for uniformity in these actions against foreign state defendants strengthens the case for federal law (either statutory or common) over state law claims.

Part IV concludes with some observations regarding the responsibility of the judicial branch to give full effect to the jurisdictional grant provided in section 1605(a)(7), a valid federal law enacted subject to the article I bicameral and presentment requirements.[26] While there are strong foreign policy arguments as to why such suits might not be desirable, there are equally valid policy arguments favoring such litigation. I argue that it is not within the province of the federal judiciary to unilaterally circumscribe jurisdiction that has been validly conferred by Congress within the bounds of the Constitution.[27] If the Executive branch wishes to repeal section 1605(a)(7), it should be done through transparent legislative process in a politically accountable fashion and not through piecemeal attack in the courts.

24. *See infra* notes 67-76 and accompanying text.

25. Sosa v. Alvarez-Machain, 124 S.Ct. 2739 (2004).

26. U.S. CONST., art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States.").

27. Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 829 (1986) (Brennan, J., dissenting) ("the day has yet arrived when this Court may trim a statute solely because it thinks that Congress made it too broad."), citing Cohens v. Virginia, 19 U.S. 6 (Wheat.) 264, 404 (1821) (Marshall, C.J.) ("It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

II. The 1996 State-Sponsored Terrorism Amendments to the FSIA

Originally enacted in 1976, the FSIA provides the sole basis for obtaining jurisdiction over foreign sovereigns in the courts of the United States[28] and must be applied in every action involving a foreign state defendant.[29] Section 1604 of the FSIA sets forth a general presumption of foreign sovereign immunity, under which federal and state courts are barred from exercising jurisdiction over foreign states except as provided in the enumerated exceptions to immunity contained in sections 1605 to 1607.[30] Thus, unless a matter falls within one of the enumerated exceptions to foreign sovereign immunity, jurisdiction over foreign sovereigns does not lie in the courts of the United States.[31] Exceptions to foreign sovereign immunity that are commonly invoked under the FSIA include instances when "the foreign state has waived its immunity either explicitly or by implication,"[32] cases in which "the action is based upon a commercial activity carried on in the United States by the foreign state,"[33] and suits against a foreign state for "personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or any official or employee of that foreign state while acting within the scope of his office or employment."[34]

The FSIA is unique in that these and the other enumerated exceptions collapse the three normally separate inquiries regarding subject matter jurisdiction, personal jurisdiction, and abrogation of foreign sovereign immunity, into one.[35] When the substantive requirements of any of the act's enumerated exceptions to the general presumption of sovereign immunity are met, the defense of foreign sovereign immunity is vitiated, and the courts (state and federal) of the United States have both subject matter and personal jurisdiction.[36] As interpreted by the Supreme Court in *Verlinden* and reaffirmed in the Court's recent decision in *Altmann*, the FSIA is more than a mere grant of jurisdiction, but also a "comprehensive

28. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989) (denying jurisdiction under the Alien Tort Statute to Liberian corporations whose oil tanker was bombed by the Argentine military during the Falkland Islands war because the FSIA provided the sole basis for obtaining jurisdiction over a foreign state and there was no applicable exception to immunity covering the bombing at issue). 20 U.S.C. § 1602 (2000).

29. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 489 (1983); 28 U.S.C. § 1330 (2003).

30. *Amerada Hess Shipping Corp.*, 488 U.S. at 433.

31. *See* Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993); see *also* Republic of Austria v. Altmann, 124 S.Ct. 2240, 2249 (2004) ("the Act carves out certain exceptions to its general grant of immunity . . . [which] are central to the Act's functioning.").

32. 28 U.S.C. § 1605(a)(1) (2003).

33. *Id.* § 1605(a)(2).

34. *Id.* § 1605(a)(5).

35. Daliberti v. Republic of Iran, 97 F. Supp. 2d 38, 53 (D.D.C. 2000) (citing the legislative history describing the Act's personal jurisdiction provisions as "in effect, a Federal long-arm statute over foreign states") (citing H.R. Rep. No. 94-1487, at 13-14 (1976) (footnotes omitted), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6612).

36. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 489-90 ("The Act expressly provides that its standards control in 'the courts of the United States and of the States,' [28 U.S.C. § 1604], and thus clearly contemplates that suits may be brought in either federal or state courts. However, '[i]n view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area,' H.R. Rep. No. 94-1487, at 32, the Act guarantees foreign states the right to remove any civil action from a state court to a federal court. [28 U.S.C. § 1441(d)]. . . . The statute grants jurisdiction over 'any non-jury civil action against a foreign state . . . with respect to which the foreign state is not entitled to immunity,' 28 U.S. C. § 1330(a).").

regulatory statute" that allows "arising-under" jurisdiction because of the substantive standards it provides to determine the conditions under which foreign sovereign immunity is waived.[37]

As originally enacted, the FSIA primarily served to codify the "restrictive" theory of foreign sovereign immunity, or the view that foreign states could be sued in the courts of the United States for their commercial acts, but not for their public acts.[38] Thus, prior to the 1996 passage of the state-sponsored terrorism provisions, U.S. citizens injured by state-sponsored acts of terrorism were unable to obtain jurisdiction over the responsible foreign states, despite attempts by plaintiffs to squeeze such claims into the existing exceptions to immunity then-contained in the FSIA.[39] As observed in one of the earliest opinions to interpret the 1996 amendments to the FSIA, prior to their passage:

> Courts steadfastly refused to extend the FSIA as originally enacted beyond commercial activities, *jure gestionis*, to reach public acts, *jure imperii*, outside the United States. This judicial restraint permitted foreign states to use the FSIA as a shield against civil liability for violations of the law of nations committed against United States nationals overseas.[40]

The passage of the 1996 amendments to the FSIA transformed the statute. A law that had previously shielded foreign state defendants from civil liability, despite their clear violations of international law, became, in certain carefully defined circumstances, "an important economic and financial weapon [for U.S. citizens to use against] . . . outlaw states."[41]

A. The Passage of Section 1605(a)(7): The State-Sponsored Terrorism Exception

In April 1996, Congress passed the state-sponsored terrorism exception, section 1605(a)(7), as one of many anti-terrorism tools included in the omnibus anti-terrorism legislation known as the Antiterrorism and Effective Death Penalty Act (AEDPA), a comprehensive legislative scheme designed to protect national security.[42] As noted in the legislative history, many of the terrorist acts that gave rise to the law were supported, or carried out, by foreign states and their agents. Congress aimed to reduce the threat of terrorism, a threat "far

37. *Id.* at 497; see *also* Republic of Austria v. Altmann, 124 S.Ct. at 2240 (holding FSIA is *sui generis* and defies categorization as either purely substantive or purely procedural).

38. *Verlinden*, 461 U.S. at 488; 28 U.S.C. § 1602. Indeed, in the FSIA's section 1602, sub-titled Findings and Declaration of Purpose, the statute reflected the statute's codification of international law principles, expressly stating that "[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned."

39. *See, e.g.*, Saudi Arabia v. Nelson, 507 U.S. 349 (1993) (rejecting U.S. citizen's claim that there was a sufficient nexus between commercial activities and torture in Saudi Arabia to provide jurisdiction under section 1605(a)(2) (the "commercial activities" exception of the FSIA); Princz v. Federal Republic of Germany, 26 F.3d 116 (D.C. Cir. 1994) (finding no applicable grant of jurisdiction under FSIA for American citizen who survived Holocaust to seek money damages against Germany for injuries suffered and slave labor performed while in Nazi concentration camps, over the dissent of Judge Wald that section 1605(a)(1) of the FSIA should be construed to include an implied waiver of immunity if a foreign state breaches a *jus cogens* norm (at 1183)); Smith v. Socialist People's Libyan Arab Jamahiriya, 886 F. Supp. 306 (finding no applicable FSIA exception for victims of Lockerbie bombing to use against Libya, including domestic tort exception section 1605(a)(5) (on the argument that bombing occurred in U.S. aircraft), or waiver of immunity exception under section 1605(a)(1) (through breach of United Nations agreements or violation of *jus cogens* norms)).

40. Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 11 (D.D.C. 1998).

41. H.R. Rep. No. 104-383, at 62 (1995).

42. Section 1605(a)(7) is set forth at § 221(a) of AEDPA, Pub. L. 104-132, 110 Stat. 1214 (1996).

eclipsing the dangers posed by population growth or pollution," by, among other means, encouraging the President to "increase the international isolation of state sponsors of international terrorism."[43]

After chronicling many instances of terrorism sponsored by foreign states, including those terrorist acts for which the FSIA had previously shielded foreign states from civil liability in U.S. courts,[44] Congress observed that the existence of state sponsors of terrorism, or "outlaw states," was "well documented," and that such states "consider terrorism a legitimate instrument of achieving their foreign policy goals."[45] The House Committee reviewing the legislation concluded that "allowing suits in the federal courts against countries responsible for terrorist acts where Americans and/or their loved ones suffer injury or death at the hands of the terrorist states is warranted."[46]

Thus, in adding section 1605(a)(7) to the FSIA and thereby providing an explicit exception to foreign sovereign immunity for state-sponsored terrorism, Congress removed the jurisdictional bar that had previously protected state-sponsors of terrorism from civil liability for the injuries they caused to U.S. citizens and their families. Congress' drafting of section 1605(a)(7), however, was restrained, reflecting the "delicate legislative compromise" and the "consistent resistance of the Executive branch to the passage of the legislation."[47] First, Congress provided an Executive check on the exercise of jurisdiction over such claims, limiting the scope of section 1605(a)(7) to allow suits against only those foreign states designated by the Department of State as state sponsors of terrorism.[48] State Department designation of countries that repeatedly support international terrorism is governed by the Export Administration Act, which imposes four categories of government sanctions that go well beyond the grant of jurisdiction for U.S. victims seeking money damages against terrorist states.[49] This wider application of the designation of a state as a sponsor of terrorism under the Export Administration Act in areas such as trade policy ensures that the Executive branch does not manipulate such designations with the sole goal of determining the outcome of specific litigations,[50] thus avoiding article III problems.[51]

43. H.R. REP. No. 104-518, at 43-44 (1996).

44. Including "the bombing of a German discotheque killing American military personnel; the bombing of the U.S. Embassy in Beirut; the bombing of Pan Am Flight 103; [and] the hostage takings of Americans in the Middle East."

45. H.R. REP. No. 104-383, at 62 (1995).

46. *Id.* The Committee went on to observe that Section 1605(a)(7) would "give American citizens an important economic and financial weapon against these outlaw states."

47. Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 89 (D.C. Cir. 2002) ("While such legislation [to compensate victims of terrorism and punish responsible foreign states] had long been sought by victims' groups, it had been consistently resisted by the executive branch. . . . Section 1605(a)(7) [thus] has some notable features which reveal the delicate legislative compromise out of which it was born").

48. 28 U.S.C. § 1605(a)(7)(A) (2003); *see also supra* notes 9-10 and accompanying text.

49. These sanctions include: a ban on arms-related exports and sales, controls over exports of dual use items, prohibitions on economic assistance, and imposition of miscellaneous financial and other restrictions (including harsher financial and tax treatment, and the waiver of sovereign immunity in suits brought victims of terrorism). *See generally*, U.S. Dep't of State, *Patterns of Global Terrorism* (Apr. 30, 2003), *available at* http://www.state.gov/s/ct/rls/pgtrpt/2002/html/19988.htm.

50. *Cf.* United States v. Klein, 80 U.S. 128 (1871).

51. However, article II concerns may be implicated to the extent that Congress' imposition of the threat of civil liability on foreign states for extra-territorial public acts is seen as unduly hampering the Executive branch's latitude in exercising foreign policy decisions made pursuant to the goals of the Export Administration Act. Specifically, attachment of a jurisdictional consequence to the State Department's designation of a state as a

A second constraint imposed by Congress on the exercise of jurisdiction under section 1605(a)(7) is that only U.S. nationals may sue foreign state sponsors of terrorism if they or their family members are injured or killed by state-sponsored acts of terrorism.[52] Thus, non-U.S. nationals injured by state-sponsored terrorism have no recourse against the responsible foreign governments in the courts of the United States, as the FSIA is the sole means for obtaining jurisdiction over foreign states.[53] Finally, Congress limited jurisdiction over suits against foreign states to those seeking money damages for death or injury caused by a designated set of terrorist acts, specifically contemplating the same universally criminal ventures of torture, extrajudicial killing, aircraft sabotage, and hostage-taking that had previously eluded the reach of the jurisdictional grants contained in the original version of the FSIA.[54] These limitations on the class of eligible parties to sue and be sued, as well as the limited set of state violations that trigger liability, help insure that the exercise of jurisdiction over the extraterritorial acts of foreign states is within the bounds of international law.[55] Moreover, as noted by Justice Breyer in his concurring opinion in *Sosa v. Alvarez-Machain*, "recognition of universal jurisdiction in respect to a limited set of norms is consistent with principles of international comity," and given the tendency of the courts of many nations to combine civil and criminal proceedings, "universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well."[56]

The jurisdictional grant of section 1605(a)(7) is further bounded in that only a subset of the plaintiffs injured by foreign states in violation of international law that had previously been barred from the U.S. courts by the FSIA are provided access to the courts of the United States.[57] Section 1605(a)(7) is not an open invitation to every party ever injured by

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state sponsor of terrorism—a jurisdictional consequence that itself may not fully supported by the Executive branch—could hamper the willingness or effectiveness of the Executive branch in utilizing this foreign policy tool. These article II concerns are outside the scope of this paper, although recent policy research suggests that sanctions against terrorist states are often ineffective tools of statecraft. *See generally* Meghan L. O'Sullivan, SHREWD SANCTIONS: STATECRAFT AND STATE SPONSORS OF TERRORISM (2003).

52. 28 U.S.C. § 1605(a)(7)(B)(ii) (2003).

53. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989).

54. 28 U.S.C. § 1605(a)(7); *see* Cicippio v. Islamic Republic of Iran, 1993 U.S. Dist. LEXIS 21413, at *5 (D.D.C. Mar. 13, 1993), *aff'd*, 30 F.3d 164 (D.C. Cir. 1994) (concluding that "state-supported kidnapping, hostage-taking, and similar universally criminal ventures were simply not the sort of proprietary enterprises within the contemplation of Congress when it enacted the 'commercial activity' exception to [the] FSIA."); *see also supra* note 39 and accompanying text.

55. International law recognizes five principles for exercising prescriptive jurisdiction. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1987). The most common is the territorial principle, conferring jurisdiction over acts within a state's territory (objective territorial) or having effects within its territory (subjective territorial). Other relevant jurisdictional categories include the protective principle, allowing a state to assert jurisdiction over acts occurring outside its territory which threaten its security, the passive personality jurisdiction, applicable to jurisdiction over "non-nationals for crimes committed against its nationals outside of its territory, at least where the state has a particularly strong interest," (recognized in *United States v. Fawaz Yunis*, 924 F.2d 1086, 1091) (D.C. Cir. 1991) and the universality principle, which recognizes that some offenses are so serious that they are subject to the jurisdiction of all states. Limiting the plaintiff class to US nationals confers protective and passive personality jurisdiction; limiting the terrorist acts to a subset of international law violations that are recognized as *jus cogens* confers universal jurisdiction. *See generally* David Mackusick, *Human Rights vs. Sovereign Rights: The State Sponsored Terrorism Exception to the Foreign Sovereign Immunities Act*, 10 EMORY INT'L L. REV. 741, 756-763, nn. 113-161 (1996).

56. Sosa v. Alvarez Machain, 124 S.Ct. 2739, 2783 (2004) (Breyer, J., concurring).

57. For example, the plaintiffs in both *Saudia Arabia v. Nelson* and *Princz v. Federal Republic of Germany* (discussed *supra* note 39) would still be barred from bringing suit under section 1605(a)(7) as neither Saudi

a foreign state from any violation of international law to seek redress in the courts of the United States.[58] Rather, the statute is a narrowly tailored measure that provides a limited plaintiff class with the opportunity to pursue claims against a designated set of state-sponsors of terrorism only when their injuries have been caused by well-defined actions that are widely accepted as violations of international norms.[59]

Nonetheless, the Executive branch strongly resisted the passage of section 1605(a)(7).[60] Testifying in Senate hearings, a representative from the State Department expressed concerns that section 1605(a)(7) deviated from established international practice, arguing that expansion of jurisdiction under the FSIA "in ways that cause other states to question our statute ... could undermine the broad participation we seek [in our judicial system]."[61] Despite this Executive branch opposition, the legislation was passed.[62] Five months later, however, the same Congress passed the Flatow Amendment, which created a private right of action against state officials, agents, and employees when the jurisdictional requirements of section 1605(a)(7) were satisfied. In addition, the Flatow Amendment expanded the scope of available damages under the FSIA to allow punitive damages to be awarded for such actions.

Arabia nor the German Republic are designated state-sponsors of terrorism. Murphy, *supra* note 8, at 51, nn. 302-303, notes that "[a]lthough attorneys for [Scott] Nelson [the plaintiff in *Saudi Arabia v. Nelson*] urged Congress to amend the Foreign Sovereign Immunities Act so as to provide redress to Nelson and other persons similarly situated, this has not been done ... [and that Nelson's attorneys argued that] 'there is no principled reason'" for distinguishing Nelson's case from those of plaintiffs that have been tortured by states designated as state sponsors of terrorism. Similarly, foreign nationals may not bring claims against foreign states under section 1605(a)(7), as distinct from the other exceptions to sovereign immunity of the FSIA. *Verlinden B.V. v. Central Bank of Nigeria* specifically held that "[t]he [Foreign Sovereign Immunities] Act contains no indication of any limitation based on the citizenship of the plaintiff." *Verlinden*, 461 U.S. 480, 490 (1983).

58. As contrasted with the grant of universal jurisdiction briefly provided by Belgium over extraterritorial human rights violations between 1993–2003, whose short-lived history is analyzed in Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AMER. J. INT'L. L. 888 (2003). Compare also the open-ended grant of jurisdiction provided in the Alien Tort Statute, 18 U.S.C. § 1350, providing district courts with "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations ...," and discussed at length in *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (2004).

59. *See e.g.*, Anti-Terrorism Act, 18 U.S.C. § 2331 et. seq. (2001); Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641 (1970); and United Nations Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027 (1984), *as modified* 24 I.L.M. 535 (1985).

60. Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 89 (D.C. Cir. 2002).

61. Murphy, *supra* note 8, at 37-38, n. 233 (citing *Foreign Terrorism and U.S. Courts Hearing* on S.825 *Before the Subcomm. on Courts and Admin. Practice of the S. Comm. on the Judiciary*, 103d Cong. 12-15 (1994) (statement of Jamison S. Borek, Deputy Legal Adviser, Department of State)).

62. Nonetheless, as discussed further *infra* at Part IV, the Executive branch has continued to pursue its opposition to the application of section 1605(a)(7) and the subsequent Flatow Amendment in the courts, arguing that "the imposition of liability for acts of state sponsored terrorism is an area of law with serious ramifications for the United States Government's conduct of foreign affairs" and has consistently urged the judiciary to narrowly construe the 1996 amendments to the FSIA and opposed the enforcement of judgments. Brief for the United States as *amicus curiae* at 4; Cicippio-Puleo v. Islamic Republic of Iran, 353 F.3d 1024 (D.C. Cir. 2004); *see also* Carol D. Leonnig, *POWs Not Entitled to Iraqi Funds, Justice Says; Persian Gulf Vets Seek Payment That U.S. Wants to Go Toward Rebuilding Iraq*, WASH. POST, Apr. 8, 2004, at A8.

B. The Passage of the Flatow Amendment and its Relationship to Section 1605(a)(7)

The Flatow Amendment, formally titled Civil Liability for Acts of State Sponsored Terrorism, was passed as part of an appropriations bill and codified as a note to section 1605 of the FSIA.[63] Given the Flatow Amendment's enactment under omnibus appropriations legislation, there are limited sources available from which to discern the Congressional intent behind its passage. However, there is no indication that the statute was designed to limit in any way, much less repeal by implication, the full scope of the grant of jurisdiction against foreign state defendants provided by section 1605(a)(7).[64] While the Flatow Amendment certainly modifies section 1605(a)(7) by specifying the type of damages available against individual state officials,[65] the language and limited legislative history of the amendment suggest that such modification was meant to expand the scope of damages available in actions against state officials by allowing punitive damages that otherwise would be unavailable under the FSIA.[66]

The circumstances of the Flatow Amendment's passage resulted in a scant two sentences of legislative history: "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."[67] This language, brief as it is, demonstrates that the Flatow Amendment was enacted to expand, not contract, the scope of damages available to plaintiffs under claims brought pursuant to section 1605(a)(7). Statements made by Congressman Saxton, the sponsor of the Flatow Amendment and then-Chairman of the House Tax Force on Counterterrorism and Unconventional Warfare, lend further credence to the view that the Flatow Amendment was passed "to make the availability of punitive damages undisputable."[68]

According to Congressman Saxton, punitive damages were provided under the Flatow Amendment because "compensatory damages for wrongful death cannot approach a measure of damages reasonably required for a foreign state to take notice."[69] The Flatow Amendment was thus meant to further the original purpose behind the state-sponsored

63. Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, § 589, 110 Stat. 3009, 3172 (1996) (codified at 28 U.S.C.A. § 1605 note (2002). Section 1605 of the FSIA, sub-titled *General Exceptions to the Jurisdictional Immunity of a Foreign State*, includes all the enumerated exceptions under which "a foreign state shall not be immune from the jurisdiction of courts of the United States or of the States," including section 1605(a)(7), the state sponsored terrorism section.

64. The Flatow Amendment is formally an independent pronouncement of law. Under traditional principles of statutory construction, as it effects a substantial change to 28 U.S.C. § 1605(a)(7) it can appropriately be construed as an implied amendment. *See* Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 12-13 ("An implied amendment is an act which purports to be independent, but which in substance alters, modifies, or adds to a prior act.") (quoting Norman J. Singer, 1A Sutherland on Statutory Construction § 22.12 (5th ed. 1992 & Supp. 1997).

65. *See supra* notes 11-14 and accompanying text.

66. 28 U.S.C. § 1606 (2002) specifically provides that for "any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages."

67. H.R. Conf. Rep. No. 104-863, at 987 (1996).

68. *Flatow*, 999 F. Supp. at 25 (citing Congressman Jim Saxton, News Release, Saxton to the Flatow Amendment Family: "Be Strong, America is Behind You," Feb. 26, 1997.

69. *Id.*

terrorism exception, "to alter the conduct of foreign states" by imposing "massive civil liability on foreign state sponsors of terrorism whose conduct results in the death or personal injury of U.S. citizens."[70] Moreover, the text of the Flatow Amendment itself reflects that the statute in no way displaces or repeals other causes of action, as the provisions regarding application of the statute of limitations and discovery expressly apply not only to claims bought pursuant to the Flatow Amendment, but also to other claims brought pursuant to section 1605(a)(7).[71]

Subsequent legislative enactments further support the view that Congressional intent behind the passage of the Flatow Amendment was not to limit the scope of jurisdiction under section 1605(a)(7) to individual official defendants, but rather to expand the scope of damages available to U.S. victims of state-sponsored terrorism. In 1998, Congress amended section 1606 of the FSIA to allow punitive damages to be awarded against foreign *states* in actions brought pursuant to the jurisdictional grant of section 1605(a)(7).[72] Although this allowance of punitive damages against foreign state defendants remained on the books for only a brief two-year window,[73] Congressional authorization to award punitive damages against foreign state defendants suggests that Congress did contemplate suits being brought pursuant to section 1605(a)(7) against foreign governments, and that the full grant of jurisdiction under section 1605(a)(7) against foreign state defendants was meant to be sustained after the enactment of the Flatow Amendment.

In summary, all available evidence suggests that the state-sponsored terrorism exception's grant of jurisdiction against foreign state defendants survives the passage of the Flatow Amendment. The Flatow Amendment's legislative history demonstrates that it was meant to expand, rather than contract, the scope of damages available to plaintiffs who bring actions pursuant to section 1605(a)(7).[74] The language of the statute demonstrates that actions other than those brought pursuant to the Flatow Amendment cause of action are available.[75] Subsequent Congressional enactments support the view that Congress intended jurisdiction to lie against foreign state defendants and not just individual state officials.[76] Moreover, under the canons of statutory construction, there is a general rule disfavoring repeals by implication, a rule that applies with special force when the second provision is enacted as part of an appropriations bill.[77] These arguments demonstrate that the Flatow

70. *Id.*

71. Subsection (b) reads: Provisions related to statute of limitations and limitations on discovery that would apply to an action brought under 28 U.S.C. 1605(f) and (g) shall *also* apply to actions brought under this section . . . 28 U.S.C. § 1605 note. 28 U.S.C. §§ 1605(f) and (g) are expressly applicable to actions brought pursuant to § 1605(a)(7). *See* § 1605 (emphasis added).

72. 28 U.S.C. § 1606 (2002) currently states "As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages." In 1998, Congress briefly amended § 1606 to allow punitive damages against foreign state defendants, for claims *brought pursuant to § 1605(a)(7)*, inserting the words "except any action under section 1605(a)(7) or 1610(f)" after "punitive damages" in the text of 28 U.S.C. § 1606. Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, Sec. 117(b), § 1606, 112 Stat. 2681 (1998). (emphasis added)

73. *Id., repealed by* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386, § 2002(f)(2), 114 Stat. 1464 (2002).

74. *See supra* note 67-71 and accompanying text.

75. *See supra* note 71 and accompanying text.

76. *See supra* note 72-73 and accompanying text.

77. 73 AM. JUR. 2D STATUTES § 279 (2004) (citing U.S. v. Will, 449 U.S. 200 (1980)).

Amendment was in no way intended to narrow the original grant of jurisdiction provided by section 1605(a)(7). Hence, even if the cause of action provided by the Flatow Amendment is construed to allow only personal capacity actions against foreign state officials, jurisdiction against foreign state defendants is still available under section 1605(a)(7) when appropriate claims are brought. The next section explores the alternative sources of law under which plaintiffs may seek money damages against foreign state defendants pursuant to the jurisdictional grant of section 1605(a)(7).

III. Potential Causes of Action Against State-Sponsors of Terrorism

Determining liability under the FSIA involves a two-step inquiry. First, plaintiffs must satisfy the jurisdictional prerequisite by establishing that the conditions of one of the relevant exceptions to foreign sovereign immunity are met. Second, liability must be proven for the specific relief that is sought—*e.g.* a breach of contract under the commercial activity exception, negligence for an auto accident under the domestic tort exception, etc. Section 1606 of the FSIA reflects this two-step inquiry, providing that "[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances."[78]

Prior to the enactment of the state-sponsored terrorism exception, U.S. courts "interpreted this mandate to mean that the forum state's law of liability shall determine the liability of a foreign state" under the traditional exceptions to foreign sovereign immunity then codified in the FSIA.[79] In general, this interpretation meant that courts applied state common law to determine the nature of foreign state liability when any of the exceptions to foreign sovereign immunity were met.[80] However, circumstances did arise where courts applied federal common law as a threshold inquiry—not to rule upon the final liability of a foreign state regarding the claim at issue, but to determine whether or not the jurisdictional prerequisites of the FSIA exception at issue were met.[81] For example, in questions such as the attribution of liability to a foreign state for the actions of one of its agents, where jurisdiction under the FSIA hinged upon whether or not the agent had the authority to contract for the foreign state, courts applied federal common law in addressing the threshold jurisdictional inquiry.[82] Thus, although the general rule was that the FSIA was construed neutrally with respect to the rules of substantive liability affecting foreign states,

78. 28 U.S.C. § 1606 (2002).

79. Sandra Engle, Note, *Choosing Law for Attributing Liability Under the Foreign Sovereign Immunities Act: A Proposal for Uniformity*, 15 FORDHAM INT'L L. J. 1060, 1074 (1992).

80. In *First National City Bank v. Banco para el Comercio Exterior de Cuba*, Justice O'Connor noted the identical language between section 1606 and the similar provision in the Federal Tort Claims Act, interpreting such language to mean that "*where state law provides a rule of liability governing private individuals*, the FSIA requires the application of that rule to foreign states in like circumstances." 462 U.S. 611, 622 (1983) (emphasis added); *see also infra* note 112 and accompanying text.

81. As observed by the Supreme Court in *Verlinden B.V. v. Central Bank of Nigeria*, when Congress enacted the FSIA, it expressly acknowledged "the importance of developing a uniform body of law." 461 U.S. 480, 489 (internal citations omitted).

82. "For example, if an agent did not have the authority to contract on behalf of the principal foreign state, the court had no subject matter or personal jurisdiction over the foreign state under the [commercial activity exception to] the FSIA." Engle, *supra* note 79, at 1076.

occasions did arise where courts nonetheless used federal common law to determine if jurisdiction lay under the FSIA. Furthermore, courts sometimes applied federal common law instead of state law in determining the choice-of-law rule when identifying the standard of substantive liability for foreign states.[83]

In this section, I first argue that the jurisdictional prerequisites to abrogate the defense of foreign sovereign immunity, embodied in the state-sponsored terrorism exception of section 1605(a)(7), themselves provide a substantive rule of liability. As distinct from the other exceptions to foreign sovereign immunity contained within the FSIA, under section 1605(a)(7) a plaintiff must essentially establish his or her *prima facie* case for tort liability simply to meet the threshold jurisdictional requirement.[84] In effect, the normal two-step process of first obtaining jurisdiction and then determining liability under the FSIA, reflected in section 1606, is collapsed into one inquiry under the state-sponsored terrorism exception, which was enacted twenty years later.

Admittedly, the D.C. Circuit, in *Cicippio-Puleo*, held that neither the Flatow Amendment, nor section 1605(a)(7), nor the two provisions considered in tandem provided a statutory right of action against foreign state defendants.[85] Here, I am contesting that part of the court's holding that denies the existence of a federal statutory right of action expressly contemplated by the grant of jurisdiction in section 1605(a)(7). I argue that the jurisdictional grant itself provides a statutory right of action, as plaintiffs must *de facto* demonstrate the necessary elements for liability in tort in order to establish jurisdiction.[86]

Although the availability of a statutory right of action under section 1605(a)(7) may be contestable, common law claims have traditionally provided the basis for actions pursuant to the other enumerated exceptions of the FSIA. Furthermore, there is no law to suggest that common law claims would not be applicable to the state-sponsored terrorism exception (although raising a common law claim would arguably be redundant, given the demonstration of the elements of tort required to establish jurisdiction).[87] Accordingly, the second half of this section examines the potential sources of common law, their relationship to one another, and their relative strengths and weaknesses in this context of civil suits against foreign state defendants.

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83. *See* Joel Mendal Overton, II, *Will the Real FSIA Choice-of-Law Rule Please Stand Up?* 49 WASH. & LEE L. REV. 1591, 1593 (1992) [hereinafter Overton].

84. The closest parallel in the FSIA is the non-commercial, or domestic tort exception of 28 U.S.C. § 1605(a)(5) which provides jurisdiction against foreign states when "money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment [with a set of delineated torts that are NOT included under this exception]." 28 U.S.C § 1605(a)(5) (2002). The domestic tort exception, unlike the state sponsored terrorism exception, does not specify the specific torts that must give rise to liability (although it does list the torts that do not give rise to the exception). Thus, in seeking jurisdiction under section 1605(a)(5), plaintiffs do not have to allege the specific nature of the foreign state's tortious acts, and there is no limitation of the class of possible torts to *malum in se* torts where breach is presumed. *Id.*

85. *See supra* note 18 and accompanying text.

86. *See, e.g.*, Smith v. Islamic Emirate of Afghanistan, 262 F.Supp.2d 217, 226-27 (S.D.N.Y. 2003) (outlining the five elements that must be proven to state a cause of action under the Flatow Amendment which are the precise same elements contained within § 1605(a)(7)).

87. Cicippio-Puleo v. Islamic Republic of Iran, 335 F.3d 1024, 1036 (D.C. Cir. 2004) (finding that plaintiffs were entitled to remand after the court dismissed their first complaint filed against Iran under the Flatow Amendment so that they might seek relief under "some other source of law, including state law."); *see supra* note 20 and accompanying text.

A. Statutory Claims Contained within the Jurisdictional Grant

It is uncommon, but not unheard of, for rights of action to be read directly into grants of jurisdiction.[88] In section 1605(a)(7), the right of action—to seek money damages for personal injury or death against the responsible foreign state—is expressly provided in the text of the statute.[89] Although the argument can be made that the Flatow Amendment represents an implicit legislative intent to deny the remedy explicitly provided in section 1605(a)(7), through the substitution of an alternative narrower remedy, this argument fails.[90] As argued above, both the text and the legislative history of the Flatow Amendment indicate that the provision was added to expand options available for plaintiffs under section 1605(a)(7), not to contract them.[91]

The text of section 1605(a)(7) delineates five prerequisites that must be met before foreign states are stripped of sovereign immunity under section 1605(a)(7)—prerequisites that are not present in other FSIA exceptions.[92] Unlike the other provisions, which are largely focused on the jurisdictional requirements to establish sufficient contacts with the United States[93] but provide less detail on the elements of potential claims, section 1605(a)(7) delineates all the requisite elements for an action in tort.

Duty and breach of duty are provided at both the general and the specific level. First, the requirement that the foreign state be designated by the State Department as a state-sponsor of terrorism provides an initial threshold breach of the terrorist state's duty with respect to other nations. Arguably, this threshold breach of duty results from crossing some line of behavior that withdraws the protection of sovereign immunity presumptively pro-

88. One example can be found in the line of admiralty cases governed by 28 U.S.C. § 1333(1) (1948) ("The district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are entitled."); *see also* Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) (jurisdictional statute permitting judicial explication of federal common law).

89. *See supra* note 10 and accompanying text.

90. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979) ("Yet it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.").

91. *See supra* Part II.B.

92. 28 U.S.C. § 1605(a)(7)-(a)(7)(B)(ii) (First, a claim for money damages not covered by the commercial activity exception must be sought for "personal injury or death . . . caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act." Second, the "act or provision of material support" must be "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." Third, the Secretary of State must have designated the defendant state as a "state sponsor of terrorism" either "at the time the act occurred" or as "a result of [the] act." Fourth, either the claimant or the victim must have been "a national of the United States . . . when the act upon which the claim is based occurred." And fifth, if "the act occurred in the foreign state," the claimant must afford the defendant "a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration.").

93. Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 90 (D.C. Cir. 2002) ("[T]he original statute's immunity exceptions 'prescribe[d] the necessary contacts which must exist before our courts can exercise personal jurisdiction.' H.R. Rep. No 94-1487, at 13 (describing the Act's personal jurisdiction provisions as a kind of federal long-arm statute . . . When Congress passed the original FSIA, it was assumed that the exercise of personal jurisdiction over foreign states under the statute always would satisfy the demands of the Constitution . . . Indeed as some courts have noted, the nexus requirements imposed by the original FSIA sometimes exceeded the constitutional standard.") (some internal citations omitted).

vided through international law principles of comity.[94] At the specific level, the statute limits claimants to (U.S.) victims of a small subset of the universe of imaginable terrorist acts—torture, extrajudicial killing, aircraft sabotage, and hostage-taking, all of which are clearly defined crimes, or *malum in se* torts (and therefore *per se* breaches of duty) both under U.S. law and in international agreements.[95] The elements of harm and causation are also specified and therefore must be proven before immunity is abrogated and jurisdiction granted. Additionally, suits are limited to those seeking money damages for personal injury or death caused by the listed terrorist acts. Further support for an express right of action is provided by the fact that the state-sponsored terrorism exception, unlike the other exceptions to immunity in the FSIA, has its own statute of limitations set forth in a separate provision of the FSIA. This statute of limitations provision was drafted before the enactment of the Flatow Amendment and only applies to actions brought pursuant to section 1605(a)(7) or the Flatow Amendment.[96]

Thus, for jurisdiction to lie under section 1605(a)(7)—and prior to the triggering of the second clause of section 1606 that "foreign state[s] shall be liable in the same manner and to the same extent as a private individual under like circumstances,"[97]—plaintiffs must essentially argue their *prima facie* tort case: duty, breach, causation, and harm. The findings of *Verlinden*—made with respect to general jurisdictional requirements that did not include the specific elements of the claims at issue—that the FSIA "governs the types of actions for which foreign sovereigns may be held liable"[98] and requires the application of detailed federal law standards[99] thus apply *a fortiori* to the state-sponsored terrorism exception which details all the elements of the tort claim as part of the jurisdictional requirement.[100]

Moreover, the clear purpose behind the passage of section 1605(a)(7) was to allow American citizens to bring civil actions against foreign state sponsors of terrorism.[101] Where federal courts have declined to find a private right of action in other statutes because of foreign policy concerns, their reasons were based on the fact that such private suits would run counter to the statutory purpose, as well as diminish needed uniformity in the sphere

94. *See* Lee M. Caplan, *State Immunity, Human Rights, and* Jus Cogens: *A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L L. 741 (2003) (arguing that the 1996 amendments to the FSIA do have a well-grounded justification in international law based on principles of the withdrawal of comity privileges (as opposed to dignity rights), and summarizing the existing debate among international legal scholars as to the relationship between state sponsored human rights violations and abrogation of foreign sovereign immunity) [hereinafter Caplan]; *accord* Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983) ("foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution.").

95. *See e.g.*, Anti-Terrorism Act of 1991, 18 U.S.C. §§ 2331-2332(e); Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192; United Nations: Draft Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 23 I.L.M. 1027 (1984), *modified*, 24 I.L.M. 535 (1985).

96. 28 U.S.C. § 1605(f).

97. 28 U.S.C. § 1606.

98. *Verlinden*, 461 U.S. at 496-97.

99. *Id.* at 493-94.

100. The D.C. Circuit's recent discussion of the jurisdictional requirements under section 1605(a)(7) in the case of *Kilburn v. Socialist People's Libyan Arab Jamhiriya*, 376 F.3d 1123, 1127-29 (D.C. Cir. 2004), is illustrative of how the jurisdictional inquiry can collapse into a substantive tort law inquiry, which in that case, was with respect to the delineation of the appropriate causation standard. The court did, however, make the disclaimer that "the only issue before us here is *jurisdictional causation*." *Id.* at 1129 (emphasis in original).

101. *See supra* notes 41-48 and accompanying text.

of foreign affairs.[102] While recognizing that "it would be imprudent for a court to create rights of action that might interfere with the conduct of foreign policy,"[103] the proposed right of action under the state-sponsored terrorism exception to the FSIA is itself the instrument of foreign policy that has been expressly endorsed by Congress. Therefore, concerns raised by other courts about judicially recognized private rights of action unduly interfering with foreign policy in the context of statutes such as the Export Administration Act,[104] the Foreign Corrupt Practices Act,[105] or the Hostage Taking Act,[106] are inapposite to the FSIA context. In the FSIA context, the judicial forum is clearly provided by the statute, and, particularly with respect to section 1605(a)(7), private litigation against foreign state defendants was envisioned by Congress as the necessary (and sole) means of furthering the statutory purpose.

In sum, section 1605(a)(7) is more than a mere jurisdictional statute that "speak[s] to the power of the court rather than to the rights or obligations of the parties."[107] Indeed, the state-sponsored terrorism exception speaks expressly to the rights of U.S. victims of international terrorism to bring suit against foreign states that have breached their obligations under international law through systematic sponsoring of acts of terrorism. As such, section 1605(a)(7) should be construed to directly confer a private right of action for U.S. citizens that have been injured by state-sponsored acts of terrorism to bring suit against the foreign states responsible for their injuries.

B. Common Law Claims

Even if adherence to the formal structure of the FSIA dictates treating section 1605(a)(7) as a mere grant of jurisdiction—notwithstanding its substantive law content—relief is still available against foreign state defendants when the conditions of the state-sponsored terrorism exception are met. As has traditionally been the case for the other enumerated exceptions to foreign sovereign immunity contained within the FSIA, common law claims may be brought pursuant to the state-sponsored terrorism exception's grant of jurisdiction against foreign state defendants.[108] Potential sources for such claims include domestic (state) tort law, customary international law, and federal common law.[109]

102. *See, e.g.* Smith v. Regan, 844 F.2d 195, 198 (4th Cir. 1988) (refusing to imply a right of action under the Hostage Act (22 U.S.C. § 1732 (1982)) in favor of missing Vietnam veterans, finding that the act puts a duty only on the President, and that "as different courts address these issues, the judiciary may speak with multiple voices in an area where it is imperative that the nation speak as one."); *see also* Lamb v. Phillip Morris, Inc., 915 F.2d 1024, 1029 (6th Cir. 1990) (refusing to find an implied right of action under the Foreign Corrupt Practices Act (FCPA) on the basis that an antitrust private right of action would contravene rather than support the FCPA, where the "legislative scheme clearly evinces a preference for compliance in lieu of prosecution.").

103. Israel Aircraft Indus. Ltd. v. Sanwa Bus. Credit Corp., 16 F.3d 198, 202 (7th Cir. 1994) (declining to imply a right of action in a suit by an Israeli corporation against a Japanese bank for violation of the Export Administration Act's anti-boycott provision, in part on the basis that it might interfere with State Department efforts to enlist Japanese aid in brokering Mideast peace accords).

104. *Id.*

105. *Lamb*, 915 F.2d at 1029.

106. *Smith*, 844 F.2d. at 198.

107. Landgraf v. USI Film Prods., 511 U.S. 244, 274 (1994).

108. *See supra* note 87 and accompanying text.

109. It may fairly be deemed hair-splitting to differentiate between judicial interpretation of section 1605(a)(7) to contain an express private right of action and judicial interpretation of section 1605(a)(7) as a

In an action against a foreign state defendant brought pursuant to the FSIA, "there is no clear understanding as to whether the forum state's choice-of-law rules should apply or whether federal common law should govern."[110] The potential for confusion is even greater with respect to claims brought pursuant to the state-sponsored terrorism exception, as the conduct at issue occurred extraterritorially, and choice-of-law doctrine that applies to other provisions of the FSIA may not be readily transferable.[111] In assessing liability for standard domestic tort or breach of contract claims, courts interpreting the FSIA have often applied state law as the substantive law for liability determinations, and section 1606 has been read to dictate choice of law in a manner consistent with similar language in the Federal Tort Claims Act.[112]

While the application of state tort law has a certain historical lineage under the FSIA, nonetheless, that choice-of-law rule is disputed in "standard" FSIA claims.[113] Moreover, it is especially inappropriate to apply state tort law for liability determinations under section 1605(a)(7) given the inadequacy of domestic tort law, or "garden variety municipal tort[s]," to encapsulate the international law aspects of the torts in question and thereby to serve as a "placeholder for [the] values" at stake in the kind of wrongs covered by section 1605(a)(7).[114] Furthermore, equity concerns for similarly situated plaintiffs, the inappropriateness of stim-

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grant of jurisdiction which allows federal common law claims. Nonetheless, and at the risk of some repetition, I present the two issues separately. The relative merits of federal common law as opposed to state law and international law is better argued as a separate issue from that of the force of the substantive content in section 1605(a)(7) (which is applicable both to the reading of an express statutory right of action and to the ease of crafting federal common law in this context).

110. Dumont v. Saskatchewan Gov't Ins., 258 F.3d 880, 886 (8th Cir. 2001) (quoting 14A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3662, p. 231 (3d ed.1998)); *see also* Overton, *supra* note 83 (documenting how the FSIA fails to establish explicit choice-of-law rules for determining what rules to apply to substantive issues and describing divergence of opinion between the Ninth and the Second Circuit as to whether to apply federal common law or state choice of law rules in determining which substantive law to apply in wrongful death claims brought pursuant to the commercial activity exception (section 1605(a)(2)).

111. *See, e.g.*, Liu v. Republic of China, 892 F.2d 1419 (9th Cir. 1989) (holding that choice of law under the domestic tort exception, section 1605(a)(5), operates much like the Federal Tort Claims Act, and normally applies the tort law of the state where the injury occurred).

112. *Compare* 28 U.S.C. § 1606 ("As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages"), *with* The Federal Tort Claims Act (FTCA), 28 U.S.C. § 2674 (1976) ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."); *see also* First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba, 462 U.S. 611, 622 n. 11 (1983) (Justice O'Connor noted the identical language, interpreting it to mean that "*where state law provides a rule of liability governing private individuals*, the FSIA requires the application of that rule to foreign states in like circumstances" (emphasis added)).

113. Overton, *supra* note 83, at 1592-93, nn. 12-15.

114. *See* Xuncax v. Gramajo, 886 F. Supp. 162, 183 (D. Mass. 1995) ("reading [18 U.S.C.] § 1350 as essentially a jurisdictional grant only and then looking to domestic tort law to provide the cause of action mutes the grave *international law* aspect of the tort, reducing it to no more (or less) than a garden-variety municipal tort. This is not merely a question of formalism or even of the amount or type of damages available; rather it concerns the proper characterization of the *kind* of wrongs meant to be addressed under § 1350: those perpetrated by *hostis humani generis* ('enemies of all humankind') in contravention of *jus cogens* (peremptory norms of international law). In this light, municipal tort law is an inadequate placeholder for such values").

ulating forum-shopping with respect to a statute designed to further a national purpose, and the longstanding preference for uniformity in the foreign affairs sphere[115] suggest the need for uniform standards of liability grounded in the substance of the claims under the FSIA. Such uniformity will help ensure that the ability of plaintiffs to recover will vary according to the degree of their injuries or the culpability of the defendant, rather than differ arbitrarily according to the local laws that apply where suit is filed or the plaintiff is domiciled.[116]

Even when courts think that they are applying state law in determining liability under section 1605(a)(7), they are arguably crafting federal common law as can be illustrated by the D.C. Circuit's recent decision in *Bettis v. Islamic Republic of Iran*.[117] In interpreting section 1606's stipulation that "a foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances," the *Bettis* court found that it lacked a "free-wheeling commission to construct common law as we see fit. Rather, we are bound to look to state law in an effort to fathom the 'like circumstances' to which 28 U.S.C. § 1606 refers. The statute instructs us to find the law, not to make it."[118]

In *Bettis*, the D.C. Circuit found itself bound to treat the issue of tort liability of a state-sponsor of terrorism to a private individual within the confines of section 1606, and therefore turned to state law to provide the standards for the substance of the tort law claim.[119] The D.C. Circuit ignored the fact that there is no state tort law regarding tort recovery for international terrorist acts of torture and hostage-taking, and also ignored that the Supreme Court had already found the implicit mandate of section 1606 to apply state law inapposite when state law was silent to the matter at hand.[120] Courtesy of "an extraordinary survey of the common law of intentional infliction of emotional distress, with a chart showing the law in every state in which the tort has been elucidated," the court concluded that no state law case had ever permitted nieces or nephews to recover for third-party intentional infliction of emotional distress.[121] Although "mindful that state-sponsored terrorist groups . . . transgress all bounds of human decency through the physical and psychological torture of their hostages," the D.C. Circuit held that "[a]s the law now stands, the nieces and nephews of a victim have no viable basis for a third-party claim of intentional infliction of

115. American Ins. Ass'n v. Garamendi, 123 S.Ct. 2374, 2386 (2003) (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427, n. 25 (1964)) ("There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the 'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of the foreign relations power to the National Government in the first place").

116. *See, e.g., In re* Air Crash Disaster at Boston, Mass. July 31, 1973, 399 F. Supp. 1107 (D. Mass. 1975) (applying wrongful death statutes of the decedents' domiciles to determine liability for individual claims with resulting discrepancies in the ability of similarly situated plaintiffs to recover).

117. Bettis v. Islamic Republic of Iran, 315 F.3d 325 (D.C. Cir. 2003). The issue in *Bettis* was whether or not nieces and nephews of a victim of terrorism sponsored by Iran could recover for intentional infliction of emotional distress under the Flatow Amendment. The court did not reach the issue, later decided in *Cicippio-Puleo*, of whether or not the Flatow Amendment furnished the basis for a cause of action against a defendant state; instead the case was resolved through the application of tort law principles rendering it unnecessary for the court to reach the cause of action issue, as plaintiffs could not recover under tort law. *Id.* at 330.

118. *Id.* at 338.

119. *Id.*

120. First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba, 462 U.S. 611, 622 n. 11 (1983).

121. *Bettis*, 315 F.3d at 336.

emotional distress under the statute."[122] The court therefore affirmed the judgment of the lower court denying relief.[123]

The *Bettis* court's decision to "find the law, not to make it," despite its disavowal of federal common law, can itself be seen as an act of federal common-law making, albeit masked by the specific facts of the case. The fifty-state survey of the relevant tort law found *no* states that would have allowed the plaintiffs to recover in "like circumstances." This made the court's "decision" easy, and in effect clouded the fact that a decision had been made at all.[124] But, what if one state, or ten, had allowed nieces and nephews to recover for third-party intentional infliction of emotional distress? Then the court would have had to make a substantive decision whether to apply the minority or majority view in creating a federal rule to govern liability under the statute. The court would thereby engage in the process of federal common-law making aptly described by Justice Jackson: "apply[ing] the traditional common-law technique of decision and . . . draw[ing] upon all the sources of the common law . . . appropriate to effectuate the policy of the governing Act."[125] The *Bettis* decision is thus a federal common law wolf in state law sheep's clothing; in effect, the D.C. Circuit crafted a uniform body of law applicable for use in deciding claims under a federal statute. That the state law precedent "binding" the court turned out to be uniform does not negate the court's apparent willingness to engage in a process of crafting one rule out of fifty—that itself constitutes common-law making.[126]

As an alternative to state tort law, customary international law, while potentially solving the uniformity problem as well as recognizing the gravity of the torts at issue, is nonetheless problematic in providing a freestanding source for private rights of action under section 1605(a)(7). The amorphous content of customary international law,[127] and the lack of any consensus in the courts, or the scholarly literature, that customary international law can, by its own force, create private duties against foreign states engaged in public acts, serve to undermine its utility in furnishing a private right of action.[128]

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122. *Id.* at 338 (The court concluded that the nieces and nephews were neither direct victims under § 46(1) of the Restatement (Second) of Torts, nor immediate family members under § 46(2)).

123. *Id.* at 325.

124. Moreover, the panel did not formally articulate the reasoning behind its threshold decision, to apply neither the tort law of the plaintiffs' home state, nor that of the venue for filing, nor the tort law of Iran. In effect, that initial choice to attempt to craft a standardized rule from state tort law had already moved the court into the process of crafting federal common-law.

125. D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 472 (1942) (Jackson, J., concurring).

126. In *Cicippio-Puleo*, the D.C. Circuit did not reach this issue of the implications of divergent state tort law (in that case, for whether or not immediate family members could recover for intentional infliction of emotional distress when not "present" at the scene of the hostage-taking in question), because they upheld the dismissal of the claim for failure to state a cause of action under the Flatow Amendment. However, in a 50 state survey of tort law done by Amicus Curiae Georgetown Appellate Litigation Clinic, it was documented that 10 out of 50 states did in fact waive the presence requirement. Brief for the Georgetown Appellate Litigation Clinic as *Amicus Curiae* to the Republic of Iran at 30, *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004) (No. 02-7085).

127. *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 839-842 (noting the differences between traditional CIL and the "new CIL," with the latter less tied to state practice, subject to more rapid development, and increasingly willing to ignore traditional boundaries of national sovereignty) [hereinafter Bradley & Goldsmith]; Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (concurring opinion of Judge Bork on amorphous nature of customary international law).

128. *Compare* Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights*

The fact that customary international law does not, of its own force, provide a private right of action to be brought under section 1605(a)(7) does not deprive it of relevance in this context. In crafting substantive rules of liability under the federal common law, courts can draw on international law as a source for inspiration.[129] In *First National City Bank*, the Supreme Court took precisely this approach, drawing equally upon international law principles and those of domestic law to determine that Cuba should be liable for the actions of its instrumentality, despite its independent juridical status.[130]

Similarly, in the first case brought after the 1996 amendments to the FSIA, *Alejandre v. Republic of Cuba*, survivors of U.S. citizens who were killed when the Cuban Air Force shot down their airplane over international waters as they were carrying out a humanitarian mission sought to recover money damages for the killings under section 1605(a)(7) and the Flatow Amendment. The court justified the imposition of punitive damages (there levied pursuant to the cause of action provided in the Flatow Amendment) with invocation of international law principles, finding that the "ban on extrajudicial killing . . . rises to the level of *jus cogens*, a norm of international law so fundamental that it is binding on all members of the world community."[131]

Although it is beyond the scope of this paper to engage fully in the debates regarding the relationship between customary international law and federal common law,[132] or the relationship between foreign sovereign immunity and human rights,[133] it is nonetheless worth mentioning that the state-sponsored terrorism exception has made it "easier" for courts to incorporate customary international law by expressly delineating the violations which ensure the grant of jurisdiction and clearly waiving foreign sovereign immunity in

Litigation, 66 FORDHAM L. REV. 319 (1997), *with* Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997); *see also*, Jordan J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. J. 51 (1992) (arguing that some human rights instruments demonstrate the existence of private duties).

129. Doe v. Unocal Corp., 2002 WL 31063976 at *27-29 (9th Cir. 2002) (Reinhardt, J., concurring in part) ("It is important to recognize that there is a distinction between *substituting* international law for federal common law and making proper use of international law as part of federal common law. Employing federal common law does not force courts to ignore a constructive or helpful rule adopted under international law, because in appropriate circumstances federal common law incorporates relevant principles of international law [citation omitted] . . . Thus, the benefits of the vast experience embodied in federal common law as well as any useful international law principles are obtained when we employ the traditional common law approach followed by federal courts. Those benefits are lost, however, when we substitute for the wide body of federal authority and reasoning, as the majority does here, an undeveloped principle of international law promulgated by a recently-constitute ad hoc international tribunal.").

130. First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba, 462 U.S. 611, 621 (1983).

131. Alejandre v. Republic of Cuba, 996 F. Supp. 1239, 1252 (S.D.F.L. 1997).

132. This paper does not purport to resolve the debate as to the appropriate role of customary international law in the federal courts, which is the subject of an extensive scholarly literature. *See, e.g.* Bradley & Goldsmith, *supra* note 127; Ernest A. Young, *Sorting out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365 (2002); Daniel J. Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 VA. J. INT'L L. 513 (2002) [hereinafter Meltzer, Foreign Affairs].

133. *See, e.g.*, Caplan, *supra* note 94 (summarizing the existing debate among international legal scholars as to the relationship between state sponsored human rights violations and abrogation of foreign sovereign immunity); and David J. Bederman, *Dead Man's Hand: Reshuffling Foreign Sovereign Immunities in U.S. Human Rights Litigation*, 25 GA. J. INT'L & COMP. L. 255 (1996) (finding foreign sovereign immunity the principle problem involved in litigating international human rights claims in the courts of the United States).

those instances.[134] When applying customary international law—or better, federal common law informed by customary international law principles—to hold foreign sovereigns liable for the specified set of *jus cogens* violations within the framework of section 1605(a)(7), courts are well within the bounds of narrowly defined congressional intent as manifested by the plain language of the statute.

Arguing that customary international law norms should be incorporated into federal common law causes of action somewhat puts the cart before the horse as to the availability of federal common law claims under section§ 1605(a)(7). Here, I contend that federal common law is the preferred option for a non-statutory right of action. Federal common law has been applied previously in the FSIA context in assessing whether the threshold jurisdictional requirements are met for other provisions,[135] in determining choice of law rules,[136] and in defining the parameters of liability under the state-sponsored terrorism exception.[137] Unlike state tort law, federal common law is uniform in application and is also better able to incorporate the international law principles that are inherent in the state-sponsored terrorism exception (particularly given the details provided in the statute itself).[138] Moreover, federal common law, unlike customary law, can clearly create binding duties in the courts of the United States.[139] As observed by one federal judge with respect to the same issue in the context of the Alien Tort Statute, federal common law is more appropriate for the development of liability standards applicable to violation of international law than is state tort law.[140]

Under the precepts of *Verlinden* and *Lincoln Mills*, federal common law can give rise to a right of action under section 1605(a)(7). As noted above, the language of the state-sponsored terrorism exception sets forth the full elements of an action in tort—duty, breach, causation, and injury.[141] Given that the FSIA is a comprehensive regulatory statute with federally protected interests that merit a uniform body of law,[142] there is no doctrinal reason why federal common law would not be applicable under section 1605(a)(7). The Supreme Court

134. *See supra* note 57 and accompanying text (Previous claims brought under the FSIA for human rights violations did not fit into any of the existing exceptions. And, now that section 1605(a)(7) has been added, only a subset of such claims is viable only against designated state-sponsors of terrorism); note also that Congress' careful delineation of qualifying international law violations in the FSIA context is distinct from the general nature of the jurisdictional grant provided by 18 U.S.C. § 1350. Indeed, one of the concerns jurists have with implying a cause of action under the Alien Tort Statute is the potentially unbounded scope of claims that might arguably constitute violations of the "law of nations." *See e.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (concurring opinion of Judge Bork on amorphous nature of customary international law).

135. Engle, *supra* note 79.

136. Overton, *supra* note 83, at 1592-93, nn. 12-15.

137. Karnezis, *supra* note 16.

138. Even Bradley and Goldsmith agree that CIL norms can be incorporated into federal law with appropriate political branch authorization. Bradley & Goldsmith, *supra* note 127, at 871.

139. *See, e.g.*, Meltzer, *supra* note 132 (advocating that federal courts formulate a rule of decision called for by federal law when interpreting statutes implicating international law—a rule "which might be state law, CIL, a rule borrowed from another federal statute, or a rule fashioned afresh by the court itself"); *see also supra* note 129 and accompanying text.

140. Xuncax v. Gramajo, 886 F. Supp. 162, 183 (D. Mass. 1995) ("[W]hile it may be an 'awesome duty' to develop the liability standards applicable to international law violations through the generation of federal common law, I do not see how . . . recurrence to municipal tort law would provide an appropriate response to the challenge").

141. *Supra* notes 95-100 and accompanying text.

142. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 497 (1983).

has not hesitated to apply "federal common law where federally created substantive rights and obligations are at stake . . . [to] avoid subjecting relevant federal interests to the inconsistencies in the laws of several States."[143] The substantive tort law content of section 1605(a)(7) readily addresses the concerns of Justice Frankfurter, who, dissenting in *Lincoln Mills*, queried: "Assuming, however, that we would be justified in pouring substantive content into a merely procedural vehicle, what element of federal law could reasonably be put into the provisions of s 301?"[144]

Verlinden's assessment of the FSIA as a comprehensive regulatory statute, codifying the standards governing foreign sovereign immunity as an aspect of substantive federal law and essential to the promotion of uniquely federal interests, is especially pertinent to the appropriateness of federal common law.[145] The Court's language that the FSIA "does not merely concern access to the federal courts" but rather "governs the types of actions for which foreign sovereigns may be held liable"[146] resonates with that of the majority in *Textile Workers Union v. Lincoln Mills*, where a divided Court found that the Taft-Hartley Act did more than merely confer federal court jurisdiction over labor organizations; it actually promoted an important federal policy as part of a comprehensive legislative scheme to maintain peace in the labor force.[147] Under *Verlinden*, therefore, the door is opened not only to the possibility of bringing state law claims directly in federal court with no diversity constraints, but also to considering options under federal common law necessary to further statutory purposes (as was the case with the comprehensive legislative scheme under the Taft-Hartley Act at issue in *Lincoln Mills*). This judge-made law can issue without fear or critique of self-aggrandizement, as jurisdiction is already ensured and protected by congressionally defined substantive standards.

Moreover, just as the Taft-Hartley Act aimed to channel labor dispute cases away from unfriendly state courts, Congress "deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts, thereby reducing the potential for a multiplicity of conflicting results among the courts of the 50 states."[148] The predominance of foreign policy concerns in the opinion and the *Verlinden* Court's emphasis on the need for uniformity in the field of foreign affairs raises the possibility that circumstances might exist in which federal common law can be applied instead of state law—particularly when there are no appropriate governing standards of private liability, and therefore the implicit command of section 1606 to apply state law is inapposite. It is precisely this constellation of circumstances that the *Verlinden* Court found itself facing one month later in

143. City of Milwaukee v. Ill. & Mich., 451 U.S. 304, 336 (1981) (citing Textile Workers v. Lincoln Mills, 353 U.S. 448, 456-57 (1957); United States v. Standard Oil Co., 332 U.S. 301, 305 (1947); Clearfield Trust Co. v. United States, 318 U.S. 363, 366-367 (1943); D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942)).

144. *Textile Workers*, 353 U.S. at 478.

145. *Verlinden*, 461 U.S. at 496-97 ("As the House Report clearly indicates, the primary purpose of the Act was to 'se[t] forth comprehensive rules governing sovereign immunity,' . . . the jurisdictional provisions of the Act are simply one part of this comprehensive scheme") (internal citations omitted).

146. *Id.*

147. *Textile Workers*, 353 U.S. at 455 ("Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way.").

148. *Verlinden*, 461 U.S. at 497.

displacing a New York rule of decision with one of federal common law in *First National City Bank v. Banco Para El Comercio Exterior de Cuba.*[149] Citing *Verlinden* and *Sabbatino*, the Court found that "matters bearing on the Nation's [sic] foreign relations 'should not be left to divergent and perhaps parochial state interpretations.'"[150]

Admittedly, *Verlinden* and *First National City Bank* were decisions of a Supreme Court more willing to engage in common-law making than is the Court today. But notwithstanding statements by the Court such as Justice Scalia's in *Sandoval* that "[r]aising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals,"[151] federal courts are still in the business of crafting judge-made law. Indeed, as Justice Scalia himself acknowledged in *Boyle*, federal common law is available and may be used to displace state law, in situations where "uniquely federal interests" present "significant conflict" with state rules of decision.[152]

It is not hard to imagine a situation where state tort law of battery and wrongful imprisonment, for example, might prove inadequate to establish the requisite liability for the claims of torture and hostage-taking allowable under section 1605(a)(7). In such instances, whether you consider state law "silent" on the matter at hand, as did the Supreme Court in *First National City Bank*, or presenting "significant conflict" with the "uniquely federal interests" of section 1605(a)(7) in providing U.S. citizens with an effective weapon to use against outlaw states, application of federal common law is warranted.

In *Sosa v. Alvarez-Machain*, the Supreme Court expressly found that the "door is still ajar subject to vigilant doorkeeping" for the crafting of federal common law through "independent judicial recognition of actionable international norms."[153] In that case, the jurisdictional provision at issue, the Alien Tort Statute, provided district courts jurisdiction over "tort[s] only, in violation of the laws of nations,"[154] and the relevant issue was whether or not the limited federal judicial power, post-Erie, encompassed the authority to define the content of what might constitute a modern-day violation of the law of nations.[155] In the case of the terrorism exception to the FSIA, the statute itself defines the acts that give rise to jurisdiction. Congress has defined, within this particular context, the "narrow class of international norms" which, if violated, give rise to jurisdiction under the statute. Justice

149. First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba, 462 U.S. 611, 622 n. 11, 623 (1983) ("Bancec also contends alternatively that the FSIA, like the FTCA, requires application of the law of the forum State—here New York—including its conflicts principles. We disagree." The court also notes: "[T]he principles governing this case are common to both international law and federal common law, which in these circumstances is necessarily informed both by international law principles and by articulated congressional policies.").

150. *Id.* at 622 n. 11.

151. Alexander v. Sandoval, 532 U.S. 275, 287 (2001); Cannon v. Univ. of Chicago, 441 U.S. 677, 732 (1977) (Powell, J., dissenting) (Justice Powell observed that the earlier, more liberal, implied cause of action doctrine hinged on the pre-Erie freedom of federal courts to act as common-law courts in creating substantive standards of liability).

152. Boyle v. United Techs. Corp., 487 U.S. 500, 507-08 (1988) (Federal common law can be used to substitute for the state rule of decision when there is both a "uniquely federal interest" and "a 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law,' . . . [a] conflict with federal policy [which] need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates 'in a field which the States have traditionally occupied.'") (internal citations omitted).

153. Sosa v. Alvarez Machain, 124 S.Ct. 2739 (2004).

154. *Id.* at 2747.

155. *Id.*

Scalia's concern regarding independent judicial recognition of actionable international norms[156] is thus not present when the federal judiciary crafts common law under section 1605(a)(7)—Congress has already specified which norms are actionable. Rather, the judicial power in this context is exercised only to provide needed uniformity in a sphere of "uniquely federal interests."

Moreover, the need for uniform federal law—be it an express statutory right of action contained within section 1605(a)(7) or the crafting of federal common law to bring claims pursuant to that grant of jurisdiction—takes on an added force in the context of suits against state-sponsors of terrorism. In *Verlinden*, the Court acknowledged that the FSIA allowed plaintiffs to file claims in state courts, but also emphasized that "[i]n view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area," the statute guarantees removal from state to federal courts at the request of the foreign state defendant.[157] However, this guarantee of removal is inoperative when the foreign state defendant defaults, as is typical of many of the actions brought under the state-sponsored terrorism exception.[158] The argument for the application of federal rather than state law is therefore even stronger in situations where the statute's removal guarantee is ineffectual due to the non-appearance of the foreign state defendant.[159] Absent the removal guarantee, uniformity is lost in a context where state courts can only hear state law claims. If federal law is applicable, then even if the suit is heard in state court, the states are presumably bound by federal court interpretations of that law. The asserted importance of a uniform body of law in the context of suing state sponsors of terrorism, however, hinges on the predicate argument that the same (or heightened) concerns about the sensitivity of foreign policy and need for uniformity are present with respect to actions against designated state-sponsors of terrorism as are present with respect to actions against foreign states with whom the United States has cordial diplomatic relations.[160]

156. *Id.* at 2764.

157. *See* Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 489-90 (1983).

158. For example, all the cases cited in note 15, *supra*, including the *Cicippio-Puleo* case, were default judgment cases.

159. The only state court case to yet hear a claim under section 1605(a)(7) has been a New York Surrogate Court: *In re* Estate of Weinstein, 712 N.Y.S.2d 300, 301-02 (N.Y. Sur., 2000) ("The sole asset of decedent's estate is his claim against Syria pursuant to FSIA § 1605(a)(7) . . . Since FSIA provides for jurisdiction in either the state or federal courts for a claim brought pursuant to FSIA § 1605(a)(7), a state court would have jurisdiction to hear claimants' case against Syria.").

160. Recent experience with the lifting of certain economic sanctions against Libya (who nonetheless remains on the State Department's official list of state-sponsors of terrorism) in light of the country's cooperation regarding weapons of mass destruction, apology for the destruction of Pan Am Flight 103, and offer to pay $10 million to each of the victim's families indicates that the possibility of moving towards cordial relationships always is hovering in the background, and therefore that the need for uniform standards regarding civil law suits is present in order to facilitate such restored diplomatic relationships. *See, e.g.*, Glenn Kessler, *U.S. Opens Door to Business with Libya; Bush Says Easing of Sanctions Rewards Cooperation on Banned Weapons*, WASH. POST, Apr. 24, 2004, at A14. Indeed, lack of uniform treatment of all United States victims of Libyan terrorism may actually stall progress in normalizing relations. *See* Robert S. Greenberger, *U.S. Overture Toward Libya Faces Hurdle*, WALL ST. J., Apr. 23, 2004, at A13 (describing opposition of victims of April 1986 bombing of La Belle discotheque to lifting of sanctions against Libya, and their attempts to seek a settlement similar to that provided to the Pan Am families before sanctions are lifted).

IV. Conclusion: Judicial Responsibility to Effectuate Jurisdiction

The fact that the judicial power comprehends recognition of federal claims against state-sponsors of terrorism under section 1605(a)(7) provides no guarantee that the judiciary will choose to recognize such suits. Apparent opposition by the Executive branch to suits against state-sponsors of terrorism,[161] the special deference afforded to the Executive branch in the field of foreign affairs,[162] the Supreme Court's increasing reluctance to engage in expansive interpretations of remedial statutes,[163] and the existence of an alternative (albeit less than equally effective) remedy under the Flatow Amendment are all factors suggesting that the jurisdictional grant against foreign state defendants *qua* states provided in the state-sponsored terrorism exception may never be given its full effect absent a crystalline statement from Congress. Such a clear statement rule would shift the "burden of inertia"[164] to Congress in this highly charged political arena to more forcefully redraft legislation in an area that the D.C. Circuit has already recognized as reflecting a "delicate legislative compromise."[165]

There are strong reasons, however, why the judiciary should not force Congress' hand in such a way. Foremost among these is the inherent fairness of fulfilling the statutory promise of section 1605(a)(7) by allowing litigants to present their claims (as defined in the very text of the statute) against the terrorist states responsible for their injuries.[166] Moreover, absent federal law with the power to displace state law, suits against foreign sovereigns who are designated state-sponsors of terrorism are still "open ground" for state law claims given the explicit grant of jurisdiction in section 1605(a)(7). Ironically, if the judiciary does defer to the Executive branch and declines to endorse the existence of a federal cause of action, such judicial inaction could itself set the stage for a proliferation of state law claims that would presumably be more disruptive to foreign policy than any judge-crafted federal law. At issue, therefore, is who decides the boundaries of foreign state liability in giving effect to the jurisdictional grant against foreign state sponsors of terrorism under section 1605(a)(7)—state judges or federal judges.

It seems clear that "a statute passed by Congress and signed by the President obviously stands on a different footing than a representation to the Court by the Executive branch."[167] While the statutory text of section 1605(a)(7) has the democratic imprimatur of the bicam-

161. *See* Cicippio-Puleo v. Islamic Republic of Iran, 353 F.3d 1024, 1030-31 (regarding the court's request for the appearance of the United States as Amicus Curiae, summarizing the U.S. position in the case of *Roeder v. Islamic Republic of Iran*, that the Flatow Amendment does not create a cause of action against foreign states, a posture that was then reiterated, and elaborated to exclude official capacity suits against state actors as well, in their filing in the *Cicippio-Puleo* case).

162. *See, e.g.*, United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936) (noting the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress.").

163. *See generally* Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343 (2002) [hereinafter Meltzer, Judicial Passivity]; Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L. J. 223 (2003) [hereinafter Resnik].

164. *See* Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128 (1986).

165. Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 89 (D.C. Cir. 2002).

166. *See* Meltzer, Judicial Passivity, *supra* note 163; Resnik, *supra* note 163.

167. *See* Carlos Manuel Vazquez, *W(h)ither Zschernig*, 46 VILL. L. REV. 1259, 1267 n. 58 (2001); *see also* Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 328 (1994) (distinguishing between unrealized aspirations of the Executive branch and the law as it currently stands to find that a California corporate tax affecting multinational enterprises is not preempted by the dormant foreign commerce clause).

eral passage and presentation requirements of article I, Executive branch filings in specific cases are subject to shifting political winds with little or no democratic accountability or legislative transparency.[168] The preference of the Executive branch may well be for section 1605(a)(7) to become nugatory, as reflected by its interventions in litigation to date. However, on the presumption that the provision is not void, the choice (absent a statutory cause of action that is interpreted to give full effect to the jurisdictional grant) is between judge-made law at the federal level, that "which in these circumstances is necessarily informed both by international law principles and by articulated congressional policies,"[169] or reliance upon state tort law claims that are poorly suited to the cases at issue.[170]

There are strong policy arguments on either side regarding the desirability of allowing private litigation against foreign state sponsors of terrorism.[171] If the Executive branch wants to repeal the statute, then it should be done in a democratically accountable way through the introduction of new legislation rather than through piecemeal attack in the courts. Indeed, such piecemeal interventions arguably run counter to the recognized purpose of the FSIA to depoliticize actions against foreign sovereigns and "assur[e] litigants that . . . decisions [regarding the conditions under which foreign sovereigns are amenable to suit in the courts of the United States] are made on purely legal grounds and under procedures that insure due process."[172] Unless and until the Congressional authorization for civil suits against foreign state sponsors of terrorism is repealed through the legislative process, the judiciary has a duty under article III of the Constitution to interpret the grant of jurisdiction under section 1605(a)(7)—and the substantive rights and obligations that it creates—so as to give the law its uniform and full effect.

168. *Compare* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (and specifically the U.S. Memorandum as *Amicus Curiae* in same (reprinted in 19 I.L.M. 585 (1980))), *with* the position of the United States in *Alvarez-Machain v. Sosa*, Brief for the United States as Respondent Supporting Petitioner filed in *Sosa v. Alvarez-Machain, Et al.* No. 03-339.

169. First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba, 462 U.S. 611, 623 (1983).

170. *See supra* notes 114-116 and accompanying text.

171. *See supra* notes 5-6 and accompanying text.

172. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 488 (1983) (citing H.R. REP. No. 94-1487, at 7 (1976)).