

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**JAMES S. VINE, et al.,**

**Plaintiffs,**

**v.**

**REPUBLIC OF IRAQ, et al.,**

**Defendants.**

**Civil Action 01-02674 (HHK)**

**MEMORANDUM AND ORDER**

Plaintiffs bring this action against the Republic of Iraq and Saddam Hussein ("Hussein"), in his official capacity as President of Iraq, alleging that Hussein ordered the armed forces of Iraq to take hostage all American citizens present in Iraq and Kuwait during the Iraqi invasion of Kuwait in 1990. Plaintiffs, either American citizens who were taken hostage or the spouses of such hostages, seek to recover for the physical and emotional maltreatment they suffered during their detention. Plaintiffs bring this action under Article I of the International Convention Against the Taking of Hostages, *opened for signature* Dec. 18, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205, and the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-11, asserting claims for hostage-taking, false imprisonment, and loss of consortium and solatium. Presently before the court is the issue of whether this court is able to exercise subject matter jurisdiction over this action, a matter brought to this court's attention by the United States by its filing of a statement of interest. Upon consideration of the statement of interest of the United

States, the plaintiffs' responses thereto, and the record of this case, the court concludes that it has subject matter jurisdiction over this suit. However, to the extent plaintiffs' claims are premised on 28 U.S.C. § 1605(a)(7) and the Flatow Amendment, their claims must be dismissed *sua sponte* because such claims fail to state a cause of action.

## I.

Under the FSIA, foreign states are immune from suit in U.S. courts unless Congress expressly waives immunity under an enumerated exception. In 1996, Congress enacted the "terrorism exception" to the FSIA, which waived the immunity of foreign states and their agents in cases seeking money damages against a foreign state 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 . . . ." 28 U.S.C. § 1605(a)(7).

The United States contends that this court lacks subject matter jurisdiction in light of Congress's recent enactment of Section 1503 of the Emergency Wartime Supplemental Appropriations Act ("EWSAA"), Pub. L. No. 108-11, § 1503, 117 Stat. 559, 579 (2003)<sup>1</sup>, as

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<sup>1</sup> The EWSAA provides:

The President may suspend the application of any provision of the Iraq Sanctions Act of 1990: Provided, That nothing in this section shall affect the applicability of the Iran-Iraq Arms Non-Proliferation Act of 1992 (Public Law 102-484), except that such Act shall not apply to humanitarian assistance and supplies: Provided further, That the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism: Provided further, That military equipment, as defined by title XVI, section 1608(1)(A) of Public Law 102-484, shall not be exported under the authority of this section: Provided further, That section 307 of the Foreign Assistance Act of 1961 shall not apply with respect to programs of international organizations for Iraq: Provided further, That provisions of law that direct the United States Government to vote against or oppose loans or other uses of funds, including for financial or technical assistance, in international

implemented by Presidential Determination No. 2003-23, which “ma[d]e inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 . . . and any other provision of law that applies to countries that have supported terrorism.” Presidential Determination No. 2003-23, 68 Fed. Reg. 26,459 (May 7, 2003). The United States argues this combined legislative and executive action operate to make the terrorism exception to the FSIA inapplicable to Iraq and, consequently, this court lacks subject matter jurisdiction of this suit.

This issue was recently addressed by the D.C. Circuit in *Acree v. Republic of Iraq*, 2004 WL 1217953 (D.C. Cir. June 4, 2004).<sup>2</sup> *Acree* involved plaintiffs who were American prisoners of war (“POWs”) in the 1990 Gulf War and their immediate family members who sought damages for injuries arising from torture suffered while the POWs were in Iraqi captivity. In

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financial institutions for Iraq shall not be construed as applying to Iraq: Provided further, That the President shall submit a notification 5 days prior to exercising any of the authorities described in this section to the Committee on Appropriations of each House of the Congress, the Committee on Foreign Relations of the Senate, and the Committee on International Relations of the House of Representatives: Provided further, That not more than 60 days after enactment of this Act and every 90 days thereafter the President shall submit a report to the Committee on Appropriations of each House of the Congress, the Committee on Foreign Relations of the Senate, and the Committee on International Relations of the House of Representatives containing a summary of all licenses approved for export to Iraq of any item on the Commerce Control List contained in the Export Administration Regulations, 15 CFR Part 774, Supplement 1, including identification of end users of such items: Provided further, That the authorities contained in this section shall expire on September 30, 2004, or on the date of enactment of a subsequent Act authorizing assistance for Iraq and that specifically amends, repeals or otherwise makes inapplicable the authorities of this section, whichever occurs first.

Pub. L. No. 108-11, § 1503, 117 Stat. 559, 579

<sup>2</sup> The United States concedes that this same question regarding subject matter jurisdiction was before the court in *Acree v. Republic of Iraq*, Civil Action No. 02-00632 (RWR). See U.S.’s Statement of Interest at 16.

*Acree*, the D.C. Circuit held that the district court had properly exercised jurisdiction over the suit. *Id.* at \*9-16. The court, after examining the EWSAA as a whole and its legislative history, determined that although it was a close question, § 1503 of the EWSAA “is aimed at legal provisions that present obstacles to assistance and funding for the new Iraqi Government and was not intended to alter the jurisdiction of the federal courts under the FSIA.” *Id.* at \*9. Given the D.C. Circuit’s ruling in *Acree*, this court must conclude that it has subject matter jurisdiction over this action.

Although this court has subject matter jurisdiction, the *Acree* decision and the D.C. Circuit’s ruling in *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004), raise the issue of whether this action should be dismissed for failure to state a claim. *Cicippio-Puleo* involved claims for tortious injuries sustained as a result of a terrorist hostage taking. The D.C. Circuit in *Cicippio-Puleo* held that neither § 1605(a)(7) nor the Flatow Amendment to the FSIA, 28 U.S.C. § 1605 note<sup>3</sup>, nor the two together, created a cause of action against a foreign state or against officials sued in their official capacities. 353 F.3d at 1033-34. The court in *Cicippio-Puleo* remanded to allow the plaintiffs an opportunity to amend their complaint to state a cause of action under some other source of law. *Id.* at 1036. In light of *Cicippio-Puleo*, the *Acree* court *sua sponte* dismissed the plaintiffs’ torture claims under FED. R. CIV. P. 12(b)(6), after providing the plaintiffs an opportunity to set forth a source of liability other than § 1605(a)(7) and the Flatow Amendment, which they failed to do. *See Acree*, 2004 WL 1217953, at \*18-19.

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<sup>3</sup> The Flatow Amendment provides a cause of action against an “official, employee, or agent of a foreign state designated as a state sponsor of terrorism” for personal injury or death caused by acts listed in 28 U.S.C. § 1605(a)(7). *See* 28 U.S.C. § 1605 note.

This court can also reach the question of whether this action should be dismissed for failure to state a claim even though no motion to dismiss for failure to state a claim has been filed in this case. “Complaints may also be dismissed, *sua sponte* if need be under Rule 12(b)(6) whenever ‘the plaintiff cannot possibly win relief.’” *Best v. Kelly*, 39 F.3d 328, 331 (D.C. Cir. 1994) (quoting *Baker v. Director, United States Parole Comm’n*, 916 F.2d 725, 726 (D.C. Cir. 1990)). A motion to dismiss is appropriate “only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” *Martin v. Ezeagu*, 816 F. Supp. 20, 23 (D.D.C. 1993) (internal quotations omitted); see *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (stating that a complaint should not be dismissed “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief”). In addition, the court must construe the complaint in a light most favorable to the plaintiff and must accept as true all reasonable factual inferences drawn from well-pleaded factual allegations. *In re United Mine Workers of Am. Employee Ben. Plans Litig.*, 854 F. Supp. 914, 915 (D.D.C. 1994); see *Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979) (stating that the court must give the plaintiff “the benefit of all inferences that can be derived from the facts alleged”). The D.C. Circuit’s holdings in *Cicippio-Puleo* and *Acree* clearly establish that to the extent plaintiffs’ claims in the instant case for hostage taking and false imprisonment are premised on § 1605(a)(7) and the Flatow Amendment, these claims must be

dismissed *sua sponte* under FED. R. CIV. P. 12(b)(6) for failure to state a cause of action. The court, however, will allow plaintiffs to amend their complaint to state a cause of action under an alternative source of law.<sup>4</sup>

## II.

For the foregoing reasons, the court concludes that it has subject matter jurisdiction over this suit. The court, *sua sponte*, dismisses plaintiffs' claims for failure to cause of action to the extent plaintiffs ground them on 28 U.S.C. § 1605(a)(7) and/or the Flatow Amendment. Plaintiffs will have an opportunity to amend their complaint to assert an alternative source of law for their claims.

Accordingly, it is this 20<sup>th</sup> day of July, 2004, hereby:

**ORDERED**, that this court has subject matter jurisdiction over this action; and it is further

**ORDERED**, that plaintiffs' claims are **DISMISSED** *sua sponte* for failure to state a cause of action to the extent plaintiffs rely on 28 U.S.C. § 1605(a)(7) and/or the Flatow Amendment as the source of law for their claims; and it is further

**ORDERED**, that by August 10, 2004, plaintiffs are granted leave to amend their complaint to clearly state a cause of action under an alternative source of law.

Henry H. Kennedy, Jr.  
United States District Judge

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<sup>4</sup> The court notes that the amended complaint states that defendants' acts violate Article I of the International Convention Against the Taking of Hostages, but does not clearly set forth whether this source of law is asserted as a separate source of liability.