

to annex “some or all” of the West Bank if he was reelected.³⁸ When pressed by the Senate Appropriations subcommittee on how the United States would respond to such a move, Pompeo repeatedly avoided giving a direct answer.³⁹

STATE RESPONSIBILITY AND LIABILITY

D.C. District Court Enters Over \$300 Million Default Judgment Award Against Syria for the Death of Marie Colvin
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On February 1, 2019, the United States District Court for the District of Columbia granted a motion for default judgment and entered a \$302,511,836.00 award against the Syrian Arab Republic (“Syria”).¹ The court found the Syrian government liable for the death of Marie Colvin, who died in an artillery shelling on February 22, 2012, at a media center in the city of Homs. Colvin was a heralded war correspondent who had previously “cover[ed] conflict zones in Iraq, Chechnya, the Balkans, East Timor, Sri Lanka, Sierra Leone, and Libya.”² Colvin’s heirs brought suit, claiming that because Syria had been designated a “state sponsor of terrorism,” it could be held liable for an extrajudicial killing of a U.S. national under the Foreign Sovereign Immunities Act (FSIA).³ Judge Amy Berman Jackson concluded that the plaintiffs met the evidentiary burden required to support their claim after finding personal and subject matter jurisdiction.⁴

Marie Colvin’s death occurred during the conflict in Syria, which began in 2011. Relying on evidence presented by the plaintiffs, as Syria did not participate in the case, the court found that her death came as a result of the Assad regime’s deliberate targeting of a civilian media center.⁵ The court concluded that the highest military planning group within the Syrian government had ordered military operations “against those who tarnish the image of Syria in foreign media and international organizations.”⁶ Syrian military forces focused on Homs

(describing Netanyahu’s failure to form a government and the scheduling of new elections, tentatively set for September 17).

³⁸ Edward Wong & Catie Edmondson, *Pompeo Refuses to Say What U.S. Would Do if Israel Annexes West Bank*, N.Y. TIMES (Apr. 9, 2019), at <https://www.nytimes.com/2019/04/09/us/politics/pompeo-israel-west-bank.html>.

³⁹ *Id.*; see generally C-SPAN, *supra* note 24.

¹ Colvin v. Syrian Arab Republic, 363 F. Supp. 3d 141, 146 (D.D.C. 2019).

² *Id.* at 149.

³ *Id.* at 146 & nn. 1–2, 153; see also Complaint at 28–30, Colvin v. Syrian Arab Republic, 363 F. Supp. 3d 141 (D.D.C. 2019) (No. 16-1423).

⁴ Colvin, 363 F. Supp. 3d at 146.

⁵ *Id.* at 146–47 & nn. 3–4. The court drew upon expert reports and upon declarations provided by Syrian government defectors and by individuals present at the events. The expert reports were authored by Ewan Brown (a consultant for the Commission for International Justice and Accountability); David Kaye (the UN special rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression); and Robert Ford (the U.S. ambassador to Syria at the time of the events in question). *Id.* at n. 3.

⁶ *Id.* at 148 (quoting the expert report of Ewan Brown).

“made it a priority to pin down the location” of a civilian media center in the Baba Amr neighborhood that, among other things, was used as a base for foreign journalists.⁷ In February 2012, the renowned American journalist, Marie Colvin, stayed at the media center for several nights while on an assignment for the British newspaper, *The Sunday Times*.⁸ On February 21—a day that Colvin carried out live interviews within Bab Amr for major U.S. and UK television providers—Syrian military officials linked the location of media center to the origin of intercepted broadcasts.⁹ On February 22, Syrian forces targeted the media center with concentrated shelling.¹⁰ One shell killed Colvin and a French photographer as they were fleeing the building.¹¹

On July 9, 2016, Colvin’s sister and several other relatives filed suit in the federal district court in Washington D.C. against Syria, requesting compensatory and punitive damages. They claimed subject matter jurisdiction because Colvin’s killing was “extrajudicial” and committed by a “state sponsor of terrorism” under the FSIA.¹² The plaintiffs served the Syrian government in accordance with 28 U.S.C. § 1608, which stipulates how service against foreign states in U.S. courts is to be accomplished.¹³ Section 1608 provides that if certain conditions are satisfied, the plaintiffs may send the summons, complaint, and notice of suit to the U.S. secretary of state for transmission through diplomatic channels.¹⁴ The plaintiffs followed this procedure for service, and Syria did not mount a defense.¹⁵ The clerk of the court then entered default against Syria, and on March 22, 2018, the plaintiffs filed a motion for default judgment.¹⁶

In its memorandum granting the plaintiffs’ motion for default judgment, the court addressed whether it had jurisdiction before moving to the merits of the claim. As Judge Jackson noted, “[a] foreign state is typically immune from jurisdiction in U.S. courts” unless there is some basis for jurisdiction under the FSIA, which creates several exceptions to otherwise presumptive immunity.¹⁷ The court held that Syria’s conduct fell within the FSIA’s

⁷ *Id.* at 148–150.

⁸ *Id.* at 150–51.

⁹ *Id.*

¹⁰ *Id.* at 151 (noting that Syrian military officials later gathered and “drank to a successful operation” in “locating and attacking the Media Center” and that the commander of the assault received “a new car as a reward for the successful attack” from a higher-ranked military official who was also President Assad’s brother).

¹¹ *Id.*

¹² Complaint at 28, 30–31, *Colvin v. Syrian Arab Republic*, 363 F. Supp. 3d 141 (D.D.C. 2019) (No. 16-1423).

¹³ *Colvin*, 363 F. Supp. 3d at 152; 28 U.S.C. § 1608.

¹⁴ 28 U.S.C. § 1608(a)(1)–(4); *see also* *Republic of Sudan v. Harrison*, 139 U.S. 1048 (2019) (interpreting one aspect of the statutory requirement for service of process).

¹⁵ *Colvin*, 363 F. Supp. 3d at 146, 154–55 (noting that the U.S. State Department sent these documents to the Czech Embassy in Syria, which in turn provided them to the Syrian Ministry of Foreign Affairs).

¹⁶ Plaintiffs’ Motion for Default Judgment, *Colvin v. Syrian Arab Republic*, 363 F. Supp. 3d 141 (D.D.C. 2019) (No. 16-1423). “Federal Rule of Civil Procedure 55(a) provides that the Clerk of the Court must enter a party’s default ‘[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise.’” *Colvin*, 363 F. Supp. 3d at 152 (quotations omitted).

¹⁷ *Colvin*, 363 F. Supp. 3d at 152. Further, “[u]nder the Foreign Sovereign Immunities Act, a court may not enter default judgment against a foreign state ‘unless the claimant establishes his claim or right to relief by evidence

“state sponsor of terrorism” exception.¹⁸ This exception provides that a foreign state is not immune from suits for money damages in U.S. courts when the damages are sought 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 the foreign state was “designated as a state sponsor of terrorism” by the U.S. secretary of state at the time of the act.¹⁹ Additionally, the claimant or victim at the time of the act must have been a “national of the United States,” “member of the armed forces,” or a U.S. government employee.²⁰ For claims brought based on acts that occurred within the foreign state being sued—as was the case with Colvin’s death within Syria—the plaintiffs must also have “afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration.”²¹

The court found that Syria “has been designated a state sponsor of terrorism since December 29, 1979.”²² The court also found that Colvin was a U.S. national at the time of the act and that the plaintiffs “afforded the foreign state . . . a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration.”²³ Because the plaintiffs sought money damages from Syria based on the claim that Colvin’s death was an extrajudicial killing caused by the Syrian government, the court found that it had subject matter jurisdiction.²⁴ Additionally, the court found that the plaintiffs attempted to serve the Syrian government

satisfactory to the court.” *Id.* (citing 28 U.S.C. § 1608(e); *Han Kim v. Democratic People’s Republic of Korea*, 774 F.3d 1044, 1047 (D.C. Cir. 2014)) (quotations omitted).

¹⁸ *Id.* at 152–53 (citing 28 U.S.C. § 1605A(a)(1)). The court did not discuss the extent to which this FSIA exception is consistent with customary international law. *See, e.g.*, RESTATEMENT (FOURTH) OF FOREIGN RELATIONS: SELECTED TOPICS IN TREATIES, JURISDICTION, AND SOVEREIGN IMMUNITY § 460 rep. note 11 (2018) (stating that “it is not clear that § 1605A contravenes any presumptive jurisdictional constraint under international law”); Jasper Finke, *Sovereign Immunity: Rule, Comity or Something Else?*, 21 EUR. J. INT’L L. 853, 863–64 (2010) (discussing the extent to which customary international law recognizes exceptions to state sovereign immunity); *cf.* Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), Judgment, 2012 ICJ Rep. 1031, para. 78 (“[T]he Court considers that customary international law continues to require that a State be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict”).

¹⁹ 28 U.S.C. § 1605A(a)(1)–(2); § 1605A(h)(6).

²⁰ *Id.*, § 1605A(a)(2)(ii).

²¹ *Id.*, § 1605A(a)(2)(iii).

²² *Colvin*, 363 F. Supp. 3d at 154 (citing 15 C.F.R. § 742.9(a)(2) (2013)). Syria is the longest listed member on the State Department’s current roster of state sponsors of terrorism. *See* U.S. Dep’t of State, State Sponsors of Terrorism at <https://www.state.gov/j/ct/list/c14151.htm> [<https://perma.cc/6NCL-M9PK>]. With respect to Syria’s continuing designation, the State Department has noted Syria’s support of Lebanese Hizballah, the support Syria has received from “Shia militia groups, some of which are U.S.-designated Foreign Terrorist Organizations aligned with Iran,” and more generally “the Assad regime’s permissive attitude towards al-Qa’ida and other terrorist groups’ foreign terrorist fighter facilitation efforts during the Iraq conflict.” *Chapter 2: State Sponsors of Terrorism*, in U.S. DEP’T OF STATE, COUNTRY REPORTS ON TERRORISM 2017, at <https://www.state.gov/j/ct/rls/crt/2017/282847.htm> [<https://perma.cc/EW93-CVJV>].

²³ *Colvin*, 363 F. Supp. 3d at 154 (citing 8 U.S.C. § 1101(22); § 1605A(h)(5); 28 U.S.C. § 1605A(a)(2)) (quotation omitted).

²⁴ *Id.* at 153–54. In finding that the plaintiffs presented sufficient evidence to show that the Syrian government “caused” the extrajudicial killing of Marie Colvin, the court noted that the D.C. Circuit has interpreted the FSIA to only require “a showing of proximate cause.” *Id.* at 153. A showing of proximate cause is met “so long as there is some reasonable connection between the act or omission of the defendant and the damages which the plaintiff has suffered.” *Id.* (citations and quotations omitted). Declarations submitted to the court provided that the Syrian government knew foreign journalists were broadcasting somewhere within Baba Amr. *Id.* The Syrian government then “uncovered the location of the Media Center through informants and launched an artillery attack at a time foreign journalists were inside, thereby causing Colvin’s death.” *Id.*

with their summons, complaint, and notice of suit in compliance with statutory rules for establishing personal jurisdiction over foreign governments in U.S. courts.²⁵

Once its jurisdiction over the claim was established, court turned to assessing the merits of the plaintiffs' claim. Judge Jackson articulated that under the FSIA:

a foreign state is liable to (1) "a national of the United States" (2) "for personal injury or death [(3)] caused by" (4) "an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or provision of material support or resources for such an act," (5) committed by "that foreign state, or an official, employee, or agent of that foreign state" (6) "for which the courts of the United States may maintain jurisdiction under this section for money damages".²⁶

The court had already addressed most of these elements in its jurisdictional analysis, leaving it only to decide the substantive questions of whether the plaintiffs presented enough evidence to support the claim that Colvin's death was an "extrajudicial killing" within the meaning of FSIA and whether the plaintiffs sufficiently established a theory of relief for punitive and compensatory damages.²⁷

Moving first to the question of whether the plaintiffs had established a theory for relief, the court explained that "[b]ecause the FSIA-created federal cause of action does not provide any guidance on the substantive bases for liability to determine plaintiffs' entitlement to damages, courts have applied 'general principles of tort law' . . ."²⁸ In their complaint, the plaintiffs established two tort theories for recovery: wrongful death and intentional infliction of emotional distress (IIED).²⁹ Citing to an earlier federal district court opinion, the court held that the plaintiffs established a wrongful death claim for relief because "[i]t is axiomatic that acts of terrorism under [FSIA]—including extrajudicial killing or material support thereof—are, by definition, wrongful."³⁰ The court next drew upon the *Restatement (Second) of Torts* to assess whether Colvin's sister had met the four requirements for an IIED claim, which makes a defendant liable when it: "(1) engaged in extreme and reckless conduct, (2) that was directed at a person or persons other than plaintiff, (3) which intentionally or recklessly caused severe emotional distress, (4) to immediate family members who were present at the time the conduct occurred."³¹ The court found that Syria's acts were extreme and reckless because "[a]cts of terrorism are by their very definition extreme and outrageous," and the acts were directed at Colvin.³² The court also found that the acts caused severe emotional distress to Colvin's sister who had experienced "sleepless nights, anxiety over the welfare of her own children, and mental anguish over the

²⁵ *Id.* at 154–55. U.S. courts have personal jurisdiction over foreign states for claims of relief in which service is made pursuant to 28 U.S.C. § 1608. 28 U.S.C. § 1330(b).

²⁶ Colvin, 363 F. Supp. 3d at 155 (citing 28 U.S.C. §§ 1605A(c), (a)(1)).

²⁷ *Id.* at 156. With respect to the first element, the court noted that, like Colvin herself, the plaintiffs have U.S. citizenship. *Id.*

²⁸ *Id.* (quotations and citation omitted). The FSIA only provides that in an action for personal injury or death caused by a foreign state, "damages may include economic damages, solatium, pain and suffering, and punitive damages." 28 U.S.C. § 1605A(c).

²⁹ Complaint at 30–31, Colvin v. Syrian Arab Republic, 363 F. Supp. 3d 141 (D.D.C. 2019) (No. 16-1423).

³⁰ Colvin, 363 F. Supp. 3d at 156 (citing *Shoham v. Islamic Republic of Iran*, No. 12-cv-508 (RCL), 2017 WL 2399454, at *18 (D.D.C. June 1, 2017)).

³¹ *Id.* at 157 (citing RESTATEMENT (SECOND) OF TORTS § 46(1)).

³² *Id.*

loss of the person she was closest to in her family.”³³ With respect to the last element—presence at the conduct—the court relied on commentary and another federal district court decision to conclude that this element need not be satisfied to establish the IIED claim of Colvin’s sister.³⁴

After concluding that the plaintiffs could recover under theories of wrongful death and IIED, the D.C. District Court proceeded to assess whether Colvin’s death was an “extrajudicial killing” within the meaning of the FSIA. The FSIA bases its definition of “extrajudicial killing” on the Torture Victim Protection Act of 1991,³⁵ which provides that:

the term “extrajudicial killing” means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.³⁶

The court held that plaintiffs met their evidentiary burden in showing that Colvin’s death constituted an extrajudicial killing under FSIA:

[The presented declarations and export reports] show[] that officials at the highest level of the Syrian government carefully planned and executed the artillery assault on the Baba Amr Media Center for the specific purpose of killing the journalists inside.

. . . The Syrian government launched the attack the morning immediately after it received an informant’s tip as to the location of the Media Center, and after Colvin conducted live broadcasts which were intercepted and helped to verify the Media Center’s location.

. . .

Finally, Colvin’s death was not lawful in any way. It was not authorized by a judgment pronounced by any court. Syria did not charge Marie Colvin with any crime nor was she ever called to appear or stand trial before any court in Syria. And, this killing was not lawfully carried out under the authority of the foreign nation pursuant to international law. *See, e.g., Letelier v. Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980) (“Whatever policy options exist for a foreign country, it has no ‘discretion’ to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national or international law.”).³⁷

After examining an expert report, the D.C. District Court agreed to award some damages for Colvin’s lost income and \$11,836 in funeral expenses under the wrongful death claim.³⁸ It

³³ *Id.*

³⁴ *Id.* at 158; *cf. Republic of Sudan v. Owens*, 194 A.3d 38 (D.C. 2018) (concluding with respect to a question certified to it by the D.C. Circuit that, as a matter of D.C. tort law, family members do not need to be physically present to assert IIED claims regarding harms to their relatives during terrorist attacks).

³⁵ 28 U.S.C. § 1605A(h)(7).

³⁶ Torture Victim Protection Act 1991, Pub. L. No. 102–256, § 3(a), 106 Stat. 73, 73 (1992).

³⁷ *Colvin*, 363 F. Supp. 3d at 158–59.

³⁸ *Id.* at 161. The court did not assign a specific damages amount for lost income in this opinion, as it wished to delay doing so until receiving “an updated [expert] report . . . that accounts for Colvin’s consumption costs.” *Id.*

also awarded \$2.5 million in compensatory damages under the IIED claim.³⁹ In its decision to award punitive damages, the court weighed four factors: “(1) the character of the defendants’ act, (2) the nature and extent of harm to the plaintiffs that the defendants caused or intended to cause, (3) the need for deterrence, and (4) the wealth of the defendants.”⁴⁰ Finding that the act was “unconscionable,” the “harm to plaintiffs was significant,” “the need for deterrence for terrorist acts” high, and the Syrian government a sovereign with “substantial wealth,” the court decided that all factors weighed in favor of a punitive damages award.⁴¹ In calculating the size of the award, the court explained that “in cases of exceptionally deadly attacks with multiple victims,” one approach by courts “is to multiply the defendant state’s annual expenditure on terrorism by a factor of three to five.”⁴² Because the court found that the attack killing Colvin did not fall within the “exceptionally deadly” category, it decided to use another approach for calculating punitive damages—namely, to “impose a fixed amount per decedent.”⁴³ Citing to four federal district court cases, the court considered that “typically” this award would amount to \$150 million per decedent, but it noted that courts in several other cases had awarded \$300 million for a single decedent in light of particular circumstances.⁴⁴ Since Colvin was “specifically targeted because of her profession, for the purpose of silencing those reporting on the growing opposition movement in the country,” the court concluded that an award of \$300 million against Syria was appropriate.⁴⁵

Whether these damages will ever be paid by Syria is an issue that remains unresolved. Since Judge Jackson issued her opinion, there have been three attempts to deliver the judgment physically to Syria’s Ministry of Foreign Affairs, but each delivery has been refused.⁴⁶ The U.S. State Department signaled support for the judgment, claiming that the “United States seeks to shed light on abuses committed by the Assad regime,” and will continue to “push for effective mechanisms to hold perpetrators accountable”⁴⁷

³⁹ *Id.* at 161–63.

⁴⁰ *Id.* at 163 (citation omitted).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 164.

⁴⁵ *Id.* at 164–65. For a critique of this award, see Haim Abraham, *Awarding Punitive Damages Against Foreign States Is Dangerous and Counterproductive*, LAWFARE (Mar. 1, 2019), at <https://www.lawfareblog.com/awarding-punitive-damages-against-foreign-states-dangerous-and-counterproductive> (arguing that large punitive damages awards against foreign states are problematic because they impede “the ability of individuals to enforce awards of compensation against foreign states within the United States,” and that punitive damages pose a risk to “the peaceful international order” by placing the court “in a position of authority over the defendant”); see also E. Perot Bissell & Joseph R. Schottenfeld, Comment, *Exceptional Judgments: Revising the Terrorism Exception to the Foreign Sovereign Immunities Act*, 127 YALE L.J. 1890 (2018) (arguing for a more restrictive approach to the use of punitive damages in FSIA cases involving state sponsors of terror).

⁴⁶ Affidavit Requesting Foreign Mailing on April 8, 2019 at Ex. 4, *Colvin v. Syrian Arab Republic*, 363 F. Supp. 3d 141 (D.D.C. 2019) (No. 16-1423). Cf. Bissell & Schottenfeld, *supra* note 45, at 1897–98 (noting the difficulties in enforcing judgments under the FSIA’s terrorism exception and describing the establishment of various victim compensation funds).

⁴⁷ U.S. Dep’t of State Press Release, Marie Colvin Civil Suit Against the Syrian Regime (Feb. 1, 2019), at <https://www.state.gov/r/pa/prs/ps/2019/02/288720.htm> [<https://perma.cc/8W9G-PT4T>]. This press release came as the Trump administration began winding down the U.S. presence in Syria by withdrawing U.S. forces. Jean Galbraith, *Contemporary Practice of the United States*, 113 AJIL 394 (2019).