INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING
CERTAIN IRANIAN ASSETS

(ISLAMIC REPUBLIC OF IRAN V. UNITED STATES OF AMERICA)

ATTACHMENTS AND ANNEXES TO THE MEMORIAL

OF THE ISLAMIC REPUBLIC OF IRAN

VOLUME II

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IN THE NAME OF GOD

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CRS Report for Congress

Lawsuits Against State Supporters of Terrorism: An Overview

Jennifer K. Elsea
Legislative Attorney
American Law Division

Summary

A 1996 amendment to the Foreign Sovereign Immunities Act (FSIA) enables American victims of international terrorist acts supported by certain States designated by the State Department as sponsors of terrorism — Cuba, Iran, North Korea, Sudan, Syria, and previously Iraq and Libya — to bring suit in U.S. courts for damages. Despite congressional efforts to make blocked (or "frozen") assets of such States available for attachment by judgment creditors in such cases, plaintiffs encountered difficulties in enforcing the awards. Congress passed, as part of the National Defense Authorization Act for FY2008 (NDAA) (H.R. 1585), an amendment to the FSIA to provide a federal cause of action against terrorist States and to facilitate enforcement of judgments. After the President vetoed the NDAA based on the possible impact the measure would have on Iraqi assets, Congress passed a new version, P.L. 110-181 (H.R. 4986), which includes authority for the President to waive the FSIA provision with respect to Iraq. Congress later passed a measure to exempt Libya if it agrees to compensate victims (S. 3370). This report, which will be updated, provides an overview of these issues and relevant legislation (H.R. 5167). For more details, see CRS Report RL31258, *Suits Against Terrorist States by Victims of Terrorism*, by Jennifer K. Elsea.

In 1996, Congress amended the FSIA to allow civil suits by U.S. victims of terrorism against designated State sponsors of terrorism (DSST)[1] responsible for, or complicit in, such terrorist acts as torture, extrajudicial killing, aircraft sabotage, and hostage taking. 28 U.S.C. § 1605(a)(7). Congress also abrogated the immunity of foreign State assets under the FSIA to satisfy judgments awarded under the terrorism exception. 28 U.S.C. § 1610. After a court found that the abrogation of sovereign immunity did not itself create a cause of action, Congress passed the "Flatow Amendment," 28 U.S.C. § 1605 note, to create a cause of action for such cases. Courts initially interpreted the

[1] The list, established by the State Department, currently includes Cuba, Iran, North Korea, Sudan, and Syria. Iraq was removed from the list in 2004; Libya was removed in 2006. North Korea is eligible to be removed from the list in August 2008 depending on progress in dismantling its nuclear program.

statute as creating a cause of action against foreign States and their agencies and instrumentalities, although its plain language referred only to officials, employees, and agents of such States. Numerous court judgments, generally rendered after the defendants' default, ensued, resulting in substantial awards to plaintiffs.

The nature of lawsuits against DSSTs changed significantly after the D.C. Circuit Court of Appeals held that neither the terrorism exception to the FSIA nor the Flatow Amendment created a private right of action against the foreign government itself, including its agencies and instrumentalities. Consequently, most plaintiffs asserted causes of action under domestic state laws, which resulted in some disparity in the relief available to victims injured due to similar or even the same acts of terrorism. Courts nevertheless continued to award sizable judgments against DSSTs and their officials, which now amount to more than $18 billion in damages, most of which has been assessed against Iran. See CRS Report RL31258, *Suits Against Terrorist States by Victims of Terrorism*, by Jennifer K. Elsea.

Enforcement of Judgments Against Terrorist States

While winning judgments against terrorist States never posed insurmountable obstacles, enforcing those judgments has proven more arduous, primarily due to the scarcity of assets within U.S. jurisdiction that belong to States subject to economic sanctions and the immunity from attachment that assets frozen by sanctions regulations enjoy. Successive Administrations opposed allowing the use of frozen assets of foreign States to satisfy judgments out of concerns for treaty obligations to protect foreign diplomatic and consular properties, the desire to maintain the blocked assets for diplomatic leverage, and the concern that permitting the attachment of such assets would expose U.S. assets abroad to reciprocal action. Notwithstanding these objections, Congress has repeatedly stepped in to make more foreign assets available for judgment creditors, and appropriated some $400 million to pay portions of certain judgments against Iran with the understanding that the President would seek to recover that amount from Iran. Consequently, some plaintiffs were able to collect portions of their judgments, while others were stymied. Some of the assets associated with DSSTs remained off-limits because they were not "blocked" within the meaning of the relevant statute; because plaintiffs had waived their right to attach the assets in question when they accepted payment from U.S. funds; because the assets were not subject to the exception to immunity or were exempted by presidential waiver; or because the United States validly possesses the property and successfully asserted U.S. sovereign immunity.

The National Defense Authorization Act for FY2008

In order to assist plaintiffs, Congress passed § 1083 of the National Defense Authorization Act for FY2008 (NDAA) (P.L. 110-181), to create § 1605A in title 28, U.S. Code. Section 1083 incorporates the terrorist State exception to the FSIA previously codified at 28 U.S.C. § 1605(a)(7), and a new cause of action against DSSTs to replace the Flatow Amendment. It allows U.S. nationals (and non-U.S. nationals working for the U.S. government overseas) who are harmed by terrorism to seek compensatory as well as punitive damages (which are not otherwise available against foreign States). The provision also seeks to make more assets associated with State sponsors of terrorism

available for attachment in aid of execution of terrorism judgments, and to permit some plaintiffs to refile claims.

President Bush vetoed the original version of the NDAA, H.R. 1585, on the stated basis that the FSIA amendments would threaten Iraq's economic security. Congress responded with the new version, H.R. 4986, which authorizes the President to waive any provision of § 1083 with respect to Iraq. The President signed the bill and exercised the waiver authority. Section 1083 also encourages the President to negotiate a settlement of outstanding terrorism claims against Iraq. Pending cases have been permitted to go forward under the previous law, but it is unclear whether any Iraqi assets will remain available for attachment by judgment holders under other provisions of law.

New 28 U.S.C. § 1605A(g) provides for the establishment of a lien of *lis pendens* with respect to all real or tangible personal property within the judicial district that is subject to attachment in aid of execution and is titled in the name of a defendant State or any entities listed by the plaintiff as "controlled by" that State. Ordinarily, *lis pendens* in civil litigation is used to put third parties on notice that the property is the subject of litigation, which effectively prevents the alienation of such property, although the notice is not technically a lien. Under the new provision, the clerk of the district court is required to file the notice of action indexed by listing the defendant and its controlled entities. This may relieve plaintiffs of the burden of identifying specific property in the notices, but it is unclear what further measures might be required to ensure adequate notice is afforded to prospective purchasers under the procedure or how it is to be determined without further process that the property is in fact subject to attachment. In the case of State sponsors of terror, whose property for the most part is already subject to substantial limitations on transactions, the primary utility may be the establishment of a line of priority among lien-holders. However, in the case of States that are no longer subject to terrorism sanctions, such as Libya, the provision could have some impact on lawful transactions.

New 28 U.S.C. § 1610(g) provides that the property of a foreign State against which a judgment has been entered under §1605A (or predecessor provision), or of an agency or instrumentality of such a foreign State, "including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity," is subject to attachment in aid of execution and execution upon that judgment, regardless of how much economic control over that property the foreign government exercises and whether the government derives profits or benefits from it. The President has no waiver authority (except with respect to Iraq). The provision may enable a plaintiff to "pierce the corporate veil"of a corporation owned, in whole or in part, by a judgment debtor State without having to demonstrate to the court that the presumption of independent status should be overridden. It could also be read as an effort to make any entity in which the defendant State (including its separate agencies and instrumentalities) has any interest liable for the terrorism-related judgments awarded against that State. On the other hand, § 1610(g) states that nothing in it is to be construed as superceding the court's authority to protect the interests of a person "who is not liable in the action giving rise to a judgment."

Section 1610(g) also makes a property that is regulated by reason of U.S. sanctions available to satisfy terrorism judgments. It does not explicitly waive U.S. sovereign immunity, but appears designed to defeat provisions in the sanctions regulations that make blocked property effectively immune from court action. In this respect, it echoes

language in § 1610(f)(1) (which is not in effect because it was waived by President Clinton), except that § 1610(g) applies only to *regulated* property rather than property that is *blocked or regulated* pursuant to sanctions regimes,[2] and it would not be subject to the presidential waiver in § 1620(f)(3). Unlike § 201 of TRIA (28 U.S.C. § 1610 note), the new language applies to *regulated* rather than *blocked* assets and it allows assets to be attached in aid of enforcing punitive damages.

The new provisions apply to any claim arising under them as well as to any action brought under former 28 U.S.C. § 1605(a)(7) or the Flatow Amendment that "relied on either of these provisions as creating a cause of action" and that "has been adversely affected on the grounds that either or both of these provisions fail to create a cause of action against the state," and that is still before the courts "in any form," including appeal or motion for post-judgment relief. In cases brought under the older provisions, the federal court in which the claim originated is required, on motion by the plaintiffs within 60 days after enactment, to treat the case as if it had been brought under the new provisions, apparently to include reinstating a vacated judgment. The measure waives a defendant's "defenses of res judicata, collateral estoppel and limitation period" in any reinstated action. The provision also permits the filing of new cases involving incidents that are already the subject of a timely-filed terrorism action under the FSIA, notwithstanding the limitation time for filing, so long as the related action is filed within 60 days after enactment (January 28, 2008) or entry of judgment in the original action. Several actions have been filed under this provision, including some lawsuits by plaintiffs who have already won significant judgments under the previous law.

While § 1083(c) refers to "pending cases," it appears to cover finally adjudicated cases in which litigants have filed a motion for relief from final judgment after appeals are exhausted. To the extent the provision is read to require courts to reopen final judgments or reinstate vacated judgments, it may be vulnerable to invalidation as an improper exercise of judicial powers by Congress.[3] A similar objection may be raised regarding the waiver of legal defenses: while it seems well-established that Congress can waive defenses in actions against the United States, an effort to abrogate legal defenses of other parties could raise constitutional due process and separation of powers issues. It may be that no cases qualify for reopening under this provision because the plaintiffs would have had to have filed a motion prior to the enactment of P.L. 110-181. However, if previous lawsuits can be filed again as "related actions" under § 1083(c)(3), then plaintiffs who file prior to the deadline can bring new actions regardless of the reason their original case was unsuccessful or perhaps even if their case yielded an award. It is unclear whether such lawsuits would count as "refiled actions" for the purpose of abrogating the defendant's legal defenses under § 1803(c)(2)(B).

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[2] TRIA § 201(d)(2) defines "blocked asset" to mean property seized or frozen pursuant to certain sanctions, but not property that may be transferred pursuant to a license that is required by statute *other than* the International Emergency Economic Powers Act (IEEPA) or the United Nations Participation Act of 1945. It also excludes diplomatic or consular property being used solely for diplomatic or consular purposes from the definition of "blocked asset." TRIA does not refer to regulated assets, so it is unclear whether "blocked" and "regulated" are mutually exclusive terms, or whether "blocked" assets would be considered to be "regulated" as well. Assets regulated pursuant to IEEPA presumably mean those that are licensed for transfer.

[3] *See* Plaut v. Spendthrift Farms, 514 U.S. 211 (1995).

The new federal cause of action may make judgments against DSSTs heftier and easier to obtain, but whether such judgments will be easier to enforce seems less certain. The result may be an increase in debts owed by those States without a sufficient increase in assets available to cover them, which could amplify competition among plaintiffs and lead to calls for further congressional action. Transactions with debtor States are likely to increase only with respect to States that are no longer subject to anti-terrorism sanctions, in which case the use of their assets to satisfy judgments may act as a barrier to trade despite the lifting of sanctions. The presidential waiver for Iraq permits the President to protect Iraqi assets from attachment to satisfy any outstanding judgments. H.R. 5167 has been introduced in the House to repeal the presidential waiver provision.

Effect of the Waiver of § 1083 on Cases Pending Against Iraq

Section 1083(d) authorizes the President to waive any provision of §1083 with respect to Iraq if he determines that a waiver serves U.S. national security interests and promotes U.S.-Iraq relations, the waiver will promote reconstruction and political development in Iraq, and Iraq continues to be a reliable ally and partner in combating terrorism. The waiver applies retroactively regardless of its effect on pending cases.

On the day the President signed the FY2008 NDAA into law, the White House signed a waiver,[4] apparently foreclosing any refiling of the lawsuit by former prisoners of war against Iraq and Saddam Hussein for their mistreatment during the first Gulf War.[5] However, pending claims against Iraq under the FSIA terrorism exception (as previously in force) have been permitted to go forward.[6] Final judgments against Iraq are not affected, but will remain difficult to enforce. Iraqi government assets used for commercial purposes in the United States that are not subject to the protection of E.O. 13303, which covers the Development Fund for Iraq and all interests associated with Iraqi petroleum and petroleum products, may be subject to attachment and execution on terrorism judgments against Iraq under 28 U.S.C. § 1610. The President could, however, issue another executive order to protect all Iraqi assets from attachment to satisfy judgments.

Administration Proposal to Waive § 1083 for Libya

U.S. businesses seeking to establish a commercial relationship with Libya expressed concern that § 1083 will harm U.S.-Libya trade.[7] The Bush Administration, which has touted renewed U.S. investment in Libya and growth in bilateral trade as beneficial to the

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[4] Presidential Determination No. 2008-9 of January 28, 2008, Waiver of Section 1083 of the National Defense Authorization Act for Fiscal Year 2008, 73 Fed. Reg. 6,571 (2008) (waiving all provisions of § 1083 with respect to Iraq).

[5] Acree v. Republic of Iraq, 370 F.3d 41 (D.C. Cir. 2004), *cert. denied*, 544 U.S. 1010 (2005). The district court rejected recently the plaintiffs' motion to reopen the case. Acree v. Iraq, 2008 WL 2764858 (D.D.C. 2008).

[6] Simon v. Iraq, 529 F.3d 1187 (D.C. Cir. 2008).

[7] Correspondence from the U.S.-Libya Business Association, the National Foreign Trade Council, the National Association of Manufacturers, and the United States Chamber of Commerce to U.S. Secretary of State Condoleezza Rice, February 28, 2008 (urging the Administration to seek waiver authority with respect to Libya). For more information about U.S.-Libya relations, see CRS Report RL33142, *Libya: Background and U.S. Relations*, by Christopher M. Blanchard.

U.S. economy and as important tools for reestablishing relations with a reformed state sponsor of terrorism, appears to share their view.

To relieve Libya from the possible effects of § 1083 in the event Libya agrees to compensate victims of terrorism, Congress enacted S. 3370, the "Libyan Claims Resolution Act." S. 3370 exempts Libya from the terrorism exception to the FSIA if Libya signs a claims agreement with the United States to settle terrorism-related claims and provides funds to compensate claimants. S. 3370 authorizes the Secretary of State to designate one or more "entities" to assist in the provision of compensation. Entities would be immune from lawsuits related to this function. It appears that the government is to receive funds from Libya, which it would then turn over to the designated entity for dispersal to claimants, although there is no express requirement to this effect in the statute.

If the Secretary of State certifies to Congress that sufficient funds have been received under the claims agreement to cover settlements Libya has agreed to pay to victims of the Pan Am 103 airliner bombing and the La Belle Disco bombing, as well as to provide "fair compensation" to some other U.S. nationals who have pending cases against Libya, the statute will provide immunity to Libya, including its agencies and instrumentalities, as well as its officials, employees, and agents, for all claims pending under the terrorism exception to the FSIA, and for all property sought to be attached to satisfy existing terrorism judgments. It appears that the amount of fair compensation is left to the discretion of the Secretary of State. The provision may not include all pending cases against Libya under § 1605A. It appears to cover claims for wrongful death or physical injury arising under 28 U.S.C. § 1605A (including previous actions that have been given effect as if they had been filed under § 1605A), but not cases for non-physical injuries[8] or for cases filed under the previous version of the FSIA exception that have not been given effect as if they had been filed under § 1605A.[9] It appears that finally adjudicated cases are not covered, in which case unsatisfied judgments against Libya and its officials will likely be unenforceable.[10] Claimants do not appear to have any recourse in court to dispute the amount or a denial of compensation, although a claim against the United States for an uncompensated "taking" in violation of the Fifth Amendment would not be foreclosed.

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[8] 28 U.S.C. § 1605A provides a cause of action for "personal injury or death," which appears to cover a broader scope of injuries than "wrongful death or physical injury." Claims for wrongful death under the FSIA amendment have been limited to the decedent's estate, while close relatives of a victim have recovered in their own right based on claims of solatium, intentional infliction of emotional distress, and pain and suffering, depending on the applicable state law. *See*, *e.g.*, Pugh v. Libya, 530 F. Supp. 2d 216 (D.D.C. 2008).

[9] NDAA § 1083(c) provides that pending cases originally brought under previous 28 U.S.C. § 1605(a)(7) are to be given effect as if they had been filed under § 1605A if the action was "adversely affected on the grounds that [the previous] provisions fail to create a cause of action against the state" and the plaintiff makes a motion to the court asking for such treatment.

[10] Price v. Libya, 384 F. Supp. 2d 120 (D.D.C. 2005)(approximately $18 million judgment against Libya for injuries suffered during plaintiffs' imprisonment pending trial for allegedly taking unlawful photographs); Pugh v. Libya, 530 F. Supp. 2d 216 (D.D.C. 2008)(nearly $7 billion judgment against Libya and six named officials for bombing of a French airliner over Africa in 1989).

Annex 28

First National City Bank v. Banco Para el Comercio Exterior de Cuba,
U.S. Supreme Court, 17 June 1983, 462 U.S. 611 (1983)

462 U.S. 611

103 S.Ct. 2591

77 L.Ed.2d 46

FIRST NATIONAL CITY BANK, Petitioner
v.
BANCO PARA EL COMERCIO EXTERIOR DE CUBA.

No. 81-984.

Argued March 28, 1983.
Decided June 17, 1983.

Syllabus

In 1960, the Cuban Government established respondent to serve as an official autonomous credit institution for foreign trade with full juridical capacity of its own. Respondent sought to collect on a letter of credit issued by petitioner bank in respondent's favor in support of a contract for delivery of Cuban sugar to a buyer in the United States. Shortly thereafter, all of petitioner's assets in Cuba were seized and nationalized by the Cuban Government. When respondent brought suit on the letter of credit in Federal District Court, petitioner counterclaimed, asserting a right to set off the value of its seized Cuban assets. After the suit was brought but before petitioner filed its counterclaim, respondent was dissolved and its capital was split between Banco Nacional, Cuba's central bank, and certain foreign trade enterprises or houses of the Cuban Ministry of Foreign Trade. Rejecting respondent's contention that its separate juridical status shielded it from liability for the acts of the Cuban Government, the District Court held that since the value of petitioner's Cuban assets exceeded respondent's claim, the setoff could be granted in petitioner's favor, and therefore dismissed the complaint. The Court of Appeals reversed, holding that respondent w § not an alter ego of the Cuban Government for the purpose of petitioner's counterclaim.

Held: Under principles of equity common to international law and federal common law, petitioner may apply the claimed setoff, notwithstanding the fact that respondent was established as a separate juridical entity. Pp.619-633.

(a) The Foreign Sovereign Immunities Act of 1976 does not control the determination of whether petitioner may apply the setoff. That Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among such instrumentalities. Pp. 619-621.

(b) Duly created instrumentalities of a foreign state are to be accorded a presumption of independent status. This presumption may be overcome, however, where giving effect to the corporate form would permit a foreign state to be the sole beneficiary of a claim pursued in United States courts while escaping liability to the opposing party imposed by international law. Pp. 623-630.

(c) Thus, here, giving effect to respondent's juridical status, even though it has long been dissolved, would permit the real beneficiary of such an action, the Cuban Government, to obtain relief in our courts that it could not obtain in its own right without waiving its sovereign immunity and answering for the seizure of petitioner's assets in violation of international law. The corporate form will not be blindly adhered to where doing so would cause such an injustice. Having dissolved respondent and transferred its assets to entities that may be held liable on petitioner's counterclaim, Cuba cannot escape liability for acts in violation of international law simply by retransferring assets to separate juridical entities. To hold otherwise would permit governments to avoid the requirements of international law simply by creating juridical entities whenever the need arises. Pp. 630-633.

658 F.2d 913 (2nd Cir.1981), reversed and remanded.

Henry Harfield, New York City, for petitioner.

Richard G. Wilkins, Washington, D.C., for the U.S., as amicus curiae, pro hac vice, by special leave of Court.

Michael Krinsky, New York City, for respondent.

Justice O'CONNOR delivered the opinion of the Court.

1 In 1960 the Government of the Republic of Cuba established respondent Banco Para El Comercio Exterior de Cuba (Bancec) to serve as "[a]n official autonomous credit institution for foreign trade . . . with full juridical capacity . . . of its own. . . ." Law No. 793, Art. 1 (1960), App. to Pet. for Cert. 2d. In September 1960 Bancec sought to collect on a letter of credit issued by

petitioner First National City Bank (now Citibank) in its favor in support of a contract for delivery of Cuban sugar to a buyer in the United States. Within days after Citibank received the request for collection, all of its assets in Cuba were seized and nationalized by the Cuban Government. When Bancec brought suit on the letter of credit in United States District Court, Citibank counterclaimed, asserting a right to set off the value of its seized Cuban assets. The question before us is whether Citibank may obtain such a setoff, notwithstanding the fact that Bancec was established as a separate juridical entity. Applying principles of equity common to international law and federal common law, we conclude that Citibank may apply a setoff.

2 * Resolution of the question presented by this case requires us to describe in some detail the events giving rise to the current controversy.

3 Bancec was established by Law No. 793, of April 25, 1960, as the legal successor to the Banco Cubano del Comercio Exterior (Cuban Foreign Trade Bank), a trading bank established by the Cuban Government in 1954 and jointly owned by the Government and private banks. Law No. 793 contains detailed "By-laws" specifying Bancec's purpose, structure, and administration. Bancec's stated purpose was "to contribute to, and collaborate with, the international trade policy of the Government and the application of the measures concerning foreign trade adopted by the 'Banco Nacional de Cuba,' " Cuba's central bank (Banco Nacional). Art. 1, No. VIII, App. to Pet. for Cert. 4d. Bancec was empowered to act as the Cuban Government's exclusive agent in foreign trade. The Government supplied all of its capital and owned all of its stock. The General Treasury of the Republic received all of Bancec's profits, after deduction of amounts for capital reserves. A Governing Board consisting of delegates from Cuban governmental ministries governed and managed Bancec. Its president was Ernesto Che Guevara, who also was Minister of State and president of Banco Nacional. A General Manager appointed by the Governing Board was charged with directing Bancec's day-to-day operations in a manner consistent with its enabling statute.

4 In contracts signed on August 12, 1960, Bancec agreed to purchase a quantity of sugar from El Institutio Nacional de Reforma Agraria (INRA), an instrumentality of the Cuban Government which owned and operated Cuba's nationalized sugar industry, and to sell it to the Cuban Canadian Sugar Company. The latter sale agreement was supported by an irrevocable letter of credit in favor of Bancec issued by Citibank on August 18, 1960, which Bancec assigned to Banco Nacional for collection.

5 Meanwhile, in July 1960 the Cuban Government enacted Law No. 851, which

provided for the nationalization of the Cuban properties of United States citizens. By Resolution No. 2 of September 17, 1960, the Government ordered that all of the Cuban property of three United States banks, including Citibank, be nationalized through forced expropriation. The "Bank Nationalization Law," Law No. 891, of October 13, 1960, declared that the banking function could be carried on only by instrumentalities created by the State, and ordered Banco Nacional to effect the nationalization.

6 On or about September 15, 1960, before the banks were nationalized, Bancec's draft was presented to Citibank for payment by Banco Nacional. The amount sought was $193,280.30 for sugar delivered at Pascagoula, Mississippi. On September 20, 1960, after its branches were nationalized, Citibank credited the requested amount to Banco Nacional's account and applied the balance in Banco Nacional's account as a setoff against the value of its Cuban branches.

7 On February 1, 1961, Bancec brought this diversity action to recover on the letter of credit in the United States District Court for the Southern District of New York.

8 On February 23, 1961, by Law No. 930, Bancec was dissolved and its capital was split between Banco Nacional and "the foreign trade enterprises or houses of the Ministry of Foreign Trade," which was established by Law No. 934 the same day.[1] App. to Pet. for Cert. 16d. All of Bancec's rights, claims, and assets "peculiar to the banking business" were vested in Banco Nacional, which also succeeded to its banking obligations. *Ibid.* All of Bancec's "trading functions" were to be assumed by "the foreign trade enterprises or houses of the Ministry of Foreign Trade." By Resolution No. 1, dated March 1, 1961, the Ministry of Foreign Trade created Empresa Cubana de Exportaciones (Cuban Enterprise for Exports) (Empresa), which was empowered to conduct all commercial export transactions formerly conducted by Bancec "remaining subrogated in the rights and obligations of said bank [Bancec] as regards the commercial export activities." App. to Pet. for Cert. 26d. Three hundred thousand of the two million pesos distributed to the Ministry of Foreign Trade when Bancec was dissolved were assigned to Empresa. *Id.,* at 27d. By Resolution No. 102, dated December 31, 1961, and Resolution No. 1, dated January 1, 1962, Empresa was dissolved and Bancec's rights relating to foreign commerce in sugar were assigned to Empresa Cubana Exportadora de Azucar y sus Derivados (C ba Zucar), a state trading company, which is apparently still in existence.

9 On March 8, 1961, after Bancec had been dissolved, Citibank filed its answer, which sought a setoff for the value of its seized branches, not an affirmative recovery of damages.[2] On July 7, 1961, Bancec filed a stipulation signed by the

parties stating that Bancec had been dissolved and that its claim had been transferred to the Ministry of Foreign Trade, and agreeing that the Republic of Cuba may be substituted as plaintiff. The District Court approved the stipulation, but no amended complaint was filed.

10 Apparently the case lay dormant until May 1975, when respondent filed a motion seeking an order substituting Cuba Zucar as plaintiff. The motion was supported by an affidavit by counsel stating that Bancec's claim had passed through the Ministry of Foreign Trade and Empresa to Cuba Zucar, all by operation of the laws and resolutions cited above. Counsel for petitioner opposed the motion, and the District Court denied it in August 1975, stating that "to permit such a substitution . . . would only multiply complications in this already complicated litigation." App. 160.

11 A bench trial was held in 1977[3], after which the District Court[4] granted judgment in favor of Citibank. 505 F.Supp. 412 (1980). The court rejected Bancec's contention that its separate juridical status shielded it from liability for the acts of the Cuban Government.

12 "Under all of the relevant circumstances shown in this record, . . . it is clear that Bancec lacked an independent existence, and was a mere arm of the Cuban Government, performing a purely governmental function. The control of Bancec was exclusively in the hands of the Government, and Bancec was established solely to further Governmental purposes. Moreover, Bancec was totally dependent on the Government for financing and required to remit all of its profits to the Government.

13 * * * * *

14 Bancec is not a mere private corporation, the stock of which is owned by the Cuban Government, but an agency of the Cuban Government in the conduct of the sort of matters which even in a country characterized by private capitalism, tend to be supervised and managed by Government. Where the equities are so strong in favor of the counter-claiming defendants, as they are in this case, the Court should recognize the practicalities of the transactions. . . . The Court concludes that Bancec is an *alter ego* of the Cuban Government." *Id.,* at 427-428.

15 Without determining the exact value of Citibank's assets seized by Cuba, the court held that "the value of the confiscated branches . . . substantially exceeds the sums already recovered, and therefore the set-off pleaded here may be

granted in full in favor of Citibank." *Id.,* at 467. It therefore entered judgment dismissing the complaint.[5]

16 The United States Court of Appeals for the Second Circuit reversed. 658 F.2d 913 (2nd Cir.1981). While expressing agreement with the District Court's "descriptions of Bancec's functions and its status as a wholly-owned instrumentality of the Cuban government," the court concluded that "Bancec was not an alter ego of the Cuban government for the purpose of [Citibank's] counterclaims." *Id.,* at 917. It stated that, as a general matter, courts would respect the independent identity of a governmental instrumentality created as "a separate and distinct juridical entity under the laws of the state that owns it"—except "when the subject matter of the counterclaim assertible against the state is state conduct in which the instrumentality had a key role." *Id.,* at 918. As an example of such a situation the Court of Appeals cited *Banco Nacional de Cuba v. First National City Bank,* 478 F.2d 191 (CA2 1973), in which it had ruled that Banco Naciona could be held liable by way of setoff for the value of Citibank's seized Cuban assets because of the role *it* played in the expropriations. But the court declined to hold that "a trading corporation wholly owned by a foreign government, but created and operating as a separate juridical entity, is an alter ego of that government for the purpose of recovery for wrongs of the government totally unrelated to the operations, conduct or authority of the instrumentality." 658 F.2d, at 920.[6]

17 Citibank moved for rehearing, arguing, *inter alia,* that the panel had ignored the fact that Bancec had been dissolved in February 1961. The motion, and a suggestion of rehearing en banc, were denied. This Court granted certiorari. --- U.S. ----, 103 S.Ct. 253, 74 L.Ed.2d 198 (1982). We reverse, and remand the case for further proceedings.

II

A.

18 As an initial matter, Bancec contends that the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (1976 ed.) (FSIA), immunizes an instrumentality owned by a foreign government from suit on a counterclaim based on actions taken by that government. Bancec correctly concedes that, under 28 U.S.C. § 1607(c)[7], an instrumentality of a foreign state bringing suit in a United States court is not entitled to immunity "with respect to any counterclaim—. . . to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the [instrumentality.]" It contends, however, that as a substantive matter the FSIA

prohibits holding a foreign instrumentality owned and controlled by a foreign government responsible for actions taken by that government.

19 We disagree. The language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state. Section 1606 of the FSIA provides in relevant part that "[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity . . ., the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances. . . ." The House Report on the FSIA states:

20 "The bill is not intended to affect the substantive law of liability. Nor is it intended to affect . . . the attribution of responsibility between or among entities of a foreign state; for example, whether the proper entity of a foreign state has been sued, or whether an entity sued is liable in whole or in part for the claimed wrong." H.R.Rep. No. 94-1487, p. 12 (1976), U.S.Code Cong. & Admin.News 1976, pp. 6604, 6610.[8]

21 Thus, we conclude that the Foreign Sovereign Immunities Act does not control the determination of whether Citibank may set off the value of its seized Cuban assets against Bancec's claim. Nevertheless, our resolution of that question is guided by the policies articulated by Congress in enacting the FSIA. See *infra,* at 627-628.

B

22 We must next decide which body of law determines the effect to be given to Bancec's separate juridical status. Bancec contends that internationally recognized conflict-of-law principles require the application of the law of the state that establishes a government instrumentality—here Cuba—to determine whether the instrumentality may be held liable for actions taken by the sovereign.

23 We cannot agree. As a general matter, the law of the state of incorporation normally determines issues relating to the *internal* affairs of a corporation. Application of that body of law achieves the need for certainty and predictability of result while generally protecting the justified expectations of parties with interests in the corporation. See Restatement (Second) of Conflict of Laws § 302, Comments *a* & *e,* (1971). Cf. *Cort v. Ash,* 422 U.S. 66, 84, 95 S.Ct. 2080, 2090, 45 L.Ed.2d 26 (1975). Different conflicts principles apply,

however, where the rights of third parties *external* to the corporation are at issue. See Restatement (Second) of Conflict of Laws, *supra,* § 301.[9] To give conclusive effect to the law of the chartering state in determining whether the separate juridical status of its instrumentality should be respected would permit the state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts.[10] We decline to permit such a result.[11]

24 Bancec contends in the alternative that international law must determine the resolution of the question presented. Citibank, on the other hand, suggests that federal common law governs. The expropriation claim against which Bancec seeks to interpose its separate juridical status arises under international law, which, as we have frequently reiterated, "is part of our law . . . ." *The Paquete Habana,* 175 U.S. 677, 700, 20 S.Ct. 290, 299, 44 L.Ed. 320 (1900). As we set forth below, see *infra,* at 624-630 and nn. 19-20, the 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.

III

A.

25 Before examining the controlling principles, a preliminary observation is appropriate. The parties and *amici* have repeatedly referred to the phrases that have tended to dominate discussion about the independent status of separately constituted juridical entities, debating whether "to pierce the corporate veil," and whether Bancec is an "alter ego" or a "mere instrumentality" of the Cuban Government. In *Berkey v. Third Avenue Railway Co.,* 244 N.Y. 84, 155 N.E. 58 (1926), Justice (then Judge) Cardozo warned in circumstances similar to those presented here against permitting worn epithets to substitute for rigorous analysis.

26 "The whole problem of the relation between parent and subsidiary corporations is one that is still enveloped in the mists of metaphor. Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." *Id.,* at 94, 155 N.E., at 58.

27 With this in mind, we examine briefly the nature of government instrumentalities.[12]

28 Increasingly during this century, governments throughout the world have

established separately constituted legal entities to perform a variety of tasks.[13] The organization and control of these entities vary considerably, but many possess a number of common features. A typical government instrumentality, if one can be said to exist, is created by an enabling statute that prescribes the powers and duties of the instrumentality, and specifies that it is to be managed by a board selected by the government in a manner consistent with the enabling law. The instrumentality is typically established as a separate juridical entity, with the powers to hold and sell property and to sue and be sued. Except for appropriations to provide capital or to cover losses, the instrumentality is primarily responsible for its own finances. The instrumentality is run as a distinct economic enterprise; often it is not subject to the same budgetary and personnel requirements with which government agencies must comply.[14]

29 These distinctive features permit government instrumentalities to manage their operations on an enterprise basis while granting them a greater degree of flexibility and independence from close political control than is generally enjoyed by government agencies.[15] These same features frequently prompt governments in developing countries to establish separate juridical entities as the vehicles through which to obtain the financial resources needed to make large-scale national investments.

30 "[P]ublic enterprise, largely in the form of development corporations, has become an essential instrument of economic development in the economically backward countries which have insufficient private venture capital to develop the utilities and industries which are given priority in the national development plan. Not infrequently, these public development corporations . . . directly or through subsidiaries, enter into partnerships with national or private foreign enterprises, or they offer shares to the public." Friedmann, "Government Enterprise: A Comparative Analysis" in Government Enterprise: A Comparative Study 333-334 (W. Friedmann & J.F. Garner eds. 1970).

31 Separate legal personality has been described as "an almost indispensable aspect of the public corporation." Friedmann, *supra,* at 314. Provisions in the corporate charter stating that the instrumentality may sue and be sued have been construed to waive the sovereign immunity accorded to many governmental activities, thereby enabling third parties to deal with the instrumentality knowing that they may seek relief in the courts.[16] Similarly, the instrumentality's assets and liabilities must be treated as distinct from those of its sovereign in order to facilitate credit transactions with third parties. *Id.,* at 315. Thus what the Court stated with respect to private corporations in *Anderson v. Abbott,* 321 U.S. 349, 64 S.Ct. 531, 88 L.Ed. 793 (1944), is true also for governmental corporations:

32 "Limited liability is the rule, not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted." *Id.,* at 362, 64 S.Ct., at 537.

33 Freely ignoring the separate status of government instrumentalities would result in substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against the sovereign, and might thereby cause third parties to hesitate before extending credit to a government instrumentality without the government's guarantee.[17] As a result, the efforts of soverei n nations to structure their governmental activities in a manner deemed necessary to promote economic development and efficient administration would surely be frustrated. Due respect for the actions taken by foreign sovereigns and for principles of comity between nations, see *Hilton v. Guyot,* 159 U.S. 113, 163-164, 16 S.Ct. 139, 143, 40 L.Ed. 95 (1895), leads us to conclude—as the courts of Great Britain have concluded in other circumstances[18]—that government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such.

34 We find support for this conclusion in the legislative history of the Foreign Sovereign Immunities Act. During its deliberations, Congress clearly expressed its intention that duly created instrumentalities of a foreign state are to be accorded a presumption of independent status. In its discussion of FSIA § 1610(b), the provision dealing with the circumstances under which a judgment creditor may execute upon the assets of an instrumentality of a foreign government, the House Report states:

35 "Section 1610(b) will not permit execution against the property of one agency or instrumentality to satisfy a judgment against another, unrelated agency or instrumentality. There are compelling reasons for this. If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary. However, a court might find that property held by one agency is really the property of another." H.R.Rep. No. 94-1487, pp. 29-30, U.S.Code Cong. & Admin.News 1976, pp. 6628-6629 (citation omitted).

36 Thus, the presumption that a foreign government's determination that its instrumentality is to be accorded separate legal status is buttressed by this congressional determination. We next examine whether this presumption may be overcome in certain circumstances.

B

37 In discussing the legal status of *private* corporations, courts in the United States[19] and abroad[20], have recognized that an incorporated entity—described by Chief Justice Marshall as "an artificial being, invisible, intangible, and existing only in contemplation of law"[21]—is not to be regarded as legally separate from its owners in all circumstances. Thus, where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created, we have held that one may be held liable for the actions of the other. See *NLRB v. Deena Artware, Inc.,* 361 U.S. 398, 402-404, 80 S.Ct. 441, 443, 44 L.Ed.2d 400 (1960). In addition, our cases have long recognized "the broader equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice." *Taylor v. Standard Gas Co.,* 306 U.S. 307, 322, 59 S.Ct. 543, 550, 83 L.Ed. 669 (1939). See *Pepper v. Litton,* 308 U.S. 295, 310, 60 S.Ct. 238, 246, 84 L.Ed. 281 (1940). In particular, the Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies. *E.g., Anderson v. Abbot, supra,* 321 U.S., at 362-363, 64 S.Ct., at 537-38. And, in *Bangor Punta Operations, Inc. v. Bangor & Aroostook Railroad Co.,* 417 U.S. 703, 94 S.Ct. 2578, 41 L.Ed.2d 418 (1974), we concluded:

38 "Although a corporation and its shareholders are deemed separate entities for most purposes, the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy. . . . [W]here equity would preclude the shareholders from maintaining the action in their own right, the corporation would also be precluded. . . . [T]he principal beneficiary of any recovery and itself estopped from complaining of petitioners' alleged wrongs, cannot avoid the command of equity through the guise of proceeding in the name of . . . corporations which it owns and controls." *Id.,* at 713, 94 S.Ct., at 2584 (citations omitted).

C

39 We conclude today that similar equitable principles must be applied here. In *National City Bank v. Republic of China,* 348 U.S. 356, 75 S.Ct. 423, 99 L.Ed. 389 (1955), the Court ruled that when a foreign sovereign asserts a claim in a United States court, "the consideration of fair dealing" bars the state from asserting a defense of sovereign immunity to defeat a setoff or counterclaim. *Id.,* at 365, 75 S.Ct., at 429. See 28 U.S.C. § 1607(c). As a general matter, therefore, the Cuban Government could not bring suit in a United States court without also subjecting itself to its adversary's counterclaim. Here there is apparently no dispute that, as the District Court found, and the Court of Appeals apparently agreed, see 658 F.2d, at 916, n. 4, "the devolution of [Bancec's] claim, however viewed, brings it into the hands of the Ministry [of Foreign

Trade], or Banco Nacional," each a party that may be held liable for the expropriation of Citibank's assets. 505 F.Supp., at 425.[22] See *Banco Nacional de Cuba v. First National City Bank, supra,* 478 F.2d, at 194. Bancec was dissolved even before Citibank filed its answer in this case, apparently in order to effect "the consolidation and operation of the economic and social conquests of the Revolution," particularly the nationalization of the banks ordered by Law No. 891.[23] Thus, the Cuban Government and Banco Nacional, not any third parties that may have relied on Bancec's separate juridical identity, would be the only beneficiaries of any recovery.[24]

40 In our view, this situation is similar to that in the *Republic of china* case.

41 "We have a foreign government invoking our law but resisting a claim against it which fairly would curtail its recovery. It wants our law, like any other litigant, but it wants our law free from the claims of justice." *Id.,* at 361-362, 75 S.Ct., at 427 (footnote omitted).[25]

42 Giving effect to Bancec's separate juridical status in these circumstances, even though it has long been dissolved, would permit the real beneficiary of such an action, the Government of the Republic of Cuba, to obtain relief in our courts that it could not obtain in its own right without waiving its sovereign immunity and answering for the seizure of Citibank's assets—a seizure previously held by the Court of Appeals to have violated international law.[26] We decline to adhere blindly to the corporate form where doing so would cause such an injustice. See *Bangor Punta Operations, Inc. v. Bangor & Aroostook Railroad Co., supra,* 417 U.S., at 713, 94 S.Ct., at 2584.

43 Respondent contends, however, that the transfer of Bancec's assets from the Ministry of Foreign Trade or Banco Nacional to Empresa and Cuba Zucar effectively insulates it from Citibank's counterclaim. We disagree. Having dissolved Bancec and transferred its assets to entities that may be held liable on Citibank's counterclaim, Cuba cannot escape liability for acts in violation of international law simply by retransferring the assets to separate juridical entitles. To hold otherwise would permit governments to avoid the requirements of international law simply by creating juridical entities whenever the need arises. Cf. *Federal Republic of Germany v. Elicofon,* 358 F.Supp. 747, 757 (EDNY 1972), aff'd, 478 F.2d 231 (CA2 1973), cert. denied, 415 U.S. 931, 94 S.Ct. 1443, 39 L.Ed.2d 489 (1974). See n. 25, *supra.* We therefore hold that Citibank may set off the value of its assets seized by the Cuban Government against the amount sought by Bancec.

IV

44 Our decision today announces no mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded.[27] Instead, it is the product of the application of internationally recognized equitable principles to avoid the injustice that would result from permitting a foreign state to reap the benefits of our courts while avoiding the obligations of international law.[28]

45 The District Court determined that the value of Citibank's Cuban assets exceeded Bancec's claim. Bancec challenged this determination on appeal, but the Court of Appeals did not reach the question. It therefore remains open on remand. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

46 *It is so ordered.*

47 Justice STEVENS, with whom Justice BRENNAN and Justice BLACKMUN join, concurring in part and dissenting in part.

48 Today the Court correctly rejects the contention that American courts should readily "pierce the corporate veils" of separate juridical entities established by foreign governments to perform governmental functions. Accordingly, I join Parts I, II, III-A, and III-B of the Court's opinion. But I respectfully dissent from Part III-C, in which the Court endeavors to apply the general principles it has enunciated. Instead I would vacate the judgment and remand the case to the Court of Appeals for further proceedings.

49 As the Court acknowledges, the evidence presented to the District Court did not focus on the factual issue that the Court now determines to be dispositive. Only a single witness testified on matters relating to Bancec' legal status and operational autonomy. The record before the District Court also included English translations of various Cuban statutes and resolutions, but there was no expert testimony on the significance of those foreign legal documents. Finally, as the Court notes, the record includes a July 1961 stipulation of the parties and a May 1975 affidavit by counsel for respondent. *Ante,* at 616-617, n. 3. It is clear to me that the materials of record that have been made available to this Court are not sufficient to enable us to determine the rights of the parties.

50 The Court relies heavily on the District Court's statement that "the devolution of [Bancec's] claim, however viewed, brings it into the hands of the Ministry [of Foreign Trade], or Banco Nacional." But that statement should not be given dispositive significance, for the District Court made no inquiry into the capacity

in which either entity might have taken Bancec's claim. If the Ministry of Foreign Trade held the claim on its own account, arguably the Cuban government could be subject to Citibank's setoff. But it is clear that the Ministry held the claim for six days at most, during the interval between the promulgation of Laws No. 930 and No. 934 on February 23, 1961, and the issuance of Resolution No. 1 on March 1. It is thus possible that these legal documents reflected a single, integrated plan of corporate reorganization carried out over a six-day period, which resulted in the vesting of specified assets of Bancec in a new, juridically autonomous corporation, Empresa.[1] Respondents argue that the Ministry played the role of a trustee, "entrusted and legally bound to transfer Bancec's assets to the new *empresa* [foreign trade enterprise]. . . . The Republic having acted as a trustee, there could be no counterclaim based upon its acts in an individual capacity." Brief for Respondent 57.

51 Of course, the Court may have reached a correct assessment of the transactions at issue. But I continue to believe that the Court should not decide factual issues that can be resolved more accurately and effectively by other federal judges, particularly when the record presented to this Court is so sparse and uninformative.[2]

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1 Law No. 934 provides that "[a]ll the functions of a mercantile character heretofore assigned to [Bancec] are hereby transferred and vested in the foreign trade enterprises or houses set up hereunder, which are subrogated to the rights and obligations of said former Bank in pursuance of the assignment of those functions ordered by the Minister." App. to Pet. for Cert. 24d.

2 Citibank's answer alleged that the suit was "brought by and for the benefit of the Republic of Cuba by and through its agent and wholly-owned instrumentality, . . . which is in fact and in law and in form and function an integral part of and indistinguishable from the Republic of Cuba." App. 113.

3 The bulk of the evidence at trial was directed to the question whether the value of Citibank's confiscated branches exceeded the amount Citibank had already recovered from Cuba, including a setoff it had successfully asserted in *Banco Nacional de Cuba v. First National City Bank,* 478 F.2d 191 (CA2 1973) (*Banco I*), the decision on remand from this Court's decision in *First National City Bank v. Banco Nacional de Cuba,* 406 U.S. 759, 92 S.Ct. 1808, 32 L.Ed.2d 466 (1972). Only one witness, Raul Lopez, testified on matters touching upon the question presented. (A second witness, Juan Sanchez, described the operations of Bancec's predecessor. App. 185-186.) Lopez, who was called by Bancec, served as a lawyer for Banco Nacional from 1953 to

1965, when he went to work for the Foreign Trade Ministry. He testified that "Bancec was an autonomous organization that was supervised by the Cuban government but not controlled by it." App. 197. According to Lopez, under Cuban law Bancec had independent legal status, and could sue and be sued. Lopez stated that Bancec's capital was supplied by the Cuban government and that its net profits, after reserves, were paid to Cuba's Treasury, but that Bancec did not pay taxes to the Government. *Id.,* at 196.

The District Court also took into evidence translations of the Cuban statutes and resolutions, as well as the July 1961 stipulation for leave to file a motion to file an amended complaint substituting the Republic of Cuba as plaintiff. The court stated that the stipulation would be taken "for what it is worth," and acknowledged respondent's representation that it was based on an "erroneous" interpretation of Cuba's law. *Id.,* at 207-209.

4 Judge vanPelt Bryan, before whom the case was tried, died before issuing a decision. With the parties' consent, Judge Brieant decided the case based on the record of the earlier proceedings. 505 F.Supp. 412, 418 (1980).

5 The District Court stated that the events surrounding Bancec's dissolution "naturally inject a question of 'real party in interest' into the discussion of Bancec's claim," but it attached "no significance or validity to arguments based on that concept." 505 F.Supp., at 425. It indicated that when Bancec dissolved, the claim on the letter of credit was "the sort of asset, right and claim peculiar to the banking business, and accordingly, probably should be regarded as vested in Banco Nacional. . . ." *Id.,* at 424. Noting that the Court of Appeals, in *Banco I,* had affirmed a ruling that Banco Nacional could be held liable by way of setoff for the value of Citibank's seized Cuban assets, the court concluded:

"[T]he devolution of [Bancec's] claim, however viewed, brings it into the hands of the Ministry, or Banco Nacional, each an *alter ego* of the Cuban Government. . . . [W]e accept the present contention of plaintiff's counsel that the order of this Court of July 6th [1961] permitting, but apparently not requiring, the service of an amended complaint in which the Republic of Cuba itself would appear as a party plaintiff in lieu of Bancec was based on counsel's erroneous assumption, or an erroneous interpretation of the laws and resolutions providing for the devolution of the assets of Bancec. Assuming this to be true, it is of no moment. The Ministry of Foreign Trade is no different than the Government of which its minister is a member." *Id.,* at 425 (emphasis in original).

6 In a footnote, the Court of Appeals referred to Bancec's dissolution and listed its successors, but its opinion attached no significance to that event. 658 F.2d, at

916, n. 4.

7 In relevant part, 28 U.S.C. § 1607 provides:

"In any action brought by a foreign state . . . in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

* * * * *

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state."

As used in 28 U.S.C. § 1607, a "foreign state" includes an "agency or instrumentality of a foreign state. . . ." 28 U.S.C. § 1603(a).

Section 1607(c) codifies our decision in *National City Bank v. Republic of China,* 348 U.S. 356, 75 S.Ct. 423, 99 L.Ed. 389 (1955). See H.R.Rep. No. 94-1487, p. 23 (1976).

8 See also H.R.Rep. No. 94-1487, p. 28, U.S.Code Cong. & Admin.News 1976, p. 6627 (in deciding whether property in the United States of a foreign state is immune from attachment and execution under 28 U.S.C. § 1610(a)(2), "[t]he courts will have to determine whether property 'in the custody of' an agency or instrumentality is property 'of' the agency or instrumentality, whethe property held by one agency should be deemed to be property of another, [and] whether property held by an agency is property of the foreign state.")

9 See also Hadari, The Choice of National Law Applicable to the Multinational Enterprise and the Nationality of Such Enterprises, 1974 Duke L.J. 1, 15-19.

10 Cf. *Anderson v. Abbott,* 321 U.S. 349, 365, 64 S.Ct. 531, 539, 88 L.Ed. 793 (1944) (declining to apply the law of the state of incorporation to determine whether a banking corporation complied with the requirements of federal banking laws because "no State may endow its corporate creatures with the power to place themselves above the Congress of the United States and defeat the federal policy concerning national banks which Congress has announced").

11 Pointing out that 28 U.S.C. § 1606, see *ante,* at 620, contains language identical to the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2674 (1976 ed.), 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. Section 1606 provides that "[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity . . ., the foreign

state shall be liable in the same manner and to the same extent as a private individual in like circumstances." Thus, 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. The statute is silent, however, concerning the rule governing the attribution of liability *among* entities of a foreign state. In *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 425, 84 S.Ct. 923, 938, 11 L.Ed.2d 804 (1964), this Court declined to apply the State of New York's act of state doctrine in a diversity action between a United States national and an instrumentality of a foreign state, concluding that matters bearing on the nation's foreign relations "should not be left to divergent and perhaps parochial state interpretations." When it enacted the FSIA, Congress expressly acknowledged "the importance of developing a uniform body of law" concerning the amenability of a foreign sovereign to suit in United States courts. H.R.Rep. No. 94-1487, p. 32. See *Verlinden B.V. v. Central Bank of Nigeria,* --- U.S. ----, ----, 103 S.Ct. 1962, 1969, 75 L.Ed.2d 81 (1983). In our view, these same considerations preclude the application of New York law here.

12 Although this Court has never been required to consider the separate status of a foreign instrumentality, it has considered the legal status under federal law of United States government instrumentalities in a number of contexts, none of which are relevant here. See, *e.g., Keifer & Keifer v. Reconstruction Finance Corp.,* 306 U.S. 381, 59 S.Ct. 516, 83 L.Ed. 784 (1939) (determining that Congress did not intend to endow corporations chartered by the Reconstruction Finance Corporation with immunity from suit).

13 Friedmann, "Government Enterprise: A Comparative Analysis" in Government Enterprise: A Comparative Study 306-307 (W. Friedmann & J.F. Garner eds. 1970). See D. Coombes, State Enterprise: Business or Politics? (1971) (United Kingdom); Dallmayr, Public and Semi-Public Corporations in France, 26 Law & Con emp. Prob. 755 (1961); J. Quigley, The Soviet Foreign Trade Monopoly 48-49, 119-120 (1974); Seidman, "Government-sponsored Enterprise in the United States," in The New Political Economy 85 (B. Smith ed. 1975); Supranowitz, The Law of State-Owned Enterprises in a Socialist State, 26 Law & Contemp.Prob. 794 (1961); United Nations Department of Economic and Social Affairs, Organization, Management and Supervision of Public Enterprises in Developing Countries 63-69 (1974) (hereinafter United Nations Study); A.H. Walsh, The Public's Business: The Politics and Practices of Government Corporations 313-321 (1978) (Europe).

14 Friedmann, *supra,* at 334; United Nations Study, *supra,* at 63-65.

15 President Franklin D. Roosevelt described the Tennessee Valley Authority,

perhaps the best known of the American public corporations, as "a corporation clothed with the power of government but possessed of the flexibility and initiative of a private enterprise." 77 Cong.Rec. 1423 (1933). See also J. Thurston, Government Proprietary Corporations in the English-Speaking Countries 7 (1937).

16 J. Thurston, *supra,* at 43-44. This principle has long been recognized in courts in common law nations. See *Bank of the United States v. Planters' Bank of Georgia,* (22 U.S.) 9 Wheat. 904, 6 L.Ed. 244 (1824); *Tamlin v. Hannaford,* [1950] 1 K.B. 18, 24 (C.A.).

17 See Posner, The Rights of Creditors of Affiliated Corporations, 43 U.Chi.L.Rev. 499, 516-517 (1976) (discussing private corporations).

18 The British courts, applying principles we have not embraced as universally acceptable, have shown marked reluctance to attribute the acts of a foreign government to an instrumentality owned by that government. In *I Congreso del Partido,* [1983] A.C. 244, a decision discussing the so-called "restrictive" doctrine of sovereign immunity and its application to three Cuban state-owned enterprises, including Cubazucar, Lord Wilberforce described the legal status of government instrumentalities:

"State-controlled enterprises, with legal personality, ability to trade and to enter into contracts of private law, though wholly subject to the control of their state, are a well-known feature of the modern commercial scene. The distinction between them, and their governing state, may appear artificial: but it is an accepted distinction in the law of English and other states.

Quite different considerations apply to a state-controlled enterprise acting on government directions on the one hand, and a state, exercising sovereign functions, on the other." *Id.,* at 258 (citation omitted).

Later in his opinion, Lord Wilberforce rejected the contention that commercial transactions entered into by state-owned organizations could be attributed to the Cuban government. "The status of these organizations is familiar in our courts, and it has never been held that the relevant state is in law answerable for their actions." *Id.,* at 271. See also *Trendtex Trading Corp. v. Central Bank of Nigeria,* [1977] Q.B. 529 in which the Court of Appeal ruled that the Central Bank of Nigeria was not an "alter ego or organ" of the Nigerian government for the purpose of determining whether it could assert sovereign immunity. *Id.,* at 559.

In *C. Czarnikow, Ltd. v. Rolimpex,* [1979] A.C. 351, the House of Lords affirmed a decision holding that Rolimpex, a Polish state trading enterprise that

sold Polish sugar overseas, could successfully assert a defense of *force majeure* in an action for breach of a contract to sell sugar. Rolimpex had defended on the ground that the Polish government had instituted a ban on the foreign sale of Polish sugar. Lord Wilberforce agreed with the conclusion of the court below that, in the absence of "clear evidence and definite findings" that the foreign government took the action "purely in order to extricate a state enterprise from contractual liability," the enterprise cannot be regarded as an organ of the state. Rolimpex, he concluded, "is not so closely connected with the government of Poland that it is precluded from relying on the ban [on foreign sales] as government intervention. . . ." *Id.,* at 364.

19 See 1 W.M. Fletcher, Cyclopedia of the Law of Private Corporations § 41 (rev. perm. ed. 1974):

"[A] corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons." *Id.,* at 166 (footnotes omitted).

See generally, H. Henn, Handbook of the Law of Corporations § 146 (2d ed. 1970); I.M. Wormser, Disregard of the Corporate Fiction and Allied Corporate Problems 42-85 (1927).

20 In *Case Concerning The Barcelona Traction, Light & Power Co.,* 1970 I.C.J. 3, the International Court of Justice acknowledged that, as a matter of international law, the separate status of an incorporated entity may be disregarded in certain exceptional circumstances:

"Forms of incorporation and their legal personality have sometimes not been employed for the sole purposes they were intended to serve; sometimes the corporate entity has been unable to protect the rights of those who have entrusted their financial resources to it; thus inevitably there have arisen dangers of abuse, as in the case of many other institutions of law. Here, then, as elsewhere, the law, confronted with economic realities, has had to provide protective measures and remedies in the interests of those within the corporate entity as well as those outside who have dealings with it: the law has recognized that the independent existence of the legal entity cannot be treated as an absolute. It is in this context that the process of 'lifting the corporate veil' or 'disregarding the legal entity' has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent misuse of the privileges of legal personality, as in certain

cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations.

* * * * *

In accordance with the principle expounded above, the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law. . . ." *Id.,* at 38-39.

On the application of these principles by European courts, see Cohn and Simitis, "Lifting the Veil" in the Company Laws of the European Continent, 12 Int. & Comp.L.Q. 189 (1963); Hadari, The Structure of the Private Multinational Enterprise, 71 Mich.L.Rev. 729, 771, n. 260 (1973).

21 *Trustees of Dartmouth College v. Woodward,* (17 U.S.) 4 Wheat. 514, 636, 4 L.Ed. 629 (1819).

22 Pointing to the parties' failure to seek findings of fact in the District Court concerning Bancec's dissolution and its aftermath, Bancec contends that the District Court's order denying its motion to substitute Cuba Zucar as plaintiff precludes further consideration of the effect of the dissolution. While it is true that the District Court did not hear evidence concerning *which* agency or instrumentality of the Cuban Government, under Cuban law, succeeded to Bancec's claim against Citibank on the letter of credit, resolution of that question has no bearing on our inquiry. We rely only on the fact that Bancec was dissolved by the Cuban Government and its assets transferred to entities that may be held liable on Citibank's counterclaim—undisputed facts readily ascertainable from the statutes and orders offered in the District Court by Bancec in support of its motion to substitute Cuba Zucar.

23 Law No. 930, the law dissolving Bancec, contains the following recitations:

"WHEREAS, the measures adopted by the Revolutionary Government in pursuance of the Program of the Revolution have resulted, within a short time, in profound social changes and considerable institutional transformations of the national economy.

"WHEREAS, among these institutional transformations there is one which is specially significant due to its transcendence in the economic and financial fields, which is the nationalization of the banks ordered by Law No. 891, of October 13, 1960, by virtue of which the banking functions will hereafter be the exclusive province of the Cuban Government.

"WHEREAS, the consolidation and the operation of the economic and social conquests of the Revolution require the restructuration into a sole and centralized banking system, operated by the State, constituted by the [Banco Nacional], which will foster the development and stimulation of all productive activities of the Nation through the accumulation of the financial resources thereof, and their most economic and reasonable utilization. . . ." App. to Pet. for Cert. 14d-15d.

24 The parties agree that, under the Cuban Assets Control Regulations, 31 CFR Part 515 (1982), any judgment entered in favor of an instrumentality of the Cuban Government would be frozen pending settlement of claims between the United States and Cuba.

25 See also *Banco Nacional de Cuba v. First National City Bank, supra,* 406 U.S., at 770-773, 92 S.Ct., at 1814-1816 (Douglas, J., concurring in the result); *Federal Republic of Germany v. Elicofon,* 358 F.Supp. 747 (EDNY 1972), aff'd, 478 F.2d 231 (CA2 1973), cert. denied, 415 U.S. 931, 94 S.Ct. 1443, 39 L.Ed.2d 489 (1974). In *Elicofon,* the District Court held that a separate juridical entity of a foreign state not recognized by the United States may not appear in a United States court. A contrary holding, the court reasoned, "would permit non-recognized governments to use our courts at will by creating 'juridical entities' whenever the need arises." 358 F.Supp., at 757.

26 See *Banco I, supra,* 478 F.2d, at 194.

27 The District Court adopted, and both Citibank and the Solicitor General urge upon the Court, a standard in which the determination whether or not to give effect to the separate juridical status of a government instrumentality turns in part on whether the instrumentality in question performed a "governmental function." We decline to adopt such a standard in this case, as our decision is based on other grounds. We do observe that the concept of a "usual" or a "proper" governmental function changes over time and varies from nation to nation. Cf. *New York v. United States,* 326 U.S. 572, 580, 66 S.Ct. 310, 313, 90 L.Ed. 326 (1945) (opinion of Frankfurter, J.) ("To rest the federal taxing power on what is 'normally' conducted by private enterprise in contradiction to the 'usual' governmental functions is too shifting a basis for determining constitutional power and too entangled in expediency to serve as a dependable legal criterion"); *id.,* at 586, 66 S.Ct., at 316 (Stone, C.J., concurring); *id.,* at 591, 66 S.Ct., at 318 (Douglas, J., dissenting). See also Friedmann, The Legal Status and Organization of the Public Corporation, 16 Law & Contemp.Prob. 576, 589-591 (1951).

28 Bancec does not suggest, and we do not believe, that the act of state doctrine,

see *e.g., Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964), precludes this Court from determining whether Citibank may set off the value of its seized Cuban assets against Bancec's claim. Bancec does contend that the doctrine prohibits this Court from inquiring into the motives of the Cuban Government for incorporating Bancec. Brief for Respondent 16-18. We need not reach this contention, however, because our conclusion does not rest on any such assessment.

1 Law No. 930 provided, in part, that Bancec's "trade functions will be assumed by the foreign trade enterprises or houses of the Ministry of Foreign Trade," App. to Pet. for Cert. 16d, App. 104. Law No. 934, correspondingly, stated, "All the functions of a mercantile character heretofore assigned to said Foreign Trade Bank of Cuba are hereby transferred and vested in the foreign trade enterprises or houses set up hereunder, which are subrogated to the rights and obligations of said former Bank in pursuance of the assignment of those functions ordered by the Minister." App. to Pet. for Cert. 24d. The preamble of Resolution No. 1 of 1961, issued on March 1, 1961, explained that Law No. 934 had provided "that all functions of a commercial nature that were assigned to the former Cuban Bank for Foreign Trade are attributed to the enterprises or foreign trade houses which are subrogated in the rights and obligations of said Bank." Nothing in the affidavit filed by respondent in May 1975 elucidates the precise nature of these transactions, or explains how Bancec's former trading functions were exercised during the six-day interval. App. 132-137.

2 Nor do I agree that a contrary result "would cause such an injustice." *Ante,* at 632. Petitioner is only one of many American citizens whose property was nationalized by the Cuban Government. It seeks to minimize its losses by retaining $193,280.30 that a purchaser of Cuban sugar had deposited with it for the purpose of paying for the merchandise, which was delivered in due course. Having won this lawsuit, petitioner will simply retain that money. If petitioner's contentions in this case had been rejected, the money would be placed in a fund comprised of frozen Cuban assets, to be d stributed equitably among all the American victims of Cuban nationalizations. *Ante,* at 632, n. 24. Even though petitioner has suffered a serious injustice at the hands of the Cuban Government, no special equities militate in favor of giving this petitioner a preference over all other victims simply because of its participation in a discrete, completed, commercial transaction involving the sale of a load of Cuban sugar.

Annex 29

***Flatow v. Islamic Republic of Iran et al.*, U.S. District Court, District of Columbia, 15 November 1999, 74 F. Supp. 2d 18 (D.D.C. 1999)**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEPHEN M. FLATOW,

Plaintiff,

v.

THE ISLAMIC REPUBLIC OF IRAN,
THE IRANIAN MINISTRY OF INFORMATION & SECURITY,
AYATOLLAH ALI HOSEINIE KHAMENEI,
ALI AKBAR HASHEMI-RAFSANJANI,
ALI FALLAHIAN-KHUZESTANI, and
JOHN DOES 1-99,

Defendants.

C.A. No. 97-396 (RCL)

MEMORANDUM OPINION

The United States moves to quash the writ of attachment entered by the Clerk of this Court on November 18, 1998, which purports to attach "all credits held by the United States to the benefit of the Islamic Republic of Iran," including U.S. Treasury funds owed to Iran in accordance with an award of the Iran-United States Claims Tribunal. Seeking these funds to satisfy part of his prior judgment against Iran, Plaintiff Stephen Flatow maintains that certain amendments to the Foreign Sovereign Immunities Act waive the United States' sovereign immunity with respect to U.S. funds owed to judgment debtors. 28 U.S.C. §1610(f)(1)(A) & §1610(a)(7) (Supp. 1999). Because this Court finds that Congress has not clearly and unequivocally waived the United States' sovereign immunity, the Court GRANTS the United

States's Motion to Quash the Writ of Attachment. This order, however, is stayed, for ten days, to provide plaintiff the opportunity to seek a further stay from the Court of Appeals.

I. Factual and Procedural Background

In April 1995, Alisa Flatow, Plaintiff Stephen Flatow's 20-year-old daughter, was killed in a terrorist bombing of a tourist bus in Israel. The terrorist group responsible for the suicide bombing mission, the Shaqaqi faction of the Palestine Islamic Jihad, is funded exclusively by the Islamic Republic of Iran ("Iran"). See Flatow v. The Islamic Republic of Iran, 999 F. Supp. 1, 6-9 (D.D.C. 1998).

A year after Alisa Flatow's murder, Congress amended the Foreign Sovereign Immunities Act, 28 U.S.C. §1602-1611 (1994 & Supp. 1999) ("FSIA"), by enacting the Antiterrorism and Effective Death Penalty Act of 1996, which lifts the sovereign immunity of foreign states that commit acts of terrorism or provide material support for terrorism. Pub.L. No. 104-132, Title II, §221(a), (April 24, 1996), 110 Stat. 1241, *codified at* 28 U.S.C. §1605 (1996 & Supp. 1999). In addition, Congress created a federal cause of action for personal injury or death and provided, *inter alia*, that punitive damages would be available in actions brought under the state-sponsored terrorism exception. 28 U.S.C. §1605(a)(7) (1996 & Supp. 1999). This particular amendment became known as the "Flatow Amendment." Flatow, 999 F. Supp. at 12.

Pursuant to these newly enacted provisions, Flatow filed a wrongful death action against Iran, its Ministry of Information & Security, and various government officials. See Flatow, 999 F. Supp. at 8-10. Iran failed to appear. Accordingly, after an evidentiary hearing in which the plaintiff "establishe[d] his claim or right to relief by evidence . . . satisfactory to the Court," 28

U.S.C. §1608(e), this Court entered a default judgment against Iran, finding Iran and its co-defendants jointly and severally liable for loss of accretions, compensatory damages, solatium and $225,000,000.00 in punitive damages. See Flatow, 999 F. Supp. at 5.

Attempting to execute this judgment, plaintiff filed a writ of attachment on November 18, 1998 against certain U.S. Treasury funds owed to Iran. Specifically, plaintiff sought attachment of $5,042,481.65 plus interest in the Treasury Judgment Fund, which was awarded to Iran by the Iran-U.S. Claims Tribunal ("Tribunal"). See Islamic Republic of Iran v. United States, Case No. A/27, AWD No. 586-A27-FT, (Iran-United States Claims Tribunal June 5, 1998).

In opposing the United States' motion to quash the writ of attachment, plaintiff contends that these U.S. Treasury funds, which are earmarked for payment of the Tribunal award, represent the property of Iran. See Iranian Assets Control Regulations, 31 C.F.R. §535.311(1999) (recognizing, *inter alia*, debt, indebtedness and judgments as property). As such, plaintiff maintains that these funds are subject to attachment pursuant to the Foreign Sovereign Immunities Act. 28 U.S.C. §1610(f)(1)(A) & (a)(1)(7) (1998). More specifically, he claims that because he is a judgment-creditor of Iran, he is entitled to these funds as partial satisfaction of his March 11, 1998 judgment.

Needless to say, the United States does not share plaintiff's characterization of these U.S. Treasury funds as "Iranian property." Rather, the United States maintains that attachment of the funds constitutes a suit against the United States, which is barred by the doctrine of sovereign immunity. Buchanan v. Alexander, 45 U.S. (4 How.) 20, 21 (1846).

As a preliminary matter, then, this Court must determine whether the funds at issue constitute property of the United States or Iran. As explained below, controlling authority

dictates the finding that the Treasury funds are U.S. property. As such, sovereign immunity bars their attachment here, as neither the Iranian Assets Control Regulations nor the Foreign Sovereign Immunities Act contain a clear and unequivocal waiver of the United States' immunity.

II. Sovereign Immunity

Suits against the United States are barred by sovereign immunity, absent an effective waiver. Department of Army v. Blue Fox, Inc., 525 U.S. —, 119 S.Ct. 687, 690 (1999)(holding that sovereign immunity barred subcontractor's equitable lien against United States); FDIC v. Meyer, 510 U.S. 471, 475 (1994) (finding that "sue-and-be-sued" clause waived government agency's sovereign immunity); see also United States v. Mitchell, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction."). Waiver of the federal government's sovereign immunity must be "expressed in unequivocal statutory text and cannot be implied." Blue Fox, 119 S.Ct. at 690; Lane v. Pena, 518 U.S. 187, 192 (1996) ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text."); United States v. Nordic Village, Inc., 503 U.S. 30, 33 (1992) ("Waivers of the Government's sovereign immunity, to be effective, must be 'unequivocally expressed.'")(quoting Mitchell, 463 U.S. at 538). Moreover, courts must construe the scope of such waivers "strictly in favor of the sovereign." Blue Fox, 119 S.Ct. at 691; Lane, 518 U.S. at 192; Nordic Village, 503 U.S. at 33. Accordingly, any ambiguities in the statutory text must be resolved in favor of immunity. United States v. Williams, 514 U.S. 527, 531 (1995). In sum, these rules of construction derive from the

fact that sovereign immunity operates as a jurisdictional bar. As such,"the 'terms of [the United States'] consent to be sued in any court define [a] court's jurisdiction to entertain the suit.'" Meyer, 510 U.S. at 475 (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)).

Principles of sovereign immunity apply with equal force to attachments and garnishments. See Buchanan v. Alexander, 45 U.S. (4 How.) 20, 21 (1846); FHA v. Burr, 309 U.S. 242, 243 (1939); see also Neuckirchen v. Wood County Head Start, Inc., 53 F.3d 809, 811 (7th Cir. 1995); Automatic Sprinkler Corp. v. Darla Envtl. Specialists, 53 F.3d 181, 182 (7th Cir. 1995); State of Arizona v. Bowsher, 935 F.2d 332, 334 (D.C. Cir. 1991); Haskins Bros. & Co. v. Morgenthau, 85 F.2d 677, 681 (App. D.C. 1936). Indeed, early Supreme Court precedent established that creditors may not attach funds held by the U.S. Treasury or its agents. Buchanan, 45 U.S. at 21. As the Supreme Court explained, "[s]o long as money remains in the hands of a disbursing officer, it is as much the money of the United States, as if it had not been drawn from the treasury." Id. In other words, funds held in the U.S. Treasury—even though set aside or "earmarked" for a specific purpose—remain the property of the United States until the government elects to pay them to whom they are owed. Id. ("Until paid over by the agent of the government to the person entitled to it, the fund cannot, in any legal sense, be considered a part of his effects."). Notably, the Supreme Court has recently reaffirmed the continued vitality of this precedent. See Department of the Army v.Blue Fox, Inc., 525 U.S. —, 119 S.Ct. 687, 692 (1999) (Rehnquist, C.J.) (citing Buchanan). In holding that a subcontractor's lien against government funds owed to an insolvent prime contractor was barred by sovereign immunity, the Supreme Court stated that such a result "is in accord with our precedent establishing that sovereign immunity bars creditors from attaching or garnishing funds in the Treasury." Id.

Similarly, the D.C. Circuit continues to acknowledge the principle set forth in Buchanan. See State of Arizona v. Bowsher, 935 F.2d 332, 334 (D.C. Cir. 1991) (citing Buchanan). While rejecting states' claims against money owed to their citizens by the federal government, the D.C. Circuit stated that "[w]hen the United States sets aside money for the payment of specific debts, it does not thereby lose its property interest in that money." Id. To the contrary, the court of appeals determined that "[t]he money here is federal money. That various persons have claims against the United States in amounts exactly matching the funds, and intended by Congress to be paid from these funds, does not give those individuals a property interest in the money." Id. at 334.

Even early precedent from this circuit recognized this principle. Haskins Bros. v. Morgenthau, 85 F.2d 677, 681 (App. D.C. 1936). In Haskins, the court of appeals rejected a corporation's claim for recovery of taxes assessed on imported coconut oil, determining that it was "of no consequence that the bill alleges that the fund belongs to appellant and others similarly situated." Rather, the court concluded that "it is money in the Treasury of the United States as to which the United States had and have the power of control and disposition." Id.

Likewise, other courts, following Buchanan, have rejected claims against funds held in the U.S. Treasury. For example, in rejecting a suit against the United States brought by a judgment-creditor of a defunct government contractor, the Seventh Circuit stated that "the principle of governmental immunity is simple: anyone who seeks money from the Treasury needs a statute authorizing that relief." Automatic Sprinkler Corp. v. Darla Envtl. Specialists, 53 F.3d 181, 182 (7th Cir. 1995). And, in Neukirchen v. Wood County Head Start, the Seventh Circuit reversed a district court's issuance of a writ of execution against property purchased by federal

grant funds, stating that "[i]t is axiomatic that the doctrine of sovereign immunity prevents a judgment creditor from attaching federal property, absent consent by the United States." 53 F.3d 809, 811 (7th Cir. 1995) (citing Buchanan); see also Palmiter v. Action, Inc., 733 F.2d 1244, 1248 (7th Cir. 1984) (holding that a judgment creditor could not garnish federal funds granted to a state program); Henry v. First Nat. Bank of Clarksdale, 595 F.2d 291, 309 (5th Cir. 1979) (determining that sovereign immunity protects federal grant funds from garnishment).

Here, it is undisputed that the funds plaintiff seeks to attach are held in the U.S. Treasury. Moreover, plaintiff has pointed to no contrary authority that undermines the continued strength of Buchanan and its progeny. Thus, controlling authority requires this Court to find that the Treasury funds at issue here are U.S. property and that the writ of attachment constitutes a suit against the United States, which is barred by sovereign immunity. Blue Fox, 119 S.Ct. at 69. Accordingly, the Court must grant the United States' motion to quash, unless plaintiff can identify an explicit, unequivocal waiver of the United States' sovereign immunity with respect to these funds. As explained below, however, plaintiff's endeavors in this regard will prove to be unsuccessful.

III. The Foreign Sovereign Immunities Act

Notwithstanding the authority supporting the United States' contention that sovereign immunity bars attachment of funds held in the U.S. Treasury, plaintiff maintains that this doctrine is inapplicable because these funds are not U.S. property. To the contrary, plaintiff asserts that the Tribunal judgment constitutes Iranian property, as defined by the Iranian Assets Control Regulations. 31 C.F.R. §535.311 (1999). Thus, according to plaintiff, as Iranian

property, these funds are subject to attachment pursuant to two amendments to the Foreign Sovereign Immunities Act. See 28 U.S.C. A.§1610(a)(7) (providing that property in the United States of a foreign state used for a commercial activity is subject to attachment to satisfy Section 1605(a)(7) judgments); 28 U.S.C. A. §1610(f)(1)(A) (providing that judgments obtained pursuant to 28 U.S.C.§1605(a)(7) may be satisfied by attachment of property subject to the Iranian Assets Control Regulations). But, as explained below, plaintiff's argument must fail, as he cannot identify a waiver of sovereign immunity that unequivocally and expressly authorizes the attachment and payment of U.S. Treasury funds owed to Iran to third-party judgment-creditors.[1]

Plaintiff's argument that the Foreign Sovereign Immunities Act authorizes attachment of these Treasury funds proceeds from the legally untenable assertion that such funds constitute Iranian property under the Iranian Assets Control Regulations. These regulations define property to

> "include, *but not by way of limitation*, money, checks, drafts, bullion, bank deposits, savings accounts, *debts*, *indebtedness*,. . . any other evidences of title, ownership or indebtedness, . . . *judgments*, . . . and any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future or contingent."

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[1] Plaintiff also advances that the President's waiver of the requirements of Section 1610(f) of the Foreign Sovereign Immunities Act exceeds the scope of the waiver authority that was delegated by Congress. See Waiver of Exception to Immunity from Attachment or Execution, Pub.L. 105-277, Title I, §117(d), 112 Stat. 2681 (October 21, 1998) (stating that "[t]he President may waive the requirements of this section. . . in the interest of national security"); see also Determination to Waive Requirements Relating to Blocked Property of Terrorist-List States, 63 Fed. Reg. 59201 (October 21, 1998) (exercising authority to waive requirements under §117(d) and stating that such requirements "would impede the ability of the President to conduct foreign policy in the interest of national security"). Because the Court finds that the FSIA provisions at issue fail to set forth an effective waiver of U.S. sovereign immunity, and thus are not applicable to funds in the U.S. Treasury, the Court need not address the proper scope of the President's waiver authority under Section 117(d). See Pub.L. No. 105-277, §101 (h) [Title I, §117], 112 Stat. 2681, 2681-491 (1998).

Id. (emphasis added). Admittedly, by its plain terms, this definition appears to cover any debt or judgment held by Iran, irrespective of the identity of the debtor. Nevertheless, this Court need not decide whether this seemingly expansive definition of property covers a judgment against the United States held in the U.S. Treasury, for two reasons. First, to obtain money from the U.S. treasury, there must be a *statute* authorizing payment. See Automatic Sprinkler, 53 F.3d at 182 (citing, *inter alia*, Nordic Village, 503 U.S. at 33-34). Here, plaintiff points to a definition contained in a Treasury *regulation*. Second, and more important, plaintiff's characterization of the Treasury funds as Iranian property is refuted by the weight of authority, see *supra*, which is binding on this Court. Moreover, even assuming *arguendo* that the regulation's definition of property does cover debts or judgments against the United States, plaintiff still could not prevail with his claim, as neither the Iranian Assets Control Regulations[2] nor the Foreign Sovereign Immunities Act contain the sort of express and unequivocal waiver required to abrogate the United States' sovereign immunity. See Blue Fox, 119 S.Ct. at 690 (instructing that "[w]aiver of the federal government's sovereign immunity must be "expressed in unequivocal statutory text and cannot be implied").

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[2]As noted above, the broad definition of property in these regulations makes no specific mention of judgments or debts owed by the United States and held in the Treasury. Indeed, because the regulation is directed at financial institutions, such as private banks, it is questionable whether the regulation even applies to the U.S. Treasury. See, e.g., 31 C.F.R. §500.308 (defining "person"); 31 C.F. R. §500.314 (defining "banking institution"); 31 C.F.R. §500.320 (defining "domestic bank"). Irrespective of its scope, however, none of regulation's provisions expressly authorizes the Secretary of the Treasury to waive the United States' sovereign immunity with respect to the Treasury's Judgment Fund. Nor does any unequivocal expression a waiver of sovereign immunity appear anywhere in the regulations.

A. Section 1610(f)(1) (A)

Proceeding from the unsupported assertion that the Tribunal judgment represents Iranian property, plaintiff argues that Congress intended to abrogate the United States' sovereign immunity for purposes of enforcing judgments obtained under the Foreign Sovereign Immunities Act. To support this position, plaintiff points to the plain language of Section 1610(f)(1)(A) and the canon of statutory construction, *expresio unius est exclusio alterius*. To wit, Section 1610(f)(1) provides that

> ***Notwithstanding any other provision of law***, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), ***any property with respect to which financial transactions are*** prohibited or ***regulated pursuant to*** section 5(b) of the Trading with the Enemy Act (50 U.S.C. 5(b)), section 620(a) of the Foreign Assistance Act of 1961(22 U.S.C.2370(a)), ***sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702),*** or any other proclamation, order, regulation, or license issued pursuant thereto, ***shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality of such state) claiming such property is not immune under section 1605(a)(7).***

28 U.S.C. §1610(f)(1)(A)(emphasis added). Plaintiff posits that the opening clause, "[n]otwithstanding any provision of law," encompasses any sovereign interest of the United States in the Tribunal judgment that exists either by statute or at common law. In addition, plaintiff contends that the one enumerated exception, which applies to property held by or in trust for a natural person, as evidence of Congress' intent that the provision be applicable in all other instances, including attachments of U.S. Treasury funds. 28 U.S.C. §1610(f)(1)(B). In short, plaintiff reasons that because Congress chose to enumerate one exception to this provision, had Congress intended to create other exceptions, such as retaining the sovereign immunity of U.S.

Treasury funds, it would have done so explicitly.

The Court begins by noting the seeming contradiction implicit in plaintiff's argument—*i.e.*, that in a statute purporting to abrogate the sovereign immunity of *foreign* states, Congress would waive the United States' sovereign immunity. But irony or unintended consequence aside, this Court finds that this provision fails to meet the exacting standard for finding an effective waiver of sovereign immunity. See Lane, 518 U.S. at 192 (stating that "waivers of immunity must construed strictly in favor of the sovereign. . . and not enlarge[d] . . .beyond what the language requires") (citations omitted). First, plaintiff's assertions regarding the opening phrase, "notwithstanding any other provision of law," are unpersuasive. Construing, as it must, the scope and ambiguities in favor of the sovereign, Williams, 514 U.S. at 531, the Court finds that the language "provision of law" is sufficiently imprecise so that it could be construed to refer only to other statutes, and not the common law doctrine of sovereign immunity. Nordic Village, 503 U.S. at 34. This narrow interpretation of the opening clause is further supported by reference to the phrase immediately following it, which enumerates various statutes to which the provision applies.

Alternatively, even if the Court were to accept the plaintiff's broad reading of the opening phrase as encompassing the doctrine of sovereign immunity, such a waiver hardly rises to the requisite unequivocal expression mandated by the Supreme Court. See Blue Fox, 119 S.Ct. at 691; Lane, 518 U.S. at 192; Nordic Village, 503 U.S. at 33. Simply put, there is no language whatsoever suggesting that United States waives its immunity from attachment suits filed by third party creditors of Iran. Accordingly, as Congress is presumed to be familiar with the unequivocal expression requirement for waivers of sovereign immunity, see United States Dep't

of Energy v. Ohio, 503 U.S. 607, 614 (1992), the Court must conclude that no such waiver was contemplated here.

B. Section 1610(a)(7)

Alternatively, plaintiff asserts that, even if the Court determines that Section 1610(f)(1)(A) does not apply in this matter, Section 1610(a)(7) authorizes the writ of attachment. Section 1610(a)(7), enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996, provides that

> ***[t]he property in the United States of a foreign state***, as defined in section 1603(a) of this chapter, ***used for commercial activity in the United States***, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, ***if***. . .
>
> > (7)***the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7)***, regardless of whether the property is or was involved with the act upon which the claim is based.

28 U.S.C. §1610(a)(7) (emphasis added). Essentially, plaintiff argues that this provision applies to the Treasury funds because the underlying basis for the Tribunal award was a contract dispute over sales of aircraft equipment between various entities controlled by the Iranian government and Avco Corporation, a U.S. corporation. See Avco Corporation v. Iran Aircraft Indus., Award No. 377-261-3, at ¶145, reprinted in 19 Iran-U.S. C.T.R. 200, 230 (Iran-United States Claims Tribunal July 18, 1988). Hence, according to plaintiff, the "used for commercial activity" requirement is satisfied. But, as explained above, funds in the U.S. Treasury are not properly characterized as the "the property of a foreign state." Moreover, even assuming that the Treasury funds at issue satisfy this "commercial activity" requirement, the Court nonetheless finds that the

statutory text lacks a clear, unequivocal waiver of immunity. Indeed, plaintiff points to nothing in the provision's language that is even remotely suggestive of congressional intent to waive the United States' sovereign immunity.

As a corollary to his argument under Section 1610(a)(7), plaintiff contends that he may attach these Treasury funds by virtue of the Algiers Accords.[3] Specifically, plaintiff notes that Iran and the United States both waived their sovereign immunity with respect to the enforcement of Tribunal awards, by agreeing that "[a]ny award which the Tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with its laws." Algiers Accords, Art. IV (1)(3). Plaintiff reasons that because he is a judgment-creditor of Iran, he "stands in the shoes" of Iran vis à vis the United States. In short, citing Harris v. Balk, 198 U.S. 215 (1905) for the proposition that a creditor may obtain satisfaction on a debt from a third-party debtor of his debtor, plaintiff asserts that he is entitled to benefit from the United States' waiver of sovereign immunity in the Algiers Accords. Without deciding the extent to which, if any, the United States has waived its sovereign immunity with respect to Iran under the Algiers Accords, this Court is unpersuaded by this argument. First, Harris v. Balk did not address claims made against the United States, nor any other sovereign entity; hence it does nothing to alter the standards that apply to waivers of federal sovereign immunity. Moreover, applying the standards outlined by the Supreme Court, this Court does not find that the Algiers Accords contain an express waiver of sovereign immunity that would permit

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[3]See Art. IV.(1)(3), Decl. of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of Iran (19 January 1998), reprinted in U.S. Department of State, Selected Documents No. 19: Hostage Agreements Transmitted to Congress (March 12, 1981) ("Algiers Accords").

a third-party to attach U.S. funds owed to Iran. While plaintiff's assertion that Iran may seek to execute this judgment in any court may be correct, the Accords do not authorize third party creditors to enforce judgments for Iran. Absent a clear and unequivocal statement of consent to such a suit, this Court declines to imply one. Meyer, 510 U.S. at 475.

IV. Conclusion

The Court concludes by acknowledging the apparent unfairness that attends its grant of the United States' motion to quash. Indeed, the Court regrets that its ruling today forestalls plaintiff's efforts to execute a judgment that was issued by this Court. Flatow, 999 F. Supp. at 5. Moreover, the Court appreciates plaintiff's frustration with the White House's present efforts to block his recovery, see Stephen M. Flatow, *In This Case, I Can't Be Diplomatic*, The Washington Post, November 7, 1999, at B2, particularly in light its previous pledges of support.[4] Nonetheless, this Court must remain faithful to its proper role within our constitutional system,

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[4]See, e.g., MEET THE PRESS (NBC Television Broadcast, November 7, 1999)(Interview with White House Chief of Staff John Podesta) (re-broadcasting February 26, 1996 videotape of President Clinton, where he stated "I am asking that Congress pass legislation that will provide immediate compensation to the families, something to which they are entitled under international law, out of Cuba's blocked assets here in the United States. If Congress passes this legislation, we can provide the compensation immediately."); see also President's Remarks on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 WEEKLY COMP. PRES. DOC. 717 (April 24, 1996) (commenting that "[t]his bill strikes a mighty blow against terrorism, and it is fitting that this bill becomes law during National Crime Victim's Rights Week, because it stands up for victims in so many important ways"and concluding that "America will never abide terrorists. . . [w]e will not rest until we have brought them all to justice").

which requires courts to follow the rule of law, not their own individual conceptions of what is fair or just. Accordingly, for the foregoing reasons, the United States' Motion to Quash the Writ of Attachment is GRANTED.

A separate order shall issue this date.

DATE: 11-15-99

Royce C. Lamberth
Royce C. Lamberth
United States District Judge

Annex 30

***Weinstein et al. v. The Islamic Republic of Iran et al.*, U.S. District Court, District of Columbia, 6 February 2002, 184 F.Supp.2d 13 (D.D.C 2002)**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUSAN WEINSTEIN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action Number 00-2601 (RCL)**
	)	
THE ISLAMIC REPUBLIC OF IRAN, et al.,	)	
	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION

This wrongful death action against the Islamic Republic of Iran, the Iranian Ministry of Information and Security, and three senior officials of the Iranian government arises from an act of state-sponsored terrorism. The decedent, a United States citizen named Ira Weinstein, was killed in the terrorist bombing of the Number 18 Egged passenger bus in Jerusalem, Israel on February 25, 1996. The plaintiffs, who are family members and administrators of Ira Weinstein's estate, have brought this action pursuant to the Foreign Sovereign Immunities Act ("FSIA") of 1976, 28 U.S.C. § 1602-1611.

The FSIA grants federal courts jurisdiction over suits involving foreign states and their officials, agents, and employees in certain enumerated instances. In particular, the FSIA creates a federal cause of action for personal injury or wrongful death resulting from acts of state-sponsored terrorism. 28 U.S.C. §1608(e) (giving federal courts jurisdiction over suits "in which money damages are sought against a foreign state for personal injury or death that was caused by

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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[.]"). The statute explicitly eliminates foreign governments' sovereign immunity in suits for money damages based on extrajudicial killings and provides that "[a]n official, employee, or agent of a foreign state designated as a state sponsor of terrorism . . . shall be liable to a United States national or the national's legal representatives for personal injury or death caused by acts . . . for which the courts of the United States may maintain jurisdiction[.]" 28 U.S.C. § 1605(a)(7); 28 U.S.C. § 1605 note, Civil Liability for Acts of State Sponsored Terrorism.

It is worth noting that two recent cases before this Court that were brought under the FSIA involved the same terrorist bombing that killed Ira Weinstein. In Eisenfeld v. Islamic Republic of Iran, 172 F. Supp.2d 1 (D.D.C. 2000), and Mousa v. Islamic Republic of Iran, Civil Action Number 00-2096 (WBB), this Court held the same defendants in the present case jointly and severally liable for the deaths of two other American citizens, Matthew Eisenfeld and Sara Rachel Duker, and for the injuries sustained by Leah Mousa. All three individuals, like Ira Weinstein, were aboard the Number 18 Egged bus when it was bombed on February 25, 1996.

The defendants, despite being properly served with process pursuant to 28 U.S.C. § 1608, have failed to enter an appearance in this matter. As a result, the Court entered default against the defendants on July 16, 2001, pursuant to 28 U.S.C. § 1608(e) and Federal Rule of Civil Procedure 55(a). Notwithstanding indicia of the defendants' willful default, however, the Court

is compelled to make further inquiry prior to entering a judgment by default against them. As with actions against the federal government, the FSIA requires that a default judgment against a foreign state be entered only after a plaintiff "establishes his claim or right to relief that is satisfactory to the Court." 28 U.S.C. § 1608(e).

Accordingly, the Court has engaged in a careful review of the evidence presented in this case, in light of Eisenfeld, Mousa, and the other reported cases brought under the antiterrorism provisions of the FSIA. Wagner v. Islamic Republic of Iran, 172 F. Supp.2d 128 (D.D.C. 2001); Jenco v. Islamic Republic of Iran, 154 F. Supp.2d 27 (D.D.C. 2001); Sutherland v. Islamic Republic of Iran, 151 F. Supp.2d 27 (D.D.C. 2001); Daliberti v. Islamic Republic of Iran, 146 F. Supp.2d 19 (D.D.C. 2001); Elahi v. Islamic Republic of Iran, 124 F. Supp.2d 97 (D.D.C. 2000); Anderson v. Islamic Republic of Iran, 90 F. Supp.2d 107 (D.D.C. 2000); Cicippio v. Islamic Republic of Iran, 18 F. Supp.2d 62 (D.D.C 1998); Flatow v. Islamic Republic of Iran, 999 F. Supp. 1 (D.D.C. 1998); Alejandre v. Republic of Cuba, 996 F. Supp. 1239 (S.D. Fla. 1997). Based upon the extensive evidence presented by the plaintiffs, the Court concludes that they have established their claim and right to relief as set forth below.

I. FINDINGS OF FACT

The Court heard testimony in this matter on December 6 and 7, 2001. The plaintiffs proceeded in the manner of a bench trial and the following findings of fact are based upon the sworn testimony and documents entered into evidence in accordance with the Federal Rules of Evidence. Plaintiffs have "established [their] claim or right to relief by evidence that is

satisfactory to the Court," as required by 28 U.S.C. § 1608(e). The Court finds the following facts to be established by clear and convincing evidence, which would have been sufficient to establish a prima facie case in a contested proceeding.

(1) Ira William Weinstein was born on December 4, 1942, in the United States of America. He was a United States citizen from the time of his birth until his death on April 13, 1996.

(2) Plaintiff Susan Weinstein is the widow of decedent Ira Weinstein. She is, and at all relevant times was, a citizen of the United States. She brings this action in her own right, as Co-Administrator of the Estate of Ira Weinstein, and as the natural guardian of plaintiff David Weinstein.

(3) Plaintiff Jeffrey A. Miller, who is also a citizen of the United States, brings this action as Co-Administrator of the Estate of Ira Weinstein.

(4) Plaintiff Joseph Weinstein is the son of decedent Ira Weinstein. He is, and at all relevant times was, a citizen of the United States.

(5) Plaintiff Jennifer Weinstein Hazi is the daughter of decedent Ira Weinstein. She is, and at all relevant times was, a citizen of the United States.

(6) Plaintiff David Weinstein is the son of decedent Ira Weinstein. He is, and at all relevant times was, a citizen of the United States.

(7) Ira Weinstein, who had served in the United States Navy, worked as a butcher for the Supersol supermarket chain in Israel at the time of his death.

(8) On February 25, 1996, Ira Weinstein boarded the Number 18 Egged bus in Jerusalem, Israel to go to work.

(9) At approximately 6:45 a.m. Jerusalem time, while Ira Weinstein was still aboard, Magid Wardah, another passenger, detonated an explosive charge which, at the direction of HAMAS, he had carried onto the bus concealed in a travel bag. The ensuing explosion caused the complete destruction of the bus, resulted in debris being hurled in excess of 100 meters, and led to the injury and death of numerous individuals, including Ira Weinstein. Nails were placed in the bomb so that it would cause even more injuries than a typical bomb would inflict.

(10) Medical personnel evacuated Ira Weinstein from the site of the bombing to Hadassah Hospital in Jerusalem. Doctors treated Ira Weinstein in the emergency room of the hospital for 1 ½ hours and then admitted him into the intensive care unit, where he stayed until his death on April 13, 1996.

(11) Despite all of his injuries, which are detailed below, Ira Weinstein was conscious upon arrival at the hospital, and remained at least semi-conscious for the majority of his time at Hadassah Hospital.

(12) Dr. Charles Sprung was responsible for Ira Weinstein's medical care at Hadassah Hospital. Dr. Sprung is the director of the general intensive care unit at Hadassah Hospital and is one of the world's foremost experts on severe trauma injuries, including bomb blast injuries and burns. In addition, Dr. Sprung has extensive teaching experience in the field of severe trauma injuries and conditions resulting from bomb blasts, and has conducted a substantial amount of research and published numerous articles in the field. The findings of fact made by the Court

with respect to the injuries sustained by and treatment given to Ira Weinstein are based primarily on the testimony of Dr. Sprung.

(13) To a reasonable degree of medical certainty, Ira Weinstein endured extreme and conscious pain and suffering for forty-nine days, from the time of the explosion on February 25, 1996, until his death on April 13, 1996.

(14) Specifically, Ira Weinstein suffered severe and painful injuries from the bomb blast itself. The explosion resulted in such pressure within the confines of the bus that portions of Ira Weinstain's skin were literally ripped from his body. Ira Weinstein suffered an extreme amount of pain as a result of this injury. The blast also caused second to fourth degree burns to 30-35 percent of Ira Weinstein's body, including on his legs, chest, face, and hands. These burns required debridements (the procedure of cleaning out and taking off dead skin caused by burns) and skin grafts every one to three days, and the burn dressings also needed to be changed on a regular basis. All of this treatment caused Ira Weinstein to experience severe pain and to suffer greatly.

(15) As a result of the bomb blast, Ira Weinstein also sustained severe injuries to his lungs that caused him to suffer respiratory distress and failure. Upon his arrival at the hospital, Ira Weinstein had to be intubated, he had to have chest tubes inserted, and he had to be placed on a ventilator so that he could breathe. Ira Weinstein endured pain as a result of all of these things as well. Moreover, the treatment of Ira Weinstein was complicated because burn injuries are generally treated with fluids while limiting the amount of fluid intake, conversely, is the treatment for lung and respiratory injuries.

(16) As a result of his injuries, Ira Weinstein developed infections that caused further complications. The most devastating side effect from the infections was low blood pressure, which at times caused him to go into shock and to be near death. Further, bomb blast injuries and burns are usually treated with high doses of pain medication. This could not be done in Ira Weinstein's case, however, because pain medication lowers blood pressure, and since his blood pressure was already low, the pain medication itself could have killed him. Thus, Ira Weinstein could not receive an adequate amount of pain medication and, consequently, suffered a higher level of pain throughout his stay at the hospital than a patient with his injuries otherwise would have endured.

(17) Ira Weinstein also had to have surgery to relieve abdominal swelling that was caused by excess air pushed downward from his chest area. Doctors were unable, however, to close his abdomen following surgery because of the other injuries he had sustained and the pressure problems that he had.

(18) Ira Weinstein also suffered from abnormal bleeding, which was likely caused by the damage to his lungs. The abnormal bleeding resulted in tremendous swelling of his eyelids, face, and head. The abnormal bleeding further led to extensive clotting that required Dr. Sprung and his staff to perform intermittently a procedure to suction out clots that were developing in his lungs. The procedure, which included the insertion of a tube into Ira Weinstein's windpipe to extract the blood clots, was very painful. Further, while a normal person may only have needed to be suctioned twice every eight hours, Ira Weinstein at various times had to be suctioned several times in an hour because of the abnormal bleeding he was experiencing.

(19) As a result of the infections Ira Weinstein developed (and to prevent future infections), he had both legs amputated on April 11, 1996.

(20) On April 13, 1996, Ira Weinstein died as a result of the injuries he sustained in the bombing of the Number 18 Egged bus.

(21) Dr. Sprung met with the family on a daily basis and kept them updated as to Ira Weinstein's condition. Dr. Sprung testified that Ira Weinstein's family appeared devastated during his stay at Hadassah Hospital.

(22) Plaintiffs Susan Weinstein, Joseph Weinstein, Jennifer Weinstein Hazi, and David Weinstein were informed of the attack and the injuries sustained by Ira Weinstein on February 25, 1996. They visited Ira Weinstein at Hadassah Hospital numerous times.

(23) HAMAS publicly claimed credit for the February 25, 1996 attack on the Number 18 Egged bus shortly after the bombing. Statements made by Hassan Salamah, the HAMAS member who planned the attack, to Israeli police verified this claim. Salamah later corroborated HAMAS' responsibility for the bombing in an interview with the CBS Television news program *60 Minutes*.

(24) HAMAS, the popular name for the Islamic Resistance Movement, is an organization supported by The Islamic Republic of Iran, dedicated to the waging of Jihad, or a holy war employing terrorism with the object of seizing the leadership of the Palestinian people and asserting sovereignty and the rule of the Muslim religion over all of Palestine, including all territory of the State of Israel.

(25) The affidavit testimony of Dr. Reuven Paz and Dr. Patrick Clawson establishes conclusively that the defendants knew of the destructive purposes and objectives of HAMAS, which were set forth in detail in the organization's charter introduced into evidence as Exhibit B to Plaintiff's Exhibit # 1.

(26) Notwithstanding the destructive purposes and objectives of HAMAS, the Islamic Republic of Iran gave the organization at least $25-$50 million in 1995 and 1996, and also provided other groups with tens of millions of dollars to engage in terrorist activities. In total, Iran gave terrorist organizations, such as HAMAS, between $100 and $200 million per year during this period. The money, among other things, supported HAMAS' terrorist activities by, for example, bringing HAMAS into contact with potential terrorist recruits and by providing legitimate front activities behind which HAMAS could hide its terrorist activities. In fact, this was a peak period for Iranian economic support of HAMAS because Iran typically paid for results, and HAMAS was providing "results" by committing numerous bus bombings such as the one on February 25, 1996.

(27) The conclusion of Dr. Paz and Dr. Clawson that the Islamic Republic of Iran had given material support to HAMAS was further supported by the statements of Hassan Salamah to the Israeli Police and to the CBS reporter during the *60 Minutes* interview. In the *60 Minutes* interview, Salamah projected himself as relaxed and satisfied with his supervision of the murder of 50 people, including decedent Ira Weinstein. In those statements, Salamah further explained that after joining HAMAS he went to the Sudan for indoctrination training, following which he was sent to Syria, from where he was transported by Iranian aircraft to a base near Tehran.

Osamah Hamdan, the official representative of HAMAS in Iran, met him in Tehran. For three months, Iranian military instructors, assisted by translators, trained Salamah at the base outside Tehran in the use of explosives, automatic weapons, hand grenades, RPG and LAW missiles, terrorist methods of ambush, deactivation of land mines for extraction of explosive material, and trigger mechanism for various explosive materials. He sketched out two similar mechanisms, one of which was used in an operation at Gush Qatif in the Gaza Strip in 1995. According to the statements, he received all of his training in the use of explosives in Iran. The statements also include mention of meeting with Mohammed Deif, commander of the military, terrorist wing of HAMAS. Following completion of training, Salamah was sent back to Israel so that he could carry out terrorist attacks, such as the one on the Number 18 Egged bus on February 25, 1996.

(28) Defendant the Islamic Republic of Iran is a foreign state and has been designated as a state sponsor of terrorism pursuant to section 6(j) of the Export Administration Act of 1979, 50 U.S.C. App. § 2405(j) continuously since January 19, 1984.

(29) Defendants Ayatollah Ali Hoseini Khamenei, Ali Akbar Hashemi-Rafsanjani, and Ali Fallahian-Kuzestani were high officials of the Islamic Republic of Iran on February 25, 1996. They were aware of, consented to, and were involved in Iran's support for HAMAS during the performance of their official duties. In particular, their approval would have been necessary to carry out the economic and other commitment of Iran to HAMAS, including the training of HAMAS terrorists in Iran.

(30) Defendant the Iranian Ministry of Information and Security is the Iranian intelligence service, functioning both within and beyond the territorial borders of Iran. Acting as an agent of

the Islamic Republic of Iran, the Iranian Ministry of Information and Security performed acts within the scope of its agency, within the meaning of 28 U.S.C. § 1605(a)(7) and 28 U.S.C. § 1605 note, which caused the death of Ira Weinstein. The Iranian Ministry of Information and Security acted as a conduit for the Islamic Republic of Iran's provision of funds to HAMAS and training to the terrorists under the direction of HAMAS, including Hassan Salamah.

(31) Ira Weinstein's death was caused by a willful and deliberate act of extrajudicial killing in that it was the result of an explosion of material carried aboard the Number 18 Egged bus on February 25, 1996, and intentionally detonated by Magid Wardah at approximately 6:45 a.m. Jerusalem time, acting under instructions from Hassan Salameh, who was acting as an agent of HAMAS.

(32) As a result of Ira Weinstein's death, his Estate suffered a loss of accretions that could have been expected to occur during the course of his anticipated life expectancy in the amount of $248,164.00.

(33) As a result of Ira Weinstein's death, his surviving wife and children have suffered and will continue to suffer severe mental anguish and the loss of his society and companionship. Indeed, despite being emotionally and psychologically taxing to do so, all of the family member plaintiffs testified extensively about the mental anguish they have suffered as a result of Ira Weinstein's death.

II. CONCLUSIONS OF LAW

A. Subject Matter Jurisdiction—The FSIA Controls This Action

As this Court noted in Flatow, an action brought against a foreign state, its intelligence service acting as its agent, and three of its officials, acting in their official capacities, must be brought under the FSIA. Flatow, 999 F. Supp. at 10. See also Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993) (noting that "[u]nder the [FSIA], a foreign state is presumptively immune from the jurisdiction of United States court; unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state."). Indeed, the FSIA must be applied in every action involving a foreign state defendant. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 489 (1983); 28 U.S.C. § 1330. That is, the sole bases for subject matter jurisdiction in an action against a foreign state defendant are the FSIA's enumerated exceptions to immunity. Argentine Republic v. Amerada hess Shipping Corp., 488 U.S. 428 (1989). Accordingly, this Court lacks jurisdiction over this matter unless it falls within one of the FSIA's enumerated exceptions to foreign sovereign immunity. Nelson, 507 U.S. at 355.

The FSIA has been construed to apply to individuals for acts performed in their official capacity on behalf of either a foreign state or its agency or instrumentality. El-Fadl v. Central Bank of Jordan, 75 F.3d 668, 671 (D.C. Cir. 1996) (citing Chuidian v. Phillipine Nat'l Bank, 912 F.2d 1095, 1099-1103 (9th Cir. 1990). In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996, which abrogates the immunity of foreign states for their sponsorship of terrorist acts. 28 U.S.C. §1605. Specifically, Congress amended the FSIA to eliminate the immunity of those foreign states officially designated as state sponsors of terrorism by the

Department of State, if the foreign state so designated commits a terrorist act, or provides material support and resources to an individual or entity that commits such a terrorist act, which results in the death or personal injury of a United States citizen. 28 U.S.C. § 1605(a)(7). Based on the foregoing authority, the Court concludes that it has jurisdiction over the subject matter of this action.

B. Personal Jurisdiction

This Court has *in personam* jurisdiction over foreign state sponsors of terrorism under 28 U.S.C § 1605(a)(7). As the Court noted in Flatow, the FSIA provides that personal jurisdiction over defendants will exist where a plaintiff establishes the applicability of an exception to immunity pursuant to 28 U.S.C. § 1604, §1605, or § 1607, and service of process has been accomplished pursuant to 28 U.S.C. § 1608. Flatow, 999 F. Supp. at 19. Plaintiffs have demonstrated by clear and convincing evidence that § 1605(a)(7) of the FSIA applies in this action, and that service of process was properly accomplished pursuant to 28 U.S.C. § 1608.

C. The Actions of the Defendants

A foreign state may be liable under the FSIA when there is injury from a terrorist act, that act was perpetrated by the designated state or an agent receiving material support from the designated state, the provision of support was an act authorized by the foreign state, the foreign state has been designated as one providing material support to terrorism, either the victim or the plaintiff was a United States national at the time of the terrorist act, and similar conduct by the Untied States, its agents, officials or employees within the United States would be actionable. In

this case, all of these elements have been demonstrated by clear and convincing evidence. 28 U.S.C. § 1605(a)(7); 28 U.S.C. § 1605 note.

The action of the HAMAS agent in detonating an explosive charge on the Number 18 Egged bus on February 25, 1996 falls within the scope of the Torture Victim Protection Act of 1991. The Court finds that it was a "deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all judicial guarantees which are recognized as indispensable by civilized peoples."

There is no question that HAMAS and its agents received massive material and technical support from the Islamic Republic of Iran. The sophistication demonstrated in the use of a relatively small explosive charge with such devastating effect indicates that it is unlikely that this attack could have resulted in such loss of life without the assistance of regular military forces, such as those of Iran. Thus, the defendants not only provided the terrorists with the technical knowledge required to carry out the February 25, 1996 attack on the Number 18 Egged bus, but also gave HAMAS the funding necessary to do so. Further, as of February 25, 1996, Iran was a nation designated by the United States Department of State as providing material support for terrorism and Ira Weinstein was an American national.

Finally, it is beyond question that if officials of the United States, acting in their official capacities, provided material support to a terrorist group to carry out an attack of this type, they would be civilly liable and would have no defense of immunity. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

D. Damages

(1) Wrongful Death. The plaintiffs produced comprehensive affidavit testimony from Professor Adrian Ziderman detailing the loss of accretions to the Estate of Ira Weinstein. These calculations were based on conservative procedures and assumptions. In accordance with Professor Ziderman's affidavit and the report attached thereto, the Court concludes that judgment should be entered for this element of damages for the Estate of Ira Weinstein in the amount of $248,164.00.

(2) Survival Action—Pain and Suffering. The Court has no difficulty, based on the testimony of Dr. Sprung, finding that Ira Weinstein endured extreme pain and that he suffered greatly from the time of the explosion on February 25, 1996, until his death on April 13, 1996. As Dr. Sprung noted, during his seven-week stay at Hadassah Hospital, Ira Weinstein underwent several surgical procedures which were very painful, including the amputation of both legs, and he suffered immense pain as a result of extensive burn and blast injuries. Moreover, because of his particular medical condition, doctors did not provide Ira Weinstein with as much pain medication as they otherwise would have given to someone with the types of injuries he sustained. Consequently, Ira Weinstein endured even more pain than individuals normally would experience with severe burn and blast injuries.

Despite the overwhelming evidence concerning the extent of Ira Weinstein's injuries and the amount of pain and suffering he endured, it is difficult for the Court to determine the appropriate amount of damages to award as compensation for this pain and suffering. As one court aptly noted, "there is no market where pain and suffering are bought and sold, nor any

standard by which compensation for it can be definitely ascertained, or the amount actually endured can be determined[.]" St. Louis S.W. R. Co. v. Kendall, 169 S.W. 822, 824 (Ark. 1914). This is because "[t]he nature of pain and suffering is such that no legal yardstick can be fashioned to measure accurately reasonable compensation for it. No one can measure another's pain and suffering; only the person suffering knows how much he is suffering, and even he could not accurately say what would be reasonable compensation for it. Earning power and dollars are interchangeable; suffering and dollars are not." Herb v. Hallowell, 154 A 582, 584 (Pa.1931). Indeed, it goes without saying that no monetary judgment would truly compensate Ira Weinstein for the pain and suffering he endured as a result of the terrorist attack on the Number 18 Egged bus on February 25, 1996. Nor could any court fashion a remedy that would have ameliorated the pain and suffering that Ira Weinstein endured for those forty-nine days at Hadassah Hospital.

Notwithstanding the inherent difficulty and subjectivity involved in awarding damages based on the pain and suffering of a claimant, compensation is required once liability has been determined and in this case such compensatory damages are certainly warranted. Because there is no precise methodology used to calculate damages for pain and suffering, however, the trier of fact (which in this case is the Court) has a significant amount of discretion in determining what is appropriate compensation. Taylor v. Washington Terminal Co., 409 F.2d 145 (D.C. Cir. 1969); Hysell v. Iowa Public Service Co., 559 F.2d 468, 472-73 (8th Cir. 1977). In making this determination, the Court will not simply award what it abstractly finds to be fair. Rather, in deciding the amount of damages to award in this case, the Court will look at damage awards for pain and suffering in other cases brought under the FSIA and also in personal injury lawsuits

arising under a variety of circumstances. See e.g., Eisenfeld, 172 F. Supp.2d at 8 (awarding $1,000,000 to plaintiffs that suffered extreme pain for several minutes after being injured in the bombing of the Number 18 Egged bus); Flatow, 999 F Supp. 29 (awarding $1,000,000 for 3 to 5 hours of pain and suffering to plaintiff injured in another bus bombing); Mousa, Civil Action Number 00-2096 at 21 (awarding $12,000,000 for both past and future pain and suffering of plaintiff injured extensively in Number 18 Egged bus bombing); Snearl v. Mercer, 780 So.2d 563, 589-90 (La. Ct. App. 2001) (sustaining award of $5,000,000 for past and future pain and suffering of plaintiff that had extensive burn injuries and underwent numerous surgical procedures, including the amputation of both legs, after automobile accident); Eiland v. Westinghouse Electric Corp., 58 F.3d 176, 183 (5th Cir. 1995) (finding that $3,000,000 was the maximum amount that plaintiff could recover for the pain he endured and will endure as a result of severe burn wounds); Martin v. United States, 471 F. Supp 6 (D. Ariz. 1979) (awarding $1,000,000 and $750,000 respectively to two plaintiffs that endured a significant amount of pain after being severely burned in an accident involving a power line); Hysell, 599 F.2d at 471-72 (awarding $300,000 for past and future pain and suffering of plaintiff that was severely burned and had both legs and one arm amputated); Lynch, et al., v. Invacare Corp., Civil Action Number 99-CV-749 (E.D. Okl. 2000) (awarding plaintiff $24,000,000 in products liability case where plaintiff suffered extensive burn wounds and had his left arm amputated). Based on these and other similar cases, the Court finds that $10,000,000 is an appropriate amount of compensatory damages for the pain and suffering of Ira Weinstein.

(3) Solatium. The FSIA provides for an award for solatium where physical injury results in death. As this Court noted in Flatow, damages for solatium belong to the individual heir personally for injury to the feelings and loss of decedent's comfort and society. The unexpected quality of a death may be taken into consideration in gauging the emotional impact to those left behind. In this case, the impact upon Ira Weinstein's wife and three children was devastating. Their testimony established conclusively that they each loved Ira Weinstein dearly and that they have experienced a tremendous amount of mental anguish as a result of his death. Thus, the Court finds that the following amounts are appropriate compensation for this element of damages: Susan Weinstein: $8,000,000; Joseph Weinstein: $5,000,000; Jennifer Weinstein Hazi: $5,000,000; David Weinstein: $5,000,000.

(4) Punitive Damages: Punitive damages are awarded to punish a defendant for particularly egregious conduct, and to serve as a deterrent to future conduct of the same type. Restatement (Second) Torts, § 908 (defining punitive damages as "damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future."). As an initial matter, the Court must determine whether it can award punitive damages under the FSIA. Based on the language of the statute and in accordance with the corresponding caselaw, the Court finds that it can levy punitive damages against the Iranian Ministry of Information and Security.[1] The

[1]The plaintiffs also seek punitive damages against the Islamic Republic of Iran itself. As the Court noted in Elahi, however, punitive damages may not be awarded against the Islamic Republic of Iran because "Congress recently repealed legislation that would have permitted punitive damages against a foreign state in cases, such as this one, brought under 28 U.S.C. § 1605(a)(7). *See* P.L. No. 106-386, § 2002(f)(2) [October 28, 2000]. In so doing, Congress returned the law to its pre-1998 state, when it

FSIA specifically provides courts with the power to award punitive damages against an agency or instrumentality of a foreign state in a case brought under section 1605(a)(7). 28 U.S.C. § 1606. In this case, the Court finds that both of these requirements are easily satisfied. That is, the plaintiffs brought this action pursuant to 28 U.S.C. § 1605(a)(7) since it arises from the extrajudicial killing of Ira Weinstein, and the Iranian Ministry of Information and Security is an agency or instrumentality of the Islamic Republic of Iran for purposes of the FSIA. Anderson, 90 F. Supp.2d at 113; Elahi, 124 F. Supp.2d 113.

Having found that the FSIA authorizes it to award punitive damages, the Court still must determine whether such damages should be awarded in this case. According to the Restatement (Second) of Torts, punitive damages are merited in cases involving "outrageous conduct." In the instant case, the Court has no difficulty finding that the depraved and uncivilized conduct of the Iranian Ministry of Information and Security constitutes outrageous conduct. The defendant provided material support in the form of training and money to HAMAS so that the organization could carry out terrorist attacks such as the one on February 25, 1996. Under even the most restrictive interpretation of the term, the defendant's actions in this matter are clearly outrageous and warrant the imposition of punitive damages.

The Court must now determine the appropriate amount of punitive damages to award against the Iranian Ministry of Information and Security. In determining the amount of punitive

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provided that a 'foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages[.]'" Elahi, 124 F.Supp.2d at 113 n.17. The Court's decision in Eisenfeld predated this statutory change. Thus, while the Court did award such damages in Eisenfeld, it cannot do so in the instant case.

damages to award, courts should consider several factors, including: "[1] the character of the defendant's act, [2] the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and [3] the wealth of the defendant." Restatement (Second) Torts § 908. The Restatement (Second) of Torts provides that a fourth "factor that may affect the amount of punitive damages is the existence of multiple claims by numerous persons affected by the wrongdoer's conduct. It seems appropriate to take into consideration both the punitive damages that have been awarded in prior suits and those that may be granted in the future, with greater weight being given to the prior awards."

With respect to the first factor—the character of the defendant's act—the Court has already detailed the heinous nature of the defendant's conduct in this case. The defendant provided material support to HAMAS so that the organization could carry out terrorist acts such as the bombing of the Number 18 Egged bus. It provided terrorists such as Hassan Salameh with both the technical knowledge and the funding necessary to carry out terrorist attacks like the one on February 25, 1996. With respect to the second factor—the extent and nature of harm to the plaintiff—the severity of the injuries Ira Weinstein sustained as a result of the explosion was adequately explained above in the Court's Findings of Fact. With respect to the third factor—the wealth of the defendant—the Court finds that the Iranian Ministry of Information and Security has substantial amounts of funds at its disposal. The Iranian Ministry of Information and Security has approximately 30,000 employees and is the largest intelligence agency in the Middle East. Aff. of Clawson at ¶ 22. Moreover, its annual budget is estimated to be between $100-$400 million. Id.

Finally, with respect to the fourth factor, the Court has considered previous and potential future awards of punitive damages based on the defendant's conduct in this regard. Specifically, the Court is aware of the fact that in two other cases brought under the FSIA as a result of the bombing of the Number 18 Egged bus, a total of $420,000,000 was awarded in punitive damages. Notwithstanding the awards in these other cases, the Court finds that $150,000,000 in punitive damages is an appropriate award in this case. In reaching this conclusion, the Court notes that "[n]o principle exists which prohibits a plaintiff from recovering punitive damages against a defendant or defendants simply because punitive damages have previously been awarded against the same defendant or the same defendants for the same conduct, or because other actions are pending against the defendant or defendants which could result in an award of punitive damages." Speiser, Krause, and Gans, The American Law of Torts 828-29 (1985) (observing that "[i]n a number of product liability cases, involving usually drugs or motor vehicles, the courts have held or recognized that, notwithstanding the potential danger of awarding multiple punitive damages to separate plaintiffs bringing successive actions against a single defendant, successive awards of punitive damages are permissible."); Scheufler v. General Host Corp., 126 F.3d 1261, 1272 (10th Cir. 1997) (stating that "although the United States Supreme Court recently emphasized the Due Process Clause of the Fourteenth Amendment prohibits a state from imposing grossly excessive punishment on a tortfeasor, it did not hold multiple punitive damage awards arising out of the same conduct are unconstitutional) (internal citation omitted); Dunn v. Hovic, 1 F.3d 1371, 1387 (3d Cir. 1993) (noting that the "Restatement, which provides the most persuasive evidence of the common law 'as generally

understood and applied in the United States,' and which we are obliged to consult before exercising whatever common law authority we have in this case, does not preclude successive claims of punitive damages arising out of the same course of conduct, but instead permits consideration of the existence of multiple punitive damages claims against a defendant as a factor in accessing damages."). At the same time, the Court is cognizant of the fact that several potential difficulties can arise when several plaintiffs seek punitive damages from one defendant. In re TMI, 67 F.3d 1119, 1127-29 (3d Cir. 1995) (stating that "[a]s a practical matter we are, of course, aware of the possibility that several large punitive damage awards here, as with any mass tort litigation involving a limited fund, might deplete the fund."); Simpson v. Pittsburg Corning Corp., 901 F.2d 277, 280-82 (2d Cir. 1990) (positing that multiple punitive damage awards may be due process violation); Juzwin v. Amtorg Trading Corp., 705 F.Supp. 1053, 1055 (D.N.J.) (noting that defendants "can be held liable over and over again for the same conduct, a result which would be barred by virtue of the right against double jeopardy in a criminal matter. Although an award in an individual case may be fair and reasonable, the cumulative effect of such awards may not be[.]"). See also Kenneth R. Redden, Punitive Damages 118-120 (1980). Nevertheless, the Court finds that a total award of $570,000,000 ($150,000,000 here, $300,000,000 awarded to the plaintiffs in Eisenfeld, and $120,000,000 awarded to the plaintiff in Mousa) is not excessive in light of the dual purposes of punitive damage awards (punishment and deterrence), the facts established by clear and convincing evidence in this case, and the punitive

damage awards in other cases brought under the FSIA.[2] Indeed, were the Court to hold otherwise, it would be effectively limiting the defendant's exposure to punitive damages precisely because it killed these individuals in one massive terrorist act as opposed to killing them in three separate acts. There is no persuasive, let alone controlling, legal authority to support such a ruling.

III. CONCLUSION

Today, the Court hopes to make whole, as much as legally possible, those hurt by the death of Ira Weinstein. Although judicial remedies will greatly support the plaintiffs' recovery, full recovery can only be attained by each plaintiff in his own way. Thus, for the foregoing reasons, the Court finds that the plaintiffs have established, by clear and convincing evidence, their claim or right to relief.

A separate order shall issue this date.

Date: 2-6-02

Royce C. Lamberth
United States District Judge

[2] In other cases brought under to the FSIA, courts have awarded $300,000,000 in punitive damages against the Iranian Ministry of Information and Security. See e.g., Elahi, 124 F. Supp.2d at 114.

Annex 31

***Flatow v. Islamic Republic of Iran et al.*, U.S. Court of Appeals, Ninth Circuit, 23 October 2002, 308 F.3d 1065 (9th Cir. 2002)**

Source: Legal > / . . . / > Federal & State Cases, Combined
Terms: name(bank saderat) (Edit Search)

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*308 F.3d 1065, *; 2002 U.S. App. LEXIS 22071, **;*
2002 Cal. Daily Op. Service 10581; 2002 Daily Journal DAR 12193

STEPHEN M. FLATOW, Plaintiff-Appellant, **BANK SADERAT** IRAN, Claimant-Appellee, v. THE ISLAMIC REPUBLIC OF IRAN, Defendant.

No. 00-56446

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

308 F.3d 1065; 2002 U.S. App. LEXIS 22071; 2002 Cal. Daily Op. Service 10581; 2002 Daily Journal DAR 12193

December 3, 2001, Argued and Submitted, San Francisco, California
October 23, 2002, Filed

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by Flatow v. Iran, 2003 U.S. LEXIS 2522 (U.S., Mar. 31, 2003)

PRIOR HISTORY: [1]** Appeal from the United States District Court for the Southern District of California. D.C. No. MC-99-250-MLH. Marilyn L. Huff, Chief Judge, Presiding.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff, a parent of a child killed in a terrorist attack, sued defendant Iranian government involved in the attack, received a default judgment, and sought to levy property owned by an Iranian bank. The United States District Court for the Southern District of California agreed with the bank that the property was not an asset of the judgment debtor, granted its motion for release of the money and terminated the case. The parent appealed.

OVERVIEW: The district court found the parent did not show the bank operated as an arm of the Iranian government or that its mission was to further state policies. Unlike in the Bancec case, where a foreign bank was an arm of the state, the Iranian bank was not attempting to use a United States court to recover on a claim while trying to avoid being the subject of an adversary proceeding. The bank was a nonparty to the underlying case. Even though Iran owned capital in the bank, it was still accorded the presumption that it is a separate juridical entity. The arguments the Iranian Constitution and nationalization were sufficient to overcome the Bancec presumption also failed. Iran's limited supervision, through the role of its General Assembly of Banks and the High Council, was not day-to-day control sufficient to overcome the separate juridical entity presumption. Also, since the parent did not show former officials were competent to testify whether Iran exerted enough control over the bank for assets to be attached in satisfaction of his judgment against Iran, the district court had properly issued a protective order under Fed. R. Civ. P. 26(c) against deposing them.

OUTCOME: The district court's decision and protective order were affirmed.

CORE TERMS: entity, instrumentality, juridical, banking, discovery, protective order, foreign state, sector, day-to-day, terrorist, exerts, execute, regulations, depositions, ownership, cooperative, faction, sufficient to overcome, foreign trade, nationalized, extensively, large-scale, injustice, exiled, compensatory damages, writ of execution, license, International Emergency Economic Powers Act, Flatow Amendment, sovereign immunity

LexisNexis(R) Headnotes • Hide Headnotes

International Law > Immunity > Foreign Sovereign Immunities Act

HN1 The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996) created an exception to the sovereign immunity of those foreign states officially designated by the Department of State as terrorist states if the foreign state commits a terrorist act, or provides material support and resources to an individual or entity that commits such an act, which results in the death or personal injury of a United States citizen. 28 U.S.C.S. § 1605(a)(7). Congress also expressly provided that punitive damages be available in actions brought under the state-sponsored terrorism exception to sovereign immunity. § 1605 statutory note. More Like This Headnote

Civil Procedure > Appeals > Standards of Review > Standards Generally

HN2 An appellate court reviews a district court's findings of fact for clear error. The district court's conclusions of fact are reviewed de novo. And the court reviews the grant or denial of a protective order for an abuse of discretion. More Like This Headnote

International Law > Immunity > Foreign Sovereign Immunities Act

HN3 In Bancec, the United States Supreme Court clearly stated that the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C.S. §§ 1330, 1602-1611, does not govern substantive liability for foreign states or their instrumentalities. The language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state. The enumerated exceptions to the FSIA provide the exclusive source of subject matter jurisdiction over civil actions brought against foreign states, but the FSIA does not resolve questions of liability. Questions of liability are addressed by Bancec, which examines the circumstances under which a foreign entity can be held substantively liable for the foreign government's judgment debt. More Like This Headnote

International Law > Immunity > Foreign Sovereign Immunities Act

HN4 Even though an entity or instrumentality is wholly owned by a foreign state, that entity is accorded the presumption of independent and separate legal status. A typical government instrumentality, if one can be said to exist, is created by an enabling statute that prescribes the powers and duties of the instrumentality, and specifies that it is to be managed by a board selected by the government in a manner consistent with the enabling law. The instrumentality is typically established as a separate juridical entity, with the powers to hold and sell property and to sue and be sued. Except for appropriations to provide capital or to cover losses, the instrumentality is primarily responsible for its own finances. The instrumentality is run as a distinct economic enterprise; often it is not subject to the same budgetary and personnel requirements with which government agencies must comply. The presumption of separate juridical status may be overcome in two ways. First, where it can be shown that the corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created, one may be held liable for the actions of the other. Second, an instrumentality should not be deemed a separate juridical entity where doing so would work fraud or injustice. More Like This Headnote

Banking Law > International Banking > Foreign Banks in the United States
International Law > Immunity > Foreign Sovereign Immunities Act
HN5 An entity fully owned by a foreign state is still accorded the presumption that it is a separate juridical entity. More Like This Headnote

Banking Law > International Banking > Foreign Banks in the United States
International Law > Immunity > Foreign Sovereign Immunities Act
HN6 Day-to-day governmental control of a foreign bank sufficient for the bank to considered a separate juridical entity under the Bancec analysis of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C.S. §§ 1330, 1602-1611, has been found where the government required that all checks above a certain amount be signed by a government official, governmental agency was required to approve all invoices for shipment, and the government generally exercised direct control over the instrumentality's operations. More Like This Headnote

Civil Procedure > Disclosure & Discovery > Protective Orders
HN7 Under Fed. R. Civ. P. 26(c), a district court may grant a protective order for "good cause shown." In reaching this decision, the court has extensive control over the discovery process. More Like This Headnote

COUNSEL: Thomas Fortune Fay, Esq. and Jane Carol Norman, Esq., Washington, D.C., for the appellant.

Steven W. Kerekes, Esq., Beverly Hills, California, for the appellee.

Robert D. McCallum, Jr., Assistant Attorney General, Patrick K. O'Toole, United States Attorney, and Douglas N. Letter, H. Thomas Byron III, and Anne Murphy, Attorneys, USDJ, Washington, D.C., for the amicus, United States Department of Justice.

Ellen Pattin, Esq., Olney, Maryland, for the amicus, Marine Corps Aviation Association.

JUDGES: Before: Myron H. Bright * , Betty B. Fletcher, and Raymond C. Fisher, Circuit Judges. Opinion by Judge Bright.

* The Honorable Myron H. Bright, United States Circuit Judge for the Eighth Circuit, sitting by designation.

OPINIONBY: Myron H. Bright

OPINION: [*1066]

BRIGHT, Circuit Judge:

Petitioner Stephen M. Flatow appeals the dismissal of his action to levy against California real estate owned by Bank Saderat Iran ("BSI") pursuant to a default judgment entered against the Islamic Republic of Iran by the United States District **[**2]** Court for the District of Columbia. The District Court for the Southern District of California agreed with BSI that the property in question was not an asset of the judgment debtor and therefore released proceeds from the sale of the property and terminated Flatow's action. We affirm the district court.

I. BACKGROUND

On April 9, 1995, Alisa Flatow, an American college student spending a semester studying in Israel, was killed in an explosion when the bus in which she was traveling collided with a van loaded with explosives. The United States Department of State later concluded that the Shaqiqi faction of the Palestine Islamic **[*1067]** Jihad n1 committed the bombing. The State

Department also determined that the Islamic Republic of Iran provided material support and resources to the Palestine Islamic Jihad. n2

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n1 Palestine Islamic Jihad is a collection of loosely affiliated factions rather than a cohesive group. The Shaqiqi faction is a terrorist cell with a small core membership whose goal is to conduct terrorist activities in the Gaza region. *See* Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 8 (D.D.C. 1998). **[**3]**

n2 The Shaqaqi faction's sole source of funding is the Iranian government, from which the group receives approximately two million dollars annually. *Flatow*, 999 F. Supp. at 8-9.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Shortly after the bombing, Congress amended the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611, as part of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), effective April 24, 1996. HN1 The Act created an exception to the sovereign immunity of those foreign states officially designated by the Department of State as terrorist states if the foreign state commits a terrorist act, or provides material support and resources to an individual or entity that commits such an act, which results in the death or personal injury of a United States citizen. *See* 28 U.S.C. § 1605(a)(7). Congress also expressly provided that punitive damages be available in actions brought under the state-sponsored terrorism exception to sovereign immunity. *See* 28 U.S.C. § 1605 statutory note. n3 This provision is commonly referred **[**4]** to as the "Flatow Amendment."

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n3 "The Flatow Amendment is apparently an independent pronouncement of law, yet it has been published as a note to 28 U.S.C. § 1605, and requires several references to 28 U.S.C. § 1605(a)(7) *et seq*. to reach even a preliminary interpretation." *Flatow*, 999 F. Supp. at 12.

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Relying upon these new provisions, Stephen M. Flatow, as Alisa's father and executor of her estate, filed a wrongful death complaint against Iran and its officials on February 26, 1997, in the United States District Court for the District of Columbia. On March 11, 1998, the district court entered a default judgment against Iran in favor of Flatow in the amount of $ 247,513,220. *See* Flatow v. Islamic Republic of Iran, 999 F. Supp. 1 (D.D.C. 1998).

In the instant matter, Flatow registered his judgment with the District Court for the Southern District of California on April 23, 1999. On September 14, 1999, Flatow obtained a writ **[**5]** of execution for $ 247,513,220.00 on property in Carlsbad, California, owned by California Land Holding Company, a wholly-owned subsidiary of BSI. As the California Land Holding Company was about to sell the property, Flatow and BSI agreed that the writ of execution should be released from the property so that escrow could close. Pursuant to a consent order entered on October 1, 1999, the proceeds of the sale were held in an interest-bearing account subject to the lien created by the writ of execution.

BSI filed its initial motion for the release of the money on November 1, 1999. After extensive

briefing by the parties and the United States government, n4 as well as **[*1068]** oral argument on whether BSI's assets could be used to satisfy a judgment against the Islamic Republic of Iran, the district court issued an order on May 22, 2000, denying without prejudice BSI's motion for release of the funds held pursuant to the consent order. The court found that the evidence Flatow presented was not sufficient to overcome the presumption that BSI is a juridical entity separate and apart from the Islamic Republic of Iran and therefore BSI was not subject to execution of the judgment against Iran. In **[**6]** making this determination, the court relied upon the Supreme Court's *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 629, 77 L. Ed. 2d 46, 103 S. Ct. 2591 (1983) (hereinafter "*Bancec*") (holding that unless the entity is found to be "so extensively controlled by [the foreign state] that a relationship of principal and agent is created" or recognizing the entity as separate "would work fraud or injustice," the FSIA does not permit execution upon the entity's assets). **n5** However, the court permitted Flatow to conduct discovery on the limited issue of whether Iran exercised day-today control over the operations of BSI.

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n4 On February 28, 2000, the district court ordered the United States to file briefing on the effect of Presidential Determination No. 99-1, which waived the requirements of 28 U.S.C. § 1610(f)(1)(A) on the same day that subsection was enacted, pursuant to waiver authority supplied by Congress. *See* Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. 105-277, § 117, 112 Stat. 2681-491-92 (Oct. 21, 1998) (enacting, as § 117(a), the language now codified at § 1610(f)(1)(A), and providing in § 117(d) that "the President may waive the requirements of this section in the interest of national security"). The government filed a statement of interest on April 3, 2000, which explained that the Presidential waiver deactivated the provision codified at § 1610(f)(1)(A). The United States concluded that none of the assets of BSI that Flatow sought to attach were blocked from execution under the International Emergency Economic Powers Act ("IEEPA") or its implementing regulations. *See* Statement of Interest at 8.

The district court considered the government's conclusion and determined that it was inconsistent with the text of the license under which the Carlsbad property was sold because that license was granted under one of the IEEPA sections specifically listed in the Presidential Determination as immune from attachment. However, the district court determined that clarification of this matter was unnecessary because by order entered May 19, 2000, it determined that the threshold issue is whether property belonging to BSI may be attached in aid of execution of a judgment against the Islamic Republic of Iran. Because we affirm the district court on its resolution of this question, we do not address the application of Presidential Determination No. 99-1 to this case. **[**7]**

n5 In its April 3, 2000 statement of interest, the United States took no position on the *Bancec* issue of whether BSI could be held liable for the judgment against Iran.

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The court allowed Flatow to pursue discovery until July 31, 2000. BSI then filed its renewed motion for release of the Carlsbad land sale money. Flatow argued in opposition that BSI is "extensively controlled" by Iran because all Iranian banks including BSI were nationalized following the 1979 revolution. Flatow submitted a copy of the Iranian Constitution, which states that banking, as well as insurance, power generation, post, telegraph and telephone services, and other large-scale industries "will be publicly owned and administered by the State." The district court concluded that this evidence did not show that Iran exerts day-to-day control over BSI as required by *Banco*, 462 U.S. at 629-31. The district court also rejected

Flatow's alternative argument under *Bancec's* fraud or injustice exception, *id.*, to the presumption of BSI's status as a separate juridical entity.

During the course of discovery, **[**8]** Flatow requested the assistance of the court under the Hague Convention, 28 U.S.C. § 1781, to take depositions of former Iranian President Bani Sadr, who had been exiled to Paris, France, and former Iranian intelligence operative Ahmad Behbahani, who had been exiled to Turkey. The district court denied this request and entered a protective order under Federal Rule of Civil Procedure 26(c) so that the depositions of Bani Sadr and Behbehani could not proceed.

The district court granted BSI's motion for the release of the money and terminated **[*1069]** the case. Flatow timely appeals. n6

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n6 On October 28, 2000, the Victims of Trafficking and Violence Protection Act of 2000 became law. This statute permitted certain victims of terrorist acts to collect 100 of their compensatory damages from the United States government. *See* Victims Protection Act, § 2002(a)(1)(B). Flatow exercised this right, and was paid $ 26 million by the Department of Treasury on January 4, 2001. This amount constitutes Flatow's compensatory damages award. He still retains the right to execute his punitive damages award.

In its amicus curiae brief to this panel, the United States argues that Flatow has relinquished his right to execute the punitive damages judgment against the Carlsbad property at issue in this case. The government contends that when he signed the relinquishment of rights that rendered him eligible, under the terms of Section 2002, for the $ 26 million in compensatory damages and interest, he gave up his right to "execute against or attach property that is at issue in claims against the United States before an international tribunal, that is the subject of awards rendered by such tribunal, or that is subject to section 1610(f)(1)(A) of title 28, United States Code." (Amicus Br. at 21-22). According to the government, the Carlsbad property falls into the category of property to which Flatow has waived his execution rights.

Because Flatow accepted the $ 26 million award on January 4, 2001 and the district court in the instant case made its final ruling on June 30, 2000, the district court did not consider this issue. Neither of the parties raised this argument in their briefs or in oral argument. We elect to resolve this case on the same grounds as the district court, and make no determination on the government's argument that Flatow has relinquished his rights to pursue the Carlsbad property under Section 2002

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - **[**9]**

II. STANDARD OF REVIEW

HN2 We review the district court's findings of fact for clear error. *See* Freeman v. Allstate Life Ins. Co., 253 F.3d 533, 536 (9th Cir. 2001); *Troutt v. Colorado Western Ins. Co.*, 246 F.3d 1150, 1156 (9th Cir. 2001). The district court's conclusions of fact are reviewed *de novo. See In re Cybernetic Servs., Inc.*, 252 F.3d 1039, 1045 (9th Cir. 2001); *Troutt*, 246 F.3d at 1156. And we review the grant or denial of a protective order for an abuse of discretion. *See* Anderson v. Calderon, 232 F.3d 1053, 1099 (9th Cir. 2000); *Portland Gen. Elec. Co. v. U.S. Bank Trust Nat'l Ass'n*, 218 F.3d 1085, 1089 (9th Cir. 2000).

III. DISCUSSION

A. Separate Juridical Entity Analysis

HN3 In *Bancec*, the Supreme Court clearly stated that the FSIA does not govern substantive liability for foreign states or their instrumentalities. *See* 462 U.S. at 620 ("The language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution **[**10]** of liability among instrumentalities of a foreign state."). The enumerated exceptions to the FSIA provide the exclusive source of subject matter jurisdiction over civil actions brought against foreign states, *see Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-35, 102 L. Ed. 2d 818, 109 S. Ct. 683 (1989), but the FSIA does not resolve questions of liability. Questions of liability are addressed by *Bancec*, which examines the circumstances under which a foreign entity can be held substantively liable for the foreign government's judgment debt. This distinction between liability and jurisdiction is crucial to our resolution of this case.

In *Bancec*, the government of Cuba expropriated property from First National City Bank (subsequently known as "Citibank"). Citibank asserted a set-off against the plaintiff Bancec based upon the Cuban government's seizure of Citibank's Cuban assets. 462 U.S. at 616. The Court addressed the issue of **[*1070]** whether the acts and liabilities of the foreign sovereign government of Cuba could be attributed to the state-owned banking entity, Bancec.

The Court held that Bancec was not an entity independent **[**11]** from the Cuban government. *Id.* at 633. In making this determination, the Court noted that Bancec had been dissolved and its capital split between a Cuban national bank and the foreign trade enterprises of the Cuban Ministry of Foreign Trade. *Id.* at 632. Furthermore, Bancec was empowered to act as the Cuban government's exclusive agent in foreign trade, the government supplied all of Bancec's capital and owned all of its stock, and all of Bancec's profits were deposited in the General Treasury. Bancec's Governing Board consisted of delegates from Cuban government ministries and the president of Bancec was the Minister of State. *See Banco*, 462 U.S. at 614. The Court explained, "To hold otherwise would permit governments to avoid the requirements of international law simply by creating juridical entities whenever the need arises." *Id.* at 633. n7

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n7 On the other hand, the Court did caution that "freely ignoring the separate status of government instrumentalities would result in substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against the sovereign, and might thereby cause third parties to hesitate before extending credit to a government instrumentality without the government's guarantee." *Banco*, 462 U.S. at 626.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**12]**

Nonetheless, under *Bancec*, HN4 even though an entity or instrumentality is wholly-owned by a foreign state, that entity is accorded the presumption of independent and separate legal status. *Id.* at 627-28. *Bancec* outlined the features typical of a separate government instrumentality:

> A typical government instrumentality, if one can be said to exist, is created by an enabling statute that prescribes the powers and duties of the instrumentality, and specifies that it is to be managed by a board selected by the government in a manner consistent with the enabling law. The instrumentality is typically established as a separate juridical entity, with the powers to hold and sell property and to sue and be sued. Except for appropriations to provide capital or to cover losses, the instrumentality is primarily responsible for its own finances. The instrumentality is run as a distinct economic enterprise; often it is not subject to

the same budgetary and personnel requirements with which government agencies must comply.

Id. at 624.

The Court indicated that the presumption of separate juridical status may be overcome in two ways. First, where **[**13]** it can be shown that the "corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created, we have held that one may be held liable for the actions of the other." *Id.* at 629. Second, an instrumentality should not be deemed a separate juridical entity where doing so would work "fraud or injustice." *Id.* n8 Having laid out these two exceptions to the presumption of separate juridical status, the Court declined **[*1071]** to provide a "mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded." *Id.* at 633. n9

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n8 Flatow's briefs and argument to this court focus solely on the first *Bancec* exception. However, at the district court level, he argued that it would be unjust to recognize BSI as a separate juridical entity. The district court, in its May 19, 2000, order, rejected this argument because Flatow has not claimed that BSI participated in the terrorist acts that gave rise to this litigation, or that BSI is a sham entity established to allow Iran to avoid liability. Flatow does not appeal this ruling. **[**14]**

n9 At least one circuit court has articulated five *Bancec* factors: "(1) the level of economic control by the government; (2) whether the entity's profits go to the government; (3) the degree to which government officials manage the entity or otherwise have a hand in its daily affairs; (4) whether the government is the real beneficiary of the entity's conduct; and (5) whether adherence to separate identities would entitle the foreign state to benefits in United States courts while avoiding its obligations." *Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines*, 965 F.2d 1375, 1380 n. 7 (5th Cir. 1992).

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Flatow argues that the district court erred in applying *Bancec* and concluding that BSI is a separate juridical entity, which cannot be held liable for Flatow's judgment against Iran. n10 Flatow rests his argument almost entirely upon the contention that the Iranian Constitution, which nationalized the banking industry after the 1979 Iranian revolution, creates a principal-agent relationship between BSI and the Iranian government. n11 Flatow argues that this **[**15]** fact alone demonstrates the control required by *Bancec* to preclude an entity from separate juridical status. n12

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n10 Flatow argues in his reply brief that amendments to Section 1605(a)(7) of the FSIA were intended to alter the application of *Bancec's* presumption of separate juridical entity status for foreign instrumentalities. The district court rejected this argument and cited two other decisions rejecting this position: *Flatow v. Islamic Republic of Iran*, 67 F. Supp. 2d 535, 539 (D. Md. 1999) (holding there is nothing in the language of § 1605(a)(7) itself or the legislative

history that indicates Congress intended the new provision to abrogate the *Bancec* presumption); *Alejandre v. Telefonica Larga Distancia de Puerto Rico, Inc.*, 183 F.3d 1277 (11th Cir. 1999) (reversing a district court decision that the *Bancec* presumption could more easily be overcome in situations where families were attempting to satisfy judgments obtained as a result of terrorist acts).

We asked the United States to file an amicus curiae brief on the issue of whether amendments to the FSIA abrogate the *Bancec* presumption. The United States took the position that the amendments to the FSIA did not alter the *Bancec* presumption because *Bancec* and the FSIA govern two separate questions of law: liability and jurisdiction. It is now clear to the panel that the district court was correct in resolving this matter under the threshold *Bancec* liability inquiry. Thus we limit our resolution of the matter to that ground. **[**16]**

n11 Article 44 of the Constitution of the Islamic Republic of Iran states:

> (1) The economy of the Islamic Republic of Iran is to consist of three sectors: state, cooperative, and private, and is to be based on systematic and sound planning.
>
> (2) The state sector is to include all large-scale and mother industries, foreign trade, major minerals, banking, insurance, power generation, dams, and large-scale irrigation networks, radio and television, post, telegraph and telephone services, aviation, shipping, roads, railroads and the like; all these will be publicly owned and adMinistered [sic] by the State.
>
> (3) The cooperative sector is to include cooperative companies and enterprises concerned with production and distribution, in urban and rural areas, in accordance with Islamic criteria.
>
> (4) The private sector consists of those activities concerned with agriculture, animal husbandry, industry, trade, and services that supplement the economic activities of the state and cooperative sectors.
>
> (5) Ownership in each of these three sectors is protected by the laws of the Islamic Republic, in so far as this ownership is in conformity with the other articles of this chapter, does not go beyond the bounds of Islamic law, contributes to the economic growth and progress of the country and does not harm society.
>
> (6) The scope of each of these sectors as well as the regulations and conditions governing their operation, will be specified by law.

[17]**

n12 Flatow also argues that demonstrating "actual day to day supervision" could never be accomplished because of "the totalitarian nature of the regime and the limited ability of this or any other non-governmental plaintiff to assure the safety of witnesses ...." (Appellant's Br. at 16-17). Flatow does not elaborate on this claim or provide any examples of efforts he has made to show day-to-day control that have been thwarted by Iran. The discovery assistance he requested from the district court was denied because it was not pertinent to the sole subject of discovery: whether Iran exerts control over BSI. For further discussion of this issue, *see infra*, at III.B.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*1072]**

The district court considered and rejected this argument in a thorough, well-reasoned opinion. Specifically, the court concluded that the facts of this case are different from those in *Bancec*. The court found that Flatow had not shown that BSI operates as an arm of the Iranian government or that BSI's mission is to further the policies of the Iranian government. Additionally, unlike in *Bancec*, BSI is not attempting to use **[**18]** a United States court to recover on a claim while at the same time trying to avoid being the subject of an adversary proceeding. BSI is a nonparty to the underlying case.

In rejecting Flatow's principal-agent argument, the district court also pointed out that BSI is an Iranian corporation, organized under the banking laws of Iran as a banking corporation, but it has its own Articles of Association. n13 BSI was founded in 1952 and until 1979, n14 BSI was a privately owned bank. BSI consists of more than 3000 branch offices throughout the Middle East, London, Paris, Hamburg, and New York. The New York office is the only office BSI has in the United States. n15

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n13 According to the district court, BSI's operations are governed by its Articles of Association, established in 1982. The stated objective of the bank is "to execute banking operations and servicies [sic] within the country and abroad." Article 1 of the Articles of Association states, "Except in those cases which have clearly been stipulated in the law and regulatio [sic], BANK SADERAT IRAN is not subject to general rules and regulations related to the ministries and government-affiliated companies and organizations." **[**19]**

n14 On June 7, 1979, the Iranian government nationalized all Iranian banks.

n15 BSI conducts the operations of its New York office pursuant to a license issued under the International Emergency Economic Powers Act ("IEEPA"), codified at 50 U.S.C. § 1701-02.

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BSI has continued to operate under its own charter as a separate banking entity, and is supervised by a Board of Directors. The Board of Directors consists of a Managing Director, one person from among the BSI staff, and five other recommended individuals. The members of the Board of Directors are elected for three-year terms and may be reelected. The Managing Director holds the highest administrative and executive position and has authority to determine bank policies. n16 The Board of Directors is responsible for, and presides over, the daily activities of BSI.

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n16 According to the affidavit of Mohammedreza Moghadasi, the current Managing Director of BSI, his powers include, but are not limited to: (1) representing the bank before all real or judiciary persons; (2) hiring, terminating, or promoting banking staff and employees; (3) opening accounts with other banks and operating those accounts on behalf of BSI; (4) executing contracts and renting facilities; (5) filing and dismissing civil actions on behalf of BSI; and (6) all other powers specified in Article 20 of the Articles of Association.

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According to the district court, two governmental entities regulate BSI: the General Assembly of Banks and the High Council of Banks. The General Assembly consists of Iranian government officials n17 **[*1073]** and it meets yearly to review the status of banks in Iran. It reviews BSI's annual report, balance sheet, and profit and loss statements. The High Council of Banks n18 has an advisory role to the General Assembly of Banks and meets weekly. The High Council proposes candidates for Iranian banks' boards of directors, including BSI's Board of Directors, and assists in the preparation of regulations, budgets, and reports on banking operations in Iran. The High Council does not involve itself in the day-to-day operations of BSI. The district court credited BSI's assertion that the General Assembly of Banks and the High Council of Banks perform broad policymaking functions like those of the United States Federal Reserve.

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n17 Specifically, the official members are the Minister of Economic and Financial Affairs, the Minister of Industries and Mines, the Minister of Commerce, the Minister of Agriculture and Rural Development, the Minister of Housing and Town Planning, and the Director of Plan and Budget Organization. **[**21]**

n18 This Council is composed of the Director General of the Central Bank of Iran, the General Manager of Bank Melli Iran, a representative of the Ministry of Plan and Budget Organization, a representative of the Ministry of Economic and Financial Affairs, a representative of the Ministry of Housing and Town Planning, a representative of the Ministry of Agriculture and Rural Development, a representative of the Ministry of Commerce, and a representative of the Ministry of Industries.

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Finally, the district court noted the affidavit of Mohammedreza Moghadasi, the Managing Director of BSI, in which Moghadasi asserts that members of the BSI Board of Directors are all career bankers with extensive experience in finance and banking. He also states that the Board of Directors appoints officers of the bank and oversees the bank's affairs, which include accepting deposits, loan and investment activities, letters of credit, credit collections, and payment order transactions.

Flatow argues that Iran's ownership of BSI's capital precludes BSI from being considered a separate juridical entity under *Bancec* **[**22]** . However, Flatow is incorrect in his belief that this fact alone is determinative. As the Supreme Court recognized in *Bancec*, HN5 an entity fully owned by a foreign state is still accorded the presumption that it is a separate juridical entity. *See* Banco, 462 U.S. at 624 (recognizing that government "appropriations to provide capital or to cover losses" do not prevent a typical government instrumentality from being considered a separate juridical entity); *see also* Banco Nacional de Cuba v. Chemical Bank New York Trust Co., 782 F.2d 377, 380 (2d Cir. 1986) (concluding that although Banco Nacional was entirely owned by Cuba it was a separate entity from Cuba); Pravin Banker Assoc. v. Banco Popular del Peru, 9 F. Supp. 2d 300, 306 (S.D.N.Y. 1998) (analogizing Peru's full ownership of the bank "to the conduct of a majority shareholder" and concluding that state ownership cannot be the sole basis for ignoring the corporate form, especially where the entity was not established in an attempt to shield the assets of Peru). We reject Flatow's argument

that the Iranian Constitution and the nationalization of Iranian banks are sufficient **[**23]** to overcome the *Bancec* presumption, and accordingly, we affirm the decision of the district court.

We also affirm the district court's determination that Iran's limited supervision, through the role of the General Assembly of Banks and the High Council, does not constitute day-to-day control sufficient to overcome the separate juridical entity presumption. The government involvement must rise to a higher level. *See, e.g.,* McKesson Corp. v. Islamic Republic of Iran, 311 U.S. App. D.C. 197, 52 F.3d 346, 351-52 (D.C. Cir. 1995) (concluding that the separate juridical entity presumption was overcome where Iran controlled routine **[*1074]** business decisions, such as declaring and paying dividends and honoring contracts); *Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia*, 616 F. Supp. 660, 666 (W.D. Mich. 1985) HN6(finding day-to-day control where the government required that all checks above a certain amount be signed by a government official, governmental agency was required to approve all invoices for shipment, and the government generally exercised direct control over the instrumentality's operations). The daily affairs of BSI **[**24]** and its 3000 branch offices are overseen by the Board of Directors, consisting of career bankers, the Managing Director, and other bank officers. On this record, the level of economic control exercised by the Iranian government over BSI appears quite limited, and we agree with the district court that Flatow has not shown that the Iranian government is the real beneficiary of BSI's banking operations.

B. Protective Order and Discovery Request

Even though the district court concluded on May 22, 2000, that Iran did not exercise sufficient control over BSI to overcome the *Bancec* presumption, the court allowed the parties to pursue discovery on the matter until July 31, 2000. The sole subject of discovery was: whether the Islamic Republic of Iran exerts sufficient control over BSI for the bank's assets to be attached in satisfaction of the judgment against Iran.

On June 22, 2000, Flatow submitted two motions for the district court to issue a Request for International Judicial Assistance pursuant to the Hague Convention on the Taking of Evidence Abroad. n19 Flatow sought to depose Abolhassan Bani Sadr, who was president of Iran from 1979 to 1981 and now resides in France, **[**25]** and Ahmad Behbahani, who represents himself to be the former director of terrorist operations for Iran and now lives in Turkey. BSI opposed the motions and sought a protective order from the court to prohibit the depositions on the ground that they would be an undue burden on and expense for BSI, and because neither Bani Sadr nor Behbahani is competent to testify regarding the subject of discovery.

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n19 The Hague Convention of March 18, 1970, On the Taking of Evidence Abroad In Civil or Commercial Matters provides procedures for taking discovery in foreign countries.

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The district court granted BSI's protective order and denied Flatow's request for international assistance in deposing the former Iranian leaders. The court first concluded that the burden and expense of obtaining discovery outweighed Flatow's interest in deposing Bani Sadr, who the district court found has no first-hand knowledge of whether Iran exerts day-to-day control over BSI. Bani Sadr has been exiled from Iran since 1981 and has never been **[**26]** a director or officer of BSI. Secondly, the court explained that Flatow's efforts to depose Behbahani are prohibited by his failure to demonstrate that Turkey, where Behbahani resides, has signed the Hague Convention. Additionally, the information Flatow sought to obtain from

Behbahani was outside the scope of the sole issue of discovery. Flatow objects to both of these determinations and makes essentially the same arguments to this court that he made to the district court.

We affirm the district court's decision to grant a protective order under Fed. R. Civ. P. 26(c) that the depositions of Bani Sadr and Behbahani may not proceed. HN7 Under that provision, the district court may grant a protective order for "good cause shown," *see* Fed. R. Civ. P. 26 (c). In reaching this decision, the court has "extensive control" over the discovery process. *United States v. Columbia Broad.* **[*1075]** *Sys., Inc.*, 666 F.2d 364, 369 (9th Cir. 1982). Flatow has failed to demonstrate that either of these individuals is remotely competent to testify regarding whether the Islamic Republic of Iran exerts sufficient control over BSI for the bank's assets to be attached in satisfaction of his judgment **[**27]** against Iran.

IV. CONCLUSION

This panel joins other courts in expressing regret that its holding forestalls the Flatow family's efforts to execute their judgment against Iran. *See, e.g., Flatow v. Islamic Republic of Iran*, 74 F. Supp. 2d 18, 25-26; *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16, 27-28. There has, however, been substantial payment of damages through the legislation passed by the United States Congress. *See supra*, note 6. The government of Iran should pay its debt to the Flatow family, but BSI cannot be held liable for this debt. We follow the clear path set out by the applicable case law. Thus, we AFFIRM the district court.

Annex 32

***Peterson et al. v. Islamic Republic of Iran et al.*, U.S. District Court, District of Columbia, 30 May 2003, 264 F. Supp. 2d 46, 61 (D.D.C. 2003)**

Excerpts: p. 1 and p. 20 to 30

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEBORAH D. PETERSON, Personal Representative of the Estate of James C. Knipple, et al.,	
Plaintiffs,	
v.	**Civil Action No. 01-2094 (RCL)**
THE ISLAMIC REPUBLIC OF IRAN, et al.,	
Defendants.	
JOSEPH AND MARIE BOULOS, Personal Representatives of the Estate of Jeffrey Joseph Boulos, et al.,	
Plaintiffs,	**Civil Action No. 01-2684 (RCL)**
v.	
THE ISLAMIC REPUBLIC OF IRAN, et al.,	
Defendants.	

MEMORANDUM OPINION

These actions arise from the most deadly state-sponsored terrorist attack made against American citizens prior to September 11, 2001: the Marine barracks bombing in Beirut, Lebanon on October 23, 1983. In the early morning hours of that day, 241 American servicemen were murdered in their sleep by a suicide bomber. On that day, an unspeakable horror invaded the

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a frantic sound to his voice that I had never heard before and he said – he just screamed, "Debbie, our worst nightmare has been realized. And I turned on the television and saw what was happening. . . .

It seemed like an awful long time [before word of his death was received]. We waited and waited and waited. We watched every television, we were – I mean, the house was filled with people. We watched the television, we got every newspaper, photograph, magazine we could. We looked for his face among the survivors. We even thought we saw him a couple of times. All of his friends gathered, neighbors, and we held out hope even though the count was rising. . . .

I think around November 7th or 8th, we got a phone call . . . They wanted dental information and identifying marks, anything we could give them, and my father told them about a scar on his forearm. The next day, they told us that he was identified.

We brought him home on the 9th, on his 21st birthday, and we buried him on the 10th, the Marine Corps birthday. I remember the casualty officer, he was all by himself, he came to the house. We were all gathered around, and he told us that Jim was among the dead. It was official.

I remember the casualty officer sitting next to my father and they both seemed really quiet while everybody else was screaming and yelling and crying, and my dad just sat there really quiet. And then when everybody left, he went downstairs and started to scream Jim's name over and over and over again at the top of his lungs.

III. CONCLUSIONS OF LAW

Having made the above-listed findings of fact, the Court now enters the following conclusions of law:

1. An action brought against a foreign state, its intelligence service acting as its agent, and its officials, acting in their official capacity, must be brought under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 et seq. The FSIA must be applied in every action involving a foreign state defendant. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 489; 28 U.S.C. § 1330. The sole bases for subject matter jurisdiction in an action against a foreign state defendant are the FSIA's enumerated

exceptions to immunity. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989). This Court lacks subject matter jurisdiction over the present actions unless they fall within one of the FSIA's enumerated exceptions to foreign sovereign immunity. See Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993). The FSIA has been construed to apply to individuals for acts performed in their official capacity on behalf of either a foreign state or its agency or instrumentality. El-Fadl v. Central Bank of Jordan, 75 F.3d 668, 671 (D.C. Cir.1996) (citing Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1101-1103 (9th Cir. 1990).

2. When it passed the Antiterrorism and Effective Death Penalty Act of 1996, Congress lifted the immunity of foreign states for certain sovereign acts that are repugnant to the United States and the international community, and created a right of civil action based upon the commission of terrorist acts. Pub. L. 104-132, Title II, § 221(a), (April 24, 1996), 110 Stat. 1214, codified at 28 U.S.C.A. § 1605 (West 1997 Supp.). That Act created an exception to the immunity of those foreign states officially designated by the State Department as state sponsors of terrorism, if the foreign state so designated commits a terrorist act, or provides material support and resources to an individual or entity which commits a terrorist act, which results in the death or personal injury of a United States citizen. See 28 U.S.C. § 1605(a)(7); see also H. R. REP. NO. 104-383, at 137-38 (1995).

3. Iran has continuously been designated a state sponsor of terrorism by the U.S. Department of State since January 19, 1984.

4. Applying the above-mentioned law, as a consequence of the actions of the defendants, this Court concludes that it possesses subject matter jurisdiction over the defendants in these actions, the Islamic Republic of Iran and the Iranian Ministry of Information and Security.

5. 28 U.S.C. § 1605(a)(7) provides for personal jurisdiction over foreign state sponsors of terrorism. As this Court has noted in a previous case involving the government of Iran, "[because] international terrorism is subject to universal jurisdiction, Defendants had adequate notice that their actions were wrongful and susceptible to adjudication in the United States." Flatow, 999 F. Supp. at 14 (citing Eric S. Kobrick, The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction over International Crimes, 87 COLUM. L. REV. 1515, 1528-30 (1987)); see also Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 88-89 (D.C. Cir. 2002) ("In enacting [28 U.S.C. § 1605(a)(7)], Congress sought to create a judicial forum for compensating the victims of terrorism, and in so doing to punish foreign states who have committed or sponsored such acts and deter them from doing so in the future.")

6. Applying the above-mentioned law, this Court concludes that it possesses personal jurisdiction over the defendants in these actions, the Islamic Republic of Iran and the Iranian Ministry of Information and Security.

7. 28 U.S.C. § 1605(f) provides for a statute of limitations of "10 years after the date on which the cause of action arose," and provides for equitable tolling during the "period during which the foreign state was immune from suit."

8. The state of Iran was immune from suit until passage of Pub. L. 104-132, which was made effective on April 24, 1996. Accordingly, the Court concludes that the statute of limitations contained in 28 U.S.C. § 1605(f) does not bar these actions.

9. In a memorandum opinion issued December 18, 2002, this Court stated that if the plaintiffs in these actions proved that the U.S. military service members at issue in these cases were part of a peacekeeping mission and that they operated under peacetime rules of engagement, they would qualify for recovery. As set forth in the above findings of fact, the plaintiffs have demonstrated that the U.S. military service members at issue were part of a peacekeeping mission, and that they were operating under peacetime rules of engagement. Therefore, the Court concludes that the military service members at issue in these cases qualify for recovery.

10. A foreign state is liable for money damages under the FSIA "for personal injury or death that was caused by an act of . . . extrajudicial killing, 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." 28 U.S.C. § 1605(a)(7). The foreign state

must be designated as a state sponsor of terrorism under either section 6(j) of the Export Administration Act of 1979, 50 U.S.C. app. 2405(j) or section 620A of the Foreign Assistance Act of 1961, 22 U.S.C. 2371, at the time that the act occurred, unless the foreign state is thus designated later as a result of that act. Id. Either the victim or the plaintiff must have been a United States national at the time of the act. Id. Additionally, the act must be such that it would be actionable if the United States, its agents, officials or employees within the United States engaged in similar conduct. The Court concludes, based on the above findings of fact, that plaintiffs in these actions have established all of these elements by clear and convincing evidence.

11. The FISA utilizes the same definition of "extrajudicial killing" as the Torture Victim Protection Act of 1991, which defines an "extrajudicial killing" as "a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all judicial guarantees which are recognized as indispensable by civilized peoples. . . ." Pub. L. 102-256, 106 Stat. 73 (1992). The Court concludes that the act undertaken by agents of Hezbollah – the development and detonation of an explosive charge in the barracks of the 24th MAU on October 23, 1983, which resulted in the deaths of over 241 peacekeeping American servicemen – satisfies the FISA's definition of an "extrajudicial killing."

12. The Court finds that MOIS, acting as an agent of the Islamic Republic of Iran, performed acts on or about October 23, 1983, within the scope of its agency (within the meaning of

28 U.S.C. § 1605(a)(7) and 28 U.S.C.A. § 1605 note), which acts caused the deaths of over 241 peacekeeping servicemen at the Marine barracks in Beirut, Lebanon. Specifically, the deaths of these servicemen were the direct result of an explosion of material that was transported into the headquarters of the 24th MAU and intentionally detonated at approximately 6:25 a.m., Beirut time by an Iranian MOIS operative. The Court therefore concludes that MOIS actively participated in the attack on October 23, 1983, which was carried out by MOIS agents with the assistance of Hezbollah.

13. The Court concludes that the deaths of over 241 peacekeeping servicemen at the Marine barracks in Beirut, Lebanon were caused by a willful and deliberate act of extrajudicial killing.

14. As the result of the deaths of the 241 American servicemen in Beirut, Lebanon, their parents, surviving siblings, children, and spouses have suffered and will continue to suffer severe mental anguish and loss of society.

15. It is beyond dispute that if officials of the United States, acting in their official capacities, provided material support to a terrorist group to carry out an attack of this type, they would be civilly liable and would have no defense of immunity. See 42 U.S.C. § 1983; Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

16. The Court concludes that the defendants, the Islamic Republic of Iran and the Iranian Ministry of Information and Security, are jointly and severally liable to the plaintiffs for compensatory and punitive damages.

17. As to each claim of each Complaint, the Court will make a determination of the proper amount of compensatory damages after its receipt of reports from the special masters appointed by the Court. The Court will also make a determination as to punitive damages at that time.

IV. CONCLUSION

The Court is mindful that some may question the utility of the present suit. During the March trial, the Court heard testimony from a number of witnesses as to the reasons why this suit was brought, and as to its potential efficacy.

Dr. Patrick Clawson, deputy director of the Washington Institute for Near East Policy, described the manner in which civil judgments for acts of state-sponsored terrorism have had a noticeable impact upon the present regime in Iran:

> Q: To what extent since its creation in 1979 has the Islamic Republic of Iran been susceptible to influence because of economic sanctions? By sanctions, I don't mean something that was stated, but simply having to pay out bucks, whether it's in damages in personal injury cases or damages awarded by a tribunal, punitive damages, anything of that sort?
>
> A: To begin with, the release of those held hostage at the American Embassy in Tehran, most Iranian observers think that the American freezing of billions of dollars of Iranian assets and the eventual negotiations which really hinged around

how much money Iran was going to get back is a good example from the very beginning of this process of Iran's susceptibility to economic pressure, and there have been a number of situations since in which Iran has been deflected from its main course by economic pressures. For instance, the Europeans [were] successful at doing that in the early 1990s, deflecting Iran from terrorist activities in European soil.

* * * * * * * * * * *

Q: Given the enormity of the offense committed on October 23rd, 1983, in the attack of the Marine barracks, how much of that sum in the pockets of Iran would have to be subtracted before – in order to give some indication that they would start to change policy?

A: Well, sir, I would – the larger the sum, the more of an impact this is going to have on the Iranians, and if this court case results in a large judgment, be it for compensatory or punitive damages, that is very likely to receive the attention of a fair number of policymakers in Iran, and I have great confidence that the Iranian leaders will consider that in deciding which way to proceed.

* * * * * * * * * **

I think, sir, that the Iranians have been extraordinarily sensitive to court actions, whether it was in Germany or in Argentina or in the United States, which make any references to the top leadership of the country being involved in these cases. That has been a matter of greatest sensitivity in Iran, and there have been several cases in which the Iranians reacted extremely strongly, particularly to suggestions that the supreme religious leader was involved in any way in these activities. . . . I have to say that I think that they pay quite detailed attention to these judgments . . . .

* * * * * * * * * *

I would say that based on the past precedent about the way that these court cases have been viewed, what will be looked at very closely is two things. One is the size of the dollars involved, and the other is whether or not there is any change in the way that the court views the matter. So this case, if it involves a much larger judgment in dollar terms than previous cases, will be regarded as a toughening of the American stance.

On the other hand, there will be close examination of whether or not this case in its legal reasoning or in the application or non-application of punitive damages involves any change in the way in which a court rules. So, for instance, a lack of punitive damages would be regarded as an indication that the United States Government is making a gesture towards Iran.

Q: A softening of our position.

A: Correct, sir. . . .

Q: So as I read you correctly, less in punitive damages than has been awarded in cases before would be to the Iranians a softening of the American resolve; more would be a hardening of the American resolve?

A: Correct, sir.

The Court also heard the testimony of Dr. Michael Ledeen[23] as to the likely effect of an award of damages in the present actions:

THE COURT: From your experience dealing all these years now with Iran, have you seen, from the court cases where punitive damages have been entered by the courts, what impact, if any, that has had in Iran and on the government, and what do you think of that?

A: Well, it hurts the government because it stings them, and the people see – what the Iranian people need to reach the point where they are willing to risk their lives to bring down this regime is that the civilized world understands what kind of regime it is and therefore would welcome that kind of event; and consequently, in my opinion, every time that regime is condemned and punished in a Western court, that hastens the moment of the downfall of that regime.[24]

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[23] As noted above, Dr. Ledeen served as a consultant to the U.S. Defense Department at the time of the October 23, 1983 bombing, and is one of the premier experts in the nation on the subject of U.S. foreign relations. He is presently a resident scholar at the American Enterprise Institute.

[24] Regarding the tension between the Iranian government and the populace, Dr. Ledeen testified that

> the people of Iran hate the regime. Even the public opinion polls taken by the regime itself show that 70-plus percent of the Iranian people don't like the regime, would like a national referendum, deplore the foreign policy of the regime and want better relations with the United States, and you would have to figure that if 70 percent of Iranians will tell people that they know are coming from the Ministry of Information that they hate the regime, that the real number must be something higher than that.

The Court also heard testimony from the men and women who have brought the present actions about their reasons for so doing. During the trial, Lt. Col. Howard Gerlach, who was paralyzed in the October 23 attack, was asked about what he hoped to achieve by participating in these actions:

> Well, I guess there's three words: accountability, deterrence and justice. And they are interrelated. The accountability, and I swear it was on Sunday, I was listening to a rerun of one of the TV – I don't know, Meet the Press or whatever, but Vice President Cheney was talking and he was saying that they, the terrorists feel that they can do things with impunity, and he said ever since the Marines in '83. Yes, there hasn't been any accountability.
>
> Deterrence effect is, in some way, and this is also what he was talking about, was one thing we have to go after – and I think I'm stating this correctly; this is what I heard, is the funding. It's the funding. Even on the radio coming over here, we heard some talk about funding for terrorist organizations.
>
> Then the third thing is the justice, and this refers to the people, a good portion of [whom] are in this room. . . . They lost a large chunk of their lives, young Marines, sons, husbands, fathers, brothers. They were attempting to do a noble thing. They went as peacekeepers in the tradition of this country. . . [W]e weren't trying to conquer land, we weren't trying to get anything for ourselves; we were really trying in a humanitarian way to help those people in Lebanon. I think this is . . . the day in court, literally and figuratively speaking, for recognition of just how great these guys were.

The Court also heard the testimony of Lynn Smith Derbyshire, whose brother, Capt. Vincent Smith, was killed in the October 23 attack:

> I'm not sure it's true that time heals wounds, but even so, a wound which has healed over time is not the same thing as not having a wound. Even a healing wound gets reopened from time to time.
>
> * * * * * * * * * *
>
> [A]s I have talked to so many of the Beirut families, I believe that many of them would concur with me when I say that the pain does not stop when you bury the dead; it is only the very beginning. We feel this loss over and over and over again. It does not go away and it does not lessen with time; that is a myth. It is more like teaching someone who has a chronic pain disorder how to manage and embrace their pain than it is a lessening of pain.

* * * * * * * * * *

I have spoken to quite a number of the family member and I think we're all – I think they would all agree with me when I tell you that what Vince would have wanted was justice.

Vince was a fair-minded man. Vince was a man of integrity, as I know so many of the men who were lost that day were. It's the kind of men Marines are. That's what the Marine Corps produces. And Vince would have wanted us to fight.

Vince would have said . . . we must hold these men accountable. Vince would have said that it is time for justice, that it is time for compensation, that it is time to make it – to make them pay enough to make them stop, because Vince was a man who believed in what was right, and if he had lived, he would be sitting here in my place and he would be saying, "Come on, sis, let's go get them."

But he can't be here, and in his name, and in his honor, and with the permission of some of the other family members here . . . in their names and in their honor, I salute them, and we stand together to do what they cannot do for themselves.

There is little that the Court can add to the eloquent words of these witnesses. No order from this Court will restore any of the 241 lives that were stolen on October 23, 1983. Nor is this Court able to heal the pain that has become a permanent part of the lives of their mothers and fathers, their spouses and siblings, and their sons and daughters. But the Court can take steps that will punish the men who carried out this unspeakable attack, and in so doing, try to achieve some small measure of justice for its survivors, and for the family members of the 241 Americans who never came home.

A separate order accompanies this opinion.

Date: 5-30-03

Royce C. Lamberth
United States District Judge

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Annex 33

***Campuzano et al. v. The Islamic Republic of Iran et al.*, U.S. District Court, District of Columbia, 10 September 2003, 281 F. Supp. 2d 258 (D.D.C. 2003)**

Excerpts: p. 1 and pp. 18-40

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DIANA CAMPUZANO, AVI ELISHIS, and GREGG SALZMAN, Plaintiffs, v. THE ISLAMIC REPUBLIC OF IRAN (aka Iran, The Republic of Iran, Republic of Iran, The Government of Iran, Iranian Government, and Imperial Government of Iran), THE IRANIAN MINISTRY OF INFORMATION AND SECURITY, and THE IRANIAN REVOLUTIONARY GUARD, Defendants.	:	Civil Action No.: 00-2328 (RMU) ~File Document No.: 30 **FILED** SEP 10 2003 NANCY MAYER WHITTINGTON, CLERK U.S. DISTRICT COURT
JENNY RUBIN, DEBORAH RUBIN, DANIEL MILLER, ABRAHAM MENDELSON, STUART E. HERSH, RENAY FRYM, NOAM ROZENMAN, ELENA ROZENMAN, and TZVI ROZENMAN, Plaintiffs, v. THE ISLAMIC REPUBLIC OF IRAN (aka Iran, The Republic of Iran, Republic of Iran, The Government of Iran, Iranian Government, and Imperial Government of Iran), THE IRANIAN MINISTRY OF INFORMATION AND SECURITY, AYATOLLAH ALI HOSEINI KHAMENEI, ALI AKBAR HASHEMI-RAFSANJANI, and ALI FALLAHIAN-KHUZESTANI, Defendants.	:	Civil Action No.: 01-1655 (RMU) Document Nos.: 14, 20

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hypersensitivity. Tr. at 2/2-3. Dr. Strous testified that Ms. Rozenman's emotional injuries have led to physical injuries, including irritable bowel syndrome and generalized joint pain and stiffness. *Id.*

(4) Tzvi Rozenman

78. Tzvi Rozenman is, and was at the time of the bombing, an American citizen. Tr. at 2/78.

79. Mr. Rozenman is plaintiff Noam Rozenman's father. *Id.*

80. Since the bombing, Mr. Rozenman has dedicated his time and effort to care for his son. Tr. at 2/81.

81. Mr. Rozenman suffers from grief and anguish caused by his son's injuries. Ex. 13.

II. CONCLUSIONS OF LAW

A. Jurisdiction and Liability

1. Legal Standard for a Default Judgment

A court shall not enter a default judgment against a foreign state "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e); *Roeder v. Islamic Republic of Iran*, 2003 WL 21495185, at *3 (D.C. Cir. July 1, 2003). This "satisfactory to the court" standard is identical to the standard for entry of default judgments against the United States in Federal Rule of Civil Procedure

55(e).[3] *Hill v. Republic of Iraq*, 328 F.3d 680, 684 (D.C. Cir. 2003). In evaluating the plaintiffs' proof, the court may "accept as true the plaintiffs' uncontroverted evidence." *Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97, 100 (D.D.C. 2000). In FSIA default judgment proceedings, the plaintiffs may establish proof by affidavit. *Weinstein v. Islamic Republic of Iran*, 184 F. Supp. 2d 13, 19 (D.D.C. 2002).

2. Legal Standard for Subject-Matter Jurisdiction and Liability

In order to establish subject-matter jurisdiction, the plaintiffs must establish an exception to the defendant foreign state's sovereign immunity. 28 U.S.C. §§ 1604, 1605(a)(7). The Antiterrorism and Effective Death Penalty Act of 1996 amended the FSIA and waived the sovereign immunity of state sponsors of terrorism. 28 U.S.C. § 1605(a)(7); *Elahi*, 124 F. Supp. 2d at 107. When an exception to sovereign immunity exists under 28 U.S.C. § 1605(a)(7), this court has original subject-matter jurisdiction pursuant to 28 U.S.C. § 1330(a). *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 435 (1989); *Elahi*, 124 F. Supp. 2d at 106.

Creating a cause of action for victims of terrorism, Congress amended the FSIA with the Civil Liability for Acts of State Sponsored Terrorism Act, commonly known as the Flatow Amendment. 28 U.S.C. § 1605 note; *Roeder,* 2003 WL 21495184, at *1. Thus, to establish subject-matter jurisdiction and prove liability pursuant to the FSIA and its amendments, the plaintiffs must prove with "evidence satisfactory to the court" the following applicable elements:

> (1) that personal injury or death resulted from an act of torture, extrajudicial killing, aircraft sabotage, or hostage taking;

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[3] Rule 55(e) states that no "default [judgment] shall be entered against the United States or an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." FED. R. CIV. P. 55(e).

> (2) that the act was either perpetrated by a foreign state directly or by a non-state actor which receives material support or resources from the foreign state defendant;
>
> (3) the act or provision of material support or resources is engaged in by an agent, official, or employee of the foreign state while acting within the scope of his or her office, agency, or employment;
>
> (4) that the foreign state be designated as a state sponsor of terrorism either at the time the incident complained of occurred or was later so designated as a result of such act;
>
> (5) that if the incident complained of occurred within the foreign state defendant's territory, plaintiff has offered the defendants a reasonable opportunity to arbitrate the matter;
>
> (6) that either the plaintiff or the victim was a United States national at the time of the incident;
>
> (7) that similar conduct by United States agents, officials, or employees within the United States would be actionable.

28 U.S.C. §§ 1605(a)(7) and 1605 note; *Peterson v. Islamic Republic of Iran*, 2003 WL 21251867, at *11-12 (D.D.C. May 30, 2003); *Elahi*, 124 F. Supp. 2d at 106-07.

3. Conclusions of Law Regarding Subject-Matter Jurisdiction and Liability

In accordance with the D.C. Circuit, the court applies the Rule 55(e) standard to determine whether the plaintiffs satisfied their burden of proof pursuant to 28 U.S.C. § 1608(e). *Hill*, 328 F.3d at 683. The court concludes that default judgment for the plaintiffs is proper because they have proven each of the applicable elements by "evidence satisfactory to the court." *Peterson*, 2003 WL 21251867, at *11-12. Indeed, the court concludes that the plaintiffs have gone beyond the necessary burden of "evidence satisfactory to the court" and have proven each element by clear and convincing evidence. *Hill*, 328 F.3d at 683.

Considering the first of the FSIA elements, the court determines that the bombing

was an act of extrajudicial killing that caused the plaintiffs' injuries.[4] 28 U.S.C. §§ 1605(a)(7) and 1605 note. Other members of this court have previously determined that a deadly terrorist attack is an act of extrajudicial killing. *Flatow*, 999 F. Supp. at 18 (holding that "a suicide bombing . . . is an act of 'extrajudicial killing' within the meaning of 28 U.S.C. § 1605(a)(7)"); *Elahi*, 124 F. Supp. 2d at 107 (same). Further, the bombing was a deliberate killing not authorized by a previous judgment. 28 U.S.C. § 1350 note.

Addressing the second FSIA element, the court determines that Hamas, a non-state actor that receives material support and resources from Iran, deliberately detonated the September 4, 1997 bombs at the Ben Yehuda Street pedestrian mall in Jerusalem. 28 U.S.C. §§ 1605(a)(7) and 1605 note. Iran directly provided material support and resources to Hamas and its operatives, for the specific purpose of carrying out acts of extrajudicial killing, including the bombing at issue here. *Cf. Ungar v. Islamic Republic of Iran*, 211 F. Supp. 2d 91, 97-98 (D.D.C. 2002) (ruling that the plaintiffs failed to establish a connection between the terrorists and Iran sufficient to satisfy the requirements of section 1605(a)(7)).

Regarding the third element, the court determines that MOIS, an agency of the government of Iran, and senior Iranian officials Ayatollah Ali Hoseini Khamenei, Ali Akbar Hashemi-Rafsanjani and Ali Fallahian-Khuzestani provided "material support or resources" to Hamas and its operatives, for the specific purpose of carrying out the bombing, an act of extrajudicial killing. 28 U.S.C. §§ 1605(a)(7) and 1605 note.

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[4] Section 1605(e)(1) adopts the definition of extrajudicial killing contained in the Torture Victim Protection Act of 1991: "a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all judicial guarantees which are recognized as indispensable by civilized peoples." 28 U.S.C. §1350 note.

Because providing material support and resources to Hamas is part of official Iranian policy, MOIS and the Iranian leaders acted within the scope of their office, agency, and employment.

Turning to the fourth and fifth elements, the court determines that Iran was a designated state sponsor of terrorism on September 4, 1997. *Id.* Also, the FSIA does not require the plaintiffs to offer the defendants an opportunity to arbitrate because the attack did not occur within Iranian territory. *Id.* Addressing the sixth element, the court determines that the plaintiffs were United States citizens on September 4, 1997, the date of the bombing. *Id.* Considering the seventh element, the court concludes that if an official of the United States, acting in his or her official capacity, provided material support to an organization similar to Hamas in order to cause or facilitate terrorist attacks, he or she would be held liable and unable to claim a defense of immunity. *Id.*; *Elahi*, 124 F. Supp. 2d at 108.

Having met all of the requisite elements, the court concludes that the plaintiffs have established, by the requisite "evidence satisfactory to the court" and by clear and convincing evidence, the court's subject-matter jurisdiction and the liability of the defendants for the plaintiffs' personal injuries caused by the September 4, 1997 bombing. *Id.*

One final point regarding liability merits attention. In addition to their claim for liability pursuant to the FSIA, specifically, the Flatow Amendment, the *Rubin* plaintiffs also claim liability pursuant to common law for the torts of assault, battery, and intentional infliction of emotional distress and present proposed conclusions of law for

these claims.[5] *Rubin* Pls.' Prop. Findings of Fact and Conclusions of Law at 22-46. However, the *Rubin* plaintiffs' proposed findings of fact and conclusions of law leave unclear whether they included their common law causes of action as an alternative or additional theory of liability. *Id.* Because the court has concluded that the defendants are liable for the personal injuries caused to the plaintiffs by the defendants' actions, the analysis of these claims is redundant with the FSIA liability analysis. Nevertheless, out of an abundance of caution, the court will briefly address the common law claims, which are valid claims that the plaintiffs have proven.

The *Rubin* plaintiffs' evidence of the bombing and their resultant physical and emotional injuries supports their claims that the defendants are liable for the torts of battery, assault, and intentional infliction of emotional distress against plaintiffs Jenny Rubin, Daniel Miller, Abraham Mendelson, Stuart Elliot Hersh and Noam Rozenman. *E.g., Sutherland v. Islamic Republic of Iran*, 151 F. Supp. 2d 27, 47-50 (D.D.C. 2001) (ruling that Iran and MOIS were liable for the common law torts of battery, assault, and intentional infliction of emotional distress due to actions by a terrorist group they funded and supported); *Jenco*, 154 F. Supp. 2d at 33-36 (same). In addition, the *Rubin* plaintiff's evidence of the bombing, their resultant emotion distress, and the immediate family

[5] In contrast, the *Campuzano* plaintiffs limit their proposed conclusions of law to liability pursuant to the FSIA and the Flatow amendment. *Campuzano* Pls.' Prop. Findings of Fact and Conclusions of Law at 22-29. While many FSIA judgments have founded liability on the FSIA and the Flatow Amendment alone, some have instead founded liability on common law causes of action including assault, battery, and intentional infliction of emotional distress. *Compare, e.g., Elahi,* 124 F. Supp. 2d at 106-08 (basing liability on the FSIA and the Flatow amendment) *and Mousa v. Islamic Republic of Iran*, 2001 U.S. Dist. LEXIS 24316, at *28-29 (D.D.C. Sept. 19, 2001) (same) *with, e.g., Bettis v. Islamic Republic of Iran,* 315 F.3d 325, 332 (D.C. Cir. 2003) (affirming district court's application of common law to the plaintiffs' claims for intentional infliction of emotional distress) *and Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27, 38 (D.D.C. 2001) (determining that the defendants were liable pursuant to the plaintiff's common law claims for battery, assault, and intentional infliction of emotional distress).

relationships between the plaintiffs present at the bombing and those not present supports their claims that the defendants are liable for intentionally inflicting emotional distress on plaintiffs Deborah Rubin, Renay Frym, Elana Rozenman and Tzvi Rozenman. *E.g., Sutherland*, 151 F. Supp. 2d at 49-50 (holding that Iran and MOIS were liable for the intentional infliction of emotional distress of plaintiffs who did not witness the terrorist act but whose immediate family members did); *Jenco*, 154 F. Supp. 2d at 35-36 (same). For these reasons, the court concludes that the defendants are liable to the *Rubin* plaintiffs for the common law torts of assault, battery, and intentional infliction of emotional distress.

4. Personal Jurisdiction

The FSIA provides that personal jurisdiction over a foreign-state defendant exists once the plaintiff establishes an exception to immunity pursuant to 28 U.S.C. § 1605 and accomplishes service of process pursuant to 28 U.S.C. § 1608. 28 U.S.C. §§ 1330(b), 1605, 1608; *Foremost-McKesson v. Islamic Republic of Iran*, 905 F.2d 438, 442 (D.C. Cir. 1990) ("Personal jurisdiction under FSIA exists so long as subject-matter jurisdiction exists and service has been properly made pursuant to 28 U.S.C. § 1608") (citing 28 U.S.C. § 1330(b)). Accordingly, because the plaintiffs have established an exception to the defendants' immunity pursuant to 28 U.S.C. § 1605 and thereby established subject matter jurisdiction, and because the plaintiffs properly served the defendants pursuant to 28 U.S.C. § 1608, the court has personal jurisdiction over the defendants. *Foremost-McKesson*, 905 F.2d at 442.

B. Compensatory Damages

1. Legal Standard for Compensatory Damages

To recover damages, "a FSIA default winner must prove damages 'in the same manner and to the same extent' as any other default winner." *Hill*, 328 F.3d at 684-85 (citation omitted). Plaintiffs must prove future damages to a "reasonable certainty," or by a preponderance of the evidence, and must prove the amount of damages by a reasonable estimate. *Id.* For the court to award damages for past economic losses, plaintiffs need only "reasonably prove" the amount of damages they request and the court should consider any "special problems of proof arising from the defendant's absence." *Id.*

Using this framework, the court considers whether the following types of compensatory damages are available: pain and suffering, loss of prospective income, medical expenses, and solatium. While all of the plaintiffs present at the bombing request pain and suffering damages and all of the plaintiffs not present at the bombing request solatium damages, only Diana Campuzano requests damages for lost future wages and only Avi Elishis requests damages for past medical expenses.

a. Pain and Suffering

In considering the plaintiff's requests for pain and suffering damages, the court follows the rationale used in other FSIA cases in which other members of this court have looked to previous decisions to calculate damages for the pain and suffering caused by Iran-sponsored terrorist acts. *E.g.*, *Cronin v. Islamic Republic of Iran*, 238 F. Supp. 2d 222, 234-35 (D.D.C. 2002). The case most similar to the instant case, and therefore most helpful for the calculation of pain and suffering damages, is *Mousa v. Islamic Republic of*

Iran. 2001 U.S. Dist. LEXIS 24316. Unlike most FSIA plaintiffs who were either killed or held as hostages, but similar to the plaintiffs in this action, Ms. Mousa survived a terrorist bombing and was not a hostage. *Id.* at *30-33 (discussing damage awards in other FSIA cases).

The plaintiff in *Mousa* survived a suicide bombing of a bus in Israel and suffered from severe burns and blast injuries to her lungs, skull, face, and hand. *Id.* at *10. Ms. Mousa was hospitalized for about four weeks, spent another nine days at a rehabilitation center, and received continuous treatment for about three months thereafter. *Id.* at *31. Ms. Mousa suffers from numerous permanent injuries including hearing loss, blindness in one eye, loss of function in her dominant hand, disfigurement, burn scars, concentration problems, walking difficulties, breathing impairment, and PTSD. *Id.* at *10-14. The court awarded Ms. Mousa $12,000,000 in compensatory damages for past and future pain and suffering because the plaintiff suffered at the time of the attack and, as a survivor, continues to suffer from her permanent injuries. *Id.* at *33. The court explained that "[a]lthough not held hostage in the traditional sense of that phrase, the person of Ms. Mousa was misappropriated by [the] defendants – by means of horrible, violent injuries – to make a political statement, and has thus been held hostage in mind and body by the Iran-sponsored terrorists for nearly six years, with no hope of relief from that captivity for the rest of her life."

b. Loss of Prospective Income

The FSIA also permits compensatory damages when plaintiffs' terrorist-caused injuries prohibit them from working. *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19, 26 (D.D.C. 2001). In *Daliberti*, the court awarded damages for loss of prospective

income pursuant to the FSIA because the plaintiffs were unable to continue their previous employment due to psychological and emotional injuries caused by a terrorist act for which the defendants were responsible. *Id.*

c. Medical Expenses

Pursuant to the FSIA, economic expenses of terrorist-caused personal injury are compensable. 28 U.S.C. § 1605 note. Although no previous FSIA cases include claims for medical expenses, the court in *Mousa* noted that medical expenses are compensable under the FSIA's "economic damages" provision. 2001 U.S. Dist. LEXIS 24316, at *29-30 (listing all the claims the plaintiff did not make, but could have made).

d. Solatium Damages

Solatium damages are available to FSIA plaintiffs when extreme and outrageous conduct has caused grief and anguish to plaintiffs closely related to a victim of terrorism. *E.g.*, *Flatow*, 999 F. Supp. at 29; *Surette v. Islamic Republic of Iran*, 231 F. Supp. 2d 260, 269-70 (D.D.C. 2002). "[A]cts of terrorism are by their very definition extreme and outrageous and intended to cause the highest degree of emotional distress, literally, terror[.]" *Stethem v. Islamic Republic of Iran*, 201 F. Supp. 78, 89 (D.D.C. 2002). As with pain and suffering damages, courts in this circuit have a well-established practice of looking to previous solatium awards to determine solatium damages in FSIA cases. *Hill*, 175 F. Supp. 2d at 48; *Jenco*, 154 F. Supp. 2d at 38.

Courts have recognized the distress of parents whose children are victims of terrorist acts by awarding solatium damages to the parents of terrorism victims. *Stethem,* 201 F. Supp. at 89; *Acree v. Republic of Iraq*, 2003 WL 21537919, at *43 (D.D.C. July 7, 2003); *Stethem*, 201 F. Supp. 2d at 91. In *Stethem*, the court awarded $5,000,000 in

solatium damages to the parent of a plaintiff killed by terrorists for the parents' grief and mental anguish suffered as a result of the terrorist-caused injuries to their child. *Stethem*, 201 F. Supp. 2d at 91. Following *Stethem*, the court in *Acree* awarded $5,000,000 in solatium damages to the parents of surviving terrorism victims for their grief and mental anguish. *Acree*, 2003 WL 21537919, at *43. In *Acree*, the victims were held hostage for periods of time ranging from one week to over six weeks. 2003 WL 21537919, at *3-31. During their childrens' captivity, the parents suffered extreme emotional distress. *Id.* at *31. After the release of the hostages and the families' reunions, the parents continued to suffer because of the changed physical and emotional conditions of their children. *Id.* at *31-32. The *Acree* court distinguished the parents' suffering during the captivity and post-release by awarding them $2,500,000 "for the mental anguish and emotional distress during the period of their loved ones' captivity" and an additional $2,500,000 "for their mental anguish, emotional distress, and any economic damage" after the release of the hostages. *Id.* at *43.

Courts have also recognized the distress of spouses of terrorism victims by awarding solatium damages to such spouses. *Acree*, 2003 WL 21537919, at *42-43; *Weinstein*, 184 F. Supp. 2d at 23; *Higgins v. Islamic Republic of Iran*, 2000 WL 33674311, at *7-8 (D.D.C. Sept. 21, 2000); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 65-67 (D.D.C. 1998). In *Weinstein* and *Higgins*, both cases in which terrorists killed the plaintiffs, the courts awarded $8,000,000 and $12,000,000 respectively, in solatium damages to the plaintiffs' spouses. *Weinstein*, 184 F. Supp. 2d at 23; *Higgins*, 2000 WL 33674311, at *7-8. In *Cicippio*, the court awarded $10,000,000 in solatium damages to each surviving hostage victim's spouse for the mental anguish

endured while separated and for the spouses' continuing mental anguish suffered upon the return of the victims due to the terrorist-caused injuries. *Cicippio*, 18 F. Supp. at 65-67. The *Cicippio* court specifically stated that the spouses' suffering "may have exceeded the grief normally experienced as a result of the death of a loved one, and will in all likelihood continue to do so into an uncertain future." *Id.* at 70. Following similar analysis, this court awarded $10,000,000 in solatium damages to each surviving terrorism victims' spouse in *Acree*. 2003 WL 21537919, at *42-43. Again, the court in *Acree* distinguished between suffering during captivity and post-release by awarding $4,000,000 "for the mental anguish and emotional distress during the period of a husband's captivity" and $6,000,000 "for mental anguish and emotional distress following a husband's release." *Id.* at *43.

2. Conclusions of Law Regarding Compensatory Damages

In considering the plaintiffs' claims for past damages, the court concludes that the plaintiffs have "reasonably proven" their claims. *Hill*, 328 F.3d at 684-85. Similarly, in considering the plaintiffs' claims for future damages, the court concludes that the plaintiffs have proven their claims by a "reasonable certainty." Accordingly, the plaintiffs are entitled to damage awards as set forth below. *Id.*

a. The Plaintiffs Present at the Bombing

The plaintiffs present at the bombing were severely and permanently injured as a result of the Iran-sponsored bombing. Because the nature and duration of the plaintiffs' pain and suffering is comparable to the pain and suffering experienced by the *Mousa* plaintiff, this court follows the analysis and guidance of the *Mousa* court in determining

the amount of the plaintiffs' damages awards. *Mousa*, 2001 U.S. Dist. LEXIS 24316, at *30-33.

(1) Diana Campuzano

Overall and of most significance to this analysis, Ms. Campuzano's severe burns, skull injuries, scarring, permanent vision and hearing impairments, and PTSD symptoms are similar to those of Ms. Mousa. *Id.* at *10-14. Contrasting Ms. Campuzano to the plaintiff in *Mousa*, however, the court determines that Ms. Campuzano's pain and suffering is more severe in that Ms. Campuzano's injuries are slightly more serious and she was hospitalized for two weeks longer than Ms. Mousa. *Id.* at *11. Taking into account the similarities and differences between the injuries of Ms. Mousa and Ms. Campuzano, and the $12,000,000 compensatory damages award to Ms. Mousa, the court concludes that Ms. Campuzano is entitled to recover compensatory damages for her past and future pain and suffering in the amount of $17,000,000. *Id.* at *33.

In addition, Ms. Campuzano's expert testimony proved that her loss of prospective income, as caused by her inability to work because of her emotional and psychological injuries, entitles her to an award of $1,952,725 for loss of prospective income. *Daliberti*, 146 F. Supp. 2d at 26.

(2) Avi Elishis

Similar to Ms. Mousa, Mr. Elishis was hospitalized for about four weeks, suffered severe burns and blast injuries, scarring, and has permanent hearing loss, walking difficulties, difficulty breathing, and PTSD. *Mousa*, at *10-14. Because of the severity and permanence of his injuries, and because of the similar degree of pain and suffering between the plaintiff in *Mousa* and Mr. Elishis, the court concludes that Mr. Elishis is

entitled to recover compensatory damages for his past and future pain and suffering in the amount of $12,000,000, the same amount as the plaintiff in *Mousa* received. *Id.* at *33.

Mr. Elishis has also requested damages for his past medical expenses and has "reasonably proven" these expenses through the testimony of his mother. *Hill*, 328 F.3d at 684-85. Thus, the court concludes that Mr. Elishis is entitled to an award of $10,882.87 for past medical expenses.

(3) Gregg Salzman

Mr. Salzman suffered severe burns and blast injuries including a perforated eardrum and a shrapnel wound to his upper lip. His permanent injuries – severe nerve damage that causes chronic pain, debilitating headaches and PTSD – are not as severe as those of Ms. Mousa. *Mousa*, 2001 U.S. Dist. LEXIS 24316, at *10-14. In contrast to Ms. Mousa's injuries, Mr. Salzman's injuries, although serious, did not completely change his life. *Id.* He continues to work as a chiropractor, although in a permanently limited capacity. Also in contrast to the plaintiff in *Mousa*, Mr. Salzman was hospitalized for about one week while Ms. Mousa was hospitalized for about four weeks. *Id.* at *11. Taking into account Mr. Salzman's pain and suffering, which is severe but slightly less severe than that of Ms. Mousa, the court concludes that Mr. Salzman is entitled to recover compensatory damages for his past and future pain and suffering in the amount of $10,000,000, $2,000,000 less than the pain and suffering award in *Mousa*. *Id.* at *33.

(4) Jenny Rubin

In contrast to Ms. Mousa, Ms. Rubin did not require hospitalization after the bombing because she had no apparent physical injuries. *Id.* at *10-14. Like Ms. Mousa, Ms. Rubin suffers from PTSD and concentration disruptions. *Id.* Taking into account that Ms. Rubin's injuries are significantly less severe than those of Ms. Mousa, the court concludes that Ms. Rubin is entitled to recover compensatory damages for her past and future pain and suffering in the amount of $7,000,000. This amount is $5,000,000 less than the pain and suffering award in *Mousa*. *Id.* at *33.

(5) Daniel Miller

Similar to Ms. Mousa, Mr. Miller suffered severe blast injuries including multiple shrapnel wounds to his legs and left eye and his permanent injuries include a hematoma in his left leg, a permanent limp in his right leg, difficulty walking, permanent hypersensitivity to sunlight, nerve damage to his fingers and hands, and PTSD. *Id.* Also like Ms. Mousa, Mr. Miller received medical treatment for about five weeks. *Id.* Taking into account the similar degree of pain and suffering between Mr. Miller and the plaintiff in *Mousa*, the court concludes that Mr. Miller is entitled to recover compensatory damages for his past and future pain and suffering in the same amount as Ms. Mousa received, $12,000,000. *Id.* at *33.

(6) Abraham Mendelson

Similar to Ms. Mousa, Mr. Mendelson suffered severe burns and blast injuries including a perforated eardrum, a partially severed right ear, partial hearing loss, tinnitus, large scars, chronic headaches, and PTSD. *Id.* Although Mr. Mendelson was hospitalized for only four days, compared to Ms. Mousa's four weeks, Mr. Mendelson

underwent burn therapy for about a month after leaving the hospital. *Id.* Taking into account the similar degree of pain and suffering between Mr. Mendelson and the plaintiff in *Mousa*, and focusing on both plaintiffs' severe burns, the court concludes that Mr. Mendelson is entitled to recover compensatory damages for his past and future pain and suffering in the amount of $12,000,000, the same amount as the plaintiff in *Mousa* received. *Id.* at *33.

(7) Stuart Hersh

Similar to Ms. Mousa, Mr. Hersh suffered severe burns and blast injuries including a 60 percent hearing loss, tinnitus, back pain, chronic ear infections, burn scars, difficulty walking, PTSD, and psychomotor retardation. *Id.* Although Mr. Hersh was hospitalized only one day, compared to Ms. Mousa's four weeks, Mr. Hersh's permanent injuries are similar in type and severity to Ms. Mousa's permanent injuries. *Id.* Taking into account the similar degree of pain and suffering between Mr. Hersh and the plaintiff in *Mousa*, the court concludes that Mr. Hersh is entitled to recover compensatory damages for his past and future pain and suffering in the amount of $12,000,000, the same amount as the plaintiff in *Mousa* received. *Id.* at *33.

(9) Noam Rozenman

Similar to Ms. Mousa, Mr. Rozenman suffered severe burns and blast injuries, including tinnitus, perforated eardrums, chronic ear infections, scars, nerve damage in his left leg and right hand, and PTSD. *Id.* In contrast to Ms. Mousa's four weeks of hospitalization, Mr. Rozenman spent six weeks in the hospital, and underwent additional surgeries a year after the bombing. *Id.* Also in contrast to the plaintiff in *Mousa*, Mr. Rozenman's extreme and severe burn injuries required ongoing painful treatment. His

higher degree of pain and suffering suggests a damages award greater than the award in *Mousa*. Taking into account the differences in pain and suffering between the plaintiff in *Mousa* and Mr. Rozenman, the court concludes that Mr. Rozenman is entitled to recover compensatory damages for his past and future pain and suffering in the amount of $15,000,000, $3,000,000 more than the pain and suffering award in *Mousa*. *Id.* at *33.

b. The Plaintiffs Not Present at the Bombing

The defendants' extreme and outrageous conduct – the September 4, 1997 bombing – caused mental grief and anguish to those plaintiffs who are close to the bombing victims, but who were not present at the bombing. *Surette*, 213 F. Supp. 2d at 269-70.

(1) Deborah Rubin

Deborah Rubin suffers grief and anguish as a result of her daughter Jenny Rubin's injuries caused by the bombing. Because Deborah Rubin has a parent-child relationship with Jenny Rubin and because Jenny Rubin is a surviving terrorism victim, the court applies the reasoning in *Acree*. *Acree,* 2003 WL 21537919, at *43. Similar to the parent-plaintiffs in *Acree*, Ms. Rubin suffers severe mental anguish from the physical and emotional changes to Jenny Rubin caused by the bombing. *Id.* Unlike the victims in *Acree*, Ms. Rubin's daughter was not taken hostage. *Id.* Taking into account both the parent-child relationship and the grief and anguish Ms. Rubin suffers, and recognizing that Ms. Rubin did not suffer any hostage-taking separation from her daughter, the court concludes that Ms. Rubin is entitled to recover compensatory damages for solatium in the amount of $2,500,000.

(2) Renay Frym

Renay Frym suffers from grief and mental anguish as a result of Stuart Hersh's injuries as caused by the bombing. Like the spouse-plaintiffs in *Cicippio* and *Acree*, as a result of the bombing, Ms. Frym suffers ongoing mental anguish, regards herself as more a nurse than a wife to her spouse, and has no marital relations with her husband. *Cicippio*, 18 F. Supp. 2d at 66-67; *Acree*, 2003 WL 21537919, at *42-43. Unlike the surviving victims in *Cicippio* and *Acree*, Ms. Frym's spouse was not taken hostage. *Id.* Taking into account the severity of Ms. Frym's husband's permanent injuries, Ms. Frym's suffering which is similar to that of the surviving hostages' wives in *Cicippio* and *Acree*, and recognizing that Ms. Frym did not suffer any hostage-taking separation from her husband, the court concludes that Ms. Frym is entitled to recover compensatory damages for solatium in the amount of $6,000,000.

(3) Elena Rozenman

Elena Rozenman suffers from grief and anguish due to Noam Rozenman's injuries as caused by the bombing. Because Ms. Rozenman has a parent-child relationship with Noam Rozenman and because Noam Rozenman is a surviving terrorism victim, the court applies the reasoning in *Acree*. 2003 WL 21537919, at *43. Similar to the parent-plaintiffs in *Acree*, Ms. Rozenman suffers severe mental anguish from the physical and emotional changes to Noam Rozenman as caused by the bombing. *Id.* Unlike the terrorism victims in *Acree*, Ms. Rozenman's son was not taken hostage. *Id.* Taking into account both the parent-child relationship and the grief and anguish Ms. Rozenman suffers, and recognizing that Ms. Rozenman did not suffer any hostage-taking

separation from her son, the court concludes that Ms. Rozenman is entitled to recover compensatory damages for solatium in the amount of $2,500,000.

(4) Tzvi Rozenman

Tzvi Rozenman suffers grief and mental anguish due to Noam Rozenman's injuries as caused by the bombing. Because Mr. Rozenman has a parent-child relationship with Noam Rozenman and because Noam Rozenman is a surviving terrorism victim, the court applies the reasoning in *Acree*. 2003 WL 21537919, at *43. Similar to the parent-plaintiffs in *Acree*, Mr. Rozenman suffers severe mental anguish from the physical and emotional changes to Noam Rozenman caused by the bombing. *Id.* Unlike the terrorism victims in *Acree*, Mr. Rozenman's son was not taken hostage. *Id.* Taking into account both the parent-child relationship and the grief and anguish Mr. Rozenman suffers, and recognizing that Mr. Rozenman did not suffer any hostage-taking separation from his son, the court concludes that Mr. Rozenman is entitled to recover compensatory damages for solatium in the amount of $2,500,000.

C. Punitive Damages

1. Legal Standard for Punitive Damages

In addition to compensatory damages, pursuant to the FSIA, courts also have "the power to award punitive damages against an agency or instrumentality of a foreign state in a case brought under section 1605(a)(7)." *Kilburn v. Republic of Iran*, 2003 U.S. Dist. LEXIS 14347 (D.D.C. Aug. 8, 2003); *Cronin*, 238 F. Supp. 2d at 235 (citing 28 U.S.C. § 1606). In previous FSIA cases, courts treated MOIS as an agent or instrumentality of Iran and awarded punitive damages against MOIS and Iranian officials. *E.g.*, *Stern v. Islamic Republic of Iran*, 2003 WL 21670671, at *14 (D.D.C. July 17, 2003) (awarding

$300,000,000 in punitive damages against MOIS, Ayatollah Ali Hoseini Khamenei, Ali Akbar Hashemi-Rafsanjani and Ali Fallahian-Khuzestani); *Cronin*, 238 F. Supp. 2d at 235-36 (awarding $300,000,000 in punitive damages against MOIS); *Surette*, 231 F. Supp. 2d at 273-74 (noting that "the FSIA expressly exempts a foreign state from liability for punitive damages, but permits punitive damages to be assessed against an 'agency or instrumentality' of a foreign state").

Recently, in ruling on a preliminary issue not related to damages, the D.C. Circuit determined that "if the core functions of the entity are governmental, it is considered the foreign state itself; if commercial, the entity is an agency or instrumentality of the foreign state." *Roeder*, 2003 WL 21495184, at *5. Applying this categorical approach, the court stated that Iran's Ministry of Foreign Affairs has a core governmental function, and thus, "must be treated as the state of Iran itself rather than as its agent." *Id.* In *Kilburn*, this member of the court recently considered *Roeder* and determined that *Roeder*'s categorical approach does not apply to the issue of punitive damages in FSIA cases. *Kilburn*, No. 01-1301, at 30. This outcome was appropriate because in *Roeder*, the D.C. Circuit did not set forth the categorical approach in the context of punitive damages. *Id.* at 30. Thus, rather than break with the long line of FSIA cases that assessed punitive damages against MOIS as an agency or instrumentality of Iran, this court follows the precedent of the previous punitive damages awards against MOIS. *E.g.*, *Stern*, 2003 WL 21670671, at *14; *Cronin*, 238 F. Supp. 2d at 235-36.

Courts award punitive damages to plaintiffs who are direct victims of terrorism and their estates, but not to plaintiffs who are family members of surviving terrorism victims. *Stern*, 2003 WL 21670671, at *15; *Acree*, 2003 WL 21537919, at *43-44;

Eisenfeld, 172 F. Supp. 2d at 9. In addition, because punitive damages are intended to punish the defendants for the terrorist act itself, courts assess a single amount of punitive damages against the defendants for a terrorist act, rather than separate amounts for each plaintiff. *Acree*, 2003 WL 21537919, at *44 (awarding $306,000,000 in punitive damages to be shared equally among 17 prisoners of war); *Cronin*, 238 F. Supp. 2d at 235-36 (awarding to the single victim $300,000,000 in punitive damages); *Eisenfeld*, 172 F. Supp. 2d at 9 (rejecting the plaintiffs' request for two separate punitive damages awards – one for each deceased terrorism victim's estate – and awarding a single amount of $300,000,000 in punitive damages, "given that their deaths resulted from the same act of terrorism").

Turning to the appropriate amount of punitive damages, courts consider 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." *Acree*, 2003 WL 21537919, at *43 (citing *Flatow*, 999 F. Supp. at 32). In consideration of these factors, courts have used a multiple of three times Iran's annual expenditure on terrorism and consequently have generally awarded $300,000,000 in punitive damages per terrorist incident. *E.g.*, *id.* at 44; *Stern*, 2003 WL 21670671, at *14-15; *Cronin*, 238 F. Supp. 2d at 235-36; *Eisenfeld*, 172 F. Supp. 2d at 9.

2. Conclusions of Law Regarding Punitive Damages

The court determines that the plaintiffs may seek punitive damages against all of the defendants except Iran and that the court has the power to award punitive damages pursuant to the FSIA. *Stern,* 2003 WL 21670671, at *14-15. Considering the first factor for the punitive damages determination, the court determines that the character of the

bombing is extremely heinous. *Acree*, 2003 WL 21537919, at *43. The defendants' demonstrated policy of encouraging, supporting and directing a campaign of deadly terrorism is evidence of the monstrous character of the bombing that inflicted maximum pain and suffering on innocent people. Killing innocent civilians for political ends constitutes unconscionable conduct in any civilized society. *E.g.*, *Cronin*, 238 F. Supp. 2d at 235.

Second, the nature and extent of the harm to the plaintiffs is obvious from the evidence of the devastating and permanent physical and emotional injuries suffered by the plaintiffs. *Acree*, 2003 WL 21537919, at *43. The plaintiffs' physical injuries are severe and their ongoing emotional damages only compound the severity of the physical injuries. The defendants caused, and intended to cause, these injuries by packing the bombs with metal pieces and chemicals.

Third, the court recognizes that "[p]unitive damages are particularly appropriate in seeking to deter terrorist states from engaging in the heinous acts designated for § 1605(a)(7) actions, including . . . extrajudicial killing." *Id.* at *44. The court determines that only a large amount of punitive damages can serve as an effective deterrent against future terrorist acts. *Stern*, 2003 WL 21670671, at *14.

Fourth, expert testimony at the trial showed that MOIS has a substantial amount of funds at its disposal and courts in this circuit have consistently recognized MOIS's wealth in prior FSIA cases. *Acree*, 2003 WL 21537919, at *43; *see also, e.g., Weinstein*, 184 F. Supp. 2d at 25 (noting that MOIS is the largest intelligence agency in the Middle East, with approximately 30,000 employees and an annual budget between $100,000,000

and $400,000,000); *Cronin*, 238 F. Supp. 2d at 236 (awarding punitive damages based on the "approximately $100 million [spent] each year in support of . . . terrorist activities").

Consistent with the longstanding precedent of this court, the court applies the multiple of three times Iran's annual expenditure on terrorism to award punitive damages against all defendants, except for Iran, jointly and severally in the amount of $300,000,000, to be shared equally among the eight plaintiffs present at the bombing and resulting in $37,500,000 for each plaintiff present at the bombing. *E.g.*, *Stern*, 2003 WL 21670671, at *14; *Acree*, 2003 WL 21537919, at *44.

IV. CONCLUSION

For the foregoing reasons, the court finds and concludes that the plaintiffs have established their right to relief and enters default judgments against the defendants. For each of these two consolidated actions, an Order and Judgment directing the parties in a manner consistent with these Findings of Fact and Conclusions of Law is separately and contemporaneously issued this 10th day of September, 2003.

Ricardo M. Urbina
United States District Judge

Annex 34

***Cicippio-Puelo et al. v. Islamic Republic of Iran et al.*, U.S. Court of Appeals, D.C. Circuit, 16 January 2004, 353 F.3d 1024 (D.C. Cir. 2004)**

Excerpts: p. 1 and pp. 11-19

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 15, 2003 Decided January 16, 2004

No. 02-7085

ELIZABETH A. CICIPPIO-PULEO, ET AL.,
APPELLANTS

v.

ISLAMIC REPUBLIC OF IRAN AND
IRANIAN MINISTRY OF INFORMATION AND SECURITY,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 01cv01496)

Thomas L. Gowen argued the cause for appellants. With him on the briefs were *James J. Oliver* and *Steven J. McCool.*

Stuart H. Newberger argued the cause for *amicus curiae* Blake Kilburn in support of appellants. With him on the brief were *Michael L. Martinez, Laurel Pyke Malson* and *F. Ryan Keith.*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Cicippio-Puleo v. Islamic Republic of Iran, No. 02-7085 (D.C. Cir. Nov. 5, 2003) (order requesting statement of United States).

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

> Neither Section 1605(a)(7) nor the Flatow Amendment, nor the two considered in tandem, offers any indication that Congress intended to take the more provocative step of creating a private right of action against foreign governments themselves. Such a move could have serious adverse consequences for the conduct of foreign relations by the Executive Branch, and therefore an intent to do so should not be inferred – it should be recognized only if Congress has acted clearly in that direction.

Br. for the United States as *Amicus Curiae* at 5.

II. Analysis

A. Standard of Review

In denying plaintiffs' motion for summary judgment and in *sua sponte* dismissing their complaint pursuant to Rule 12 (b)(6), the District Court assumed that plaintiffs' factual allegations were true. The standard of review covering both the denial of summary judgment and the dismissal for failure to state a claim is the same – *de novo*. *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1293 (D.C. Cir. 2002) (citing *Wilson v. Pena*, 79 F.3d 154, 160 n.1 (D.C. Cir. 1996)). And we may affirm a district court's *sua sponte* dismissal for failure to state a claim if it appears beyond a doubt that the plaintiffs can prove no set of facts that would entitle them to relief. *See Baker v. Dir., United States Parole Comm'n*, 916 F.2d 725, 726 (D.C. Cir. 1990). Because we hold that the Flatow Amendment does not authorize a cause of action against foreign states, it is clear that plaintiffs can allege no

facts in their lawsuit against Iran that would entitle them to relief under the Flatow Amendment. Therefore, we affirm the District Court's dismissal for failure to state a claim under section 1605(a)(7) and the Flatow Amendment.

B. The Limited Cause of Action under the Flatow Amendment

Section 1605(a)(7) waives the sovereign immunity of a designated "foreign state" in actions in which money damages are sought for personal injury or death caused by one of the specified acts of terrorism, if the act of terrorism or provision of material support is engaged in by "an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency." 28 U.S.C. § 1605(a)(7). Section 1605(a)(7) is merely a jurisdiction-conferring provision that does not otherwise provide a cause of action against either a foreign state or its agents. However, the Flatow Amendment, 28 U.S.C. § 1605 note, undoubtedly does provide a cause of action against "[a]n official, employee, or agent of a foreign state designated as a state sponsor of terrorism" "for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under section 1605(a)(7)." The question here is whether the Flatow Amendment, which does not refer to "foreign state," may be construed, either alone or in conjunction with section 1605(a)(7), to provide a cause of action against a foreign state.

This issue was flagged in *Price v. Socialist People's Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002), where we observed that

> [t]he FSIA is undoubtedly a jurisdictional statute which, in specified cases, eliminates foreign sovereign immunity and opens the door to subject matter jurisdiction in the federal courts. *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620, 103 S. Ct. 2591, 2596-97, 77 L.Ed.2d 46 (1983). There is a question, however, whether the FSIA creates a federal cause of action

> for torture and hostage taking *against foreign states.*

Id. at 87. Since *Price*, some district court opinions in this circuit have held or assumed that the Flatow Amendment creates a cause of action against foreign states. *See Cronin v. Islamic Republic of Iran*, 238 F. Supp. 2d 222, 231 (D.D.C. 2002) (holding that the Flatow Amendment provides a cause of action against a foreign state). *See also Regier v. Islamic Republic of Iran*, 281 F. Supp. 2d 87, 98-99 (D.D.C. 2003) (adopting *Cronin*'s reasoning that there is a cause of action against foreign states under the Flatow Amendment); *Kilburn v. Islamic Republic of Iran*, 277 F. Supp. 2d 24, 36-37 (D.D.C. 2003) (same).

This court, however, has never affirmed a judgment that the Flatow Amendment, either alone or in conjunction with section 1605(a)(7), provides a cause of action against a foreign state. The issue was raised in *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 333 (D.C. Cir. 2003), but the appeal was resolved on other grounds. In *Roeder v. Islamic Republic of Iran*, 333 F.3d 228 (D.C. Cir. 2003), the court noted that, "[i]n view of the Flatow amendment's failure to mention the liability of foreign states, it is 'far from clear' that a plaintiff has a substantive claim against a foreign state under the Foreign Sovereign Immunities Act," *id.* at 234 n.3, but that appeal was also decided on other grounds.

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

* * * *

There is a clearly settled distinction in federal law between statutory provisions that waive sovereign immunity and those that create a cause of action. It cannot be assumed that a claimant has a cause of action for damages against a government agency merely because there has been a waiver of sovereign immunity. *See FDIC v. Meyer*, 510 U.S. 471, 483-84 (1994). As the Supreme Court has noted:

> The first inquiry is whether there has been a waiver of sovereign immunity. If there has been such a waiver, as in this case, the second inquiry comes into play–that is, whether the source of substantive law upon which the claimant relies provides an avenue for relief.

Id. at 484.

The Supreme Court has also made it clear that the federal courts should be loathe to "imply" a cause of action from a jurisdictional provision that "creates no cause of action of its own force and effect . . . [and] imposes no liabilities." *See Touche Ross & Co. v. Reddington*, 442 U.S. 560, 577 (1979). "The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law." *Id.* at 578. In adhering to this view, the Supreme Court has declined to construe statutes to imply a cause of action where Congress has not expressly provided one. *See, e.g., Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 67 n.3 (2001) (recognizing the Court's retreat from its previous willingness to imply a cause of action where Congress has not provided one); *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress.").

Unsurprisingly, the Supreme Court has applied the distinction between immunity and liability in interpreting the FSIA itself, explaining that "[t]he language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or

instrumentality." *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620 (1983). With this case law to guide us, there can be little doubt of the outcome in this case.

* * * *

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

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

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

> As the Supreme Court repeatedly has explained, an *official*-capacity claim against a government official is in substance a claim against the government itself. See, *e.g.*, *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). . . . By definition, a damages judgment in an official-capacity suit is enforceable against the state itself (and only against the state). See *Gra-*

> *ham*, 473 U.S. at 166 . . .; see also Fed. R. Civ. P. 25(d). . . . Thus, to construe the Flatow Amendment as permitting official-capacity claims would eviscerate the recognized distinction between suits against governments and suits against individual government officials. . . . [T]he text of the the Flatow Amendment and Section 1605(a)(7), as well as all relevant background interpretive principles . . . foreclose any such construction.

Br. for the United States as *Amicus Curiae* at 17.

* * * *

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

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

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

> This subtitle provides that nations designated as state sponsors of terrorism under section 6(j) of the

> Export Administration Act of 1979 will be amenable to suit in U.S. courts for terrorist acts. It permits U.S. federal courts to hear claims seeking money damages for personal injury or death against such nations and arising from terrorist acts they commit, or direct to be committed, against American citizens or nationals outside of the foreign state's territory, and for such acts within the state's territory if the state involved has refused to arbitrate the claim.

H.R. CONF. REP. NO. 104-518, at 112 (1996). It is noteworthy that the legislative history does not say that section 1605(a)(7) imposes liability against foreign states or create a cause of action against them.

When Congress later passed the appropriations bill that included the Flatow Amendment, there was very little legislative history purporting to explain the enactment. The Conference Report said: "The conference agreement inserts language expanding the scope of monetary damage awards available to American victims of international terrorism. The conferees intend that this section shall apply to cases pending upon enactment of this Act." H.R. CONF. REP. NO. 104-863, at 987 (1996). As the United States notes in its brief, "[o]n its face, that statement addresses only issues of damages and retroactivity, not the question whether foreign states are proper defendants in the first place." Br. for the United States as *Amicus Curiae* at 12. We agree. Thus, the legislative history of the Flatow Amendment is not inconsistent with the clear terms of the statute.

Subsequent enactments by Congress providing for the payment or enforcement of judgments entered against foreign states in cases brought under § 1605(a)(7) fail to establish that Congress created a cause of action against foreign states. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002, 114 Stat. 1464, 1541-43; Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337-39. As we explained in *Roeder*, these statutes merely provide for payment "*if* an individual has a judgment against Iran," but they do not address or

resolve the anterior question "whether plaintiffs are legally entitled to such a judgment." 333 F.3d at 239 (emphasis added). It is entirely plausible for Congress to direct the United States to compensate victims of terrorism without purporting to establish or support a cause of action against foreign state sponsors of terrorism.

* * * *

There is nothing anomalous in Congress's approach in enacting the Flatow Amendment. As we noted in *Price*, the passage of § 1605(a)(7) involved a delicate legislative compromise. While Congress sought to create a judicial forum for the compensation of victims and the punishment of terrorist states, it proceeded with caution, in part due to executive branch officials' concern that other nations would respond by subjecting the American government to suits in foreign countries. *See Price*, 294 F.3d at 89 (citing John F. Murphy, *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARV. HUM. RTS. J. 1, 35-37 (1999)).

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

Clearly, Congress's authorization of a cause of action against officials, employees, and agents of a foreign state was a significant step toward providing a judicial forum for the

compensation of terrorism victims. Recognizing a federal cause of action against foreign states undoubtedly would be an even greater step toward that end, but it is a step that Congress has yet to take. And it is for Congress, not the courts, to decide whether a cause of action should lie against foreign states. Therefore, we decline to imply a cause of action against foreign states when Congress has not expressly recognized one in the language of section 1605(a)(7) or the Flatow Amendment.

* * * *

Although we affirm the District Court's dismissal of plaintiffs' complaint for failure to state a claim under section 1605(a)(7) and the Flatow Amendment, we will nonetheless remand the case. The Cicippios' suit was filed in the wake of judgments in favor of Mr. and Mrs. Cicippio and other hostage victims, so they may have been misled in assuming that the Flatow Amendment afforded a cause of action against foreign state sponsors of terrorism. We will therefore remand the case to allow plaintiffs an opportunity to amend their complaint to state a cause of action under some other source of law, including state law, as the Kilburn *amici* have suggested.

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. *See, e.g.*, *Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n*, 158 F.3d 1335, 1338 (D.C. Cir. 1998). Accordingly, we will leave it to the District Court in the first instance to address any amended complaint that is offered by plaintiffs.

III. Conclusion

For the foregoing reasons, we affirm the judgment of the District Court dismissing plaintiffs' complaint for failure to state a claim upon which relief can be granted, and remand the case for further proceedings consistent with this opinion.

Annex 35

***Prevatt v. Islamic Republic of Iran et al.*, U.S. District Court, District of Columbia, 27 March 2006, 421 F. Supp. 2d 152 (D.D.C. 2006)**

Excerpts: p. 1 and pp. 14-15

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VICTORIA PREVATT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 02-1775 (RCL)**
	)	
ISLAMIC REPUBLIC OF IRAN, *et al.*,	)	
	)	
Defendants.	)	
	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case arises from the October 23, 1983 terrorist attack on the Marine barracks in Beirut, Lebanon. Plaintiff, the sister of a serviceman killed in the bombing, alleges that defendants are liable for damages resulting therefrom because they provided material support and assistance to Hezbollah, the terrorist organization that orchestrated the bombing. As such, defendants are subject to suit under the terrorism exception to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(7).

In plaintiff's initial complaint, filed on September 9, 2002, she brought suit on her own behalf, as well as on behalf of her brother's estate, against four named defendants: the Islamic Republic of Iran ("Iran"), the Iranian Ministry of Information and Security (the "MOIS"), the Iranian Islamic Revolutionary Guard Corps (the "IRGC"), and Hizballah. On July 14, 2003, after service on three defendants – Iran, the MOIS and the IRGC – was completed through diplomatic channels and those defendants failed to respond or enter an appearance, default was entered against them. An evidentiary hearing on the issue of liability was held on January 16, 2004. As

the friendship and experiences they might have shared had he survived. Taking all of the relevant factors into account, this Court finds that Victoria Prevatt-Wood is entitled to an award for pain and suffering in the amount of $2,500,000.

E. Punitive Damages

Punitive damages are not allowed against a foreign state.[1] Similarly, punitive damages may not be entered against divisions of the foreign state that are considered the state itself, rather than an agency or instrumentality thereof.[2] To determine whether an entity is to be considered the state itself, and thus not subject to punitive damages, a court must evaluate the core functions of the entity. *Roeder*, 333 F.3d at 234. If they "are governmental, it is considered the foreign state itself; if commercial, the entity is an agency or instrumentality of the foreign state." *Id.*

Plaintiff Victoria Prevatt-Wood concedes that punitive damages are not available against Iran, but argues that they are available against the IRGC, as an agent or instrumentality of Iran. There is no evidence, however, that the IRGC's functions are commercial rather than governmental. Rather, the IRGC's primary function is paramilitary, and "a nation's armed forces are clearly on the governmental side." *Id.* Other cases in this Circuit have arrived at the same conclusion with regard to the IRGC. *See Holland, et al. v. Islamic Republic of Iran, et al.*, Civ. A. No. 01-1924 (CKK) (D.D.C. Oct. 31, 2005) (Kotelly, J.); *Salazar*, 370 F. Supp. 2d at 116; *Welch v. Islamic Republic of Iran*, 2004 U.S. Dist. LEXIS 19512, 2004 WL 2216534 (D.D.C.

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[1] 28 U.S.C. § 1606 ("[A] foreign state . . . shall not be liable for punitive damages"); *Dammarell*, 2005 WL 3418304, at *5, 2005 U.S. Dist. LEXIS 32618, at *14-15; *Collett v. Socialist Peoples' Libyan Arab Jamahiriya*, 362 F. Supp. 2d 230, 243 (D.D.C. Mar. 24, 2005) (Urbina, J.); *Kapar v. Islamic Republic of Iran*, Civ. A. No. 02-78 (HHK), at 19 n.3 (D.D.C. Sept. 22, 2004) (Kennedy, J.).

[2] *Roeder*, 333 F.3d at 234 (considering the MOIS to be the state of Iran itself and thus not subject to punitive damages).

Sept. 27, 2004) (Kay, J.). Therefore, this Court lacks the authority to grant plaintiff's request for punitive damages. It shall accordingly be denied as to all defendants.

CONCLUSION

This Court takes note of plaintiff's courage and steadfastness in pursuing this litigation and her effort to take action to deter more tragic suffering of innocent Americans at the hands of terrorists. Her efforts are to be commended.

A judgment consistent with these findings shall issue this date.

SO ORDERED.

Signed by Royce C. Lamberth, United States District Judge, March 27, 2006.

Annex 36

***Bodoff et al. v. Islamic Republic of Iran et al.*, U.S. District Court, District of Columbia, 29 March 2006, 424 F. Supp. 2d 74 (D.D.C. *2006*)**

Excerpts: p. 1, pp. 13-14 and p. 24

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEFFREY BODOFF, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 02-1991 (RCL)**
ISLAMIC REPUBLIC OF IRAN, *et al.*,	)	
Defendants.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action against the Islamic Republic of Iran and a senior official of the Iranian government arises from an act of state-sponsored terrorism. The decedent, a United States citizen named Yonathan Barnea, was killed in the terrorist bombing of the Number 18 Egged passenger bus in Jerusalem, Israel on February 25, 1996. Plaintiffs, surviving family members and the administrator of Yonathan Barnea's estate, have brought this action pursuant to the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 ("FSIA").

The FSIA grants federal courts jurisdiction over suits involving foreign states and their officials, agents, and employees in certain enumerated instances. In particular, the FSIA creates a federal cause of action for personal injury or wrongful death resulting from acts of state-sponsored terrorism. 28 U.S.C. § 1608(e) (giving federal courts jurisdiction over suits "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

III. Liability

A. Proper Causes of Action Under the FSIA

Once a foreign state's immunity has been lifted under Section 1605 and jurisdiction is proper, Section 1606 provides that "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. Section 1606 acts as a "pass-through" to substantive causes of action against private individuals that may exist in federal, state or international law. *See Dammarell v. Islamic Republic of Iran*, Civ. A. No. 01-2224, 2005 WL 756090, at *8-10, 2005 U.S. Dist. LEXIS 5343, at *27-32 (D.D.C. Mar. 29, 2005) (Bates, J.).

In this case, state law provides a basis for liability. First, the law of the United States applies rather than the law of the place of the tort or any other foreign law. This is because the United States has a "unique interest" in having its domestic law apply in cases involving terrorist attacks on United States citizens. *See Dammarell*, 2005 WL 756090, at *20, 2005 U.S. Dist. LEXIS 5343, at *63.

Second, the applicable state law is that of the District of Columbia. As the forum state, its choice of law rules apply to determine which state's law shall apply. Under District of Columbia choice of law rules, courts employ a refined government interest analysis under which they "evaluate the governmental policies underlying the applicable laws and determine which jurisdiction's policy would be most advanced by having its law applied to the facts of the case under review." *Hercules & Co. v. Shama Rest. Corp.*, 566 A.2d 31, 41 (D.C. 1989) (citations and internal quotations omitted). This test typically leads to the application of the law of plaintiff's domicile, as the state with the greatest interest in providing redress to its citizens. *See*

Dammarell, 2005 WL 756090, at *20-21, 2005 U.S. Dist. LEXIS 5343, at *66-67 (citing REST. (THIRD) FOREIGN RELATIONS LAW § 402(3) (1987)). Here, although plaintiffs have no current United States domicile, members of the family, including the decedent, were formerly domiciled in the District of Columbia. There is no other American state with an interest in the case.[2] Therefore, the District of Columbia has the greatest interest, and thus the application of its law is proper.

Third, as required by 28 U.S.C. § 1606, District of Columbia law provides a cause of action against private individuals for the kind of acts that defendants allegedly committed. Plaintiffs seek damages for wrongful death and intentional infliction of emotional distress, each of which is a tort for which private individuals may face liability. The Court's next task is to determine whether plaintiffs have demonstrated defendants' liability and their right to damages under the laws of the District of Columbia.

B. Vicarious Liability

The purported basis of defendants' liability is that they provided material support and resources to Hamas, the organization that personally completed the attack. One party may be liable for the acts of another under theories of vicarious liability, such as conspiracy, aiding and abetting and inducement. This Court finds that civil conspiracy provides a basis of liability for defendants Iran and Khamenei and thus declines to reach whether they might also be liable on the basis of aiding and abetting and/or inducement.

A civil conspiracy exists under District of Columbia law where there is "(1) an agreement

[2] While the analogy is not exact, this Court notes that a prior decision recited that claims by American citizens temporarily domiciled overseas are governed by their last United States domicile. *See Dammarell*, 2005 WL 756090, at *22, 2005 U.S. Dist. LEXIS 5343, at *71-72.

CONCLUSION

This Court takes note of plaintiffs' courage and steadfastness in pursuing this litigation and their efforts to take action to deter more tragic suffering of innocent Americans at the hands of terrorists. Their efforts are to be commended.

A judgment consistent with these findings shall issue this date.

Signed by Royce C. Lamberth, United States District Judge, March 29, 2006.

Annex 37

***Greenbaum et al. v. Islamic Republic of Iran et al.*, U.S. District Court, District of Columbia, 10 August 2006, 451 F. Supp.2d 90 (D.D.C. 2006)**

Excerpts: p. 1 and pp. 13-27

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEVEN M. GREENBAUM, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 02-2148 (RCL)**
ISLAMIC REPUBLIC OF IRAN, *et al.*,	)	
Defendants.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

These actions arise from the August 9, 2001 suicide bombing of a restaurant in downtown Jerusalem, Israel. Plaintiffs, the husband, parents and estate of a woman killed in the attack, allege that the Islamic Republic of Iran ("Iran") and the Iranian Ministry of Information and Security ("MOIS") are liable for damages resulting from the attack because they provided material support and assistance to Hamas, the terrorist organization that orchestrated the bombing. As such, defendants are subject to suit under the terrorism exception to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1604.

PROCEDURAL HISTORY

On October 23, 2002, plaintiffs filed their original complaint seeking redress for their losses under the FSIA. On August 21, 2003, this Court ordered service upon the defendants through diplomatic channels in accordance with 28 U.S.C. § 1608(a)(4). Plaintiffs filed proof of service in accordance with the statutory procedures and sought entry of default on January 5, 2005, the defendants having failed to answer. On June 3, 2005 this Court entered default against

CONCLUSIONS OF LAW

I. Legal Standard for FSIA Default Judgment

Under the Foreign Sovereign Immunities Act, "[n]o judgment by default shall be entered by a court of the United States or of a state against a foreign state . . . unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e); *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 232-33 (D.C. Cir. 2003), *cert. denied*, 542 U.S. 915 (2004). Plaintiffs' evidence may take the form of affidavits and, where uncontroverted, may be accepted as true by this Court. *See Bodoff*, 424 F. Supp. 2d at 82 (quoting *Campuzano*, 281 F. Supp. 2d at 268).

II. Jurisdiction

The Foreign Sovereign Immunities Act provides the sole basis for asserting jurisdiction over foreign sovereigns in the United States. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-35 (1989). The "state-sponsored terrorism" exception removes a foreign sovereign's immunity to suit in U.S. courts where 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 (as defined in section 2339A of title 18) 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. 28 U.S.C. § 1605(a)(7).

To subject a foreign sovereign to suit under section 1605(a)(7), plaintiffs must demonstrate: (1) that the foreign sovereign was designated by the State Department as a "state sponsor of terrorism"; (2) that the victim or plaintiff was a U.S. national at the time the acts took

place; and (3) that the foreign sovereign engaged in conduct that falls within the ambit of the statute, in this case, providing material support or resources for an act of extrajudicial killing.

Each of the requirements has been satisfied in this case. Defendant Iran is, and was at the time of the attack, designated a state sponsor of terrorism. *See* 31 C.F.R. § 596.201 (2001). The victim and the plaintiffs were all U.S. nationals at the time of the attack. Defendant Iran's knowing support of an entity that committed an extrajudicial killing squarely falls within the ambit of the statute. As to defendant MOIS, it is treated as the state of Iran itself, *Roeder*, 333 F.3d at 234, and thus the same determinations apply to its conduct.

Personal jurisdiction over a non-immune foreign sovereign exists so long as service of process has been made under section 1608 of the FSIA. *See Stern* v. *Islamic Republic of Iran*, 271 F. Supp. 2d 286, 298 (D.D.C. 2003) (Lamberth, J.). Such service has been made, and this Court has in personam jurisdiction over defendants Iran and the MOIS.

III. Liability

A. Proper Causes of Action Under the FSIA

Once a foreign state's immunity has been lifted under section 1605 and jurisdiction is proper, section 1606 provides that "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. Section 1606 acts as a "pass-through" to substantive causes of action against private individuals that may exist in federal, state or international law. *See Dammarell II*, 2005 WL 756090, at *8-10, 2005 U.S. Dist. LEXIS 5343, at *27-32.

In this case, state law provides a basis for liability. First, the law of the United States applies rather than the law of the place of the tort or any other foreign law. This is because the

United States has a "unique interest" in having its domestic law apply in cases involving terrorist attacks on United States citizens. *See Dammarell II*, 2005 WL 756090, at *20, 2005 U.S. Dist. LEXIS 5343, at *63.

Second, the applicable state law is that of New Jersey and of California. As the forum state, District of Columbia choice of law rules apply to determine which state's law shall apply. Under District of Columbia choice of law rules, courts employ a refined government interest analysis under which they "evaluate the governmental policies underlying the applicable laws and determine which jurisdiction's policy would be most advanced by having its law applied to the facts of the case under review." *Hercules & Co. v. Shama Rest. Corp.*, 566 A. 2d 31, 41 (D.C. 1989) (citations and internal quotations omitted). This test typically leads to the application of the law of plaintiff's domicile, as the state with the greatest interest in providing redress to its citizens. *See Dammarell II*, 2005 WL 756090, at *20-21, 2005 U.S. Dist. LEXIS 5343, at *66-67 (citing RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 402(3) (1987)). Accordingly, the claims of plaintiffs Alan and Shirlee Hayman shall be governed by their domicile at the time of the attack, California. The claims of plaintiff Steven Greenbaum shall be governed by his domicile at the time of the attack, New Jersey. Finally, the claims of the Estate of Judith Greenbaum shall be governed by her domicile at the time of the attack, New Jersey. There are no other American states with an interest in the case; therefore, application of California and New Jersey law, respectively, is proper.

Third, as required by 28 U.S.C. § 1606, California and New Jersey law provide a cause of action against private individuals for the kind of acts that defendants allegedly committed. Plaintiffs seek damages for wrongful death and intentional infliction of emotional distress, each

of which is a tort for which private individuals may face liability. The Court's next task is to determine whether plaintiffs have demonstrated defendants' liability and their right to damages under the laws of California and New Jersey.

B. Vicarious Liability

The purported basis of defendants' liability is that they provided material support and resources to Hamas, the organization that personally completed the attack. One party may be liable for the acts of another under theories of vicarious liability, such as conspiracy, aiding and abetting and inducement. This Court finds that civil conspiracy provides a basis of liability for defendants Iran and MOIS.

1. New Jersey

A civil conspiracy exists under New Jersey law where there is "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another, and an overt act that results in damages." *Morgan v. Union County Bd. of Chosen Freeholders*, 633 A.2d 985, 998 (N.J. Super Ct. App. Div. 1993) (internal citations omitted).

The agreement may be inferred from conduct. *Id.* at 999 (noting that plaintiff is "not required to provide direct evidence of the agreement between the conspirators" and that the "unlawful agreement need not be express") (citations omitted). Where there is no direct evidence of an agreement between the alleged co-conspirators, the factfinder "may infer from the circumstances that [the alleged conspirators] had a meeting of the minds and thus reached an

understanding to achieve the conspiracy's objectives." *Id.* at 998 (internal quotations and citations omitted).

Here, it has been established that Hamas agreed together with defendants Iran and MOIS to commit terrorist activities in furtherance of the goals of eradicating the Jewish state of Israel and promoting Islamic ideology. *See Weinstein*, 184 F. Supp. 2d at 21; *Mousa*, 238 F. Supp. 2d at 9; *Eisenfeld,* 172 F. Supp. 2d at 7. This agreement can be inferred from the comprehensive financial support and training that Iran provides to Hamas. *See Weinstein*, 184 F. Supp. 2d at 19, ¶¶ 26-27; *Mousa*, 238 F. Supp. 2d at 4, ¶¶ 9-11, 9; *Eisenfeld*, 172 F. Supp. 2d at 5, ¶¶ 17-20, 7. Indeed, as this Court has previously noted, the very "[s]ponsorship of terrorist activities inherently involves a conspiracy to commit terrorist attacks." *Bodoff,* 424 F. Supp. 2d at 84 (quoting *Flatow*, 999 F. Supp. at 27).

It is undisputed that Hamas committed the attack that killed Judith Greenbaum. It also has been established that the attack was committed in furtherance of the broad common scheme between Hamas and Iran. Therefore, the elements of civil conspiracy are established between the defendants in this case and the actual perpetrators of the attack.

2. California

Civil conspiracy under California law consists of "formation and operation of the conspiracy and damage resulting to plaintiff from an act or acts done in furtherance of the common design." *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 869 P.2d 454, 511 (Cal. 1994) (internal quotations and citations omitted). It "is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share

with the immediate tortfeasors a common plan or design in its perpetration actionable." *Id.* (citations omitted).

As such, the elements of civil conspiracy under California law are subsumed within the elements of the same doctrine under New Jersey law. In this case, therefore, since the conspiracy has been demonstrated under New Jersey law, it has been demonstrated under California law as well.

C. Wrongful Death

Steven Greenbaum, as administrator of Judith Greenbaum's estate, asserts a claim for wrongful death. The statute enables an administrator to bring suit for wrongful acts resulting in death for economic damages that would have been recoverable by the decedent had the act resulted only in injury, not death. N.J. Stat. Ann. § 2A:31-1, 31-2, 31-5 (2006). Any recovery, however, is payable to the persons entitled to intestate distribution of the decedent's estate, not to the estate itself. *See F.F. v. G.A.D.R.*, 750 A.2d 786, 788-89 (N.J. Super. Ct. App. Div. 2000). New Jersey intestate distribution law dictates that, when the decedent was married and had no children, all of the decedent's property – including any damages recovered under the Wrongful Death Act – shall be distributed to the spouse. N.J. Stat. Ann. § 3A:4-3.

It is axiomatic that murder is a wrongful act. This Court has already determined, as a matter of fact and law, that defendants are vicariously liable for perpetrating a suicide attack that murdered Judith Greenbaum and several other innocent civilians. Accordingly, plaintiff Steven Greenbaum as administrator of the estate of Judith Greenbaum has demonstrated his right to recovery under the New Jersey Wrongful Death Act.

C. Intentional Infliction of Emotional Distress

The Haymans and Steven Greenbaum in his personal capacity assert a claim for intentional infliction of emotional distress ("IIED") under their respective state's common law. California and New Jersey each not only recognize the tort, but define it to include substantially similar elements. Accordingly, all of the IIED claims will be discussed together.

To satisfy the elements of IIED, the plaintiff must show that defendants committed an act (1) intentionally or recklessly as to the act and as to its causing emotional distress; (2) that was extreme and outrageous, *i.e.*, "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community"; (3) that proximately caused the plaintiff's emotional distress; and (4) that the emotional distress suffered by the plaintiff is "so severe that no reasonable man could be expected to endure it." *See Buckley v. Trenton Sav. Fund Soc'y*, 544 A.2d 857, 863 (N.J. 1988) (citing Restatement (Second) of Torts, § 46 cmt. d (1965)) (citations and internal quotations omitted); *Cervantez v. J.C. Penney Co.*, 595 P.2d 976, 983 (Cal. 1979).

Each element is satisfied here. First, Iran intentionally provided material support to Hamas, and did so with the intent that Hamas would carry out attacks that would cause severe emotional distress. Terrorist acts, by their nature, are intentionally designed to inflict harm, and thereby to cause severe emotional distress. (*See* Dr. Clawson Dep. (Ex. 14) at 28 ("[T]he Iranian Government has no doubt that many of those killed are, in fact, children and other civilians and that the relatives and friends of those killed . . . suffer psychological damage as a result.").) Second, the act of engaging in terrorism by means of material support and civil conspiracy is extreme, outrageous, and goes beyond all possible bounds of decency. Terrorists seek to cause

extreme suffering in order to achieve political ends; accordingly, they perpetrate acts that are deliberately outrageous.

Third, this Court has already determined that defendants' actions proximately caused the death of decedent and subsequent emotional distress of her family. Fourth, this Court has also determined that the emotional distress suffered by the Haymans due to the loss of their only daughter and unborn grandchild has been, and will continue to be, more severe than a reasonable person would be expected to endure. The same is true for Steven Greenbaum's loss of his new wife and their unborn child.

Neither state's law requires the plaintiff's presence during the act, but where the plaintiff was not present, the law requires that the act was directed at the plaintiff insofar as it caused profound and extreme emotional consequences. *See Delia S. v. Torres*, 184 Cal. Rptr. 787, 794-95 (Cal. Ct. App. 1982); *cf. also Marlene F. v. Affiliated Psych. Med. Clinic, Inc.*,770 P.2d 278, 286 & n.4 (Cal. 1989) (Arguelles, J., concurring) (collecting cases); *Buckley*, 544 A.2d at 864 (noting that "when the intentional conduct is directed at the plaintiff, he or she need not prove any physical injury . . . [i]t suffices that the conduct produce emotional distress that is severe") (internal citations omitted). California and New Jersey each attribute this requirement to concern about the genuineness of such claims. The requirement is satisfied in this case: terrorist acts such as the one that caused JudithGreenbaum's death are directed at the relatives of the victims as well as at the victims themselves. *See, e.g., Dammarell v. Islamic Republic of Iran,* 404 F. Supp. 2d 261, 283 (D.D.C. 2005) (Bates, J.) (citing *Salazar*, 370 F. Supp. 2d at 115 n.12). Additionally, it should be noted that this act was so outrageous that this Court has no doubt that as to the genuineness of plaintiffs' claims for emotional distress.

IV. Damages

To obtain damages against these defendants under the FSIA, the plaintiffs must prove that the consequences of the defendant's conduct were "reasonably certain (i.e., more likely than not) to occur, and must prove the amount of damages by a reasonable estimate consistent with this [Circuit's] application of the American rule on damages." *Salazar*, 370 F. Supp. 2d at 115-16 (quoting *Hill v. Republic of Iraq*, 328 F.3d 680, 681 (D.C. Cir. 2003)) (internal quotations omitted). Punitive damages are not available against foreign states.[1] Accordingly, plaintiffs' claim for punitive damages is denied.

Here, it was reasonably certain that Judith Greenbaum's death and the attendant emotional distress by her parents and husband would occur. The plaintiffs have shown that Iran has been engaged in an ongoing campaign of terror intended to kill innocent civilians, including U.S. citizens in Israel, in an effort to terrorize their families and others. Each plaintiff is entitled, therefore, to compensatory damages for emotional distress, and Steven Greenbaum in his capacity as administrator of his wife's estate, is entitled to compensatory damages for the loss of accretions to his wife's estate.

A. Alan and Shirlee Hayman

As a result of the wrongful conduct of defendants Iran and the MOIS, plaintiffs Alan Hayman and Shirlee Hayman have suffered, and will continue to suffer, pain and mental anguish.

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[1] Plaintiffs' request for punitive damages appears to rely on an outdated interpretation of the law. A number of recent cases compel the determination that punitive damages are not available in this action against either Iran or the MOIS. *See, e.g., Roeder*, 333 F.3d at 234; *Haim v. Islamic Republic of Iran,* 425 F. Supp. 2d 56, 71 n.2 (D.D.C. 2006) (Lamberth, J.); *Holland*, 2005 U.S. Dist. LEXIS 40254, Civ. A. No. 01-1924 (CKK); *Dammarell,* 404 F. Supp. 2d at 274; *Collett v. Socialist Peoples' Libyan Arab Jamahiriya,* 362 F. Supp. 2d 230, 243 (D.D.C. 2005) (Urbina, J.); *Kapar v. Islamic Republic of Iran*, Civ. A. No. 02-78 (HHK), at 19 n.3 (D.D.C. 2004) (Kennedy, J.).

Since a "foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. § 1606, the Haymans are entitled to the typical array of damages that may be awarded against tortfeasors in California.

The appropriate compensatory damages for plaintiffs' pain and suffering due to intentional infliction of emotional distress may be guided not only by prior decisions awarding damages for pain and suffering, but also by those which awarded damages for solatium. *See Prevatt v. Islamic Republic of Iran*, 421 F. Supp. 2d 152, 161 (D.D.C. 2006) (Lamberth, J.); (citing cases and noting that "[w]hile intervening changes in law have ruled many cases' reliance on federal common law improper, such findings need not disturb the accuracy of the analogy between solatium and intentional infliction of emotional distress").

As this Court has previously noted, compensatory damage awards in cases like this one are typically calculated "by the nature of the relationship [between plaintiff and victim] and the severity and duration of the pain suffered by the family member." *Haim*, 425 F. Supp. 2d at 75. The awards seek to recognize a plaintiff's emotional distress immediately after the attacks as well as the continued suffering that results from the loss of a normal relationship, or any relationship at all, with one's child.

Applying these considerations to the facts of this case, this Court finds that Alan and Shirlee Hayman suffered a great deal of mental anguish in the days surrounding the attack. For several hours, they did not know whether their daughter had been killed in the bombing. (Trial Tr. 5/19/06 at 26-32, 63-65.) While in the professional, impersonal environment of their respective workplaces, Mr. and Mrs. Hayman were forced to suffer the uncertainty of not knowing what had happened to their daughter – whether she was injured and needed their help,

whether she was already dead, or whether she had escaped injury altogether. (*Id.*) Mr. Hayman spoke to family members in Israel several times, who were also distressed and searching for news. (*Id.* at 28-30.) He received false hope when it was reported, and then later retracted, that his daughter was safe. (*Id.* at 29-30.) Upon leaving work, still not knowing what had happened to his daughter, he suppressed his suffering enough to drive some distance in heavy traffic to pick up his wife at her workplace. (*Id.* at 31-32.) He learned that his daughter and unborn grandchild were dead while sitting in his vehicle waiting outside his wife's workplace. (Trial Tr. 5/19/06 at 32.) He then suffered the pain of having to tell his wife. (*Id.*) Both of them suffered severe mental anguish upon learning the news, and then returned home. (*Id.* at 32-33, 64-65.)

In addition to the "typical" mental anguish that might be expected in a case like this, Mr. and Mrs. Hayman also suffered emotional distress from factors unique to this case. They were unable to attend their daughter's funeral. (*Id.* at 33, 35.) While attempting to mourn, they received a threat so serious that they hired a security guard to stand outside their house so that they might be safe to mourn the loss of their daughter. (*Id.* at 52-53.) They received a number of visitors and gifts that were difficult reminders of their daughter. (Trial Tr. 5/19/06 at 37, 65.)

Shortly after the death of their daughter, and within days of attending memorial services on the thirty-day anniversary of her death, the Haymans suffered through a painful reminder of the attack on September 11, 2001, when terrorist attacks occurred in this country. (*Id.* at 52.)

Even as time has passed, the Haymans have continued to mourn the loss of their daughter, and to mourn the loss of the relationship and experiences they might have shared had she and her unborn child survived. (*Id.* at 53-54, 60, 63, 69-70, 74-76, 77.) While mental anguish is extremely difficult to quantify, courts typically award parents $5 million in compensatory

damages for suffering related to the death of a child. *See, e.g., Eisenfeld*, 172 F. Supp. 2d at 8 (awarding $5 million each to the parents of victims of a suicide bombing on a passenger bus); *Flatow*, 999 F. Supp. at 31 (awarding $5 million to each parent of victim who was killed in a suicide bombing on a passenger bus). Taking all of the relevant factors into account, this Court finds that Alan and Shirlee Hayman are each entitled to an award of $5,000,000. Such an award recognizes their closeness with their daughter, the severity of their pain and suffering in the days immediately after the attack to the present, and the continued pain and suffering they will likely suffer throughout their lives.

B. Steven Greenbaum as Administrator of the Estate of Judith Greenbaum

Under New Jersey law, damages recoverable under the Wrongful Death Act are limited to (1) loss of earning capacity; (2) out-of-pocket expenses; and (3) pain and suffering. *See Arenas v. Gari*, 706 A.2d 736, 748 (N.J. Super. Ct. App. Div. 1998). The report of Dr. Lurito admitted into evidence calculates that loss of accretions to Judith Greenbaum's estate total $879,023. Steven Greenbaum also seeks damages for loss of accretions to himself based on the loss of his wife's household services. He fails, however, to direct the Court to any New Jersey case law – and this Court's research has revealed none – indicating that such losses are ever compensable under the Wrongful Death Act. Accordingly, such damages will not be awarded. The damages awarded shall be limited to $879,023, to be distributed to himself in his personal capacity as the husband of the decedent.

C. Steven Greenbaum in his personal capacity

As a result of the wrongful conduct of defendants Iran and the MOIS, plaintiff Steven Greenbaum has suffered, and will continue to suffer pain and mental anguish. Since a "foreign

state shall be liable in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. § 1606, plaintiff is entitled to the typical array of damages that may be awarded against tortfeasors in New Jersey.

As noted previously, the compensatory damages award may be determined by prior awards for solatium as well as pain and suffering. This Court must consider "the nature of the relationship [between plaintiff and victim] and the severity and duration of the pain suffered by the family member." *Haim*, 425 F. Supp. 2d at 75.

Applying these considerations to the facts of this case, this Court finds that Steven Greenbaum suffered a great deal of mental anguish in the days surrounding the attack. For several hours, he did not know whether his wife had been killed in the bombing. (Trial Tr. 5/19/06 at 29.) He had spoken to her mere hours prior to learning about the attack, and thus did not think she could have been injured. Indeed, he had left her presence only a few days prior and thus could not imagine that she was gone. He suffered the uncertainty of not knowing what had happened to his wife and their unborn child. When he finally learned what had happened, he was faced with the agonizing decision – which had to be made immediately – whether to risk his own safety and travel to Israel for his wife's funeral. (*Id.* at 34.) He decided to do so, and immediately traveled to Israel where he was a pallbearer in her funeral. (*Id.* at 102-03.) Upon returning home, Steven Greenbaum mourned for seven days in his rabbi's home. He received a number of visitors that were difficult reminders of his wife. Shortly after his return, he suffered through a powerful reminder of the attack when the September 11, 2001 attacks occurred, which included a devastating attack in New York City. (*Id.* at 107.)

Several years have passed since Steven Greenbaum lost his wife and unborn child. Yet he continues to suffer the pain and anguish of the loss. He speaks of the difficulty of being unmarried in a community that prizes marriage and family. (*Id.* at 115.) He does not anticipate remarrying. Encouraged by the positive energy that his wife brought into so many lives, Steven Greenbaum has chosen to use the experience to teach kindness to others: he speaks to high school students and other groups across the country. He has also created web sites that focus on positive experiences. While mental anguish is extremely difficult to quantify, courts typically award spouses between $8 million and $12 million for pain and suffering resulting from the death of a spouse. *See, e.g., Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107, 113 (D.D.C. 2000) (Jackson, J.) (awarding $10 million to the wife of a hostage and torture victim); *Weinstein* (granting $8 million to the widow of a bus bombing victim); *Kerr v. Islamic Republic of Iran*, 245 F. Supp. 2d 59, 64 (D.D.C. 2003) (awarding $10 million to the widow of a murder victim); *Salazar,* 370 F. Supp. 2d at 116 (awarding $10 million to the widow of a bombing victim).

Taking all of the relevant factors into account, this Court finds that Steven Greenbaum is entitled to an award of $9,000,000. Such an award is commensurate with other cases with similar circumstances, and recognizes his closeness with his wife, and the severity of his pain and suffering due to the loss of his wife and unborn first child.

While this Court does not deny the severe pain that Steven Greenbaum endures as a result of the terrorist attack that killed his wife, larger awards are typically reserved for cases with aggravating circumstances that appreciably worsen the surviving spouse's pain and suffering, such as cases involving torture or kidnaping of a spouse, or in which the victim survives with

severe physical and emotional conditions that continue to cause severe suffering by the spouse. *See, e.g., Cicippio*, 18 F. Supp. 2d at 70 (granting $10 million to spouses of surviving hostage victims whose suffering "may have exceeded the grief normally experienced as a result of the death of a loved one, and will in all likelihood continue to do so into an uncertain future"); *see also Acree*, 271 F. Supp. 2d at 222 (attributing more than half of $10 million awards to widows of hostage victims to difficulties anticipated in the period following release of their husbands).

CONCLUSION

This Court takes note of plaintiffs' courage and steadfastness in pursuing this litigation and their efforts to take action to deter more tragic suffering of innocent Americans at the hands of terrorists. Their efforts are to be commended.

A judgment consistent with these findings shall issue this date.

Signed by Royce C. Lamberth, United States District Judge, August 10, 2006.

Annex 38

***Estate of Heiser et al. v. Islamic Republic of Iran et al.*, U.S. District Court, District of Columbia, 22 December 2006, 466 F. Supp.2d 229 (D.D.C. 2006)**

Excerpts: p. 1, pp. 13-46 and p. 209

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ESTATE OF MICHAEL HEISER, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 00-2329 (RCL)**
ISLAMIC REPUBLIC OF IRAN, *et al.*,	)	
Defendants.	)	
ESTATE OF MILLARD D. CAMPBELL, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 01-2104 (RCL)**
ISLAMIC REPUBLIC OF IRAN, *et al.*,	)	
Defendants.	)	

MEMORANDUM OPINION

BACKGROUND

These actions arise from the June 25, 1996 bombing at Khobar Towers, a residence on a United States military base in Dhahran, Saudi Arabia. The plaintiffs in this consolidated action are the family members and estates of 17 of the 19 servicemen killed in the attack. Plaintiffs allege that the Islamic Republic of Iran ("Iran"), the Iranian Ministry of Information and Security ("MOIS"), the Iranian Islamic Revolutionary Guard Corp ("IRGC" or "the Pasdaran"), and "John Does 1-99" are liable for damages from the attack because they provided material support and

testimony by Matthew Levitt, senior fellow and director of the Washington Institute's Terrorism Studies Program, and articles published by the Federation of American Scientists as well as the Free Muslims Coalition. *Id.*

CONCLUSIONS OF LAW

I. Jurisdiction

In the United States, the Foreign Sovereign Immunities Act provides the sole basis for asserting jurisdiction over foreign sovereigns. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-34 (1989). Normally, a party may not bring an action for money damages in U.S. courts against a foreign state. 28 U.S.C. § 1604. The "state-sponsored terrorism" exception, however, removes a foreign state's immunity to suits for money damages brought in U.S. courts where plaintiffs are seeking damages against the 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 (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment or agency." 28 U.S.C. § 1605(a)(7).

In order to subject a foreign sovereign to suit under section 1605(a)(7), plaintiffs must show that: (1) the foreign sovereign was designated by the State Department as a "state sponsor of terrorism"; (2) the victim or plaintiff was a U.S. national at the time the acts took place; and (3) the foreign sovereign engaged in conduct that falls within the ambit of the statute. *Prevatt v. Islamic Republic of Iran*, 421 F. Supp. 2d 152, 158 (D.D.C. Mar. 28, 2006).

Each of the requirements is met in this case. First, defendant Iran has been designated a

state sponsor of terrorism continuously since January 19, 1984, and was so designated at the time of the attack. *See* 31 C.F.R. § 596.201 (2001); *Flatow*, 999 F. Supp. at 11, ¶ 19. Second, the plaintiffs have described themselves as "the Estates and family members" of 17 of the 19 servicemen who were killed on June 25, 1996, after "Hizbollah terrorists detonated a 5,000 pound truck bomb outside of Khobar Towers, a United States military complex in Dhahran, Saudi Arabia." Second Amended Complaint, at 3. Both the plaintiffs and the victims to which they are related were United States nationals at the time the bombing occurred. Finally, defendant Iran's support of an entity that committed an extrajudicial killing squarely falls within the ambit of the statute. Defendants MOIS and the IRGC are considered to be a division of state of Iran, and thus the same determinations apply to their conduct. *Roeder*, 333 F.3d at 234; *see also Salazar v. Islamic Republic of Iran*, 370 F. Supp. 2d 105, 116 (D.D.C. 2005) (Bates, J.) (analogizing the IRGC to the MOIS for purposes of liability, and concluding that both must be treated as the state of Iran itself).

Personal jurisdiction exists over a non-immune sovereign so long as service of process has been made under section 1608 of the FSIA. *See Stern v. Islamic Republic of Iran*, 271 F. Supp. 2d 286, 298 (D.D.C. 2003) (Lamberth, J.). In this case, service of process has been made. Accordingly, this Court has *in personam* jurisdiction over defendants Iran, MOIS, and IRGC.

II. Legal Standard for FSIA Default Judgment

Under the Foreign Sovereign Immunities Act, "[n]o judgement by default shall be entered by a court of the United States or of a state against a foreign state . . . unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e); *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 232-33 (D.C. Cir. 2003), *cert. denied*, 542

U.S. 915 (2004). In default judgment cases, plaintiffs may present evidence in the form of affidavits. *Bodoff v. Islamic Republic of Iran*, 424 F. Supp. 2d 74, 82 (D.D.C. Mar. 29, 2006) (quoting *Campuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258, 268 (D.D.C. 2003)). Upon evaluation, the court may accept plaintiffs' uncontroverted evidence as true. *Campuzano*, 281 F. Supp. 2d at 268. This Court accepts the uncontested evidence and testimony submitted by plaintiffs as true in light of the fact that the defendants in this action have not objected to it or even appeared in this action to contest it.

III. Magistrate Judge's Report and Recommendation of Proposed Findings of Fact and Conclusions of Law

A. Standard of Review of a Magistrate Judge's Proposed Findings and Recommendation

Under the Federal Magistrate's Act, "a judge may . . . designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition." 28 U.S.C. § 636(b)(1)(B). Once the magistrate judge's proposed findings and recommendation are submitted to the court and copies have been served on the parties, the parties may serve and file within ten days from receipt of service written objections to any proposed finding or recommendations made within the magistrate judge's report and recommendation. 28 U.S.C. § 636(b). In reviewing the objections made to the magistrate judge's report and recommendation, the district court judge shall make a *de novo* review of the portions of the report and recommendation objected to by the parties. *Id.* Upon review, "[a] judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." *Id.*; *see also Roell v. Withrow*, 538

U.S. 583, 585 (2003) (noting that a district court is "free to do as it sees fit with [a] magistrate judge's recommendations" made under authority of 28 U.S.C. § 636(b)(1)).[5] The district court "must not be a rubber stamp" of the magistrate judge's recommendations. *Reese v. Meritor Automotive, Inc.*, 113 F. Supp. 2d 822, 824 (W.D.N.C. 2000) (quoting 12 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3070.2 (2006)).

B. Magistrate Judge Robinson's Proposed Findings of Fact and Recommendation

In her Report and Recommendation, Magistrate Judge Robinson recommended that plaintiffs' motion for default judgment be denied on the basis that plaintiffs had not presented evidence satisfactory to the Court of defendants' liability. (Rep. and Reco. [129] 30.) The magistrate judge proposed that "Plaintiffs failed to establish a nexus between the June 25, 1996 bombing and any action or decision of any of the Defendants in these consolidated actions." *Id.* As a result, Magistrate Judge Robinson recommended that this Court find that plaintiffs failed to "[establish] [their] claim or right to relief by evidence that is satisfactory to the Court[.]" *Id.* (quoting *Haim v. Islamic Republic of Iran*, 2006 U.S. Dist. LEXIS 12816, at *3) (internal citation omitted). The magistrate judge also discussed generally, but made no specific findings or

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[5] Plaintiffs have requested pursuant to LCvR 72.3(c) and LCvR 78.1 that the Court hold a hearing on plaintiffs' objections to the magistrate judge's Report and Recommendation. Pl. Obj. to Report and Recommendation, at 1. Though the district court must consider any objections that have been made regarding the magistrate judge's proposed findings, the language of 28 U.S.C. § 636(b)(1) does not obligate the court to hold a hearing on those objections. *See United States v. Raddatz*, 447 U.S. 667, 674-76 (1980). Rather, by "providing for a '*de novo* determination' rather than *de novo* hearing [in the statutory language], Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate's proposed findings and recommendations." *Id.* at 676. Accordingly, to the extent that plaintiffs have objected to Magistrate Judge Robinson's Report and Recommendation to this Court, those objections have been considered and will be addressed within the purview of this written opinion, and not at a hearing before this Court.

recommendations concerning, two additional issues, namely: (1) whether plaintiffs, as members of the United States Air Force operating under peacetime rules of engagement, may qualify for recovery under the FSIA; and (2) whether an apparent conflict of interest existed with respect to plaintiffs' representation by DLA Piper Rudnick Gray Cary US LLP.[6] (Rep. and Reco. [129] 15-17, 25-26.)

Plaintiffs objected to the magistrate judge's finding as to the insufficiency of the evidence,[7] as well as to other portions of the report and recommendation. (*See* Pl.'s Obj. to Report and Recommendation [130] 4-5.) In addition to the objection as to the sufficiency of their evidence, plaintiffs objected to: (1) whether Magistrate Judge Robinson had jurisdiction to preside over an evidentiary hearing or to make a report and recommendation regarding default judgment; (2) the magistrate judge's discussion of whether plaintiffs, as members of the United States Air Force, could recover as noncombatants under peacetime rules of engagement at the time of their deaths; and (3) her discussion of an apparent conflict of interest with respect to plaintiffs' counsel. (Pl.'s Obj. to Report and Recommendation [130] 5.)

Having reviewed *de novo* the objected-to portions of Magistrate Judge Robinson's report and recommendation to this Court, and for the reasons set forth in this opinion, this Court makes the following determinations. First, the Court finds that Magistrate Judge Robinson had proper

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[6] Previously, Piper Rudnick LLP.

[7] As to the magistrate judge's finding and recommendation regarding the sufficiency of the evidence plaintiffs submitted, plaintiffs object on the grounds that the evidence presented is sufficient to find the defendants liable, that such evidence is "consistent with and virtually identical to–and even more direct than–liability evidence found to be sufficient as a matter of law in 23 other [FSIA] cases," and that this Court may take judicial notice of evidence, findings and conclusions entered by this Court in *Blais v. Islamic Republic of Iran*, 2006 WL 2827372, at *3-4 (D.D.C. Sept. 29, 2006) (Lamberth, J.). (Pl.'s Obj. to Report and Recommendation [130] 4-5.)

jurisdiction to hear evidence and render a report and recommendation in this matter. Second, the Court finds that plaintiffs may properly recover under the FSIA as noncombatants under peacetime rules of engagement. Third, this Court finds that no conflict of interest presently exists arising out of plaintiffs' representation by DLA Piper Rudnick Gray Cary US LLP. Finally, the Court finds that plaintiffs have provided evidence satisfactory to this Court to establish their claim or right to relief. In light of the foregoing findings, judgment shall be entered in favor of the plaintiffs and against the defendants.

IV. Analysis and Review of Objections to Magistrate Judge Robinson's Report and Recommendation

A. Plaintiff's Objection that Magistrate Judge Robinson Lacked Jurisdiction to Hear Evidence and Render an Opinion in this Matter

Plaintiffs objected to the magistrate judge's report and recommendation in its entirety on the grounds that she lacked jurisdiction to conduct an evidentiary hearing or issue a recommendation on plaintiffs' motion for default judgment against the defendants. At the heart of their objections is the notion that appointment of a magistrate judge in lieu of an Article III Judge is unauthorized by the Magistrates Act and might run afoul of the parties' due process and Article III rights under the U.S. Constitution.[8]

Plaintiffs' objection is unfounded. As noted above,[9] such an appointment is clearly authorized by the Magistrates Act. The plain language of 28 U.S.C. § 636(b)(1)(B) clearly states

[8] Plaintiffs chief concern is that any final judgment might be collaterally attacked by defendants on these grounds.

[9] *See supra* Part III.A.

that a district court "may . . . designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition." 28 U.S.C. § 636(b)(1)(B). Additionally, the Supreme Court held that this statute "strikes the proper balance between the demands of due process and the constraints of Article III." *Raddatz*, 447 U.S. at 683-84. Delegation under this provision does not run afoul of Article III "so long as the ultimate decision is made by the district court." *Raddatz*, 447 U.S. at 683. Moreover, the parties' due process rights are protected by the fact that "the district court judge alone acts as the ultimate decisionmaker, [and] the statute grants the judge the broad discretion to accept, reject, or modify the magistrate's proposed findings." *Id.* at 680. Here, Magistrate Judge Robinson heard evidence from the parties, and rendered a report and recommendation to this Court, pursuant to 28 U.S.C. § 636(b), and this Court alone is responsible for rendering the ultimate decision as to the merits of this case. Accordingly, this Court finds that neither of the parties' due process or Article III rights were violated by appointing Magistrate Judge Robinson to conduct an evidentiary hearing. This Court finds that Magistrate Judge Robinson had proper jurisdiction under 28 U.S.C. § 636(b) to conduct an evidentiary hearing and submit a report and recommendation thereon.

B. Plaintiffs' Ability to Recover Under State-Sponsored Terrorism Exception to the FSIA

Magistrate Judge Robinson raised in her report and recommendation the issue of whether plaintiffs, as relatives of active servicemen on duty at the time of their deaths, were able to recover for damages arising from those servicemen's deaths. Plaintiffs argued that they are not excluded under the state-sponsored terrorism exception to the FSIA from recovering.

Previously, this Court has awarded damages to United States service members who were injured or killed as a result of state-sponsored terrorist attacks and their families.[10] In *Peterson*, this Court held that a service member and his or her family may recover under the state-sponsored terrorism exception to the FSIA only if the service member was a non-combatant not engaged in military hostilities. There, the Court established a two-prong test to determine whether a military service member was a non-combatant. Under this test, a service member is deemed a non-combatant if he or she was: (1) engaged in a peacekeeping mission; and (2) operating under peacetime rules of engagement. *Peterson*, 264 F. Supp. 2d at 60.

Here, plaintiffs have conclusively demonstrated that the servicemen who died at the Khobar Towers satisfy the two-prong test under *Peterson*. Colonel Douglas Cochran testified on December 2, 2003, that the service members who died at the Khobar Towers were deployed as a part of a peacekeeping mission sanctioned by United Nations Resolutions. (Dec. 12, 2003 Tr. at 12.) He also stated that the decedents were operating under standing rules of engagement,[11] under which the decedents did not have the right to participate directly in hostilities. *Id.* at 10-12, 15. The decedents were not allowed to attack unless attacked or in peril of immediate attack resulting in death or serious bodily harm. *Id.* at 15. Moreover, as noted by the Reports of Casualty and personnel records for each of the decedents in this case, the cause of the service

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[10] *See, e.g.*, *Blais*, 2006 WL 2827372 (D.D.C. Sept. 29, 2006) (Lamberth, J.); *Prevatt v. Islamic Republic of Iran*, 421 F. Supp. 2d 152 (D.D.C. Mar. 27, 2006) (Lamberth, J.); *Dammarell v. Islamic Republic of Iran*, 404 F. Supp. 2d 261 (D.D.C. 2005) (Bates, J.); *Salzar v. Islamic Republic of Iran*, 370 F. Supp. 2d 105 (D.D.C. 2005) (Bates, J.); *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46 (D.D.C. 2003) (Lamberth, J.).

[11] According to Col. Cochran, the term "standing rules of engagement" is synonymous with the term "peacetime rules of engagement." (Dec. 2, 2003 Tr. at 15.)

members' deaths was indisputably the result of a terrorist bombing, and not a result of combat hostilities. (Dec. 1, 2003 Tr. at 29; *see also* Dec. 2, 2003 Tr. at 35-38.) In light of the above-mentioned evidence, this Court finds that plaintiffs have satisfied the two-prong test under *Peterson*. Therefore, this Court finds that plaintiffs are not excluded from recovering under the state-sponsored terrorism exception to the FSIA.

C. Apparent Conflict of Interest

Next, in her discussion of the procedural history of the case, the magistrate judge discussed an apparent conflict of interest resulting from plaintiffs' representation in this matter by DLA Piper Rudnick Gray Cary US LLP (the "Firm"), and the Firm's representation of the Government of Sudan ("Sudan"), the defendant in the separate matter of *Owens v. Republic of Sudan* (Civ. Action No. 01-2244 (JDB)).[12] The magistrate judge was concerned that the Firm's representation in the *Owens* matter created a conflict of interest because defendants Iran, IRGC, and MOIS were co-defendants with Sudan in *Owens*, and because the Firm's representation of Sudan would cause the Firm to make an argument in *Owens* that was directly contrary to the arguments it made on behalf of plaintiffs in this matter. Plaintiffs raise an objection and allege that no conflict of interest (apparent or otherwise) exists in this matter.

Under District of Columbia Rules of Professional Conduct 1.7, unless a lawyer obtains informed consent from both clients, a lawyer shall not represent one client in a matter if the position taken by that client is adverse to the position taken by another client. D.C. Rule of Prof. Conduct 1.7. As the District of Columbia Bar Legal Ethics Committee has noted, "the lawyer

[12] The magistrate judge had the parties brief the issue of whether a conflict of interest existed.

may not, without informed consent of all parties, accept simultaneous representation of both clients where such representation creates a substantial risk that representation of one client will adversely effect the representation of the other." District of Columbia Bar Legal Ethics Committee Formal Op. 265 (1996).

Upon a review of the pleadings and evidence in this matter, the Court finds that no conflict of interest exists. First, the Firm's prior representation in another matter of a co-defendant to the defendants in this matter does not create a conflict of interest. Though the defendants in this matter were co-defendants along with Sudan in the *Owens* matter, the Firm has stated that it never represented Iran, MOIS, or IRGC in the *Owens* matter or any other matter. (Pl.'s Resp. to Apr. 16, 2004 Court Order 1.) Moreover, the Firm has withdrawn completely from representing Sudan in *Owens* as Rule 1.7 states it must in such situations.

Next, the Court is satisfied that no apparent conflict exists that would preclude the Firm from continuing to represent plaintiffs' interests in this matter. As the Firm's pleadings to the magistrate judge plainly show, upon discovering that an apparent conflict had arisen, the Firm took immediate steps to eliminate it. The Co-Chair of the Firm's Professional Responsibility function instructed the partners representing the Government of Sudan that they were not to continue to represent Sudan in light of the fact that such representation would force the Firm to argue conflicting positions in both matters. Unbeknownst to the heads of the Firm, however, the specific attorneys responsible for representing Sudan disregarded the partners' instruction, and continued to represent Sudan, entering filings on their behalf. Still, when the Firm's management discovered the actions of events, it promptly sought withdrawal as counsel for Sudan in the *Owens* matter, notified the D.C. Bar Counsel and this Court's Committee on

Grievances of the sequence of events, and wrote off fees and expenses otherwise due from Sudan as a former client. In addition, the attorneys who disregarded the Firm's instructions to cease representation have left the Firm.[13]

Finally, this Court is persuaded that no conflict of interest exists by considering the manner in which the magistrate judge ultimately dealt with the issue. After the Firm issued its responses on the conflict issue to Magistrate Judge Robinson's Orders dated April 13 and April 16, 2004,[14] the magistrate judge proceeded forth with the remaining portions of the trial, and never issued a ruling on whether a conflict existed as a result of the Firm's representation of plaintiffs in this matter, and their representation of Sudan in *Owens*. Moreover, in her report and recommendation to this Court, the magistrate judge included the "apparent conflict of interest" issue solely within her discussion of the case's procedural history. She neither issued nor recommended within her report and recommendation any finding that a conflict existed. Surely, were the magistrate judge of the opinion that a conflict of interest did exist, she would have taken more substantive steps to ensure that such a representation would not continue.

In light of these facts, the Court finds that no conflict of interest exists arising from the Firm's representation of plaintiffs in this matter and Sudan in the *Owens* case.

D. Sufficiency of Liability Evidence Provided by Plaintiffs

Magistrate Judge Robinson recommended that plaintiffs' motion for default judgment be

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[13] Of additional import is the fact that the former attorneys at the Firm who represented Sudan–and who thereby placed the Firm in the position of a potential conflict of interest–did not take part in the Firm's work related to the present matter before the Court.

[14] *See* Docket Nos. [77] and [79], respectively (ordering plaintiffs to file memoranda addressing the conflict of interest issue).

denied on the grounds that she found plaintiffs had not submitted evidence satisfactory to the Court of defendants' liability. She found Director Freeh and Mr. Watson's respective testimony to be unsatisfactory on the grounds that each witness' testimony was largely conclusory, and that each was testifying in his personal capacity and not as a representative of the FBI. She also found that the testimony given by Doctor Clawson was conclusory as to defendants' liability, and failed to provide evidence of the link between Saudi Hezbollah, Hezbollah, and Iran.

Plaintiffs objected to these findings on three grounds. They argued that the evidence submitted is legally sufficient to sustain a finding of liability against defendants. They also argue that the evidence presented is consistent with, nearly identical to and–in some instances–more direct than liability evidence found by this Court to be sufficient as a matter of law in prior cases arising under the state-sponsor of terrorism exception to the FSIA. Finally, plaintiffs argue that the Court may take judicial notice of the facts and findings in *Blais v. Islamic Republic of Iran* 2006 WL 2827372 (D.D.C. Sept. 29, 2006) (Lamberth, J.), a case arising out of the same attack on the Khobar Towers. They argue that the facts from *Blais*, combined with the evidence submitted by plaintiffs in this matter, support a finding that defendants are liable in this matter.

1. Testimony of Director Louis J. Freeh and Dale L. Watson

To establish the defendant's liability for the bombing, plaintiffs offered the testimony of Louis J. Freeh, a former Director at the FBI, and Dale L. Watson, an agent and investigator at the FBI and CIA with over 20 years experience in the counterterrorism and counterintelligence fields. Over the course of the approximately four year investigation into the Khobar Towers bombing, both Freeh and Watson "reviewed all reports prepared by the FBI investigators, and spoke directly with FBI agents and Saudi officials" all of which established a link between the

defendants and the bombing. All of the information conveyed to both Freeh and Watson was communicated by FBI agents who were on the scene.

Based on this knowledge of the investigation, Mr. Freeh testified at the evidentiary hearing before the magistrate judge as to the defendants' involvement in the Khobar Towers attack.[15] In his testimony, Director Freeh testified that, during the course of the investigation into the explosion, it was concluded that the Khobar Towers explosion was the cause of a fertilizer-based explosive device. (Dec. 18, 2003 Tr. at 10.) It was also concluded, Director Freeh testified, that the bombing was an act of terrorism. *Id.*

According to Director Freeh, the FBI also obtained a great deal of information linking the defendants to the bombing from interviews with six individuals arrested by the Saudis shortly after the bombing. *Id.* at 11-30. These six individuals, who were members of the Saudi Hezbollah organization, admitted to the FBI their complicity in the attack on the Khobar Towers. Exh. 7 at 11, 13-14, 27. The six individuals admitted that senior officials in the Iranian government provided them with funding, planning, training, sponsorship, and travel necessary to carry out the attack on the Khobar Towers. (*Id.* at 13-14; *see also* Dec. 18, 2003 Tr. at 24-30.) The six individuals also indicated that the selection of the target and the authorization to proceed was done collectively by Iran, MOIS, and IRGC, though the actual preparation and carrying out

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[15] Mr. Freeh's testimony mirrors the testimony he provided at a Joint Hearing before the United States House of Representatives Permanent Select Committee on Intelligence and the United States Senate Select Committee on Intelligence, in which he testified under oath as to the defendants' involvement in sanctioning, funding and directing the Khobar Towers attack. A transcript of this testimony was admitted into evidence as Plaintiffs' Exhibit 24. *See also* Pl.'s Exh. 25 (May 20, 2003, *Wall Street Journal* article written by Mr. Freeh in which Mr. Freeh indicated that the FBI's investigation indicated Iran, IRGC, and MOIS's involvement in funding and coordinating the attack on the Khobar Towers).

of the attack was done by the IRGC. (Dec. 18, 2003 Tr. at 25.)

More specifically, Mr. Freeh testified, the FBI obtained specific information from the six about how each was recruited and trained by the Iranian government *in Iran* and Lebanon, and how weapons were smuggled into Saudi Arabia from Iran through Syria and Jordan. One individual described in detail a meeting about the attack at which senior Iranian officials, including members of the MOIS and IRGC, were present. (Dec. 18, 2003 Tr. at 23.) Several stated that IRGC directed, assisted, and oversaw the surveillance of the Khobar Towers site, and that these surveillance reports were sent to IRGC officials for their review. Another told the FBI that IRGC gave the six individuals a large amount of money for the specific purpose of planning and executing the Khobar Towers bombing.

Adding credence to Mr. Freeh's testimony is the reliability of the information he relied on in linking the defendants with the attack. First, Director Freeh testified that the information obtained from the six individuals was communicated to the FBI on more than one occasion. Second, there was a great deal of cross-corroboration among the individuals' stories, even when each was interviewed by the FBI separately. Third, he testified that the material portions of each of the individuals' accounts of the bombing did not contradict. Fourth, and perhaps most importantly, in many instances the FBI was able to corroborate independently the statements made by the six individuals.

As a result of this information and his direct participation in the four year investigation into the bombing, Director Freeh testified that it was his ultimate opinion that the bombing was the result of a terrorist attack by Saudi Hezbollah, organized and sponsored by the defendants in this case: Iran, MOIS, and IRGC.

Mr. Watson, who was also an active member in the investigation into the Khobar Towers bombing, testified similarly to Director Freeh. According to Mr. Watson, the bases for his opinion were the direct conversations with the six Saudi Hezbollah members, the corroborating facts discovered from their confessions, his historical knowledge and public record of the Hezbollah organization and statements proffered in an indictment filed in the Eastern District of Virginia. (Dec. 18, 2003 Tr. at 52, 63.) All of this information was information Mr. Watson gleaned as a result either of his own personal research or his involvement in the Khobar Towers bombing investigation. Most importantly, Mr. Watson reached the same conclusion as Director Freeh that the bombing was the result of a terrorist attack by Saudi Hezbollah members, organized and sponsored by the defendants.

2. Dr. Clawson's Expert Testimony as to Involvement by Iran, IRGC, and MOIS

Plaintiffs also relied upon the testimony of Dr. Patrick Clawson to establish a more complete picture as to the involvement of Iran, MOIS, and IRGC in helping carry out the attack on the Khobar Towers. At trial, Dr. Clawson testified as an expert in three areas: (1) the government of Iran; (2) Iran's sponsorship of terrorism; and (3) the Iranian economy. Dr. Clawson's expert opinion regarding the perpetrators of the Khobar Towers bombing is based on his involvement on a Commission investigating the bombing, his top-secret security clearance, his discussions with Saudi officials, as well as his academic research on the subject. Exh. 9 at 62-63.

Dr. Clawson testified that the government of Iran formed the Saudi Hezbollah organization. *Id.* at 56. He testified that the IRGC was responsible for providing military

training to Hezbollah terrorists as to how to carry out a terrorist attack. *Id.* at 28. He also testified as to the defendants' state-sponsorship of terrorism, noting that at the time of the Khobar Towers bombing, Iran spent an estimated amount of between $50 million and $150 million on terrorist activities. Exh. 10 at 46. In light of all these facts, Dr. Clawson stated conclusively his opinion that the government of Iran, MOIS, and IRGC were responsible for the Khobar Towers bombing, and that Saudi Hezbollah carried out the attack under their direction. Exh. 9 at 67-68.

3. Judicial Notice of Findings and Conclusions in Blais v. Islamic Republic of Iran[16]

Plaintiffs argue that the Court should take judicial notice of the facts and conclusions made by this Court in its recent consideration of the matter of *Blais v. Islamic Republic of Iran*, an action brought against the same defendants for damages resulting from the same 1996 attack on the Khobar Towers. As has recently been noted in a FSIA case within this Circuit, "[a] court may take judicial notice of related proceedings and records in cases before the same court." *Salazar v. Islamic Republic of Iran*, 370 F. Supp. 2d 105, 109 n.6 (D.D.C. 2005) (Bates, J.). As Judge Bates noted in *Salazar*, under Federal Rules of Evidence 201(e), a "party opposing judicial notice of a given fact must be afforded an opportunity to be heard . . . and may certainly make recognized objections to the admissibility of such judicially noticed facts as evidence in the case . . . ." *Id.* (internal citations omitted). Defendants in this case have failed to make such objections, or even make an appearance at all before this Court. Accordingly, in addition to the unopposed trial submissions made by plaintiffs in this matter, this Court will take judicial notice of the

[16] *Blais v. Islamic Republic of Iran*, 2006 WL 2827372 (D.D.C. Sept. 29, 2006) (Lamberth, J.).

findings made in *Blais* as to the defendants involvement in and liability for the Khobar Towers bombing.

In *Blais*, this Court found as fact that the Khobar Towers attack was carried out by individuals who referred to themselves as the group "Saudi Hezbollah." *Blais*, 2006 WL 2827372, at *3. The Court found that these individuals were recruited by Brigadier General Ahmed Sharifi, a senior official of the IRGC. *Id.* Brigadier General Sharifi planned the operation, and recruited the individual members of Saudi Hezbollah at the Iranian Embassy in Damascus, Syria. *Id.* He was also responsible for providing the funds, passports, and paperwork for the individuals who carried out the attack. *Id.* In addition to acknowledging General Sharifi's involvement in the attack, this Court found that the attack was approved by the Ayatollah Khameini, Iran's Supreme Leader at the time, and was approved and supported by Ali Fallahian, the head of MOIS at the time. *Id.*[17]

This Court heard testimony from and accepted documentary evidence considered by Dr. Bruce Tefft.[18] Dr. Tefft expressed his opinion "that defendants the Islamic Republic of Iran and

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[17] This Court also found that Mr. Fallahian's representative in Damascus, Syria, a man by the name of Nurani, provided additional direct support for the operation. *Id.*

[18] As noted in Finding of Fact #23 in the *Blais* opinion:

> Dr. Bruce Tefft was one of the founding members of the CIA's counterterrorism bureau in 1985. He served in the CIA until 1995, and has continued to work as a consultant on terrorism since that time, including work as an unofficial adviser to the New York Police Department's counterterrorism and intelligence divisions. *Id.* He retains a top-secret security clearance in connection with his work. *Id.* He has been qualified as an expert witness in numerous other cases involving Iranian sponsorship of terrorism. Ex. 1 at 3. He was qualified as an expert witness on terrorism in this case.

Blais, 2006 WL 2827372, at *4.

the Iranian Revolutionary Guards Corp were responsible for planning and supporting the attack on the Khobar Towers, including providing operational and financial support." *Blais*, 2006 WL 2827372, at *4. Dr. Tefft's testimony and the evidence accompanying his testimony are consistent with the testimony and evidence from *Blais*, including testimony made by Mr. Freeh. In fact, Dr. Tefft not only relied upon the conclusions put forth by Messrs. Freeh and Watson in forming his own opinion in this matter, but Dr. Tefft stated that he agreed with their conclusions regarding the connection between Iran and Saudi Hezbollah in bringing about the bombing on the Khobar Towers. When asked as to the defendants' involvement in the attack, Dr. Tefft stated that there was "'no question about it. It wouldn't have happened without Iranian support..'" *Id.*

Finally, this Court considered written testimony from both former FBI Director Louis Freeh and former Deputy Counterterrorism Chief Dale Watson. In his written statement, Director Freeh stated that, based upon his involvement in the FBI's five year investigation into the attack on the Khobar Towers, Iran was responsible for supporting and funding the attack. *Id.* Mr. Watson likewise stated unequivocally that, based upon information uncovered in the investigation into the attack,[19] there was Iranian, MOIS, and IRGC involvement in the bombing. *Id.* As here, the Court found the conclusions of Messrs. Freeh and Watson in *Blais* to be amply reliable and probative as to the question of the defendants' involvement in the Khobar Towers bombing.

4. Conclusion

Upon *de novo* review of the evidence, the Court is convinced that the evidence is sufficiently satisfactory to establish liability. First, contrary to the magistrate judge's

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[19] An investigation for which Watson was responsible for day-to-day oversight. *Id.*

recommendation, the testimony by Freeh and Watson is not conclusory because the asserted statements made by Freeh and Watson do not lack supporting evidence. Director Freeh and Mr. Watson based their testimony upon their four year direct involvement in the investigation into the bombing, and their extensive years of experience in the counterintelligence and counterterrorism fields. Throughout this time, Messrs. Freeh and Watson, and the FBI agents they directly supervised, uncovered and synthesized a great deal of information about the attack on Khobar Towers and its perpetrators. The facts unearthed by this investigation led them to the six captured participants in the bombing, each of whom implicated the defendants as having organized, funded, and supported the attack. Accordingly, the Court finds that the facts testified to by Freeh and Watson were supported by more than a sufficient basis for the witnesses' conclusions that Iran, MOIS, and IRGC were responsible for the Khobar Towers bombing carried out by Saudi Hezbollah.

The Court also fails to see the rationale behind Magistrate Judge Robinson's conclusion that the testimony offered by Freeh and Watson was somehow less credible because it was made in their individual capacities, and not on behalf of the FBI for whom they were no longer employed. The reliability of a witness' testimony should not and indeed does not hinge solely upon that person's employment with a particular organization. Rather, the reliability and credibility of a witness' testimony is determined by considering a myriad of factors including, *inter alia*, the witness' demeanor, the ability of the witness to observe the information about which he is testifying, whether the testimony is corroborated by other facts introduced into evidence, as well as the witness' prior experience.

Applying these factors to the testimony of Messrs. Freeh and Watson, this Court finds

their testimony to be undeniably credible and reliable. Each was directly involved in the investigation into the Khobar Towers bombing, and was personally familiar with the results from that investigation. This is bolstered by the fact that Freeh and Watson occupied leadership positions in overseeing the entirety of the investigation into the bombing. Such positions would undoubtedly place Freeh and Watson in the best possible position to assess *all* the information about the attack and make a logical conclusion as to the cause and perpetrators of the attack. In addition, their testimony was consistent with each other, with the testimony by Dr. Clawson, and with information available in the public record. Moreover, this Court has previously relied upon Freeh and Watson's conclusions as to the involvement of Iran, IRGC, and MOIS in the Khobar Towers attack, and sees no reason to discount the credence of their testimony as conclusive on the grounds that they are not currently employed by the FBI. *See Blais v. Islamic Republic of Iran*, 2006 WL 2827372, at *3-4 (D.D.C. Sept. 29, 2006) (Lamberth, J.) (finding as fact both Mr. Freeh and Mr. Watson's conclusion as to the involvement of Iran, IRGC, and MOIS in the Khobar Towers bombing).

The fact that neither testified about the attack as agents of the FBI does not nullify the credibility of their statements. Messrs. Freeh and Watson's intricate involvement with the investigation into the Khobar Towers bombing while they were with the FBI provides more than an adequate basis for their testimony and the conclusions each drew therein as to the perpetrators of the attack.

The Court also disagrees with the magistrate judge's recommendation that Dr. Clawson's testimony, whether evaluated alone or in conjunction with the testimony by Freeh and Watson, was unsatisfactory to establish liability. To the contrary–Dr. Clawson is a renowned scholar of

Middle Eastern politics, who has studied and written about Iran for years. In over 20 cases, Dr. Clawson has repeatedly provided this Court with reliable and credible testimony regarding the involvement of Iran, MOIS, and IRGC in sponsoring and organizing acts of terrorism carried out against citizens of the United States.[20] The Court sees no reason to deviate from the judges in prior cases who found Dr. Clawson's testimony to be satisfactorily reliable.

Accordingly, having considered the evidence and testimony admitted at trial in the present case, this Court finds that plaintiffs have met their burden under the state-sponsored terrorism exception of the FSIA by establishing their right to relief "by evidence that is satisfactory to the Court[.]" The totality of the evidence at trial, combined with the findings and conclusions entered by this Court in *Blais*, firmly establishes that "the Khobar Towers bombing was planned, funded, and sponsored by senior leadership in the government of the Islamic Republic of Iran; the IRGC had the responsibility and worked with Saudi Hizbollah to execute the plan, and the MOIS participated in the planning and funding of the attack." Proposed Findings and Conclusions at 9, ¶ 28.

V. Liability

A. Proper Causes of Action Under the FSIA

Once a foreign state's immunity has been lifted under Section 1605 and jurisdiction is found to be proper, Section 1606 provides that "the foreign state shall be liable in the same

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[20] *See, e.g.*, *Greenbaum v. Islamic Republic of Iran*, 2006 WL 2374241 (D.D.C. Aug. 10, 2006) (Lamberth, J.); *Prevatt v. Islamic Republic of Iran*, 421 F. Supp. 2d 152 (D.D.C. Mar. 27, 2006) (Lamberth, J.); *Haim v. Islamic Republic of Iran*, 425 F. Supp. 2d 56 (D.D.C. Mar. 24, 2006) (Lamberth, J.); *Stern v. Islamic Republic of Iran*, 271 F. Supp. 2d 2286 (D.D.C. 2003) (Lamberth, J.); *Weinstein v. Islamic Republic of Iran*, 184 F. Supp. 2d 13 (D.D.C. 2002) (Lamberth, J.).

manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. Section 1606 acts as a "pass-through" to substantive causes of action against private individuals that may exist in federal, state or international law. *Dammarell v. Islamic Republic of Iran*, Civ. A. No. 01-2224, 2005 WL 756090, at *8-10, 2005 U.S. Dist. LEXIS 5343, at *27-32 (D.D.C. Mar. 29, 2005) (Bates, J.) [hereinafter *Dammarell II*].

In this case, state law provides a basis for liability. First, the law of the United States applies rather than the law of the place of the tort or any other foreign law because the United States has a "unique interest" in having its domestic law apply in cases involving terrorist attacks on United States citizens. *See Dammarell II*, 2005 WL 756090, at *20, 2005 U.S. Dist. LEXIS 5343, at *63.

B. Applicable State Law Governing Causes of Action

Having established that the laws of the United States apply in this action, the Court must determine the applicable state law to govern the action. As the forum state, District of Columbia choice of law rules apply to determine which state's law shall apply. Under District of Columbia choice of law rules, courts employ a modified government interest analysis under which they "evaluate the governmental policies underlying the applicable laws and determine which jurisdiction's policy would be most advanced by having its law applied to the facts of the case under review." *Hercules & Co. V. Shama Rest. Corp.*, 566 A.2d 31, 41 (D.C. 1989) (citations and internal quotations omitted). Generally, application of this governmental interest test points to the law of *each* plaintiff's domicile at the time of the attack as having the greatest interest in providing redress to its citizens. *See Dammarell II*, 2005 WL 756090, at *20-21, 2005 U.S. Dist. LEXIS 5343, at *66-67 (citing RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 402(3)

(1987)).

Plaintiffs' claims involve consideration of the law of thirteen different states. The estates and surviving family members of persons killed in the bombing have asserted wrongful death claims and intentional infliction of emotional distress claims. In order to avoid repetition, the discussion will be organized by state, with an initial overview of each state's law followed by a discussion of each plaintiff's asserted claims under those laws.

C. Vicarious Liability

The basis of defendants' liability is that they provided material support and resources to Saudi Hezbollah, which personally completed the attack. One may be liable for the acts of another under theories of vicarious liability, such as conspiracy, aiding and abetting and inducement. This Court finds that civil conspiracy provides a basis of liability for Iran, MOIS, and IRGC, and accordingly declines to reach the issue of whether they might also be liable on the basis of aiding and abetting and/or inducement.

The doctrine of civil conspiracy is recognized under the laws of each of the states each claimant has brought an action.[21] Though each state has its own particular means of describing

[21] *Rusheen v. Cohen*, 128 P.3d 713, 722 (Cal. 2006) ("The elements of an action for civil conspiracy are (1) formation and operation of the conspiracy and (2) damage resulting to plaintiff (3) from a wrongful act done in furtherance of the common design."); *Walters v. Blankenship*, 931 So.2d 137 (Fla. Dist. Ct. App. Apr. 28, 2006) (finding that a civil conspiracy exists under Florida law where there is "(a) a conspiracy between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts performed pursuant to the conspiracy"); *Sims v. Beamer*, 757 N.E.2d 1021 (Ind. Ct. App. 2001) ("'Civil conspiracy' consists of a combination of two or more persons, by concerted action, to accomplish an unlawful purpose or to accomplish some purpose, not in itself unlawful, by unlawful means."); *Sullivan v. Wallace*, 859 So.2d 245, 248 (La. App. Ct. 2003) ("To recover under a civil conspiracy theory of liability, the plaintiff must prove that an agreement existed to commit an illegal or tortious act which resulted in plaintiff's injury."); *Harding v. Ohio Cas. Ins. Co. of*

civil conspiracy, upon inspection of each state's laws the elements of civil conspiracy are met in each state if it can be demonstrated that: (1) there is an agreement between two or more persons or entities; (2) to do an unlawful act, or an otherwise lawful act by unlawful means; (3) there was an overt act committed in furtherance of this unlawful agreement; and (4) damages were incurred by the plaintiff as a proximate result of the actions taken pursuant to the conspiracy.[22]

In this case, the elements of civil conspiracy between Iran, MOIS, the IRGC and Saudi Hezbollah have been satisfied. As this Court has previously held, "sponsorship of terrorist activities inherently involves a conspiracy to commit terrorist attacks." *Flatow*, 999 F. Supp. At

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Hamilton, Ohio, 230 Minn. 327, 41 N.W.2d 818, 824 (Minn. 1950) ("A conspiracy is a combination of persons to accomplish an unlawful purpose or a lawful purpose by unlawful means.") (quoting *Dairy Region Land Co. v. Paulson*, 199 N.W. 398 (Minn. 1924); *In re Appeal of Armaganian*, 784 A.2d 1185, 1189 (N.H. 2001) ("[U]nder New Hampshire law, the elements of a civil conspiracy are: "(1) two or more persons ···; (2) an object to be accomplished (i.e., an unlawful object to be achieved by lawful or unlawful means or a lawful object to be achieved by unlawful means); (3) an agreement on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof.") (quoting *Jay Edwards, Inc. v. Baker*, 534 A.2d 706, 709 (N.H. 1987)); *Piccoli A/S v. Calvin Klein Jeanswear Co.*, 19 F. Supp. 2d 157 (S.D.N.Y. 1998) ("Elements of a civil conspiracy under New York law are (1) the corrupt agreement between two or more persons, (2) an overt act, (3) their intentional participation in the furtherance of a plan or purpose, and (4) the resulting damage."); *Boyd v. Drum*, 501 S.E.2d 91, 96 (N.C. Ct. App. 1998) ("A civil conspiracy claim consists of: (1) an agreement between two or more persons; (2) to do an unlawful act or to do a lawful act in an unlawful way; (3) which agreement resulted in injury to the plaintiff."); *Matthews v. New Century Mortg. Corp.*, 185 F. Supp. 2d 874 (S.D. Ohio 2002) ("Under Ohio law, the tort of civil conspiracy is a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages."); *Jenkins v. Entery Corp.*, 2006 WL 488580 (Tex. App. Corpus Christi 2006), reh'g overruled, (Apr. 7, 2006) ("Elements of a civil conspiracy claim include: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as a proximate result."); *Onderdonk v. Lamb*, 255 N.W.2d 507, 510 (Kan. 1977) ("To state a cause of action for civil conspiracy, the complaint must allege: (1) The formation and operation of the conspiracy; (2) the wrongful act or acts done pursuant thereto; and (3) the damage resulting from such act or acts.").

[22] *See supra* note 21.

27. It is undisputed that Saudi Hezbollah committed the attack on the Khobar Towers. It has been established by evidence satisfactory to this Court that Saudi Hezbollah and defendants Iran, MOIS and the IRGC conspired to commit the terrorist attack on the Khobar Towers.[23] The evidence elicited from the FBI's investigation and interview of the six detained members of Saudi Hezbollah shows that senior Iranian, MOIS and IRGC officials participated in the planning of, and provided material support and resources to Saudi Hezbollah for the attack on the Khobar Towers. The evidence also shows that the defendants also provided money, training and travel documents to Saudi Hezbollah members in order to facilitate the attacks. Moreover, the sheer gravity and nature of the attack demonstrate the defendants' unlawful intent to inflict severe emotional distress upon the American servicemen as well as their close relatives. The defendants' acts of financing, training and providing travel documents ably satisfy the overt act requirement for civil conspiracy. Finally, as will be discussed below, the plaintiffs in this action incurred damages resulting from the deaths caused by the conspiracy. Accordingly, the elements of civil conspiracy are established between Saudi Hezbollah and the defendants Iran, MOIS and the IRGC.

D. Cause of Death

Thomas R. Parsons, M.D., an associate medical examiner, was received by the Court as an expert in the field of forensic pathology. (Feb. 9, 2004 A.M. Tr. at 82-83; Ex. 232.) On June 25, 1996, Dr. Parsons was on active duty as a major in the United States Air Force. He was a medical examiner with the Armed Forces Institute of Pathology ("AFIP"). Dr. Parsons first

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[23] This Court also found in *Blais* that "Saudi Hezbollah, Iran, MOIS and the IRGC reached an understanding to do an unlawful act, namely the murder and maiming of American servicemen."

learned of the June 25, 1996 bombing at Khobar Towers in Dharan, Saudi Arabia on June 26, 1996. Dr. Parsons and three other medical examiners performed the autopsies of the 19 officers and airman killed in the Khobar Towers bombing at Dover AFB on June 27 and 28, 1996. *Id.* at 83-84.

Based on his performance of several of the autopsies in June of 1996, his review of the complete autopsy files and photographs from the AFIP, and his training and experience as a forensic pathologist, Dr. Parsons testified that the cause of death of each of the 17 decedents represented in the present litigation "was the explosion that occurred near their barracks [in Dharan, Saudi Arabia]." *Id.* at 105-106. This conclusion, Dr. Parsons noted, was corroborated by the types of severe blast injuries sustained by each of the deceased plaintiffs. Dr. Parsons testified that the injuries of these 17 decedents were "very severe. As a matter of fact. This is about as bad as you can get until you get to body fragmentation." *Id.* at 110.

Based on his performance of several of the autopsies in June of 1996, his review of the complete autopsy files and photographs from the AFIP, and his training and experience as a forensic pathologist, Dr. Parsons testified as to his opinion to a reasonable degree of certainty that 16 of the 17 individuals were rendered immediately unconscious and died immediately or shortly after the explosion. *Id.* at 110-111. According to Dr. Parsons, Airman Christopher Lester, the single plaintiff who did not die immediately after the explosion, died after a significant post-injury survival period. *Id.* at 111.

E. Damages

Before assessing the merits of the individual claims, this Court must briefly discuss damages in actions against foreign states arising under the FSIA. To obtain damages against

defendants under the FSIA, the plaintiffs must prove that the consequences of the defendants' conduct were "'reasonably certain' (i.e., more likely than not) to occur, and must prove the amount of damages by a 'reasonable estimate' consistent with this [Circuit's] application of the American rule on damages." *Salazar*, 370 F. Supp. 2d at 115-16 (quoting *Hill v. Republic of Iraq*, 328 F.3d 680, 681 (D.C. Cir. 2003) (internal quotations omitted).

1. Compensatory Damages

As a result of the wrongful conduct of defendants Iran, MOIS, and the IRGC, plaintiffs have suffered and will continue to suffer pain and mental anguish. Under the FSIA, if a foreign state may be held liable, it "shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. Accordingly, plaintiffs are entitled to the typical bases of damages that may be awarded against tortfeasors under the laws under which each claim is brought.

In determining the appropriate amount of compensatory damages, the Court may look to prior decisions awarding damages for pain and suffering, and to those awarding damages for solatium. *Prevatt*, 421 F. Supp. 2d at 160. "While intervening changes in law have ruled many cases' reliance on federal common law improper, such findings need not disturb the accuracy of the analogy between solatium and intentional infliction of emotional distress." *Haim*, 425 F. Supp. 2d at 71.

In determining the amount of compensatory damages awards to family members of a surviving victim, this Court has held that these awards are determined by the "nature of the relationship" between the family member and victim, and "the severity of the pain suffered by the family member." *Haim*, 425 F. Supp. 2d at 75. Spouses typically receive greater damage awards

than parents, who, in turn, receive greater awards than siblings. *Compare, e.g.*, *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107, 113 (D.D.C. 2000) (Jackson, J.) (awarding $10 million to the wife of a hostage and torture victim); *Cicippio*, 18 F. Supp. 2d at 70 (same), *with Eisenfeld*, 172 F. Supp. 2d at 8 (awarding $5 million each to the parents and $2.5 million each to the siblings of victims of a suicide bombing on a passenger bus); *see also Flatow*, 999 F. Supp. at 31 (awarding parents each $5 million and siblings each $2.5 million of victim who was killed in the same passenger bus bombing in which Seth was injured). Moreover, "families of victims who have died are typically awarded greater damages than families of victims who remain alive." *Id.* While the loss suffered by the plaintiffs in these cases is undeniably difficult to quantify, courts typically award between $8 million and $12 million for pain and suffering resulting from the death of a spouse,[24] approximately $5 million to a parent whose child was killed,[25] and approximately $2.5 million to a plaintiff whose sibling was killed.[26]

2. Pain and Suffering Damages

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[24] *See, e.g., Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107, 113 (D.D.C. 2000) (Jackson, J.) (awarding $10 million to the wife of a hostage and torture victim); *Weinstein* (granting $8 million to the widow of a bus bombing victim); *Kerr v. Islamic Republic of Iran*, 245 F. Supp. 2d 59, 64 (D.D.C. 2003) (awarding $10 million to the widow of a murder victim); *Salazar,* 370 F. Supp. 2d at 116 (awarding $10 million to the widow of a bombing victim). As this Court noted in *Greenbaum*, however, "larger awards are typically reserved for cases with aggravating circumstances that appreciably worsen the surviving spouse's pain and suffering, such as cases involving torture or kidnaping of a spouse, or in which the victim survives with severe physical and emotional conditions that continue to cause severe suffering by the spouse." *Greenbaum v. Islamic Republic of Iran*, 451 F. Supp. 2d 90, 108 (D.D.C. August 10, 2006) (Lamberth, J.) (citing *Cicippio*, 18 F. Supp. 2d at 70; *Acree*, 271 F. Supp. 2d at 222.)

[25] *Eisenfeld*, 172 F. Supp. 2d at 8.

[26] *Prevatt v. Islamic Republic of Iran*, 421 F. Supp. 2d 152, 161 (D.D.C. 2006) (Lamberth, J.).

Dr. Dana Cable testified as an expert for the plaintiffs concerning the grief process and the factors which cause it to be more extensive and intensive. (Feb. 10, 2004 Tr. at 9-28; Ex. 267.) Dr. Cable testified concerning the impact of each decedent's death on his particular family. (Feb. 10, 2004 Tr. at 28-214.) Dr. Cable is a licensed psychologist, a certified death educator, and a certified grief therapist. (*Id.* at 5; Ex. 267.)

Dr. Cable described the grief process and the seven stages of grief: (1) shock; (2) disorganization; (3) volatile emotions; (4) guilt; (5) loss & loneliness (usually lasting 1-2 years); (6) relief (can go on with life, but experience some guilt for going on); and (7) reestablishment. (Feb. 10, 2004 Tr. at 9-11.) Dr. Cable stated that each of the surviving family members were still in the "loss and loneliness" stage of the grief process. *Id.* at 11. Dr. Cable described this stage of the grief process as "the most intense part of the grief process." *Id.* at 10.

Though a person who loses someone to death is only in the "loss and loneliness" stage for a year or two, Dr. Cable explained that a number of issues present in this case complicate the grieving process and cause the "loss and loneliness" stage to last much longer for family members of terrorism victims. *Id.* at 11-12; 19-23. According to Dr. Cable, the grief process is made worse for the family members because none of them were present at the time the terrorist act took place at Khobar Towers. *Id.* at 26.

The Court's review of the testimony and the demeanor of the plaintiffs, as well as the testimony accepted via affidavit, leads the Court to agree with Dr. Cable's opinion that all of the plaintiffs are still in the "loss and loneliness" stage of the grief process, even seven and one-half years after the death of their loved ones.

3. Punitive Damages

In addition to seeking compensatory damages against the defendants, plaintiffs have also sought punitive damages against the defendants. Punitive damages, however, are not available against foreign states. 28 U.S.C. § 1606; *Blais*, 2006 WL 2827372, at *15. Accordingly, plaintiffs' claim for punitive damages against defendant Islamic Republic of Iran cannot be maintained, and is denied.

Moreover, "punitive damages are not recognized against divisions of a foreign state that are considered to be the state itself, instead of an agent or instrumentality thereof."[27] In order to determine whether the entity is sufficiently linked to the foreign state for punitive damages purposes, the court must assess the core functions of the entity. *See Roeder*, 333 F.3d at 234. Entities that are governmental are considered a part of the foreign state itself, while commercial entities are deemed agencies or instrumentalities of the foreign state, and thereby subject to punitive damages. *Id.* Plaintiff has an affirmative burden of producing evidence that the entity is commercial. *Blais*, 2006 WL 2827372, at *15.

Here, there is inadequate evidence for this Court to determine that either MOIS or IRGC is sufficiently commercial as to justify the imposition of punitive damages against them. Therefore, this Court lacks authority to grant plaintiffs' request for punitive damages against MOIS and IRGC because both MOIS and IRGC are governmental entities, and parts of the state of Iran itself. Accordingly, plaintiffs' claim for punitive damages as to the remaining two defendants is denied.

VI. Specific Findings and Conclusions, By State

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[27] *Prevatt*, 421 F. Supp. 2d at 161(citing *Roeder v. Islamic Republic of Iran*, 333 F.3d 222, 234 (D.C. Cir. 2003).

Plaintiffs' claims in this action involve the consideration of the laws of eleven different states. The estates and family members of the seventeen servicemen killed in the attack on the Khobar Towers have asserted wrongful death claims and intentional infliction of emotional distress claims. The following discussion is organized by state, first providing an overview of the causes of action under that state's law, and then discussing each plaintiff's individual claims as applied under those laws.

A. Florida

1. Causes of Action

a. Wrongful Death

Under Florida law, a right of action exists for wrongful death in favor of the personal representative of the decedent's estate for the benefit of certain designated beneficiaries. Fla. Stat. Ann. §§ 768.16-768.25 (2005). Under the Florida Wrongful Death Act,

> When the death of a person is caused by the wrongful act . . . of any person [or entity] . . . and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued, the person [or entity] . . . that would have been liable in damages if death had not ensued shall be liable for damages as specified in this act notwithstanding the death of the person injured, although death was caused under circumstances constituting a felony.[28]

Moreover, the Florida Wrongful Death Act allows the decedent's personal representative to bring

[28] Fla. Stat. Ann. §§ 768.19 (2005).

an action for the benefit of the decedent's estate *and* the decedent's "survivors." Fla. Stat. Ann. § 768.20-768.21. Under the Act, "survivors" who may be entitled to recovery include the decedent's: (1) spouse, (2) children, (3) parents, and (4) blood relatives, provided these blood relatives can demonstrate they are partly or wholly dependent on the decedent for support. Fla. Stat. Ann. § 768.18.[29]

If the decedent has a surviving spouse or lineal descendants or the decedent is an adult with a surviving parent but no dependents, then the decedent's personal representative may recover the present value of the "loss of the prospective net accumulations" of the decedent that might reasonably have been expected but for the wrongful death. Fla. Stat. Ann. § 768.21(6).[30] A personal representative may recover on behalf of minor children the value of lost support and services, the loss of parental companionship, instruction and guidance, and for mental pain and suffering from the date of injury. Fla. Stat. Ann. §§ 768.21(1), (3). A decedent's surviving spouse and children may recover for mental pain and suffering from the date of the injury. Fla.

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[29] Accordingly, siblings of a decedent are not considered "survivors" unless evidence is presented demonstrating that sibling's dependence upon the decedent. Fla. Stat. Ann. § 768.18. As the Florida Supreme Court has held, a plaintiff's dependency upon the decedent must be proven irrespective of any relationship or legal right to support. *Benoit v. Miami Beach Electric Co.*, 96 So. 158, 159 (Fla. 1923). Moreover, in cases where adults–siblings or otherwise–claim dependency upon the deceased, the plaintiff must show "an actual inability to support themselves and an actual dependence upon some one for support, coupled with a reasonable expectation of support, or with some reasonable claim for support from the deceased." *Id.*

[30] The Act defines "net accumulations" as the portion of the decedent's expected net business or salary income that the decedent would have retained if the decedent had lived her or his normal life expectancy. Fla. Stat. Ann. § 786.18(5). "Net business or salary income" means the part of decedent's probable gross income after taxes and after the decedent's costs of maintenance. *Id.*

Stat. Ann. 768.21(2), (3).[31] A decedent's surviving parents may also recover for mental pain and suffering if the decedent is under 25 years old. Fla. Stat. Ann. § 768.21(4). If the decedent is 25 years old or older, then the decedent's surviving parents may only recover for mental pain and suffering if there are no other survivors. Fla Stat. Ann. § 768.21(4).

b. Intentional Infliction of Emotional Distress

Florida courts have adopted Section 46 of the RESTATEMENT (SECOND) OF TORTS (1965) as the definition of the tort of intentional infliction of emotional distress. *Metropolitan Life Ins. Co. v. McCarson*, 467 So.2d 277, 278-79 (Fla. 1985). Specifically, under Florida law, a defendant is liable for intentional infliction of emotional distress if the defendant's "extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another . . . ." *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 46(1) (1965)).

In evaluating the degree of severity of the defendant's conduct, Florida courts have held that liability for intentional infliction of emotional distress is found "only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *McCarson*, 467 So.2d at 576 (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)). A defendant's conduct is deemed intentional where the defendant "knows that such distress is certain, or substantially certain, to result from his conduct . . . ." *McCarson*, 467 So.2d at 576 (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. i (1965)). Plaintiffs who are the spouse, child, sibling, or parent of a decedent have standing to recover for intentional infliction of

[31] Each parent of an adult child may recover for mental pain and suffering if there are no other survivors. *Id.*

emotional distress even though plaintiffs were not present at the scene. *Williams v. City of Minneola*, 575 So.2d 683, 690 (Fla. App. 1991).

2. Plaintiffs

a. Estate and Surviving Family Members of Brent Marthaler[32]

i. Estate of Brent Marthaler

Airman First-Class Brent Marthaler was born in 1976, and was raised in Minnesota. He is survived by his wife, plaintiff Katie Lee Marthaler, his parents plaintiffs Herman C. Marthaler III and Sharon Marthaler, as well as his brothers, plaintiffs Kirk and Matthew Marthaler.

Brent graduated from high school in June of 1994 and joined the U.S. Air Force. Brent graduated from boot camp in September 1994, and Katie drove to Texas with Brent's parents to attend his graduation. (Dec. 2, 2003 Tr. at 62-63.) Brent went to technical school in Texas after his graduation from basic training. After graduation, Brent was then assigned to Shepherd AFB for his advanced technical training. (Dec. 3, 2003 Tr. at 21.) After advanced training, Brent was permanently assigned to Eglin AFB in Florida. (Dec. 2, 2003 Tr. at 62-63.)

Brent was scheduled to be deployed to Saudi Arabia in April 1996. Two days prior to his deployment, however, Brent and Katie Lee Marthaler, his high school sweetheart of five years, were married to each other. According to Katie, Brent "just felt better going to Saudi Arabia and knowing that we were married and that we were taking on the world together then." *Id.* at 73-74.

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[32] As will be discussed further below, plaintiffs Matthew and Kirk Marthaler, Brent's brothers, cannot recover under Florida's wrongful death statute because no evidence was put forth that they were dependent upon the decedent, their brother. Accordingly, each must demonstrate that he may recover under a valid cause of action under the laws of Minnesota, the state in which each was domiciled at the time of the attack. A more detailed discussion of both Matthew and Kirk's claims will be provided later in this opinion. See *infra* Part VI.G.2.a.

CONCLUSION

This Court takes note of plaintiffs' courage and steadfastness in pursuing this litigation and their efforts to take action to deter more tragic suffering of innocent Americans at the hands of terrorists. Their efforts are to be commended.

A separate Order and Judgment consistent with these findings shall issue this date.

SO ORDERED.

Signed by Royce C. Lamberth, United States District Judge, December 22, 2006.

Annex 39

***Bennett v. Islamic Republic of Iran*, U.S. District Court, District of Columbia, 30 August 2007, 507 F. Supp. 2d 117 (D.D.C. 2007)**

Excerpts: p. 1 and pp. 7-19

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MICHAEL BENNETT, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 03-1486 (RCL)**
ISLAMIC REPUBLIC OF IRAN, *et al.*,	)	
Defendants.	)	

MEMORANDUM OPINION

BACKGROUND

These actions arise from the July 31, 2002 bombing of the cafeteria at the Frank Sinatra Building on the campus of Hebrew University in Jerusalem, Israel. Plaintiffs allege that the Islamic Republic of Iran ("Iran"), and the Iranian Ministry of Intelligence and Security ("MOIS"), are jointly and severally liable for damages from the attack because they provided material support and assistance to Hezbollah, the terrorist organization that orchestrated and carried out the bombing. Plaintiffs have relied upon causes of action founded upon provisions of the Foreign Sovereign Immunities Act ("FSIA"), inter alia, 28 U.S.C. § 1605(a)(7).

PROCEDURAL HISTORY

On July 2, 2003, plaintiffs filed their Complaint with this Court, in which they sought redress for their losses under the FSIA. Plaintiffs made various attempts at serving the defendants with process, as prescribed under the FSIA. *See* 28 U.S.C. § 1608(a). Upon request of the plaintiffs, default was entered by the Clerk of this Court against defendant Iran on March

Institute of Forensic Medicine, who performed the postmortem examination of Marla Bennett's body, established that her death was not instantaneous. Rather, a resuscitation tube was found in her body at the scene, which indicates that there was some sign of life when the emergency medical team arrived.

19. Still, in Dr. Nachman's opinion, Marla Bennett's wounds–including one caused by a bolt that struck Marla Bennett on the left side of the head above her eye–were undeniably fatal, even if emergency medical personnel were at the scene at the time the bomb was detonated.

20. The death of Marla Bennett was caused by a willful and deliberate extrajudicial killing because it was caused by a detonation of explosive material planted by Muhammad Uda in the cafeteria at the Frank Sinatra Building on July 31, 2002, and intentionally detonated by him on or around 1:00 p.m. on that date.

21. As a result of the death of Marla Bennett, her estate suffered a loss of accretions after deduction for statistically determined future living costs and taxes which could have been expected to occur during the course of her anticipated life expectancy.

22. The net calculated amount of loss to the Estate of Marla Bennett is $404,548.00.

23. As the result of the death of Marla Bennett, her parents, Linda and Michael Bennett, her sister, Lisa Bennett, and her maternal grandmother, Florence Ackerman, have suffered and will continue to suffer severe mental anguish and the loss of society.

CONCLUSIONS OF LAW

6

I. Jurisdiction

In the United States, the Foreign Sovereign Immunities Act provides the sole basis for asserting jurisdiction over foreign sovereigns. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-34 (1989). A party may generally not bring an action for money damages in U.S. courts against a foreign state. 28 U.S.C. § 1604. The "state-sponsored terrorism" exception, however, removes a foreign state's immunity to suits for money damages brought in U.S. courts where plaintiffs are seeking damages against the 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 (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment or agency." 28 U.S.C. § 1605(a)(7).

In order to subject a foreign sovereign to suit under section 1605(a)(7), plaintiffs must show that: (1) the foreign sovereign was designated by the State Department as a "state sponsor of terrorism"; (2) the victim or plaintiff was a U.S. national at the time the acts took place; and (3) the foreign sovereign engaged in conduct that falls within the ambit of the statute. *Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 229, 305 (D.D.C. Dec. 22, 2006) (Lamberth, J.) (citing *Prevatt v. Islamic Republic of Iran*, 421 F. Supp. 2d 152, 158 (D.D.C. Mar. 28, 2006) (Lamberth, J.)).

Each of the requirements is met in this case. First, defendant Iran has been designated a state sponsor of terrorism continuously since January 19, 1984, and was so designated at the time of the attack. *See* 31 C.F.R. § 596.201 (2001); *Flatow*, 999 F. Supp. at 11, ¶ 19. Second, both

the plaintiffs and the victim to which they are related, Marla Bennett, were United States nationals at the time the bombing occurred. Finally, defendant Iran's persistent financial and organizational support of an entity that committed an extrajudicial killing squarely falls within the ambit of the statute. Defendant MOIS is considered to be a division of state of Iran, and is treated as a member of the state of Iran itself. *Roeder*, 333 F.3d at 234; *see also Salazar v. Islamic Republic of Iran*, 370 F. Supp. 2d 105, 116 (D.D.C. 2005) (Bates, J.) (analogizing the IRGC to the MOIS for purposes of liability, and concluding that both must be treated as the state of Iran itself). Therefore, the same determinations apply to their conduct as to that of Iran.

Personal jurisdiction exists over a non-immune sovereign so long as service of process has been made under section 1608 of the FSIA. *See Stern v. Islamic Republic of Iran*, 271 F. Supp. 2d 286, 298 (D.D.C. 2003) (Lamberth, J.). In this case, service of process has been effected under that provision. Accordingly, this Court has *in personam* jurisdiction over defendants Iran and MOIS.

II. Legal Standard for FSIA Default Judgment

Under the Foreign Sovereign Immunities Act, "[n]o judgement by default shall be entered by a court of the United States or of a state against a foreign state . . . unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e); *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 232-33 (D.C. Cir. 2003), *cert. denied*, 542 U.S. 915 (2004). In default judgment cases, plaintiffs may present evidence in the form of affidavits. *Bodoff v. Islamic Republic of Iran*, 424 F. Supp. 2d 74, 82 (D.D.C. Mar. 29, 2006) (quoting *Campuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258, 268 (D.D.C. 2003)). Upon evaluation, the court may accept any uncontroverted evidence presented by plaintiffs as

true. *Heiser*, 466 F. Supp. 2d at 255 (citing *Campuzano*, 281 F. Supp. 2d at 268). This Court accepts the uncontested evidence and testimony submitted by plaintiffs as true in light of the fact that the defendants in this action have not objected to it or even appeared in this action to contest it.

III. Liability

A. Proper Causes of Action Under the FSIA

The FSIA does not itself provide a cause of action, but rather "acts as a 'pass-through' to substantive causes of action against private individuals that may exist in federal, state or international law." *Blais v. Islamic Republic of Iran*, 459 F. Supp. 2d 40, 54 (D.D.C. Sept. 29, 2006) (Lamberth, J.) (citing *Dammarell v. Islamic Republic of Iran*, Civ. A. No. 01-2224, 2005 WL 756090, at *8-10, 2005 U.S. Dist. LEXIS 5343, at *27-32 (D.D.C. Mar. 29, 2005) (Bates, J.)).

In this case, state law provides a basis for liability.[1] In order to determine the applicable state law to each action, the Court must look to the choice of law rules of the forum, in this case, the choice of law rules of the District of Columbia. *See Blais*, 459 F. Supp. 2d at 54. Under District of Columbia choice of law rules, courts employ a modified government interest analysis under which they "evaluate the governmental policies underlying the applicable laws and determine which jurisdiction's policy would be most advanced by having its law applied to the facts of the case under review." *Hercules & Co. v. Shama Rest. Corp.*, 566 A.2d 31, 41 (D.C.

[1] Obviously, the law of the United States applies rather than the law of the place of the tort or any other foreign law because the United States has a "unique interest" in having its domestic law apply in cases involving terrorist attacks on United States citizens. *See Dammarell*, 2005 WL 756090, at *20, 2005 U.S. Dist. LEXIS 5343, at *63.

1989) (citations and internal quotations omitted). Application of this governmental interest test generally points to the law of plaintiff's domicile as having the greatest interest in providing redress to its citizens. Accordingly, the validity of each of the plaintiffs' claims shall be determined by the state in which they were domiciled at the time of the attack.

Here, the laws of California govern the claims brought by plaintiffs because each plaintiff and the deceased was a domiciliary of California at the time of the attack. Upon examination of the law of California, the Court concludes that California provides a cause of action against private individuals for the kind of acts that defendants allegedly committed. Plaintiffs seek damages for wrongful death and for intentional infliction of emotional distress, both torts for which private individuals may face liability. The Court's next task is to determine whether plaintiffs have demonstrated defendants' liability and their right to damages under the laws of California.

B. Vicarious Liability

The purported basis of defendants' liability is that they provided material financial support and resources to Hamas, the organization whose members personally perpetrated the attack on Marla Bennett. Under a theory of vicarious liability, a party may be liable for the acts of another, including conspiracy, aiding and abetting, and inducement. Accordingly, this Court finds that civil conspiracy provides a basis of liability in this case for defendants Iran and MOIS, provided such a theory exists under California law.

California recognizes the theory of civil conspiracy. "The elements of an action for civil conspiracy [in California] are (1) formation and operation of the conspiracy and (2) damage resulting to plaintiff (3) from a wrongful act done in furtherance of the common design."

Rusheen v. Cohen, 128 P.3d 713, 722 (Cal. 2006).

As this Court has previously held, "sponsorship of terrorist activities inherently involves a conspiracy to commit terrorist attacks." *Flatow*, 999 F. Supp. At 27. It is undisputed that members of Hamas committed this extrajudicial killing of Marla Bennett, and indeed took credit for it. It has also been established by evidence satisfactory to this Court that Iran has continuously provided material support to and sponsorship of Hamas and its members so that they may undertake terrorist attacks like the one in this action. Moreover, it is clear that this attack was approved and sponsored by senior members of Hamas, one of whose members helped construct the bomb used in the attack. The evidence also clearly shows that the goal Uda and his associates maintained was to do an unlawful act towards as many American citizens as possible. In addition, the nature of the attack that killed Marla Bennett demonstrates that the defendants also intended to inflict severe emotional distress upon as many individuals, as well as their close relatives. The many acts undertaken by Uda to seek approval, the failed attempt to detonate the bomb, and the ultimate horrific act of detonating a bomb that killed innocent people ably qualify as acts in furtherance of the unlawful common design in this case. Finally, extreme amounts of damage were incurred by Marla Bennett and her family as a result of the conspiracy. Accordingly, this Court finds that the elements of civil conspiracy under California law are established between Hamas and defendant Iran and MOIS.

C. Plaintiffs Claims

1. Wrongful Death

Under California law, a wrongful death cause of action arises "for the death of a person caused by the wrongful act or neglect of another." Cal Civ. Proc. Code § 377.60(a). This cause

of action may be asserted by a number of individuals, including the decedent's surviving spouse, children, personal representative, and, when the decedent has no surviving spouse or children, the decedent's parents. *Id.*; *Nelson v. County of Los Angeles*, 6 Cal. Rptr. 3d 650, 654-56 (Cal. Ct. App. 2003).

A plaintiff asserting a wrongful death claim is entitled to such damages that, under the circumstances of the case, may be just. Cal Civ. Proc. Code § 377.61. In California, "just" damages that a wrongful death plaintiff may recover include "lost present and future economic support as well as the pecuniary (as opposed to sentimental) value of such factors as lost comfort, society, companionship, care and protection."[2] The amount of available damages in claims brought by a decedent's personal representative are limited, however, and do not include damages for pain, suffering or disfigurement.[3]

In this case, Marla Bennett has no surviving spouse or children. Therefore, her parents may properly bring a wrongful death action on her behalf for the benefit of those entitled to the property of the decedent by intestate succession.[4] Cal Civ. Proc. Code § 377.60(a) (2007). At

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[2] *Fox v. Pacific Southwest Airlines*, 184 Cal.Rptr. 87, 89 (Cal. Ct. App. 1982), *disavowed on other grounds by*, *Canavin v. Pacific Southwest Airlines*, 196 Cal.Rptr. 82 (Cal. Ct. App. 1983).

[3] Cal. Civ. Proc. Code § 377.34 (2007) ("In an action or proceeding by a decedent's personal representative . . . , the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement."); Cal. Civ. Proc. Code § 377.61 (stating that "just" damages arising out of a wrongful death action *do not include* those damages allowed under Section 377.34)

[4] Plaintiffs' complaint states that Michael Bennett and Linda Bennett are the Co-Administrators of Marla Bennett's estate and in that capacity, plaintiffs represent Marla Bennett's other beneficiaries pursuant to federal and California state law, including Lisa Bennett,

trial, plaintiffs produced testimony from Dr. Jerome Paige detailing the loss of accretions to the estate of Marla Bennett as $404,548.00. Upon review, the Court concludes that these calculations are appropriate, and finds that the estate of Marla Bennett is entitled to $404,548.00 in damages for wrongful death.

The estate of Marla Bennett has also sought $1 million in damages for pain and suffering arising out of the a survival claim,[5] due to the fact that Marla was alive for an undetermined amount of time after the attack before she died at the scene. Under California law, however, "survival statutes do not create a cause of action but merely prevent the abatement of the decedent's cause of action and provide for its enforcement by the decedent's personal representative or successor in interest." *San Diego Gas & Elec. Co. v. Superior Court*, 53 Cal.Rptr.3d 722, 728 (Cal. Ct. App. Jan. 25, 2007). Moreover, "[d]amages for a survivor claim include punitive damages and all the decedent's losses incurred prior to death, *but exclude any award for the decedent's pain or suffering.*" (emphasis added). Therefore, the estate of Marla Bennett may not recover for pain and suffering based on a survivor claim under California law.

2. Intentional Infliction of Emotional Distress

In California, the elements of the tort of intentional infliction of emotional distress are: (1) extreme and outrageous conduct by the defendant with the intent to cause, or with reckless disregard of the probability of causing, emotional distress; (2) the plaintiff suffering severe or extreme emotional distress; and (3) the defendant's conduct is the actual and proximate cause of

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decedent's sister, and decedent's grandmother, Flo Ackerman. *See* Pls.' Compl., at ¶ 2. The Court will therefore construe plaintiffs' complaint to include a claim for damages by Lisa Bennett and Flo Ackerman.

[5] Plaintiffs cite Cal. Civ. Proc. Code § 377.20, 377.21 (2007).

the plaintiff's emotional distress. *Davidson v. City of Westminster*, 649 P.2d 894, 901 (Cal. 1982). Under California law, in order for a plaintiff to have standing to recover for an intentional infliction of emotional distress claim, there is a requirement that the conduct either is directed at a plaintiff or occur within the plaintiff's presence. *See Christensen v. Superior Court*, 820 P.2d 181, 203-204 (Cal. 1992). The plaintiff's presence is not, however, always required, and is deemed unnecessary in situations where the defendant is aware of the high probability that the defendant's acts will cause a plaintiff severe emotional distress. *Id.*

In *Heiser*, this Court found that, when a terrorist attack occurs, the presence element is not required to bring a valid IIED claim under California law, and that plaintiffs domiciled in California at the time of the attack may bring a claim for IIED without establishing their presence at the scene of the injury.[6] *Heiser*, 466 F. Supp. 2d at 305. As has been noted by this Court and courts of other jurisdictions, "a terrorist attack-by its nature-is directed not only at the victims but also at the victims' families." *Id.* (quoting *Salazar v. Islamic Republic of Iran*, 370 F. Supp. 2d 105, 115 n.12 (D.D.C. 2005) (Bates, J.)). Here, the evidence demonstrates that the defendants' motives in providing consistent material support for the terrorist group that carried out this attack was intended to harm both the victims of the attack, and to instill terror in their loved ones and others in the United States. Accordingly, in the case of a terrorist attack as this, the Court finds that the presence element does not need to be proven in order to successfully bring a cause of action for intentional infliction of emotional distress under California law.

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[6] This finding, of course, is on the assumption that those plaintiffs have standing to recover in the first place. Those plaintiffs without standing to recover under the law of their respective domiciliary states may not recover, regardless of whether a plaintiff with standing could so recover.

In its discussion of the tort of intentional infliction of emotional distress, comment l to Section 46 of the RESTATEMENT (SECOND) OF TORTS notes that recovery for third-parties has typically been granted to members of the victim's "near relatives." RESTATEMENT (SECOND) OF TORTS § 46, cmt. l. The Court finds this approach to be a logical one. Accordingly, under California law, a victim's near relatives–that is, their immediate family–who were not present may nonetheless have standing to seek redress under a claim of intentional infliction of emotional distress.

This Court has previously deemed near relatives to include only the victim's spouse, parents, children, and siblings. *See Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27 (D.D.C. 2002) (Lamberth, J.), *affirmed sub nom.*, *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 335 (D.C. Cir. 2003). Though the Court does not deny the extreme pain and suffering felt by those outside of this class of individuals, it is necessary to draw such a line at immediate family members in order "to prevent a potentially unlimited number of plaintiffs who were not present at the site of the attack from seeking redress." *Heiser*, 466 F. Supp. 2d at 329. Moreover, such a delineation is consistent with the provisions of Section 46 of the Restatement. See Restatement (Second) of Torts § 46, cmt. l; *cf. Bettis*, 315 F.3d at 335 (finding that permitting nieces and nephews to recover under § 46(1) would undermine the limitations on recovery of "immediate family" members under § 46(2)). Therefore, those plaintiffs who are not members of this class of individuals in relation to the servicemen cannot recover. Accordingly, the Court must dismiss the claim brought by Marla Bennett's maternal grandmother, Florence Ackerman.

The Court must now assess the merits of the claims brought by the remaining plaintiffs in

this action: Linda and Michael Bennett (Marla's parents), and Lisa Bennett (Marla's sister). Based upon the evidence presented to the Court, the elements of intentional infliction of emotional distress claim are met for each. The defendants' conduct in facilitating, financing, and providing material support to Hamas, who brought about this attack was intentional, extreme, and outrageous. As the evidence shows, this horrific terrorist attack that was precipitated by the defendants' financial support and sponsorship brought extreme emotional distress to Linda Bennett, Michael Bennett, and Lisa Bennett. Finally, it is clear that Linda Bennett, Michael Bennett, and Lisa Bennett have continued to experience severe emotional distress since the time of the attack due to the fact that their daughter and sister was taken away from them in such an unspeakably tragic and awful manner.

IV. Damages

A. Wrongful Death Damages

For the reasons stated previously,[7] the estate of Marla Bennett is entitled to $404,548.00 in damages for wrongful death.

B. Compensatory Damages

As a result of the wrongful conduct of defendants Iran and MOIS, plaintiffs have suffered and will continue to suffer pain and mental anguish. Under the FSIA, if a foreign state may be held liable, it "shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. Accordingly, the plaintiffs who have successfully brought claims before this Court in this action are entitled to the typical bases of damages that may be awarded against tortfeasors under the laws of California.

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[7] *See supra* Section III.C.1.

In determining the appropriate amount of compensatory damages, the Court may look to prior decisions awarding damages for pain and suffering, and to those awarding damages for solatium. *Prevatt*, 421 F. Supp. 2d at 160. "While intervening changes in law have ruled many cases' reliance on federal common law improper, such findings need not disturb the accuracy of the analogy between solatium and intentional infliction of emotional distress." *Haim*, 425 F. Supp. 2d at 71. Following this framework, this Court recently awarded the valid claims brought by spouses of deceased servicemen $8 million in pain and suffering, parents and children of deceased servicemen $5 million, and siblings of deceased servicemen $2.5 million. *See generally Heiser*, 466 F. Supp. 2d at 271-356. This Court finds that the damages framework set forth in *Heiser* to be an appropriate measure of damages in this case. Therefore, this Court shall award to Linda and Michael Bennett $5 million, each, to compensate each for the emotional distress, pain and suffering that each sustained as a result of their daughter's untimely death. Further, this Court shall award to Lisa Bennett $2.5 million to compensate her for the emotional distress, pain and suffering that she sustained as a result of her sister's untimely death.

B. Punitive Damages

Punitive damages are not available against foreign states. 28 U.S.C. § 1606. Therefore, punitive damages are not against defendant Islamic Republic of Iran. Additionally, punitive damages are not recognized against divisions of a foreign state that are considered to be the state itself, instead of an agent or instrumentality thereof.[8] For punitive damages purposes, the court must consider the core functions of the entity. *Roeder*, 333 F.3d at 234. This Court has already

[8] *Prevatt v. Islamic Republic of Iran*, 421 F. Supp. 2d 152, 161 (D.D.C. 2006) (Lamberth, J.) (citing *Roeder v. Islamic Republic of Iran*, 333 F.3d 222, 234 (D.C. Cir. 2003).

found as a matter of fact that defendant MOIS is a division of the state of Iran, and is therefore considered a part of the state of Iran. Accordingly, punitive damages also may not be sought against defendant MOIS. Therefore, plaintiffs' claims for punitive damages must be DISMISSED.

CONCLUSION

This Court is cognizant of the extreme pain and suffering felt by each of the plaintiffs in this action for losing a person who, by all accounts, was a shining light of the lives of so many. The plaintiffs should be praised for their courageous and steadfast pursuit of justice through legal means. This noble effort is made even more so when contrasted with the heinous and brutishly unlawful acts undertaken by the defendants and the individuals they support. Though it is impossible for this Court to make the plaintiffs completely whole again, the Court hopes that this award helps begin the healing process, and that one day the plaintiffs' hearts and minds will be mended by the fact that some measure of justice–no matter how incalculable–was done on their behalf.

A judgment consistent with these findings shall issue this date.

SO ORDERED.

Signed by Royce C. Lamberth, United States District Judge, August 30, 2007.

Annex 40

***Peterson et al. v. Islamic Republic of Iran et al.*, U.S. District Court, District of Columbia, 7 September 2007, 515 F.Supp.2d 25 (D.D.C. 2007)**

Excerpts: p. 1 and pp. 25-43

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEBORAH D. PETERSON, **Personal Representative of the** **Estate of James C. Knipple (Dec.), *et al.*,**	)	
Plaintiffs,	)	**Consolidated Civil Actions:**
v.	)	**01-2094 (RCL)** **01-2684 (RCL)**
ISLAMIC REPUBLIC OF IRAN, *et al.*,	)	
Defendants.	)	

MEMORANDUM OPINION

BACKGROUND

These actions arise from the October 23, 1983, bombing of a United States Marine barracks in Beirut, Lebanon, in which 241 American servicemen operating under peacetime rules of engagement were murdered by a suicide bomber. This attack was regarded as the most deadly state-sponsored terrorist attack made against American citizens, until the tragic attacks on September 11, 2001.

The nearly one thousand plaintiffs in this consolidated action are many of the family members and estates of the 241 servicemen killed in the attack. Plaintiffs allege that the Islamic Republic of Iran ("Iran") and the Iranian Ministry of Information and Security ("MOIS") are liable for damages from the attack because they provided material support and assistance to

decedent, including adopted children and stepchildren, as well as the decedent's siblings, parents and any persons who were financially dependent upon the decedent at the time of his or her death. *See* W. Va. Code §§ 55-7-5, 55-7-6(b) (2007). Further, under West Virginia law, an individual qualifies as a "legal parent" if that individual is "defined as a parent, by law, on the basis of biological relationship, presumed biological relationship, legal adoption or other recognized grounds, [such as financial dependence]." W. Va. Code, § 48-1-232 (2007). In this case, the evidence shows that Russell Cyzick's birth mother married Richard Mason when Russell was nearly eighteen years old. There is no evidence that Russell was either legally adopted or financially dependent upon Richard Mason during what was left of his minor years. Accordingly, Richard Mason lacks standing to bring a claim because he is not a "legal parent" under West Virginia law. Therefore, this Court finds that Richard Mason's IIED claim must be DISMISSED.

5. Individuals with Valid Intentional Infliction of Emotional Distress Claims

Accordingly, the Court finds that the individuals listed in Appendix A to this opinion may bring intentional infliction of emotional distress claims. *See* Appendix A.

The Court will now turn its attention to damages for these IIED claims, as well as those claims for battery and wrongful death.

II. Damages

A. Damages Framework

The validity of each claim having been assessed, the Court can now turn to the respective amounts of damages associated with each valid claim before this Court. Under the FSIA, a "foreign state shall be liable in the same manner and to the same extent as a private individual

under like circumstances." 28 U.S.C. § 1606. Therefore, plaintiffs are entitled to the typical array of compensatory damages that may be awarded against tortfeasors in the plaintiffs' respective domiciliary states. "In determining the appropriate compensatory damages for each plaintiff's pain and suffering, this Court is guided not only by prior decisions awarding damages for pain and suffering, but also by those which awarded damages for solatium." *Haim*, 425 F. Supp. 2d at 71. This Court has previously looked to the nature of the relationship between the family member and the victim in order to help determine the amount of each award. *See Blais*, 459 F. Supp. 2d at 59-60; *Haim* 425 F. Supp. 2d at 75.[24] Parents of victims typically receive awards similar in amount to those awarded to children of the victim. *See generally Heiser*, 466 F. Supp. 2d at 271-356 (awarding children and parents of a terrorist attack decedents $5 million in pain and suffering damages). This award for parents and children of the decedents is typically smaller than the award for pain and suffering damages provided to spouses, but is larger than awards of pain and suffering damages to siblings. *See id.* (awarding spouses of decedents $8 million in pain and suffering damages, while awarding siblings to decedents $2.5 million). Moreover, "families of victims who have died are typically awarded greater damages than families of victims who remain alive." *Blais*, 459 F. Supp. 2d at 60 (quoting *Haim*, 425 F. Supp. 2d at 75).

This Court finds that the damages framework set forth in *Heiser* to be an appropriate

[24] As noted previously, damages for pain and suffering have traditionally been available to those members of the decedent serviceman's near relatives, which consists of his or her immediate family. *See supra* Section I.C.2. "This Court defines one's immediate family as his spouse, parents, siblings, and children. This definition is consistent with the traditional understanding of one's immediate family." *Jenco*, 154 F. Supp. 2d at 36 n.8.

measure of damages for those family members of victims who died in this attack.[25] The Court finds that the framework detailed in *Blais* is appropriate to help determine damages for those surviving servicemen and their families seeking redress. *See Blais*, 459 F. Supp. 2d at 59.[26]

Accordingly, unless otherwise specifically addressed in Section B below, *see infra* Section II.B., the Court finds that the following damages amounts for pain and suffering shall be awarded to the plaintiffs who this Court deems to have standing to bring a valid cause of action. First, in terms of lost wages due the servicemen in this case, the Court hereby ADOPTS all of the financial calculations and recommendations made by the special masters as to lost wages.[27] Those calculations for lost wages shall be specified in Appendix B to this opinion. Second, unless otherwise specified in Section B below, the Court finds that the awards for pain and suffering to the servicemen are appropriate and hereby ADOPTS them. Third, the Court finds

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[25] In *Heiser*, family members of the servicemen who were killed in the 1996 Khobar Towers bombing brought various claims against the Islamic Republic of Iran, MOIS, and IRGC for their part in providing material financial and logistical support in bringing about the attack. *Heiser*, 466 F. Supp. 2d at 248-51. This Court awarded the valid claims brought by spouses of deceased servicemen $8 million in pain and suffering, parents and children of deceased servicemen $5 million, and siblings of deceased servicemen $2.5 million. *See generally Heiser*, 466 F. Supp. 2d at 271-356.

[26] As this Court stated in *Blais*:

> In cases that involve an attack where the victim survives, and where no captivity occurred, courts typically award a lump sum award based in large part on an assessment of the following factors: "the severity of the pain immediately following the injury, the length of hospitalization, and the extent of the impairment that will remain with the victim for the rest of his or her life."

Id.

[27] As mentioned above, *see supra* note 2, there are a few servicemen who have sought damages for pain and suffering incurred during the time at which they were alive after the attack and the time at which they died. Those claims will be addressed in Section II.B.1, *infra*.

that the appropriate amount of pain and suffering damages for the spouse of a deceased serviceman to be $8 million. Fourth, the Court finds that the appropriate amount of pain and suffering damages for the parents and children of a deceased serviceman to be $5 million, per individual.[28] Fifth, the Court finds that the appropriate pain and suffering damages award for each sibling in this case to be $2.5 million, per sibling. Siblings of half-blood to the servicemen in this case are presumed to recover as a full-blood sibling would–that is, they are entitled to $2.5 million–unless the law of the state in which they were domiciled at the time of the attack states that they are not entitled to so recover.[29] Next, the Court finds that the appropriate amount of damages for family members of surviving servicemen are as follows: spouse ($4 million); parents ($2.5 million); children ($2.5 million); siblings ($1.25 million).[30] Unless otherwise specified below in Section B, to the extent that the special masters have awarded a plaintiff more or less than the aforementioned respective award amounts based upon the plaintiff's relation to the serviceman, those amounts shall be altered so as to conform with the respective award amounts set forth in this paragraph.

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[28] Each parent and child shall receive this amount. *See Heiser*, 466 F. Supp. 2d at 271-356.

[29] This Court will address the claims of those half-blood siblings whose award recommendations differ from the permissible awards under the respective state laws, *infra*. *See infra* Section II.B.3.

[30] The Court recognizes that the parents in *Blais* received $3.5 million for their IIED claims for pain and suffering damages associated with the aftermath of taking care of their son, who survived the attack on the Khobar Towers in 1996. *See Blais*, 459 F. Supp. 2d at 60. This exceptional award was given in light of the extremely severe and continuing nature of their son's maladies, and in light of the facts that their son was in a coma and vegetative state for a period of over five weeks. *Id.* at 59-60. Attention was also given to the fact that the parents in *Blais* gave up their jobs in order to take full-time care of their son. *Id.* at 60.

B. Special Damages Cases

1. Pain and Suffering Amount for Deceased Servicemen Who Initially Survived Attack

The personal representatives and estates of deceased servicemen Alvin Burton Belmer, Nathaniel Walter Jenkins, Luis J. Rotondo, Larry H. Simpson, Jr., and Stephen Tingley have each sought damages for pain and suffering incurred during the time at which they were alive after the attack and the time at which they died, in addition to the damages for lost wages and earnings arising out of their respective wrongful death claims. Several cases have awarded damages for the victim's pain and suffering that occurred between the attack and the victim's death shortly thereafter. *Haim*, 425 F. Supp. 2d at 71-72 (citing *Eisenfeld v. Islamic Republic of Iran*, 172 F.Supp.2d 1, 8 (D.D.C.2000) (Lamberth, J.); *Elahi v. Islamic Republic of Iran*, 124 F.Supp.2d 97, 112-13 (D.D.C.2000) (Green, J.). When the victim endured extreme pain and suffering for a period of several hours or less, courts in these cases have rather uniformly awarded $1 million. *Haim*, 425 F.Supp.2d at 71-72. This award increases when the period of the victim's pain is longer. *Id.* at 72. In line with this precedent, this Court recently awarded $500,000 to a serviceman who survived a terrorist attack for 15 minutes, and was in conscious pain for 10 minutes.

The estate of Alvin Burton Belmer established before the special master that serviceman Belmer was alive and conscious for nearly eight days (7 days and 20 hours). The special master recommended an award of pain and suffering of $15 million. Though the Court recognizes Mr. Belmer was under excruciating pain during that period of time, it is not prepared to adopt such a recommendation. In light of his nearly eight days of pain and suffering, this Court finds that the

estate of Alvin Burton Belmer should be awarded $7.5 million in pain and suffering, in addition to the amount of lost wages he is awarded.

Similarly, the estate of Nathaniel Walter Jenkins established before a special master that serviceman Jenkins was alive for seven days after the attack. The special master recommended that Mr. Jenkins be awarded $7 million for pain and suffering undergone by Mr. Jenkins during this period of time. The Court finds this award amount is appropriate and finds that the estate of Nathaniel Walter Jenkins should be awarded $7 million in pain and suffering, in addition to the amount of lost wages he is awarded.

The estate of Luis J. Rotondo established before a special master that serviceman Rotondo was alive for six hours after the attack. The special master recommended a pain and suffering damages award of $250,000. In keeping with the precedent set forth in *Haim*, the Court finds that Luis J. Rotondo is entitled to $1 million in pain and suffering damages, in addition to the amount of lost wages he is awarded.

The estate of Larry H. Simpson, Jr. established before a special master that serviceman Simpson was alive for nine years after the attack, living with severe injuries throughout that time. The special master recommended an award of pain and suffering damages of $2 million. In light of the fact that Mr. Simpson was saddled with injuries from this attack that plagued him until his death, but conscious of the fact that Mr. Simpson appears to have led a somewhat functional life after the attack, the Court finds that Mr. Simpson should be awarded $5 million in pain and suffering, in addition to the amount of lost wages he is awarded.

The estate of Stephen Tingley established before a special master that serviceman Tingley was alive for a short but unknown amount of time. The special master recommended a pain and

suffering damages award of $1 million. Though the Court is certain that Mr. Tingley endured a great deal of pain during the minimal time he survived the attack, the Court is reluctant to grant such an award without any definitive proof of a duration of time that Mr. Tingley was alive. Therefore, this Court finds that Stephen Tingley is entitled to $500,000 in pain and suffering damages, in addition to the amount of lost wages he is awarded.

2. Pain and Suffering Amount for Surviving Servicemen

Each of the twenty six surviving servicemen have sought pain and suffering awards associated with their claims for battery. In awarding pain and suffering damages, the Court must take pains to ensure that individuals with similar injuries receive similar awards. Due to the large number of plaintiffs represented in this action, the Court needed to enlist the help of many different special masters to help calculate damages for each of the plaintiffs. Understandably, each special master calculated pain and suffering damages differently, which resulted in varying awards for varying maladies suffered by the surviving servicemen. Upon examination of the nature of the injuries of each of the servicemen, the Court makes the following findings about the pain and suffering damages for the twenty six surviving servicemen arising out of their respective battery claims:

- Marvin Albright suffered compound fracture of his right leg, injuries to the toes on his left foot, wounds and scars from shrapnel, in addition to lasting and severe psychological harm as a result of the attack. Therefore, this Court finds that he is entitled to $5 million in pain and suffering;
- Pablo Arroyo suffered a broken jaw, severe flesh wounds and scars on his arms, legs and face, a loss of teeth, and lasting and severe psychological harm as a result

of the attack. Therefore, this Court finds that he is entitled to $5 million in pain and suffering;

- Anthony Banks suffered as a result of this attack loss of sight in one eye, a perforated right eardrum resulting in some hearing loss, and a shrapnel injury to the back of his right thigh. He also suffered lasting and severe psychological problems from the attack. Therefore, this Court finds that he is entitled to $7.5 million in pain and suffering;
- Rodney Darrell Burnette was initially thought dead as a result of the attack, and was placed in a body bag, buried alive in the morgue for four days until someone heard him moaning in pain. His injuries from the attack include a closed head injury, a basilar skull fracture, a facial nerve palsy, rib injuries, a rupturing to the timpanic membrane in both ears, and injuries to both feet. He also suffered lasting and severe psychological problems from the attack. Accordingly, this Court finds that he is entitled to $8 million in pain and suffering;
- Glenn Dolphin suffered injuries in the back, arm and head from being hit with shrapnel from the attack. He also suffered lasting and severe psychological problems from the attack. Therefore, the Court finds that he is entitled to $3 million in pain and suffering;
- Charles Frye was minimally injured from small arms fire occurring just after the initial bomb explosion, and has experienced resulting nerve pain and foot numbness. He also suffered lasting and severe psychological problems from the attack. Therefore, this Court finds that he is entitled to $2 million in pain and

suffering, plus $200,000 in loss of earnings suffered;[31]

- Truman Dale Garner suffered as a result of the attack a shrapnel injury to the head, a subdural hematoma, a perforated right eardrum, crushed left ankle, collapsed left lung, and other shrapnel wounds that became infected. He also suffered lasting and severe psychological problems from the attack. Therefore, this Court finds that he is entitled to $7.5 million in pain and suffering damages;
- Larry Gerlach suffered severe injuries including a broken neck, which has resulted in permanent quadriplegia. He also suffered lasting and severe psychological problems from the attack. Therefore, this Court finds that he is entitled to $12 million in pain and suffering damages;[32]
- Orval Hunt suffered skull fractures, brain bruising, various broken bones in his leg, and an exposed Achilles tendon as a result of the attack. He also suffered lasting and severe psychological problems from the attack. Therefore, this Court finds that he is entitled to $8 million in pain and suffering damages;
- Joseph P. Jacobs suffered a shoulder injury, and still suffers from neck, shoulder and back pain to this day. He also suffered lasting and severe psychological problems from the attack, and has admitted to having problems with alcohol abuse. Therefore, this Court finds that he is entitled to $5 million in pain and

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[31] Charles Frye admits that his physical injuries were minimal, and that he suffered severe psychological harm from the attack.

[32] *Cf. Mousa v. Islamic Republic of Iran*, 238 F. Supp. 2d 1, 12-13 (D.D.C. 2001) (Bryant, J.) (awarding $12 million to plaintiff with permanent and debilitating injuries, including complete deafness and blindness in one eye).

suffering damages;

- Brian Kirkpatrick suffered an eye injury, a perforated left ear drum, broken ribs, various shrapnel wounds, and the lining of his lungs were burned as a result of the attack. He also suffered lasting and severe psychological problems from the attack. Therefore, this Court finds that he is entitled to $8 million in pain and suffering damages;
- Burnham Matthews suffered a shrapnel wound in the forehead that destroyed the middle part of his nose, cuts to the head and back, and a perforated eardrum as a result of the attack. He also suffered lasting and severe psychological problems from the attack. Therefore, this Court finds that he is entitled to $7 million in pain and suffering damages;
- Timothy Mitchell suffered lacerations to the back of his head, back injuries, and has resulting chronic back pain and headaches as a result of the attack. He also suffered lasting and severe psychological problems from the attack. Therefore, this Court finds that he is entitled to $3 million in pain and suffering damages, in addition to $1,555,099 in lost wages;
- Lovelle "Darrell" Moore suffered a torn ear, broken leg, damaged foot, and cuts from shrapnel from the attack. He also suffered lasting and severe psychological problems from the attack. Therefore, this Court finds that he is entitled to $7 million in pain and suffering damages, in addition to $1,314,513 in lost wages;
- Jeffrey Nashton suffered a skull fracture, a shattered cheekbone, eyebrow and right eye orbit, crushed arms, a broken left leg, bruised right leg, two collapsed

lungs, burns on his arms and back, and internal bleeding. He also suffered lasting and severe psychological problems from the attack. Therefore, this Court finds that he is entitled to $9 million in pain and suffering damages, in addition to $2,776,632 in lost wages;

- Paul Rivers suffered two broken eardrums, skin lacerations, burned skin, and knee damage from the attack. He also suffered lasting and severe psychological problems from the attack. Therefore, this Court finds that he is entitled to $7 million in pain and suffering damages;
- Stephen Russell suffered a broken femur, hand and pelvis bone, and was covered in cuts and bruises from the attack. His left foot was turned completely backwards. He also suffered lasting and severe psychological problems from the attack. Therefore, this Court finds that he is entitled to $7.5 million in pain and suffering damages, in addition to $1,752,749 in lost wages;
- Dana Spaulding suffered two broken clavicles, a broken middle ear which caused internal bleeding and continued vertigo, a punctured lung, bruised kidney, broken ribs, a severe laceration across his back, and a loss of his eyelashes. Moreover in the ten days after the attack, Dana was in a coma. He also suffered lasting and severe psychological problems from the attack. Therefore, this Court finds that he is entitled to $8 million in pain and suffering damages, in addition to $1,559,609 in lost wages;
- Michael Toma suffered various cuts from shrapnel, internal bleeding in his urinary system, a deflated left lung, and a permanently damaged right ear drum.

He also suffered lasting and severe psychological problems from the attack. Therefore, this Court finds that he is entitled to $7.5 million in pain and suffering damages;

- Danny Wheeler suffered soft tissue damage to the chest and sternum area, flash burns, and lingering back problems, internal maladies and physical scarring. He also suffered lasting and severe psychological problems from the attack. Therefore, this Court finds that he is entitled to $5 million in pain and suffering damages.

In addition, Frank Comes Jr., Frederick Daniel Eaves, John Hlywiak, John Oliver, and Craig Joseph Swinson, and Thomas D. Young suffered no physical injuries, and are not required to do so to recover for IIED under North Carolina law. *See Dickens v. Puryear*, 276 S.E.2d 325, 332 (N.C. 1981). Still, each has demonstrated that he has suffered severe and lasting psychological harm, and may recover damages for that. Accordingly, the Court finds that each is entitled to $1.5 million in pain and suffering damages.[33]

3. Individual Family Member Cases

In certain instances, the special masters were presented with claims from individuals who were related by half-blood to a deceased serviceman in this case. This section addresses those claims under which the special master awarded the half-blood siblings an amount different than would be permissible under the laws of the half-blood siblings respective states of domicile at the time of the attack.

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[33] In addition to his award for pain and suffering, John Oliver is entitled to $1,777,542 in lost wages.

a. Richard J. Wallace

Under Oklahoma law, "[k]indred of the half-blood inherit equally with those of the whole blood in the same degree, unless the inheritance come [sic] to the intestate by descent, devise or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from such inheritance." Okla. Stat. Ann. tit. 84, § 222 (2007). Stephen Eugene Spencer's half-brother, Richard J. Wallace, was awarded $1.25 million for pain and suffering arising out of his IIED claim. By contrast, Stephen's full-blooded brother, Douglas Spencer, was awarded $2.5 million. Richard J. Wallace did not come into this damages award as a result of descent, devise or a gift of one of his ancestors. Therefore, this disparity in awards is impermissible under Oklahoma law. Richard J. Wallace is entitled to the same amount as Douglas Spencer, his half-brother, and therefore should be awarded $2.5 million.

b. Hilton and Arlington Ferguson

Under Florida law, "[w]hen property descends to the collateral kindred of the intestate and part of the collateral kindred are of the whole blood to the intestate and the other part of the half blood, those of the half blood shall inherit only half as much as those of the whole blood . . . ." Fla. Stat. Ann. § 732.105 (2007). Half blood siblings may recover a whole amount only "if all [remaining siblings] are of the half blood . . . ." Fla. Stat. Ann. § 732.105 (2007).

In this case, Hilton and Arlington Ferguson are half-brothers to serviceman Rodney J. Williams. Therefore, each may recover only half as much as Mr. Williams' full blood siblings, if there are any. If there are no full blood siblings, then Hilton and Arlington may recover whole amounts, each. Here, Mr. Williams is survived by two full blood siblings: Rhonda and Ronald Williams. Accordingly, though Hilton and Arlington Ferguson are entitled to recover for pain

and suffering under an IIED claim for the loss of their half-brother, they may only recover half the amount of damages as will be awarded to Rhonda and Ronald Williams. Therefore, Hilton and Arlington Ferguson may recover $1.25 million each because Rhonda and Ronald Williams are each entitled to recover $2.5 million for pain and suffering damages associated with the untimely loss of their brother.

c. Damien Briscoe and Kia Briscoe Jones

Under Maryland law, half-blood siblings are given the same status as full blood siblings of the same degree. Md. Code Ann., Estates & Trusts § 1-204 (2007). The special master charged with determining the appropriate amount of pain and suffering damages for relatives of serviceman Davin M. Green, however, recommended that Mr. Green's half-siblings Damien Briscoe and Kia Briscoe Jones be awarded $1.25 million for their pain and suffering associated with Mr. Green's death, while at the same time awarding Mr. Green's full blood siblings $2.5 million for pain and suffering.

This Court finds that this recommended disparity in award does not conform to the requirement that full blood and half blood siblings of the same degree be treated equally under the law. Accordingly, this Court finds that under Maryland law, Mr. Green's half-siblings are entitled to the same amount of recovery as their full blood sibling counterparts. This Court has typically found $2.5 million to be an appropriate level of pain and suffering damages under an IIED claim arising out of a terrorist attack. Accordingly, this Court adopts the special master's damages recommendation of $2.5 million for Mr. Green's full blood siblings, and finds that Mr. Green's half-siblings-Damien Briscoe and Kia Briscoe Jones-are also entitled to $2.5 million in pain and suffering damages in connection with their IIED claim against the defendants.

d. Darren Keown

Darren Keown is the half-brother of deceased serviceman Thomas Keown. Darren was domiciled in Tennessee at the time of the attack. It has long been recognized under Tennessee law that full and half-blood siblings may share equally in inheritance and intestate distribution. *Kyle v. Moore*, 35 Tenn. 183 (3 Sneed) (Tenn. 1855). The special master charged with determining the appropriate amount of pain and suffering damages for relatives of Thomas Keown recommended awarding Darren $4 million for pain and suffering, which was similar to the recommended award for Thomas' full-blooded brothers, Adam, Bobby Jr., and William, which was also $4 million. In light of the fact that full-blooded siblings in this case shall be awarded $2.5 million, however, the award for Adam, Bobby Jr., and William must be reduced to $2.5 million. Darren's award must be similarly lowered. Accordingly, this Court finds that the pain and suffering award for Darren Keown is $2.5 million.

e. Kenty Maitland & Alex Griffin

Kenty Maitland is the half-brother of Samuel Maitland, Jr. Alex Griffin is Samuel Maitland Jr.'s legally adopted brother. Both were domiciled in New York at the time of the attack. Under New York law, both half-blood siblings and adopted siblings are treated as equals to full-blooded siblings for purposes of inheritance and recovery. *See* N.Y. Est. Powers & Trusts § 4-1.1(b) (2007); N.Y. Dom. Rel. § 117 (2007). Accordingly both Kenty Maitland and Alex Griffin are entitled to recover in the same manner as Samuel's actual full-blooded siblings. The special master recommended that Kenty and Alex receive $1 million, each, for pain and suffering damages. Samuel's full-blood sister, Shirla Maitland, is entitled to recover $2.5 million in pain and suffering arising from her IIED claim against the defendants. Accordingly, this Court finds

that both Kenty Maitland and Alex Griffin are entitled to recover $2.5 million, each, in pain and suffering damages arising out of their respective IIED claims in this case.

f. Florene Martine Carter

Florene Martin Carter is the half-sister of deceased serviceman Charlie Robert Martin. Florene was domiciled in North Carolina at the time of the attack. Under North Carolina law, half-blood siblings may inherit and recover in the same manner as full-blood siblings. *Peel v. Corey*, 144 S.E. 559, 562 (N.C. 1928); *Univ. of North Carolina v. Markham*, 93 S.E. 845, 846 (N.C. 1917). Accordingly, Florene Martin Carter is entitled to recover in the same manner as Charlie's full-blooded siblings would have recovered. The special master recommended that Florene receive $1.25 million in pain and suffering damages. Charlie Robert Martin does not have full-blooded siblings. Still, siblings of deceased servicemen in this action are entitled to $2.5 million in pain and suffering damages arising out of their IIED claims against the defendants. Accordingly, the Court finds that Florene Martin Carter is entitled to $2.5 million in pain and suffering damages arising out of her IIED claim in this action.

g. Linda Martin Johnson, Corene Martin Jones, John Martin, Gussie Martin Williams, Mary Ellen Thompson

Linda Martin Johnson, Corene Martin Jones, John Martin, Gussie Martin Williams, and Mary Ellen Thompson are also half-siblings of deceased serviceman Charlie Robert Martin. Each was domiciled in Georgia at the time of the attack. Under Georgia law, half-blood siblings inherit equally with whole-blood siblings. *Bacon v. Smith*, 474 S.E.2d 728, 731-32 (Ga. Ct. App. 1996). Accordingly, Linda Martin Johnson, Corene Martin Jones, John Martin, Gussie Martin Williams, and Mary Ellen Thompson are entitled to recover in the same manner as Charlie's full-

blooded siblings would have recovered. The special master recommended that Linda, Corene, John, Gussie, and Mary Ellen each receive $1.25 million in pain and suffering damages. Charlie Robert Martin does not have full-blooded siblings. Still, siblings of deceased servicemen in this action are entitled to $2.5 million in pain and suffering damages arising out of their IIED claims against the defendants. Accordingly, the Court finds that Linda Martin Johnson, Corene Martin Jones, John Martin, Gussie Martin Williams, and Mary Ellen Thompson are entitled to $2.5 million in pain and suffering damages, each, arising out of their respective IIED claims in this action.

h. Sybil Caeser

Under Florida law, "[w]hen property descends to the collateral kindred of the intestate and part of the collateral kindred are of the whole blood to the intestate and the other part of the half blood, those of the half blood shall inherit only half as much as those of the whole blood . . . ." Fla. Stat. Ann. § 732.105 (2007). Half blood siblings may recover a whole amount only "if all [remaining siblings] are of the half blood . . . ." Fla. Stat. Ann. § 732.105 (2007).

Here, Sybil Caeser is the half-sister of deceased serviceman Johnnie Caesar. Johnnie, however, has full-blooded siblings who have also survived him. Therefore, Sybil Caesar is entitled to one-half of what Johnnie's full-blooded siblings received. The full-blood siblings of Johnnie Caeser received $2.5 million. Therefore, this Court finds that Sybil Caeser is entitled to $1.25 million in pain and suffering damages arising out of her IIED claim in this action.

C. Punitive Damages

Punitive damages, however, are not available against foreign states such as the Islamic Republic of Iran. *Haim v. Islamic Republic of Iran*, 425 F.Supp.2d 56, 71 (D.D.C. Mar. 24,

2006) (Lamberth, J.). Therefore, plaintiffs' claim for punitive damages against the Islamic Republic of Iran is DENIED. Moreover, this Court has previously found on a number of occasions that punitive damages are not available against MOIS because MOIS is a governmental entity, and part of the state of Iran itself. *Heiser*, 466 F. Supp. 2d at 270-71; *Greenbaum v. Islamic Republic of Iran*, 451 F. Supp. 2d 90, 105 & n.1 (D.D.C. Aug. 10, 2006) (Lamberth, J.) (citing *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 232-33 (D.C. Cir. 2003); *Haim*, 425 F. Supp. 2d at 71 n.2. Accordingly, plaintiffs' claim for punitive damages against defendant MOIS is also DENIED.

CONCLUSION

This Court is sadly aware that there is little it can do to heal the physical wounds and emotional scars suffered by the servicemen in this case and their family members. Though the attack on the Marine barracks in Beirut, Lebanon occurred nearly twenty four years ago from this date, it is clear from the testimony presented to this Court and the special masters that the intense suffering experienced on that day has had a tragically lasting effect on the plaintiffs who have brought this action. The fact that almost 1000 individuals sought redress in this action confirms the sheer number of individuals whose lives were forever altered as a result of this senseless attack on these courageous servicemen.

Indeed, at a time like this and an era such as ours, it is important to acknowledge the selfless courage that these–and all–servicemen demonstrated by choosing to take action and make this world a safer and better place in which to live. The fact that the servicemen in this action made the ultimate sacrifice to pursue such a noble cause only serves to further establish the legacy of these courageous individuals in the annals of history.

Not to be forgotten is the courage demonstrated by the family members who have come forth in bringing this claim. These individuals, whose hearts and souls were forever broken on October 23, 1983, have waited patiently for nearly a quarter of a century for justice to be done, and to be made whole again. And though this Court can neither bring back the husbands, sons, fathers and brothers who were lost in this heinous display of violence, nor undo the tragic events of that day, the law offers a meager attempt to make the surviving family members whole, through seeking monetary damages against those who perpetrated this heinous attack. The Court hopes that this extremely sizeable judgment will serve to aid in the healing process for these plaintiffs, and simultaneously sound an alarm to the defendants that their unlawful attacks on our citizens will not be tolerated.

A separate Order and Judgment consistent with these findings shall issue this date.

SO ORDERED.

Signed by Royce C. Lamberth, United States District Judge, September 7, 2007.

Annex 41

***Levin et al. v. The Islamic Republic of Iran et al.*, U.S. District Court, District of Columbia, 31 December 2007, 529 F. Supp.2d 1 (D.D.C. 2007)**

Excerpts: p. 1 and pp. 26-35

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEREMY LEVIN and DR. LUCILLE LEVIN,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Civ. No. 05-2494 (GK/JMF)
	:	
ISLAMIC REPUBLIC OF IRAN; IRANIAN MINISTRY OF INFORMATION AND SECURITY; SEYYED ALI HOSSEINI KHAMENEI; MOHAMMAD MOHAMMADI NIK; and IRANIAN ISLAMIC REVOLUTIONARY GUARD CORP,	:	
	:	
Defendants.	:	

REPORT AND RECOMMENDATION

This action came before the Court for an evidentiary hearing on August 14, 2007. Plaintiffs are Jeremy Levin ("Jerry Levin" or "Mr. Levin") and Dr. Lucille Levin ("Dr. Levin"). Defendants are the Islamic Republic of Iran ("Iran"), the Iranian Ministry of Information and Security ("MOIS"), and the Iranian Revolutionary Guard Corp. ("IRGC").

Based upon the testimony of the witnesses presented during the hearing, and the sworn affidavits and documents entered into evidence in accordance with the Federal Rules of Evidence, the Court makes the following recommended findings of fact and conclusions of law.

FINDINGS OF FACT

Plaintiffs

A. Mr. Levin

CONCLUSIONS OF LAW

A. Subject Matter Jurisdiction

33. This action is brought against a foreign state and its intelligence services acting as its agents, under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 *et seq*., as amended ("FSIA").[2] This Court has jurisdiction over this matter under the FSIA. *See Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 10-11 (D.D.C. 1998). *See also* 28 U.S.C. § 1330(a); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983).

34. In the Anti-Terrorism and Effective Death Penalty Act of 1996, Congress lifted the immunity of foreign states officially designated by the Department of State as terrorist states, if the foreign state commits a terrorist act or provides material support and resources to an individual or entity which commits such an act which results in the death or personal injury of a United States citizen. *See* 28 U.S.C. § 1605(a)(7); *Flatow*, 999 F. Supp. at 12. Congress has expressly directed the retroactive application of 28 U.S.C. § 1605(a)(7):

> The amendments made by this subtitle shall apply to any cause of action arising before, on, or after the date of the enactment of this Act [Apr. 24, 1996].

Pub. L. No. 104-132, § 221(c); 110 Stat. 1214, 1243 (1996). *See also Flatow*, 999 F. Supp. at 13.

35. In order to establish subject matter jurisdiction pursuant to 28 U.S.C. § 1605(a), a claim must contain the following statutory elements:

> (1) that personal injury or death resulted from an act of torture, extrajudicial killing, aircraft sabotage, or hostage taking; and

[2] All references to the United States Code are to the electronic versions that appear in Lexis or Westlaw.

> (2) the act was either perpetrated by the foreign state directly or by a non-state actor which receives material support or resources from the foreign state defendant; and
>
> (3) the act or the provision of material support or resources is engaged in by an agent, official or employee of the foreign state while acting within the scope of his or her office, agency or employment; and
>
> (4) that the foreign state be designated as a state sponsor of terrorism either at the time the incident complained of occurred or was later so designated as a result of such act; and
>
> (5) if the incident complained of occurred with [sic] the foreign state defendant's territory, plaintiff has offered the defendants a reasonable opportunity to arbitrate the matter; and
>
> (6) either the plaintiff or the victim was a United States national at the time of the incident; and
>
> (7) similar conduct by United States agents, officials, or employees within the United States would be actionable.

See Flatow, 999 F. Supp. at 16.

36. These statutory elements have been held to be satisfied in other cases where Hizbollah, sponsored by Iran and MOIS, held Americans like Mr. Levin hostage in Lebanon. *See, e.g.*, *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 68 (D.D.C. 1998); *Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27, 33 n.7 (D.D.C. 2001).

37. Sections 1605(e)(1) and (2) of the FSIA provides guidance with regard to interpreting the terms “torture” and “hostage taking.”

“Torture,” under 28 U.S.C. § 1605(e)(1) is defined as:

> (1) [T]he term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing

> that individual or a third person, or for any reason based on discrimination of any kind; and
>
> (2) mental pain or suffering refers to prolonged mental harm caused by or resulting from--
>
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
>
> (B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
>
> (C) the threat of imminent death; or
>
> (D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

28 U.S.C. § 1605(e)(1), citing to section 3 of the Torture Victim Protection Act of 1991, P.L. 102-256, 106 Stat 73 (1992).

> "Hostage taking" is defined as:
>
> Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an intentional intergovernmental organization, a natural or juridical persona, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offense of taking of hostages within the meaning of this Convention.

28 U.S.C. §1605(e)(2), citing to Article 1 of the International Convention Against the Taking of Hostages.

38. Pursuant to 28 U.S.C. §§ 1605(a)(7) and 1605(e)(1), Mr. Levin was a victim of "torture" as defined in section 3 of the Torture Victim Protection Act of 1991, P.L. 102-256, 106 Stat. 73 (1992).

39. Pursuant to 28 U.S.C. §§ 1605(a)(7) and 1605(e)(2), Mr. Levin was a victim of "hostage taking" as defined in Article 1 of the International Convention Against the Taking of Hostages.

40. Mr. Levin has suffered "personal injury" as a result of Defendants' action and activities as defined in 28 U.S.C. § 1605(a)(7).

41. 28 U.S.C. § 1605(a)(7) adopts the definition of "material support or resources" set forth in the federal criminal code, 18 U.S.C. § 2339A:

> [T]he term "material support or resources" means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

18 U.S.C. § 2339A(b)(1).

42. This Court in *Flatow* held that the routine provision of financial assistance to a terrorist group in support of its terrorist activities constitutes "providing material support or resources" for a terrorist act within the meaning of 28 U.S.C. § 1605(a)(7). *Flatow*, 999 F. Supp at 17-18. Further, the *Flatow* court found that "a plaintiff need not establish that the material support or resources provided by a foreign state for a terrorist act contributed directly to the act from which his claim arises in order to satisfy 28 U.S.C. § 1605(a)(7)'s statutory requirements for subject matter jurisdiction. Sponsorship of a terrorist group which causes the personal injury or death of a United States national alone is sufficient to invoke jurisdiction." *Id.* at 18.

43. It has been well established within the intelligence, academic, and legal communities that Iran, the MOIS, and the IRGC were providing material support and

resources to Hizbollah in the early 1980's. *See, e.g.*, *Cicippio*, 18 F. Supp. 2d at 68 ("Iran . . . openly provided 'material support or resources' to Hizballah . . . ."); *see also Jenco*, 154 F. Supp. 2d 33 n.7 ("Iran and the Iranian MOIS provided 'material support or resources' to Hizbollah . . ."); *Salazar v. Islamic Republic of Iran*, 370 F. Supp. 2d 105, 111 (D.D.C. 2005) ("With the support of the MOIS and the IRGC, Hizbollah undertook a series of terrorist acts directed at Westerners in the early 1980s."); *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 51 (D.D.C. 2003) ("Hezbollah is . . . the name of a group of Shi'ite Muslims in Lebanon that was formed under the auspices of the government of Iran."); *Stern v. Islamic Republic of Iran*, 271 F. Supp. 2d 286, 293 n.5 (D.D.C. 2003) ("[I]t is now the universally held view of the intelligence community that Iran was responsible for the formation, funding, training, and management of Hizbollah.") (quoting *Higgins v. Islamic Republic of Iran*, 2000 WL 33674311 (D.D.C.2000)); Clawson Affidavit ¶¶ 15, 20.

44. "The law of *respondeat superior* demonstrates that if a foreign state's agent, official or employee provides material support and resources to a terrorist organization, such provision will be considered an act within the scope of his or her agency, office or employment." *Flatow*, 999 F. Supp. at 18.

45. "[I]f a foreign state's heads of state, intelligence service, and minister of intelligence routinely provide material support or resources to a terrorist group, whose activities are consistent with the foreign state's customs or policies, then that agent and those officials have acted squarely within the scope of their agency and offices within the meaning of 28 U.S.C. § 1605(a)(7) and 28 U.S.C.A § 1605 note." *Id.*

46. The courts have consistently found in other hostage cases that agents and officials of the Iranian government, the MOIS, and the IRGC were acting within the scope of their agency and offices in providing material support and resources to Hizbollah. *See*, *e.g.*, *Flatow*, 999 F. Supp. at 18; *Cicippio*, 18 F. Supp. 2d at 68.

47. Iran has been designated a state sponsor of terrorism by the Department of State since January 1984. *See* 49 Fed. Reg. 2836-02 ("In accordance with Section 6(i) of the Export Administration Act of 1979, 50 U.S.C. App. 2405(i), I [Sec. of State George P. Schultz] hereby determine that Iran is a country which has repeatedly provided support for acts of international terrorism.").

48. In addition, it has been held that the MOIS and IRGC "must be treated as the state of Iran itself rather than as its agent." *Salazar*, 370 F. Supp. 2d at 116.

49. Mr. Levin was kidnapped in Beirut, Lebanon, not within the territory of Iran. Jerry Levin Affidavit ¶ 6 (Ex. B to Smith Decl.). Therefore, under 28 U.S.C. § 1605(a)(7), Plaintiffs did not need to offer Defendants an opportunity to arbitrate.

50. Plaintiffs were both residents of Washington D.C. before moving to Lebanon, and both were U.S. nationals at the time the acts occurred. Jerry Levin Affidavit ¶ 4 (Ex. B to Smith Decl.); Dr. Levin Affidavit ¶ 2 (Ex. C to Smith Decl.).

51. As recognized by the Court in *Cicippio*, *Flatow*, and dozens of other hostage cases, subject matter jurisdiction is established under 28 U.S.C. § 1605(a)(7), and Defendants Iran, the MOIS, and the IRGC, as sponsors of Hizbollah, are responsible for the personal injuries inflicted upon by Hizbollah on hostages and their families, such as Mr. and Dr. Levin. *See e.g.*, *Flatow*, 999 F. Supp. at 18; *Cicippio*, 18 F. Supp. 2d at 68; *Sutherland*, 151 F. Supp. 2d at 47.

B. Personal Jurisdiction

52. "The FSIA provides that personal jurisdiction over defendants will exist where Plaintiff establishes the applicability of an exception to immunity pursuant to 28 U.S.C. § 1604, § 1605, or § 1607 and service of process has been accomplished pursuant to 28 U.S.C. § 1608." *Flatow*, 999 F. Supp. at 19. Service of process has been accomplished in this case and as set forth above, Defendants fall within an exception to immunity pursuant to 28 U.S.C. § 1607(a)(7).

53. The FSIA provides that *in personam* jurisdiction over a foreign stated defendant has been accommodated inherently in the statute for the acts enumerated in 28 U.S.C. §§ 1605(a)(7). *See* H. Rep. 94-1487 at 13-14 (1976), reprinted at 1976 U.S.C.C.A.N. at 6611-12.

54. The court in *Flatow* held that the exercise of personal jurisdiction over foreign state sponsors of terrorism which cause the personal injury or death of United States nationals is proper under the Constitution. *Flatow*, 999 F. Supp. at 19-23.

C. Venue

Venue is proper in this District pursuant to 28 U.S.C. § 1391(f)(4), which states:

> A civil action against a foreign state as defined in section 1603(a) of this title may be brought . . . in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

28 U.S.C. § 1391(f)(4).

D. Liability

55. Federal district courts presiding over similar cases have repeatedly held that Iran is liable to victims of state sponsored terrorism, including terrorist acts committed in Lebanon by Hizbollah. *See, generally*, *Flatow*, 999 F. Supp. 1; *Cicippio*,

18 F. Supp. 2d 62; *Sutherland*, 151 F. Supp. 2d 27; *Jenco*, 154 F. Supp. 2d 27; *Peterson*, 264 F. Supp. 2d 46.

56. "Should an exception to the FSIA apply and a foreign state have no sovereign immunity as to a given claim, '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.'" *See Salazar*, 370 F. Supp. 2d at 112 (*quoting* 28 U.S.C. § 1606).

57. Victims of state-sponsored terrorism have a valid claim against designated sovereigns under state and/or federal common law. Plaintiffs may proceed with claims against Iran, IRGC, and MOIS under the laws of the District of Columbia, Plaintiffs' last state of domicile prior to moving to Beruit. *See Salazar*, 370 F. Supp. 2d at 14; *see also Dammarell v. Islamic Republic of Iran*, 2005 WL 756090, at *22; Jerry Levin Affidavit ¶ 4; Dr. Levin Affidavit ¶ 2.

58. Here, Plaintiffs have established their right to relief under the common law of the District of Columbia.

I. <u>False Imprisonment</u>

59. "'[T]he unlawful detention of a person without a warrant or for any length of time whereby he is deprived of his personal liberty or freedom of locomotion . . . by actual force, or by fear of force, or even by words' constitutes false imprisonment." *Dent v. May Dept. Stores Co*., 459 A.2d 1042, 1044 (D.C. 1982).

60. Hizbollah intentionally and unlawfully used force and threat of force to restrain, detain, and confine Jerry Levin for 343 days, from March 7, 1984 to February 14, 1985. Jerry Levin Affidavit ¶¶ 6, 43. As described in detail by Mr. Levin, both

during his live testimony and in his affidavit, Mr. Levin was forced into a car in Beirut at gunpoint by members of Hizbollah. *Id.* ¶ 6. The terrorists held him at an unknown location in Beirut before transporting him to the Bekka Valley, where he was chained to the floor while being held in a succession of small cells. *Id.* ¶¶ 9-14. Mr. Levin was let out of his cell once a day to use the restroom at which times he was always escorted by an armed guard. *Id.* ¶ 19. As a direct and proximate result of Hizbollah's unlawful restraint and confinement of Jerry Levin, Mr. Levin sustained serious physical and psychological injuries for which he continues to require medical treatment, and has lost his career as a professional news correspondent. *Id.* ¶¶ 49-52.

61. These acts are attributable to Defendants because Defendants substantially funded and controlled Hizbollah. As such, Defendants are liable under the tort doctrines of *respondeat superior* and joint and several liability. *See Jenco*, 154 F. Supp. at 34-35; *see also Sutherland*, 151 F. Supp. 2d at 49; *Flatow*, 999 F. Supp. at 26-27.

II. Battery

62. "To establish liability for the tort of battery in the District of Columbia, a plaintiff must plead and prove 'an intentional, unpermitted, harmful or offensive contact with his person or something attached to it.'" *Dammarell v. Islamic Republic of Iran*, 404 F. Supp. 2d 261, 275 (D.D.C. 2005) (*quoting Marshall v. Dist. of Columbia*, 391 A.2d 1374, 1380 (D.C.1978)).

63. Mr. Levin suffered harmful contact at the hands of Hizbollah. As described in detail by Mr. Levin, both during his live testimony and in his affidavit, Mr. Levin was pulled off of a Beirut street at gunpoint, shoved into a car, bound and gagged, and wrapped from head to toe in packing tape. Jerry Levin Affidavit ¶¶6-13. His captors

beat him throughout his captivity, including jumping up and down on his legs, *id.* ¶¶ 9, 18, 40; and kept him chained to a wall, *id.* ¶¶ 14-15. His captors would shove unloaded pistols against Mr. Levin's neck or underneath his blindfold so he could see the barrel, and pull the trigger. *Id.* ¶ 20. As a direct and proximate result of Hizbollah's battery of Jerry Levin, Mr. Levin sustained serious physical and psychological injuries for which he continues to require medical treatment, and has lost his career as a professional news correspondent. *Id.* ¶¶ 49-52.

64. These acts, which were intentionally committed by Mr. Levin's captors, are attributable to Defendants because Defendants substantially funded and controlled Hizbollah. As such, Defendants are liable under the tort doctrines of *respondeat superior* and joint and several liability. *See Jenco*, 154 F. Supp. at 34; *see also Sutherland*, 151 F. Supp. 2d at 48; *Flatow*, 999 F. Supp. at 26-27.

III. Assault

65. "[A]n assault may be defined as an intentional and unlawful attempt or threat, either by words or by acts, to do physical harm to the victim." *Etheredge v. Dist. of Columbia*, 635 A.2d 908, 916 (D.C. 1993).

66. As described in detail by Mr. Levin, both during his live testimony and in his affidavit, Mr. Levin's captors constantly threatened beat and kill him if he did not obey their commands. Jerry Levin Affidavit ¶¶ 18-20, 40. As the court recognized in *Sutherland*, hostages like Mr. Levin "lived . . . in an environment where, at any moment, he might find himself harassed or beaten for virtually no reason at all" and "[i]n this sense, it is not a gross exaggeration to suggest that [he] withstood a continuous . . . assault." *Sutherland*, 151 F. Supp. 2d at 48. At all times during his captivity, Mr. Levin

believed that his captors would carry out their threats to hit or even kill him, and he lived in constant fear of immediate bodily harm at the hands of his captors. Jerry Levin Affidavit ¶¶ 18, 34-35. As a direct and proximate result of Hizbollah's assault of Jerry Levin, Mr. Levin sustained serious physical and psychological injuries for which he continues to require medical treatment, and has lost his career as a professional news correspondent. *Id.* ¶¶ 49-52.

67. These acts, which were intentionally committed by Mr. Levin's captors, are attributable to Defendants because Defendants substantially funded and controlled Hizbollah. As such, Defendants are liable under the tort doctrines of *respondeat superior* and joint and several liability. *See Jenco*, 154 F. Supp. at 34; *see also Sutherland*, 151 F. Supp. 2d at 49; *Flatow*, 999 F. Supp. at 26-27.

IV. Intentional Infliction of Emotional Distress

68. "The tort of [Intentional Infliction of Emotional Distress or] IIED requires a showing of '(1) extreme and outrageous conduct on the part of the defendant which (2) intentionally or recklessly (3) causes the plaintiff severe emotional distress.'" *Dammarell*, 404 F. Supp. 2d at 275 (quoting *Howard University v. Best*, 484 A.2d 958, 985 (D.C.1984)).

69. District courts have held that "[t]errorist acts, by their nature, are intentionally designed to inflict harm, and thereby to cause severe emotional distress." *Greenbaum v. Islamic Republic of Iran*, 451 F. Supp. 2d 90, 104 (2006). Moreover, "the act of engaging in terrorism by means of material support and civil conspiracy is extreme, outrageous, and goes beyond all possible bounds of decency. Terrorists seek to cause

extreme suffering in order to achieve political ends; accordingly, they perpetrate acts that are deliberately outrageous." *Id.*

70. Hizbollah intentionally kidnapped Mr. Levin and held him hostage for 343 days. This conduct "quite easily qualifies as extreme and outrageous." *Jenco*, 154 F. Supp. 2d at 35. As a direct and proximate result of such conduct, Mr. Levin suffered extreme emotional distress both during his captivity and after his escape, and has sought and continues to seek professional psychological treatment to help him cope with the mental distress and trauma of his captivity. Jerry Levin Affidavit ¶ 51 (Ex. B to Smith Decl.). Such emotional distress has also resulted in the loss of Mr. Levin's career as a professional news correspondent. *Id.* ¶ 52.

71. With regard to the effect of the IIED on Dr. Levin, "[c]ourts have uniformly held that a terrorist attack - by its nature - is directed not only at the victims but also at the victims' families." *Salazar*, 370 F. Supp. 2d at 115 n.12. "When an organization takes someone hostage, it is implicitly intending to cause emotional distress among the members of that hostages' immediate family. Further . . . an organization taking someone hostage implicitly believes that such emotional distress is substantially certain to result." *Sutherland*, 151 F. Supp. 2d at 50. Because the District of Columbia recognizes the existence of a cause of action for intentional infliction of emotional distress for members of the victim's immediate family, *Peterson v. Islamic Republic of Iran*, - - - F. Supp. 2d - - - , 2007 WL 2563441, at *6 (D.D.C. Sept. 7, 2007) (citing *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 334-35 (D.D. Cir. 2003)), both Mr. Levin and Dr. Levin may recover.

72. In some sense, the families of terrorist captives, particularly the spouses, suffer at least as much if not more than the hostages themselves. The spouse does not know if her partner is alive or dead. She cannot mourn, for she hopes he lives. Yet hope is truly irrational, and the safe return of a terrorist captive is unlikely. The spouse cannot rebuild a separate live and is caught in an almost unique state of agonizing limbo. Dr. Levin spent the entire 343 days of her husband's captivity fearing for his life and vacillating wildly between hope and despair. Dr. Levin Affidavit ¶ 4 ; Bolling Affidavit ¶ 6. She was consumed by the terrifying thought that she might never see her husband again, yet not knowing whether he was alive or dead, she worked tirelessly and spent all of their savings attempting to find her husband and secure his release. Dr. Levin Affidavit ¶ 5; Bolling Affidavit ¶¶ 11-12. In a further act of terrorism, Defendants tape recorded Mr. Levin in an extremely vulnerable and debilitated state and forced him to read a prepared statement indicating that he would be killed if convicted terrorists held in Kuwait were not released. Jerry Levin Affidavit ¶ 32. Hizbollah released the videotape, which was viewed by Dr. Levin. Dr. Levin Affidavit ¶ 8. Dr. Levin watched the videotape of her husband, and her fear intensified when she observed his emaciated state and disheveled appearance. *Id.* Dr. Levin was so consumed by fear that she needed professional psychological treatment to help her deal with the mental distress and trauma of living through her husband's captivity. *Id.* ¶¶ 17-19.

73. Hizbollah's actions were deliberate and outrageous, and intended to cause severe emotional distress to Mr. Levin and his wife, and it did in fact cause such severe emotional distress. *See Greenbaum*, 451 F. Supp. 2d at 104; *see also Sutherland*, 151 F. Supp. 2d at 50. These acts, which were intentionally committed by Mr. Levin's captors,

are attributable to Defendants because Defendants substantially funded and controlled Hizbollah. As such, Defendants are liable under the tort doctrines of *respondeat superior* and joint and several liability. *See Jenco*, 154 F. Supp. at 35; *see also Sutherland*, 151 F. Supp. 2d at 49-50; *Flatow*, 999 F. Supp. at 26-27.

V. Negligence

74. "The plaintiff in a negligence action bears the burden of proof on three issues: the applicable standard of care, a deviation from that standard by the defendant, and a causal relationship between that deviation and the plaintiff's injury." *Etheredge*, 635 A.2d at 917. "A uniform standard of care applies in actions for negligence: reasonable care under the circumstances." *Battle v. Thornton*, 646 A.2d 315, 319 (D.C. 1994).

75. Hizbollah breached its duty of reasonable care to Mr. Levin by depriving Mr. Levin of adequate food, light, toilet facilities, and medical care. Jerry Levin Affidavit ¶¶ 21-27. As a direct and proximate result of the deplorable conditions in which Hizbollah held Mr. Levin, Mr. Levin developed severe and life-threatening illnesses and infections, including a severe ear infection that has left him almost deaf in both ears and hepatitis. *Id.* ¶¶ 26-27.

76. These acts, which were committed by Mr. Levin's captors, are attributable to Defendants because Defendants substantially funded and controlled Hizbollah. As such, Defendants are liable under the tort doctrines of *respondeat superior* and joint and several liability. *See Flatow*, 999 F. Supp. at 26-27.

VI. Loss of Consortium

77. In the District of Columbia, a spouse may recover for loss of consortium "where the plaintiff proves an actual loss of services or affection as a result of an actionable tort against his or her spouse even though the latter has suffered no physical injury." *Crowley v. North American Telecomm. Ass'n*, 691 A.2d 1169, 1175 (D.C. 1997). Plaintiffs in other hostage cases have been awarded damages for loss of consortium. *See, e.g.*, *Cicippio*, 18 F. Supp. 2d at 70; *Sutherland*, 151 F. Supp. 2d at 51.

78. Hizbollah intentionally inflicted extreme emotional distress on Dr. Levin by kidnapping and holding her husband hostage for 11 months. Dr. Levin's extreme emotional distress has deprived Mr. Levin of his wife's services, affection, society, and companionship, and exacted a toll on Plaintiffs' marital relationship. As a result, Plaintiffs' have required continual counseling to deal with the stress placed on their relationship. Dr. Levin Affidavit ¶¶ 13-18; Jerry Levin Affidavit ¶ 51.

79. Mr. Levin's Hizbollah captors caused Dr. Levin to be deprived of Mr. Levin's services, affection, society, and companionship for the 343 days in which her husband was held captive. Dr. Levin Affidavit ¶¶ 3-4. Even following Mr. Levin's release, the stress and trauma of his captivity has continued to exact a toll on their marital relationship, and Plaintiffs have required continual counseling to deal with the stress placed on their relationship. *Id.* ¶¶ 13-18; Jerry Levin Affidavit ¶ 51.

80. These acts, which were committed by Mr. Levin's captors, are attributable to Defendants because Defendants substantially funded and controlled Hizbollah. As such, Defendants are liable under the tort doctrines of *respondeat superior* and joint and several liability. *See Flatow*, 999 F. Supp. at 26-27.

E. Damages

81. "The Foreign Sovereign Immunities Act specifically permits plaintiffs suing under section 1605(a)(7) to pursue 'money damages which may include economic damages, solatium, pain, and suffering.'" *Sutherland*, 151 F. Supp. 2d at 50-51; *see also* 28 U.S.C. § 1605 note. Plaintiffs are not seeking to recover punitive damages. 28 U.S.C. 1606 ("[A] foreign state . . . shall not be liable for punitive damages."). *See also Salazar*, 370 F. Supp. 2d at 116 (declining plaintiff's prayer for punitive damages against Iran, the MOIS, and the IRGC).

82. It is firmly established that the trier of fact has broad discretion in calculating damages for pain and suffering. *Leeper v. United States*, 756 F.2d 300, 307-08 (3d Cir. 1985). However, plaintiffs must still satisfy the court's need to assure "that the projected consequences are 'reasonably certain' (i.e., more likely than not) to occur," and that the amount of damages was derived "by a 'reasonable estimate.'" *Hill v. Republic of Iraq*, 328 F. 3d 680, 684 (D.C. Cir. 2003).

83. Mr. Levin seeks $202,003 for past and future medical expenses and Dr. Levin seeks $446,604 for past and future medical expenses. However, the only evidence submitted by plaintiffs in support of their request was that of their own affidavits and testimony at trial. Thus, while the Court concludes that both plaintiffs, through their own testimony, have reasonably proven the costs incurred as a result of past medical expenses, the Court cannot make such a conclusion as to plaintiffs' future medical expenses. *See Campuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258, 275 (D.D.C. 2003) (court held that requested damages for plaintiff's past medical expenses had been "reasonably proven" through testimony of his mother). *See also Nikbin v. Islamic Republic Iran*, ---

F. Supp. 2d ---, 2007 WL 2828010, at *3-*4 (D.D.C. Sept. 28, 2007) (testimony of plaintiff's treating psychiatrist offered in support of claim for past and future medical expenses); *Price v. Socialist People's Libyan Arab Jamahiriya*, 384 F. Supp. 2d 120 (D.D.C. 2005) (testimony of board-certified psychiatrist offered in support of claims for past and future medical expenses).

84. Mr. Levin also seeks 2.9 million for lost earnings. Again, however, the only evidence submitted was that of Mr. Levin's affidavit, which in turn was based on his own personal estimates of lost past wages and lost future earnings. Where awards have been made for such economic losses, the court has had before it the testimony of an expert in the field. Thus, the Court cannot therefore recommend an award economic damages based on the record before it. *See Blais v. Islamic Republic of Iran*, 459 F. Supp. 2d 40, 51 (D.D.C. 2006) (court awarded damages for lost wages based on expert testimony of forensic economist); *Salazar*, 370 F. Supp. 2d at 116 (award of damages for lost wages and benefits based on expert's calculation); *Kerr v. Islamic Republic of Iran*, 245 F. Supp. 2d 59, 63 (D.D.C. 2003) (expert economist testified as to economic loss caused by the murder of plaintiff's husband).

85. Finally, both Mr. and Doctor Levin seek damages for pain and suffering, extreme emotional distress, and loss of society. Mr. Levin seeks $25 million and Dr. Levin seeks $15 million.

86. In cases involving the compensation of kidnapping victims, courts have awarded damages for pain and suffering based on a per diem calculation of $10,000 per day of captivity. In cases like that of Mr. Levin, where the pain and suffering is heightened by tortuous acts, courts have added a lump sum award to the per diem

amount, in order to fully compensate the victim. Thus, in Mr. Levin's case, the Court recommends a per diem award in the amount of $3,430,000 ($10,000 multiplied by the 343 days of Mr. Levin's captivity). To that amount, the Court recommends adding the lump sum of $15 million, in order to more fully compensate Mr. Levin for the brutal treatment he received during his captivity. *See Cronin v. Islamic Republic of Iran*, 238 F. Supp. 2d 222, 234-35 (D.D.C. 2002) (court awarded lump sum of $1.2 million in compensatory damages to hostage who was held captive for four days and who suffered severe beatings during that time); *Surette v. Islamic Republic of Iran*, 231 F. Supp. 2d 260, 264-69 (D.D.C. 2002) (court awarded per diem amount of $4,440,000 plus lump sum of $1 million in compensatory damages to the estate of a hostage who was held for 14 months prior to his death); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 70 (D.D.C. 1998) (court awarded lump sum of $6.1 million in compensatory damages to hostage who was held captive for 532 days and who suffered regular beatings).

87. In cases involving the compensation of the spouses of kidnapping victims who survive, this Court has awarded $10 million in solatium[3] damages. *See Acree*, 271 F. Supp. 2d at 22 (court awarded $10 million in solatium damages to each spouse of surviving victim); *Cicippio*, 18 F. Supp. 2d at 65-67 (court awarded $10 million in solatium damages to each spouse of surviving victim).

88. Based on the foregoing, the Court therefore recommends that judgment be entered in favor of Plaintiffs Jerry and Lucille Levin and against Defendants Iran, MOIS, and IRGC, jointly and severally as follows:

a. For Plaintiff Jerry Levin:

[3] "In the context of FISA cases, this Court has recognized the claim of solatium as . . . indistinguishable from the claim of intentional infliction of emotional distress." *Surette*, 231 F. Supp. 2d at 267 n.5.

i. $3,430,000 ($10,000 multiplied by the 343 days of Mr. Levin's captivity) in per diem compensatory damages for pain and suffering, extreme emotional distress, and loss of society,

ii. $15 million lump sum in additional compensatory damages for pain and suffering, extreme emotional distress, and loss of society, and

iii. $76,935 for past medical expenses.[4]

b. For Plaintiff Dr. Levin:

i. $10 million lump sum for pain and suffering, extreme emotional distress, and loss of society, and

ii. $300,784 for past medical expense.[5]

Therefore, the Court recommends that judgment be entered in favor of Plaintiff Jerry Levin and against Defendants Iran, MOIS, and IRGC, jointly and severally, in the total amount of $18,506,935 and that judgment be entered in favor of Plaintiff Dr. Levin and against Defendants Iran, MOIS, and IRGC, jointly and severally, in the total amount of $10,300,784.

Failure to file timely objections to the findings and recommendations set forth in this report may waive your right of appeal from an order of the District Court adopting such findings and recommendations. See Thomas v. Arn, 474 U.S. 140 (1985).

[4] See Attachment A.
[5] See Attachment B.

Date: December 31, 2007

/S/
JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE

Attachment A: Damage Calculations for Mr. Levin's Past Medical Expenses

Description	Frequency	Duration	Cost	Total
Eardrum replacement surgery	3	n/a	$17,000.00 per surgery	$51,000.00
Placement of drainage tubes	3	n/a	$225.00 per procedure	$675.00
Ear doctor visits	6 times per year	22 years	$60.00 per visit	$7,920.00
Antibiotics and eardrops	n/a	22 years	$100.00 per year	$2,200.00
Hearing aids	3	17 years	$1,730.00 per set	$5,190.00
Hearing aid batteries	n/a	17 years	$50.00 per year	$850.00
Psychotherapy (couples)	Once per week	1 year	$175.00 per visit	$9,100.00
TOTAL:				**$76,935.00**

Attachment B: Damage Calculations for Dr. Levin's Past Medical Expenses

Description	Frequency	Duration	Cost	Total
Psychotherapy (individual)	Once per week	22 years	$175.00 per visit	$200,200.00
Medication – 3 prescriptions	Once per day	22 years	$4,572 per year	$100,584.00
Psychotherapy (couples)	*Once per week*	*1 year*	*$175.00 per visit*	*$9,100.00 (reflected in Damage Calculations for Mr. Levin)*
TOTAL:				**$300,784.00**

Annex 42

***Leibovitch et al. v. Syrian Arab Republic et al.*, U.S. District Court, Northern District of Illinois, Notice of Pending Action, 8 April 2008, No. 08-cv-01939 (N.D. Ill. 2008)**

Excerpts: pp. 1-2 of the attached complaint

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SHLOMO LEIBOVITCH, et al.,

Plaintiffs,

v. No. 08-cv-01939

THE SYRIAN ARAB REPUBLIC, et al.,

Defendants.

NOTICE OF PENDING ACTION

TO THE CLERK OF THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS:

You are hereby respectfully notified that this action was instituted by a complaint filed in this Court on April 3, 2008, pursuant to 28 U.S.C. §1605A, a copy of which Complaint is attached to this Notice of Pending Action.

Pursuant to 28 U.S.C. §1605A(g)(1), a lien of lis pendens is hereby established upon all real property and tangible personal property that is subject to attachment in aid of execution, or execution, under 28 U.S.C. §1610, located within this judicial district and titled in the name of any of the defendants: The Syrian Arab Republic; The Syrian Ministry of Defense, Mustafa Tlass; Syrian Military Intelligence; Hassan Khalil; Assef Shawkat; Ali Douba; The Syrian Air Force Intelligence Directorate; Ibrahim Hueiji; The Islamic Republic of Iran; The Iranian Ministry of Information and Security; Ayatollah Ali Hoseini Khamenei; and/or Ali Yunesi.

You are hereby respectfully requested to file this Notice of Pending Action in the same manner as any pending action, indexed by listing as defendants all named defendants, as required by 28 U.S.C. §1605A(g)(2).

Dated: April 8, 2008

Shlomo Leibovitch, Galit Leibovitch,
Shira Leibovitch, Moshe Leibovitch,
Nerya Leibovitch, Hila Leibovitch
Shmuel Eliad and Miriam Eliad

By: s/ Robert D. Cheifetz
One of plaintiffs' attorneys

Robert D. Cheifetz
Daniel A. Shmikler
Sperling & Slater, P.C.
55 West Monroe Street, Suite 3200
Chicago, IL 60603
(312) 641-3200
(312) 641-6492 (fax)
Local counsel

David J. Strachman
McIntyre, Tate & Lynch LLP
321 South Main Street, Suite 400
Providence, RI 02903
(401) 351-7700
(401) 331-6095 (fax)
djs@mtlhlaw.com

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SHLOMO LEIBOVITCH, individually, as personal representative of the Estate of Noam Leibovitch, and as natural guardian of plaintiffs Shira Leibovitch, Moshe Leibovitch and Nerya Leibovitch; **GALIT LEIBOVITCH**, individually, as personal representative of the Estate of Noam Leibovitch, and as natural guardian of plaintiffs Shira Leibovitch, Moshe Leibovitch and Nerya Leibovitch; **SHIRA LEIBOVITCH**, a minor, by her guardians, Shlomo Leibovitch and Galit Leibovitch; **MOSHE LEIBOVITCH**; a minor, by his guardians, Shlomo Leibovitch and Galit Leibovitch; **NERYA LEIBOVITCH**, a minor, by her guardians Shlomo Leibovitch and Galit Leibovitch; **HILA LEIBOVITCH**; **SHMUEL ELIAD**; and **MIRIAM ELIAD**

Plaintiffs,

vs.

THE SYRIAN ARAB REPUBLIC, c/o Foreign Minister Walid al-Mualem Ministry of Foreign Affairs Shora, Muhajireen, Damascus, Syria; **THE SYRIAN MINISTRY OF DEFENSE**, Omayad Square, Damascus, Syria; **MUSTAFA TLASS**, Syrian Ministry of Defense, Omayad Square, Damascus, Syria; **SYRIAN MILITARY INTELLIGENCE** (aka Shu'bat al-Mukhabarat al-'Askariyya), Syrian Ministry of Defense, Omayad Square, Damascus, Syria; **HASSAN KHALIL**, Commander, Syrian Military Intelligence (aka Shu'bat al-Mukhabarat al-'Askariyya) Syrian Ministry of Defense Omayad Square Damascus, Syria; **ASSEF SHAWKAT**, Syrian Military Intelligence (aka Shu'bat) al-Mukhabaratal-'Askariyya) Syrian Ministry of Defense, Omayad Square, Damascus, Syria; **ALI DOUBA**, Syrian Military Intelligence (aka Shu'bat al-Mukhabarat al-'Askariyya) Syrian Ministry of Defense, Omayad Square, Damascus, Syria; **THE SYRIAN AIR FORCE INTELLIGENCE DIRECTORATE** (aka Idarat al-Mukhabarat al-Jawiyya), Syrian Ministry of Defense, Omayad Square,

FILED: APRIL 3, 2008
08CV1939 EDA
JUDGE HART
MAGISTRATE JUDGE MASON

Case No.

Damascus, Syria; **IBRAHIM HUEIJI,** Commander Syrian Air Force Intelligence Directorate (aka Idarat al-Mukhabarat al-Jawiyya) Syrian Ministry of Defense, Omayad Square, Damascus, Syria; **SYRIAN DOES 1-10,** Damascus, Syria; **THE ISLAMIC REPUBLIC OF IRAN**, Ministry of Foreign Affairs, Khomeini Ave. United Nations St., Teheran, Iran; **THE IRANIAN MINISTRY OF INFORMATION AND SECURITY**, Pasdaran Ave., Golestan Yekom Teheran, Iran; A**YATOLLAH ALI HOSEINI KHAMENEI,** Supreme Leader of the Islamic Republic of Iran Office of the Supreme Leader, Palestine St., Teheran, Iran; **ALI YUNESI**, c/o the Iranian Ministry of Information and Security, Pasdaran Ave. Golestan Yekom Teheran, Iran; **IRANIAN DOES 1-10**, Teheran, Iran; and **PALESTINE ISLAMIC JIHAD**, Damascus, Syria

Defendants.

COMPLAINT

Plaintiffs, by counsel, complain of the Defendants and allege for their Complaint as follows:

INTRODUCTION

1. This is a civil action for wrongful death, personal injury and related torts pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. §1602 *et seq*., and the Antiterrorism Act, 18 U.S.C. §2333, arising from a terrorist shooting attack carried out on June 17, 2003, near Eyal Junction, Israel (the "Terrorist Attack").

2. Decedent Noam Leibovitch, seven years old, was murdered in the Terrorist Attack, and her sister, plaintiff Shira Leibovitch, a U.S. citizen then three years old, was severely injured in the Terrorist Attack.

3. The Terrorist Attack was carried out by defendant Palestine Islamic Jihad ("PIJ") using material support and resources provided by defendants Syrian Arab Republic ("Syria") and Islamic Republic of Iran ("Iran").

Annex 43

***Acosta et al. v. The Islamic Republic of Iran et al.*, U.S. District Court, 26 August 2008, 574 F.Supp.2d 15 (D.D.C. 2008)**

Excerpts: p. 1 and pp. 13-27

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARLOS ACOSTA, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	**Civil Action No. 06-745 (RCL)**
THE ISLAMIC REPUBLIC OF IRAN, *et al.*,	)	
	)	
Defendants.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action arises from the assassination of Rabbi Meir Kahane and the shooting of Irving Franklin and U.S. Postal Police Officer Carlos Acosta on November 5, 1990, in New York. Plaintiffs are Carlos Acosta and his wife, Maria Acosta, Irving Franklin (on his own behalf and as administrator of his wife Irma Franklin's estate), and the surviving spouse, mother, children, and sibling of Rabbi Meir Kahane. Rabbi Meir Kahane was killed and Irving Franklin and Carlos Acosta were seriously wounded by El Sayyid Nosair. Nosair was and is a member of Al-Gam'aa Islamiyah (or, the "Islamic Group"), a terrorist organization headed by Sheik Omar Ahmad Ali Abdel Rahman ("Sheik Abdel Rahman"). Plaintiffs allege that the Islamic Republic of Iran ("Iran"), and the Iranian Ministry of Information and Security ("MOIS"), are liable for damages from the shooting because they provided material support and assistance to the Islamic Group. As such, defendants are subject to suit under the recently revised terrorist exception to

VI. Family Members of Decedent Meir Kahane

(45) Each of Rabbi Kahane's family members suffered severe emotional pain as a result of the shooting. Each of them described the enormous loss to their family that resulted from his death. Rabbi Kahane's murder and the events that followed were "unnerving" for all of them. (*See* Baruch Kahane Dep. 39:17.) They recognize that the head of their family is no longer there. (*See id.* at 42:8–10; Tova Ettinger Dep. 31:15–17.) His mother, Sonya Kahane, cried for years over the loss of her oldest son. (*See* Cipporah Kaplan Dep. 56:21–22.) As a result of Rabbi Kahane's murder, his wife, mother, brother and each of his children have suffered and will continue to suffer severe mental anguish.

(46) Plaintiffs submitted a report on the economic loss of Rabbi Kahane compiled by Richard J. Lurito, Ph.D. Dr. Lurito considered Rabbi Kahane's various sources of income including, *inter alia*, the decedent's salary as an executive with Kach International, income as a newspaper columnist for The Jewish Press, and fees received for speaking engagements in the United States. (*See* Ex. 3 at 2.) Dr. Lurito concluded that Rabbi Kahane's family lost between $2,449,381 and $3,160,798 in net income due to his death. (*See id.* at 5.)

CONCLUSIONS OF LAW

I. Legal Standard for FSIA Default Judgment

Under the Foreign Sovereign Immunities Act, no judgment by default shall be entered by a court unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. 28 U.S.C. § 1608(e); *see also Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 232 (D.C. Cir. 2003), *cert. denied*, 542 U.S. 915 (2004). In FSIA default judgment proceedings, plaintiffs may establish proof by affidavit. *Campuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258,

268 (D.D.C. 2003) (Urbina, J.). Upon evaluation, the court may accept plaintiffs' uncontroverted evidence as true. *Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 229, 255 (D.D.C. 2006) (Lamberth, J.) (citing *Campuzano*, 281 F. Supp. 2d at 268). This Court accepts the uncontested evidence and sworn testimony submitted by plaintiffs as true in light of defendants' failure to object or enter an appearance to contest the matters in this case.

II. Jurisdiction

The Foreign Sovereign Immunities Act is the sole basis for jurisdiction over foreign sovereigns in the United States. *See Argentine Republic v. Amerada Hess Shipping Corp*., 488 U.S. 428, 434 (1989). The recently enacted National Defense Authorization Act for Fiscal Year 2008 ("NDAA"), Pub. L. No. 110-181, 122 Stat. 3, § 1083, revised the terrorism exception to sovereign immunity by repealing § 1605(a)(7) of Title 28 and replacing it with a separate section, § 1605A. The revised "state-sponsored terrorism" exception provides that a foreign sovereign will not be immune to suit in U.S. courts where:

> 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 or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

28 U.S.C. § 1605A. Most importantly, § 1605A creates a private, federal cause of action against a foreign state that is or was a state sponsor of terrorism, and provides for economic damages, solatium, pain and suffering, and punitive damages. *See* 28 U.S.C. § 1605A(c). To establish liability against a foreign sovereign under § 1605A, plaintiffs must show that (1) the foreign sovereign was designated

by the State Department as a "state sponsor of terrorism;" (2) the victim or plaintiff was either U.S. national, a member of the armed forces, or a federal employee or contractor acting within the scope of employment at the time the acts took place; and (3) the foreign sovereign engaged in conduct that falls within the ambit of the statute. *See id.*

The first and third requirements are clearly met in the instant case. As to the first requirement, defendant Iran has been designated a state sponsor of terrorism continuously since January 19, 1984, and was so designated at the time of the attack. *See* 31 C.F.R. § 596.201 (2001); *Flatow*, 999 F. Supp. 1, 11 (D.D.C. 1998) (Lamberth, J.). As to the third element, defendant Iran knowingly provided material support to Sheik Abdel Rahman and the Islamic Group for the extrajudicial killing associated with the November 5, 1990 shooting. As such, Iran's support of Sheik Abdel Rahman and the Islamic Group falls squarely within the ambit of the statute. Defendant MOIS is treated as the state of Iran itself rather than its agent, *Roeder*, 333 F.3d at 234, and thus the same determinations apply to its conduct.

The second requirement, which addresses the relationship between the victim or plaintiff and the United States, requires more discussion. With the exception of Rabbi Meir Kahane, there is no dispute that all of the plaintiffs in this action were United States nationals at the time of the extrajudicial killing as each of them are United States citizens. Rabbi Meir Kahane's status is more complicated. He became a United States citizen by virtue of his birth in New York City on August 1, 1932. After moving to Israel in 1971, he also became an Israeli citizen by operation of that country's Law of Return. During that same time, Rabbi Meir Kahane became actively involved in Israeli politics. In early 1988, the Israeli Parliament passed a law that forbade its members to maintain dual citizenship. On August 16, 1988, and again on September 16, 1988, Rabbi Meir Kahane completed

an Oath of Renunciation which formally renounced his United States citizenship. On October 7, 1988, the U.S. Department of State prepared a Certificate of Loss of Nationality for Rabbi Meir Kahane. Less than two weeks later, the Israeli Supreme Court barred Rabbi Meir Kahane's party from running in the November 1988 Israeli election. Rabbi Meir Kahane subsequently attempted to withdraw his renunciation of U.S. citizenship. When his attempts proved unsuccessful, he applied to this Court for a temporary restraining order and a preliminary injunction. The late Judge Barrington Parker determined that as of September 16, 1988, Rabbi Kahane ceased to be a citizen of the United States because he voluntarily renounced his American citizenship in order to pursue a political career in Israel. *See Kahane v. Sec'y of State*, 700 F. Supp. 1162 (D.D.C. 1988) (Parker, J.). The D.C. Circuit summarily affirmed the district court's determination. *See Kahane v. Sec'y of State*, No. 92-5311, 1993 WL 71724 (D.C. Cir. Mar. 2, 1993).

The term "United States national" as defined in the United States Code includes both U.S. citizens as well as someone, though not a citizen, who owes permanent allegiance to the United States. 8 U.S.C. § 1101(a)(22). Plaintiffs argue that even though Rabbi Meir Kahane was no longer a U.S. citizen, he remained a U.S. national by virtue of his continued allegiance to the United States. According to plaintiffs, Rabbi Meir Kahane's appeal of the State Department's determination of his loss of citizenship demonstrates his permanent allegiance to the United States in spite of his formal renunciation of citizenship. This Court disagrees. While it is true that Rabbi Meir Kahane challenged his loss of citizenship, he was unsuccessful in convincing the Court that his allegiance remained in tact and that it should overturn the State Department's decision. Moreover, plaintiffs' arguments run directly counter to the clear findings of this Court dating back nearly twenty years ago. As stated by Judge Parker, "Kahane knew or should have known that when he renounced his American

citizenship the result would be the loss of his United States nationality, rights, and privileges." *Kahane*, 700 F. Supp at 1168. As such, "his personal and conscious choice[] severed his relationship with the United States government." *Id.* Under these circumstances, this Court cannot conclude that the Congress intended that a cause of action under § 1605A remain available to those persons who voluntarily and deliberately renounce American citizenship. Having failed to satisfy the second requirement under § 1605A, Rabbi Meir Kahane's claims must be dismissed for lack of standing.

The claims brought by Rabbi Meir Kahane's family members in their individual capacities, however, remain valid. Section 1605A(a)(2)(A)(ii) requires only that either the claimant *or* the victim be a U.S. national at the time the act of terrorism occurred. *See e.g. Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25, 41 n.8 (D.D.C. 2007) (Lamberth, J.) (finding that relatives of a victim who was a U.S. national at the time of attack had standing even though the relatives themselves were not U.S. nationals). Since each of Rabbi Meir Kahane's relatives in this action were U.S. citizens at the time of the extrajudicial killing, each of them maintain a valid cause of action under § 1605A.

III. Liability

A. Vicarious Liability

The basis of defendants' liability is that they provided material support and resources to the Islamic Group, which through the acts of Nosair, completed the extrajudicial killing giving rise to this action. One may be liable for the acts of another under theories of vicarious liability, such as conspiracy, aiding and abetting, and inducement. This Court finds that civil conspiracy provides a basis of liability for defendants Iran and MOIS and accordingly declines to reach the issue of whether they might also be liable on the basis of aiding and abetting and/or inducement.

The elements of civil conspiracy consist of: (1) an agreement between two or more persons; (2) to participate in an unlawful act, or a lawful act in an unlawful manner; (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement; (4) which overt act was done pursuant to and in furtherance of the common scheme. *See Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983).

As this Court has previously held, "[s]ponsorship of terrorist activities inherently involves a conspiracy to commit terrorist attacks." *Bodoff v. Islamic Republic of Iran*, 424 F. Supp. 2d 74, 84 (D.D.C. 2006) (Lamberth, J.) (quoting *Flatow*, 999 F. Supp. at 27). Here, it has been established by evidence satisfactory to this Court that Iran continuously provided material support in the form of, *inter alia*, funding, training, and safe haven to the Islamic Group so that it may undertake terrorist attacks like the one in this action. The assassination of Rabbi Meir Kahane and the wounding of Irving Franklin and Carlos Acosta were caused by a willful and deliberate act of extrajudicial killing by El Sayyid Nosair who, as a member of the Islamic Group headed by Sheik Abdel Rahman, was acting in furtherance of the terrorist *jihad* goals of each of them and of defendants. Finally, as will be discussed below, the plaintiffs in this action incurred damages resulting from the death and injuries caused by the conspiracy. Accordingly, the elements of civil conspiracy are established between the Islamic Group and defendants Iran and MOIS.

B. Wrongful Death

In Count II of the Amended Complaint, plaintiff Libby Kahane, as the personal representative of Rabbi Meir Kahane's estate, asserts a cause of action for wrongful death. Typically, a wrongful death statute is designed to compensate decedent's heirs-at-law for economic losses which result from decedent's premature death. *Flatow*, 999 F. Supp. at 27. A wrongful death claim, however, is

unavailable in the instant matter since Libby Kahane's recovery ultimately turns on the decedent's ability to recover. *See Oveissi v. Islamic Republic of Iran*, 498 F. Supp. 2d 268, 278–79 (D.D.C. 2007) (Lamberth, J.) (holding that plaintiff had no right of action for wrongful death claim brought under the state sponsored terrorism exception to the FSIA since decedent was not a U.S. national and therefore would not have been able to recover under the FSIA had he lived). The FSIA's "state-sponsored terrorism" exception expressly requires that either the victim or plaintiff be a U.S. national in order to recover. 28 U.S.C. § 1605A. This Court has already recognized that Rabbi Meir Kahane was no longer a U.S. national at the time of his November 5, 1990 assassination. Thus, even if Rabbi Meir Kahane had survived the shooting, his deliberate renouncement of citizenship would have precluded him from bringing a cause of action under the FSIA. Because "no action could have been brought by the deceased if still alive, no right of action exists," and the Court lacks jurisdiction to entertain plaintiff Libby Kahane's wrongful death claim. *Oveissi*, 498 F. Supp. 2d at 279 (quoting RESTATEMENT (SECOND) OF TORTS § 925 cmt. a (1971)).

C. Conscious Pain and Suffering

In Count III of the Amended Complaint, plaintiff Libby Kahane, as the personal representative of Rabbi Meir Kahane's estate, asserts a claim for his conscious pain and suffering experienced between the time that he was wounded and the time of his death. As with wrongful death claims, "survival [claims] are dependent upon the rights of the deceased." RESTATEMENT (SECOND) OF TORTS § 925 cmt. a. "Hence, if no action could have been brought by the deceased if still alive, no right of action exists." *Id.* Here, Rabbi Meir Kahane would not have been able to assert a cause of action under the FSIA for conscious pain and suffering because he was not a U.S. national at the time

of the shooting. Thus, no such claim may be asserted for the benefit of his estate and plaintiff Libby Kahane's claim must be denied.

D. Assault

According to the Restatement (Second) of Torts, a defendant has committed an assault if "he acts intending to cause a harmful or offensive contact with [a] person, . . . or an imminent apprehension of such a contact" and the person is "thereby put in such imminent apprehension." RESTATEMENT (SECOND) OF TORTS § 21 (1965).

El Sayyid Nosair's production of the .357 caliber magnum revolver at the lecture on November 5, 1990, was an intentional act that placed others in fear of imminent harm or offensive contact. Moreover, when Nosair fired shots first at Rabbi Meir Kahane, then at Irving Franklin, and ultimately at Carlos Acosta, these acts were done intentionally and induced fear of immediate harm and danger in many that were present at the scene. Accordingly, defendants are liable to plaintiffs' Irving Franklin and Carlos Acosta for assault.

E. Battery

According to the Restatement (Second) of Torts, a defendant has committed battery if "he acts intending to cause a harmful or offensive contact with [a] person," and a "harmful contact with the person . . . directly or indirectly results." RESTATEMENT (SECOND) OF TORTS § 13 (1965).

In light of the uncontested evidence presented by plaintiffs, this Court finds that plaintiffs Irving Franklin and Carlos Acosta have asserted a valid claim of battery. Defendants, through their material support of the Islamic Group, clearly had the intent to make harmful and offensive bodily contact. In addition, plaintiffs have proved through pictures and testimony, that Irving Franklin and Carlos Acosta encountered direct physical contact and consequential injuries as a direct result of this

act. Accordingly, defendants Iran and MOIS are liable for battery under the theory of vicarious liability.[2]

F. Intentional Infliction of Emotional Distress

Section 46 of the Restatement (Second) of Torts provides that "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress." RESTATEMENT (SECOND) OF TORTS § 46 (1965). Section 46(2) of the Restatement specifically states that only present third parties may recover for an IIED claim. Plaintiff Irma Franklin was present at the time of the assassination and therefore has standing to recover.

The Caveat to section 46(2) leaves open the possibility of other possible situations where a defendant could be liable for intentional infliction of emotional distress to a third party plaintiff who was not present to witness defendant's conduct. *Peterson*, 515 F. Supp. 2d at 42. As this Court has previously found, "a terrorist attack—by its nature—is directed not only at the victims but also at the victims' families." *Heiser*, 466 F. Supp. 2d at 328 (quoting *Salazar v. Islamic Republic of Iran*, 370 F. Supp. 2d 105, 115 n.12 (D.D.C. 2005) (Bates, J.)). The evidence in the instant action is consistent with the Court's previous findings as to the impact of terrorist attacks. Accordingly, plaintiffs Maria Acosta, Sonya Kahane, Cipporah Kaplan, Libby Kahane, Tova Ettinger, Baruch Kahane, Ethel Griffin and Norman Kahane have standing to recover for an IIED claim.

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[2] Because Jason Irving Franklin and Carlos Acosta are entitled to recovery for mental anguish and suffering under their battery claim, the Court need not separately consider his intentional infliction of emotional distress claim, which would result in an impermissible double recovery. *See Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25, 40 n.7 (D.D.C. 2007) (Lamberth, J.)

This Court further concludes that defendants' actions proximately caused the assassination of Rabbi Meir Kahane and the injuries sustained by Carlos Acosta and Irving Franklin, and the subsequent emotional distress experienced their immediate family members. Each of the plaintiffs have suffered and will continue to suffer severe emotional distress from the loss and/or injuries sustained by their loved ones.

Accordingly, this Court concludes that plaintiffs have "establishe[d] [their] claims or right to relief by evidence satisfactory to the court," and are therefore entitled to the entry of a default judgment against defendants. 28 U.S.C. § 1608(e); *see Roeder*, 333 F.3d at 232.

IV. Damages

The FSIA specifically permits plaintiffs suing under section § 1605A to pursue "economic damages, solatium, pain and suffering and punitive damages." 28 U.S.C. § 1605A(c). After reviewing the argument presented by plaintiffs, and the law applicable thereto, the Court makes the following conclusions regarding damages.

A. Compensatory Damages

In determining the appropriate amount of compensatory damages, the Court may look to prior decisions awarding damages for pain and suffering, and to those awarding damages for solatium. *Haim v. Islamic Republic of Iran*, 425 F. Supp. 2d 56, 71 (D.D.C. 2006) (Lamberth, J.). "While intervening changes in law have ruled many cases' reliance on federal common law improper, such findings need not disturb the accuracy of the analogy between solatium and intentional infliction of emotional distress." *Id.*

1. Pain and Suffering Award for Carlos Acosta and Irving Franklin

Carlos Acosta and Irving Franklin have sought pain and suffering awards associated with their claims for battery. Damages for a surviving victim are typically determined based upon an assessment of the following factors: "the severity of the pain immediately following the injury, the length of hospitalization, and the extent of the impairment that will remain with the victim for the rest of his or her life." *Peterson*, 515 F. Supp. 2d at 52 n.26 (quoting *Blais v. Islamic Republic of Iran*, 459 F. Supp. 2d 40, 59 (D.D.C. 2006) (Lamberth, J.)). In awarding pain and suffering damages, the Court must take pains to ensure that individuals with similar injuries receive similar awards. Upon examination of the nature and impact of the injuries involved, the Court finds that plaintiff Carlos Acosta is entitled to $4 million in pain and suffering, in addition to $50,000 for medical expenses and $57,000 for lost wages. The Court further finds that Irving Franklin is entitled to $4 million in pain and suffering, plus $65,000 for medical expenses.

2. Pain and Suffering Award for Victims' Relatives

This Court has previously looked to the nature of the relationship between the family member and the victim in order to help determine the amount of each award. *Peterson*, 515 F. Supp. 2d at 51 (citations omitted). Parents of victims typically receive awards similar in amount to those awarded to children of the victim. *Blais*, 459 F. Supp. 2d at 60. Moreover, families of victims who have died are typically awarded greater damages than families of victims who remain alive. *Id.* This Court has previously set out a general framework for compensatory awards for family members of victims who were killed as a result of terrorist activity consisting of $8 million to spouses of deceased victims, $5 million to parents and children of deceased victims, and $2.5 million to siblings of deceased victims. *See Peterson*, 515 F. Supp. 2d at 51–52 n.25 (adopting the damages framework set forth in *Heiser*).

As to family members of surviving victims of terrorist attacks, this Court has previously awarded pain and suffering awards as follows: $4 million to spouses of surviving victims, $2.5 million to parents and children of surviving victims, and $1.25 million to siblings of surviving victims. *Peterson*, 515 F. Supp. 2d at 52.

Applying the damages framework set forth above as a guideline, this Court awards each plaintiff damages in the following amounts. Plaintiff Libby Kahane is entitled to $8 million to compensate her for emotional distress and loss of consortium caused by the death of her husband. Plaintiff Sonya Kahane, Rabbi Meir Kahane's mother, is entitled to $5 million for her pain and suffering. Each child of Rabbi Meir Kahane, Cipporah Kaplan, Tova Ettinger, Baruch Kahane, and Ethel Griffin as Administrator of Binyamin Kahane's estate, is entitled to $5 million for pain and suffering. Plaintiff Norman Kahane, Rabbi Meir Kahane's brother, is entitled to $2.5 million for his pain and suffering. As to the spouses of the surviving victims of the shooting, this Court will award a slightly lessor amount than in *Peterson* as the injuries here, while serious, are not as severe and permanently debilitating as the majority of injuries sustained by the bombing victims in that case. Thus, plaintiff Maria Acosta is entitled to $3 million for her emotional distress and loss of consortium resulting from the injuries sustained by her husband, Carlos Acosta. Plaintiff Irma Franklin was present at the time of the shooting and thus suffered her own emotional distress in the face of gunfire and as a result of having witnessed her husband's shooting firsthand. Accordingly, Irma Franklin should receive $3.5 million both as spouse of a surviving victim and for her own pain and suffering endured by being present during the shooting.

B. Punitive Damages

The Court's final task is to determine whether, and to what extent, punitive damages should be levied against defendants. Until Congress passed the National Defense Authorization Act for Fiscal Year 2008, punitive damages were not available against foreign states. Under the newly enacted 28 U.S.C. § 1605A, punitive damages are now available against foreign state sponsors of terrorism. *See* 28 U.S.C. § 1605A(c).

According to the Restatement (Second) of Torts, punitive damages are designed "to punish [a defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future." RESTATEMENT (SECOND) OF TORTS § 908(1) (1977). In determining the proper punitive damages award, courts evaluate 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." *Flatow*, 999 F. Supp. at 32 (citing RESTATEMENT (SECOND) OF TORTS § 908(1)–(2) (1965)). In cases such as this, the analysis typically results in punitive damages in an amount three times Iran's annual expenditure on terrorism, or $300,000,000. *See, e.g.*, *Bodoff v. Islamic Republic of Iran*, 424 F. Supp. 2d 74, 89 (D.D.C. 2006) (Lamberth, J.); *Stern v. Islamic Republic of Iran*, 271 F. Supp. 2d 286, 301 (D.D.C. 2003) (Lamberth, J.); *Cronin v. Islamic Republic of Iran*, 238 F. Supp. 2d 222, 235–36 (D.D.C. 2002) (Lamberth, J.), *abrogated on other grounds by Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004); *Eisenfeld v. Islamic Republic of Iran*, 172 F. Supp. 2d 1, 9 (D.D.C. 2000) (Lamberth, J.).

In the instant case, this Court recognizes that a shooting incident, while very serious, is less heinous in nature than a bombing. While both activities clearly produce deadly results, the sheer number of casualties and the extent of the injuries that this Court has seen in cases involving

bombings are more extensive than those involved in the instant case. Regardless of the severity of the act, however, this Court has no doubt that Iran's intention, in supporting terrorist groups such as the one involved here, is to create maximum harm through terrorist acts. Accordingly, only a large punitive damage award will serve as an effective deterrent against future terrorist acts. As to defendants' wealth, this Court has previously adopted expert testimony estimating Iran's annual terrorism expenditures during the relevant time period at approximately $50 to $150 million. *See Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 51 (D.D.C. 2003) (Lamberth, J.); *Heiser*, 466 F. Supp. 2d at 262. Taking all of these factors into account, and the precedent of this Court, the Court shall apply the formula of three times defendant Iran's annual expenditure on terrorism to award punitive damages for plaintiffs and against defendants Iran and MOIS, jointly and severally, in the amount of $300,000,000.

If any recovery is made, compensatory damages should be apportioned upon receipt. After compensatory damages are satisfied, any subsequent recovery of punitive damages should be apportioned to plaintiffs according to the percentage of compensatory damages awarded to each plaintiff.

CONCLUSION

This Court takes note of plaintiffs' courage and steadfastness in pursuing this litigation and their efforts to take action to deter more tragic suffering of innocent Americans at the hands of terrorists. Their efforts are to be commended.

A separate Order and Judgment consistent with these findings shall issue this date.

SO ORDERED.

Signed by Royce C. Lamberth, Chief Judge, on August 26, 2008.

Annex 44

***In re Islamic Republic of Iran Terrorism Litigation*, U.S. District Court, District of Columbia, 30 September 2009, 659 F. Supp. 2d 31, 58 (D.D.C. 2009)**

Excerpts: pp. 1-3; pp. 27-44 and pp. 156-191

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:	)	
ISLAMIC REPUBLIC OF IRAN TERRORISM LITIGATION	)	**Civil Action Nos.**
	)	**01-CV-2094, 01-CV-2684, 02-CV-1811, 03-CV-1486, 03-CV-1708, 03-CV-1959, 05-CV-2124, 06-CV-473, 06-CV-516, 06-CV-596, 06-CV-690, 06-CV-750, 06-CV-1116, 07-CV-1302, 08-CV-520, 08-CV-531, 08-CV-1273, 08-CV-1615, 08 CV-1807, 08-CV-1814**

I.

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II.

INTRODUCTION

For more than a decade now, this Court has presided over what has been a twisting and turning course of litigation against the Islamic Republic of Iran under the state sponsor of terrorism exception of the Foreign Sovereign Immunities Act (FSIA). Despite the best intentions of Congress and moral statements of support from the Executive Branch, the stark reality is that

3. The Never-Ending Struggle to Enforce Judgments Against Iran

In the years since the *Flatow* decision, a number of practical, legal, and political obstacles have made it all but impossible for plaintiffs in these FSIA terrorism cases to enforce their default judgments against Iran. This Court has examined this fundamental and longstanding problem time and again as plaintiffs before this Court have sought, with very little success, to

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entities of a foreign government may be liable for punitive damages. In terrorism cases against Iran in this Court under § 1605(a)(7), plaintiffs have never identified an appropriate Iranian agency that would qualify as an "agency or instrumentality" of Iran for the purpose of a punitive damages award.

In *Roeder v. Islamic Republic of Iran*, a case that was decided only a few months prior to *Cicippio-Puleo*, the Court of Appeals emphasized that it follows a categorical approach when determining whether a foreign governmental entity should be considered "'a foreign state or political subdivision' rather than an 'agency or instrumentality of the nation'" for purposes of the FSIA. 333 F.3d 228, 234 (D.C. Cir. 2003) (quoting *Transaero, Inc. V. La Fuerza Aerea Boliviana*, 30 F.3d 148, 149–50 (D.C. Cir. 1994)). Under the categorical approach, "if the core functions of the entity are governmental, it is considered the foreign state itself; if commercial, the entity is an agency or instrumentality of the foreign state." *Id.* In *Roeder*, the Court determined that Iran's Ministry of Foreign Affairs is part of the foreign state itself, rather than an "agency of instrumentality" because the Ministry of Foreign Affairs, like a nation's armed forces, is governmental in nature. *Id.* Following the *Roeder* decision, this Court found that MOIS must be considered part of the state of Iran itself and is therefore exempt from liability for punitive damages. *See, e.g.*, *Haim v. Islamic Republic of Iran*, 425 F. Supp. 2d 56, 71 n.2 (D.D.C. 2006) (Lamberth, J.).

In *Rimkus*, a case that is addressed in today's consolidated opinion, the plaintiffs asserted claims against IRGC as well as MOIS. In rendering the decision in *Rimkus*, this Court again followed the categorical approach from *Roeder* and determined that IRGC, like MOIS, is part of the state itself and is therefore exempt from punitive damage under the FSIA. *See* 575 F. Supp. 2d 181, 198–200 (D.D.C. 2008) (Lamberth, C.J.); *see also Blais v. Islamic Republic of Iran*, 459 F. Supp. 2d 40, 60–61 (D.D.C. 2006) (Lamberth, J.) (concluding that both MOIS and IRGC must be treated as the state of Iran itself for purposes of liability); *Salazar v. Islamic Republic of Iran*, 370 F. Supp. 2d 105, 115–16 (D.D.C. 2005) (Bates, J.) (same). Consequently, in the years following *Cicippio-Puleo*, plaintiffs in actions under the original terrorism exception, § 1605(a)(7), lacked a basis for claiming punitive damages in actions arising out of Iran-sponsored terrorism.

Because claims against MOIS or IRGC are not legally distinguishable from claims against Iran itself, this opinion refers to Iran as the only defendant.

locate and attach Iranian Government assets in aid of execution of their civil judgments. *See, e.g.*, *Bennett v. Islamic Republic of Iran*, 604 F. Supp. 2d 152 (D.D.C. 2009) (Lamberth, C.J.); *Peterson v. Islamic Republic of Iran*, 563 F. Supp. 2d 268 (D.D.C. 2008) [hereinafter *Peterson III*] (Lamberth, C.J.); *Weinstein v. Islamic Republic of Iran*, 274 F. Supp. 2d 53 (D.D.C. 2003) (Lamberth, J.); *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16 (D.D.C. 1999) [hereinafter *Flatow III*] (Lamberth, J.); *Flatow v. Islamic Republic of Iran*, 74 F. Supp. 2d 18 (D.D.C. 1999) [hereinafter *Flatow II*] (Lamberth, J.). To even begin to appreciate the difficulties plaintiffs face with respect to locating Iranian property in the United States, it is important to first understand the significance of the Iran-Hostage Crisis and its aftermath and, more specifically, the Algiers Accords, the bilateral executive agreement between Iran and the United States that brought about the settlement of the hostage crisis in 1981.

On November 14, 1979, ten days after the start of the Iran hostage crisis in which Iranian revolutionaries seized the United States embassy in Tehran and took most embassy personnel as hostages, President Carter exercised his powers under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701–1706, and "blocked all property and interests in property of the Government of Iran . . . subject to the jurisdiction of the United States." Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (Nov. 14, 1979); *see* Transactions Involving Property in Which Iran or Iranian Entities Have an Interest, 31 C.F.R. § 535.201; *see also Dames & Moore v. Regan*, 453 U.S. 654, 662–664 (1981) (discussing the Iran Hostage Crisis and President Carter's actions in response to the Iran hostage crisis pursuant to his authority under the IEEPA).

Approximately five months later, as the hostage crisis continued to wane on, President Carter severed diplomatic relations with Iran, and the State Department assumed custody of all Iran's diplomatic and consular property here in the United States. *See, e.g.*, *Bennett*, 604 F.

Supp. 2d at 162–66 (discussing the termination of diplomatic relations with Iran and the State Department's assumption of custody over Iran's diplomatic and consular properties within the United States). The hostage crisis was finally resolved when Iran and the United States executed the Algiers Accords on January 19, 1981, and all hostages were released the following day, just moments after President Regan took office. *See* Iran-United States: Settlement of the Hostage Crisis, Jan. 18–20, 1981, 20 I.L.M. 223 [hereinafter Algiers Accords]; *Dames & Moore*, 453 U.S. at 664–65 (discussing the release of the hostages and terms of the Algiers Accords).

As part of the Algiers Accords, the United States agreed in principle to restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979." Algiers Accords, 20 I.L.M. at 223, 224. Additionally, the United States "commit[ted] itself to ensure the mobility and free transfer of all Iranian assets within its jurisdiction." *Id.* at 223–224. Iran and the United States further agreed to settle all litigation between the two governments, to include any outstanding litigation between the nationals of the two countries as of January, 19 1981. *Id.* at 223–224, 230–232. To this end, the Algiers Accords established an Iran-U.S. Claims Tribunal in the Hague to arbitrate any claims not settled within six moths. *Id.* at 226, 230–34. Consistent with these commitments to restore Iran's financial position, to facilitate the transfer of Iranian assets, and to have unresolved claims presented to the Iran-Claims Tribunal, the United States agreed to "bring about the transfer" of all Iranian assets held in this country by American banks, with one billion dollars in those assets set aside on account of the Central Bank of Algeria for the payment of any awards entered against Iran by the Claims Tribunal. *Id.* at 225–27. The Claims-Tribunal would also have jurisdiction to revolve disputes between Iran and the United States concerning each other's compliance with the Algiers Accords. *Id.* at 231.

To comply with the terms of the Algiers Accords, President Carter issued, and President Regan subsequently ratified, a series of Executive Orders in which the President unblocked the majority of Iran assets within the jurisdiction of the United States and directed United States banks to transfer all Iranian assets to the Federal Reserve Bank of New York, where they would be held or transferred to Iran as directed by the Secretary of the Treasury. *See Dames & Moore*, 453 U.S. at 665–66. Subsequent Executive Orders and treasury regulations have controlled the transfer of Iranian Assets consistent with the Algiers Accords. *See, e.g.*, Iranian Assets Control Regulations, 31 C.F.R. pt. 535. Thus, practically speaking, there are simply few assets within the United States that are available for plaintiffs to seize in satisfaction of their judgments under the FSIA terrorism exception.

In *Dames & Moore*, the Supreme Court upheld the validity of actions taken by both President Regan and Carter to settle the Iran Hostage Crisis through the implementation of the Algiers Accords. 453 U.S. 654. Specifically, the Court examined two issues. First, the Court addressed the validity of Executive Orders that nullified all attachments and similar encumbrances on Iranian property in the United States and directed the transfer of Iranian assets to the Federal Reserve Bank of New York for ultimate transfer back to Iran under the terms of the Algiers Accords. Second, the Court addressed Executive Orders that suspended claims pending against Iran in American courts and provided for those claims to be presented to Iran-United States Claims Tribunal for resolution through binding arbitration.

With respect to the termination of attachments on Iran's property and the transfer of Iran's assets, the Court found that Congress had provided in the IEEPA, 50 U.S.C. §§ 1701–1706, specific authorization for the President to take those actions. *Dames & Moore*, 453 U.S. at 674–75. Accordingly, the Court relied on the strong presumption of validity traditionally

accorded to such Executive action pursuant to a federal statute, as described in Justice Jackson's famous concurrence in *Youngstown Sheet & Tube Co. V. Sawyer*, 343 U.S. 579 (1952), and held that, in light of this "specific congressional authorization," it could not find that the power exercised by the President had exceeded the bounds of any powers afforded under the Constitution. *Dames & Moore*, 453 U.S. at 675. The Court observed: "A contrary ruling would mean that the Federal Government as a whole lacked the power exercised by the President, and that we are not prepared to say." *Id.* at 674 (citation omitted).

With respect to the suspension of claims, the Court ultimately upheld that action as well, but the Court's rationale was a bit more nuanced. While the Court could not identity a specific authorization from Congress, the Court did find that, over more than two centuries, Congress had either acquiesced in or implicitly approved of the settlement of claims of United States nationals through executive agreement. *See id.* at 675–687. Thus, in light of what the Court deemed as Congress' consent to the President's actions, the Court held that it could not say that the President's actions in suspending claims against Iran exceeded the President's powers. *Id.* at 686.[11]

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[11]As a leading case on the scope of Federal Power, particularly Executive Power, as exercised in the realm of foreign affairs and national security, and as a case concerning the Algiers Accords and Iran specifically, *Dames & Moore* remains particularly relevant with respect to many of the issues presented in the terrorism cases considered by this Court today. For example, by reaffirming the strong presumption of validity that should attach to actions expressly authorized by both political branches in the area of foreign affairs, *Dames & Moore* lends supports to this Court's ruling in Part E that § 1083(c) does not offend separation-of-powers principles relating to the independence of the judiciary. Additionally, *Dames & Moore* provides a historical perspective that helps to illustrate some of the unique challenges that plaintiffs in FSIA terrorism cases against Iran face as a consequence of executive actions implementing and honoring the terms of Algiers Accords.

More generally, then-Justice Rehnquist's discussion in *Dames & Moore* concerning our nation's rich history and tradition of the use of Executive authority to settle claims between

What few assets of Iran that might be found within jurisdiction of the United States courts since the Algiers Accords are a subject to a dizzying array of statutory and regulatory authorities due in large part to the federal government's obligations under that bilateral executive agreement, but also in part because of the increasing hostility in the relationship between Iran and the United States in the wake of the hostage crisis and the continuous designation of Iran as a state sponsor of terrorism since 1984. In fact, much like the assets of other state sponsors of terrorism, most of Iran's known property or interests in property are blocked, i.e., frozen, or otherwise regulated under any number of United States sanctions programs.[12]

United States nationals and foreign sovereigns, *see* 453 U.S. at 678–687, provides an even broader historical perspective that this Court finds highly instructive for the purposes of today's opinion. Indeed, as Justice Rehnquist illustrated in his opinion for the Court, the exercise of Federal Power by the President to settle claims of U.S. nationals against foreign sovereigns—a long-standing practice to which the Congress has acquiesced and occasionally supported by legislation—has often proven to be the most effective way to ensure relief to United States Nationals aggrieved by foreign sovereigns. In Part K of this opinion, this Court relies on the time-honored practice of claims settlement by the Executive, as expressed in *Dames & Moore*, in support of this Court's call for reforms to help victims of Iran-sponsored terrorism find the relief they deserve.

[12] *See* TERRORIST ASSETS REPORT, *supra* note 2, at 2, 10. The Office of Foreign Assets Control (OFAC) of the Treasury Department administers economic sanction programs relating to terrorists, terrorist organizations, and officially designated state sponsors of terrorism. Each year, OFAC publishes a report to Congress regarding assets in the United States that belong to terrorist nations and other terrorist actors. This annual report discusses both blocked and non-blocked assets of Iran, as well assets attributable to other state sponsors of terrorism. As such, the Terrorist Assets Report is a good reference point for individuals interested in understanding some of the tremendous difficulties terrorism victims face in their efforts to enforce judgments entered against Iran under the FSIA terrorism exception.

According to the CRS, the blocked assets of Iran in the United States "includes property that is blocked under the Iranian Assets Control Regulations, 31 C.F.R. pt. 535, since the hostage crisis was resolved in 1981. The property blocked in 1981 remains blocked in part because of pending claims before the Iran-U.S. Claims Tribunal." *Id.* at 10. Other blocked assets include Iran's diplomatic and consular properties here in the United States, as well as any proceeds from the leasing of those properties, which are now managed and maintained by the State Department's Office of Foreign Missions. *Id.* "Additionally, other sanction authorities designed

Beyond the imposition of economic sanctions and other regulatory controls, however, the inviolable doctrines of both foreign sovereign immunity and federal sovereign immunity have often precluded the attachment or execution of property that plaintiffs have identified as belonging to Iran. With respect to foreign sovereign immunity specifically, the FSIA itself has long forestalled plaintiffs' efforts to enforce judgments entered under § 1605(a)(7). This is largely because, much like foreign sovereigns are generally immune from civil suit under the FSIA, *see* § 1604, any property belonging to a foreign nation is similarly immune from attachment and execution by judgment creditors. *See* § 1609. The relevant exceptions to the general rule of immunity from the attachment or execution are listed in § 1610. Prior to the enactment of last year's reforms in the 2008 NDAA, however, these exceptions to the general rule of immunity for foreign government property were limited almost exclusively to property relating to the commercial activities of the foreign sovereign within the United States. *See* § 1610(a) and (b). Given the lack of formal relations between the United States and Iran, these provisions have been of little utility to the judgment creditors of Iran in FSIA terrorism cases. Thus, the FSIA facilitated a somewhat ironic and perverse outcome because on the one hand, in § 1605(a)(7), it created an opportunity for terrorism victims to sue Iran for money damages, while on the other hand, in §§ 1609 and 1610, it denied these victims the legal means to enforce their court judgments.[13]

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to address national emergencies distinct from terrorism have also resulted in the blocking of assets in which the Government of Iran has an interest." *Id.* The report adds that Iran claims "miscellaneous blocked and non-blocked military property that it asserts was in the possession of private entities in the United States when the hostage crisis was resolved in 1981. *Id.* at 12. The United States disputes Iran's claims and the matters are pending before the Claims-Tribunal. *Id.* at 13.

[13] Another challenge for plaintiffs looking to collect on their judgments in this context is

In addition to the immunity from attachment or execution that the FSIA has long provided to foreign property, assets held within United States Treasury accounts that might otherwise be attributed to Iran are the property of the United States and are therefore exempt from attachment or execution by virtue of the federal government's sovereign immunity. *See Dep't of the Army v. Blue Fox, Inc*., 525 U.S. 255 (1999); *State of Arizona v. Bowsher*, 935 F.2d 332 (D.C. Cir. 1991). As the Supreme Court held in the seminal case of *Buchanan v. Alexander*, United States sovereign immunity is an extremely broad bar to jurisdiction that prevents creditors from attaching funds held by the United States treasury or its agents. 45 U.S. 20 (1846).

Because the federal government has assumed control over significant portions of what limited Iranian assets remain in the United States, plaintiffs' efforts to enforce judgments under the FSIA have often pitted victims of terrorism against the Executive Branch. Under successive presidential administrations, the Justice Department repeatedly moved to quash writs of attachment issued by judgment creditors of Iran. Two frequently discussed and well-documented examples concern the efforts of Stephen Flatow to enforce his civil judgment, which culminated in litigation against the United States in this Court. *See Flatow II*, 74 F. Supp. 2d 18;

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that many of the world's leading financial institutions are agencies or instrumentalities of foreign nations and are therefore immune from jurisdiction of the United States Courts under the FSIA. *See* §§ 1603–1604. In *Peterson*, for example, this Court recently quashed writs of attachment issued upon Japan Bank for International Cooperation, Bank of Japan, and the Export Import Bank of Korea. *See Peterson III*, 563 F. Supp. 2d 268. Plaintiffs alleged that these three foreign banks posses Iranian assets, but this Court found that all three banks are foreign state entities that qualify for immunity from jurisdiction under the FSIA. For the same reasons, this Court quashed numerous subpoenas that plaintiffs had issued to those financial institutions and denied plaintiffs' request for the appointment of a receivership for any and all assets of Iran held by those foreign banks.

Flatow III, 76 F. Supp. 2d 16. In both cases, this Court had to deny plaintiff relief and thereby granted the federal government's motion to quash.

In the first case, plaintiff issued writs that purported to attach credits held by the United States for the benefit of Iran, including more than 5 million dollars in the United States Treasury Judgment Fund, which had been earmarked to pay an award issued in Iran's favor by the Iran-United States Claims Tribunal. *Flatow II*, 74 F. Supp. at 20. Plaintiff pointed to the Iranian Assets Control Regulations in support of his argument that money in the Treasury Judgment Fund should be considered Iranian property that is potentially subject to attachment and execution under the FSIA, 1610. *See id.* (citing 31 C.F.R. § 535.311 (1999)). In rejecting plaintiff's argument, this Court relied on *Buchanan* and *Blue Fox*, and held that funds in the United States Treasury—regardless of whether those funds have been set aside to pay a debt to Iran—remain immune from attachment by virtue of United States sovereign immunity. *Id.* at 21. "In other words, funds held in the U.S. Treasury—even though set aside or 'earmarked' for a specific purpose—remain the property of the United States until the government elects to pay them to who they are owed." *Id.* Accordingly, as the United States had not waived its sovereign immunity with respect to those funds that had been earmarked to pay a Tribunal Award or other debts to Iran, that money remained exempt from attachment or execution by virtue of federal sovereign immunity. *Id.* at 23; *see also Weinstein*, 274 F. Supp. 2d at 58 (holding that funds allegedly owed to Iran in the Treasury's Foreign Military Sales (FMS) Program are immune from attachment by virtue of federal sovereign immunity).

In the second case, plaintiff issued writs of attachment upon three parcels of real estate owned by Iran that once served as the Iranian Embassy and as residences and offices for Iran's diplomatic personnel. *Flatow III*, 76 F. Supp. 2d at 18. Additionally, plaintiff issued writs of

attachment upon two bank accounts that contained funds generated by the State Department's lease of Iran's diplomatic properties. *Id.* The first of the two accounts was used to pay for the maintenance and repair of Iran's properties. *Id.* at 19. The second account contained all the profits generated as a result of the lease of Iran's foreign mission properties. *Id.*

The United States promptly intervened and moved to quash the writs, arguing that real property and the related banks accounts were immune from attachment under the Foreign Missions Act, the FSIA, the IEEPA, the Vienna Convention on Diplomatic Relations, and Article II of the U.S. Constitution. *Id.* at 19. The plaintiffs countered that because Iran's former embassy properties were being managed and leased out to tenets by the Department of the State under the auspices of the Foreign Missions Act, 22 U.S.C. §§ 4301–4313, the property was being used for a "commercial activity" and therefore satisfied the requirements for attachment under § 1610(a)(7) of the FSIA. *See Flatow III*, 76 F. Supp. 2d. at 21.

Without reaching any of the more fundamental arguments raised by the government's motion to quash, this Court held that the leasing of Iran's real property by the United States did not qualify as a commercial activity in part because the United States' action in taking custody of Iran's property under the authority of the Foreign Missions Act "was decidedly sovereign in nature." *Id.* at 23; *see also Bennett*, 604 F. Supp. 2d at 169 (relying on *Flatow* to grant United States' motion to quash writs of attachment recently issued on Iran's foreign mission properties). For similar reasons, the Court found that the bank account that was used by the State Department's Office of Foreign Missions (OFM) for the maintenance and repair of Iran's real property was also immune from attachment because the funds within that account were expended by OFM in exercise of its statutory prerogative to provide for the upkeep properties that once housed Iran's foreign mission. *Flatow III*, at 24. This Court also found that the other account at

issue, which simply contained the profits earned on the lease of Iran's property, was immune from attachment as a result of federal sovereign immunity. *Id.*

In some frustration, this Court observed in *Flatow* that President Clinton's Administration, including President Clinton himself, had both publicly and privately expressed support for the victims of terrorism and for the plaintiffs in these terrorism cases specifically, and yet the Clinton Justice Department repeatedly fought efforts by these victims to enforce court judgments under the FSIA. *See Flatow II*, 74 F. Supp. 2d at 26; *Flatow III*, 76 F. Supp. 2d at 19–20. Moreover, as will be discussed below, President Clinton twice blocked reforms to the FSIA that would have subjected Iran's blocked assets to attachment and execution. *See infra* pp. 39–40; SUITS AGAINST TERRORIST STATES, *supra* note 4, at 10–12 (discussing President's exercise of waiver authority with respect to provisions that would have permitted attachment and execution upon frozen assets of state sponsors of terrorism); *see also Flatow*, 76 F. Supp. 2d 16 (noting President's first exercise of waiver in the interest of national security of provision that would have permitted attachment of blocked assets). In a letter to the *Washington Post* cited by this Court in two of its published decisions, Stephen Flatow documented his meetings with President Clinton, including private meetings and phone calls, as well as his meetings with other high ranking members of the Clinton Administration. *See* Stephen Flatow, *In This Case, I Can't Be Diplomatic; I Lost a Child to Terrorism; Now I'm Losing U.S. Support*, WASH. POST, Nov. 7, 1999, at B2. Mr. Flatow explained how he grew tremendously frustrated in his long pursuit of justice in which he received statements of support from the Executive Branch, as well as personal assurances of assistance, only to later find that the administration proved to be the most formidable adversary in his efforts to execute judgment upon the blocked assets of Iran. In

reflecting on his experiences some years later, Stephen Flatow referred to his litigation against the United States "as a real cat fight." Tucker, *Pain and Suffering*, *supra*.

As this Court observed how many plaintiffs struggled to enforce their court judgments in FSIA terrorism cases against Iran, this Court began to refer these judgments as "Pyrrhic Victories." *Eisenfeld*, 172 F. Supp. 2d at 9; *Flatow III*, 76 F. Supp. 2d at 27. Moreover, this Court expressed dismay over the fact that the rule of law was being frustrated in these actions. *Eisenfeld*, 172 F. Supp. 2d at 9. Allowing plaintiffs to go forward with suits under § 1605(a)(7) while not freeing up Iran's assets to satisfy those judgments under § 1610, or through the release of blocked assets under United States' control, was a quintessential example of the federal government promising with one hand what it takes away with the other. In fact, it is not uncommon for plaintiffs to receive mixed signals from Congress and the President in this highly-charged political context. *See, e.g.*, *Roeder*, 195 F. Supp. 2d at 145 (observing that the political branches of the Government "should not with one hand express support for the plaintiffs and with the other leave it to this Court to play the role of the messenger of bad news").

In view of the challenges that plaintiffs encountered in their efforts to execute judgments against the assets of state sponsors of terrorism here in the United States, Congress did make a number of efforts on behalf of the victims of terrorism to free up blocked assets for judgments under § 1605(a)(7). The first law enacted as part of this effort to free up assets of state sponsors of terrorism was included in the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999. Pub. L. No. 105-277, div. A, tit. I, § 117(a), 112 Stat. 2681-0, 2681-491 (codified at § 1610(f)(1)(A)). That measure created a new exception—§ 1610(f)—which allowed for the first time attachment and execution against blocked assets of state sponsors of

terrorism.[14] When Congress passed this measure, however, it also provided that the President could waive the provision "in the interest of national security." § 1610(f)(3). Upon signing the bill into law, President Clinton exercised that waiver authority. *See* Pres. Determ. No. 99-1, 63 Fed. Reg. 59,201 (Oct. 21, 1998). In doing so, the President stated:

> Absent my authority to waive section 117's attachment provision, it would effectively eliminate the use of blocked assets of terrorist States in the national security interests of the United States, including denying an important source of leverage. In addition, section 117 could seriously impair our ability to enter into global claims settlements that are fair to all U.S. claimants, and could result in U.S. taxpayer liability in the event of a contrary claims tribunal judgment. To the extent possible, I shall construe section 117 in a manner consistent with my constitutional authority and with U.S. international legal obligations, and for the above reasons, I have exercised the waiver authority in the in the national security interest of the United States.

Statement on Signing the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, 2 PUB. PAPERS 1843, 1847 (Oct. 23, 1998). Thus, § 1610(f)(1)(A)—which would have broadly subjected Iranian assets to attachment and execution—was rendered a nullity.[15]

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[14] Section 1610(f)(1)(A) of the FSIA has not changed in substance since its enactment in 1998. It was amended slightly by § 1083 of the 2008 NDAA in order to account for the repeal of § 1605(a)(7) and enactment of § 1605A. The exception now reads as follows:

> Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701–1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

[15] The Supreme Court has long recognized the important role that blocked assets can play in a President's efforts to manage a foreign policy crisis. *See Dames & Moore v. Regan*, 453

The following term, Congress passed the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), in which Congress again tried to subject blocked assets of state sponsors of terrorism to attachment of execution. Pub. L. No. 106-386, § 2002, 114 Stat. 1464, 1541. Specifically, Congress aimed in the VTVPA to resurrect § 1610(f)(1)(A) of the FSIA and thus repealed the waiver authority that was exercised by President Clinton under § 117(d) of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999. *See* § 2002(f)(2). Oddly enough, however, Congress replaced that earlier waiver provision with a new, and nearly identical provision, that again granted the President the authority to waive § 1610(f)(1)(A) "in the interest of national security." § 2002(f)(1)(B). Upon singing the VTVPA into law, the President again exercised the waiver authority, as granted by Congress, which again rendered § 1610 a nullity. Thus, § 1610(f) remains inapplicable in cases under the FSIA terrorism exception.

More significantly, the VTVPA also directed the Secretary of Treasury to pay the compensatory damages awarded in court judgments to plaintiffs in a limited number of FSIA terrorism cases against Iran or Cuba. § 2002(a). With respect to the payment of judgments against Iran specifically, the VTVPA directed the Secretary of Treasury to make those payments out of the rental proceeds that had been accrued as a result of the federal government's lease of

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U.S. at 673 (1980) (relying on *Propper v. Clark*, 337 U.S. 472, 493 (1949)). In *Dames & Moore*, the Court emphasized that blocked assets "serve as a 'bargaining chip' to be used when dealing with a hostile country." 453 U.S. at 673. Notably, the Court also observed how subjecting frozen assets "to attachments, garnishments, and similar encumbrances" would enable "individual claimants throughout the country to minimize or wholly eliminate this 'bargaining chip.'" *Id.* at 673. The efforts by Congress to subject the blocked assets of terrorists states to attachment and execution has been one of the most controversial issues pertaining to the FSIA terrorism exception. The tug of war between Congress and the President over this thorny issue serves as a great example of the ways in which the FSIA terrorism exception and its related enactments constitute a "delicate legislative compromise." *Price*, 294 F.3d at 86.

Iranian diplomatic and consular property and from appropriated funds "not to exceed the total of the amount in the Iran Foreign Military Sales Program account within the Foreign Military Sales Fund." § 2002(b).[16] Once an eligible plaintiff accepts a payment of compensatory damages from the United States Treasury on a judgment against Iran, the plaintiff's right to pursue that claim is "fully subrogated" to the United States. *Id.* As a result of the VTVPA, precisely ten cases against Iran qualified for payments from the United States Treasury. *See* TERRORIST ASSETS REPORT, *supra* note 2, at 12–15, app. A (discussing VTVPA program for payment of compensatory damage in judgments entered against Iran and Cuba and listing cases). *Flatow* was among the cases that qualified, and Stephen Flatow, along with plaintiffs in all of the nine other qualifying cases, opted to have their compensatory damages paid by United States. *See id.*; *see also* Tucker, *Pain and Suffering*, *supra* (discussing Stephen Flatow's acceptance of payment of compensatory damages from the United States Treasury and his ongoing efforts to enforce the punitive damages portion of his judgment against Iran). Subsequent legal enactments have expanded the number of cases with judgments against Iran that are eligible for payments from the United States Treasury. *See* Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 686, 116 Stat. 1350, 1411 (2002); Terrorism Risk Insurance Act of 2002 (TIRA), Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337–39.

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[16] The Foreign Military Sales (FMS) Program account for Iran is a United States Treasury account, subject to federal sovereign immunity, which contains funds relating to military transactions with Iran that pre-date the Iran-hostage crisis and which are currently the subject of ongoing litigation before the Iran-U.S. Claims Tribunal. *See Weinstein*, 274 F. Supp. 2d (discussing the FMS Program account and holding that federal sovereign immunity bars attachment); TERRORIST ASSETS REPORT, *supra* note 2, at 16–17 (discussing both the VTVPA and the FMS Program account).

In the TRIA, Congress not only expanded the class of plaintiffs eligible for payment from the United States Department of Treasury under the VTVPA, but, even more fundamentally, Congress finally succeeded in subjecting the assets of state sponsors of terrorism to attachment and execution in satisfaction of judgments under § 1605(a)(7). *See* § 201. The TRIA provides that "[n]otwithstanding any other provision of law," the blocked assets of a terrorist state are subject to attachment or execution to the extent of any compensatory damages awarded against that state under the FSIA terrorism exception. *Id.* The TRIA does, however, continue to exempt diplomatic and consular property from attachment and execution under § 1610. *See* § 201(d)(2)(B)(ii). Nonetheless, the TRIA has opened a wide range of blocked assets to attachment and execution by the judgment creditors of state sponsors of terrorism. Thus, the TRIA appears to represent something of a victory for these terrorism victims—whose interests have been most vigorously advanced by members of Congress—over the longstanding objections of the Executive Branch.

In the case of Iran, however, the simple fact remains that very few blocked assets exist. In fact, according to OFAC's latest report, there are only 16.8 million dollars in blocked assets relating to Iran. TERRORIST ASSETS REPORT, *supra* note 2, at 14, tbl. 1. This amount is inconsequential—a mere drop in the bucket—when compared to the staggering 9.6 billion dollars in outstanding judgments entered against Iran in terrorism cases as of August 2008, which is the last time the Congressional Research Service compiled data on this issue. *Id.* at 75, app. B, tbl. B-1. The amount of Iranian non-blocked assets within the United States, as reported to OFAC, is similarly inconsequential in comparison to Iran's liability under the FSIA terrorism

exception. According to OFAC, the amount of non-blocked Iranian assets is merely 28 million dollars. *Id.* at 15, tbl. 3.[17]

The billions of dollars in liability that Iran now faces is likely to increase tremendously as a result of the new federal cause of action under § 1605A, which now includes punitive damages. Thus, Congress has continued to fuel expectations in these actions by broadly subjecting Iran to suit for sponsorship of terrorism while simultaneously ignoring the fact that the prospects for recovery are virtually nonexistent. This fundamental problem is an issue that the Court will explore later in this opinion in Part K below.

[17] In fairness, it is important to emphasize here that "there is no requirement for U.S. persons to report non-blocked assets to OFAC." TERRORIST ASSETS REPORT, *supra* note 2, at 10. Thus, arguably, there could be any number of undisclosed, non-blocked Iranian assets within the jurisdiction of the United States courts. In light of the lack of formal relations between Iran and the United States, however, the prospect of large sums of Iranian assets being located within the jurisdiction of the federal courts seems remote.

B.

SECTION 1083 OF THE 2008 NDAA AND THE CREATION OF A NEW TERRORISM EXCEPTION, SECTION 1605A

In light of the significant setbacks that plaintiffs experienced in actions under § 1605(a)(7), Congress implemented a number of major reforms last year. Section 1083 of National Defense Appropriations Act (NDAA) completely repeals § 1605(a)(7) and replaces that provision with a new statute, § 1605A. As noted above, it is important to keep in mind that the exception to foreign sovereign immunity under the new provision, § 1605A, is identical to that which is contained in § 1605(a)(7), but this new law is more comprehensive and more favorable to plaintiffs because it adds a broad array of substantive rights and remedies that simply were not available in actions under § 1605(a)(7).

As noted above, § 1605A accomplishes four basic objectives. This new terrorism statute (1) furnishes a cause of action against state sponsors of terrorism; (2) makes punitive damages available in those actions; (3) authorizes compensation for special masters; and (4) implements new measures designed to facilitate the enforcement of judgments. Each of these four key aspects of § 1605A will now be discussed in turn.

1. New Federal Cause of Action

With respect to the first objective, the new law now expressly provides that designated state sponsors of terrorism may be subject to a federal cause of action for money damages if those terrorist states cause or otherwise provide material support for an act of terrorism that results in the death or injury of a United States citizen or national. *See* § 1605A(c). This new federal right of action for money damages abrogates *Cicippio-Puleo*, 353 F.3d 1024, and is a

K.

A CALL FOR MEANINGFUL REFORM

The most difficult issues confronting this unique area of the law relate to how plaintiffs in these FSIA terrorism cases might enforce their court judgments against the Islamic Republic of Iran. While this highly charged topic of debate has been the subject of numerous legislative proposals and enactments over the last decade—and is again the subject of many of the most recent reforms implemented by the 2008 NDAA—very little has been achieved. Today, the overwhelming majority of successful FSIA plaintiffs with judgments against Iran still have not received the relief that our courts have determined they are entitled to under the law.[44]

In speaking to this critical issue today in light of the nineteen civil actions addressed in this opinion—and the more than one thousand American victims of Iran-sponsored terrorism that these actions represent—the Court fully appreciates first and foremost the delicate nature of the political compromise the FSIA terrorism exception embodies. "While such legislation had long

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[44] This Court's observations and comments in this part of the opinion and throughout relate only to civil actions against the Iran under the FSIA terrorism exception. The Court therefore does not express any views with respect to the viability of actions against other state sponsors of terrorism. While it appears that similar issues as those that impact actions against Iran may also be present in civil actions against other state sponsors of terrorism under either § 1605(a)(7) or § 1605A, cases against Iran face a number of unique challenges, such as the Algiers Accords and the establishment of the Iran-United States Claims Tribunal, which make it particularly difficult for plaintiffs to recover in these actions. Finally, the vast majority of cases that have been filed in this Court under the FSIA terrorism exception, have been filed against Iran. Thus, this Court does not want to assume problems or issues in other FSIA terrorism cases in which it has much more limited experience.

Additionally, it should be noted that the Court's opinion today concerns only the FSIA terrorism exception. This Court does not address the Antiterrorism Act, 18 U.S.C. §§ 2331–38; the Torture Victim Protection Act, 28 U.S.C. § 1350 note; the Alien Tort Claims Act, 28 U.S.C. § 1350; or any other civil statutes that may permit civil actions for personal injury or death caused by terrorist acts.

been sought by victims' groups, it had been consistently resisted by the executive branch." *See Price*, 294 F.3d at 89 (citations omitted). As our Court of Appeals has emphasized, certain features of the terrorism exception "reveal the delicate legislative compromise out of which it was born." *Id.* Among these is the restriction providing that only "state sponsors of terrorism," as officially designated by the State Department, may be subject to suit under the terms of the statute. *Id.* (citing § 1605(a)(7)(A) (repealed)). Additionally, only United States nationals are entitled to file lawsuits under the statute, and the offending state must be given a reasonable opportunity to arbitrate any claims based on an incident that occurred within its borders. *Id.* (citing § 1605(a)(7)(B) (repealed)).

In this Court's view, however, the compromise is perhaps best evinced by the resistance of the Executive Branch to legislation permitting the execution of court judgments through assets of state sponsors of terrorism. As discussed in Part A, *supra*, the enforcement of judgments through the attachment and execution of the assets of terrorist states, whether those assets are blocked or not, has been a particularly controversial issue, and it is one that has been tackled continuously in legislative enactments almost since the inception of the FSIA terrorism exception ten years ago. For instance, the enactment of the VTVPA, the TRIA, and now § 1083 of the 2008 NDAA, which provides the most sweeping judgment enforcement authority to date, illustrates the gradual progress that terrorism victims have achieved though Congress over the Executive Branch in their efforts to obtain more power to enforce judgments under the FSIA terrorism exception. Thus, § 1083 is just the latest chapter in what has been a longstanding political debate over how best to achieve some measure of justice for these victims.[45]

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[45] Executive Branch resistance to legislation permitting the enforcement of judgments through the assets of terrorist states is probably best documented in SUITS AGAINST TERRORIST

In view of the incremental nature of these reforms as meted out through the political process over the years, perhaps the Court's words here will make little difference. This Court is certainly mindful of its limited authority under Article III, and this Court certainly does not wish to wade into the politics of these matters, but it is precisely because this Court's authority is so very limited in this context that this Court has grown increasingly frustrated by the way the political process has treated the terrorism victims in these cases under the FSIA. The experience of this Court in presiding over these actions for over a decade now has revealed that the political compromise achieved through the FSIA terrorism exception and its related enactments is superficial, filled with contradictions, and utterly in denial of practical and political realities—to say nothing of separation-of-powers problems—that courts can do little to address. Moreover, if this Court's experience in any indicator, the most recent reforms in § 1083 are not only destined to fail, but these new measures may even make matters worse.

To be sure, the changes to the FSIA enacted through § 1083 of the 2008 NDAA appear, on the surface at least, to be extraordinarily advantageous to plaintiffs. The direct cause of action contained in the new terrorism exception § 1605A will make it easier for most plaintiffs to file and litigate cases against Iran, and the availability of punitive damages in these actions creates a tremendous incentive for these lawsuits. With respect to the substantial problems plaintiffs in these actions have encountered in their efforts to execute judgments, the provision allowing for prejudgment liens of lis pendens, *see* § 1605A(g), and the new measures added to § 1610 that purport to limit the applicability of both foreign sovereign immunity and United States sovereign

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STATES, *supra* note 4, at 7–23.

immunity are the most significant legislative initiatives to date that aim to overcome the inability of plaintiffs to execute judgments against Iran.

From the bench of this Article III Judge, however, what the Court sees in § 1083 is not so much meaningful reform, but rather the continuation of a failed policy and an expansion of the empty promise that the FSIA terrorism exception has come to represent. Through the enactment of § 1083, the political branches have promoted or otherwise acquiesced in subjecting Iran to sweeping liability while simultaneously overlooking the proverbial elephant in the room—and that is the fact that these judgments are largely unenforceable due to the scarcity of Iranian assets within the jurisdiction of the United States courts. As noted Part A, *supra*, few Iranian assets remain with the jurisdiction of the United States courts since the transfer of those assets out of the United States was accomplished in 1981 in fulfillment of the Federal Government's obligations under the terms of Algiers Accords. OFAC's latest report on blocked assets indicates that the total value of blocked assets relating to Iran in the United States is approximately 16.8 million dollars, an infinitesimal amount in comparison to the more than 9.6 billion dollars in civil judgments against Iran under the FSIA terrorism exception. *See* TERRORIST ASSETS REPORT, *supra* note 2, at 14, tbl. 1. Similarly, OFAC's records suggest that there are very few non-blocked assets within the United States—perhaps no more than 28 million dollars worth. *See id.* at 15, tbl. 3.

Even if one assumes, however, that there are sufficient Iranian assets within the jurisdiction United States courts to satisfy the billions of dollars in judgments entered in these civil suits, proceedings before this District Court have revealed that whatever non-blocked assets might be found may be held by certain large financial institutions that are in fact agencies of instrumentalities of other foreign nations, which are in and of themselves subject to sovereign

immunity under the FSIA**.** *See* § 1604. Indeed, this is precisely the problem that foiled plaintiffs' efforts to enforce their judgment in *Peterson*; it is the sovereign immunity from jurisdiction afforded to the financial entities of other foreign states—and not of Iran—that frequently frustrates recovery. *See Peterson III*, 563 F. Supp. 2d 268 (quashing writs of attachment issued against Japan Bank for International Cooperation, the Bank of Japan, and the Export and Import Bank of Korea).

Moreover, plaintiffs still have the burden of proving Iranian ownership—whether beneficial or otherwise—of the assets at issue, which can be extraordinary challenging in this context.[46] In this regard, this Court observes that § 1610(g) expressly protects the rights of third parties in actions to levy or execute upon a judgment entered against Iran. Section 1610(g)(3) states:

> Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to the judgment in property subject to attachment in aid of execution or execution upon such judgment.

Thus, the tremendous complexities and challenges with respect to proving Iranian ownership of the assets in this thorny context are likely to persist.

Finally, United States sovereign immunity will remain an issue under § 1610(g), as nothing prevents the President from seizing Iranian assets and vesting title to them in the U.S. Treasury, as Presidents have often done in the interest of important foreign policy objectives.[47]

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[46] *See Flatow v. Islamic Republic of Iran*, 67 F. Supp. 2d 535 (D. Md 1999) (quashing writs of attachment issued against the Alavi Foundation and rejecting argument that this separately incorporated entity should be considered an agent or alter ego of the Iranian Government). For more detailed analysis of the difficulties of establishing foreign state ownership in these actions, see SUITS AGAINST TERRORIST STATES, *supra* note 4, at 54–59.

[47] *See, e.g.*, *Smith v. Fed. Reserve Bank of N.Y.*, 346 F.3d 246 (2d Cir. 2003). In *Smith*,

Accordingly, the language in § 1610(g)(2) purporting to render United States sovereign immunity "inapplicable" may be of utility because, while it speaks to sovereign immunity that might be inferred by virtue of the Federal Government's regulation of assets under either the Trading with the Enemy Act or the International Emergency Economic Powers Act, it does not abrogate United States sovereign immunity with respect to funds held in the United States treasury.[48]

In terms of real and tangible property that Iran owns in the United States, much of it was once used for diplomatic or consular purposes by Iran and is therefore subject to the Vienna Conventions on Diplomatic and Consular Relations. This property is thus immune from

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the Court held that certain blocked assets of Iraq were not susceptible to attachment because the President had, in the interest of national security, confiscated those assets and vested title to those assets in the United States Treasury.

[48] This Court is not overlooking the possibility of execution of judgments through enforcement proceedings in foreign jurisdictions, as least one scholar has recently suggested as a still-viable means of recovery in these actions. *See* Strauss, *supra*, at 307 (arguing for broader, multilateral approach to suits against sponsors of terrorism with leadership from the United Nations and other international organizations, and involving courts worldwide, that would enable victims of terrorism to more effectively execute civil judgments in foreign jurisdictions). The possibility of widespread enforcement of these terrorism judgments in foreign jurisdictions is a difficult prospect in these actions, as Professor Strauss concedes. *See id.* at 325–327 (discussing reluctance of foreign courts to honor U.S. terrorism judgments); *see also* Michael T. Kotlarczyk, Note, *"The Provision of Material Support and Resources" and Lawsuits Against State Sponsors of Terrorism*, 96 GEO. L. J. 2029 (2008). Mr. Kotlarczyk discusses the difficulties in enforcing judgments against liable states respect and stresses how terrorism cases under the FSIA terrorism exception lack legitimacy under international law. Kotlarczyk, *supra* note 48, at 2044–47. "The United States remains essentially alone in international law in applying the jurisdiction of its civil courts to actions performed overseas by foreign sovereigns." *Id.* at 2047.

More fundamentally, however, the continued focus in Congress on the private litigation model, and ad hoc litigation fixes around the failed concept, may be limiting the opportunity for the types proposals that can result in more meaningful and systemic reforms. In short, the focus on the terrorism exception is a distraction from the long-term, practical, and political dilemmas that challenge this area of the law.

attachment and execution because it is currently being held in protective custody by the Department of State under the auspices of the Foreign Mission Act. *See, e.g.*, *Bennett*, 604 F. Supp. 2d 152.[49]

In sum, § 1610(g) is unlikely to be the cure-all that some plaintiffs perceive it to be. As with past measures intended to help victims execute judgments, a myriad of legal issues still await to befuddle plaintiffs at every turn. Thus, these victims will continue to struggle in their attempts to execute court judgments, whether those efforts involve the very limited disclosed Iranian assets known to OFAC or other yet-undisclosed Iranian property that may or may not be within the jurisdiction of the courts of the United States.[50]

The lack of available Iranian assets to satisfy court judgments has contributed to a rather harsh and unseemly unfairness in these actions because a few dozen plaintiffs in the earliest

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[49] Recent OFAC estimates indicate that the total value of Iran's diplomatic property, to include any remaining furnishings for that property, is unlikely to exceed 23.2 million dollars. Again, this figure represents little more than a drop in the bucket when compared to the nearly 10 billion dollars owed judgment creditors of Iran under the FSIA terrorism exception.

[50] The Court recognizes that plaintiffs are optimistic that § 1610(g) is a tool that will finally enable them to execute judgments, and it appears that some victims have invested a great deal of emotional stock in this provision. *See* Strauss, *supra*, at 331–336, 354–355 (discussing § 1083 of the 2008 NDAA, and in particular the measures now codified at § 1610(g), and observing positive reactions expressed by the victims upon the signing of the law). As Professors Strauss observes: "Victims of terrorism and their families have praised the new law and voiced their intention to put it quickly to action." *Id.* at 335. Professor Strauss quotes Lynn Derbyshire, who serves as national spokesperson for the victims of the Beirut Marine Corps Barracks Bombing, as stating: "'Our focus now turns back to the court system, where we intend to move vigorously and rapidly to identify and attach the $2.6 billion in Iranian assets' awarded by the U.S. Court to the victims and their families.'" *Id.* It is precisely because these victims appear to have placed so much emotional stock in this provision, however, that this Judge finds that it is important to speak candidly about the continuing problems that await these victims in their efforts to execute judgments in these cases. This Court believes it is especially important to engage in an honest dialog with these victims who have waited so long for justice; it hopes our political leaders will do the same.

cases managed to obtain compensation for their losses, but hundreds of other equally deserving victims of terrorism—including the more than one thousand plaintiffs in the actions considered in today's decision—have gotten nothing. As noted in Part A, *supra*, the VTPVA directed the Secretary of the Treasury to pay the compensatory damages portion of court judgments entered in a select number of cases against Iran. Under the terms of the VTPVA, payments of compensatory damages in qualifying cases were made from either funds that had accrued as a result of the Federal Government lease of Iran's diplomatic and consular properties or from appropriated funds up to the total amount of funds contained in Iran's FMS Program account. Ultimately, plaintiffs in 16 cases against Iran received payments of compensatory damages. *See* SUITS AGAINST TERRORIST STATES, supra note 4, at p. 11–23, app. A. By as early as 2004, however, the funds made available for payment to plaintiffs under the VTVPA were totally exhausted and the program has not been continued. *Id.* at app. A.

Thus, there has not only been a race to this federal courthouse in these civil actions, but there also appears to have been something of a race across the street to Capitol Hill. In the end, the terrorism victims who had access to a Congressman or a Senator—or who could otherwise afford to spend the time or money to lobby Congress—obtained millions of dollars in compensation under the VTVPA program, but those victims who were not able to get in early and gain access to Congress have been left to fend for themselves. This inequitable result is not only unseemly, it is just plain wrong.[51]

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[51] *Washington Post* Staff Writer Neely Tucker has reported extensively on terrorism lawsuits in this Courthouse and on suits against Iran in particular. *See, e.g.*, Neely Tucker, *Iran Hostages Seek Suit's Reinstatement; Case Reflects Hill-White House Divide*, WASH. POST, May 13, 2003, at A10; Neely Tucker, *Iran Stands on Trial in 1983 Suicide Bombing in Beirut*, WASH. POST, Apr. 8, 2003, at A9. Mr. Tucker's work *Pain and Suffering; Relatives of Terrorist Victims Race Each Other to the Court, but Justice and Money are Both Hard to Find*, *supra*, is

The harsh reality is that the promise of relief in these actions—if there ever was one—is more distant and seemingly illusory today than it was when this exercise started more than a decade ago, when judgment creditors in these terrorism cases first encountered resistance in their efforts to execute judgments against Iran. The reforms enacted through § 1083 of the 2008 NDAA to the FSIA terrorism exception and related provisions in § 1610 are in all likelihood destined to fail because these changes remain premised on the same flawed private litigation concept that has proven unworkable since the original terrorism exception was first enacted in 1996. In fact, the availability of punitive damages under § 1605A, when combined with the authorization in § 1083(c) for claims that were compromised or failed on state law grounds under § 1605(a)(7) to now be reinstated as federal causes of action under § 1605A, means that both the total amount of liability and the overall quantity of civil judgments against Iran is likely to increase exponentially, and in short order. Indeed, in the immediate aftermath of the enactment of § 1083, dozens of new cases against Iran were filed in this Court. With virtually no Iranian assets within the jurisdiction of our courts to satisfy judgments in these many additional cases, the great travesty in all this is that our political branches have essentially told victims of terrorism to continue their long march to justice down a path that leads to nowhere.

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particularly insightful. In it, Mr. Tucker chronicles the plight of terrorism victims, to include Stephen Flatow and many others, in their struggles to achieve justice though civil lawsuits under the FSIA terrorism exception. Mr. Tucker reports on interviews with these victims, which adds a human touch that is often missing in the discussion of these terrorism lawsuits. More significantly, Mr. Tucker's article highlights the perils, contradictions, and unintended consequences that victims face in these actions. His reporting on the race to the courthouse and Congress, in which victims compete against each other for what limited assets might be available, that helped this Court to see the inherent and unseemly unfairness that these actions create among the victims.

Beyond the scarcity of Iranian assets, however, there are a number of other fundamental problems that confront these actions against Iran under the FSIA terrorism exception. In terms of United States foreign policy and national security objectives, one of the perverse outcomes of Congress' legislative victories over the Executive Branch is that what limited resources might have served as a bargaining chip that the President could have used in dealings with Iran are now subject to depletion as a result of the TRIA. These frozen assets, once at the disposal of the President in his management of foreign policy crises under the IEEPA and other authorities, are now largely subject to the jurisdiction of the Article III courts to be divided up among what few plaintiffs first lay claim to them in satisfaction of judgments under § 1605(a)(7) or § 1605A.[52]

Finally, because of the potential for these lawsuits to interfere with the foreign policy prerogatives of the President, another fundamental problem is that these actions have often pitted victims of terrorism against the Executive Branch, engendering a tremendous amount of acrimony in these victims toward the Federal Government, and, at times, the President. Beyond the wrangling back and forth over legislative initiatives intended to aid victims in these lawsuits—which is best exemplified by the blocked assets issue, discussed Part A, *supra*,—the victims in these cases often face stiff resistance in court from Department of Justice lawyers. In fact, in the absence of Iran, which never shows to defend itself in these actions, the Federal Government has turned out to be the number one adversary of these victims in litigation before this Court.

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[52] Another troubling aspect of litigation under the FSIA terrorism exception is that it appears to have spurred on reciprocal lawsuits in the courts of Iran against the United States for actions allegedly committed against Iran and its citizens by United States agencies and officials. *See* Tucker, *Pain and Suffering*, *supra* (discussing antiterrorism lawsuits in the Iranian courts against the United States).

As noted in Part E, *supra*, the victims of the Iran hostage crisis—and their backers in Congress—have been opposed repeatedly by the Federal Government in their efforts to sue Iran in this Court. The administration has consistently maintained that such a lawsuit is barred by the Algiers Accords. Similarly, as noted in Part A, *supra*, successive presidential administrations have intervened to quash writs of attachment issued by judgment creditors of Iran against Iranian diplomatic properties here in Washington, DC and against other assets under the control of either the Department of State or the Department of Treasury. Thus, victims of Iran-sponsored terrorism have grown increasingly frustrated as the Department of Justice has repeatedly opposed them in this context and defeated them in litigation. This frustration has been exacerbated by the fact that many high-level Executive officials, to include the President at times, have expressed sympathy for these victims and have even made public pronouncements of support for their cause, thereby sending mixed, and even outright contradictory signals.

The Executive Branch, in its dealings with Congress and in litigation before this Court, often takes the position that these actions threaten to undermine United States foreign policy and national security interests, both with respect to Iran specifically, as well as with respect to our relations with other nations more broadly. The victims in these cases counter with what are often extremely emotional retorts to the Executive Branch's opposition. In frustration and anger, the victims, their lawyers, and even some members of Congress, have unfairly accused the Administration of defending Iran and siding with terrorists. While such extreme rhetoric undoubtedly reveals the depth of the frustration experienced by the victims in these civil actions against Iran, it inaccurately characterizes the position of the Executive Branch and the true nature of the interests at stake in these important actions. What the victims, their attorneys, and backers in Congress apparently fail to see, or perhaps conveniently overlook, is that these actions

frequently run into direct conflict with other sources of law, including bilateral Executive agreements, multilateral treaty obligations, and numerous other statutory and regulatory authorities relating to foreign policy and the President's powers to manage national security crises.

Nonetheless, the victims in these lawsuits are right to feel abandoned and frustrated to a certain extent. After all, these Americans are merely pursuing justice under the terms of a federal statute that, twice now, the Congress has passed and two Presidents have signed. Yet, in taking action in accordance with that federal law, these victims are all too frequently stopped in their tracks by their own Government, which quickly and poignantly reveals in open Court, that the promise of justice that they thought they had achieved in the FSIA terrorism exception is nothing more than an illusion.

In the end, both the victims of terrorism and the Federal Government each have valid concerns—and both sides are ultimately seeking to achieve the same broad objectives of holding terrorists accountable and eliminating terrorism against United States nationals—but the private litigation model for resolving these terrorism claims has had the very unfortunate consequence of casting the United States Government and American victims of terrorism as constant and bitter adversaries. This cold reality will undoubtedly continue under § 1605A.

As Congress usually backs the victims in their desire to press forward with lawsuits against Iran in the courts, the FSIA terrorism exception has had another unfortunate consequence of turning these already extraordinary lawsuits against a foreign power into high stakes contests between the two political branches. As this inter-branch feud over terrorism suits has heated up over the years, the Executive Branch and Congress have in essence waged a war by proxy against one another through these FSIA terrorism lawsuits. As difficult separation-of-powers

problems and other challenging legal questions loom large in these supercharged actions, the victims are often relegated to the role of bystanders, stuck in the middle, caught up, and emotionally torn up in the cross-fire of an inter-branch political feud turned-litigation event.

But it is not only the victims who are caught up in the middle of this volatile political mix; this Court itself is also stuck in the middle and forced to referee these highly charged and highly political disputes. Like the victims, this Court finds itself relegated to the role of a powerless and frustrated bystander at times because under Article III this Court has neither foreign affairs powers nor any of the plenary authorities that are rightly vested in the political branches under our Constitution. It is these powers of governance, and not the powers of the courts, that must be used to help these victims overcome the significant challenges they face. Thus, this Court is caught in something of a political quagmire in which it is called upon to consume judicial resources chewing on novel legal issues and jurisprudential problems while carefully dodging delicate political questions. All the while the victims in these actions are no closer to justice. More fundamentally, respect for this Court and for the rule of law are undermined as judges in these actions are cast as the perennial bearers of bad news and as the designated apologists for the meaningless charade that our the political branches have created.

All these problems might be easy enough to ignore, if it were not for the real people involved. As this Court and others continue to wrestle with and mete out judicial solutions to the variety of legal issues that stem from this delicate political compromise that is the terrorism exception to foreign sovereign immunity, it can be all too easy to lose sight of the human beings whose lives have been torn apart. These victims have poured much of their emotional energy and time, to say nothing of their financial resources, into these civil cases in the hope of finding justice for themselves and for the loved ones they have lost due to terrorist violence. Over the

last decade, this Court has listened to live testimony of these victims in dozens of tragic cases, and this Court will not forget—and no one familiar with the harsh and intimate details of these cases could ever forget—the stories these victims have to tell of lives destroyed by unjustifiable violence committed against them or their family members and against the laws of all civilized nations.

These Americans pour their hearts out in these actions, and yet with more than ten years gone by now, the notion of suing the terrorists out of business has not been realized, and the vast majority of victims have not collected so much as a dime on their court judgments against Iran. In fact, as discussed Part A, *supra*, it was almost ten years ago to this date that this Court regrettably had to deny some of Stephen Flatow's first efforts to execute his civil judgment. This Court held that Mr. Flatow could not attach certain Iranian diplomatic property and related bank accounts. *See Flatow III*, 76 F. Supp. 2d 16. Following that tough decision, the *Washington Post* published an editorial in which it called for the repeal of the FSIA terrorism exception. The *Post* stated in part:

> Judge Lamberth quashed an effort by a man whose daughter was killed in a suicide bombing in the Gaza Strip to satisfy a judgment he had obtained against Iran by tapping such frozen assets as that country's old embassy. The opinion is not just, but it is correct. The executive branch's ability to conduct foreign policy simply must trump the right of any individual plaintiff to collect money damages against a sovereign state.
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> . . .
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> The administration and Congress both deserve blame for a law that is, in large measure, a lie. Because frozen assets—whether consular or otherwise—are tools of foreign policy, the executive branch has to resist their being turned over to private plaintiffs. Congress never should have passed, nor President Clinton signed, a law that could only offer Mr. Flatow justice by depriving the administration of control over important instruments of foreign policy. This law should be repealed.

Editorial, WASH. POST, Dec. 26, 1999, at B6.

While this Court will not go so far as to call for an outright repeal of the terrorism exception, this Judge has come to the conclusion, after careful deliberation and reflection, that substantial reforms in the law are needed with respect to civil actions against Iran. This judge has taken a special interest in these cases since their inception, and after presiding over these actions for over ten years now, this Court has grown increasingly troubled by the fact that no matter how hard they struggle—and struggle they must—it is virtually impossible for the victims in these terrorism cases to collect on the civil judgments entered against Iran in this Court.

Thus, as a measure devised to achieve justice for victims, the FSIA terrorism exception has failed, and judged by the plaintiffs before the Court today, it has failed one thousand times over and seems all but certain to fail again, unless a real—rather than a superficial and politically convenient solution—is found, and found soon. Our political branches should not continue to tell victims of terrorism to come into this Court in search of justice for unspeakable harms that they have suffered at the hands of terrorists when our political leaders know, or should know, that these lawsuits will not offer redress of any kind for the vast majority of victims in these actions against Iran. In fact, to the extent any of the judgments have been paid in these cases, those payments have come from U.S. Treasury funds under the VTVPA, and these costs may ultimately be borne by U.S. taxpayer. Thus, Iran has not been held accountable and the vast majority of victims have not received compensation of any kind. In the final analysis, the terrorism exception is at best an empty promise, and at worst, it is a provision that has demoralized—and in some ways exploited—these victims of horrific acts of violence.

By other important measures, the private litigation model as a means to resolve terrorism cases against Iran has not achieved success. It has not deterred Iran. Today, Iran is still the world's foremost sponsor of terrorism, and the same oppressive regime is in power and appears

committed to staying in power at all costs. United States relations with Iran remain openly hostile, and it appears that this is likely to continue into the foreseeable future. Thus, if the goals of the FSIA terrorism exception are justice in terms of compensation for victim and accountability for Iran, as well as deterrence of Iran from its material support for terrorists, civil litigation against Iran has not brought our nation any closer to these goals today than we were when the terrorism exception was first enacted in 1996. Yet, in addition to imposing tremendous costs on the victims who have invested their hopes, time, money, and emotions into these lawsuits, civil litigation against Iran in this context has undermined the President's ability to handle some of our most sensitive foreign relations matters, exposed the United States to reciprocal lawsuits in Iran, and wastefully consumed the resources of our Courts here at home.

Now today, in 2009, and ten years after this Court first found itself in the disquieting predicament of having to quash the first efforts of victims to enforce judgments achieved in this Court under the original version of the FSIA terrorism exception, this Court finds itself committed to a new round of litigation under the terms of § 1083 of the 2008 NDAA and a new, and supposedly improved, FSIA terrorism exception, § 1605A. Candidly, this Court has grown increasingly frustrated as the political branches have now enabled new lawsuits and new claims against Iran to populate this Court's docket without first addressing the more fundamental problems that will again condemn these actions, if successful before this Court, to the status of "Pyrrhic victories." Quite simply, this is déjà vu all over again.

The new terrorism exception § 1605A—much like § 1605(a)(7) before it—is in many respects a lie. The truth is, as long as civil litigation is the means by which our political branches choose to redress the harms suffered as a result of terrorism sponsored by Iran, the victims in these cases will continue to be unwitting participants in a meaningless charade. And let no one

forget that both political branches are responsible for this problem, as Congress drafted both the original and the most recent version of the state sponsor of terrorism exception, and now two different Presidents, one Democrat, and one Republican, signed these provisions into law. Accordingly, the frustrations and anger of the victims in these actions, which are often manifested in emotional outbursts and extreme rhetoric directed toward the Executive, are in many ways a direct result of the overblown expectations that the political branches have themselves created.

What this Court hopes our political branches will realize and appreciate today is that it is extraordinarily difficult to tell these victims that the rights and remedies they believe they are entitled to under the FSIA terrorism exception either do not exist or cannot be enforced. These victims have been waiting for years, and, in many cases, decades, for justice. How much longer should this meaningless kabuki dance continue?

This is not the first time that this Court has been critical of the FSIA terrorism exception and nothing said here is all that original. Numerous commentators in the legal community, among others, have called for the repeal of the terrorism exception or have otherwise proposed significant reforms intended to improve this provision of law that virtually all recognize has not achieved redress for victims of terrorism.[53] More significantly, there have been some efforts at

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[53] *See, e.g.*, Kotlarczyk, *supra* note 48, at 2030 (arguing that the "provision of material support and resources" clause of the FSIA terrorism exception should be eliminated thereby limiting suits to those case in which the state or its officials have directly participated in a specified act of terrorism); Keith Sealing, *"State Sponsors of Terrorism" Is a Question, Not an Answer: The Terrorism Amendment to the FSIA Makes Less Sense Now Than it Did Before 9/11*, 38 TEX. INT'L L.J. 119, 122 (2003) (arguing for the outright repeal of the FSIA terrorism exception); Jonathan Fischbach, Note, *The Empty Pot at the End of the Rainbow: Confronting "Hallow-Rights Legislation" After Flatow*, 87 CORNELL L. REV. 1001 (arguing that, in addition to the existing jurisdictional requirements for an action under the FSIA terrorism exception, jurisdiction should also be predicated on a court determination that there are sufficient assets

systemic reforms introduced in Congress in recent years in the form of proposals for alternative compensations scheme that shift away from the private litigation paradigm. Most of these proposals would have established what would in essence function as a government insurance program in which qualifying victims of terrorism and their loved ones could file claims with the government for compensation. To date, none of these proposals has gotten any traction on Capitol Hill.[54]

Perhaps nothing said here can add to what has already been stated by legal commentators, critics, and those that have explored alternative proposals on the Hill and in other policy-making circles, but unlike political leaders, academic pundits, and media commentators, this Court has the benefit of years of experience—difficult experience—with these cases. By just looking at these actions on the Court's docket, this Court sees today all too clearly just how unsustainable these actions have become. Our political branches have opened the floodgates to even greater numbers of actions against Iran and have added the lure of punitive damage awards. Reforms are needed now before things get out of hand. This Court senses the enactment of § 1083, which greatly expands the failed private litigation concept and all its pitfalls, while combined with the start of a new Administration—one which has promoted a policy of engagement with Iran and

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available to satisfy any money judgment awarded in such an action). *But see* Strauss, *supra*, at 307 (arguing that a multilateral strategy focused on both the freezing of assets and civil litigation against terrorist groups and states would serve as the most effective deterrent of international terrorism and would best ensure justice for terrorism victims).

[54] The proposals introduced in Congress recently, including a comprehensive alternative compensation scheme proposed by Bush Administration, are well documented in SUITS AGAINST TERRORIST STATES, *supra* note 4, at 20, 23, 47. *See also* Kotlarczyk, *supra* note 48, at 2044 (suggesting a terrorism victim compensation fund similar to the September 11th Victim Compensation Fund as an alternative to civil actions under the FSIA state sponsor of terrorism exception).

with the Middle East more broadly—may offer something of a perfect storm, which may perhaps serve as the perfect opportunity to accomplish something meaningful for the victims in these tragic cases.

Looking back on these matters now, the Court cannot help but see the wisdom in two of Justice Rehnquist's opinions, both of which formed part of this Court's analysis of issues addressed earlier in today's decision, *see* Parts A & E, *supra*, and appear particularly relevant now to the Court's request of our political leaders to find meaningful reform. The first is Justice Rehnquist's opinion for the Court in *Dames & Moore*, 453 U.S. 654, and the second is the Justice's dissenting opinion in *Sioux Nation*, 448 U.S. 371.

Dames & Moore is most relevant for a number of reasons. Historically speaking, the decision documents the Iran Hostage Crisis and upholds the Algiers Accords and related Executive actions taken to bring about the end of that crisis, including, most importantly, the transfer of Iranian assets outside the jurisdiction of the United States courts and the settlement of claims of United States nationals. Thus, *Dames & Moore* reveals the inviolability of the Algiers Accords and related Executive actions as large stumbling blocks standing in the way of meaningful redress of terrorism claims against Iran. More significantly, Justice Rehnquist's opinion for the Court underscores the very limited powers of Article III Courts to resolve issues relating to a foreign policy crisis and places emphasis on the role of Executive power and discretion in the resolution of sensitive matters with hostile nations like Iran. Indeed, since the implementation of the Algiers Accords, the ability of the political branches—particularly the Executive—to manage our hostile relations with Iran has been in a constant state of tension with the desire of United States nationals to assert claims against Iran for acts of terrorism. This is an inherent tension under our Constitution that this Court is not at liberty to resolve.

Finally, what this Court sees as an essential take-away from *Dames & Moore* is the discussion of the history of the longstanding practice of Executive claims settlement as a means to redress claims of United States nationals against foreign sovereigns. As Justice Rehnquist's discussion points out, Executive settlement of claims is a practice that reaches far back to the time of President George Washington, and numerous other American Presidents have exercised this authority consistently throughout our history. *See* 453 U.S. at 679–688. Moreover, as the Court's opinion observes, Executive claims settlement is a practice that has been reinforced by Congress though statutes establishing claims settlement commissions, such as the Foreign Claims Settlement Commission under the International Claims Settlement Act of 1949, 22 U.S.C. §§ 1621–1645o. *See Dames & Moore*, 453 U.S. at 680–81. Historically speaking, claims settlement by the Executive has often proven to be the only effective means of redress of those claims that originate during a period of strained relations with another nation.

Thus, while private litigation is now authorized under the FSIA against state sponsors of terrorism, Executive action is historically an important and necessary practice to ensure relief for United States nationals who have suffered at the hands of an unfriendly foreign government. Courts can only function at the margins on these matters, if at all. Indeed, in comparison to the long-standing tradition of Executive settlement of claims, these private terrorism suits represent a novel and unprecedented experiment, and one that has failed.

This brings the Court to Justice Rehnquist's dissent in *Sioux Nation*, which he penned in the term immediately prior to that in which he wrote the opinion for the Court in *Dames & Moore v. Regan*. As discussed Part E, *supra*, *Sioux Nation*, involved a no less challenging and difficult context—the mistreatment of the Sioux Indians and their divestment from their lands in the Black Hills of South Dakota. The Court's opinion in the case recounts this American tragedy

in painstaking detail. *See* 448 U.S. at 374–384. Like many difficult political issues, the failure to address that injustice apparently had much to do with money, as the Sioux Indians were claiming upwards of a billion dollars in compensation for the land and mineral rights they lost, as compounded over time. *See id.* at 390.

As noted in Part E, *supra*, *Sioux Nation* involved a claim under the Taking Clause of the Fifth Amendment. The Sioux Indians claimed that their ouster from their lands in the Blacks Hills by the Federal Government in 1877 violated the terms of the Fort Laramie Treaty of 1868 and therefore amounted to a taking for which just compensation was owed. *See* 448 U.S. at 384. Over a series of decades, Congress intervened on no less than three occasions in order to allow the Sioux to press their case against the Federal Government. *See id.* at 384–90. These efforts were consistently opposed by the Executive Branch.

At the culmination of the first action brought by the Sioux Nation in 1942, the Court of Claims ruled squarely against the Indians, holding that the Sioux had merely presented "a moral claim not protected by the Just Compensation Clause." *See id.* at 384. Thereafter, Congress established the Indian Claims Commission, and the Sioux Indians then resubmitted their Black Hills takings clause claim to that body. *Id.* at 384–85. After the Commission ruled in favor of the Sioux, the Federal Government appealed to the Court of Claims. *Id.* at 386–87. Without reaching the merits of the issue, the Court of Claims held that the Sioux Indian's takings claim was barred by the res judicata effect of its 1942 decision. *Id.* at 387. In the meantime, however, Congress again passed special legislation in favor of the Sioux Indians in which Congress directed the Court of Claims to hear the Sioux Indians claim "[n]otwithstanding any other provisions of law . . . [and] without regard to the defense of res judicata or collateral estoppel." *Id.* at 389, 391. Pursuant to that special enactment, the Court of Claims promptly reheard the

Sioux Indians' case on the merits and ultimately decided in their favor. *Id.* at 389–390. The Supreme Court granted the Federal Government's petition for a writ of certiorari to in order to review constitutional "questions not only of long-standing concern to the Sioux, but also of significant economic import to the Government." *Id.* at 390.

In a narrowly crafted decision, the Supreme Court ruled that the doctrine of separation of powers did not prevent the reinstatement of the Sioux Indians claim on the grounds that Congress was free, if it wished to do so, to waive the res judicata effect of the prior judicial decision in the Government's favor. *Id.* at 407. The Court found that the Federal Government had effectively waived those defenses though the special legislation allowing the Sioux Nation case to be reinstated. *See id.* at 406–407. In so doing, the Court emphasized Congress' broad powers to acknowledge and pay debts under the Constitution. *See id.* at 397 (citing U.S. Const., Art. I, § 8, cl. 1). On the merits, the Court upheld the Court of Claims' determination that the Government actions amounted to a taking in violation of the Fifth Amendment and the Court's award of compensation, plus interest, in favor of the Sioux. *Id.* at 432–424.

As stressed in Part E, *supra*, Justice Rehnquist mounted a vigorous dissent. *See* 448 U.S. at 424–437. At the heart of Justice Rehnquist's dissent in *Sioux Nation* was the basic sense that Congress should not be permitted to co-opt the judicial powers of the Article III Courts to resolve a claim decided previously in a manner not to its liking. *See id.* at 427–32. The Justice stated, "Congress may not attempt to shift its legislative responsibilities and satisfy its constituents by discarding final judgments and ordering new trials." *Id.* at 431–432. According to Justice Rehnquist, if Congress really wanted to achieve justice for the Indians, it could have simply passed legislation providing the sizable compensation owed. Unlike the majority of the Court at that time, Justice Rehnquist would hold that Congress had impermissibly attempted to

usurp judicial power by reopening a case that was previously resolved in a final judgment—albeit unfavorably to the Indians—long ago. *Id.* at 424–25.

The parallels between the factual circumstances surrounding the claim of the Sioux Indians against the Federal Government and those that now afflict the claims of victims of state-sponsored terrorism in actions under the FSIA terrorism actions are remarkably striking. Similar to the *Sioux Nation* case, the difficult problems confronting these FSIA terrorism cases have been foisted upon the Article III Courts in part because of a lack of real consensus between our co-equal political branches of Government on how to deal with this controversial topic. Much like the takings claim of the Sioux, Congress persistently pushes for the litigation of claims of terrorism victims in the Federal Courts, where these victims are opposed by the Federal Government and encounter adverse court rulings.

In the dicey political context of these terrorism cases, that message of Justice Rehnquist's dissent in *Sioux Nation* reads clarion clear: If Congress and the President are serious about finding redress of the injustices suffered by these terrorism victims, then they should pull together to find meaningful, workable solutions, rather than finding new and creative ways to push these tragic claims back onto the Courts. The private litigation has not worked, and simply is not workable, in this highly sensitive context involving affairs with a hostile nation. It is the plenary powers of governance, and not the powers of the courts, that must be used to help these victims overcome the significant challenges they face.

Even though the President has lost much of his "bargaining chip" with respect to Iran because of the depletion of blocked assets under the VTVPA and the TRIA, there is still room for the President to reassert his prerogative in foreign affairs in this sensitive context. In light of the scarcity of Iranian assets and the tension in United States relations with Iran, the President

might consider renewing efforts to move forward with the establishment of a terrorism claims settlement commission, like those that have been introduced in Congress in recent years. This would be consistent with longstanding historical practice as described in *Dames & Moore v. Regan*.

To succeed, however, any proposal in this area will have to do more than simply provide compensation to victims. Experience in these actions has demonstrated convincingly to this Court that what these victims truly want is justice. This point was underscored poignantly in live testimony in this Court during the trial in *Peterson* case involving the bombing of the Marine Barrack in Beirut. In finding Iran liable for that terrorist attack, this Court recounted some of the testimony. When Lt. Col Howard Gerlach of the United States Marine Corps, who was paralyzed in the attack, was asked about what he hoped to achieve by participating in these actions, he answered:

> Well, I guess there's three words: accountability, deterrence and justice. And they are interrelated. The accountability, and I swear it was on Sunday, I was listening to a rerun of one of the TV—I don't know, Meet the Press or whatever, but Vice President Cheney was talking and he was saying that they, the terrorists feel that they can do things with impunity, and he said ever since the Marines in '83. Yes, there hasn't been any accountability.
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> Deterrence effect is, in some way, and this is also what he was talking about, was one thing we have to go after—and I think I'm stating this correctly; this is what I heard, is the funding. It's the funding. Even on the radio coming over here, we heard some talk about funding for terrorist organizations.
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> Then the third thing is the justice, and this refers to the people, a good portion of [whom] are in this room. . . . They lost a large chunk of their lives, young Marines, sons, husbands, fathers, brothers. They were attempting to do a noble thing. They went as peacekeepers in the tradition of this country. . . . [W]e weren't trying to conquer land, we weren't trying to get anything for ourselves; we were really trying in a humanitarian way to help those people in Lebanon. I think this is . . . the day in court, literally and figuratively speaking, for recognition of just how great these guys were.

Peterson I, 264 F. Supp. 2d at 63–64.

On this salient point, this Court recognizes again today, as it did in *Peterson* in 2003, that "there is little that the Court can do to add to the eloquent words" of witnesses who came to this Court in an effort to "achieve some small measure of justice." *Id.* at 64. It would indeed be naive and insulting to the victims to suggest that these difficult cases can be resolved through cash pay outs from our Federal Government. Nothing could be further from the truth. Justice requires accountably for Iran, and a claims authority that simply doles out compensation to victims will not achieve that end any more than actions before this Court will.[55]

The accountability aspect of the justice these victims seek certainly does not admit of any easy answers, and this is precisely the sort of challenging question that is best left to the capable minds in the Administration and in Congress. It seems to this Court, however, that such a commission might include administrative law judges within the Executive Branch who could adjudicate claims under the terrorism exception and the body of law around it, as modified for such administrative proceedings. Through that process, the Executive Branch could obtain a thorough record of these horrific cases with the active participation of the victims, and thus these matters could then be more easily presented to the policy makers within the Executive Branch who are in the best position to hold Iran accountable. To enhance the prospect of accountability in these matters, the record from hearings on these case could then be published in an annual report to both Congress and the President and made available publicly to the citizens at large in an effort to keep these matters in focus.

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[55] *But see* Kotlarczyk, supra note 48, at 2044 (suggesting that a compensation fund similar to the September 11th Fund might be the most appropriate way to redress terrorism claims.)

Another advantage of a claims commission process within the Executive Branch is that Executive departments, and particularly the Department of State, have superior access to data and information that can help verify these terrorist incidents, and determine more reliably to what extent Iran may have played a role in supporting a particular act of terrorism. With the benefit of such data, the findings of a terrorism claims commission might carry more weight with the State Department and the President during periods of negotiations with Iran and thus further advance the prospect of settlement with Iran down the road. Similarly, the Executive Branch through the Treasury Department, particularly OFAC, is in the best position to locate assets of Iran in the United States, including unblocked assets. Accordingly, if it is empowered to do so, such a commission would be most capable of tracking down these assets and could more effectively liquidate them in satisfaction of claims, which would provide real accountability and might also defray the costs of the commission.

Finally, the commission might work on an ongoing basis to make recommendations on how best to structure a large settlement with Iran, and perhaps other state sponsors of terrorism as well, in the event of normalization. Whatever the case may be, the commission will have to conduct itself in an open and transparent manner, use all available renounces to verify and document terrorist incidents, speak candidly with the victims, and work aggressively on their behalf. Such a terrorism commission, if well resourced and able to report independently on its findings to both political branches of Government, should provide victims of terrorism with a better opportunity for meaningful redress of their claims.

The need for substantial reforms with respect to terrorism lawsuits has become even more apparent over the last several months. As the events in Iran since that country's presidential election in June have revealed, the affairs of that nation are tremendously complex. There are

forces for both good and evil in that society, and there are those who want reform and a new day for Iran, and for its relations with the larger international community. While that day is still undoubtedly a long ways off, we cannot ignore its promise. And while we must decry and condemn the current regime and its use of terror in furtherance of its political objectives—we cannot forget the courage of the people, including women and young people, who took to the streets of Tehran and elsewhere in the hope of a better day.

What we have seen from the citizens of Iran is inspiring and brings a brief flicker of hope for a lasting peace and a chance to settle grievances—real or perceived—whatever they may be. It is in that process of normalization, whenever and however it might occur, that there is the best chance for achieving justice for all those who have suffered over the last thirty years. Regrettably, the same cannot be said of the FSIA terrorism exception—whether § 1605(a)(7) or § 1605A. Frankly, these measures are politically superficial and overly simplistic solutions to much deeper problems. These measures are empty political gestures that offer no justice for so many victims who—whether intentionally or not—have been exploited by the politics of these terrorism lawsuits.

There is an important dialogue occurring in our nation over how best to deal with terrorism, including state sponsors of terrorism like Iran, but neither tough rhetoric nor large, unenforceable court judgments will help to resolve these extraordinarily sensitive and complex matters. By fanning flames and fueling unrealistic exceptions, these court actions do not contribute to a productive dialogue. These actions may even add to the atmosphere of tension and hostility between Iran and the United States that moves that rogue country further down the path of isolation and paranoia, thereby contributing to the conditions that strengthen and further the ends of a regime that seems determined to do us in. Certainly, these actions under the FSIA

terrorism exception do nothing to enhance the President's ability to carefully and intelligently respond to a host of sensitive matters pertaining to our relations with Iran, and there are indeed many substantial competing considerations in this context. The most paramount of these is the grave risk of nuclear proliferation.

Make no mistake about it, terrorism is a grave threat to our society. Our citizens will continue to be targeted precisely because they are Americans.[56] The White House may have declared the war on terrorism over,[57] but the threat of terrorism remains very real, and Americans will continue to suffer casualties as a result of this insidious and murderous evil. These victims certainly deserve justice, but the private litigation approach to redress is unsustainable and works at cross purposes of the President's foreign policy initiatives other developments that may lead to lasting change and peace. Nothing that occurs in this Court can achieve those ends.

Thus, today's decision is merely a roadmap for the long road ahead that awaits these victims in renewed litigation before this Court under the FSIA terrorism exception, a provision

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[56] Terrorists attack American targets more often than those of any other country. America's pre-eminent role in the world guarantees that this will continue to be the case, and the threat of attacks creating massive casualties is growing. If the United States is to protect itself, if it is to remain a world leader, this nation must develop and continuously refine sound counterterrorism policies appropriate to the rapidly changing world around us."

NAT'L COMM'N ON TERRORISM, COUNTERING THE CHANGING THREAT OF INTERNATIONAL TERRORISM, at iii (2008), *available at* http://www.gpo.gov/nct/nct1.pdf.

[57] The Administration has apparently decided to stop using the phrase "war on terrorism." *See* John Brennan, Assistant to the President for Homeland Sec. and Counterterrorism, A New Approach for Safeguarding Americans, Address at the Center for Strategic and International Studies (Aug. 6, 2009) ("[T]he president does not describe this as a 'war on terrorism.'") (transcript available at http://csis.org/files/attachments/090806_brennan_transcript.pdf); *see also* John Ward, *U.S. No Longer at War with "Terrorism"; Administration Deems Terms from Bush Era Unacceptable*, WASH. TIMES, Aug. 7, 2009, at A1.

of law that so far has gotten the victims of terrorism no closer to the justice they seek.[58] What this Court really hopes for, however, is that some of our political leaders may read this opinion and consider the experiences of this Court in a broader effort to obtain meaningful reform. Our political leaders must find a way to muster the commitment and courage it will take to address the fundamental problems—the roadblocks—that will continue to undermine the efforts of these victims to find justice in new lawsuits under § 1605A. This meaningless charade under the FSIA has gone on far too long. It is high time for our political leaders to consider the flaws of this private litigation experience and address the deeper political problems that this Court has no authority to resolve.

This Court's experience with these terrorism lawsuits might not offer any immediate answers, but it may lend some valuable insights, and thus this Court hopes these insights—these lessons learned—will assist in a larger dialogue about reform. Is there a better way to address these important terrorism cases and achieve justice for the victims? It is in this spirit that today's decision is offered. This opinion is in no way intended as a criticism of the victims and their noble efforts, but as a call to action for their cause. If the President and Congress are able to candidly acknowledge the both the legitimate grievances of the terrorism victims and the fundamental problems that undercut the private litigation model long embraced by FSIA terrorism exception, they can undoubtedly develop a workable system of redress for these tragic cases. Key Executive Branch officials, including the Secretary of State, the Attorney General,

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[58] This opinion speaks only to 20 pending cases, which is only a fraction of the number now pending against Iran in this Court. This judge has several more not included in this opinion, and there dozens of others representing billions in potential liability for Iran that are now pending with other judges of this Court.

and the Secretary of the Treasury, among others will likely prove crucial to the success of such an undertaking.

Whatever measures might be advanced to aid terrorism victims in this context should neither limit the President's ability to extend his hand nor encourage Iran to continue to clench its fist. Now more than ever, it is important for our President to be able to speak with one voice and to marshal the full measure of American power and diplomacy in search of better relations with Iran in the interest of all Americans. This Court is concerned, however, that if these unsustainable civil actions continue to fan flames and exhaust terrorism victims who have already suffered enough, judgments entered by this Court will continue to undermine the President's ability to address sensitive matters of national security and will do so at crucial times when the President's ability to act is likely to matter most.

L.

AN INVITATION FOR THE UNITED STATES TO PARTICIPATE IN THESE ACTIONS

This Court has found on past occasions that the appearance of the United States in actions against Iran has greatly assisted the Court. The United States often brings to light additional, relevant legal authorities and arguments bearing on the questions presented and generally provides the kind of broader perspective that this Court must have when addressing cases against foreign sovereigns. For these reasons, the United States will be invited to file a brief within 60 days in which the United States may express its views regarding any of the issues raised by this consolidated opinion and the accompanying order. Filing a brief by invitation of this Court will not prejudice the United States with respect to any submissions it may wish to make in response to specific filings by plaintiffs in any of the civil actions addressed today.

Additionally, in an effort to further the case-management function of this opinion, this Court will hold a series of status conferences for all the civil cases addressed in this decision. The United States will be invited to attend the status conferences along with the parties. The Court anticipates holding similar status conferences in these cases approximately every 60 days thereafter to ensure that these matters remain on track. Many of these cases have been languishing on the Court's docket for quite some time, and thus the Court is eager to bring these matters to conclusion as expeditiously as possible. The clerk will contact counsel for plaintiffs and the United States to schedule a time on the Court's docket that is convenient for all parties.

IV.

CONCLUSION

Nearly thirty years ago, the Hostage Crisis began as Islamic students seized the United States Embassy in Tehran and took more than 50 Americans as hostages. For over four hundred long and painful days, Americans looked on with shock and horror as they followed the nightly news coverage of the events in Tehran. It seemed as if our whole nation was being held hostage. On the eve of Ronald Reagan's Inauguration, the hostage standoff was finally settled peacefully through the conclusion of the Algiers Accords on January 19, 1981. All American hostages were released the following day, only moments after President Reagan took the oath of office. Little did we know at that time that the Hostage Crisis merely signaled the beginning of what would become an increasingly hostile era of relations between the Islamic Republic of Iran and the United States.

Less than three years later, in Beirut, Lebanon, more than two hundred United States Marines and numerous other uniformed service members, most of whom were asleep in their barracks, would die in a tremendously powerful explosion—the result of a highly sophisticated and carefully executed suicide bombing orchestrated by Hezbollah operatives acting with training, guidance, and other material support from Iran's Ministry of Information and Security. By January 1984, Iran was designated as a state sponsor of terrorism by the State Department. In the years that followed, Iran's material support for terrorism would lead to unprecedented suicide bombing attacks throughout the Gaza Strip and Israel. Schools and buses were frequent targets of the terrorist perpetrators of these attacks—unjustified killings of innocents in contravention of all the laws of humanity—which have claimed the lives of many bright young American men and women.

Since 1996, the civil cases brought under the FSIA state sponsor of terrorism exception have chronicled the senseless violence and carnage that have dotted the last three decades of hostile relations between the Islamic Republic of Iran and the United States. These terrorism cases are the tragic stories of the many victims—like the more than one thousand victims represented here today—who have suffered dearly as a result of a campaign of terror that has included hostage takings, torture, suicide bombings, and assassinations.

Regrettably, the tragedies represented by these cases under the FSIA terrorism exception have been compounded by what has turned into a long and often futile quest for justice under this novel provision of law. The reality is that the FSIA terrorism exception, as applied by our Article III Courts of limited jurisdiction and powers, has not provided the victims the relief they deserve. Instead of finding justice, most of these plaintiffs have found themselves holding unenforceable judgments. They have faced years of costly, emotionally draining, and time-consuming postjudgment litigation. They have often been opposed by the Executive Branch, and their struggles have rarely produced positive results. Similarly, these victims have fought in the halls of Congress for *ad hoc* and often ineffectual legislative fixes in an effort to give some real teeth to this failed provision of law.

This Court commends Stephen Flatow, Deborah Peterson, and the many others who have bravely pursued justice under the terrorism exception. They have brought to light to an important issue, and their cases in the courts provide an important historical record concerning all those who have been injured or killed as a result of state-sponsored terrorism. Our Nation has been served by their efforts. It is out of respect and appreciation for these victims—and out of observance of the frustrations that experience with this terrorism law has borne out over time in proceedings before this Court—that this Court expresses the view that these FSIA terrorism

actions cannot achieve justice as intended. In the long and difficult process that this Court has witnessed over the last decade, these cases have consumed substantial judicial resources while achieving few tangible results for the victims. The problems encountered by the Flatows a decade ago are the same problems experienced by Deborah Peterson today. More fundamentally, the rule of law is being frustrated in what now seems to be an increasingly counterproductive and largely academic exercise.

For the sake of these terrorism victims, however, and for the sake of our Nation as a whole, these actions should not continue on as academic exercises. The stakes are far too high, both in terms of the losses sustained, and in terms of the larger foreign policy interests of the United States.

To be sure, the current regime in Iran is apparently not going away any time soon and the problem of state-sponsored terrorism will be with us for years to come, and long after the judges of this Court who have presided over this grand experiment have passed from the bench. But these are complicated matters. If anything, the events of the last few months and weeks have underscored the depth of that complexity. There are forces for evil in that country, as there are in any nation, but there are also forces for good, and with that there is a glimmer of hope for a better future.

Meanwhile, here at home, the reforms implemented as part of § 1083 of the 2008 NDAA last year—which are just now being implemented in individual cases here today—will not, in this Court's humble opinion, lend much support to the cause of these victims or their long march toward justice. These most recent reforms, like others before them, are premised on the same failed private-litigation model that has, in effect, doomed these actions from the start. These terrorism cases—whether under § 1605(a)(7) or § 1605A—are likely to face the same obstacles

discussed in this opinion, such as the Algiers Accords, limited assets to satisfy judgments, conflicting laws and regulations, and the President's foreign policy prerogative, among others. These are intractable problems that are more often political, rather than jurisprudential, and so it seems that the new § 1605A, although well intentioned, is destined to prolong and perhaps aggravate the ways in which the same intractable issues have continuously foiled plaintiffs in these cases time and again. Today, more than a decade after these suits began—and with the majority of Iran's blocked assets depleted to pay for earlier judgments—the hope for justice under the terrorism exception is growing increasingly distant and unobtainable.

But these difficult realities should not give license to those who would rather ignore the plight of American victims of terrorism. Instead, this Court sincerely hopes that today, on the dawn of a new presidential administration—one that remains committed to a policy of engagement with Iran and the Middle East as whole—that the President, the Secretary of State, the Attorney General, the Secretary of the Treasury, and leaders in Congress will look at these matters and look for ways to make real change. The President should be commended for his work to foster a dialogue with the Middle East generally and the Muslim world specifically. In light of this fresh and inspiring approach, perhaps today more than ever there is hope for real reform.

The challenges that confront the President with respect to our relations with Iran are as daunting as ever, and thus this Court must leave it to the experts in the political branches to consider whether a balanced and meaningful political compromise can be reached with respect to these difficult terrorism cases. It seems to this judge that it is time for a new approach, and perhaps it is time to think more systematically about how these cases can work in concert, rather

than in conflict, with a broader strategy towards the goals of better relations with the Muslim world, peace in the Middle East, and the eradication of terrorism.

To all the plaintiffs, this Court wishes to stress that it, as always, will endeavor to see to it that plaintiffs in these actions get all the relief to which they are entitled under the law. This Court continues to hope that one day soon justice might be achieved.

ROYCE C. LAMBERTH

CHIEF JUDGE
U.S. DISTRICT COURT
WASHINGTON, D.C.

SEPTEMBER 30, 2009

Annex 45

***Estate of Heiser et al. v. Islamic Republic of Iran et al.*, U.S. District Court, District of Columbia, 30 September 2009, 659 F.Supp.2d 20 (D.D.C. *2009*)**

Excerpts: p. 1 and pp. 14-17

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ESTATE OF MICHAEL HEISER, *et al.*,	)	
Plaintiffs,	)	
v.	)	
ISLAMIC REPUBLIC OF IRAN, *et al.*,	)	**00-CV-2329 (RCL)**
Defendants.	)	
	)	**Consolidated With**
ESTATE OF MILLARD D. CAMPBELL, *et al.*,	)	**01-CV-2104 (RCL)**
Plaintiffs,	)	
v.	)	
ISLAMIC REPUBLIC OF IRAN, *et al.*,	)	
Defendants.	)	

MEMORANDUM OPINION

These postjudgment consolidated actions arise from the 1996 terrorist bombing of the Khobar Towers, a residential complex on a United States military base in Dhahran, Saudi Arabia. *See Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 229 (D.D.C. 2006) (Lamberth, J.). The plaintiffs are the family members and estates of 17 of the 19 United States Air Force officers and airmen killed in the attack. The defendants are the Islamic Republic of Iran ("Iran"), the Iranian Ministry of Information and Security (MOIS), and the Iranian Islamic Revolutionary Guard Corps (IRGC). These cases were filed in September 2000 and October 2001,

stepfather," that "Che and Kevin maintained their close relationships until the day Kevin died," and that "[after] Shryl and Kevin married, Kevin was financially responsible for Che," *Heiser*, 499 F. Supp. 2d at 327, this Court finds that Che had been the functional equivalent of a son and thus satisfies the immediate-family test. Accordingly, the Court will award him compensatory damages in the amount requested in the motion.[7]

D. PUNITIVE DAMAGES.

In its original *Heiser* decision, this Court denied plaintiffs' request that punitive damages be awarded against the state of Iran, MOIS and the IRGC. 466 F. Supp. 2d at 270. Under § 1605A, however, plaintiffs are now entitled to an award of punitive damages. When determining punitive damage awards under the FSIA's terrorism exception, it is the custom of this Court to apply general principles of tort law. *Flatow*, 999 F. Supp. at 32. Among these is the "need for deterrence." *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 908(1)-(2)). In *Flatow*, Iran expert Dr. Patrick Clawson testified that a factor of three times Iran's then-yearly expenditure of approximately $75 million on terrorist activities "would be the minimum amount in punitive damages that would affect the conduct of the Islamic Republic of Iran, and that a factor of up to ten times its annual expenditure for terrorism must be considered to constitute a serious deterrent to future terrorist activities aimed at United States nationals." *Id.* at 34. The Court then found that an award of three times the expenditure was appropriate—$225 million.

Yet, on the matter of how this Court is to determine the proper amount in punitive damages, this action differs from *Flatow* in several respects. First, in this case, Dr. Clawson has

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[7] *See supra* note 4 (listing typical damage award amounts for a family member's pain and suffering in terrorism cases).

recommended an award of damages between three and *five* times Iran's annual terrorism expenditure, not three and ten. Second, rather than providing this Court with a single dollar amount spent by Iran on terrorism, Dr. Clawson has been able merely to estimate that in 1996 the sum fell between $50 million to $150 million. This range, according to Dr. Clawson, reflects not only a degree of uncertainty regarding the precise dollar amount earmarked yearly for terrorists, but more significantly, disagreement among experts over what activities constitute terrorism in the first place. Though some of the money goes directly to terrorist operations, most of it ultimately funds "arms" of the terrorist groups, such as hospitals and political organizations, through which the terrorists are able to recruit. Third, relying on the expert opinion of Dr. Clawson, Plaintiffs have argued that a punitive damage award in this action less than any amount awarded in a prior case against Defendants would indicate to Iran "that the United States was less concerned about Iranian terrorism." *See* Dk. # 143 at p. 28. Fourth, though no prior FSIA case against Iran has resulted in an award of punitive damages exceeding $400 million,[8] Plaintiffs here requested first an award of $500 million—only later to increase that amount in their post-2008 NDAA motion to $650 million.

With these facts before it, this Court finds an award of punitive damages in the amount of $300 million to be appropriate. In *Flatow*, the award of punitive damages equaled Iran's annual expenditure on terrorism multiplied by three (the lowest multiplier Dr. Clawson recommended), and, in numerous subsequent cases, such awards were calculated likewise. This Court sees no reason to break from that tradition now. Regarding the award formula's multiplicand, however, prior decisions offer little guidance. Here, this Court is presented not with a single dollar

[8] The highest award of punitive damages ordered against Iran ($400 million) issued from *Estate of Bayani v. Islamic Republic of Iran*, 530 F. Supp. 2d 40 (D.D.C. 2007).

amount, but with a range—and, by extension, the controversy the range reflects. In the interest of remaining neutral in the debate on the complicated topic of terrorism financing, the Court chooses to take the mean of the range's two extremes ($50 million and $150 million) and multiply it ($100 million) by three. The result, an award of $300 million, appears fitting also in light of the foreign policy issue raised by Plaintiffs. Were the Court to award an amount less than any of those declared in prior cases, the U.S., Plaintiffs have argued, would risk seeming to Iran "less concerned about Iranian terrorism." Yet, with one exception, this Court has never awarded an amount higher than $300 million in punitive damages against Iran or its divisions and instrumentalities.[9] To the extent that Iran is paying attention and is sensitive to the judgments of this Court—and if Dr. Clawson is to be believed, it is—an award of $300 million in this case seems likely to have a deterrent effect.

II. CONCLUSION.

For the above reasons, the Court awards the plaintiffs a total of $36,658,063 in compensatory damages and $300,000,000 in punitive damages. This Court is mindful of the tremendous challenges that these and other plaintiffs face in their efforts to enforce Court judgments entered in accordance with the FISA terrorism exception. It is therefore the earnest hope of this Court that today's judgment will offer these victims something more than a symbolic victory in what has been their long and arduous struggle against state-sponsored terrorism.

A separate Order and Judgment consistent with this opinion shall issue this date.

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[9] *See* case cited *supra* note 8.

ROYCE C. LAMBERTH

CHIEF JUDGE
United States District Court
Washington, D.C.

September 30, 2009