

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR ENTRY OF JUDGMENT BY DEFAULT AS TO LIABILITY

Plaintiffs file this memorandum in support of their motion for an entry of a judgment by default as to liability against defendants the Republic of Iraq (“Iraq”) and Saddam Hussein, in his official capacity as President of Iraq.

PRELIMINARY STATEMENT

This is an action brought under the Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. §§ 1602 *et seq.*, by a group of American citizens who were taken hostage by the Government of Iraq following Iraq’s invasion of the State of Kuwait (“Kuwait”) on August 2, 1990. On June 14, 2000, plaintiffs moved this Court to join six additional plaintiffs and for certification of a class of all American citizens who, like themselves, were present in Iraq or Kuwait at the time of the Iraqi invasion of Kuwait and who were subsequently detained by Iraq in violation of the International Convention Against the Taking of Hostages, December 17, 1979, T.I.A.S. No. 11,081.¹ By their present motion, plaintiffs, on behalf of themselves and all members of the class they seek to represent, seek a judgment by default against defendants Iraq and Hussein on the issue of liability only. Plaintiffs anticipate further evidentiary proceedings in which they will seek an award of both compensatory and punitive damages.

Plaintiffs are entitled to entry of a default judgment because defendants have defaulted and because plaintiffs have presented satisfactory evidence establishing their right to relief. 28

1. In view of Fed. R. Civ. P. 23(c)(1)’s requirement that the issue of class certification be resolved “as soon as practicable” after the commencement of an action, plaintiffs respectfully suggest that their motion for class certification should be decided prior to the present motion seeking default judgment as to liability. *See Watkins v. Blinzinger*, 784 F.2d 474, 475 n.3 (7th Cir. 1986).

U.S.C. § 1608(e). Plaintiffs filed their complaint in this action on December 15, 1999. The summons and complaint were served upon defendants through diplomatic channels on April 19, 2000 in accordance with the requirements of § 1608(a) of the FSIA. Defendants, however, failed to respond to the complaint within the sixty day period specified in § 1608(d). Accordingly, plaintiffs filed an application with the clerk of this Court requesting that the clerk enter defendants' default. Pursuant to this application, the clerk entered a default against defendants Iraq and Hussein on July 5, 2000.

Plaintiffs are now hereby moving this Court for the entry of default judgment against defendants on the issue of liability pursuant to Fed. R. Civ. P. 55(b)(2) and 28 U.S.C. § 1608(e).²

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2. On July 19, plaintiffs filed their First Amended Complaint in this action. The First Amended Complaint adds ten named plaintiffs, includes an additional cause of action for loss of consortium on behalf of the spouses of American citizens who were taken hostage by Iraq following the invasion of Kuwait, adds class action allegations with respect to such spouses, and specifies the amount of damages sought in the prayer for relief. Because the First Amended Complaint was filed after the Clerk entered Defendants' default, it appears that plaintiffs are required under Fed. R. Civ. P. 5(a) to serve the First Amended Complaint upon Iraq in accordance with the procedures set forth in the FSIA. Plaintiffs have initiated that process. (Service of the original complaint took four months to complete.)

The First Amended Complaint (at ¶ 1) specifically refers to, incorporates and adopts each of the allegations in the original Complaint (except the places of residence of certain named plaintiffs whose residence has changed since the filing of the original Complaint). Accordingly, the Amended Complaint in this case does not supersede the original Complaint, which continues to be effective. *See, e.g., Geas v. Dubois*, 868 F. Supp. 19, 22 (D. Mass. 1994); *Miesowicz v. Essex Group, Inc.*, 1994 U.S. Dist. LEXIS 19995 (D.N.H. 1994); *Zousmer v. Canadian Pacific Air Lines*, 307 F. Supp. 892 (S.D.N.Y. 1969) (“[a]n amended pleading does not supersede the original pleading where it is evident that it is not designed as a substitute . . . or intended to take its place, as where it refers to its allegations, or expressly reaffirms them, or merely elaborates certain of them, or merely augments the original pleading by additional allegations”); 71 C.J.S. Pleading § 321(a) (1951); *cf. El-Hadad v. Embassy of the United Arab Emirates*, 69 F. Supp. 2d 69, 72 n.1 (D.D.C. 1999) (“An amended complaint supersedes and the original complaint and renders it of no legal effect unless the amended complaint specifically refers to and adopts or incorporates by reference the earlier pleading.”) (emphasis added). Moreover, even where an amended complaint is intended to take the place of the original pleading, the original complaint remains effective until the amended complaint is served. *International Controls Corp. v. Vesco*, 556 F.2d 665, 669 (2d Cir. 1977).

As set forth herein, defendants have failed to respond to the original complaint within the sixty day period specified in the FSIA and plaintiffs have established their entitlement to a judgment by default on the issue of liability. As the First Amended Complaint does nothing to alter the substance of the causes of action

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Under § 1608(e) of the FSIA, in order to obtain a default judgment against a foreign state, a claimant must establish “his claim or right to relief by evidence satisfactory to the court.” As set forth below, plaintiffs have submitted more than ample evidence that establishes both the existence of this Court’s jurisdiction over defendants in this case and each of the elements of plaintiffs’ claims of hostage-taking and false imprisonment.

STATEMENT OF FACTS

Facts Relating To The Hostage Taking-Policy Generally. On August 2, 1990, at the directive of its President, defendant Saddam Hussein (“Hussein”), Iraqi armed forces invaded Kuwait, expelled the existing Kuwaiti government, and seized control of the country. Immediately thereafter, Hussein issued an order forbidding foreign nationals, including approximately three thousand American citizens located in both Kuwait and Iraq, from leaving these countries. *See* Declaration of Morris D. Busby, executed on June 12, 2000 (“Busby Decl.”), ¶ 12, attached hereto as Exhibit A; Supplemental Declaration of Daniel Wolf, executed on July 31, 2000 (“Supp. Wolf Decl.”), ¶ 7, Exs. 13 & 14, attached hereto as Exhibit B. Pursuant to this directive, all American citizens in both Iraq and Kuwait were denied access to their passports, refused exit visas, and precluded from leaving by roadblocks that were set up throughout Baghdad and Kuwait City. Busby Decl. ¶¶ 12, 13.

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upon which plaintiffs have sought default judgment and as the original complaint remains in force, there is no reason to delay decision on plaintiffs’ pending motions for class certification and entry of judgment by default as to liability.

On August 16, 1990, two weeks after the invasion, Hussein issued an order requiring all American citizens in both Kuwait and Iraq to report to hotels and diplomatic properties in those countries. Busby Decl. ¶ 14; Supp. Wolf Decl. ¶ 7, Exs, 12 & 15 . At the same time, Iraqi security forces took up positions around the compound of the U.S. Embassy in Kuwait, and cut off water, electricity and telephone service. U.S. citizens located at the Embassy were not permitted to leave. Busby Decl. ¶ 14.

American citizens who failed to report to the locations designated by Iraq or who were otherwise found in public view were subject to seizure by Iraqi security forces and forced relocation to military installations and other strategic sites where they would be detained as “human shields” in order to prevent allied air attack. *See id.* ¶¶ 12-14; Supp. Wolf Decl. ¶ 7, Exs. 12 (at 24) & 15; note 11 *infra*. During the course of the crisis, more than 100 American citizens were, in fact, relocated pursuant to this policy and forced to serve as human shields. *See* Busby Decl. ¶ 14; Supp. Wolf Decl. ¶ 7, Exs. 8, 10, 12 & 18.

On August 20, 1990, President George Bush declared that all Americans detained in Kuwait and Iraq were, in fact, “hostages” because they were being used by Hussein as leverage to prevent the United States from attacking Iraq. Supp. Wolf Decl. ¶ 7, Ex. 6 (at 484); Busby Decl. ¶ 15. On that same day in an address before the Annual Conference of the Veterans of Foreign Wars, in Baltimore, Maryland, President Bush stated that:

We’ve been reluctant to use the term “hostage”. But *when Saddam Hussein specifically offers to trade the freedoms of those citizens of many nations he holds against their will in return for concessions, there can be little doubt that whatever these innocent people are called, they are, in fact, hostages.* And I want there to be no misunderstanding. I will hold the Government of Iraq responsible for the safety and well-being of American citizens held against their will.

Supp. Wolf Decl. ¶ 7, Ex. 6 (at 484) (emphasis added).

On August 31, 1990, Hussein issued an order authorizing the release of 500 American women and 410 American children in Kuwait along with 100 American women and children in Iraq. Supp. Wolf Decl. ¶ 7, Exs. 13, 14 & 15; Busby Decl. ¶ 16. In conjunction with his release of women and children, Hussein promised to free all American male hostages in exchange for a U.S. promise not to attack Iraq. Busby Decl. ¶ 16; Supp. Wolf Decl. ¶ 7, Exs. 13 & 15. The United States refused to accept Hussein's terms and demanded the unconditional release of all American citizens in Kuwait and Iraq. Supp. Wolf Decl. ¶ 7, Ex. 13.

During the next several weeks, Hussein issued a series of orders authorizing the release of American citizens in groups of various sizes -- including hundreds of American citizens who had been transported to Iraq from Kuwait. *See* Busby Decl. ¶ 17; Supp Wolf Decl. ¶ 7, Exs. 8 & 9. The release of this final group of hostages was ordered by Hussein in early December 1990. Supp. Wolf Decl. Ex. 12 (at 24). The hostage-taking finally came to an end in mid-December 1990, when after more than four months in captivity, approximately 400 American citizens were liberated from their holding facilities in Iraq and Kuwait, transported to airports, given their passports and exit visas, and flown out of the country. Busby Decl. ¶ 17; Supp. Wolf Decl. ¶ 7, Exs. 17 & 18.

Specific Facts Relating To The Situation Of The Named Plaintiffs. Each of the named plaintiffs was adversely affected by the Iraq hostage-taking policy. At the time of the Iraqi invasion of Kuwait, three of the named plaintiffs were physically present in Kuwait³ and fourteen

3. *See* Declaration of Charles Amos, executed on June 8, 2000 ("Amos Decl."), ¶ 4, attached hereto as Exhibit C; Declaration of Richard Guy Sementelli, executed on June 9, 2000 ("Sementelli Decl."), ¶ 3,

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were in Iraq.⁴ All of these named plaintiffs are U.S. citizens and were, thus, subject to Hussein's orders preventing all U.S. citizens from leaving those countries.⁵ Within approximately three weeks of the invasion, the three named plaintiffs who were trapped in Kuwait were seized by Iraqi forces, forcibly taken to Iraq and detained at various strategic locations in Iraq where they were used as "human shields" to prevent allied air attack until their release in the second week of December 1990.⁶

Each of the fourteen named plaintiffs who was trapped in Iraq were subject to Hussein's directives to congregate at specified locations in that country.⁷ As a result of that directive,

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attached hereto as Exhibit D; Declaration of William Van Dorp, executed on June 13, 2000 ("Van Dorp Decl."), ¶ 4, attached hereto as Exhibit E.

4. *See* Declaration of Plaintiff Michael Barner, executed on July 12, 2000 ("Barner Decl."), ¶ 3, attached hereto as Exhibit F; Declaration of Richard Biasetti, executed on July 10, 2000 ("Biasetti Decl."), ¶ 3, attached hereto as Exhibit G; Declaration of Petrica Brown, executed on June 6, 2000 ("Brown Decl."), ¶¶ 3-4, attached hereto as Exhibit H; Declaration of Jack Frazier, executed on July 14, 2000 ("Frazier Decl."), ¶ 3, attached hereto as Exhibit I; Declaration of Cheryl Graham, executed on July 31, 2000 ("Graham Decl."), ¶ 5, attached hereto as Exhibit J; Affidavit of Mel Hill, executed on April 27, 2000 ("M. Hill Aff."), ¶¶ 3-4, attached hereto as Exhibit K; Affidavit of Vivian Hill, executed on April 27, 2000 ("V. Hill Aff."), ¶¶ 3-4, attached hereto as Exhibit L; Declaration of Shane Foley, executed on July 26, 2000 ("Foley Decl."), ¶ 3, attached hereto as Exhibit M; Affidavit of Plaintiff David O. Morris, executed on April 17, 2000 ("Morris Aff."), ¶ 4, attached hereto as Exhibit N; Declaration of Mike Nickman, executed on July 13, 2000 ("Nickman Decl."), ¶ 3, attached hereto as Exhibit O; Declaration of James Roach, executed on July 11, 2000 ("Roach Decl."), ¶ 4, attached hereto as Exhibit P; Declaration of Floyd Watson, executed on June 7, 2000 ("Watson Decl."), ¶ 4, attached hereto as Exhibit Q; Declaration of Susan Vinton, executed on June 7, 2000 ("Vinton Decl."), ¶ 3, attached hereto as Exhibit R.
5. *See* Amos Decl. ¶¶ 2, 5-6; Sementelli Decl. ¶¶ 1, 4-6; Van Dorp Decl. ¶¶ 2, 5; Barner Decl. ¶¶ 1, 4-5; Biasetti Decl. ¶¶ 1, 4-5; Brown Decl. ¶¶ 2, 5; Frazier Decl. ¶¶ 1, 4-5; Graham Decl. ¶¶ 2-3, 6-7; M. Hill Aff. ¶¶ 2, 4; V. Hill Aff. ¶¶ 2, 4; Foley Decl. ¶¶ 1, 4-5; Morris Aff. ¶¶ 2, 5; Nickman Decl. ¶¶ 1, 4-5; Roach Decl. ¶¶ 1, 5-6; Watson Decl. ¶¶ 1, 5-6; Vinton Decl. ¶¶ 2, 4.
6. *See* Amos Decl. ¶¶ 6-7; Sementelli Decl. ¶¶ 5-7; Van Dorp Decl. ¶¶ 6-8.
7. *See* Barner Decl. ¶ 5; Biasetti Decl. ¶ 5; Brown Decl. ¶ 5; Frazier Decl. ¶ 5; Graham Decl. ¶ 7; M. Hill Aff. ¶ 4; V. Hill Aff. ¶ 4; Foley Decl. ¶¶ 4-5; Nickman Decl. ¶ 5; Roach Decl. ¶ 6; Watson Decl. ¶ 6; Vinton Decl. ¶ 4.

eleven of these plaintiffs were required to relocate to the U.S. Ambassador's residence in Baghdad⁸ where they were forced to stay for varying periods of time; the other three were detained at different locations.⁹ Approximately one month after the invasion, four of these fourteen plaintiffs were seized by Iraqi forces and detained at strategic locations in Iraq, where they were used as "human shields" to prevent allied air attack.¹⁰ The other ten were at risk of suffering a similar fate if they were found outside the locations in Baghdad where they had been directed to stay.¹¹ Three of these fourteen named plaintiffs -- two women and one child -- were allowed to leave Iraq in the beginning of September 1990 after having been detained for approximately one month.¹² As for the eleven male plaintiffs who were trapped in Iraq at the commencement of the invasion of Kuwait, one was released in late October¹³, two in late November¹⁴ and eight between December 6 and 11, 1990.¹⁵

ARGUMENT

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8. *See* Barner Decl. ¶ 5; Biasetti Decl. ¶ 5; Frazier Decl. ¶ 5; Graham Decl. ¶ 7; M. Hill Aff. ¶ 4; V. Hill Aff. ¶ 4; Foley Decl. ¶ 5; Morris Aff. ¶ 5; Nickman Decl. ¶ 5; Roach Decl. ¶ 6; Watson Decl. ¶ 6.
 9. *See* Brown Decl. ¶ 6; Vinton Decl. ¶ 5.
 10. *See* Brown Decl. ¶ 6; M. Hill Aff. ¶ 6; Roach Decl. ¶ 7; Vinton Decl. ¶ 5.
 11. *See* Barner Decl. ¶ 4; Biasetti Decl. ¶ 4; Brown Decl. ¶ 5; Frazier Decl. ¶ 4; Graham Decl. ¶ 6; V. Hill Aff. ¶ 4; Foley Decl. ¶ 4; Morris Aff. ¶ 5; Nickman Decl. ¶ 4; Watson Decl. ¶ 5.
 12. *See* Brown Decl. ¶ 7; V. Hill Aff. ¶¶ 5, 7; Foley Decl. ¶¶ 5, 7.
 13. *See* Frazier Decl. ¶ 5.
 14. *See* Barner Decl. ¶ 5; Graham Decl. ¶ 7.
 15. *See* Biasetti Decl. ¶ 5; Brown Decl. ¶ 7; M. Hill Aff. ¶ 7; Morris Aff. ¶ 6; Nickman Decl. ¶ 5; Roach Decl. ¶ 8; Watson Decl. ¶ 6; Vinton Decl. ¶ 6.

Where, as here, a foreign state fails to serve an answer or responsive pleading within sixty days after service has been made, the plaintiff is entitled to entry of default judgment against that foreign state if he “establishes his claim or right to relief by evidence satisfactory to the court.” 28 U.S.C. § 1608(e); *see, e.g., Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 6 (D.D.C. 1998); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 67 (D.D.C. 1998). As set forth below, the evidence proffered by plaintiffs conclusively establishes both that this Court has jurisdiction over this action and that plaintiffs have suffered personal injury as a result of the tortious conduct of Iraq for which they are entitled to relief.

I. This Court Has Jurisdiction Over This Action.

The Foreign Sovereign Immunities Act (“FSIA”) provides “the sole basis for obtaining jurisdiction over a foreign state in the courts of this country.” *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). That Act confers upon the district courts “original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity under sections 1605-1607 of this title or under any applicable international agreement.” 28 U.S.C. § 1330(a). Thus, “[f]ederal district courts have exclusive jurisdiction over civil actions against a foreign state, regardless of the amount in controversy, provided that the foreign state is not entitled to immunity under the FSIA.” *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 42 (D.D.C. 2000).

Under the FSIA, “[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a),” that is, any claim with respect to which one of the exceptions to jurisdictional immunity specified in 28 U.S.C. §§ 1605 to 1607 is applicable, and “service has been made under section 1608.” 28 U.S.C.

§ 1330(b). Thus, the FSIA merges the issues of personal jurisdiction and subject matter jurisdiction: “personal jurisdiction equals subject matter jurisdiction plus valid service of process.” *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1020 (2d Cir. 1991); *see also Flatow*, 999 F. Supp. at 19; *Eisenfeld v. Islamic Republic of Iran*, 2000 U.S. Dist. LEXIS 9545, at *13 (D.D.C. July 11, 2000).¹⁶

As set forth below, this Court has jurisdiction over the defendants in this action because service has been made under section 1608 and because it is based upon acts of hostage-taking for which defendants enjoy no immunity from suit under 28 U.S.C. § 1605(a)(7).

A. Service Of Process Has Been Made Upon Defendants In Accordance With The FSIA.

Service of process against a foreign state is governed by 28 U.S.C. § 1608(a), which “delineates the ‘exclusive procedures’ for effecting service of process upon a foreign state.” *Alberti v. Empresa Nicaraguense de La Carne*, 705 F.2d 250, 253 (7th Cir. 1983). That section sets forth a hierarchy of four different mechanisms through which service can be made upon a

16. A foreign state such as Iraq has no standing to assert a due process claim based upon the absence of “minimum contacts” necessary for the exercise of personal jurisdiction, because a foreign state is not a “person” within the meaning of the Due Process Clause of the Fifth Amendment. *See, e.g., Flatow*, 999 F. Supp. at 21; *Palestine Information Office v. Shultz*, 674 F. Supp. 910, 919 (D.D.C. 1987). Moreover, “even if a foreign state is accorded the status of a ‘person’ for the purposes of Constitutional Due Process analysis, a foreign state that sponsors terrorist activities which causes the death or personal injury of a United States national will invariably have sufficient contacts with the United States to satisfy due process.” *Flatow*, 999 F. Supp. at 23; *Daliberti*, 97 F. Supp. 2d at 54-55; *Eisenfeld*, 2000 U.S. Dist. LEXIS 9545, at *13-14. Finally, [a]ll states are on notice that state sponsorship of terrorism is condemned by the international community,” *Flatow*, 999 F. Supp. at 23, and that the commission of such acts constitutes a jus cogens violation of international law giving rise to universal jurisdiction. *Id.* at 14; *see also Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring). Accordingly, no state that perpetrates such acts against U.S. citizens could reasonably harbor the expectation that it would not be held accountable for its actions in the courts of this country and the exercise of jurisdiction over such a state can in no sense offend “traditional notions of fair play and substantial justice.” *See, e.g., Daliberti*, 97 F. Supp. 2d at 53-54; *Flatow*, 999 F. Supp. at 23.

foreign state: (1) by special arrangement between the plaintiff and a foreign state; (2) if no special arrangement exists, in accordance with an applicable international convention; (3) if no special arrangement or international convention exists, by any form of mail requiring a signed receipt and addressed to the head of the ministry of foreign affairs; and (4) if service cannot be made in any other way, through the U.S. Secretary of State in Washington, D.C.

In this case, service could not be made under 28 U.S.C. § 1608(a)(1) or (2) because there is no special arrangement between plaintiffs and Iraq and no international convention that governs the subject of service upon Iraq. Accordingly, plaintiffs attempted to effectuate service upon Defendants under 28 U.S.C. § 1608(a)(3). Consistent with the requirements of that paragraph, on December 22, 1999, the clerk of this Court addressed and dispatched a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state (“the service papers”), by registered mail to the head of the ministry of foreign affairs of Iraq. *See* Supplemental Wolf Decl. ¶ 2 & Ex. 1. As this method failed to effectuate service within 30 day, plaintiffs next attempted to complete service under 28 U.S.C. § 1608(a)(4). Consistent with the requirements of that paragraph, on January 27, 2000, the clerk of this Court addressed and dispatched the service papers to the U.S. Secretary of State who, in turn, transmitted them through diplomatic channels to Iraq. *Supp. Wolf Decl. ¶ 3 & Ex. 2.*

On June 30, 2000, the Secretary of State sent the clerk of this Court a certified copy of a diplomatic note indicating that the service papers were transmitted to Iraq on April 19, 2000. *Id.* ¶ 4 & Ex. 3. As the United States does not have diplomatic relations with Iraq, the papers were delivered to Iraq through the Embassy of Poland -- the protecting power for the United States in Iraq. *Id.* The law is clear that where, as here, the United States does not maintain diplomatic relations with the defendant state, service may be accomplished with the assistance of such a

protecting power (i.e., another state which has diplomatic relations with the state sought to be served). *See, e.g., Flatow*, 999 F. Supp. 1 at 6; *Eisenfeld*, 2000 U.S. Dist. LEXIS 9545, at *13. Accordingly, service has been effectuated upon defendants in accordance with the requirements of the FSIA.

B. This Action Is Based Upon Acts Of Hostage Taking For Which Defendants Are Subject To Suit Under The FSIA’s State Sponsored Terrorism Exception To Sovereign Immunity.

Under Section 1605(a)(7) of the FSIA, a foreign state is stripped of its jurisdictional immunity from suit with respect to any case 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 [or] hostage taking . . . if such act . . . 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, except that the court shall decline to hear a claim under this paragraph --

(A) if the foreign state was not designated as a state sponsor of terrorism under 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 the act occurred, unless later so designated as a result of such act; and

(B) even if the foreign state is or was so designated, if --

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States . . . when the act upon which the claim is based occurred.

This “state sponsored terrorism exception” to a foreign state’s immunity from suit was “enacted by Congress as part of the Antiterrorism and Effective Death Penalty Act of 1996

(‘AEDPA’), for the purpose of holding rogue states accountable for acts of terrorism perpetrated on United States citizens.” *Daliberti*, 97 F. Supp. 2d at 43; *see also Hartford Fire Ins. Co. v. Socialist People’s Libyan Arab Jamahiriya*, 1999 U.S. Dist. LEXIS 15035, at *9 (D.D.C. Sept. 22, 1999) (“the principal statutory purpose” of the state sponsored terrorism exception “is to deter foreign states from sponsoring terrorist activities”). As set forth below, neither Iraq nor Hussein are entitled to immunity from suit under the state sponsored terrorism exception.¹⁷

1. The preliminary eligibility requirements for invoking jurisdiction under the state sponsored terrorism exception are present in this case.

As the language of 28 U.S.C. § 1605(a)(7) makes clear, three preliminary eligibility requirements must exist before a plaintiff may invoke the court’s jurisdiction under that section:

- (1) the foreign state must have been designated as a state sponsor of terrorism pursuant to 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);
- (2) if the actionable conduct of the foreign state occurred within the state’s territory, then the state must be offered an opportunity to arbitrate the claims; and
- (3) the plaintiff or the victim must be a United States national.

Daliberti, 97 F. Supp. 2d at 44. Each of these three preliminary requirements are present in this case.

17. Actions against officials of foreign states acting in their official capacity, such as the present action against Saddam Hussein, are treated as actions against a foreign state and are governed by the provisions of the FSIA. *See, e.g., El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996); *Eisenfeld*, 2000 U.S. Dist. LEXIS 9545, at *11-12; *Flatow*, 999 F. Supp. at 17 n.3. Moreover, as the FSIA specifically provides the exclusive means through which jurisdiction can be asserted over a foreign state and as § 1605(a)(7) of the FSIA specifically exempts from immunity acts committed by officials of foreign states acting in their official capacity, the FSIA plainly “overrides the doctrine of head of state immunity.” *Flatow*, 999 F. Supp. at 24.

- a. Iraq was designated as a sponsor of terrorism at the time the acts of hostage taking occurred or was later so designated as a result of those acts.

Suits may be brought under the state sponsored terrorism exception against a foreign state that that was either “designated as a state sponsor of terrorism . . . at the time the act occurred” or was “later so designated as a result of such act.” 28 U.S.C. § 1605(a)(7)(B).¹⁸ Here, the designation of Iraq as a terrorist state occurred in the midst and as a result of the acts of hostage-taking that give rise to this action.

As set forth above, those actions commenced on August 2, 1990 and continued until approximately December 11, 1990. On September 12, 1990, the Acting Secretary of State caused to be published in the Federal Register his determination that Iraq was a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. § 2405(j)). 55 Fed. Reg. 37, 793 (1990). *See also Daliberti*, 97 F. Supp. 2d at 44; Busby Decl. ¶ 18. The designation was effective as of September 1. Busby Decl. ¶ 18. Accordingly, Iraq was designated as a state sponsor of terrorism at a time when it was committing the acts of hostage taking upon which this action is based.

18. In *Daliberti*, Iraq argued that this provision of the FSIA “impermissibly delegates to an Executive Branch official the power that properly resides in Congress to set the limits of the jurisdiction of the federal courts.” 97 F. Supp. 2d at 49. This Court (per Judge Friedman) soundly rejected that argument reasoning that Congress plainly has the authority to “manifest its intent that United States victims of terrorist states be given a United States judicial forum in which to seek redress” and that Congress’ decision to delegate to the Secretary of State authority “to determine which sovereign states fall within the class [of terrorist states] fully conforms to the requirements of the Constitution.” *Id.* at 51; *see also Rein v. Socialist People’s Libyan Arab Jamahiriya*, 162 F.3d 748, 762-64 (2d Cir. 1998). Moreover, as in *Daliberti*, “Iraq was already on the list of state sponsors of terrorism at the time” the FSIA was amended to add the state-sponsored terrorism exception. *Id.* at 51. Accordingly, “[n]o decision whatsoever of the Secretary of State was needed to create jurisdiction over Iraq” and, hence, no separation of powers issue is raised in this case. *Id.* at 51; *see also Rein*, 162 F.3d at 764.

Moreover, the designation of Iraq as a terrorist state on September 12 was made as a result of Iraq's acts in taking American and other foreign citizens hostage commencing just one month before. Busby Decl. ¶¶ 18-20. Indeed, it was Iraq's hostage-taking policy that "tipped the balance" in favor of designating Iraq as a terrorist state. *Id.* ¶ 20. Accordingly, Iraq may not base a claim of immunity in this case on the ground that it was not a state sponsor of terrorism at the time it perpetrated the acts of terrorism that form the basis for this action.

b. Defendants have been afforded a reasonable opportunity to arbitrate.

On October 26, 1999, plaintiffs sent Iraq and Hussein a letter affording them an opportunity to arbitrate these claims in accordance with international rules of arbitration. *See* Supp. Wolf Decl. ¶ 5 & Ex. 4.¹⁹ The letter informed defendants that if they did not respond within 40 days, plaintiffs would commence an action in this Court. The letter further informed defendants that in the event they did not respond within 40 days, plaintiffs would nonetheless be willing to explore the possibility of arbitration even after the filing of the complaint. *Id.* This letter plainly gave defendants a reasonable opportunity to arbitrate the claims upon which this action is based. *See Daliberti*, 97 F. Supp. 2d at 45 n.4. To this date, however, defendants have failed to respond to plaintiffs' offer of arbitration.²⁰

19. The letter afforded defendants the opportunity to arbitrate the claims of each of the original plaintiffs in this case, either individually or as part of a broader action that would include the claims of any similarly situated person who consented to be bound by such an arbitration. A second letter, sent to Iraq on June 14, 2000, afforded defendants an additional opportunity to arbitrate the claims of six additional claimants who had moved to be joined as additional plaintiffs in this action on that same date. *See* Supp. Wolf Decl. ¶ 6 & Ex. 5.

20. Some of the acts of hostage-taking against putative class members took place in Kuwait. Under 28 U.S.C. § 1605(a)(7)(B)(i), plaintiffs were not required to give defendants an opportunity to arbitrate those claims because the acts did not take place in the foreign state against whom those claims were brought.

c. Plaintiffs are nationals of the United States.

Each of the named plaintiffs is and was at the time he or she was taken hostage a national of the United States. *See* note 5 *supra*. The class that named plaintiffs seek to represent is limited to U.S. nationals. Accordingly, subparagraph 1605(a)(7)(B)'s requirement that either the claimant or the victim be a national of the United States is plainly met in this case.

2. This action is based upon acts of hostage-taking engaged in by officials of Iraq while acting in their official capacity.

Inasmuch as the threshold eligibility requirements for bringing an action under the state-sponsored terrorism exception have clearly been met, the only remaining question that this Court need address in order to exercise jurisdiction over defendants in this case is whether they have committed one of the predicate acts enumerated in that exception. In the words of this Court, the state sponsored terrorism exception set forth in § 1605(a)(7) of the FSIA “enables U.S. courts to entertain cases brought directly against a sovereign foreign state, once it has been formally designated by the U.S. Department of State as a state sponsor of terrorism, that . . . commits a terrorist act (including ‘hostage taking,’ and ‘torture’) on its own . . . which results in the death of or injury to an American citizen.” *Cicippio*, 18 F. Supp. 2d at 67. The state sponsored terrorism exception is plainly applicable here because this action is based upon predicate acts of hostage taking committed by Iraq and Hussein.²¹

21. By its terms, the amendments creating by the state sponsored terrorism exception apply retroactively “to any cause of action arising before . . . the date of [their] enactment.” *See, e.g., Daliberti*, 97 F. Supp. 2d at 43; *Flatow*, 999 F. Supp. at 13 (“Congress has expressly directed the retroactive application of 28 U.S.C. § 1605(a)(7) in order to further a comprehensive terrorism initiative by the legislative branch of government.”); *Cicippio*, 18 F. Supp. 2d at 68 (“Retroactivity principles therefore are no bar to the application of the state sponsored terrorism exception to this action.”); *Daliberti*, 97 F. Supp. 2d at 43.

Under subparagraph 1605(e)(2) of the FSIA, the term “hostage taking” has the same meaning “given that term in Article 1 of the International Convention Against the Taking of Hostages.” Article 1 of the Hostage Convention provides that an act of hostage taking occurs whenever any person “seizes or detains and threatens to kill, to injure or to continue to detain another person . . . in order to compel . . . a State . . . to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage.” T.I.A.S. No. 11,081. Thus, in order to state a claim for hostage-taking, a plaintiff must establish the existence of two elements: (1) that an act of the defendant resulted in his seizure or detention; and (2) that the defendant threatened to kill, injure or continue to detain him in order to extract concessions from a foreign state as a condition for his release. Plainly, both of these elements are present in this case.

First, plaintiffs were “detained” against their will in Kuwait and Iraq as a result of President Hussein’s order of August 2, 1990, prohibiting American citizens from leaving those countries. Second, plaintiffs were detained as a result of Hussein’s subsequent order of August 16 requiring all American citizens in both Kuwait and Iraq to report to hotels and diplomatic properties. Plaintiffs who reported to those locations were confined against their will either by Iraqi armed guards who prohibited them from leaving or, when armed guards were not present, by the knowledge that if they did leave they would be subject to seizure by Iraqi security forces and forced relocation to military installations and other strategic sites where they would be detained as “human shields.” Plaintiffs who refused to report to the locations specified by Iraq were likewise confined against their will in the locations at which they sought refuge, since departure from those locations would subject them to seizure, forced relocation and detention as

“human shields.” Finally, more than 100 plaintiffs were, in fact, detained as “human shields” at various military and strategic sites located throughout Iraq.

In addition to seizing and detaining plaintiffs, defendants threatened that they would continue to detain them until they had received a commitment from the United States and its allies not to commence an aerial bombardment of Iraq as a condition for the release of the detained citizens. Indeed, Hussein explicitly stated that plaintiffs would not be allowed to leave Iraq until he had obtained a commitment from the United States that it would not launch an attack upon Iraq. Supp Wolf Decl. ¶ 9, Ex.12 (at 24), 13 & 15; Busby Decl. ¶ 15.

Thus, both of the elements of the offense of hostage taking are present in this case: (1) plaintiffs were seized and/or detained by orders of the Government of Iraq on August 2, 1990 and continued to be detained for varying periods of time through mid-December 1990; and (2) the purpose of plaintiffs’ seizure, detention and continued detention was to compel the United States and its allies “to abstain from doing an[] act as an explicit or implicit condition for the release of the hostage[s].” See *Daliberti*, 97 F. Supp. 2d at 46 (holding that plaintiffs’ allegations that they “were held in prison in an effort to coerce the United States and the United Nations to lift the economic sanctions imposed on Iraq at the end of the Gulf War” were sufficient “to allow a reasonable inference” that they “were subjected to ‘hostage-taking’”).²² Indeed, at the time these acts were being committed, President Bush himself recognized that all of the American citizens

22. Section 1605(f) of the FSIA creates a ten year statute of limitations for any action maintained under subsection 1605(a)(7) and provides for equitable tolling of “any period during which the foreign state was immune from suit.” Inasmuch as the events giving rise to the claim took place between August and December 1990 and Iraq enjoyed immunity from suit with respect to that claim until September 30, 1996, the statute of limitations will present no bar to the proposed suit. See *Cicippio*, 18 F. Supp. 2d at 68; *Flatow*, 999 F. Supp. at 23.

who were then trapped inside Kuwait and Iraq were, in fact, being held hostage by the Iraqi regime:

We've been reluctant to use the term "hostage". But *when Saddam Hussein specifically offers to trade the freedoms of those citizens of many nations he holds against their will in return for concessions, there can be little doubt that whatever these innocent people are called, they are, in fact, hostages.* And I want there to be no misunderstanding. I will hold the Government of Iraq responsible for the safety and well-being of American citizens held against their will.

Supp. Wolf Decl. ¶ 7, Ex. 6 (at 484) (emphasis added).²³ Accordingly, the state-sponsored terrorism exception to sovereign immunity is plainly applicable to this case and this Court may properly exercise subject matter jurisdiction over plaintiffs' claims against Iraq and Hussein.²⁴

II. Plaintiffs Have Established Their Claims Of Hostage Taking And False Imprisonment By Satisfactory Evidence.

A. Plaintiffs Have Satisfied All Of The Elements Of Their Claim For Hostage Taking.

Soon after it created jurisdiction over foreign states when they engage in acts of terrorism such as hostage taking, Congress passed legislation that created a cause of action based upon such terrorist acts. As part of a 1996 statute entitled Civil Liability for Acts of State Sponsored

23. President Bush's characterization of American citizens trapped in Iraq and Kuwait as hostages was repeated by other high ranking administration officials on numerous occasions throughout the crisis. *See* Supp. Wolf Aff. ¶ 7, Exs. 6 (at 485) 7, 9 & 10.

24. In *Daliberti*, Iraq suggested that the district court should abstain from exercising jurisdiction under the doctrine of forum non conveniens. *Id.* at 54 n.7. This Court (per Judge Friedman) rejected that argument on the ground that "Congress has explicitly authorized" actions based upon acts of state-sponsored terrorism to be brought in the federal courts of this country and "in so doing has already balanced the interests of the United States in hearing such . . . suit[s] against the interests of [foreign states who are alleged to have engaged in such acts] in not being forced to defend here." *Id.*; *see also Flatow*, 999 F. Supp. at 25 ("as a matter of law, the defense of forum non conveniens is not available in actions brought pursuant to 28 U.S.C. § 1605(a)(7)).

Terrorism (the “Civil Liability Act”), Pub. L. No. 104-208, Congress imposed liability upon “any official, employee, or agent of a foreign state designated as a terrorist state” who, “while acting within the scope of his or her office, employment, or agency,” engages in an act over which “the courts of the United States may maintain jurisdiction under section 1605(a)(7).” 28 U.S.C.

§ 1605 (note). By its terms, the Civil Liability Act expressly “provides a cause of action against a foreign state and its agents” that commit any of the terrorist acts enumerated in subsection 1605(a)(7). *Daliberti*, 97 F. Supp. 2d at 43 n.1; *see also Eisenfeld*, 2000 U.S. Dist. LEXIS 9545, at *2; *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107, 113 (D.D.C. 2000); *Flatow*, 999 F. Supp. at 6; *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239, 1249 (S.D. Fla. 1997).²⁵ If a plaintiff “prove[s] an agent’s liability under this Act, the foreign state employing the agent would also incur liability under the theory of respondeat superior.” *Alejandre*, 996 F. Supp. at 1249; *see also Flatow*, 999 F. Supp. at 6 (holding that the 1996 and 1998 amendments to the FSIA “create federal causes of action related to personal injury or death resulting from state-sponsored attacks” and ordering judgment against Iran for committing such an attack).²⁶ Thus, “the FSIA authorizes personal injury claims against a foreign state “that provides material support for or itself engages in “acts of hostage-taking.” *Anderson*, 90 F. Supp. 2d at 113. Among the damages that are recoverable to a plaintiff who establishes such a claims are damages for “pain and suffering, economic damages, solatium and punitive damages.” *Daliberti*, 97 F. Supp. 2d at 43 n.1.

25. By its terms, the Civil Liability Act applies retroactively. 28 U.S.C. § 1605 (note).

26. Even in the absence of the Civil Liability Act, it is at least arguable that when Congress enacted the 1996 amendments to the FSIA stripping foreign states of immunity in cases in which they engage in acts of terrorism, it intended not only to confer jurisdiction, but also to create a cause of action. For instance, subsection 1605(a)(7) speaks of a “claim” being brought under that subsection and section 1605(f) creates a statute of limitations for any action “maintained under subsection (a)(7).”

As set forth in Section I.B. above, both of the elements of hostage-taking are plainly present in this case. Accordingly, defendants are liable to plaintiffs under the Civil Liability Act.²⁷

B. Plaintiffs Have Satisfied All Of The Elements Of Their Claim For False Imprisonment.

Regardless of whether the FSIA itself creates a cause of action against a foreign state for acts of hostage-taking, a plaintiff may assert a common law cause of action against any foreign state that is subject to the jurisdiction of U.S. courts by virtue of having committed one of the acts of terrorism enumerated in subsection 1605(a)(7). *See, e.g., Cicippio*, 18 F. Supp. 2d at 69 (holding that acts of torture and hostage-taking are “all clearly actionable as tortious conduct under U.S. law” including assault, battery and false imprisonment); *Anderson*, 90 F. Supp. at 113 (holding that cause of action for false imprisonment “is authorized under § 1605(a)(7) of the FSIA”).

The same acts of Iraq that give rise to plaintiffs’ claim of hostage taking likewise support their cause of action based upon false imprisonment. False imprisonment is “the restraint by one person of the physical liberty of another without consent or legal justification.” *Faniel v. Chesapeake & Potomac Tel. Co. of Md.*, 404 A.2d 147, 150 (D.C. 1979). “The essential

27. The Civil Liability Act includes a provision barring maintenance of a cause of action under that section “if an official, employee, or agent of the United States, while acting within the scope of his or her office, employment, or agency would not be liable for such acts if carried out within the United States.” Acts of hostage-taking by officials, agents or employees of the United States would plainly be actionable if committed in this country. *See, e.g., Cicippio*, 18 F. Supp. 2d at 68 & n.8 (holding that acts similar to those taken by Iran, which resulted in hostage-taking of U.S. nationals, “would also be actionable” if they were “conducted by officials, employees or agents of the U.S.”); *Flatow*, 999 F. Supp. at 19 (holding that officials in United States “would not be immune from civil suits for wrongful death and personal injury” if they committed “a suicide bombing within the United States”); *Eisenfeld*, 2000 U.S. Dist. LEXIS 9545, at *15-16.

elements of the tort are (1) the detention or restraint of one against his will, within boundaries fixed by the defendant, and (2) the unlawfulness of the restraint.” *Id.*; accord *District of Columbia v. Gandy*, 450 A.2d 896, 900 n.3 (D.C. 1982), *aff’d on reh’g*, 458 A.2d 414 (D.C. 1982); *Koroma v. United States*, 628 F. Supp. 949, 952 (D.D.C. 1986); Restatement (Second) of Torts § 35 (1965) (elements of false imprisonment are: (a) an intention to confine a person within certain fixed boundaries; (b) conduct which directly or indirectly results in such a confinement; and (c) harm to the person confined, which harm can include mere consciousness of the confinement itself.)

The imprisonment element of the tort of false imprisonment is satisfied by conduct that “deprive[s] the plaintiff of his freedom of locomotion for any length of time.” *Gandy*, 450 A.2d at 899; accord *Marshall v. District of Columbia*, 391 A.2d 1374, 1380 (D.C. 1978); *United States v. Allegheny Bottling Co.*, 695 F. Supp. 856, 861 (E.D. Va. 1988) (“Imprisonment simply means restraint, that is, a deprivation of liberty.”); 35 C.J.S. § 17. The unlawfulness of the restraint “‘is presumed once ‘an allegation is made that a plaintiff was arrested and imprisoned without process.’” *Dellums v. Powell*, 566 F.2d 167, 175 (D.C. Cir. 1977) (quoting *Clarke v. District of Columbia*, 311 A.2d 508, 511 (D.C. 1973)).²⁸

28. The determination whether a cause of action exists in a case in which jurisdiction is premised upon the state-sponsored terrorism exception is governed by federal common law. *Flatow*, 999 F. Supp. at 14-15 (holding that “interstitial federal common law” provides rule of decision for purposes of determining “the liability of foreign states for the terrorist acts of its officials, agents and employees”); accord *Hartford Fire*, 1999 U.S. Dist. LEXIS 15035, at *13-14. Moreover, “[a]s the dedicated venue for actions against foreign states, the law of [the] District of Columbia provides an appropriate model in developing a federal standard” defining the elements of a claim against a foreign state with respect to which jurisdiction exists under the FSIA’s state sponsored terrorism exception to sovereign immunity. *Flatow*, 999 F. Supp. at 15 n.6.

The evidence clearly establishes each of the elements of false imprisonment in this case. First, as set forth above, plaintiffs were detained or restrained against their will, “within boundaries fixed by the defendant,” as a result of intentional acts of defendants:

- prohibiting plaintiffs from leaving Kuwait and Iraq;
- ordering plaintiffs to congregate at specific locations in Kuwait and Iraq where they were forced to remain throughout the duration of the crisis; and
- seizing plaintiffs and forcing them to serve as “human shields” at strategic sites located throughout Iraq.

While not all Plaintiffs were physically unable to leave the locations at which they had been forced to take refuge, any plaintiff who was found outside of one of those locations was subject to seizure and forced relocation and detention as a “human shield.”

The restrictions on liberty posed by that threat plainly are sufficient to satisfy the detention element of the tort of false imprisonment. *See, e.g., Faniel*, 404 A.2d at 151 (“the ways in which an actor may bring about the confinement required as an element of false imprisonment” include both “submission to threat to apply physical force” and “submission to duress other than threats of physical force, if sufficient to vitiate the consent given”); *Mendoza v. K-Mart, Inc.*, 587 F.2d 1052, 1058 (10th Cir. 1978); 35 C.J.S. § 15 (1999); Prosser & Keeton, *The Law of Torts* 47 (5th ed. 1984); Restatement (Second) of Law of Torts §§ 40 & 40A (1965). Likewise, the restrictions on liberty resulting from Hussein’s order barring Plaintiffs from leaving Iraq constitutes detention within fixed boundaries for purposes of that tort. *See, e.g., Albright v. Oliver*, 975 F.2d 343, 346 (7th Cir. 1992) (“The tort of false imprisonment does not

require close confinement. The ‘prison’ could indeed be as large as an entire state.”);

Restatement (Second) of Law of Torts § 36.²⁹

Second, there is no question but that the detention of plaintiffs was unlawfully imposed. Each of the plaintiffs were subjected to such detention without process of law. Accordingly, plaintiffs’ detention was presumptively unlawful. *Dellums*, 566 F.2d at 175. Moreover, the fact that plaintiffs’ detention was imposed for the purpose of extracting concessions from the United States in violation of the International Convention Against the Taking of Hostages conclusively establishes the unlawfulness of that detention.

Finally, there can be no doubt that all or virtually all of the plaintiffs were harmed by their detention. Obviously, with the exception perhaps of any infants and certain very young children, each of the plaintiffs was aware of their detention and the demands that Hussein had placed upon their release from detention. Restatement (Second) of Torts § 35 (1965). Moreover, given those demands and the length and conditions surrounding their detention, it is inconceivable that any of the plaintiffs did not suffer harm in the form of loss of liberty and emotional distress.

CONCLUSION

For the foregoing reasons, plaintiffs’ motion for entry of default judgment on the issue of classwide liability should be granted. In the alternative, if no class has been certified, a default judgment should be entered on behalf of each of the named plaintiffs.

Dated: Washington, D.C.
 August 1, 2000

29. In instigating plaintiffs’ detention through his own directives, Hussein is subject to liability for plaintiffs’ false imprisonment to the same extent as if he had physically brought it about. Restatement (Second) of Law of Torts § 45A & cmt. c.

Respectfully submitted,

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