

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

James S. Vine, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	C. A. No.1:01CV02674(HHK)
)	
Republic of Iraq.)	
)	
Defendant.)	

**PLAINTIFFS' MEMORANDUM IN OPPOSITION
TO DEFENDANT'S MOTION TO DISMISS**

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FACTUAL AND PROCEDURAL BACKGROUND

On December 27, 2001, James Vine and 34 other persons filed this case as a class action against the Republic of Iraq (“Iraq”) for money damages resulting from acts of hostage taking and false imprisonment. On March 7, 2002, August 13, 2004 and February 18, 2005, respectively, plaintiffs filed first amended, second amended and third amended complaints, naming an additional 201 individuals as plaintiffs in this action.

Plaintiffs allege that following the Iraqi invasion of Kuwait on August 2, 1990, former Iraqi President Saddam Hussein issued an order forbidding all American citizens who were then present in Iraq and Kuwait from leaving those countries and detaining each of them against their will. Third Amended Complaint (“TAC”) ¶¶ 12-13. Hussein’s avowed purpose in issuing that order was to use American citizens as leverage to extract a commitment from the United States and its allies to refrain from using military force to liberate Kuwait. *Id.* ¶¶ 14-15. Hussein authorized the release of American women and children about one month into the invasion, but kept most of the males hostage until mid-December. *Id.* ¶¶ 17 & 20.

Each of the plaintiffs is either an American citizen who was taken hostage by the former Iraqi regime (the “plaintiff hostages”) or is the spouse of such a hostage (the “plaintiff spouses”). *Id.* ¶¶ 9-10. Many of the plaintiff hostages were rounded up by Iraqi security forces and forcibly relocated to strategic sites in Iraq and Kuwait, where they were used as “human shields” to prevent allied air attack. *Id.* ¶¶ 14 & 18. Other plaintiff hostages took refuge at various diplomatic properties in Iraq and/or Kuwait, where they were confined throughout the crisis. *Id.* ¶ 19. Still others hid themselves in “safehouses” and private residences for fear of being captured by Iraqi security forces, who they believed would either execute them or force them to serve as “human shields.” *Id.*

All plaintiff hostages allege that they were forced to endure harsh conditions throughout their detention, that they lived in constant fear for their lives and that they suffered severe emotional distress. *Id.* ¶¶ 4, 18-19 & 29. Likewise, all plaintiff spouses allege that they suffered severe emotional distress as a result of their husband’s hostage-taking ordeal. *Id.* ¶¶ 18 & 50.

Plaintiffs filed this action as a class action that was related to *Hill v. Republic of Iraq*, Civ. Action No. 1:99CV03346 (TPJ) (D.D.C.). The *Hill* case was filed on December 15, 1999 as a class action on behalf of hundreds of American citizens (and their spouses) who, like the plaintiffs in this action, were held hostage by Iraq in the latter half of 1990.¹ As Iraq failed to appear in *Hill* after having been properly served, the case proceeded by default.

Reluctant to certify a class in a default case against a foreign state, Judge Jackson denied the *Hill* plaintiffs’ motion for class certification on June 29, 2001. *Hill v. Republic of Iraq*, 175 F. Supp. 2d 36, 38 (D.D.C. 2001), *rev’d in part on other grounds*, 328 F.3d 680 (D.C. Cir. 2003). Inasmuch as each of them alleged injury as a result of a single Iraqi directive, Judge Jackson did, however, agree that additional plaintiffs could properly be joined to the action pursuant to Fed. R. Civ. P. 21 and he issued a series of orders granting motions for such joinder. *Id.* Subsequently, in the Fall of 2001, Judge Jackson imposed a moratorium on the addition of new plaintiffs in *Hill* and informed plaintiffs’ counsel that any other former hostages who wished to bring claims against Iraq would have to file a separate suit.

On December 5, 2001, Judge Jackson issued a Decision and Order in *Hill*, in which he made factual findings pursuant to Fed. R. Civ. P. 52(a). He found that jurisdiction existed under the state-sponsored terrorism exception of the Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. § 1605(a)(7), and that each of the plaintiffs had established his or her right to relief by

¹ The spousal claims for loss of consortium were added to the *Hill* complaint by amendment on July 19, 2000.

satisfactory evidence in accordance with 28 U.S.C. § 1608(e). 175 F. Supp. 2d at 38 & 47-48. Applying federal common law, Judge Jackson found that the evidence was “clearly sufficient” to entitle plaintiffs to recover on their claims for false imprisonment and hostage taking. *Id.* at 47.

Disabled from joining the *Hill* case, just three weeks later plaintiffs filed their complaint in this action. Their first amended complaint was served on Iraq in accordance with the requirements of the FSIA, 28 U.S.C. § 1608(e), on November 25, 2002. As Iraq failed to respond within the 60 day period prescribed by 28 U.S.C. § 1608(d), the Clerk of the Court entered its default on August 18, 2003. Following the filing and service of plaintiffs’ second amended complaint, Iraq finally appeared in this action on January 19, 2005, whereupon this Court granted its unopposed motion to have the default vacated. By its present motion, Iraq seeks to have this complaint dismissed on the grounds that: (1) jurisdiction does not exist over the claims of any plaintiff who took refuge at a diplomatic property or was in hiding because they were not “hostages” within the meaning of the FSIA; (2) plaintiffs’ claims are all barred by the statute of limitations; (3) plaintiffs have failed to state a claim upon which relief can be granted; and (4) this case presents a non-justiciable political question. As set forth below, none of those arguments has merit.

ARGUMENT

I. THE COMPLAINT PROPERLY ALLEGES THE APPLICABILITY OF THE HOSTAGE-TAKING EXCEPTION TO SOVEREIGN IMMUNITY AS TO THE CLAIMS OF EACH AND EVERY PLAINTIFF.

Section 1605(a)(7) provides, in pertinent part, that, subject to certain requirements not relevant here, a foreign state shall not be entitled to immunity in any case in which “money damages are sought against a foreign state for personal injury or death that was caused by an act of . . . hostage taking . . . if such act . . . is engaged in by an official . . . of such foreign state

while acting within the scope of his or her office.” 28 U.S.C. § 1605(a)(7). Under subsection 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,” Dec. 17, 1979, T.I.A.S. No. 11,081, 18 I.L.M. 1456 [“the Hostage Convention”]. Under Article 1, 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.” *Id.*

As set forth in the complaint, at the time of the crisis, the official position of the Administration of then President George H.W. Bush was that “*all* Americans detained in Kuwait and Iraq were, in fact, ‘hostages’” under the Convention “because they were being used by Saddam as leverage to prevent the United States and its allies from attacking Iraq and liberating Kuwait.” TAC ¶ 15.² Consistent with that position, the U.S. Congress enacted legislation affording “hostage status” to any U.S. citizen trapped inside Iraq or Kuwait who was “being held in custody by governmental or military authorities” of Iraq or who had “taken refuge within [Iraq or Kuwait] in fear of being taken into such custody.” Pub. L. No. 101-513, Title V, § 599C, 104 Stat. 2064 (Nov. 6, 1990).

The position of the U.S. Government on the interpretation and application of the Hostage Convention is “entitled to great weight.” *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982). Iraq, therefore, carries a heavy burden in its effort to establish that plaintiffs

² In his testimony in the *Hill* case, Ambassador Morris D. Busby, the State Department Coordinator for Counter-Terrorism at the time, testified that it was the position of both the Bush Administration and its State Department that all of the American citizens who were trapped in Kuwait and Iraq, including “those who were in hiding and those who were at diplomatic properties,” were “hostages” within the meaning of the Hostage Convention. *Hill*, Civ. Action No. 1:99CV03346, Trial Tr. at 22-25 (Oct. 9, 2001), attached hereto at Tab A; *see also* *Hill*, 175 F. Supp. 2d at 38-39. Statements like those of Mr. Busby’s regarding the official position of the U.S. Government reflect “historical facts beyond dispute” and are, thus, “eminently recognizable through judicial notice” under Fed. R. Evid. 201(b). *Simpson v. Socialist People’s Libyan Arab Jamahiriya*, 2005 U.S. Dist. LEXIS 3292, at *40-41 (D.D.C. Mar. 7, 2005).

were not hostages within the meaning of the Hostage Convention. Given how well founded the U.S. Government's position is in both fact and law, that is a burden Iraq cannot hope to meet.

A. The Complaint Properly Alleges That All Plaintiffs, Including Those Confined To Diplomatic Properties And In Hiding, Were "Detained" Within The Meaning Of The Hostage-Taking Convention.

Plaintiffs allege that immediately after the Iraqi invasion of Kuwait on August 2, 1990 they were detained against their will as a result of: (1) Hussein's directive preventing American citizens from leaving Iraq and Kuwait; and (2) roadblocks that precluded them from getting out of Baghdad and Kuwait City. TAC ¶¶ 12-13. Many plaintiffs were arrested by Iraqi security forces, who forcibly relocated them to strategic sites, where they faced the prospect of being executed or killed in allied bombing raids. *Id.* ¶¶ 14 & 18. Those plaintiffs who managed to avoid being taken into the direct physical custody of the Iraqi authorities were either forced into hiding or to take refuge in diplomatic properties for fear of their lives. *Id.* ¶ 19.

Under settled principles, these allegations must be taken as true and all "plausible inferences" therefrom must be drawn in plaintiffs' favor for purposes of resolving Iraq's challenge to "the legal sufficiency of [their] jurisdictional claims." *Price v. Socialist People's Libyan Arab Jamahiriya*, 284 F.2d 82, 93 (D.C. Cir. 2002). At any rate, Judge Jackson found that plaintiffs in *Hill* had established an identical set of facts by satisfactory evidence and, upon doing so, concluded that, "[i]t is beyond dispute that the American citizens denied permission to leave Kuwait and Iraq from August through mid-December, 1990, by the armed forces and civilian police of the Republic of Iraq were 'hostages' within the meaning of the FSIA." 175 F. Supp.2d at 46.

Notwithstanding the position taken by the U.S. Government at the time and the fact that Judge Kennedy did not think the issue even close, Iraq argues (at 5-7) that plaintiffs who were

confined to diplomatic properties or forced into hiding cannot be characterized as “hostages” because they never fell into the immediate physical custody of Iraqi authorities. Iraq is wrong.

“[A] hostage is “seized” or “detained” within the meaning of the Hostage Taking [Convention] when she is held or confined against her will for an appreciable period of time.” *United States v. Carrion-Caliz*, 944 F.2d 220, 225 (5th Cir. 1991). Thus, as Judge Jackson noted in *Hill*, the “essence of the tort of hostage taking is a false imprisonment,” 175 F. Supp.2d at 46, which likewise requires “detention or restraint of one against his will, within boundaries fixed by the defendant.” *Faniel v. Chesapeake & Potomac Tel. Co.*, 404 A.2d 147, 150 (D.C. 1979); accord *District of Columbia v. Gandy*, 450 A.2d 896, 900 n.3 (D.C.), *aff’d on reh’g*, 458 A.2d 414 (D.C. 1982); Restatement (Second) of Torts § 35 (1965).

As the case law concerning the tort of false imprisonment makes clear, a detention occurs whenever the conduct of the defendant “deprive[s] the plaintiff of his freedom of locomotion for any length of time.” *Gandy*, 450 A.2d at 899; *see also 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.”). The complaint plainly alleges that all plaintiffs, including the plaintiffs in hiding, were deprived of their freedom of locomotion. Accordingly, the only questions should be whether the allegations would support a finding that this deprivation of freedom occurred against their will and within boundaries fixed by Iraq. The answer to both questions is yes.

As Iraq itself admits (at 6), an individual need not be “*physically* restrained or confined” in order to be detained “against her will.” *Carrion-Caliz*, 944 F.2d at 225 (emphasis in original). Rather, all that is required is a threat – whether physical or non-physical – sufficient to vitiate the consent of the victim. *Id.*; *See also Faniel*, 404 A.2d at 151; Restatement (Second) of Torts §§ 40 & 40A. Thus, in *Carrion-Caliz*, the Fifth Circuit found the detention element of hostage-

taking met in the case of a defendant who “frightened” his victims into remaining in his home by threatening them that “they would be captured by immigration officials and deported” if they left. *Id.* at 225-26. *A fortiori*, a victim who can show that he was frightened into hiding by the threat of being captured and executed or forced to serve as a “human shield” is sufficient to establish that he was detained.

In addition to being against his or her will, each plaintiff’s detention occurred within boundaries fixed by Iraq. Contrary to the assumption underlying Iraq’s argument, the requirement that the detention take place within fixed boundaries “does not require close confinement” or immediate physical custody. *Albright v. Oliver*, 975 F.2d 343, 346 (7th Cir. 1992). Rather, as the Seventh Circuit has noted, “[t]he ‘prison’ could indeed be as large as an entire state.” *Id.*; *see also Gallo v. Philadelphia*, 161 F.3d 217, 222 (3d Cir. 1998) (holding that prohibition from travel outside of Pennsylvania and New Jersey, together with requirement to attend court hearings, constitutes a “seizure” within meaning of Fourth Amendment); *Helstrom v. North Slope Borough*, 797 P.2d 1192, 1199 (Alaska 1990) (holding that confinement within city satisfies detention element of false imprisonment); Restatement (Second) of Torts § 36.

Applying this standard, all plaintiffs have alleged a detention within boundaries fixed by Iraq. First, Iraq fixed the boundaries of their detention by issuing its directive sealing the Iraqi and Kuwaiti borders to plaintiffs and otherwise preventing them from leaving those countries. Second, Iraq fixed more limited boundaries by setting up roadblocks preventing plaintiffs from leaving Baghdad and Kuwait City. Third, Iraq fixed yet another set of boundaries on the streets outside each plaintiff’s hiding place by ordering its security forces patrolling those streets to round up any American citizens they could find so that they could be used as “human shields” at strategic sites. At any rate, however narrowly or broadly the boundaries might be defined, all

plaintiffs have alleged (and Judge Jackson properly found) that they were “unable to move about freely in either country” for fear of being arrested and killed. 175 F. Supp.2d at 46.³

Iraq’s argument that the complaint fails to allege the detention element of hostage-taking is particularly perplexing with respect to those plaintiffs who took refuge inside diplomatic properties. The complaint alleges that all such plaintiffs had become “trapped” in those locations after having fled from Iraqi security forces. TAC ¶ 19. In the case of those who took refuge at the U.S Embassy in Kuwait, it specifically allege that were confined there by Iraqi security forces who took up positions around the compound and refused to allow anyone to leave. TAC ¶ 14. Similarly, the complaint alleges that those who had been lured out of the Kuwait Embassy by false promises of freedom were later forced to remain in diplomatic properties in Baghdad. *Id.* As these plaintiffs were plainly under Iraq’s immediate “power” and “control,” they qualify as hostages, even applying Iraq’s own self-serving definition of what constitutes a detention.

B. The Complaint Properly Alleges That Iraq Detained All Plaintiffs, Including Those Confined To Diplomatic Properties And In Hiding, For The Purpose Of Extracting Concessions From The United States.

Iraq contends (at 7-8) that plaintiffs who were not detained at Iraqi strategic sites were not “hostages” because nowhere in the complaint do those plaintiffs allege that they were held in order to extract concessions from the United States. That is simply hogwash.

Citing a speech by President Bush, paragraph 15 of plaintiffs’ complaint specifically alleges “*all* Americans detained in Kuwait and Iraq were, in fact, ‘hostages’ because they were being used by Saddam as leverage to prevent the United States and its allies from attacking Iraq

³ Iraq argues that the Fifth Circuit’s decision in *Carrion-Caliz*, 944 F.2d 220, somehow supports its position because, unlike Iraq, the defendant in that case had the power to keep his victims inside his home. That is no distinction, as Iraq had the power in this case to keep its victims inside Iraq and Kuwait (as well as their capital cities) and off of the streets outside their safehouses. Furthermore, nothing in *Carrion-Calize* suggests that a defendant must be able to dictate to a plaintiff specifically where he can and cannot move within the boundaries it has fixed in order for a detention to take place.

and liberating Kuwait.” Similarly, paragraph 27 of the complaint states that “[t]he reason and purpose for which Iraq seized or detained the plaintiff hostages” – not just those held at strategic sites – “was to compel the United States and other foreign states to abstain from launching an armed attack upon Iraq as an explicit or implicit condition for the[ir] release.”

Iraq’s argument begs the question: if the American citizens who were detained in Iraq and Kuwait were not held there as bargaining chips then why were they kept there at all? The only alternative explanation that has ever been offered was that given by Hussein at the time of the hostage-taking, namely that plaintiffs were staying in those countries as his “guests” for their health and entertainment. While for purposes of the present litigation, the current Iraqi regime and their counsel may wish that that were so, the only reason for plaintiffs’ detention that can fairly be inferred from the complaint is the one that is explicitly set forth therein, namely to extract a commitment from the U.S. Government to refrain from taking measures to liberate Kuwait. Accordingly, the hostage-taking exception to sovereign immunity is plainly applicable to this case and this Court has subject matter jurisdiction over plaintiffs’ claims against Iraq.

II. THE CLAIMS OF ALL PLAINTIFFS WERE TIMELY FILED.

Iraq’s argument that plaintiffs’ claims are barred by the ten-year statute of limitations for actions maintained under the FSIA’s terrorism exception, 28 U.S.C. § 1605(f), is predicated on the assumption that: (a) the clock began running no later than December 9, 1990, when the last of the plaintiffs were released from detention; and (b) continued to run without interruption until expiring on December 9, 2000. In fact, the limitations period did not begin to run until Iraq lost its immunity from suit on April 24, 1996, when section 1605(a)(7) was passed into law.

Moreover, even if that were not the case, the filing of the *Hill* suit as a class action suspended the

running of the statute of limitations for all of the plaintiffs in this action under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and, hence, all of their claims were timely filed.

A. Plaintiffs' Claims Were Timely Filed Because The Ten-Year Limitations Period Did Not Begin Running Until Iraq Lost Its Immunity From Suit In 1996.

Under section 1605(f) of the FSIA, “[a]ll principles of equitable tolling, including the period during which the foreign state was immune from suit, shall apply in calculating th[e] limitation period” for causes of action maintained under section 1605(a)(7). Applying section 1605(f)’s mandate that equitable tolling principles be used to compute the limitations period to this case, plaintiffs had ten years after Iraq lost its immunity from suit in which to file their claims and, hence, the limitations period does not expire until April 2006.

Relying on *Phillips v. Heine*, 984 F.2d 489 (D.C. Cir. 1993), Iraq argues (at 13) that section 1605(f) is of no help to plaintiffs here, because, under the law of this Circuit, the application of equitable tolling principles “requires only that a plaintiff be given a ‘reasonable period’ after the tolling circumstance is mended to file suit.” Iraq’s argument cannot be squared with the language of section 1605(f). That provision mandates not only that equitable tolling principles be applied, but that they be applied “*in calculating th[e] limitations period.*” Under Iraq’s construction, application of equitable tolling would have no bearing at all upon the *calculation* of the limitations period. It would simply give plaintiffs some “extra time” to file suit if they “needed it” after the conditions supporting tolling are gone. The result would, of course, be no different if section 1605(f) simply provided that “[a]ll principles of equitable tolling . . . shall apply.” Thus, Iraq’s interpretation reads the phrase “in calculating the limitations period” out of that section in violation of basic principles of statutory construction. *Dunn v. Cftc*, 519 U.S. 465, 472 (1997). Indeed, inasmuch as “federal law recognizes and

applies principles of equitable tolling to every federal claim,” *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1549 (N.D. Cal. 1987), Iraq’s reading of section 1605(f) would render that entire provision mere surplusage.

Even if its interpretation of section 1605(f) were correct, Iraq is wrong in its understanding of how equitable tolling principles work in this case. While Iraq would have this Court believe that those principles operate in the same way no matter what the equitable basis for tolling may be, the law on that subject is not so simple as Iraq supposes. Indeed, quoting the Supreme Court’s opinion in *United States v. Ibarra*, 502 U.S. 1, 4 n.2 (1991), the D.C. Circuit has explained that “‘principles of equitable tolling *usually dictate* that when a time bar has been suspended and then begins to run again upon a later event, *the time remaining on the clock is calculated by subtracting from the full limitations period whatever time ran before the clock was stopped.*’” *United States v. Saro*, 252 F.3d 449, 454 (D.C. Cir. 2001) (emphasis added); *see also Haekal v. Refco, Inc.*, 198 F.3d 37, 43 (2d Cir. 1999) (“When equitable tolling is applied, the limitations period is deemed interrupted; when the tolling condition or event has ended, the claimant is allowed the remainder of the limitations period in which to file his action.”).

To be sure, in *Phillips* and other cases, the D.C. Circuit has described “equitable tolling” as a doctrine that “gives the plaintiff extra time only if he needs it.” 984 F.2d at 492. But in each of those cases it was referring to “equitable tolling” in its narrow sense to describe the grace that equity affords a plaintiff in cases such as those in which “despite all due diligence,” he is “unable to obtain vital information bearing on the existence of his claim.” *Chung v. U.S. Dep’t of Justice*, 333 F.3d 273, 278 (D.C. Cir. 2003). In those same cases, the D.C. Circuit used the term “equitable estoppel” to describe the tolling doctrine that applies when “the plaintiff’s delay arises out of the defendant’s fault.” *Phillips*, 984 F.2d at 492 n.3. Where that doctrine is applicable, it

is universally recognized that the clock stops running “as long as is necessary to prevent the defendant from benefiting from his misconduct.” *Chung*, 333 F.3d at 279.

This case involves neither the variety of equitable tolling that “revolv[es] . . . around the circumstances of the plaintiff,” nor the variety – frequently referred to as “equitable estoppel” – that “revolv[es] around the conduct of the defendant.” *Chung*, 333 F.3d 273 at 278-79. Rather, this case involves a third form of equitable tolling that comes into play when access to the courts has been closed off as a result of war, immunity or some other external circumstance, having nothing to do with the incapacity of the plaintiff or the conduct of the defendant.

As both the Supreme Court and the D.C. Circuit have made clear, in such cases, equitable tolling works by stopping the clock during the period in which access to the courts is denied and running it anew once access becomes available. *See, e.g., Hangar v. Abbott*, 73 U.S. 532, 539 (1867); *Salvoni v. Pilson*, 181 F.2d 615, 618 (D.C. Cir. 1950). In *Salvoni*, for instance, the D.C. Circuit held that the statute of limitations was “suspended” for nearly four years while the United States and Italy were at war and, hence, “extend[ed]” the statute by that time after the war ended. *Id.* at 619; *accord Hangar*, 73 U.S. at 539 (holding that the statute of limitations was suspended during period in which the courts in the rebellious states were closed by the Civil War); *Compania Maritima v. United States*, 136 Ct. Cl. 697, 707 (1957). Similarly, where, as here, remedies were foreclosed during the period in which a defendant enjoyed immunity from suit, the limitations period is suspended and starts to run anew only when that immunity is lifted. *See, e.g., Hilao v. Estate of Marcos*, 103 F.3d 767, 773-74 (9th Cir. 1996); *Roxas v. Marcos*, 969 P.2d 1209, 1247 (Haw. 1998); *Seamans v. Walgren*, 514 P.2d 166, 169 (Wash. 1973).⁴ As the

⁴ Viewed from another perspective, the limitations period did not begin to run until April 1996 because, in the absence of any judicial forum in which to pursue their remedies prior to that date, that is when plaintiffs’ causes of action first accrued. *United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353, 1458 (5th Cir. 1972) (“No cause of action generally accrues until the plaintiff has a right to

reasons plaintiffs were disabled from bringing suit prior to 1996 are far more akin to those in *Hangar* and *Salvoni* than they are to those in *Phillips*, the tolling principles from those earlier cases should guide this Court in applying the mandate of section 1605(f) to this case.

Iraq's argument to the contrary is predicated on the assumption that when Congress enacted that provision, it made a conscious choice to use the term "equitable tolling" in the narrow sense that the D.C. Circuit used that term in *Phillips* and its progeny. That assumption is baseless. As is apparent from the D.C. Circuit's opinion in *Saro*, it is perfectly natural to use the phrase "equitable tolling" to refer to *any* equitable circumstances that might justify extending the limitations period and, hence, "[t]he terms [equitable tolling and equitable estoppel] are often used interchangeably." *Barrueto v. Larios*, 205 F. Supp. 2d 1325, 1330 n.4 (S.D. Fla. 2002).

That Congress was using the term "equitable tolling" in its broadest sense when it wrote section 1605(f) is apparent from the legislative history of the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 (note), a statute that gives victims a federal cause of action against those who, while acting under the authority of a foreign nation, are responsible for torturing them. In both the House and Senate Reports on that statute, Congress expressed its understanding that "equitable tolling remedies" would be available to extend the limitations period both in situations in which a defendant "fraudulently conceals" his whereabouts and in which jurisdiction over him could not be had. H.R. Rep. No. 102-367, 102d Cong., 1st Sess., at 5 (1991); *see also* S. Rep. No. 102-249, 102d Cong. 1st Sess., at 11 (1991) (expressing congressional understanding that periods in which remedies were not available should be

enforce his cause."); *United States v. International Ass'n of Firefighters*, 716 F. Supp. 656, 659 (D.D.C. 1989) (same). Applying this basic principle in *Gilson v. Republic of Ireland*, 682 F.2d 1022 (D.C. Cir. 1982), the D.C. Circuit ruled that, inasmuch as commercial claims against foreign states could be asserted in the courts of this country prior to 1976, the "passage of the FSIA" in that year did not "change[] plaintiff's position so much that it was only at that time that 'the right to maintain the action accrue[d].'" *Id.* at 1025. In this case, by contrast, plaintiffs could not have pursued their hostage-taking claims in any forum prior to April 1996 and, hence, those claims could not have accrued before that time.

“[e]xcluded . . . from calculation of the statute of limitations”). Given the reference to “*all principles of equitable tolling*” in the text of section 1605(f), it is simply not credible that Congress had a narrower understanding of that term when it wrote that provision than it did five years before when it adopted the TVPA.

B. Plaintiffs’ Class Claims Were Timely Filed Because The Filing Of A Class Action In *Hill* Suspended The Statute Of Limitations Under *American Pipe* Tolling Principles.

In its seminal decision in *American Pipe*, the Supreme Court held that “the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.” 414 U.S. at 553-54. Thus, even if [Iraq is correct and] the limitations period on each plaintiff’s claim began running at the time he or she was released from detention in 1990, plaintiffs’ class claims were still timely filed because they were tolled during the 18-month period that the same class claims were pending in *Hill*.

Iraq asserts (at 12-14) that, as “a species of the larger genus of equitable tolling,” *American Pipe* tolling does not give putative class members the time remaining on the limitations period after a decision denying class certification, but rather just gives them extra time if they need it *a la Phillips*. Iraq cannot cite a single case in support of that proposition and for a wholly predictable reason. Its argument flies in the face not only of *American Pipe*, but also of *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), wherein the Supreme Court held in no uncertain terms that “in the event that class certification is denied,” putative class members remain free to file individual actions, so long as they do so “*within the time that remains on the*

limitations period.” *Id.* at 346-47 (emphasis added). Needless to say every court that has considered the issue has held that *American Pipe* and *Crown, Cork* mean exactly what they say.⁵

Iraq next argues (at 9-10) that the *American Pipe* tolling doctrine is not applicable here because it does not apply to class claims in subsequent class actions. Iraq is only partially correct. *American Pipe* does not toll the limitations period for class claims in a subsequently filed class action where the district court in the earlier action found those claims inherently unsuitable for class treatment. However, where there has been no “‘definitive determination’ of the inappropriateness of class certification,” *American Pipe* tolling remains fully applicable. *Shields v. Washington Bancorporation*, 1992 U.S. Dist. LEXIS 4177, at *6 (D.D.C. Apr. 7, 1992); see also *Yang v. Odom*, 392 F.3d 97, 112 (3d Cir. 2004); *In re Issuer Plaintiff Initial Public Offering Antitrust Litig.*, 2002 U.S. Dist. LEXIS 18116, at *12 (S.D.N.Y. Sept. 25, 2002). For instance, “where class certification has been denied solely on the basis of the lead plaintiffs’ deficiencies as class representatives and not because of the suitability of the claims for class treatment, *American Pipe* tolling applies to subsequent class actions.” *Yang*, 392 F.3d at 111.

Applying those principles here and giving *American Pipe* the “broad reading” that the D.C. Circuit requires, *McCarthy v. Kleindeinst*, 562 F.2d 1269, 1273 (D.C. Cir. 1977), plaintiffs’ class action is timely because Judge Jackson did not definitively determine that their claims were unsuitable for class treatment in *Hill*. Rather, as set forth in his opinion in that case, the reason he refused to certify a class was a *combination* of: (1) “the fact that the case was proceeding by default;” (2) his “uncertainty” over “the numbers of U.S. citizens” who might be eligible for relief; and (3) the existence of “significant variations in the experiences of the hostages.” 175 F.

⁵ See, e.g., *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1391 (11th Cir. 1998) (holding that when class certification is denied, “the statute of limitations begins to run again” and plaintiffs have until “the time remaining in the limitations period expires” in which to file their individual actions); *Tosti v. Los Angeles*, 754 F.2d 1485, 1488 (9th Cir. 1985) (same); *Fernandez v. Chardon*, 681 F.2d 42, 48 (1st Cir. 1982) (same); *Barrett v. U.S. Civil Service Comm’n*, 439 F. Supp. 216, 218 (D.D.C. 1977) (same).

Supp. 2d at 39 n.5. Critically, Judge Jackson did not find that the numerosity requirement was not satisfied. Nor could he have, since regardless of any uncertainty about the final tally, it was apparent from the record (including the public record) that the number of class members was not less than several hundred, 172 of whom were parties in *Hill* – a number that is more than sufficient number to satisfy Rule 23(a)’s numerosity requirement.⁶ Likewise, while finding that “significant variations in the experiences” of the putative class members existed, Judge Jackson did not make any finding that either Rule 23(a)’s common question requirement or Rule 23(c)’s predominance requirement had not been met. To the contrary, in holding that all “American citizens denied permission to leave Kuwait and Iraq . . . were ‘hostages’ within the meaning of the FSIA, and entitled to maintain an action against Iraq” for damages, Judge Jackson implicitly found that the issue of liability was common to the class. 175 F. Supp. 2d at 46. In such circumstances, the courts have consistently held that common questions predominate over any individual questions relating to damages. *See, e.g., Dellums v. Powell*, 566 F.2d 167, 189 (D.C. Cir. 1977); *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 626 (5th Cir. 1999); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988). Accordingly, Judge Jackson’s decision to deny class certification can only be understood as a prudential one driven by his reticence over allowing a class action to go forward in a default case against a foreign sovereign.

That Judge Jackson’s decision did not constitute a “definitive determination” of the class action question is confirmed by subsequent events. In particular, in his last in-chambers conference before sending this case to the Calendar Committee, Judge Jackson encouraged undersigned counsel to continue to pursue class certification, which he said he would now be

⁶ *See, e.g., Johns v. Rozet*, 141 F.R.D. 211, 216 (D.D.C. 1992) (“a class of 250 people clearly satisfies the numerosity requirement”); *Sperling v. Donovan*, 104 F.R.D. 4, 7 (D.D.C. 1984) (certifying class of 46 members); *EEOC v. Printing Industry of Metropolitan Washington, D.C., Inc.*, 92 F.R.D. 51, 53 (D.D.C. 1981) (“the Court notes that as few as 25-30 class members should raise a presumption that joinder would be impracticable, and thus the class should be certified”).

inclined to grant were he to retain the case. Second and consistent with that comment, Judge Jackson granted plaintiffs' motion to extend the deadline for filing their motion for class certification in the *Vine* case – something that he would not likely have done if he felt that he had already definitively resolved the issue in *Hill*.

Iraq contends (at 11) that even if plaintiffs' class claims are otherwise timely under *American Pipe* tolling principles, the class claims of plaintiffs in hiding are not because they “were not part of the class for which certification was sought in *Hill*.” The class in the original *Hill* complaint was defined (at ¶ 29) to include “[a]ll American citizens . . . who were taken hostage” by Iraq between August 2 and December 31, 1990. Quoting President Bush, the complaint further stated (at ¶ 24) that “all Americans detained in Kuwait and Iraq were, in fact, ‘hostages.’” The complaint alleged (at ¶¶ 2 & 21) that “more than 2,000 American citizens” were present in Iraq and Kuwait at the time of the invasion and forbidden from leaving. Not coincidentally, the complaint also alleged (at ¶ 29) that the class “contains at least 2000 members” – only about 100 of whom it alleged (at ¶ 26) had been used as human shields at strategic sites. Even without the benefit of the liberal construction that they must be given, these allegations were more than sufficient to put Iraq on notice that the proposed class consisted of all 2000 or so American citizens who were detained in Iraq and Kuwait between August 2 and December 31, 1990, regardless of whether they were held at strategic sites, took refuge at diplomatic properties or were in hiding.

C. The Individual Claims Of All Plaintiff Hostages Were Timely Filed Under Both *American Pipe* Tolling And The Doctrine Of Relation Back.

Without citing a single case, Iraq leaps to the conclusion that if *American Pipe* tolling cannot be applied to extend the limitations period on their class claims, it cannot be applied to their individual claims either. Iraq is wrong. The case law makes clear that a plaintiff's

individual claims are subject to *American Pipe* tolling, notwithstanding the fact that he may also have filed his suit as a class action on behalf of others similarly situated. *See, e.g., Robbin v. Fluor Corp.*, 835 F.2d 213, 215 (9th Cir. 1987); *Zachery v. Texaco Exploration & Prod., Inc.*, 185 F.R.D. 230, 242 (W.D. Tex. 1999); *Phillips v. Kidder, Peabody & Co.*, 933 F. Supp. 303, 309 (S.D.N.Y. 1996); *In re Crazy Eddie Sec. Litig.*, 747 F. Supp. 850, 856 (E.D.N.Y. 1990).

Iraq contends (at 15, n.7), however, that even if *American Pipe* tolling applies to plaintiffs' individual claims, the limitation period was extended by, at most, 18 months and 14 days from the date of each plaintiff's release in 1990 and, hence, the claims of many plaintiffs who were added to this case after the filing of the original complaint are untimely. Iraq is incorrect because the claims of all such plaintiffs "relate back" to the filing of the original complaint in this action under Fed. R. Civ. P. 15(c).

Although the text of Rule 15(c) speaks only to the addition of defendants, the courts have uniformly held that it is applicable to amendments that add new plaintiffs. *See, e.g., Fleck v. Cablevision VII, Inc.*, 799 F. Supp. 187 (D.D.C. 1992); *Stoppelman v. Owens*, 580 F. Supp. 944, 946 (D.D.C. 1983). In evaluating whether such amendments do, in fact, "relate back," the Advisory Committee Notes instruct that the "*attitude* taken in revised Rule 15(c) toward change of defendants" – as opposed to the literal requirements of that rule – "extends by analogy to amendments changing plaintiffs." *See, e.g., Griffin v. District of Columbia*, 1996 U.S. Dist. LEXIS 7258, at *5 (D.D.C. 1996), *aff'd*, 1997 U.S. App. Lexis 11640 (D.C. Cir. Apr. 23, 1997); *Olech v. Village of Willowbrook*, 138 F. Supp. 2d 1036, 1042 (N.D. Ill. 2000). "[T]he attitude is to liberally permit amendments . . . so long as that can be done without sacrificing 'essential fairness' to defendants." *Olech*, 138 F. Supp. at 1044.

In determining whether an amendment adding plaintiffs relates back under Rule 15(c), the courts have looked to four overlapping factors:

whether or not (1) the new plaintiff's claim arose out of the 'same conduct, transaction or occurrence' set forth in the original complaint; (2) the new plaintiff shares an 'identity of interest' with the original plaintiff; (3) the defendant's have 'fair notice' of the new plaintiff's claim; and (4) the addition of the new plaintiff causes the defendant prejudice.

Olech, 138 F. Supp. at 1044; accord *Immigration Assistance Project v. INS*, 306 F.3d 842, 857 (9th Cir. 2002); *Miller v. Airline Pilots Ass'n*, 2000 U.S. Dist. LEXIS 8797, at *8 (D.D.C. Mar. 30, 2000). Applying this four-part inquiry, the courts have consistently held that an amendment adding new plaintiffs relates back in cases in which the original complaint alleged that defendant had engaged in systemic practices of unlawful conduct against a class of similarly situated individuals. See, e.g., *Immigration Assistance Project*, 306 F.3d at 857-58; *Haas v. Pittsburgh Nat'l Bank*, 526 F.2d 1083, 1097 (3d Cir. 1975); *Miller*, 2000 U.S. Dist. LEXIS 8797, at *10; *Fleck*, 799 F. Supp. at 192; cf. *Griffin*, 1997 U.S. App. Lexis 11640, at *1 (stating that complaint would have related back if it had "included John or Jane Doe plaintiffs or sought class certification").⁷ That is no less the case here.

First, the claims of each plaintiff that was added by amended complaint arise out of "the same conduct, transaction or occurrence" as those of the original plaintiffs – the blanket directive of the former Iraqi regime ordering the detention of all American citizens in Iraq and Kuwait as hostages in order to deter the United States from launching an attack to liberate Kuwait. Second, since "the circumstances giving rise to the claims" of the additional plaintiffs are the same as those of the original plaintiffs, they share an "identity of interest" sufficient to satisfy the

⁷ Inasmuch as relation back is independently authorized under Rule 15 (c), an amended complaint adding new parties can relate back to the original filing, "regardless of whether [*American Pipe*] tolling is appropriate." *Blanchard v. Edgemark*, 2000 U.S. Dist. LEXIS 7157, at *24 (N.D. Ill. May 22, 2000); see also *Immigration Assistance Project*, 306 F.3d at 856.

requirement of Rule 15(c). *Immigration Assistance Project*, 306 F.3d at 858; *Miller*, 2000 U.S. Dist. LEXIS 8797, at *8. Third, inasmuch as both the original complaint in this case and the complaint in *Hill* were filed as class actions, which informed defendants of “the general number and generic identities” of the potential plaintiffs, the notice requirement of Rule 15(c) is plainly met. *Fleck*, 799 F. Supp. at 192; *accord Immigration Assistance*, 306 F.3d 842 at 857-58; *Haas*, 526 F.2d at 1097; *Miller*, 2000 U.S. Dist. LEXIS 8797, at *10; *Griffin*, 1996 U.S. Dist. LEXIS 7258, at *6 n.2. Finally, Iraq cannot possibly claim any prejudice resulting from the joinder of the additional plaintiffs in light of the fact that: (1) Iraq had notice of their claims at the time the original complaint was filed; (2) their claims are based on the same allegations as are the claims of the original plaintiffs; and (3) Iraq had not even appeared at the time they were added. *See, e.g., Immigration Assistance Project*, 306 F.3d at 858; *Fleck*, 799 F. Supp. at 192; Wright, Miller & Kane, 6A Federal Practice and Procedure § 1501 (2d ed. 1990).⁸

D. The Individual Claims Of All Plaintiff Spouses Were Timely Filed Under Both American Pipe Tolling And The Doctrine Of Relation Back.

Iraq maintains (at 10-11) that, even with *American Pipe* tolling, the claims of all the plaintiff spouses in this case were filed approximately one month after the statute of limitation had run, because the *Hill* complaint was not amended to add spousal claims for loss of consortium until July 19, 2000. Iraq’s argument again overlooks the doctrine of relation back.

A claim for loss of consortium is, by its nature, purely derivative of and collateral to an underlying claim for personal injury. *See, e.g., Romer v. District of Columbia*, 449 A.2d 1097, 1101 (D.C. 1982); 41 Am. Jur.2d Husband and Wife § 247 (2004). Indeed, in certain

⁸ Neither the additional time and expense required to defend the action, nor Iraq’s exposure to greater damages, constitutes prejudice for purposes of Fed. R. Civ. P. 15(c). *Fleck*, 799 F. Supp. at 192; *Olech*, 138 F. Supp. 2d at 1046; Wright, Miller & Kane § 1501. Furthermore, in the absence of such prejudice, any delay in joining the suit, including unjustifiable delay, is “not a sufficient basis to deny relation back.” *Olech*, 138 F. Supp.2d at 1047; *see also Fleck*, 799 F. Supp. at 192 n.4.

jurisdictions (though not in D.C.), a loss of consortium claim belongs to a husband and wife jointly and must be filed in a single action, *see, e.g., Matthews v. Germantown Injury Care Center*, 2000 U.S. App. LEXIS 11433, at *8-9 (4th Cir. May 19, 2000); *Tiernan v. DeVoe*, 923 F.2d 1024, 1036 (3d Cir. 1991), while in others an unfavorable judgment on the underlying claim will bar the loss of consortium claim under the doctrine of *res judicata*. *See, e.g., Huguley v. General Motors Corp.*, 1993 U.S. Dist. LEXIS 4134, at *9 (E.D. Mich. Jan. 21, 1993); *Willard v. City of Myrtle Beach*, 728 F. Supp. 397, 407-08 (D.S.C. 1989). It is, therefore, hardly surprising that the courts have found amendments adding a husband or wife’s claim for loss of consortium to relate back to the date on which his or her spouse’s underlying claim was filed. *See, e.g., Robinson v. City of West Chester*, 1994 U.S. Dist. LEXIS 5022, at *4-6 (E.D. Pa. Apr. 14, 1994); *Pendlye v. Komori Printing Machinery Co.*, 1990 U.S. Dist. LEXIS 1800, at *11-12 (D.R.I. Feb. 8, 1990); *Audlee v. New England Tank Indus.*, 1985 U.S. Dist. LEXIS 12400, at *8-9 (D. Mass. Dec. 23, 1985); *Hoch v. Venture Enterprises, Inc.*, 473 F. Supp. 541, 542 (D.V.I. 1979); *Hocket v. American Airlines, Inc.*, 357 F. Supp. 1343, 1348 (N.D. Ill. 1973).

Given the derivative nature of the *Hill* plaintiffs’ loss of consortium claims, Iraq can hardly contend that it had no notice of those claims at the time the *Hill* suit was first filed. The original complaint in that case specifically alleged (at ¶¶ 5, 35 & 39) that, as a result of their confinement and separation from “*their loved ones*,” plaintiffs suffered “*loss of companionship*” and were entitled to damages for “*loss of consortium*.” Furthermore, given that the *Hill* complaint put the size of the class at 2,000, Iraq clearly had actual or constructive notice that a good many of those “loved ones” were spouses,⁹ each of whom “was a potential party to the suit.” *Robinson*, 1994 U.S. Dist. LEXIS 5022, at *4; *see also Olech*, 138 F. Supp. at 1046.

⁹ Indeed, among the original *Hill* plaintiffs were two plaintiff spouses – one who was released prior to her husband and another who filed suit on behalf of her husband in her capacity as executor of his estate.

Given that the *Hill* plaintiffs' class claims for loss of consortium related back to their original complaint, both the plaintiff spouses' individual claims and their class claims were timely filed in this case under *American Pipe* tolling principles.

Finally, even if the loss of consortium claims in *Hill* did not relate back to the original complaint, plaintiffs' loss of consortium claims are timely here because they relate back to the filing of the *Hill* action. While the general rule is that a complaint may not relate back to a complaint in a separate action, a court may deviate from that rule when "equitable considerations" so warrant. *Burnholdt v. Brady*, 869 F.2d 57, 69 (2d Cir. 1989). This Court should do so here. Judge Jackson closed the *Hill* case to new plaintiffs purely as a housekeeping matter and, at the time he did so, he invited plaintiffs' counsel to file a second action in the event any other former hostages or their spouses wished to pursue claims against Iraq. Undoubtedly, if he had thought that his order barring new plaintiffs from joining the *Hill* case would have prevented them from filing timely claims at all, Judge Jackson would have never issued that order. Just three weeks after he did (and just five weeks after Iraq says the limitations period ran), plaintiffs filed their new claims in this case in accordance with his instructions. In these circumstances, this Court should find that plaintiffs' loss of consortium claims relate back to the *Hill* action on equitable grounds.

III. PLAINTIFFS HAVE ALL STATED CLAIMS UPON WHICH RELIEF CAN BE GRANTED.

Relying exclusively on two decisions of the D.C. Circuit – *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004), and *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004) – Iraq argues (at 16-17) that the complaint must be dismissed because it fails to state a claim upon which relief can be granted. In both cases, the D.C. Circuit held that neither section 1605(a)(7) of the FSIA nor the so-called Flatow Amendment, 28 U.S.C. § 1605 note, nor

the two together, create a cause of action against a foreign state. *Cicippio-Puleo*, 353 F.3d at 1033; *Acree*, 373 F.3d at 59. Iraq contends that in so holding, the D.C. Circuit has foreclosed the possibility of any cause of action being asserted against a foreign state under *any* source of law in any case in which jurisdiction has been predicated upon the state-sponsored terrorism exception. That contention is incorrect.

In its decision in *Cicippio-Puleo*, the D.C. Circuit refused to consider the argument of certain *amici* that “some other source of law” – that is, some source of law other than 28 U.S.C § 1605(a)(7) or the Flatow Amendment – might furnish the rule of decision for a claim against a foreign state. 353 F.3d at 1036. Instead, the *Cicippio-Puleo* court remanded the case to give plaintiffs an opportunity to amend their complaint and to allow the district court to determine “in the first instance” whether they “have a viable cause of action” under an alternative source of law. *Id.* Similarly, while the D.C. Circuit refused to permit plaintiffs to amend their complaint in *Acree*, it did so not based on any finding that no such source of law existed, but because the *Acree* plaintiffs had failed to identify one when given the opportunity. 361 F.3d at 59-60.

In at least two cases that were decided subsequent to the decisions in *Cicippio-Puleo* and *Acree*, the D.C. Circuit has acknowledged the possibility that a plaintiff might be able to proceed against a terrorist state on a cause of action grounded upon a source of law other than section 1605(a)(7) or the Flatow Amendment. *See, e.g., Kilburn v. Socialist People’s Libyan Arab Jamahiriya*, 376 F.3d 1123, 1129 (D.C. Cir. 2004) (noting that plaintiff in FSIA case predicated upon hostage-taking had “alleged a number of sources that could provide a cause of action, including state, federal, foreign, and international law”); *Price v. Socialist People’s Libyan Arab Jamahiriya*, 389 F.3d 192, 200 (D.C. Cir. 2004) (same). It is, therefore, apparent that neither *Cicippio-Puleo* nor *Acree* insulates terrorist states from liability in cases falling under the FSIA’s

state-sponsored terrorism exception.¹⁰ As set forth below, whether plaintiffs' claims against Iraq are governed by local law (that is, federal law and/or the common law of this District) or foreign law (that is, the laws of Kuwait and/or Iraq), the complaint states viable claims against Iraq.

A. Section 1606 Of The FSIA Makes Any Cause Of Action Against A Private Individual Applicable To A Foreign State In Like Circumstances.

The complaint states claims against Iraq that are expressly authorized by section 1606 of the FSIA. That section 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.” 28 U.S.C. § 1606. By its terms, section 1606 resolves any uncertainty as to whether causes of action applicable in disputes between private individuals may be asserted against a non-immune foreign state. In providing that a “foreign state shall be liable,” section 1606 mandates that all such causes of action shall be available against a foreign state without limitation.¹¹

In essence, section 1606 puts a foreign state in the shoes of a private individual; if a private individual may be held liable for the conduct upon which the plaintiff's complaint is based, then so too may the foreign state. Thus, by operation of section 1606, a plaintiff who files suit against a terrorist state under the state-sponsored terrorism exception may “sue that state

¹⁰ See, e.g., *Simpson*, 2005 U.S. Dist. LEXIS 3292, at *40-41 (per Judge Urbina) (holding that plaintiff may base cause of action for hostage-taking on source of law other than the Flatow Amendment); *Wyatt v. Syrian Arab Republic*, 2005 U.S. Dist. LEXIS 3386, at *35-36 (D.D.C. Mar. 3, 2005) (per Judge Urbina) (same); *Dodge v. Islamic Republic of Iran*, Case No. 03-252, slip op. at 8 n.8 (D.D.C. Aug. 25, 2004) (per Judge Jackson and attached hereto at Tab B) (holding that *Cicippio-Puleo* “does not undermine the ability of any victim of terrorism to bring an action under any potentially applicable law otherwise applicable to individuals.”); *Dammarell v. Islamic Republic of Iran*, 281 F. Supp. 2d 105, 194 (D.D.C. 2003) (per Judge Bates) (holding that even if the Flatow Amendment does not “create a federal statutory cause of action against state sponsors of terrorism, plaintiffs nevertheless would have valid claims against Iran . . . under state and/or federal common law”).

¹¹ See *Key Tronic Corp. v. United States*, 511 U.S. 809, 822 (1994) (Scalia, J., dissenting) (“Surely to say that A shall be liable to B is the *express* creation of a right of action.”); *American Council of Certified Podiatric Physicians & Surgeons v. American Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 613 (6th Cir. 1999) (holding that the language “shall be liable” creates cause of action).

under any cause of action arising from common law, foreign law, or federal statute which ordinarily might give rise only to individual liability.” *Dodge*, slip op. at 8.

Rejecting this common sense reading, Iraq argues (at 22) that section 1606 applies only “when an independent cause of action against a foreign sovereign already exists.” In other words, Iraq maintains that in order for section 1606 to come into play, there must be a pre-existing sovereign-specific cause of action – that is, a cause of action that runs directly against a foreign state – in which case section 1606 would make that state liable for damages “to the same extent” as a private individual. Iraq’s interpretation is contrary to both the plain language of section 1606 and the case law.

Iraq imagines that its construction is supported by the introductory clause to section 1606, which makes that provision applicable “[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity.” Contrary to Iraq’s suggestion, nothing in that clause suggests that the only claims for relief to which section 1606 applies are causes of action that were specifically designed to impose liability upon a sovereign state. Rather, by its terms, all that introductory clause does is limit the category of claims with respect to which a foreign state shall be put on the same footing as a private individual to those for which it does not enjoy immunity from suit. Iraq’s reading would violate basic principles of statutory construction by rendering the language in section 1606 making a foreign state liable “*in the same manner . . . as a private individual in like circumstances*” entirely superfluous. *Dunn*, 519 U.S. at 472.

That section 1606 does, in fact, mean what it says is confirmed by nearly thirty years of case law that has applied and construed that provision since the enactment of the FSIA in 1976. Critically, in its seminal decision in *First National City Bank v. Banco Para el Comercio Exterior de Cuba* (“*Bancec*”), 462 U.S. 611 (1983), the Supreme Court held that “where state

law provides a rule of liability governing private individuals,” section 1606 “requires the application of that rule to foreign states in like circumstances.” *Id.* at 622. Consistent with that principle, the courts have uniformly applied rules governing the conduct of private individuals – whether derived from statutory, common or foreign law – to the conduct of foreign sovereigns for purposes of determining their liability. Moreover, these courts have done so not only in the case of commercial claims,¹² but also in the case of personal injury claims such as negligence, murder and assault.¹³ If it was proper for plaintiffs to ground their claims against a foreign state upon statutory, common and foreign law in those cases, then surely plaintiffs can rely upon those sources of law to support their hostage-taking and false imprisonment claims against Iraq here.

Iraq’s argument regarding the meaning of section 1606 also overlooks the case law under section 2674 of the Federal Tort Claims Act (“FTCA”) from which that provision is borrowed. 28 U.S.C. § 2674. Like section 1606 of the FSIA, section 2674 of the FTCA provides that regarding its provisions “relating to tort claims,” the United States “shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances.” The Supreme Court has held that the “plain natural meaning” of this language “make[s] the United States liable” for tortious conduct “if as alleged in the complaints, [state] law would impose liability on private persons in similar circumstances.” *Rayonier Inc. v. United States*, 352 U.S.

¹² See, e.g., *Southway v. Central Bank of Nigeria*, 198 F.3d 1210, 1216 (10th Cir. 1999) (holding that Nigeria could be subject to civil liability for violations of RICO based on predicate acts of wire fraud); *Joseph v. Office of Consulate General*, 830 F.2d 1018, 2026 (9th Cir. 1987) (applying California common law for purposes of determining Nigeria’s liability for tortious waste, conversion and trespass); *Virtual Defense and Dev’t Int’l, Inc. v. Republic of Moldova*, 133 F. Supp. 2d 9, 16-17 (D.D.C. 2001) (applying D.C. common law for purposes of determining Moldova’s liability for breach of contract).

¹³ See, e.g., *Barkanic v. General Admin. of Civil Aviation of People’s Republic of China*, 923 F.2d 957, 963 (2d Cir. 1991) (applying Chinese law to plaintiffs’ wrongful death claim); *Liu v. Republic of China*, 892 F.2d 1419, 1426 (9th Cir. 1989) (holding that California common law applies for purposes of determining whether China could be held liable for murder); *Letelier v. Republic of Chile*, 502 F. Supp. 259 (D.D.C. 1980) (finding Chile liable for murder under D.C. wrongful death statute, for assault and battery under D.C. common law, for conspiracy to deny plaintiffs their constitutional rights in violation of 42 U.S.C. § 1985, and for assault on an internationally protected person in violation of 18 U.S.C. § 1116).

315, 319 (1957); *see also United States v. Muniz*, 374 U.S. 150, 153 (1963) (same). This rule applies no less to a common law false imprisonment claim than it does to any other claim with respect to which the United States has waived its immunity under the FTCA. *See, e.g., Arnsberg v. United States*, 757 F.2d 971, 978-79 (9th Cir. 1984) (applying Oregon law for purposes of determining whether United States could be held liable for false imprisonment).

Iraq contends (at 22 & 24), however, that to apply section 1606 to claims with respect to which a foreign state is not immune under the state-sponsored terrorism exception would contravene congressional intent by altering “the substantive law determining the liability of a foreign state” and enabling the courts to “imply” causes of action where none exist. But the courts no more alter the substantive law or imply causes of action when they apply section 1606 to section 1605(a)(7) cases than they do when they (a) apply section 1606 to cases falling under any of the FSIA’s other exceptions to immunity or, for that matter, (b) apply section 2674 of the FTCA (which, likewise, was not intended to alter the substantive law of liability) to claims with respect to which the United States has waived its immunity from suit. Moreover, as set forth in Point IV below, far from taking care to insulate foreign sovereigns from liability rules applicable to private individuals, Congress enacted section 1605(a)(7) on the understanding and with the intent that it would enable American victims of hostage-taking and other terrorist crimes to maintain claims against the responsible foreign states grounded upon existing sources of law.

Finally, based on nothing more than its own *ipse dixit*, Iraq argues that section 1606 is inapplicable in cases in which jurisdiction is predicated upon the state-sponsored terrorism exception because Congress intended “to occupy the field and exclude state law” when it enacted the Flatow Amendment. The Flatow Amendment – an isolated provision in the U.S. code

consisting of a single paragraph – is hardly the kind of comprehensive federal regulatory scheme from which a congressional intent to occupy the field can be readily inferred.

However, Iraq’s preemption argument suffers from an even more fundamental flaw. Under the FSIA, state law does not provide the rule of liability in an action against a non-immune foreign state merely by its own force. Rather, as the Supreme Court made clear in *Bancec*, section 1606 mandates the application of state law where it would “provide [the] rule of liability governing private individuals.” 462 U.S. at 622. Accordingly, the issue is not one of preemption of state law, but implied repeal of the federal requirement that it control. As nothing at all in the language of the Flatow Amendment or its legislative history even remotely suggests that it was intended to render section 1606 inapplicable in cases involving the state-sponsored terrorism exception, it cannot be construed as having that effect. *United States v. Hsia*, 176 F.3d 517, 525 (D.C. Cir. 1999) (“we will not find repeal absent ‘clear and manifest’ evidence that it was intended”).

Nor can any such intent to restrict the liability of a terrorist state be inferred from the legislative history. To the contrary, the Flatow Amendment was enacted in response to the plight of families like that of Stephen Flatow, who if they had to rely solely on state law could find the damages available to them extremely restricted in cases involving wrongful death. Thus, as is apparent from the legislative history, Congress adopted the Flatow Amendment in order to “expand[] the scope of monetary damage awards available to American victims of international terrorism” by giving them the right to seek damages for solatium and punitive awards. H.R. Conf. Rep. No. 104-863, 104th Cong, 2d Sess., at 987 (1996).

B. Plaintiffs Have A Cause Of Action Against Iraq For False Imprisonment Under D.C. Common Law Because A Private Individual Would Be Liable In Like Circumstances.

As a threshold matter, the determination whether a private individual would be liable in like circumstances requires that a court apply the same choice-of-law principles that would be applied in an action against a private individual. *See, e.g., Barkanic*, 923 F.2d at 959-60; *Virtual Defense*, 133 F. Supp. 2d at 15. In such private actions, where local law and foreign law do not conflict, choice-of-law issues do not arise and the courts appropriately apply the law of the forum. *Taylor v. Canady*, 536 A.2d 93, 96 (D.C. 1988); *see also Nelson v. Sandoz Pharmaceutical Corp.*, 288 F.3d 954, 963 (7th Cir. 2002). Furthermore, the party advocating application of foreign law bears the burden of establishing its content with “reasonable certainty” and, in the absence of such proof, a “district court should apply the law of the forum.” *Banque Lebanaise Pour le Commerce v. Khreich*, 915 F.2d 1000, 1006-07 (5th Cir. 1990); *see also Bel-Ray Co. v. Chemrid Ltd.*, 181 F.3d 435, 440-41 (3d Cir. 1999); Restatement (Second) of Conflicts of Law § 136, cmt.f and h (1971).

Iraq has made no effort to establish the content of Kuwaiti and/or Iraqi law in this case, the application of which would, at any rate, support a cause of action against private individuals had they engaged in like conduct to that alleged in the complaint. Accordingly, this Court should apply the law of the forum – that is, federal law and the common law of the District of Columbia – in determining whether the complaint states claims upon which relief can be granted.¹⁴

¹⁴ Even if Iraq were able to establish the existence of a conflict between local law and either Iraqi or Kuwaiti law (which they cannot), it would not matter. Applying the District of Columbia’s “government interest” approach for resolving choice-of-law questions, *Felch v. Air Florida, Inc.*, 866 F.2d 1521, 1523 (D.C. Cir. 1989), this Court would still be required to apply local law to this dispute since the interest of the United States in having federal or D.C. common law applied to these claims is far greater than any interest Iraq and/or Kuwait may have in the application of their laws. *See, e.g., Tracy v. Islamic Republic of Iran*, 2003 U.S. Dist. LEXIS 15844, at *16-17 (D.D.C. Aug. 21, 2003); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 14 (D.D.C. 1998). As Iraq has failed to raise the choice-of-law issue in its memorandum, plaintiffs will say no more on that subject, which is, at any rate, comprehensively addressed in their Memorandum in Support of their Motion to Schedule an Evidentiary Hearing, filed Sept. 24, 2004, at 18-22.

In count III of their complaint, plaintiffs allege a cause of action for false imprisonment under D.C. common law, including both of the essential elements of the tort, namely that (1) Iraq restrained each of the plaintiffs against his or her will, and (2) such restraint was unlawful. *See, e.g., Faniel*, 404 A.2d at 150; Restatement (Second) of Torts § 35; 32 Am. Jur. 2d False Imprisonment § 8 (2003). Iraq does not dispute that if such allegations had been made against a private individual, they would support a cause of action for false imprisonment under D.C. common law or, for that matter, under the common law of every other jurisdiction in this country. Thus, by operation of section 1606 of the FSIA, the complaint states an actionable common law claim for false imprisonment against Iraq.

C. Plaintiffs Have A Cause Of Action Against Iraq For Wrongful Conduct Under Both Kuwaiti And Iraqi Law Because A Private Individual Would Be Liable In Like Circumstances.

Under Article 227(1) of the Kuwaiti Civil Code, “[e]very person who causes through his wrongful conduct harm to another shall be obligated to compensate [him] whether he was in its occurrence a perpetrator or a cause.” Declaration of Reema I. Ali, executed on March 12, 2004 (“Ali Decl.”), ¶ 5, attached hereto at Tab C. As set forth in the Declaration of Reema I. Ali, an expert in the legal systems of both Kuwait and Iraq, the “wrongful conduct” that is made actionable by section 227(1) includes conduct that would constitute false imprisonment under generally accepted principles of American common law. *Id.* ¶¶ 4-7.

As further set forth in Ms. Ali’s declaration, “wrongful conduct” under Article 227(1) also includes: (a) conduct that violates the Hostage Convention (to which Kuwait is a party), *id.* ¶ 10; and (b) any act that would be in violation of the Kuwaiti Penal Code, *id.* ¶¶ 6-9, including Article 184, which makes it a crime to “confine[] someone in any manner other than in accordance to the law or the procedures required by it.” *Id.* ¶ 9.

The provisions of the Iraqi Civil Code governing liability for tort are substantively the same as those of the Kuwaiti Civil Code. Ali Decl. ¶¶ 14-16. Thus, as in the case of the Kuwaiti Civil Code, the Iraqi Civil Code provides for a rule of general responsibility that gives any individual who is injured by the wrongful conduct of another the right to obtain compensation for any damages he may have suffered by reason of that wrongful conduct. *Id.* ¶ 14. Specifically, under Article 205 of the Civil Code, “[a]ny encroachment on the freedom of another . . . makes the encroacher liable for compensation.” *Id.*

Furthermore, as in the case of the Kuwaiti Civil Code, wrongful conduct under the rule of general responsibility includes any conduct that is in violation of the Iraqi Penal Code, which, like the Kuwaiti Penal Code, makes it unlawful for anyone to “detain[] or in any manner deprive[] a person of his freedom,” except in accordance with law. Ali Decl. ¶ 16.

Iraq does not dispute that had plaintiffs directed the allegations of false imprisonment and hostage-taking set forth in the complaint against a private individual, their complaint would state actionable claims for relief under both Kuwaiti and Iraqi law. Thus, were the laws of either of those two countries applicable to this dispute, Iraq would be subject to liability by operation of section 1606 of the FSIA.

D. Plaintiffs Have A Cause Of Action Against Iraq For Hostage-Taking Under Federal Common Law.

As set forth below, even if Iraq is correct in arguing that its liability depends upon the existence of a sovereign-specific cause of action, which it is not, the complaint would still state an actionable claim for relief against Iraq because there exists such a cause of action for hostage-taking under federal common law. On the other hand, even if the federal common law does not create a cause of action for hostage-taking running directly against a sovereign state, it plainly does create such a cause of action against private individuals. Thus, to the extent the allegations

set forth in the complaint are correct, Iraq is liable for the federal common law tort of hostage taking by operation of section 1606.

1. A Foreign State That Violates The International Proscription Against Hostage-Taking Is Liable In Tort Under Federal Common Law.

Just last year, in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (June 29, 2004), the Supreme Court held that a federal common law cause of action exists for certain torts committed in violation of fundamental principles of international law. Applying the logic of *Sosa*, which was issued subsequent to the D.C. Circuit's rulings in *Cicippio-Puleo* and *Acree*, to the present case, it is plain that the complaint states a viable federal common law cause of action against Iraq as sovereign for hostage-taking.

In *Sosa*, the Supreme Court was faced with the issue whether the Alien Tort Statute of 1789 (the "ATS"), which gives the district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations," 28 U.S.C. § 1350, creates a federal cause of action on behalf of such an alien. While finding that "the statute is in terms only jurisdictional" and, hence, creates no cause of action, the Supreme Court held that the ATS nonetheless "enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." 124 S. Ct. at 2755. The *Sosa* court based this conclusion on an examination of the "historical record," which convinced it that "Congress would not have enacted the ATS only to leave it lying fallow indefinitely." *Id.* at 2758-59. Instead, the court found that "the statute was intended to have practical effect the moment it became law" and that the jurisdictional grant was "best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time." *Id.* at 2761.

When the ATS was enacted in 1789, only three categories of offenses – offenses against ambassadors, violations of safe conduct, and piracy – were regarded “as definite and actionable” under the common law. *Id.* at 2759. The *Sosa* court, however, was unable to discern any development “in the two centuries from the enactment of § 1350 to the birth of the modern line of cases beginning with *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980),” that would preclude the federal courts from recognizing additional “claim[s] under the law of nations as an element of common law.” *Id.* And, while it imposed a “high bar” on the recognition of new private causes of action for violating international law, *id.* at 2763, the *Sosa* court’s decision makes clear that it would be appropriate for the federal courts to do so in cases involving “a norm of international law” having “a content as definite as, and an acceptance as widespread as, those that characterized 18th century norms prohibiting piracy.” *Id.* at 2782 (Breyer, J., concurring in part); *see also id.* at 2766 (majority opinion).

The international legal norm prohibiting hostage-taking meets that exacting standard. The Hostage Convention has been signed by no less than 112 countries. U.S. Dep’t of State, *Treaties in Force* 477 (2003). It obligates all signatory states to prosecute those responsible for the crime of hostage-taking, which, as set forth in Point I above, it defines in specific and straightforward terms. Article 5 of the Hostage Convention requires each contracting party to exercise jurisdiction over any alleged hostage-taker who is “present in its territory” and whom it does not extradite, regardless of where the offense might have been committed. In light of this requirement and the virtually universal condemnation of the crime of hostage-taking by the global community, “international legal scholars unanimously agree that [it] fit[s] within the

category of heinous crimes for purposes of universal jurisdiction.” *United States v. Yunis*, 681 F. Supp. 896, 901 (D.D.C. 1988), *aff’d*, 924 F.2d 1086 (D.C. Cir. 1991).¹⁵

In short, the hostage-taker “has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind.” *Filartiga*, 630 F.2d at 890. And just as aliens can bring a federal common law claim against the hostage-taker in a case in which jurisdiction has been predicated on the ATS, so too can American citizens bring such a claim against a foreign state in a case in which jurisdiction has been predicated on section 1605(a)(7) of the FSIA.

Iraq argues (at 20) that, unlike cases in which jurisdiction is predicated on the ATS, plaintiffs who invoke the FSIA’s jurisdictional grant cannot assert federal common law causes of action because the FSIA was “not intended to affect the substantive law of liability.” The basic flaw in that argument is that, by their nature, federal common law claims exist independent of any jurisdictional statute. A congressional grant of jurisdiction merely enables plaintiffs to pursue those claims in a forum that would not otherwise be available. Accordingly, recognition of a plaintiff’s right to bring federal common law claims (rare, as they may be) in an FSIA case would in no way alter “the substantive law of liability.”

Iraq next argues (at 20) that *Sosa* is not applicable here because, unlike in the case of the ATS, Congress did not enact the FSIA’s state-sponsored terrorism exception with the understanding that the jurisdictional grant would enable plaintiffs to pursue federal common law causes of action for basic violations of international law. First, even if Congress did not have such an understanding, the Supreme Court’s decision in *Sosa* makes clear that, in the post-*Erie*

¹⁵ See, e.g., Philip B. Heymann & Ian Heath Gershengorn, Pursuing Justice, Respecting the Law, 3 *Crim. L.F.* 1, 15 (1991); Kenneth C. Randall, Universal Jurisdiction Under International Law, 66 *Tex. L. Rev.* 785, 836-37 (1988); M. Cherif Bassiouni, II *International Criminal Law* 31-32 (1986); Michael J. Bazylar, Capturing the Terrorist in the Wild Blue Yonder, 8 *Whittier L. Rev.* 685, 687 (1986); Christopher L. Blakesley, United States Jurisdiction Over Extraterritorial Crime, 73 *J. of Crim. L. & Criminology* 1109, 1140 (1982).

era, the door remains ajar to the recognition of federal common law rights in a narrow class of cases involving violations of basic international norms. 124 S. Ct. at 2675. If such rights exist, logic dictates that they may be asserted in any case over which the Congress has given the courts jurisdiction.

At any rate, there is no reason to believe that Congress did not intend to include federal common law claims within its jurisdictional grant when it enacted the state-sponsored terrorism exception. As in the case of the ATS, the historical record demonstrates that Congress did not enact section 1605(a)(7) “only to leave it lying fallow indefinitely.” To the contrary, as the legislative history makes clear, Congress well understood that passage of section 1605(a)(7) would enable individuals to seek and obtain restitution against terrorist states in our courts and, thereby, to hold them legally accountable when they perpetrate terrorist crimes upon our citizens.¹⁶ That congressional understanding is reflected in the fact that section 1605(a)(7) contains its own limitations period, which is expressly made applicable to any “cause of action” maintained under that provision, 28 U.S.C. § 1605(a)(7)(e), as well as its own retroactivity

¹⁶ The House report on the original version of the state-sponsored terrorism amendment stated that the purpose of that amendment was “to allow U.S. citizens who have been subjected to” the terrorist crimes enumerated therein “to maintain a *federal cause of action* for damages against the foreign government involved.” H.R. Rep. No. 702, 103rd Cong., 2nd Sess. 1 (1994) (emphasis added). A subsequent House report on the amendment emphasized that it would, thereby, “give American citizens an important economic and financial weapon against these outlaw states.” H.R. Rep. No. 383, 104th Cong., 1st Sess. 62 (1995). The understanding of the effect of section 1605(a)(7) expressed in these House reports was wholly consistent with that of the amendment’s principal sponsors – Senator Arlen Specter and Congressman Jon Fox – both of whom likewise expressed the view that it would give American victims a remedy against foreign states in their speeches on the floor. *See, e.g.*, 139 Cong. Rec. S4924 (1993) (statement of Senator Specter) (“[This legislation would let foreign sovereigns know that states which practice terrorism or actively support it will not do so without consequence” by “allow[ing] U.S. citizens . . . to protect their interests and seek compensation for the harm done to them.”); 142 Cong. Rec. H2141-42 (1996) (statement of Congressman Fox) (“I introduced . . . the State-Sponsored Terrorism Responsibility Act to allow American victims to have a means of redress in the courts.”). *Accord* 142 Cong. Rec. S3454 (1996) (statement of Senator Brown) (“This provision provides vital remedies for victims.”); 142 Cong. Rec. H2132 (1996) (statement of Congresswoman Ros-Lehtinen) (“This bill . . . allow[s] victims . . . to seek redress for these crimes from the governments that sponsor these atrocities.”); *Id.* H2185 (statement of Congressman Hyde) (noting that the amendment would give victims the ability “to sue terrorist countries and perpetrators of terrorist acts in this country and get a judgment”).

provision, which states that the state-sponsored terrorism exception “shall apply to any *cause of action* arising before, on, or after the date of the enactment of this Act.” Pub. L. No. 104-132, § 221(c) (emphasis added). Accordingly, even though section 1605(a)(7) of the FSIA does not itself create a cause of action, it clearly enables a plaintiff who has properly invoked its jurisdictional grant to pursue claims such as hostage-taking that are independently actionable as a matter of federal common law.¹⁷

2. Plaintiffs have a federal common law cause of action for hostage-taking against Iraq by operation of section 1606 of the FSIA because a private individual would be liable in like circumstances.

Even if federal common law does not create a cause of action for hostage-taking *running directly* against a sovereign state, such a federal common law cause of action does exist against a private individual who violates the international norm against hostage-taking. Thus, by operation of section 1606 of the FSIA, plaintiffs can assert a federal common law cause of action against Iraq.

In general, the law of nations concerns itself only with state actors and does not reach the conduct of private individuals. The principle of “statism” in international law, however, has never been absolute. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J., concurring); *see also Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995). As the

¹⁷ Iraq has a unique perspective on the *Sosa* court’s unwillingness to assume that Congress adopted the ATS “only to leave it lying fallow indefinitely.” In its view (at 20-21), the *Sosa* court’s interpretation of the effect of the ATS was guided not by congressional intent at the time the ATS was enacted in 1789, but by the failure of future Congresses to act “for well over 200 years,” which failure would – absent judicial intervention – have, in fact, kept the ATS lying fallow over all of those years. By parity of flawed reasoning, Iraq maintains (at 21) that since “Congress entered the arena” by enacting the Flatow Amendment just five months after the enactment of section 1605(a)(7) of the FSIA, the latter provision cannot be construed as leaving any room open for the assertion of federal common law causes of action. In truth, however, the *Sosa* court construed the ATS in accordance with the congressional intent *at the time of its enactment*. 124 S. Ct. at 2761. Likewise, this Court should construe the FSIA’s state-sponsored terrorism exception by reference to what Congress intended when it was enacted, rather than by the actions it chose to take at some later date.

Second Circuit held in *Kadic*, “certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.” 70 F.3d at 239. In his seminal opinion in *Tel-Oren*, Judge Edwards identified the crimes of piracy and slave trading as among the “handful of crimes to which the law of nations” has long attribute[d] individual responsibility.” 726 F.2d at 795; *see also Kadic*, 70 F.3d at 239; Restatement (Third) of the Foreign Relations Law of the United States § 404 (1986).

In the modern era, individual responsibility under international law has been extended to a small number of other particularly egregious crimes. For instance, “from its incorporation into international law, the proscription of genocide has applied equally to state and non-state actors.” *Kadic*, 70 F.3d at 242. This is apparent from the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, T.I.A.S. No. 1021, 78 U.N.T.S. 277, which provides that “persons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals,” *id.* art. IV, as well as from the Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091 (1988), which criminalizes acts of genocide without regard to whether the offender is a public official or acting under color of law. *See Kadic*, 70 F.3d at 241-42.

As in the case of genocide, both the Hostage Convention and the Hostage Taking Act, 18 U.S.C. § 1203, apply to any “person” or “offender” who commits the crime of hostage-taking, regardless of whether he has any official status or is acting under color of law. Thus, as in the case of piracy, slave trading and genocide, a private individual may be held liable for hostage-taking under international law. Accordingly, plaintiffs may maintain a cause of action for hostage-taking against Iraq under federal common law, even if such a cause of action is not available to them under the Flatow Amendment. *See Dodge*, slip op. at 9 n.9 (holding that

“federal common law causes of action still give rise to liability” against Iran, regardless of applicability of Flatow Amendment).

E. Plaintiffs Have A Cause Of Action For Hostage-Taking Under Federal Statutory Law Because A Private Individual Would Be Liable In Like Circumstances Under The Flatow Amendment.

In its decision in *Cicippio-Puleo*, the D.C. Circuit recognized that the Flatow Amendment imposes liability upon officials, employees and agents of a foreign state when they engage in hostage-taking and other terrorist acts “in their personal [or private] capacities.” 353 F.3d at 1029. If, for example, a private individual is recruited by a foreign government to perform an act of hostage-taking, that individual could be held liable in his personal capacity under the Flatow Amendment. Section 1606 of the FSIA creates a cause of action against foreign states whenever they engage in conduct that would subject a private individual to liability. Thus, as Judge Jackson recently held in *Dodge*, a terrorist state that engages in hostage taking or any other terrorist act proscribed by the Flatow Amendment is subject to liability by operation of section 1606. Slip op. at 8.

Nothing in *Cicippio-Puleo* commands a contrary result. As set forth above, *Cicippio-Puleo* stands only for the limited proposition that the Flatow Amendment does not by itself, nor “in tandem” with section 1605(a)(7) of the FSIA, “create[] a private right of action against foreign governments.” *Id.* at 1027. As Judge Jackson correctly observed in *Dodge*, that case “did not address § 1606, and therefore did not consider whether 28 U.S.C. § 1606 provides a basis for asserting federal statutory causes of action against foreign states,” including under the Flatow Amendment. Slip Op. at 8 n.8.

Iraq complains (at 23) that the application of section 1606 to the Flatow Amendment would “eviscerate” the D.C. Circuit’s holding in *Cicippio-Puleo*. In so doing, Iraq neglects the

fact that the *Cicippio-Puleo* court took pains to point out that section 1605(a)(7) and the Flatow Amendment were “the *only* provisions” that the *Cicippio-Puleo* plaintiffs had relied upon as the source of their cause of action. 353 F.3d at 1033 (emphasis added). It specifically refused to address issues that were “not raised by the parties,” including the issue whether section 1606’s mandate that non-immune foreign states be treated the same as private individuals for liability purposes applies to the Flatow Amendment. *Id.* at 1036.¹⁸

Given the structure of the FSIA and the manner in which section 1606 authorizes liability to be imposed upon foreign states, the fact that Congress did not create a cause of action running directly against foreign states when it wrote the Flatow Amendment should come as no surprise. Congress does not ordinarily create foreign sovereign-specific causes of action when it writes liability-creating statutes. Indeed, the U.S. Code is replete with provisions that create liability against private individuals, none of which mentions foreign states. Nonetheless, each of those provisions is made applicable to non-immune foreign states by operation of section 1606. Logic dictates that the same should be true of the Flatow Amendment.

IV. THE POLITICAL QUESTION DOCTRINE POSES NO BARRIER TO THE ADJUDICATION OF THESE CLAIMS.

Iraq argues (at 27) that adjudication of this case is barred by the political question doctrine because it would implicate “American foreign policy and national security issues of the highest importance.” Iraq forgets, however, that the political question doctrine “is one of ‘political questions,’ not one of ‘political cases.’” *Baker v. Carr*, 369 U.S. 186, 217 (1962). This case raises no such questions.

¹⁸ It is worth noting that the consequences of being held directly liable under the Flatow Amendment are different from those of being held liable by operation of section 1606. The Flatow Amendment expressly authorizes an award of punitive damages against individuals. 28 U.S.C. § 1605(note). Section 1606, however, provides that a foreign state “shall not be liable for punitive damages.”

In determining whether a case presents a non-justiciable political question, this Circuit applies the three-part test that was articulated by Justice Powell in his concurrence in *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) namely:

“Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?”

Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1511 (D.C. Cir. 1984) (en banc). As the Second Circuit has made clear, the most important of these inquiries is the first – “whether there is a ‘textually demonstrable constitutional commitment of the issue to a coordinate political department.’” *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991) (quoting *Goldwater v. Carter*, 444 U.S. 996, 1006 (1979) (Brennan, J., dissenting)).

Iraq maintains (at 30) that the resolution of plaintiffs’ claims against Iraq is constitutionally committed to the political branches because any decision to award them compensation would undermine the efforts of the President and Congress “to create a stable Iraq.” That is a *non-sequitor*. The issue of justiciability turns upon whether adjudication of a dispute is textually committed to the political branches, not upon whether it implicates foreign policy concerns. *See, e.g., Baker*, 369 U.S. at 211 (“it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance”); *Ramirez de Arellano*, 745 F.2d at 1512 (“Not every issue related to foreign relations . . . is constitutionally committed for resolution by the Executive.”) Indeed, the courts, including the Supreme Court and the D.C. Circuit, have not hesitated to exercise their responsibility to address the merits of legal issues lying within their competence, even where their decisions could have far-reaching

effects on U.S. foreign policy.¹⁹ Likewise, this Court “should not convert what is essentially an ordinary tort suit” into “a non-justiciable political question” merely because the issues in this case “arise in a politically charged context” and a setting in which strong foreign policy interests might be at stake. *Klinghoffer*, 937 F.2d at 49; *accord Biton v. Palestinian Interim Self-Gov’t Auth’y*, 310 F. Supp. 2d 172, 184 (D.D.C. 2004); *Estates of Unger ex rel. Strachman v. Palestinian Auth’y*, 315 F. Supp. 2d 164, 174 (D.R.I. 2004).

Iraq’s argument that this case involves issues that are constitutionally committed to the political branches overlooks the fact that in enacting the state-sponsored terrorism exception, Congress gave American victims the right to pursue their claims against state sponsors of terrorism in the courts of this country. Accordingly, the branch to which the issues presented by this case “has been ‘constitutionally committed’ is none other than . . . the Judiciary.” *Klinghoffer*, 937 F.2d at 49 (holding that political question doctrine did not preclude courts from hearing claims based on acts of terrorism perpetrated by PLO, where Congress had empowered them to do so by enacting the Anti-Terrorism Act (“ATA”), 18 U.S.C. § 2333); *Estates of Unger*, 315 F. Supp. 2d at 174; *Knox v. PLO*, 306 F. Supp. 2d 424, 449 (S.D.N.Y. 2004).

Iraq is also wrong in suggesting that the vast changes in the political landscape since the liberation of that country by coalition forces in March 2003 has altered the constitutional commitment of these issues to the judicial branch. To the contrary, when Congress committed the adjudication of hostage-taking and other claims against terrorist states to the judiciary in

¹⁹ See, e.g., *Rasul v. Bush*, 124 S. Ct. 2686, 2698 (2004) (holding that courts could entertain ATS claims by aliens challenging the legality of their detention in Guantanamo Bay, despite President’s argument that to do so would interfere with efforts of the United States to fight the war on terrorism); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 690-01 (1952) (invalidating President Truman’s decision to seize private steel mills, despite his assertion that such action would “immediately jeopardize and imperil our national defense” and the safety of “our soldiers, sailors, and airmen engaged in combat”); *Ramirez de Arellano*, 745 F.2d at 1512 (holding that issue whether the U.S. military could conduct exercises overseas on “land [that] has not been lawfully expropriated” does not constitute a non-justiciable political question, despite implications for U.S. military and foreign policy).

1996, it contemplated the possibility that they might one day renounce their terrorist ways and rejoin the community of nations. But instead of stripping American victims of their ability to pursue their claims in the event of such changes in the political landscape, Congress gave the courts jurisdiction to entertain those claims in any case in which the defendant state was designated as a state sponsor of terrorism “at the time the act occurred.” 28 U.S.C.

§ 1605(a)(7)(A).²⁰

Given the enactment of legislation committing to the judiciary the resolution of all claims against former rogue states for acts occurring before they renounced terror, the courts have a constitutional responsibility to hear those claims, absent some equally forceful and unambiguous directive from the political branches taking them outside the realm of judicial competence. The political branches could have (but have not) taken such action in this case by enacting legislation that would strip the courts of their jurisdiction to hear these and similar claims arising out of the conduct of the former Iraqi regime. *See Acree*, 370 F.3d at 57 (rejecting argument that section 1503 of the Emergency Wartime Supplemental Appropriations Act gave President the authority to make section 1605(a)(7) inapplicable to Iraq). Alternatively, with the acquiescence of Congress, the President could have (but has not) exercised his authority to espouse these claims – an action that would enable him to settle or waive them at his pleasure and, at the same time, extinguish plaintiffs’ rights to pursue them in this Court. *Asociacion de Reclamates v. United Mexican States*, 735 F.2d 1517, 1523 (D.C. Cir. 1984). Had the political branches taken either of these steps, this Court would be faced with a very different question than the one currently

²⁰ Iraq suggests (at 32) that section 1605(a)(7) no longer has any relevance to this matter because “any deterrent effect [it] may once have had with respect to Iraq has vanished.” Leaving aside the fact that, by its terms, section 1605(a)(7) makes this Court’s responsibility clear, Iraq’s argument ignores the deterrent effect that provision might have on the conduct of other terrorist states or some future Iraqi government that may not have the same respect for international norms as does the current regime. Furthermore, Iraq’s argument ignores the fact that a no less important purpose of the state-sponsored terrorism exception was to provide redress for victims. *See* note 16 *supra*.

before it. But the mere fact that the President may have expressed his view (Iraq Br. at 29) that a judicial finding of liability in this case poses a “threat to the national security and foreign policy of the United States” or that the Congress may be “seized of these matters” (*id.* at 30) cannot, as a constitutional matter, commit their resolution to the political branches in the face of specific legislation giving that role to the judiciary. *See, e.g., Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237 (11th Cir. 2004) (holding that political question doctrine did not preclude adjudication of claims arising during the Nazi era that President had neither espoused nor settled); *In re Agent Orange*, 2005 U.S. Dist. LEXIS 3644, at *191-94 (holding that political question doctrine did not preclude adjudication of claims arising out of use of chemical herbicide during Vietnam War where they had not been subject of any reparations or other settlement agreement).²¹

Iraq’s argument (at 28-29) that the issues presented by this case lie outside the realm of this Court’s expertise fares no better than its argument that they are committed to the political branches. The judicial task in this case is merely to adjudicate Iraq’s liability to plaintiffs under federal, state or foreign law. As the Second Circuit observed when faced with the analogous issue in the context of a claim against the PLO in a case brought under the ATA, that task is well within the competence of the district courts since “the common law of tort provides clear and well-settled rules on which [they] can easily rely.” *Klinghoffer*, 937 F.2d at 49; *accord Biton*, 310 F. Supp. 2d at 184; *Estates of Unger*, 315 F. Supp. 2d at 174. Likewise, resolution of the issue whether Iraq can be held liable for hostage-taking under federal common law requires nothing more than the application of “universally recognized norms of international law,” which

²¹ It is, of course, conceivable that the President may one day choose to espouse plaintiffs’ claims and then either waive or settle them. In the fourteen years that have passed between the time of their release and the present, however, the executive branch has opted not to exercise its unquestioned power to espouse these claims. The mere fact that it may do so years or perhaps even decades in the future is no warrant for the Court to shirk the constitutional responsibility with which it has been entrusted.

themselves “provide judicially discoverable and manageable standards for adjudicating disputes.” *Kadic*, 70 F.3d at 249. In short, the proposition that consideration of personal injury claims arising out of the kind of barbaric acts at issue here lie outside judicial cognizance “cuts against the grain of what compels the business of the courts.” *Knox*, 306 F. Supp. 2d at 448. To accept that proposition “would rub every syllable of justice out of the concept of justiciability and do equal violence” to the FSIA. *Id.*

Finally, the kind of prudential considerations that might counsel against judicial intervention are completely absent from this case. First, “given the fact that both the Executive and Legislative Branches have expressly endorsed the concept of suing terrorist [states] in federal court, resolution of this matter will not exhibit ‘a lack of respect due coordinate branches of government.’” *Klinghoffer*, 937 F.2d at 50; *accord Biton*, 310 F. Supp. 2d at 184; *Knox*, 306 F. Supp. 2d at 449. Second, entertaining these claims will not require this Court to make “an initial policy determination of a kind clearly for non-judicial discretion,” *Baker*, 369 U.S. at 217, since that initial policy choice was already made by the political branches when they enacted legislation committing the resolution of terrorism claims to the judiciary. Moreover, the specific determination concerning Iraq’s liability to plaintiffs “is one of [common] law, not policy.” *In re Agent Orange*, 2005 U.S. Dist. LEXIS 3644, at *171. For similar reasons, this case does not involve “an unusual need for unquestioning adherence to a political decision already made.” *Baker*, 369 U.S. at 217. Inasmuch as the political branches have made no decision to waive, settle or otherwise espouse these claims, the only political decision that has been made that requires “unquestioned adherence” is that giving plaintiffs the right to pursue these claims in this Court. *See Klinghoffer*, 937 F.2d at 50.

In the end, all Iraq is left with is its argument (at 31) that adjudication of this matter would embarrass the political branches in their conduct of foreign relations by sending conflicting messages on this country's commitment to the reconstruction effort. However, the complete "absence of executive and legislative action" to take these claims from the branch in which their resolution has been entrusted "obviates" any such concern regarding "multifarious pronouncements by various departments on one question." *In re Agent Orange*, 2005 U.S. Dist. Lexis, at *174. To the contrary, their adjudication is entirely consistent with the pronouncements of both the Congress and the President that American victims of terrorist crimes should be able to seek redress from a perpetrating state in our courts, even when that state has come under new leadership and has foresworn the use of terrorism as an instrument of foreign policy. *See Klinghoffer*, 937 F.2d at 49.

CONCLUSION

For the reasons set forth herein, Iraq's motion to dismiss should be denied.

Dated: Washington, D.C.
March 22, 2005

Respectfully submitted,

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