

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

ROBERT L. PUGH, *et al.*,

Plaintiffs,

v.

SOCIALIST PEOPLE’S LIBYAN
ARAB JAMAHIRIYA, *et al.*,

Defendants.

Civil Action No. 02-2026 (HHK)

PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56.1, Plaintiffs hereby move for a judgment of liability against all Defendants. As demonstrated in the accompanying Statement of Material Facts As To Which There Is No Genuine Issue, all Defendants are responsible for the 1989 terrorist bombing of UTA Flight 772 and should be held legally accountable to the U.S. citizen victims and their families. In addition, the individual Defendants are liable to Interlease, Inc., the owner-lessor of the DC-10 aircraft, for the property and business losses it incurred as a direct result of the bombing.

As discussed more fully in the accompanying Memorandum of Law in Support of Plaintiffs’ Motion, by operation of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.*, Plaintiffs have available to them a number of viable causes of action through which to vindicate the wrongs they suffered as a direct

result of Defendants' deliberate, intentional and heinous acts. Because the undisputed material facts establish Defendants' liability under those causes of action as a matter of law, a judgment of liability should be entered.

Respectfully submitted,

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**MEMORANDUM OF LAW IN SUPPORT OF
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Introduction

On September 19, 1989, a DC-10 airliner operated by the French airline Union de Transports Aeriens (“UTA”) as UTA Flight 772 exploded in mid-air over the Tenere desert in the African country Niger. The flight had originated in Brazzaville, Congo and was en route to Paris following a stopover in N’Djamena, Chad. All 170 people on the flight were killed, including seven Americans. On the heels of the Libyan-sponsored bombing of Pan Am 103 over Lockerbie, Scotland approximately nine months earlier in December 1988, it eventually became clear that Libya also was behind the bombing of UTA Flight 772. The exhaustive investigation which followed made clear beyond peradventure, that the Government of Libya, acting through its agents, officials and employees, had planned, funded,

sponsored, and carried out the in-flight destruction of UTA Flight 772 and was directly responsible for the deaths of all that were on board.

This action was filed in this Court in 2002 by the personal representatives and family members of the seven United States citizen victims,¹ as well as by the United States corporate owner-lessor of the DC-10,² against the State of Libya – formally known as the Socialist People’s Libyan Arab Jamahiriya – the Libyan External Security Organization (“LESO”),³ and six high-ranking individuals of the Libyan Government, in both their official and individual capacities.⁴ It was filed pursuant to the state-sponsored terrorism exception of the Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. § 1605(a)(7), and states claims under, *inter alia*, the Torture Victims Protection Act (“TVPA”), 28 U.S.C. § 1350 note, the so-called Flatow Amendment, 28 U.S.C. § 1605 note, appropriate state and common law causes of action, and 18 U.S.C. § 2333(a) (a civil treble damages provision for acts of international terrorism).

¹ The seven United States citizens killed on UTA Flight 772 were Bonnie Barnes Pugh, Margaret Elizabeth Schutzius, Mark E. Corder, James E. Turlington, Sr., Patrick Wayne Huff, Donald J. Warner, and Mihai Alimanestianu.

² The corporate owner-lessor of the airplane is Interlease, Inc. a Georgia corporation.

³ LESO is the Libyan State intelligence agency, the de facto head of which is Defendant Abdallah Senoussi, the brother-in-law of Libyan Head of State, Muammar Qadhafi.

⁴ A seventh individual defendant named in the Complaint is Muammar Qadhafi, the Head of State of the Libyan Government, but Plaintiffs are not suing him in his individual capacity.

In response to the Complaint, Defendants asserted sovereign immunity, in addition to various other threshold defenses, and moved to dismiss. Judge Thomas Penfield Jackson, who has since retired, denied Defendants' motion in its entirety with respect to the individual Plaintiffs. The Court, however, granted the motion with respect to Interlease, except Judge Jackson held that Interlease could proceed with its claims against the individual Defendants, including its claim pursuant to 18 U.S.C. § 2333(a). *Pugh v. Socialist People's Libyan Arab Jamahiriya*, 290 F. Supp. 2d 54, 60-61 (D.D.C. 2003). The Defendants noticed an immediate appeal. On November 22, 2004, the Court of Appeals dismissed the appeal for lack of jurisdiction. *See Pugh v. Socialist People's Libyan Arab Jamahiriya*, 112 Fed. Appx. 756 (D.C. Cir. 2004).

Now that all jurisdictional issues have been resolved, the case is ripe for adjudication of the merits. Because the material facts regarding the liability of the Defendants are beyond genuine dispute, Plaintiffs hereby move for partial summary judgment against all the Defendants solely regarding the issue of their liability for this notorious act of terrorism and murder. As summarized below, and in extensive detail in the accompanying Statement of Material Facts As To Which There Is No Genuine Issue (including its numerous exhibits), there is no question that the Defendants are responsible, and should be held legally liable to Plaintiffs, for the terrorist bombing of UTA Flight 772.⁵

⁵ Plaintiffs' Statement of Material Facts is also supported by the Declaration of retired Ambassador Thomas E. McNamara, who obtained first-hand,
(continued...)

Factual Background

The facts supporting this Motion are set forth in detail in the accompanying Statement of Material Facts As To Which There Is No Genuine Issue (“Statement”), pursuant to Local Civil Rule 56.1.⁶ Briefly stated, following the destruction of UTA Flight 772 and the death of all 170 persons on the DC-10 jumbo jet, the Government of France commenced an exhaustive investigation of the crime. The investigation took eight years to complete and was headed by France’s most experienced counterterrorism investigative magistrate judge – Magistrate Judge Jean Louis Bruguiere. Judge Bruguiere was aided in his investigative efforts by, among others, France’s intelligence and investigative services, the U.S. Federal Bureau of Investigation and the National Transportation Safety Board, as well as numerous other intelligence officials from around the world.

At the conclusion of this lengthy and exhaustive investigation, France’s Public Prosecutor concluded that Libya and the other Defendants in this case were directly responsible for the bombing of UTA Flight 772. Indeed, as described in

(...continued)

personal knowledge of Libya’s responsibility for the bombing of UTA Flight 772 during his service as the U.S. Government’s chief official regarding terrorism issues, including at the National Security Council and the Department of State. See Declaration of Ambassador Thomas McNamara, attached as Ex. 6.

⁶ The rule states in relevant part that a summary judgment motion “shall be accompanied by a statement of material facts as to which the moving party contends there is no genuine issue, which shall include references to the parts of the record relied on to support the statement.”

detail in the accompanying Statement and supporting exhibits, the evidence is not only conclusive, it is overwhelming. As a result of this evidence, the six Libyan intelligence officers sued in this case (all the individual Defendants except Qadhafi) were criminally tried in France, *in absentia*, in a special Court of Assize. In fact, Libya refused to comply with the French arrest warrants and to this day has refused to extradite any of the individuals to France. Following a hearing, the six Defendants were convicted of deliberately destroying, or deliberately being complicit in the destruction of, the UTA airliner, by means of an explosive device, and intentionally taking the lives of the passengers and crew on board. Each was sentenced to life in prison. The Court of Assize also issued a civil judgment against the Libyan officials in the amount of \$33 million.

Similarly, and based on the French investigation and criminal proceedings, the United States Government concluded that Libya was responsible for the bombing of UTA Flight 772, as well as for the bombing of Pan Am 103 over Lockerbie.⁷ As a result of these bombings, and other events, the United Nations Security Council, in 1992, imposed international sanctions against Libya.

In 2003, Libya finally accepted responsibility for the Pan Am 103 Lockerbie bombing. Although Libya has thus far refused to accept any responsibility for the bombing of UTA Flight 772, in 1999, the Libyan State directly paid the \$33 million

⁷ Libya has been on the Department of State's list of designated state sponsors of terrorism since the list's inception in 1979. Libya remains on the list today. *See* 22 C.F.R. § 126.1(d) (2005).

civil judgment against its intelligence officers to the Government of France as compensation to the French families killed in the UTA 772 bombing. In addition, an entity called the “Qadhafi Foundation” subsequently tendered an additional \$170 million to the non-American families of the victims of UTA 772, pursuant to what was characterized as a “humanitarian settlement.” In contrast, neither the United States victims, nor their families, nor Interlease – Plaintiffs in this case – have been compensated by the Defendants.

ARGUMENT

The Legal Framework

At the time Plaintiffs filed this case, various judges of this Court repeatedly had held that the terrorism exception to the FSIA and the so-called Flatow Amendment, 28 U.S.C. § 1605 note, created a substantive federal cause of action by which United States citizen victims of terrorism could pursue civil monetary claims against designated state-sponsors of terrorism. *See, e.g., Dammarell v. Islamic Republic of Iran*, 281 F. Supp. 2d 105, 194 (D.D.C. 2003) (holding that plaintiffs have federal statutory, federal common law, and state common law claims against Iran); *Cronin v. Islamic Republic of Iran*, 238 F. Supp. 2d 222, 231-33 (D.D.C. 2002) (holding that the statutes and subsequent Congressional action read together created a federal cause of action); *Kerr v. Islamic Republic of Iran*, 245 F. Supp. 2d 59, 63 n.9 (D.D.C. 2003) (agreeing with *Cronin* analysis).

In *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004), however, the D.C. Circuit Court of Appeals held that although 28 U.S.C.

§ 1605(a)(7) confers subject matter jurisdiction in federal courts for cases asserting state-sponsored terrorism, neither that provision, nor the Flatow Amendment, in and of themselves creates a federal cause of action. 353 F.3d at 1034. The Court did, however, remand the case to permit Plaintiffs in that case “an opportunity to amend their complaint to state a cause of action under some other source of law, including state law, as the Kilburn *amici* have suggested.” *Id.* at 1036.⁸ In reaching its conclusions, the Court of Appeals specifically did not consider the effect of 28 U.S.C. § 1606 on what claims might be available to plaintiffs in state-sponsored terrorism cases.

Subsequently, the D.C. Circuit Court of Appeals held in *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 1928 (2005), that plaintiffs suing under 28 U.S.C. § 1605(a)(7) cannot state a right of action under “generic common law” or “allude[] to the traditional torts . . . in their generic form.” *Acree*, 370 F.3d at 59. The Court indicated that plaintiffs must instead “identify a particular cause of action arising out of a specific source of law.” *Id.* (internal quotations and citation omitted).

Based on these decisions, the various judges of this Court have since addressed how to move forward with pending lawsuits brought pursuant to

⁸ The undersigned counsel participated in the *Cicippio-Puleo* case on appeal as counsel for *amici* Blake Kilburn and others. In that capacity, we argued, *inter alia*, that the Flatow Amendment created a federal cause of action against terrorist states, but that should the Court hold otherwise – as it did ultimately – state causes of action would still permit Plaintiffs to proceed with their claims.

28 U.S.C. § 1605(a)(7), and related statutes, by victims of state-sponsored terrorism against the applicable foreign state sponsors. Although judges of this Court have adopted different approaches, they uniformly have determined that plaintiffs may pursue state sponsors of terrorism asserting various claims once immunity is stripped pursuant to § 1605(a)(7).

In August 2004, Judge Jackson held in *Dodge v. Islamic Republic of Iran*, C.A. No. 03-252 (D.D.C. August 25, 2004), that “[o]nce a foreign state is found amenable to suit under § 1605(a)(7), that state is liable ‘in the same manner and to the same extent as a private individual under like circumstances’ by virtue of section 1606 of the FSIA.” Slip Op. at 7-8. Thus, Judge Jackson explained, a plaintiff “may sue that state under any cause of action arising from common law, foreign law, or federal statute which might ordinarily give rise only to individual liability.” *Id.* at 8. As applied in *Dodge*, the Court identified two appropriate federal statutory causes of action under which the Plaintiffs could proceed – the TVPA, Pub. L. 102-256, 106 Stat. 73 (reprinted at 28 U.S.C. § 1350 note), and the Flatow Amendment, 28 U.S.C. § 1605 note. *Id.* at 8-10. Based on this analysis, Judge Jackson awarded David Dodge – who had been held hostage for a year by terrorists sponsored by Iran – and his family, a multi-million dollar judgment against Iran. *Id.* at 12.

More recently, Judge Bates, presented with many issues similar to those presented in *Dodge*, held in *Dammarell v. Islamic Republic of Iran*, C.A. No. 01-224 (JDB), 2005 U.S. LEXIS 5343 (D.D.C. March 29, 2005), that Iran is “subject to the

suit under the state-sponsored terrorism exception to the FSIA [28 U.S.C. § 1605(a)(7)],” and that pursuant to District of Columbia choice of law principles, “state common and statutory law – specifically, the law of the state of the domicile of each of the plaintiffs (or, in the case of an estate, the law of domicile of the decedent) – may provide a cause of action against defendants in this action.” *Id.* at *4.⁹ As Judge Bates explained, once a foreign state’s immunity has been lifted under 28 U.S.C. § 1605 – which it clearly has under the terrorism exception – 28 U.S.C. § 1606 provides that “the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.” Thus, Section 1606 acts as a “pass through” to substantive causes of action that may exist in federal, state, foreign, or international law. 2005 U.S. LEXIS 5343 at *27-32. Judge Bates nonetheless concluded that state law is the preferred vehicle for plaintiffs to obtain relief. For various reasons, he held that the domiciliary state of the claimant has a “paramount” interest in having its own law provide the appropriate relief to its residents. *Id.* at *62-63.

On the same day, Judge Bates issued a separate opinion in *Salazar v. Islamic Republic of Iran*, 370 F. Supp. 2d 105 (D.D.C. 2005), which, not surprisingly, reached the same conclusion as *Dammarell* regarding the applicable causes of

⁹ Following Judge Bates’ March 29, 2005 decision, Plaintiffs moved for reconsideration on several issues. The motion was granted in part and denied in part. *See Dammarell v. Islamic Republic of Iran*, 370 F. Supp. 2d 218 (D.D.C. 2005). The Court’s conclusion that state statutory and common law claims must be applied was not altered. The plaintiffs in that case await a resolution regarding liability, damages and final judgment.

action. *Id.* at 113-14. Both cases were brought by families and victims of the 1983 bombing of the United States Embassy in Beirut, Lebanon. Again applying this forum's choice of law principles, Judge Bates, in *Salazar*, applied the law of the decedent – Illinois in that case – to the claims brought by the decedent's estate and wife, and awarded Plaintiffs a final judgment against Iran. *Id.* at 114-15.

Most recently, Judge Lamberth issued a final judgment in *Price v. Socialist People's Libyan Arab Jamahiriya*, C.A. No. 97-975, 2005 U.S. Dist. LEXIS 14858 (D.D.C. July 26, 2005), another case arising out of the FSIA's state-sponsored terrorism exception. He adopted the rationale of Judge Bates in *Dammarell* and concluded for many of the same reasons (and applying this jurisdiction's choice of law principles) that the applicable state law should govern the causes of action that can be asserted by a plaintiff under the FSIA's state-sponsored terrorism exception. *Id.* at *29-32. Thus, in *Price*, he applied the laws of Texas and California to award a judgment in favor of the plaintiffs and against Libya. *Id.* at *33-47.

Additionally, Judge Urbina, in *Collett v. Socialist People's Libyan Arab Jamahiriya*, 362 F. Supp. 2d 230 (D.D.C. 2005) – another case brought under the terrorism exception of the FSIA – rejected an approach that relied on *generic* federal common law, but delayed for another day a decision as to whether international law could provide a cause of action. *Id.* at 241-42 & n.5. He also held that the Flatow Amendment and the TVPA provide causes of action only against individuals, not the foreign states themselves. *Id.* Finally, Judge Urbina reiterated that conventional state law torts “such as assault, battery, and intentional infliction of

emotional distress” could form the basis of a cause of action against a designated state sponsor of terrorism. *Id.* at 239 n.5.

In sum, different judges of this Court have taken different routes – whether it be via the application of federal or state law – to find liability and award damages against designated foreign state sponsors of terrorism. Here, plaintiffs seek at this time resolution of the Defendants’ *liability only*. Once the Court rules on the question of liability, assuming a finding that Defendants are liable for the destruction of UTA Flight 772, it should thereafter conduct an evidentiary hearing to determine the scope of damages. In order to ensure that the Court has the benefit of the various possible routes to a conclusion of liability here, we discuss below, and argue in the alternative, various federal and state causes of action on which this Court can conclude that Defendants are liable to Plaintiffs for this act of terrorism and murder. Under any of these legal scenarios, Plaintiffs are entitled to summary judgment on all issues regarding liability.

I. THE FSIA SPECIFICALLY MANDATES THAT ALL CAUSES OF ACTION AGAINST INDIVIDUALS THAT FALL WITHIN THE TERMS OF A § 1605(a)(7) EXCEPTION ARE ALSO AVAILABLE AGAINST THE LIBYAN STATE.

To assist the Court with its analysis of which causes of action apply to this case, we begin first with a brief overview of the FSIA and the way in which causes of action are made available once a court determines that sovereign immunity is no longer a defense to the foreign state defendant.

With its original enactment of the FSIA in 1976, Congress codified the historic practice of affording foreign states immunity from suit as a matter of comity

in United States courts. That immunity is not, however, absolute. Section 1605 specifically sets forth various circumstances, generally based on the nature of the case or the claims made, under which a foreign state may not properly claim immunity as a defense to actions brought in the United States. *See* 28 U.S.C. § 1605. For almost thirty years, the FSIA has provided that immunity may not serve as a jurisdictional bar against claims involving a foreign sovereign's (1) commercial activities; (2) expropriation of property in violation of international law; or (3) non-commercial torts. *Id.*

The exceptions found in § 1605 eliminate the foreign state's immunity defense. Claims falling within an enumerated exception are rendered jurisdictionally proper in United States courts. Once the immunity defense has been lifted, plaintiffs may then pursue whatever causes of action fall within the scope of the exception – as supported by the facts and relevant law.

Although § 1605 lifts the immunity defense and provides a basis for federal jurisdiction, § 1605 does not itself create any causes of action. *Cicippio-Puleo*, 353 F.3d at 1033. If a § 1605 exception applies – meaning that immunity is revoked and jurisdiction in United States courts is proper – the foreign state is simply rendered subject to all of the causes of action that its immunity previously barred. Thus, plaintiffs are permitted to pursue whatever causes of action fall within the scope of the exception (and are supported by the facts of the case and the relevant substantive law).

Nothing in the FSIA *limits* the sources of potentially applicable law under which a plaintiff may assert a cause of action against a non-immune foreign state. Thus, the foreign state might be liable under *state* common and statutory law; the foreign state may be liable under *federal* statutory and common law (including such principles of international law as are enforceable under federal common law); the foreign state may be held liable under *foreign* law. Plaintiffs relying on the commercial activity exception, for example, commonly bring breach of contract claims based on state common law, statutory law, or foreign law.¹⁰ Plaintiffs relying on the noncommercial torts exception might rely on state common law or foreign law.¹¹ Federal statutory law claims – for example, RICO or antitrust claims – also may be brought against foreign states.¹²

The most recent addition to the § 1605 list of sovereign immunity exceptions is § 1605(a)(7), the exception directly at issue here. Congress enacted this exception in 1996 as part of a concerted response to terrorism that targeted United States

¹⁰ See, e.g., *Dar El-Bina Eng'g & Contracting Co. v. Republic of Iraq*, 79 F. Supp. 2d 374 (S.D.N.Y. 2000) (New York law); *Walpex Trading Co. v. Yacimientos Petroliferos Fiscales Bolivianos*, 789 F. Supp. 1268 (S.D.N.Y. 1992) (Bolivian law in breach action).

¹¹ See, e.g., *Joseph v. Office of the Consulate*, 830 F.2d 1018 (9th Cir. 1987) (applying California law); *Barkanic v. Gen. Admin. of Civil Aviation of People's Republic of China*, 923 F.2d 957 (2d Cir. 1991) (Chinese law in wrongful death action).

¹² See, e.g., *Southway v. Cent. Bank of Nigeria*, 198 F.3d 1210 (10th Cir. 1999) (evaluating RICO claims under FSIA); *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922 (2d Cir. 1998) (antitrust).

citizens. Section 1605(a)(7), or the “state-sponsored terrorism” exception, revokes immunity and confers jurisdiction when:

money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, *extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act* if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

28 U.S.C. § 1605(a)(7) (emphasis added).¹³ See *Kilburn v. Republic of Iran*, 277 F. Supp. 2d 24, 36 (D.D.C. 2003), *aff’d* 376 F.3d 1123 (D.C. Cir. 2004).

With § 1605(a)(7), “Congress sought to create a judicial forum for compensating the victims of terrorism, and in so doing to punish foreign states who have committed or sponsored such acts and deter them from doing so in the future.” *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 329 (D.C. Cir. 2003) (citation omitted);¹⁴ see also H.R. Rep. No. 104-383, at 62 (1995) (“[A]llowing suits in the

¹³ The reach of § 1605(a)(7) is limited to foreign states designated as “state sponsors of terrorism” by the Department of State. In addition, the claimant or victim must be a U.S. national. 28 U.S.C. § 1605(a)(7)(A) & (B). Both of these elements are uncontested in this case.

¹⁴ Before enactment of § 1605(a)(7), U.S. victims of international terrorism attempted to sue foreign states by invoking the “commercial activity” exception to the FSIA, or by arguing that the foreign sovereign had impliedly waived immunity through its terrorist acts. See, e.g., *Cicippio v. Islamic Republic of Iran*, No. 92-2300, 1993 U.S. Dist. LEXIS 21413, *2-4 (D.D.C. Mar. 18, 1993), *aff’d* 30 F.3d 164 (D.C. Cir. 1994); see also *Smith v. Socialist People’s Libyan Arab Jamahiriya*, 886 F. Supp. 306 (E.D.N.Y. 1995), *aff’d* 101 F.3d 239 (2d Cir. 1996) (suit against Libya for 1988 bombing of Pan American Flight 103 over Lockerbie, Scotland). While courts were sympathetic to the plaintiffs’ claims in these cases, they were compelled to dismiss the actions
(continued...)

federal courts against countries responsible for terrorist acts where Americans and/or their loved ones suffer injury or death at the hands of the terrorist states is warranted. [Section 1605(a)(7)] will give American citizens an important economic and financial weapon against these outlaw states.”). Congress expressly provided that § 1605(a)(7) would apply retroactively, *see* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(c), 110 Stat. 1243 (immunity exception “shall apply to any cause of action arising before, on, or after the date of the enactment of this Act”), and the statute of limitations was tolled until immunity was stripped by the statute. 28 U.S.C. § 1605(f).

As with the other § 1605 exceptions, the foreign state stripped of immunity under § 1605(a)(7) is rendered amenable to suit under whatever causes of action are available under state statutory or common law, federal statutory or common law (including international law), or under foreign law.

Indeed, the FSIA affirmatively requires that certain causes of action *must* be made available to litigants in actions against non-immune foreign states.

Specifically, Section § 1606 provides:

(...continued)

based on foreign sovereign immunity. *See Smith*, 886 F. Supp. at 315 (concluding “because participating in ‘terrorist’ activity does not indicate a foreign sovereign’s amenability to suit, Libya has not impliedly waive [sic] its immunity pursuant to § 1605(a)(1)”); *Cicippio*, 1993 U.S. Dist. LEXIS 21413 at *5 (finding that “state-supported kidnapping, hostage-taking, and similar universally criminal ventures were simply not the sorts of proprietary enterprises within the contemplation of Congress when it enacted the ‘commercial activity’ exception to the FSIA”).

As to any claim for relief with respect to which a foreign state is not entitled to immunity under Sections 1605 or 1607 of this chapter, *the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances*; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages.

28 U.S.C. § 1606 (emphasis added). *See e.g., First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 622 n.11 (1983) (where “state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances”).

Section 1606 thus obviates the need to find in either state law or federal law a statute that affirmatively indicates that it applies to foreign states. Section 1606 provides that – on a case-by-case basis – once immunity has been lifted, any cause of action available against private individuals *must* likewise be made available against the foreign state, whether or not that particular cause of action could otherwise have been asserted against a foreign state as a matter of state law, foreign law, or even federal statutory or common law.

According to Section 1606, in order to determine whether a cause of action exists against the non-immune foreign state, one need determine only whether a cause of action would be available against a private individual in like circumstances. If it would, then the foreign state “shall be liable” in the same manner and to the same extent. This is true whether the underlying cause of action is found in state or federal common law, international law, foreign law, or applicable statutory law.

Because § 1606 “provides that ‘the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances,’ it in effect instructs the court ‘to find the relevant law, not to make it.’” *Kilburn*, 277 F. Supp. 2d at 36 (quoting *Bettis*, 315 F.3d at 333). The law that must be “found” is the law applicable to private individuals in like circumstances.

Section 1606 applies to claims authorized by § 1605(a)(7), as it does to any of the other exceptions set forth in § 1605. Thus, in a particular case where § 1605(a)(7) revokes a foreign state’s immunity, as it does here, § 1606 requires that the foreign state shall be liable in the same matter as a private individual, whether under statutory or judge-made (*i.e.* common) law, whether under federal, state, foreign, or international law.

II. THE UNDISPUTED FACTS ESTABLISH LIBYA’S AND THE INDIVIDUAL DEFENDANTS’ LIABILITY TO THE FAMILY MEMBER AND ESTATE PLAINTIFFS UNDER NUMEROUS AVAILABLE CAUSES OF ACTION.

To be sure, based on the evidence and undisputed facts as outlined in the accompanying Statement, one would certainly expect that *some* cause of action should be available to allow Plaintiffs here to recover for the heinous acts of Libya and its agents. The FSIA directs that having firmly established that Libya is not entitled to immunity pursuant to § 1605(a)(7), the individual Plaintiffs are entitled to pursue judgment against Libya and the individual Defendants under several causes of action pursuant to federal and state statutory and common law. Because the evidence here is so clear, a finding of liability should be entered against the

Defendants as a matter of law, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

A. Defendants Are Liable to the Individual Plaintiffs Under the TVPA and the Flatow Amendment.

At least two federal statutes are applicable to Plaintiffs here under § 1606 – the Torture Victim Protection Act (“TVPA”) and the Flatow Amendment.¹⁵ As discussed below, the facts surrounding the terrorist bombing of UTA Flight 772 fall squarely within the confines of these statutory remedies. And, because Plaintiffs are able to recover against the individual Defendants under these statutes in this very case, they can also, by virtue of § 1606, recover against Libya under these federal statutes. Accordingly, the Court should enter a finding of liability against Libya and the individual defendants under both the TVPA and the Flatow Amendment.

1. The TVPA.

The Torture Victim Protection Act, Pub. L. 102-256, 106 Stat. 73 (reprinted at 28 U.S.C. § 1350 note), reflects fundamental international law norms and specifically provides a statutory cause of action against individuals for certain terrorist acts applicable to this case.

The TVPA provides:

¹⁵ The individual plaintiffs also have a federal statutory cause of action available against the individual defendants in their *individual* capacities – 18 U.S.C. § 2333(a). For the same reasons that the individual defendants are liable to Interlease under that statute (see below), they also are liable to the individual Plaintiffs.

[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation –

- (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
- (2) subjects an individual to *extrajudicial killing* shall, in a civil action, be liable for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death.

28 U.S.C. § 1350 note (emphasis added). As defined by Congress, “Extrajudicial killing”:

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

Id. sec. 3(a).

As the Supreme Court recently held, the TVPA describes a cause of action available against individuals who commit certain types of terrorist acts. In explicit terms, the TVPA sets forth “a clear mandate ... providing authority that ‘establish[es] an unambiguous and modern basis for’ federal claims of torture and extrajudicial killing.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 751 (2004) (quoting H.R. Rep. No. 102-367, pt. 1, at 3 (1991)). By their very nature, these acts are associated with the improper actions of a foreign sovereign: Extrajudicial killing is not simply murder, but rather murder under the auspices of a foreign nation acting outside its lawful authority (*e.g.*, not in connection with the processes of law, or the law of war). By virtue of § 1606, the cause of action reflected statutorily in the

TVPA – a cause of action which the Supreme Court recently described as mirroring a cause of action provided by international law – must be available against Libya here, just as it is, by its very terms, available against the six individual defendants. That is what the FSIA explicitly requires.

Having established that the TVPA is an available cause of action, there can be no question that all the Defendants are liable under the TVPA to the individual Plaintiffs. The individual defendants, acting under the authority and at the express direction of their employer, the Government of Libya, subjected the passengers of UTA Flight 772 – including the seven Americans whose estates and family members are plaintiffs here – to “extrajudicial killing.” As detailed in the accompanying Statement, the evidence firmly establishes that Libya and its agents, including the individual defendants here, quite deliberately planned the bombing of UTA Flight 772, knowing that the certain outcome would be the death of all those aboard. Under no circumstance were the killings lawfully carried out: the innocent victims of the bombing were not charged with, much less tried for or convicted of, any sort of crime; nor is there any other even arguable basis upon which Libya could legitimately contend that the killings were otherwise lawful. To the contrary, as discussed below, they were in direct contravention of long-recognized international law, and the law of Libya itself.

2. The Flatow Amendment.

During the same Session in which Congress enacted § 1605(a)(7), providing jurisdiction for suits against foreign states for certain types of terrorism claims,

Congress enacted the Flatow Amendment, codified at 28 U.S.C. § 1605 note, to afford specific additional relief to victims of state-sponsored terrorism.¹⁶

Before the Flatow Amendment, a plain reading of §§ 1605(a)(7) and 1606 did not make clear the extent to which victims of state-sponsored terrorism could sue *individuals* who engaged in terrorist acts on behalf of state sponsors. There assuredly was no cause of action that precisely paralleled the specific scope of § 1605(a)(7). Thus, efforts to bring certain types of claims against foreign *terrorists acting within the scope of their office*, or against foreign states themselves, might have been hindered by the vagaries of state, foreign, or international law.

Under the FSIA, the possibility that there was no cause of action that precisely paralleled the § 1605(a)(7) exception potentially left gaps in the remedies available to victims of terrorism. State law and foreign law available under § 1606 might, or might not, have been effective to vindicate fully the interests of terrorism victims. Moreover, the fact that no cause of action would be available against *individuals* involved in state-sponsored terrorism in certain circumstances would have two potential consequences: (1) it would deprive victims of terrorism of the ability to bring suit against those individuals; and (2) it would undermine the existence of a suit against the foreign state itself under § 1606, thus undercutting if not defeating entirely Congress's purpose in enacting § 1605(a)(7). Congress

¹⁶ Despite the name by which it is commonly known, the provision is not an amendment to the FSIA but rather was enacted separately, codified as a note to § 1605(a)(7).

eliminated any uncertainty in this regard by enacting the Flatow Amendment. The Flatow Amendment provides that:

[a]n official, employee, or agent of a foreign state designated as a state sponsor of terrorism ... while acting within the scope of his or her office, employment, or agency shall be liable to a United States national or the national's legal representative for personal injury or death caused by acts of that official, employee or agent for which the courts of the United States may maintain jurisdiction under 1605(a)(7) ... for money damages which may include economic damages, solatium, pain and suffering, and punitive damages if the acts were among those described in section 1605(a)(7).

28 U.S.C. § 1605 note; *see also Flatow v. Islamic Republic of Iran*, 999 F. Supp 1 (D.D.C. 1998). Congress thus created a federal cause of action – using the same “shall be liable” terminology found in both § 1605(a)(7) and the TVPA – against individuals acting at the behest of foreign terrorist states.

Foreign states are not mentioned in the Flatow Amendment, except to the extent the statute refers to cases properly brought to federal court under § 1605(a)(7). By itself then, the Flatow Amendment creates a civil claim against individual terrorists, not a foreign state. *Cicippio-Puleo*, 353 F.3d at 1034. This makes sense. The creation of a cause of action running specifically and explicitly against a foreign state would be inconsistent with the basic approach of the FSIA. Instead, the FSIA imposes the same liabilities on non-immune foreign states as on private individuals. 28 U.S.C. § 1606. Because the Flatow Amendment sets forth a cause of action and specific damages remedies against private individuals, § 1606

instructs, and indeed requires, that such rights of action and remedies likewise be available against the non-immune foreign state.

The precise terms of the statute aside, it is clear that Congress fully and broadly intended that foreign states themselves be held accountable for their support of terrorism. As the D.C. Circuit recognized in *Cicippio-Puleo*, Congress, in enacting § 1605(a)(7), “sought to create a judicial forum for the compensation of victims and the punishment of *terrorist states*.” *Cicippio-Puleo*, 353 F.3d at 1035 (emphasis added). House Report No. 104-383 underscores this point, and the fact that Libya was one of the terrorist states that § 1605(a)(7) was explicitly designed to address:

The existence of state-sponsored terrorism is well documented and state sponsors of terrorism include *Libya*, Iraq, Iran, Syria, North Korea, Cuba, and Sudan. These outlaw states consider terrorism a legitimate instrument of achieving their foreign policy goals. They have become better at hiding their material support for their surrogates, which include the provision of safe havens, funding, training, supplying weaponry, medical assistance, false travel documentation, and the like. For this reason, *the Committee has determined that allowing suits in the federal courts against countries responsible for terrorist acts where Americans and/or their loved ones suffer injury or death at the hands of the terrorist states is warranted*. [Section § 1605(a)(7)] will give American citizens an important economic and financial weapon against these outlaw states.

H.R. Rep. No. 104-383 at 62 (1995) (emphasis added).¹⁷

¹⁷ The Flatow Amendment expressly permits recovery for loss of solatium by the immediate family members of individuals killed in terrorist acts such as
(continued...)

The individual Plaintiffs here, therefore, have a cause of action grounded in the Flatow Amendment against both Libya and the individual Defendants.¹⁸ That is what the statutory language commands and precisely what Congress intended. Having resolved any question about whether the Flatow Amendment might be available against the foreign sovereign and its officials in an appropriate case, there can be no question that it is applicable in this case. The evidence as outlined in the accompanying Statement makes clear that the individual Defendants who carried out the acts to perpetrate the terrorist bombing were acting within the scope of their employment by Libya and caused deaths falling squarely within the confines of immunity-stripping § 1605(a)(7).

Thus, both the letter of the law as expressed in § 1606 of the FSIA, and the evidence of Congress's intentions, require that the individual Plaintiffs here may pursue claims under the TVPA and the Flatow Amendment against Libya, as well as the individual Defendants. The evidence as outlined in the accompanying Statement establishes beyond any serious doubt that Libya and the individual Defendants are directly responsible for the bombing of UTA Flight 772, and thus

(...continued)

the bombing of UTA Flight 772. The TVPA, enacted in 1991 before § 1605(a)(7), is silent on this point.

¹⁸ Should the Court decline to permit Plaintiffs to pursue a claim under the Flatow Amendment against Libya, it should nonetheless permit Plaintiffs to pursue the cause of action against the individual Defendants in their official capacities. That is precisely what the statutory language permits.

are liable to Plaintiffs under these applicable statutes. Accordingly, a judgment of liability should be entered against them.

B. Federal Common Law, Incorporating International Law, Provides A Cause Of Action For The Victims Of The Terrorist Bombing Of UTA Flight 772.

In addition to the express federal statutory causes of action that are available to Plaintiffs to establish Libya's and its agents' liability for the terrorist bombing of UTA Flight 772, the federal common law, to the extent that it incorporates international law principles, also provides a viable cause of action. Although some courts have been reluctant to recognize federal common law as a general, undefined matter, the acts at issue here fall squarely within that narrow category of cases that the Supreme Court has recently pronounced to be actionable. *See Sosa*, 542 U.S. 692.

Certain principles of international law are incorporated into, and are part of, federal common law – and provide a private cause of action, with all appropriate compensation, enforceable in United States courts. As the Supreme Court has long stated, “international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.” *The Paquete Habana*, 175 U.S. 677, 700 (1900); *see The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (Marshall, C.J.) (“the Court is bound by the law of nations which is a part of the law of the land”); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (“United States courts apply international law as a part of our own in

appropriate circumstances”); *see also* *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 623 (1983) (same); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992) (same); *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980) (same).

More recently, the Supreme Court specifically acknowledged that *certain* international law principles are enforceable in United States courts as federal common law, even by non-U.S. citizens, in addition to or in the absence of statutory causes of action such as the TVPA. Actionable international law principles involve those concrete, well-defined international norms that are universally accepted, involving conduct that is universally condemned. *Sosa*, 542 U.S. at 753-54.

Sosa dealt with the applicability of the Alien Tort Claims Act (“ATCA”), 28 U.S.C. § 1350, an enactment of the First Congress, and specifically how claims arising in the context of today’s international law fit within the confines of a two centuries old domestic statute. The Supreme Court held that the First Congress understood the ATCA to “recognize private causes of action for certain torts in violation of the law of nations,” including “violation of safe conducts, infringement of the rights of ambassadors, and piracy,” 542 U.S. at 749, and that “courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of [those] 18th century paradigms.” *Id.*

Although there was clearly no air travel in the 18th century, “violations of safe conduct” and “piracy,” as noted, were among the non-exhaustive list of 18th

century violations of “a norm of international character accepted by the civilized world” that were identified by the Supreme Court. The 20th century bombing of an in-flight aircraft carrying scores of passengers is an obvious parallel to those 18th century actions that provide a cause of action in violation of the law of nations and that are actionable under the ATCA.¹⁹

Indeed, the acts at issue here – specifically the blowing up of an airliner, killing all aboard – are now, and were at the time of the events, both sufficiently well-defined and universally condemned to fall well within the *Sosa* paradigm. No state is likely to put its imprimatur on the terrorist bombing at issue here, and contend that it is somehow acceptable. There are, in fact, several treaties – to which defendant Libya is a signatory – that specifically proscribe Defendants’ conduct in connection with the bombing of UTA Flight 772. For example, the 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil

¹⁹ In a similar vein, the D.C. Circuit recently decided *Mwani v. Osama bin Laden*, 417 F.3d 1 (D.C. Cir. 2005), a case involving the 1998 terrorist bombing of the U.S. Embassy in Nairobi, Kenya. In doing so, the Court noted that the “plaintiffs’ contention that bin Laden and al Qaeda attacked the American embassy intending, among other things, to kill American diplomatic personnel inside, would appear to fall well within [*Sosa*’s] paradigms. *Id.* at 14 & n.14. Thus, *Mwani* suggests that the D.C. Circuit would read *Sosa* as providing a basis – at least in certain cases involving acts of terrorism – for *federal* common law claims against foreign state defendants.

Aviation,²⁰ which Libya joined in 1974, makes it an offense to “unlawfully and intentionally,” among other things:

(b) destroy[] an aircraft in service or cause[] damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety or its safety in flight; or

(c) place[] or cause[] to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or cause damage to it which renders it incapable of flight

The Convention also specifically makes it an offense to be an accomplice of any person who commits such acts. Similarly, the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft, which Libya joined in 1972, condemns any acts on board aircraft that would be “offences against penal law,” as the terrorist bombing at issue here assuredly is, as well as other acts that “may or do jeopardize the safety of the aircraft or of persons or property therein”

Further, the Restatement (Third) of Foreign Relations leaves no doubt that a nation violates clearly established and well-defined norms of international law if it “practices, encourages, or condones” murder, defined as the killing of an individual by a state “other than as lawful punishment pursuant to conviction in accordance with due process of law, or as necessary under exigent circumstances.”

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 and cmt. f (1987). The prohibition on extrajudicial killing is recognized in numerous treaties – and, as

²⁰ This is the very treaty from which § 1605(a)(7) derives its definition of “aircraft sabotage.” *See* 28 U.S.C. § 1605(e)(3).

discussed above, is affirmatively prohibited by statute in the form of the TVPA and the Flatow Amendment. *See generally* Pub. L. 102-256, 106 Stat. 73, reprinted at 28 U.S.C. § 1350 note; 28 U.S.C. § 1605.

In sum, the specific applicable treaties, as well as generally accepted international law norms, establish the universal condemnation for Defendants' acts, which in this context are well-defined and easily identifiable, and thus give rise to a viable cause of action – based on federal common law incorporating international law – for Plaintiffs here. Because the acts of Libya and its agents are clearly in contravention of those treaties and norms, a finding of liability should be entered on that basis as well.

C. State Statutory and Common Law Provides Additional Appropriate Causes Of Action And Remedies To Vindicate The Wrongs At Issue In This Case.

Where, as here, immunity is lifted because an exception to § 1605 applies, the foreign state is subject to *all* causes of action made available by the facts, whether under applicable federal law, state law, or foreign law. 28 U.S.C. § 1606. Thus, should the Court decline to apply the federal statutory causes of action discussed above, Plaintiffs alternatively are entitled to equivalent relief through state statutory and common law causes of action – including wrongful death and intentional infliction of emotional distress. There is no question that state law uniformly provides a basis for finding liability, and ultimately awarding damages, to the estates of those U.S. citizens killed in Defendants' terrorist bombing of UTA Flight 772 as well as their family members. *See, e.g., Price v. Socialist People's*

Libyan Arab Jamahiriya, 2005 U.S. Dist. LEXIS 14858, *31 (D.D.C. July 26, 2005) (finding that “[s]tate law may provide a basis for liability” on assault, battery and intentional infliction of emotional distress claims in case involving physical and mental torture of Plaintiffs by Libya and its agents); *see also Dammarell v. Islamic Republic of Iran*, 2005 U.S. Dist. LEXIS 5343, *54 (D.D.C. Mar. 29, 2005) (finding that Plaintiffs, survivors and surviving family members of U.S. citizens killed in April 1983 bombing of U.S. Embassy in Beirut, Lebanon could assert causes of action and bases for recovery of damages under state common and statutory law). Although different states may provide different mechanisms by which to recover under the torts asserted in this case, the actual underlying causes of action for the claims asserted – wrongful death and intentional infliction of emotional distress – are provided for and are fairly uniform in every state.²¹

Although it is clear that state law (statutory and common law) causes of action apply to afford Plaintiffs relief against Libya and its agents, it is less clear *which* state’s law applies. Of course, the starting point for such an analysis is the District of Columbia’s choice of law principles. *See Dammarell*, 2005 U.S. Dist.

²¹ There are differences state by state to the extent recovery is available for the loss of consortium and solatium. However, as the judges of this court have recognized, these claims are essentially variants of or mirror the intentional infliction of emotional distress claims. *See Dammarell*, 281 F. Supp. 2d at 196 n.19; *Surette v. Islamic Republic of Iran*, 231 F. Supp. 2d 260, 269 n.8 (D.D.C. 2002); *Wagner v. Islamic Republic of Iran*, 172 F. Supp. 2d 128, 135 n.11 (D.D.C. 2001).

LEXIS 4911 at *65 (citing cases).²² Applying those principles, there may be slightly different mechanisms for imposing liability from state to state. Given the similarities of the elements for liability across the various state laws potentially applicable to Plaintiffs' claims, however, the Court need not resolve the choice of law question for purposes of this motion for partial summary judgment, which is limited solely to the issue of liability. The Court need not, in the first instance, engage in a state-by-state analysis of the various causes of action, as asserted by each plaintiff. It is enough at this stage for the Court to conclude – as it must – that the undisputed material facts establish the Defendants' liability to Plaintiffs under

²² In similar cases involving claims asserted by the victims of state-sponsored terrorism, courts attempting to resolve this issue have utilized, consistent with D.C. law, a “constructive blending” of the “governmental interests” analysis and the “most significant relationship” test. *See generally Dammarell*, 2005 U.S. Dist. LEXIS 5343 at *57-59, citing *Hercules & Co., Ltd. v. Shama Rest. Corp.*, 566 A.2d 31, 40 (D.C. 1989). Based on the “constructive blending analysis,” the Court in *Dammarell*, which involved claims asserted by direct survivors of, and surviving family members of U.S. citizens killed in, the April 1983 bombing of the U.S. Embassy in Beirut, determined that claims of the estates of U.S. citizens killed in the Embassy bombing are “traditionally governed by the laws of the decedent’s domicile” at death. *Id.* at *67. With respect to the surviving family members of the victims of a terrorist attack, the Court indicated that it would, in the first instance, apply the law of each survivor’s domicile at the time of the terrorist act in question. *Id.* at *69-70. Other courts have subsequently adopted the same approach. *See Price*, 2005 U.S. Dist. LEXIS 14858 at *31 (applying Texas and California law, to claims of plaintiffs detained and tortured by Libya where plaintiffs were domiciled in these states at the time of Libya’s terrorist actions).

the applicable causes of action. The amount of damages and the extent of a monetary recovery, will be resolved at a later hearing before the Court.²³

1. Wrongful Death

Given the heinous acts at issue, and Libya's and its agents direct responsibility for them, it would seem beyond question that Plaintiffs would have a viable wrongful death claim arising out of *any* state's law. As an example, Virginia Code Section § 8.01-50 *et seq.* governs wrongful death actions and provides:

Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person . . . and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action . . . then, and in every such case, the person who . . . would have been liable, if death had not ensued, shall be liable to an action for damages. . .

Va. Code Ann. § 8.01-50(A) (2005). To be actionable, the defendant must have been at fault in some manner – the underlying wrongful act may be intentional or negligent – and it must be established that defendant's wrongful act caused the decedent's death. Charles E. Friend, *Personal Injury Law in Virginia* 15.2 (2000).

Based on the undisputed – and indisputable – evidence, it is beyond doubt that Defendants are “at fault” for the 1989 bombing of UTA Flight 772, and that

²³ Notwithstanding this assertion, we note for the record, and by way of example, that were the Court to apply Judge Bates' approach regarding “domicile at death,” to the state law claims, as explained in *Dammarell*, the states applicable to each of the seven decedent plaintiff estates would apparently be Virginia (Pugh), Texas (Turlington, Schutzius, Huff, Corder), Montana (Warner), and New York (Alimanestianu). All of these states recognize causes of action for the types of claims asserted here.

their “wrongful act” caused the death of all the passengers aboard, including the seven Americans whose estates are represented as Plaintiffs here. If death had not ensued, the victims would have been able to assert myriad actions, including, *inter alia*, assault and battery, against Defendants. Defendants are accordingly, under state wrongful death statutes, liable for their wrongful and heinous conduct.

Virginia Code § 8.01-52, by way of example, prescribes the damages available in wrongful death actions, and provides for recovery for both economic and non-economic loss including:

- 1) Sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent;
- 2) Compensation for reasonably expected loss of income of the decedent and services, protection, care and assistance provided by the decedent;
- 3) Expenses for the care, treatment and hospitalization of the decedent incident to the injury resulting in death;
- 4) Reasonable funeral expenses; and
- 5) Punitive damages may be recovered for willful or wanton conduct, or such recklessness as evinces a conscious disregard for the safety of others.

Va. Code Ann. § 8.01-52 (2005). Virginia’s wrongful death provisions – which are similar in material respects to those of the other potentially applicable states – therefore provide a basis for recovery for the types of damages traditionally encompassed in Plaintiffs’ separate counts for survival damages (*see* Complaint Count II), economic damages (Complaint Count III), intentional infliction of emotional distress (Complaint Count IV), loss of solatium (Complaint Count V), and loss of consortium (Complaint Count VI).

2. Intentional Infliction of Emotional Distress

As with wrongful death, the tort of intentional infliction of emotional distress, although perhaps nuanced by the vagaries of particular states' laws, encapsulates basic elements. Section 46 of the Restatement (Second) of Torts provides a good source of those elements:

Outrageous Conduct Causing Severe Emotional Distress

- (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.
- (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
 - (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
 - (b) to any other person who is present at the time, if such distress results in bodily harm

RESTATEMENT (SECOND) OF TORTS § 46 (1965).

Following this principle, under Virginia law, again by way of example, a cause of action for emotional distress will lie (whether or not accompanied by bodily impact or physical injury) provided that four elements are shown: "(1) the wrongdoer's conduct was intentional or reckless; (2) the conduct was outrageous and intolerable in that it offends against the generally accepted standards of decency and morality; (3) there was a causal connection between the wrongdoer's conduct and the emotional distress; and (4) the emotional distress was severe."

Womack v. Eldridge, 210 S.E. 2d 145, 148 (Va. 1974). The term “emotional distress” encompasses

all highly unpleasant mental reactions such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea’ . . . But liability arises only when the emotional distress is extreme, and only where the distress inflicted is so severe that no reasonable person could be expected to endure it.

Russo v. White, 400 S.E.2d 160, 163 (Va. 1991) (citing RESTATEMENT (SECOND) OF TORTS § 46 cmt. j).

It is readily apparent that the terrorist bombing of UTA Flight 772 had, and continues to have, a huge psychological impact on the lives of the victims’ family members. Although the family members were not present at the scene of the act of state-sponsored terrorism, courts have permitted immediate family members²⁴ of victims of terrorism to assert claims for intentional infliction of emotional distress.²⁵

²⁴ “Immediate family members” consist of the parents, spouses, children, and siblings of victims of state-sponsored terrorism. *See Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27, 36-37 & n.8 (D.D.C. 2001) (defining “immediate family members” and rejecting claim that nieces and nephews are within definition of “immediate family”). All of the individual Plaintiffs here fall into one of those categories.

²⁵ As the *Sutherland* court explained, “when an organization takes someone hostage, it is implicitly intended to cause emotional distress among the members of that hostage’s immediate family. Further, the Court finds that an organization taking someone hostage implicitly believes that such emotional distress is substantially certain to result...” *Sutherland v. Islamic Republic of Iran*, 151 F. Supp. 2d 27, 61 (D.D.C. 2001).

This rationale applies with equal force to non-hostage related acts of state sponsored terrorism, such as the bombing of UTA Flight 772. As noted by Judge Bates (quoting an expert, Dr. Pastor, in *Dammarell*), in situations involving “intentional, man-made acts of violence, including individual

(continued...)

In so doing, courts have recognized that “in an intentional homicide case such as a terrorist killing, solatium appears ... to be indistinguishable from ... intentional infliction of emotional distress.” *Dammarell*, 281 F. Supp. 2d at 196 n.19, citing *Surette v. Islamic Republic of Iran*, 231 F. Supp. 2d 260, 269 n.8 (D.D.C. 2002) (internal quotations omitted). See, e.g., *Wagner*, 172 F. Supp. 2d at 136 (quoting RESTATEMENT (SECOND) OF TORTS § 46 in awarding solatium to family members of Michael Wagner, who was killed in the September 1984 suicide bombing by Hizbollah of the Beirut Embassy Annex).

In considering the intentional infliction of emotional distress claims of family members of individuals killed in an act of state-sponsored terrorism, courts focus on

- (1) the act that caused the plaintiff to suffer significant emotional distress;
- (2) whether the defendant “intentionally or recklessly caused” the distress, and
- (3) whether the plaintiff was a close family member of the victim of the terrorist act

(...continued)

criminal acts ... and terrorist acts ... there’s a sense of agency ... someone did this intentionally, and it’s totally incompatible with the belief systems of most people.” *Dammarell*, Phase I Tr. Vol. II at 61-62. Such acts are designed to impact an audience wider than those directly involved. Under these circumstances:

[T]here’s an open wound always. There’s an open sore. People want a sense of justice. People want a sense of completion. People want to know again that the world can be made a safer place. It’s a lack of closure, and it’s just more difficult to know that someone is responsible for this, is out there, benefiting, profiting, not being held accountable for what they’ve done.

Id. at 63.

whose distress was implicit in the nature of the defendant's conduct. *Sutherland*, 151 F. Supp. 2d at 50 (applying above elements to a hostage situation); *see Jenco*, 154 F. Supp. 2d at 35-36 (applying *Sutherland* elements).

Here again, the baseline facts required for a finding of liability under the applicable state law are beyond dispute. As discussed above, surely the actions of Libya and its agents, in plotting and carrying out the bombing UTA Flight 772 with the resulting deaths of everyone on board, were intentional acts that affront the norms of state, federal and international law and "generally accepted" standards of decency and morality. The impact of the loss of the passengers in the bombing on the members of their immediate family cannot be doubted – nor can Defendants' intent to have such an impact. Indeed, by definition, acts of state-sponsored terrorism such as the bombing of UTA Flight 772 are specifically designed to impact not only those involved in the attack itself, but their family members as well. Thus,

[c]ourts have uniformly held that a terrorist attack – by its nature – is directed not only at the victims but also at the victims' families In this case, the evidence demonstrates that defendant's campaign of attacks against Westerners was intended not only to harm the victims, but to instill terror in their loved ones and others in the United States."

Salazar, 370 F. Supp. 2d at 115 n.12 (discussing April 1983 bombing of US Embassy in Beirut, and impact of attack on family member of decedent).

Plaintiffs here have suffered greatly over the years from the traumatic loss of a loved one in the terrorist bombing of UTA Flight 772 – a result specifically intended by Libya. This is precisely the kind of severe emotional distress for which courts have awarded damages for intentional infliction of emotional distress and/or

solatium. But the Court need not, at this stage, concern itself with the *extent* of damages that might be available under these causes of action, or even how much each plaintiff will recover. The only question currently before the Court is whether Libya and the individual Defendants are liable under these causes of action to the individual Plaintiffs. Based on the undisputed facts as outlined in the attached Statement, the answer to that question is undoubtedly yes.

As this analysis demonstrates, state law provides an ample basis for an alternative finding of liability against all the Defendants.

III. THE UNDISPUTED FACTS ESTABLISH THE INDIVIDUAL DEFENDANTS' LIABILITY TO PLAINTIFF INTERLEASE UNDER AVAILABLE CAUSES OF ACTION.

Although this Court, through Judge Jackson, has previously determined that Interlease, the owner-lessor of the DC-10 aircraft that was destroyed as a result of the terrorist bombing, cannot pursue claims directly against Libya or the individual Defendants in their *official* capacities, he expressly permitted Interlease to pursue claims against the individual Defendants in their individual capacities. *See Pugh*, 290 F. Supp. 2d at 61. At least one federal statute and various common law causes of action provide Interlease with a viable avenue to recovery for the losses it sustained as a direct result of Defendants' wrongful, outrageous conduct.

A. 18 U.S.C. § 2333(a)

Congress has explicitly provided a cause of action for Interlease against the terrorist individual defendants in their individual capacities. Incorporated as part

of the criminal code, § 2333(a) expresses Congress’s will to provide a civil remedy to victims of terrorism such as Interlease:

§ 2333 Civil remedies

(a) Action and jurisdiction. Any national of the United States injured in his or her person, *property, or business* by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney’s fees.
(emphasis added)

There can be no ambiguity about whether this express statutory cause of action is available to Interlease, as well as the individual Plaintiffs.²⁶ The Defendants’ acts in planning and carrying out the bombing of UTA Flight 772 unquestionably constitute “international terrorism” as that term is defined by the statute.²⁷ Equally clear is that Interlease – which was deprived of its property, the

²⁶ The individual Plaintiffs also rely on 18 U.S.C. § 2333, and are thus entitled to a judgment of liability against the individual Defendants in their individual capacities. They incorporate by reference the arguments in this section regarding the claims of Interlease.

²⁷ Section 2331 defines “international terrorism” to include activities that:

- (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
- (B) appear to be intended --
 - (i) to intimidate or coerce a civilian population;
 - (ii) to influence the policy of a government by intimidation or coercion;or
- (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(continued...)

DC-10 aircraft, and the foreseeable flow of income that came from that property (*i.e.*, long-term lease agreements with UTA) – was injured in its property and its business, just as the individual Plaintiffs – forever deprived of their lives (the estates) or the lives of a loved one (the family members) – were injured in their person.

Nor can there be any ambiguity that it was at the hands of the individual defendants that Plaintiffs were so injured. The evidence, as detailed in the accompanying Statement, is direct, clear and indisputable that all six of the individual Defendants played a direct and key role in planning and carrying out the terrorist bombing. They must now be held accountable to the American citizens and the U.S. business they injured. Section 2333 provides one basis for that accountability, and the Court thus should enter a finding of liability against the individual Defendants in their individual capacities for the property and business losses Interlease incurred.

B. Common Law Conversion and Tortious Interference

Interlease also has remedies against the individual defendants grounded in the common law. As a direct result of Defendants' wrongful acts, Interlease was

(...continued)

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.

18 U.S.C. § 2331.

fully deprived not only of its property – the DC-10 aircraft that was destroyed in the bombing – but also of the stream of income it received, and had expected to receive for many more years, from leasing the aircraft. At least two common law causes of action permit Interlease to recover for its losses against the individual Defendants in their individual capacities: conversion and tortious interference.

Georgia²⁸ courts define conversion as:

[A]n unauthorized assumption and exercise of the right of ownership over personal property belonging to another, in hostility to his rights; an act of dominion over the personal property of another inconsistent with his rights; or an unauthorized appropriation

Maryland Cas. Ins. Co. v. Welch, 356 S.E. 2d 877, 879 (Ga. 1987). To establish a claim for conversion as applicable here, Interlease must show an “actual conversion” which is “any distinct act of dominion and control wrongfully asserted over another’s personal property, in denial of his right or inconsistent with his right.” See, e.g., *Taylor v. Powertel, Inc.*, 551 S.E. 2d 765, 769 (Ga. App. 2001); *Habel v. Tavormina*, 597 S.E. 2d 645, 648 (Ga. App. 2004). Clearly, Defendants’ unauthorized blowing up and total destruction of Interlease’s aircraft constitutes conversion, and a judgment of liability on that claim should be entered.

Interlease is also entitled to a judgment of liability against the individual defendants on its tortious interference claim. In order to maintain an action for tortious interference, a plaintiff must allege:

²⁸ Interlease is a Georgia corporation, so we assume that in this instance Georgia law would apply to its claims.

(1) improper action or wrongful conduct by the defendant without privilege; (2) the defendant acted purposely and with malice with the intent to injure; (3) the defendant induced a breach of contractual obligations or caused a party or third parties to discontinue or fail to enter into an anticipated business relationship with the plaintiff; and (4) the defendant's tortious conduct proximately caused damage to the plaintiff.

Tidikis v. Network for Medical Communications & Research, C.A. No. AOSA0456, 2005 Ga. App. LEXIS 445, *13 (Ct. App. Ga. 2005). As detailed in the accompanying Statement, Defendants here clearly acted intentionally, with malice and with the specific intent to injure, and in fact directly injured Interlease. By blowing up and completely destroying Interlease's aircraft, defendants intentionally and tortiously deprived Interlease of the benefit of its lease agreement with UTA and of any future lease agreement it might have entered but for Defendants' wrongful conduct.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that this Court enter a judgment of liability against all Defendants. Thereafter, the Court should schedule a hearing to determine the appropriate damages, and thereafter enter final judgment.

Respectfully submitted,

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