No. 17-

IN THE

Supreme Court of the United States

MONICAH OKOBA OPATI, IN HER OWN RIGHT, AS EXECUTRIX OF THE ESTATE OF CAROLINE SETLA OPATI, DECEASED, *et al.*,

Petitioners,

v.

REPUBLIC OF SUDAN, MINISTRY OF EXTERNAL AFFAIRS AND MINISTRY OF THE INTERIOR OF THE REPUBLIC OF SUDAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DC CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Whether a party which knowingly and intentionally twice defaults, acts to delay and not in good faith, and affirmatively elects not to contest a nonjurisdictional legal issue before judgment may nevertheless demonstrate "extraordinary" and "exceptional" circumstances warranting appellate review of the forfeited nonjurisdictional legal issue post-judgment.

2. Whether, consistent with this Court's decision in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), the Foreign Sovereign Immunities Act applies retroactively, thereby permitting recovery of punitive damages under 28 U.S.C. § 1605A(c) against foreign states for terrorist activities occurring prior to the passage of the current version of the statute.

PARTIES TO THE PROCEEDING

Petitioners in this proceeding are U.S. Government employees killed or injured in the August 7, 1998 bombing of the U.S. Embassies in Nairobi, Kenya and Dar-es-Salaam, Tanzania and their family members. Due to its length, the list of parties is set forth in full in the Appendix at App. 369a.

RULE 29.6 STATEMENT

None of the petitioners is a nongovernmental corporation. None of the petitioners has a parent corporation or shares held by a publicly traded company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in Case Nos. 14-7124 (Opati), 14-7125 (Wamai), 14-7127 (Amduso), and 14-7128 (Onsongo), which were consolidated before the D.C. Circuit.

OPINIONS BELOW

The opinion of the D.C. Circuit is published and available at 864 F.3d 751 (D.C. Cir. 2017). App. 1a. The opinion of the U.S. District Court for the District of Columbia denying Respondents' Motions to Vacate the Judgment is published and available at 174 F.Supp.3d 242. App. 147a.

JURISDICTION

The D.C. Circuit entered judgment on July 28, 2017 and denied rehearing en banc on October 3, 2017. App. 342a. On December 27, 2017, Chief Justice Roberts granted petitioners' application to extend the time for filing a petition for writ of certiorari to and including March 2, 2018. 28 U.S.C. § 1254(1) confers jurisdiction in this matter.

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are listed at App. 344a-368a.

STATEMENT OF THE CASE

Petitioners are U.S. Government employees or contractors killed or injured as a result of the August 7, 1998 bombings of the United States Embassies in Nairobi, Kenya and Dar-es-Salaam, Tanzania. In those terrorist attacks, Al-Qaeda, with knowing, material support from Sudan, engaged in the premeditated murder and injury of more than 150 United States Government employees and more than 4,000 persons in total. Petitioners filed four lawsuits in the U.S. District Court for the District of Columbia, seeking compensatory and punitive damages from Sudan for its critical support of Al Qaeda, without which the bombings could not have occurred. The district court had subject matter jurisdiction over those cases pursuant to 28 U.S.C. §§ 1330(a) and 1605A.

Before the district court, Sudan, a state sponsor of terrorism so-designated by the U.S. Department of State since 1993,[1] repeatedly and willfully made tactical litigation decisions designed to delay and obstruct any recovery by the embassy bombing victims and their families. For more than a decade, and with the assistance of multiple

1. In August 1993, the United States publicly designated Sudan as a state sponsor of international terrorism, 58 Fed. Reg. 52523-01 (October 8, 1993), following public reports of Sudan's participation in a conspiracy to bomb the United Nations Headquarters and other landmarks in New York City and to kidnap and murder U.S. Government officials.

highly experienced counsel belonging to sophisticated international law firms, Sudan made determinations:

(i) to enter the litigation;

(ii) to contest jurisdictional and other claims before the district court (*see Owens v. Republic of Sudan*, 374 F.Supp.2d 1 (D.D.C. 2005) and 412 F.Supp.2d 99 (D.D.C. 2006)); and on appeal to the D.C. Circuit (*see Owens v. Republic of Sudan*, 531 F.3d 884 (D.C. Cir. 2008));

(iii) to exit the litigation after losing those arguments and claims before the D.C. Circuit;

(iv) to ignore judicial proceedings, despite repeated service and notice, conducted by the district court over the course of six years to assess liability and damages, which were imposed only after a three-day bench trial (*Owens v. Republic of Sudan*, 826 F.Supp.2d 128 (D.D.C. 2011)), two years of individualized assessments of damages by seven Special Masters appointed by the district court, and the district court's final assessment of compensatory and punitive damages which were limited by district court to a one-to-one ratio; and then

(v) to reenter the litigation post-judgment in 2014 to file notices of appeal and Rule 60 motions.

Despite Sudan's calculated and willful decisions to default several times on the merits and therefore to forfeit nonjurisdictional challenges to the district court's carefully considered written assessments of the legal and factual bases of the plaintiffs' claims *and* despite the U.S. Government's decision not to intervene or file a statement of interest on Sudan's behalf, even when invited by the

district court to do so, a panel of the D.C. Circuit revisited the nonjurisdictional issues of punitive damages and the elements of a state law tort claim for the intentional infliction of emotional distress, thereby vacating nearly half of the damages awarded and certifying a question of law to the Court of Appeals for the District of Columbia.

I. Sudan Actively Litigated The Cases Until It Knew It Would Be Forced to Defend the Cases on Their Merits

The willfulness of Sudan's default and avoidance of the merits proceeding before the district court is apparent when that default is juxtaposed against Sudan's vigorous earlier participation. In the first phase of litigation before the district court, with the assistance of skilled counsel from major international law firms, Sudan selectively entered to raise procedural challenges in a related case only to exit again when it received adverse rulings from the district court and D.C. Circuit that would have required it to defend, on the merits, its role in the terrorist attacks.

• On February 4, 2003, Sudan was duly served with the Complaint in the consolidated action of *Owens v. Sudan*, Case No. 01-2244 (on appeal Case No. 14-5105), but failed to respond or appear.

• In February 2004, Sudan retained experienced U.S. counsel to contest the default entered by the Court in May 2003 and to seek dismissal of the complaint. The district court considered fully Sudan's motions to dismiss and vacated the default against Sudan in April 2005.

• On March 29, 2005 and January 26, 2006, the district court denied Sudan's motions to dismiss and

jurisdictional challenges. *Owens v. Republic of Sudan*, 412 F.Supp.2d 99 (D.D.C. 2006).

• On July 11, 2008, after oral argument, the D.C. Circuit rejected Sudan's consolidated interlocutory appeal and affirmed the several orders of the district court, which considered and rejected Sudan's jurisdictional claims. *Owens v. Republic of Sudan*, 531 F.3d 884 (D.C. Cir. 2008).

During this period of time, Sudan also unsuccessfully litigated jurisdictional challenges at the trial level and on appeal in a case relating to its support of a separate act of terrorism—the October 2000 attack on the USS Cole. *See Rux v. Republic of Sudan*, 461 F.3d 461 (4th Cir. 2006).

II. Sudan Stopped Participating Despite Receiving Notice of the New Actions and Judgments Against It

While Sudan's interlocutory appeal was pending before the D.C. Circuit in 2008, Congress amended the Foreign Sovereign Immunities Act ("FSIA") by repealing the previous terrorism exception, 28 U.S.C. § 1605(a)(7) (2006), and replacing it with a revised terrorism exception, 28 U.S.C. § 1605A, which (i) added a private right of action against a state sponsor of international terrorism for an injured U.S. national, service member, or employee (or their legal representative), and (ii) authorized explicitly a private right of action and the recovery of several categories of damages, including punitive damages, against state sponsors of international terrorism. Congress in the 2008 legislation at Section 1083(c) of the National Defense Authorization Act of 2008 ("NDAA") made these amendments applicable "to any claim arising under section 1605A of Title 28" and to

prior actions, including those which had reached judgment and were "before the courts in any form, including on appeal or motion under rule 60(b) of the Federal Rules of Civil Procedure." Pub. L. No. 110-181, § 1083(c), 122 Stat. 3, 342–43.

In 2008, four additional groups of U.S. Government employees killed or injured as a result of the August 1998 embassy bombings and their families—including three of the four groups of petitioners here—filed civil actions arising under 28 U.S.C. § 1605A, relying upon the federal right of action made explicit by the 2008 legislation at 28 U.S.C. § 1605A(c) and state common law claims.

Sudan was served in each of those four actions in 2009. Facing the prospect of having to defend on the merits and to respond to discovery requests if it returned to these related cases, Sudan knowingly and intentionally failed to respond or appear during the subsequent course of five years of litigation and before the entry of final judgments.

In October 2010, the district court presided over a three-day bench trial which included live and recorded testimony, expert witnesses, and documentary evidence to establish Sudan's responsibility for the mass murder and injury of U.S. Government employees at the U.S. Embassies. In November 2011, the district court entered findings of liability against Sudan in favor of the plaintiffs in a detailed written opinion which carefully and meticulously considered the relevant factual and legal issues in five consolidated cases arising from the August 1998 bombings. *Owens*, 826 F.Supp.2d at 157. On September 11, 2012, the Government of Sudan received legal service of the Court's ruling pursuant to the requirement of 28 U.S.C. § 1608(a)(3).

From 2012 through July 2014, seven special masters conducted intensive individualized assessments of damages and submitted written reports of their findings to the district court with respect to the petitioners. On July 25, 2014, following its review and assessment of those recommendations, the district court issued extensive written opinions in each of the petitioners' consolidated actions and judgment in favor of the petitioners. *See Onsongo v. Republic of Sudan*, 60 F.Supp.3d 144 (D.D.C. 2014); *Wamai v. Republic of Sudan*, 60 F.Supp.3d 84 (D.D.C. 2014); *Amduso v. Republic of Sudan*, 61 F.Supp.3d 42 (D.D.C. 2014); *Opati v. Republic of Sudan*, 60 F.Supp.3d 68 (D.D.C. 2014).[2] From 2008 through July 2014, Sudan knowingly and tactically elected to disregard these proceedings and to forfeit its right to defend on the merits despite the repeated notices and service of process.

III. Sudan Abandoned But Monitored the Litigation Until the Last Moment

Despite receiving multiple and repeated notifications of these actions, having actively litigated the prior consolidated action on jurisdictional grounds, and obtaining advice and counsel from extremely capable counsel, Sudan failed to appear again in the proceedings until the entry of judgments in 2014. With respect to the

2. The district court's careful and individualized assessment of liability and damages is well-illustrated by the fact that in several instances it rejected and denied claims or found no basis for a damages award despite the entry of default. *See, e.g.*, *Mwila v. Islamic Republic of Sudan*, 33 F.Supp.3d 36, 42–43 (D.D.C. 2014) (rejecting special master's recommended pain and suffering awards where the record provided insufficient evidence that the victims suffered before passing away); *Wamai*, 60 F.Supp.3d at 90.

petitioners' cases, as well as with respect to the three other consolidated cases in which the Court entered judgments in March and October 2014, Sudan monitored the litigation, waited for the entry of the final judgments, and only then reappeared to file notices of appeal in each of the consolidated cases. *Owens*, 174 F.Supp.3d at 248. In fact, Sudan filed its first two notices of appeal in relation to the seven consolidated cases in April 2014, and intentionally failed to enter an appearance at that time in the remaining consolidated cases which had not yet gone to judgment. Rather than enter the remaining consolidated matters, Sudan affirmatively chose again not to enter the litigation and instead filed notices of appeal in seriatim fashion over the next six months from May until December 2014.

After filing the notices of appeal in 2014, Sudan waited until April 2015 before filing its motion to vacate the judgments under Rule 60(b) of the Federal Rules of Civil Procedure. The D.C. Circuit held Sudan's appeals in abeyance so that the district court could address the Rule 60(b) motions.

In those Rule 60(b) motions, Sudan offered vague assertions that its frequent entries and exits in these proceedings were the result of domestic turmoil—an assertion that the district court found "quite literally, incredible." *Owens*, 174 F.Supp.3d at 256. Thus, with the full record before it, the district court denied Sudan's motions to vacate in a detailed opinion and found that Sudan acted tactically and not in good faith and must therefore assume the consequences of its strategic choice. *Id.* at 257. As the district court explained:

> "Viewing the entire history of the litigation, it seems more likely that Sudan chose (for whatever reason) to ignore these cases over the years, changing course only when the final judgment saddled it with massive liability . . . . Given how long-lasting and complete that inaction was, and how weak Sudan's proffered explanations are, the Court cannot conclude that Sudan acted in good faith."

Id. at 257 (citation omitted). The district court found that Sudan's tactics of delay also "posed a real risk of prejudice to the plaintiffs" and observed that "a number of plaintiffs have in fact died during the course of this litigation." *Id.* at 257–58.

In its 40-page opinion, the district court specifically rejected Sudan's efforts to vacate the punitive damage awards under Rule 60(b)(6) due to its forfeiture of nonjurisdictional defenses. As the district court wrote:

> "But Sudan has once again completely failed to explain why these arguments, even if persuasive, come within the ambit of Rule 60(b)(6). Like the arguments discussed in the preceding section of this opinion, these are claims of nonjurisdictional legal error. And for the reasons explained in that section, error by itself—unless, perhaps, it is obvious—is not an extraordinary circumstance. . . .
>
> One might wonder whether the sheer magnitude of the punitive damages awarded here—billions of dollars—is an extraordinary circumstance.

> But, although Sudan mentions the size of the awards, it does not argue that this is relevant to Rule 60(b)(6)—perhaps because there is no authority to that effect."

Id. at 288 (citations omitted).

Notably, in connection with Sudan's motion to vacate the final judgments, the district court affirmatively invited the involvement of, or a Statement of Interest from, the United States. *See* Case No. 1:01-cv-02244 (D.D.C.) at ECF No. 393. But the United States declined to intervene or file a Statement of Interest in the consolidated matters. *See Owens*, 174 F.Supp. at 253; *Owens v. Republic of Sudan*, 864 F.3d 751, 820 (D.C. Cir. 2017).[3]

IV. The D.C. Circuit's Opinion

After unsuccessfully attempting to reinsert itself in the district court proceedings through Rule 60(b)(6) motions, Sudan appealed to the D.C. Circuit. The D.C. Circuit affirmed the district court's final "judgments in most respects," but it vacated all awards of punitive damages and certified to the D.C. Court of Appeals the question whether a plaintiff must be present at the scene of a terrorist bombing in order to recover for intentional infliction of emotional distress. 864 F.3d at 769.

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3. In *Altmann*, this Court explained that "should the State Department choose to express its opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy." 541 U.S. at 702 (emphasis in original). The U.S. Government's silence in this matter therefore speaks volumes.

The D.C. Circuit noted that Sudan was a "double-defaulting" litigant, 864 F.3d at 821, and set forth the long history of this consolidated litigation stretching from 2001 until today, in which Sudan repeatedly acted to delay the orderly, efficient, and fair administration of justice, *id*. at 765–68. The D.C. Circuit observed: "By defaulting, then appearing, then defaulting again [after the initial default had been vacated], Sudan delayed this case for years beyond its likely end had it simply failed to appear at all. These affirmative actions extended the delay and make Sudan's second default even less excusable than its first." *Id.* at 824.

Nonetheless, the D.C. Circuit determined "to consider some" of Sudan's nonjurisdictional objections and not to hold that Sudan had forfeited all of its nonjurisdictional objections. The D.C. Circuit explained:

> "Ordinarily, all of Sudan's nonjurisdictional arguments would be forfeited by reason of its having defaulted in the district court. In this case, however, due to the size of the judgments against Sudan, their possible effects upon international relations, and the likelihood that the same arguments will arise in future litigation, we exercise our discretion to consider some, but not all, of Sudan's nonjurisdictional objections."

Id. at 768–69 (citations omitted). Based on those factors, the D.C. Circuit found that Sudan's nonjurisdictional argument that the award of punitive damages pursuant to Section 1605A(c) and state common law claims was impermissibly "retroactive" presented "extraordinary

circumstances" for review under Rule 60(b)(6) and "exceptional circumstances" for review on direct appeal. 864 F.3d at 813–14.

Rather than analyze the retroactive application of the FSIA and its 2008 amendments in light of this Court's ruling in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), the Court of Appeals began and structured its review of the objection under the rule of *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

Upon reviewing Sudan's forfeited, nonjurisdictional challenges to the punitive damages awards, the D.C. Circuit determined that the general presumption against retroactive legislation set forth in *Landgraf* barred the punitive damages award. *Id.* at 817–18. In so holding, the D.C. Circuit found that "the imposition of punitive damages under the new federal cause of action in § 1605A of the FSIA operates retroactively because it increases Sudan's liability for past conduct" and "goes to the heart of the concern in *Landgraf* about retroactively penalizing past conduct." *Id.* at 815–16. Because the D.C. Circuit did not find that "the Congress has made a clear statement authorizing punitive damages for past conduct" under Section 1605A, it ultimately concluded that "a plaintiff proceeding under either state or federal law cannot recover punitive damages for conduct occurring prior to the enactment of § 1605A." *Id.* at 816–18.

In reaching this conclusion, the D.C. Circuit rejected petitioners' argument that this Court's decision in *Altmann* renders inapplicable the presumption against retroactivity in the context of the FSIA. The D.C. Circuit attempted to distinguish *Altmann* by holding that it stands only

for the narrow proposition that "jurisdiction under the FSIA applies retroactively" and that it "has no bearing upon the question whether the authorization of punitive damages does as well." *Id.* at 815. That is, the D.C. Circuit opined that the FSIA may, at times, be applied retroactively and, at other times, not be applied retroactively. The D.C. Circuit failed to explain "what in the statutory provision suggests that sometimes courts should, but sometimes they should not, simply look to the" statutory language and rule of *Altmann*. *See Bolivarian Republic of Venezuela v. Helmerich & Payne Intern. Drilling Co.*, 137 S. Ct. 1312, 1324 (2017).

In light of these holdings, the D.C. Circuit vacated the punitive damages awards of approximately $4.3 billion to these petitioners, 864 F.3d at 825, who were awarded punitive damages by the district court on a carefully considered and limited one-to-one basis in relation to compensatory damages awarded to the more than 550 petitioners in this case.[4] Petitioners requested rehearing by the panel and hearing en banc, but that request was denied. App. 342a.

REASONS FOR GRANTING THE PETITION

This Petition presents an opportunity for the Court to outline and clarify whether (a) a foreign sovereign is entitled to review of forfeited nonjurisdictional legal issues even where the forfeiture of those legal issues resulted from intentional and tactical litigation choices designed to

4. *See Onsongo*, 60 F.Supp.3d at 152–55; *Wamai*, 60 F.Supp. 3d at 96–98; *Amduso*, 61 F.Supp.3d at 51–53; *Opati*, 60 F.Supp. 3d at 81–82.

delay or defeat justice, and (b) the FSIA may be applied retroactively to impose punitive damages on a state sponsor of terrorism where Congress explicitly allowed for their retroactive imposition.

I. THE COURT OF APPEALS ERRED IN AFFORDING SUDAN PREFERENTIAL TREATMENT AND REVIEWING FORFEITED NONJURISDICTIONAL ISSUES WHERE SUDAN HAD NOT ACTED IN GOOD FAITH

The D.C. Circuit found "extraordinary circumstances" and "exceptional circumstances" warranting review under Rule 60(b)(6) and on direct appeal of a forfeited, nonjurisdictional legal issue—the retroactive application of punitive damages—where it is beyond dispute that Sudan knowingly and intentionally forfeited the legal issue and was found not to have acted in good faith or with excusable neglect. 864 F.3d at 813–14. As applied to a double-defaulting party which does not act in good faith in failing to raise a nonjurisdictional legal issue before the district court, extraordinary and exceptional circumstances do not, and cannot, exist to warrant review of such a forfeited issue.

A. The Opinion Below Conflicts with the Rule Set Forth by this Court in *Pioneer*

In *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, this Court held that: "To justify relief under subsection (6) [of Rule 60(b)], a party must show 'extraordinary circumstances' suggesting that the party is faultless in the delay." 507 U.S. 380, 393 (1993). "If a party is partly to blame for

the delay, relief must be sought within one year under subsection (1) and the party's neglect must be excusable." *Id.*

Under the rule set forth in *Pioneer*, if a party makes knowing and intentional strategic choices to forego nonjurisdictional legal issues or is found to have not acted in good faith by failing to appear to contest a civil action, such a party cannot satisfy the "extraordinary circumstances" standard or the substantially similar "exceptional circumstances" standard[5] sufficiently to warrant Rule 60(b)(6) review or direct appellate review of the forfeited nonjurisdictional legal issue. A party must be "faultless" to seek such relief. 507 U.S. at 393. If it is even "partly to blame," it must seek prompt relief under Rule 60(b)(1) and the failure to act must reflect "excusable neglect." *Id.*[6] Thus, for example, the Federal Circuit applied *Pioneer* and affirmed a district court's denial of a Rule 60(b)(6) motion where the district court found that the movant's own "lack of diligence" caused it to be "at fault for the delay," thereby rendering the movant "not faultless" and ineligible for Rule 60(b)(6) relief. *Amado v. Microsoft Corp.*, 517 F.3d 1353, 1363 (Fed. Cir. 2008).

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5. *See Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 419 n.5 (D.C. Cir. 1991) ("exceptional circumstances" standard is satisfied in "extraordinary situations in which review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process"); *Budget Blinds, Inc. v. White*, 536 F.3d 244, 255 n.13 (3d Cir. 2008) ("Our circuit uses the terms 'extraordinary circumstances' and 'exceptional circumstances' interchangeably when discussing Rule 60(b)(6).").

6. The D.C. Circuit affirmed the district court's finding that Sudan's failure to defend in these cases was not "excusable neglect." 864 F.3d at 819-24.

Sudan similarly was "not faultless." The district court found that Sudan knowingly and intentionally failed to appear based on strategic litigation choices which were not in good faith and have only served to delay and prolong the plaintiffs' long efforts to secure justice. As the district court explained: "Given how long-lasting and complete that inaction was, and how weak Sudan's proffered explanations are, the Court cannot conclude that Sudan acted in good faith." 174 F.Supp.3d at 257. The Court of Appeals did not in any manner find fault with that factual finding. Thus, it cannot be said that Sudan was "faultless" and entitled to post-judgment review of forfeited non-jurisdictional arguments under the rule set forth in *Pioneer*.[7]

Allowing Sudan to address the substance of such arguments after judgment and after repeated acts to delay justice should not be permitted. Indeed, Congress enacted Section 1606, and the FSIA as a whole, in response "to the inconsistent application of sovereign immunity" by the U.S. Department of State and other components of the Executive Branch. *Samantar v. Yousuf*, 560 U.S. 305, 313 (2010); *see also Altmann*, 541 U.S. at 690–91 (2004); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480,

7. Sudan also engaged in gamesmanship and intentional forfeiture with respect to the question whether Section 1605A permits plaintiffs to retroactively recover punitive damages in *Kumar v. Republic of Sudan*, 2011 WL 4369122 (E.D. Va. Sept. 19, 2011). In that case, the district court specifically ordered Sudan to respond to the plaintiffs' motion to add, among other damages, a claim for punitive damages. But, in September 2009, "Counsel for Sudan advised the Court that 'Sudan objects to this Court's subject matter jurisdiction and has instructed us not to defend or otherwise participate in this proceeding on the merits.'" *Id.* at *3.

487–88 (1983). Varying from established and consistent application of the rules of civil procedure in relation to litigation involving foreign states, as the D.C. Circuit did here, defeats a central aim of the FSIA: instilling a consistent application of sovereign immunity according to the rule of law.

Nor were the reasons provided by the D.C. Circuit for reviewing the nonjurisdictional issues compelling or unique. In its opinion, the D.C. Circuit outlined the primary reasons it granted appellate review of the forfeited issues, stating: "Of particular note are the size of the awards (totaling $4.3 billion), the presentation of a novel question of constitutional law (retroactivity), and the potential effect on U.S. diplomacy and foreign relations." 864 F.3d at 813.

These factors are either not present here or, to the extent they arguably are present, would be present in nearly every terrorism-related case brought under the FSIA: nearly every civil action under Section 1605A involves large damages awards for death or serious bodily injury, purported constitutional issues, and potential effects on foreign relations. Thus, the D.C. Circuit's reasoning would nearly always allow a state sponsor of international terrorism to intentionally disregard court proceedings in bad faith and still obtain review of forfeited nonjurisdictional issues. Further, if the quantum of damages is a key factor weighing in favor of post-judgment review, state sponsors of international terrorism which inflict the most destruction and cause the most death would also be the most likely to receive post-judgment review despite engaging in intentional defaults.

Moreover, this Court's review is warranted because the D.C. Circuit's failure to follow *Pioneer* in a case involving a foreign sponsor of international terrorism is not isolated to that Circuit. For example, although the First Circuit properly applied *Pioneer* in several cases involving private litigants, *see, e.g.*, *Claremont Flock Corp. v. Alm*, 281 F.3d 297, 299–300 (1st Cir. 2002) and *Blanchard v. Cores-Molina*, 453 F.3d 40, 44–45 (1st Cir. 2006), it failed to properly apply *Pioneer* in a case involving the Palestine Liberation Organization ("PLO"). In *Ungar v. Palestine Liberation Organization*, the First Circuit reversed the district court's denial of a Rule 60(b)(6) motion where the district court had found that the PLO was not faultless and "the default judgment resulted from their deliberate strategic choice." 599 F.3d 79, 85 (1st Cir. 2010). Criticizing courts that rigorously apply the rule set forth in *Pioneer*, the First Circuit held: "But even for a willful defaulter, relief is not *categorically* barred [under Rule 60(b)(6)]." *Id.* at 86. The Court should take this opportunity to remind lower courts of *Pioneer*'s holding.

B. The Review of the Forfeited Nonjurisdictional Legal Issue by the D.C. Circuit Conflicts with the Approach of Other Circuits to the Review of Forfeited Nonjurisdictional Legal Issues

The D.C. Circuit's holding that the legal question of the retroactivity of punitive damages constituted "extraordinary circumstances" to warrant review under Rule 60(b)(6), as well as "exceptional circumstances" allowing review of the defaulted issue on direct appeal, conflicts with the approach followed by other Circuits in assessing whether review is available under Rule 60(b)(6) or on direct appeal where a party has knowingly and intentionally forfeited a nonjurisdictional legal issue.

In the context of Rule 60(b)(6), for example, the Third Circuit has held that the correction of legal error is not sufficient to justify relief under Rule 60(b)(6): "The correction of legal errors . . . without more does not justify the granting of relief under Rule 60(b)(6)." *Martinez-McBeam v. Gov't of the Virgin Islands*, 562 F.2d 908, 912 (3d Cir. 1977); *see also Venegas-Hernandez v. Sonolux Records*, 370 F.3d 183, 189 n.4 (1st Cir. 2004) (suggesting that the First Circuit would reject an argument that an "error of law would be a valid ground for relief under Rule 60(b)(6)").

Similarly, in the direct appeal context, other Circuits also have held that forfeited questions of law on direct appeal can be reviewed only for plain error, not according to the approach adopted by D.C. Circuit below. *See, e.g.*, *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1128–29 (10th Cir. 2011) ("[N]o case in this circuit has held that we may reverse based on 'purely legal' arguments [not previously presented to the district court] in the absence of plain error."); *Robb Evans & Assocs., LLC v. United States*, 850 F.3d 24, 36 (1st Cir. 2017) (courts may address forfeited arguments only when they are "so compelling as virtually to insure appellant's success"). The Court should take this opportunity to resolve those Circuit splits.

C. Foreign States Generally Are Subject to the Same Standards of Procedure and Review as Ordinary Civil Litigants

Where not provided in the FSIA with immunity from traditional rules of procedure and review in civil litigation, foreign states—including those designated as sponsors of international terrorism—are subject to the same

standards of procedure and review as private litigants. Congress articulated this principle in Section 1606 of the FSIA by directing the judiciary to treat a foreign state in the same manner as a private litigant. Specifically, 28 U.S.C. § 1606 states that: "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances."[8]

This Court recently applied that principle in *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250 (2014). There, the Court refused to apply a special rule to govern post-judgment discovery from Argentina under Rule 69 of the Federal Rules of Civil Procedure. In so holding, the Court found in the negative with respect to the "single, narrow question . . . whether the Foreign Sovereign Immunities Act specifies a different rule when the judgment debtor is a foreign state." *Id.* at 2255. As this Court explained, although foreign states might "urge us to consider the worrisome international-relations consequences" of applying the same rules of procedure and review to foreign states, "[t]hese apprehensions are better directed to that branch of government with authority to amend the Act": Congress, not the federal courts. *Id.* at 2258.

In short, unless otherwise specifically required or allowed by Congress, a foreign state subject to civil action should be held to the rules of procedure and review applicable to all civil litigants. Of course, a "defendant

8. In contrast, where Congress determined that special rules should control the administration of civil actions against foreign nations, Congress so directed in the FSIA. *E.g.*, 28 U.S.C. § 1608(a) (relating to service of process), § 1611 (relating to the exemption of certain property from attachment).

is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding." *Ins. Corp. of Ireland, Ltd. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 706 (1982) (citation omitted). "[D]efault, however, forfeits the opportunity to defend on the merits should the assertion of jurisdiction be upheld by a later court." 18A Charles Alan Wright *et al*., Federal Practice and Procedure § 4430 (2d ed. 2017).

This standard should apply with equal force to designated state sponsors of terrorism, like Sudan, which certainly should not be afforded greater deference than other litigants. Even foreign states which are not designated for their repeated support of international terrorism have been held to have forfeited non-jurisdictional claims where they intentionally disregarded litigation or exhibited gamesmanship in the course of litigation. *See*, *e.g.*, *Meadows v. Dominican Republic*, 817 F. 2d 517, 521 (9th Cir. 1987) (Dominican Republic and its executive agency were not entitled to vacate judgment because they were "fully informed of the legal consequences of failing to respond").

II. THE COURT OF APPEALS ERRED BY HOLDING THAT PETITIONERS WERE NOT PERMITTED TO RECOVER PUNITIVE DAMAGES UNDER THE FSIA

A. The Opinion Below Conflicts with *Altmann*

In *Altmann*, 541 U.S. at 696, this Court held that the FSIA is not subject to the anti-retroactivity principle

enunciated in *Landgraf*, 511 U.S. at 267. The D.C. Circuit's application of *Landgraf's* inapposite anti-retroactivity principle to the FSIA in the matter below was therefore fundamental error.[9]

1. In *Altmann*, This Court Held that the FSIA Applies Retroactively

In *Altmann*, this Court held that, instead of applying the *Landgraf* presumption, courts should defer to the judgment of Congress, as embodied in the statutory text, when construing the FSIA "absent contraindications," *Altmann*, 541 U.S. at 696. The "sui generis context" of the FSIA is "freed from *Landgraf*'s anti-retroactivity presumption." *Id.* at 696, 700. As the Court explained:

> "The aim of the [anti-retroactivity] presumption is to avoid unnecessary post hoc changes to legal rules on which parties relied in shaping their primary conduct. But the principal purpose of foreign sovereign immunity has never been to permit foreign states and their instrumentalities to shape their conduct in reliance on the promise of future immunity from suit in United States courts. Rather, such immunity reflects current political realities and relationships, and aims to give foreign

9. The D.C. Circuit's holding also stands in contrast to the Ninth Circuit's recent holding in *Bennett v. Islamic Republic of Iran*, where that Circuit held: "when it comes to sovereign immunity for both foreign states and their agencies and instrumentalities, there is a presumption in favor of retroactivity 'absent contraindications' from Congress." 825 F.3d 949, 963 (9th Cir. 2016) (citing *Altmann*, 541 U.S. at 696).

> states and their instrumentalities some *present* 'protection from the inconvenience of suit as a gesture of comity.'"

Id. at 696 (emphasis in original) (citation omitted). The Court further explained in *Altmann*:

> "Throughout history, courts have resolved questions of foreign sovereign immunity by deferring to the 'decisions of the political branches on whether to take jurisdiction.' In this *sui generis context*, we think it more appropriate, absent contraindications, to defer to the most recent such decision—namely, the FSIA—than to presume that decision inapplicable merely because it postdates the conduct in question."

Id. at 696 (quoting *Verlinden*, 461 U.S. at 486).

The Court in *Altmann* thus concluded that it is appropriate for courts to address questions of foreign sovereign immunity by deferring to the decisions of the political branches, as embodied in statutory text of the FSIA, not by applying the *Landgraf* anti-retroactivity presumption. *Id.* Indeed, the Court explained that the *Landgraf* presumption is "most helpful" in "cases involving private rights," not the FSIA. *Id.*

In so holding, the *Altmann* Court rejected the U.S. Government's argument in its amicus brief that the retroactivity of the FSIA should be evaluated on a "provision-by-provision" basis. *See* Amicus Brief of the U.S. Government, 2003 U.S. S.Ct. Briefs LEXIS 933 at

p.24 n.5. Instead, the *Altmann* Court held that the Act as a whole applies to preenactment conduct, explaining: "we find clear evidence that Congress intended the Act to apply to preenactment conduct." 541 U.S. at 697. The Court further explained:

> "The FSIA's overall structure strongly supports this conclusion. Many of the Act's provisions unquestionably apply to cases arising out of conduct that occurred before 1976. . . . In this context, ***it would be anomalous to presume that an isolated provision (such as the expropriation exception on which respondent relies) is of purely prospective application absent any statutory language to that effect***."

Id. at 698 (emphasis added).

2. The D.C. Circuit Wrongly Rejected *Altmann*

The D.C. Circuit wrongly sought to distinguish *Altmann* as concerning only procedural issues involving "jurisdiction under the FSIA," not the sort of "essentially substantive" issues that the D.C. Circuit believed to be at play in this matter. 864 F.3d at 815. But, this Court explicitly has rejected such efforts to parse or label an aspect of the FSIA as involving procedural or substantive law. As the Court explained in *Altmann*:

> "Under *Landgraf*, therefore, it is appropriate to ask whether the Act affects substantive rights (and thus would be impermissibly retroactive if applied to preenactment conduct) or addresses

> only matters of procedure (and thus may be applied to all pending cases regardless of when the underlying conduct occurred). ***But the FSIA defies such categorization***."

Altmann, 541 U.S. at 694 (emphasis added). Instead, the FSIA's provisions affect *both* jurisdictional *and* "*substantive* federal law." *Id.* at 695 (internal quotation marks omitted) (emphasis added); *see also Verlinden*, 461 U.S. at 495–96 (1983).

The D.C. Circuit wrongly disregarded this precedent and held that the FSIA was jurisdictional before 2008 and the 2008 amendments were squarely substantive. 864 F.3d at 815. But, even without this Court's guidance, the D.C. Circuit should have recognized that there were substantive aspects of the FSIA prior to 2008. For instance, 28 U.S.C. § 1606, which preexisted the 2008 NDAA, deals expressly with the extent of liability and the availability of punitive damages in cases where jurisdiction was established under the FSIA.

The D.C. Circuit also observed that "[u]nlike the grant of jurisdiction held retroactive in *Altmann*, the authorization of punitive damages 'adheres to the cause of action' under § 1605A(c), making it 'essentially substantive.'" 864 F.3d at 815 (citing *Altmann*, 541 U.S. at 695 n.15). The D.C. Circuit reasoned that "the new terrorism exception authorizes a quantum of liability punitive damages to which foreign sovereigns were previously immune." 864 F.3d at 815. But whether a provision of the FSIA exposes a foreign sovereign to an "additional quantum" of liability was equally before the Court in *Altmann* with respect to Austria, which suddenly

was exposed to liability in the United States courts by the FSIA for its past acts of improperly accepting artwork stolen by the Nazis. *Altmann*, 541 U.S. at 680–81.

Indeed, the enactment of the FSIA in 1976 exposed most sovereigns to a host of new liabilities for which they previously were immune in the courts of the United States, and every past and future amendment to the FSIA has done and may do the same. That unremarkable fact was not a proper basis for the D.C. Circuit to depart from *Altmann*.

Nor is this a situation in which petitioners asked the district court to reopen judgments after the 2008 amendments. The district court here did not enter judgment in favor of petitioners until six years after Congress passed the NDAA and only after the district court had conducted a series of thorough factual and legal analyses.

The D.C. Circuit also wrongly disregarded *Altmann*'s core holding that a reviewing court should defer to the judgment of the political branches with respect to the FSIA absent explicit contraindications, characterizing that principle as "a policy argument." 864 F.3d at 815. According to the D.C. Circuit, because Section 1605A's authorization of punitive damages is purportedly aimed at deterring state sponsorship of terror, it was intended "to influence foreign sovereigns in shaping their primary conduct." *Id.* at 816 (internal quotation marks omitted). But as the *Altmann* Court explained, "the principal purpose of sovereign immunity has never been to permit foreign states and their instrumentalities to shape their conduct in reliance on the promise of future immunity from suit in United States courts." 541 U.S. at 696. Thus,

the constitutional concerns applicable to a private litigant simply do not apply to displace the reasoned judgment of the political branches with respect to foreign relations and national security.

With respect to the FSIA, *Altmann* commands courts to defer to the judgments of Congress in this arena. *Id.* In support of its conclusion, the *Altmann* Court reiterated "Chief Justice Marshall's observation that foreign sovereign immunity is a matter of grace and comity rather than a constitutional requirement." *Id.* at 689. The Court should grant this Petition in order to affirm for the lower courts the applicability of this principle to the FSIA.

Although the Constitution plainly places certain limits on retroactive legislation—such as the Ex Post Facto, Takings, and Due-Process Clauses, those "restrictions . . . are of limited scope." *Landgraf*, 511 U.S. at 267. In *Bank Markazi v. Peterson*, the Court recently reiterated this principle that restrictions upon retroactive legislation by Congress are limited and noted specifically in the Constitution:

> "Absent a violation of one of those specific provisions, when a new law makes clear that it is retroactive, the arguable unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give that law its intended scope. . . . Congress may indeed direct courts to apply newly enacted, outcome altering legislation in pending civil cases."

136 S. Ct. 1310, 1324–25 (2016) (citations omitted). Throughout these proceedings, Sudan has failed to articulate any Constitutional concerns under the specific

Constitutional provisions cited in *Landgraf* and *Bank Markazi*.

Moreover, Sudan and the D.C. Circuit have failed to explain adequately how retroactive legislation can be impermissible in this context, where it is not by any means outcome determinative. This omission is particularly telling given that the Court has held that "Congress may indeed direct courts to apply newly enacted, outcome altering legislation in pending civil cases." *Bank Markazi*, 136 S. Ct. at 1324–25; *see also Patchak v. Zinke*, --- S. Ct. ----, slip op. at 11 (2018) ("But a statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts.").

The D.C. Circuit similarly should have implemented Congress's policy judgments, "with fidelity to those judgments" and permitted recovery of punitive damages under Section 1605A based upon the August 1998 terrorist bombings relevant to these actions that preceded the passage of the current version of the FSIA. The D.C. Circuit has respected such policy judgments in the past, as it recognized in *Bakhtiar v. Islamic Republic of Iran* that punitive damages were available in a case pending at the time of the enactment of Section 1605A involving a murder which occurred in 1991. 668 F.3d 773, 774 (D.C. Cir. 2012). The D.C. Circuit thus already has recognized that punitive damages can be awarded retroactively under Section 1605A, and the D.C. Circuit's opinion below therefore conflicts not only with *Altmann* but with its own precedent.

Moreover, even under the D.C. Circuit's own logic below, punitive damages are available for state-law causes

of action. As the D.C. Circuit recognized, 28 U.S.C. § 1606 does not limit 28 U.S.C. § 1605A. 864 F.3d at 817. Therefore, there is nothing preventing the award of punitive damages to the state-law plaintiffs here. The D.C. Circuit concluded that Section 1605A(c)'s grant of punitive damages was subject to *Landgraf*'s anti-retroactivity principle because Section 1605A(c) is a substantive cause of action, not a jurisdictional provision. 864 F.3d at 815. But state-law causes of action do not arise under Section 1605A(c)'s federal cause of action, only under Section 1605A(a)'s waiver of sovereign immunity. Because Section 1605A(a) is undeniably a "jurisdictional" provision, the punitive damages awarded on the state law claims should not have been vacated, even under the D.C. Circuit's mistaken reading of *Altmann*.[10]

B. The D.C. Circuit's Opinion Conflicts with the Statutory Text and Legislative Intent of the FSIA

The D.C. Circuit also ignored clear statements in the statutory text which confirm that Congress authorized

10. Petitioners understand that one of the grounds for this Court to issue a writ of certiorari is if there is a conflict among Circuits as to a question of law. Supreme Court Rule 10(a). Because the venue statute applicable to civil actions against a foreign state directs that many such actions be filed in the U.S. District Court for the District of Columbia, *see* 28 U.S.C. § 1391(f)(4), questions of foreign state liability under the FSIA often are addressed primarily by the D.C. Circuit and, thus, often are not susceptible to Circuit splits. However, the importance of the questions presented by this petition to thousands of victims of state sponsors of international terrorism warrants ensuring that the D.C. Circuit does not ignore the rules articulated by this Court.

retroactive application of the 2008 amendments to the FSIA, including the specification of certain damages, such as punitive damages, pursuant to Section 1605A(c). Far from containing "contraindications" suggesting that the statute ought not be applied retroactively, *see Altmann*, 541 U.S. at 696, the statutory text and history clearly indicate that Congress in 2008 intended the new cause of action in Section 1605A(c)—including the specifically noted categories of damages, of which punitive damages are but one—to apply to pending cases and cases yet to be filed arising from conduct predating 2008. Here, petitioners timely filed their civil action in 2008 within seven months of the 2008 Amendments and, in one instance, in 2012. According to Congress's express language in the 2008 NDAA, petitioners may bring a private right of action seeking recovery for their damages, "includ[ing] economic damages, solatium, pain and suffering, and punitive damages," arising from the 1998 bombings. 28 U.S.C. § 1605A(c).

First, through Section 1605A(c), Congress created a private right of action for victims of state sponsors of international terrorism and expressly authorized a wide range of damages, including "punitive damages," without temporal limitation. 28 U.S.C. § 1605A(c).

Second, the enacting legislation, within a note to Section 1605A entitled "APPLICATION TO PENDING CASES," provides that "[t]he amendments made by this section *shall apply* to *any claim* arising under section 1605A of title 28, United States Code." Note to Section 1605A, Pub. L. No. 110–181, § 1083(c)(1), 122 Stat. 3, 342 (emphasis added).

Third, Section 1083(c)(2) of the 2008 NDAA provides that already-pending § 1605(a)(7) actions "shall . . . be given effect as if the action had originally been filed under section 1605A(c)." § 1083(c)(2), 122 Stat. at 342–43. And Section 1083(c)(3) provides that "any other action arising out of the same act or incident as a timely 1605(a)(7) action may be brought under section 1605A." § 1083(c)(2), 122 Stat. at 343.

Similarly, Section 1605A(b) permits retroactive 1605A(c) actions if "a related action was commenced under section 1605(a)(7)" within "10 years after April 24, 1996." The statute thus expressly contemplates that the "related action" may have been commenced well before the NDAA's enactment. This category of prior Section 1605(a)(7) actions also includes plaintiffs who had already received *final* judgments. The only reason to allow plaintiffs to convert their final Section 1605(a)(7) judgments into Section 1605A(c) judgments is to ensure that plaintiffs who had obtained compensatory damages against terrorist-defendants could return to seek punitive damages against those same defendants. *See Rimkus v. Islamic Republic of Iran*, 750 F.Supp.2d 163, 179 (D.D.C. 2010) (making this point). These punitive damages would, of course, all be retroactive.

Thus, Congress transformed pending claims arising under Section 1605(a)(7) into claims arising under Section 1605A, and then authorized a wide range of damages, including "punitive damages," for "any claim arising under section 1605A." Because pending 1605(a)(7) claims must "be given effect as if" they arose under Section 1605A, punitive damages and all of the other similarly listed damages, such as economic damages, solatium, and pain

and suffering, must therefore apply to these pending cases.

The 2008 NDAA's text even resembles the model language that the *Landgraf* Court offered as an example of a "clear statement" that would overcome the anti-retroactivity presumption. In *Landgraf*, the Court stated that, if Congress had wanted the new provisions to apply retroactively, it would have said that those provisions "shall apply to all proceedings pending on or commenced after the date of enactment of this Act." *Landgraf*, 511 U.S. at 260. Here, in the portion of the NDAA entitled "APPLICATION TO PENDING CASES," Congress stated that the new provisions, including the availability of punitive damages, "shall apply to any claim arising under section 1605A," and that "actions" that had already been "brought under section 1605(a)(7) . . . before the date of the enactment of this Act . . . shall . . . be given effect as if the action had originally been filed under section 1605A(c)." § 1083(c), 122 Stat. at 342–43. Congress could not have more closely approached the Supreme Court's model statement. Therefore, even if *Landgraf* were to apply here, the text of the NDAA demonstrates that Congress intended for punitive damages to be available for injuries suffered before 2008.

That Congressional intent evident in the statutory text is consistent with the legislative history of the NDAA. Having created the state-sponsored terrorism exception to the FSIA in 1996 and having "subsequently passed the Flatow amendment to the FSIA, which allows victims of terrorism to seek meaningful damages, such as punitive damages, from state sponsors of terrorism for the horrific acts of terrorist murder and injury committed

or supported by them," Congress drafted the relevant portion of the proposed 2008 NDAA to clarify and bolster the state-sponsored terrorism exception because "Congress's original intent behind the 1996 legislation ha[d] been muddied by numerous court decisions." 153 Cong. Rec. S15614 (Dec. 14, 2007) (statement of Sen. Lautenberg).

The language of the proposed act so clearly permitted retroactive application of the state-sponsored terrorism exception and its accompanying punitive damages provision that President George W. Bush vetoed the initial version of the Act, fearing that it would hamper U.S. efforts to rebuild and revitalize Iraq because it would permit victims of Saddam Hussein's regime to bring claims against the current Iraqi government. As Senator Frank Lautenberg explained: "The President contended that this provision would hinder Iraqi reconstruction by exposing the current Iraqi government to liability for terrorist acts committed by Saddam Hussein's government." 154 Cong. Rec. S55 (Jan. 22, 2008). Indeed, in his Memorandum of Disapproval, the President explained that he was vetoing the bill because:

> "Section 1083 also would expose Iraq to new liability of at least several billion dollars by undoing judgments favorable to Iraq, by foreclosing available defenses on which Iraq is relying in pending litigation, and by creating a new Federal cause of action backed by the prospect of punitive damages to support claims that may previously have been foreclosed."

See Mem. of Disapproval (Dec. 28, 2007), 2007 WL 4556779.

Congress addressed the President's concerns in the version of the 2008 NDAA that ultimately was signed into law by providing a narrow carve-out with regard to Iraq but no other designated state sponsors of terrorism. *See* Pub. L. No. 110-181, § 1083(d), 122 Stat. 3, 343–44. As Senator Lautenberg explained, the modifications to the proposed act would deprive victims of "past Iraqi terrorism" from achieving "the same justice" as victims of past terrorism by other state sponsors of terrorism:

> "By insisting on being given the power to waive application of this new law to Iraq, **the President seeks to prevent victims of *past* Iraqi terrorism—for acts committed by Saddam Hussein—from achieving the *same justice* as victims of other countries**. Fortunately, the President will not have authority to waive the provision's application to terrorist acts committed by Iran and Libya, among others."

154 Cong. Rec. S55 (Jan. 22, 2008) (emphasis added). The President accepted that compromise and signed the NDAA into law on January 28, 2008.

This legislative history evidences a clear Congressional intent that the 2008 amendments to the FSIA should apply retroactively. But the D.C. Circuit also ignored the fact that the members of Congress who enacted the FSIA amendments in 2008 necessarily relied upon this Court's decision four years earlier in *Altmann*. This Court has long "assume[d] that Congress is aware of existing law when it passes legislation." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). Any evaluation of the retroactive

application of the 2008 amendments to the FSIA should be viewed through that prism. Thus, Congress reasonably understood the 2008 amendments would be presumed to apply retroactively "absent contraindications." *Altmann*, 541 U.S. at 696. Nevertheless, the D.C. Circuit ignored Congress's plain direction. If such an approach were applied by future appellate courts to the FSIA, it would create confusion and uncertainty for any legislators considering further amendments to the FSIA.

Nor may Sudan reasonably argue that it was not on notice that it could be subject to punitive damages under the FSIA. As an initial matter, the Flatow Amendment, which permitted the recovery of punitive damages by victims of state sponsors of terrorism, was passed two years prior to the August 1998 bombings. *See* Pub. L. No. 104-208, § 589, 110 Stat. 3009-172 (1996). And, relying on that Amendment, federal courts already had begun awarding punitive damages to such victims prior to the August 1998 bombings. *See Flatow v. Islamic Republic of Iran*, 999 F.Supp.1, (D.D.C. Mar. 11, 1998) (awarding $225,000,000 in punitive damages). Those awards of punitive damages against state sponsors of terrorism under the FSIA continued in the years between the August 1998 embassy bombings and when Sudan was served with the *Owens* complaint in 2003. *See, e.g., Mousa v. Islamic Republic of Iran*, 203 F.Supp.2d 1, 12 (D.D.C. 2001); *Elahi v. Islamic Republic of Iran*, 124 F.Supp.2d 97, 114 (D.D.C. 2000); *Eisenfeld v. Islamic Republic of Iran*, 172 F.Supp.2d 1, 9 (D.D.C. 2000). Thus, Sudan had ample notice that it could be held liable for punitive damages under the FSIA, yet it intentionally and strategically double-defaulted through "affirmative actions" intended to extend the district court proceedings and deny the petitioners justice.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted. In the alternative, the Court should grant certiorari, vacate the judgment of the D.C. Circuit, and remand the case for reconsideration consistent with this Court's holdings in *Pioneer* and *Altmann*.[11]

Respectfully submitted,

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11. This case may not fit squarely into the categories of cases as to which the Court typically uses the grant, vacate, and remand procedure. However, given that the D.C. Circuit in effect disregarded the significance of the fundamental rules of *Pioneer* and *Altmann*, we respectfully submit that such procedure may be warranted here. *See Youngblood v. West Virginia*, 547 U.S. 867, 870 (2006).

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED JULY 28, 2017

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5105

Consolidated with 14-5106, 14-5107, 14-7124, 14-7125, 14-7127, 14-7128, 14-7207, 16-7044, 16-7045, 16-7046, 16-7048, 16-7049, 16-7050, 16-7052

JAMES OWENS, *ET AL.*,

Appellees,

v.

REPUBLIC OF SUDAN, MINISTRY OF EXTERNAL AFFAIRS AND MINISTRY OF THE INTERIOR OF THE REPUBLIC OF THE SUDAN,

Appellants.

October 11, 2016, Argued; July 28, 2017, Decided

Appeals from the United States District Court for the District of Columbia. (No. 1:01-cv-02244), (1:08-cv-01377), (1:10-cv-00356), (1:12-cv-01224), (1:08-cv-01349), (1:08-cv-01361), (1:08-cv-01380).

Before: HENDERSON and ROGERS, Circuit Judges, and GINSBURG, *Senior Circuit Judge.*

Appendix A

Opinion for the Court filed by *Senior Circuit Judge* GINSBURG.

[TABLES INTENTIONALLY OMITTED]

GINSBURG, *Senior Circuit Judge*: On August 7, 1998 truck bombs exploded outside the United States embassies in Nairobi, Kenya and in Dar es Salaam, Tanzania. The explosions killed more than 200 people and injured more than a thousand. Many of the victims of the attacks were U.S. citizens, government employees, or contractors.

As would later be discovered, the bombings were the work of al Qaeda, and only the first of several successful attacks against U.S. interests culminating in the September 11, 2001 attack on the United States itself. From 1991 to 1996, al Qaeda and its leader, Usama bin Laden, maintained a base of operations in Sudan. During this time, al Qaeda developed the terrorist cells in Kenya and Tanzania that would later launch the embassy attacks. This appeal considers several default judgments holding Sudan liable for the personal injuries suffered by victims of the al Qaeda embassy bombings and their family members.

I. Background

Starting in 2001 victims of the bombings began to bring suits against the Republic of Sudan and the Islamic Republic of Iran, alleging that Sudan, its Ministry of the Interior, Iran, and its Ministry of Information and Security materially supported al Qaeda during the 1990s.

Specifically, the plaintiffs contended Sudan provided a safe harbor to al Qaeda and that Iran, through its proxy Hezbollah, trained al Qaeda militants. In bringing these cases, the plaintiffs relied upon a provision in the Foreign Sovereign Immunity Act (FSIA) that withdraws sovereign immunity and grants courts jurisdiction to hear suits against foreign states designated as sponsors of terrorism. 28 U.S.C. § 1605(a)(7). This provision and its successor are known as the "terrorism exception" to foreign sovereign immunity.

Initially, neither Sudan nor Iran appeared in court to defend against the suits. In 2004 Sudan secured counsel and participated in the litigation. Within a year, its communication with and payment of its attorneys ceased but counsel continued to litigate until allowed to withdraw in 2009. In the years that followed, several new groups of plaintiffs filed suits against Sudan and Iran. The sovereign defendants did not appear in any of these cases, and in 2010 the district court entered defaults in several of the cases now before us. After an evidentiary hearing in 2010 and the filing of still more cases, the court in 2014 entered final judgments in all pending cases. Sudan then reappeared, filing appeals and motions to vacate the judgments. The district court denied Sudan's motions to vacate, and Sudan again appealed.

Today we address several challenges brought by Sudan on direct appeal of the default judgments and collateral appeal from its motions to vacate. Most of Sudan's contentions require interpretation of the FSIA terrorism exception, to which we now turn.

Appendix A

A. The FSIA Terrorism Exception

Enacted in 1976, the FSIA provides the sole means for suing a foreign sovereign in the courts of the United States. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439, 109 S. Ct. 683, 102 L. Ed. 2d 818 (1989). A foreign state is presumptively immune from the jurisdiction of the federal and state courts, 28 U.S.C. § 1604, subject to several exceptions codified in §§ 1605, 1605A, 1605B, and 1607.

When first enacted, the FSIA generally codified the "restrictive theory" of sovereign immunity, which had governed sovereign immunity determinations since 1952. Under the restrictive theory, states are immune from actions arising from their public acts but lack immunity for their strictly commercial acts. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487-88, 103 S. Ct. 1962, 76 L. Ed. 2d 81 (1983). Thus, the original exceptions in the FSIA withdrew immunity for a sovereign's commercial activities conducted in or causing a direct effect in the United States, 28 U.S.C. § 1605(a)(2), and for a few other activities not relevant here. *See* 28 U.S.C. § 1605(a)(1)-(6).

None of the original exceptions in the FSIA created a substantive cause of action against a foreign state. Rather, the FSIA provided "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances" except that it prohibited the award of punitive damages against a sovereign. 28 U.S.C. § 1606. As a result, a plaintiff suing a foreign sovereign typically relied upon state substantive

law to redress his grievances. In this way, the FSIA "operate[d] as a 'pass-through' to state law principles," *Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 12 (2d Cir. 1996), granting jurisdiction yet leaving the underlying substantive law unchanged, *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620, 103 S. Ct. 2591, 77 L. Ed. 2d 46 (1983).

Until 1996 the FSIA provided no relief for victims of a terrorist attack. Courts consistently rebuffed plaintiffs' efforts to fit terrorism-related suits into an existing exception to sovereign immunity. *See, e.g., Saudi Arabia v. Nelson*, 507 U.S. 349, 113 S. Ct. 1471, 123 L. Ed. 2d 47 (1993); *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164, 308 U.S. App. D.C. 102 (D.C. Cir. 1994); *Smith v. Socialist People's Libyan Arab Jamahiriya*, 886 F. Supp. 306 (E.D.N.Y. 1995). This changed with the passage of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214, which added a new exception to the FSIA withdrawing immunity and granting jurisdiction over cases in which

> money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act if such act or provision of material 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.

Id. at § 221, 110 Stat. at 1241-43 (codified at 28 U.S.C. § 1605(a)(7) (2006) (repealed)).

This new "terrorism exception" applied only to (1) a suit in which the claimant or the victim was a U.S. national, 28 U.S.C. § 1605(a)(7)(B)(ii), and (2) the defendant state was designated a sponsor of terrorism under State Department regulations at or around the time of the act giving rise to the suit, § 1605(a)(7)(A) (referencing 50 U.S.C. App. § 2405(j) and 22 U.S.C. § 2371). The AEDPA also set a filing deadline for suits brought under the new exception at ten years from the date upon which a plaintiff's claim arose. 28 U.S.C. § 1605(f).

Initially, there was some confusion about whether the new exception created a cause of action against foreign sovereigns. *See In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 42-43 (D.D.C. 2009). Within five months of enacting the AEDPA, the Congress clarified the situation with an amendment, codified as a note to the FSIA, Pub. L. No. 104-208, § 589, 110 Stat. 3009, 3009-172 (1996) (codified at 28 U.S.C. § 1605 note), which provides:

> [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 section

> 1605(a)(7) of title 28, United States Code, 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).

This amendment was known as the Flatow Amendment after Alisa Flatow, a Brandeis University student mortally wounded in a suicide bombing in the Gaza Strip. The Flatow Amendment, which the Congress intended to deter state support for terrorism, (1) provided a cause of action against officials, employees, or agents of a designated state sponsor of terrorism and (2) authorized the award of punitive damages against such a defendant. These two changes marked a departure from the other FSIA exceptions, none of which provided a cause of action or allowed for punitive damages. *See* 28 U.S.C. § 1606.

Although it referred in terms only to state officials, for a time some district courts read the Flatow Amendment and § 1605(a)(7) to create a federal cause of action against foreign states themselves. *See, e.g., Kilburn v. Republic of Iran*, 277 F. Supp. 2d 24, 36-37 (D.D.C. 2003). *But see Roeder v. Islamic Republic of Iran*, 195 F. Supp. 2d 140, 171 (D.D.C. 2002). In *Cicippio-Puleo v. Islamic Republic of Iran*, we rejected this approach, holding that "neither 28 U.S.C. § 1605(a)(7) nor the Flatow Amendment, nor the two considered in tandem, creates a private right of action against a foreign government." 353 F.3d 1024, 1033, 359 U.S. App. D.C. 299 (D.C. Cir. 2004). We based this conclusion upon the plain text of the Flatow Amendment — which applied only to state officials — and upon the

function of all the other exceptions to the FSIA, which withdraw immunity but leave the substantive law of liability unchanged. *Id.* at 1033-34 (noting the "settled distinction in federal law between statutory provisions that waive sovereign immunity and those that create a cause of action"). Because there was no federal cause of action, we remanded the case "to allow plaintiffs an opportunity to amend their complaint to state a cause of action under some other source of law, including state law." *Id.* at 1036. Hence, a plaintiff proceeding under the terrorism exception would follow the same pass-through process that governed an action under the original FSIA exceptions.

The pass-through approach, however, produced considerable difficulties. In cases with hundreds or even thousands of claimants, courts faced a "cumbersome and tedious" process of applying choice of law rules and interpreting state law for each claim. *See Iran Terrorism Litig.*, 659 F. Supp. 2d at 48. Differences in substantive law among the states caused recoveries to vary among otherwise similarly situated claimants, denying some any recovery whatsoever. *See Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25, 44 45 (D.D.C. 2007) (denying recovery for intentional infliction of emotional distress to plaintiffs domiciled in Pennsylvania and Louisiana while permitting recovery for plaintiffs from other states).

The Congress addressed these problems in 2008. Section 1083 of the National Defense Authorization Act for Fiscal Year 2008 (NDAA) repealed § 1605(a)(7) and replaced it with a new "Terrorism exception to the

jurisdictional immunity of a foreign state." Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338-44 (2008) (hereinafter NDAA) (codified at 28 U.S.C. § 1605A). The new exception withdrew immunity, granted jurisdiction, and authorized suits against state sponsors of terrorism for "personal injury or death" arising from the same predicate acts — torture, extrajudicial killing, aircraft sabotage, hostage taking, and the provision of material support — as had the old exception. 28 U.S.C. § 1605A(a)(1). Jurisdiction for suits under the new exception extended to "claimants or victims" who were U.S. nationals, and for the first time, to members of the armed forces and to government employees or contractors acting within the scope of their employment. 28 U.S.C. § 1605A(a)(2)(A)(ii). Most important, the new exception authorized a "[p]rivate right of action" against a state over which a court could maintain jurisdiction under § 1605A(a). 28 U.S.C. § 1605A(c). By doing so, the Congress effectively abrogated *Cicippio-Puleo* and provided a uniform source of federal law through which plaintiffs could seek recovery against a foreign sovereign. *Iran Terrorism Litig.*, 659 F. Supp. 2d at 59. A claimant who was a U.S. national, military service member, government employee or contractor acting within the scope of his employment, and the claimant's legal representative could make use of this cause of action. As with the Flatow Amendment but unlike § 1605(a)(7), the NDAA authorized awards of punitive damages under the new federal cause of action. The exception also provided claimants a host of other new benefits not relevant here.

Like its predecessor, the new exception contained a ten-year limitation period on claims brought under

§ 1605A. Notwithstanding the limitation period, the NDAA provided two means of bridging the gap between the now-repealed § 1605(a)(7) and the new § 1605A. Claimants with claims "before the courts in any form" who had been adversely affected by the lack of a federal cause of action in § 1605(a)(7) could move to convert or refile their cases under § 1605A(c). NDAA § 1083(c)(2). Furthermore, "[i]f an action arising out of an act or incident has been timely commenced under section 1605(a)(7) or [the Flatow Amendment]," then a claimant could bring a "related action" "arising out of the same act or incident" within 60 days of the entry of judgment in the original action or of the enactment of the NDAA, whichever was later. NDAA § 1083(c)(3). Each of these provisions is examined below in greater detail as they relate to Sudan's arguments.

B. History of this Litigation

This appeal follows 15 years of litigation against Sudan arising from the 1998 embassy bombings. In October 2001 plaintiff James Owens filed the first lawsuit against Sudan and Iran for his personal injuries. Other plaintiffs joined the *Owens* action in the following year. These included individuals (or the legal representatives of individuals) killed or injured in the bombings, who sought recovery for their physical injuries (or deaths), and the family members of those killed or injured, who sued for their emotional distress. The *Owens* complaint alleged that the embassy bombings were "extrajudicial killings" under the FSIA and that Sudan provided material support for the bombings by sheltering and protecting al Qaeda during the 1990s.

When Sudan failed to appear, the district court entered an order of default in May 2003. The default was translated into Arabic and sent to Sudan in accordance with 28 U.S.C. § 1608(e). In February 2004 Sudan secured counsel and in March 2004 moved to vacate the default and to dismiss the *Owens* action. Sudan argued, among other things, it remained immune under the FSIA because the plaintiffs had not adequately pleaded facts showing it had materially supported al Qaeda or that its support had caused the bombings. Sudan attached to its motion declarations from a former U.S. Ambassador to Sudan and a former FBI agent stating that it neither assisted al Qaeda nor knew of the group's terrorist aims during the relevant period.

In March 2005 the district court granted, in part, Sudan's motion to dismiss and vacated the order of default. *Owens v. Republic of Sudan*, 374 F. Supp. 2d 1, 9-10 (D.D.C. 2005) (*Owens I*). The court, however, allowed the plaintiffs to amend their complaint in order to develop more fully their allegations of material support. *Id.* at 15. The court further noted that although "the Sudan defendants severed ties to al Qaeda two years before the relevant attacks," this timing did not necessarily foreclose the conclusion that Sudan had "provided material support within the meaning of the statute and that this support was a proximate cause of the embassy bombings." *Id.* at 17.

The plaintiffs then amended their complaint, and Sudan again moved to dismiss. Sudan once again argued the complaint had not sufficiently alleged material support and that any support it provided was not a legally sufficient

cause of the embassy bombings. Assuming the truth of the plaintiffs' allegations, the district court denied Sudan's motion in its entirety. *Owens v. Republic of Sudan*, 412 F. Supp. 2d 99, 108, 115 (D.D.C. 2006) (*Owens II*).

While the motions to dismiss were pending, difficulties arose between Sudan and its counsel. After filing the first motion to dismiss, Sudan's initial counsel withdrew due to a conflict of interest with the Iranian codefendants. Sudan retained new counsel, but their relationship soon deteriorated. Starting in January 2005 new counsel filed several motions to withdraw, citing Sudan's unresponsiveness and failure to pay for legal services. Sudan's last communication with counsel was in September 2008. The district court eventually granted a final motion to withdraw in January 2009, leaving Sudan without representation.

Despite these difficulties, counsel for Sudan continued to defend their client until the court granted the motion to withdraw in January 2009. Following the denial of its second motion to dismiss, Sudan pursued an interlocutory appeal to this court. Its appeal, in part, challenged the legal sufficiency of the plaintiffs' allegations that Sudan's material support had caused the embassy bombings. In July 2008 we affirmed the district court's decision, holding that "[a]ppellees' factual allegations and the reasonable inferences that can be drawn therefrom show a reasonable enough connection between Sudan's interactions with al Qaeda in the early and mid-1990s and the group's attack on the embassies in 1998" to maintain jurisdiction under the FSIA. *Owens v. Republic of Sudan*, 531 F.3d 884, 895,

382 U.S. App. D.C. 155 (D.C. Cir. 2008) (*Owens III*). We then remanded the case to allow the plaintiffs to pursue the merits of their claims.

Shortly after our decision, several new groups of plaintiffs filed actions against Sudan and Iran arising from the embassy bombings. These actions — brought by the Wamai, Amduso, Mwila, and Osongo plaintiffs — were filed after the enactment of the new terrorism exception and before the expiration of its limitation period. This brought the total number of suits against Sudan to six, including the original *Owens* action and a suit filed by the Khaliq plaintiffs under § 1605(a)(7).

From that point on, neither Sudan nor its counsel participated in the litigation again until after the 2014 entry of final judgment in *Owens*. After entering new orders of defaults against Sudan in several of the pending actions, the court held a consolidated evidentiary hearing in order to satisfy a requirement in the FSIA that "the claimant establish[] his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e). Without considering this evidence, the court could not transform the orders of default into enforceable default judgments establishing liability and damages against Sudan.

For three days, the district court heard expert testimony and reviewed exhibits detailing the relationship between both Iran and Sudan and al Qaeda during the 1990s. Shortly after this hearing the district court held both defendants liable for materially supporting the embassy bombings. *Owens v. Republic of Sudan*, 826

F. Supp. 2d 128, 157 (D.D.C. 2011) (*Owens IV*). More specifically, the district court found Sudan had provided al Qaeda a safe harbor from which it could establish and direct its terrorist cells in Kenya and Tanzania. *Id.* at 139-43, 146. The court further found Sudan provided financial, military, and intelligence assistance to the terrorist group, which allowed al Qaeda to avoid disruption by hostile governments while it developed its capabilities in the 1990s. *Id.* at 143-46. These findings established both jurisdiction over and substantive liability for claims against Sudan and Iran.

The court also addressed the claims of non-American family members of those killed or injured in the bombings. Although those plaintiffs could not make use of the federal cause of action in § 1605A(c), the court concluded they could pursue claims under state law, as was the practice under the previous terrorism exception. *Id.* at 153. The court's opinion was translated into Arabic and served upon Sudan in September 2012.

The district court then referred the cases to special masters to hear evidence and recommend the amounts of damages to be awarded. While this process was ongoing, two new sets of plaintiffs entered the litigation. In July 2012 the Opati plaintiffs filed suit against Sudan, claiming their suits were timely as a "related action" with respect to the original *Owens* litigation. In May 2012 the Aliganga plaintiffs sought to intervene in the *Owens* suit. Notwithstanding the expiration of the ten-year limitation period starting from the date of the bombings, the district court allowed both groups of plaintiffs to proceed against

Sudan and to rely upon the court's factual findings of jurisdiction and liability. The court then referred the Aliganga and *Opati* claims to the special masters.

In 2014 the district court entered final judgments in favor of the various plaintiffs. All told, the damages awarded against Sudan came to more than $10.2 billion. Family members, who outnumbered those physically injured by the bombing, received the bulk of the award — over $7.3 billion. Of the total $10.2 billion, approximately $4.3 billion was punitive damages. *See, e.g., Opati v. Republic of Sudan*, 60 F. Supp. 3d 68, 82 (D.D.C. 2014).

Within a month of the first judgments, Sudan retained counsel and reappeared in the district court. Sudan appealed each case and in April 2015 filed motions in the district court to vacate the default judgments under Federal Rule of Civil Procedure 60(b). We stayed the appeals pending the district court's ruling on the motions.

In those motions, Sudan raised a number of arguments for vacatur, most of them challenging the district court's subject matter jurisdiction. As before, Sudan also attacked the plaintiffs' evidence. It argued the judgments were void because they rested solely upon inadmissible evidence to prove jurisdictional facts, which Sudan argued was impermissible under § 1608(e). It also argued the evidence did not show it proximately caused the bombings because al Qaeda did not become a serious terrorist threat until after Sudan had expelled bin Laden in 1996.

Sudan raised a host of new arguments as well. In its most sweeping challenge, Sudan argued it did not provide

material support for any predicate act that would deprive it of immunity under the FSIA. In making this argument, Sudan contended the embassy bombings, carried out by al Qaeda, were not "extrajudicial killings" because that term requires the involvement of a state actor in the act of killing. Sudan also contended the claims brought by the Opati, Aliganga, and Khaliq plaintiffs were barred by the statute of limitation in § 1605A(b) which, it argued, deprived the court of jurisdiction to hear their suits.[1]

Sudan's last jurisdictional challenge took aim at the family members of those physically injured or killed by the bombings. Sudan argued that the court could hear claims only from a person who was physically harmed or killed by the bombings or the legal representative of that person. And even if jurisdiction was proper, Sudan contended, foreign (i.e., non U.S.) family members could not state a claim under either the federal cause of action or state law.

Finally, Sudan raised two nonjurisdictional arguments: First, it urged the district court to vacate its awards of punitive damages to the plaintiffs proceeding under state law, contending § 1605A(c) is the sole means for obtaining punitive damages against a foreign state. Second, Sudan argued the court should vacate the default judgments under Federal Rule of Civil Procedure 60(b) for "extraordinary circumstances" or "excusable neglect" on Sudan's part. In support of the latter argument, Sudan

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1. As we discuss *infra*, the Khaliq plaintiffs later asserted claims under § 1605A.

submitted a declaration from the Sudanese Ambassador to the United States detailing the country's troubled history of civil unrest, natural disaster, and disease, which allegedly impeded Sudan's participation in the litigation.

After a consolidated hearing, the district court denied the motions to vacate in all respects. *Owens v. Republic of Sudan*, 174 F. Supp. 3d 242 (D.D.C. 2016) (*Owens V*). Sudan appealed and its appeal was consolidated with its earlier appeals from the final judgments. Sudan's briefs before this court are directed primarily to the district court's jurisdiction, and present novel questions of law, which we review de novo. *See Jerez v. Republic of Cuba*, 775 F.3d 419, 422, 413 U.S. App. D.C. 378 (D.C. Cir. 2014). Ordinarily, all of Sudan's nonjurisdictional arguments would be forfeited by reason of its having defaulted in the district court. *See Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1547, 258 U.S. App. D.C. 354 (D.C. Cir. 1987). In this case, however, due to the size of the judgments against Sudan, their possible effects upon international relations, and the likelihood that the same arguments will arise in future litigation, we exercise our discretion to consider some, but not all, of Sudan's nonjurisdictional objections. *See Acree v. Republic of Iraq*, 370 F.3d 41, 58, 361 U.S. App. D.C. 410 (D.C. Cir. 2004) ("while we will ordinarily refrain from reaching non-jurisdictional questions that have not been raised by the parties . . . we may do so on our own motion in 'exceptional circumstances'").

At the end of the day, we affirm the judgments in most respects, holding the FSIA grants jurisdiction over all the claims and claimants present here. We hold also that those

plaintiffs ineligible to proceed under the federal cause of action may continue to press their claims under state law. We also vacate all the awards of punitive damages and certify a question of local tort law to the District of Columbia Court of Appeals.

We turn first to Sudan's challenges to the district court's subject matter jurisdiction, starting with those that would dispose of the entire case. In Part II we address Sudan's challenge to the meaning of "extrajudicial killings" under the FSIA. In Part III we review the sufficiency of the evidence supporting the conclusions that Sudan provided material support to al Qaeda and that this support was a jurisdictionally sufficient cause of the embassy bombings.

We then proceed to Sudan's jurisdictional challenges that would eliminate the claims of particular plaintiffs. In Part IV we consider whether some of the plaintiffs' claims are barred by the statute of limitation in the FSIA terrorism exception, which Sudan contends is jurisdictional. In Part V we address both jurisdictional and nonjurisdictional arguments opposing the claims of the family members of victims physically injured or killed by the embassy bombings. Finally, we address Sudan's purely nonjurisdictional arguments in Part VI — whether the new terrorism exception authorizes punitive damages for a sovereign's pre-enactment conduct — and Part VII — addressing Sudan's arguments for vacatur under Rule 60(b)(1) and 60(b)(6).

II. Extrajudicial Killings

Sudan first argues the 1998 embassy bombings were not "extrajudicial killings" within the meaning of the FSIA terrorism exception. As noted above, § 1605A divests a foreign state of immunity and grants courts jurisdiction over cases

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

Because this argument poses a challenge to the court's subject matter jurisdiction, it was not forfeited by Sudan's failure to appear in the district court. *See Practical Concepts*, 811 F.2d at 1547. This is Sudan's most sweeping challenge, and, if correct, then the claims of all the plaintiffs must fail. The district court rejected Sudan's jurisdictional argument based upon the plain meaning of "extrajudicial killing." *Owens V*, 174 F. Supp. 3d at 259-66. Reviewing de novo this question of law relating to our jurisdiction, we agree that "extrajudicial killings" include the terrorist bombings that gave rise to these cases.

Section 1605A(h)(7) of the FSIA provides that the term "extrajudicial killing" has the meaning given to it in

§ 3(a) of the Torture Victim Protection Act of 1991, which defines an extrajudicial killing as:

> a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all 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.

Pub. L. No. 102-256, § 3(a), 106 Stat. 73, 73 (1991) (codified at 28 U.S.C. § 1350 note) (hereinafter TVPA).

On its face, this definition contains three elements: (1) a killing; (2) that is deliberated; and (3) is not authorized by a previous judgment pronounced by a regularly constituted court. The 1998 embassy bombings meet all three requirements and do not fall within the exception for killings carried out under the authority of a foreign nation acting in accord with international law. First, the bombings caused the death of more than 200 people in Kenya and Tanzania. The bombings were "deliberated" in that they involved substantial preparation, meticulous timing, and coordination across multiple countries in the region. *See Mamani v. Berzaín*, 654 F.3d 1148, 1155 (11th Cir. 2011) (defining "deliberated" under the TVPA as "being undertaken with studied consideration and purpose"). Finally, the bombings themselves were neither authorized by any court nor by the law of nations. Therefore, on its face, the FSIA would appear to cover the bombings as extrajudicial killings.

Sudan offers a host of reasons we should ignore the plain meaning of "extrajudicial killing" in the TVPA and exclude terrorist bombings like the 1998 embassy attacks from jurisdiction under the FSIA terrorism exception. Sudan's arguments draw upon the text and structure, the purpose, and the legislative history of the TVPA and of the FSIA terrorism exception. Each of Sudan's arguments shares the same basic premise: Only a state actor, not a non-state terrorist, may commit an "extrajudicial killing."

A. Textual Arguments

We begin, as we must, with the text of the statute. First, Sudan contends the text of the TVPA, and, by extension of the FSIA, defines an "extrajudicial killing" in terms of international law, specifically the Geneva Conventions. According to Sudan, international law generally and the Geneva Conventions specifically prohibit only killings carried out by a state actor. The plaintiffs vigorously contest both propositions.

1. State action requirements under international law

Sudan bases its argument that principles of international law supply the meaning of "extrajudicial killing" in the FSIA upon similarities between the TVPA and the prohibition on "summary executions" in Common Article 3 of the Geneva Conventions of 1949, which condemns "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial

guarantees which are recognized as indispensable by civilized peoples." Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3(1)(d), Aug. 12, 1949, 6 U.S.T. 3114, 75 U.S.T.S. 85. The similarities between the two definitions, Sudan contends, shows the Congress intended to define an "extrajudicial killing" in the TVPA with reference to principles of international law adopted in the Geneva Conventions.

To Sudan, this is of critical importance because the Geneva Conventions and international law, it argues, proscribe killings only when committed by a state agent, not when perpetrated by a non-state actor. Three pieces of evidence are said to demonstrate this limitation. First, Sudan notes, the United Nations adopted a resolution in 1980 condemning as inconsistent with international law "[e]xtra-legal executions" carried out by "armed forces, law enforcement or other governmental agencies." Congress on the Prevention of Crime and the Treatment of Offenders Res., A/Conf.87/L.11 (Sep. 5, 1980). Second, Sudan cites a United Nations annual report, S. Amos Wako (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Summary or Arbitrary Executions*, ¶¶ 74-85, U.N. Doc. E/CN.4/1983/16 (Jan. 31, 1983), which describes "extralegal executions" and "summary executions" in terms suggesting state involvement. And third, Sudan references an online database of the United Nations, which links the term "extrajudicial killing" to the definition of "extralegal execution." U.N. Terminology Database, http://untermportal.un.org/UNTERM/display/Record/UNHQ/extra-legal_execution/c253667 (last visited July 19, 2017).

Each of these references to international law is both inapposite and rebutted by the plaintiffs. If Sudan means to say the TVPA incorporates the prohibition against a "summary execution" in the Geneva Conventions, then it must show what was meant by that term in the Geneva Conventions themselves. In doing so, however, Sudan principally relies upon U.N. documents published more than a quarter century after the ratification of the Geneva Conventions in 1949, rather than the deliberations over the proposed Conventions, which Sudan does not cite at all. Odder still, none of these documents (or the terminology database) actually says the Geneva Conventions proscribe only "summary executions" committed by a state actor. *See Summary or Arbitrary Executions, supra* p. 22, ¶¶ 35-36 (noting Article 3 of the Geneva Conventions prohibits "murder" in general and "also specifically prohibits the passing of sentences and the carrying out of executions without previous judement pronounced by a regularly constituted court"). Indeed, the plaintiffs present reasons to doubt whether the Geneva Conventions in specific, or international law in general, prohibit only killings by a state actor. As the plaintiffs note, Article 3 of the First Convention prohibits "violence to life and person, in particular murder of all kinds." Geneva Convention, art. 3(1)(a), Aug. 12, 1949, 6 U.S.T. 3114, 75 U.S.T.S. 85. Likewise, the U.N. Terminology Database lists "[k]illings committed by vigilante groups" as an example of an "extrajudicial killing." And finally, a "Handbook" published by the U.N. Special Rapporteur on Summary or Arbitrary Executions contains a full chapter on "killings by non-state actors and affirmative state obligations," which states that "Human rights and humanitarian law

clearly apply to killings by non-State actors in certain circumstances." Project on Extrajudicial Executions, *UN Special Rapporteur on Extrajudicial Executions Handbook*, ¶ 45, http://www.extrajudicialexecutions.org/application/media/Handbook%20Chapter%203-Responsibility%20of%20states%20for%20non-state%20killings.pdf (last visited July 19, 2017).

This does not mean Sudan's interpretation of international law as it pertains to summary executions (as opposed to extrajudicial killings) is wrong or that direct state involvement is not needed for certain violations of international law. Rather, the point is that the role of the state in an extrajudicial killing appears less clear under international law than Sudan would have us believe; indeed it appears less clear than the definition of an "extrajudicial killing" in the TVPA itself. Accordingly, we doubt the Congress intended categorically to preclude state liability for killings by non-state actors by adopting a definition of "extrajudicial killing" similar to that of a "summary execution" in the Geneva Conventions.

2. International law and the TVPA

More important, even if Sudan's interpretation of the Geneva Conventions and international law is correct, its argument would fail because the TVPA does not appear to define an "extrajudicial killing" coextensive with the meaning of a "summary execution" (or any similar prohibition) under international law. For example, the TVPA does not adopt the phrasing of the Geneva Conventions wholesale. Rather, as the plaintiffs point

out, the TVPA substitutes the term "deliberated killing" for "the passing of sentences and the carrying out of executions" in the Geneva Conventions. While "the passing of sentences and the carrying out of executions" strongly suggests at least some level of state involvement, a non-state party may commit a "deliberated killing" as readily as a state actor. Indeed, several other statutes contemplate "deliberate" attacks by non-state entities, including terrorist groups. *See, e.g.*, 6 U.S.C. § 1169(a) (requiring the Secretary of Transportation to assess vulnerability of hazardous materials in transit to a "deliberate terrorist attack"); 42 U.S.C. § 16276 (mandating research on technologies for increasing "the security of nuclear facilities from deliberate attacks"). Due to the substitution of "deliberated" killings for "the passing of sentences and the carrying out of executions," the inference of direct state involvement is much less strong in the TVPA than in the Geneva Conventions. The difference between the definition in the TVPA and the prohibition in the Geneva Conventions also signals the Congress intended the TVPA to reach a broader range of conduct than just "summary executions." For the court to rely upon the narrower prohibition in the Geneva Conventions would contravene the plain text of the TVPA, which is, after all, the sole "authoritative statement" of the law. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005).

Resisting this conclusion, Sudan points to two phrases that, it contends, impose a state actor requirement upon the definition of an extrajudicial killing in the TVPA. First, Sudan notes that an extrajudicial killing must not

be one "authorized by a previous judgment pronounced by a regularly constituted court." As Sudan would have it, the "only killings that can be reasonably be imagined to be authorized by a 'previous judgment' are those by state actors." Regardless whether Sudan is right on this point, the argument does not imply what Sudan intends. If only a state actor may lawfully kill based upon a "previous judgment," then all killings committed by a non-state actor are, by definition, not "authorized by a previous judgment." Therefore, only a killing committed by a state actor might not be an "extrajudicial killing," that is, if it was "authorized by a previous judgment pronounced by a regularly constituted court." Accepting Sudan's premise, no other outcome can "reasonably be imagined."

Similarly, Sudan argues the second sentence in the definition of an "extrajudicial killing" in the TVPA anchors the meaning of the first sentence in international law which, in Sudan's view, prohibits only summary executions by state actors. Even accepting Sudan's view of international law, we are not persuaded. In the first sentence of § 3(a), the Congress defined the proscribed conduct (i.e., a "deliberated killing") in terms that extended beyond the prohibition on a "summary execution" under international law. The second sentence excludes from the definition of "extrajudicial killing" "any . . . killing that, under international law, is lawfully carried out under the authority of a foreign nation." This ensured that the more expansive prohibition of the first sentence would not reach the traditional prerogatives of a sovereign nation. Were "extrajudicial killings" no broader than "summary executions," the limitation in international

law of what constitutes an "extrajudicial killing" would be unnecessary because, by Sudan's own argument, a "summary execution" always violates international law. Therefore, Sudan's interpretation would make superfluous the reference to killings "lawfully carried out" "under international law," contrary to the "cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute." *See Williams v. Taylor*, 529 U.S. 362, 404, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (internal quotation marks and citation omitted).

Moreover, the reference to international law in the second sentence of § 3(a) of the TVPA highlights its omission in the first sentence. Had the Congress intended the definition of an "extrajudicial killing" to track precisely with that of a "summary execution" under international law, § 3(a) could have expressly referenced international law in both the prohibition and its limitation. That approach is found elsewhere in the FSIA, *see* 28 U.S.C. § 1605(a)(3) (authorizing jurisdiction where "rights in property [are] taken in violation of international law"), as well as in other statutes, *see* 18 U.S.C. § 1651 (proscribing "the crime of piracy as defined by the law of nations"). Indeed, the Congress specifically defined other predicate acts in § 1605A by reference to international treaties, *see* 28 U.S.C. § 1605A(h)(1),(2) (defining "aircraft sabotage" and "hostage taking" with reference to international treaties), but referenced only a U.S. statute, the TVPA, in its definition of "extrajudicial killing." That the Congress incorporated international law expressly into other jurisdictional provisions undermines the inference that it intended implicitly to do so here. *See Dep't of Homeland*

Sec. v. MacLean, 135 S. Ct. 913, 919, 190 L. Ed. 2d 771 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another").

3. State action requirements in the TVPA and the FSIA terrorism exception

The plaintiffs provide another persuasive reason Sudan's textual arguments are flawed. The TVPA authorizes an action only for harms arising from the conduct of a state actor. *See* TVPA § 2(a) (providing a cause of action against an "individual who, under actual or apparent authority, or color of law, of any foreign nation" engages in torture or extrajudicial killing). Sudan argues the state actor requirement for a suit under the TVPA is "necessarily incorporated" in § 3(a) and therefore applies to those actions arising from "extrajudicial killings" under the FSIA. The limitation of actions to state actors, however, is found not in § 3(a) but in § 2(a) of the TVPA. As the plaintiffs note, when passing the current and prior FSIA terrorism exceptions, the Congress each time incorporated the section of the TVPA that defined an "extrajudicial killing" but not the section that limited the cause of action under the TVPA to state actors. If the Congress had wanted to limit extrajudicial killings to state actors, then it could have incorporated both sections of the TVPA into the FSIA terrorism exception. That it did not compels us to conclude the state actor limitation in the TVPA does not transfer to the definition of an "extrajudicial killing" in the FSIA. *Cf. Sebelius v. Cloer*, 569 U.S. 369, 133 S. Ct. 1886, 1894, 185 L. Ed. 2d 1003

(2013) (declining to apply limitations from one section of a statute when the text of another section does not cross-reference the first section).

Indeed, the reason the Congress declined to incorporate the state-actor limitation in the TVPA is plain on the face of the FSIA terrorism exception. As the plaintiffs observe, the TVPA and the FSIA share a similar structure. Each statute defines the predicate acts that give rise to liability in one section — TVPA § 3 and FSIA § 1605A(h) - and then limits who may be subjected to liability in another — TVPA § 2 and FSIA §§ 1605A(a)(1) and (c). Both statutes also require a plaintiff to show a certain type of nexus to a foreign sovereign. In the TVPA, a state official must act "under actual or apparent authority, or color of law" of a foreign sovereign. In the FSIA, liability arises when the state official, employee, or agent acting within the scope of his authority either directly commits a predicate act or provides "material support or resources" for another to commit that act. If the more stringent state-actor limitation in the TVPA traveled with the definition of an "extrajudicial killing" in that statute, then it would all but eliminate the "material support" provision of § 1605A(a), at least with respect to extrajudicial killings. For example, § 1605A(a) would extend jurisdiction over a sovereign that did not directly commit an extrajudicial killing only if an official of the defendant state materially supported a killing committed by a state actor from a different state. We seriously doubt the Congress intended the exception to immunity for materially supporting an extrajudicial killing to be so narrow.

Sudan attempts to avoid the conclusion that the FSIA does not adopt the state-actor limitation in the TVPA in two ways. First, Sudan contends the introductory clause of § 3(a) implicitly incorporates the state actor limitation of § 2(a). This clause states that an "extrajudicial killing" is defined "[f]or the purposes of this Act." That supposedly indicates the Congress intended to import the state actor limitation of § 2(a) into the definition of an extrajudicial killing in § 3(a). But Sudan's reading of this phrase leads to an illogical conclusion. A statutory definition made expressly "[f]or the purposes of this Act" informs our understanding of the entire statute. In other words, the definitions in TVPA § 3 govern the use of those defined terms elsewhere in the Act. Under Sudan's interpretation, however, the reverse would occur: in order to understand the meaning of a defined term, we would have to look to the remainder of the statute, and not to the definition itself. What then, we wonder, would the definition contribute to the statute? Would it be wholly redundant, a conclusion that conflicts with our usual interpretive presumptions? *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 669, 127 S. Ct. 2518, 168 L. Ed. 2d 467 (2007). Or, if not redundant, how would a court then apply the definition to terms used in the remainder of the statute if the remainder of the statute, in turn, gave meaning to the definition? Given these paradoxes, the phrase "[f]or the purposes of this Act" cannot mean what Sudan contends. Instead, that phrase simply means that the definition of an "extrajudicial killing" in TVPA § 3(a) informs the remainder of the TVPA (and, by extension, the FSIA), and not the reverse.

Second, Sudan contends the definition of an "extrajudicial killing" in the TVPA implicitly incorporates international law (and the supposed state-actor limitation therein) even without reference to the state-actor limitation in § 2(a). Here Sudan relies principally upon a dictum in a Second Circuit opinion discussing the TVPA in a case arising under the Alien Tort Claims Act (ATCA), which expressly incorporates international law: "torture and summary execution — when not perpetrated in the course of genocide or war crimes — are proscribed by international law only when committed by state officials or under color of law." *Kadić v. Karadžić*, 70 F.3d 232, 243 (1995). The court further noted that "official torture is prohibited by universally accepted norms of international law, and the Torture Victim Act confirms this holding and extends it to cover summary execution." *Id.* at 244 (citation omitted). This, Sudan contends, shows the TVPA definition of an "extrajudicial killing" (and not just the TVPA in general) draws upon international law. The court's discussion in that case, however, relied not only upon the definition of an "extrajudicial killing" in TVPA § 3(a) but also upon the limitation of the cause of action to state actors in TVPA § 2(a). *Id.* at 243. Indeed, the court later separately summarized the two provisions of the TVPA, distinguishing § 2(a), which "provides a cause of action" against an individual acting under state authority, from § 3, which "defines the terms 'extrajudicial killing' and 'torture.'" *Id.* at 245.

Sudan's argument that the definitions in the TVPA incorporate international law is flawed as a matter of statutory interpretation. If the definition of an

"extrajudicial killing" (and "torture") in TVPA § 3(a) already had a state actor limitation from international law, then the additional state actor limitation in § 2(a) would be surplusage. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 574, 115 S. Ct. 1061, 131 L. Ed. 2d 1 (1995) (instructing courts in interpreting a statute to "avoid a reading which renders some words altogether redundant"). That the Congress included § 2(a) in the TVPA therefore implies either that the definition of extrajudicial killing in § 3(a) of the FSIA does not incorporate international law or that international law contains no state actor limitation. Either way, Sudan is out of luck.

In sum, Sudan's textual arguments that an extrajudicial killing requires a state actor all fail. Even if international law contained such a limitation — a proposition we doubt but do not decide — the TVPA does not incorporate international law (or any limitations therein) into its definition of an "extrajudicial killing." Because the FSIA terrorism exception references only the definitions in TVPA § 3, and not the limitation to state actors in TVPA § 2(a), nothing in the text of the FSIA makes a state actor a prerequisite to an extrajudicial killing.

B. Statutory Purpose

Without a viable textual basis for its position, Sudan argues the purpose of the TVPA and the FSIA extend only to an "extrajudicial killing" committed by a state actor. Even if we could ignore the statutory text in pursuit of its supposed purpose, Sudan's arguments from the purpose of the statutes would still not be convincing.

With respect to the purpose of the TVPA, Sudan pursues a line of reasoning parallel to that of its textual arguments: Because the TVPA was intended to "carry out obligations of the United States under the United Nations Charter and other international agreements . . . by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing," Pub. L. No. 102-256, 106 Stat. at 73 (preamble), Sudan contends the supposed state-actor requirement for a killing to violate international law also limits the definition of an "extrajudicial killing" in the TVPA and hence the jurisdictional requirements of the FSIA. Even if international law both motivated enactment of the TVPA and limits extrajudicial killing to a killing by state actor, Sudan's argument about the purpose of the TVPA still would fail. The TVPA may well be intended to carry out certain international obligations, but this purpose is reflected in the TVPA as a whole, not in each individual provision viewed in isolation. One would struggle to find a distinct purpose in the definition section of the TVPA, which neither creates rights nor imposes duties, divorced from the broader statute. When one statute, such as the FSIA, incorporates a definition from another statute, here the TVPA, it imports only the specified definition and not the broader purpose of the statute from which it comes.

In any event, the different purposes of the TVPA and the FSIA are plain on the face of those statutes. The TVPA targets individual state officials for their personal misconduct in office, while the terrorism exception to the FSIA targets sovereign nations in an effort to deter them from engaging, either directly or indirectly, in terrorist acts.

Sudan's own arguments tacitly admit the FSIA serves a different purpose than the TVPA, but it again frames this purpose in terms of international law. To Sudan, the FSIA serves to withdraw sovereign immunity only for "certain universally defined and condemned acts" that are "firmly grounded in international law." Once again Sudan contends, this excludes killings committed by non-state terrorists because international law proscribes killings only when committed by a state actor. Furthermore, § 1605A, Sudan contends, should be read to exclude acts of terrorism because terrorism lacks "universal condemnation, or even [an] accepted definition . . . under international law." Other predicate acts included in § 1605A, particularly aircraft sabotage and hostage taking, are inconsistent with this reading of the FSIA. As the plaintiffs and the district court recognized, "[f]or the past fifteen years it has been hard to think of a more quintessential act of terrorism than the purposeful destruction of a passenger aircraft in flight — yet such an act is manifestly covered by § 1605A." *Owens V*, 174 F. Supp. 3d at 264. Indeed, both aircraft sabotage and hostage taking are more often committed by a non-state terrorist than by a state actor, and both often result in extrajudicial killings. Moreover, the definitions of these acts in the FSIA clearly do not require state action. 28 U.S.C. §§ 1605A(h)(1) (referencing the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, art. 1, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177 (proscribing aircraft sabotage committed by "[a]ny person")); 1605A(h)(2) (referencing the International Convention Against the Taking of Hostages, art. 1, Dec. 17, 1979, 1316 U.N.T.S. 205 (proscribing hostage

taking by "[a]ny person")). It would be more than odd if a provision designed to sanction acts "firmly grounded in international law" - but not international terrorism — included only acts synonymous with international terrorism while excluding other violations of international law, such as genocide, not closely associated with terrorist groups. Against this backdrop, it also strains belief that the Congress would assert jurisdiction over claims against a state that materially supports non-state terrorists who kill via aircraft sabotage or hostage taking, yet deny jurisdiction for similarly supported killings caused by a truck bombing or a kidnapping. It is far more likely the Congress intended to penalize a state's provision of material support for terrorist killings in general, rather than to codify broad principles of international law or to regulate the specific way state-supported terrorists go about their horrific deeds. Were the law otherwise, designated state sponsors of terrorism could effectively contract out certain terrorist acts and avoid liability under the FSIA.

As the district court correctly recognized, § 1605A strives to hold designated state sponsors of terrorism accountable for their sponsorship of terror, regardless whether they commit atrocities themselves or aid others in doing so. *Owens V*, 174 F. Supp. 3d at 262. Therefore, the purpose of the statute clearly embraces liability for the embassy bombings here in question.

C. Statutory History

Sudan next resorts to the legislative history of the FSIA and the TVPA to explain why an "extrajudicial

killing" requires state involvement. The short answer to its long and winding argument through the characteristically inconclusive background materials is that when the meaning of a statute is clear enough on its face, "reliance on legislative history is unnecessary." *See Mohamad v. Palestinian Auth.*, 566 U.S. 449, 132 S. Ct. 1702, 1709, 182 L. Ed. 2d 720 (2012) (citation omitted).

Subsequent legislation, on the other hand, because it is enacted and not just compiled, may inform our understanding of a prior enactment with which it should be read in harmony. In this instance, the Congress made clear that an extrajudicial killing includes a terrorist bombing when, in 1996, it enacted the Flatow Amendment to the FSIA to provide a federal cause of action against state officials who had committed or materially supported one of the predicate acts listed in § 1605(a)(7), including an extrajudicial killing. *See* Pub. L. No. 104-208, § 589, 110 Stat. at 3009-172. The Flatow Amendment responded to a suicide bombing in Israel, carried out by a non-state terrorist group supported by Iran; it aimed to deter terrorism by making officials of states that sponsor terrorism liable for punitive damages. We do not believe the Congress would provide a cause of action aimed at killings over which it had not authorized jurisdiction.

Subsequent events in the Flatow saga reinforce this conclusion. Immediately following passage, relatives of the victim sued Iran under the Amendment, and the district court asserted jurisdiction based upon this "extrajudicial killing." *Flatow*, 999 F. Supp. at 18. The plaintiffs won a default judgment but could not collect due to Iran's lack of

attachable assets. In 2000 the Congress again responded, passing a compensation scheme to pay individuals who "held a final judgment for a claim or claims brought under section 1605(a)(7) of title 28," including the Flatows. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002(a)(2)(A), 114 Stat. 1464, 1541-43 (authorizing payment to claimants with judgments against Iran, which included the Flatows); H.R. REP. NO. 106-939, at 116 (2000). This legislation too would make little sense if the judgments themselves were void because no extrajudicial killing had occurred.

Finally, after courts had applied the FSIA terrorism exception to terrorist bombings for over a decade,[2] the Congress reenacted the same predicate acts in § 1605(a)(7) when authorizing the new FSIA exception under § 1605A. The Congress thereby ratified the *Flatow* court's

2. *See, e.g., Salazar v. Islamic Republic of Iran*, 370 F. Supp. 2d 105, 113 (D.D.C. 2005) (applying the terrorism exception to the U.S. embassy bombing in Beirut); *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 61 (D.D.C. 2003) (U.S. Marine barracks in Beirut), *approved of by* 627 F.3d 1117, 1122-23 (9th Cir. 2010); *Wagner v. Islamic Republic of Iran*, 172 F. Supp. 2d 128, 133 (D.D.C. 2001) (U.S. embassy annex in East Beirut); *Ben-Rafael v. Islamic Republic of Iran*, 540 F. Supp. 2d 39, 53 (D.D.C. 2008) (Israeli embassy in Buenos Aires); *Blais v. Islamic Republic of Iran*, 459 F. Supp. 2d 40, 53 (D.D.C. 2006) (Khobar Towers military residence in Saudi Arabia); *Rux v. Republic of Sudan*, No. 2:04-cv-428, 2005 U.S. Dist. LEXIS 36575, 2005 WL 2086202, at *13 (E.D. Va. Aug. 26, 2005) (USS Cole), *aff'd in relevant part*, 461 F.3d 461 (4th Cir. 2006); *see also Owens II*, 412 F. Supp. 2d at 106 n.11 ("[T]he Sudan defendants do not dispute that the embassy bombings constitute an act of extrajudicial killing"), *aff'd*, 531 F.3d 884, 382 U.S. App. D.C. 155.

understanding — and those of every other court since then — that a non-state actor may commit an extrajudicial killing. *See Lorillard v. Pons*, 434 U.S. 575, 580, 98 S. Ct. 866, 55 L. Ed. 2d 40 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"). Now, after more than two decades of consistent judicial application of the FSIA, narrowing the term "extrajudicial killing" to include only killings committed by a state actor would contravene the Congress's revealed intent in repeatedly authorizing judicial remedies for victims of terrorist bombings.

To summarize, the plain meaning of § 1605A(a) grants the courts jurisdiction over claims against designated state sponsors of terrorism that materially support extrajudicial killings committed by non-state actors. Contrary to Sudan's contention, the purpose and statutory history of the FSIA terrorism exception confirm this conclusion. Therefore, this court may assert jurisdiction over claims arising from al Qaeda's bombing of the U.S. embassies in 1998 if the plaintiffs have adequately demonstrated Sudan's material support for those bombings.

III. Sufficiency of the Evidence Supporting Jurisdiction

Sudan's weightiest challenge to jurisdiction relates to the admissibility and sufficiency of the evidence that supported the district court's finding of jurisdiction. As discussed above, § 1605A(a)(1) of the FSIA grants jurisdiction and withdraws immunity for claims "caused by an act of . . . extrajudicial killing . . . or the provision of material support or resources for such an act."

Appendix A

In order to establish the court's jurisdiction, the plaintiffs in this case must show (1) Sudan provided material support to al Qaeda and (2) its material support was a legally sufficient cause of the embassy bombings. *See Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1127, 363 U.S. App. D.C. 87 (D.C. Cir. 2004) (treating causation as a jurisdictional requirement). Sudan challenges the district court's factual findings on both accounts. Because the elements of material support and causation are jurisdictional, Sudan may contest them on appeal even though it forfeited its right to contest the merits of the plaintiffs' claims. *See Practical Concepts*, 811 F.2d at 1547. This does not mean, however, that the plaintiffs on appeal must offer the same quantum of evidence needed to show liability in the first instance. Establishing material support and causation for jurisdictional purposes is a lighter burden than proving a winning case on the merits. *See Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934, 940, 381 U.S. App. D.C. 316 (D.C. Cir. 2008).

In its opinion rejecting Sudan's motion to vacate the default judgments, the district court identified two bases upon which the plaintiffs established material support and causation for the purpose of jurisdiction. For plaintiffs proceeding under the federal cause of action in § 1605A(c), the court — following then-binding Circuit precedent — held the plaintiffs had established jurisdiction by making a "non-frivolous" claim that Sudan materially supported al Qaeda and that such support proximately caused their injuries. *Owens V*, 174 F. Supp. 3d at 272-75. Since that decision, the Supreme Court has overruled the precedent upon which the district court relied, requiring a plaintiff

to prove the facts supporting the court's jurisdiction under the FSIA, rather than simply to make a "non-frivolous" claim to that effect. *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1316, 197 L. Ed. 2d 663 (2017). The Court's decision eliminates the first basis for the district court's jurisdictional holding.

The decision in *Helmerich*, however, left intact the district court's second basis for concluding the plaintiffs had sufficiently shown material support and causation in this case. For reasons no longer relevant, the district court concluded that plaintiffs who are ineligible to use the federal cause of action in § 1605A(c) — namely, victims or claimants who were not U.S. nationals, military service members, or government employees or contractors — could not establish jurisdiction simply by making a non-frivolous claim of material support and causation. *Owens V*, 174 F. Supp. 3d at 275. Consequently, the court required those plaintiffs to offer evidence proving these jurisdictional elements. *Id.* First in its 2011 opinion on liability and again in its 2016 opinion denying vacatur, the district court weighed the plaintiffs' evidence of material support and causation and concluded it satisfied the jurisdictional standard. *Owens V*, 174 F. Supp. 3d at 276; *Owens IV*, 826 F. Supp. 2d at 150-51. Because the court's finding of Sudan's material support for the 1998 embassy bombings plainly applies to all claimants and all claims before this court, Sudan can prevail in its challenge to material support and causation only if the district court erred in its factual findings of jurisdiction. We conclude it did not.

In each of the cases, the plaintiffs' evidence was received at the three-day evidentiary hearing held by the district court in October 2010. The court held that hearing to satisfy the FSIA requirement that, in order to secure a default judgment, a claimant must "establish[] his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e). At the hearing, the court received evidence of both Iran's and Sudan's support for al Qaeda in advance of the embassy bombings, but we limit our discussion here to the evidence pertaining to Sudan.

In evaluating Sudan's evidentiary arguments, we proceed in three steps. First, we summarize the proceedings at the 2010 evidentiary hearing and the facts presented by the plaintiffs and their expert witnesses. Then we consider Sudan's two challenges to this evidence. In the first, Sudan argues the district court relied upon inadmissible evidence to conclude that it materially supported al Qaeda. In the second, Sudan contends that, even if admissible, the evidence presented could not establish material support and causation as a matter of law.

A. The Evidentiary Hearing

At the October 2010 evidentiary hearing the plaintiffs presented evidence from a variety of sources. Reviewing this evidence as a whole, the district court concluded it sufficed both to establish jurisdiction and to prove Sudan's liability on the merits. We first describe the sources of evidence the court received and then briefly summarize the factual findings the court drew from this evidence.

Appendix A

1. The sources of evidence presented

As is apparent from the opinions of the district court, the testimony of expert witnesses and al Qaeda operatives was of critical importance to its factual findings. For this reason, we discuss the experts' and operatives' testimony first and in greatest detail. The plaintiffs produced three expert witnesses and prior recorded testimony from three former members of al Qaeda.

First, the plaintiffs called terrorism consultant Evan Kohlmann to testify about the relationship between Sudan and al Qaeda in the 1990s. Kohlmann advised government and private clients on terrorist financing, recruitment, and history. He has authored a book and several articles on terrorism and has testified as an expert in multiple criminal trials. Kohlmann based his opinions regarding Sudan's support for al Qaeda upon a review of secondary source materials, including but not limited to the exhibits introduced at the hearing, testimony from criminal trials, and firsthand interviews he conducted with al Qaeda affiliates over the past decade. Kohlmann testified that this information was of the type routinely relied upon by experts in the counterterrorism field.

Next, the court received a written expert report from Dr. Lorenzo Vidino on "Sudan's State Sponsorship of al Qaeda." Dr. Vidino was a fellow at the Belfer Center for Science and International Affairs, Kennedy School of Government, at Harvard University. Like Kohlmann, Vidino has authored books and articles on terrorism and has previously testified in federal court on Sudan's

support for al Qaeda. Vidino based his report upon open source materials initially gathered around 2004, which he reviewed and updated for the present case.

The district court also received live testimony and a written report from Steven Simon, a security consultant and Special Advisor for Combatting Terrorism at the Department of State. From 1995 to 1999, during which time al Qaeda bombed the embassies, Simon served on the National Security Council (NSC) as Senior Director for Transnational Threats. His responsibilities at the NSC included directing counterterrorism policy and operations on behalf of the White House. After his government service, Simon published a book and several articles on international terrorism and taught graduate courses on counterterrorism.

The court also heard recorded trial testimony from three former al Qaeda operatives. In particular, the plaintiffs' star witness, Jamal al Fadl, cast a long shadow over the proceedings. al Fadl was a Sudanese national and former senior al Qaeda operative turned FBI informant. Now in the witness protection program, in 2001 he testified at the criminal trial of Usama bin Laden and other terrorists arising from the African embassy bombings. Al Fadl was particularly well-suited to address the relationship between al Qaeda and the government of Sudan in the 1990s because he served then as a principal liaison between the terrorist group and Sudanese intelligence. He had also been instrumental in facilitating al Qaeda's relocation from Afghanistan to Sudan in 1991 and had assisted the group in acquiring

properties there. Although al Fadl did not testify at the evidentiary hearing, his prior testimony provided much of the factual basis for the expert witnesses' opinions.

The court also received transcripts of prior testimony from two other al Qaeda operatives: Essam al Ridi and L'Houssaine Kherchtou. Both al Ridi and Kherchtou were members of al Qaeda when the terrorist group was based in Sudan, and both testified at the bin Laden trial. They testified, based upon firsthand knowledge, about the Sudanese government and military facilitating al Qaeda's movement throughout East Africa and protecting al Qaeda leadership. The plaintiffs also submitted a deposition from al Ridi prepared for the instant case.

In addition to this witness testimony, the court viewed videos produced by al Qaeda describing its move to Sudan and its terrorist activities thereafter. And finally, the court considered reports from the U.S. Department of State and the Central Intelligence Agency describing Sudan's relationship with al Qaeda in the 1990s.[3]

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3. Sudan did put some evidence into the record before absenting itself from the litigation. For its 2004 motion to dismiss, Sudan obtained statements disputing its support for the 1998 embassy bombings from Timothy Carney, the U.S. Ambassador to Sudan from 1995 to 1997, and from John Cloonan, a FBI Special Agent charged with building the conspiracy case against Bin Laden during the 1990s. The plaintiffs moved for leave to depose Carney and Cloonan, but the FBI and the Department of State successfully opposed the motion, arguing the request did not comply with each agency's so-called *Touhy* regulations for obtaining permission to solicit testimony from former government officials, *see* 22 C.F.R. §§ 172.1-172.9; 28 C.F.R. §§ 16.21-16.29. The agencies also noted that Sudan had not properly sought approval to take the declarations.

2. The district court's findings of fact

From the plaintiffs' evidence, the district court found that Sudan had provided material support to al Qaeda and that such support caused the embassy bombings. This support was provided in several ways, which we recount in a much abbreviated form.

First, the district court found Sudan provided al Qaeda a safe harbor from which it could direct its operations. *Owens IV*, 826 F. Supp. 2d at 139-43. This began with the overthrow of the Sudanese government in 1989 by Omar al Bashir, leader of the Sudanese military, and Hassan al Turabi, head of the National Islamic Front (NIF), Sudan's most powerful political party. Kohlmann and Simon testified that al Turabi initiated contact with al Qaeda and other extremist groups, encouraging them to relocate to Sudan. Al Bashir formalized this initial outreach with a 1991 letter of invitation to Usama bin Laden. According to all three experts, Sudan's outreach to al Qaeda was part of a broader strategy of inviting radical Islamist groups to establish bases of operations in the country, which is

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Sudan then ceased participating in the litigation. Although Sudan does not now contend the declarations were admissible, *see Owens V*, 174 F. Supp. 3d at 276 n.16, at oral argument it complained the court unfairly considered the plaintiffs' supposedly inadmissible evidence but not the Carney and Cloonan declarations. The matter stands precisely as the district court left it in 2005. Sudan likely violated the agencies' *Touhy* regulations in obtaining the declarations in 2004. Allowing it to use the declarations on appeal, without affording the plaintiffs an opportunity to seek depositions from Carney and Cloonan in compliance with the regulations, would work a substantial injustice.

confirmed by the State Department Patterns of Global Terrorism reports. *See* U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM: 1991, at 3 (1991) ("The government reportedly has allowed terrorist groups to train on its territory and has offered Sudan as a sanctuary to terrorist organizations"). Sudan's extensive ties to terrorist groups prompted the Department of State to designate Sudan as a state sponsor of terrorism in August 1993. U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM: 1993, at 25 (1994).

In 1991 al Qaeda accepted Sudan's invitation. According to Kohlmann and Simon, the invitation benefited both bin Laden and the Sudanese government. For bin Laden, it allowed al Qaeda to depart an increasingly unstable Afghanistan and relocate closer to its strategic interests in the Middle East. For Sudan, outreach to terrorist groups provided leverage against the government's enemies at home and abroad and advanced al Turabi's ideological ambition for Sudan to become "the new haven for Islamic revolutionary thought." Sudan also viewed al Qaeda as a source of domestic investment as bin Laden was rumored to be extremely wealthy and was well-known as a financier of the mujahedeen insurgency in Afghanistan.

Once bin Laden had determined Sudan was a trustworthy partner, al Qaeda moved its operations there. All three experts described al Qaeda purchasing several properties in Sudan, including a central office and a guesthouse in Khartoum, and starting terrorist training camps on farms throughout the country. Al Fadl personally participated in some of these transactions. For a time, according to Kohlmann, al Qaeda even shared

offices with the al Turabi's NIF party in Khartoum. The close relationship between al Qaeda and the Sudanese government continued throughout the early 1990s, according to Kohlmann and Vidino, even after bin Laden publicized his intent to attack American interests in a series of *fatwas* and after al Qaeda members claimed responsibility for the killing of U.S. soldiers in Mogadishu, Somalia. For example, bin Laden appeared in multiple television broadcasts with al Bashir and al Turabi celebrating the completion of infrastructure projects financed, in part, by bin Laden. Sudanese intelligence officials also worked hand-in-glove with al Qaeda operatives to screen purported al Qaeda volunteers entering the country in order "to ensure that they were not seeking to infiltrate bin Laden's organization on behalf of a foreign intelligence service." Al Fadl personally took part in these efforts.

Sudan also helped al Qaeda develop contacts with other terrorist organizations. In 1991 the NIF organized an unprecedented gathering of terrorist organizations from around the world in Khartoum at the Popular Arab and Islamic Congress. Several of these groups, including the Egyptian Islamic Jihad (EIJ), whose membership would later overlap with that of al Qaeda, and the Iranian-backed Hezbollah, which later provided training to al Qaeda operatives, also established bases in Sudan. According to Kohlmann and Simon, Sudanese intelligence actively assisted al Qaeda in forming contacts with these groups, allowing the nascent organization to acquire skills and to recruit members from the more experienced groups that it would later use with devastating effect.

Although Sudan expelled bin Laden in 1996 under international pressure, Kohlmann, Vidino, and one other expert testified that some al Qaeda operatives remained in the country thereafter. They based this conclusion, in part, upon an unclassified report of the CIA, dated December 1998. A State Department report from 1998, published after the embassy bombings, reinforced the conclusion that "Sudan continued to serve as a meeting place, safe haven, and training hub for a number of international terrorist groups, particularly Usama Bin Laden's al-Qaida organization." U.S. Dep't of State Patterns of Global Terrorism: 1998 (1999). Although expelling bin Laden was a "positive step[]," the CIA concluded Sudan continued to send "mixed signals about cutting its terrorist ties" after his expulsion but before the embassy bombings. Cent. Intel. Agency, Sudan: A Primer on Bilateral Issues with the United States, at 4 (May 12, 1997). Notably, Sudan remains a designated state sponsor of terrorism today.

The district court also found Sudan had provided financial, governmental, military, and intelligence support to al Qaeda. *Owens IV*, 826 F. Supp. 2d at 143-46. During its time in Sudan, al Qaeda operated several business and charities. All three experts explained that these enterprises provided legitimate employment for al Qaeda operatives as well as cover for the group's illicit activities throughout the region. The Sudanese government actively promoted al Qaeda's businesses in several ways. As described by al Fadl, Sudan partnered with al Qaeda-affiliated businesses in major infrastructure projects, allowing al Qaeda to gain access to and experience with

explosives. Sudan also granted al Qaeda businesses "customs exemptions" and "tax privileges" which, according to Vidino, enabled al Qaeda nearly to monopolize the export of several agricultural products. Sudan offered al Qaeda the services of its banking system, which helped the organization in "laundering money and facilitating other financial transactions that stabilized and ultimately enlarged Bin Laden's presence in the Sudan."

From the very beginning Sudan also aided al Qaeda's movement throughout the region. Relying upon al Fadl's testimony, Kohlmann testified that al Qaeda circulated copies of President al Bashir's letter of invitation among its operatives. Al Qaeda agents could present these copies to Sudanese officials in order to "avoid having to go through normal immigration and customs controls" and to head off any "problems with the local police or authorities." According to Kohlmann, Sudanese intelligence also transported weapons and equipment for al Qaeda from Afghanistan to Sudan via the state-owned Sudan Airways. On at least one occasion, Sudan allowed al Qaeda operative Kherchtou to smuggle $10,000 in currency — an amount above that permitted by law — to an al Qaeda cell in Kenya. This Kenyan cell ultimately carried out the bombing of the U.S. embassy in Nairobi in 1998.

In addition to aiding al Qaeda's movements directly, all three experts testified that the government provided al Qaeda members hundreds of passports and Sudanese citizenship. Al Qaeda operatives needed these passports because they were "de facto stateless individuals" who could no longer safely travel on passports from their

countries of origin. Upon returning from abroad, Sudanese officials allowed al Qaeda operatives to bypass customs and immigration controls. As al Fadl testified, this allowed militants to avoid having their passport stamped by a nation that had come under increasing scrutiny for its ties to terrorist organizations.

Finally, the district court identified several instances in which Sudan provided security to al Qaeda leadership. *Owens IV*, 826 F. Supp. 2d at 145. In his prior testimony, al Fadl recounted an occasion when Sudanese intelligence intervened to prevent the arrest of al Qaeda operatives by local police. Al Ridi also testified that Sudan assigned 15 to 20 uniformed soldiers to act as personal bodyguards for bin Laden and other al Qaeda members. In 1994, according to Kohlmann, Sudanese intelligence even foiled an assassination attempt against bin Laden in Khartoum. On another occasion, Sudanese intelligence thwarted a plot against al Qaeda's second-in-command, Ayman al-Zawahiri. Even as international pressure mounted on Sudan to expel bin Laden, Simon — who covered terrorism matters for the NSC during the events in question — explained that the Sudanese government refused to provide actionable intelligence on al Qaeda's plans throughout the region or to hand bin Laden over to the United States. Simon echoed the State Department's conclusion that bin Laden's eventual expulsion was nothing more than a "symbolic gesture designed to placate the international community" that changed little in the day-to-day reality of Sudan's support for terrorism. *See* U.S. Dep't of State, Patterns of Global Terrorism : 1998.

From this evidence, all three experts concluded Sudan provided material support to al Qaeda. Moreover, the experts viewed this support as "indispensable" to the success of the 1998 embassy bombings. Without "a country that not only tolerated, but actually actively assisted . . . al Qaeda terrorist activities," Vidino asserted, "al Qaeda could not have achieved its attacks on the US Embassies." Noting that "the vast majority of planning and preparation [for the attacks] took place between the years of 1991 and 1997," Kohlmann opined "without the base that Sudan provided, without the capabilities provided by the Sudanese intelligence service, without the resources provided, none of this would have happened." Simon likewise surmised "it's difficult to see how . . . the attacks could have been carried out with equal success" without Sudan's "active support" and safe haven.

From the expert testimony, trial transcripts, and government reports, the district court concluded that the plaintiffs had met their burden of demonstrating "to the satisfaction of the court" that Sudan had provided material support to al Qaeda and that such support was a legally sufficient cause of the embassy bombings. *Owens IV*, 826 F. Supp. 2d. at 150. As such, the plaintiffs both established jurisdiction and prevailed on the merits of liability. When faced with Sudan's Rule 60(b)(4) motion to vacate the default judgments as void, the district court reaffirmed that its findings of material support and causation satisfied the standard for jurisdiction under § 1605A(a). *Owens V*, 174 F. Supp. 3d at 276.

On this appeal, Sudan contends the record contains insufficient evidence of material support and causation

to give the court jurisdiction under the FSIA. Its attack comes in two forms. First, Sudan disputes the admissibility of much of the evidence introduced to support the district court's factual findings. It does so despite having failed to participate in the evidentiary hearing, where such challenges would have been properly raised. Second, even assuming the evidence was admissible, Sudan contends the district court's factual findings on material support and causation were clearly erroneous and insufficient to sustain jurisdiction as a matter of law. As we shall see, neither argument has merit.

B. Standard of Review

Sudan faces an uphill battle with its evidentiary challenges for two reasons. First is the burden of proof applicable to a FSIA case. The FSIA "begins with a presumption of immunity" for a foreign sovereign. *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1183, 407 U.S. App. D.C. 133 (D.C. Cir. 2013). The plaintiff bears an initial burden of production to show an exception to immunity, such as § 1605A, applies. *Id.* Then, "the sovereign bears the ultimate burden of persuasion to show the exception does not apply," *id.*, by a preponderance of the evidence. *See Simon v. Republic of Hungary*, 812 F.3d 127, 147 (D.C. Cir. 2016). Therefore, if a plaintiff satisfies his burden of production and the defendant fails to present any evidence in rebuttal, then jurisdiction attaches.

Although a court gains jurisdiction over a claim against a defaulting defendant when a plaintiff meets

his burden of production, the plaintiff must still prove his case on the merits. This later step, however, does not affect the court's jurisdiction over the case, and a defaulting defendant normally forfeits its right to raise nonjurisdictional objections. *See Practical Concepts*, 811 F.2d at 1547. Thus, the only question before this court is whether the plaintiffs have met their rather modest burden of production to establish the court's jurisdiction.

This brings us to Sudan's second obstacle on appeal. When assessing whether a plaintiff has met his burden of production, appellate review of the district court's findings of fact and evidentiary rulings is narrowly circumscribed. With respect to a defaulting sovereign, the FSIA requires only that a plaintiff "establish[] his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e). This standard mirrors a provision in Federal Rule of Civil Procedure 55(d) governing default judgments against the U.S. Government. *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 242 (2d Cir. 1994). While both § 1608(e) and Rule 55(d) give an unresponsive sovereign some protection against an unfounded default judgment, *see Jerez*, 775 F.3d at 423, neither provision "relieves the sovereign from the duty to defend cases," *Rafidain Bank*, 15 F.3d at 242. Moreover, § 1608(e) does not "require the court to demand more or different evidence than it would ordinarily receive," *cf. Marziliano v. Heckler*, 728 F.2d 151, 158 (2d Cir. 1984) (applying Rule 55(d)); indeed, "the quantum and quality of evidence that might satisfy a court can be less than that normally required." *Alameda v. Sec'y of Health, Ed. & Welfare*, 622 F.2d 1044, 1048 (1st Cir. 1980) (applying Rule 55(d)).

Unlike the court's conclusions of law, which we review de novo, we review for abuse of discretion the district court's satisfaction with the evidence presented. *Hill v. Republic of Iraq*, 328 F.3d 680, 683, 356 U.S. App. D.C. 142 (D.C. Cir. 2003). A district court abuses its discretion when it relies upon a clearly erroneous finding of fact. *Amador County v. U.S. Dep't of the Interior*, 772 F.3d 901, 903, 413 U.S. App. D.C. 192 (D.C. Cir. 2014). In a FSIA default proceeding, a factual finding is not deemed clearly erroneous if "there is an adequate basis in the record for inferring that the district court . . . was satisfied with the evidence submitted." *Rafidain Bank*, 15 F.3d at 242 (quoting *Marziliano*, 728 F.2d at 158). That inference is drawn when the plaintiff shows "her claim has some factual basis," *cf. Giampaoli v. Califano*, 628 F.2d 1190, 1194 (9th Cir. 1980) (applying Rule 55(d)), even if she might not have prevailed in a contested proceeding. Provided "the claimant's district court brief and reference to the record appear[] relevant, fair and reasonably comprehensive," we will not set aside a default judgment for insufficient evidence. *Alameda*, 622 F.2d at 1049. This lenient standard is particularly appropriate for a FSIA terrorism case, for which firsthand evidence and eyewitness testimony is difficult or impossible to obtain from an absent and likely hostile sovereign.

The district court also has an unusual degree of discretion over evidentiary rulings in a FSIA case against a defaulting state sponsor of terrorism. For example, we have allowed plaintiffs to prove their claims using evidence that might not be admissible in a trial. *See Han Kim v. Democratic People's Republic of Korea*, 774 F.3d

1044, 1048-51, 413 U.S. App. D.C. 356 (D.C. Cir. 2014) (noting "courts have the authority — indeed, we think, the obligation — to adjust evidentiary requirements to differing situations" and admitting affidavits in a FSIA default proceeding) (internal alterations and quotation marks removed). This broad discretion extends to the admission of expert testimony, which, even in the ordinary case, "does not constitute an abuse of discretion merely because the factual bases for an expert's opinion are weak." *Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 567, 303 U.S. App. D.C. 1 (D.C. Cir. 1993). Section 1608(e) does not require a court to step into the shoes of the defaulting party and pursue every possible evidentiary challenge; only where the court relies upon evidence that is both clearly inadmissible and essential to the outcome has it abused its discretion. This is part of the risk a sovereign runs when it does not appear and alert the court to evidentiary problems. *Cf. Bell Helicopter Textron*, 734 F.3d at 1181.

In this case, the district court has already undertaken to weigh the plaintiffs' evidence and determine its admissibility without any assistance from Sudan. Under these circumstances, we accord even more deference to the district court's factual findings and evidentiary rulings in a FSIA case than in reviewing default judgments to which the strictures of § 1608(e) (or Rule 55(d)) do not apply.

Deference is especially appropriate when considering the lengthy history of the proceedings in the district court. The same learned judge has presided over this litigation since 2001. Over that time, the court has gained considerable familiarity with the plaintiffs' evidence

and, during the periods when Sudan participated, with its objections to that evidence. The court has issued four lengthy and detailed opinions that directly address many of Sudan's challenges to the evidence of material support and jurisdictional causation. Through its opinions and actions, it is abundantly clear that the district court both appreciated and carried out is obligation under § 1608(e). *Cf. Compania Interamericana Exp.-Imp., S.A. v. Compania Dominicana de Aviacion*, 88 F.3d 948, 951 (11th Cir. 1996) (vacating default judgment when "the record does not reflect that the court considered the differing standard required by § 1608(e)"). Only if we found the record wholly lacking an "adequate basis" for the district court's conclusions would we overturn its jurisdictional findings.

C. Admissibility of the Evidence

Sudan first challenges the admissibility of evidence supporting the district court's findings of material support and jurisdictional causation. In order to issue a default judgment under § 1608(e), a court must base its findings of fact and conclusions of law upon evidence admissible under the Federal Rules of Evidence. *Kim*, 774 F.3d at 1049. If inadmissible evidence alone substantiates an essential element of jurisdiction, then the court abuses its discretion in concluding the claimant has established his case "by evidence satisfactory to the court." 28 U.S.C. § 1608(e).

Reviewing the admissibility of evidence supporting a default judgment presents significant challenges, which color our treatment of Sudan's arguments. The adversarial

process gives the parties an incentive to raise evidentiary challenges at the earliest opportunity because failure to do so ordinarily results in their forfeiture. Raising evidentiary challenges early on also provides the proponent of the evidence the opportunity to respond by offering an alternative theory of admissibility or different, admissible evidence on the same point. Thus, the adversarial process properly places the burden of admissibility upon the interested party, allocates the original determination of admissibility to the district court, which is more familiar with the evidence, and preserves evidentiary disputes for appellate review with the aid of a full trial record. Furthermore, allowing a defaulting defendant to benefit from sandbagging the plaintiff with an admissibility objection on appeal would be unfair and would encourage gamesmanship. When the defendant defaults, therefore, we do not consider its evidentiary challenges on appeal.

These principles do not map neatly to a FSIA case because a defaulting defendant may challenge the factual basis for the court's jurisdiction for the first time on appeal. And because a FSIA plaintiff must produce evidence that is both admissible, *Kim*, 774 F.3d at 1049, and "satisfactory to the court," 28 U.S.C. § 1608(e), in order to obtain a default judgment, we presume a defendant may also challenge for the first time on appeal the admissibility of evidence supporting a jurisdictional fact. As previously noted, however, a defendant sovereign that defers its challenge until appealing a default judgment makes the district court's decision less fully informed and deprives the reviewing court of a fully developed record; it also handicaps the non-defaulting plaintiff in filling out the evidentiary record. For these reasons, we will

not accept a belated challenge to admissibility raised by a defaulting sovereign unless the contested evidence is clearly inadmissible and we seriously doubt the plaintiff could have provided alternative evidence that would have been admissible. Those circumstances are not present here.

In this case, Sudan principally challenges the admissibility of two types of evidence: (1) the plaintiffs' expert testimony and (2) reports from the Department of State and the CIA. We find no error in the district court's reliance upon either.

1. The expert testimony

In its opinions on liability and on Sudan's Rule 60(b) motion, the district court discussed the experts' testimony in great detail and concluded it sufficed to establish jurisdiction. *Owens V*, 174 F. Supp. 3d at 276. Because it may be dispositive, we, too, start with the expert testimony.

The testimony of expert witnesses is of crucial importance in terrorism cases, *see, e.g., Kilburn*, 376 F.3d at 1132 (jurisdiction satisfied based solely upon the declaration of an expert witness); *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 704 (7th Cir. 2008); *United States v. Damrah*, 412 F.3d 618, 625, 124 Fed. Appx. 976 (6th Cir. 2005), because firsthand evidence of terrorist activities is difficult, if not impossible, to obtain. Victims of terrorist attacks, if not dead, are often incapacitated and unable to testify about their experiences. Perpetrators

of terrorism typically lie beyond the reach of the courts and go to great lengths to avoid detection. Eyewitnesses in a state that sponsors terrorism are similarly difficult to locate and may be unwilling to testify for fear of retaliation. The sovereigns themselves often fail to appear and to participate in discovery, as Sudan did here. With a dearth of firsthand evidence, reliance upon secondary materials and the opinions of experts is often critical in order to establish the factual basis of a claim under the FSIA terrorism exception.

Sudan raises three challenges to the expert testimony presented at the evidentiary hearing. First, despite conceding that expert testimony is "doubtless admissible" in a FSIA default proceeding, Sudan contends that experts alone are insufficient to establish jurisdiction in the absence of other direct, admissible evidence. Second, Sudan objects that the plaintiffs' experts merely served as conduits for inadmissible hearsay, upon which the district court relied. Finally, Sudan quarrels with the inferences drawn by the experts and by the district court from the underlying factual background. None of these arguments is persuasive.

a. Need for direct evidence

The recent case of *Han Kim v. Democratic People's Republic of Korea* demonstrates the importance of expert testimony in FSIA proceedings and forecloses Sudan's first argument. In *Kim*, relatives of a pastor who was a U.S. citizen sued the Democratic People's Republic of Korea (DPRK) under the FSIA terrorism exception,

alleging the regime abducted, tortured, and killed the cleric for his ministry to DPRK refugees. 774 F.3d at 1046. Because the DPRK refused to participate in the litigation and intimidated potential eyewitnesses, the plaintiffs could offer no direct evidence of their relative's torture and killing by the DPRK. Instead, two experts submitted declarations stating that North Korea invariably tortured and killed its political prisoners. *Id.* The court in *Kim* found these declarations "doubtless admissible" under Federal Rule of Evidence 702 and refused categorically to require eyewitness testimony or direct evidence on both practical and policy grounds:

> In these circumstances, requiring that the Kims prove exactly what happened to the Reverend and when would defeat the Act's very purpose: to give American citizens an important economic and financial weapon to compensate the victims of terrorism, and in so doing to punish foreign states who [sic] have committed or sponsored such acts and deter them from doing so in the future. This is especially true in cases of forced disappearance, like this one, where direct evidence of subsequent torture and execution will, by definition, almost always be unavailable, even though indirect evidence may be overwhelming. Were we to demand more of plaintiffs like the Kims, few suits like this could ever proceed, and state sponsors of terrorism could effectively immunize themselves by killing their victims, intimidating witnesses, and refusing to appear in court.

Id. at 1048-49 (internal citations and quotation marks omitted).

Here, as in *Kim*, the plaintiffs face a state sponsor of terrorism that has refused to participate in the litigation. By skipping discovery and the evidentiary hearing, Sudan made it virtually impossible for the plaintiffs to get eyewitness accounts of its activities in the 1990s. Nor can the plaintiffs ordinarily subpoena members of al Qaeda, many of whom are dead or in hiding, to testify regarding the actions of the regime. The Congress originally enacted the terrorism exception in the FSIA because state sponsors of terrorism "ha[d] become better at hiding their material support" and misdeeds. *Kilburn*, 376 F.3d at 1129 (internal quotation marks omitted). Just as requiring firsthand evidence of the DPRK's covert atrocities in *Kim* would "effectively immunize" the regime from responsibility for its crimes, requiring that a victim of a state-supported bombing offer direct evidence of material support would shield state sponsors of terrorism from liability for the very predicate act — material support — that gives the court jurisdiction.

Nevertheless, Sudan persists that expert testimony alone cannot establish jurisdiction and liability under the FSIA. To wit, Sudan complains that the plaintiffs did not offer "any admissible factual evidence" or "call any percipient witnesses competent to testify about relevant facts in Sudan in the 1990s." In particular, Sudan would have us distinguish *Kim* as having turned solely upon a piece of non-expert evidence.

Sudan's argument is both legally and factually flawed. Neither § 1608(e) nor any other provision of the FSIA requires a court to base its decision upon a particular type of admissible evidence. As long as the evidence itself is admissible, as expert testimony certainly may be, and the court finds it satisfactory, its form or type is irrelevant. *Cf. Holland v. United States*, 348 U.S. 121, 140, 75 S. Ct. 127, 99 L. Ed. 150, 1954-2 C.B. 215 (1954) (refusing to distinguish between different types of evidence in a criminal prosecution). Indeed, cases in this Circuit and in others have repeatedly sustained jurisdiction or liability or both under the terrorism exception to the FSIA and in other terrorism cases based solely upon expert testimony. *Kilburn*, 376 F.3d at 1132; *Boim*, 549 F.3d at 705 ("[W]ith [the plaintiff's expert report] in the record and nothing on the other side the [district] court had no choice but to enter summary judgment for the plaintiffs with respect to Hamas's responsibility for the Boim killing"). Therefore the plaintiffs' "failure" to present eyewitness testimony or other direct evidence is of no moment as to whether they have satisfied their burden of production.

Sudan's attempt to distinguish *Kim* on its facts is similarly unpersuasive. True, in *Kim*, we placed great weight upon a single piece of admissible non-expert evidence: the conviction of a DPRK agent who had kidnapped the victim, of which the district court took judicial notice. *Kim*, 774 F.3d at 1049. This conviction placed the victim at the scene of the crime and allowed the court to conclude he had been subjected to the torture and killing that the DPRK "invariably" inflicts upon its prisoners. *Id.* at 1051. Without this conviction, we noted,

"[o]ur conclusion would no doubt differ" because there was no other evidence linking the DPRK to the victim's disappearance. *Id.*

Our conclusion, however, turned upon the specific facts of that case; we did not announce a categorical requirement of direct evidence in FSIA cases. Whereas the conviction in *Kim* linked the defendant sovereign to the plaintiff's disappearance, in the present case there is no missing link between Sudan's actions and the embassy bombings. It is undisputed that al Qaeda came to Sudan in the early 1990s and maintained its headquarters there. It is also beyond question that al Qaeda perpetrated the embassy bombings in 1998. As in *Kim*, expert testimony supplies the predicate act (here material support, in *Kim* torture and extrajudicial killing) linking these two events and conferring jurisdiction upon the court. But here, unlike in *Kim*, we need no further evidence beyond the expert testimony to connect the defendant sovereign to the extrajudicial killings. The expert testimony therefore suffices to meet the plaintiffs' burden of production on jurisdiction.

b. Reliance upon inadmissible hearsay

Sudan next contends the experts recited facts based upon inadmissible hearsay and the district court improperly relied upon those facts to establish jurisdiction and to hold Sudan liable.

Under Federal Rule of Evidence 703, a properly qualified expert may base his opinion upon otherwise

inadmissible sources of information as long as those sources are reasonably relied upon in his field of expertise. Further, the expert may disclose to the factfinder otherwise inadmissible "underlying facts or data as a preliminary to the giving of an expert opinion." *See, e.g.*, FED. R. EVID. 705 advisory committee's note. Indeed, disclosure is often necessary to enable the court to "decid[e] whether, and to what extent, the person should be allowed to testify." *Id.*; 2 MCCORMICK ON EVIDENCE § 324.3 (7th ed. 2016) ("otherwise the opinion is left unsupported with little way for evaluation of its correctness"). Nevertheless, "the underlying information" relied upon by a qualified expert "is not admissible simply because the [expert's] opinion or inference is admitted." *See* FED. R. EVID. 703 advisory committee's note. Thus, as Sudan points out, "a party cannot call an expert simply as a conduit for introducing hearsay under the guise that the testifying expert used the hearsay as the basis of his testimony." *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 136 (2d Cir. 2013) (internal quotation marks omitted).

Applying these standards to the case at hand, we see that the district court properly distinguished the experts' clearly admissible opinions from the potentially inadmissible facts underlying their testimony. Sudan principally objects to the district court's recitation of those underlying facts in its 2011 opinion on liability, which facts it claims are inadmissible even if the experts' opinions were properly admitted. The district court acknowledged this complication in its 2016 opinion on Sudan's motion to vacate: "Sudan may have plausible arguments" that not "every factual proposition in the Court's 2011 opinion can

be substantiated by record evidence admissible under the Federal Rules of Evidence." *Owens V*, 174 F. Supp. 3d at 275. But even if "particular statements in that opinion may not be adequately supported," the experts' opinions "nonetheless" provided "sufficient evidence in the record of the necessary jurisdictional facts." *Id.* We agree with this conclusion.

At the outset, we note the district court did not err — much less prejudicially err — in reciting potentially inadmissible facts in its 2011 opinion on liability. For their conclusions to be admissible and credible, the plaintiffs' experts needed to disclose the factual basis for their opinions. *See, e.g., Fox v. Taylor Diving & Salvage Co.*, 694 F.2d 1349, 1356 (5th Cir. 1983) ("An expert is permitted to disclose hearsay for the limited purpose of explaining the basis for his expert opinion"). Without that disclosure, the district court would have been at a loss to determine whether the opinions were admissible as reliable expert testimony. *See* FED. R. EVID. 702 (requiring court to determine whether expert's knowledge "is based on sufficient facts or data," and is "the product of reliable principles and methods" that have been "reliably applied . . . to the facts of the case"). Therefore, the court did not err in allowing the plaintiffs' experts to recount potentially inadmissible facts in order to establish the basis for their admissible opinions.

The district court also needed to engage with the underlying facts in order to explain why it admitted and credited the experts' opinions. Without those facts, we too would struggle to evaluate Sudan's evidentiary challenges

to the opinion testimony. Hence, some discussion of the potentially inadmissible underlying facts was unavoidable in the 2011 opinion in order to admit, to credit, and to enable our review of the experts' opinions.

More important, the district court properly based its findings upon the experts' "undoubtedly admissible" opinions and not upon any arguably inadmissible facts. The district court's 2011 and 2016 opinions extensively quote the experts' opinions in reaching the conclusion that Sudan's material support caused the embassy bombings. *See Owens V*, 174 F. Supp. 3d at 277-79 (quoting the opinions of Kohlmann, Simon, and Vidino); *Owens IV*, 826 F. Supp. 2d at 146 (quoting Simon and Kohlmann to conclude "Sudanese government support was critical to the success of the 1998 embassy bombings"). We therefore see no error in the court's conclusion that the expert testimony satisfied the plaintiffs' burden of production on jurisdictional causation.

In a supplemental filing, Sudan compares the experts' opinions in this case to those held inadmissible in *Gilmore v. Palestinian Interim Self-Government Authority*, 843 F.3d 958 (D.C. Cir. 2016), but the gulf between the two cases is wide. In *Gilmore*, the plaintiff's expert neither stated nor applied "a reliable methodology" from which he had derived his opinions. *Id.* at 972-73. Instead, "his analysis consist[ed] entirely of deductions and observations that flow directly from the content of the hearsay statements and would be self-evident to a layperson." *Gilmore v. Palestinian Interim Self-Gov't Auth.*, 53 F. Supp. 3d 191, 213 (D.D.C. 2014). Indeed, the *Gilmore* expert's opinion

derived solely from materials that had been proffered at trial but excluded as inadmissible hearsay. *Id.* at 212-13. In this case, the plaintiffs' experts relied upon their own extensive research into terrorist organizations to conclude that Sudan provided material support that caused the embassy bombings. In doing so, the experts — unlike the expert in *Gilmore* — drew upon both materials admitted at the evidentiary hearing and sources encountered in their research and professional experience. A "layperson" could not reliably have reached the same conclusions as the experts in this case.

Finally, Sudan belatedly challenges the reliability of the factual bases for the experts' testimony. Of course, "the decision whether to qualify an expert witness is within the broad latitude of the trial court and is reviewed for abuse of discretion." *Haarhuis v. Kunnan Enters.*, 177 F.3d 1007, 1015, 336 U.S. App. D.C. 174 (D.C. Cir. 1999) (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)). As previously stated, experts may rely upon hearsay evidence in forming their admissible, professional opinions. Indeed, it is hard to imagine what other than hearsay an expert on terrorism could use to formulate his opinion. *See Boim*, 549 F.3d at 704 ("Biologists do not study animal behavior by placing animals under oath, and students of terrorism do not arrive at their assessments solely or even primarily by studying the records of judicial proceedings"). All the Federal Rules require is that the "facts or data in the particular case upon which an expert bases an opinion or inference . . . [are] of a type reasonably relied upon by experts in the particular field in forming opinions or

inferences upon the subject." FED. R. EVID. 703 (2010) (amended without substantive change 2011).

Here, the plaintiffs' experts used, among other things, trial testimony of al Qaeda informants, intelligence reports from the U.S. Government, and their exhaustive review of secondary sources to reach their conclusions. Courts have consistently held these sorts of materials provide an adequate basis for expert testimony on terrorism. *See Damrah*, 412 F.3d at 625& n.4 (approving an expert's reliance upon books, press releases, newspaper articles, and the State Department's *Patterns of Global Terrorism* reports); *Boim*, 549 F.3d at 704-05 (approving reliance upon terrorist websites and observations from prior criminal trials). In light of the general acceptance of the plaintiffs' experts' sources and methodologies, we conclude the district court did not abuse its discretion in qualifying the experts, summarizing their testimony, or crediting their conclusions.

c. Reliability of the experts' conclusions

Sudan's third objection attacks the reliability of the experts' opinions in this case as inconsistent with the underlying facts. In other words, Sudan asks this court to hold the expert opinions are inadmissible because the plaintiffs' witnesses have not "reliably applied [their] principles and methods to the facts of the case." *See* FED. R. EVID. 702(d). This challenge also implies the district court based its findings of jurisdiction upon clearly erroneous facts. *See Price*, 389 F.3d at 197 (reviewing for clear error jurisdictional findings of fact in a FSIA

terrorism case); *see also Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 74-77, 98 S. Ct. 2620, 57 L. Ed. 2d 595 (1978).

The problem with this argument is that Sudan has not explained — either at the evidentiary hearing or on appeal — why these expert opinions are unreliable or clearly erroneous. By refusing to participate in the evidentiary hearing, Sudan gave up its opportunity to challenge the fit between the experts' opinions and the underlying facts. At the hearing, the witnesses described the general bases of their expertise, and the district court found them qualified to give opinions on Sudan's material support for al Qaeda. In doing so, the experts said they had relied upon multiple sources of information, including but not limited to those presented at the hearing. But the experts did not — and did not need to — provide the specific basis for their knowledge for each factual proposition they advanced. *See* FED. R. EVID. 705 ("an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data"). Therefore, we cannot know with certainty whether the experts' opinions were consistent or in conflict with the underlying facts upon which they relied. Had Sudan participated in the hearing, it could have challenged the experts to substantiate each and every factual proposition they asserted. *Cf. Bryan v. John Bean Div. of FMC Corp.*, 566 F.2d 541, 545 (5th Cir. 1978) (noting "the onus of eliciting the bases of the opinion is placed on the" party opposing admission). That would have allowed this court to determine whether the experts' opinions reliably reflected the more developed factual record. By deferring its attack until this appeal, Sudan

has deprived the experts of an opportunity to respond, and instead asks this court to rule on an incomplete record. We decline the invitation. *See Boim*, 549 F.3d at 704-05 (rejecting a challenge to the reliability of an expert's inferences first brought on appeal).

2. The State Department reports

Of course, the district court did not rely solely upon expert testimony to establish jurisdiction and liability. Of particular importance, the plaintiffs marshaled nearly a decade of State Department reports that speak directly to Sudan's support for terrorist groups, including al Qaeda. *See, e.g.*, U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM: 1993 ("Despite several warnings to cease supporting radical extremists the Sudanese government continued to harbor international terrorist groups in Sudan"); U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM: 1998 ("Sudan provides safe haven to some of the world's most violent terrorist groups, including Usama Bin Laden's al-Qaida"); U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM: 2000 (2001) ("Sudan . . . continued to be used as a safe haven by members of various groups, including associates of Osama bin Laden's al-Qaeda organization"). These reports both bolster the experts' conclusions about Sudan's material support for the al Qaeda embassy bombings and independently show the plaintiffs' claims "ha[ve] some factual basis," as required by § 1608(e). *Giampaoli*, 628 F.2d at 1194.

As with the expert testimony, Sudan contends these reports are inadmissible hearsay. The plaintiffs urge the

State Department reports were admissible under the hearsay exception for public records. *See* FED. R. EVID. 803(8). That exception allows the admission of "a record or statement of a public office if" it: (1) contains factual findings (2) from a legally authorized investigation. *Id* at 803(8)(A)(iii). Pursuant to the "broad approach to admissibility" under Rule 803(8), a court may also admit "conclusion[s] or opinion[s]" contained within a public record. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 170, 109 S. Ct. 439, 102 L. Ed. 2d 445 (1988). Once proffered, a public record is presumptively admissible, and the opponent bears the burden of showing it is unreliable. *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 143 (2d Cir. 2000).

The State Department's *Patterns of Global Terrorism* reports fit squarely within the public records exception. First, the reports contain both factual findings and conclusions on Sudan's support for terrorism in general and al Qaeda in particular. Second, the reports were created pursuant to statute, *see* 22 U.S.C. § 2656f(a) (requiring annual reports on terrorism), and are therefore the product of a "legally authorized investigation." *See Bridgeway*, 201 F.3d at 143 (holding State Department reports required by statute are public records). Indeed, in contested FSIA proceedings we have previously approved admission of the very reports Sudan challenges, *Simpson*, 470 F.3d at 361; *Kilburn*, 277 F. Supp. 2d at 33, *aff'd* 376 F.3d at 1131, as have other courts, *Damrah*, 412 F.3d at 625 n.4.

Sudan objects on appeal to the "trustworthiness" of these reports, but that objection should have been made in

the district court. *See* FED. R. EVID. 803(8)(B) (providing for the admission of public records if "the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness"). Even now, Sudan does not present any reason, beyond their reliance upon hearsay, to deem these reports unreliable. *See Kehm v. Procter & Gamble Mfg. Co.*, 724 F.2d 613, 618 (8th Cir. 1983) (holding inclusion of hearsay is not a sufficient ground for excluding a public record as unreliable).[4] Although the reports lack the details that the expert witnesses provided concerning Sudan's material support, they are competent, admissible evidence, which together with the plaintiffs' admissible opinion evidence satisfy the burden of production on material support and jurisdictional causation. Because Sudan, by defaulting in the district court, has not carried its burden of persuasion, the district court properly asserted jurisdiction over the cases.[5]

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4. In a supplemental filing, Sudan compares these reports to excerpts on an Israeli governmental website in *Gilmore* that we excluded as inadmissible hearsay outside the exception for public records. But *Gilmore* turned upon the plaintiffs' failure to establish a foundation for admissibility; they "rested on a bare, one-sentence assertion that the web pages were admissible under Rule 803(8)" and gave no "further explication of how the pages conveyed 'factual findings from a legally authorized investigation.'" 843 F.3d at 969-70. The webpages themselves "offer[ed] no information explaining who made the findings or how they were made." *Id.* at 969.

5. Sudan also objects to the admission of the recorded testimony of Jamal al Fadl at the Bin Laden criminal trial, contending it is inadmissible hearsay. We agree to the extent that al Fadl's prior testimony is not admissible as "former testimony" under the hearsay exception in Rule 804(b)(1) because it was not "offered against a

D. Sufficiency of the Evidence

This brings us to Sudan's second major challenge to the plaintiffs' evidence. In addition to disputing the admissibility of the evidence, Sudan argues the totality of the evidence cannot establish material support and jurisdictional causation as a matter of law. First, Sudan contends the plaintiffs cannot show its actions caused the plaintiffs' injuries because its conduct neither substantially nor foreseeably provided material support for the embassy bombings. Second, Sudan argues the plaintiffs cannot recover because its support, if any, was not intended to cause the bombings.

1. Proximate causation

Sudan's first challenge to the sufficiency of the evidence

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party who had . . . an opportunity and similar motive to develop it by" cross-examination in the prior criminal case.

The district court held, and the plaintiffs argue on appeal, that Sudan's inability to cross-examine al Fadl was irrelevant in a non-adversarial evidentiary hearing. After all, they note, courts have admitted sworn affidavits in § 1608(e) hearings in previous FSIA cases. *Owens V,* 174 F. Supp. 3d at 280-81 & n.18 (citing *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, 111 (6th Cir. 1995) and *Kim*, 774 F.3d at 1049-51). But in each case cited, the out-of-court declarant was at least potentially available to testify in court, should the need arise. Plaintiffs here have made no such showing regarding al Fadl, who is in the witness protection program. For this reason, we hesitate to equate affidavits prepared for a FSIA hearing with former trial testimony recorded for a wholly separate purpose. We, however, need not decide whether al Fadl's prior trial testimony is otherwise admissible because sufficient, admissible evidence sustains the district court's findings of jurisdiction in this case.

rests upon the standard for jurisdictional causation, *viz.*, proximate cause. In *Kilburn*, we held a plaintiff must show proximate cause to establish jurisdiction under § 1605(a)(7), the predecessor of the current FSIA terrorism exception. 376 F.3d at 1128. Because § 1605A(a) restates the predicate acts of § 1605(a)(7), it stands to reason that proximate cause remains the jurisdictional standard.

Proximate cause requires "some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered." *Id.* (quoting PROSSER & KEETON ON THE LAW OF TORTS 263 (5th ed. 1984)). It "normally eliminates the bizarre," *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 536, 115 S. Ct. 1043, 130 L. Ed. 2d 1024 (1995), "preclud[ing] liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity." *Paroline v. United States*, 134 S. Ct. 1710, 1719, 188 L. Ed. 2d 714 (2014). As Sudan points out, the inquiry into proximate cause contains two similar but distinct elements. First, the defendant's actions must be a "substantial factor" in the sequence of events that led to the plaintiff's injury. *Rothstein v. UBS*, 708 F.3d 82, 91 (2d Cir. 2013). Second, the plaintiff's injury must have been "reasonably foreseeable or anticipated as a natural consequence" of the defendant's conduct. *Id.* Sudan contends that its support satisfies neither element of the inquiry into proximate cause with respect to the 1998 embassy bombings here at issue.

a. Substantial factor

Sudan offers two reasons its actions were not a "substantial factor" in al Qaeda's embassy bombings. Most basically, Sudan contends it did not provide any material support at all to al Qaeda during the 1990s, making proximate causation impossible. Much of this argument reprises Sudan's objections to the inferences drawn by the experts from al Fadl's testimony, which objections we have considered and rejected.

Nevertheless, Sudan points to a number of events as to which it contends the district court erroneously found material support for al Qaeda. For example, Sudan criticizes the district court's discussion of al Qaeda purchasing properties, starting businesses, and establishing terrorist training camps in Sudan. *Owens IV*, 826 F. Supp. 2d at 141, 143-44. Viewed in isolation, none of these events necessarily evinces a Sudanese hand in al Qaeda's activities. That view, however, like Nelson at the Battle of Copenhagen, turns a blind eye to the broader picture. The record shows that after al Qaeda started its businesses, Sudan fostered their growth through tax exceptions and customs privileges. This allowed al Qaeda nearly to monopolize the export of several agricultural commodities, plowing its profits back into its broader organization. Again, after al Qaeda opened its training camps, Sudanese intelligence shielded their operations from the local police despite complaints from nearby residents. This preferential treatment certainly qualifies as material support, even if Sudan played no role in creating the underlying businesses and training camps.

Sudan also disputes the district court's finding that it provided financial support to al Qaeda. To the contrary, Sudan argues, al Qaeda financially supported Sudan by investing in Sudanese infrastructure. Sudan is correct — bin Laden did provide financial assistance to Sudan — but it ignores record evidence of Sudan's reciprocal aid. For example, as the district court noted, bin Laden's $50 million investment in the partially state-owned al Sharmal Islamic Bank gave al Qaeda "access to the formal banking system," which proved useful for "laundering money" and "financing terrorist operations." *Id.* at 144. Al Qaeda operatives, including bin Laden himself, held accounts in their real names in al Sharmal bank, demonstrating the impunity with which the group operated in Sudan. Thus, although Sudan did not directly fund al Qaeda or its business, the court reasonably concluded its in-kind assistance had the same practical effect.

Finally, Sudan invokes the testimony of Simon, the former NSC staffer overseeing counterterrorism activities, that Sudan provided no "useful information on bin Laden's" activities that "might have helped the U.S. unravel the plots to attack the two East African U.S. embassies." *Id.* at 145. The district court's finding of material support, Sudan argues, is unsustainable "without a showing that Sudan had useful intelligence and nonetheless elected not to share it." Although the district court did not say what Sudan knew about al Qaeda or when it knew it, Sudan's claims of ignorance regarding al Qaeda's aims defies both reason and the record. After all, Sudan invited "literally every single jihadist style group," including al Qaeda, to relocate to Sudan in the early 1990s.

At the time, bin Laden was known as a wealthy Islamist financier and a leader in the Afghani mujahedeen. As soon as al Qaeda took up residence in Sudan, bin Laden began issuing *fatwas* denouncing the United States and calling for attacks upon U.S. interests. And after the Battle of Mogadishu in 1993, al Qaeda operatives publicly boasted about killing U.S. soldiers in Somalia. According to Kohlmann, bin Laden himself took to the Arab press and U.S. cable television to claim responsibility for this attack. Sudanese intelligence officers would have been privy to all this information because they frequented al Qaeda's guesthouses, and al Turabi's NIF shared offices with al Qaeda for a time.

Sudan's own actions also gave it knowledge of al Qaeda's capabilities and aims. For example, Sudanese intelligence must have known that al Qaeda operated training camps where explosives were used because it shielded those camps from interference by the local police. Sudan also knew al Qaeda was transporting large, undeclared sums of money to Kenya because Sudanese agents shepherded operatives with this money past airport inspections. Likewise, Sudan knew something of al Qaeda's arsenal because its own planes transported al Qaeda's weapons from Afghanistan to Sudan. Indeed, on one occasion, a Sudanese official even assisted al Qaeda in an ultimately unsuccessful bid to obtain nuclear weapons from a smuggler in South Africa. Contrary to Sudan's contention, all this information would have aided the United States in appreciating the threat of al Qaeda and attempting to disrupt its operations. Sudan's refusal to divulge any of this information — even after a specific request from the

United States in 1996 — certainly qualifies as material support. *Cf. Estate of Parsons v. Palestinian Auth.*, 651 F.3d 118, 125-26, 397 U.S. App. D.C. 236 (D.C. Cir. 2011) (security officers who, with knowledge, failed to intervene in ongoing bomb plot provided material support).

Sudan's second argument that its actions were not a "substantial factor" causing the plaintiffs' injuries focuses upon the temporal distance between Sudan's support for al Qaeda and the embassy bombings. Principally, Sudan argues that by expelling bin Laden in 1996 it broke the chain of causation leading to the 1998 embassy bombings. We confronted and rejected the same objection in our 2008 opinion affirming the district court's denial of Sudan's motion to dismiss. *Owens III*, 531 F.3d at 895. Although we there recognized the "[p]laintiffs' allegations are somewhat imprecise as to the temporal proximity of Sudan's actions to and their causal connection with the terrorist act," we held "this imprecision [was] not fatal for purposes of jurisdictional causation." *Id.* (quoting *Rux v. Republic of Sudan*, 461 F.3d 461, 474 (4th Cir. 2006)) (internal quotation marks omitted). In order to bridge the gap, we noted the plaintiffs' "allegations, and the reasonable inferences drawn therefrom" need only "demonstrate a reasonable connection between the foreign state's actions and the terrorist act." *Id.* In other words, provided the plaintiffs demonstrated proximate cause, the temporal remoteness between Sudan's material support and the embassy bombings was irrelevant. *See Grubart*, 513 U.S. at 536 (proximate cause "normally eliminates the bizarre" without "the need for further temporal or spatial limitations"). And at that stage in the litigation, we

concluded, the plaintiffs had more than met their burden of pleading facts sufficient to establish proximate causation. *Owens III*, 531 F.3d at 895.

Fast-forwarding to the present day, the plaintiffs have substantiated their allegations of material support and jurisdictional causation with admissible evidence, which Sudan did not challenge at the evidentiary hearing. Once again, the district court found the evidence established a "reasonable connection" between Sudan's actions and the embassy bombings. As in our 2008 decision, we see nothing erroneous with this conclusion for two reasons.

First, we do not believe Sudan broke the chain of proximate causation by completely disassociating itself from al Qaeda in or after 1996. A declassified CIA President's Daily Brief in December 1998 — months after the embassy bombings — reports a "Bin Laden associate in Sudan" sending materials to al Qaeda in Afghanistan. The State Department's 1998 *Patterns of Global Terrorism* further reports that "Sudan *continued* to serve as a meeting place, safehaven, and training hub for a number of international terrorist groups, particularly Usama Bin Laden's al-Qaida organization" even after the embassy bombings. Although counterterrorism cooperation between the United States and Sudan improved after the bombings, the 2000 *Patterns of Global Terrorism* report reiterates "Sudan *continued* to serve as a safehaven for members of al-Qaida, the Lebanese Hizballah, al-Gama'a al Islamiyya, Egyptian Islamic Jihad, the PIJ, and HAMAS." In addition, both Kohlmann and Simon testified that al Qaeda operatives remained in Sudan after 1996. Sudan insists that a gap remained between

its expulsion of bin Laden and the government reports detailing al Qaeda's presence in Sudan in late 1998, but it strains credulity that Sudan would immediately resume relations with al Qaeda following bombings for which the group claimed credit after completely cutting ties two years earlier. Rather, as the district court inferred, it is far more likely that Sudan, despite having expelled bin Laden in 1996, continued to harbor al Qaeda terrorists until and after the bombings.

Second, even if Sudan were correct on this factual point, severing ties with al Qaeda would not preclude a finding that its material support remained a substantial factor in the embassy bombings. *See Boim*, 549 F.3d at 699-700 (holding a "two year[]" interval between the defendant's material support and the plaintiff's injury was far from the point at which "considerations of temporal remoteness might . . . cut off liability").

Sudan counters by selectively quoting the 9/11 Commission Report, stating "Bin Laden left Sudan . . . significantly weakened." Perhaps so if viewed in isolation, but bin Laden's expulsion did not undo the support Sudan provided in the previous years. Sudan's invitation, after all, allowed al Qaeda to extricate itself from a war-torn Afghanistan and organize its terrorist enterprise in a stable safe haven. During al Qaeda's stay, Sudan sheltered the group from foreign intelligence and facilitated its movement throughout the region. It also put al Qaeda in contact with other, more experienced terrorist groups residing in Sudan. These actions allowed al Qaeda to grow its membership, to develop its capabilities, and

to establish the cells in Kenya and Tanzania, which ultimately launched the 1998 bombings. Indeed, "the vast majority of the planning and preparation [for the embassy attacks] took place between the years of 1991 and 1997" when Bin Laden, for the most part, remained in the Sudan. According to one expert, Sudan's expulsion of bin Laden may have even "accelerated the bomb plot" by allowing al Qaeda to militarize its African cells without fear of reprisal against him by the United States, which had known of his presence in Sudan. *Id.* at 310-11. As Sudan notes, al Qaeda had not committed "any terrorist attacks predating" its arrival in the country, and indeed "the idea that al-Qaeda was capable of anything significant" in the early 1990s "was laughable." Yet in a few short years, al Qaeda progressed from mounting small-scale, often-unsuccessful attacks to orchestrating the near-simultaneous bombings of American embassies in two different countries. Although the expulsion of bin Laden may have marked a temporary setback for Al Qaeda, on balance, the organization benefited greatly from Sudan's aid during the 1990s. Therefore, the district court's conclusion that Sudan's support was a "substantial factor" in the chain of causation leading to the embassy bombings was far from clearly erroneous.

b. Reasonable foreseeability

Sudan contends even if its support was a "significant factor" in the embassy bombings, the attacks were not "reasonably foreseeable or anticipated as a natural consequence" of that support. Principally, Sudan argues it was not foreseeable in 1991 — when Sudan invited

bin Laden to relocate — that al Qaeda would engage in terrorist activities. As evidence, Sudan points out that bin Laden was not yet infamous for acts of terrorism and the United States had not yet designated al Qaeda a terrorist organization or bin Laden a terrorist and did not do so until after the embassy bombings. Designation of Foreign Terrorist Organizations, 64 Fed. Reg. 55,112, 55,112/1 (Oct. 8, 1999); Exec. Order No. 13099, 63 Fed. Reg. 45,167, 45,167 (Aug. 20, 1998). That bin Laden and al Qaeda "may have abused their opportunities" in the country, Sudan urges, does not mean it should be held accountable when "its residents later turn out to be terrorists."

Once again Sudan ignores the broader context of its actions. In the early 1990s the Sudanese government reached out to numerous terrorist groups, including the "Palestinian HAMAS movement, the Palestinian Islamic Jihad, Hezbollah, . . . al Qaeda, the Egyptian Islamic Jihad, the Libyan Islamic Fighting Group, dissident groups from Algeria, Morocco, the Eritrean Islamic Jihad movement." *Owens IV*, 826 F. Supp. 2d at 141 (quoting Kohlmann). "[L]iterally every single jihadist style group, regardless of what sectarian perspective they had, was invited to take a base in Khartoum" during this period. *Id.* That al Qaeda was included in this list of renowned terrorist organizations supports an inference that its terrorist aims were foreseeable — indeed, foreseen — at the time of Sudan's invitation.

Sudan's own briefs implicitly concede the foreseeability of al Qaeda's aims in the early 1990s. To wit, Sudan reiterates the district court's finding that "Bin Laden 'was a famous mujahedeen fighter who had successfully

fought the Soviet Union' and 'was thought to be fabulously wealthy.'" *See Owens IV*, 826 F. Supp. 2d at 140-41. Yet it argues "the idea that al-Qaeda was capable of anything significant was laughable." True, al Qaeda was then a fledgling terrorist organization, but one led by a "famous . . . fighter" and a "fabulously wealthy" fundamentalist jihadi who had "successfully fought" a world superpower. Any impartial observer could see the group's future potential for mayhem far outstripped its then already substantial capabilities. Sudan cannot bury its head in the sand and contend otherwise.

Furthermore, as its relationship with al Qaeda deepened, Sudan undoubtedly became aware of al Qaeda's hostility to the United States and its intention to launch attacks against American interests. Starting in 1991, bin Laden issued a series of *fatwas* against the United States from Khartoum, and al Qaeda operatives publicly boasted about attacking American soldiers in Somalia in 1993. Despite this, Sudan continued to assist the group in moving people and resources throughout the region. Sudan's claimed ignorance of al Qaeda's specific aim to bomb American embassies focuses too narrowly upon those events; Sudan could not help but foresee that al Qaeda would attack American interests wherever it could find them.

In sum, Sudan's actions in the 1990s were undoubtedly a "substantial factor in the sequence of responsible causation" that led to the embassy bombings. *Rothstein*, 708 F.3d at 91. Moreover, the bombings were a "reasonably foreseeable or anticipated as a natural consequence" of its

material support. *Id.* Therefore, the district court correctly held that the plaintiffs had demonstrated proximate cause, establishing jurisdiction under the FSIA.

2. Sudan's specific intent

Sudan resists this conclusion by attempting to graft an additional requirement onto the proximate cause analysis. The FSIA terrorism exception, Sudan argues, requires something more than proximate causation: "The foreseeability aspect of proximate causation" it says, "is reinforced by § 1605A(a)(1)'s requirement that material support be provided 'for' the predicate act." Sudan's point is that the use of "for" with reference to "the provision of material support" indicates that the FSIA "requires a showing of intent" on the part of the foreign sovereign to achieve the predicate act, for which it refers us to *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 502, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982) (prohibition on selling merchandise "marketed for use" with illegal drugs requires a showing of intent on the defendant's behalf). *But see Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 519, 114 S. Ct. 1747, 128 L. Ed. 2d 539 (1994) (prohibition in the same statute on selling a product "intended or designed for use" with illegal drugs looks only to the objective features of the product, not to a defendant's intent). Under this reading, Sudan's material support could not give rise to jurisdiction unless Sudan specifically intended its support to cause the embassy bombings.

Although the record contains much evidence of Sudan's support for al Qaeda and its general awareness

of the group's terrorist aims, nothing suggests that Sudan specifically knew of or intended its support to cause the embassy bombings. Nothing in the FSIA, however, requires a greater showing of intent than proximate cause. Indeed, we dispatched a similar argument in *Kilburn*, along with a hypothetical raised by the sovereign defendant:

> A terrorist organization is supported by two foreign states. One specifically instructs the organization to carry out an attack against a U.S. citizen. Can the state which only provides general support, but was not involved with the act giving rise to the suit, also be stripped of its immunity?

376 F.3d at 1128. Yes, we said. Because material support "is difficult to trace," requiring more than proximate cause "could absolve" a state from liability when its actions significantly and foreseeably contributed to the predicate act. *Id.*

Further, we rejected the related argument that the "provision of material support or resources . . . *for such an act*" required that "a state's material support must go directly for the specific act." *Id.* at 1130. That limitation, we explained, "would likely render § 1605(a)(7)'s material support provision ineffectual" because material support "is fungible" and "terrorist organizations can hardly be counted on to keep careful bookkeeping records." *Id.* Indeed, in other situations, courts have required neither specific intent nor direct traceability to establish

the liability of material supporters of terrorism. *See Boim*, 549 F.3d at 698 (approving liability for donors to terrorist organizations whose donations were made for non-terrorism purposes). As Judge Posner has aptly said, "[t]o require proof that [a defendant] *intended* that his contribution be used for terrorism . . . would as a practical matter eliminate . . . liability except in cases in which the [defendant] was foolish enough to admit his true intent." *Id.* at 698-99. The same holds true for a state sponsor of terrorism under the FSIA; it may not avoid liability for supporting known terrorist groups by professing ignorance of their specific plans for attacks. In sum, that the evidence failed to show Sudan either specifically intended or directly advanced the 1998 embassy bombings is irrelevant to proximate cause and jurisdictional causation.

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In short, the plaintiffs have offered sufficient admissible evidence that establishes that Sudan's material support of al Qaeda proximately caused the 1998 embassy bombings. The district court, therefore, correctly held the plaintiffs met their burden of production under the FSIA terrorism exception. Because Sudan failed to participate in the litigation, it did not rebut that its material support caused these extrajudicial killings. Therefore, this court has jurisdiction to hear claims against Sudan arising from the 1998 embassy bombings.

IV. Timeliness of Certain Claims

The remainder of Sudan's jurisdictional arguments apply only to certain groups of plaintiffs. Even if we rule for Sudan on all these matters, many of the judgments — and the district court's 2011 holding on liability — will therefore remain intact.

One such argument is that the claims of certain plaintiffs are barred by the statute of limitation in the FSIA, which Sudan views as a jurisdictional limit on the court's power to hear a case. Like its predecessor, the current version of the FSIA terrorism exception contains a limitation period on personal injury claims against a state sponsor of terrorism. Application of the limitation period requires analysis of three components of the 2008 NDAA.

The first is the limitation period itself. Codified at § 1605A(b), the FSIA provides that:

> An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) . . . or [the Flatow Amendment] not later than the latter of (1) 10 years after April 24, 1996; or (2) 10 years after the date on which the cause of action arose.

The second component is § 1083(c)(3) of the 2008 NDAA, which defines the contours of a "related action" and imposes an additional time limitation on the filing of related actions:

> (3) RELATED ACTIONS. - If an action arising out of an act or incident has been timely commenced under section 1605(a)(7) . . . or [the Flatow Amendment], any other action arising out of the same act or incident may be brought under section 1605A . . . if the action is commenced not later than the latter of 60 days after — (A) the date of the entry of judgment in the original action; or (B) the date of the enactment of this Act.

Finally, in addition to filing a new action or a "related action," the NDAA offers a second way to avoid the limitation period if the plaintiff had previously brought a claim under § 1605(a)(7). Section 1083(c)(2) of the NDAA provides, in part:

> (2) PRIOR ACTIONS. - (A) IN GENERAL. — With respect to any action that — (i) was brought under section 1605(a)(7) of title 28, United States Code, or [the Flatow Amendment] before the date of enactment of this act . . . and . . . is before the courts in any form . . . that action, and any judgment in the action shall, on motion made by plaintiffs . . . be given effect as if the action had originally been filed under section 1605A(c).

For these "prior actions" the NDAA removes the "defenses of res judicada, collateral estoppel, and [the] limitations period" if the plaintiff moved to convert his prior action or refiled a new action under

§ 1605A(c). NDAA § 1083(c)(2)(B). A new claim using § 1083(c)(2) is timely if it complies with the limitation period in § 1605A(b) or was filed within 60 days of enactment of the NDAA. *Id.* § 1083(c)(2)(C).

Each provision comes into play in Sudan's challenge to the timeliness of the plaintiffs' actions. In this case, the plaintiffs' causes of action arose on August 7, 1998, the date of the embassy bombings. *See Vine v. Republic of Iraq*, 459 F. Supp. 2d 10, 21 (D.D.C. 2006) (holding a claim under the FSIA "arises on the date that the action in question occurred"), *rev'd in part on another ground sub nom. Simon v. Republic of Iraq*, 529 F.3d 1187, 1194-95, 381 U.S. App. D.C. 483 (D.C. Cir. 2008) (describing an argument to the contrary as "rather strained"), *rev'd on another ground sub nom. Republic of Iraq v. Beaty*, 556 U.S. 848, 129 S. Ct. 2183, 173 L. Ed. 2d 1193 (2009). Therefore, unless the plaintiffs can identify a "related action . . . commenced under section 1605(a)(7)" or had brought a "prior action" that remained "before the courts in any form," the last day to file a new action under § 1605A was August 7, 2008, ten years after the bombings.

Sudan does not dispute that several of the plaintiffs have filed timely actions under § 1605A. The Owens plaintiffs filed their original action under § 1605(a)(7) in October 2001 and after passage of the NDAA timely moved to convert their prior action pursuant to § 1083(c)(2). Days before the statutory deadline, the Amduso and Wamai plaintiffs filed new actions under § 1605A, and the Osongo and Mwila plaintiffs filed suit on the last possible day. Sudan does not challenge the timeliness of these plaintiffs.

The Khaliq, Opati, and Aliganga plaintiffs are another story. The Khaliq plaintiffs filed a complaint in November 2004 but missed the statutory deadline to convert that prior action under § 1083(c)(2) into a new action under § 1605A. *See Khaliq v. Republic of Sudan*, No. 1:04-cv-01536, at *3 (D.D.C. Sept. 9, 2009) (denying motion to convert under § 1083(c)(2)). Six months later, they filed a new case under § 1605A, asserting it was "related" both to their earlier suit and to the *Owens, Mwila*, and *Amduso* actions. The district court ordered briefing on whether the new suit was a "related action" within the scope of § 1083(c)(3) and ultimately allowed the case to proceed.

After the court held the evidentiary hearing and made its findings on liability and well past August 2008, the Aliganga plaintiffs moved to intervene in the *Owens* action, which the district court allowed, holding their claims were "related" to the *Owens* action per § 1083(c)(3). The Opati plaintiffs joined last, filing a suit "related" to the *Owens* action under § 1083(c)(3) on July 24, 2012. The court allowed both the Aliganga and Opati plaintiffs the benefit of its earlier findings on liability and jurisdiction.

Sudan challenges the timeliness of the Khaliq, Opati, and Aliganga plaintiffs, which raises two issues, only one of which we need to address on appeal. First, Sudan asserts that the limitation period in § 1605A(b) is jurisdictional and therefore bars a court from hearing any untimely action. Unless the limitation period in § 1605A(b) is jurisdictional, Sudan forfeited this affirmative defense by defaulting in the district court. *See Practical Concepts*, 811 F.2d at 1547. The plaintiffs argue that the time bar,

like most statutes of limitation, is not jurisdictional and hence is forfeit. *See Day v. McDonough*, 547 U.S. 198, 202, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006) ("Ordinarily in civil litigation, a statutory time limitation is forfeited if not raised in a defendant's answer or in an amendment thereto").

Assuming the limitation period is jurisdictional, Sudan contends the Khaliq, Opati, and Aliganga claims are barred because they are not "related actions" under § 1605A(b). A "related action," Sudan urges, must be filed by the same plaintiff who had filed an earlier action under § 1605(a)(7), which the Opati and Aliganga plaintiffs did not do. We need not, however, decide what qualifies as a "related action" because we hold the limitation period in § 1605A(b) is not jurisdictional. As a consequence Sudan forfeited its limitation defense by defaulting in the district court. *See Harris v. Sec'y, U.S. Dep't of Veterans Affairs*, 126 F.3d 339, 343, 326 U.S. App. D.C. 362 (D.C. Cir. 1997).

A line of recent Supreme Court cases has defined the circumstances in which a statute of limitation is jurisdictional. These cases uniformly recognize that a limitation period is not jurisdictional "unless it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435, 131 S. Ct. 1197, 179 L. Ed. 2d 159 (2011). To have a jurisdictional effect, a statute of limitation must "speak in jurisdictional terms," that is, restrict "a court's power" to hear a claim. *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1633, 191 L. Ed. 2d 533 (2015) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500,

515, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006)). Unless the Congress has "clearly stated" that it "imbued a procedural bar with jurisdictional consequences," the bar does not have them. *Id.* at 1632 (quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153, 133 S. Ct. 817, 184 L. Ed. 2d 627 (2013)) (internal quotation marks and alterations omitted). Thus has the Court "made plain that most time bars are nonjurisdictional." *Id.*

Of course, the Congress need not incant "magic words" in order clearly to demonstrate its intent. *Henderson*, 562 U.S. at 436. We look for the Congress's intent in "the text, context, and relevant historical treatment of the provision at issue." *Musacchio v. United States*, 136 S. Ct. 709, 717, 193 L. Ed. 2d 639 (2016) (quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166, 130 S. Ct. 1237, 176 L. Ed. 2d 18 (2010) (internal quotation marks omitted)). Doing so shows that § 1605A(b) is not a limit on the court's jurisdiction to hear an untimely FSIA claim.

We begin, as we must, with the text of § 1605A(b), which we note does not appear to "speak in jurisdictional terms":

> An action may be brought or maintained under this section . . . if commenced . . . [within] 10 years after April 24, 1996; or 10 years after the date on which the cause of action arose.

Nothing in the section refers to the "court's power" to hear a case. Nothing in § 1605A(a) "conditions its jurisdictional grant on compliance with [the] statute of limitations" in

§ 1605A(b). *Musacchio*, 136 S. Ct. at 717 (quoting *Reed Elsevier*, 559 U.S. at 165). Indeed, § 1605A(b) "is less 'jurisdictional' in tone" than limitation periods held nonjurisdictional in prior cases. *See Auburn Reg'l Med. Ctr.*, 568 U.S. at 154 (comparing the permissive term "may" in one statute with the mandatory term "shall" in another but holding both were nonjurisdictional). The plain text alone is enough to render the limitation period in § 1605A(b) nonjurisdictional.

Sudan nonetheless contends that the reference to "actions" rather than "claims" imbues the provision with jurisdictional import. For this proposition Sudan cites *Spannaus v. U.S. Department of Justice*, 824 F.2d 52, 262 U.S. App. D.C. 325 (D.C. Cir. 1987), in which we held a statute that similarly barred untimely "actions" was jurisdictional. *See* 28 U.S.C. § 2401(a). Sudan argues that by using the term "action" in § 1605A(b) the Congress made a clear statement replicating the jurisdictional reach of the similarly phrased statute at issue in *Spannaus*.

This analogy has several problems. First, as the plaintiffs point out, *Spannaus* was decided nearly a decade before the Supreme Court erected the presumption against jurisdictional effect, *see Carlisle v. United States*, 517 U.S. 416, 434, 116 S. Ct. 1460, 134 L. Ed. 2d 613 (1996) (Ginsburg, J. concurring) (making the first reference to a presumption against jurisdictional effect), and the Congress enacted § 1605A after that presumption had been fully articulated, *see Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004) (criticizing the "less than meticulous" use of the term "jurisdictional"

in earlier decisions). Therefore, *Spannaus* is unpersuasive on the matter. Second, the plaintiffs correctly note we did not rely upon the phrase "every civil action" in *Spannaus* to hold the limitation period in § 2401(a) jurisdictional. Rather, we relied upon longstanding precedent establishing that "§ 2401(a) is a jurisdictional condition attached to the government's waiver of sovereign immunity, and as such must be strictly construed." 824 F.2d at 55 (citing *United States v. Mottaz*, 476 U.S. 834, 106 S. Ct. 2224, 90 L. Ed. 2d 841 (1986) and *Soriano v. United States*, 352 U.S. 270, 276, 77 S. Ct. 269, 1 L. Ed. 2d 306 (1957)); *cf. John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139, 128 S. Ct. 750, 169 L. Ed. 2d 591 (2008) (holding a statute of limitation as jurisdictional when "[b]asic principles of stare decisis" required that outcome). In this case, precedent does not help Sudan because no court has given § 1605A(b) "a definitive earlier interpretation" that could displace the presumption against jurisdictional reach. *Id.* at 137-38.

Further, Sudan's invocation of the nostrum that identical words in similar statutes demand an identical construction finds little support in the most relevant precedents. *See Wong*, 135 S. Ct. at 1629 (rejecting the argument that use of the phrase "shall forever be barred" rendered a limitation period jurisdictional despite the inclusion of the identical phrase in a jurisdictional statute of limitation). Therefore, the use of the term "action" in a provision held jurisdictional in *Spannaus* says little about whether a similarly phrased statute also has jurisdictional reach. Nor have courts attached jurisdictional significance to the word "action" in other statutes. *See, e.g., Reed*

Elsevier, 559 U.S. at 166 (holding nonjurisdictional 17 U.S.C. § 411(a), which bars any "civil action" for infringement without prior registration of the copyright); *Hardin v. City Title & Escrow Co.*, 797 F.2d 1037, 1040, 254 U.S. App. D.C. 370 (D.C. Cir. 1986) (stating that 15 U.S.C. § 15b, which bars "[a]ny [untimely] action to enforce any cause of action," is "a good example of a nonjurisdictional time limitation"). Sudan presents no reason we should embrace *Spannaus* yet ignore these other precedents as well as the Supreme Court's most recent guidance on statutory interpretation. Hence, we find no support for Sudan's textual argument that § 1605A(b) is jurisdictional.

Sudan next argues from the structure of the statute in which § 1605A(b) appears: Because the limitation period follows immediately after the grant of jurisdiction in § 1605A(a), it takes on the jurisdictional nature of the prior provision. Again, precedent suggests otherwise. As the plaintiffs note, the Supreme Court has held the "separation" of a time bar "from jurisdictional provisions" implies the limitation period is not jurisdictional. *Gonzalez v. Thaler*, 565 U.S. 134, 132 S. Ct. 641, 651, 181 L. Ed. 2d 619 (2012); *cf. Blueport Co., LLC v. United States*, 533 F.3d 1374, 1380 (Fed. Cir. 2008) (holding limits on patent infringement suits against the Government are jurisdictional because they appear in the same sentence as a general waiver of sovereign immunity). The limitation period in § 1605A(b) and the grant of jurisdiction in § 1605A(a) appear in two different subsections of the terrorism exception, only one of which speaks in jurisdictional terms. The remaining subsections of § 1605A are plainly nonjurisdictional. *See, e.g.*, 28 U.S.C. §§ 1605A(c) (private right of action), 1605A(d) (additional damages), 1605A(e) (use of special masters),

1605A(g) (property disposition). That the limitation period follows immediately after the jurisdictional provisions of § 1605A(a) is of little import. *See Gonzalez*, 565 U.S. at 147 ("Mere proximity will not turn a rule that speaks in nonjurisdictional terms into a jurisdictional hurdle"). If proximity alone were enough, then every subsection in a section containing a jurisdictional provision would, by the transitive property, also abut a jurisdictional subsection and therefore be jurisdictional as well, an absurd proposition. *Auburn Reg'l Med. Ctr.*, 568 U.S. at 155 ("A requirement we would otherwise classify as nonjurisdictional . . . does not become jurisdictional simply because it is placed in a section of a statute that also contains jurisdictional provisions").

Sudan also argues the history of § 1605A supports reading the time bar in § 1605A(b) as jurisdictional. Prior to the enactment of the 2008 NDAA, the FSIA terrorism exception under § 1605(a)(7) contained a similar time bar of ten years. *See* 28 U.S.C. § 1605(f) (2006). Sudan now contends that § 1605 was "undisputedly a purely jurisdictional statute," rendering both the current and the former limitation periods jurisdictional as well.

This argument mischaracterizes both old § 1605(f) and new § 1605A. The time bar in the former terrorism exception was in a separate subsection of the FSIA, § 1605(f), from the grant of jurisdiction over claims against a state sponsor of terrorism in § 1605(a)(7). Section § 1605 did have several jurisdictional provisions, *see* §§ 1605(a)(1)-(7), (b), (d), but each one expressly proclaimed its jurisdictional reach. *See, e.g.*, 28 U.S.C. §§ 1605(a)

("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case" falling within one of the seven enumerated exceptions). The other four subsections of § 1605 made no mention of jurisdiction. The difference is telling, but understandable as these provisions — much like those in § 1605A — defined terms (§ 1605(e)), limited discovery (§ 1605(g)), and governed the choice of law and the calculation of damages (§ 1605(c)), among other things, none of which could have jurisdictional effect. As in § 1605A, § 1605 demonstrates that when the Congress intends to make a provision jurisdictional, it normally does so expressly. When words of jurisdictional import are absent, so too, we presume, is jurisdictional effect.

Sudan lastly argues that waivers of sovereign immunity must be strictly construed. *See Spannaus*, 824 F.2d at 55. *But see Scarborough v. Principi*, 541 U.S. 401, 421, 124 S. Ct. 1856, 158 L. Ed. 2d 674 (2004) ("[L]imitations principles should generally apply to the Government 'in the same way that' they apply to private parties") (quoting *Franconia Assocs. v. United States*, 536 U.S. 129, 145, 122 S. Ct. 1993, 153 L. Ed. 2d 132 (2002)). The Supreme Court has twice addressed this very point and rejected it for time bars that conditioned waivers of the U.S. Government's sovereign immunity. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 94-96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990); *Wong*, 135 S. Ct. at 1636. Treating a time bar as nonjurisdictional, the Court has said, "is likely to be a realistic assessment of legislative intent" and "amounts to little, if any, broadening of the congressional waiver" of sovereign immunity. *Irwin*, 498

U.S. at 95. Therefore, Sudan's argument that sovereignty gives jurisdictional import to the limitation period in the FSIA terrorism exception is unpersuasive.

In any event, Sudan misses the distinction between a waiver of sovereign immunity and an exception to the statutory grant of foreign sovereign immunity. The Congress "did not waive [a foreign state's] sovereign immunity in enacting [the FSIA terrorism exception]" because "only the sovereign can forswear the sovereign's legal rights." *Simon*, 529 F.3d at 1196. Rather, "[i]n the terrorism exception the Congress qualified the statutory grant of immunity to [foreign sovereigns]," which is "itself 'a matter of grace and comity.'" *Id.* (quoting *Verlinden*, 461 U.S. at 486). Because the FSIA exceptions are not waivers of sovereign immunity, the rule of strict construction does not apply.

Having reviewed the text, structure, or history of the FSIA terrorism exception, we see "no authority suggesting the Congress intended courts to read [§ 1605A(b)] any more narrowly than its terms suggest." *Id.* Sudan's arguments to the contrary fail. We therefore hold that the limitation period in § 1605A(b) is not jurisdictional. It follows that Sudan has forfeited its affirmative defense to the *Khaliq, Opati*, and Aliganga actions by failing to raise it in the district court. *See Musacchio*, 136 S. Ct. at 717; *Harris*, 126 F.3d at 343. As a consequence, we have no need to consider Sudan's interpretation of a "related action" under NDAA § 1083(c)(3).

V. Jurisdiction and Causes of Action for Claims of Third Parties

Sudan next takes aim at claims brought under state and federal law by the family members of those killed or injured in the embassy bombings. First, Sudan contends § 1605A(a) does not grant the court jurisdiction to hear a claim from a plaintiff (or the legal representative of a plaintiff) who was not physically injured by a terrorist attack. Second, even if jurisdiction is proper, Sudan argues the federal cause of action in § 1605A(c) supplies the exclusive remedy for a FSIA claimant, precluding claims under state law. Finally, Sudan insists a family member who was not present at the scene of the embassy bombings cannot state a claim for intentional infliction of emotional distress (IIED) under District of Columbia law.

A. Jurisdiction

We turn first to Sudan's jurisdictional argument, which we are obliged to address notwithstanding Sudan's default. The plaintiffs in this case have brought two different types of claims under various sources of law. First are the claims of those physically injured by the embassy bombings or by the legal representatives of those now deceased or incapacitated. Second are the claims of family members of those physically injured or killed by the bombings who seek damages for their emotional distress. Sudan contends the FSIA extends jurisdiction only to members of the first group and their legal representatives. The claims of family members for emotional distress, it argues, are outside the jurisdiction conferred upon the court.

Sudan's argument turns upon the meaning of the phrase "the claimant or the victim" in § 1605A(a)(2)(A)(ii). Section 1605A(a) gives the court jurisdiction and withdraws immunity only when "the claimant or the victim" falls within one of four categories: U.S. nationals, members of the armed forces, and employees or contractors of the United States acting within the scope of their employment. A separate subsection of the terrorism exception provides a federal cause of action to the same groups of plaintiffs and their legal representatives. 28 U.S.C. § 1605A(c).

Sudan contends that "the claimant" in § 1605A(a)(2)(A)(ii) refers only to the legal representative of a victim of a terrorist attack. This would effectively align the grant of jurisdiction with the federal cause of action under § 1605A(c). That is, under Sudan's proffered interpretation, a court would have jurisdiction only over claims brought by persons who could invoke the federal cause of action in § 1605A(c). Applied to the case at hand, this might preclude jurisdiction over a claim for emotional distress brought by a relative of someone killed or injured by the embassy bombings because a family member is arguably neither a victim of the attack nor the legal representative of a victim.

Sudan's argument has several problems. First and foremost, Sudan's interpretation is inconsistent with the plain meaning and the structure of the statute, as is clear from the differences between the grant of jurisdiction in § 1605A(a) and the cause of action in § 1605A(c). Section 1605A(a)(2) grants jurisdiction when "the claimant or the victim" is a member of one of the four enumerated groups.

In contrast, § 1605A(c) authorizes a cause of action not only for those four groups but also for the legal representative of a member of those groups. If the Congress had intended § 1605A(a)(2) to mirror the scope of § 1605A(c), then it would have used the same term — "legal representative" — in both subsections (i.e., "the legal representative or the victim"), as it did with the verbatim enumeration of the four qualifying groups. That it did not signals its intent to give the term "claimant" in § 1605A(a)(2) a meaning different from and broader than "the legal representative" in § 1605A(c). *See Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983).

What, then, does the FSIA mean by the terms "claimant" and "legal representative"? The plain meaning of claimant, the plaintiffs correctly note, is simply someone who brings a claim for relief. Who can be a claimant is typically defined by the substantive law under which a plaintiff states a claim. By contrast, the term "legal representative" contemplates a far narrower universe of persons based upon principles of agency or a special relationship, such as marriage. *See, e.g., Fed. Treasury Enter. Sojuzplodoimport v. SPI Spirits Ltd.*, 726 F.3d 62, 80 (2d Cir. 2013) ("In its broadest usage, the phrase 'legal representative' may refer simply to '[o]ne who stands for or acts on behalf of another'"). Federal and state procedural law, not the substantive law under which a plaintiff states a claim, typically defines who may serve as a legal representative in a given suit. *See* FED. R. CIV. P. 17(b)(3); *Gurley v. Lindsley*, 459 F.2d 268, 279 (5th Cir. 1972) (applying Texas law in accord with Rule 17(b)). Thus, a legal representative is a special type of claimant who

proceeds on behalf of an absent party with a substantive legal right.

Sudan nonetheless offers three reasons we should narrowly interpret "claimant" to mean no more than "legal representative." First, Sudan argues that interpreting "claimant" to mean "legal representative" is necessary to "harmonize[]" the scope of jurisdiction under § 1605A(a) with the cause of action under § 1605A(c). If the terms had different meanings, Sudan warns, then "certain plaintiffs [could] establish jurisdiction under § 1605A(a)" but anomalously could not "avail[] themselves of the private right of action in § 1605A(c)." Here Sudan is assuming a grant of jurisdiction must be no broader than the causes of action that may be brought under it. But that does not follow. *Cf. FDIC v. Meyer*, 510 U.S. 471, 484, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994) (noting that "whether there has been a waiver of sovereign immunity" and "whether the source of substantive law" "provides an avenue for relief" are "two 'analytically distinct' inquiries"). The other exceptions to sovereign immunity in the FSIA exemplify this distinction because they grant the courts jurisdiction over claims against foreign sovereigns but neither create nor withdraw substantive causes of action for FSIA plaintiffs. *See Helmerich & Payne*, 137 S. Ct. at 1324 ("Indeed, cases in which the jurisdictional inquiry does not overlap with the elements of a plaintiff's claims have been the norm in cases arising under other exceptions to the FSIA").

Furthermore, even under the prior terrorism exception, the Congress authorized a cause of action — in

the Flatow Amendment — with a narrower reach than the grant of jurisdiction in § 1605(a)(7). *See Leibovitch v. Islamic Republic of Iran*, 697 F.3d 561, 570-71 (7th Cir. 2012). That the Flatow Amendment applied only to state officials, not foreign states, took "nothing away from" the grant of jurisdiction under § 1605(a)(7) because the broader jurisdictional provision operated independently of the narrower cause of action. *See Cicippio-Puleo*, 353 F.3d at 1035-36. Accordingly, we declined to "harmonize" the broad grant of jurisdiction in the old terrorism exception with the narrower cause of action provided by the Flatow Amendment because doing so would have conflicted with the text of both provisions. *Id.* at 1032-33. So too here. Again the Congress has authorized a narrower cause of action, § 1605A(c), correlative to a broader jurisdictional grant, § 1605A(a), and as before, we see no reason to distort the plain meaning of either provision in order to make them coextensive.

Second, Sudan contends a broad interpretation of "claimant" would "render[] the term 'victim' superfluous." Not so; as the plaintiffs note, the use of both terms affords jurisdiction when "either the claimant or the victim is a national of the United States" or is within one of the other three groups identified in the statute. *La Reunion Aerienne v. Socialist People's Libyan Arab Jamahiriya*, 533 F.3d 837, 844, 382 U.S. App. D.C. 365 (D.C. Cir. 2008).

Third, Sudan argues that reading "claimant" to mean "one who brings a claim" would "greatly expand[] the universe of possible plaintiffs, contrary to Congressional intent." The term "claimant," unlike the term "victim,"

is indeed less bounded by the underlying acts that give the courts jurisdiction: Only a limited set of individuals could properly be considered victims of the 1998 embassy bombings, whereas the term "claimant" may appear to encompass a larger universe of possible plaintiffs. That universe is actually quite limited, however. The FSIA itself limits claimants to those seeking "money damages" "for personal injury or death," 28 U.S.C. § 1605A(a)(1). *See La Reunion Aerienne*, 533 F.3d at 845 (allowing an insurer to recover payments made to survivors and to estates of those killed in an airline bombing because the insureds' claims were "personal injury claim[s] under traditional common-law principles") (internal quotation marks, emphasis, and citation removed).

Substantive law also limits who is a proper claimant under the FSIA. This is clearly the case with the federal cause of action in the FSIA, which limits claimants to the four enumerated groups and their legal representatives. So too with substantive law outside the FSIA: We have held the common-law tort of IIED limits recovery to the immediate family of a victim who is physically injured or killed. *See Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 338, 354 U.S. App. D.C. 244 (D.C. Cir. 2003) (rejecting claims for IIED brought by nieces and nephews of a U.S. national taken hostage); RESTATEMENT (SECOND) OF TORTS § 46 (1965). Therefore, not every person who experiences emotional distress from a major terrorist attack — a universe that could be large indeed — can state a claim for IIED absent some close relationship to a victim who was injured or killed. Therefore, due to the limitations imposed upon potential claimants both by the FSIA and

by substantive law, we are not persuaded by Sudan's argument that the plain meaning of "claimant" produces "absurd results" or is "contrary to Congressional intent."

In sum, by its plain text, the FSIA terrorism exception grants a court jurisdiction to hear a claim brought by a third-party claimant who is not the legal representative of a victim physically injured by a terrorist attack. Who in particular may bring a claim against a foreign sovereign is a question of substantive law, wholly separate from the question of our jurisdiction.

B. Causes of Action

Sudan next contends the foreign family members cannot state a claim under any source of substantive law. Starting from first principles, we reiterate that the question whether a statute withdraws sovereign immunity is "analytically distinct" from whether a plaintiff has a cause of action. *See Meyer*, 510 U.S. at 484; *United States v. Mitchell*, 463 U.S. 206, 218, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983). As the district court correctly recognized, we have never required the Congress, in order to effectuate a grant of jurisdiction, expressly to "define the substantive law that applies." *Owens V*, 174 F. Supp. 3d at 286. Indeed, before enactment of the FSIA, the courts — absent objection by the State Department — had jurisdiction to hear suits against a foreign government under state and federal law even though no statute provided rules of decision for such cases. *See, e.g., Victory Transp. Inc. v. Comisaria Gen. de Abastecimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964) (enforcing a state-law arbitration

agreement against a foreign sovereign via the Federal Arbitration Act). Hence, unless the enactment of the FSIA or of § 1605A somehow changed this situation, a plaintiff proceeding under the FSIA may rely upon alternative sources of substantive law, including state law.

Sudan would have us find an abrogation of a plaintiff's access to state law in § 1606 of the FSIA, which provides in relevant part:

> As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 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.

When the original FSIA terrorism exception was in force, § 1606 governed what a claimant could recover from a foreign sovereign. This was because the original exception was codified as a subsection of § 1605, to which § 1606 expressly applied. After we declined in *Cicippio-Puleo* to infer a federal cause of action against a foreign sovereign arising from § 1605(a)(7) or from the Flatow Amendment, a plaintiff using the old terrorism exception could press a claim under state law, as qualified by § 1606, in the same manner as any other FSIA plaintiff. When the Congress passed the 2008 NDAA, it repealed old § 1605(a)(7) and codified the current terrorism exception in new § 1605A. As a result, § 1606, which references only

§ 1605 and § 1607, does not apply to the current FSIA terrorism exception. This, Sudan contends, demonstrates the Congress's intent to foreclose a plaintiff from relying upon state law when suing under § 1605A. Essentially, Sudan suggests the Congress struck a deal when it recodified the new terrorism exception in § 1605A: A plaintiff could sue under the new federal cause of action but could no longer press a state-law claim against a foreign sovereign via the pass-through process endorsed by *Cicippio-Puleo*. Therefore, according to Sudan, plaintiffs who are ineligible for the purportedly exclusive remedy of the federal cause of action — including the foreign family members in this case — were left without a "gateway" to any substantive law under which to state a claim. *Contra Leibovitch*, 697 F.3d at 572 ("Although § 1605A created a new cause of action, it did not displace a claimant's ability to pursue claims under applicable state or foreign law upon the waiver of sovereign immunity" (quoting *Estate of Doe v. Islamic Republic of Iran*, 808 F. Supp. 2d 1, 20 (D.D.C. 2011)).

One might wonder, as the plaintiffs do, why we need to reach this nonjurisdictional argument, which Sudan forfeited by failing to appear in the district court. *See Practical Concepts*, 811 F.2d at 1547. We do so because we have discretion to reach the question, *see Acree*, 370 F.3d at 58, and this case presents sound reasons for doing so. The question presented is "purely one of law important in the administration of federal justice" because most cases invoking the terrorism exception are filed in this circuit, *see* 28 U.S.C. § 1391(f)(4), and "resolution of the issue does not depend on any additional facts not

considered by the district court." *Acree*, 370 F.3d at 58 (quoting *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 419 n.5, 294 U.S. App. D.C. 198 (D.C. Cir. 1992)). Review is particularly appropriate here because the foreign family member plaintiffs have secured billions in damages against a foreign sovereign. *See id.* (finding extraordinary circumstances from a "nearly-billion dollar default judgment against a foreign government"). We therefore exercise our discretion to consider Sudan's nonjurisdictional argument that the pass-through approach recognized in *Cicippio-Puleo* did not survive enactment of § 1605A.

In our view, Sudan assigns undue significance to § 1606. On its face, that section does not authorize a plaintiff to resort to state (or federal or foreign) law in a suit against a foreign sovereign. Nor does it create a substantive body of law for such an action. *See First Nat'l City Bank*, 462 U.S. at 620-21. Rather, as the plaintiffs argue and the district court recognized, § 1606 simply limits the liability of a foreign state to "the same manner and to the same extent as a private individual under like circumstances" regardless of what substantive law is being applied. The exclusion of punitive damages from the pass-through approach reinforces our confidence that § 1606 operates only to limit, not to create, the liability of a foreign state. As the Supreme Court has said, the Congress made clear that the FSIA, including § 1606, was not "intended to affect the substantive law of liability" applicable to a foreign sovereign. *Id.* at 620 (quoting H.R. Rep. NO. 94-1487, at 12 (1976)). In keeping with this straightforward reading, we have recognized that § 1606

does not authorize a court to craft federal common law, but rather requires it to apply state law to suits under the FSIA. *See Bettis*, 315 F.3d at 333 (noting that § 1606 "instructs federal judges to find the relevant law, not to make it").

One might wonder, then, why the Congress moved the FSIA terrorism exception from § 1605, where it was covered by § 1606, to § 1605A, where it is not. Contrary to Sudan's convoluted argument about an implied withdrawal of remedies under state law, the new exception itself provides a ready answer. If the Congress had reenacted the new terrorism exception in the same section as the old one, then it would have created an irreconcilable conflict between the new federal cause of action, which allows the award of punitive damages, and § 1606, which prohibits them. In order to avoid this conflict, a court would have either to disregard a central element of the federal cause of action or to hold the new exception implicitly repealed § 1606 as applied to state sponsors of terror. *See Morton v. Mancari*, 417 U.S. 535, 549, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974) (noting the "cardinal rule . . . that repeals by implication are not favored") (internal quotation marks removed). Avoiding a conflict between § 1605 and § 1606, rather than Sudan's strained "gateway" argument, more likely explains the Congress's purpose in moving the terrorism exception out of § 1605.

Of course, in most cases brought under the new terrorism exception, the plaintiff need not rely upon state tort law. This does not, however, imply that the Congress intended to foreclose access to state law by those who

need it, as do foreign family members. U.S. nationals will continue to sue under § 1605A(c) and benefit from its consistent application. But the pass-through approach remains viable to effectuate the intent of the Congress to secure recoveries for other plaintiffs harmed by a terrorist attack.

C. Intentional Infliction of Emotional Distress

We turn now to Sudan's third and final argument respecting family members who have brought state-law claims for IIED. The district court held that District of Columbia law controls these actions, *Owens IV*, 826 F. Supp. 2d at 157, which Sudan does not contest. Judgments under D.C. law in favor of the foreign family member plaintiffs total more than $7 billion. Sudan contends these awards are invalid because D.C. tort law requires a plaintiff to be present at the scene of a defendant's outrageous and extreme conduct in order to recover for IIED. In particular, Sudan points to *Pitt v. District of Columbia*, in which this court applied the "presence" requirement to bar a claim for IIED under D.C. law. 491 F.3d 494, 507, 377 U.S. App. D.C. 103 (D.C. Cir. 2007).

That case does not extend as far as Sudan contends. In *Pitt*, we noted "[t]he District of Columbia has adopted the standard for intentional infliction of emotional distress from the Restatement (Second) of Torts." *Id.* (citing *Sere v. Grp. Hospitalization, Inc.*, 443 A.2d 33, 37 (D.C. 1982). As Sudan points out, the Second Restatement contains a presence requirement:

> Where such [extreme and outrageous] 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."

The Restatement, however, also provides that "there may . . . be other circumstances under which the actor may be subject to liability for the intentional or reckless infliction of emotional distress." RESTATEMENT (SECOND) OF TORTS § 46 (1965) (caveat). A comment to the Restatement expressly applies this caveat to the presence requirement, "leav[ing] open the possibility of situations in which presence at the time may not be required." *Id.* cmt. l.[6]

Although we did apply the presence requirement in *Pitt*, the factual situation there was quite different than in the present case. The plaintiff in *Pitt* alleged emotional distress from the "filing of a false and misleading affidavit and possible evidence tampering." 491 F.3d at 507.

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6. Several district courts have applied this exception to claims for emotional distress under the federal cause of action in the new FSIA terrorism exception. *See, e.g., Estate of Heiser v. Islamic Republic of Iran*, 659 F. Supp. 2d 20, 26-27 (D.D.C. 2009) ("All acts of terrorism are by their very definition extreme and outrageous and intended to cause the highest degree of emotional distress, literally, terror, in their targeted audience") (quoting *Stethem v. Islamic Republic of Iran*, 201 F. Supp. 2d 78, 89 (D.D.C. 2002)).

Allowing a claim for IIED stemming from a procedural irregularity in law enforcement, we reasoned, would "substantially expand[] the scope of the third-party IIED tort under District of Columbia law," *id.*, without any principled limitation on future actions. In contrast, a massive terrorist attack resulting in widespread casualties and worldwide attention would appear so exceptional that recognizing an appropriate plaintiff's claim for IIED would not broaden the scope of liability to innumerable similar incidents. Therefore, nothing in *Pitt* suggests D.C. law would apply the presence requirement to an act of international terrorism.

At the same time, we proceed with caution when applying D.C. tort law to this novel situation. The District of Columbia has yet to decide whether it would apply the presence requirement or the exception in the Restatement to an act of international terrorism. Neither has Maryland, the common law of which is authoritative when D.C. law is silent. *Clark v. Route*, 951 A.2d 757, 763 n.5 (D.C. 2008). Although there are convincing reasons to do so, there are also good reasons to draw back. Some of the first cases applying the caveat in the Restatement dealt with hostage taking. *See, e.g., Stethem*, 201 F. Supp. 2d at 89-91; *Sutherland v. Islamic Republic of Iran*, 151 F. Supp. 2d 27, 50 (D.D.C. 2001). Hostage takers often target the family members of the victim, demanding they pay a ransom for the release of the hostage. The emotional distress of the family member is intended to advance the hostage taker's aims. Therefore, hostage taking seems to be the type of case in which the defendant's extreme and outrageous conduct is "directed at a third person"

but is intended also to cause severe emotional distress to the absent plaintiff. *See* DAN B. DOBBS, THE LAW OF TORTS § 307, at 384 (2000) ("If the defendants' conduct is sufficiently outrageous and intended to inflict severe emotional harm upon a person which [sic] is not present, no essential reason of logic or policy prevents liability"). If so, the plaintiff's contemporaneous physical presence is not required because the plaintiff is the direct target of the tortious conduct, rather than a mere bystander, as the latest version of the Restatement recognizes. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 46 (2012) (cmt. m) ("If an actor harms someone for the purpose of inflicting mental distress on another person, the [presence] limitations . . . do not apply").

In contrast, a terrorist bombing is not so precisely targeted at certain absent individuals. Rather than leveraging distress inflicted upon specific third parties to achieve their aims, terrorist bombings typically target the public at large in order to create a general environment of fear and insecurity. Widespread distress, rather than distress "directed at" or confined to particular persons, provides a considerably weaker basis for IIED liability. Indeed, the Second Restatement would preclude an individual's recovery for an event causing widespread emotional distress, absent some unique, foreseeable, and intended harm to the plaintiff. RESTATEMENT (SECOND) OF TORTS § 46 cmt. l. For this reason too, the drafters of the Third Restatement of Torts have criticized several district court decisions for abandoning the presence requirement in FSIA terrorism cases. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 46 (2012) reporter's note cmt. m (criticizing the "questionable determination that

the terrorists acts were directed not only to the victims of the attack but also at their family members"). Although we have not decided the matter, we too have expressed skepticism that the sensational nature of a terrorist attack warrants an exception to the limitations of IIED in the Restatement. *See Bettis*, 315 F.3d at 334 ("If any person that Iran hoped to distress . . . could recover under section 46(1) as a direct victim of Iran's conduct, virtually anyone claiming he or she was affected could recover").

We believe a court may reasonably characterize a terrorist bombing as falling either within the caveat in the Second Restatement or beyond the scope of a sovereign's liability to third parties. The plaintiffs once again urge us not to reach this nonjurisdictional question forfeited by Sudan's default, but as with the availability of state law claims, we see sound reasons for exercising our discretion to consider the matter. *See Acree*, 370 F.3d at 58. Billions of dollars have been awarded to foreign family members as damages for IIED. Furthermore, how to apply the Restatement to terrorist bombings is a question, unfortunately, almost certain to recur in this Circuit. Finally, this is a pure question of law that "does not depend on any additional facts not considered by the district court," *Roosevelt*, 958 F.2d at 419 & n.5, and potentially may bear upon sensitive matters of international relations. *Cf. Acree*, 370 F.3d at 58. The situation therefore presents "exceptional circumstances" sufficient to overcome our ordinary reluctance to hear nonjurisdictional arguments not raised before the district court. *Id.*

That said, the choice is not ours to make. District of Columbia law controls the scope of IIED liability, and the

D.C. Court of Appeals has yet to render a decision on the matter. Therefore, we shall certify the question to that court pursuant to D.C. Code Ann. § 11-723. Whether to certify a question "rests in the sound discretion of the federal court." *Lehman Bros. v. Schein*, 416 U.S. 386, 390-91, 94 S. Ct. 1741, 40 L. Ed. 2d 215 (1974). "The most important consideration guiding the exercise of this discretion . . . is whether the reviewing court finds itself genuinely uncertain about a question of state law that is vital to a correct disposition of the case before it." *Tidler v. Eli Lilly & Co.*, 851 F.2d 418, 426, 271 U.S. App. D.C. 163 (D.C. Cir. 1988).

This case presents such a question. We are genuinely uncertain whether the D.C. Court of Appeals would apply the presence requirement in the Second Restatement of Torts to preclude recovery for IIED by family members absent from the scene of a terrorist bombing. Other states have reached different conclusions on this question. *See Peterson*, 515 F. Supp. 2d at 43-44 & n.19 (identifying Florida, California, and Vermont as states that apply the presence requirement and Louisiana, and Pennsylvania as states that do not).

Furthermore, the question is one of significant public interest in the District of Columbia. *See Eli Lilly & Co. v. Home Ins. Co.*, 764 F.2d 876, 884, 246 U.S. App. D.C. 243 (D.C. Cir. 1985). Because the great majority of claims under the FSIA terrorist exception are brought in the federal district court in D.C. pursuant to the FSIA venue provision in 28 U.S.C. 1391(f)(4), this question of D.C. tort law will likely arise in future cases before our

district court. And the District, as the home of thousands of government employees, military service members, and contractors, and as itself a potential target of terrorist attacks, has a substantial interest in determining who may recover for the emotional distress caused by a terrorist attack.

We therefore certify the following question to the D.C. Court of Appeals:

> Must a claimant alleging emotional distress arising from a terrorist attack that killed or injured a family member have been present at the scene of the attack in order to state a claim for intentional infliction of emotional distress?

VI. Punitive Damages

Having affirmed that the district court properly asserted jurisdiction over the plaintiffs' claims and held Sudan liable for their injuries, we now review the amount in damages it awarded to the plaintiffs. The court awarded $10.2 billion in damages, including more than $4.3 billion in punitive damages under both state and federal law. *See, e.g., Opati*, 60 F. Supp. 3d at 81-82. In post-judgment motions under Rule 60(b)(6), Sudan asked the district court to vacate the awards of punitive damages. The court declined, reasoning that any nonjurisdictional legal error in assessing punitive damages against Sudan did not present an "extraordinary circumstance" that would justify vacatur. *Owens V*, 174 F. Supp. 3d at 288; *see Gonzalez v. Crosby*, 545 U.S. 524, 536, 125 S. Ct. 2641,

162 L. Ed. 2d 480 (2005) ("[R]elief under Rule 60(b)(6) . . . requires a showing of 'extraordinary circumstances'").

Sudan's renewed request to vacate these awards is now before us both on appeal from the denial of Sudan's Rule 60(b) motions and on direct appeal from the final judgments. Sudan principally contends the FSIA terrorism exception does not retroactively authorize the imposition of punitive damages against a sovereign for conduct occurring before the passage of § 1605A. As explained below, we agree. But before reaching the merits, we first explain why we are addressing the matter despite Sudan's default in the district court.

A. Whether to Review the Awards of Punitive Damages

The plaintiffs contend, and the district court agreed, we need not consider Sudan's argument against the awards of punitive damages because it forfeited this nonjurisdictional challenge by failing to appear in the district court. While this is true, *see Practical Concepts*, 811 F.2d at 1547, there are sound reasons to exercise our discretion to hear Sudan's argument, whether under Rule 60(b) or on direct appeal.

First, Supreme Court precedent generally favors more searching appellate review of punitive damages than of other nonjurisdictional matters. *See Pac. Mut. Life Ins. v. Haslip*, 499 U.S. 1, 18, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991) (warning against "unlimited judicial discretion" in fixing punitive damages). Heightened scrutiny is appropriate because punitive damages are in the nature

of criminal punishment. *Id.* at 19. Accordingly, the Court has closely reviewed the size of punitive damage awards relative to compensatory damages, *State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408, 426, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003), the availability of punitive damages for conduct occurring outside a court's territorial jurisdiction, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996), and the factors a court may consider in imposing punitive damages, *Haslip*, 499 U.S. at 21-22. In particular, the Court has emphasized the importance of judicial review to ensure awards of punitive damages comport with the Constitution. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432, 114 S. Ct. 2331, 129 L. Ed. 2d 336 (1994). Consistent with these concerns, the scope of appellate review for a timely challenge to an award of punitive damages is broad. *See Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 436, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001) (reviewing de novo constitutional challenges to punitive damages). We think the same concerns call for a similarly exacting standard for review of an untimely challenge to an award of punitive damages. Our view is reinforced by the Court's warning that the "[r]etroactive imposition of punitive damages would raise a serious constitutional question." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 281, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).[7]

7. These circumstances distinguish the review of retroactive punitive damages from the review of Sudan's forfeited limitations defense. *See Musacchio*, 136 S. Ct. at 717 ("[A] limitations bar . . . is a defense that becomes part of a case only if the defendant presses it in the district court"); *Day*, 547 U.S. at 202 ("Ordinarily in civil litigation, a statutory time limitation is forfeited if not raised in a defendant's answer or in an amendment thereto").

In order to avoid possible constitutional infirmities, other Circuits too have reviewed denials of Rule 60(b)(6) motions to vacate punitive damages awarded in default judgments. *See Watkins v. Lundell*, 169 F.3d 540, 545 (8th Cir. 1999); *Merrill Lynch Mortg. Corp. v. Narayan*, 908 F.2d 246, 253 (7th Cir. 1990). Although review of punitive damages entered upon default is not always warranted, we think the circumstances of this case merit appellate review. Of particular note are the size of the awards (totaling $4.3 billion), the presentation of a novel question of constitutional law (retroactivity), and the potential effect on U.S. diplomacy and foreign relations. We believe these factors present the "extraordinary circumstances" needed for review under Rule 60(b)(6).[8]

This issue also comes before the court on direct appeal from the default judgments. As previously mentioned, we may consider nonjurisdictional questions

8. The circumstances of this case also distinguish it from *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 108 S. Ct. 1645, 100 L. Ed. 2d 62 (1988) in which the Supreme Court declined to hear a challenge to a state court's award of punitive damages that the appellant had not raised in the state court. Here, although Sudan did not object to punitive damages before the entry of final judgment, it raised the matter in its post-trial motions for vacatur. Unlike in *Crenshaw*, the district court considered these untimely objections and considered their merits before denying vacatur. For this reason, we have a "properly developed record on appeal" and "a reasoned opinion on the merits" with which to evaluate this pure question of law. *Id.* at 79-80. Also unlike *Crenshaw*, this case does not involve considerations of "comity to the States" as it arises under federal law, *id.* at 79, and any concern about relations between nations cuts in favor of, rather than against, exercising discretionary review.

not raised by the parties on direct appeal in "exceptional circumstances." *Acree*, 370 F.3d at 58. Our discretion is properly exercised over pure questions of law — such as the retroactivity of punitive damages — that need no further factual development. *Roosevelt*, 958 F.2d at 419 & n. 5. Direct review of forfeited arguments is also warranted for questions that bear upon sensitive matters of international relations. *Acree*, 370 F.3d at 58 (finding exceptional circumstances from a "nearly-billion dollar default judgment against a foreign government"). Furthermore, because most cases invoking the FSIA exception for terrorism are brought in this district, our decision on retroactivity will provide useful guidance to the district court. *Compare Owens V*, 174 F. Supp. 3d at 291 (doubting whether punitive damages apply retroactively but declining to vacate award) *with Flanagan v. Islamic Republic of Iran*, 190 F. Supp. 3d 138, 182 (D.D.C. 2016) (vacating punitive damages despite the defendant's default) *and Kumar v. Republic of Sudan*, No. 2:10-cv-171, at 39 n.17 (E.D. Va. Oct. 25, 2016) (approving retroactive assessment of punitive damages); *see also Leatherman*, 532 U.S. at 436 (noting that "[i]ndependent review [of punitive damages] is . . . necessary if appellate courts are to maintain control of, and to clarify, the legal principles"). Given the size of the awards, the strength of Sudan's contentions, and the likelihood of this question recurring, we believe reviewing the award of punitive damages both promotes "the interests of justice" and "advance[s] efficient judicial administration." *City of Newport*, 453 U.S. at 257. We therefore exercise our discretion to consider Sudan's belated objections.

B. Retroactivity of Punitive Damages Under § 1605A(c)

In challenging the punitive damage awards, Sudan raises the "presumption against retroactive legislation" explicated in *Landgraf v. USI Film Products*, 511 U.S. 244, 265, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994). Courts "have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent." *Id.* at 270. This presumption avoids "the unfairness of imposing new burdens on persons after the fact," absent a clear signal of congressional intent to do so. *Id.* The Court in *Landgraf* noted the retroactive authorization of punitive damages, in particular, "would raise a serious constitutional question." *Id.* at 281.

An analysis of retroactivity entails two steps. First, the court must determine "whether Congress has expressly prescribed the statute's proper reach." *Id.* at 280. If the Congress has clearly spoken, then "there is no need to resort to judicial default rules," and the court must apply the statute as written. *Id.* When "the statute contains no such express command," the court must then evaluate whether the legislation "operate[s] retroactively," as it does if it "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* If the statute operates retroactively but lacks a clear statement of congressional intent to give it retroactive effect, then the *Landgraf* presumption controls and the court will not apply the statute to pre-enactment conduct. Sudan argues both that the new FSIA terrorism exception does not contain a clear statement of retroactive

effect and that it operates retroactively.

1. Section 1605A operates retroactively

As for the latter point, it is obvious that the imposition of punitive damages under the new federal cause of action in § 1605A(c) operates retroactively because it increases Sudan's liability for past conduct. Under § 1605(a)(7), the predecessor to the current terrorism exception, and the pass-through approach recognized in *Cicippio-Puleo*, § 1606 expressly barred courts from awarding punitive damages against a foreign sovereign. The 2008 NDAA plainly applies the new cause of action in § 1605A(c) to the pre-enactment conduct of a foreign sovereign. Further, recall that, pursuant to NDAA § 1083(c), a plaintiff may convert a pending, prior action under § 1605(a)(7) into a new action under § 1605A(c) or file a new suit arising from the same act or incident as an action "related" to an original suit timely filed under § 1605(a)(7). In both cases, the new actions under § 1605A(c) necessarily are based upon the sovereign defendant's conduct before enactment of § 1605A.

The plaintiffs dispute this, relying upon *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004), in which the Supreme Court held the jurisdictional provisions of the FSIA apply to conduct occurring prior to its enactment notwithstanding the absence of a clear statement to that effect in the statute. *Id.* at 692-96, 700. That jurisdiction under the FSIA applies retroactively, however, has no bearing upon the question whether the authorization of punitive damages

does as well.

Unlike the grant of jurisdiction held retroactive in *Altmann*, the authorization of punitive damages "adheres to the cause of action" under § 1605A(c), making it "essentially substantive" and thereby triggering retroactive operation. *Id.* at 695 n.15; *cf. Landgraf*, 511 U.S. at 274 ("Application of a new jurisdictional rule usually takes away no substantive right," causing it not to operate retroactively) (internal quotation marks omitted). Furthermore, while the original FSIA codified only the preexisting "restrictive theory" of foreign sovereign immunity, leaving the scope of a sovereign's potential liability unchanged, *see Altmann*, 541 U.S. at 694, the new terrorism exception authorizes a quantum of liability — punitive damages — to which foreign sovereigns were previously immune.

Having failed to distinguish the FSIA terrorism exception from the Supreme Court's core concerns in *Landgraf*, the plaintiffs advance a policy argument transplanted from *Altmann*. There the Court explained the "aim of the presumption [against retroactivity] is to avoid unnecessary *post hoc* changes to legal rules on which parties relied in shaping their primary conduct." 541 U.S. at 696. In contrast, the plaintiffs urge "the principal purpose of foreign sovereign immunity . . . reflects current political realities and relationships, and aims to give foreign states and their instrumentalities some *present* 'protection from the inconvenience of suit as a gesture of comity.'" *Id.* (quoting *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479, 123 S. Ct. 1655, 155 L. Ed. 2d 643 (2003)).

Because the Congress was motivated by these "*sui generis*" concerns of comity in initially passing the FSIA, *id.*, the plaintiffs contend the presumption in *Landgraf* should not apply to a subsequent FSIA amendment, even if it appears to operate retroactively.

That argument misses the central point of authorizing punitive damages against a state sponsor of terrorism, *viz.*, to deter terrorism. By its nature, deterrence attempts to influence foreign sovereigns in "shaping their primary conduct." *Id.* And when the law affects a defendant's past actions, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf*, 511 U.S. at 265.

This principle applies equally to state sponsors of terrorism. As the Supreme Court has said, "[e]ven when the conduct in question is morally reprehensible or illegal, a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past." *Id.* at 282 n.35. Therefore, without a clear statement of retroactivity, courts have properly declined to apply statutes authorizing an award of punitive damages, even for outrageous conduct. *See, e.g., Ditullio v. Boehm*, 662 F.3d 1091, 1100 (9th Cir. 2011) (holding that punitive damages under the Trafficking Victims Protection Act are unavailable to punish child sex trafficking that occurred before enactment); *Gross v. Weber*, 186 F.3d 1089, 1091 (8th Cir. 1999) (holding the same for the Violence Against Women Act as applied to pre-enactment sexual abuse). Hence, unlike the grant of jurisdiction in *Altmann*, the

authorization of punitive damages in § 1605A(c) cannot be dismissed as a reflection of "current political realities and relationships" but rather goes to the heart of the concern in *Landgraf* about retroactively penalizing past conduct.

2. Clear statement of retroactive effect

Having concluded that § 1605A(c) operates retroactively, the next question is whether the Congress has made a clear statement authorizing punitive damages for past conduct. We will find that authorization only if the statute is "so clear that it could sustain only one interpretation." *See Lindh v. Murphy*, 521 U.S. 320, 328 n.4, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997). With this in mind, we agree with the district court that the FSIA contains no such statement. *Owens V*, 174 F. Supp. 3d at 289.

As a starting point, we look for a clear statement in § 1605A(c), which provides that a designated state sponsor of terrorism:

> shall be liable . . . for personal injury or death caused by acts described in subsection (a) (1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of

its officials, employees, or agents.

On its face, nothing in the text of § 1605A(c) speaks to whether punitive damages are available under the federal cause of action for pre-enactment conduct. Nor does precedent provide support for retroactivity. Although *Altmann* held the grant of jurisdiction in § 1605(a) applies retroactively (despite lack of a clear statement to that effect), the authorization of punitive damages under the current terrorism exception lies in the cause of action under § 1605A(c), not in the grant of jurisdiction under § 1605A(a).

The plaintiffs contend that § 1083(c) of the 2008 NDAA, when combined with the authorization of punitive damages in § 1605A(c), provides a clear statement of retroactive effect. As we have seen, *supra* part IV, both a converted prior action under § 1083(c)(2) and a related action under § 1083(c)(3) necessarily arise out of conduct that occurred before the enactment of the 2008 NDAA, and both provisions allow a plaintiff to proceed under the federal cause of action in § 1605A(c), which authorizes punitive damages. Accordingly, the plaintiffs contend, both § 1083(c)(2) and (c)(3), when read in conjunction with § 1605A(c), clearly allow a court to award punitive damages under the federal cause of action for pre-enactment conduct.

This argument takes one too many a logical leap. Yes, by allowing a plaintiff to convert an action brought under § 1605(a)(7), § 1083(c)(2) clearly authorizes the federal cause of action to apply retroactively. This, however, does not mean that § 1083(c) authorizes the punitive damages

in § 1605A(c) to apply retroactively as well. *Cf. Roeder v. Islamic Republic of Iran*, 646 F.3d 56, 61-62, 396 U.S. App. D.C. 183 (D.C. Cir. 2011) (finding no clear statement that § 1083(c)(3) abrogated the Algiers Accords simply by allowing plaintiffs to bring actions under § 1605A related to those formerly dismissed by reason of the Accords). Instead, § 1083(c) operates as a conduit for a plaintiff to access the cause of action under § 1605A(c). If punitive damages under § 1605A(c) were not available retroactively to any plaintiff (including those who did not make use of § 1083(c)), then nothing in § 1083(c) would change that. Inversely, if § 1083(c) did not exist, then one plaintiff's inability to convert his pending case or to bring a related action under § 1083(c) would not detract from the retroactive availability of punitive damages for another plaintiff if such relief were clearly authorized by the Congress. At most, Sudan has identified § 1083(c) as a plausible mechanism through which the Congress could have authorized punitive damages for past conduct. But *Landgraf* demands more, and no clear statement emerges from the union of § 1083(c) and § 1605A(c).

There being no clear textual command, the plaintiffs urge that the purpose of § 1083(c) supplies the necessary clear statement of congressional intent. An argument based solely upon the purpose of a statute can hardly supply a "clear statement" of any sort. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988) ("congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result"). Because an expansion of punitive damages would

operate retroactively by "increas[ing] [Sudan's] liability for past conduct," the presumption in *Landgraf* applies and bars an award of punitive damages for the embassy bombings, which occurred before the enactment of the 2008 NDAA. Therefore, we vacate the award of punitive damages to plaintiffs proceeding under the federal cause of action.

C. Retroactivity of Punitive Damages Under State Law

The same principle applies to the awards of punitive damages to plaintiffs proceeding under state law. Sudan makes two arguments against the availability of punitive damages for them. Sudan first contends that § 1605A(c) provides the sole source for seeking punitive damages against a foreign sovereign. Sudan rests this view upon § 1606 of the FSIA, which precludes punitive damages against a sovereign defendant. As we have recognized, *supra* p. 95, § 1606, by its terms, applies only to claims brought under § 1605 and § 1607 of the FSIA. *Owens V*, 174 F. Supp. 3d at 290. Section 1606 therefore has no bearing upon state law claims brought under the jurisdictional grant in § 1605A.

If this were the end of the analysis, however, a puzzling outcome would arise from our holding that punitive damages are not available retroactively to plaintiffs proceeding under the federal cause of action in § 1605A(c). As we have said, in creating a federal cause of action, the Congress sought to end the inconsistencies in the "patchwork" pass-through approach of *Cicippio-Puleo. See Leibovitch*, 697 F.3d at 567. Allowing punitive

damages for pre-enactment conduct under state but not federal law would frustrate this intent: Plaintiffs otherwise eligible for the federal cause of action, for which punitive damages are unavailable, would instead press state law claims for punitive damages, which would effectively perpetuate the inconsistent outcomes based upon differences in state law that the Congress sought to end by passing § 1605A.

As it happens, the retroactive authorization of punitive damages under state law fails for the same reason it does under the federal cause of action: The authorization of § 1605A, read together with § 1606, lacks a clear statement of retroactive effect. Without the *Landgraf* presumption, the enactment of § 1605A would have lifted the restriction on punitive damages in § 1606 from state law claims. If the express authorization of punitive damages under § 1605A(c) lacks a clear statement of retroactive effect, then the implicit, backdoor lifting of the prohibition against punitive damages in § 1606 for state law claims fares no better. *Cf. Landgraf*, 511 U.S. at 259-60 (finding that cross-references between several sections of the Civil Rights Act did not impliedly make a clear statement of retroactive effect). As a result, a plaintiff proceeding under either state or federal law cannot recover punitive damages for conduct occurring prior to the enactment of § 1605A. Accordingly we vacate all the awards of punitive damages.

VII. Vacatur Under Rule 60(b)

Finally, Sudan argues the district court abused its discretion in denying its motions to vacate the default

judgments, invoking three sections of the Rule 60(b): the judgments are void for lack of subject matter jurisdiction per § (b)(4); default was due to "excusable neglect" per § (b)(1); and relief may be justified for "any other reason" per § (b)(6). The first jurisdictional ground is nondiscretionary, *Bell Helicopter*, 734 F.3d at 1179, and has been rejected already in the sections on extrajudicial killing, jurisdictional causation, and the ability of family members of a victim physically injured by the bombings to press a claim under § 1605A.

We review the district court's decision to deny vacatur on the other two grounds for abuse of discretion. *Gonzalez*, 545 U.S. at 535 ("Rule 60(b) proceedings are subject to only limited and deferential appellate review"). In doing so, we recognize "the district judge, who is in the best position to discern and assess all the facts, is vested with a large measure of discretion in deciding whether to grant a Rule 60(b) motion." *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1138, 268 U.S. App. D.C. 308 (D.C. Cir. 1988). Deferential review preserves the "delicate balance between the sanctity of final judgments . . . and the incessant command of a court's conscience that justice be done in light of all the facts." *Good Luck Nursing Home, Inc. v. Harris*, 636 F.2d 572, 577, 204 U.S. App. D.C. 300 (D.C. Cir. 1980) (emphasis and internal quotation marks removed). With respect to Rule 60(b)(1), relief for excusable neglect "is rare" as "such motions allow district courts to correct only limited types of substantive errors," *Hall v. CIA*, 437 F.3d 94, 99, 369 U.S. App. D.C. 346 (D.C. Cir. 2006), and relief for "any other reason" under Rule 60(b)(6) is even more rare, being available

only in "extraordinary circumstances," *Ackermann v. United States*, 340 U.S. 193, 199, 71 S. Ct. 209, 95 L. Ed. 207 (1950). Factual determinations supporting the district court's decision are, of course, reviewed only for clear error. *Gates v. Syrian Arab Republic*, 646 F.3d 1, 4, 396 U.S. App. D.C. 128 (D.C. Cir. 2011).

Sudan, as "the party seeking to invoke Rule 60(b)," bears "the burden of establishing that its prerequisites are satisfied." *Id.* at 5 (internal alterations and quotation marks removed). As we have said before, "no principle of sovereign immunity law upsets the parties' respective burdens under Rule 60(b); nor do oft cited ephemeral principles of fairness" demand a different result for a foreign sovereign than for a private litigant. *Id.* In order to secure vacatur, therefore, Sudan must show the district court, in denying its motion for relief, relied upon an incorrect understanding of the law or a clearly erroneous fact. Sudan has not met this burden.

A. Excusable Neglect Under Rule 60(b)(1)

We begin with Sudan's claim of excusable neglect, which the district court addressed in detail. In evaluating a claim of excusable neglect, a court makes an equitable determination based upon "the danger of prejudice to the [non-moving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 395, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993).

Additionally, a party seeking vacatur must "assert a potentially meritorious defense." *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 447 F.3d 835, 842, 371 U.S. App. D.C. 60 (D.C. Cir. 2006).

In its motion, Sudan submitted a three-page declaration from Maowia Khalid, the Ambassador of Sudan to the United States, explaining its failure to participate in much of the litigation. First, the Ambassador asserted Sudan's ongoing domestic problems, including natural disasters and civil war, rendered it unable to appear. Khalid Decl. ¶ 4. Second, the Ambassador said a "fundamental lack of understanding in Sudan about the litigation process in the United States" accounted its prolonged absence from the litigation. *Id.* ¶ 5. The district court soundly rejected both reasons. On Sudan's domestic troubles, the district court noted that "[s]ome of that turmoil . . . has been of the Sudanese government's own making," but, regardless of blame, Sudan could not excuse at least six years of non-participation without sending a single communication to the court. *Owens V*, 174 F. Supp. 3d at 255. The court further doubted the credibility of Sudan's alleged ignorance of U.S. legal procedure. After all, Sudan had used this excuse to escape an earlier default in the same litigation, and the "fundamental-ignorance card cannot convincingly be played a second time." *Id.* at 256.

Although the district court, in denying Sudan's Rule 60(b) motion, addressed all the elements of "excusable neglect" mentioned in *Pioneer*, on appeal Sudan challenges only the "reason for the delay" and the "length of the delay." The district court's unchallenged finding that "vacatur would pose a real risk of prejudice to the

plaintiffs," *Owens V*, 174 F. Supp. 3d at 257, makes it difficult to imagine Sudan could prevail even if it were to succeed on the two elements it does raise, *Pioneer*, 507 U.S. at 397 (affirming a holding of excusable neglect when the "petitioner does not challenge the findings made below concerning . . . the absence of any danger of prejudice" to him), but we consider its arguments nonetheless.

Preliminarily, Sudan also contends the district court "ignored" the "policy favoring vacatur under Rule 60(b)" as it applies to a foreign sovereign. Sudan then claims error in the district court purportedly blaming Sudan for the circumstances that prompted its default. Finally, Sudan faults the district court's comparison of the instant case to *FG Hemisphere*, in which this court vacated a default judgment against the Democratic Republic of Congo (DRC).

On the first point, Sudan correctly notes that precedent in this Circuit supports a liberal application of Rule 60(b)(1) to default judgments. *See Jackson v. Beech*, 636 F.2d 831, 836, 205 U.S. App. D.C. 84 (D.C. Cir. 1980). This stems from the general policy favoring adjudication on the merits. *Id.; Foman v. Davis*, 371 U.S. 178, 181-82, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). The policy has particular force with respect to a defaulting sovereign because "[i]ntolerant adherence to default judgments against foreign states could adversely affect this nation's relations with other nations and undermine the State Department's continuing efforts to encourage foreign sovereigns generally to resolve disputes within the United States' legal framework." *FG Hemisphere*, 447 F.3d at

838-39 (quoting *Practical Concepts*, 811 F.2d at 1551 n.19). Further, we have noted, "[w]hen a defendant foreign state has appeared and asserts legal defenses, albeit after a default judgment has been entered, it is important . . . , if possible, that the dispute be resolved on the basis of [] all relevant legal arguments." *Practical Concepts*, 811 F.2d at 1552.

For these reasons, the U.S. Government on many occasions has submitted an amicus brief urging vacatur of a default judgment against a foreign sovereign. *See, e.g., id.; FG Hemisphere*, 447 F.3d at 838; *Gregorian v. Izvestia*, 871 F.2d 1515, 1518 (9th Cir. 1989); *Jackson v. People's Republic of China*, 794 F.2d 1490, 1495 (11th Cir. 1986). In this case, however, we think it significant that the Government has not taken a position on Sudan's motion to vacate. Indeed, with only two factually unique exceptions, *see Beaty*, 556 U.S. at 855 and *Roeder*, 646 F.3d at 56, the Government has not weighed in on behalf of a defendant state sponsor of terrorism. *Cf. Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 360, 374 U.S. App. D.C. 205 (D.C. Cir. 2007) (noting that "courts give deference . . . when the Executive reasonably explains that adjudication of a particular civil lawsuit would adversely affect the foreign policy interests of the United States").

Absent an expressed governmental concern with the liability of a foreign sovereign, the general policy favoring vacatur, by itself, cannot control the resolution of Sudan's Rule 60(b) motion. After all, the FSIA expressly authorizes default judgments against absent sovereigns. *See* 28 U.S.C. § 1608(e). If policy considerations alone

made vacatur of judgments against foreign sovereigns under Rule 60(b) near-automatic, then the general policy favoring vacatur would render the specific authorization of default judgments in the FSIA a nullity. A district court would abuse its discretion if it were simply to apply the general policy, as Sudan asks us to do now, without considering the specific facts at hand. *See FG Hemisphere*, 447 F.3d at 838-42 (noting the general policy opposing vacatur but considering the *Pioneer* factors). Considering those facts, we see why the district court said that "shouldering [Sudan's] burden is a Herculean task." *Owens V*, 174 F. Supp. 3d at 254. Indeed, if we were to vacate the default judgment in this case, then we could not expect any sovereign to participate in litigation rather than wait for a default judgment, move to vacate it under Rule 60(b), appeal if necessary, and then reenter the litigation to contest the merits, having long delayed its day of reckoning. *Cf. H. F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, 432 F.2d 689, 691, 139 U.S. App. D.C. 256 (D.C. Cir. 1970) (approving of default judgments "when the adversary process has been halted because of an essentially unresponsive party" in which case "the diligent party must be protected lest he be faced with interminable delay and continued uncertainty as to his rights").

Sudan's own actions place it well outside the general policy favoring vacatur. In the cases it cites, relief was justified because the defendant had no notice of the default and promptly responded once made aware of the judgment. *See Bridoux v. E. Air Lines*, 214 F.2d 207, 209, 93 U.S. App. D.C. 369 (D.C. Cir. 1954); *FG Hemisphere*, 447 F.3d at 839. In contrast, Sudan knew of the *Owens* action, twice

obtained sophisticated legal counsel in 2004, and fully participated in the litigation before absenting itself in 2005. In another case involving a foreign sovereign, there was no abuse of discretion in denying vacatur because the defendant had "received actual or constructive notice of the filing of the action and failed to answer" or to provide a good-faith reason for its unresponsiveness. *See Meadows v. Dominican Republic*, 817 F.2d 517, 521 (9th Cir. 1987). Moreover, unlike the foreign sovereigns in some cases vacating default judgments, *see, e.g., Gregorian*, 871 F.2d at 1525; *Jackson*, 794 F.2d at 1495-96, Sudan cannot claim to have defaulted in the reasonable belief that it enjoyed sovereign immunity. Several decisions of the district court and this court served on Sudan suggested the evidence proffered by the *Owens* plaintiffs could meet or met their burden of production to establish the jurisdiction of the court.[9]

Even when served with the district court's 2011 opinion on liability, which definitively established Sudan's lack of immunity, Sudan let three years pass before filing its motion to vacate. For these reasons, Sudan's lack of diligence in pursuing its Rule 60(b) motion weighs heavily against vacatur. *Cf. Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1276, 1278 (7th Cir. 1990) (affirming denial of Rule 60(b) motion

9. *See Owens IV*, 826 F. Supp. 2d at 150 ("Plaintiffs have satisfied their burden under 28 U.S.C. § 1608(e) to show . . . Sudan . . . provided material support and resources . . . for acts of terrorism"); *Owens I*, 374 F. Supp. 2d at 17-18 (noting the plaintiffs "will have no trouble in making [the] allegation[s]" necessary to "survive a motion to dismiss") (quoting *Price*, 294 F.3d at 93); *Owens II*, 412 F. Supp. 2d at 108-09, 115 (holding the plaintiffs' claims, accepted as true, satisfied the pleading standards of the FSIA).

made by a state-owned insurance company for failure to "demonstrate the diligence necessary" to vacate a default judgment).

Furthermore, this is not the first time Sudan has sought to vacate its default or default judgment. In May 2003 the district court entered a default against Sudan for failure to appear. Ten months later, Sudan secured counsel and moved for vacatur under Rule 55(c), which the court granted based upon the very "presumption against an entry of default judgment against a foreign state" that Sudan claims the court ignored in 2016. *Owens I*, 374 F. Supp. 2d at 9, 10 n.5. But the presumption against a default judgment is just that — a presumption. The rationale for leniency is necessarily weaker when a defendant seeks to excuse its second default. *See Flanagan*, 190 F. Supp. 3d at 158 (noting, as well, Sudan's prior default in *Rux v. Republic of Sudan*, No. 2:04-cv-0428, 2005 U.S. Dist. LEXIS 36575, 2005 WL 2086202, at *2-3, *12-13 (E.D. Va. Aug. 26, 2005)). A double-defaulting sovereign also loses the ability to assert certain "reasons for the delay," including ignorance of the law and a reasonable belief in its own immunity. It is still more difficult to show "good faith" by a defendant that has walked away a second time without so much as a fare thee well. Hence, the general policy favoring relief from default judgments is not enough to overcome Sudan's double default in this case.[10]

10. In a supplemental filing, Sudan points to our recent decision in *Gilmore*, in which we held the district court did not abuse its discretion by vacating two defaults entered against the Palestinian Authority in light of the defendant's willingness to participate in subsequent discovery and litigation. 843 F.3d at 965-66. In doing so, Sudan notes, we referenced "the federal policy favoring trial over default judgment." *Id.* at 965 (quoting *Whelan v. Abell*, 48 F.3d 1247,

Finally, it bears mentioning that the district court and now this court have afforded Sudan, as a foreign sovereign, substantial protection against the harsh consequences of a default judgment. Notwithstanding Sudan's failure to participate, the district court assessed whether the plaintiffs' evidence was satisfactory, once to prevail on the merits and twice to establish jurisdiction. *See Owens IV*, 826 F. Supp. 2d at 139-46 (applying 28 U.S.C. § 1608(e)); *Owens V*, 174 F. Supp. 3d at 275-80. Furthermore, the district court (and now this court de novo) reviewed Sudan's jurisdictional arguments pursuant to its Rule 60(b)(4) motion. We have also exercised our discretion to consider several of Sudan's nonjurisdictional objections, even though Sudan forfeited these arguments by defaulting. We even granted Sudan relief from punitive damages despite its failure timely to object to these awards in the district court. Therefore, Sudan cannot complain "the dispute [has not been] resolved on the basis of . . . all relevant legal arguments." *See Practical Concepts*, 811 F.2d at 1552.

Beyond relying upon the general policy in favor of vacatur, Sudan challenges the reasoning behind the district court's decision. In particular, Sudan faults the district court for holding it responsible for its domestic

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1258, 310 U.S. App. D.C. 396 (D.C. Cir. 1995)). But *Gilmore* dealt with vacatur of a default under Rule 55(c); the less-demanding "good cause" standard for vacating a default under that rule "frees a court from the restraints of Rule 60(b)" and "entrusts the determination to the discretion of the court." *Id.* at 965 (quoting 10A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE § 2694 (3d ed. 2016)).

troubles, contending a court may not consider "the question of blame" in analyzing excusable neglect. Sudan is twice wrong. Not only have courts consistently recognized that a defendant's "culpable conduct" may justify denying it relief under Rule 60(b)(1), *see Mfrs.' Indus. Relations Ass'n v. E. Akron Casting Co.*, 58 F.3d 204, 206 (6th Cir. 1995) (inquiring "[w]hether culpable conduct of the defendant led to the default"); *Gregorian*, 871 F.2d at 1523; *Info. Sys. & Networks Corp. v. United States*, 994 F.2d 792, 795 (Fed. Cir. 1993), but the district court expressly based its decision upon Sudan's unresponsiveness, not its blameworthiness; "setting aside the question of blame," it said:

> Domestic turmoil would surely have justified requests by Sudan for extensions of time in which to respond to the plaintiffs' filings. It would have also probably led the Court to forgive late filings. And perhaps it would have even justified a blanket stay of these cases. But Sudan was not merely a haphazard, inconsistent, or sluggish litigant during the years in question — it was a complete and utter nonlitigant. Sudan never sought additional time or to pause any of these cases in light of troubles at home. Sudan never even advised the Court of those troubles at the time they were allegedly preventing Sudan's participation — not through formal filings, and not through any letters or other mode of communication with the Court. The idea that the relevant Sudanese officials could not find the opportunity over a period of

> years to send so much as a single letter or email communicating Sudan's desire but inability to participate in these cases is, quite literally, incredible.

Owens V, 174 F. Supp. 3d at 256. Therefore, we find no abuse of discretion in the district court's brief reference to the Sudan's possible responsibility for its domestic turmoil.

Sudan also objects to the district court's discussion of its unresponsiveness, arguing the court demonstrated "a lack of appreciation of the operational realities of a least developed nation in turmoil." But the one conclusory paragraph in the three-page declaration of its Ambassador to the United States that Sudan cites as evidence for this proposition does not show it was incapable of maintaining any communication with the district court. Indeed, Sudan participated in the litigation during its civil war and while negotiating a peace treaty bringing that war to a close. *See UNMIS Background*, UNITED NATIONS MISSION IN THE SUDAN, http://www.un.org/en/peacekeeping/missions/past/unmis/background.shtml (last visited July 19, 2017). This shows Sudan could participate in legal proceedings despite difficult domestic circumstances. Without record evidence supporting Sudan's complete inability to participate, the district court did not abuse its discretion in holding Sudan failed to carry its burden of proving excusable neglect.

As a final argument under Rule 60(b)(1), Sudan faults the district court's comparison of this case to *FG Hemisphere*. In *FG Hemisphere* we vacated a default judgment against the Democratic Republic of Congo

(DRC) rendered under the FSIA exception for commercial activity, § 1605(a)(2). 447 F.3d at 843. Sudan's reliance upon *FG Hemisphere* is unsurprising as there we noted the DRC "was plainly hampered by its devastating civil war" which justified, in part, its delayed response. *Id.* at 141. But the outcome in *FG Hemisphere* did not turn solely, or even primarily, upon the domestic turmoil in the DRC. Problems with notice and service, not internal strife, principally excused the DRC's default. In that case, the defendant sovereign was first notified that its diplomatic properties were in jeopardy when it was served with a motion to execute a default judgment a mere six days before a response was due. *Id.* at 839-40. The plaintiffs' failure to translate the motion from English into French, the official language of the DRC, "virtually guaranteed the DRC's inability to file a timely response." *Id.* That the DRC was then engaged in a "devastating civil war" merely diminished its "capacity . . . for [the] swift and efficient handling of . . . English-language materials"; it did not ultimately prevent the DRC from responding to the motion, which it did shortly after receipt. *Id.* at 840-41.

Unlike the DRC in *FG Hemisphere*, Sudan had notice of the litigation from the time it was first sued. The district court's 2011 opinion on liability was translated into Arabic, Sudan's national language, and delivered through diplomatic channels. Sudan cannot, and does not, complain about defects in notice or service of process. *See Owens V*, 174 F. Supp. 3d at 255 (noting that "Sudan's council conceded, 'there's no dispute about service being proper'").

Nor can Sudan claim to be surprised by the suits, as was the defendant in *FG Hemisphere*. Sudan actively

participated in the litigation from February 2004 until January 2005. Even after disengaging from the case, Sudan contacted its counsel for a status update in September 2008. If Sudan indeed needed to divert "all [its] meager legal and diplomatic personnel" to the "cession of south Sudan," as its Ambassador now suggests, then it could have communicated this affirmative decision to the court, along with a request to stay the proceedings. In light of this history, it was not unreasonable for the district court to demand something more than a conclusory assertion without virtually any record evidence of Sudan's inability to participate in the litigation.

Also, as the district court noted, the length of delay in *FG Hemisphere* pales in comparison to Sudan's absence in this case. The DRC initiated efforts to secure counsel within one day of receiving notice of the motion to execute. 447 F.3d at 838. Within two months, its counsel filed motions to vacate the default judgment and to stay its execution. *Id.* In contrast, Sudan filed its motions to vacate the judgments 17 months after service of the complaint in *Opati*, the last of the consolidated cases, 40 months after the district court's 2011 opinion on liability, and 53 months after the evidentiary hearing that Sudan did not attend. Indeed, Sudan ceased regular communication with counsel in the *Owens* action nearly eight years before filing its present motions. *Cf. Smith v. District of Columbia*, 430 F.3d 450, 456 n.5, 368 U.S. App. D.C. 361 (D.C. Cir. 2005) (noting that delay of "well over a year" militated against excusable neglect). By defaulting, then appearing, then defaulting again, Sudan delayed this case for years beyond its likely end had it simply failed to appear at all. These

affirmative actions extended the delay and make Sudan's second default even less excusable than its first. We therefore find no error in the district court's unfavorable comparison of Sudan's default to that of the DRC in *FG Hemisphere*. In sum, none of Sudan's arguments shows the district court abused its discretion in failing to vacate the default judgments for "excusable neglect."

B. Extraordinary Circumstances Under Rule 60(b)(6)

Sudan also challenges the district court's denial of its motion under Rule 60(b)(6), claiming its failure to appear was justified by "extraordinary circumstances."[11] Because

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11. In addition, Sudan moves to vacate the judgments in favor of foreign family members and the awards of punitive damages under Rule 60(b)(6), claiming the district court's errors of law on these questions also provide "extraordinary circumstances" supporting vacatur. We have addressed these nonjurisdictional matters separately in the preceding sections. Although a "dispute over the proper interpretation of a statute," by itself, does not likely justify relief under Rule 60(b)(6), *Carter v. Watkins*, 995 F.2d 305, 301 U.S. App. D.C. 405 (D.C. Cir. 1993) (per curiam) (table); *cf. Ctr. for Nuclear Responsibility, Inc. v. U.S. Nuclear Regulatory Comm'n*, 781 F.2d 935, 939-40, 251 U.S. App. D.C. 82 (D.C. Cir. 1986) (discussing a Circuit split on the matter and expressing doubt on whether Rule 60(b) should be used to correct legal errors), we have reviewed and rejected each of Sudan's contentions on direct appeal from the default judgments due to the size of the awards in question, underlying constitutional concerns about retroactive liability for punitive damages, and the likelihood of the purely legal issues here recurring in our district court. Hence, there is no need to evaluate whether these claims present "extraordinary circumstances" under Rule 60(b)(6). In contrast to these purely legal arguments, which require no further factual development, *see Roosevelt*, 958 F.2d

Rule 60(b)(1) contains a one-year filing deadline for claims of "excusable neglect," which Sudan missed with respect to the *Mwila* and *Khaliq* judgments, Sudan's Rule 60(b)(6) motions are the only way it may obtain vacatur of those default judgments.

Perhaps recognizing this, Sudan rephrased its earlier arguments asserting "excusable neglect" as requests for relief from those default judgments under Rule 60(b)(6). As with the other cases, the declaration of Ambassador Khalid figures prominently in Sudan's *Mwila* and *Khaliq* motions. This gets Sudan nowhere. In order to receive relief under Rule 60(b)(6), a party must show "extraordinary circumstances" justifying vacatur. *Gonzalez*, 545 U.S. at 534. As the Supreme Court has explained, the grounds for vacatur under Rule 60(b)(1) and(b)(6) are "mutually exclusive." *Pioneer*, 507 U.S. at 393. Therefore, "a party who failed to take timely action due to 'excusable neglect' may not seek relief more than a year after the judgment by resorting to subsection (6)." *Id.*

The district court acknowledged this distinction and denied Sudan's motion under Rule 60(b)(6) as merely a

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at 419 & n.5, we see far less reason to give Sudan an opportunity to relitigate the factual record by vacating the default judgments, especially considering its failure to participate in the district court and our independent review of the evidence showing material support and jurisdictional causation. *See Practical Concepts*, 811 F.2d at 1552 ("When a defendant foreign state has appeared and asserts *legal* defenses, albeit after a default judgment has been entered, it is important . . . that the dispute be resolved on the basis of . . . all relevant *legal* arguments") (emphases added).

"rehash of Sudan's Rule 60(b)(1) argument for excusable neglect." *Owens V*, 174 F. Supp. 3d at 258. Instead of grappling with the district court's actual decision, Sudan takes issue with the court's reference to *Ungar v. Palestine Liberation Organization*, 599 F.3d 79 (1st Cir. 2010), in which the First Circuit held that a sovereign's willful default did not *per se* preclude vacatur. *Id.* at 86-87. The district court was understandably puzzled by Sudan's fleeting reference to *Ungar* in light of its assertions that its default was involuntary. If Sudan's default was intentional, as in *Ungar*, the court noted, then relief under Rule 60(b)(1) would be unavailable. *Owens V*, 174 F. Supp. 3d at 258. But these musings were not the basis of the district court's decision and therefore cannot be an abuse of discretion.

Undeterred, Sudan now argues *Ungar* demands vacatur when there would be "political ramifications[] and [a] potential effect on international relations" from a default judgment, as Sudan claims there would be in this case. *Ungar*, 599 F.3d at 86-87. In its view, these political considerations supply the "extraordinary circumstances" needed to vacate a default judgment under Rule 60(b)(6). Sudan failed to raise this argument before the district court, and it is therefore forfeit on appeal. Accordingly, we affirm the district court's denial of vacatur under Rule 60(b).

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To conclude, we (1) affirm the district court's findings of jurisdiction with respect to all plaintiffs and all claims; (2) affirm the district court's denial of vacatur; (3) vacate

all awards of punitive damages; and (4) certify a question of state law — whether a plaintiff must be present at the scene of a terrorist bombing in order to recover for IIED — to the District of Columbia Court of Appeals.

So ordered.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED MARCH 23, 2016

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 01-2244 (JDB)

JAMES OWENS, *et al.*,

Plaintiffs,

v.

REPUBLIC OF SUDAN, *et al.*,

Defendants.

Civil Action No. 08-1349 (JDB)

WINFRED WAIRIMU WAMAI, *et al.*,

Plaintiffs,

v.

REPUBLIC OF SUDAN, *et al.*,

Defendants.

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Civil Action No. 08-1361 (JDB)

MILLY MIKALI AMDUSO, *et al.*,

Plaintiffs,

v.

REPUBLIC OF SUDAN, *et al.*,

Defendants.

Civil Action No. 08-1377 (JDB)

JUDITH ABASI MWILA, *et al.*,

Plaintiffs,

v.

ISLAMIC REPUBLIC OF IRAN, *et al.*,

Defendants.

Civil Action No. 08-1380 (JDB)

MARY ONSONGO, *et al.*,

Plaintiffs,

v.

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REPUBLIC OF SUDAN, *et al.*,

Defendants.

Civil Action No. 10-356 (JDB)

RIZWAN KHALIQ, *et al.*,

Plaintiffs,

v.

REPUBLIC OF SUDAN, *et al.*,

Defendants.

Civil Action No. 12-1224 (JDB)

MONICAH OKOBA OPATI, *et al.*,

Plaintiffs,

v.

REPUBLIC OF SUDAN, *et al.*,

Defendants.

March 23, 2016, Decided

Appendix B

MEMORANDUM OPINION

On August 7, 1998, the United States embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, were devastated by the nearly simultaneous detonations of a pair of truck bombs. More than 200 people were killed, including 12 Americans, and thousands were injured. There is no doubt the attacks were the work of al Qaeda, a grisly precursor to the bombing of the U.S.S. Cole and the atrocities of September 11, 2001.

Starting in 2001, various groups of plaintiffs—comprising individuals directly injured in the two embassy bombings, estates of individuals who were killed, and family members of the wounded and dead—filed lawsuits against the Republic of Sudan and the Islamic Republic of Iran, charging those nations with responsibility for the attacks. With respect to Sudan, the only defendant relevant for present purposes, the essence of the plaintiffs' allegations was that Sudan had given Osama bin Laden and al Qaeda safe haven throughout the mid-1990s, as well as other forms of assistance, and that this support had allowed al Qaeda to grow, train, plan, and eventually carry out the 1998 embassy attacks. In the plaintiffs' view, this support of al Qaeda was sufficient both to divest Sudan of the immunity generally granted to foreign states by the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 *et seq.*, and also to render it liable for the plaintiffs' physical and emotional injuries stemming from the attacks.

Sudan hired U.S. counsel and defended against the first of these lawsuits in its early stages. But even as this Court denied its repeated requests that the suit be dismissed, Sudan stopped paying and communicating with its lawyers, and eventually ignored the case entirely. Sudan never participated at all in the six other cases at issue here. Because the FSIA requires plaintiffs to substantiate their claims with evidence even when a foreign sovereign defaults, in October 2010 the Court held a three-day hearing at which the plaintiffs presented a range of evidence about the bombings and Sudan's relationship with al Qaeda. Roughly a year later, the Court issued an opinion in which it concluded that Sudan had indeed provided material support to al Qaeda, was not entitled to sovereign immunity, and was liable for the plaintiffs' injuries. The Court then referred the hundreds of claims to special masters, who heard evidence relevant to individual plaintiffs' damages, reported their findings to the Court, and recommended awards. Between March and October of 2014, the Court entered final judgments against Sudan in all seven cases, awarding a total of over $10 billion in compensatory and punitive damages.

One month after the entry of the first of these final judgments, Sudan reappeared with new counsel and began to participate in the litigation. Sudan first filed notices of appeal in all seven cases. Then, in April 2015, it filed with this Court motions to vacate all of the judgments pursuant to Federal Rule of Civil Procedure 60(b). The Court of Appeals ordered the appeals held in abeyance pending this Court's resolution of the motions to vacate, which are now ripe for decision.

The Court will deny Sudan's motions in all respects. Sudan's years of total nonparticipation in this litigation, despite full awareness of its existence, cannot be justified as "excusable neglect." Nor did this Court lack subject-matter jurisdiction for any of the reasons Sudan offers: these bombings were acts of "extrajudicial killing" within the meaning of the jurisdictional provision; there was sufficient evidence of the necessary jurisdictional facts; and the jurisdictional provision extends to claims of emotional harms by immediate family members. Sudan's nonjurisdictional arguments also fail: some are without merit, and for those with some heft, Sudan fails to explain what would justify relief from a final judgment.

Perhaps Sudan could have prevailed in these cases, fully or partially, if it had defended in a timely fashion. But, as a result of either deliberate choice or inexcusable recklessness, it did not do so. Either way, Sudan has no one to blame for the consequences but itself.

BACKGROUND

Statutory Background

Because many of the issues Sudan has raised in its vacatur motions concern the proper interpretation of the Foreign Sovereign Immunities Act (FSIA), and because Congress amended the FSIA significantly during the long course of this litigation, the Court begins with a brief overview of the Act and its history.

Appendix B

Enacted in 1976, "the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439, 109 S. Ct. 683, 102 L. Ed. 2d 818 (1989). The Act provides that federal district courts shall have jurisdiction over civil claims against foreign states "with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of [Title 28] or under any applicable international agreement." 28 U.S.C. § 1330(a). Subject-matter jurisdiction is thus intertwined with immunity: insofar as a foreign sovereign defendant is entitled to immunity, a federal court lacks subject-matter jurisdiction to hear claims against it. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493, 103 S. Ct. 1962, 76 L. Ed. 2d 81 (1983). And § 1604 provides that foreign states are generally entitled to immunity, subject to specific statutory exceptions, most notably those contained in § 1605. 28 U.S.C. §§ 1604-1605.

As originally enacted, § 1605's exceptions generally codified the "restrictive" theory of foreign sovereign immunity, under which "immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts." *Verlinden*, 461 U.S. at 487-88. None of the original immunity exceptions overtly had anything to do with terrorism or human rights abuses. In 1996, however, Congress enacted § 1605(a)(7), commonly referred to as the "terrorism exception" to foreign sovereign immunity. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241-43 ("Jurisdiction for Lawsuits Against

Terrorist States"). Subject to certain exceptions, that provision removed immunity in cases

> in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

28 U.S.C. § 1605(a)(7) (2006). Only foreign states designated as state sponsors of terrorism under certain federal statutes could be sued under this provision. *Id.* § 1605(a)(7)(A). And a suit could not proceed if "neither the claimant nor the victim was a national of the United States . . . when the act upon which the claim [was] based occurred." *Id.* § 1605(a)(7)(B)(ii).

Like the other provisions in § 1605, subsection (a)(7) eliminated immunity and thereby created federal jurisdiction for a certain set of claims, but it did not provide plaintiffs with a federal cause of action. *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1032, 359 U.S. App. D.C. 299 (D.C. Cir. 2004); *see also Republic of Austria v. Altmann*, 541 U.S. 677, 695 n.15, 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004) ("The [FSIA] does not create or modify any causes of action . . . ."). Shortly after the enactment of § 1605(a)(7), however, in what is frequently

called the "Flatow Amendment," Congress did create a related federal cause of action. The Flatow Amendment provided that

> an 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 section 1605(a)(7) of title 28.

Pub. L. No. 104-208, § 589, 110 Stat. 3009, 3009-172 (1996). Although several district courts initially held that the Flatow Amendment created a cause of action against foreign states, in 2004 the D.C. Circuit clarified that the statute "only provides a private right of action against officials, employees, and agents of a foreign state, not against the foreign state itself." *Cicippio-Puleo*, 353 F.3d at 1033. After *Cicippio-Puleo*, plaintiffs suing foreign states under § 1605(a)(7), like those suing under the FSIA's other immunity exceptions, generally had to rely on state law for causes of action. *See, e.g., Holland v. Islamic Republic of Iran*, 496 F. Supp. 2d 1, 23-24 (D.D.C. 2005).

In the National Defense Authorization Act (NDAA) of 2008, Congress significantly amended the terrorism-related provisions of the FSIA. Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338-44. Section 1605(a)(7) was struck, and

an entirely new section, § 1605A, was enacted. Section 1605A, entitled "Terrorism exception to the jurisdictional immunity of a foreign state," contains several provisions relevant here. Subsection (a) contains an immunity exception that closely tracks the repealed § 1605(a)(7). Subsection (b), in conjunction with § 1083(c) of the 2008 NDAA, establishes a somewhat convoluted statute of limitations. And subsection (c) supersedes *Cicippio-Puleo* by creating a federal cause of action for certain plaintiffs against foreign states (and their agents) that engage in, or provide material support for, the four predicate acts for which immunity is not provided (torture, extrajudicial killing, hostage taking, and aircraft sabotage). The Court will examine these provisions in greater detail as they become relevant to Sudan's arguments.

Procedural Background

James Owens, a U.S. citizen injured in the Dar es Salaam attack, filed the first of the seven cases at issue here on October 26, 2001. Compl. [*Owens* ECF No. 1]. Owens was eventually joined by several dozen co-plaintiffs, some of whom had been directly injured or killed in the embassy bombings, and some of whom were family members of those directly harmed. They brought suit against Sudan and Iran (as well as Sudan's Ministry of the Interior and Iran's Ministry of Information and Security), whom they alleged had provided support to the terrorists who carried out the attacks. Am. Compl. [*Owens* ECF No. 4]. The plaintiffs sought to recover for the physical injuries (or death) inflicted on those present during the attacks and also for the emotional injuries suffered by both those direct victims and their relatives.

Initially, neither Sudan nor Iran appeared in *Owens*, and in May 2003 the Court entered defaults against them. Order of May 8, 2003 [*Owens* ECF No. 11]. In February 2004, however, Sudan retained U.S. counsel and began to participate in the litigation. Notice of Appearance [*Owens* ECF No. 43]. Sudan quickly moved to vacate the default and to dismiss the case, raising a host of arguments, most notably that it was immune under the Foreign Sovereign Immunities Act. Mot. to Dismiss [*Owens* ECF No. 49]. In March 2005 the Court granted in part and denied in part Sudan's motion. *Owens v. Republic of Sudan*, 374 F. Supp. 2d 1, 2005 U.S. Dist. LEXIS 4912 (D.D.C. 2005) ("*Owens I*"). Although the Court rejected most of Sudan's arguments, it concluded that the plaintiffs' existing allegations were insufficient to show that the immunity exception in § 1605(a)(7) applied to Sudan. *Id.* at 14-15, 17-18. But the Court felt that the plaintiffs could overcome these pleading failures and therefore gave them leave to file an amended complaint. *Id.*

The plaintiffs did so, Sudan again moved to dismiss, and the Court denied its motion. *Owens v. Republic of Sudan*, 412 F. Supp. 2d 99, 2006 U.S. Dist. LEXIS 2547 (D.D.C. 2006) ("*Owens II*"). The applicability of § 1605(a)(7) was again the headline issue. Although Sudan did not dispute that the embassy bombings were acts of "extrajudicial killing," it argued that the plaintiffs' allegations remained insufficient to show that Sudan had provided material support to al Qaeda or that there was a legally cognizable causal link between the alleged material support and the plaintiffs' injuries. *See id.* at 106 & n.11. The Court rejected these arguments, holding that

the plaintiffs' amended complaint sufficiently alleged the provision of material support in various forms by Sudanese government officials acting in their official capacities, *id.* at 106-09, and that those allegations, if true, could justify the conclusion that Sudan's support caused the bombings, *id.* at 109-15.

During these two rounds of motion-to-dismiss proceedings, relations between Sudan and its U.S. counsel deteriorated. In January 2005 Sudan's counsel informed the Court that Sudan had "made no payment for any of the legal services provided to date," and that there had been a "lack of effective communication from the client" on legal issues. Mot. to Withdraw [*Owens* ECF No. 100] at 2. Counsel's difficulties communicating with Sudanese officials persisted, and by late 2007 it appears that Sudan had stopped responding to counsel's communications entirely. Mot. to Withdraw [*Owens* ECF No. 129] at 4. Counsel apparently received an inquiry about the case from a Sudanese official on September 1, 2008, but there were no accompanying instructions and no follow-up. Status Report [*Owens* ECF No. 144] at 3.

Despite the communication difficulties and eventual breakdown, Sudan's counsel continued to defend. After the January 2006 denial of its second motion to dismiss, Sudan took an interlocutory appeal to the D.C. Circuit, which affirmed this Court's decision in July 2008. *Owens v. Republic of Sudan*, 531 F.3d 884, 382 U.S. App. D.C. 155, 2008 U.S. App. LEXIS 14716 (D.C. Cir. 2008) ("*Owens III*"). As relevant here, Sudan again argued that the plaintiffs had "failed to plead sufficient facts to 'reasonably

support a finding' that Sudan's material support of al Qaeda in the early 1990s caused the embassy bombings in Kenya and Tanzania in 1998." *Id.* at 893-94. The D.C. Circuit rejected this argument:

> Although Plaintiffs' allegations are somewhat imprecise as to the temporal proximity of Sudan's actions to and their causal connection with the terrorist act and do not chart a direct and unbroken factual line between Sudan's actions and the terrorist act, this imprecision is not fatal for purposes of jurisdictional causation so long as the allegations, and the reasonable inferences drawn therefrom, demonstrate a reasonable connection between the foreign state's actions and the terrorist act.

Id. at 895 (internal quotation marks omitted). The court concluded that the allegations and reasonable inferences drawn therefrom did indeed demonstrate such a connection. *Id.*

Within roughly a month of the D.C. Circuit's decision, four groups of plaintiffs filed four new lawsuits—*Wamai*, *Amduso*, *Mwila*, and *Onsongo*—against Iran and Sudan for their alleged roles in the embassy bombings. Sudan did not appear to defend against these actions. And in January 2009 the Court granted Sudan's counsel's request to withdraw in *Owens*. Order of January 26, 2009 [*Owens* ECF No. 148]. From that point until April 2014, Sudan did not participate in any of these cases or communicate with the Court in any way.

Appendix B

A new default against Sudan was entered on March 25, 2010. Entry of Default [*Owens* ECF No. 173]. The FSIA forbids the entry of a default *judgment*, however, "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e). Accordingly, in October 2010 the Court held a three-day evidentiary hearing in Sudan's absence. (By this time, a sixth case, *Khaliq*, had joined the group.) The plaintiffs presented a wide range of evidence—including live testimony (of both lay and expert witnesses), videotaped testimony, transcripts of testimony from other cases, affidavits, and U.S. government reports—concerning the embassy attacks and Sudan's relationship with al Qaeda.

In November 2011 the Court issued an opinion that presented its findings of fact and conclusions of law. *Owens v. Republic of Sudan*, 826 F. Supp. 2d 128, 2011 U.S. Dist. LEXIS 135961 (D.D.C. 2011) ("*Owens IV*"). As a factual matter, the Court found that Sudan had provided safe harbor, as well as financial, military, and intelligence assistance, to al Qaeda, *id.* at 139-46, and that "Sudanese government support was critical to the success of the 1998 embassy bombings," *id.* at 146. Because this amounted to the provision of material support for acts of extrajudicial killing, under § 1605A(a) Sudan was not entitled to immunity. *Id.* at 148-51. The Court also clarified that while plaintiffs who were U.S. nationals or employees of the U.S. government (essentially everyone directly injured in the bombings) could recover under the federal cause of action provided by § 1605A(c), foreign family members of direct victims were not within the ambit of that provision, but could instead recover under the tort law of the District of

Columbia. *Id.* at 151-57. The Court deemed Sudan's (and Iran's) fundamental liability established, but referred the hundreds of plaintiffs' claims to special masters, "who [would] receive evidence and prepare proposed findings and recommendations for the disposition of each individual claim in a manner consistent with [the Court's] opinion." *Id.* at 157.

The work of the special masters took several years, during which time a number of events worth noting occurred. First, the Court's November 2011 opinion was translated into Arabic and forwarded to the State Department to be served on Sudan through diplomatic channels. That service was effected in September 2012, when the U.S. embassy in Khartoum delivered the translated opinion to the Sudanese Ministry of Foreign Affairs. *See* Letter from William P. Fritzlen [*Owens* ECF No. 282]. Also in 2012, two new sets of plaintiffs entered the picture. One group filed a new case, *Opati*, the last of the seven at issue here. The other—referred to as the "Aliganga plaintiffs" after Marine Sergeant Jesse Nathanael Aliganga, who was killed in the Nairobi attack—did not file a new case, but instead sought and received permission to intervene in *Owens*. Order of July 3, 2012 [*Owens* ECF No. 233]. Because the *Opati* and Aliganga plaintiffs' claims arose from the same attacks for which the Court had already found Sudan liable (and Sudan again did not respond), the Court did not revisit the question of liability, and instead referred these plaintiffs' claims to special masters just as it had done in the other cases. Order of July 31, 2012 [*Owens* ECF No. 236]; *Opati v. Republic of Sudan*, 60 F. Supp. 3d 68, 73-75, 2014 U.S. Dist. LEXIS 101321 (D.D.C. 2014).

Appendix B

On March 28, 2014, having received and reviewed the special masters' reports, the Court issued final judgments awarding hundreds of millions of dollars to the plaintiffs in *Owens*,[1] *Mwila*, and *Khaliq*. Mem. Op. of March 28, 2014 [*Owens* ECF No. 300] at 3 (over $487 million); *Mwila v. Islamic Republic of Iran*, 33 F. Supp. 3d 36, 40, 2014 U.S. Dist. LEXIS 41881 (D.D.C. 2014) (over $419 million); *Khaliq v. Republic of Sudan*, 33 F. Supp. 3d 29, 32, 2014 U.S. Dist. LEXIS 41882 (D.D.C. 2014) (over $49 million). On July 25, 2014, the Court issued four more final judgments, bringing *Wamai, Amduso, Onsongo*, and *Opati* to a close. *Wamai v. Republic of Sudan*, 60 F. Supp. 3d 84, 89, 2014 U.S. Dist. LEXIS 101322 (D.D.C. 2014) (over $3.5 billion); *Amduso v. Republic of Sudan*, 61 F. Supp. 3d 42, 46,, 2014 U.S. Dist. LEXIS 101319 (D.D.C. 2014) (over $1.7 billion); *Onsongo v. Republic of Sudan*, 60 F. Supp. 3d 144, 148, 2014 U.S. Dist. LEXIS 101323 (D.D.C. 2014) (over $199 million); *Opati*, 60 F. Supp. 3d at 76 (over $3.1 billion). Finally, on October 24, 2014, the Court entered judgment in favor of the Aliganga plaintiffs, the eighth and last judgment at issue in these seven cases. *Owens v. Republic of Sudan*, 71 F. Supp. 3d 252, 256, 2014 U.S. Dist. LEXIS 150999 (D.D.C. 2014) (over $622 million).

1. This judgment resolved only the claims of the original *Owens* plaintiffs, not those of the Aliganga plaintiffs. As such, it was not automatically a final judgment. *See* Fed. R. Civ. P. 54(b). On April 11, 2014, however, on the original plaintiffs' motion, the Court certified the judgment of March 28, 2014, as final pursuant to Federal Rule of Civil Procedure 54(b). Order of April 11, 2014 [*Owens* ECF No. 305].

Appendix B

Shortly after the Court entered the first group of judgments, Sudan at long last arrived on the scene (or, in the case of *Owens*, returned). On April 28, 2014, new counsel for Sudan entered appearances in *Owens, Mwila*, and *Khaliq*, and filed a notice of appeal in each. Sudan did not, however, take any immediate action in the four other cases, in which final judgments had not yet been entered. Only several weeks *after* judgment was subsequently entered in those cases did Sudan appear, again filing notices of appeal. Similarly, despite reappearing in *Owens* in April 2014, Sudan took no action with respect to the Aliganga plaintiffs until after judgment was entered in their favor in October 2014.

In April 2015 Sudan retained new counsel and, over the course of several weeks, filed the eight motions to vacate that are presently before the Court. Soon after, Sudan filed its opening brief in the consolidated appeal of these cases before the D.C. Circuit. Br. for Appellants, *Owens v. Islamic Republic of Iran*, No. 14-5105 (D.C. Cir. May 11, 2015) ("Sudan's D.C. Cir. Br."). Before any of the plaintiffs filed their appellees' briefs, however, the D.C. Circuit granted their request to stay the appeal pending this Court's consideration of the motions to vacate. Order, *Owens v. Islamic Republic of Iran*, No. 14-5105 (D.C. Cir. July 22, 2015). After all filings related to the motions were received, the Court held a consolidated motions hearing on December 18, 2015. *See generally* Mot. Hr'g Tr. [*Owens* ECF No. 399]. Mindful that these cases might impact foreign relations, the Court also invited the United States to file a statement of interest concerning any of the issues raised by Sudan's motions, but the United States

declined to file such a statement. Notice by the United States [*Owens* ECF No. 396].

DISCUSSION

Sudan moves to vacate the eight judgments in these cases pursuant to Federal Rule of Civil Procedure 60(b). As relevant to these motions, Rule 60(b) provides:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> > (1) mistake, inadvertence, surprise, or excusable neglect; . . .
> > (4) the judgment is void; . . . or
> > (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). Sudan fits—or tries to fit—a host of arguments into these three categories. Some of its arguments apply to all of these cases, others to only a subset. Some, if correct, would require the outright dismissal of some or even all of these cases. Others would lead to the dismissal of only certain plaintiffs' claims. And still others would merely give Sudan another chance to dispute its liability. Unconvinced there is one "correct" order in which to address Sudan's various arguments, the Court will proceed as follows. It will first address Sudan's argument under Rule 60(b)(1) that the failure to contest these cases before final judgment was the result

of excusable neglect. It will then turn to Sudan's several arguments under Rule 60(b)(4) that these judgments, in whole or in part, are void for lack of subject-matter jurisdiction. Finally, it will address Sudan's claims of nonjurisdictional error, which Sudan lodges under Rule 60(b)(6).

Rule 60(b)(1): Sudan Has Failed To Demonstrate Excusable Neglect

Sudan moves to vacate all of the judgments, except those in *Mwila* and *Khaliq*, on the basis of Rule 60(b)(1), which permits relief from a final judgment based on "mistake, inadvertence, surprise, or excusable neglect." Sudan does not raise this argument in *Mwila* and *Khaliq* because relief under Rule 60(b)(1) must be sought not later than a year after the entry of judgment, *see* Fed. R. Civ. P. 60(c)(1), a deadline Sudan missed in those two cases. In the other cases, however, Sudan says relief under Rule 60(b)(1) is appropriate because its failure to participate in this litigation until after the entry of judgment was the product of "excusable neglect." *See, e.g.*, Mem. Supp. Mot. to Vacate [*Owens* ECF No. 367-1] ("Sudan's Aliganga Mem.") at 32-36.

"'[E]xcusable neglect' is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 394, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993). "[T]he determination of excusable neglect is an equitable matter" that depends on "several relevant factors: the

risk of prejudice to the non-movant, the length of delay, the reason for the delay, including whether it was in control of the movant, and whether the movant acted in good faith." *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 447 F.3d 835, 838, 371 U.S. App. D.C. 60 (D.C. Cir. 2006) (citing *Pioneer*, 507 U.S. at 395-397). "[A] party seeking relief on grounds of excusable neglect" must also "assert a potentially meritorious defense." *Id.* at 842. The burden of proving the right to relief under Rule 60(b)(1) rests on the movant seeking vacatur. *See Gates v. Syrian Arab Republic*, 646 F.3d 1, 5, 396 U.S. App. D.C. 128 (D.C. Cir. 2011).

On the facts of these cases, shouldering that burden is a Herculean task. Consider first the length of the delay. Even if one looks only at the most recently filed of these cases, *Opati*, Sudan did not enter an appearance until more than seventeen months after the complaint and summons had been served through diplomatic channels. *See* Letter from William P. Fritzlen [*Opati* ECF No. 36] (service effected on March 11, 2013); Notice of Appearance [*Opati* ECF No. 49] (appearance by Asim A. Ghafoor on August 21, 2014). But given the close relationship among these cases, it is far too generous to Sudan to measure the length of delay with reference to *Opati*. A much fairer starting point would be the date of Sudan's second default in *Owens*, which the Clerk entered on March 25, 2010. Clerk's Entry of Default [*Owens* ECF No. 173]. (And even that is likely too generous, for in practice Sudan had stopped being a responsible litigant in *Owens* years before.) Taking March 25, 2010, as the starting point, Sudan was absent from this litigation for just over *four years*, and it was only after

nearly *five years* that Sudan filed the first of these motions to vacate. This is an extraordinary amount of delay. Sudan has not pointed to a single case in which a delay of this magnitude was found excusable.

Of course, turning to the next factor, a delay of this length could be consistent with excusable neglect if the reasons for the delay were sufficiently compelling. The lack of actual knowledge of a lawsuit or filing deadline can be a compelling reason, *see* 11 Charles Alan Wright et al., Federal Practice and Procedure § 2858, at 333-37 (3d ed. 2012), but Sudan has made no such claim. Nor could it. Sudan was obviously aware of *Owens*—after its initial default, it actively participated in that case before defaulting a second time. Although Sudan did not participate in any of the other six cases until after the entry of final judgment, it was served with the complaint in each, as well as with the Court's 2011 liability opinion. And as Sudan's counsel conceded, "there's no dispute about service being proper." Mot. Hr'g Tr. at 11:20. Thus, Sudan was well aware of these cases and yet did nothing.

Rather than lack of knowledge, Sudan offers two other reasons for its delay, both of which are contained in a declaration from Sudan's ambassador to the United States. Sudan first points to its troubled domestic situation, noting that its absence from this litigation

> was principally during periods of well-known civil unrest and political turmoil in Sudan, in addition to times of natural disaster wrought by heavy flooding . . . . The cession of south

> Sudan and the attendant and protracted diplomatic moves and negotiations completely pre-occupied the Government of Sudan and necessitated the diversion of all meager legal and diplomatic personnel to that process.

Khalid Decl. [*Owens* ECF No. 367-2] ¶ 4. Sudan also claims an ignorance of American law, citing "a fundamental lack of understanding in Sudan about the litigation process in the United States, in particular surrounding the limits of foreign sovereign immunity and developments in that area of the law." *Id.* ¶ 5.

The Court finds neither of these proffered justifications particularly persuasive. As for the first, the Court will not deny that Sudan has experienced serious turmoil over the past decade. Some of that turmoil, however, has been of the Sudanese government's own making. *See, e.g.*, Darfur Peace and Accountability Act of 2006, Pub. L. No. 109-344, § 4(1), 120 Stat. 1869, 1873 (expressing Congress's sense that "the genocide unfolding in the Darfur region of Sudan is . . . [occurring] with the complicity and support of the National Congress Party-led faction of the Government of Sudan"); Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174, §§ 7-8, 121 Stat. 2516, 2522 (expressing Congress's sense that "the Government of Sudan . . . continue[s] to oppress and commit genocide against people in the Darfur region and other regions of Sudan" and "refus[es] to allow the implementation of a peacekeeping force in Sudan").[2] But even setting the

2. *See also* President Bush's Statement on Signing the Sudan Accountability and Divestment Act of 2007, 43 Weekly Comp. Pres.

question of blame aside, the Court does not find this an adequate reason. Domestic turmoil would surely have justified requests by Sudan for extensions of time in which to respond to the plaintiffs' filings. It would have also probably led the Court to forgive late filings. And perhaps it would have even justified a blanket stay of these cases. But Sudan was not merely a haphazard, inconsistent, or sluggish litigant during the years in question—it was a complete and utter non-litigant. Sudan never sought additional time or to pause any of these cases in light of troubles at home. Sudan never even advised the Court of those troubles at the time they were allegedly preventing Sudan's participation—not through formal filings, and not through any letters or other mode of communication with the Court. The idea that the relevant Sudanese officials could not find the opportunity over a period of *years* to send so much as a single letter or email communicating Sudan's desire but inability to participate in these cases is, quite literally, incredible. Sudan's single, vague paragraph of explanation simply does not convince the Court.

In relying on its domestic troubles, Sudan attempts to liken these cases to *FG Hemisphere Associates*, in which the D.C. Circuit held that the district court abused its discretion by denying Rule 60(b)(1) relief to the Democratic Republic of Congo (DRC). *See* 447 F.3d at 839-43. But the factual gulf between that case and these is unbridgeably wide. In *FG Hemisphere Associates*, the DRC was a mere two months late in responding to a

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Doc. 1646 (Dec. 31, 2007) ("I share the deep concern of the Congress over the continued violence in Darfur perpetrated by the Government of Sudan and rebel groups.").

motion to execute, some of which delay was attributable to the movant's failure to translate the motion. *Id.* at 839-41. True, the D.C. Circuit relied in part on the fact that the DRC "was plainly hampered by its devastating civil war," *id.* at 841, but that hardly suggests that Sudan's domestic upheaval is a sufficient justification here. Despite its devastating civil war, "the DRC secured counsel only one day after receiving its first actual notice, filing its motion to quash less than four weeks later." *Id.* at 840. Sudan, by contrast, did absolutely *nothing* for *years*, while plainly aware of the litigation. The DRC's relatively minor lateness, rectified by prompt efforts to respond, is a world apart from Sudan's years of knowing inaction.

Nor is the Court persuaded by Sudan's alleged lack of understanding of U.S. litigation. As a general matter, it is true, courts should be mindful that foreign sovereigns might not be familiar with our judicial system or might misconceive the scope of their immunity. *See Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1551 n.19, 258 U.S. App. D.C. 354 (D.C. Cir. 1987). *But see* 11 Wright et al., *supra*, § 2858, at 352-55 & n.26 (noting that "ignorance of the law" is generally not grounds for Rule 60(b)(1) relief). Indeed, it was in part for this reason that the Court vacated Sudan's *first* default in *Owens*. *See Owens I*, 374 F. Supp. 2d at 8-10. But the fundamental-ignorance card cannot convincingly be played a second time, especially not after hiring sophisticated U.S. legal counsel, as Sudan did in 2004. Sudan's more specific claim that it was ignorant of "the limits of foreign sovereign immunity and developments in that area of the law," Khalid Decl. ¶ 5, is hard to understand. The claim would

make sense if an early decision in *Owens* had indicated that Sudan *was* immune, but then a later development that Sudan was conceivably unaware of, such as the 2008 FSIA amendments, had undermined that immunity. But that is not what happened. Although the *Owens I* decision identified deficiencies in the plaintiffs' allegations, it clearly indicated that Sudan might *not* be immune. *See, e.g.*, 374 F. Supp. 2d at 17 ("[I]t cannot be said at this early stage of the proceedings that plaintiffs will be unable to show that the Sudan defendants provided material support to al Qaeda within the meaning of the [FSIA] and that this support was a proximate cause of the embassy bombings."). By rejecting Sudan's FSIA based arguments for dismissal, this Court in *Owens II* and the D.C. Circuit in *Owens III* put Sudan on even clearer notice that it might not be immune. And this Court's 2011 decision in *Owens IV* renders Sudan's claim of ignorance wholly untenable. That decision, issued *after* the 2008 FSIA amendments, definitively concluded that Sudan was not immune and was liable in connection with the embassy bombings. That decision, moreover, was translated into Arabic and delivered to Sudan through diplomatic channels on September 11, 2012. *See* Letter from William P. Fritzlen [*Owens* ECF No. 282]. If an honestly held but mistaken conception of its immunity had truly been the reason Sudan was not participating in these cases, *Owens IV* should have spurred it to action. Instead, Sudan did nothing for more than 19 months.

In light of the foregoing, the Court is by no means persuaded that Sudan has behaved in good faith. That is, the Court is not convinced that Sudan would have

participated in the prejudgment proceedings if only circumstances had been more favorable. Viewing the entire history of the litigation, it seems more likely that Sudan chose (for whatever reason) to ignore these cases over the years, changing course only when the final judgments saddled it with massive liability. A defendant who disputes a federal court's jurisdiction is free to take this approach, letting a default judgment be entered and raising his objection only in subsequent proceedings. *See Practical Concepts*, 811 F.2d at 1547. But he must accept the consequences of that choice: "If he loses on the jurisdictional issue . . . his day in court is normally over; as a consequence of deferring the jurisdictional challenge, he ordinarily forfeits his right to defend on the merits." *Id.* To be clear, the Court is not calling into question the current good faith of the Sudanese officials who have now decided to defend these cases. But the question is not whether Sudan *now* wishes to participate fully—or now wishes it had done so all along—but rather whether it was acting in good faith during the years of inaction. Given how long-lasting and complete that inaction was, and how weak Sudan's proffered explanations are, the Court cannot conclude that Sudan acted in good faith.

Turning to the final factor, vacatur would pose a real risk of prejudice to the plaintiffs, Sudan's blithe assertion to the contrary notwithstanding. There is, to start, the time and money the plaintiffs have spent litigating these cases in Sudan's absence, much of which will have been wasted if Sudan now gets a mulligan. For example, much of the plaintiffs' efforts preparing for and conducting the 2010 liability hearing will have been for naught—a serious

waste that could have been avoided by Sudan's timely participation. Sudan's suggestion that the hearing will not have been wasted because it also addressed Iran's misconduct, and the default judgment against Iran will remain, is unpersuasive. Throwing half a ripe apple in the garbage may be less wasteful than tossing the whole thing, but wasteful it remains. More troubling than the pointless loss of the plaintiffs' resources, however, is the fact that the delay would surely make it harder for them to prove their case going forward. "[L]itigation is better conducted when the dispute is fresh and additional facts may, if necessary, be taken without a substantial risk that witnesses will die or memories fade." *Sibron v. New York*, 392 U.S. 40, 57, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968); *see also Wilson v. Garcia*, 471 U.S. 261, 271, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985) ("Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost."). The years of delay spawned by Sudan's nonparticipation presents a serious likelihood of lost witnesses, memories, and documentary evidence, to the detriment of the plaintiffs, who bear the burden of proof on the merits. Finally, a number of plaintiffs have in fact died during the course of this litigation, and others might die during the years it would take to relitigate these cases. *See* Ndeda Aff. [*Amduso* ECF No. 288-14]. Hence, there is sufficient danger of prejudice that this factor, like the others, weighs against Sudan.

In sum, Sudan has failed to carry its burden of showing that its failure to participate was the result of excusable neglect. The Court doubts that Sudan's nonparticipation

was a matter of neglect at all—as opposed to a matter of choice, whether well-considered or reckless. But if indeed neglect, then that neglect—so complete and so enduring—was inexcusable. (Accordingly, the Court need not address whether Sudan has "assert[ed] a potentially meritorious defense." *FG Hemisphere Assocs.*, 447 F.3d at 842.) Insofar as they rely on Rule 60(b)(1), therefore, Sudan's motions to vacate the judgments are denied.

Equally unavailing is Sudan's argument that its years of domestic turmoil justify vacating the judgments under Rule 60(b)(6), which permits vacatur for "any other reason that justifies relief." Sudan makes this argument most clearly in *Mwila* and *Khaliq, see, e.g.*, Mem. Supp. Mot. to Vacate [*Mwila* ECF No. 121-1] ("Sudan's *Mwila* Mem.") at 13-15, though it makes a perfunctory version in the other cases as well, *see, e.g.*, Sudan's Aliganga Mem. at 35-36. The Court is hard pressed to see how this argument is anything but a rehash of Sudan's Rule 60(b)(1) argument for excusable neglect. With respect to *Mwila* and *Khaliq*, therefore, it is not only unpersuasive but time-barred—for Rule 60(b)'s "provisions are mutually exclusive, and thus a party who failed to take timely action due to 'excusable neglect' may not seek relief more than a year after the judgment by resorting to subsection (6)." *Pioneer*, 507 U.S. at 393.

Moreover, Sudan points to no precedent for Rule 60(b)(6) relief under circumstances like these. Sudan's primary reliance on *Ungar v. Palestine Liberation Organization*, 599 F.3d 79 (1st Cir. 2010), is puzzling. The defendants in that case, forsaking any argument for excusable neglect,

"freely admit[ted] that the default judgment resulted from their deliberate strategic choice," but "insist[ed] that they [had] had a good-faith change of heart" and wished to present their defenses, circumstances they thought justified relief under Rule 60(b)(6). 599 F.3d at 85-86. Sudan has made no admission of a deliberate choice, and doing so would flatly contradict its primary claim of excusable neglect, as *Ungar* itself teaches. *See id.* at 85 ("willfulness . . . is directly antagonistic to a claim premised on any of the grounds specified in [Rule 60(b)(1)]"). What does Sudan mean, then, when it says that it too has had a "good-faith change of heart"? Sudan's *Mwila* Mem. at 13 (quoting *Ungar*, 599 F.3d at 86). Isn't Sudan's position that its heart has been in the right place all along, just not its resources? In any event, even if Sudan's Rule 60(b)(6) argument could be fit into *Ungar's* mold without contradicting Sudan's claim of excusable neglect, the court in *Ungar* did not—contrary to Sudan's misreading of the case—"vacat[e the] default judgment under Rule 60(b)(6)." Sudan's Aliganga Mem. at 36. The First Circuit held in *Ungar* that the denial of the defendants' Rule 60(b)(6) motion had rested on an erroneous categorical rule, but it did not say that the motion should have been granted. 599 F.3d at 87 & n.6.

Here, the Court does not rely on the categorical rule disapproved in *Ungar*. It instead rejects Sudan's Rule 60(b)(6) argument because, first, it appears simply to reiterate Sudan's (already rejected) Rule 60(b)(1) argument. And to the extent it can be construed as a distinct argument, it is simply unconvincing and unsupported by factually apposite precedent. Relief under Rule 60(b)(6) requires

the existence of "extraordinary circumstances." *Gonzalez v. Crosby*, 545 U.S. 524, 536, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005). "In a vast majority of the cases finding that extraordinary circumstances do exist so as to justify relief, the movant is completely without fault for his or her predicament; that is, the movant was almost unable to have taken any steps that would have resulted in preventing the judgment from which relief is sought." 12 James Wm. Moore et al., Moore's Federal Practice § 60.48[3][b] (3d ed. 2015). For the reasons already discussed, Sudan cannot possibly be deemed "completely without fault"—not for its own domestic turmoil, and certainly not for its predicament in this litigation.

Rule 60(b)(4): The Bombings Were Acts of Extrajudicial Killing

Although Rule 60(b) speaks of grounds on which a court "may" grant relief from a final judgment, relief from a void judgment under Rule 60(b)(4) is not discretionary. *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1179, 407 U.S. App. D.C. 133 (D.C. Cir. 2013). "Under [Rule 60(b)(4)], the only question for the court is whether the judgment is void; if it is, relief from it should be granted." *Austin v. Smith*, 312 F.2d 337, 343, 114 U.S. App. D.C. 97 (D.C. Cir. 1962). In this circuit, a judgment is void within the meaning of Rule 60(b)(4) "whenever the issuing court lacked [subject-matter] jurisdiction." *Bell Helicopter*, 734 F.3d at 1180.[3] And because under the

3. Other circuits, by contrast, hold "that a lack of subject matter jurisdiction will not always render a final judgment 'void.' Only when the jurisdictional error is 'egregious' will courts treat the judgment

FSIA subject-matter jurisdiction exists where immunity is absent, and is absent where immunity exists, Sudan can raise a range of arguments concerning its sovereign immunity under Rule 60(b)(4).

The first and most expansive of these jurisdictional arguments is that the embassy bombings were not acts of "extrajudicial killing" within the meaning of the FSIA. Section 1605A provides, in relevant part, that a foreign state is not immune from a suit

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

28 U.S.C. § 1605A(a)(1) (emphasis added). The plaintiffs' theory of jurisdiction has always been that the bombings were acts of extrajudicial killing for which Sudan provided

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as void" under Rule 60(b)(4). *United States v. Tittjung*, 235 F.3d 330, 335 (7th Cir. 2000); *see also United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (2010) ("Federal courts considering Rule 60(b)(4) motions that assert a judgment is void because of a jurisdictional defect generally have reserved relief only for the exceptional case in which the court that rendered judgment lacked even an 'arguable basis' for jurisdiction.").

material support or resources. Sudan of course denies that it provided such support, but it now also denies that the bombings qualify as extrajudicial killings. And if that contention were correct, § 1605A would not eliminate Sudan's immunity even if Sudan had provided vital support to al Qaeda's attacks, or even if it had carried out the bombings directly. If the bombings were not acts of extrajudicial killing, then, all eight judgments must be vacated in full and all of these cases dismissed. The Court concludes, however, consistent with all the FSIA precedent it has found, that the bombings qualify as acts of extrajudicial killing within the meaning of the statute.

"Extrajudicial killing" is a defined term in the FSIA. For purposes of § 1605A, "the terms 'torture' and 'extrajudicial killing' have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991" (TVPA). 28 U.S.C. § 1605A(h)(7).[4] Section 3 of the TVPA in turn specifies that

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

4. The same definition of "extrajudicial killing" existed under the now repealed § 1605(a)(7). *See* 28 U.S.C. § 1605(e)(1)(2006).

Pub. L. No. 102-256, § 3(a), 106 Stat. 73, 73 (codified at 28 U.S.C. § 1350 note). On its face, this definition encompasses the embassy bombings. First and most obviously, the bombings were "killing[s]." They were also "deliberated": it is clear from the careful timing and magnitude of the bombings that the killers planned their actions carefully and intended those actions to result in death. *See, e.g., Mamani v. Berzaín*, 654 F.3d 1148, 1155 (11th Cir. 2011) (deliberated killing is one "undertaken with studied consideration and purpose"). The killings were plainly not authorized by the judgment of any court. And, finally, there is no suggestion that these killings were permissible under international law. Numerous district court decisions in this circuit have followed this basic reasoning to conclude that similar terrorist bombings were extrajudicial killings under the FSIA. *See, e.g.*, *Ben-Rafael v. Islamic Republic of Iran*, 540 F. Supp. 2d 39, 53 (D.D.C. 2008); *Blais v. Islamic Republic of Iran*, 459 F. Supp. 2d 40, 53 (D.D.C. 2006); *Salazar v. Islamic Republic of Iran*, 370 F. Supp. 2d 105, 113 (D.D.C. 2005).

In Sudan's view, however, these decisions are all mistaken. For, according to Sudan, there is more to the term "extrajudicial killing" than the statutory definition in the TVPA. Specifically, "[t]he language and context of the definition of 'extrajudicial killing' in the TVPA indicates that Congress intended to adopt the international law meaning of that term." Sudan's D.C. Cir. Br. at 19. And that "international law meaning," Sudan continues, does not encompass bombings like these for two reasons: it covers only killings by state actors, and it does not include "broad-based terrorist attack[s]." *Id.* at 16, 22; *see also*

Consolidated Reply Mem. [*Owens* ECF No. 378] ("Reply") at 5 ("'extrajudicial killing' does not encompass terrorist bombings").

The Court parts ways with Sudan at the first step. Section 3 of the TVPA defines "extrajudicial killing" the way it defines "extrajudicial killing." It does not secretly adopt by reference some different definition that is broader or narrower than the definition in its text. "Statutes are law, not evidence of law," much less evidence of meaningfully *different* law. *Matter of Sinclair*, 870 F.2d 1340, 1343 (7th Cir. 1989). (And it is hard to see why Sudan spends pages and pages establishing its "international law meaning" premise unless it thinks that meaning is advantageously different from the statutory definition.) It may be, as some legislative history suggests, that the drafters of the TVPA believed that their statutory definition was consistent with the international law understanding of the term "extrajudicial killing." *See* S. Rep. No. 102-249, at 6 (1991); H.R. Rep. No. 102-367, at 4 (1991). But that justifies, at most, turning to international law to help clarify any ambiguous terms in the statutory definition—not turning to international law *instead of* the statutory definition. If, for instance, international law did not in fact always require extrajudicial killings to be "deliberated," it would nonetheless be the case that only "deliberated" killings are actionable under the TVPA and § 1605A of the FSIA. "When a statute includes an explicit definition, [courts] must follow that definition, even if it varies from that term's ordinary meaning," *Stenberg v. Carhart*, 530 U.S. 914, 942, 120 S. Ct. 2597, 147 L. Ed. 2d 743 (2000), or its meaning in another legal context, *see,*

e.g., Burgess v. United States, 553 U.S. 124, 129-30, 128 S. Ct. 1572, 170 L. Ed. 2d 478 (2008).

The fact that the second sentence of the definition excludes killings that are lawful "under international law" does not alter this conclusion. Indeed, it shows that when Congress wants to incorporate international law directly into U.S. law, without further distillation or qualification, it says so. The FSIA itself provides another example, eliminating foreign sovereign immunity in certain cases where "rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3). Thus, the way the TVPA (or the FSIA) would indicate that "extrajudicial killing" means whatever it means in international law is by saying precisely that. *Cf.* 18 U.S.C. § 1651 (punishing with life imprisonment "the crime of piracy as defined by the law of nations"); 18 U.S.C. § 2339C(e)(14) ("the term 'state' has the same meaning as that term has under international law").

Hence, whatever the international law definition of "extrajudicial killing," there is no requirement under the FSIA that the killers be state actors.[5] Section 1605A of

5. Sudan has not even made a compelling case that the international law definition demands state actors. For instance, Sudan points to the definition of "extrajudicial killing" found in the U.N. Terminology Database. *See* Sudan's D.C. Cir. Br. at 18. But that definition does not include a state-actor requirement, and in fact encompasses "[k]illings committed . . . by vigilante groups." U.N. Terminology Database, http://untermportal.un.org/UNTERM/display/Record/UNHQ/extra-legal_execution/c253667 (last visited Mar. 23, 2016). Sudan also discusses the work of the U.N. Special Rapporteur on Summary or Arbitrary Executions. *See* Sudan's

the FSIA says that "extrajudicial killing" has the meaning given in section 3 of the TVPA, and section 3 of the TVPA is devoid of any state-actor requirement. It would be no more appropriate for the Court to add a new requirement to the definition than to delete an existing one. *Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 341, 125 S. Ct. 694, 160 L. Ed. 2d 708 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply . . . ."); *62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596, 71 S. Ct. 515, 95 L. Ed. 566 (1951) ("Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort."). It is true that liability under the TVPA itself is limited to those who act "under actual or apparent authority, or color of law, of any foreign nation," but that limitation is not part of the definition of "extrajudicial killing" in section 3, but is rather part of the cause of action in section 2. TVPA section 2(a), 28 U.S.C. § 1350 note. Had Congress wished to limit extrajudicial killings under the FSIA to those perpetrated directly by state actors, it could have cross-referenced both TVPA sections. But it did not. First in 1996, and again in 2008, Congress incorporated only TVPA section 3. *See* 28

D.C. Cir. Br. at 16-18. The Special Rapporteur has not reported only on killings by state actors. Indeed, the Special Rapporteur from 2004 to 2010 has compiled an online "Handbook" that contains an entire chapter on "Killings by non-state actors and affirmative State obligations." Project on Extrajudicial Executions, UN Special Rapporteur on Extrajudicial Executions Handbook, http://www.extrajudicialexecutions.org/LegalObservations.html (last visited Mar. 23, 2016).

U.S.C. § 1605A(h)(7) (enacted 2008); 28 U.S.C. § 1605(e)(1) (enacted 1996, repealed 2008); *cf.* Sudan's D.C. Cir. Br. at 50 ("Where Congress knows how to say something but chooses not to, its silence is controlling." (internal quotation marks omitted)).

The absence of a state-actor requirement is also consistent with § 1605A's removal of immunity not only when a defendant state is responsible for an extrajudicial killing, but also when it is responsible for "the provision of material support or resources for such an act." 28 U.S.C. § 1605A(a)(1). Congress clearly wanted to permit liability both when states themselves perpetrate the predicate acts and also when they help others do so. And the most obvious actors that Congress would worry might receive material support from designated state sponsors of terrorism (which are the only states covered by § 1605A) are non-state terrorist organizations. The Court does not mean to say that Sudan's interpretation would actually render statutory text meaningless. But it is more consonant with the overall thrust of § 1605A—namely, to render designated state sponsors of terrorism liable for directly perpetrating or materially supporting the predicate acts—not to import an extra-textual state-actor requirement into the definition of "extrajudicial killing."

What of Sudan's contention that, even apart from the state-actor issue, a terrorist bombing just cannot be an extrajudicial killing? Even if the Court accepted Sudan's "international law meaning" premise, Sudan has not provided an authoritative international law definition of "extrajudicial killing" that clearly excludes

these bombings. Sudan says that under international law "extrajudicial killing" means "summary execution," Sudan's D.C. Cir. Br. at 19, but offering a synonym does not advance the analysis. Sudan's papers nowhere identify exactly what it is that puts the bombings outside the scope of either term. At the motions hearing, Sudan's counsel had to concede (what seems obvious to the Court) that it cannot be the mere fact that the weapon used was a bomb. Mot. Hr'g Tr. at 32:10-11. Counsel also conceded (what again seems obvious) that it cannot be the mere fact of multiple victims. *Id.* at 32:15-17. The bottom-line objection seemed to be that a bombing of this sort "is indiscriminate in its killing of individuals." *Id.* at 32:21-24; *see also id.* at 35:11-14 (contending that "[e]xtrajudicial killing" and "[i]ndiscriminate terrorism bombing" are "at opposite ends of [a] spectrum").[6] Put otherwise, and with far more precision than Sudan has provided, the alleged problem is that the bombers did not know whom exactly they would kill and could not be certain that any specific individual would die.

The Court is unconvinced, however, that this characteristic precludes an act of killing from being an act of "extrajudicial killing" within the meaning of § 1605A. The statutory definition does not contain a precision-targeting element. Sudan's counsel suggested for the first time at the motions hearing that this notion inheres in the word "deliberated." Mot. Hr'g Tr. at 33:13-15; *see* TVPA section 3(a), 28 U.S.C. § 1350 note ("[T]he term 'extrajudicial killing' means a deliberated killing . . . .").

6. Readers are invited to try to find a clear enunciation of this point anywhere in Sudan's filings.

The Court disagrees. A "deliberated" killing is simply one undertaken with careful consideration, not on a sudden impulse. *See, e.g.*, Webster's Third New International Dictionary 596 (1993) ("deliberate": "to ponder or think about with measured careful consideration and often with formal discussion before reaching a decision or conclusion"); 4 The Oxford English Dictionary 414 (2d ed. 1989) ("deliberated": "Carefully weighed in the mind"); Black's Law Dictionary 492 (9th ed. 2009) ("deliberation": "The act of carefully considering issues and options before making a decision or taking some action"); *see also, e.g., State v. Hamlet*, 312 N.C. 162, 321 S.E.2d 837, 842-43 (N.C. 1984) ("Deliberation means an intent to kill carried out by the defendant in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation."); *People v. Dykhouse*, 418 Mich. 488, 345 N.W.2d 150, 154 (Mich. 1984) ("Deliberate means that the defendant must have considered the pros and cons of that design and have measured and chosen his actions. The intent must be formed by a mind that is free from undue excitement. This excludes acts done on a sudden impulse without reflection." (quoting jury instructions with approval)). The killings here were obviously the product of deliberation. No one can seriously doubt that the bombers carefully planned their attack with the goal and expectation of killing those in and around the embassies. No, they did not look their victims in the eye, nor could they have produced a list of names of those who would perish, but their killings were nonetheless deliberated.

Appendix B

In addition to its unpersuasive argument about what § 1605A *does* say, Sudan makes an argument about what it does not. These bombings do not come within § 1605A, the argument goes, because § 1605A "does not include 'terrorism' as a predicate act." Sudan's D.C. Cir. Br. at 26. Sudan explains that in the early 1990s Congress considered adding a broad "international terrorism" exception to the FSIA but decided against it, instead confining the new immunity exception to the four predicate acts of torture, extrajudicial killing, hostage taking, and aircraft sabotage. *See id.* at 22-25 (citing S. 825, 103d Cong. (1993)). To read "extrajudicial killing" as encompassing terrorist bombings, Sudan argues, would effectively nullify Congress's decision *not* to enact the broader statute. Mot. Hr'g Tr. at 36:12-21. Moreover, says Sudan, there is a federal statute that creates a cause of action for victims of terrorism: the Anti-Terrorism Act (ATA), 18 U.S.C. § 2331 *et seq.* That act was even amended in 2002 to specifically cover bombings, including bombings of U.S. embassies and consulates. *See* 18 U.S.C. § 2332f(b)(2)(E). The ATA illustrates how Congress creates liability for terrorist bombings, Sudan argues, but it specifically excludes foreign states from liability. *See id.* § 2337. According to Sudan, the logical inference to be drawn is that Congress does not intend the FSIA to permit liability for terrorist bombings like these. Sudan's D.C. Cir. Br. at 26-29.

As to the basic point, the Court cannot disagree with Sudan: § 1605A does not contain an immunity exception for acts of "terrorism." Nor did its predecessor, § 1605(a)(7). A plaintiff trying to sue under § 1605A on

the theory that a foreign state's conduct amounted to "terrorism" is out of luck. But Sudan's conclusion does not follow. That § 1605A does not include "terrorism" does not mean that it excludes everything that could be called (or meet some legal definition of) "terrorism." For the past fifteen years it has been hard to think of a more quintessential act of terrorism than the purposeful destruction of a passenger aircraft in flight—yet such an act is manifestly covered by § 1605A. That it is "terrorism" is irrelevant; all that matters is that it is "aircraft sabotage" within the meaning of § 1605A. *See* 28 U.S.C. § 1605A(h)(1) (incorporating Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation). The same logic applies to any act that a plaintiff claims is an extrajudicial killing under § 1605A. If it falls within the statutory definition, it is; if it doesn't, it isn't. For the reasons already explained, these bombings fit within the FSIA's definition of "extrajudicial killing." That they can also be called "terrorism" does not pull them out. To give such an immunity-expanding effect to the label "terrorism" is especially perverse when one remembers that the very reason a foreign state is even subject to the immunity exceptions in § 1605A is that the Secretary of State has determined that its government "has repeatedly provided support for acts of international terrorism"—*i.e.*, is a state sponsor of *terrorism*. 28 U.S.C. § 1605A(h)(6).

Although the foregoing suffices to explain the Court's conclusion that the bombings were acts of extrajudicial killing under § 1605A, the Court's conviction is bolstered by another principle: "If a statute uses words or phrases that have already received authoritative construction by

the jurisdiction's court of last resort, *or even uniform construction by inferior courts* or a responsible administrative agency, they are to be understood according to that construction." Antonin Scalia & Bryan A. Garner, Reading Law 322 (2012) (emphasis added). The FSIA exception for extrajudicial killings was first enacted in 1996, in § 1605(a)(7). Over the next twelve years, numerous district court decisions from this circuit (where the vast majority of § 1605(a)(7) litigation occurred) held that terrorist bombings could be extrajudicial killings under the FSIA. And among the cases in which they did so were a number that involved some of the most infamous terrorist attacks of the late 20th century: the 1983 bombing of the U.S. embassy in Beirut,[7] the 1983 bombing of the U.S. Marine barracks in Beirut,[8] the 1984 bombing of the U.S. embassy annex in East Beirut,[9] the 1992 bombing of the Israeli embassy in Buenos Aires,[10] the 1996 Khobar Towers bombing,[11] and the 1998 embassy attacks at issue

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7. *Dammarell v. Islamic Republic of Iran*, 281 F. Supp. 2d 105, 192 (D.D.C. 2003), *vacated in part on other grounds by Dammarell v. Islamic Republic of Iran*, 404 F. Supp. 2d 261 (D.D.C. 2005); *Salazar v. Islamic Republic of Iran*, 370 F. Supp. 2d 105, 113 (D.D.C. 2005).

8. *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 61 (D.D.C. 2003).

9. *Wagner v. Islamic Republic of Iran*, 172 F. Supp. 2d 128, 133 (D.D.C. 2001)

10. *Ben-Rafael v. Islamic Republic of Iran*, 540 F. Supp. 2d 39, 53 (D.D.C. 2008)

11. *Blais v. Islamic Republic of Iran*, 459 F. Supp. 2d 40, 53 (D.D.C. 2006).

here.[12] And a federal court in Virginia likewise held that victims of the 2000 bombing of the U.S.S. Cole could sue under § 1605(a)(7).[13] True, as Sudan notes, in none of these cases did the foreign sovereign contest the meaning of "extrajudicial killing." But that is irrelevant for present purposes. The point is that by 2008 the unmistakable and unanimous judicial reading of § 1605(a)(7)—even if not the product of adversarial litigation—was that its use of "extrajudicial killing" encompassed terrorist bombings of this kind.

This reading was hardly hidden from Congress. Indeed, in 2000, Congress passed a statute that provided a compensation scheme for certain individuals who "held a final judgment for a claim or claims brought under section 1605(a)(7) of title 28," as well as for plaintiffs who had "filed a suit under such section 1605(a)(7) on" five specific dates. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002(a)(2)(A), 114 Stat. 1464, 1542. One of the cases specifically identified by filing date concerned the death of a U.S. Marine in the 1984 bombing of the U.S. embassy annex in East Beirut. *See id.* (listing "July 27, 2000"); *Wagner v. Islamic Republic of Iran*, 172 F. Supp. 2d 128 (D.D.C. 2001) (filed July 27, 2000). And,

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12. *Owens II*, 412 F. Supp. 2d 99, 104-06 & nn.9-11 (D.D.C. 2006).

13. *Rux v. Republic of Sudan*, 2005 U.S. Dist. LEXIS 36575, 2005 WL 2086202, at *13 (E.D. Va. Aug. 26, 2005), *aff'd in part, appeal dismissed in part*, 461 F.3d 461 (4th Cir. 2006). The court in *Rux* did not discuss the meaning of "extrajudicial killing," but because the elements of § 1605(a)(7) were jurisdictional—as the court recognized—it implicitly concluded that the bombing met the definition of the term.

as the accompanying Conference Report noted, two of the covered § 1605(a)(7) cases that had already gone to final judgment involved suicide bombings of buses in Israel that had been deemed extrajudicial killings. *See* H.R. Rep. No. 106-939, at 116 (2000) (Conf. Rep.) (noting the cases of Alisa Flatow and of Matthew Eisenfeld and Sara Duker). A victim of one of those bombings was Alisa Flatow, whose death inspired the creation of the federal cause of action linked to § 1605(a)(7) (discussed earlier, *see supra* p. 6), which became known in courts and Congress alike as the "Flatow Amendment." *See, e.g., Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 87, 352 U.S. App. D.C. 284 (D.C. Cir. 2002); 150 Cong. Rec. 24,003 (2004) (statement of Sen. Specter); 153 Cong. Rec. 22,665 (2007) (statement of Sen. Lautenberg); *see also* 144 Cong. Rec. 3339 (1998) (statement of Rep. Saxton) (describing the origins of the provision). Furthermore, press coverage, legal commentary, and government reports also made clear that § 1605(a)(7) had repeatedly been interpreted to encompass terrorist bombings. *See, e.g.*, Carol D. Leonnig, *Damages Awarded In Beirut Bombing; Judge Says Iran Backed '83 Attack*, Wash. Post, Sept. 9, 2003, at A4; Jennifer K. Elsea, Cong. Research Serv., RL31258, Suits Against Terrorist States By Victims of Terrorism 8 n.24, 13 n.42, 17 n.53, 21 n.62, 43 (2005) (discussing bombing cases).

In light of this history, the 2008 FSIA amendments take on added significance. In those amendments, Congress deleted § 1605(a)(7) and enacted the new § 1605A, and in doing so it chose to use the *same* language to define the *same* four predicate acts that § 1605(a)(7) had

covered. That is, it used the same language that anyone who had paid the slightest attention would know had been universally read as reaching terrorist bombings. It is fair to say, then, that by choosing to reuse in § 1605A the exact terms and definitions from § 1605(a)(7), Congress implicitly ratified the courts' prior construction of "extrajudicial killing." It might be unusual for a ratification argument to rest on district court decisions, but it is not impossible. *See* Scalia & Garner, *supra*, at 325. And because FSIA terrorism cases are more likely than most to actually become known to Congress—given the notoriety of the underlying events, the magnitude of the judgments, and the potential diplomatic repercussions—this is a context in which prior construction even by district courts deserves serious weight. The history of § 1605A thus strengthens the Court's view that these bombings qualify as acts of "extrajudicial killing" within the meaning of the statute.

One final point regarding "extrajudicial killing." In some of its motions to vacate (though not in its reply or D.C. Circuit brief), Sudan makes a cryptic argument, the gist of which seems to be that plaintiffs who did not die cannot sue under § 1605A because their injuries "were not 'caused by' the 'extrajudicial killing' of others." Sudan's Aliganga Mem. at 21. Sudan also suggests it would be "absurd" for "an injured person's ability to bring a claim [to turn] on the happenstance of whether others were killed in the bombing." *Id.* Both parts of this argument are misguided. First, § 1605A covers "personal injury or death that was caused by an act of . . . extrajudicial killing," 28 U.S.C. § 1605A(a)(1) (emphasis added), and the same act of killing one person can quite obviously injure another. *See, e.g.,*

Death of a Terrorist, Time, Feb. 5, 1979, at 111 (noting that the car-bomb assassination of Black September leader Ali Hassan Salameh wounded 18 bystanders). And there is nothing absurd about eliminating immunity only for those acts that actually cause death, for those are likely to be the most heinous. Moreover, Sudan's proffered "absurdity" would exist even under its own narrow view of "extrajudicial killing": the estate of an individual killed by the bullet of a state-employed assassin can sue, yet if the same individual miraculously survives, but suffers terrible injuries, he cannot. The fact that the statute draws a line that will not always appear just does not make it absurd.

In sum, the Court remains convinced that these bombings qualify as acts of "extrajudicial killing" within the meaning of § 1605A, and thus that the Court did not lack subject-matter jurisdiction for this reason.

Rule 60(b)(4): The Plaintiffs' Claims Were Timely Filed

Subsection (b) of § 1605A, entitled "Limitations," provides:

> An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) . . . not later than the latter of—
>
> > **(1)** 10 years after April 24, 1996; or
> > **(2)** 10 years after the date on which the cause of action arose.

28 U.S.C. § 1605A(b). Sudan contends that the *Khaliq*, Aliganga, and Opati plaintiffs—who filed their actions in March 2010 (*Khaliq*) and July 2012 (Aliganga and *Opati*)—did not comply with this statute of limitations because their actions were filed more than 10 years after the 1998 bombings and there is no timely "related action" they can rely on. Sudan further argues that the statute of limitations is jurisdictional, and so the untimeliness of these claims is grounds for relief under Rule 60(b)(4). The Court disagrees with Sudan on both points.

A. Section 1605A(b) Is Not Jurisdictional

First, the Court is unpersuaded that the statute of limitations in § 1605A(b) is jurisdictional. The Supreme Court has recently reiterated that "most time bars are nonjurisdictional." *United States v. Wong*, 135 S. Ct. 1625, 1632, 191 L. Ed. 2d 533 (2015) (holding statute of limitations in Federal Tort Claims Act nonjurisdictional). Indeed, courts should "treat a time bar as jurisdictional only if Congress has clearly stated that it is." *Musacchio v. United States*, 136 S. Ct. 709, 717, 193 L. Ed. 2d 639 (2016) (internal quotation marks omitted). There is no clear statement here. "Although [§ 1605A(b)] uses mandatory language, it does not expressly refer to subject-matter jurisdiction or speak in jurisdictional terms." *Id.* True, § 1605A(b) follows subsection (a), which *does* speak to subject-matter jurisdiction, but "[m]ere proximity will not turn a rule that speaks in nonjurisdictional terms into a jurisdictional hurdle." *Gonzalez v. Thaler*, 565 U.S. 134, 132 S. Ct. 641, 651, 181 L. Ed. 2d 619 (2012). And other subsections of § 1605A, most notably subsection (c), plainly

do *not* concern subject-matter jurisdiction, so the mere fact that the statute of limitations is located within § 1605A is not a clear statement of its jurisdictional character. Finally, there is no long history of this provision being treated as jurisdictional.[14] *See Worley v. Islamic Republic of Iran*, 75 F. Supp. 3d 311, 330-31 (D.D.C. 2014); *cf. John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 134-139, 128 S. Ct. 750, 169 L. Ed. 2d 591 (2008) (holding statute of limitations in Tucker Act jurisdictional primarily because a "long line of earlier cases" had already so held).

In arguing otherwise, Sudan leans heavily on a statement in a D.C. Circuit opinion that § 1605A(b)'s predecessor, § 1605(f),[15] was "contain[ed]" in a "jurisdictional provision." *Simon v. Republic of Iraq*, 529 F.3d 1187, 1194, 381 U.S. App. D.C. 483 (D.C. Cir. 2008) ("The jurisdictional provision upon which the plaintiffs rely contains a limitation period."), *rev'd on other grounds sub nom. Republic of Iraq v. Beaty*, 556

14. Candor compels the Court to acknowledge that in a 2009 order it concluded that the limitations period in § 1605A(b) *was* jurisdictional. *See* Order of Oct. 26, 2009, *Khaliq v. Republic of Sudan*, No. 04-1536 [ECF No. 35] at 3. But several intervening decisions from higher courts, most notably *United States v. Wong*, 135 S. Ct. 1625, 191 L. Ed. 2d 533 (2015), and *Van Beneden v. Al-Sanusi*, 709 F.3d 1165, 404 U.S. App. D.C. 223 (D.C. Cir. 2013), have convinced the Court to rethink its analysis.

15. "No action shall be maintained under [§ 1605(a)(7)] unless the action is commenced not later than 10 years after the date on which the cause of action arose. All principles of equitable tolling, including the period during which the foreign state was immune from suit, shall apply in calculating this limitation period." 28 U.S.C. § 1605(f) (repealed 2008).

U.S. 848, 129 S. Ct. 2183, 173 L. Ed. 2d 1193 (2009); *see* Sudan's Aliganga Mem. at 5-6. But *Simon* did not actually hold that § 1605(f)'s time bar was jurisdictional. And in a more recent decision, *Van Beneden v. Al-Sanusi*, 709 F.3d 1165, 404 U.S. App. D.C. 223, 2013 U.S. App. LEXIS 5708 (D.C. Cir. 2013), the D.C. Circuit treated § 1605A(b) as nonjurisdictional.

On appeal in *Van Beneden* was a 2010 decision in which the district court had held that an action against Libya was untimely under § 1605A(b) because an earlier suit did not qualify as a "related action." The district court had given two independent reasons that the earlier suit was not a "related action": first, because it was not brought by the same plaintiffs, and second, because it did not stem from the same act or incident. *Knowland v. Great Socialist People's Libyan Arab Jamahiriya*, No. 08-1309, slip op. at 6-11 (D.D.C. Oct. 8, 2010). On appeal, however, Libya wholly failed to defend the first of these holdings. The D.C. Circuit "[v]iew[ed] this as an implicit concession" and "d[id] not address the district court's determination that Knowland's suit fails because he was not involved in" the earlier suit against Libya. *Van Beneden*, 709 F.3d at 1167 n.3. It then reversed the district court's second holding and remanded the case for further proceedings. *Id.* at 1169. This disposition makes sense only if the D.C. Circuit concluded that timeliness under § 1605A(b) is not jurisdictional. If it were jurisdictional, the court could not have treated the district court's first holding as conceded by Libya's silence, a point a member of the panel recognized at the oral argument. Oral Arg. Recording at 3:05, *Van Beneden*, No. 11-7045 (D.C. Cir. Dec. 7, 2012)

("Is it something we nevertheless have to address? Is it jurisdictional?"). That the *Van Beneden* court concluded the issue is not jurisdictional is further signaled by the opinion's citation of *Southern California Edison Co. v. FERC*, which states: "A party can and does waive any argument not presented in our court *except those going to our own jurisdiction or similar structural issues* and a concession is analogous to a waiver." 603 F.3d 996, 1000, 390 U.S. App. D.C. 267 (D.C. Cir. 2010) (emphasis added) (cited by *Van Beneden*, 709 F.3d at 1167 n.3). Because the time limitation in § 1605A(b) is not jurisdictional, the alleged untimeliness of the *Khaliq*, Aliganga, and *Opati* plaintiffs' claims could not render their judgments "void" within the meaning of Rule 60(b)(4).

B. The Actions Were Timely

Even if § 1605A(b) *is* jurisdictional, the Court would not grant Sudan relief on this ground, for these plaintiffs' claims were timely. As noted, for an action to be timely under § 1605A(b), either (1) the action itself must have been filed by the later of April 24, 2006, or ten years after the cause of action arose, or (2) a "related action" must have been filed by the later of those two dates. *See* 28 U.S.C. § 1605A(b). The "related action" concept is elaborated in § 1083(c) of the 2008 NDAA (the act that created § 1605A), which provides in relevant part:

> **Related actions**. — If an action arising out of an act or incident has been timely commenced under section 1605(a)(7) of title 28, United States Code, . . . any other action arising out of

> the same act or incident may be brought under section 1605A of title 28, United States Code, if the action is commenced not later than the latter of 60 days after—
>
> > **(A)** the date of the entry of judgment in the original action; or
> > **(B)** the date of the enactment of this Act [Jan. 28, 2008].

Pub. L. No. 110-181, § 1083(c)(3), 122 Stat. at 343 (codified at 28 U.S.C. § 1605A note). The *Khaliq*, Aliganga, and *Opati* actions are timely under this provision. These actions "aris[e] out of the same act or incident" as the original *Owens* action. *Owens* was "timely commenced under section 1605(a)(7)" in October 2001. And the *Khaliq*, Aliganga, and *Opati* actions were "commenced not later than . . . 60 days after . . . the date of the entry of judgment in the original action," because judgment was not entered in *Owens* until 2014.

Sudan argues that these three actions are not "related" to *Owens* because a "related action" must be filed by the same plaintiffs. *See* Sudan's Aliganga Mem. at 8-11. In Sudan's view, § 1083(c)(3) would allow Plaintiff X, whose timely § 1605(a)(7) action went to final judgment on January 1, 2009, to file a new action under § 1605A within 60 days of that date—but it would not allow Plaintiff Y to file a "related" § 1605A action within that window, even if Y's action arises from the "same act or incident" as X's. Sudan points to two cases that it thinks support this "same plaintiffs" argument. The first is *Simon*, in which the

D.C. Circuit said that "[s]ection 1083(c)(3) . . . authorizes a plaintiff who had 'timely commenced' a 'related action' under § 1605(a)(7) to bring 'any other action arising out of the same act or incident.'" 529 F.3d at 1192. Sudan reads this sentence to mean that "the plaintiff bringing the 'related action' must be the same plaintiff who previously had timely filed a § 1605(a)(7) action." Sudan's D.C. Cir. Br. at 54. And the second is *Knowland*, the district court decision that squarely held that a "related action" requires the same plaintiffs, but which was then reversed on other grounds in *Van Beneden*. See Sudan's Aliganga Mem. at 8-9 (relying on *Knowland*).

The Court rejects Sudan's "same plaintiffs" argument. First and foremost, there is no such requirement in the text of § 1083(c)(3), which requires only that the actions arise from the same incident. Nor did *Simon* require identical plaintiffs: the sentence Sudan quotes comes from a discussion of the options available to plaintiffs with "cases that were pending under [§ 1605(a)(7)] when the Congress enacted the NDAA," 529 F.3d at 1192, so it makes perfect sense that the court described how § 1083(c)(3) operates with respect to plaintiffs who had previously filed a § 1605(a)(7) action. But *Simon* neither said nor held that *only* such plaintiffs can bring a "related action." By contrast, the district court in *Knowland* did so hold, but this Court is not bound by that decision and, with all respect, does not find its analysis convincing. The Court gives far greater weight to a more recent statement from the D.C. Circuit: "[T]he related action provision of § 1083(c)(3) . . . speaks of 'any *other* action,' and it turns on whether the new action 'arises from' the same act or

incident, not on whether it is identical to the prior suit *or even brought by the same plaintiff*." *Roeder v. Islamic Republic of Iran*, 646 F.3d 56, 61, 396 U.S. App. D.C. 183 (D.C. Cir. 2011) (second emphasis added). This statement might be dictum (as Sudan notes, *see* Reply at 18), but it is a highly persuasive dictum that accords with this Court's own reading of § 1083(c)(3). Because there is no "same plaintiffs" requirement, the *Khaliq*, Aliganga, and *Opati* actions were "related" to *Owens* and timely filed under § 1083(c)(3).

Sudan's fallback argument is that, even if identical plaintiffs are not required, these three actions cannot be deemed "related" to *Owens* because at the time they were commenced *Owens* no longer had any § 1605(a)(7) claims pending. Sudan's Aliganga Mem. at 11. Sudan is correct as a descriptive matter. Section 1083(c)*(2)* of the 2008 NDAA provided a mechanism whereby plaintiffs with pending § 1605(a)(7) actions could move to convert them into § 1605A actions. The *Owens* plaintiffs filed such a motion, which the Court granted, and they amended their complaint to allege jurisdiction under § 1605A. *See* Pls.' Mot. [*Owens* ECF No. 131]; Order of Jan. 26, 2009 [*Owens* ECF No. 148]; Fourth Am. Compl. [*Owens* ECF No. 149]. But this fact does not have the significance Sudan wishes. Section 1083(c)(3) does not say the original action must *still* have § 1605(a)(7) claims pending; it says the original action must "ha[ve] been timely *commenced* under section 1605(a)(7)" (emphasis added). There is no question that *Owens* was timely commenced under § 1605(a)(7).

Appendix B

Although the foregoing discussion adequately explains the timeliness of these three actions, some additional discussion of *Khaliq* may be justified, given the complicated history of that case and Sudan's effort to single it out. *See* Sudan's D.C. Cir. Br. at 55-57. Rizwan Khaliq and Jenny Lovblom originally filed a § 1605(a)(7) action against Sudan in 2004. *See Khaliq v. Republic of Sudan*, No. 04-1536 (D.D.C. filed Sept. 3, 2004). After the passage of the 2008 NDAA, they moved under § 1083(c)(2) to convert their action into a § 1605A action. But § 1083(c)(2) required such a conversion motion to be filed within 60 days of the NDAA's enactment, and Khaliq and Lovblom missed that deadline; the Court accordingly denied them leave to amend their complaint. Order of Sept. 9, 2009, *Khaliq*, No. 04-1536 [ECF No. 32]. Roughly six months later, Khaliq and Lovblom (now joined by seven additional co-plaintiffs) filed a new action, the *Khaliq* case now before the Court. They explained that this new action was timely under § 1083(c)(3) because it was "related" to *Owens* (and other embassy bombing cases). *See* Pls.' Mem., *Khaliq*, No. 10-356 [ECF No. 8] at 2.

Sudan thinks this must not be allowed—that a plaintiff who missed the § 1083(c)(2) deadline should not be able to "evade [it] simply by filing an action 'related' to his (or someone else's) pending action," as this would "effectively nullif[y] § 1083(c)(2)." Reply at 17. But Sudan is simply incorrect that the original *Khaliq* plaintiffs had to proceed through § 1083(c)(2) or not at all. As the D.C. Circuit has observed, the 2008 NDAA gave plaintiffs with pending § 1605(a)(7) actions several "*options* for obtaining the benefits of § 1605A," one of which was to file a new related

action in accordance with § 1083(c)(3). *Bakhtiar v. Islamic Republic of Iran*, 668 F.3d 773, 775, 399 U.S. App. D.C. 228 (D.C. Cir. 2012) (emphasis added). The plaintiffs in *Bakhtiar* failed to exercise any of those options correctly: they neither converted their § 1605(a)(7) action within the time set by § 1083(c)(2) nor filed a new related action under § 1083(c)(3) within 60 days of the entry of judgment in their original action (which appears to have been the only case "arising from the same act or incident"). *See id.* at 774-75. But the same is not true of the *Khaliq* plaintiffs. True, the original *Khaliq* plaintiffs did not convert their action within the time set by § 1083(c)(2), but they did file a new related action not later than 60 days after the entry of judgment in another case arising from the same incident: namely, *Owens*, in which judgment was not entered until 2014. That they did not successfully employ § 1083(c)(2) does not bear on whether they complied with § 1083(c)(3). *Cf. Roeder*, 646 F.3d at 62 (noting that "subsections [(c)(2) and (c)(3)] were added at different times in the legislative process, serve different purposes and share little similar language").

In sum, the Court will not vacate the *Khaliq*, Aliganga, or *Opati* judgments under Rule 60(b)(4) on timeliness grounds. The Court is unconvinced timeliness under § 1605A(b) is of jurisdictional significance. And even if the Court is mistaken on that point, these actions were timely because they are "related" to *Owens* and brought in compliance with § 1083(c)(3) of the 2008 NDAA.

Appendix B

Rule 60(b)(4): There Was Sufficient Evidence To Support Jurisdiction

Sudan's next attack on the judgments concerns the sufficiency of the evidence introduced at the October 2010 hearing. It is too late for Sudan to use this argument to attack the Court's *merits* determination. "A judgment is not void . . . simply because it is or may have been erroneous." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (2010) (internal quotation marks omitted). Recognizing as much, Sudan frames its evidentiary attack as going to the Court's subject-matter jurisdiction and therefore a ground to vacate under Rule 60(b)(4). The Court will address this argument in two stages. It will first explore whether Sudan's evidentiary objections actually pertain to subject-matter jurisdiction. The Court concludes that Sudan's objections are irrelevant to the Court's jurisdiction to hear claims based on the federal cause of action in § 1605A(c), but that they do bear on jurisdiction to hear the foreign family members' state-law claims. The Court then proceeds to examine whether the evidence was sufficient to support its jurisdiction over these claims, and concludes it was.

A. The Nature of the Jurisdictional Inquiry

In much federal litigation, the sufficiency of the evidence presented is unrelated to jurisdiction, because jurisdiction does not turn on the existence of facts. Federal question jurisdiction under 28 U.S.C. § 1331, most obviously, depends solely on the nature of the plaintiff's

claims, not on the truth of any of his factual allegations. *See, e.g., Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 249, 71 S. Ct. 692, 95 L. Ed. 912 (1951) ("If the complaint raises a federal question, the mere claim confers power to decide that it has no merit, as well as to decide that it has."). Thus, in a § 1331 case—for instance, a suit under the Americans with Disabilities Act—a judgment that rests on insufficient evidence is erroneous, but not void for lack of jurisdiction. *Cf. EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 623, 326 U.S. App. D.C. 67 (D.C. Cir. 1997).

The FSIA is a more complicated font of jurisdiction. Its various exceptions to immunity rest (at least to some extent) on factual predicates, and so a foreign sovereign "defendant may challenge either the legal sufficiency or the factual underpinning of an exception." *Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 40, 342 U.S. App. D.C. 145 (D.C. Cir. 2000). Thus, for instance, in a case brought under § 1605(a)(1)—which permits actions when "the foreign state has waived its immunity either explicitly or by implication"—a defendant could argue that the plaintiff's allegations, even if accepted as true, do not demonstrate a waiver. But the defendant could also argue that the alleged waiver did not occur in fact—that, for example, the contract containing the purported waiver is actually a forgery. If the defendant were correct as a matter of fact, the court would lack jurisdiction. *See Phoenix Consulting*, 216 F.3d at 41.

Not without reason, Sudan points to *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d

1123, 363 U.S. App. D.C. 87 (D.C. Cir. 2004), as an example of how these principles apply to the present litigation. *See* Sudan's Aliganga Mem. at 12-13. The plaintiff in *Kilburn* sued Libya under § 1605(a)(7), alleging hostage taking, torture, and extrajudicial killing. 376 F.3d at 1125. After the district court denied Libya's motion to dismiss, Libya pursued two arguments on appeal that are relevant here. Libya first argued that the plaintiff's allegations, even if true, failed to state a sufficient "causal connection between the foreign state's alleged acts and the victim's alleged injuries." *Id.* at 1127. The D.C. Circuit agreed that "because § 1605(a)(7) is a jurisdictional provision, causation is indeed a jurisdictional requirement," *id.* (citation omitted), but it concluded that the plaintiff's allegations sufficed to show the necessary degree of causation, *id.* at 1127-31. Second, and more importantly for present purposes, Libya contested "the factual basis for the district court's jurisdiction." *Id.* at 1131. The D.C. Circuit entertained this challenge, weighing the evidence of causation and concluding that the plaintiff's submissions were sufficient to defeat Libya's motion to dismiss. *Id.* at 1131-33.

Kilburn thus appears to confirm Sudan's view that whether the Court had subject-matter jurisdiction to enter the judgments in these cases depended in part on whether the plaintiffs introduced enough evidence showing that Sudan provided material support to al Qaeda that was causally connected to the bombings. And the Court will ultimately explain why, assuming this premise is correct, there was sufficient factual support. *See infra* pp. 49-59. Before doing so, however, the Court will explain why more

recent D.C. Circuit decisions persuade the Court that at least some of the plaintiffs in these cases are impervious to Sudan's factual attack on jurisdiction.

In *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934, 381 U.S. App. D.C. 316 (D.C. Cir. 2008), the D.C. Circuit addressed the FSIA's expropriation exception to immunity. That exception removes immunity in any case

> in which [A] rights in property taken in violation of international law are in issue and [B][1] that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or [2] that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States . . . .

28 U.S.C. § 1605(a)(3). The *Chabad* court explained that this exception "rest[s] jurisdiction in part on the character of a plaintiff's claim (designated 'A') and in part on the existence of one or the other of two possible 'commercial activity' nexi between the United States and the defendants (designated 'B')." 528 F.3d at 940. The alternative requirements in part B, the court continued, "are purely factual predicates independent of the plaintiff's claim, and must . . . be resolved in the plaintiff's favor before

the suit can proceed." *Id.* at 941. However, part A "does not involve jurisdictional facts, but rather concerns what the plaintiff has put 'in issue,' effectively requiring that the plaintiff assert a certain type of claim." *Id.* Critically, "to the extent that jurisdiction depends on the plaintiff's asserting a particular type of claim, and it has made such a claim, there typically is jurisdiction unless the claim is 'immaterial and made solely for the purpose of obtaining jurisdiction or . . . wholly insubstantial and frivolous.'" *Id.* at 940 (footnote omitted) (quoting *Bell v. Hood*, 327 U.S. 678, 682-83, 66 S. Ct. 773, 90 L. Ed. 939 (1946)). In other words, while jurisdiction depended on the plaintiff's proving that one or the other links to commercial activity actually existed, the plaintiff did not have to show that the property was actually "taken in violation of international law"—it merely had to make a non-frivolous claim of such a taking. *See id.* at 940-41.

Section 1605A(a) contains a two-part structure much like the one *Chabad* identified in § 1605(a)(3). Indeed, it is clearer in § 1605A, for it lines up precisely with subsections (a)(1) and (a)(2). Subsection (a)(1), recall, eliminates immunity in cases

> in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while

> acting within the scope of his or her office, employment, or agency.

28 U.S.C. § 1605A(a)(1). By eliminating immunity in cases where damages are "*sought*" for a particular kind of injury, this provision "requir[es] that the plaintiff assert a certain type of claim." *Chabad*, 528 F.3d at 941; *see also Robinson v. Gov't of Malaysia*, 269 F.3d 133, 149 (2d Cir. 2001) (Sotomayor, J., concurring in the judgment) (proposing similar reading of § 1605(a)(5)). Subsection (a)(2), by contrast, contains three collateral requirements: that the foreign state was designated a state sponsor of terrorism; that the claimant or victim was a U.S. national, servicemember, or government employee at the relevant time; and that, in certain circumstances, the foreign state was given a chance to arbitrate. *See* 28 U.S.C. § 1605A(a)(2)(A)(i)-(iii). These three requirements are "purely factual predicates" and hence traditional "jurisdictional facts." *Chabad*, 528 F.3d at 941.

On this reading, a court has jurisdiction only if the three requirements in subsection (a)(2) are *actually* met. If, say, it turned out that neither the claimant nor the victim in fact had the necessary U.S. status, the court would lack jurisdiction. But not so for subsection (a)(1). The question with respect to subsection (a)(1) is not whether the foreign state *actually* provided material support for an act of extrajudicial killing, it is merely whether the plaintiff has made a plausible *claim* that it did. *See Chabad*, 528 F.3d at 940. To analogize to a provision outside the FSIA, subsection (a)(1) is read like the Tucker Act, which gives the Court of Federal Claims "jurisdiction

to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States." 28 U.S.C. § 1491(a)(1). Jurisdiction under this provision, the Federal Circuit has held, does not depend on the plaintiff proving that a contract actually exists—rather, "a non-frivolous *allegation* of a contract with the government" suffices. *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1353 (Fed. Cir. 2011); *see, e.g., Gould, Inc. v. United States*, 67 F.3d 925, 929-30 (Fed. Cir. 1995).

This reading of § 1605A(a) might at first seem inconsistent with *Kilburn*, which did not simply accept the plaintiff's non-frivolous claim but examined the factual sufficiency of the plaintiff's allegations of torture, extrajudicial killing, and hostage taking. But a recent D.C. Circuit decision explains how to reconcile the two. In *Simon v. Republic of Hungary*, the court explained that *Chabad* and subsequent expropriation cases had required only a non-frivolous claim of a taking in violation of international law "because, in those cases, the plaintiff's claim on the merits directly mirrored the jurisdictional standard." 812 F.3d 127, 140 (D.C. Cir. 2016). That is, those plaintiffs had used the expropriation immunity exception in § 1605(a)(3) to bring a substantive claim of expropriation in violation of international law. "When the jurisdictional and merits inquiries fully overlap in that fashion, a plaintiff need not prove a winning claim on the merits merely to establish jurisdiction." *Id.* at 141. In *Simon* itself, by contrast, the "plaintiffs' claim on the merits [was] not an expropriation claim asserting a taking without just compensation in violation of international law. The plaintiffs instead

[sought] recovery based on garden-variety common-law causes of action such as conversion, unjust enrichment, and restitution." *Id.* Because "the jurisdictional and merits inquiries [did] not overlap," the court "ask[ed] for more than merely a non-frivolous argument," instead "assess[ing] whether the plaintiffs' allegations satisfy the jurisdictional standard." *Id.* The court assumed the truth of allegations because the defendants challenged only the complaint's *legal* sufficiency, but the court noted that the defendants could in theory "challenge the factual basis of those allegations on remand." *Id.* at 144.

Simon thus reveals why *Kilburn* required not just a non-frivolous claim but actual evidence that Libya caused the torture, extrajudicial killing, and hostage taking: because the jurisdictional and merits inquiries did not overlap. *Kilburn*, recall, predated the 2008 amendments. Jurisdiction might have existed under § 1605(a)(7), but there was no corresponding federal cause of action against Libya. The plaintiff was therefore necessarily going to rely on a substantive cause of action from some other source of law—a cause of action that would not neatly overlap with the jurisdictional grant in § 1605(a)(7). *See* 376 F.3d at 1129.

Chabad and *Simon* suggest a different jurisdictional inquiry here, however—at least with respect to some of the plaintiffs. The substantive law relied on by many of the plaintiffs here was the federal cause of action in § 1605A(c). That provision creates a "claim on the merits [that] directly mirror[s] the jurisdictional standard." *Simon*, 812 F.3d at 140. It renders foreign states liable

to certain plaintiffs "for personal injury or death caused by acts described in subsection (a)(1) of that foreign state . . . for which the courts of the United States may maintain jurisdiction under this section for money damages." 28 U.S.C. § 1605A(c); *see also* Mot. Hr'g Tr. at 43:14-16 (Sudan's counsel: "I do think that the jurisdictional inquiry and the merits inquiry on causation are conjoined and may be inseparable."). Because "the jurisdictional and merits inquiries fully overlap" in cases brought under § 1605A(c), *Simon* teaches that plaintiffs invoking that cause of action "need not prove a winning claim on the merits merely to establish jurisdiction." *Simon*, 812 F.3d at 141. "Rather, the plaintiff need only show that its claim is 'non-frivolous' at the jurisdictional stage, and then must definitively prove its claim in order to prevail at the merits stage." *Id.* (citing *Bell*, 327 U.S. at 682 ("If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.")); *cf.* Kevin M. Clermont, *Jurisdictional Fact*, 91 Cornell L. Rev. 973, 1020 (2006) ("On any factual element or legal question of forum authority, . . . if that element or question overlaps the merits of the claim, the proponent need provide only prima facie proof to establish the forum's authority.").

On this reading, there is no doubt that the Court had subject-matter jurisdiction over the claims brought under § 1605A(c). The plaintiffs' claim that Sudan provided material support causally connected to the bombings was nowhere near frivolous. *See infra* pp. 49-59; *Owens III*, 531 F.3d 884, 893-894, 382 U.S. App. D.C. 155, 2008 U.S. App.

LEXIS 14716 (D.C. Cir. 2008). Under *Chabad* and *Simon*, that was enough to invest the Court with subject-matter jurisdiction to hear the claims. *See also Williamson v. Tucker*, 645 F.2d 404, 415 (5th Cir. 1981) ("Where the defendant's challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, the proper course of action for the district court . . . is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case."). If, as Sudan claims, the plaintiffs failed to put forward sufficient evidence to substantiate those claims, that means only that the Court should have decided against the plaintiffs *on the merits*, not that it lacked jurisdiction. Hence, an insufficiency of evidence might render the judgments erroneous, but not void for lack of jurisdiction under Rule 60(b)(4).

Not only is this view of subject-matter jurisdiction under § 1605A supported by the statutory text, *Chabad*, and *Simon*, it also has the practical value of simplicity. "[A]dministrative simplicity is a major virtue in a jurisdictional statute." *Hertz Corp. v. Friend*, 559 U.S. 77, 94, 130 S. Ct. 1181, 175 L. Ed. 2d 1029 (2010). "Complex jurisdictional tests" create a variety of problems, including excessive "appeals and reversals," the danger of "gamesmanship," and—given federal courts' independent obligation to examine the issue—a drain on judicial resources. *Id.; see also Sisson v. Ruby*, 497 U.S. 358, 375, 110 S. Ct. 2892, 111 L. Ed. 2d 292 (1990) (Scalia, J., concurring in the judgment) (cautioning that "vague boundar[ies]" are "to be avoided in the area of subject-matter jurisdiction wherever possible"). Those

problems are avoided by a simple jurisdictional inquiry: is the claim under subsection (a)(1) non-frivolous and are the three requirements in subsection (a)(2) satisfied? If so, the court has jurisdiction to determine whether a plaintiff can recover under § 1605A(c).

But the claims of the foreign family-member plaintiffs are another matter. Because those plaintiffs could not invoke § 1605A(c), they relied on District of Columbia tort law, claiming intentional infliction of emotional distress (IIED). *See, e.g., Amduso v. Republic of Sudan*, 61 F. Supp. 3d 42, 47-48 (D.D.C. 2014). IIED is akin to the "garden-variety common-law causes of action" at issue in *Simon*, and like them does not "mirror[] the jurisdictional standard." 812 F.3d at 140. Hence, jurisdiction over these claims requires "more than merely a non-frivolous argument." *Id.* at 141. Instead, as *Kilburn* also indicates, there must be evidence substantiating the claim under § 1605A(a)(1). The Court must therefore examine whether the evidence was sufficient to support its jurisdiction.

B. The Sufficiency of the Evidence

The fundamental question Sudan's challenge poses is whether the plaintiffs adduced sufficient admissible evidence that Sudan provided "material support or resources" that "caused" the bombings. *See* Sudan's D.C. Cir. Br. at 30 (contending that plaintiffs "did not prove that any 'material support or resources' provided by Sudan 'caused' the Embassy bombings." (quoting 28 U.S.C. § 1605A(a)(1))). Before elaborating what this inquiry entails, a word about what it does *not.* The question is

not whether every factual proposition in the Court's 2011 opinion can be substantiated by record evidence admissible under the Federal Rules of Evidence. Sudan may have plausible arguments that some cannot. This is hardly surprising: the best safeguard against evidentiary error is an alert adversary raising timely objections—a role Sudan wholly failed to play. *See, e.g.*, 1 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 1:5, at 19-20 (4th ed. 2013). But the fact that particular statements in that opinion may not be adequately supported is irrelevant if there is nonetheless sufficient evidence in the record of the necessary jurisdictional facts. *Cf. Jennings v. Stephens*, 135 S. Ct. 793, 799, 190 L. Ed. 2d 662 (2015) ("This Court, like all federal appellate courts, does not review lower courts' opinions, but their *judgments*."); *Wilburn v. Robinson*, 480 F.3d 1140, 1148, 1151, 375 U.S. App. D.C. 257 (D.C. Cir. 2007) (affirming grant of summary judgment, despite district court's evidentiary error, on alternative ground supported by the record).

Assessing whether the record evidence was sufficient requires, of course, a proper understanding of the parties' respective burdens. "[T]he FSIA begins with a presumption of immunity, which the plaintiff bears the initial burden to overcome by producing evidence that an exception applies." *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1183, 407 U.S. App. D.C. 133 (D.C. Cir. 2013). If the plaintiff satisfies this "burden of production," "the defendant[] will bear the burden of persuasion to establish the absence of the factual basis by a preponderance of the evidence." *Simon*, 812 F.3d at 147 (internal quotation marks omitted); *accord*

Chevron Corp. v. Ecuador, 795 F.3d 200, 204, 417 U.S. App. D.C. 463 (D.C. Cir. 2015). The meaning of "burden of production" here is not wholly self-evident, as that term usually refers to the amount of evidence a party must present to allow an issue to go to a jury—a concept not directly applicable in the jury-less context of FSIA cases. *See, e.g.*, 2 Kenneth S. Broun et al., McCormick on Evidence § 336, at 645 (7th ed. 2013). But that usual meaning suggests a burden akin to the requirement of "substantial evidence" in administrative law. *See Kay v. FCC*, 396 F.3d 1184, 1188, 364 U.S. App. D.C. 448 (D.C. Cir. 2005) (noting that substantial evidence "is the amount of evidence constituting enough to justify, if the trial were to a jury, a refusal to direct a verdict" (internal quotation marks omitted)). The point is: the bar is relatively low. Yes, the existence of the burden of production means that the plaintiff must provide *some* evidence that could convince a factfinder of the jurisdictional fact in question. But because the ultimate burden of persuasion lies with the defendant, in cases where the defendant offers little or no evidence of its own, even a meager showing by the plaintiff will suffice. It is for this reason that the D.C. Circuit has adverted to the "risk[]" run by a FSIA "defendant that chooses to remain silent." *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 470 F.3d 356, 361, 373 U.S. App. D.C. 417 (D.C. Cir. 2006) (affirming denial of motion to dismiss); *see also Price v. Socialist People's Libyan Arab Jamahiriya*, 389 F.3d 192, 199, 363 U.S. App. D.C. 404 (D.C. Cir. 2004) (same). Sudan ran that risk here, offering no evidence whatsoever at the 2010 hearing.[16] The

16. Sudan did attach two affidavits to its first motion to dismiss in *Owens*, filed in March 2004. *See* Carney Decl. [*Owens* ECF No.

question, then, is simply whether the plaintiffs offered enough to satisfy their burden of production.

Although the record contains much else as well, the opinions of the plaintiff's three expert witnesses are enough to satisfy that burden. Expert opinions are often used in terrorism cases and can be of critical importance. *See, e.g., Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 705 (7th Cir. 2008) (en banc) ("[W]ith [the plaintiff's expert report] in the record and *nothing* on the other side the [district] court had no choice but to enter summary judgment for the plaintiffs with respect to Hamas's responsibility for the Boim killing."); *United States v. Benkahla*, 530 F.3d 300, 309-10 (4th Cir. 2008); *Simpson*, 470 F.3d at 361; *United States v. Damrah*, 412 F.3d 618, 625, 124 Fed. Appx. 976 (6th Cir. 2005); *Kilburn*, 376 F.3d at 1132; *Smith ex rel. Smith v. Islamic Emirate of Afghanistan*, 262 F. Supp. 2d 217, 228-32 (S.D.N.Y. 2003). Standard forms of direct evidence are for various reasons difficult, if not impossible, to obtain in terrorism cases. Terrorist groups and their state sponsors generally wish to hide their activities. *See Kilburn*, 376 F.3d at 1129 (noting Congress's recognition that "'material support' of terrorist acts by . . . state sponsors . . . is difficult to trace"). They are unlikely to keep the sorts of records

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49-1]; Cloonan Decl. [*Owens* ECF No. 49-2]. But those affidavits were never part of the record in any of the other cases. Sudan (obviously) did not attempt to introduce them at the 2010 evidentiary hearing it did not attend, so the plaintiffs had no opportunity or occasion to raise any evidentiary objections they might have had. And Sudan's own view appears to be that these declarations would have been inadmissible. *See* Sudan's Aliganga Mem. at 20.

that are crucial in other forms of litigation, *see id.* at 1130 ("[T]errorist organizations can hardly be counted on to keep careful bookkeeping records."), and even if they did, they generally do not (as Sudan did not here) participate in the discovery process, *see Han Kim v. Democratic People's Republic of Korea*, 774 F.3d 1044, 1048, 413 U.S. App. D.C. 356 (D.C. Cir. 2014) (noting North Korea's refusal "to appear in court and subject itself to discovery"). Security concerns give terrorists and their state sponsors good reason to minimize what any one individual knows of the group's (or state's) larger activities, making knowledgeable firsthand witnesses rare. And even when such witnesses exist, locating and bringing them into a U.S. court is incredibly difficult. In light of these circumstances, the opinions of experts who have studied these organizations and their links to state sponsors are extremely useful. Indeed, given the evidentiary difficulties in terrorism cases, discounting the value of expert testimony "would defeat [§ 1605A's] very purpose: to give American citizens an important economic and financial weapon to compensate 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." *Id.* (internal quotation marks, citation, and alterations omitted). Thankfully, "courts have the authority—indeed . . . the obligation—to adjust evidentiary requirements to differing situations." *Id.* (internal quotation marks and alterations omitted). In the context of § 1605A, that means an obligation to take expert testimony seriously. *See id.* at 1049-1051 (relying heavily on the declarations of expert witnesses).

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The easiest way to see the weight of the expert evidence here is simply to reproduce the experts' opinions. First were the conclusions of Evan F. Kohlmann, provided during live testimony at the October 2010 hearing:

> [A]l-Qaeda would not have been able to carry out the 1998 East Africa bombings had it not had a presence in Khartoum, Sudan. The presence, the safe haven that al-Qaeda had in the Sudan was absolutely integral for its capability of launching operations not just in Kenya, but in Somalia, in Eritrea, in Libya. Without this base of operations, none of this would have happened.
>
> Al-Qaeda did not have the capability of bringing in resources to that extent into this area. It did not have a place to base its leadership or its operatives. It did not have a ready supply of passports, of infrastructure. Sudan was the base for which almost everything that al-Qaeda did in the space between 1992 and 1998 leads back to. Without the support given by the Sudanese government, the attempted assassination attempt on Hosni Mubarak, the involvement in Somalia, the embassy bombings, none of this would have happened.
>
> . . . .
>
> [Sudanese government support] was integral [to al-Qaeda's ability to launch the two embassy

> attacks]. Again, without the base that Sudan provided, without the capabilities provided by the Sudanese intelligence service, without the resources provided, none of this would have happened. If you look, it's quite clear because of the fact that the vast majority of planning and preparation that went into the al-Qaeda cell in Nairobi took place between the years of 1991 and 1997. The vast majority of that was done by al-Qaeda operatives transiting back and forth between Nairobi from Khartoum.
>
> And you can take the words of al-Qaeda operatives themselves. They label the cell in Nairobi as the key way station that allowed them back and forth into Somalia. Without Sudan, there never would have been Nairobi, there would have never been a Somalia, there would have never been any of this. It was absolutely essential, integral.

Evidentiary Hr'g Tr., Oct. 28, 2010 [*Owens* ECF No. 213] at 317-18.

Next, Dr. Lorenzo Vidino submitted an expert report on "Sudan's State Sponsorship of al Qaeda" that arrived at the following conclusions:

> The twin attacks on the United States Embassies in Nairobi, Kenya, and Dar Es Salaam, Tanzania, were part of a decade-long plan conceived by Osama Bin Laden's terrorist

organization, al Qaeda, to attack US interests in the Middle East and East Africa. Since the end of the 1980s, Bin Laden had worked on creating a worldwide terrorist organization whose main aim was to strike at American targets.

From 1991 to 1996, Osama Bin Laden and his organization were sheltered and supported by the Sudanese government in Sudan. During these five years, al Qaeda and the Sudanese government established a deeply intertwined, symbiotic relationship, which required cooperation on many fronts. Early during its stay in Sudan, al Qaeda publicized its intent to attack American interests. This was demonstrated by several fatwas and by attacks on US contractors in Riyadh, Saudi Arabia, an attempted attack on US soldiers in Aden, Yemen, as they were en route to Somalia to carry out Operation Restore Hope, and al Qaeda's infamous campaign against the US forces in Somalia during the Operation Restore Hope. The Sudanese government even facilitated attempted terrorist attacks in the United States. The Sudanese government can not claim that it allowed Bin Laden to stay in Khartoum but did not know of and support his goals to attack US interests.

During the years that the Sudanese government sheltered al Qaeda, the organization flourished both financially and militarily. It developed

> critical ties with several terrorist organizations and trained its operatives who subsequently carried out increasingly sophisticated attacks throughout the world.
>
> The material support that the Sudanese government provided was indispensable, as al Qaeda could not have achieved its attacks on the US Embassies in 1998 if it had not operated in a country that not only tolerated, but actually actively assisted and participated in al Qaeda terrorist activities, despite knowing al Qaeda's intent to attack US interests.

Vidino Report [*Amduso* ECF No. 288-5] at 34-35. (Vidino's report was introduced as Exhibit V during the October 2010 evidentiary hearing. *See* Evidentiary Hr'g Tr., Oct. 26, 2010 [*Owens* ECF No. 212] at 142-43.)

Finally, there was the opinion of Steven Simon, who both submitted an expert report and provided live testimony. In his report he concluded:

> The Republic of Sudan supplied al Qaeda with important resources and support during the 1990s knowing that al Qaeda intended to attack the citizens, or interests of the United States. This support encompassed the safe haven of the entire country for bin Laden and the top al Qaeda leadership. This enabled bin Laden and his followers to plot against the US and build their organization free from US interference.

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> Sudanese shelter enabled Bin Laden to create training camps, invest in—and use—banking facilities, create business firms to provide cover for operatives, generate funds for an array of terrorist groups, provide official documents to facilitate clandestine travel, and enjoy the protection of Sudan's security service against infiltration, surveillance and sabotage.

Simon Report [*Amduso* ECF No. 288-3] at 5-6. (Simon's report was introduced as Exhibit W-2 during the October 2010 evidentiary hearing. *See* Evidentiary Hr'g Tr., Oct. 28, 2010, at 343-44.) And in his live testimony Simon concluded:

> I think it's fair to say that in the absence of the safe haven provided by Sudan to al-Qaeda, that the planning for and the execution of the attacks against those embassies would have been vastly more complicated. I can't say that they would have been impossible, but it's difficult to see how, in the absence of the active support and freedom of action that Bin Laden enjoyed in the Sudan, and the fact that much of the preoperational activities were directed from Khartoum, that the attacks could have been carried out with equal success.

Evidentiary Hr'g Tr., Oct. 28, 2010, at 344.

It is important to note that the foregoing are the experts' ultimate conclusions—that is, their expert

opinions. Sudan spills a great deal of ink attacking as inadmissible hearsay particular statements the experts made in the course of explaining the bases for their opinions. *See, e.g.*, Sudan's Aliganga Mem. at 16-17. But the admissibility of statements along the way is irrelevant if—as the Court concludes—the ultimate opinions themselves are sufficient.[17] For it is perfectly clear that an expert's opinion need not be based on evidence that is itself admissible. Fed. R. Evid. 703; *see, e.g., Williams v. Illinois*, 567 U.S. 50, 132 S. Ct. 2221, 2233-35, 183 L. Ed. 2d 89 (2012) (plurality opinion); *Simpson*, 470 F.3d at 362 & n.1 (discussing expert opinion in FSIA terrorism case). As Judge Posner ably put the point—in the context of expert testimony concerning terrorism, no less—to confine experts' analysis to admissible evidence alone

> would be a crippling limitation because experts don't characteristically base their expert judgments on legally admissible evidence; the rules of evidence are not intended for the guidance of experts. Biologists do not study animal behavior by placing animals under oath, and students of terrorism do not arrive at their assessments solely or even primarily by studying the records of judicial proceedings.

17. It would be a different matter if Sudan were attacking a jury verdict on the theory that the revelation of inadmissible evidence underlying an expert's opinion was unduly prejudicial. *See* Fed. R. Evid. 703 advisory committee's note to 2000 amendments (noting "the risk of prejudice resulting from the jury's potential misuse of the information for substantive purposes"). But that of course is not the situation here.

Boim, 549 F.3d at 704; *see also Damrah*, 412 F.3d at 625 ("'Given the secretive nature of terrorists, the Court can think of few [non-hearsay] materials that experts in the field of terrorism would rely upon.'" (quoting district court)). Thus, Sudan's contention that the experts' "conclusions are inadmissible because they are based on underlying inadmissible evidence," Reply at 14, is just flat wrong.

Sudan's fallback argument, which makes its first appearance in Sudan's reply brief, is that Kohlmann and Vidino should not have been accepted as experts in the first place. Reply at 11-13. (Sudan does not, presumably because it cannot, question the expertise of Simon.) The proper occasion for such an argument was not Sudan's reply brief, nor even its opening motion for vacatur—it was October 2010. *See* Fed. R. Evid. 103(a)(1)(A); *Hinds v. Gen. Motors Corp.*, 988 F.2d 1039, 1046 (10th Cir. 1993) (refusing to consider untimely attack on expert's qualifications). And even if the merits of this argument deserved consideration, the Court would rule against Sudan. Sudan is effectively asking the Court to review its own qualification decision. The Court sees no abuse of discretion. *See Haarhuis v. Kunnan Enters., Ltd.*, 177 F.3d 1007, 1015, 336 U.S. App. D.C. 174 (D.C. Cir. 1999) ("[T]he decision whether to qualify an expert witness is within the broad latitude of the trial court and is reviewed for abuse of discretion."). That conclusion is bolstered by the fact that both Kohlmann and Vidino have repeatedly been qualified as experts on this or similar subject matter. *See, e.g., United States v. Hassan*, 742 F.3d 104, 131 (4th Cir. 2014) (Kohlmann); *Harrison v. Republic of Sudan*, 882 F. Supp. 2d 23, 31 n.10 (D.D.C. 2012) (Vidino).

In sum, the consistent and admissible opinions of these three experts were sufficient to satisfy the plaintiffs' burden of producing evidence that Sudan provided "material support" that "caused" the embassy bombings. Because Sudan offered nothing—neither evidence nor argument—in response, it failed to carry its "burden of persuasion to establish the absence of the factual basis by a preponderance of the evidence." *Simon*, 812 F.3d at 147 (internal quotation marks omitted). The Court therefore had subject-matter jurisdiction to decide the plaintiffs' claims.

Although the Court sees no need to review all of the other evidence the plaintiffs introduced or to respond to all of Sudan's much-belated evidentiary objections, it will address one further issue, on the chance that its views might assist the D.C. Circuit. One significant piece of evidence the plaintiffs introduced was a transcript of testimony given in an earlier federal criminal trial by Jamal al-Fadl, a former al Qaeda member who had "served as an intermediary between al Qaeda and the Sudanese intelligence service." *Owens IV*, 826 F. Supp. 2d 128, 140 (D.D.C. 2011); *see* Evidentiary Hr'g Tr., Oct. 26, 2010, at 136-37 (introduction of al-Fadl's prior testimony). Sudan argues that al-Fadl's prior testimony was inadmissible in its entirety because it was hearsay. Sudan's Aliganga Mem. at 18; Reply at 7-9. That is incorrect.

To understand why Sudan is wrong, it is important to recall the nature of the 2010 proceeding. It was not an adversarial trial. It was an evidentiary hearing to satisfy the FSIA provision that prohibits entry of a default

judgment "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e). Although courts seeking to comply with this requirement often hold hearings featuring live witness testimony, the provision does not actually demand a hearing or live testimony; it demands *evidence*. *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 242 (2d Cir. 1994) ("[W]e do not believe that § 1608(e) requires evidentiary hearings or explicit findings where the record shows that the plaintiff provided sufficient evidence in support of its claims."). Courts have accordingly recognized that FSIA plaintiffs seeking a default judgment can proceed by affidavit. *See, e.g., Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, 111 (6th Cir. 1995); *Rafidain Bank*, 15 F.3d at 242; *Rimkus v. Islamic Republic of Iran*, 750 F. Supp. 2d 163, 171 (D.D.C. 2010). "Affidavits, though usually not admitted into evidence in ordinary trials, are allowed in hearings conducted under 28 U.S.C. § 1608(e) since the hearings are ex parte. That is, courts have found that there is no reason to require live witness testimony in these hearings because the defendants have failed to enter an appearance in the actions, and, accordingly, would not be there to cross-examine the affiant in open court." *Hutira v. Islamic Republic of Iran*, 211 F. Supp. 2d 115, 124 (D.D.C. 2002). Thus, for instance, although the district court never held a hearing with live testimony in *Han Kim v. Democratic People's Republic of Korea*, the D.C. Circuit found sufficient admissible evidence to support a FSIA default judgment in the various affidavits the plaintiffs had submitted. *See* 774 F.3d at 1049-51.[18]

18. That the district court did not hold a hearing with live testimony is evident from the district court docket entries and the various filings in both the district court and the D.C. Circuit.

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In the context of FSIA default proceedings, sworn prior testimony is just as admissible as a sworn affidavit. An affidavit in which Jane swears, "I saw X," is not meaningfully different from a transcript of a trial in which Jane took the stand and swore, "I saw X." That is why prior testimony can support a motion for summary judgment just as well as an affidavit can. *E.g., Int'l Distrib. Corp. v. Am. Dist. Tel. Co.*, 569 F.2d 136, 138, 186 U.S. App. D.C. 305 (D.C. Cir. 1977) ("[E]ither an affidavit or a certified transcript of prior testimony may provide the basis for summary judgment."). Of course, the *content* of either type of submission could in theory be inadmissible, but they are both equally admissible *forms* of evidence. *See* 11 James Wm. Moore et al., Moore's Federal Practice § 56.91[1]-[3] (3d ed. 2015) (discussing the distinction between admissible content and admissible form). That is just as true in FSIA default judgment proceedings as in Rule 56 summary judgment proceedings.

Sudan's attack on al-Fadl's prior testimony is a misguided objection to its form, not its content. If Sudan had shown up in 2010 and gone to trial, it could have demanded that the plaintiffs put al-Fadl on the stand (or fit his prior testimony into a hearsay exception)—but it didn't. In light of Sudan's default, al-Fadl's prior testimony was a perfectly appropriate form of evidence. By the same logic, Sudan's hearsay objections to the deposition testimony of Essam al-Ridi and the plea hearing testimony of Ali Mohamed also fail. *See* Sudan's Aliganga Mem. at 19; Reply at 14. The consideration of all three sets of testimony was proper. And any objection to aspects of the *content* of that testimony should have—as is true of so many of Sudan's arguments—been raised long ago.

In sum, the Court had jurisdiction to hear claims brought under § 1605A(c) because that cause of action directly mirrors the jurisdictional standard in § 1605A(a) and the plaintiffs' claims were not frivolous. Jurisdiction to hear the state-law claims depended on the plaintiffs' producing admissible evidence that Sudan provided "material support or resources" that "caused" the bombings. The plaintiffs met their burden of production by offering the three expert opinions (as well as the testimony of al-Fadl and others), and Sudan failed to carry its burden of persuasion. The Court therefore had a sufficient factual basis for jurisdiction to hear all of the plaintiffs' claims.

Rule 60(b)(4): "Indirect" Victims Can Sue Under § 1605A

Sudan's final jurisdictional argument is that § 1605A does not provide subject-matter jurisdiction for the claims of "indirect" victims, that is, immediate family members of those physically injured or killed in the bombings, who have claimed emotional injuries stemming from the attacks. Subsection (a)(1) of § 1605A is limited to cases in which damages are sought "for personal injury or death," and in Sudan's view "personal injury" requires bodily harm. Sudan's Aliganga Mem. at 26-27. Sudan also relies on subsection (a)(2), which (among other things) requires that at the time of the predicate act "the claimant or the victim was" a U.S. national, a member of the U.S. armed forces, or a U.S. government employee. 28 U.S.C. § 1605A(a)(2)(A)(ii). In Sudan's view, this indicates that claims can be brought only by the direct "victim" or by a legal representative ("claimant") on the victim's behalf if the victim is killed or incapacitated. Reply at

15-16; Sudan's D.C. Cir. Br. at 46-48. Sudan also points to the district court opinion in *Cicippio Puleo v. Islamic Republic of Iran*, which concluded (correctly, in Sudan's estimation) that "Congress did not intend the FSIA to so enlarge the scope of potential liability of sovereign foreign states—even 'terrorist' states—to require them to compensate non-victim plaintiffs for damages." 2002 U.S. Dist. LEXIS 27050, 2002 WL 34408105, at *3 (D.D.C. June 21, 2002); *see* Sudan's Aliganga Mem. at 25-26; Sudan's D.C. Cir. Br. at 48-49.

The short answer to this argument is that it is foreclosed by precedent. In fact, it is the *Cicippio-Puleo* case that forecloses it. That action was brought by family members of Joseph J. Cicippio, Sr., who had been taken hostage and held for years by Hezbollah. The plaintiffs sued Iran under § 1605(a)(7), alleging emotional injuries stemming from Cicippio's captivity. As Sudan notes, the district court dismissed the case, both for failure to state a claim and for lack of jurisdiction. *Cicippio Puleo*, 2002 U.S. Dist. LEXIS 27050, 2002 WL 34408105, at *2 ("dismiss[ing] the complaint pursuant to Fed. R. Civ. P. 12(b)(6) and 12(h)(3)"). But Sudan ignores what happened on appeal. After noting that the district court had dismissed on these two alternative grounds, the D.C. Circuit said: "The second ground is inapposite, for it is clear that the District Court had jurisdiction pursuant to the statutory waiver of sovereign immunity under 28 U.S.C. § 1605(a)(7)." *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1030, 359 U.S. App. D.C. 299 (D.C. Cir. 2004). That is, it was "*clear*" that § 1605(a)(7) provided jurisdiction to family members suing for intentional

infliction of emotional distress (IIED). The D.C. Circuit went on to hold that the plaintiffs lacked a cause of action under the Flatow Amendment (thus affirming the district court in part), but because it held that there was jurisdiction under § 1605(a)(7), it remanded the case "to allow plaintiffs an opportunity to amend their complaint to state a cause of action under some other source of law." *Id.* at 1036. Thus, the D.C. Circuit has squarely held that § 1605(a)(7) provided jurisdiction for family members' claims. This holding cannot be waved off as unconsidered: this was an issue of subject-matter jurisdiction, which the court surely knew it must consider carefully. Moreover, the court received briefing that directly addressed whether IIED fit within § 1605(a)(7)'s terms. *See* Br. for Appointed Amicus Curiae at 26-27, *Cicippio-Puleo*, 353 F.3d 1024, 359 U.S. App. D.C. 299 (No. 02-7085), 2003 WL 25585771.[19] Because the language of § 1605A(a) is not different from the language of § 1605(a)(7) in any relevant way—and nothing suggests the enactment of § 1605A(a) was intended to *expand* immunity—Sudan's argument that the Court lacked jurisdiction to hear family members' claims must be rejected.

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19. And the court concluded likewise in *Oveissi v. Islamic Republic of Iran*, 573 F.3d 835, 387 U.S. App. D.C. 366 (D.C. Cir. 2009). There, the grandson of a former Iranian general who was assassinated by Hezbollah sued Iran under the FSIA, alleging IIED and wrongful death. Although the D.C. Circuit remanded the case without determining whether the plaintiff had viable causes of action, it noted that "the district court correctly determined that it had jurisdiction over the plaintiff's suit under the terrorism exception of the FSIA," *i.e.*, § 1605(a)(7). 573 F.3d at 840.

Cicippio-Puleo's conclusion, moreover, is correct as a matter of statutory interpretation. Sudan thinks not, in part (as noted earlier) because it thinks "personal injury" means only physical bodily injury. But "personal injury" does not usually receive so narrow an interpretation. Indeed, four years before § 1605(a)(7) was enacted, the Supreme Court interpreted the term as used in a tax code provision to encompass "nonphysical injuries to the individual, such as those affecting emotions, reputation, or character," an interpretation it deemed "in accord with common judicial parlance and conceptions" of the term. *United States v. Burke*, 504 U.S. 229, 235 n.6, 112 S. Ct. 1867, 119 L. Ed. 2d 34 (1992). Burke relied in part on the sixth edition of Black's Law Dictionary, which observed that the "narrow sense" of "personal injury" is bodily injury, but the "wider sense," found "usually in statutes," includes "any injury which is an invasion of personal rights, and in this signification it may include such injuries to the person as . . . mental suffering." Black's Law Dictionary 786 (6th ed. 1990) (defining various types of "injury"). And IIED is commonly described as a "personal injury" claim. *See, e.g., Leach v. Taylor*, 124 S.W.3d 87, 91 (Tenn. 2004); *Hawkes v. Commercial Union Ins. Co.*, 2001 ME 8, 764 A.2d 258, 264 (Me. 2001); *Curtis v. Firth*, 123 Idaho 598, 850 P.2d 749, 752 (Idaho 1993); *Luddeke v. Amana Refrigeration, Inc.*, 239 Va. 203, 387 S.E.2d 502, 504, 6 Va. Law Rep. 1170 (Va. 1990). Still, says Sudan, "personal injury" could mean only bodily injury, and any ambiguity in § 1605A should be construed narrowly, in favor of its immunity. Sudan's Aliganga Mem. at 26-29. But the D.C. Circuit has rejected such a rule of narrow construction (albeit in a decision that was later reversed

on other grounds). *See Simon v. Republic of Iraq*, 529 F.3d 1187, 1196, 381 U.S. App. D.C. 483 (D.C. Cir. 2008) ("[N] or are we aware of any case in which a court presumed or suggested exceptions to foreign sovereign immunity should be construed narrowly."), *rev'd on other grounds sub nom. Republic of Iraq v. Beaty*, 556 U.S. 848, 129 S. Ct. 2183, 173 L. Ed. 2d 1193 (2009). Interpretation of § 1605A proceeds "unencumbered by any special canons of construction," *id.*, and the better reading is that "personal injury" includes emotional injuries of the sort the family members suffered.

Nor is the Court persuaded by Sudan's argument that the only possible "claimant" apart from the "victim" directly injured by the incident is a legal representative of that "victim." Reply at 15-16; Sudan's D.C. Cir. Br. at 46-48. No doubt "claimant" can encompass the legal representative of a direct victim who has been killed or incapacitated. But it seems strange to limit "claimant" to only that meaning, given that in the cause of action in § 1605A(c)—enacted at the same time as § 1605A(a)—Congress specifically used the term "legal representative." 28 U.S.C. § 1605A(c)(4); *see Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004) (noting the "usual rule" that differences of language within a statute indicate differences of meaning). The more natural reading is that "claimant" means whoever is bringing the claim under § 1605A(a). Subsection (a)(2), after all, is devoted to explaining the circumstances in which "[t]he court shall hear a claim under this section." 28 U.S.C. § 1605A(a)(2). And because IIED is a claim that fits within subsection (a)(1), the Court sees no reason

why the "claimant"/"victim" language in subsection (a)(2) forecloses jurisdiction over family members' claims. The far more obvious function of subsection (a)(2) is to ensure that only claims with a connection to a U.S. national, servicemember, or government employee can be heard. That function is not undermined by allowing family members' claims. *See Oveissi v. Islamic Republic of Iran*, 573 F.3d 835, 840, 387 U.S. App. D.C. 366 (D.C. Cir. 2009) (finding jurisdiction under § 1605(a)(7) for suit alleging IIED by U.S. grandson of assassinated Iranian general, and describing grandson as "the claimant"); *see also Leibovitch v. Islamic Republic of Iran*, 697 F.3d 561, 568-72 (7th Cir. 2012) (finding jurisdiction under § 1605A for family members' claims).

Rule 60(b)(6): The Court Will Not Vacate Foreign Family Members' Judgments

Sudan's next argument is that, even if § 1605A(a) gave the Court subject-matter jurisdiction to hear the claims of victims' family members, those family-member plaintiffs who are foreign nationals did not have a valid cause of action. That is so, Sudan argues, for two independent reasons. First, § 1606, which Sudan characterizes as a "gateway" through which FSIA plaintiffs must pass to access substantive law, does not cross-reference § 1605A, but only §§ 1605 and 1607. According to Sudan, this means that the only cause of action available to plaintiffs proceeding under § 1605A(a) is the one in § 1605A(c), and that cause of action (as this Court has held) is not available to foreign plaintiffs. Sudan's Aliganga Mem. at 29-30; *see also Owens IV*, 826 F. Supp. 2d 128, 151-53 (D.D.C. 2011).

Second, Sudan argues that even if the foreign family members could access D.C. law—the substantive law this Court held would apply to those plaintiffs, *see Owens IV*, 826 F. Supp. 2d at 153-57—they failed to state viable IIED claims because they did not personally witness (or at least contemporaneously perceive) their direct-victim relatives suffer their injuries. Sudan's Aliganga Mem. at 30-32. And because the foreign family members did not have a valid cause of action, Sudan says, their judgments should be vacated under Rule 60(b)(6). *Id.* at 32.

Sudan completely fails, however, to explain why these nonjurisdictional arguments, even if correct, would justify relief under Rule 60(b)(6). As noted earlier, that provision, which follows the more specific circumstances identified in subsections (b)(1) through (b)(5), allows a court to vacate a final judgment for "any other reason that justifies relief." "[R]elief under Rule 60(b)(6) . . . requires a showing of 'extraordinary circumstances.'" *Gonzalez v. Crosby*, 545 U.S. 524, 536, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005); *accord Kramer v. Gates*, 481 F.3d 788, 792, 375 U.S. App. D.C. 292 (D.C. Cir. 2007) (noting "that Rule 60(b)(6) should be only sparingly used" and requires movants to "clear a very high bar to obtain relief" (internal quotation marks omitted)). Sudan provides no authority suggesting that the mere existence of a nonjurisdictional legal error is such an extraordinary circumstance. Precedent suggests the contrary. In *Gonzalez*, for instance, the Supreme Court said that a district court's (assumedly) "incorrect" dismissal, based on circuit precedent later held to be erroneous, did not amount to extraordinary circumstances under Rule 60(b)(6). 545 U.S. at 536. And the D.C. Circuit has noted

that "a dispute over the proper interpretation of a statute does not qualify as an extraordinary circumstance under Rule 60(b)(6)." *Carter v. Watkins*, 995 F.2d 305, 301 U.S. App. D.C. 405 [published in full-text format at 1993 U.S. App. LEXIS 14654], 1993 WL 210853, at *2 (D.C. Cir. 1993) (per curiam) (table); *see also, e.g., Pierce v. United Mine Workers of Am. Welfare & Ret. Fund for 1950 & 1974*, 770 F.2d 449, 451 (6th Cir. 1985) ("Because of the residual nature of Rule 60(b)(6), a claim of simple legal error, unaccompanied by extraordinary or exceptional circumstances, is not cognizable under Rule 60(b)(6)."); *Elgin Nat'l Watch Co. v. Barrett*, 213 F.2d 776, 779-80 (5th Cir. 1954) ("The mere fact that the judgment was erroneous does not constitute 'any other reason justifying relief' from it." (footnote omitted)).

If the mere fact of nonjurisdictional error can ever be the basis for Rule 60(b) relief, it should be limited to instances of clear or obvious error, or (perhaps) where the controlling law has changed after the entry of judgment. *See Van Skiver v. United States*, 952 F.2d 1241, 1244 (10th Cir. 1991) (relief based on "mistake" of law under Rule 60(b)(1) "is available only for obvious errors of law"); *Alvestad v. Monsanto Co.*, 671 F.2d 908, 913 (5th Cir. 1982) (similar); *Ctr. for Nuclear Responsibility, Inc. v. U.S. Nuclear Regulatory Comm'n*, 781 F.2d 935, 940, 251 U.S. App. D.C. 82 (D.C. Cir. 1986) (correction of legal errors permitted under Rule 60(b)(1), at least during the appeal period, "where the controlling law of the circuit had changed between the time of the judgment and the

time of the motion").[20] (Even under the more forgiving Rule 59(e) standard, relief need not be granted absent "an intervening change of controlling law, the availability of new evidence, or the need to correct a *clear* error or prevent *manifest* injustice." *Patton Boggs LLP v. Chevron Corp.*, 683 F.3d 397, 403, 401 U.S. App. D.C. 263 (D.C. Cir. 2012) (emphasis added) (internal quotation marks omitted).) There is no suggestion here of any change in controlling law. And Sudan has not identified clear or obvious errors.

Start with Sudan's contention that § 1605A(c) provides the only cause of action available to plaintiffs proceeding under the jurisdictional grant in § 1605A(a). As noted, the premise underlying this argument is that in order to access substantive law outside the FSIA, a plaintiff needs the "gateway" of § 1606, and § 1606 refers only to claims brought under §§ 1605 or 1607, not § 1605A. Sudan's Aliganga Mem. at 29-30. But § 1606 (reproduced in full in the margin[21]) does not by its terms create an exclusive

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20. As these citations suggest, those courts that have held that legal error alone can justify relief from a final judgment have usually done so under Rule 60(b)(*1*). *See generally* 11 Charles Alan Wright et al., Federal Practice and Procedure § 2858.1 (3d ed. 2012). Sudan has made no argument of this sort, and would have been time-barred from doing so in *Mwila* and *Khaliq*. *See* Fed. R. Civ. P. 60(c)(1) (requiring motions under Rule 60(b)(1) to be brought no more than one year after the entry of judgment).

21. Section 1606 ("Extent of liability") provides:

> As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be

"gateway" through which a plaintiff must pass in order to access substantive law. The section does not grant access to substantive law, or even define what substantive law applies to claims brought under the FSIA. *See Oveissi*, 573 F.3d at 841 ("The FSIA does not contain an express choice-of-law provision."). Instead, as suggested by its title, "Extent of liability," § 1606 places certain limits on the liability that the applicable substantive law—whatever its source—can impose on the foreign sovereign. True, courts have relied in part on § 1606 in deciding what choice-of-law rules to apply in FSIA cases, *see id.*, but that does not make § 1606 the indispensable "gateway" that Sudan envisions.

To put the point another way, imagine if § 1606 were deleted entirely: would that mean FSIA plaintiffs proceeding under the jurisdiction provided by § 1605 would have no access to substantive law? The Court thinks not. It is aware of no authority suggesting that a grant

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> 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; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

28 U.S.C. § 1606.

of subject-matter jurisdiction is a nullity if Congress fails to expressly define the substantive law that applies. Early Supreme Court decisions repeatedly avowed that even if the first Congress had not enacted the Rules of Decision Act—which instructed federal courts to use state laws as rules of decision in certain circumstances, see Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (codified as amended at 28 U.S.C. § 1652)—federal courts would have the obligation (and *a fortiori* the ability) to apply state law to cases within their jurisdiction. *See Hawkins v. Barney's Lessee*, 30 U.S. (5 Pet.) 457, 464, 8 L. Ed. 190 (1831) ("[The Rules of Decision Act] has been uniformly held to be no more than a declaration of what the law would have been without it: to wit, that the lex loci must be the governing rule of private right, under whatever jurisdiction private right comes to be examined."); *Bank of Hamilton v. Dudley's Lessee*, 27 U.S. (2 Pet.) 492, 525, 7 L. Ed. 496 (1829) (observing that state law would "be regarded as a rule of decision in the courts of the United States . . . independent of" the Rules of Decision Act); *see also Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 161-63, 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987) (Scalia, J., concurring in the judgment). Hence, it appears that even if § 1606 did not exist at all, federal courts could still adjudicate cases falling within the subject-matter jurisdiction provided by the FSIA. They would continue to do what they do now: use the choice-of-law rules of the state in which they sit to determine the applicable substantive law. *See Oveissi*, 573 F.3d at 841; *cf.* 19 Charles Alan Wright et al., Federal Practice and Procedure § 4520 (2d ed. 1996) (discussing the application of state law by federal courts in nondiversity cases). The

upshot is that Congress's failure to add a cross-reference to § 1605A in § 1606 does not block state law from applying to claims for which subject-matter jurisdiction is provided by § 1605A(a). It merely means that the special rules of liability in § 1606 do not apply to claims arising under § 1605A(a).

That brings us to Sudan's second argument: that the foreign family members failed to state viable IIED claims under D.C. law. Sudan argues that D.C. law would not allow recovery for IIED unless these plaintiffs had been present at the time of, or at least had contemporaneously perceived, the outrageous conduct (*i.e.*, the bombings). But Sudan cannot point to a decision by the D.C. Court of Appeals that actually imposes a bright-line presence requirement. True, Sudan can and does point to a D.C. Circuit decision that reads D.C. tort law in this way: *Pitt v. District of Columbia*, which said that "under D.C. tort law, a family member can only recover for IIED if she was 'present' when the extreme or outrageous conduct took place." 491 F.3d 494, 507, 377 U.S. App. D.C. 103 (D.C. Cir. 2007). But with all due respect, this Court does not believe *Pitt* clearly controls under the circumstances here. *Pitt* noted that the District of Columbia had adopted the IIED standard laid out in the Restatement (Second) of Torts, which does suggest that presence is usually required for family-member plaintiffs. *See id.* But the Restatement also contains a "Caveat" that leaves open "whether there may not be other circumstances under which the actor may be subject to liability for the intentional or reckless infliction of emotional distress," and more specifically "leave[s] open the possibility of situations in which presence at

the time may not be required." Restatement (Second) of Torts § 46, Caveat (1965); *id.* § 46, cmt. *l*. Relying on this Caveat, courts in this district have held that terrorist attacks are a form of outrageous conduct to which the presence requirement should not apply. *See, e.g., Estate of Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 229, 328 (D.D.C. 2006) ("[A] terrorist attack is precisely the sort of situation in which presence at the time is not required in light of the severity of the act and the obvious range of potential grief and distress that directly results from such a heinous act.") (applying New Hampshire law, which follows the Restatement). The D.C. Court of Appeals has never addressed the Restatement's Caveat or an IIED claim arising out of terrorism, and nor did the D.C. Circuit in *Pitt*. This Court therefore does not find it clear that D.C. law would require the foreign family-member plaintiffs to have been present at the bombings. And even if it is ultimately determined that D.C. law does require presence under these circumstances, the Court's error on this open and debatable point of law is not, for the reasons discussed earlier, a basis under Rule 60(b) for vacating the judgments.

One might wonder, the Court recognizes, whether it makes sense to apply the demanding Rule 60(b) standard to Sudan's nonjurisdictional arguments, given that Sudan filed timely notices of appeal. That is, one might think that if Sudan will get to raise these nonjurisdictional arguments in its direct appeal of the judgments, then for efficiency's sake this Court should give them plenary consideration in the first instance. But, for one thing, there is simply no authority suggesting, nor does Sudan contend,

that the Court has discretion to apply anything but the Rule 60(b) standard here, regardless of what concern for judicial efficiency might suggest. Moreover, Sudan's nonjurisdictional arguments will likely not receive plenary consideration on appeal either. Arguments not raised in the district court are generally forfeit on appeal. *E.g., Benoit v. U.S. Dep't of Agric.*, 608 F.3d 17, 21, 391 U.S. App. D.C. 95 (D.C. Cir. 2010). If the D.C. Circuit agrees that Sudan's default was inexcusable, this forfeiture rule would seem to apply. Hence, this Court does not believe it is reviewing any of Sudan's arguments under a standard more demanding than what Sudan will face on appeal.

Rule 60(b)(6): The Court Will Not Vacate The Punitive Damages Awards

Sudan also challenges the judgments in *Wamai*, *Amduso*, *Onsongo*, and *Opati* insofar as they included awards of punitive damages, which Sudan says were not available to any plaintiffs. Punitive damages were not available to foreign family-member plaintiffs, Sudan argues, because the only mechanism for obtaining punitive damages under the FSIA is the cause of action in § 1605A(c), which has never been available to foreign family members. Mem. Supp. Mot. to Vacate [*Amduso* ECF No. 285-1] ("Sudan's *Amduso* Mem.") at 25. And as for those plaintiffs properly proceeding under § 1605A(c), Sudan contends that § 1605A(c) should not be read to authorize punitive damages for pre-enactment conduct, lest it run afoul of the Ex Post Facto Clause. Reply at 20-22. Hence, says Sudan, the punitive damages portions of these judgments should be vacated under Rule 60(b)(6). Sudan's *Amduso* Mem. at 25.

But Sudan has once again completely failed to explain why these arguments, even if persuasive, come within the ambit of Rule 60(b)(6). Like the arguments discussed in the preceding section of this opinion, these are claims of nonjurisdictional legal error. And for the reasons explained in that section, error by itself—unless, perhaps, it is obvious—is not an extraordinary circumstance. The fact that one of Sudan's arguments has a constitutional component does not alter the analysis. Constitutional arguments are generally subject to forfeiture and waiver just like any other legal argument, *see, e.g., Al Bahlul v. United States*, 767 F.3d 1, 8-10, 412 U.S. App. D.C. 372 (D.C. Cir. 2014) (en banc) (forfeiture of ex post facto argument); *United States v. Behrman*, 235 F.3d 1049, 1051-52 (7th Cir. 2000) (guilty pleas can waive constitutional arguments), and the Court is aware of no authority suggesting that claims of constitutional error render final judgments more susceptible to reopening under Rule 60(b)(6).

One might wonder whether the sheer magnitude of the punitive damages awarded here—billions of dollars—is an extraordinary circumstance. But, although Sudan *mentions* the size of the awards, *see* Sudan's *Amduso* Mem. at 25, it does not argue that this is relevant to Rule 60(b)(6)—perhaps because there is no authority to that effect. This Court has found no precedent suggesting that the magnitude of a damages award can itself be an extraordinary circumstance that would justify relief from the judgment. Consistent with the general thrust of Rule 60(b), courts applying Rule 60(b)(6) have largely focused on flaws in the adjudicatory *process*—such as fraud, lack of actual notice, or a party's disability—not on the nature

or scope of the relief awarded. *See* 12 James Wm. Moore et al., Moore's Federal Practice § 60.48[3][b], [4][a] (3d ed. 2015). Once again, then, Sudan has failed to persuade the Court that its arguments—however strong they might have been if presented at the appropriate time—justify vacating the judgments.

In fairness to Sudan, however, and in case it might assist the D.C. Circuit (if it reviews this issue), the Court must acknowledge the apparent strength of Sudan's underlying arguments about the unavailability of punitive damages. Take first Sudan's argument regarding punitive damages under § 1605A(c). As Sudan correctly notes, there is a "presumption against retroactive legislation [that] is deeply rooted in our jurisprudence, and [that] embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994). A statute will not be interpreted to "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed . . . absent clear congressional intent favoring such a result." *Id.* at 280; *see also Lindh v. Murphy*, 521 U.S. 320, 325, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997) (noting "the traditional rule requiring retroactive application to be supported by a clear statement"). Before the enactment of the 2008 NDAA, Sudan was not subject to punitive damages for the conduct at issue in these cases. *See* 28 U.S.C. § 1606 ("a foreign state . . . shall not be liable for punitive damages" for claims under § 1605); *Owens I*, 374 F. Supp. 2d 1, 25-26 (D.D.C. 2005). It would therefore only be appropriate to interpret the amendments in the

2008 NDAA as authorizing punitive damages for that same behavior—thereby "increas[ing Sudan's] liability for past conduct"—if there is a clear statement of that intent.

The Court does not see such a clear statement. The plaintiffs argue that because "§ 1605A(b) permits retroactive § 1605A(c) claims 'under this section' and subsection (c) provides for punitive damages, Congress has unequivocally expressed its intent that punitive damages have a retroactive effect under § 1605A." Pls.' Surreply [*Amduso* ECF No. 294-1] at 2.[22] But the mere fact that Congress has authorized plaintiffs to bring § 1605A(c) claims on the basis of pre-2008 conduct is not a clear statement that *punitive damages* are available for that subset of claims. If § 1605A(c) said, "Punitive damages are available in all actions brought under this subsection," the Court might agree with the plaintiffs. But as Sudan notes, it says only that an award "*may* include . . . punitive damages." 28 U.S.C. § 1605A(c) (emphasis added). That language does not compel the conclusion that punitive damages are available for pre-enactment conduct.

The plaintiffs also point to *Arnold v. Islamic Republic of Iran*, 787 F. Supp. 2d 37, 42 (D.D.C. 2011), which

22. The plaintiffs in the four cases in which punitive damages were awarded have moved for leave to file surreplies addressing this issue of retroactivity and three other issues. *See, e.g.*, Pls.' Mot. for Leave to File Sur-Reply [*Amduso* ECF No. 294] at 2-3. Sudan does not oppose the plaintiffs' request insofar as it relates to this one issue. The Court will grant the plaintiffs leave to file those portions of their surreplies that address this issue, but not the portions that address the other three issues.

discusses the retroactive effect of the 2008 amendments. Pls.' Surreply at 2. *Arnold* did say that the punitive damages provision in § 1605A(c) should be applied retroactively in some cases, but it based that conclusion not on any clear statement in § 1605A itself, but rather on the particular language in § 1083(c)(2) of the 2008 NDAA, the provision allowing the conversion of pending § 1605(a)(7) actions. 787 F. Supp. 2d at 43 (noting that "the NDAA instructs courts to treat a case converted into a § 1605A suit under that section [*i.e.*, § 1083(c)(2)] '*as if the action had originally been filed*' under § 1605A" (quoting §1083(c)(2)(A)). *Arnold* expressly distinguished "related actions" brought pursuant to § 1083(c)(3), which it said "lacks any express directive" regarding retroactivity. *Id.* at 45. *Arnold* may or may not be correct about § 1083(c)(2), but since none of the four actions at issue here were brought under that provision, *Arnold* does not help the plaintiffs here in any event.

In connection with this dispute over retroactivity, Sudan and the plaintiffs spar over the applicability of the Ex Post Facto Clause. Sudan says the retroactive imposition of punitive damages might very well violate that provision of the Constitution. *See Landgraf*, 511 U.S. at 281 ("Retroactive imposition of punitive damages would raise a serious constitutional question."). The plaintiffs contend, however, that a foreign sovereign like Sudan "cannot avail itself of the U.S. Constitution to object to punitive damages." Pls.' Surreply at 3. The plaintiffs raise an interesting question: do foreign sovereigns have standing (so to speak) to object when Congress exceeds its Article I authority? On the one hand, the D.C. Circuit has

held that a foreign sovereign is not a "person" protected by the Fifth Amendment, observing along the way that "legal disputes between the United States and foreign governments are not mediated through the Constitution." *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 96-97, 352 U.S. App. D.C. 284 (D.C. Cir. 2002); *see also* Lori Fisler Damrosch, *Foreign States and the Constitution*, 73 Va. L. Rev. 483, 489, 515-34 (1987) (arguing that foreign states' "constitutional claims against the actions of the federal political branches must fail on the merits because of the relationship of foreign states to the federal structure," *id.* at 489). On the other hand, the D.C. Circuit has at least once—in this litigation, no less—addressed on the merits an Article I argument by a foreign sovereign, never suggesting the sovereign had no right to make it. *See Owens III*, 531 F.3d 884, 888-93, 382 U.S. App. D.C. 155 (D.C. Cir. 2008) (rejecting Sudan's contention that aspects of the FSIA violate the nondelegation doctrine). Ultimately, however, the Court does not think the applicability of the Ex Post Facto Clause is dispositive, for as Sudan rightly notes, the interpretive presumption that statutes affecting substantive rights are nonretroactive is a general legal principle not dependent on the Constitution. *See Landgraf*, 511 U.S. at 265 & n.17. And the fact that the Supreme Court has wrestled with how this presumption applies to the FSIA generally, *see Republic of Austria v. Altmann*, 541 U.S. 677, 692-702, 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004), shows that it is fully applicable to cases involving foreign sovereigns. Here, that presumption leaves the Court with serious doubt about whether § 1605A(c) should be read as authorizing punitive damages for pre-enactment conduct.

The Court has equally serious doubt about whether the foreign family-member plaintiffs could receive punitive damages. As Sudan notes, the Court's only explanation for its award of punitive damages was § 1605A(c), *see, e.g.*, *Amduso v. Republic of Sudan*, 61 F. Supp. 3d 42, 51-53 (D.D.C. 2014), but the foreign family-member plaintiffs were not (and could not have been) bringing claims under that provision. They were instead bringing claims under state law. Could the punitive damages nonetheless have been justified under state law? Sudan says no, relying on the FSIA's general prohibition on the award of punitive damages against a foreign state. But that prohibition is contained in § 1606, and as Sudan itself highlights in the context of its "gateway" argument (*see supra* p. 65), § 1606 does not apply to claims brought under § 1605A. *See* Sudan's *Amduso* Mem. at 23 ("By its terms, § 1606 pertains only to §§ 1605 and 1607, not § 1605A."). Sudan does not get to selectively apply § 1606 to § 1605A when it helps but not when it hurts. Hence, as a general matter, the Court does not see why a plaintiff bringing state-law claims through the jurisdiction provided by § 1605A(a) cannot obtain punitive damages against a foreign state (assuming such damages are warranted under state law, of course).

In these cases, however, there remains the problem of retroactivity. If state-law punitive damages are indeed now available against foreign sovereigns, it is the 2008 NDAA that made this so, by creating a new jurisdictional provision, § 1605A(a), that is unconstrained by the liability limitations of § 1606. This "increase[d] a party's liability for past conduct," *Landgraf*, 511 U.S. at 280; at the time of

Sudan's conduct, it was not subject to punitive damages in any American court, but now (on this reading) it would be. The presumption against retroactivity thus again directs a court not to give the 2008 NDAA that construction absent a clear statement. (By contrast, a change merely in the scope of the jurisdiction the FSIA provides would not be subject to the presumption against retroactivity. *Republic of Iraq v. Beaty*, 556 U.S. 848, 864, 129 S. Ct. 2183, 173 L. Ed. 2d 1193 (2009).) And if there was no clear statement of retroactivity with respect to the express authorization of punitive damages by § 1605A(c), there is certainly no clear statement with respect to the 2008 NDAA's *implicit* authorization of state-law punitive damages under § 1605A(a).

In sum, the Court now has significant doubt about whether any of the punitive damages awards in these cases involving conduct predating the 2008 NDAA were proper. It is not *certain* they were improper, however—the parties' briefing of these complex issues is rather scant—and to return to the critical point, Sudan has provided no authority suggesting that such error alone is a proper basis for vacating the judgments. Perhaps the D.C. Circuit will expand the range of circumstances in which legal error justifies vacatur, *cf. Ctr. for Nuclear Responsibility, Inc. v. U.S. Nuclear Regulatory Comm'n*, 781 F.2d 935, 940, 251 U.S. App. D.C. 82 (D.C. Cir. 1986) (leaving open whether "to allow corrections of substantive legal errors where no . . . change in the law of the circuit has occurred" under Rule 60(b)(*1*)), but this Court will not do so on its own. Even with its doubts, then, the Court will not vacate the punitive damages awards, which at

most entail nonjurisdictional legal error not amounting to an "extraordinary circumstance" within the ambit of Rule 60(b)(6).

CONCLUSION

For all of the foregoing reasons, the Court will deny Sudan's motions to vacate the judgments in each of these cases. *See* Fed. R. Civ. P. 62.1(a)(2) (authorizing the denial of relief when an appeal is pending). A separate order will issue today in each case.

/s/
JOHN D. BATES
United States District Judge

Dated: March 23, 2016

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED JULY 25, 2014

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 08-1380 (JDB)

MARY ONSONGO, *et al.*,

Plaintiffs,

v.

REPUBLIC OF SUDAN, *et al.*,

Defendants.

July 25, 2014, Decided

MEMORANDUM OPINION

Over fifteen years ago, on August 7, 1998, the United States embassies in Nairobi, Kenya and Dar es Salaam, Tanzania were devastated by simultaneous suicide bombings that killed hundreds of people and injured over a thousand. This Court has entered final judgment on liability under the Foreign Sovereign Immunities Act ("FSIA") in this civil action and several related cases—brought by victims of the bombings and their families—against the Republic of Sudan, the Ministry of the Interior of the Republic of Sudan, the Islamic Republic

of Iran, the Iranian Revolutionary Guards Corps, and the Iranian Ministry of Information and Security (collectively "defendants") for their roles in supporting, funding, and otherwise carrying out these unconscionable acts. The next step in the case is to assess and award damages to each individual plaintiff, and in this task the Court has been aided by several special masters.

The fourteen plaintiffs in this case are Kenyan citizens injured and killed in the Nairobi bombings and their immediate family members.[1] Service of process was completed upon each defendant, but defendants failed to respond, and a default was entered against each defendant. The Court has held that it has jurisdiction over defendants and that the foreign-national plaintiffs who worked for the U.S. government are entitled to compensation for personal injury and wrongful death under 28 U.S.C. § 1605A(c)(3). *See Owens v. Republic of Sudan*, 826 F. Supp. 2d 128, 148-51 (D.D.C. 2011). The Court has also held that, although those plaintiffs who are foreign-national family members of victims lack a federal cause of action, they may nonetheless pursue claims under the laws of the District of Columbia. *Id.* at 153-57. A final judgment on liability was entered in favor of plaintiffs. Nov. 28, 2011

1. Two plaintiffs are listed in this case and in two other cases pending before this Court: the *Wamai* case (No. 08-1349), and the *Opati* case (No. 12-1224). Of course, plaintiffs are entitled only to one award. Those plaintiffs will thus be awarded damages in the *Wamai* case, and will not be awarded damages in this case or in the *Opati* case. Similarly, one plaintiff is listed in this case and in the *Opati* case. That plaintiff will be awarded damages in this case but not in the *Opati* case.

Order [ECF No. 41] at 2. The deposition testimony and other evidence presented established that the defendants were responsible for supporting, funding, and otherwise carrying out the bombings in Nairobi and Dar es Salaam. *See Owens*, 826 F. Supp. 2d at 135-47.

The Court then referred plaintiffs' claims to two special masters[2] to prepare proposed findings and recommendations for a determination of damages. Feb. 27, 2012 Order Appointing Special Masters [ECF No. 44] at 2. The special masters have now filed completed reports on each plaintiff. *See* Special Master Reports [ECF Nos. 83, 114, 134]. In completing those reports and in finding facts, the special masters relied on sworn testimony, expert reports, medical records, and other evidence. The reports extensively describe the key facts relevant to each of the plaintiffs and carefully analyze their claims under the framework established in mass tort terrorism cases. The Court commends both of the special masters for their excellent work and thorough analysis.

The Court hereby adopts all facts found by the special masters relating to all plaintiffs in this case, including findings regarding the plaintiffs' employment status or their familial relationship necessary to support standing under section 1605A(a)(2)(A)(ii). *See Owens*, 826 F. Supp. 2d at 149. The Court also adopts all damages recommendations in the reports, with the few adjustments described below. "Where recommendations deviate from

2. Those special masters (together, "the special masters") are Brad Pigott and C. Jackson Williams.

the Court's damages framework, 'those amounts shall be altered so as to conform with the respective award amounts set forth' in the framework, unless otherwise noted." *Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52, 82-83 (D.D.C. 2010) (quoting *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25, 53 (D.D.C. 2007) ("*Peterson II*"), *abrogation on other grounds recognized in Mohammadi v. Islamic Republic of Iran*, 947 F. Supp. 2d 48, 65 (D.D.C. 2013)). As a result, the Court will award plaintiffs a total judgment of over $199 million.

I. CONCLUSIONS OF LAW

On November 28, 2011, the Court granted summary judgment on liability against defendants in this case. Nov. 28, 2011 Order [ECF No. 41] at 2. The foreign national U.S.-government-employee victims have a federal cause of action, while their foreign-national family members have a cause of action under D.C. law.

a. The Government-Employee Plaintiffs Are Entitled To Damages On Their Federal Law Claims Under 28 U.S.C. § 1605A

"To obtain damages in a Foreign Sovereign Immunities Act (FSIA) action, the plaintiff must prove that the consequences of the defendants' conduct were reasonably certain (i.e., more likely than not) to occur, and must prove the amount of the damages by a reasonable estimate consistent with application of the American rule on damages." *Valore*, 700 F. Supp. 2d at 83. Plaintiffs here have proven that the consequences of defendants' conduct

were reasonably certain to—and indeed intended to—cause injury to plaintiffs. *See Owens*, 826 F. Supp. 2d at 135-46. As discussed by this Court previously, because the FSIA-created cause of action "does not spell out the elements of these claims that the Court should apply," the Court "is forced . . . to apply general principles of tort law" to determine plaintiffs' entitlement to damages on their federal claims. *Id.* at 157 n.3.

Survivors are entitled to recover for the pain and suffering caused by the bombings: acts of terrorism "by their very definition" amount to extreme and outrageous conduct and are thus compensable by analogy under the tort of "intentional infliction of emotional distress." *Valore*, 700 F. Supp. 2d at 77 (citing Restatement (Second) of Torts § 46(1) (1965)); *see also Baker v. Socialist People's Libyan Arab Jamahirya*, 775 F. Supp. 2d 48, 74 (D.D.C. 2011) (permitting plaintiffs injured in state-sponsored terrorist bombings to recover for personal injuries, including pain and suffering, under tort of "intentional infliction of emotional distress"); *Estate of Bland v. Islamic Republic of Iran*, 831 F. Supp. 2d 150, 153 (D.D.C. 2011) (same). Hence, "those who survived the attack may recover damages for their pain and suffering, . . . [and for] economic losses caused by their injuries. . . ." *Oveissi v. Islamic Republic of Iran*, 879 F. Supp. 2d 44, 55 (D.D.C. 2012) ("*Oveissi II*") (citing *Valore*, 700 F. Supp. 2d at 82-83); *see* 28 U.S.C. § 1605A(c). Accordingly, all plaintiffs who were injured in the 1998 bombings can recover for their pain and suffering as well as their economic losses. *Bland*, 831 F. Supp. 2d at 153. In addition, the estates of those who were killed in the attack are entitled to recover

compensatory damages for wrongful death. *See, e.g.*, *Valore*, 700 F. Supp.2d at 82 (permitting estates to recover economic damages caused to deceased victims' estates).

b. Family Members Who Lack A Federal Cause Of Action Are Entitled To Damages Under D.C. Law

This Court has previously held that it will apply District of Columbia law to the claims of any plaintiffs for whom jurisdiction is proper, but who lack a federal cause of action under the FSIA. *Owens*, 826 F. Supp. 2d at 153-57. This category includes only the foreign-national family members of the injured victims from the 1998 bombings. Individuals in this category seek to recover solatium damages under D.C. law based on claims of intentional infliction of emotional distress. To establish a prima facie case of intentional infliction of emotional distress under D.C. law, a plaintiff must show: (1) extreme and outrageous conduct on the part of the defendant which, (2) either intentionally or recklessly, (3) causes the plaintiff severe emotional distress. *Larijani v. Georgetown Univ.*, 791 A.2d 41, 44 (D.C. 2002). Acts of terrorism "by their very definition" amount to extreme and outrageous conduct, *Valore*, 700 F. Supp. 2d at 77; the defendants in this case acted intentionally and recklessly; and their actions caused each plaintiff severe emotional distress, *see Owens*, 826 F. Supp. 2d at 136-45; *Murphy v. Islamic Republic of Iran*, 740 F. Supp. 2d 51, 74-75 (D.D.C. 2010). Likewise, D.C. law allows spouses and next of kin to recover solatium damages. D.C. Code § 16-2701. Based on the evidence submitted to the special masters, the

Court concludes that the foreign-national family members of the victims of the 1998 bombings have each made out claims for intentional infliction of emotional distress and are entitled to solatium damages (with the few exceptions detailed below).

II. DAMAGES

Having established that plaintiffs are entitled to damages, the Court now turns to the question of the amount of damages, which involves resolving common questions related to plaintiffs with similar injuries. The damages awarded to each plaintiff are laid out in the tables in the separate Order and Judgment issued on this date.

a. Compensatory Damages

1. Economic damages

Under the FSIA, injured victims and the estates of deceased victims may recover economic damages, which typically include lost wages, benefits and retirement pay, and other out-of-pocket expenses. 28 U.S.C. § 1605A(c). Special Master Pigott recommended that the one deceased plaintiff in this case, Evans Onsongo be awarded economic damages. To determine the economic losses resulting from his death, Pigott relied on economic reports submitted by the Center for Forensic Economic Studies ("CFES"), which estimated lost earnings, fringe benefits, retirement income, and the value of household services lost as a result of the injuries sustained from the bombing. In turn, CFES relied on information from the survivors as well as other

documentation, including country-specific economic data and employment records. *See* Report of Special Master Brad Pigott Concerning Evans Onsongo [ECF No. 83] at 4-6 (further explaining methodology employed in creating the economic loss reports). The Court adopts the findings and recommendations of the special master as to economic losses to be awarded to the estate of the deceased victim.

2. Awards for pain and suffering due to injury

Courts determine pain-and-suffering awards for survivors based on factors including "the severity of the pain immediately following the injury, the length of hospitalization, and the extent of the impairment that will remain with the victim for the rest of his or her life." *O'Brien v. Islamic Republic of Iran*, 853 F. Supp. 2d 44, 46 (D.D.C. 2012) (internal quotation marks omitted). When calculating damages amounts, "the Court must take pains to ensure that individuals with similar injuries receive similar awards." *Peterson II*, 515 F. Supp. 2d at 54. Recognizing this need for uniformity, courts in this district have developed a general framework for assessing pain-and-suffering damages for victims of terrorist attacks, awarding a baseline of $5 million to individuals who suffer severe physical injuries, such as compound fractures, serious flesh wounds, and scars from shrapnel, as well as lasting and severe psychological pain. *See Valore*, 700 F. Supp. 2d at 84. Where physical and psychological pain is more severe—such as where victims suffered relatively more numerous and severe injuries, were rendered quadriplegic, partially lost vision and hearing, or were

mistaken for dead—courts have departed upward from this baseline to $7 million and above. *See O'Brien*, 853 F. Supp. 2d at 47. Similarly, downward departures to a range of $1.5 to $3 million are warranted where the victim suffers severe emotional injury accompanied by relatively minor physical injuries. *See Valore*, 700 F. Supp. 2d at 84-85.

Damages for extreme pain and suffering are warranted for those individuals who initially survive the attack but then succumb to their injuries. "When the victim endured extreme pain and suffering for a period of several hours or less, courts in these [terrorism] cases have rather uniformly awarded $1 million." *Haim v. Islamic Republic of Iran*, 425 F. Supp. 2d 56, 71 (D.D.C. 2006); *see Peterson II*, 515 F. Supp. 2d at 53-55. When the period of the victim's pain is longer, the award increases. *Haim*, 425 F. Supp. 2d at 72. And when the period is particularly brief, courts award less. For instance, where an individual "survived a terrorist attack for 15 minutes, and was in conscious pain for 10 minutes," a court in this district awarded $500,000. *See Peterson II*, 515 F. Supp. 2d at 53. To the estates of those who are killed instantly, courts award no pain-and-suffering damages. The Court adopts the special masters' recommendation to award no pain-and-suffering damages to the estate of the victim who was killed instantly.

The need to maintain uniformity with awards to plaintiffs in prior cases and between plaintiffs in this case is particularly evident. A great number of plaintiffs were injured in the bombings. Those injuries, and evidence

of those injuries, span a broad range. In this case, the special masters recommend awarding pain-and-suffering damages only to one plaintiff, Irene Kung'u; Special Master Williams recommends an award of $3,000,000. Because this is consistent with the guidelines discussed in this Court's opinion in *Wamai v. Republic of Sudan*, No. 08-1349, 60 F. Supp. 3d 84, 2014 U.S. Dist. LEXIS 101322 (D.D.C. July 25, 2014), the Court adopts that recommendation.

3. Solatium

"In determining the appropriate amount of compensatory damages, the Court may look to prior decisions awarding damages for pain and suffering, and to those awarding damages for solatium." *Acosta v. Islamic Republic of Iran*, 574 F. Supp. 2d 15, 29 (D.D.C. 2008). Only immediate family members-parents, siblings, spouses, and children-are entitled to solatium awards.[3] *See Valore*, 700 F. Supp. 2d at 79. The commonly accepted framework for solatium damages in this district is that used in *Peterson II*, 515 F. Supp. 2d at 52. *See Valore*, 700 F. Supp. 2d at 85; *Belkin*, 667 F. Supp. 2d at 23. According to

3. A few of the injured or deceased victims of the family-member plaintiffs in this case are plaintiffs not here but in a related case before this Court. *See* 1st Amend. Compl., *Wamai*, No. 08-1349 (D.D.C. Sept. 5, 2008) [ECF No. 5] at 1-12. The special masters found that each plaintiff in this case claiming solatium damages is related to an injured or deceased victim entitled to pain-and-suffering damages; whether the Court found that victim to be entitled to damages in this case or in *Wamai* is not important. The awards of those injured or deceased victims thus support the family-member solatium awards in this case.

Peterson II, the appropriate amount of damages for family members of deceased victims is as follows: $8 million to spouses of deceased victims, $5 million to parents of deceased victims, and $2.5 million to siblings of deceased victims. 515 F. Supp. 2d at 52. The appropriate amount of damages for family members of injured victims is as follows: $4 million to spouses of injured victims, $2.5 million to parents of injured victims, and $1.25 million to siblings of injured victims. *Id.* Courts in this district have differed somewhat on the proper amount awarded to children of victims. *Compare Peterson II*, 515 F. Supp. 2d at 51 ($2.5 million to child of injured victim), *with Davis v. Islamic Republic of Iran*, 882 F. Supp. 2d 7, 14 (D.D.C. 2012) ($1.5 million to child of injured victim). The Court finds the *Peterson II* approach to be more appropriate: to the extent such suffering can be quantified, children who lose parents are likely to suffer as much as parents who lose children. Children of injured victims will thus be awarded $2.5 million and, consistent with the Peterson II approach of doubling solatium awards for relatives of deceased victims, children of deceased victims will be awarded $5 million.

Although these amounts are guidelines, not rules, *see Valore*, 700 F. Supp. 2d at 86, the Court finds the distinctions made by the *Valore* court to be responsible and reasonable, and hence it will adopt the same guidelines for determining solatium damages here. In the interests of fairness and to account for the difficulty in assessing the relative severity of each family member's suffering, in this case and in related cases, the Court will not depart from those guidelines here.

In one instance, a special master recommended that the spouse of a deceased victim receive $10 million. *See* Report of Special Master Brad Pigott Concerning Evans Onsongo [ECF No. 83] at 7. Because the Court adopts the *Peterson II* guidelines, that recommendation will be adjusted and that plaintiff will be awarded $8 million. 515 F. Supp. 2d at 52. Similarly, in one instance, a special master recommended that a parent of a deceased victim receive $3.5 million. *See* Report Concerning Evans Onsongo [ECF No. 83] at 10-11. The Court will increase that award to $5 million. 515 F. Supp. 2d at 52.

The special masters also recommended against awarding solatium damages to a deceased victim's child who was born after the bombings occurred. While the Court acknowledges that the bombings' terrible impact on the victims and their families continues to this day, in similar cases courts have found that children born following terrorist attacks are not entitled to damages under the FSIA. *See Davis*, 882 F. Supp. 2d 7, 15 (D.D.C. 2012); *Wultz v. Islamic Republic of Iran*, 864 F. Supp. 2d 24, 36 (D.D.C. 2012). In holding that a plaintiff must have been alive at the time of an attack to recover solatium damages, the *Davis* court recognized the need to draw lines in order to avoid creating "an expansive and indefinite scope of liability" under the FSIA—for example, liability to children born fifteen years after an attack (a real possibility in this drawn-out litigation). 882 F. Supp. 2d at 15. The Court agrees with the special masters and with the *Davis* court's interpretation of the FSIA, and holds that a plaintiff not alive at the time of the bombings cannot recover solatium damages. Hence, the Court dismisses the claim of Venice Onsongo (born

one month after the bombings). *See* Report Concerning Evans Onsongo [ECF No. 83] at 9-10.

The Court finds that the special masters have appropriately applied the solatium damages framework to most of the plaintiffs in this case, and will adopt their recommendations with the few exceptions noted above.

b. Punitive Damages

Plaintiffs request punitive damages under section 1605A(c). Punitive damages "serve to punish and deter the actions for which they are awarded." *Valore*, 700 F. Supp. 2d at 87. Courts calculate the proper amount of punitive damages by considering four factors: "(1) the character of the defendants' act, (2) the nature and extent of harm to the plaintiffs that the defendants caused or intended to cause, (3) the need for deterrence, and (4) the wealth of the defendants." *Oveissi II*, 879 F. Supp. 2d at 56 (quoting *Acosta*, 574 F. Supp. 2d at 30). In this case, the first three factors weigh heavily in favor of an award of punitive damages: the character of defendants' actions and the nature and extent of harm to plaintiffs can accurately be described as horrific. Scores were murdered, hundreds of families were torn asunder, and thousands of lives were irreparably damaged. The need for deterrence here is tremendous. And although specific evidence in the record on defendants' wealth is scant, they are foreign states with substantial wealth.

Previous courts in this district, confronted with similar facts, have calculated punitive damages in different ways. *See, e.g., Baker*, 775 F. Supp. 2d at 85 (surveying

cases). One attractive method often used in FSIA cases is to multiply defendants' annual expenditures on terrorist activities by a factor of three to five. *See, e.g., Valore*, 700 F. Supp. 2d at 88-90. Unfortunately, there is not enough evidence in the record on defendants' expenditures during the relevant time period to adopt that approach here. Other courts have simply awarded families of terrorism victims $150 million in punitive damages. *See, e.g., Gates v. Syrian Arab Republic*, 580 F. Supp. 2d 53, 75 (D.D.C. 2008), *aff'd*, 646 F.3d 1, 396 U.S. App. D.C. 128 (D.C. Cir. 2011). Using that approach here would result in a colossal figure, given the number of families involved.

This case, when combined with the related cases involving the same bombings where plaintiffs seek punitive damages,[4] involves over 600 plaintiffs. *Valore* was a similar case, involving another terrorist bombing sponsored by Iran: the bombing of the United States Marine barracks in Beirut, Lebanon. Two hundred and forty-one military servicemen were murdered in that bombing. A similar number of people, 224, died here, and hundreds more were injured. In *Valore*, then-Chief Judge Lamberth used the expenditures-times-multiplier method. All told, Judge Lamberth awarded approximately $4 billion in compensatory damages in cases involving the Beirut bombing and about $5 billion in punitive damages. *Estate of Brown v. Islamic Republic of Iran*, 872 F. Supp. 2d 37, 45 n.1 (D.D.C. 2012) (tallying awards). This

4. Plaintiffs in *Owens, Mwila*, and *Khaliq*, cases (involving the same bombings) in which this Court previously awarded damages, did not seek punitive damages. *See, e.g., Khaliq v. Republic of Sudan*, No. 10-356, 33 F. Supp. 3d 29, 2014 U.S. Dist. LEXIS 41882, 2014 WL 1284973, at *3 (D.D.C. Mar. 28, 2014).

case is quite similar in magnitude: all told, including the judgments issued in *Owens, Mwila*, and *Khaliq*, and the judgments to be issued in conjunction with this opinion and in *Wamai, Amduso*, and *Opati*, the Court will have issued just over $5 billion in compensatory damages. Given that similarity, the inability of this Court to employ the expenditure-times-multiplier method, and in light of the "societal interests in punishment and deterrence that warrant imposition of punitive sanctions" in cases like this, the Court finds it appropriate to award punitive damages in an amount equal to the total compensatory damages awarded in this case. *Beer v. Islamic Republic of Iran*, 789 F. Supp. 2d 14, 17 (D.D.C. 2011) (citing *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998)). Doing so will result in a punitive damage award consistent with the punitive damage awards in analogous cases, particularly those involving the Beirut bombing, and will hopefully deter defendants from continuing to sponsor terrorist activities. The Court will apportion punitive damages among plaintiffs according to their compensatory damages. *See Valore*, 700 F. Supp. 2d at 90.

c. Prejudgment Interest

An award of prejudgment interest at the prime rate is appropriate in this case. *See Oldham v. Korean Air Lines Co.*, 127 F.3d 43, 54, 326 U.S. App. D.C. 375 (D.C. Cir. 1997); *Forman v. Korean Air Lines Co.*, 84 F.3d 446, 450-51, 318 U.S. App. D.C. 6 (D.C. Cir. 1996). Prejudgment interest is appropriate on the whole award, including pain and suffering and solatium—although not including the punitive damage award, as that is calculated here by reference to the entire compensatory award—with

one exception. *See Reed v. Islamic Republic of Iran*, 845 F. Supp. 2d 204, 214-15 (D.D.C. 2012) (awarding prejudgment interest on the full award). *But see Oveissi v. Islamic Republic of Iran*, 768 F. Supp. 2d 16, 30 n.12 (D.D.C. 2011) (declining to award prejudgment interest on solatium damages). Because some of the economic loss figures recommended by the special master have already been adjusted to reflect present discounted value, *see District of Columbia v. Barriteau*, 399 A.2d 563, 568-69 (D.C. 1979), the Court will not apply the prejudgment interest multiplier to the economic loss amounts except those calculated in 1998 dollars. *See Doe*, 943 F. Supp. 2d at 186 (citing *Oldham*, 127 F.3d at 54); Report of Special Master Brad Pigott Concerning Evans Onsongo [ECF No. 83] at 4-6 (explaining how to properly apply interest here without double-counting). Awards for pain and suffering and solatium are calculated without reference to the time elapsed since the attacks. Because plaintiffs were unable to bring their claims immediately after the attacks, they lost use of the money to which they were entitled upon incurring their injuries. Denying prejudgment interest on these damages would allow defendants to profit from the use of the money over the last fifteen years. Awarding prejudgment interest, on the other hand, reimburses plaintiffs for the time value of money, treating the awards as if they were awarded promptly and invested by plaintiffs.

The Court will calculate the applicable interest using the prime rate for each year. The D.C. Circuit has explained that the prime rate—the rate banks charge for short-term unsecured loans to creditworthy customers—is the most appropriate measure of prejudgment interest,

one "more appropriate" than more conservative measures such as the Treasury Bill rate, which represents the return on a risk-free loan. *See Forman*, 84 F.3d at 450. Although the prime rate, applied over a period of several years, can be measured in different ways, the D.C. Circuit has approved an award of prejudgment interest "at the prime rate for each year between the accident and the entry of judgment." *See id.* Using the prime rate for each year is more precise than, for example, using the average rate over the entire period. *See Doe*, 943 F. Supp. 2d at 185 (noting that this method is a "substantially more accurate 'market-based estimate'" of the time value of money (citing *Forman*, 84 F. 3d at 451)). Moreover, calculating interest based on the prime rate for each year is a simple matter.[5] Using the prime rate for each year results in a multiplier of 2.26185 for damages incurred in 1998.[6] Accordingly, the Court will use this multiplier to calculate the total award.[7]

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5. To calculate the multiplier, the Court multiplied $1.00 by the prime rate in 1999 (8%) and added that amount to $1.00, yielding $1.08. Then, the Court took that amount and multiplied it by the prime rate in 2000 (9.23%) and added that amount to $1.08, yielding $1.17968. Continuing this iterative process through 2014 yields a multiplier of 2.26185.

6. The Court calculated the multiplier using the Federal Reserve's data for the average annual prime rate in each year between 1998 and 2014. *See* Bd. of Governors of the Fed. Reserve Sys. Historical Data, *available at* http://www.federalreserve.gov/releases/h15/data.htm (last visited July 25, 2014). As of the date of this opinion, the Federal Reserve has not posted the annual prime rate for 2014, so the Court will conservatively estimate that rate to be 3.25%, the rate for the previous six years.

7. The product of the multiplier and the base damages amount includes both the prejudgment interest and the base damages

Appendix C

CONCLUSION

The 1998 embassy bombings shattered the lives of all plaintiffs in this case. Reviewing their personal stories reveals that, even more than fifteen years later, they each still feel the horrific effects of that awful day. Damages awards cannot fully compensate people whose lives have been torn apart; instead, they offer only a helping hand. But that is the very least that these plaintiffs are owed. Hence, it is what this Court will facilitate.

A separate Order consistent with these findings has issued on this date.

/s/ JOHN D. BATES
United States District Judge

Dated: July 25, 2014

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amount; in other words, applying the multiplier calculates not the prejudgment interest but the base damages amount plus the prejudgment interest, or the total compensatory damages award.

APPENDIX D — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED JULY 25, 2014

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 12-1224 (JDB)

MONICAH OKOBA OPATI, *et al.*,

Plaintiffs,

v.

REPUBLIC OF SUDAN, *et al.*,

Defendants.

July 25, 2014, Decided

MEMORANDUM OPINION

Over fifteen years ago, on August 7, 1998, the United States embassies in Nairobi, Kenya and Dar es Salaam, Tanzania were devastated by simultaneous suicide bombings that killed hundreds of people and injured over a thousand. Plaintiffs, victims of the bombings and their families brought this civil action and several related cases under the Foreign Sovereign Immunities Act ("FSIA") against the Republic of Sudan, the Ministry of the Interior of the Republic of Sudan, the Islamic Republic of Iran, the Iranian Revolutionary Guards Corps, and the

Iranian Ministry of Information and Security (collectively "defendants") for their roles in supporting, funding, and otherwise carrying out these unconscionable acts. Now before the Court is plaintiffs' motion for default judgment on liability and damages.

The 284 plaintiffs in this case are Kenyan, Tanzanian, and United States citizens injured and killed in the bombings and their immediate[1] family members.[2] This case is one of many before this Court involving the 1998 embassy bombings; this case happens to be the latest-filed of the group. Before it was even filed, this Court held in the earlier-filed and consolidated cases that it has jurisdiction over defendants and that the foreign-national plaintiffs who worked for the U.S. government are entitled to compensation for personal injury and wrongful death under 28 U.S.C. § 1605A(c)(3). *See Owens v. Republic of Sudan*, 826 F. Supp. 2d 128, 148-51 (D.D.C. 2011). The Court also held that, although those plaintiffs who are foreign-national family members of victims lack a federal cause of action, they may nonetheless pursue claims under the laws of the District of Columbia. *Id.* at 153-57. A final judgment on liability was entered in favor of plaintiffs. *Owens*, No. 01-2244, Nov. 28, 2011 Order [ECF No. 214]

1. A few plaintiffs are not immediate family members, but as explained below, the Court will not award damages to those plaintiffs.

2. A small number of plaintiffs are listed both in this case and the *Wamai* case (No. 08-1349); this case and the *Amduso* case (No. 08-1361); or this case and the *Onsongo* case (No. 08-1380). Those cases are also pending before this Court. To prevent double recoveries, those plaintiffs will be awarded damages—where appropriate—in those cases, and will not be awarded damages in this case.

at 2. The Court found that the deposition testimony and other evidence presented established that the defendants were responsible for supporting, funding, and otherwise carrying out the bombings in Nairobi and Dar es Salaam. *See Owens*, 826 F. Supp. 2d at 135-47.

Plaintiffs then filed this action. In their complaint, plaintiffs re-allege the same basic set of facts that had been found by the Court in *Owens*, and they seek damages under the same causes of action. *See generally* 2d Am. Compl. [ECF No. 24]. Service of process was completed upon each defendant, but defendants failed to respond, and a default was entered against each defendant. *See* Entries of Default [ECF Nos. 41, 42]. Next, plaintiffs [43] requested that this Court take judicial notice of its findings in *Owens*, and moved for default judgment.

Before plaintiffs can be awarded any relief, this Court must determine whether they have established their claims "by evidence satisfactory to the court." 28 U.S.C. § 1608(e); *see also Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 232, 357 U.S. App. D.C. 107 (D.C. Cir. 2003). This "satisfactory to the court" standard is identical to the standard for entry of default judgments against the United States in Federal Rule of Civil Procedure 55(e). *Hill v. Republic of Iraq*, 328 F.3d 680, 684, 356 U.S. App. D.C. 142 (D.C. Cir. 2003). In evaluating the plaintiffs' proof, the Court may "accept as true the plaintiffs' uncontroverted evidence." *Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97, 100 (D.D.C. 2000); *Campuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258, 268 (D.D.C. 2003). And a court may "take judicial notice of related proceedings

and records in cases before the same court." *Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52, 59 (D.D.C. 2010) (quoting *Brewer v. Islamic Republic of Iran*, 664 F. Supp. 2d 43, 50-51 (D.D.C. 2009)). Here, plaintiffs rely solely on this final form of evidence in support of their default judgment motion.

A three-day hearing on liability and damages was held in *Owens* beginning on October 25, 2010. At that hearing, the Court received evidence in the form of live testimony, videotaped testimony, affidavits, and original documentary and videographic evidence. The Court applied the Federal Rules of Evidence. Based on that record, the Court made extensive findings of fact and conclusions of law. *See Owens*, 826 F. Supp. 2d at 135-157.

Under Federal Rule of Evidence 201(b), courts may take judicial notice of facts "not subject to reasonable dispute" that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). And "[a] court may take judicial notice of, and give effect to, its own records in another but interrelated proceeding . . . ." *Booth v. Fletcher*, 101 F.2d 676, 679 n.2 (D.C. Cir. 1938); *see also* 29 Am. Jur. 2d Evidence § 151 (2010). Courts in this district have done so frequently in the FSIA context. *See, e.g., Rimkus v. Islamic Republic of Iran*, 750 F. Supp. 2d 163, 171 (D.D.C. 2010) (collecting cases). Taking judicial notice of the facts, though, does not mean automatically "accepting the truth of the earlier court's findings and conclusions." *Id.* at 172. Instead, courts in this district rely on the evidence presented in the earlier litigation

and make their own independent findings of fact based on that evidence—the judicial records "establishing the type and substance of evidence that was presented to earlier courts" is "'not subject to reasonable dispute.'" *Id.* (citing Fed. R. Evid. 201(b)). Keeping all that in mind, then, the Court takes judicial notice of the evidence presented in *Owens* and, based on that evidence, makes the following findings of fact.

I. FINDINGS OF FACT

a. Defendants

The government of the Islamic Republic of Iran ("Iran") has a long history of providing material aid and support to terrorist organizations including al Qaeda, which has claimed responsibility for the August 7, 1998 embassy bombings. *Owens*, 826 F. Supp. 2d at 128.[3] The government of Iran aided, abetted, and conspired with Hezbollah, Osama Bin Laden, and al Qaeda to launch large-scale bombing attacks against the United States via powerful suicide truck bombs. *Id.* During the relevant time period, the Iranian defendants, through Hezbollah, provided explosives training to Bin Laden and al Qaeda and rendered direct assistance to al Qaeda operatives. *Id.*

3. The Court takes judicial notice only of the evidence itself, and makes its own findings of fact in this case based on that evidence. But for ease of reference, these citations are to the findings of fact in *Owens*, which themselves cite the evidence upon which those findings of fact are based.

Appendix D

Support from Iran and Hezbollah was critical to al Qaeda's execution of the 1998 embassy bombings. *Id.* at 139. Before its meetings with Iranian officials and agents, al Qaeda did not possess the technical expertise required to carry out the embassy bombings. *Id.* In the 1990s, al Qaeda received training in Iran and Lebanon on how to destroy large buildings with sophisticated and powerful explosives. *Id.* The government of Iran was aware of and authorized this training and assistance. *Id.* Hence, for these reasons, and based on the extensive evidence presented in *Owens*, the Court finds that the Iranian defendants provided material aid and support to al Qaeda for the 1998 embassy bombings and are liable for plaintiffs' damages.

The Sudanese defendants ("Sudan") gave material aid and support to Bin Laden and al Qaeda in several ways. *Id.* Sudan harbored and provided sanctuary and support to terrorists and their operational and logistical supply network. *Id.* Bin Laden and al Qaeda received the protection of the Sudanese intelligence and military from foreign intelligence services and rival militants. *Id.* Sudanese government support for Bin Laden and al Qaeda was also important to the execution of the 1998 embassy bombings. *Id.* Critically, Sudan provided safe haven in a country near the two U.S. embassies. *Id.* Sudan provided Bin Laden and al Qaeda hundreds of Sudanese passports. *Id.* The Sudanese intelligence service allowed al Qaeda to travel over the Sudan-Kenya border without restriction, permitting the passage of weapons and money to supply the Nairobi terrorist cell. *Id.* And Sudan's support of al Qaeda was official Sudanese government policy. *Id.* Hence,

the Court finds that the Sudanese defendants provided material aid and support to al Qaeda for the 1998 embassy bombings and are liable for plaintiffs' damages.

With the support of Sudan and Iran, al Qaeda killed hundreds and attempted to kill thousands of individuals on site in the 1998 U.S. embassy attacks in Nairobi, Kenya and Dar es Salaam, Tanzania. *Id.* at 146. The evidence presented in *Owens*, and relied on here, overwhelmingly supports the conclusion that al Qaeda carried out the two bombing attacks, and Bin Laden himself claimed responsibility for them during an al Qaeda documentary history released by the al Qaeda media wing. *Id.*

b. Plaintiffs

The Court referred plaintiffs' claims to several special masters[4] to prepare proposed findings and recommendations for a determination of damages. *See Wamai*, No. 08-1349, Feb. 27, 2012 Order Appointing Special Masters [ECF No. 53] at 2. The special masters have now filed completed reports on each plaintiff; those reports were filed in the *Wamai, Amduso*, and *Onsongo* cases, but the Court incorporates them by reference here. *See, e.g., Wamai*, No. 08-1349, Special Master Reports [ECF Nos. 63-241]. Each reference in this opinion to a special master report cites the corresponding ECF number in the *Wamai* case. In completing those reports

4. Those special masters (collectively, "the special masters") are Kenneth L. Adams, John D. Aldock, Oliver Diaz, Jr., Deborah E. Greenspan, Brad Pigott, Stephen A. Saltzburg, and C. Jackson Williams.

and in finding facts, the special masters relied on sworn testimony, expert reports, medical records, and other evidence. The reports extensively describe the key facts relevant to each of the plaintiffs and carefully analyze their claims under the framework established in mass tort terrorism cases. The Court commends each of the special masters for their excellent work and thorough analysis.

The Court hereby adopts all facts found by the special masters relating to all plaintiffs in this case, including findings regarding the plaintiffs' employment status or their familial relationships necessary to support standing under section 1605A(a)(2)(A)(ii). *See Owens*, 826 F. Supp. 2d at 149. The Court also adopts all damages recommendations in the reports, with the few adjustments described below. "Where recommendations deviate from the Court's damages framework, 'those amounts shall be altered so as to conform with the respective award amounts set forth' in the framework, unless otherwise noted." *Valore*, 700 F. Supp. 2d at 82-83 (quoting *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25, 53 (D.D.C. 2007) ("*Peterson II*"), *abrogation on other grounds recognized in Mohammadi v. Islamic Republic of Iran*, 947 F. Supp. 2d 48, 65 (D.D.C. 2013)).

II. CONCLUSIONS OF LAW

The Court holds that it has jurisdiction over defendants and that the foreign-national plaintiffs who worked for the U.S. government are entitled to compensation for personal injury and wrongful death under 28 U.S.C. § 1605A(c)(3), for the reasons discussed at length in *Owens*, 826 F. Supp.

2d 128, 148-51. The Court also holds that, although those plaintiffs who are foreign-national family members of victims lack a federal cause of action, they may nonetheless pursue claims under the laws of the District of Columbia. *See id.* at 153-57. The Court thus will grant summary judgment on liability against defendants in this case. The U.S. citizens and foreign-national U.S.-government-employee victims have a federal cause of action, while their foreign-national family members have a cause of action under D.C. law.

a. The U.S. Citizens And U.S. Government-Employee Plaintiffs Are Entitled To Damages On Their Federal Law Claims Under 28 U.S.C. § 1605A

"To obtain damages in a Foreign Sovereign Immunities Act (FSIA) action, the plaintiff must prove that the consequences of the defendants' conduct were reasonably certain (i.e., more likely than not) to occur, and must prove the amount of the damages by a reasonable estimate consistent with application of the American rule on damages." *Valore*, 700 F. Supp. 2d at 83. Plaintiffs here have proven that the consequences of defendants' conduct were reasonably certain to—and indeed intended to—cause injury to plaintiffs. *See Owens*, 826 F. Supp. 2d at 135-46. As discussed in *Owens*, because the FSIA-created cause of action "does not spell out the elements of these claims that the Court should apply," the Court "is forced . . . to apply general principles of tort law" to determine plaintiffs' entitlement to damages on their federal claims. *Id.* at 157 n.3.

Appendix D

Survivors are entitled to recover for the pain and suffering caused by the bombings: acts of terrorism "by their very definition" amount to extreme and outrageous conduct and are thus compensable by analogy under the tort of "intentional infliction of emotional distress." *Valore*, 700 F. Supp. 2d at 77 (citing Restatement (Second) of Torts § 46(1) (1965)); *see also Baker v. Socialist People's Libyan Arab Jamahirya*, 775 F. Supp. 2d 48, 74 (D.D.C. 2011) (permitting plaintiffs injured in state-sponsored terrorist bombings to recover for personal injuries, including pain and suffering, under tort of "intentional infliction of emotional distress"); *Estate of Bland v. Islamic Republic of Iran*, 831 F. Supp. 2d 150, 153 (D.D.C. 2011) (same). Hence, "those who survived the attack may recover damages for their pain and suffering, . . . [and for] economic losses caused by their injuries. . . ." *Oveissi v. Islamic Republic of Iran*, 879 F. Supp. 2d 44, 55 (D.D.C. 2012) ("*Oveissi II*") (citing *Valore*, 700 F. Supp. 2d at 82-83); *see* 28 U.S.C. § 1605A(c). Accordingly, all plaintiffs who were injured in the 1998 bombings can recover for their pain and suffering as well as their economic losses, and their immediate family members—if U.S. nationals—can recover for solatium. *Bland*, 831 F. Supp. 2d at 153. In addition, the estates of those who were killed in the attack are entitled to recover compensatory damages for wrongful death. *See, e.g., Valore*, 700 F. Supp. 2d at 82 (permitting estates to recover economic damages caused to deceased victims' estates).

b. Family Members Who Lack A Federal Cause Of Action Are Entitled To Damages Under D.C. Law

This Court will apply District of Columbia law to the claims of any plaintiffs for whom jurisdiction is proper, but who lack a federal cause of action under the FSIA. This category includes only the foreign-national family members of the injured victims from the 1998 bombings. Individuals in this category seek to recover solatium damages under D.C. law based on claims of intentional infliction of emotional distress. To establish a prima facie case of intentional infliction of emotional distress under D.C. law, a plaintiff must show: (1) extreme and outrageous conduct on the part of the defendant which, (2) either intentionally or recklessly, (3) causes the plaintiff severe emotional distress. *Larijani v. Georgetown Univ.*, 791 A.2d 41, 44 (D.C. 2002). Acts of terrorism "by their very definition" amount to extreme and outrageous conduct, *Valore*, 700 F. Supp. 2d at 77; the defendants in this case acted intentionally and recklessly; and their actions caused each plaintiff severe emotional distress, *see Owens*, 826 F. Supp. 2d at 136-45; *Murphy v. Islamic Republic of Iran*, 740 F. Supp. 2d 51, 74-75 (D.D.C. 2010). Likewise, D.C. law allows spouses and next of kin to recover solatium damages. D.C. Code § 16-2701. Based on the evidence submitted to the special masters, the Court concludes that the foreign-national family members of the victims of the 1998 bombings have each made out claims for intentional infliction of emotional distress and are entitled to solatium damages (with the few exceptions detailed below). As a result, the Court will award plaintiffs a total judgment of over $3.1 billion.

III. DAMAGES

Having established that plaintiffs are entitled to damages, the Court now turns to the question of the amount of damages, which involves resolving common questions related to plaintiffs with similar injuries. The damages awarded to each plaintiff are laid out in the tables in the separate Order and Judgment issued on this date.

a. Compensatory Damages

1. Economic damages

Under the FSIA, injured victims and the estates of deceased victims may recover economic damages, which typically include lost wages, benefits and retirement pay, and other out-of-pocket expenses. 28 U.S.C. § 1605A(c). The special masters recommended that the estates of four deceased plaintiffs be awarded economic damages. To determine those plaintiffs' economic losses resulting from the bombings, the special masters relied on economic reports submitted by the Center for Forensic Economic Studies ("CFES"), which estimated lost earnings, fringe benefits, retirement income, and the value of household services lost as a result of the injuries sustained from the bombing. In turn, CFES relied on information from the survivors as well as other documentation, including country-specific economic data and employment records. *See, e.g.*, Report of Special Master Jackson Williams Concerning Hesbon Bulimu [ECF No. 235] at 10-17 (further explaining methodology employed in creating the economic loss reports). The Court adopts the findings and

recommendations of the special masters as to economic losses to be awarded to the estates of deceased victims.

2. Awards for pain and suffering due to injury

Courts determine pain-and-suffering awards for survivors based on factors including "the severity of the pain immediately following the injury, the length of hospitalization, and the extent of the impairment that will remain with the victim for the rest of his or her life." *See O'Brien v. Islamic Republic of Iran*, 853 F. Supp. 2d 44, 46 (D.D.C. 2012) (internal quotation marks omitted). When calculating damages amounts, "the Court must take pains to ensure that individuals with similar injuries receive similar awards." *Peterson II*, 515 F. Supp. 2d at 54. Recognizing this need for uniformity, courts in this district have developed a general framework for assessing pain-and-suffering damages for victims of terrorist attacks, awarding a baseline of $5 million to individuals who suffer severe physical injuries, such as compound fractures, serious flesh wounds, and scars from shrapnel, as well as lasting and severe psychological pain. *See Valore*, 700 F. Supp. 2d at 84. Where physical and psychological pain is more severe—such as where victims suffered relatively more numerous and severe injuries, were rendered quadriplegic, partially lost vision and hearing, or were mistaken for dead—courts have departed upward from this baseline to $7 million and above. *See O'Brien*, 853 F. Supp. 2d at 47. Similarly, downward departures to a range of $1.5 to $3 million are warranted where the victim suffers severe emotional injury accompanied by

relatively minor physical injuries. *See Valore*, 700 F. Supp. 2d at 84-85. Damages for extreme pain and suffering are warranted for those individuals who initially survive the attack but then succumb to their injuries, but to the estates of those who are killed instantly, courts award no pain-and-suffering damages. *See Haim v. Islamic Republic of Iran*, 425 F. Supp. 2d 56, 71 (D.D.C. 2006); *see also Peterson II*, 515 F. Supp. 2d at 53-55.

The need to maintain uniformity with awards to plaintiffs in prior cases and between plaintiffs in this case is particularly evident. A great number of plaintiffs were injured in the bombings. Those injuries, and evidence of those injuries, span a broad range. Although the special masters ostensibly applied the same guidelines, their interpretations of those guidelines understandably brought about recommendations of different awards even for plaintiffs who suffered very similar injuries—particularly those plaintiffs who did not suffer severe physical injuries. For those plaintiffs, the *Valore* court explained that downward departures to a range of $1.5 million to $3 million are appropriate, and the Court will apply that guideline as described at length in this Court's opinion in *Wamai v. Republic of Sudan*, No. 08-1349 (D.D.C. July 25, 2014). Those who suffered from injuries similar to plaintiffs who are generally awarded the "baseline" award of $5 million (involving some mix of serious hearing or vision impairment, many broken bones, severe shrapnel wounds or burns, lengthy hospital stays, serious spinal or head trauma, and permanent injuries) will be awarded that baseline. *See Valore*, 700 F. Supp. 2d at 84.

And for two plaintiffs, who suffered even more grievous wounds, upward departures to $7.5 million are in order.

Jael Oyoo was injured in the blast at the United States Embassy in Nairobi. *See* Report of Special Master Stephen Saltzburg Concerning Jael Oyoo [ECF No. 97] at 2-3. When she was pulled out of the rubble by rescuers, the burns to her face and head were so severe that rescuers thought she was dead. *Id.* at 3. She suffered total vision loss in her left eye and severely impaired vision in her right eye. *Id.* She continues to suffer from shrapnel embedded in her skin and eyes. *Id.* She has never regained the full use of her right hand. *Id.* And she spent two years recovering in hospitals. *Id.*

William Maina was working off-site during the blast at the United States Embassy in Nairobi, but after hearing of the attack, he rushed to the site of the bombing to help with recovery efforts. Report of Special Master Jackson Williams Concerning William Maina [ECF No. 233] at 3. While digging through the rubble, he suffered cuts and scratches, and was exposed to victims' blood. *Id.* Afterwards, he was diagnosed with HIV, which is a bloodborne pathogen and an occupational risk for first responders. *Id.*; *see* Ctrs. for Disease Control & Prev., *First Responders: Encourage Your Workers to Report Bloodborne Pathogen Exposures* (July 2008).[5] In 1998, approximately 12% of adults between the ages of 15 and

5. *Available at* http://www.cdc.gov/niosh/docs/2008-118/default.html.

49 in urban Kenya were HIV-positive. Nat'l Aids Control Council, *United Nations General Assembly Special Session on HIV/AIDS: Country Report - Kenya*, at 5 Fig.1, (Jan. 2006).[6] It seems reasonable to infer that a foreseeable risk of bombing an embassy is that first responders might contract bloodborne diseases, such as HIV, during recovery efforts, particularly in a country like Kenya with relatively high incidence rates. The victim here also provided evidence suggesting that he did not contract the disease elsewhere. Maina testified that he did not have HIV before the bombing, that he does not use intravenous drugs, that he has not engaged in unprotected sexual intercourse, that he has not had contact with prostitutes, and that he has never had a blood transfusion. Report of Special Master Jackson Williams Concerning William Maina at 6. Considering the circumstances and the evidence presented, Maina has shown "some reasonable connection between the act or omission of the defendant and the damages which [he] has suffered." *Valore*, 700 F. Supp. 2d at 66 (citation omitted). Although he otherwise suffered only minor physical injuries during the recovery efforts, HIV is a chronic, serious, and stigmatizing disease requiring a lifetime of treatment. Oyoo's and Maina's injuries are comparable to those plaintiffs awarded $7-$8 million in *Peterson II*, and the Court will award them $7.5 million for pain and suffering. *See* 515 F. Supp. 2d at 55-57.

The Court adopts the recommendations by special masters of awards consistent with these adjusted guidelines, and will adjust inconsistent awards accordingly.

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6. Available at http://data.unaids.org/pub/Report/2006/2006_country_progress_report_kenya_en.pdf.

3. Solatium

"In determining the appropriate amount of compensatory damages, the Court may look to prior decisions awarding damages for pain and suffering, and to those awarding damages for solatium." *Acosta v. Islamic Republic of Iran*, 574 F. Supp. 2d 15, 29 (D.D.C. 2008). Only immediate family members—parents, siblings, spouses,[7] and children—are entitled to solatium awards. *See Valore*, 700 F. Supp. 2d at 79. The commonly accepted framework for solatium damages in this district is that used in *Peterson II*, 515 F. Supp. 2d at 52. *See Valore*, 700 F. Supp. 2d at 85; *Belkin*, 667 F. Supp. 2d at 23. According to *Peterson II*, the appropriate amount of damages for family members of deceased victims is as follows: $8 million to spouses of deceased victims, $5 million to parents of deceased victims, and $2.5 million to siblings of deceased victims. 515 F. Supp. 2d at 52. The appropriate amount of damages for family members of injured victims is as follows: $4 million to spouses of injured victims, $2.5 million to parents of injured victims, and $1.25 million to siblings of injured victims. *Id.* Courts in this district have differed somewhat on the proper amount awarded to children of victims. *Compare Peterson II*, 515 F. Supp. 2d at 51 ($2.5 million to child of injured victim), *with Davis*

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7. The Court adopts Special Master Brad Pigott's recommendation that the common-law wife of Zephania Mboge, Salima Rajabu, be awarded solatium damages, for the reasons discussed in the special master report, although the Court will adjust that award to be consistent with the guidelines discussed in this opinion. *See* Report of Special Master Brad Pigott Concerning Zephania Mboge [ECF No. 161] at 5-6.

v. Islamic Republic of Iran, 882 F. Supp. 2d 7, 14 (D.D.C. 2012) ($1.5 million to child of injured victim). The Court finds the *Peterson II* approach to be more appropriate: to the extent such suffering can be quantified, children who lose parents are likely to suffer as much as parents who lose children. Children of injured victims will thus be awarded $2.5 million and, consistent with the Peterson II approach of doubling solatium awards for relatives of deceased victims, children of deceased victims will be awarded $5 million.

Although these amounts are guidelines, not rules, *see Valore*, 700 F. Supp. 2d at 86, the Court finds the distinctions made by the *Valore* court to be responsible and reasonable, and hence it will adopt the same guidelines for determining solatium damages here. In the interests of fairness and to account for the difficulty in assessing the relative severity of each family member's suffering, in this case and in related cases, the Court will depart from those guidelines only for a few plaintiffs for whom the special master's report is particularly convincing.

In some instances, special masters recommended that spouses of deceased victims receive $10 million. *See, e.g.*, Report Concerning Hesbon Bulimu at 3. Because the Court adopts the *Peterson II* guidelines, each of these recommendations will be adjusted and those plaintiffs will be awarded $8 million. *See* 515 F. Supp. 2d at 52. Similarly, in some instances, special masters recommended that spouses and children of injured victims receive $5 million and $3 million, respectively. *See, e.g.*, Report of Special Master Kenneth Adams Concerning Livingstone Busera

Madahana [ECF No. 175] at 5-8. The Court will decrease those awards to $4 million and $2.5 million, respectively. *See* 515 F. Supp. 2d at 52.

The special masters also recommended against awarding solatium damages to some injured victims' children who were born after the bombings occurred. While the Court acknowledges that the bombings' terrible impact on the victims and their families continues to this day, in similar cases courts have found that children born following terrorist attacks are not entitled to damages under the FSIA. *See Davis*, 882 F. Supp. 2d at 15; *Wultz v. Islamic Republic of Iran*, 864 F. Supp. 2d 24, 36 (D.D.C. 2012). In holding that a plaintiff must have been alive at the time of an attack to recover solatium damages, the *Davis* court recognized the need to draw lines in order to avoid creating "an expansive and indefinite scope of liability" under the FSIA—for example, liability to children born fifteen years after an attack (a real possibility in this drawn-out litigation). 882 F. Supp. 2d at 15. The Court agrees with the special masters and with the *Davis* court's interpretation of the FSIA, and holds that those plaintiffs not alive at the time of the bombings cannot recover solatium damages. Hence, the Court adopts the special masters' recommendations and dismisses the claims of Jackline Wambui, James Gwaro, Onael David Mdobilu, Joshua Daniel Mdobilu, and Mercy Bulimu because they were all born after the bombings. *See* Report of Special Master John Aldock Concerning Simon Ngure [ECF No. 120] at 7-8; Report of Special Master John Aldock Concerning Julius Ogoro [ECF No. 134] at 8; Report of Special Master Jackson Williams Concerning Justina

Mdobilu [ECF No. 221] at 10-11; Report Concerning Hesbon Bulimu at 8.

For a few plaintiffs in this case, the special masters recommended that no solatium damages be awarded because the record does not contain sufficient evidence to support their claims. *See Peterson II*, 515 F. Supp. 2d at 46. The Court adopts each of those recommendations, and also finds that in some instances the special masters recommended awarding solatium damages to plaintiffs despite insufficient evidence or evidence directly disclaiming any emotional harm. So in addition to the plaintiffs for whom the special masters recommend no solatium awards, Asha Abdullah, Said Katimba, Valentina Hiza, Christopher Hiza, Christianson Hiza, Christemary Hiza, Sally Omondi, and Miriam Muthoni will not be awarded damages. *See* Report of Special Master Stephen Saltzburg Concerning Katimba Mohamed Selemani [ECF No. 100] at 4 (finding that "[t]here is little in the evidence before me about" Asha Abdullah and noting "absence of specific evidence"); Report of Special Master Jackson Williams Concerning Victor Mpoto [ECF No. 136] at 6 (noting that Denis Mpoto was very young at the time of the bombings and that he "did not feel personally impacted by his father's injuries"); Report of Special Master Brad Pigott Concerning Christant Hiza [ECF No. 157] at 6-9 (Valentina Hiza "denied . . . that she has herself suffered long-term emotional damage from the bombing"; Christopher Hiza, Christianson Hiza, and Christemary Hiza each denying that they suffered continuing emotional damages from the bombing).

The Court finds that the special masters have appropriately applied the solatium damages framework to most of the plaintiffs in this case, and will adopt their recommendations with a few exceptions. Other courts in this district have held that it is inappropriate for the solatium awards of family members to exceed the pain-and-suffering awards of surviving victims. *See Davis*, 882 F. Supp. 2d at 15; *O'Brien*, 853 F. Supp. 2d at 47; *Bland*, 831 F. Supp. 2d at 157. The Court will follow that approach here.[8] The special masters recommended solatium awards exceeding the pain-and-suffering awards to the related victim in several cases, albeit sometimes inadvertently, because of this Court's adjustment of pain-and-suffering awards. Hence, the Court will reduce those solatium awards to match corresponding pain-and-suffering awards where appropriate.

b. Punitive Damages

Plaintiffs request punitive damages under section 1605A(c). Punitive damages "serve to punish and deter the actions for which they are awarded." *Valore*, 700 F. Supp. 2d at 87. Courts calculate the proper amount of punitive

8. Some special masters recommended proportionally reducing solatium awards to reflect downward departures from the "standard" $5 million pain-and-suffering amount. *See, e.g.*, Report of Special Master Jackson Williams Concerning Justina Mdobilu [ECF No. 221] at 8-11. For consistency, and because other courts in this district usually reduce solatium awards only to match injured victims' pain-and-suffering awards, the Court will not proportionally reduce solatium awards. Instead, the Court will reduce solatium awards to match pain-and-suffering awards.

damages by considering four factors: "(1) the character of the defendants' act, (2) the nature and extent of harm to the plaintiffs that the defendants caused or intended to cause, (3) the need for deterrence, and (4) the wealth of the defendants." *Oveissi II*, 879 F. Supp. 2d at 56 (quoting *Acosta*, 574 F. Supp. 2d at 30). In this case, the first three factors weigh heavily in favor of an award of punitive damages: the character of defendants' actions and the nature and extent of harm to plaintiffs can accurately be described as horrific. Scores were murdered, hundreds of families were torn asunder, and thousands of lives were irreparably damaged. The need for deterrence here is tremendous. And although specific vidence in the record on defendants' wealth is scant, they are foreign states with substantial wealth.

Previous courts in this district, confronted with similar facts, have calculated punitive damages in different ways. *See, e.g., Baker*, 775 F. Supp. 2d at 85 (surveying cases). One attractive method often used in FSIA cases is to multiply defendants' annual expenditures on terrorist activities by a factor of three to five. *See, e.g., Valore*, 700 F. Supp. 2d at 88-90. Unfortunately, there is not enough evidence in the record on defendants' expenditures during the relevant time period to adopt that approach here. Other courts have simply awarded families of terrorism victims $150 million in punitive damages. *See, e.g., Gates v. Syrian Arab Republic*, 580 F. Supp. 2d 53, 75 (D.D.C. 2008), *aff'd*, 646 F.3d 1, 396 U.S. App. D.C. 128 (D.C. Cir. 2011). Using that approach here would result in a colossal figure, given the number of families involved.

This case, when combined with the related cases involving the same bombings where plaintiffs seek punitive damages,[9] involves over 600 plaintiffs. *Valore* was a similar case, involving another terrorist bombing sponsored by Iran: the bombing of the United States Marine barracks in Beirut, Lebanon. Two hundred and forty-one military servicemen were murdered in that bombing. A similar number of people, 224, died here, and hundreds more were injured. In *Valore*, then-Chief Judge Lamberth used the expenditures-times-multiplier method. All told, Judge Lamberth awarded approximately $4 billion in compensatory damages in cases involving the Beirut bombing and about $5 billion in punitive damages. *Estate of Brown v. Islamic Republic of Iran*, 872 F. Supp. 2d 37, 45 n.1 (D.D.C. 2012) (tallying awards). This case is quite similar in magnitude: all told, including the judgments issued in *Owens, Mwila*, and *Khaliq*, and the judgments to be issued in conjunction with this opinion and in *Wamai, Amduso*, and *Onsongo*, the Court will have issued just over $5 billion in compensatory damages. Given that similarity, the inability of this Court to employ the expenditure-times-multiplier method, and in light of the "societal interests in punishment and deterrence that warrant imposition of punitive sanctions" in cases like this, the Court finds it appropriate to award punitive damages in an amount equal to the total compensatory damages awarded in this case. *Beer v. Islamic Republic of Iran*, 789

9. Plaintiffs in *Owens, Mwila*, and *Khaliq*, cases (involving the same bombings) in which this Court previously awarded damages, did not seek punitive damages. *See, e.g., Khaliq v. Republic of Sudan*, No. 10-356, 33 F. Supp. 3d 29, 2014 U.S. Dist. LEXIS 41882, 2014 WL 1284973, at *3 (D.D.C. Mar. 28, 2014).

F. Supp. 2d 14, 17 (D.D.C. 2011) (citing *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998)). Doing so will result in a punitive damage award consistent with the punitive damage awards in analogous cases, particularly those involving the Beirut bombing, and will hopefully deter defendants from continuing to sponsor terrorist activities. The Court will apportion punitive damages among plaintiffs according to their compensatory damages. *See Valore*, 700 F. Supp. 2d at 90.

c. Prejudgment Interest

An award of prejudgment interest at the prime rate is appropriate in this case. *See Oldham v. Korean Air Lines Co.*, 127 F.3d 43, 54, 326 U.S. App. D.C. 375 (D.C. Cir. 1997); *Forman v. Korean Air Lines Co.*, 84 F.3d 446, 450-51, 318 U.S. App. D.C. 6 (D.C. Cir. 1996). Prejudgment interest is appropriate on the whole award, including pain and suffering and solatium—although not including the punitive damage award, as that is calculated here by reference to the entire compensatory award—with one exception. *See Reed v. Islamic Republic of Iran*, 845 F. Supp. 2d 204, 214-15 (D.D.C. 2012) (awarding prejudgment interest on the full award). *But see Oveissi v. Islamic Republic of Iran*, 768 F. Supp. 2d 16, 30 n.12 (D.D.C. 2011) (declining to award prejudgment interest on solatium damages). Because some of the economic loss figures recommended by the special masters have already been adjusted to reflect present discounted value, *see District of Columbia v. Barriteau*, 399 A.2d 563, 568-69 (D.C. 1979), the Court will not apply the prejudgment interest multiplier to the economic loss amounts except those

calculated in 1998 dollars. *See Doe*, 943 F. Supp. 2d at 186 (citing *Oldham*, 127 F.3d at 54); Report Concerning Hesbon Bulimu at 11-18 (explaining how to properly apply interest here without double-counting). Awards for pain and suffering and solatium are calculated without reference to the time elapsed since the attacks. Because plaintiffs were unable to bring their claims immediately after the attacks, they lost use of the money to which they were entitled upon incurring their injuries. Denying prejudgment interest on these damages would allow defendants to profit from the use of the money over the last fifteen years. Awarding prejudgment interest, on the other hand, reimburses plaintiffs for the time value of money, treating the awards as if they were awarded promptly and invested by plaintiffs.

The Court will calculate the applicable interest using the prime rate for each year. The D.C. Circuit has explained that the prime rate—the rate banks charge for short-term unsecured loans to creditworthy customers—is the most appropriate measure of prejudgment interest, one "more appropriate" than more conservative measures such as the Treasury Bill rate, which represents the return on a risk-free loan. *See Forman*, 84 F.3d at 450. Although the prime rate, applied over a period of several years, can be measured in different ways, the D.C. Circuit has approved an award of prejudgment interest "at the prime rate for each year between the accident and the entry of judgment." *See id.* Using the prime rate for each year is more precise than, for example, using the average rate over the entire period. *See Doe*, 943 F. Supp. 2d at 185 (noting that this method is a "substantially more accurate

'market-based estimate'" of the time value of money (citing *Forman*, 84 F. 3d at 451)). Moreover, calculating interest based on the prime rate for each year is a simple matter.[10] Using the prime rate for each year results in a multiplier of 2.26185 for damages incurred in 1998.[11] Accordingly, the Court will use this multiplier to calculate the total award.[12]

CONCLUSION

The 1998 embassy bombings shattered the lives of all plaintiffs in this case. Reviewing their personal stories reveals that, even more than fifteen years later, they each still feel the horrific effects of that awful day. Damages awards cannot fully compensate people whose lives have

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10. To calculate the multiplier, the Court multiplied $1.00 by the prime rate in 1999 (8%) and added that amount to $1.00, yielding $1.08. Then, the Court took that amount and multiplied it by the prime rate in 2000 (9.23%) and added that amount to $1.08, yielding $1.17968. Continuing this iterative process through 2014 yields a multiplier of 2.26185.

11. The Court calculated the multiplier using the Federal Reserve's data for the average annual prime rate in each year between 1998 and 2014. *See* Bd. of Governors of the Fed. Reserve Sys. Historical Data, *available at* http://www.federalreserve.gov/releases/h15/data.htm (last visited July 25, 2014). As of the date of this opinion, the Federal Reserve has not posted the annual prime rate for 2014, so the Court will conservatively estimate that rate to be 3.25%, the rate for the previous six years.

12. The product of the multiplier and the base damages amount includes both the prejudgment interest and the base damages amount; in other words, applying the multiplier calculates not the prejudgment interest but the base damages amount plus the prejudgment interest, or the total compensatory damages award.

been torn apart; instead, they offer only a helping hand. But that is the very least that these plaintiffs are owed. Hence, it is what this Court will facilitate.

A separate Order consistent with these findings has issued on this date.

/s/
JOHN D. BATES
United States District Judge

Dated: July 25, 2014

APPENDIX E — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED JULY 25, 2014

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 08-1361 (JDB)

MILLY MIKALI AMDUSO, *et al.*,

Plaintiffs,

v.

REPUBLIC OF SUDAN, *et al.*,

Defendants.

MEMORANDUM OPINION

Over fifteen years ago, on August 7, 1998, the United States embassies in Nairobi, Kenya and Dar es Salaam, Tanzania were devastated by simultaneous suicide bombings that killed hundreds of people and injured over a thousand. This Court has entered final judgment on liability under the Foreign Sovereign Immunities Act ("FSIA") in this civil action and several related cases—brought by victims of the bombings and their families—against the Republic of Sudan, the Ministry of the Interior of the Republic of Sudan, the Islamic Republic of Iran, the Iranian Revolutionary Guards Corps, and the Iranian Ministry of Information and Security (collectively

"defendants") for their roles in supporting, funding, and otherwise carrying out these unconscionable acts. The next step in the case is to assess and award damages to each individual plaintiff, and in this task the Court has been aided by several special masters.

Plaintiffs are 113 Kenyan, Tanzanian, and United States citizens injured and killed in the bombings, and their immediate[1] family members.[2] Service of process was completed upon each defendant, but defendants

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1. One plaintiff, Stacy Waithere, is the granddaughter of deceased victim Joel Gitumbu Kamau. Because she is thus not an immediate family member, the Court will dismiss her claim because she does not have a viable cause of action. *See Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52, 79 (D.D.C. 2010). Similarly, another plaintiff, Yvonne Bochart, a deceased victim's widow, did not marry the victim until well after the bombings, and the Court will dismiss her claim as well. *See id.*

2. A large number of plaintiffs are listed as plaintiffs both in this case and in the related case before this Court, *Wamai v. Republic of Sudan*, No. 08-1349, 60 F. Supp. 3d 84, 2014 U.S. Dist. LEXIS 101322 (D.D.C. July 25, 2014). Initially, plaintiffs in these two cases were represented by two different sets of attorneys. Some plaintiffs signed retainer agreements with both sets of attorneys, and so appeared as plaintiffs in both cases. Following mediation with Magistrate Judge Facciola, the attorneys settled the issue of which plaintiffs were represented by whom by signing a cooperation agreement and entering into joint representation of plaintiffs in both cases. See [ECF Nos. 54-57]. Of course, plaintiffs are entitled to only one award. As *Wamai* is the earlier-filed case, and because the joint representation vitiates any conflict between counsel, the Court will award damages to plaintiffs appearing in both cases only in *Wamai*, and will deny those same plaintiffs awards in this case.

failed to respond, and a default was entered against each defendant. The Court has held that it has jurisdiction over defendants and that the foreign national plaintiffs who worked for the U.S. government are entitled to compensation for personal injury and wrongful death under 28 U.S.C. § 1605A(c)(3). *See Owens v. Republic of Sudan*, 826 F. Supp. 2d 128, 148-51 (D.D.C. 2011). The Court has also held that, although those plaintiffs who are foreign national family members of victims lack a federal cause of action, they may nonetheless pursue claims under the laws of the District of Columbia. *Id.* at 153-57. A final judgment on liability was entered in favor of plaintiffs. Nov. 28, 2011 Order [ECF No. 62] at 2. The deposition testimony and other evidence presented established that the defendants were responsible for supporting, funding, and otherwise carrying out the bombings in Nairobi and Dar es Salaam. *See Owens*, 826 F. Supp. 2d at 135-47.

The Court then referred plaintiffs' claims to several special masters[3] to prepare proposed findings and recommendations for a determination of damages. Feb. 27, 2012 Order Appointing Special Masters [ECF No. 67] at 2. The special masters have now filed completed reports on each plaintiff. *See* Special Master Reports [ECF Nos. 73-250]. In completing those reports and in finding facts,

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Similarly, one plaintiff is listed in this case and in the *Opati* case (No. 12-1224), also currently pending before this Court. That plaintiff will be awarded damages in this case but not in the *Opati* case.

3. Those special masters (collectively, "the special masters") are Kenneth L. Adams, John D. Aldock, Oliver Diaz, Jr., Deborah E. Greenspan, Brad Pigott, Stephen A. Saltzburg, and C. Jackson Williams.

the special masters relied on sworn testimony, expert reports, medical records, and other evidence. The reports extensively describe the key facts relevant to each of the plaintiffs and carefully analyze their claims under the framework established in mass tort terrorism cases. The Court commends each of the special masters for their excellent work and thoughtful analysis.

The Court hereby adopts all facts found by the special masters relating to all plaintiffs in this case, including findings regarding the plaintiffs' employment status or their familial relationship necessary to support standing under section 1605A(a)(2)(A)(ii). *See Owens*, 826 F. Supp. 2d at 149. Where the special masters have received evidence sufficient to find that a plaintiff is a U.S. national and is thus entitled to maintain a federal cause of action, the Court adopts that finding. The Court also adopts all damages recommendations in the reports, with the few adjustments described below. "Where recommendations deviate from the Court's damages framework, 'those amounts shall be altered so as to conform with the respective award amounts set forth' in the framework, unless otherwise noted." *Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52, 82-83 (D.D.C. 2010) (quoting *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25, 53 (D.D.C. 2007) ("*Peterson II*"), *abrogation on other grounds recognized in Mohammadi v. Islamic Republic of Iran*, 947 F. Supp. 2d 48, 65 (D.D.C. 2013)). As a result, the Court will award plaintiffs a total judgment of over $1.7 billion.

Appendix E

I. CONCLUSIONS OF LAW

On November 28, 2011, the Court granted summary judgment on liability against defendants in this case. Nov. 28, 2011 Order [ECF No. 62] at 2. The U.S. citizens and foreign national U.S.-government-employee victims have a federal cause of action, while their foreign-national family members have a cause of action under D.C. law.

a. The Government-Employee Plaintiffs Are Entitled To Damages On Their Federal Law Claims Under 28 U.S.C. § 1605A

"To obtain damages in a Foreign Sovereign Immunities Act (FSIA) action, the plaintiff must prove that the consequences of the defendants' conduct were reasonably certain (i.e., more likely than not) to occur, and must prove the amount of the damages by a reasonable estimate consistent with application of the American rule on damages." *Valore*, 700 F. Supp. 2d at 83. Plaintiffs here have proven that the consequences of defendants' conduct were reasonably certain to—and indeed intended to—cause injury to plaintiffs. *See Owens*, 826 F. Supp. 2d at 135-46. As discussed by this Court previously, because the FSIA-created cause of action "does not spell out the elements of these claims that the Court should apply," the Court "is forced . . . to apply general principles of tort law" to determine plaintiffs' entitlement to damages on their federal claims. *Id.* at 157 n.3.

Survivors are entitled to recover for the pain and suffering caused by the bombings: acts of terrorism "by

their very definition" amount to extreme and outrageous conduct and are thus compensable by analogy under the tort of "intentional infliction of emotional distress." *Valore*, 700 F. Supp. 2d at 77 (citing Restatement (Second) of Torts § 46(1) (1965)); *see also Baker v. Socialist People's Libyan Arab Jamahirya*, 775 F. Supp. 2d 48, 74 (D.D.C. 2011) (permitting plaintiffs injured in state-sponsored terrorist bombings to recover for personal injuries, including pain and suffering, under tort of "intentional infliction of emotional distress"); *Estate of Bland v. Islamic Republic of Iran*, 831 F. Supp. 2d 150, 153 (D.D.C. 2011) (same). Hence, "those who survived the attack may recover damages for their pain and suffering, . . . [and for] economic losses caused by their injuries. . . ." *Oveissi v. Islamic Republic of Iran*, 879 F. Supp. 2d 44, 55 (D.D.C. 2012) ("*Oveissi II*") (citing *Valore*, 700 F. Supp. 2d at 82-83); *see* 28 U.S.C. § 1605A(c). Accordingly, all plaintiffs who were injured in the 1998 bombings can recover for their pain and suffering as well as their economic losses, and their immediate family members—if U.S. nationals—can recover for solatium. *Bland*, 831 F. Supp. 2d at 153. In addition, the estates of those who were killed in the attack are entitled to recover compensatory damages for wrongful death. *See, e.g.*, *Valore*, 700 F. Supp. 2d at 82 (permitting estates to recover economic damages caused to deceased victims' estates).

b. Family Members Who Lack A Federal Cause Of Action Are Entitled To Damages Under D.C. Law

This Court has previously held that it will apply District of Columbia law to the claims of any plaintiffs

for whom jurisdiction is proper, but who lack a federal cause of action under the FSIA. *Owens*, 826 F. Supp. 2d at 153-57. This category includes only the foreign-national family members of the injured victims from the 1998 bombings. Individuals in this category seek to recover solatium damages under D.C. law based on claims of intentional infliction of emotional distress. To establish a prima facie case of intentional infliction of emotional distress under D.C. law, a plaintiff must show: (1) extreme and outrageous conduct on the part of the defendant which, (2) either intentionally or recklessly, (3) causes the plaintiff severe emotional distress. *Larijani v. Georgetown Univ.*, 791 A.2d 41, 44 (D.C. 2002). Acts of terrorism "by their very definition" amount to extreme and outrageous conduct, *Valore*, 700 F. Supp. 2d at 77; the defendants in this case acted intentionally and recklessly; and their actions caused each plaintiff severe emotional distress, *see Owens*, 826 F. Supp. 2d at 136-45; *Murphy v. Islamic Republic of Iran*, 740 F. Supp. 2d 51, 74-75 (D.D.C. 2010). Likewise, D.C. law allows spouses and next of kin to recover solatium damages. D.C. Code § 16-2701. Based on the evidence submitted to the special masters, the Court concludes that the foreign-national family members of the victims of the 1998 bombings have each made out claims for intentional infliction of emotional distress and are entitled to solatium damages (with the few exceptions detailed below).

II. DAMAGES

Having established that plaintiffs are entitled to damages, the Court now turns to the question of the

amount of damages, which involves resolving common questions related to plaintiffs with similar injuries. The damages awarded to each plaintiff are laid out in the tables in the separate Order and Judgment issued on this date.

a. Compensatory Damages

1. Economic damages

Under the FSIA, injured victims and the estates of deceased victims may recover economic damages, which typically include lost wages, benefits and retirement pay, and other out-of-pocket expenses. 28 U.S.C. § 1605A(c). The special masters recommended that four deceased plaintiffs be awarded economic damages. To determine each plaintiff's economic losses resulting from the bombings, the special masters relied on economic reports submitted by the Center for Forensic Economic Studies ("CFES"), which estimated lost earnings, fringe benefits, retirement income, and the value of household services lost as a result of the injuries sustained from the bombing. In turn, CFES relied on information from the survivors as well as other documentation, including country-specific economic data and employment records. *See, e.g.*, Report of Special Master Steven Saltzburg Concerning Francis Mbogo Njung'e, Ex. 1 [ECF No. 67-1] at 1-4 (further explaining methodology employed in creating the economic loss reports). The Court adopts the findings and recommendations of the special masters as to economic losses to be awarded to injured victims and the estates of deceased victims.

2. Awards for pain and suffering due to injury

Courts determine pain-and-suffering awards for survivors based on factors including "the severity of the pain immediately following the injury, the length of hospitalization, and the extent of the impairment that will remain with the victim for the rest of his or her life." *O'Brien v. Islamic Republic of Iran*, 853 F. Supp. 2d 44, 46 (D.D.C. 2012) (internal quotation marks omitted). When calculating damages amounts, "the Court must take pains to ensure that individuals with similar injuries receive similar awards." *Peterson II*, 515 F. Supp. 2d at 54. Recognizing this need for uniformity, courts in this district have developed a general framework for assessing pain-and-suffering damages for victims of terrorist attacks, awarding a baseline of $5 million to individuals who suffer severe physical injuries, such as compound fractures, serious flesh wounds, and scars from shrapnel, as well as lasting and severe psychological pain. *See Valore*, 700 F. Supp. 2d at 84. Where physical and psychological pain is more severe—such as where victims suffered relatively more numerous and severe injuries, were rendered quadriplegic, partially lost vision and hearing, or were mistaken for dead—courts have departed upward from this baseline to $7 million and above. *See O'Brien*, 853 F. Supp. 2d at 47. Similarly, downward departures to a range of $1.5 to $3 million are warranted where the victim suffers severe emotional injury accompanied by relatively minor physical injuries. *See Valore*, 700 F. Supp. 2d at 84-85.

Appendix E

Damages for extreme pain and suffering are warranted for those individuals who initially survive the attack but then succumb to their injuries. "When the victim endured extreme pain and suffering for a period of several hours or less, courts in these [terrorism] cases have rather uniformly awarded $1 million." *Haim v. Islamic Republic of Iran*, 425 F. Supp. 2d 56, 71 (D.D.C. 2006); *see Peterson II*, 515 F. Supp. 2d at 53-55. When the period of the victim's pain is longer, the award increases. *Haim*, 425 F. Supp. 2d at 72. And when the period is particularly brief, courts award less. For instance, where an individual "survived a terrorist attack for 15 minutes, and was in conscious pain for 10 minutes," a court in this district awarded $500,000. *See Peterson II*, 515 F. Supp. 2d at 53. To the estates of those who are killed instantly, courts award no pain-and-suffering damages. The Court adopts the special masters' recommendations to award no pain-and-suffering damages to the estates of those plaintiffs who were killed instantly.

The need to maintain uniformity with awards to plaintiffs in prior cases and between plaintiffs in this case is particularly evident. A great number of plaintiffs were injured in the bombings. Those injuries, and evidence of those injuries, span a broad range. Although the special masters ostensibly applied the same guidelines, their interpretations of those guidelines understandably brought about recommendations of different awards even for plaintiffs who suffered very similar injuries—particularly those plaintiffs who did not suffer severe physical injuries. For those plaintiffs, the *Valore* court explained that downward departures to a range of $1.5

million to $3 million are appropriate, and the Court will apply that guideline as described at length in this Court's opinion in *Wamai v. Republic of Sudan*, No. 08-1349, 60 F. Supp. 3d 84, 2014 U.S. Dist. LEXIS 101322 (D.D.C. July 25, 2014). Those who suffered from injuries similar to plaintiffs who are generally awarded the "baseline" award of $5 million (involving some mix of serious hearing or vision impairment, many broken bones, severe shrapnel wounds or burns, lengthy hospital stays, serious spinal or head trauma, and permanent injuries) will be awarded that baseline. *See Valore*, 700 F. Supp. 2d at 84. The Court adopts the recommendations by special masters of awards consistent with these adjusted guidelines, and will adjust inconsistent awards accordingly.

3. Solatium

"In determining the appropriate amount of compensatory damages, the Court may look to prior decisions awarding damages for pain and suffering, and to those awarding damages for solatium." *Acosta v. Islamic Republic of Iran*, 574 F. Supp. 2d 15, 29 (D.D.C. 2008). Only immediate family members—parents, siblings, spouses, and children—are entitled to solatium awards.[4]

4. Many of the injured or deceased victims of the family member plaintiffs in this case are plaintiffs not here but in a related case before this Court. *See* 1st Am. Compl., *Wamai*, No. 08-1349 (D.D.C. Sept. 5, 2008) [ECF No. 5] at 1-12. The special masters found that each plaintiff in this case claiming solatium damages is related to an injured or deceased victim entitled to pain-and-suffering damages; whether the Court found that victim to be entitled to damages in this case or in *Wamai* is not important. The awards of those injured

See Valore, 700 F. Supp. 2d at 79. The commonly accepted framework for solatium damages in this district is that used in *Peterson II*, 515 F. Supp. 2d at 52. *See Valore*, 700 F. Supp. 2d at 85; *Belkin*, 667 F. Supp. 2d at 23. According to *Peterson II*, the appropriate amount of damages for family members of deceased victims is as follows: $8 million to spouses of deceased victims, $5 million to parents of deceased victims, and $2.5 million to siblings of deceased victims. 515 F. Supp. 2d at 52. The appropriate amount of damages for family members of injured victims is as follows: $4 million to spouses of injured victims, $2.5 million to parents of injured victims, and $1.25 million to siblings of injured victims. *Id.* Courts in this district have differed somewhat on the proper amount awarded to children of victims. *Compare Peterson II*, 515 F. Supp. 2d at 51 ($2.5 million to child of injured victim), *with Davis v. Islamic Republic of Iran*, 882 F. Supp. 2d 7, 14 (D.D.C. 2012) ($1.5 million to child of injured victim). The Court finds the *Peterson II* approach to be more appropriate: to the extent such suffering can be quantified, children who lose parents are likely to suffer as much as parents who lose children. Children of injured victims will thus be awarded $2.5 million and, consistent with the Peterson II approach of doubling solatium awards for relatives of deceased victims, children of deceased victims will be awarded $5 million.

Although these amounts are guidelines, not rules, *see Valore*, 700 F. Supp. 2d at 86, the Court finds the

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or deceased victims support the family-member solatium awards in this case.

distinctions made by the *Valore* court to be responsible and reasonable, and hence it will adopt the same guidelines for determining solatium damages here. In the interests of fairness and to account for the difficulty in assessing the relative severity of each family member's suffering, in this case and in related cases, the Court will depart from those guidelines only for one plaintiff who clearly suffered much less than other plaintiffs.[5]

In some instances, special masters recommended that spouses of deceased victims receive $10 million. *See, e.g.*, Report of Special Master Deborah Greenspan Concerning Edwin Omori [ECF No. 220] at 5. Because the Court adopts the *Peterson II* guidelines, each of these recommendations will be adjusted and those plaintiffs will be awarded $8 million. 515 F. Supp. 2d at 52.

One plaintiff, Hannah Ngenda Kamau, is one of two widows of deceased victim Vincent Kamau Nyoike. Report of Special Master Jackson Williams Concerning Vincent Kamau Nyoike [ECF No. 239] at 3. Courts in Kenya generally recognize that more than one wife of a decedent may be entitled to an inheritance, and so this Court will consider Hannah Kamau to be an immediate family member entitled to a solatium award. *See Charity Gacheri*

5. The special master's report on one plaintiff, Grace Godia, shows clearly that a reduced award is appropriate based on her testimony directly disclaiming emotional damage based on her husband's injury, except for a period of one month following the bombing. *See* Report of Special Master Deborah Greenspan Concerning Jotham Godia [ECF No. 123] at 4. Hence, the Court will exercise its discretion and reduce her award by half.

Kaburu v. Mary Gacheri M'ritaa, Succession Cause No. 251 of 2000 (High Court of Kenya 2014)[6] (appointing both of two widows as joint administrators). Under the circumstances, the Court will exercise its discretion, adopt the special master's recommendation, and award her the normal solatium amount for a deceased spouse. A different approach might involve pro rata awards of the normal solatium amount—and that may be appropriate in cases involving larger numbers of spouses—but just as multiple children do not receive pro rata shares, for similar reasons, the Court will award the full amount to Hannah Kamau.

For some plaintiffs, the special masters recommend that no solatium damages be awarded because the record does not contain sufficient evidence to support their claims. *See Peterson II*, 515 F. Supp. 2d at 46. The Court adopts those recommendations, and so Simon Ngugi, Charity Kiato, and Betty Orario will not be awarded damages. *See* Report of Special Master Kenneth Adams Concerning Vincent Kamau Nyoike [ECF No. 131] at 8-9; Report of Special Master Kenneth Adams Concerning Elizabeth Kiato [ECF No. 133] at 4; Report of Special Master Kenneth Adams Concerning Samuel Odhiambo Oriaro [ECF No. 181] at 5.

The Court finds that the special masters have appropriately applied the solatium damages framework to most of the plaintiffs in this case, and will adopt their recommendations with a few exceptions.[7] Other courts

6. *Available at* http://kenyalaw.org/caselaw/cases/view/99160.

7. Some special master reports mistakenly refer to solatium awards as pain-and-suffering awards. *See, e.g.*, Report of Special

in this district have held that it is inappropriate for the solatium awards of family members to exceed the pain-and-suffering awards of surviving victims. *See Davis*, 882 F. Supp. 2d at 15; *O'Brien*, 853 F. Supp. 2d at 47; *Bland*, 831 F. Supp. 2d at 157. The Court will follow that approach here. The special masters recommended solatium awards exceeding the pain-and-suffering awards to the related victim in several cases, albeit sometimes inadvertently, because of this Court's adjustment of pain-and-suffering awards.[8] Hence, the Court will reduce those solatium awards to match corresponding pain-and-suffering awards where appropriate.[9]

Master Kenneth Adams Concerning Boniface Chege [ECF No. 182] at 7. In those instances—where recommendations are consistent with the guidelines discussed herein—the Court adopts the amount of damages but rejects the special masters' recommendation that the plaintiffs be awarded pain-and-suffering damages.

8. Because of an apparent clerical error, a special master recommended awarding Nancy Mimba, wife of injured victim George Magak Mimba, $750,000, while purporting to reduce her award so as not to exceed the award to Mr. Mimba—who will be awarded $2,500,000. The Court will adjust Nancy Mimba's award to be in line with the guidelines discussed.

9. Some special masters recommended proportionally reducing solatium awards to reflect downward departures from the "standard" $5 million pain-and-suffering amount. *See, e.g.*, Report of Special Master Jackson Williams Concerning Doreen Oport [ECF No. 230] at 8. For consistency, and because other courts in this district usually reduce solatium awards only to match injured victims' pain-and-suffering awards, the Court will not proportionally reduce solatium awards. Instead, the Court will reduce solatium awards to match pain-and-suffering awards.

b. Punitive Damages

Plaintiffs request punitive damages under section 1605A(c). Punitive damages "serve to punish and deter the actions for which they are awarded." *Valore*, 700 F. Supp. 2d at 87. Courts calculate the proper amount of punitive damages by considering four factors: "(1) the character of the defendants' act, (2) the nature and extent of harm to the plaintiffs that the defendants caused or intended to cause, (3) the need for deterrence, and (4) the wealth of the defendants." *Oveissi II*, 879 F. Supp. 2d at 56 (quoting *Acosta*, 574 F. Supp. 2d at 30). In this case, the first three factors weigh heavily in favor of an award of punitive damages: the character of defendants' actions and the nature and extent of harm to plaintiffs can accurately be described as horrific. Scores were murdered, hundreds of families were torn asunder, and thousands of lives were irreparably damaged. The need for deterrence here is tremendous. And although specific evidence in the record on defendants' wealth is scant, they are foreign states with substantial wealth.

Previous courts in this district, confronted with similar facts, have calculated punitive damages in different ways. *See, e.g.*, *Baker*, 775 F. Supp. at 85 (surveying cases). One attractive method often used in FSIA cases is to multiply defendants' annual expenditures on terrorist activities by a factor of three to five. *See, e.g.*, *Valore*, 700 F. Supp. 2d at 88-90. Unfortunately, there is not enough evidence in the record on defendants' expenditures during the relevant time period to adopt that approach here. Other courts have simply awarded families of terrorism victims $150

million in punitive damages. *See, e.g.*, *Gates v. Syrian Arab Republic*, 580 F. Supp. 2d 53, 75 (D.D.C. 2008), *aff'd*, 646 F.3d 1, 396 U.S. App. D.C. 128 (D.C. Cir. 2011). Using that approach here would result in a colossal figure, given the number of families involved.

This case, when combined with the related cases involving the same bombings where plaintiffs seek punitive damages,[10] involves over 600 plaintiffs. *Valore* was a similar case, involving another terrorist bombing sponsored by Iran: the bombing of the United States Marine barracks in Beirut, Lebanon. Two hundred and forty-one military servicemen were murdered in that bombing. A similar number of people, 224, died here, and hundreds more were injured. In *Valore*, then-Chief Judge Lamberth used the expenditures-times-multiplier method. All told, Judge Lamberth awarded approximately $4 billion in compensatory damages in cases involving the Beirut bombing and about $5 billion in punitive damages. *Estate of Brown v. Islamic Republic of Iran*, 872 F. Supp. 2d 37, 45 n.1 (D.D.C. 2012) (tallying awards). This case is quite similar in magnitude: all told, including the judgments issued in *Owens*, *Mwila*, and *Khaliq*, and the judgments to be issued in conjunction with this opinion and in *Wamai*, *Onsongo*, and *Opati*, the Court will have issued just over $5 billion in compensatory damages. Given that similarity, the inability of this Court to employ the

10. Plaintiffs in *Owens*, *Mwila*, and *Khaliq*, cases (involving the same bombings) in which this Court previously awarded damages, did not seek punitive damages. *See, e.g.*, *Khaliq v. Republic of Sudan*, No. 10-356, 33 F. Supp. 3d 29, 2014 U.S. Dist. LEXIS 41882, 2014 WL 1284973, at *3 (D.D.C. Mar. 28, 2014).

expenditure-times-multiplier method, and in light of the "societal interests in punishment and deterrence that warrant imposition of punitive sanctions" in cases like this, the Court finds it appropriate to award punitive damages in an amount equal to the total compensatory damages awarded in this case. *Beer v. Islamic Republic of Iran*, 789 F. Supp. 2d 14, 17 (D.D.C. 2011) (citing *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998)). Doing so will result in a punitive damage award consistent with the punitive damage awards in analogous cases, particularly those involving the Beirut bombing, and will hopefully deter defendants from continuing to sponsor terrorist activities. The Court will apportion punitive damages among plaintiffs according to their compensatory damages. *See Valore*, 700 F. Supp. 2d at 90.

c. Prejudgment Interest

An award of prejudgment interest at the prime rate is appropriate in this case. *See Oldham v. Korean Air Lines Co.*, 127 F.3d 43, 54, 326 U.S. App. D.C. 375 (D.C. Cir. 1997); *Forman v. Korean Air Lines Co.*, 84 F.3d 446, 450-51, 318 U.S. App. D.C. 6 (D.C. Cir. 1996). Prejudgment interest is appropriate on the whole award, including pain and suffering and solatium—although not including the punitive damage award, as that is calculated here by reference to the entire compensatory award—with one exception. *See Reed v. Islamic Republic of Iran*, 845 F. Supp. 2d 204, 214-15 (D.D.C. 2012) (awarding prejudgment interest on the full award). *But see Oveissi v. Islamic Republic of Iran*, 768 F. Supp. 2d 16, 30 n.12 (D.D.C. 2011) (declining to award prejudgment interest on solatium

damages). Because some of the economic loss figures recommended by the special masters have already been adjusted to reflect present discounted value, *see District of Columbia v. Barriteau*, 399 A.2d 563, 568-69 (D.C. 1979), the Court will not apply the prejudgment interest multiplier to the economic loss amounts except those calculated in 1998 dollars. *See Doe*, 943 F. Supp. 2d at 186 (citing *Oldham*, 127 F.3d at 54); Report of Special Master Steven Saltzburg Concerning Francis Mbogo Njung'e, Ex. 1 [ECF No. 67-1] at 1-4 (explaining how to properly apply interest here without double-counting). *See Doe*, 943 F. Supp. 2d at 186 (citing *Oldham*, 127 F.3d at 54). Awards for pain and suffering and solatium are calculated without reference to the time elapsed since the attacks. Because plaintiffs were unable to bring their claims immediately after the attacks, they lost use of the money to which they were entitled upon incurring their injuries. Denying prejudgment interest on these damages would allow defendants to profit from the use of the money over the last fifteen years. Awarding prejudgment interest, on the other hand, reimburses plaintiffs for the time value of money, treating the awards as if they were awarded promptly and invested by plaintiffs.

The Court will calculate the applicable interest using the prime rate for each year. The D.C. Circuit has explained that the prime rate—the rate banks charge for short-term unsecured loans to creditworthy customers—is the most appropriate measure of prejudgment interest, one "more appropriate" than more conservative measures such as the Treasury Bill rate, which represents the return on a risk-free loan. *See Forman*, 84 F.3d at 450.

Although the prime rate, applied over a period of several years, can be measured in different ways, the D.C. Circuit has approved an award of prejudgment interest "at the prime rate for each year between the accident and the entry of judgment." *See id.* Using the prime rate for each year is more precise than, for example, using the average rate over the entire period. *See Doe*, 943 F. Supp. 2d at 185 (noting that this method is a "substantially more accurate 'market-based estimate'" of the time value of money (citing *Forman*, 84 F. 3d at 451)). Moreover, calculating interest based on the prime rate for each year is a simple matter.[11] Using the prime rate for each year results in a multiplier of 2.26185 for damages incurred in 1998.[12] Accordingly, the Court will use this multiplier to calculate the total award.[13]

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11. To calculate the multiplier, the Court multiplied $1.00 by the prime rate in 1999 (8%) and added that amount to $1.00, yielding $1.08. Then, the Court took that amount and multiplied it by the prime rate in 2000 (9.23%) and added that amount to $1.08, yielding $1.17968. Continuing this iterative process through 2014 yields a multiplier of 2.26185.

12. The Court calculated the multiplier using the Federal Reserve's data for the average annual prime rate in each year between 1998 and 2014. *See* Bd. of Governors of the Fed. Reserve Sys. Historical Data, *available at* http://www.federalreserve.gov/releases/h15/data.htm (last visited July 25, 2014). As of the date of this opinion, the Federal Reserve has not posted the annual prime rate for 2014, so the Court will conservatively estimate that rate to be 3.25%, the rate for the previous six years.

13. The product of the multiplier and the base damages amount includes both the prejudgment interest and the base damages amount; in other words, applying the multiplier calculates not the prejudgment interest but the base damages amount plus the prejudgment interest, or the total compensatory damages award.

Appendix E

CONCLUSION

The 1998 embassy bombings shattered the lives of all plaintiffs in this case. Reviewing their personal stories reveals that, even more than fifteen years later, they each still feel the horrific effects of that awful day. Damages awards cannot fully compensate people whose lives have been torn apart; instead, they offer only a helping hand. But that is the very least that these plaintiffs are owed. Hence, it is what this Court will facilitate.

A separate Order consistent with these findings has issued on this date.

/s/
JOHN D. BATES
United States District Judge

Dated: July 25, 2014

APPENDIX F — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED JULY 25, 2014

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 08-1349 (JDB)

WINFRED WAIRIMU WAMAI, *et al.*,

Plaintiffs,

v.

REPUBLIC OF SUDAN, *et al.*,

Defendants.

July 25, 2014, Decided

MEMORANDUM OPINION

Over fifteen years ago, on August 7, 1998, the United States embassies in Nairobi, Kenya and Dar es Salaam, Tanzania were devastated by simultaneous suicide bombings that killed hundreds of people and injured over a thousand. This Court has entered final judgment on liability under the Foreign Sovereign Immunities Act ("FSIA") in this civil action and several related cases—brought by victims of the bombings and their families—against the Republic of Sudan, the Ministry of the Interior of the Republic of Sudan, the Islamic Republic

of Iran, the Iranian Revolutionary Guards Corps, and the Iranian Ministry of Information and Security (collectively "defendants") for their roles in supporting, funding, and otherwise carrying out these unconscionable acts. The next step in the case is to assess and award damages to each individual plaintiff, and in this task the Court has been aided by several special masters.

The 196 plaintiffs in this case are Kenyan and Tanzanian citizens injured and killed in the bombings and their immediate[1] family members.[2] Service of process was

1. A few plaintiffs are not immediate family members, but as explained below, the Court will not award damages to those plaintiffs.

2. A large number of plaintiffs are listed as plaintiffs both in this case and in the related case before this Court, *Amduso v. Republic of Sudan*, No. 08-1361, 61 F. Supp. 3d 42, 2014 U.S. Dist. LEXIS 101319 (D.D.C. July 25, 2014). Initially, plaintiffs in these two cases were represented by two different sets of attorneys. Some plaintiffs signed retainer agreements with both sets of attorneys, and so appeared as plaintiffs in both cases. Following mediation with Magistrate Judge Facciola, the attorneys settled the issue of which plaintiffs were represented by whom by signing a cooperation agreement and entering into joint representation of plaintiffs in both cases. *See Amduso*, No. 08-1361 [ECF Nos. 54-57]. Of course, plaintiffs are entitled to only one award. As this case is the earlier-filed case, and because the joint representation vitiates any conflict between counsel, the Court will award damages in this case to plaintiffs appearing in both cases, and will deny those same plaintiffs awards in *Amduso*.

Similarly, a small number of plaintiffs are listed in this case and in two other cases pending before this Court: the *Onsongo* case (No. 08-1380), and the *Opati* case (No. 12-1224). Those plaintiffs

completed upon each defendant, but defendants failed to respond, and a default was entered against each of them. The Court has held that it has jurisdiction over defendants and that the foreign national plaintiffs who worked for the U.S. government are entitled to compensation for personal injury and wrongful death under 28 U.S.C. § 1605A(c)(3). *See Owens v. Republic of Sudan*, 826 F. Supp. 2d 128, 148-51 (D.D.C. 2011). The Court has also held that, although those plaintiffs who are foreign national family members of victims lack a federal cause of action, they may nonetheless pursue claims under the laws of the District of Columbia. *Id.* at 153-57. A final judgment on liability was entered in favor of plaintiffs. Nov. 28, 2011 Order [ECF No. 54] at 2. The deposition testimony and other evidence presented established that defendants were responsible for supporting, funding, and otherwise carrying out the bombings in Nairobi and Dar es Salaam. *See Owens*, 826 F. Supp. 2d at 135-47.

The Court then referred plaintiffs' claims to several special masters[3] to prepare proposed findings and recommendations for a determination of damages. Feb. 27, 2012 Order Appointing Special Masters [ECF No. 57] at 2. The special masters have now filed completed reports on each plaintiff. *See* Special Master Reports [ECF Nos. 63-241]. In completing those reports and in finding facts,

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will be awarded damages in this case, but will not be awarded damages in those cases.

3. Those special masters (collectively, "the special masters") are Kenneth L. Adams, John D. Aldock, Oliver Diaz, Jr., Deborah E. Greenspan, Brad Pigott, Stephen A. Saltzburg, and C. Jackson Williams.

the special masters relied on sworn testimony, expert reports, medical records, and other evidence. The reports extensively describe the key facts relevant to each of the plaintiffs and carefully analyze their claims under the framework established in mass tort terrorism cases. The Court commends each of the special masters for their excellent work and thorough analysis.

The Court hereby adopts all facts found by the special masters relating to all plaintiffs in this case, including findings regarding the plaintiffs' employment status or their familial relationship necessary to support standing under section 1605A(a)(2)(A)(ii). *See Owens*, 826 F. Supp. 2d at 149. The Court also adopts all damages recommendations in the reports, with the few adjustments described below. "Where recommendations deviate from the Court's damages framework, 'those amounts shall be altered so as to conform with the respective award amounts set forth' in the framework, unless otherwise noted." *Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52, 82-83 (D.D.C. 2010) (quoting *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25, 53 (D.D.C. 2007) ("*Peterson II*"), *abrogation on other grounds recognized in Mohammadi v. Islamic Republic of Iran*, 947 F. Supp. 2d 48, 65 (D.D.C. 2013)). As a result, the Court will award plaintiffs a total judgment of over $3.5 billion.

I. CONCLUSIONS OF LAW

On November 28, 2011, the Court granted summary judgment on liability against defendants in this case. Nov. 28, 2011 Order [ECF No. 54] at 2. The foreign-national U.S.-government-employee victims have a federal cause of

action, while their foreign-national family members have a cause of action under D.C. law.

a. The Government-Employee Plaintiffs Are Entitled To Damages On Their Federal Law Claims Under 28 U.S.C. § 1605A

"To obtain damages in a Foreign Sovereign Immunities Act (FSIA) action, the plaintiff must prove that the consequences of the defendants' conduct were reasonably certain (i.e., more likely than not) to occur, and must prove the amount of the damages by a reasonable estimate consistent with application of the American rule on damages." *Valore*, 700 F. Supp. 2d at 83. Plaintiffs here have proven that the consequences of defendants' conduct were reasonably certain to—and indeed intended to—cause injury to plaintiffs. *See Owens*, 826 F. Supp. 2d at 135-46. As discussed by this Court previously, because the FSIA-created cause of action "does not spell out the elements of these claims that the Court should apply," the Court "is forced . . . to apply general principles of tort law" to determine plaintiffs' entitlement to damages on their federal claims. *Id.* at 157 n.3.

Survivors are entitled to recover for the pain and suffering caused by the bombings: acts of terrorism "by their very definition" amount to extreme and outrageous conduct and are thus compensable by analogy under the tort of "intentional infliction of emotional distress." *Valore*, 700 F. Supp. 2d at 77 (citing Restatement (Second) of Torts § 46(1) (1965)); *see also Baker v. Socialist People's Libyan Arab Jamahirya*, 775 F. Supp. 2d 48, 74 (D.D.C. 2011) (permitting plaintiffs injured in state-sponsored

terrorist bombings to recover for personal injuries, including pain and suffering, under tort of "intentional infliction of emotional distress"); *Estate of Bland v. Islamic Republic of Iran*, 831 F. Supp. 2d 150, 153 (D.D.C. 2011) (same). Hence, "those who survived the attack may recover damages for their pain and suffering, . . . [and for] economic losses caused by their injuries. . . ." *Oveissi v. Islamic Republic of Iran*, 879 F. Supp. 2d 44, 55 (D.D.C. 2012) ("*Oveissi II*") (citing *Valore*, 700 F. Supp. 2d at 82-83); *see* 28 U.S.C. § 1605A(c). Accordingly, all plaintiffs who were injured in the 1998 bombings can recover for their pain and suffering as well as their economic losses. *Bland*, 831 F. Supp. 2d at 153. In addition, the estates of those who were killed in the attack are entitled to recover compensatory damages for wrongful death. *See, e.g., Valore*, 700 F. Supp. 2d at 82 (permitting estates to recover economic damages caused to deceased victims' estates).

b. Family Members Who Lack A Federal Cause Of Action Are Entitled To Damages Under D.C. Law

This Court has previously held that it will apply District of Columbia law to the claims of any plaintiffs for whom jurisdiction is proper, but who lack a federal cause of action under the FSIA. *Owens*, 826 F. Supp. 2d at 153-57. This category includes only the foreign-national family members of the injured victims from the 1998 bombings. Individuals in this category seek to recover solatium damages under D.C. law based on claims of intentional infliction of emotional distress. To establish a prima facie case of intentional infliction of emotional distress under D.C. law, a plaintiff must show:

(1) extreme and outrageous conduct on the part of the defendant which, (2) either intentionally or recklessly, (3) causes the plaintiff severe emotional distress. *Larijani v. Georgetown Univ.*, 791 A.2d 41, 44 (D.C. 2002). Acts of terrorism "by their very definition" amount to extreme and outrageous conduct, *Valore*, 700 F. Supp. 2d at 77; the defendants in this case acted intentionally and recklessly; and their actions caused each plaintiff severe emotional distress, *see Owens*, 826 F. Supp. 2d at 136-45; *Murphy v. Islamic Republic of Iran*, 740 F. Supp. 2d 51, 74-75 (D.D.C. 2010). Likewise, D.C. law allows spouses and next of kin to recover solatium damages. D.C. Code § 16-2701. Based on the evidence submitted to the special masters, the Court concludes that the foreign national family members of the victims of the 1998 bombings have each made out claims for intentional infliction of emotional distress and are entitled to solatium damages (with the few exceptions detailed below).

II. DAMAGES

Having established that plaintiffs are entitled to damages, the Court now turns to the question of the amount of damages, which involves resolving common questions related to plaintiffs with similar injuries. The damages awarded to each plaintiff are laid out in the tables in the separate Order and Judgment issued on this date.

Appendix F

a. Compensatory Damages

1. Economic damages

Under the FSIA, injured victims and the estates of deceased victims may recover economic damages, which typically include lost wages, benefits and retirement pay, and other out-of-pocket expenses. 28 U.S.C. § 1605A(c). The special masters recommended that twenty-four deceased plaintiffs and four injured victims be awarded economic damages. To determine each plaintiff's economic losses resulting from the bombings, the special masters relied on economic reports submitted by the Center for Forensic Economic Studies ("CFES"), which estimated lost earnings, fringe benefits, retirement income, and the value of household services lost as a result of the injuries sustained from the bombing. In turn, CFES relied on information from the survivors as well as other documentation, including country-specific economic data and employment records. *See, e.g.*, Report of Special Master Kenneth Adams Concerning Maurice Okatch Ogolla, Ex. 5 [ECF No. 70] at 45-47 (further explaining methodology employed in creating the economic loss reports). The Court adopts the findings and recommendations of the special masters as to economic losses to be awarded to injured victims and the estates of deceased victims.

2. Awards for pain and suffering due to injury

Courts determine pain-and-suffering awards for survivors based on factors including "the severity of the pain immediately following the injury, the length of

hospitalization, and the extent of the impairment that will remain with the victim for the rest of his or her life." *O'Brien v. Islamic Republic of Iran*, 853 F. Supp. 2d 44, 46 (D.D.C. 2012) (internal quotation marks omitted). When calculating damages amounts, "the Court must take pains to ensure that individuals with similar injuries receive similar awards." *Peterson II*, 515 F. Supp. 2d at 54. Recognizing this need for uniformity, courts in this district have developed a general framework for assessing pain-and-suffering damages for victims of terrorist attacks, awarding a baseline of $5 million to individuals who suffer severe physical injuries, such as compound fractures, serious flesh wounds, and scars from shrapnel, as well as lasting and severe psychological pain. *See Valore*, 700 F. Supp. 2d at 84. Where physical and psychological pain is more severe—such as where victims suffered relatively more numerous and severe injuries, were rendered quadriplegic, partially lost vision and hearing, or were mistaken for dead—courts have departed upward from this baseline to $7 million and above. *See O'Brien*, 853 F. Supp. 2d at 47. Similarly, downward departures to a range of $1.5 to $3 million are warranted where the victim suffers severe emotional injury accompanied by relatively minor physical injuries. *See Valore*, 700 F. Supp. 2d at 84-85.

Damages for extreme pain and suffering are warranted for those individuals who initially survive the attack but then succumb to their injuries. "When the victim endured extreme pain and suffering for a period of several hours or less, courts in these [terrorism] cases have rather uniformly awarded $1 million." *Haim v. Islamic Republic of Iran*, 425 F. Supp. 2d 56, 71 (D.D.C.

2006); *see Peterson II*, 515 F. Supp. 2d at 53-55. When the period of the victim's pain is longer, the award increases. *Haim*, 425 F. Supp. 2d at 72. And when the period is particularly brief, courts award less. For instance, where an individual "survived a terrorist attack for 15 minutes, and was in conscious pain for 10 minutes," a court in this district awarded $500,000. *See Peterson II*, 515 F. Supp. 2d at 53. To the estates of those who are killed instantly, courts award no pain-and-suffering damages.

According to the special masters, the evidence showed that four plaintiffs who died in the bombings did not die instantly, and that they suffered before they ultimately perished. The Court accepts the special masters' recommendations as to two of those plaintiffs. The Court adjusts the recommended award, consistent with *Haim*, to two plaintiffs whose pre-death suffering lasted for several hours: the Court will adjust Kimeu Nzioka Nganga's award from $2 million to $1 million and Bakari Nyumbu's from $3 million to $1 million. 425 F. Supp. 2d at 71 (noting that courts uniformly award $1 million to victims who suffered for several hours before dying in this context). The Court adopts the special masters' recommendations not to award pain-and-suffering damages to the estates of those plaintiffs who were killed instantly.[4]

4. For similar reasons, the Court accepts the special masters' recommendation that Teresia Wairimu Kamau, daughter of deceased victim Joseph Kamau Kiongo, receive no solatium award because she herself was killed in the same blast that killed her father. *See* Report of Special Master John Aldock Concerning Joseph Kamau Kiongo [ECF No. 79] at 9.

Appendix F

The need to maintain uniformity with awards to plaintiffs in prior cases and between plaintiffs in this case is particularly evident. A great number of plaintiffs were injured in the bombings. Those injuries, and evidence of those injuries, span a broad range. Although the special masters ostensibly applied the same guidelines, their interpretations of those guidelines understandably brought about recommendations of different awards even for plaintiffs who suffered very similar injuries—particularly those plaintiffs who did not suffer severe physical injuries. For those plaintiffs, the *Valore* court explained that downward departures to a range of $1.5 million to $3 million are appropriate, and the Court will apply that guideline as follows. 700 F. Supp. 2d at 84-85.

Many plaintiffs suffered little physical injury—or none at all—but have claims based on severe emotional injuries because they were at the scene during the bombings or because they were involved in the extensive recovery efforts immediately thereafter. Those plaintiffs will be awarded $1.5 million. *See id.* Typical of this category is Edward Mwae Muthama, who was working at the offsite warehouse for the United States Embassy in Kenya when the bombings occurred. Report of Special Master John Aldock Concerning Edward Muthama [ECF No. 93] at 4. Shortly after the attack, Muthama headed to the blast site and spent days assisting with the gruesome recovery efforts; to this day he suffers from emotional distress resulting from his time administering aid to survivors and handling the dead bodies (and body parts) of his murdered colleagues. *Id.*

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Other plaintiffs suffered minor[5] injuries (such as lacerations and contusions caused by shrapnel), accompanied by severe emotional injuries. They will be awarded $2 million. Typical is Emily Minayo, who was on the first floor of the United States Embassy in Nairobi at the time of the bombing. Report of Special Master Brad Pigott Concerning Emily Minayo [ECF No. 162] at 4. She was thrown to the floor by the force of the blast, but she was lucky enough to escape with only lacerations that were later sewn up during a brief hospital stay. *Id.* She continues, however, to suffer from severe emotional damage resulting from her experience. *Id.*

To those who suffered more serious physical injuries, such as broken bones, head trauma, some hearing or vision impairment, or impotence, the Court will award $2.5 million. Typical is Francis Maina Ndibui, who was in the United States Embassy in Nairobi during the bombing. Report of Special Master Brad Pigott Concerning Francis Maina Ndibui [ECF No. 152] at 4. Ndibui became temporarily trapped under debris that fell from the ceiling, and he suffered minor lacerations similar to Minayo's. *Id.* Also as a result of the bombing, he continues to suffer from partial vision impairment, which has persisted even through reparative surgery. *Id.* He also suffers from severe emotional damage resulting from his experience. *Id.*

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5. Their injuries were "minor" only relative to the injuries suffered by others in this case.

Appendix F

Plaintiffs with even more serious injuries—including spinal injuries not resulting in paralysis, more serious shrapnel injuries, head trauma, or serious hearing impairment—will be awarded $3 million. Typical is Victor Mpoto, who was at the United States Embassy in Dar es Salaam on the day of the bombing. Report of Special Master Jackson Williams Concerning Victor Mpoto [ECF No. 136] at 3. The blast knocked him to the ground and covered him in debris, causing minor physical injuries. *Id.* Because he was only about fifteen meters away from the blast, he suffered severe hearing loss in both ears that continues to this day and for which he continues to receive treatment. *Id.* He also suffers from severe emotional damage resulting from his experience. *Id.* at 4.

Those who suffered from injuries similar to those plaintiffs who are generally awarded the "baseline" award of $5 million (involving some mix of serious hearing or vision impairment, many broken bones, severe shrapnel wounds or burns, lengthy hospital stays, serious spinal or head trauma, and permanent injuries) will also be awarded that baseline. *See Valore*, 700 F. Supp. 2d at 84. Typical is Pauline Abdallah, who was injured in the bombing of the United States Embassy in Nairobi. Report of Special Master Stephen Saltzburg Concerning Pauline Abdallah [ECF No. 117] at 3. She was knocked unconscious by the blast, and later spent about a month in the hospital. *Id.* She suffered severe shrapnel wounds requiring skin grafts, third-degree burns, and two of her fingers were amputated. *Id.* Shrapnel still erupts from her skin. *Id.* She also suffered severe hearing loss. *Id.* Like other plaintiffs who were injured in the bombing, she suffers from severe emotional damage. *Id.* at 3-4.

And for a few plaintiffs, who suffered even more grievous wounds such as lost eyes, extreme burns, severe skull fractures, brain damage, ruptured lungs, or endured months of recovery in hospitals, upward departures to $7.5 million are in order.

Livingstone Busera Madahana was injured in the blast at the United States Embassy in Nairobi. Report of Special Master Kenneth Adams Concerning Livingstone Busera Madahana [ECF No. 175] at 4. Shrapnel from the blast completely destroyed his right eye and permanently damaged his left. *Id.* He suffered a skull fracture and spent months in a coma; his head trauma caused problems with his memory and cognition. *Id.* "He endured multiple surgeries, skin grafts, physical therapy, vocational rehabilitation, speech and cognitive therapy, and psychotherapy for depression." *Id.*

Gideon Maritim was injured in the blast at the United States Embassy in Nairobi. Report of Special Master Jackson Williams Concerning Gideon Maritim [ECF No. 222] at 3. The second explosion knocked him unconscious for several hours. *Id.* at 4 The blast ruptured his eardrums, knocked out several teeth, and embedded metal fragments into his eyes. *Id.* He also suffered deep shrapnel wounds to his legs and stomach, and his lungs were ruptured. *Id.* His hearing is permanently impaired, as is his lung function. *Id.* at 5. And he suffers from chronic back and shoulder pain. *Id.*

Charles Mwaka Mulwa was injured in the blast at the United States Embassy in Nairobi. Report of Special Master Jackson Williams Concerning Charles Mwaka

Mulwa [ECF No. 132] at 3. The bomb blast permanently disfigured his skull, ruptured both his eardrums, and embedded glass in his eyes. *Id.* He continues to suffer from nearly total hearing loss, and his eyesight is permanently diminished. *Id.* And he suffered from other shrapnel injuries to his head, arms, and legs. *Id.*

Tobias Oyanda Otieno was injured in the blast at the United States Embassy in Nairobi. Report of Special Master Brad Pigott Concerning Tobias Oyanda Otieno [ECF No. 181] at 4. The blast caused permanent blindness in his left eye, and substantial blindness in his right. *Id.* He suffered severe shrapnel injuries all over his body, including a particularly severe injury to his hand, which resulted in permanent impairment. *Id.* His lower back was also permanently damaged, causing continuous pain to this day. *Id.* He spent nearly a year recovering in hospitals. *Id.*

Moses Kinyua was injured in the blast at the United States Embassy in Nairobi. Report of Special Master Deborah Greenspan Concerning Moses Kinyua [ECF No. 202] at 4. The blast knocked him into a coma for three weeks. *Id.* His skull was crushed, his jaw was fractured in four places, and he lost his left eye. *Id.* The head trauma resulted in brain damage. *Id.* In addition, he suffered from a ruptured eardrum, a detached retina in his right eye, a dislocated shoulder, broken fingers, and serious shrapnel injuries. *Id.* He was ultimately hospitalized for over six months. *Id.*

Joash Okindo was injured in the blast at the United States Embassy in Nairobi. Report of Special Master Brad Pigott Concerning Joash Okindo [ECF No. 163] at 4. He spent about eight months in hospitals, and was in a coma for the first month because he suffered a skull fracture. *Id.* at 4-5. He suffered from severe shrapnel injuries to his head, back, legs, and hands, and the blast fractured bones in both of his legs. *Id.* at 4.

Each of these plaintiffs also suffered severe emotional injuries. The injuries suffered by these plaintiffs are comparable to those suffered by plaintiffs who were awarded $7-$8 million in *Peterson II. See* 515 F. Supp. 2d at 55-57 (e.g., Michael Toma, who suffered "various cuts from shrapnel, internal bleeding in his urinary system, a deflated left lung, and a permanently damaged right ear drum"). Hence, the Court will award each of these plaintiffs $7.5 million for pain and suffering. The Court adopts the recommendations by special masters of awards consistent with the adjusted guidelines described above, and will adjust inconsistent awards accordingly.

3. Solatium

"In determining the appropriate amount of compensatory damages, the Court may look to prior decisions awarding damages for pain and suffering, and to those awarding damages for solatium." *Acosta v. Islamic Republic of Iran*, 574 F. Supp. 2d 15, 29 (D.D.C. 2008). Only immediate family members—parents, siblings,

spouses,[6] and children—are entitled to solatium awards.[7] *See Valore*, 700 F. Supp. 2d at 79. The commonly accepted framework for solatium damages in this district is that used in *Peterson II*, 515 F. Supp. 2d at 52. *See Valore*, 700 F. Supp. 2d at 85; *Belkin*, 667 F. Supp. 2d at 23. According to *Peterson II*, the appropriate amount of damages for family members of deceased victims is as follows: $8 million to spouses of deceased victims, $5 million to parents of deceased victims, and $2.5 million to siblings of deceased victims. 515 F. Supp. 2d at 52. The appropriate amount of damages for family members of injured victims is as follows: $4 million to spouses of injured victims, $2.5 million to parents of injured victims, and $1.25 million to siblings of injured victims. *Id.* Courts in this district have differed somewhat on the proper amount awarded to children of victims. *Compare Peterson II*, 515 F. Supp. 2d at 51 ($2.5 million to child of injured victim), *with Davis*

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6. The Court adopts Special Master Jackson Williams's recommendation that the common-law wife of Peter Macharia, Grace Gicho, be awarded solatium damages, for the reasons discussed in the thorough special master report. *See* Report of Special Master Jackson Williams Concerning Peter Macharia [ECF No. 242] at 5-8.

7. Many of the family members of injured or deceased victims in this case are plaintiffs not here but in the related *Amduso, Onsongo*, and *Opati* cases before this Court. *See* Compl., *Amduso*, No. 08-1361 [ECF No. 5] at 18-38; Compl., *Onsongo v. Republic of Sudan*, No. 08-1380 [ECF No. 3] at 19-26; 2nd Amend. Compl., *Opati v. Republic of Sudan*, No. 12-1224 (D.D.C. Oct. 22, 2013) [ECF No. 24] at 26-83. As explained in this Court's July 25, 2014 opinion in *Amduso*, those family members' solatium awards—granted in that case—are properly based on the awards to injured or deceased victims in this case.

v. Islamic Republic of Iran, 882 F. Supp. 2d 7, 14 (D.D.C. 2012) ($1.5 million to child of injured victim). The Court finds the *Peterson II* approach to be more appropriate: to the extent such suffering can be quantified, children who lose parents are likely to suffer as much as parents who lose children. Children of injured victims will thus be awarded $2.5 million and, consistent with the *Peterson II* approach of doubling solatium awards for relatives of deceased victims, children of deceased victims will be awarded $5 million.

Although these amounts are guidelines, not rules, *see Valore*, 700 F. Supp. 2d at 86, the Court finds the distinctions made by the *Valore* court to be responsible and reasonable, and hence it will adopt the same guidelines for determining solatium damages here. In the interests of fairness and to account for the difficulty in assessing the relative severity of each family member's suffering, in this case and in related cases, the Court will depart from those guidelines only for a few plaintiffs for whom the special master's report is particularly convincing.[8]

One deceased Kenyan victim, Joseph Kamau Kiongo, had three wives at the time of his death. Report of

8. The special master's report on two of the plaintiffs, Titus Wamai and Diana Williams, shows clearly that reduced awards are appropriate based on extended periods of pre-bombing separation and substantially attenuated relationships with their father, who was killed in the Nairobi bombings. *See* Report of Special Master Deborah Greenspan Concerning Adam Titus Wamai [ECF No. 92] at 4-5. Hence, those plaintiffs will be awarded half the normal amount awarded to children of deceased victims, or $2.5 million.

Special Master John Aldock Concerning Joseph Kamau Kiongo [ECF No. 79] at 5. Four more, Geoffrey Mulu Kalio, Dominic Musyoka Kithuva, Frederick Maloba, and Vincent Kamau Nyoike, each had two wives when they were killed. Report of Special Master Deborah Greenspan Concerning Geoffrey Mulu Kalio [ECF No. 211] at 3; Report of Special Master Oliver Diaz Concerning Dominic Musyoka Kithuva [ECF No. 217] at 3; Report of Special Master Jackson Williams Concerning Frederick Maloba [ECF No. 229] at 3; Report of Special Master Jackson Williams Concerning Vincent Kamau Nyoike [ECF No. 239] at 3. Courts in Kenya generally recognize that more than one wife of a decedent may be entitled to an inheritance, and so this Court will consider each of these wives (Lucy Kiongo, Alice Kiongo, Jane Kamau, Jane Kathuka, Bernice Ndeti, Kamali Musyoka Kithuva, Beatrice Martha Kithuva, Elizabeth Maloba, Margaret Maloba, and Josinda Katumba Kamau) to be immediate family members entitled to solatium awards. *See Charity Gacheri Kaburu v. Mary Gacheri M'ritaa*, Succession Cause No. 251 of 2000 (High Court of Kenya 2014)[9] (appointing both widows as joint administrators). Under the circumstances, the Court will exercise its discretion, adopt the special masters' recommendations, and award the normal solatium amount for a deceased spouse to each of the deceased's widows. A different approach might involve pro rata awards of the normal solatium amount—and that may be appropriate in cases involving larger numbers of spouses—but just as multiple children do not receive pro rata shares, for similar reasons, the Court will award the full amount to each spouse.

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9. *Available at* http://kenyalaw.org/caselaw/cases/view/99160.

In some instances, special masters recommended that spouses of deceased victims receive $10 million. *See, e.g.*, Report of Special Master Kenneth L. Adams Concerning Lawrence Ambrose Gitau [ECF No. 69] at 5. Because the Court adopts the *Peterson II* guidelines, each of these recommendations will be adjusted and those plaintiffs will be awarded $8 million. 515 F. Supp. 2d at 52. Similarly, in some instances, special masters recommended that parents of deceased victims receive $3.5 million. *See, e.g.*, Report of Special Master Brad Pigott Concerning Eric Abur Onyango [ECF No. 127] at 9-11. The Court will increase those awards to $5 million. *Peterson II*, 515 F. Supp. 2d at 52.

The special masters also recommended against awarding solatium damages to some injured victims' children who were born after the bombings occurred. Although the Court acknowledges that the bombings' terrible impact on the victims and their families continues to this day, in similar cases courts have found that children born following terrorist attacks are not entitled to damages under the FSIA. *See Davis*, 882 F. Supp. 2d at 15; *Wultz v. Islamic Republic of Iran*, 864 F. Supp. 2d 24, 36 (D.D.C. 2012). In holding that a plaintiff must have been alive at the time of an attack to recover solatium damages, the *Davis* court recognized the need to draw lines in order to avoid creating "an expansive and indefinite scope of liability" under the FSIA—for example, liability to children born fifteen years after an attack (a real possibility in this drawn-out litigation). 882 F. Supp. 2d at 15. The Court agrees with the special masters and with the *Davis* court's interpretation of the FSIA, and holds that those plaintiffs not alive at the time of the bombings cannot recover solatium damages. Hence,

the Court dismisses the claims of Rachel Wambui Watoro (born one month after the bombings). *See* Report of Special Master John Aldock Concerning Francis Watoro Maina [ECF No. 119] at 6.

For one plaintiff, the special masters recommended that no solatium damages be awarded because the record does not contain sufficient evidence to support her claims. *See Peterson*, 515 F. Supp. 2d at 46. The Court adopts that recommendation, and so Fatuma Omar will not be awarded damages. *See* Report of Special Master Oliver Diaz Concerning Hindu Omari Idi [ECF No. 197] at 6.

The Court finds that the special masters have appropriately applied the solatium damages framework to most of the plaintiffs in this case, and will adopt their recommendations with a few exceptions.[10] Other courts in this district have held that it is inappropriate for the solatium awards of family members to exceed the pain-and-suffering awards of surviving victims. *See Davis*, 882 F. Supp. 2d at 15; *O'Brien*, 853 F. Supp. 2d at 47; *Bland*, 831 F. Supp. 2d at 157. The Court will follow that approach here. The special masters recommended solatium awards exceeding the pain-and-suffering awards to the related victim in several cases, albeit sometimes inadvertently,

10. Some special master reports mistakenly refer to solatium awards as pain-and-suffering awards. *See, e.g.*, Report of Special Master Jackson Williams Concerning Josiah Owuor [ECF No. 237] at 6-7. In those instances— where recommendations are consistent with the guidelines discussed herein—the Court adopts the amount of damages but rejects the special master's recommendation that the plaintiffs be awarded pain-and-suffering damages.

because of this Court's adjustment of pain-and-suffering awards. Hence, the Court will reduce those solatium awards to match corresponding pain-and-suffering awards where appropriate.

b. Punitive Damages

Plaintiffs request punitive damages under section 1605A(c). Punitive damages "serve to punish and deter the actions for which they are awarded." *Valore*, 700 F. Supp. 2d at 87. Courts calculate the proper amount of punitive damages by considering four factors: "(1) the character of the defendants' act, (2) the nature and extent of harm to the plaintiffs that the defendants caused or intended to cause, (3) the need for deterrence, and (4) the wealth of the defendants." *Oveissi II*, 879 F. Supp. 2d at 56 (quoting *Acosta*, 574 F. Supp. 2d at 30). In this case, the first three factors weigh heavily in favor of an award of punitive damages: the character of defendants' actions and the nature and extent of harm to plaintiffs can accurately be described as horrific. Scores were murdered, hundreds of families were torn asunder, and thousands of lives were irreparably damaged. The need for deterrence here is tremendous. And although specific evidence in the record on defendants' wealth is scant, they are foreign states with substantial wealth.

Previous courts in this district, confronted with similar facts, have calculated punitive damages in different ways. *See, e.g., Baker*, 775 F. Supp. 2d at 85 (surveying cases). One attractive method often used in FSIA cases is to multiply defendants' annual expenditures on terrorist activities by a factor of three to five. *See, e.g., Valore*, 700

F. Supp. 2d at 88-90. Unfortunately, there is not enough evidence in the record on defendants' expenditures during the relevant time period to adopt that approach here. Other courts have simply awarded families of terrorism victims $150 million in punitive damages. *See, e.g., Gates v. Syrian Arab Republic*, 580 F. Supp. 2d 53, 75 (D.D.C. 2008), *aff'd*, 646 F.3d 1, 396 U.S. App. D.C. 128 (D.C. Cir. 2011). Using that approach here would result in a colossal figure, given the number of families involved.

This case, when combined with the related cases involving the same bombings where plaintiffs seek punitive damages,[11] involves over 600 plaintiffs. *Valore* was a similar case, involving another terrorist bombing sponsored by Iran: the bombing of the United States Marine barracks in Beirut, Lebanon. Two hundred and forty-one military servicemen were murdered in that bombing. A similar number of people, 224, died here, and hundreds more were injured. In *Valore*, then-Chief Judge Lamberth used the expenditures-times-multiplier method. All told, Judge Lamberth awarded approximately $4 billion in compensatory damages in cases involving the Beirut bombing and about $5 billion in punitive damages. *Estate of Brown v. Islamic Republic of Iran*, 872 F. Supp. 2d 37, 45 n.1 (D.D.C. 2012) (tallying awards). This case is quite similar in magnitude to *Valore*: all told, including the judgments issued in *Owens, Mwila*, and *Khaliq*, and

11. Plaintiffs in *Owens, Mwila*, and *Khaliq*, cases (involving the same bombings) in which this Court previously awarded damages, did not seek punitive damages. *See, e.g., Khaliq v. Republic of Sudan*, No. 10-356, 33 F. Supp. 3d 29, 2014 U.S. Dist. LEXIS 41882, 2014 WL 1284973, at *3 (D.D.C. Mar. 28, 2014).

the judgments to be issued in conjunction with this opinion and in *Amduso, Onsongo*, and *Opati*, the Court will have issued just over $5 billion in compensatory damages. Given that similarity, the inability of this Court to employ the expenditure-times-multiplier method, and in light of the "societal interests in punishment and deterrence that warrant imposition of punitive sanctions" in cases like this, the Court finds it appropriate to award punitive damages in an amount equal to the total compensatory damages awarded in this case. *Beer v. Islamic Republic of Iran*, 789 F. Supp. 2d 14, 17 (D.D.C. 2011) (citing *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998)). Doing so will result in a punitive damage award consistent with the punitive damage awards in analogous cases, particularly those involving the Beirut bombing, and will hopefully deter defendants from continuing to sponsor terrorist activities. The Court will apportion punitive damages among plaintiffs according to their compensatory damages. *See Valore*, 700 F. Supp. 2d at 90.

c. Prejudgment Interest

An award of prejudgment interest at the prime rate is appropriate in this case. *See Oldham v. Korean Air Lines Co.*, 127 F.3d 43, 54, 326 U.S. App. D.C. 375 (D.C. Cir. 1997); *Forman v. Korean Air Lines Co.*, 84 F.3d 446, 450-51, 318 U.S. App. D.C. 6 (D.C. Cir. 1996). Prejudgment interest is appropriate on the whole award, including pain and suffering and solatium—although not including the punitive damage award, as that is calculated here by reference to the entire compensatory award—with one exception. *See Reed v. Islamic Republic of Iran*, 845 F. Supp. 2d 204, 214-15 (D.D.C. 2012) (awarding

prejudgment interest on the full award). *But see Oveissi v. Islamic Republic of Iran*, 768 F. Supp. 2d 16, 30 n.12 (D.D.C. 2011) (declining to award prejudgment interest on solatium damages). Because some of the economic loss figures recommended by the special masters have already been adjusted to reflect present discounted value, *see District of Columbia v. Barriteau*, 399 A.2d 563, 568-69 (D.C. 1979), the Court will not apply the prejudgment interest multiplier to the economic loss amounts except those calculated in 1998 dollars. *See Doe*, 943 F. Supp. 2d at 186 (citing *Oldham*, 127 F.3d at 54); Report of Special Master Kenneth Adams Concerning Maurice Okatch Ogolla, Ex. 5 [ECF No. 70] at 45-47 (explaining how to properly apply interest here without double-counting). Awards for pain and suffering and solatium are calculated without reference to the time elapsed since the attacks. Because plaintiffs were unable to bring their claims immediately after the attacks, they lost use of the money to which they were entitled upon incurring their injuries. Denying prejudgment interest on these damages would allow defendants to profit from the use of the money over the last fifteen years. Awarding prejudgment interest, on the other hand, reimburses plaintiffs for the time value of money, treating the awards as if they were awarded promptly and invested by plaintiffs.

The Court will calculate the applicable interest using the prime rate for each year. The D.C. Circuit has explained that the prime rate—the rate banks charge for short-term unsecured loans to creditworthy customers—is the most appropriate measure of prejudgment interest, one "more appropriate" than more conservative measures such as the Treasury Bill rate, which represents the return on a risk-free loan. *See Forman*, 84 F.3d at 450.

Although the prime rate, applied over a period of several years, can be measured in different ways, the D.C. Circuit has approved an award of prejudgment interest "at the prime rate for each year between the accident and the entry of judgment." *See id.* Using the prime rate for each year is more precise than, for example, using the average rate over the entire period. *See Doe*, 943 F. Supp. 2d at 185 (noting that this method is a "substantially more accurate 'market-based estimate'" of the time value of money (citing *Forman*, 84 F. 3d at 451)). Moreover, calculating interest based on the prime rate for each year is a simple matter.[12] Using the prime rate for each year results in a multiplier of 2.26185 for damages incurred in 1998.[13] Accordingly, the Court will use this multiplier to calculate the total award.[14]

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12. To calculate the multiplier, the Court multiplied $1.00 by the prime rate in 1999 (8%) and added that amount to $1.00, yielding $1.08. Then, the Court took that amount and multiplied it by the prime rate in 2000 (9.23%) and added that amount to $1.08, yielding $1.17968. Continuing this iterative process through 2014 yields a multiplier of 2.26185.

13. The Court calculated the multiplier using the Federal Reserve's data for the average annual prime rate in each year between 1998 and 2014. *See* Bd. of Governors of the Fed. Reserve Sys. Historical Data, *available at* http://www.federalreserve.gov/releases/h15/data.htm (last visited July 25, 2014). As of the date of this opinion, the Federal Reserve has not posted the annual prime rate for 2014, so the Court will conservatively estimate that rate to be 3.25%, the rate for the previous six years.

14. The product of the multiplier and the base damages amount includes both the prejudgment interest and the base damages amount; in other words, applying the multiplier calculates not the prejudgment interest but the base damages amount plus the prejudgment interest, or the total compensatory damages award.

Appendix F

CONCLUSION

The 1998 embassy bombings shattered the lives of all plaintiffs in this case. Reviewing their personal stories reveals that, even more than fifteen years later, they each still feel the horrific effects of that awful day. Damages awards cannot fully compensate people whose lives have been torn apart; instead, they offer only a helping hand. But that is the very least that these plaintiffs are owed. Hence, it is what this Court will facilitate.

A separate Order consistent with these findings has issued on this date.

/s/ JOHN D. BATES
United States District Judge

Dated: July 25, 2014

APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED OCTOBER 3, 2017

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5105

September Term, 2017

1:01-cv-02244-JDB

JAMES OWENS, *et al.*,

Appellees,

v.

REPUBLIC OF SUDAN, MINISTRY OF EXTERNAL AFFAIRS AND MINISTRY OF THE INTERIOR OF THE REPUBLIC OF THE SUDAN,

Appellants,

ISLAMIC REPUBLIC OF IRAN, MINISTRY OF FOREIGN AFFAIR, *et al.*,

Appellees.

Consolidated with 14-5106, 14-5107, 14-7124, 14-7125, 14-7127, 14-7128, 14-7207, 16-7044, 16-7045, 16-7046, 16-7048, 16-7049, 16-7050, 16-7052

Appendix G

Filed On: October 3, 2017

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Griffith, Kavanaugh, Srinivasan, Millett, Pillard, and Wilkins, Circuit Judges; Ginsburg, Senior Circuit Judge

ORDER

Upon consideration of the petitions of plaintiffs-appellees Owens, *et al.*, and defendants-appellants Republic of Sudan, *et al.*, for rehearing *en banc*, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petitions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken R. Meadows
Deputy Clerk

APPENDIX H —28 U.S.C. § 1605A

§ 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

(a) In general.—

(1) No immunity. A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) Claim heard.—The court shall hear a claim under this section if—

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) [28 USCS § 1605(a)(7)] (as in effect before the enactment of this section [enacted Jan. 28, 2008]) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) [28 USCS § 1605 note] was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) LIMITATIONS.—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) [28 USCS § 1605 note] not later than the latter of—

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) PRIVATE RIGHT OF ACTION.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) Additional Damages.—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) Special Masters.—

(1) In general.—The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) TRANSFER OF FUNDS.—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) APPEAL.—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title [28 USCS § 1292(b)].

(g) PROPERTY DISPOSITION.—

(1) IN GENERAL.—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

(A) subject to attachment in aid of execution, or execution, under section 1610 [28 USCS § 1610];

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) NOTICE.—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) ENFORCEABILITY.—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title [28 USCS §§ 1651 et seq.].

(h) DEFINITIONS.—For purposes of this section—

(1) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18;

(4) the term "armed forces" has the meaning given that term in section 101 of title 10;

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j) [50 USCS § 4605(j)]), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

APPENDIX I — 28 U.S.C. § 1606

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter [28 USCS § 1605 or 1607], 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; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

APPENDIX J —SECTION 1083 OF THE 2008 NATIONAL DEFENSE AUTHORIZATION ACT — PUB. L. NO. 110-181, § 1083, 122 STAT. 338–44 (2008)

SEC. 1083. TERRORISM EXCEPTION TO IMMUNITY.

(a) TERRORISM EXCEPTION TO IMMUNITY.—

(1) IN GENERAL.—Chapter 97 of title 28, United States Code, is amended by inserting after section 1605 the following:

"§ 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

"(a) IN GENERAL.—

"(1) NO IMMUNITY.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

"(2) CLAIM HEARD.—The court shall hear a claim under this section if—

"(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

"(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

"(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

"(I) a national of the United States;

"(II) a member of the armed forces; or

"(III) otherwise an employee of the Government of the United States, or of an

individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

"(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

"(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

"(b) LIMITATIONS.—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of—

"(1) 10 years after April 24, 1996; or

"(2) 10 years after the date on which the cause of action arose.

"(c) PRIVATE RIGHT OF ACTION.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent

of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

"(1) a national of the United States,

"(2) a member of the armed forces,

"(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

"(4) the legal representative of a person described in paragraph (1), (2), or (3), for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

"(d) ADDITIONAL DAMAGES.—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

"(e) SPECIAL MASTERS.—

"(1) IN GENERAL.—The courts of the United States may appoint special masters to hear damage claims brought under this section.

"(2) TRANSFER OF FUNDS.—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

"(f) APPEAL.—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

"(g) PROPERTY DISPOSITION.—

"(1) IN GENERAL.—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

"(A) subject to attachment in aid of execution, or execution, under section 1610;

"(B) located within that judicial district; and

"(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

"(2) NOTICE.—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

"(3) ENFORCEABILITY.—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

"(h) DEFINITIONS.—For purposes of this section—

"(1) the term 'aircraft sabotage' has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

"(2) the term 'hostage taking' has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

"(3) the term 'material support or resources' has the meaning given that term in section 2339A of title 18;

"(4) the term 'armed forces' has the meaning given that term in section 101 of title 10;

"(5) the term 'national of the United States' has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

"(6) the term state 'sponsor of terrorism' means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

"(7) the terms 'torture' and 'extrajudicial killing' have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).".

(2) AMENDMENT TO CHAPTER ANALYSIS.—The table of sections at the beginning of chapter 97 of title 28, United States Code, is amended by inserting after the item relating to section 1605 the following:

"1605A. Terrorism exception to the jurisdictional immunity of a foreign state.".

(b) CONFORMING AMENDMENTS.—

(1) GENERAL EXCEPTION.—Section 1605 of title 28, United States Code, is amended—

(A) in subsection (a)—

(i) in paragraph (5)(B), by inserting "or" after the semicolon;

(ii) in paragraph (6)(D), by striking "; or" and inserting a period; and

(iii) by striking paragraph (7);

(B) by repealing subsections (e) and (f); and

(C) in subsection (g)(1)(A), by striking "but for subsection (a)(7)" and inserting "but for section 1605A".

(2) COUNTERCLAIMS.—Section 1607(a) of title 28, United States Code, is amended by inserting "or 1605A" after "1605".

(3) PROPERTY.—Section 1610 of title 28, United States Code, is amended—

(A) in subsection (a)(7), by striking "1605(a)(7)" and inserting "1605A";

(B) in subsection (b)(2), by striking "(5), or (7), or 1605(b)" and inserting "or (5), 1605(b), or 1605A";

(C) in subsection (f), in paragraphs (1)(A) and (2)(A), by inserting "(as in effect before the enactment of section 1605A) or section 1605A" after "1605(a)(7)"; and

(D) by adding at the end the following:

"(g) PROPERTY IN CERTAIN ACTIONS.—

"(1) IN GENERAL.—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

"(A) the level of economic control over the property by the government of the foreign state;

"(B) whether the profits of the property go to that government;

"(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

"(D) whether that government is the sole beneficiary in interest of the property; or

"(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

"(2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE.—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

"(3) THIRD-PARTY JOINT PROPERTY HOLDERS.—Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a

judgment in property subject to attachment in aid of execution, or execution, upon such judgment.".

(4) VICTIMS OF CRIME ACT.—Section 1404C(a)(3) of the Victims of Crime Act of 1984 (42 U.S.C. 10603c(a)(3)) is amended by striking "December 21, 1988 with respect to which an investigation or" and inserting "October 23, 1983, with respect to which an investigation or civil or criminal".

(c) APPLICATION TO PENDING CASES.—

(1) IN GENERAL.—The amendments made by this section shall apply to any claim arising under section 1605A of title 28, United States Code.

(2) PRIOR ACTIONS.—

(A) IN GENERAL.—With respect to any action that—

(i) was brought under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), before the date of the enactment of this Act,

(ii) relied upon either such provision as creating a cause of action,

(iii) has been adversely affected on the grounds that either or both of these provisions fail to create a cause of action against the state, and

(iv) as of such date of enactment, is before the courts in any form, including on appeal or motion under rule 60(b) of the Federal Rules of Civil Procedure, that action, and any judgment in the action shall, on motion made by plaintiffs to the United States district court where the action was initially brought, or judgment in the action was initially entered, be given effect as if the action had originally been filed under section 1605A(c) of title 28, United States Code.

(B) DEFENSES WAIVED.—The defenses of res judicata, collateral estoppel, and limitation period are waived—

(i) in any action with respect to which a motion is made under subparagraph (A), or

(ii) in any action that was originally brought, before the date of the enactment of this Act, under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), and is refiled under

section 1605A(c) of title 28, United States Code, to the extent such defenses are based on the claim in the action.

(C) TIME LIMITATIONS.—A motion may be made or an action may be refiled under subparagraph (A) only—

(i) if the original action was commenced not later than the latter of—

(I) 10 years after April 24, 1996; or

(II) 10 years after the cause of action arose; and

(ii) within the 60-day period beginning on the date of the enactment of this Act.

(3) RELATED ACTIONS.—If an action arising out of an act or incident has been timely commenced under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), any other action arising out of the same act or incident may be brought under section 1605A of title 28, United States Code, if the action is commenced not later than the latter of 60 days after—

(A) the date of the entry of judgment in the original action; or

(B) the date of the enactment of this Act.

(4) PRESERVING THE JURISDICTION OF THE COURTS.—Nothing in section 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108-11, 117 Stat. 579) has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or the removal of the jurisdiction of any court of the United States.

(d) APPLICABILITY TO IRAQ.—

(1) APPLICABILITY.—The President may waive any provision of this section with respect to Iraq, insofar as that provision may, in the President's determination, affect Iraq or any agency or instrumentality thereof, if the President determines that—

(A) the waiver is in the national security interest of the United States;

(B) the waiver will promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq; and

(C) Iraq continues to be a reliable ally of the United States and partner in combating acts of international terrorism.

(2) TEMPORAL SCOPE.—The authority under paragraph (1) shall apply—

(A) with respect to any conduct or event occurring before or on the date of the enactment of this Act;

(B) with respect to any conduct or event occurring before or on the date of the exercise of that authority; and

(C) regardless of whether, or the extent to which, the exercise of that authority affects any action filed before, on, or after the date of the exercise of that authority or of the enactment of this Act.

(3) NOTIFICATION TO CONGRESS.—A waiver by the President under paragraph (1) shall cease to be effective 30 days after it is made unless the President has notified Congress in writing of the basis for the waiver as determined by the President under paragraph (1).

(4) SENSE OF CONGRESS.—It is the sense of the Congress that the President, acting through the Secretary of State, should work with the Government of Iraq on a state-to-state basis to ensure compensation for any meritorious claims based on terrorist acts committed by the Saddam Hussein regime against individuals who were United States nationals or members of the United States Armed Forces at the time of those terrorist acts and whose claims cannot be addressed in courts in the United States due to the exercise of the waiver authority under paragraph (1).

(e) SEVERABILITY.—If any provision of this section or the amendments made by this section, or the application of such provision to any person or circumstance, is held invalid, the remainder of this section and such amendments, and the application of such provision to other persons not similarly situated or to other circumstances, shall not be affected by such invalidation.

APPENDIX K — THE FLATOW AMENDMENT — PUB. L. NO. 104-208, § 589, 110 STAT. 3009-172 (1996)

***

CIVIL LIABILITY FOR ACTS OF STATE SPONSORED TERRORISM

SEC. 589. (a) an official, employee, or agent of a foreign state designated as a state sponsor of terrorism designated under section 6(j) of the Export Administration Act of 1979 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 section 1605(a)(7) of title 28, United States Code, 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).

(b) Provisions related to statute of limitations and limitations on discovery that would apply to an action brought under 28 U.S.C. 1605(f) and (g) shall also apply to actions brought under this section. No action shall be maintained under this action if an official, employee, or agent of the United States, while acting within the scope of his or her office, employment, or agency would not be liable for such acts if carried out within the United States.

Titles I through V of this Act may be cited as the "Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997".

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APPENDIX L — LIST OF PARTIES

PETITIONERS

The following individuals are petitioners in this proceeding. They were plaintiffs in the district court and appellees before the court of appeals in *Opati v. Republic of Sudan*, No. 14-7124; *Wamai v. Republic of Sudan*, No. 14-7125; *Amduso v. Republic of Sudan*, No. 14-7127; and *Onsongo v. Republic of Sudan*, No. 14-7128: Joseph Ingosi, Diana Kibodya, Charles Kabui, Barbara Olao, Allan Olao, Audrey Pussy, Margaret Murigi, Belonce Murigi, Faith Murigi, Mischeck Murigi, Faith Mutindi, Charles Opond, Rispah Abdallah, Majdoline Abdallah, Joseph Abdallah, Christine Nabwire Bwaku, Ephraim Onyango Bwaku, Betty Kagai, Norman Kagai, Wendy Kagai, Charles Kagai, Tabitha Kagai, Wallace Njorege Nyoike, estate of Lucy Nyawida Karigi, Steven Karigi, Martin Karigi, Caroline Karigi, Daniel Kiarie, Ann Wairimu Kiarie, Maryann Njoki Kiarie, Anthony Kiarie, Barbara Kiarie, Edmund Kiarie Kiburu, Bernard Macharia, Joshua Mayunzu, Levina Minja, Violet Minja, Emmanuel Minja, Nick Minja, Petronila Munguti, Alex Munguti, Felix Munguti, John Ndibui, George Mwangi, Simon Ngure, Lucy Kambo, John Ngure, Joseph Kambo, Catherine Njeri Mwangi, Jack Ndungu, Jackline Wambui, Julius Nyamweno, Elizabeth Okelo, Hellen Okelo, Kennedy Okelo, Ronald Okelo, Leslie Onono, Laura Onono, Stephen Onono, Andrew Onono, Rispah Auma, Jael Oyoo, Edwin Oyoo, Katimba Mohamed Selemani, Asha Abdullah, Rashid Katimba, Said Katimba, Francis Kwimbere, Irene Kwimbere, Frederick Kwimbere, Sani Kwimbere, Francis Ofisi,Andrew Ofisi, Gideon Ofisi, Conceptor Orende, John

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Kiswili, Franciso Kyalo, Polychep Odihambo, Rose Nyette, Patrick Nyette, Eric Mwaka, Peter Mwaka, Felix Mwaka, Civilier Mwaka, Anipha Mpoto, Inosensia Mpoto, Denis Mpoto, Lydia Gwaro, Debora Gwaro, Emmanuel Gwaro, James Gwaro, Michael Kimeu, Winnie Kimeu, Lukas Kimeu, Grace (Eunice) Onsongo, Joseph Gathunga, Michael Mwangi, Mary Muiriri, Jonathan Nduti, Anne Nganga Mwangi, Ester Nganga Mwangi, Henry Aliviza Shitiavai, Judy Aliviza, Jacqueline Aliviza, Collins Aliviza, Humphrey Aliviza, Jeffrey Mbugua, Alex Mbugua, Wambui Kung'u, Lorna Kung'u, Edward Kung'u, Gitonga Mwanike, Techonia Owiti, Gad Gideon Achola, Valentina Hiza, Christopher Hiza, Christian Hiza, Christemary Hiza, Salima Ismail Rajabu, John Zephania Mboge, Harriet Chore, Leslie Sambuli, Peter Kunigo, Badawy Itati Ali, Jairus David Aura, Mary Esther Kiusa, Peter Ngigi Mugo, Leonard Rajab Waithira, Grace Wanjiru Waithira, Joseph Ndungu Waithira, Jeff Rabar, Beatrice Atinga, Sammy Okere, Victor Adeka, Purity Mahonja, Joyce Thadei Lokoa, Selina Gaudens, Donnie Gaudens, Judith Nandi Busera, Levis Madahana Busera, Christine Kavai Busera, Emmanuel Musambayi Busera, August Maffry, Ali Maffry, Caroline Maffry, Alice Mary Talbot, Geoffrey Tupper, Frida Yohan Mtitu, Shadrack Tupper, Agnes Senga Geoffrey Tupper, Joan Adundo, Bernard Adundo, Pauline Adundo, Samuel Adundo, Theresa Adundo, Isidore Adundo, Anne Adundo, Thomas Adundo, Wycliffe Okello Khabuchi, Jane Khabuchi, Michael Tsuma, Irene Khabuchi, Beryl Shiumbe, Zackaria Musalia Atinga, Florence Musalia, Elly Musalia, Vallen Andeyo, Juruha Musalia, Lynette Oyanda, Linda Oyanda, Vera Jean Oyanda, Fridah Makena, Ruth Gatwiri Mwirigi, Joan

Kendi Nkanatha, Joanne Oport, Sally Oport, Yvonne Oport, Onael Mdobilu, Peter Mdobilu, John Mdobilu, Katherine Mdobilu, Immanuel Mdobilu, Onael David Mdobilu, Joshua Daniel Mdobilu, Hellen Maritim, Alice Maritim, Ruth Maritim, Annah Maritim, Sharone Maritim, Edgar Maritim, Sheila Maritim, Rammy Rotich, Prisca Owino, Greg Owino, Clara Owino, Leah Owino, Gerald Owino, Kenneth Owino, estate of Sally Cecilia Mamboleo, Salome Ratemo, Luis Ratemo, Frederick Ratemo, Kevin Ratemo, Dixon Indiya, James Chaka, Stanley Chaka, Stacy Chaka, Elizabeth Tarimo, Margaret Tarimo, Cornelius Kebungo, Phoebe Kebungo, Erastus Ndeda, Ann Salamba, Beverlyne Ndeda, Cecilia Ndeda, Hesbon Lihanda, Gladis Lihanda, Dick Lihanda, Ruth Lihanda, Valentine Ndeda, Maureen Ndeda, Beatrice Amduso, Ireen Semo, Joab Amduso, Justin Amduso, Mercy Ndiritu, Christopher Ndiritu, Dennis Kinyua, Edwin Magothe, Sedrick Nair, Tanya Nair, Enna Omolo, Asha Kiluwa, Ally Mahundi, Amiri Mahundi, Asha Mahundi, Emma Mahundi, Juma Mahundi, Mwajabu Mahundi, Mwajumba Mahundi, Said Mahundi, Shaban Mahundi, Yusuph Mahundi, estate of Caroline Opati, Monicah Opati, Rael Opati, Selifah Opati, Keeliy Musyoka, Manzi Musyoka, Syuindo Musyoka, Gladys Munani Musyoka, Jack Kithuva Musyoka, Jane Mutua, Mary Nzisiva Samuel, Omar Zubari Omar, Rehana Malik, Mary Meresiana Paul, Sally Omondi, Miriam Muthoni, Jacob Gati, estate of Zakayo Matiko, Loise Kuya, Peter Kuya, Peninah Mucii, Daniel Kuya, Agnes Kubai, Celestine Kubai, Brian Kubai, Collin Kubai, Saline Kubai, William Maina, Leonard Shinenga, Elizabeth Nzaku, Peter Ngugi, estate of Hesbon Bulimu, Mary Bulimu, Jack Bulimu,

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Godfrey Bulimu, Millicent Bulimu, Lydia Bulimu, Rodgers Bulimu, Frida Bulimu, Emmily Bulimu, Mercy Bulimu, estate of Wycliffe Ochieng Bonyo, Velma Bonyo, Dorine Bonyo, Elijah Bonyo Ochieng, Angela Bonyo, Winnie Bonyo, Boniface Chege, Caroline Wanjiru Gichuru, estate of Lawrence Ambrose Gitau, Lucy Gitau, Catherine Gitau, Felister Gitau, Ernest Gitau, estate of Joel Gitumbu Kamau, Catherine Gitumbu Kamau, David Kamau, Peter Kamau, Phillip Kamau, Henry Bathazar Kessy, Frederick Kibodya, Flavia Kiyanga, estate of Joseph Kamau Kiongo, Lucy Kiongo, Alice Kiongo, Jane Kamau, Newton Kamau, Peter Kamau Kiongo, Teresia Wairimu Kamau, Pauline Kamau, Hannah Wambui, Pauline Kamau Kiongo, Mercy Wairumu Kamau, Daniel Kiongo Kamau, Raphael Kivindyo, Milka Wangari Macharia, estate of Rachael Mungasia Pussy, Samuel Pussy, Doreen Pussy, Elsie Pussy, Andrew Pussy, Michael Ngigi Mworia, John Nduati, Aaron Makau Ndivo, Joyce Mutheu, estate of Maurice Okatch Ogolla, Priscila Okatch, Jackline Achieng, Rosemary Anyango Okatch, Sam Ogolla Okatch, Dennis Okatch, Pauline Abdallah, Belinda Akinyi Adika, estate of Tony Kihato Irungu, Faith Kihato, Jacqueline Kihato, Steve Kihato, Annah Wangechi, Elsie Kagimbi, estate of Vincent Kamau Nyoike, Josinda Katumba Kamau, Caroline Wanjuri Kamau, Faith Wanza Kamau, David Kiarie Kiburu, estate of Francis Watoro Maina, Grace Kimata, Victor Watoro, Rachel Wambui Watoro, estate of Lydia Muriki Mayaka, Nyangoro Mayaka, Doreen Mayaka, Dick Obworo Mayaka, Diana Nyangara, Debra Mayaka, George Magak Mimba, Tibruss Minja, Edward Mwae Muthama, Nicholas Mutiso, estate of Geoffrey Moses Namai, Sarah Tikolo, Nigeel Namai, Charles

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Mwangi Ndibui, Julius Nzivo, estate of Francis Olewe Ochilo, Rosemary Olewe, Juliet Olewe, Wendy Olewe, Patrick Okech, estate of Lucy Grace Onono, Mordechai Thomas Onono, estate of Adam Titus Wamai, Winfred Wamai, Titus Wamai, Diana Williams, Lloyd Wamai, Angela Wamai, John Muriuki, Evitta Francis Kwimbere, Mary Ofisi, estate of Eric Abur Onyango, Joyce Onyango, Tilda Abur, Barnabas Onyango, Kelesendhia Apondi Onyango, Paul Onyango, Kaka Abubakar Iddi, Charles Mwaka Mulwa, Victor Mpoto, Julius Ogoro, estate of Kimeu Nzioka Nganga, Mary Ndambuki, Wellington Oluoma, Jacinta Wahome, Stella Mbugua, Sajjad Gulamaji, Mary Gitonga, Francis Maina Ndibui, Kirumba W'mburu Mukuria, Christant Hiza, Marina Karima, Zephania Mboge, Emily Minayo, Joash Okindo, Rukia Wanjiru Ali, Bernard Mutunga Kaswii, Hosiana Mbaga, Margaret Waithira Ndungu, Samuel Odhiambo Oriaro, Gaudens Thomas Kunambi, Livingstone Busera Madahana, Menelik Kwamia Makonnen, Tobias Oyanda Otieno, Charles Mwirigi Nkanatha, Justina Mdobilu, Gideon Maritim, Belinda Chaka, Clifford Tarimo, James Ndeda, Milly Mikali Amduso, Moses Kinyua, Valerie Nair, estate of Bakari Nyumbu, Aisha Kambenga, estate of Geoffrey Kalio, Jane Kathuka, Bernice Ndeti, Dawn Mulu, Tabitha Kalio, Aquilas Kalio, Catherine Kalio, Lilian Kalio, estate of Ramadhani Mahundi, Hussein Ramadhani, Charles Mungoma Olambo, Caroline Okech, Enos Nzalwa, estate of Hindu Omari Idi, Ali Hussein Ali, Omar Idi, Hamida Idi, Mahamud Omari Idi, Rashid Omar Idi, Fatuma Omar, estate of Dominic Musyoka Kithuva, Kamali Musyoka Kithuva, Beatrice Martha Kithuva, Titus Kyalo Musyoka, Ben Malusi Musyoka, Caroline Kasungo Mgali, Monica

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Wangari Munyori, estate of Mohamed Abdallah Mnyolya, Nuri Hamisi Sultani, Nafisa Malik, estate of Eliya Elisha Paul, Grace Makasi Paul, Blasio Kubai, estate of Frederick Maloba, Elizabeth Maloba, Margaret Maloba, Lewis Maloba, Marlon Maloba, Sharon Maloba, Kenneth Maloba, estate of Josiah Owuor, Edwina Owuor, Vincent Owuor, Warren Owuor, estate of Peter Macharia, Grace Gicho, Diana Macharia, Ngugi Macharia, Margaret Njoki Ngugi, John Ngugi, Ann Ruguru, David Ngugi, Paul Ngugi, Stanley Ngugi, Juliana Onyango, Marita Onyango, estate of Evans Onsongo, Mary Ongo, Enoch Onsongo, Peris Onsongo, Venice Onsongo, Salome Onsongo, Bernard Onsongo, George Onsongo, Edwin Onsongo, Gladys Onsongo, Pinina Onsongo, Irene Kung'u, Lucy Chege, Margaret Gitau, Susan Gitau, Peris Gitumbu, Stacy Waithere, Monicah Kamau, Joan Kamau, Margaret Nzomo, Barbara Muli, Stephen Muli, Lydia Ndivo Makau, estate of Francis Mbogo Njung'e, Sarah Mbogo, Misheck Mbogo, Isaac Kariuki Mbogo, Reuben Nyaga Mbogo, Nancy Mbogo Daugter, Ephantus Njagi Mbogo, Stephen Njuki Mbogo, Ann Mbogo, Nephat Kimathi Mbogo, Daniel Owiti Oloo, Magdaline Owiti, Ben Bwaku, Beatrice Bwaku, Jotham Godia, Grace Godia, Hannah Ngenda Kamau, Duncan Nyoike Kamau, Christine Mikali Kamau, Ruth Nduta Kamau, Mercy Wanjiru, Stanley Nyoike, Jennifer Njeri, Anthony Njoroge, Simon Ngugi, Michael Ikonye Kiarie, Jane Ikonye Kiarie, Sammy Ndungu Kiarie, Elizabeth Kiato, Charity Kiato, Judy Kiarie, Nancy Mimba Magak, Raphael Peter Munguti, Mary Munguti, Angela Mwongeli Mutiso, Ben Ndegwa, Phoeba Ndegwa, Margaret Mwangi Ndibui, Caroline Ngugi Kamau, Charles Olewe, Phelister Okech, estate of Phaedra

Vrontamitis, Leonidas Vrontamitis, Alexander Vrontamitis, Paul Vrontamitis, Anastasia Gianpoulos, John Ofisi, Katherine Mwaka, Eucabeth Gwaro, Trusha Patel, Pankaj Patel, Mary Mudeche, Michael Ware, Sammy Mwangi, Lucy Mwangi, Joseph Wahome, Solomon Mbugua, Japeth Godia, Merab Godia, Winfred Maina, Jomo Matiko Boke, Selina Boke, Humphrey Kiburu, Jennifer Wambui, Harri Kimani, Grace Kimani, Elizabeth Muli□Kibue, Hud Chore, Lydia Nyaboka Otao Okindo, Stanley Kinyua Macharia, Nancy Macharia, Betty Oriaro, Rachel Oyanda Otieno, Hilario Ambrose Fernandes, Catherine Mwangi, Doreen Oport, Philemon Oport, Gerald Bochart, Yvonne Bochart, Leilani Bower, Muraba Chaka, Roselyne Ndeda, James Mukabi, estate of Edwin Omori, Florence Omori, Bryan Omori, Jerry Omori, Janathan Okech, estate of Francis Ndungu Mbugua, Mary Muthoni Ndungu, Samuel Mbugua Ndungu, Jamleck Gitau Ndungu, John Muiru Ndungu, Edith Njeri, Annastaciah Lucy Boulden, Agnes Wanjiku Ndungu, Faith Maloba, Derrick Maloba, Steven Maloba, Belinda Maloba, Charles Ochola, and Rael Ochola.

RESPONDENTS

The following respondents were defendants in the district court and appellants before the court of appeals: Republic of Sudan, Ministry of External Affairs and Ministry of the Interior of the Republic of Sudan.

The following respondents were plaintiffs in the district court and appellees before the court of appeals in *Owens v. Republic of Sudan*, No. 14-5105: James Owens,

Gary Robert Owens, Barbara Goff, Frank B. Pressley, Jr., Yasemin B. Pressley, David A. Pressley, Thomas C. Pressley, Michael F. Pressley, Berk F. Pressley, Jon B. Pressley, Marc Y. Pressley, Sundus Buyuk, Montine Bowen, Frank Pressley, Sr., Bahar Buyuk, Serpil Buyuk, Tulay Buyuk, Ahmet Buyuk, Dorothy Willard, Ellen Marie Bomer, Donald Bomer, Michael James Cormier, Andrew John William Cormier, Alexander Rain Cormier, Patricia Feore, Cylde M. Hirn, Alice M. Hirn, Patricia K. Fast, Inez P. Hirn, Joyce Reed, Worley Lee Reed, Cheryl L. Blood, Bret W. Reed, Ruth Ann Whiteside, Lorie Gulick, Pam Williams, Flossie Varney, Linda Jane Whiteside Leslie, Lydia Sparks, Howard Sparks, Tabitha Carter, Howard Sparks, Jr., Michael Ray Sparks, Gary O. Spiers, Victoria Q. Spiers, Victoria J. Spiers, and Julita A. Qualicio.

The following respondents were plaintiffs in the district court and appellees before the court of appeals in *Mwila v. Islamic Republic of Iran*, No. 14-5106: Judith Abasi Mwila (Personal Representative of the Estate of Abbas William Mwila), William Abasi Mwila, Edina Abasi Mwila, Hapiness Abasi Mwila, Donte Akili Mwaipape, Donti Akili Mwaipape, Victoria Donti Mwaipape, Elisha Donti Mwaipape, Joseph Donti Mwaipape, Debora Donti Mwaipape, Nko Donti Mwaipape, Monica Akili, Akilimusupape, Valentine Mathew Katunda, Abella Valentine Katunda, Venta Valentine Mathew Katunda, Desidery Valentine Mathew Katunda, Veidiana Valentine Katunda, Diana Valentine Katunda, Edwine Valentine Mathew Katunda, Angelina Methew Felix, Edward Mathew Rutaheshelwa, Elizabeth Mathew Rutaheshelwa,

Angelina Mathew Rutaheshelwa, Happiness Mathew Rutaheshelwa, Eric Mathew Rutaheshelwa, Enoc Mathew Rutaheshelwa, Angelina Mathew-Ferix, Mathew Ferix, Samuel Thomas Marcus, Cecilia Samuel Marcus, Coronella Samuel Marcus, Hanuni Ramadhani Ndange (Personal Representative of the Estate of Yusuf Shamte Ndange), Abdu Yusuph Shamte Ndange, Juma Yusuph Shamte Ndange, Mwajabu Yusuph Shamte Ndange, Alli Kindamba Ng'ombe, Paulina Mbwanilwa Ng'ombe, Mohamed Alli Ng'ombe, Kindamba Alli Ng'ombe, Shabani Saidi Mtulya (Personal Representative of the Estate of Mtendeje Rajabu Mtuyla), Abdul Shabani Mtuyla, Saidi Shabani Mtuyla, Adabeth Said Nang'oko (Personal Representative of the Estate of Rogath Saidi Saidi), Veronica Alois Saidi, John Rogath Saidi, Daniel Rogath Saidi, Selina Rogath Saidi, Idifonce Rogath Saidi, Aisha Mawazo, Kulwa Ramadhani (Personal Representative of the Estate of Dotio Ramadhani), Kassim Ramadhani, Renema Ramadhani, Upemdo Ramadhani, Majaliwa Ramadhani, and Wengo Ramadhani.

The following respondents were plaintiffs in the district court and appellees before the court of appeals in *Khaliq v. Republic of Sudan*, No. 14-5107: Rizwan Khaliq, Jenny Christiana Lovblom, Imran Khaliq, Tehsin Khaliq, Kamran Khaliq, Imtiaz Bedum, Irfan Khaliq, Yasir Aziz, and Naurin Khaliq.