UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Mel J. and Vivian C. Hill, et al.,	)
Plaintiffs,	)
	) Civ. Action No.1:99CV03346(TPJ)
v.	)
Republic of Iraq and Saddam Hussein in his official capacity as President of the Republic of Iraq,	)
Defendants.	)

PLAINTIFFS' MEMORANDUM IN RESPONSE TO ORDER TO SHOW CAUSE

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Plaintiffs submit this memorandum in response to this Court's order of February 12, 2004, requiring them to show cause why their economic loss claims should not be dismissed with prejudice in light of the D.C. Circuit's ruling in *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. Jan. 16, 2004).[1]

ARGUMENT

This action is presently before this Court on remand following plaintiffs' appeal of certain final judgments that were entered in their favor insofar as those judgments denied their claims for lost income. In its decision on that appeal, the D.C. Circuit reversed those judgments only insofar as they "den[ied] appellants' claims for economic loss" and remanded the case to this Court for the sole purpose of "apply[ing] the proper standard" to those claims. *Hill v. Republic of Iraq*, 328 F.3d 680, 685 (D.C. Cir. 2003). As set forth below, this Court is bound by that directive and may not, at this final stage of these proceedings, consider anew the issue whether plaintiffs have pled and proven a viable cause of action in the first place.

Even if reconsideration of the underlying cause of action were within the scope of the D.C. Circuit's mandate, which it is not, nothing in the D.C. Circuit's decision in *Cicippio-Puleo* justifies the dismissal of plaintiffs' economic loss claims. In its decision in that case, the D.C. Circuit held only that the so-called "Flatow Amendment" to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605 note, does not, by its terms, create a cause of action against a foreign state. Nothing in *Cicippio-Puleo*, however, insulates a terrorist state from being held liable "in the same manner and to the

[1] This Court directed its show cause order to seven plaintiffs who have filed motions for supplemental default judgment as to lost income. In fact, the claims of 18 plaintiffs who have filed such motions remain pending. This memorandum is submitted on behalf of each of those plaintiffs.

same extent as a private individual under like circumstances" in accordance with the requirement of 28 U.S.C. § 1606. Had the acts of hostage-taking upon which plaintiffs' claims were based been committed by a private individual, he would plainly be subject to liability for those acts. Accordingly, the *Cicippio-Puleo* decision provides no basis for dismissing plaintiffs' outstanding claims for economic loss and the Court should proceed to rule on plaintiffs' pending motions for supplemental default judgment.

I. RECONSIDERATION OF THE ISSUE WHETHER PLAINTIFFS HAVE STATED VIABLE CAUSES OF ACTION AGAINST IRAQ IS BARRED UNDER THE MANDATE RULE.

Under the mandate rule, "'an inferior court has no power or authority to deviate from the mandate issued by an appellate court.'" *Briggs v. Pennsylvania R.R.*, 334 U.S. 304, 306 (1948). As the D.C. Circuit has described it, the mandate rule is "a 'more powerful version' of the law-of-the-case doctrine, which prevents courts from reconsidering issues that have already been decided in the same case." *Independent Petroleum Ass'n of America v. Babbitt*, 235 F.3d 588, 597 (D.C. Cir. 2001) (quoting *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 n.3 (D.C. Cir. 1996) (en banc)); *see also Odima v. Westin Tucson Hotel*, 53 F.3d 1484, 1497 (9th Cir. 1995) ("When a case has been decided by an appellate court and remanded, the court to which it is remanded *must proceed* in accordance with the mandate and such law of the case was established by the appellate court.") (emphasis added).

The mandate rule does not "simply preclude a district court from doing what an appellate court has expressly forbidden it from doing." *South Atlantic Ltd. Partnership of Texas, LP v. Riese*, 356 F.3d 576, 2004 U.S. App. LEXIS 1434, at *19 (4th Cir. 2004). Rather "[u]nder the mandate rule, a district court cannot reconsider issues the parties

failed to raise on appeal; the court must attempt to implement the spirit of the mandate; and the court may not alter rulings impliedly made by the appellate court." *Id.* In other words, "an issue . . . waived on appeal cannot be revived on remand." *Magnesystems v. Nikken, Inc.*, 933 F. Supp. 944, 949-50 (C.D. Cal. 1996).[2]

While it had every opportunity to do so, Iraq failed to appear in this case or to appeal any of the rulings that this Court had made in support of the entry of its final judgments, including its ruling that plaintiffs had properly pled and established viable causes of action against Iraq for false imprisonment and hostage-taking. As a result, the D.C. Circuit properly treated Iraq as having waived any challenge to that ruling and, thus, "assume[d]" that plaintiffs did, in fact, "have a cause of action against Iraq." 328 F.3d at 683, n.1. Having failed to raise the cause of action issue on appeal, "when the opportunity to do so existed," Iraq has "waived the right to challenge that decision" at this stage and, under the mandate rule, both this Court's initial decision on that issue and Iraq's waiver have become "the law of the case." *Williamsburg Wax Museum, Inc. v. Historicfigures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987); *see also* cases cited in note 2 *supra*.

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[2] *See also United States v. Quintieri*, 306 F.3d 1217, 1225 (2d Cir. 2002) ("The 'mandate rule' ordinarily forecloses relitigation of all issues previously waived by the defendant or decided by the appellate court."); *Tronzo v. Biomet, Inc.*, 236 F.3d 1342, 1349 (Fed. Cir. 2001) (holding that mandate rule prevents a party who "failed to raise issue" on appeal from later "raising th[at] issue on remand"); *Labor Relations Division of Construction Indus. Of Mass., Inc. v. Teamsters Local 379*, 156 F.3d 13, 15 (1st Cir. 1998) ("When a party could have raised an argument in his initial appeal, and failed to do so, he has generally waived his right to raise that argument on remand."); *United States v. Bell*, 5 F.3d 64, 67 (4th Cir. 1993) (the mandate rule "forecloses litigation of issues decided by the district court but foregone on appeal or otherwise waived"); *Northwestern Indiana Tel. Co. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989) ("It is elementary that where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand.").

To be sure, deviation from the mandate rule may be permitted in certain circumstances, including those involving an intervening change in the law. *Magnesystems*, 933 F. Supp. at 950. On remand, however, a district court is required to "construe these exceptions extremely narrowly and may deviate from the mandate in only extraordinary situations." *Id.* The circumstances surrounding the D.C. Circuit's decision in *Cicippio-Puleo* do not justify such a deviation in this case for two reasons.

First, as set forth above, the D.C. Circuit remanded this case for the limited purpose of applying the proper evidentiary standard to plaintiffs' claims that they are entitled to damages for economic loss. The underlying issue whether plaintiffs have a cause of action in the first place has been laid to rest. All of the plaintiffs have been awarded final judgments on the premise that there is, in fact, a valid legal basis for their claims, and the time for appeal of those judgments – all of which have been fully satisfied – has long since passed. In other words, the cause of action issue "is no longer *sub judice*" and does not fall within the limited scope of the mandate that this Court has been given. *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co.*, 962 F.2d 1528, 1534 (10th Cir. 1992). "[T]here is no basis" upon which this Court can apply the *Cicippio-Puleo* decision to the cause of action issue on remand: "this case [is] already over" insofar as that issue is concerned. *Id.* at 1535 (holding that intervening-change-in-law exception did not apply to choice of law issue where that issue was "no longer *sub judice*" and, hence, beyond the "dictates" of the appellate court's mandate); *see also Ute Indian Tribe v. Utah*, 114 F.3d 1513, 1521 (10th Cir. 1997).

Even if the cause of action issue were still *sub judice*, the intervening change in law exception would still be inapplicable in these circumstances. Where, as here, a party

has failed to raise an issue in an earlier stage in the proceedings, a "supervening decision" that changes the law in that party's favor may be considered only if "the law was so well-settled at the time" of the waiver that "any attempt to challenge it would have appeared pointless." *United States v. Washington*, 12 F.3d 1128, 1139 (D.C. Cir. 1994). Applying this principle in *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246 (D.C. Cir. 1998), the D.C. Circuit held that "the supervening-change-in-law exception to our ordinary waiver principle" was not available to appellants where the purported change in law was not one that "could possibly explain" their failure to raise an argument based on the Takings Clause and where the existence of that argument was "so obvious" that it had been raised by three other plaintiffs in a related case. *Id.* at 1254 n.5.[3]

Similarly, in the present case, had Iraq appeared and failed to challenge this Court's ruling that plaintiffs had established a cause of action on appeal, it would not have been able to take advantage of the supervening decision doctrine on remand. Far from being so "well-settled" as to make any challenge appear "pointless," the issue whether the Flatow Amendment creates a cause of action against a foreign state had been the subject of conflicting decisions in this District and had never been passed upon by the D.C. Circuit or any other appellate court. *Cicippio-Puleo*, 353 F.3d at 1032-33. Accordingly, the supervening change-in-law exception to the waiver principle would not apply if Iraq had appeared and failed to raise the cause of action issue.

[3] *See also Martinez v. Texas Dep't of Criminal Justice*, 300 F.3d 567, 575-76 (5th Cir. 2002); *United States v. Mikalajunas*, 186 F.3d 490, 493 (4th Cir. 1990) ("In order to justify the failure to raise an issue" on appeal "based on a subsequent change in the law, the state of the law must have been such that the legal basis for the claim was not reasonably available when the matter should have been raised.").

The fact that Iraq's failure to raise the issue arises out of its decision not to appear does not alter the analysis. The failure to raise an argument on appeal is no less a waiver when that choice is made by a party that decides to default than it is when made by a party that decides to participate in the proceedings. In the context of actions under the FSIA, any other result would reward a foreign state for its default by putting it in a better position than it would have been in had it appeared and played by the rules – a bizarre and perverse result that would be fundamentally at odds with the policies underlying the FSIA. *See Amernational Industries v. Action-Tungsram, Inc.*, 925 F.2d 970, 976 (6th Cir. 1991) (recognizing that FSIA reflects "strong policy . . . of encouraging foreign states and their instrumentalities to appear before United States courts").

II. PLAINTIFFS HAVE ESTABLISHED VIABLE CAUSES OF ACTION AGAINST IRAQ BY OPERATION OF SECTION 1606 OF THE FSIA.

The D.C. Circuit's decision in *Cicippio-Puleo* prevents victims of state sponsored terrorism from grounding their claims against a terrorist state on the Flatow Amendment alone. That decision, however, in no way compels the dismissal of plaintiffs' claims, because those claims are not dependent upon the proposition that the Flatow Amendment gives them a cause of action against Iraq.

Plaintiffs' claims against Iraq are all grounded in section 1606 of the FSIA. That section provides that "[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity . . ., the foreign state shall be liable in the same manner and to the same extent as a private individual in like circumstances." 28 U.S.C. § 1606. In

providing that a "foreign state shall be liable," section 1606 unquestionably creates a cause of action against foreign states.[4]

Admittedly, that cause of action is not a free-standing one. Rather, section 1606 mandates that any cause of action that could be asserted against a private individual in any given set of circumstances shall be available against non-immune sovereign states in like circumstances. *See, e.g.*, *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 622 (1983) ("where state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances"). In other words, section 1606 puts a foreign state in the shoes of a private individual; if a private individual may be held liable for the conduct upon which the plaintiff's complaint is based, then so too may the foreign state.

In providing that a non-immune foreign state "shall be liable in the same manner and to the same extent as a private individual in like circumstances," section 1606 "in effect instructs the federal judges to find the relevant law, not to make it." *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 333 (D.C. Cir. 2003). The "relevant law" that must be found is, of course, law that would be applicable to private individuals.

Where an ascertainable difference among the laws of the various jurisdictions that might claim an interest in the matter can be identified, the search for such "relevant law" involves the application of ordinary choice-of-law principles. However, where there is no conflict between local and foreign law, choice-of-law issues do not arise and the

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[4] *See Key Tronic Corp. v. United States*, 511 U.S. 809, 822 (1994) (Scalia, J., dissenting) ("Surely to say that A shall be liable to B is the *express* creation of a right of action."); *American Council of Certified Podiatric Physicians & Surgeons v. American Bd. of Podiatric Surgery, Inc.,* 185 F.3d 606, 613 (6th Cir. 1999) (holding that the language "shall be liable" creates cause of action); *Underwood v. Wilson*, 151 F.3d 292, 294 (5th Cir. 1998) (same).

courts appropriately apply the law of the forum. *See, e.g.*, *Nelson v. Sandoz Pharmaceutical Corp.*, 288 F.3d 954, 963 (7th Cir. 2002); *Insurance Co. of N. Am. v. Federal Express Corp.*, 189 F.3d 914, 921 (9th Cir. 1990); *Taylor v. Canady*, 536 A.2d 93, 96 (D.C. 1988). As set forth below, that is precisely the situation that obtains in the present case, since plaintiffs have viable claims against Iraq for both false imprisonment and hostage taking, whether the laws of this country or the laws of Iraq and/or Kuwait are applied to this dispute.

Furthermore, even if some theoretical conflict might exist between local law (*i.e.*, the laws of the United States and/or District of Columbia), on the one hand, or foreign law (*i.e.*, the laws of Iraq and/or Kuwait) on the other, the fact is that Iraq has never appeared in this action and no authority has been presented suggesting the existence of such a conflict. The principle is well settled that where, as here, there is an absence of "sufficient proof to establish with reasonable certainty, the substance of the foreign principles of law, the district court should apply the law of the forum." *Banque Lebanaise Pour le Commerce v. Khreich*, 915 F.2d 1000, 1006-07 (5th Cir. 1990); *see also Bel-Ray Co. v. Chemrid Ltd.*, 181 F.3d 435, 440-41 (3d Cir. 1999); *Commercial Ins. Co. v. Pacific-Peru Constr. Corp.*, 558 F.2d 948, 952 (9th Cir. 1977); Restatement (Second) of Conflicts of Law § 136, cmt. h (1969) (where "either no information, or else insufficient information, has been obtained about the foreign law, the forum will usually decide the case in accordance with its own local law," and party who has failed to provide such information may be deemed to "have acquiesced in the application" of that law).

In such circumstances, the forum court may justifiably "presume that the foreign law is the same as its own local law." Restatement (Second) of Conflicts § 136, cmt. h. Such a presumption is especially justified, where, as here, the local law that is being applied is "common law" and reflects "a fundamental principle of law that exists in all civilized nations." *Id.* And, as set forth in Point I.A.2 below, in this case, that presumption happens to be correct.

Finally, even if Iraq had appeared and were able to present proof that the acts of false imprisonment and hostage-taking about which plaintiffs complain are not actionable under Iraqi and/or Kuwaiti law, it would not matter. As set forth in Point II.C. below, if plaintiffs would be denied a remedy under foreign law, the application of relevant choice-of-law principles would require this Court to apply the law of this country to this dispute and, hence, plaintiffs would still be able to maintain viable causes of action against Iraq.

A. As Private Individuals Would Be Liable Under Like Circumstances, Plaintiffs Have Established Viable Claims Against Iraq For False Imprisonment.

In Count II of their complaint, plaintiffs asserted claims against Iraq for false imprisonment. First Amended Cmplt. ¶¶ 49-52. In particular, they alleged that, as a result of purposeful and unlawful conduct of Iraq, they were detained against their will for varying periods of time between August 2 and mid-December, 1990. *Id.* In both their Memorandum in Support of their Motion for Default Judgment as to Liability (filed on Aug. 1, 2000, at 21-25) and in their Proposed Findings of Facts and Conclusions of Law (filed on Nov. 16, 2001, at 66-69), plaintiffs argued that the evidence that they had presented in support of their claims was sufficient to establish Iraq's liability for the common law tort of false imprisonment.

In its Decision and Order, filed on December 5, 2001, and in a series of subsequent Decisions and Orders involving the claims of individual plaintiffs, this Court agreed, finding that plaintiffs had established their false imprisonment claims through satisfactory evidence in accordance with the requirements of 28 U.S.C. § 1608(e). As set forth below, the assumption underlying that ruling – that is, the assumption that the "relevant law" gives plaintiffs a cause of action for false imprisonment in the first place – was plainly correct and is in no way undermined by the D.C. Circuit's recent ruling in *Cicippio-Puleo*.

1. Plaintiffs Have A Cause Of Action For False Imprisonment Under Universally Accepted Principles Of Common Law.

The "essential elements" of false imprisonment are "(1) the detention or restraint of one against his or her will, and (2) the unlawfulness of such detention or restraint." 32 Am. Jur. 2d False Imprisonment § 8 (2003). As set forth in the Restatement (Second) of Torts (1965), an individual is subject to liability for false imprisonment if he intentionally engages in conduct, which "directly or indirectly results" in such an unlawful restraint, and such restraint causes injury to the plaintiff. *Id.* §§ 35 & 45A.

The common law tort of false imprisonment is recognized in every jurisdiction in this country, including, of course, in the District of Columbia (and in each of the ten states in which a plaintiff who has an unresolved lost income claim maintained his permanent place of residence at the time of his hostage-taking).[5] Furthermore, the basic

[5] *See, e.g.*, *Faniel v. Chesapeake & Potomac Tel. Co. of Md.*, 404 A.2d 147, 150 (D.C. 1979); *Asgari v. City of Los Angeles*, 937 P.2d 273, 281 (Cal. 1997); *Spears v. Albertson's Inc.*, 848 So.2d 1176, 1178 (Fla. Ct. App. 2003); *Russell v. Kinney Constr., Inc.*, 795 N.E.2d 340, 347 (Ill. Ct. App. 2003); *Miraliakbari v. Pennicooke*, 561 S.E. 2d 483, 488 (Ga. Ct. App. 2002); *Nadeau v. State of Maine*, 395 A.2d 107, 116 (Me. 1978); *Wax v. McGrath*, 151 N.E. 317, 318 (Mass. 1926); *Welch v. Bergeron*, 337 A.2d 341, 343

elements of that tort are the same in the District as they are everywhere else (including, in particular, the state of each remaining plaintiff's residence).[6] Accordingly, to the extent that local law (*i.e.*, D.C. or U.S. common law) provides the rule of decision in this case, which, in the absence of conflict with foreign law it does, that law provides plaintiffs with an actionable common law claim for false imprisonment.

2. Plaintiffs Have A Cause Of Action For False Imprisonment Under Both Kuwaiti And Iraqi Law.

Were this Court to apply Kuwaiti or Iraqi law to this dispute, plaintiffs would likewise be able to maintain a cause of action against Iraq based on precisely the same facts that support their claim for false imprisonment under the common law of the fifty states and the District of Columbia.

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

(N.H. 1975); *Broughton v. State of New York*, 335 N.E.2d 310, 314 (N.Y. 1975); *Gagliardi v. Lynn*, 285 A.2d 109, 111 n.2 (Pa. 1971); *Wal-Mart Stores, Inc. v. Rodriguez*, 92 S.W. 3d 502, 506 (Tex. 2002).

[6] *See, e.g.*, *Faniel*, 404 A.2d at 150 ("The essential elements of the tort are (1) the detention or restraint of one against his will, within boundaries fixed by the defendant, and (2) the unlawfulness of the restraint.") and cases cited in note 5 *supra*.

As further set forth in Ms. Ali's declaration, "wrongful conduct" under Article 227(1) includes conduct that would be in violation of the Kuwaiti Constitution or the Kuwaiti Penal Code. *Id.* ¶¶ 6-9. Article 31 of the Kuwaiti Constitution prohibits any person from "imprison[ing]" or otherwise "restrict[ing] the freedom or mobility" of any other person "except in accordance with the law." *Id.* ¶ 8. Moreover, Article 178 of the Kuwaiti Penal Code makes it a crime for any person to "forc[e another person] against his will to move from his normal place of residence" and then "detain him against his will." *Id.* ¶ 9. And, finally, Article 184 of the Kuwaiti Penal Code makes it a crime to "confine[] someone in any manner other than in accordance to the law or the procedures required by it." *Id.* As Ms. Ali's declaration makes clear, the acts of hostage-taking upon which plaintiffs' complaint is based violate each of these provisions. Accordingly, had those acts been engaged in by a private individual, plaintiffs would have an actionable claim for false imprisonment under the laws of Kuwait by virtue of Article 227(1). *Id.* ¶¶ 7-11.[7]

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

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[7] Under Article 230 of the Kuwaiti Civil Code, a person who is injured by the wrongful conduct of another is entitled to recover any direct "material damages" resulting from that conduct, which damages include both lost income and lost profits. Ali Decl. ¶ 12. In addition, such a person is entitled to recover moral damages, which includes compensation for emotional and psychological injuries. *Id.*

encroachment on the freedom of another . . . makes the encroacher liable for compensation." *Id.*

Furthermore, as in the case of the Kuwaiti Civil Code, wrongful conduct under the rule of general responsibility includes any conduct that is in violation of the Iraqi Penal Code, which, like the Kuwaiti Penal Code, makes it unlawful for anyone to "detain[] or in any manner deprive[] a person of his freedom," except in accordance with law. Ali Decl. ¶ 16. Accordingly, were this dispute to be governed by the laws of Iraq, plaintiffs would have an actionable claim for false imprisonment under those laws. *Id.* ¶¶ 15-16.[8]

3. The D.C. Circuit's Decision In *Cicippio-Puleo* Does Not Affect The Viability Of Plaintiffs' False Imprisonment Claims.

Nothing in the D.C. Circuit's decision in *Cicippio-Puleo* suggests that a plaintiff cannot ground a cause of action against a non-immune terrorist state on section 1606 of the FSIA where, as here, a private individual would be subject to liability "in like circumstances." In *Cicippio-Puleo*, certain children and siblings of Joseph Cicippio, an American citizen who had been taken hostage and tortured by Iranian agents, brought suit against Iran "based on claims purporting to arise under section 1605(a)(7) of the FSIA and the Flatow Amendment." 353 F.3d at 1028. In its decision dismissing that suit, this Court held that neither of those provisions gives the family members of victims of state-sponsored terrorism the right to assert derivative claims that are not otherwise available to them under prevailing principles of common law. *Id.* at 1029-30.

[8] As in the case of the Kuwaiti Civil Code, the damages that are recoverable in an action predicated upon violation of the Iraqi rule of general responsibility include damages for economic loss. Ali Decl. ¶ 17.

On appeal, the D.C. Circuit took pains to point out that the state-sponsored terrorism exception to immunity and the Flatow Amendment were "the *only* provisions" that the *Cicippio-Puleo* plaintiffs had relied upon in arguing against the dismissal of their complaint. 353 F.3d at 1033 (emphasis added). Accordingly, the narrow issue before the D.C. Circuit was "whether the Flatow Amendment . . . may be construed, either alone or in conjunction with section 1605(a)(7), to provide a cause of action against a foreign state." *Id.* at 1032. In answering that question in the negative, the D.C. Circuit explained that:

> Section 1605(a)(7) of the FSIA abrogates foreign sovereign immunity and provides jurisdiction in specified circumstances, but it does not create a private cause of action. By its clear terms, the Flatow Amendment provides a private right of action only against individual officials, employees, and agents of a foreign state, but not against a foreign state itself. Plainly, neither section 1605(a)(7) nor the Flatow Amendment, separately or together, establishes a cause of action against foreign state sponsors of terrorism. Therefore, the Cicippios' suit cannot proceed *on these grounds*.

Id. at 1027 (emphasis added).

While the *Cicippio-Puleo* decision forecloses any argument that the Flatow Amendment, "either alone or in conjunction with section 1605(a)(7)," creates a cause of action against a terrorist state, nowhere in that decision is there any suggestion that such a suit against a terrorist state cannot proceed on *other grounds*. To the contrary, the D.C. Circuit refused to consider the argument of certain *amici* that "some other source of law, including state law," might furnish the rule of decision for a cause of action against a foreign state predicated on section 1606 of the FSIA. 353 F.3d at 1036. Noting that it "does not ordinarily decide issues not raised by parties," the D.C. Circuit remanded the case to give the *Cicippio-Puleo* plaintiffs an opportunity to amend their complaint and to

allow this Court to determine "in the first instance" whether they "have a viable cause of action" under an alternative source of law. *Id.*

The remand in *Cicippio-Puleo* is consistent with the decisions of numerous courts in this District, which have upheld the right of plaintiffs to pursue false imprisonment and other garden-variety tort claims against terrorist states that are grounded in bedrock principles of common law. In his recent decision in *Kilburn v. Republic of Iran*, 277 F. Supp. 2d 24 (D.D.C. 2003), for instance, Judge Urbina rejected the proposition that the Flatow Amendment "provide[s] the exclusive cause of action for acts of state sponsored terrorism" or otherwise "undermines the viability of existing federal and state common-law claims once sovereign immunity is waived." *Id.* at 36 (denying motion to dismiss as to plaintiff's "preexisting common-law claims of wrongful death, battery, assault, false imprisonment, slave trafficking, and intentional infliction of emotional distress").[9] Similarly, in *Dammarell v. Islamic Republic of Iran*, 281 F. Supp. 2d 105 (D.D.C. 2003), Judge Bates held that even if the Flatow Amendment does not "create a federal statutory cause of action against state sponsors of terrorism, plaintiffs nevertheless would have valid claims against Iran . . . under state and/or federal common law." *Id.* at 194. [10]

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[9] The issue whether viable causes of action may be asserted against a terrorist state under section 1606 of the FSIA is currently before the D.C. Circuit on appeal from Judge Urbina's decision (No. 03-7117) with oral argument set for May 14, 2004.

[10] *Accord Sutherland v. Islamic Republic of Iran*, 151 F. Supp. 2d, 27, 47-50 (D.D.C. 2001) (holding Iran liable for battery, false imprisonment and intentional infliction of emotional distress under federal common law); *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 107, 113 (D.D.C. 2000) (holding that causes of action for battery, assault and false imprisonment are actionable in suits "authorized under §1605(a)(7) of the FSIA"); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 69 (D.D.C. 1998) (holding that acts of torture and hostage-taking are "all clearly actionable as tortious conduct under U.S. law," including the common law torts of assault, battery and false imprisonment).

B. As Private Individuals Would Be Liable Under Like Circumstances, Plaintiffs Have Asserted Viable Claims Against Iraq For Hostage-Taking.

In addition to asserting claims for false imprisonment in Count II of their complaint, plaintiffs asserted in Count I that Iraq was liable for hostage-taking. First Amended Cmplt. ¶¶ 45-48. In particular, they alleged that, following its invasion of Kuwait, Iraq willfully seized and/or detained them against their will, and continued to detain them for the specific purpose of compelling the United States to abstain from taking measures to liberate Kuwait. *Id.* As set forth below, these allegations – the truth of which each of the plaintiffs established by satisfactory evidence – support a viable cause of action for hostage-taking under the laws of Kuwait and the United States.

1. Plaintiffs Have A Cause Of Action For Hostage-Taking Under Kuwaiti Law.

Like the United States, Kuwait is a party to the International Convention Against the Taking of Hostages. Ali Decl. ¶ 10. Any act that violates that Convention constitutes "wrongful conduct" for purposes of Article 227(1) of the Kuwaiti Civil Code and, thus, any victim of such an act would have a compensable claim for damages under that Article. *Id.* Accordingly, plaintiffs' cause of action for hostage-taking is plainly viable under Kuwaiti law.[11]

[11] While Iraq has not ratified the Hostage Convention, that is of no moment. As set forth in point II.A.2 above, any acts that constitutes hostage-taking within the meaning of the Convention would nonetheless give rise to an actionable claim for false imprisonment under the Iraqi Civil Code.

2. Plaintiffs Have A Cause Of Action For Hostage-Taking Under Federal Statutory Law The Viability Of Which Is Not Affected By The D.C. Circuit's Decision In *Cicippio-Puleo*.

As set forth above, the legal framework for determining whether a cause of action exists against a non-immune foreign state is established under section 1606 of the FSIA, which articulates the principle that such a state "shall be liable in the same manner . . . as a private individual in like circumstances." Accordingly, a federal statute can have the effect of imposing liability upon a foreign state in two ways: (1) by expressly creating a cause of action against a foreign state; or (2) by providing a rule of liability that governs the conduct of private individuals – in which case section 1606 would require that that rule be applied to foreign states in like circumstances. In practice, however, Congress has never written a federal statute to create a cause of action running directly against a foreign state.

In its decision in *Cicippio-Puleo*, the D.C. Circuit made clear that the Flatow Amendment was no exception. At the same time, however, it affirmed that the Flatow Amendment does "create a cause of action against officials, employees, and agents" of foreign states "in their personal capacities." 353 F.3d at 1029. Thus, the Flatow Amendment imposes liability upon any private individual who, while acting as an "agent" of a foreign state, engages in acts of hostage taking (or any of the other terrorist acts specified in section 1605(a)(7) of the FSIA) that result in personal injury or death to a U.S. national. 28 U.S.C. § 1605(note). By operation of the plain language of section 1606, a terrorist state that engages in such acts is likewise subject to liability.

The *Cicippio-Puleo* decision is not to the contrary. As set forth in Point II.A.3 above, the D.C. Circuit refused to address issues that were "not raised by the parties,"

including the issue whether section 1606's mandate that non-immune foreign states be treated the same as private individuals for liability purposes applies to the Flatow Amendment. *Id.* at 1036. Thus, the *Cicippio-Puleo* decision stands only for the narrow proposition that the Flatow Amendment, neither by itself nor "in tandem" with section 1605(a)(7), "creates a private right of action against foreign governments." 353 F.3d at 1027.

Given the structure of the FSIA and the manner in which it authorizes liability to be imposed upon foreign states, the fact that Congress did not create a cause of action against foreign states when it wrote the Flatow Amendment should come as no surprise. Again, the U.S. Code is replete with provisions that create liability against private individuals, not a single one of which mentions foreign sovereigns. Nonetheless, each of those provisions is made applicable to non-immune foreign states by virtue of section 1606, which, by its terms, makes a non-immune state liable "as to *any* claim" with respect to which a private individual would be subject to liability "in like circumstances." Accordingly, this Court should not equate the failure of the Flatow Amendment to create a cause of action against foreign states with some broader congressional intention to place that Amendment outside the reach of section 1606 of the FSIA. Rather, it should apply the plain language of that provision to the Flatow Amendment just as it would to every other liability-creating provision of the U.S. Code.[12]

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

C. To The Extent Plaintiffs Lack A Remedy Under Foreign Law, Relevant Choice-Of-Law Principles Would Prevent Such Law From Being Applied To This Case.

Even if Iraq had appeared and were able to present proof that the acts of false imprisonment and hostage-taking about which plaintiffs complain are not actionable under Iraqi and/or Kuwaiti law, application of choice-of-law principles would still require this Court to apply the laws of this country to this dispute.

In determining which law to apply to claims against foreign states in actions brought under the FSIA's state sponsored terrorism exception, the courts of this District have employed federal choice-of-law rules, which embrace the approach set forth in the Restatement (Second) of Conflicts § 145. *See, e.g.*, *Wagner v. Islamic Republic of Iran*, 172 F. Supp. 2d 128, 134 (D.D.C. 2002); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 14 (D.D.C. 1998). Under that approach, the courts ask which of the interested jurisdictions has "the most significant relationship to the occurrence and the parties" – a question that, in essence, turns upon "the relevant policies" of those jurisdictions and the extent to which those policies "would be advanced by application" of their respective laws. *In re Air Crash Disaster at Washington*, 559 F. Supp. 333, 342 (D.D.C. 1983).

In enacting the state-sponsored terrorism exception to the FSIA, "Congress sought to create a judicial forum for compensating [U.S.] 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." *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 88-89 (D.C. Cir. 2002).[13] Recognizing the paramount importance of that policy, the

[13] *See also Elahi v. Islamic Republic of Iran,* 124 F. Supp. 2d 97, 106 (D.D.C. 2000) (noting that "stated purposes" of the state-sponsored terrorism exception are "to deter terrorist acts against U.S. nationals by foreign sovereigns or their agents and to provide

courts of this District have consistently held that in cases in which jurisdiction is predicated on the state-sponsored terrorism exception to sovereign immunity, the United States has a much stronger interest in the application of its laws than does any foreign jurisdiction.[14]

In this case, in particular, the acts of hostage-taking upon which this suit is based were intentionally directed at *American* citizens for the explicit purpose of extracting concessions from the *United States*. The interest of the United States in affording its citizens a remedy that will provide them a measure of justice and hold the perpetrators of those acts accountable for their crimes could hardly be more compelling. On the other hand, it is difficult to imagine any legitimate interest of Kuwait or Iraq that would be served by the application of their laws to the extent that such a remedy might not exist under those laws. Iraq, in particular, can claim no legitimate interest in application of its laws to the claims of American citizens who were detained in Kuwait and/or were forcibly relocated to Iraq against their will and in violation of international law.

Application of U.S. law is, in fact, compelled by the D.C. Circuit's decision in this very case. Relying upon the language of section 1606 requiring that it treat Iraq the same as it would "a private individual under like circumstances" for purposes of determining the manner and extent of its liability, the D.C. Circuit held that plaintiffs'

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for justice for victims of such terrorism"); *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 50 (D.D.C. 2000).

[14] *See, e.g.*, *Tracy v. Islamic Republic of Iran*, 2003 U.S. Dist. LEXIS 15844, at *16-17 (Aug. 21, 2003) ("Although the actions complained of in the instant case took place in Lebanon, the United States has a much stronger interest than Lebanon in adjudicating this action arising from the kidnapping and torture of United States citizens."); *Wagner*, 172 F. Supp. 2d at 134-35 (applying federal common law to claims arising out of bombing of U.S. Embassy in Lebanon); *Flatow*, 999 F. Supp. at 14 (holding that "the United States has a much stronger interest than the Palestinian Authority in Gaza in adjudicating" action arising out of murder of U.S. citizen by agents of Iranian government).

claims against Iraq are "subject . . . to federal common law for determining the amount of damages" they can recover. 328 F.3d at 684. Logically, if the amount of damages that can be recovered under section 1606 is subject to federal common law, then so too must the issue whether a state can be held liable under that provision.

The D.C. Circuit's decision to apply federal common law in this case is consistent with the decisions of numerous courts in this District, which have applied federal common law in determining whether and to what extent a foreign state may be adjudged liable in cases brought under the FSIA's state-sponsored terrorism exception to sovereign immunity.[15] In so doing, these courts have properly shied away from the creation of new federal causes of action, looking instead to principles of state law to provide content for federal rules of decision. *See, e.g., Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 108 (1991) ("federal courts should incorporate state law into federal common law unless the particular state law in question is inconsistent with the policies underlying the federal statute"). Furthermore, since the theories of liability in cases arising under section 1605(a)(7) (*e.g.*, false imprisonment, battery, assault, *etc.*) are recognized in the common law of every state, there has been no need to engage in a conflict of law analysis to select the law of any particular state.

In the absence of any conflict among the laws of the various states, the courts in this District have properly looked to the Restatement as an appropriate reflection of prevailing principles of state common law. *See, e.g., Bettis*, 315 F.3d at 333. Alternatively, applying a more traditional approach where conflict of law issues do not

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[15] *Flatow*, 999 F. Supp. at 15; *see also Tracy*, 2003 U.S. Dist. LEXIS 15844, at *17; *Wagner*, 172 F. Supp. 2d at 134-35; *Sutherland*, 151 F. Supp. 2d 27 at 47; *Hartford Fire Ins. Co. v. Socialist People's Libyan Arab Jamahiriya*, 1999 U.S. Dist. LEXIS 15035, at *14 (D.D.C. Sept. 23, 1999).

arise (*see* discussion at pp. 7-9 *supra*), it would be proper for this Court to look to the law of the forum as similarly reflective of such principles. *See, e.g.*, *Hill*, 328 F.3d at 684. Indeed, as Congress has made the District of Columbia "the dedicated venue for actions against foreign states," *Flatow*, 999 F. Supp. at 15, n.6, and the only permissible venue in cases involving terrorist acts of a foreign state that occur outside the territory of the United States, *see* 28 U.S.C. § 1391(d), Congress presumably expected District of Columbia law to be applied in the absence of true conflicts. Application of the laws of the District also will help promote uniformity. Accordingly, the District's laws provide an especially "appropriate model for developing a federal standard" in FSIA cases involving state-sponsored terrorism. 999 F. Supp. at 15, n.6.

At any rate, whether this Court looks to general principles of state law as laid out in the Restatement or to the laws of this District to provide content to federal common law in this case, it really does not matter. Under either approach, plaintiffs have a viable cause of action for false imprisonment.

D. Plaintiffs' Claims Are Properly Pled.

As set forth above, in *Cicippio-Puleo*, the D.C. Circuit remanded the case to give plaintiffs an opportunity to plead additional causes of action under sources of law that they had failed to pursue on appeal. While the show cause order relates only to the issue whether plaintiffs have viable claims, plaintiffs address the issue whether they have properly framed those claims in their complaint in the event this Court might have some concerns on this score in light of the *Cicippio-Puleo* remand.

Plaintiffs' complaint specifically includes a count for false imprisonment – a cause of action that is viable under District of Columbia and federal common law. To be

sure, plaintiffs' complaint does not state that their false imprisonment claim arises under District of Columbia or federal common law. But nothing in the Federal Rules of Civil Procedure requires plaintiffs to plead the source of domestic common law upon which their claims are based and, in fact, they rarely do. *See, e.g., International Armor & Limousine Co. v. Moloney Coachbuilders, Inc.*, 272 F.3d 912, 915 (7th Cir. 2001) (Easterbrook, J.) (stating that plaintiffs "need not specify a source of law" in their complaints since, under the Federal Rules, only notice pleading is required and "courts rather than parties decide which rule governs the dispute"); *Krieger v. Fadely*, 211 F.3d 134, 136 (D.C. Cir. 2000) ("complaints need not plead law"). Indeed, under the Federal Rules, plaintiffs were not even required to itemize any particular causes of action in their complaint. "The form of the complaint is not significant if it alleges facts upon which relief can be granted, even if it fails to categorize correctly the legal theory giving rise to the claim." *Peavy v. WFAA TV, Inc.*, 221 F.3d 158, 167 (5th Cir. 2000).[16]

The principle that a complaint does not have to plead law is no less applicable in the case of foreign law than it is in the case of domestic law. Any uncertainty "about whether foreign law must be pleaded [was] eliminated" by Fed. R. Civ. P. 45.1, which requires only that a party who intends to raise an issue of foreign law give notice that is "written" and "reasonable." Fed. R. Civ. P. 45.1 advisory committee notes.

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[16] *See also International Armor*, 272 F.3d at 915 ("under the Federal Rules of Civil Procedure, the concept of 'cause of action' as Holmes used it – a reference to a code-pleading regime in which law was essential to the plaintiff's complaint – has vanished from federal law"); *Bartholet v. Reishauer A.G.*, 953 F.2d 1073, 1078 (7th Cir. 1992) (recognizing that a "complaint need not identify a legal theory" and instructing courts to ask not "whether the complaint points to the appropriate statute," but whether "relief is possible under any set of facts that could be consistent with the allegations"); *Hanson v. Hoffman*, 628 F.2d 42, 52 (D.C. Cir. 1982) ("the liberal concepts of notice pleading embodied in the Federal Rules do not require the pleading of legal theories"); Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 1219 (2d. ed. 1990).

Accordingly, under that rule, foreign law "may, but need not be, incorporated in the pleadings." *Id.*[17]

Nothing in the D.C. Circuit's decision in *Cicippio-Puleo* alters these basic rules of pleading or otherwise suggests that plaintiffs' complaint is deficient in any way, shape or form. Unlike plaintiffs in this case who have been pursuing both statutory and common law causes of action from the outset, the *Cicippio-Puleo* plaintiffs predicated their right to relief solely upon the flawed proposition that § 1605(a)(7) and the Flatow Amendment gave them a cause of action, and went all the way through the appellate stage without proffering any argument that their complaint might state a viable claim for relief under some other source of law. In light of the *Cicippio-Puleo* plaintiffs' narrow characterization of the legal theories they were pursuing on appeal, the D.C. Circuit would have been fully justified in dismissing their action with prejudice. *Hall v. Ford*, 856 F.2d 255, 267 (D.C. Cir. 1988) (refusing to grant plaintiffs leave to amend to pursue "legal theories not asserted at the District Court level"). Instead, however, it opted to give them an opportunity to amend their complaint to identify the theories they had to that point chosen to forego.

In this case, plaintiffs have plainly pled facts upon which relief can be granted, have never limited themselves to any particular legal theory and, in fact, have pled viable claims in their complaint. Given these circumstances, along with the fact that all of the

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[17] Plaintiffs, of course, have never had any obligation even to provide notice of foreign law, since they have not taken – and are not now taking – the position that foreign law is applicable to this dispute. Thus, had it appeared in this case, the obligation would have fallen upon Iraq (to the extent it disagreed with plaintiffs' position on the applicable law) to raise any foreign law upon which it might have wished to rely and to give plaintiffs notice of its intent to do so.

plaintiffs in this case have already obtained and collected judgments in their favor, there can be no justification for requiring plaintiffs to amend their complaint.

CONCLUSION

For the reasons set forth herein, plaintiffs continue to have viable causes of action against Iraq and the Court should proceed to rule on plaintiffs' pending motions for the entry of supplemental default judgment as to lost income.

Dated: Washington, D.C.
March 15, 2004

Respectfully submitted,

__________/s/______________
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