

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

DARIUSH ELAHI, )  
as Next-of-Kin and Representative )  
of the Estate of Cyrus Elahi, )

Plaintiff, )

v. )

THE ISLAMIC REPUBLIC OF IRAN )

and )

THE IRANIAN MINISTRY OF )  
INFORMATION AND SECURITY, )

Defendants. )

Case No. 1:99CV02802  
Judge: Joyce Hens Green  
Deck Type: Civil General

**FILED**

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NANCY MAYER WHITTINGTON, CLERK  
U.S. DISTRICT COURT

**PLAINTIFF'S MEMORANDUM OF LAW WITH RESPECT  
TO JURISDICTION, LIABILITY, DAMAGES AND EVIDENTIARY MATTERS**

**I. INTRODUCTION**

This is an action to redress the wrongful death of an American national, Cyrus Elahi, who was assassinated on October 23, 1990, in Paris, France, by agents of the Iranian government in an act of state-sponsored terrorism. Plaintiff Dariush Elahi, brother of Cyrus Elahi and representative of his estate, has brought this lawsuit pursuant to the provisions of the Foreign Sovereign Immunities Act of 1976, as amended, 28 U.S.C. §§ 1602-1611, that grant jurisdiction over foreign states and their officials and agents and that create federal causes of action for personal injury or death to American nationals resulting from state-sponsored terrorist attacks.

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Defendants, the Islamic Republic of Iran and the Iranian Ministry of Information and Security, have failed to enter an appearance in this matter, notwithstanding the fact that service of process was made upon them in accordance with the statutory procedures. See 28 U.S.C. § 1608(a)(4).<sup>1</sup> This Court entered an order of default against the defendants on August 14, 2000, pursuant to 28 U.S.C. § 1608(e) and Fed. R. Civ. P. 55(a). Before this Court may enter a judgment by default in a specific monetary amount against the defendants, the Foreign Sovereign Immunities Act provides that the plaintiff “establish[] his claim or right to relief by evidence that is satisfactory to the Court.” 28 U.S.C. § 1608(e). Accordingly, this Court has scheduled a non-jury, ex parte evidentiary hearing to provide plaintiff with an opportunity to establish that the Defendants targeted Cyrus Elahi for assassination and arranged for his killing because he actively opposed the abuses of the Islamic regime.<sup>2</sup>

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<sup>1</sup> Service of process was accomplished on February 20, 2000, with the assistance of the Swiss Embassy in Tehran, the United States’ protecting power in the Islamic Republic of Iran. See Plaintiff’s Memorandum in Support of Ex Parte Motion for Entry of Default. This Court has yet to receive any response from defendants, either through counsel’s entry of appearance, or through a diplomatic note.

This Court may take judicial notice of the fact that the Islamic Republic of Iran is an experienced litigant in the United States federal court system in general and in this Circuit in particular. See, e.g., Foremost-McKesson v. Islamic Republic of Iran, 905 F.2d 438 (D.C. Cir. 1990); Persinger v. Islamic Republic of Iran, 729 F.2d 835 (D.C. Cir. 1985); Berkovitz v. Islamic Republic of Iran, 735 F.2d 329 (9th Cir. 1984); McKeel v. Islamic Republic of Iran, 722 F.2d 582 (9th Cir. 1984).

<sup>2</sup> This procedure has been followed by this Court in prior actions brought by victims (or the next-of-kin of victims) of terrorist acts sponsored by the Islamic Republic of Iran. See Flatow v. Islamic Republic of Iran, 999 F. Supp.1, 6 (D.D.C. 1998); Cicippio v. Islamic Republic of Iran, 18 F. Supp.2d 62, 67 (D.D.C. 1998); Anderson v. Islamic Republic of Iran, 90 F. Supp.2d 107 (D.D.C. 2000); Eisenfeld v. Islamic Republic of Iran, 2000 U.S. Dist. LEXIS 9545 (D.D.C. July 11, 2000).

Pursuant to this Court's order and in anticipation of that hearing, plaintiff submits this memorandum of law establishing that this Court has subject matter jurisdiction over plaintiff's claims, has personal jurisdiction over the defendants, and has the power and authority to award both compensatory and punitive damages in an amount to be determined by the Court. This memorandum also discusses the evidentiary standard for entering a judgment against the defendants.

## **II. STATEMENT OF THE CASE**

This matter arises from terrorist acts undertaken on behalf and under the direction of defendants, the Islamic Republic of Iran and the Iranian Ministry of Information and Security ("MOIS"), which directly resulted in the assassination of Cyrus Elahi, a 47 year-old United States national. As will be demonstrated at the hearing in this matter, the Islamic Republic of Iran and MOIS targeted Mr. Elahi because he was as a senior official of the Flag of Freedom Organization (FFO), a democratic movement opposed to the abuses of the clerical regime in Iran, whose headquarters were in Paris, France. The aims and purposes of the FFO are the realization of the rights and freedoms of the Iranian people and the establishment of a pluralistic society and parliamentary democracy in Iran. These goals directly threatened the authoritarian and anti-democratic forces within the Iranian clerical government.

### **A. Iran's Terrorist Actions Against Political Opponents and Its Assault on Freedom of Expression**

Since its founding in December, 1979, the Islamic Republic of Iran, through its intelligence agency, MOIS, has engaged in terrorist activities both within Iran and throughout

the world.<sup>3</sup> The Iranian government particularly has engaged in widespread assassination of individuals opposed to, or critical of, the Tehran regime. The scope of the terrorist activities launched against opponents of the current Iranian government is worldwide and the defendants have authorized, sponsored, and directed assassinations of critics of the Islamic regime living not only in Iran, but also in countries throughout the world, including the United States, India, Pakistan, Austria, the Philippines, England, Turkey, Italy, Japan, Switzerland, Sweden, Germany, and France. Indeed, agents of the Islamic Republic of Iran and MOIS have been successful in assassinating over 100 people living outside Iran, including persons living in the United States, who were critics of the current regime.

**1. Iran's Plot to Assassinate Opponents in France, Including Cyrus Elahi**

In furtherance of these terrorist activities, in late 1989, the defendants, through a network of agents operating in France and elsewhere, were gathering information on critics of the current Tehran regime living in France who were seeking to further the forces of democracy in the country. Agents of the defendants focused primarily upon two prominent opposition groups.

The first opposition group targeted by Tehran was composed of persons active in the organized, popular opposition to the Iranian government, most notably, Dr. Manouchehr Ganji, the founder and secretary general of the FFO, who had been the Minister of Education in the prior Iranian government and a professor of international law at Tehran University. Because he

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<sup>3</sup> Iran's direct support of terrorist activities has prompted the United States to suspend diplomatic relations, impose trade restrictions, and participate in the international embargo of the country. See, e.g., Iran and Libya Sanctions Act of 1996, Pub. L. 104-72, 104th Cong., 2d Sess. (August 5, 1996), 110 Stat. 1541; 31 C.F.R. § 596.201 (prohibiting financial transactions with Iran as a state sponsor of terrorism); 22 C.F.R. § 126.1(d) (prohibiting exports and sales to Iran).

had been outspoken in his criticism of the gross and systematic violations of human rights committed by the Iranian regime, a "Fatwa" (religious edict) had been issued for Mr. Ganji's assassination. Eliminating officials of the FFO was of particular importance to the Iranian clerical government because, through the operation of a radio station and the distribution of videotapes and printed materials, the FFO was providing uncensored news and information worldwide about events in Iran and the suppression of individual rights and free speech within that country by the current clerical regime. As a result of these efforts by Dr. Ganji and his close aid and confidant, Cyrus Elahi, the FFO was creating an effective popular organization opposed to the current Iranian government, whose goal was to establish a free and democratic Iran where open dialog and free expression would be welcomed, rather than condemned.

The second group of critics of the Tehran regime targeted by the defendants was composed of exiled, former members of the Iranian government, who had become disenchanted with the clerical regime and, as a result, had been forced to flee the country. The most prominent individuals in this group included Shahpour Bakhtiar, the former Prime Minister of Iran, and Abdel Rahman Boroumand, his deputy. Messrs. Bakhtiar and Boroumand were founders of the National Movement of Resistance (NAMIR).

Based upon the information obtained by its agents, senior MOIS officials moved first to assassinate Dr. Ganji; however, an informer among the MOIS agents, notified the French authorities about the Iranian government's plot. This information was relayed to Dr. Ganji, who immediately left Paris for a safer location. The MOIS agents then turned their attention to Cyrus Elahi, who had remained in Paris to carry on the work of the FFO. Credible information indicates that Mr. Elahi, like Dr. Ganji, had been sentenced to death in absentia and in secret by the government of Iran because he was an official of the FFO. Agents of MOIS undertook

surveillance of Mr. Elahi and on the morning of October 23, 1990, as he was leaving his Paris apartment, Mr. Elahi was shot six times in the head and killed by agents of MOIS.

Having eliminated the second highest ranking official in the FFO and having forced Dr. Ganji to flee Paris for his life, the MOIS agents next turned their attention to the political opposition to the Tehran regime. A few months after Mr. Elahi was murdered by MOIS agents, on April 18, 1991, Abdel Bouramand was killed as he left his apartment in Paris. French authorities determined that Mr. Bouramand's killing was the work of Iranian government agents. The success in eliminating the second in command of both the popular and political opposition to the Iranian regime apparently emboldened the defendants. On August 6, 1991, agents of MOIS struck again. Under a ruse, they were able to gain entrance to the suburban Paris home of Shahpour Bakhtiar and literally butchered him and his personal secretary, Katibeh Fallouch, to death.

So far, Dr. Ganji has escaped assassination, but the Fatwa against him remains in effect. Dr. Ganji, therefore, lives with the knowledge that his life is in constant danger. Dr. Ganji's activities and efforts on behalf of the Iranian organized, popular opposition also have been hampered significantly because of his need for police protection in those countries, such as France, where he may seek to travel and work. In addition, those with whom Dr. Ganji may associate, including family and friends, are at risk because of their ties to him.

## **2. Iran's Worldwide Terrorist Actions Against Political Opposition and Free Expression**

The Iranian government's terrorist activities throughout the world to silence critics and opponents of the current regime has continued unabated. In September, 1992, agents of the Iranian government gunned down the leader of the Democratic Party of Iranian Kurdistan, along

with several of his colleagues, at the Mykonos restaurant in Berlin, Germany. As a result of the German government's investigation of the Mykonos murders, in March, 1996, the German federal prosecutor issued a warrant for the arrest of Iranian Intelligence Minister Ali Fallahian for having ordered the killings. Additional assassinations of critics of the Tehran regime have occurred in Turkey, where two other members of the Democratic Party of Iranian Kurdistan, Mehran Bahram Azadfar and Mohamad Ghadiri, were assassinated in August, 1993. In May, 1996, Dr. Razai Mazlouman, also known as Cyrus Aramanesh, was killed in his apartment in a Paris suburb. Dr. Mazlouman had been affiliated with the FFO and was the publisher of a weekly magazine, Payam-e Azadi (Voice of Freedom), critical of the Tehran regime. Other terrorist actions by the Iranian government to eliminate political opponents have occurred in Austria, Germany, Turkey, and France.

The actions of the Tehran regime in stifling free expression has not been limited solely to political opposition figures. The Fatwa issued against Salmon Rushdie is a prime example of the intimidation in which the Tehran regime has engaged to silence all forms of expression that the regime finds undesirable. In addition to singling out Mr. Rushdie, himself, the Iranian regime also has taken actions against publishers and translators of Mr. Rushdie's works. The Japanese translator of Satanic Verses was killed in Tokyo in July, 1991. That same month, an assassination attempt was made against the Italian translator. The Norwegian publisher of Mr. Rushdie's books narrowly escaped death in October, 1993, when he was shot three times from behind as he was leaving his home. Noted Iranian singer, actor and poet, Feridoun Farokhzad, also known as Farouchsad, was not so fortunate. In August, 1992, Farouchsad was knifed to death and decapitated in his apartment in Bonn, Germany. Since his exile from Iran in 1979, Mr.

Farouchsad had been directly associated with opposition to the Tehran regime and, hence, had incurred the government's wrath.

The actions of the Iranian government in eliminating opponents and stifling free expression also have struck close to home. On July 22, 1981, Ali Akbar Tabatabai, the former press spokesman for the Iranian embassy in Washington, who had become an outspoken opponent of the Tehran regime, was shot at point blank range by an Iranian government agent, Daoud Salahuddin. Mr. Salahuddin posed as a postman delivering a special delivery package to Mr. Tabatabai's home in Bethesda, Maryland. The killer later appeared on an ABC news "20/20" program, where he publicly confessed to the murder and confirmed that he had killed Mr. Tabatabai at the behest of the Iranian government. To this day, Mr. Salahuddin remains at large and Mr. Tabatabai's murder goes unpunished.

**B. Nature of This Lawsuit**

The lawsuit has been brought to redress this heinous conduct by the Islamic Republic of Iran and MOIS in murdering Cyrus Elahi and in engaging in the assassination of other critics and opponents of the current Iranian government with the goal of eliminating all open political expression and discourse that the Tehran regime finds offensive. Plaintiff Dariush Elahi, as next-of-kin and representative of the estate of Cyrus Elahi, specifically seeks compensation from the defendants for the wrongful killing of Cyrus Elahi and for the pain and suffering Cyrus Elahi experienced prior to his untimely death in a hail of bullets. Compensation also is sought for the acts of conspiracy on behalf of the defendants in plotting and carrying out the assassination of Cyrus Elahi. Finally, this action seeks punitive damages to punish the defendants for engaging in conduct that violates all manner of international norms and, additionally, to deter the defendants from engaging in such repugnant and reprehensible conduct in the future.



An award of punitive damages is appropriate particularly in this case because the assassination of Cryus Elahi was not an isolated event, but, as briefly summarized above, represents but one act of terrorism in the international campaign of terror against political dissidents and freedom of expression orchestrated by the Islamic Republic of Iran and MOIS. Although other lawsuits have successfully been brought against Iran for its aid to terrorist groups in the Middle East, most notably Hizballah and Hamas, no other case has sought to punish the Iranian government for its use of assassination to eliminate critics of the clerical regime and to suppress free speech and free expression worldwide. Unlike the victims of other terrorist actions, such as terrorist bombings, who have filed lawsuits against the Islamic Republic of Iran and MOIS, Mr. Elahi and other opponents of the Tehran regime were directly targeted by the defendants for assassination because of their open and vigorous support of the ideals of freedom and free expression – ideals that are anathema to the current Tehran regime.

Plaintiff believes that a significant award of both compensatory and punitive damages in this case will serve notice upon the Tehran regime that its morally repugnant conduct in endeavoring to eliminate opponents and critics no longer will be tolerated in a civilized society of nations and that the courts of the United States will use their powers to apply and enforce the rule of law.

### **III. THIS COURT HAS JURISDICTION UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT**

#### **A. Subject Matter Jurisdiction Exists For Acts of State-Sponsored Terrorism**

As this action is brought against a foreign state and its intelligence service acting as its agent, the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611, *et seq.* (“FSIA”), as amended, controls this action. The Supreme Court has recognized that the FSIA applies in

every action involving a foreign state defendant. See Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 10-11 (D.D.C. 1998), citing Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 489 (1983). See also 28 U.S.C. § 1330.

Under the Foreign Sovereign Immunities Act, sovereign states enjoy immunity from private lawsuits subject to various statutory exceptions. See Creighton, Ltd. v. Government of the State of Qatar, 181 F.3d 118, 120 (D.C. Cir. 1999) (foreign state is immune from suit “unless the particular lawsuit comes within an exception of the FSIA”). Where an exception applies, the statute provides the requisite statutory basis for subject matter jurisdiction in an action against a foreign state defendant. See Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989); Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993).

In the Antiterrorism and Effective Death Penalty Act of 1996 (“Antiterrorism Act”), Congress lifted the immunity of foreign states for a certain category of sovereign acts that are repugnant to the United States and the international community: state-sponsored terrorism. Pub. L. No. 10-132, Title II, § 221(a) (April 24, 1996), 110 Stat. 1241 codified at 28 U.S.C.A. § 1605(a)(7) (West 1997 Supp.). The stated purpose of the Antiterrorism Act, which was signed into law in April 1996, is to deter terrorist acts against U.S. nationals by foreign sovereigns or their agents and to provide for justice for victims of such terrorism. See 110 Stat. 1214 (1996). By enacting the statute, Congress manifested its intent that U.S. nationals who are “victims of terrorist states be given a judicial forum in which to seek redress.” Daliberti v. Republic of Iraq, 97 F. Supp.2d 38, 50-51 (D.D.C. 2000), citing, Flatow, 999 F. Supp. at 12-13, 15, n. 6. As explained by Judge Friedman in Daliberti, “[t]hose nations that operate in a manner inconsistent with international norms should not expect to be granted the privilege of immunity from suit that is within the prerogative of Congress to grant or withhold.” Daliberti, 97 F. Supp.2d at 52.

The Antiterrorism Act specifically creates an exception to the immunity of those foreign states officially designated by the Department of State as terrorist states if the foreign state commits a terrorist act, or provides material support and resources to an individual or entity that commits such an act, resulting in the death or personal injury of a United States national. See 28 U.S.C. § 1605(a)(7).<sup>4</sup> As explained below, because this matter comes within the state-sponsored terrorism exception to foreign sovereign immunity, this Court has original subject matter jurisdiction.

**1. Elements of a Claim Under the Antiterrorism Act**

Under the specific terms of the Antiterrorism Act, a foreign state is not protected by sovereign immunity where the following elements are present:

1. That personal injury or death resulted from an act or torture, extrajudicial killing, aircraft sabotage, or hostage taking; and
2. The act was either perpetrated by a foreign state directly or by a non-state actor, which receives material support or resources from the foreign state defendant; and
3. The act or the provision of material support or resources is engaged in by an agent, official, or employee of the foreign state while acting within the scope of his or her office, agency, or employment; and
4. That the foreign state be designated as a state sponsor of terrorism either at the time the incident complained of occurred or was later so designated as a result of such act; and
5. If the incident complained of occurred within the foreign state defendant's territory, plaintiff has offered the defendants a reasonable opportunity to arbitrate the matter; and
6. Either the plaintiff or the victim was a United States national at the time of the incident.

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<sup>4</sup> See also Flatow, 999 F. Supp. at 12; Cicippio v. Islamic Republic of Iran, 18 F. Supp.2d 62, 67 (D.D.C. 1998); Eisenfeld v. Islamic Republic of Iran, 2000 U.S. Dist. LEXIS at \*12-13 (D.D.C. July 11, 2000).

28 U.S.C. § 1605(a)(7). Each of the requirements of the statute is satisfied in this case.

**2. Plaintiff Has Stated a Claim Under the Antiterrorism Act**

**a. Extrajudicial Killing**

The murder of Cyrus Elahi, as alleged in the Complaint, clearly constitutes an act of extrajudicial killing. The state-sponsored terrorism exception to immunity expressly adopts the definition of extrajudicial killing set forth in the Torture Victim Protection Act of 1991, 28 U.S.C. § 1605(e)(1). That Act defines an “extrajudicial killing” as

a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all 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. 102-256 at § 3(a), 106 Stat. 73 (March 12, 1992), reprinted at 28 U.S.C.A. § 1350 note.

The premeditated shooting of Mr. Elahi as he was leaving his Paris apartment easily comes within the definition of “extrajudicial killing” as defined in the Torture Victim Protection Act. See Lafontant v. Aristide, 844 F. Supp. 128, 138 (E.D.N.Y. 1994) (finding that assassination of political opponent fell within statute’s definition of extrajudicial killing). See also Flatow v. Islamic Republic of Iran, 999 F. Supp. at 16-18 (a suicide bombing of a civilian bus, which resulted in the death of a young American woman, constituted an act of “extrajudicial killing”); In Re Weinstein, 2000 N.Y. LEXIS 244 at \*4 (July 26, 2000) (suicide bombing “constitutes an extrajudicial killing under the Act”); Alejandre v. Republic of Cuba, 996 F. Supp. 1239, 1248 (S.D. Fla. 1998) (“the unprovoked firing of deadly rockets at defenseless, unarmed civilian aircraft comes within the statute’s meaning of ‘extrajudicial killing’”).

**b. Foreign State Actor or Provision of Material Support**

As alleged in the Complaint and as the evidence will show at the hearing in this matter, the murder of Mr. Elahi was perpetrated by individuals who were directed by and received support and guidance from agents of MOIS acting within the scope of their authority and in furtherance of the terrorist policies of the Islamic Republic of Iran. The assassination of Mr. Elahi was not a rogue operation, but was part of a well-orchestrated plan of the defendants to eliminate both the popular and political opposition to the Tehran regime and to cripple the movement for a free and democratic Iran. As a result, both the Islamic Republic of Iran and MOIS may be held responsible under the Antiterrorism Act for the consequences of their concerted and premeditated acts of terrorism.

Indeed, in cases where the involvement of the Iranian government in specific terrorist acts was much less direct and involved only the provision of support and resources to terrorist groups, liability still was held to exist under the Antiterrorism Act. See Flatow, 999 F. Supp. at 10 (holding Iran and MOIS liable for terrorist bombing by Islamic Jihad, which resulted in death of American citizen); Eisenfeld, 2000 U.S. Dist. LEXIS 9545 at \*14-16 (Iran and MOIS liable for death of American citizen who was killed in a terrorist bombing by Hamas because Hamas received material and financial support from defendants).

**c. State Sponsor of Terrorism**

The Antiterrorism Act requires that the foreign state be designated as a state sponsor of terrorism pursuant to either Section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. § 2405(j)) or Section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. § 2371). See Daliberti, 97 F. Supp.2d at 42. The Export Administration Act calls upon the Secretary of State to make a determination that a foreign state has "repeatedly provided support for acts of

international terrorism and to notify the relevant committees of both Houses of Congress, and to publish the determination in the Federal Register.” 50 U.S.C. App. § 2405(j).<sup>5</sup> The nations that are designated to be state sponsors of terrorism “are those that consistently operate outside the bounds of the international community by sponsoring and encouraging acts generally condemned by civilized nations.” Daliberti, 97 F. Supp.2d at 52. As pointed out by Congress, “[t]hese outlaw states consider terrorism to be a legitimate instrument of achieving their foreign policy goals.” H.R. Rep. No. 104-383 at 182.

The courts have had no difficulty finding that Iran is a state sponsor of terrorism and that MOIS acts as its agent for purposes of imposing liability under the Antiterrorism Act. See Flatow, 999 F. Supp. at 14; Anderson, 90 F. Supp. at 112. The Islamic Republic of Iran has been designated “a state sponsor” of terrorism pursuant to these provisions of the Export Administration Act continuously since January, 1984.<sup>6</sup> See Cicippio, 18 F. Supp. at 68. See also

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<sup>5</sup> Once the Secretary’s determination has been promulgated, the foreign state is considered to be a state sponsor of terrorism until the country in question has provided assurances it no longer will support acts of international terrorism. Id.

<sup>6</sup> - - Because Iran was listed as state sponsor of terrorism at the time Section 1605(a)(7) was passed, there can be no contention that the statute constitutes an unconstitutional delegation of power. See Rein v. Socialist People’s Libyan Arab Jamahiriya, 162 F.3d 748 (2d Cir. 1998) (rejecting Libya’s unconstitutional delegation argument, in part, because Libya was designated a state sponsor of terrorism at time § 1605(a)(7) passed), cert. denied, 119 S.Ct. 2337 (1999); Daliberti, 97 F. Supp.2d at 51 (rejecting contention that Antiterrorism Act unconstitutionally delegated power to Secretary of State to determine the class of sovereigns identified as terrorist states; at the time Antiterrorism Act passed “Iraq was already on the list of states designated as state sponsors of terrorism. . . .”).

Exempting sovereign nations that are “state sponsors of terrorism” from traditional principles of sovereign immunity also may not be said to violate the equal protection guarantees of the Due Process clause of the Constitution. Even assuming that foreign states are entitled to Constitutional Due Process protections, which plaintiff does not concede, the court in Daliberti held that “[t]he distinction made by Congress between those states that have been designated

(continued...)

49 Fed. Reg. 47702 (Dec. 6, 1984). Iran continues to be designated a terrorist state by the State Department, notwithstanding attempts by the United States and other countries to induce the Tehran regime to change its ways. 22 C.F.R. § 126.1(d); 31 C.F.R. § 596.201. See also U.S. Department of State, Patterns of Global Terrorism, 1999 (April 1, 2000).<sup>7</sup>

The Antiterrorism Act applies to instrumentalities and agencies of the foreign sovereign, as well as to the foreign state itself. 28 U.S.C. § 1603(a), (b). See Foremost v. McKeesson, 905 F.2d at 446. Defendant MOIS is the Iranian intelligence service, which operates both within and beyond Iranian territory.<sup>8</sup> MOIS functions as an agent of the Islamic Republic of Iran and, in this case, MOIS performed acts within the scope of its agency, within the meaning of 28 U.S.C. § 1605(a)(7), by arranging for the assassination of Cyrus Elahi. Accordingly, MOIS, as well as the Islamic Republic of Iran, is a proper defendant for purposes of suit under the Antiterrorism Act.

**d. United States National**

The Antiterrorism Act requires that either the claimant or the victim be a “national of the United States,” as the term is defined by the Immigration and Nationality Act, “when the act of

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<sup>6</sup>(...continued)

state sponsors of terrorism and those that have not is rationally related to its purpose of protecting U.S. citizens by deterring international terrorism and providing compensation for terrorist acts.” 97 F. Supp.2d at 51.

<sup>7</sup> In addition to the Islamic Republic of Iran, the foreign states currently designated as sponsors of terrorism pursuant to 50 U.S.C. App. § 2405(j) are: Cuba, Iraq, Libya, Sudan, Syria and North Korea. 31 C.F.R. § 596.201; 22 C.F.R. § 126.1(d).

<sup>8</sup> With approximately 30,000 employees, MOIS is the largest intelligence agency in the Middle East and has an annual budget of between \$100-\$300 million. MOIS’ function is comparable to that of the KGB of the former Soviet Union and it coordinates multiple terrorist activities throughout the world. See Anderson, 90 F. Supp.2d at 112-113.

state sponsored terrorism occurred.” 28 U.S.C. § 1605(a)(7)(B)(ii).<sup>9</sup> In this case, Cyrus Elahi was a nationalized United States citizen at the time he was assassinated by agents of the Islamic Republic of Iran and MOIS.<sup>10</sup> The claimant here, Dariush Elahi, also is a naturalized United States citizen. Hence, there can be no question that Dariush Elahi, as Cyrus Elahi’s next of kin and representative of his Cyrus Elahi’s estate, may bring this action under the Antiterrorism Act.<sup>11</sup>

**B. Personal Jurisdiction Exists Over the Defendants**

This Court has in personam jurisdiction over foreign state sponsors of terrorism, such as Iran, under the Antiterrorism Act, 28 U.S.C. § 1605(a)(7). The FSIA provides that personal jurisdiction over a defendant will exist where the plaintiff establishes the applicability of an exception to immunity pursuant to 28 U.S.C. § 1605 and service of process has been

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<sup>9</sup> The Immigration and Nationality Act defines the term “national of the United States” as (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, has permanent allegiance to the United States.” 8 U.S.C. § 1101(a)(22).

<sup>10</sup> Cyrus Elahi was born in Iran, but fled the country at the time of the 1979 revolution and settled in the United States, where he became a nationalized United States citizen. While in the United States, Mr. Elahi lived in California, Texas and Michigan, where he was a university professor. In order to aid Dr. Ganji in organizing and directing the activities of the FFO, Mr. Elahi moved to Paris, where the FFO had its headquarters.

<sup>11</sup> Because the murder of Mr. Elahi occurred in Paris, France – not in Iran – the fifth element for coverage under the Antiterrorism Act, addressing incidents within the foreign state’s own territory does not apply. See 28 U.S.C. § 1605(a)(7)(B)(i).

The Flatow Amendment, 28 U.S.C. § 1605 note (discussed infra at Section III.C.), adds the requirement that the liability of foreign states and their officials and agents must be comparable to that of the United States and its agents, officials and employees. There can be no serious dispute that if officials or agents of the United States, while acting in their official capacities, arranged for and directed the assassination of a critic of the United States government, they would not be immune from civil suits for wrongful death. See U.S. Const. Amend. 5; Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).



accomplished pursuant to 28 U.S.C. § 1608. See 28 U.S.C. § 1330(b). See also Foremost-Mckesson, Inc. v. The Islamic Republic of Iran, 905 F.2d 438, 442 (D.C. Cir. 1990) (“Personal jurisdiction under FSIA exists so long as subject matter jurisdiction exists and service has been properly made pursuant to 28 U.S.C. § 1608”); Shapiro v. Republic of Bolivia, 930 F.2d 1013, 1020 (2d Cir. 1991) (“under the FSIA, therefore, personal jurisdiction equals subject matter jurisdiction plus valid service of process”); Hartford Fire Ins. Co. v. The Socialist People’s Libyan Arab Jamahiriya, 1999 U.S. Dist. LEXIS 15035 at \*10-12 (finding personal jurisdiction over Libya under provisions of Section 1605(a)(7) and 1608).

These provisions of the FSIA authorizing personal jurisdiction over state sponsors of terrorism have been determined by the courts to pass Constitutional muster.<sup>12</sup> As explained by the Flatow court, the state sponsored terrorism exception to sovereign immunity “provides an express jurisdictional nexus based upon the victim’s United States nationality.” 999 F. Supp. at 22. Thus, a foreign state that causes the death of a United States national through an act of state-sponsored terrorism is deemed to have the requisite “minimum contacts” within the United States to satisfy any due process concerns. Eisenfeld, 2000 U.S. Dist. LEXIS 9545 at \*13. See also Flatow, 999 F. Supp. at 23 (“[E]ven if a foreign state is accorded the status of ‘person’ for the purposes of Constitutional due process analysis, a foreign state that sponsors terrorist

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<sup>12</sup> There is serious question as to whether a foreign state is entitled to Constitutional Due Process protections. See Daliberti, 97 F. Supp.2d at 49; Flatow, 999 F. Supp. at 21. For purposes of this legal memorandum, however, plaintiff will assume that a foreign state has Constitutional Due Process rights. This approach is in line with the analysis in other cases involving the FSIA. See El-Hadad v. Embassy of the United Arab Emirates, 69 F. Supp.2d 69, 77 n. 7 (D.D.C. 1999) (“because the D.C. Circuit has not yet resolved whether the due process clause applies to foreign states, the Court considers the [foreign state] a ‘person’ and conducts the constitutional due process analysis”); Daliberti, 97 F. Supp.2d at 49 (“indulging the same assumptions as have other courts that a foreign sovereign may enjoy at least certain due process protections. . . .”).

activities, which causes the death or personal injury of a United States national will invariably have sufficient contacts with the United States to satisfy due process”).

Moreover, as Judge Lamberth noted in Flatow, “all states are on notice that state sponsorship of terrorism is condemned by the international community . . . . Foreign state sponsors of terrorism could not reasonably have expected that the United States would not respond to attacks on its citizens.” Flatow, 999 F. Supp. at 23. See also Daliberti, 97 F. Supp.2d at 53 (“It is reasonable that foreign states be held accountable in the courts of the United States for terrorist actions perpetrated against U.S. citizens anywhere.”). Extending jurisdiction in United States’ courts over state sponsors of terrorism to answer for their terrorist acts against United States nationals, therefore, may not be said to offend – indeed, they are in full accord with – “traditional notions of fair play and substantial justice.” International Shoe Co. v. Washington, 326 U.S. 310 (1945), quoting, Milliken v. Meyer, 311 U.S. 457, 463 (1940).

In this case, the plaintiff has shown that the state sponsored terrorism exception to sovereign immunity, Section 1605(a)(7), applies to the assassination of Cyrus Elahi. In addition, in entering its August 14, 2000 order of default, this Court recognized that service upon the defendants was effectuated under the statutory requirements of 28 U.S.C. § 1608. Accordingly, because both subject matter jurisdiction exists and proper service has been made, this Court has the requisite personal jurisdiction over the defendants, the Islamic Republic of Iran and its agent and instrumentality, the Ministry of Information and Security. See 28 U.S.C. § 1330(b).

**C. Venue is Appropriate in the Federal District Court for the District of Columbia**

The federal venue statute contains a specific provision dealing with venue in civil actions brought against foreign states. 28 U.S.C. § 1391(f).<sup>13</sup> Under this provision, actions against a foreign state and a state's agent or instrumentality may be brought in the United States District Court for the District of Columbia. 28 U.S.C. § 1391(f)(4). Because plaintiff has brought his action against the Islamic Republic of Iran and against MOIS, which is an agency or instrumentality of the Iranian government, venue appropriately lies in this district court. See Ruiz v. Transportes Aereos Militares Ecuatorianos, 103 F.R.D. 458 (D.D.C. 1984).

**IV. LEGAL ISSUES INVOLVING THE APPLICATION OF THE ANTITERRORISM ACT TO THIS CASE**

**A. Plaintiff's Suit Against Iran Is Not Barred By the Act of State Doctrine**

Although this case is directed against the Islamic Republic and its agent and instrumentality, MOIS, for pursuing a concerted plan to eliminate critics and opponents of the Tehran regime, including Cyrus Elahi, this suit does not implicate the act of state doctrine. That doctrine has been said to "direct United States courts to refrain from deciding a case when the outcome turns upon the legality or illegality . . . of official action by a foreign sovereign performed within its own territory." Riggs v. Nat'l Corp. and Subsidiaries v. Commissioner of IRS, 163 F.3d 1363, 1367 (D.C. Cir. 1999), citing W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corporation, 493 U.S. 400 (1990).

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<sup>13</sup> Section 1391(f) provides that a "foreign state is defined according to the provisions of the Sovereign Immunity Act. That Act states that a "foreign state" includes both the foreign state itself and an "agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a), (b). Hence, the venue provisions apply to plaintiff's suit against the Islamic Republic of Iran and MOIS, as its agency or instrumentality.

The doctrine was developed because of the concern that the exercise of judicial power in deciding the legality of foreign acts of state would hinder the conduct of foreign affairs by the executive and legislative branches. See W.S. Kirkpatrick & Co., Inc., 493 U.S. at 404. As explained by Judge Friedman in Daliberti, “the act of state doctrine is designed, at least in part, to avoid having the Judiciary ‘embarrass’ the Executive and Legislative Branches, which are the Branches constitutionally in power to decide matters relating to foreign policy.” Daliberti, 97 F. Supp.2d at 55. See also Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421-24 (1964) (act of state doctrine derives from judicial concern that possible interference with the political branches’ conduct of foreign affairs).

Thus, the act of state doctrine is directed toward preventing judicial interference in the conduct of foreign affairs reserved to the President and Congress; “it does not prohibit Congress and the Executive from using the threat of legal action in the courts as an instrument of foreign policy.” Daliberti, 97 F. Supp.2d at 55. In passing the Antiterrorism Act, this is precisely what congress intended: allowing victims (or the relatives of victims) to obtain redress in the courts of the United States for acts of state sponsored terrorism and using the “threat of legal” action to deter foreign states from initiating or sponsoring terrorist activities that result in injury or death to American nationals. For this Court to enforce the provisions of the Antiterrorism Act, therefore, in no manner impinges upon Congressional authority in the area of foreign policy. Rather, it serves to carry out the Congressional mandate.

Moreover, this Court’s specific enforcement of the Antiterrorism Act against the Islamic Republic of Iran is in full accord with the designation of Iran as a state sponsor of terrorism by the Secretary of State on behalf of the executive branch, under an express grant of authority by Congress. By hearing this lawsuit, this Court will further the announced foreign policy of the

political branches of the United States government to combat state sponsored international terrorism by the Iranian government. Therefore, the act of state doctrine has no application here.<sup>14</sup>

**B. The Antiterrorism Act Applies Retroactively**

Although the assassination of Cyrus Elahi occurred several years prior to the enactment of the Antiterrorism Act, Congress expressly directed the retroactive application of the statute in order to further a comprehensive counter-terrorism initiative by the legislative branch of government:

The amendments made by this subtitle shall apply to any cause of action arising before, on or after the date of the enactment of this Act [April 24, 1996].

§ 221(c) of Pub. L. 104-132. Thus, in applying the Antiterrorism Act to acts of terrorism committed by foreign states, the courts have recognized that the statute applies with full force and effect to events that occurred prior to the passage of the Act. See Flatow, 999 F. Supp. at 14 (“the state sponsored terrorism provision implicates no Constitutionality protected interest which would prohibit the application of 28 U.S.C. § 1605(a)(7) to pre-enactment conduct”); Cicippio, 18 F. Supp.2d at 68-69 (“Congress expressly directed that the statute be given retroactive application”); Alejandre v. Republic of Cuba, 996 F. Supp. 1239, 1248 (S.D. Fla. 1999) (“the plain language of the statute evidences a clear Congressional intent to have Section 1607(a)(7) apply retroactively”); Daliberti v. Republic of Iraq, 97 F. Supp.2d 38, 42 (D.D.C. 2000)

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<sup>14</sup> Further, as noted above, the act of state doctrine pertains to an official action by a foreign sovereign performed within its own territory. See Riggs v. Nat'l. Corp. and Subsidiaries, 163 F.3d at 1367. Although it is the policy and practice of the Islamic Republic of Iran to engage in the assassination of opponents and critics of the regime whether within or outside of Iran, the specific acts of terrorism complained of in this suit involve terrorist assassinations carried out by the agents of MOIS outside of Iran's own territory.

("Retroactivity principles . . . are no bar to the application of the state sponsored terrorism exception. . .").<sup>15</sup>

**C. Extraterritorial Application of the Antiterrorism Act**

In passing the Antiterrorism Act, Congress intended that its provisions apply to terrorist actions anywhere in the world in which American nationals are killed or injured. Indeed, one of the Act's "express purposes is to effect the conduct of terrorist states outside the United States, in order to promote the safety of United States citizens traveling overseas." Flatow, 999 F. Supp. at 15, citing 142 Cong. Rec. S. 2454-1 (April 17, 1996) (remarks of Senator Hank Brown on consideration of the Conference Report); 142 Cong. Rec. H. 2129-05-H21A2 (March 13, 1996) (remarks of Representative Ilena Ross-Lehtinen on the proposed Antiterrorism Act). Moreover, as the Flatow court noted, Congress has the requisite constitutional "authority to enact laws applicable to conduct beyond the territorial boundaries of the United States." Flatow, 999 F. Supp. at 15, quoting EEOC v. Aramaco, 499 U.S. 244, 260-61 (1992). The Antiterrorism Act, therefore, applies with full force and effect to the killing of Cyrus Elahi in Paris, France.

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<sup>15</sup> Application of the Antiterrorism Act to past incidents of state-sponsored terrorist activity against United States nationals is not unlimited, however. Section 1065(f) contains a 10 year statute of limitations for actions under Section 1605(a)(7). In this case, Cyrus Elahi was assassinated on October 23, 1990 and suit was filed on October 22, 1999, which was within the ten year limitations period. Also, the statute provides that "principles of equitable tolling, including the period during which the foreign state was immune from suit, shall apply in calculating this limitations period." 28 U.S.C. § 1605(f). Accordingly, although Mr. Elahi was assassinated in 1990, the defendants were immune from suit until April 24, 1996, when the Antiterrorism Act was signed into law. Hence, the earliest possible date for the statute of limitations to expire would be April 24, 2006. See Flatow, 999 F.3d at 23; Cicippio, 18 F. Supp. at 69 ("Iran was immune from suit . . . under the FSIA until the enactment of § 1605(a)(7) in 1996").

**D. Federal Common Law Applies to Cases Brought to the Antiterrorism Act**

In passing the Antiterrorism Act, “Congress created jurisdiction of federal causes of action for personal injury or death resulting from state-sponsored terrorism, including its own statute of limitations. These actions indicate Congressional intent that the federal courts create coherent national standards to support this initiative of national significance.” Flatow, 999 F. Supp. at 15. Accordingly, the Flatow court concluded that an “interstitial federal common law” should be the basis for interpreting and applying the provisions of the Antiterrorism Act. Flatow, 999 F. Supp. at 14-15. Applying federal common law furthers this goal of creating national standards by “promoting uniformity of determination with respect to the liability of foreign states for the terrorist acts of officials, agents and employees. . . .” Id. See also Hartford Fire Insurance Co. v. The Socialist People’s Libya Arab Jamahiriya, 1999 U.S. Dist. LEXIS 15035 at \*13 (“The application of federal common law to legal disputes under the FSIA comports with the general practice of applying federal common law in cases involving foreign relations.”).<sup>16</sup>

**E. Evidentiary Standard for Issuing a Judgment Against Defendants**

Where, as here, a foreign state or instrumentality of a foreign state has failed to respond to a suit filed under the Foreign Sovereign Immunities Act and, hence, has defaulted, the statutory requirements provide that a plaintiff is to establish his claims by “evidence satisfactory

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<sup>16</sup> The Flatow court noted that the law of the District of Columbia, as the dedicated venue for actions against foreign states (see 28 U.S.C. § 1391(f)(4)), provides an appropriate model for developing this federal common law in the application and enforcement of the FSIA. Flatow, 999 F. Supp. at 15 n. 6. Hence, to the extent that this Court finds that the application of the Antiterrorism Act to a specific factual situation should be guided by common law legal principles, this Court may look to the law of the District of Columbia for guidance in fashioning the appropriate federal common law.

to the court.” 28 U.S.C. § 1608(e).<sup>17</sup> The reason for this evidentiary rule is to “provide foreign states protection from unfounded default judgments rendered solely upon a procedural default.” Compania Interamericana Export v. Compania Dominicana de Avacion, 88 F.3d 948, 949 (11th Cir. 1996), citing H.R. Rep. No. 1487, 94th Cong., 2d Sess. 26 (1976), reprinted in 1996 U.S.C.C.A.N. 6604, 6625. See also Transareo, Inc. v. La Fuerza Area Boliviana, 24 F.3d 457, 462 (2d Cir. 1994) (evidentiary requirement “assure[s] that foreign sovereigns, who sometimes are slow to respond to legal action, are protected from unfounded claims.”).

In order to enter a judgment pursuant to Section 1608(e), a court need not convene an evidentiary hearing or make explicit findings. All that is required is that the plaintiff introduce “sufficient evidence in support of its claims.” Commercial Bank of Kuwait, 15 F.3d at 241 (“we do not believe that Section 1608(e) requires evidentiary hearings or explicit findings where the record shows that the plaintiff provided sufficient evidence in support of its claims.”).<sup>18</sup>

Accordingly, submission of evidence in the form of affidavits and exhibits satisfies the Section 1608(e) standard. See Antoine v. Atlas Turner, Inc., 66 F.3d 105, 111 (6th Cir. 1995) (affidavits

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<sup>17</sup> The evidentiary requirement of Section 1608(e) is identical to that found in Fed. R. Civ. P. 55(e) regarding the award of default judgments against the United States. See Marziliano v. Heckler, 728 F.2d 151, 157-58 (2d Cir. 1984). Accordingly, in interpreting the evidentiary requirements under Section 1608(e) of the Foreign Sovereign Immunities Act, courts have looked to cases construing the evidentiary requirements under Fed. R. Civ. P. 55(e). See Transaero, 24 F.3d at 462. See also Commercial Bank of Kuwait v. Rafidain Bank, 15 F.3d 238, 241 (2d Cir. 1994) (“Congress promulgated Section 1608(e) to provide foreign sovereigns with the same protections from default protections that the federal government enjoys under Fed. R. Civ. P. 55(e).”).

<sup>18</sup> This is in conformity with the practice under Rule 55(e), which has been interpreted as not requiring an evidentiary hearing or obligating the court to issue explicit findings of fact. See Marziliano, 728 F.2d at 158. All that is required for entry of a judgment under Rule 55(e) is that the district court be satisfied with the evidence submitted in support of the plaintiff’s claims. Id.



may be used in granting default judgments under the FSIA and that their use does not violate due process); The Semi Conductors Materials, Inc. v. Agriculture Inputs Corp., 1998 U.S. Dist. LEXIS 10163 (S.D.N.Y. 1998) (unpublished). Although in this case, plaintiff Dariush Elahi has requested a hearing to present evidence in support of his claim against the defendants, in-court testimony is not required.

Section 1608(e) charges the district court with determining whether the evidence that a plaintiff presents is "satisfactory" to support its claims. Commercial Bank of Kuwait v. Rafidain Bank, 15 F.3d 238, 241 (2d Cir. 1994). The amount of evidence necessary to satisfy this requirement and the standard of proof has been said to be "within the discretion" of the court. Murphy v. The Republic of Panama, 751 F. Supp. 1540 (S.D. Fla. 1990). Although a court need not accept conclusory allegations from the plaintiff, the quantum and quality of evidence that may satisfy a court is less than that normally required in a contested case. See, e.g., Alameda v. Secretary of Health, Education and Welfare, 622 F.2d 1044, 1048 (1st Cir. 1980) (concluding that under Rule 55(e), which is similar to Section 1608(e), that "the quantum and quality of evidence that might satisfy a court can be less than that normally required.").

This Court has recognized that the burden of proof to establish a judgment by default under § 1608(e) is less than if the defendants had contested the matter and had participated in discovery. Dibrell Bros. Tobacco Co, Inc. v. Rafidain Bank, 1994 U.S. Dist. LEXIS 8271, \*8 (D.D.C. June 15, 1994) (unpublished). "To conclude otherwise would have the effect of rewarding foreign governments for shirking their internationally-recognized duty to defend properly-filed cases." Id., citing Ohntrup v. Makina ve Kimya Edustrisi Kurumu, No. 76-742, 1993 WL 315636 (E.D. Pa. August 18, 1993). Hence, the more relaxed evidentiary standard of

Section 1608(e) allows a court to admit evidence that might not otherwise be admissible under a strict reading of the Federal Rules of Evidence.

**V. LEGAL STANDARDS WITH RESPECT TO PLAINTIFF'S CAUSE OF ACTION AND DAMAGE CLAIMS**

**A. Count I – Wrongful Death**

Although the Antiterrorism Act, as initially passed, created a judicial forum competent to adjudicate claims of state-sponsored terrorism against United States nationals, a number of outstanding issues remained, in particular, those pertaining to the various causes of action and damages available to plaintiffs seeking to enforce the statute. Flatow, 999 F. Supp. at 12; Daliberti, 97 F. Supp.2d at 42 n. 1. Accordingly, on September 30, 1996, Congress passed an amendment to Section 1605(a)(7), commonly referred to as the Flatow Amendment, “to fill the void.” Daliberti, 97 F. Supp.2d at 42 n. 1. The Amendment creates a cause of action against agents of a foreign state that engages in state sponsored terrorism within the meaning of § 1605(a)(7) and provides, inter alia, that money damages, including economic damages, solatium, pain and suffering, and punitive damages are available in actions brought pursuant to the Antiterrorism Act. See 28 U.S.C. § 1605 note.<sup>19</sup>

The Antiterrorism Act, 28 U.S.C. § 1605(a)(7), and the Flatow Amendment, 28 U.S.C. § 1605 note, therefore, establish a cause of action for wrongful death proximately caused by an

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<sup>19</sup> The amendment was included as part of the 1997 Omnibus Consolidated Appropriates Act, Pub. L. 104-208, Div. A., Title I, Section 10(c) [Title V, Section 589] (September 30, 1996), 110 Stat. 3009-172, reprinted at 28 U.S.C. § 1605 note.

Although the Flatow Amendment was published as a note to 28 U.S.C. § 1605, it has been interpreted as being an “independent pronouncement of law.” Flatow, 999 F. Supp. at 12. Accordingly, Section 1605(a)(7) and the Flatow Amendment are to be interpreted in pari materia. Flatow, 999 F. Supp. at 13.

act of state-sponsored terrorism – in this case the extrajudicial killing of Cyrus Elahi. Although the FSIA itself does not define the precise scope of a wrongful death cause of action, the courts, in interpreting the statutory provisions, have awarded compensation to a decedent's heirs-at-law for the economic losses that result from the decedent's premature death due to acts of state sponsored terrorism. See Flatow, 999 F. Supp. at 27-28; Eisenfeld, 2000 U.S. Dist. LEXIS 9545 at \*16; Alejandro v. Republic of Cuba, 996 F. Supp. 1239, 1249-50 (S.D. Fla. 1997). This amount includes, for example, the loss of accretions to the decedent's estate based upon the decedent's projected professional profile, with appropriate adjustments for inflation, rise in productivity, job advancement, personal consumption, and net earnings. Flatow, 999 F. Supp. at 28. See also Eisenfeld, *supra*, at \*16.

**B. Count II – Action for Survival Damages**

In Flatow, the court recognized that an action for survival damages for pain and suffering could be brought under the FSIA. See Flatow, 999 F. Supp. at 28. See also Eisenfeld, 2000 U.S. Dist. LEXIS 9545 at \*16-17. Thus, a cause of action that could have been brought by Mr. Elahi but for his death, may be asserted in this lawsuit for the benefit of his Estate. Had Mr. Elahi survived the assassination, he could have asserted a cause of action for the pain and suffering he experienced after being shot by agents of the Defendants. In Count II of the Complaint, plaintiff asserts this claim on behalf of Cyrus Elahi's Estate.<sup>20</sup>

Where a plaintiff presents evidence of conscious pain and suffering on the part of the deceased based upon medical and other reports, courts applying the Antiterrorism Act have awarded to the estates of those individuals killed by terrorist acts survival damages in amount of

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<sup>20</sup> An action for survival damages is separate and distinct from a claim of wrongful death by decedent's heirs-at-law. Hoston v. United States, 566 F. Supp. 1125 (D.D.C. 1983).

one million dollars. See Flatow, 999 F. Supp. at 29 (“This Court finds that an appropriate amount of compensatory damages for Alisa Michelle Flatow’s pain and suffering is \$1,000,000”); Eisenfeld, 2000 U.S. Dist. LEXIS 9545 at \*16-17 (“While the personal suffering was mercifully brief, compensation is required and the Court therefore concludes as a matter of law that an appropriate amount of compensatory damages for pain and suffering for Sara Rachel Duker is \$1,000,000, and that an appropriate amount of compensatory damages for pain and suffering for Matthew Eisenfeld is \$1,000,000.”).

**C. Count III – Punitive Damages**

**1. Punitive Damages May Be Awarded Against Iran and MOIS**

One of the main purposes of the Antiterrorism Act is to provide victims of state sponsored terrorism (or, as in this case, the next-of-kin and personal representative) “an important economic and financial weapon against these outlaw states.” H.R. Rep. No. 104-383, at 182-183. When the Antiterrorism Act was originally enacted on April 1, 1996, however, then-existing liability provisions of the FSIA in Section 1606 prohibited the award of punitive damages against the foreign state itself. See Letelier v. Republic of Chile, 502 F. Supp. 259 (D.D.C. 1980). As noted by the Flatow court, Representative James Saxton, who was Chairman of the House Task Force on Counterterrorism and Unconventional Warfare and a member of the House National Security Committee, was particularly concerned about this flaw in the statutory scheme. 999 F. Supp. at 25. Representative Saxton and other Congressional representatives believed that in order for the Antiterrorism Act to have the desired effect, a court would need to have the authority to award punitive damages; an award of compensatory damages for wrongful death could not “approach a measure of damages reasonably required for a foreign state to take notice.” Id.

Therefore, in the subsequently enacted Flatow Amendment, Congress included a provision to allow for the imposition of punitive damages brought under the Antiterrorism Act, 28 U.S.C. § 1605 note. As explained by Judge Lambert in Flatow, “the Flatow Amendment . . . depart[ed] from the prior enactment [Section 1606] by expressly providing a cause of action for punitive damages for state sponsored terrorism.” 999 F. Supp. at 25.

The Flatow Amendment, however, did not amend Section 1606, so the statutory prohibition in that section on the award of punitive damages directly against a foreign state remained in place. The Flatow court recognized this ambiguity in the statute, but found that notwithstanding the provisions of Section 1606, punitive damages still could be assessed against a foreign state under the theory of vicarious liability or respondeat superior. Flatow, 999 F. Supp. at 25-27. See 28 U.S.C. § 1605 note.<sup>21</sup> Thus, in Flatow, the court held that the victim of a terrorist attack (or the representative of such a victim) could seek monetary damages, including punitive damages, directly from an agency or instrumentality of a foreign state and also vicariously from the foreign state itself. See Flatow, 999 F. Supp. at 27.<sup>22</sup>

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<sup>21</sup> Because Section 1606 still prohibited the award of punitive damages directly against a foreign state, however, where a victim of state-sponsored terrorism sued only the foreign state and did not include an agent of that state as a defendant, punitive damages could not be awarded. See Cicippio v. Islamic Republic of Iran, 18 F. Supp.2d 62, 69 (D.D.C. 1998) (where only foreign state was defendant, punitive damages could not be awarded because Section 1606 stated that “. . . a foreign state . . . shall not be liable for punitive damages”).

<sup>22</sup> Prior to the Flatow decision, in Alejandre, involving claims against the government of Cuba and the Cuban Air Ministry, the Southern District of Florida took the position that compensatory damages could be assessed against the Cuban government on the basis of respondeat superior, but that Section 1606 barred the imposition of punitive damages. As stated by the court, “under the theory of respondeat superior, Cuba is liable for the same amount of damages as its agent, with the exception of punitive damages, which the FSIA prohibits against foreign states. 28 U.S.C. § 1606.” 996 F. Supp. at 1249.

In order to clarify the statutory ambiguity and to confirm that punitive damages could be assessed against foreign states for acts of state sponsored terrorism, in October, 1998, Congress passed a "Conforming Amendment" to Section 1606 to allow for the imposition of punitive damages directly against foreign states in cases brought under 28 U.S.C. § 1605(a)(7).<sup>23</sup> The confirming amendment was included as Section 117(b) of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, which was signed into law on October 21, 1998. Section 117(c) of the Appropriations Act states that the provisions of Section 117 shall apply to "any claim for which a foreign state is not immune under Section 1605(a)(7) of this title arising before, on, or after October 21, 1998."<sup>24</sup>

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<sup>23</sup> The conforming amendment added a clause to Section 1606 to make clear that the foreign state exemption from punitive damages does not apply to "any action under Section 1605(a) or 1610(f)." Pub. L. 105-277, Div. A, § 101(b) [Title I, § 117(b)], October 21, 1998, 112 Stat. 2681-491.

<sup>24</sup> Section 117 of the Appropriations Act also included in subsection (a) two provisions amending 28 U.S.C. § 1610 to allow for the attachment or execution on certain property, including blocked assets of a foreign state, following a judicial determination of liability in a case under Section 1605(a)(7). Subsection (d) of Section 117 additionally contained a waiver provision, which allowed the President to "waive the requirements of this section in the interest of national security."

On the same day that President Clinton signed into law the Appropriations Act, which included Section 117, he issued Presidential Determination 99-1, which invoked the waiver provision of subsection (d) of Section 117. The President's determination dealt with the concern that the amendments in Section 117(a) providing for the attachment of certain blocked assets "would impede the ability of the President to conduct foreign policy in the interest of national security and would, in particular, impede the effectiveness of such prohibitions of the regulations upon the financial transactions. . . ." 63 Fed. Reg. 59201 (October 21, 1998).

There is no indication that the Presidential Determination affected the application of Section 117(b), the "Conforming Amendment," to amend Section 1606 to confirm that punitive damages could be assessed against foreign states. The waiver provision in subsection (d), by its terms, is limited to "the requirements of this Section [Section 117]" not "this section" in general. Subsection 117(b) contains no "requirements"; it merely amends Section 1606.

(continued...)

Because, as shown above, the Islamic Republic of Iran is not immune from suit under Section 1605(a)(7), the amendment to Section 1606 to allow for an award of punitive damages directly against a foreign state applies to this action. Hence, punitive damages may be awarded directly against the Islamic Republic of Iran for its orchestration of the assassination of Cyrus Elahi. There is no need for this Court to resort to the device of respondeat superior liability in order to enter a punitive damages award.<sup>25</sup> In addition, punitive damages also may be awarded against MOIS, which has been found to be an “agency or instrumentality of a foreign state,” i.e., the Islamic Republic of Iran. See 28 U.S.C. § 1606. See also, Flatow, 999 F. Supp. at 26; Anderson, 90 F. Supp.2d at 113.<sup>26</sup>

## 2. Legal Standards for Assessing Punitive Damages

The purpose of punitive damages is, as the name implies, “to punish [a defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future.”

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<sup>24</sup>(...continued)

Subsection 117(a) dealing with the attachment of property, on the other hand, does include various “requirements” pertaining to what property shall be subject to execution and the obligations of the U.S. government to assist judgment auditors. Accordingly, this Court has held that the President’s waiver applies to subsection 117(a), in its entirety. See Flatow v. Islamic Republic of Iran, 76 F. Supp.2d 16, 26 (D.D. C. 1999). But see Alejandre, 42 F. Supp.2d 1317, 1328-1337 (S.D. Fla.) (Presidential waiver applies only to part of Section 117(a)), rev’d on other grounds, 183 F.3d 1277 (11th Cir. 1999).

<sup>25</sup> If the President’s waiver is deemed to encompass the “Conforming Amendment” to Section 1606, however, punitive damages could be imposed upon the Islamic Republic of Iran under the principles of respondeat superior and vicarious liability. See, Flatow, 999 F. Supp. at 25-27.

<sup>26</sup> As set forth in Count IV of the Complaint, defendants Islamic Republic of Iran and MOIS conspired with various named and unnamed individuals to carry out acts of terrorism, including the assassination of Cyrus Elahi. The actions of the defendants as part of the conspiracy renders them jointly and severally liable for all damages awarded to plaintiff. See, e.g., Halberstam v. Welch, 705 F.2d 472 (D.C. Cir. 1983).

Restatement (Second) Torts § 908(1) (1997). See also Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 15 (1991). Courts faced with gross violation of international human rights have employed the tool of punitive damages to achieve these dual purposes. By granting sizeable punitive damage awards, courts have both expressed their moral outrage and condemnation of human rights abuses and, in addition, have attempted to deter future human rights abuses. See Alejandre, 996 F. Supp. at 1250. Thus, punitive damages are said to help reinforce “the consensus of the community of humankind.” Filartiga v. Pena-Irala, 577 F. Supp. 860 (E.D.N.Y. 1984). As explained by Judge Jackson in his opinion in Anderson v. Islamic Republic of Iran, “[t]he victim to whom the award is made . . . stands as a surrogate for civilized society in general; the victim is made more than whole in order that others may be spared a similar injury.” 90 F. Supp. at 113.

In Flatow, Judge Lamberth identified four factors that may be considered in determining an appropriate award of punitive damages: (1) the nature of the act itself, and the extent to which any civilized society would find that act repugnant; (2) the circumstances of its planning; (3) defendants’ economic status with regard to the ability of defendants to pay; and (4) the basis upon which a court might determine the amount of an award reasonably sufficient to deter like conduct in the future, both by the defendants and others. Flatow, 999 F. Supp. at 33.

The October 23, 1990 assassination of Mr. Elahi by agents of MOIS for his outspoken criticism of the Tehran regime, indisputably was intentional, premeditated, malicious, and unprovoked. It should go without saying that such a heinous crime violates fundamental precepts of international law and morality that are binding on all members of the world community. See Xuncax v. Gramajo, 886 F. Supp. 162, 185 (D. Mass. 1995) (“every instrument and agreement that has attempted to define the scope of human rights has ‘recognized a right to



life coupled with a right to due process to protect that right.”) (citation omitted); DeSanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1397 (5th Cir. 1985) (“The standard of human rights that have been generally accepted – and hence incorporated into law of nations . . . encompasses only such basic rights as the right not to be murdered. . . .”); DeLetelier v. Republic of Chile, 488 F. Supp. 665, 673 (D.D.C. 1980) (assassination is “clearly contrary to the precepts of humanity as recognized in both national and international law”); Restatement (Third) of Foreign Relations Law of the United States, § 702(c) (1986) (“A state violates [customary] international law if, as a matter of state policy, it practices, encourages or condones . . . the murder or causing the disappearance of individuals”). The need to redress this violation of fundamental human rights compels the imposition of a sizeable punitive damages award against the defendants.

Yet another reason to award punitive damages in this particular case is to vindicate the interest of society-at-large in supporting the free expression of political ideas anywhere in the world without fear of retaliation or persecution. Mr. Elahi’s killing was not an isolated act of terrorism; his assassination was part of the larger scheme of the Iranian government to eliminate, in short succession, the leaders of both the popular and political opposition movements to the Tehran regime and to serve as a warning to others that the Tehran regime would not tolerate any opposition. MOIS’ success in eliminating these opponents of the Tehran regime spawned additional assaults against free expression and open political dialogue, which continue to this very day.

The chilling effect upon freedom of expression resulting from the Iran government’s state sponsored terrorism has been particularly devastating. Not only political figures, but writers, actors, and musicians who voice thoughts and opinions that the Tehran regime may find

offensive or insulting have found themselves marked for assassination. It is this assault upon basic human rights that has made the current Iranian regime a pariah among the community of nations and has led to the imposition of various types of restrictions and sanctions upon the Iranian government.

Notwithstanding the world-wide efforts to curb the country's terrorist activities and the recent signs of political change within the Iranian government, Iran's terrorist activities continue, apparently, unabated. The government's budget for terrorist actions continues to increase, Fatwas continue to be issued and opponents and critics continue to die. The most recent report by the Department of State in Patterns of Global Terrorism, 1999 (April, 2000), concludes that the actions of Iranian state institutions, most notably MOIS, "in the support of terrorist groups made Iran the most active state sponsor of terrorism." Indeed, in 1999, the State Department specifically noted that "a variety of public reports indicate Iran's security forces conducted several bombings against Iranian dissidents abroad." The continued actions of the Iranian government and its agent of terror, MOIS, in seeking to eliminate all opposition to the clerical regime constitute nothing less than a concerted attack upon the very ideal of free expression and the right to express one's views and opinions without fear of retribution.

Until recently, the Islamic Republic of Iran and other state sponsors of terrorism could hide behind the shield of foreign sovereign immunity and with almost absolute impunity subsidize and direct terrorist groups to serve their own purposes. To remove this shield, Congress created jurisdiction over, and rights of action against, foreign state sponsors of terrorism. By creating these rights of action, Congress intended that the courts impose a substantial financial cost on states that sponsor terrorist groups whose activities are repugnant to

the world community of civilized nations. This cost functions both as a direct deterrent, and also as a disabling mechanism.


In order for a punitive damages award to be an effective deterrent, it must be "individualized, tailor-made for the financial condition of the defendant." Michael L. Rustad, How the Common Good is Served by the Remedy of Punitive Damages, 64 Tenn. L. Rev. 793, 799-800 (1997). Thus, an award of punitive damages against a natural person will involve different financial considerations from that assessed against a corporation, and an award against either an individual or a company will involve different factors from that against a foreign state. National governments by their very nature have substantial financial resources at their disposal. The Islamic Republic of Iran is an OPEC nation with enormous oil reserves and oil revenues and, accordingly, it is appropriate for this Court, in awarding punitive damages, to take into account the enormous wealth Iran has at its disposal to fund its terrorist operations.

In precedent under this statute, courts in this district have awarded punitive damages against both the Islamic Republic of Iran and MOIS based upon an estimate of MOIS annual budget for terrorist activities. In the Flatow case, the testimony indicated that in 1995 when the terrorist bombing that was the subject of the lawsuit occurred, the Islamic Republic of Iran expended approximately \$75,000,000 on terrorist activities and, therefore, the court awarded punitive damages of three times this amount or \$225,000,000. 999 F. Supp. at 34. In Anderson, Judge Jackson recently found that Iran had increased its budget for terrorist activities since the Flatow decision to an estimated \$100,000,00 and awarded the plaintiffs three times that amount or \$300,000,000, in punitive damages. 90 F. Supp.2d at 112. In Eisenfeld, Judge Lamberth used a similar calculus to enter a single award of \$300,000,000 to be divided equally between the two plaintiffs. 2000 U.S. Dist. LEXIS 9545 at \*18.

Further, the cost imposed upon other nations in seeking to protect governmental buildings, including embassies, from attack, as well as the cost of police protection for those targeted for assassination, such as Dr. Ganji, has been enormous. All of these various factors, as well as others that will be addressed at the hearing in this matter, compel an award of punitive damages that truly will be effective in stopping once and for all the ability of Iran to finance its agenda of terror and intimidation. To allow the actions of the Iranian government and MOIS to go unpunished will only serve to reward those who would seek to rule by force and intimidation and to silence free and open debate.

Respectfully submitted,

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