UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 02-21500-CIV-MARRA/SELTZER

COPY

JOSE J. BASULTO,

Plaintiff,

vs.

THE REPUBLIC OF CUBA, et al.,

Defendants.
_____/

FINAL JUDGMENT FOR PLAINTIFF

This Cause is before the Court upon the separately-entered Final Order Finding the Republic of Cuba Liable To Plaintiff. After due consideration, it is **ORDERED AND ADJUDGED** as follows:

1. Judgment is hereby entered for Plaintiff Jose J. Basulto and against Defendant the Republic of Cuba in the amount of $1,750,000.00 in compensatory damages.

2. This Judgment shall bear interest at the rate of 2.85% per annum from the date of this Final Judgment, for which let execution issue.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 19th day of January, 2005.

KENNETH A. MARRA
United States District Judge

Copies furnished to:

Paul Orfandes, Esq.

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CASE NO. 02-21500-CIV-MARRA/SELTZER

JOSE J. BASULTO,

Plaintiff,

vs.

THE REPUBLIC OF CUBA, et al.,

Defendants.

FINAL ORDER FINDING THE REPUBLIC OF CUBA LIABLE TO PLAINTIFF

THIS CAUSE is before the Court upon the bench trial held in this case and the various post-trial submissions. The Court has carefully considered the record, and is otherwise fully advised in the premises. Based upon the record evidence and the applicable law, the Court makes the following findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52.

I. BACKGROUND

Plaintiff, Jose J. Basulto, filed an Amended Complaint asserting claims against the Republic of Cuba, The Cuban Air Force, Fidel Castro Ruz and Raul Castro Ruz. The claims asserted by Plaintiff against Defendants are for assault (Count I), intentional infliction of emotional distress (Count II), and violations of the Anti-Terrorism and Effective Death Penalty Act, 28 U.S.C. § 1605(a)(7) (Count III).[1] These claims arise from an aerial attack by the Cuban Air Force on three civilian planes engaged in a search and rescue mission in international airspace near the Republic of Cuba. [DE 21]. Two of the civilian planes were shot down by the Cuban Air Force, and the passengers on board were killed. Plaintiff piloted a third civilian plane

[1] Count III only seeks relief against the Republic of Cuba and the Cuban Air Force.

that participated in the search and rescue mission. Plaintiff's plane was chased by the Cuban Air Force, but it managed to escape the attack and return safely to Florida. Plaintiff asserts that he was placed in reasonable apprehension of physical injury as a result of the incident. Plaintiff seeks an award of damages against Defendants resulting from the incident, including damages for emotional distress and punitive damages.

A default was entered against the Republic of Cuba. [DE 12]. The two individual defendants, Fidel Castro Ruz, the dictator of Cuba, and Raul Castro Ruz, Fidel Castro's brother and commander of the Cuban Air Force, were not served with process. The fourth Defendant, the Cuban Air Force, also was not served. The Court held a bench trial on the issue of entering a default judgment.[2] Just before trial, Plaintiff moved to amend the complaint to add the Cuban Air Force as a defendant and argued that service upon that entity need not be made. Plaintiff sought to add the Cuban Air Force as a party in order to attempt to collect punitive damages which are not available against a foreign state. 28 U.S.C. § 1606; see Trial Transcript at 4; [DE 27 at 6]. Plaintiff asserted that the Cuban Air Force is an agency or instrumentality of the principal defendant, the Republic of Cuba, which has been served. As a result, Plaintiff argued that service need not be executed upon the Cuban Air Force. [DE 33].

The issues presently before the Court are as follows: (1) whether Plaintiff can proceed against the individual defendants; (2) whether Plaintiff has stated valid causes of action against the Republic of Cuba and the Cuban Air Force; (3) whether Plaintiff can proceed against the Cuban Air Force and recover punitive damages against it; and (4) whether Plaintiff has proven

[2] "No judgment by default shall be entered by a court of the United States . . . against a foreign state . . . or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e).

any liability on the part of the Republic of Cuba or the Cuban Air Force.

II. DISCUSSION

A. CAN PLAINTIFF PROCEED AGAINST THE INDIVIDUAL DEFENDANTS FIDEL CASTRO RUZ AND RAUL CASTRO RUZ?

As to the claims against the individual Defendants Fidel Castro Ruz and Raul Castro Ruz asserted in Counts I and II,[3] the record is clear that service was never effected upon either of them in any capacity, let alone in their individual capacity. At the earliest stages of this lawsuit, the Court put Plaintiff on notice of the requirement of service pursuant to Rule 4(m). See Order to Show Cause [DE 5]. Service was eventually executed only upon the Republic of Cuba. [DE 10]. While Plaintiff argued that service of process upon the Republic of Cuba was effective as to the Cuban Air Force, that argument has not been advanced relative to Fidel or Raul Castro Ruz. Even if that argument had been made, at best, it would only have applicability to these Defendants in their official capacities as agents of the Republic of Cuba. Service of process on a defendant in an official capacity is not effective as to that defendant in his or her individual capacity. See Jackson v. Hayakawa, 682 F.2d 1344, 1347 (9th Cir. 1982) (serving an entity will not confer personal jurisdiction over individuals in any capacity); Love v. Hayden, 757 F. Supp. 1209, 1211 (D. Kan. 1991) (service of process upon a governmental representative authorized to receive service for claims against a defendant in his official capacity does not constitute service over the defendant in his individual capacity).

In addition, in his Post-Trial Memorandum [DE 27], Plaintiff recognized that he had only served the Republic of Cuba and a default had been entered only against that defendant.

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[3] The Amended Complaint indicates that Count III was not directed to the individual Defendants. See p. 11 (above ¶ 46) of the Amended Complaint [DE 21].

Furthermore, Plaintiff did not seek an award of damages from either individual defendant. In his Post-Trial Memorandum, Plaintiff stated: "In the case at bar, Plaintiff seeks money damages from Cuba and the Cuban Air Force." Id. at 3. Plaintiff also asserted that he was entitled to "compensatory damages from both Cuba and the Cuban Air Force." Id. at 8. There was no request for relief against the individual defendants.

This case has now proceeded past the trial. Therefore, the Court has no choice but to dismiss the claims against Fidel Castro Ruz and Raul Castro Ruz for a failure to serve these Defendants. This dismissal, however, is without prejudice to Plaintiff initiating a new legal proceeding against these defendants in their individual capacities and effectuating service of process upon them.[4]

B. HAS PLAINTIFF STATED VALID CAUSES OF ACTION AGAINST THE REPUBLIC OF CUBA AND THE CUBAN AIR FORCE?

Even though a default has been entered, a "default judgment cannot stand on a complaint that fails to state a claim." Chudasama v. Mazda Motor Corporation, 123 F.3d 1353, 1370 n.41 (11th Cir. 1997); see also Whittlesey v. Weyerhauser Co., 640 F.2d 739, 742 (5th Cir. 1981);[5] Nishimatsu Construction Co., Ltd. v. Houston National Bank, 515 F.2d 1200, 1206 (5th Cir. 1975). Thus, the Court must address whether Plaintiff has validly stated a claim. In doing so, the Court must accept all of Plaintiff's allegations as true. Hishon v. King & Spalding, 467

[4] The Court expresses no opinion at this time as to whether Defendant Fidel Castro Ruz is entitled to immunity as a Head of State. See Lafontant v. Aristide, 844 F. Supp. 128 (E.D.N.Y. 1994).

[5] The decisions of the United States Court of Appeals for the Fifth Circuit, as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit. Bonner v. Pritchard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

U.S. 69, 73 (1984).

1. 28 U.S.C. § 1605(a)(7).

Foreign states are immune from the jurisdiction of courts in the United States except to the extent such immunity is waived by Congress. 28 U.S.C. § 1604.[6] Plaintiff initiated this suit pursuant to a provision of the Foreign Sovereign Immunities Act ("FSIA" or "the Act"), namely, 28 U.S.C. § 1605(a)(7); [DE 21,¶ 3]. The Act provides that:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case. . . in which money damages are sought against a foreign state for personal injury or death that was caused by an act of . . . aircraft sabotage . . . or the provision of material support or resources . . . for such act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment or agency. . . .

28 U.S.C. § 1605(a)(7). The FSIA defines "aircraft sabotage" as "an act of violence against a

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[6] Plaintiff correctly relies upon 28 U.S.C. 1330(a) as the basis for the Court's jurisdiction in this case. The sole source of federal jurisdiction in suits against foreign states is 28 U.S.C. § 1330. Argentine Republic v. Amerada Hess Shipping Corporation, 488 U.S. 428, 434 (1989); Arango v. Guzman Travel Advisors, 761 F.2d 1527, 1532 (11th Cir. 1985). Section 1330 provides that the district courts shall have original jurisdiction without regard to the amount in controversy of any nonjury civil action against a foreign state as to any claim for in personam relief for which the foreign state's immunity has been waived under the Foreign Sovereign Immunities ("FSIA"). 28 U.S.C. § 1602, et seq. The statute also provides that personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under the FSIA and where service of process is properly effectuated. 28 U.S.C. § 1330(b). Section 1330(b) created, in effect, a Federal long-arm statute whereby the immunity provisions of the FSIA prescribe the necessary contacts which must exist before courts in the United States can exercise personal jurisdiction. See H.R. Rep. No. 1487, 94th Cong., 2d Sess. 14, reprinted in 1976 U. S. Code Cong. & Ad. News 6604, 6612. Plaintiff incorrectly relies upon 28 U.S.C. § 1332(a)(2) (diversity jurisdiction) as a basis for this Court's jurisdiction. With the passage of the FSIA, diversity jurisdiction was eliminated as a basis for federal jurisdiction over foreign states. Ruggiero v. Compania Peruana de Vapores S.A., 639 F.2d 872, 875-76 (2d Cir, 1981); McKeel v. Islamic Republic of Iran, 722 F.2d 582, 586-87 (9th Cir. 1983) and cases cited therein.

person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft." See 28 U.S.C. § 1605(e)(3), which incorporates Article I of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation. 24 U.S.T. 565 (1973).

Recently, the United States Court of Appeals for the District of Columbia held that 28 U.S.C. § 1605(a)(7) merely abrogates the immunity of foreign states from the jurisdiction of the courts for lawsuits for damages arising from certain enumerated acts of terrorism, but it does not create a cause of action. Cicippio-Puleo v. Islamic Republic of Iran, 353 F.3d 1024, 1033-34 (D.C. Cir. 2004) and Acree v. Republic of Iraq, 370 F.3d 41, 55 (D.C. Cir 2004).[7] On the other hand, with the passage of a statute called Civil Liability For Acts of State Sponsored Terrorism, commonly known as the Flatow Amendment, Congress did create a cause of action against "[a]n official, employee or agent of a foreign state. . . for personal injury or death caused by acts of that official, employee or agent for which the courts of the United States may maintain jurisdiction under section 1605(a)(7)." 28 U.S.C. § 1605 note; Pub. L. 104-208, 110 Stat. 3009, 3172 (1996). The cause of action created by the Flatow Amendment may only be brought against officials, employees and agents of a foreign state, and not against the state itself, and only against such individuals in their individual or personal capacity, not in their official capacity. Cicippio-Puleo, 353 F.3d at 1033.

In the absence of any controlling decisions by the Eleventh Circuit Court of Appeals on

[7] On June 25, 2004, this Court directed Plaintiff to file a memorandum addressing the effect, if any, of these decisions on this case. [DE 34]. On July 26, 2004, Plaintiff filed his memorandum. [DE 36].

these issues,[8] the Court will follow the reasoning of the District of Columbia Court of Appeals. Applying the law to this case, Count III of the Amended Complaint does not state a valid claim against the Republic of Cuba because Plaintiff seeks to hold a foreign state liable under § 1605(a)(7). In addition, even if the Court were to conclude that service of process against the Cuban Air Force is not required, the Cuban Air Force is so inextricably connected with the sovereign affairs of the Republic of Cuba that it is considered a "foreign state" for purposes of § 1605 of the FSIA. See 28 U.S.C. § 1603(a)(b); Roeder v. Islamic Republic of Iran, 333 F.3d 228, 234 (D.C. Cir. 2003), cert. denied, 124 S. Ct. 2836 (2004) (citing Transaero, Inc. v. La Fuerza Aerea Boliviara, 30 F.3d 148, 149-150 (D.C. Cir. 1994) (armed forces of a foreign state are the foreign state itself)). Therefore, Count III fails against the Cuban Air Force as well.

2. 28 U.S.C. § 1605(a)(5).

In his post-trial brief addressing Cicippio-Puleo and Acree, Plaintiff argues that the Florida common law torts of assault and intentional infliction of emotional distress alleged in Counts I and II of the Amended Complaint state valid causes of action. Plaintiff asserts two bases for the viability of these Florida tort claims: (1) 28 U.S.C. § 1605(a)(5), which eliminates immunity of a foreign state for "personal injury or death, or damage to or loss of property, *occurring in the United States* and caused by the tortious act or omission of that foreign state. . . ." (emphasis added) and (2) the suggestion by the court in Cicippio-Puleo that an injured party

[8] In Alejandre v. Telefonica Larga Distancia de Puerto Rico, Inc., 183 F.3d 1277 (11th Cir. 1999), the Eleventh Circuit Court of Appeals addressed the issue of whether in a garnishment action a judgment against the Republic of Cuba (arising from the same operative facts as the present case) could be enforced against certain debts owed to a Cuban telecommunications company. In deciding this issue, the court's references to § 1605(a)(7) appear to be in terms of immunity, and not in terms of a separate cause of action. Alejandre, 183 F.3d at 1283, 1284 n.17.

might pursue a claim against a foreign sovereign whose immunity has been waived under the FSIA if a cause of action exists under a source of law other then the FSIA, including State law. See Cicippio- Puleo, 353 F.3d at 1036.

As to the elimination of immunity under 28 U.S.C. § 1605(a)(5), Plaintiff's claims do not arise from personal injury occurring in the United States. Although Plaintiff asserts that his injury, emotional distress, occurred in the United States, the tortious act which caused the distress occurred in international air space. Both the act and the injury must occur in the United States in order for the foreign state's sovereign immunity to be waived under § 1605(a)(5). Argentine Republic, 488 U.S. at 439-41; Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 379 (7th Cir. 1985); Asociacion de Reclamantes v. United Mexican States, 735 F.2d 1517, 1524-25 (D.C. Cir. 1984), cert. denied, 470 U.S. 1051 (1985); Persinger v. Islamic Republic of Iran, 729 F.2d 835, 842-43 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984). Therefore, Plaintiff cannot rely upon § 1605(a)(5) as a basis for the waiver of a foreign state's immunity, since the acts which give rise to the claims did not occur in the United States within the meaning of that provision.

3. STATE OF FLORIDA TORT CLAIMS.

Although neither 28 U.S.C. § 1605 (a)(7) nor the Flatow Amendment creates a cause of action against a foreign government, this Court concludes that foreign states may be sued in the courts of the United States for acts of air sabotage if a body of law, other than the FSIA, provides a viable cause of action against a private individual under like circumstances. See Cicippio-Puleo, 353 F.3d at 1036. A review of the provisions of the FSIA, its legislative history and cases interpreting the Act support this conclusion.

When it enacted the FSIA, Congress acknowledged the importance of developing a uniform body of law concerning the *amenability* of a foreign sovereign to suit in the courts of the United States. First National City Bank v. Banco Para El Comerico Exterior de Cuba, 462 U.S. 611, 622 n.11 (1983) (citing H .R. Rep. No. 94-1487, at 32) (emphasis added). The FSIA was intended to set forth "the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states," and it was "intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities." H. R. Rep. No. 94-1487, at 12. However, by enacting the FSIA, Congress did not intend "to affect the substantive law of liability." H. R. Rep. No. 94-1487, at 12. Only the question of sovereign immunity is to be decided on the basis of federal law. Skeen v. Federative Republic of Brazil, 566 F. Supp. 1414, 1417 (D.D.C. 1983). Thus, it has been recognized that the FSIA does not create a federal rule of liability to be applied in an action involving a foreign state. Liu v. Republic of China, 892 F.2d 1419, 1425 (9th Cir. 1989).

Rather, "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." First National City Bank, 462 U.S. at 622 n.11. The Act expressly provides that:

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

28 U.S.C. § 1606; Bettis v. Republic of Iran, 315 F.3d 325, 338 (D.C. Cir. 2003) (the courts are

bound to look to state law to determine the "like circumstances" to which 28 U.S.C. § 1606 refers). Pursuant to § 1606, if the immunity of a foreign state has been waived for an act which, under State law, a cause of action exists against a private individual, the substantive law of the State can provide the basis for a valid claim. Thus, under the Act, a foreign state may be held liable as to any claim for relief if the following two requirements are met: (1) the foreign state is not entitled to immunity under § 1605 or § 1607 for the asserted claim for relief; and (2) the claim for relief exists under state law against a private individual in like circumstances.[9] The Court addresses both of these requirements below.

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[9] In deciding questions of liability under the FSIA, issues arise as to which choice of law rules to apply. Courts have differed as to whether to apply federal common law choice of law rules or the choice of law rules of the forum State. Barkanic v. General Administration of Civil Aviation of the People's Republic of China, 923 F.2d 957, 961 (2d Cir. 1991) (the FSIA requires courts to apply the choice of law rules of the forum state); Harris v. Polskie Linie Lotnicze, 820 F.2d 1000, 1003-04 (9th Cir. 1989) (federal common law provides the appropriate choice of law rules in cases arising under the FSIA). The Court need not resolve this question because under either federal common law or Florida law, the choice of law rules relative to a tort claim are the same. Piambra Cortes v. American Airlines, Inc., 177 F.3d 1272, 1296 n. 19 (11th Cir. 1999). Both have adopted the most significant relationship test of the Restatement (Second) of Conflicts of Law § 175 (1971). Green Leaf Nusery v. E.I. DuPont De Nemours and Company, 341 F.3d 1292, 1301 (11th Cir. 2003), cert. denied, 124 S. Ct. 2094 (2004) (Florida law); Harris, 820 F.2d at 1003-04 (federal common law).

In applying the most significant relationship test to this case, the Court concludes that Florida law, as opposed to the law of Cuba, should apply. In view of the Plaintiff's residence in Florida, the fact that the Plaintiff is allegedly suffering the effects of the tortious conduct in Florida and the fact that the alleged act occurred in international airspace, not in Cuba, Florida has the most significant relationship. Moreover, the Court has not been provided with any evidence or other information to determine what Cuba's law might be relative to this case. Under Fed. R. Civ. P. 44.1, a party who intends to raise an issue concerning foreign law must give reasonable notice. The Republic of Cuba has failed to respond to the complaint, and therefore has waived any right it may have had to argue for the application of its law in this case. See Whirlpool Financial Corp. v. Sevaux, 96 F.3d 216, 221 (7th Cir. 1996) (failure to raise timely the issue of foreign law constitutes a waiver); Symonette Shipping Ltd. v. Clark, 365 F.2d 464, 468 n.5 (5th Cir. 1966), cert. denied, 387 U.S. 908 (1967) (in the absence of proof of foreign law the law of the forum should apply).

Sovereign Immunity under Section 1605

Pursuant to § 1606, the Court must first decide whether a foreign state would be entitled to sovereign immunity under either § 1605 or § 1607 for the claims for relief asserted in the Amended Complaint. As previously discussed, pursuant to § 1605, Congress has waived the sovereign immunity of foreign states designated as state sponsors of terrorism in any case where damages are sought for personal injury caused by an act of aircraft sabotage. 28 U.S.C. § 1605(a)(7). The Republic of Cuba has been designated as a state sponsor of terrorism. See 55 Fed. Reg. 37793-01 (1990). Aircraft sabotage is defined as "an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of the aircraft." 28 U.S.C. § 1605(e)(3), which incorporates Article I of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation. 24 U.S.T. 565 (1973).

In the Amended Complaint, Plaintiff asserts a claim of assault under Florida common law.[10] The assault claim seeks damages from Defendants for personal injury caused by an

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[10] Plaintiff has also asserted a cause of action against Defendants under Florida's common law for intentional infliction of emotional distress. Since Plaintiff, as will be discussed more fully below, has successfully asserted a claim for assault, the Court need not consider whether the Republic of Cuba's immunity has been waived for that cause of action as well. The damages which Plaintiff can recover for either cause of action is identical, and Plaintiff could not recover twice for the same injuries. Johnson v. Thigpen, 788 So. 2d 410, 415 (Fla. Dist. Ct. App. 2001) (the measure of damages for intentional infliction of emotional distress and assault, battery and false imprisonment are the same). The lack of a physical impact in this case would not preclude an award of damages which includes a component of emotional distress. In Rowell v. Holt, 850 So. 2d 474, 478 n.1 (Fla. 2003), the Florida Supreme Court acknowledged that the impact rule does not apply to recognized intentional torts that result in predominately emotional damages, and that intentional torts have been deemed exclusions from, rather than exceptions to, the impact rule. Since the essential damage element of an assault is the creation of reasonable fear of imminent peril, it is apparent that emotional damage predominates. Hence, emotional damages are recoverable in Florida as an element of damages for an assault. See also Glickstein v. Setzer, 78 So. 2d 374, 375 (Fla. 1955); Albert v. Miami Transit Co., Inc., 17 So. 2d 89, 91 (Fla. 1944); Setzer v. Tyre, 126 Fla. 139, 171 So. 224, 225 (Fla. 1936) (an award of

alleged aerial attack. Taking the allegations of the Amended Complaint as true, the alleged aerial attack falls within the definition of "aircraft sabotage," provided in § 1605(a)(3), since it was an act of violence against a person on board an aircraft in flight and it was likely to endanger the safety of the aircraft. Moreover, the tort of assault under Florida common law permits the recovery of damages for injuries caused by such acts of violence. Lawrence v. Wal-Mart Stores, Inc., 236 F. Supp. 2d 1314, 1336 (M.D. Fla. 2002) (defining assault under Florida law as an intentional, unlawful offer of corporal injury to another by force, or the exertion of force directed toward another under such circumstances as to create a reasonable fear of imminent peril). Indeed, the violence offered is the essential element of a claim of assault in Florida. Thomas v. Wyatt, 405 So. 2d 1369, 1370 (Fla. Dist. Ct. App. 1981); McDonald v. Ford, 223 So. 2d 553, 555 (Fla. Dist. Ct. App. 1969). Accordingly, the Court concludes that Plaintiff's claim of assault squarely fits within the ambit of the waiver of sovereign immunity provided in § 1605(a)(7).

Claim for Relief under State Law

Although the Republic of Cuba's immunity has been waived for the acts alleged by Plaintiff in the Amended Complaint, in order for Plaintiff to prevail, it must be shown that a private individual would also be liable to Plaintiff "under like circumstances." 28 U.S.C. § 1606. As indicated above, the definition of assault under Florida law is an intentional, unlawful offer of corporal injury to another by force, or exertion of force directed toward another under such circumstances as to create a reasonable fear of imminent peril. Lawrence v. Wal-Mart Stores, Inc., 236 F. Supp. 2d 1314, 1336 (M.D. Fla. 2002). Taking the facts alleged in the Amended

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compensatory damages for assault and battery includes consideration of mental pain and suffering).

Complaint as true, Plaintiff, a resident of the State of Florida, was subjected to an intentional, unlawful aerial attack. Applying Florida's definition of assault, the Court concludes that a private individual engaged in like conduct would be liable to Plaintiff under Florida law for committing an assault. The only remaining question which arises is whether the State of Florida's tort law would apply even though the alleged conduct occurred outside the territorial jurisdiction of this nation.

Initially, the Court notes that the question presented is not one of either subject matter jurisdiction or personal jurisdiction. As previously indicated, the FSIA provides for both subject matter and personal jurisdiction. See n.4, supra. Nor is the question whether the application of State substantive law against a foreign sovereign would be an unwarranted and unconstitutional intrusion by the State in foreign affairs.[11] This is so because Congress has established a federal policy of allowing application of state rules of liability against a foreign sovereign by waiving the foreign sovereign's immunity to suit and by declaring that the foreign sovereign shall be liable in the same manner as a private individual "under like circumstances." Rather, the question is whether the State of Florida has sufficient interests to apply its civil tort law to conduct occurring outside the territorial jurisdiction of this nation.

To assist the Court in answering this question, the Court draws upon the law addressing the right of a *nation* state to exercise jurisdiction over extraterritorial conduct. Under recognized principles of international law, a nation state has jurisdiction to prescribe law with respect to conduct outside its territory that has substantial effects within its territory. Restatement (Third)

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[11] See Zschernig v. Miller, 389 U.S. 429 (1968); Hines v. Davidowitz, 312 U.S. 52 (1941).

of Foreign Relations Law of the United States § 402 (1987) ("Restatement Third").[12] Additionally, an attack on an aircraft is recognized as a matter of universal concern among the community of nations, and a nation state has jurisdiction to define and prescribe punishment for such an offense. Restatement Third § 404.[13] Jurisdiction on the basis of universal interests permits a nation state to establish remedies in tort. Id., cmt. b; see Kadic v. Karadzic, 70 F.3d 232, 240 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996). Indeed, on numerous occasions, Congress has demonstrated the right of the United States to exercise such jurisdiction.[14]

Similarly, the right of the several States of the United States to prescribe laws relative to

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[12] Section 402 of the Restatement Third provides:

> Subject to § 403, a state has jurisdiction to prescribe law with respect to...
> (1)(c) conduct outside its territory that has or is intended to have substantial effect within its territory;

This is known as the "effects principle" of territoriality jurisdiction. Id., cmt d.

[13] Section 404 of the Restatement Third provides:

> A state [under international law, not a State of the United States] has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as ....attacks on or hijacking of aircraft...., even where none of the bases of jurisdiction indicated in § 402 is present.

The bases of jurisdiction recognized in § 402 of the Restatement Third are territoriality, nationality and the protective principle.

[14] Alien Tort Statute, 28 U.S.C. § 1350 ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."); Torture Victim Protection Act of 1991, Pub. L. 102-256, 106 Stat. 73 (1992) (an individual who, under actual or apparent authority or color of law of any foreign nation, subjects an individual to torture or extrajudicial killing shall be liable for damages in a civil action); Flatow Amendment, 28 U.S.C. 1605 note (an official, employee, or agent of a foreign state designated as a state sponsor of terrorism, while acting within the scope of his or her office, employment or agency, shall be liable to a United States national for personal injury caused by the acts of that official for money damages).

the such extraterritorial conduct is also recognized under the same principles of international law, so long as the exercise of such jurisdiction does not violate constitutional limitations. Restatement Third § 402, Reporters' Note 5; cmt. k; see State v. Stepansky, 761 So. 2d 1027, 1035-36 (Fla. 2000) (Florida had the sovereign authority to exercise criminal jurisdiction over acts committed outside the territorial limits of the State under the effects doctrine as long as the exercise of jurisdiction does not conflict with federal law and the exercise of jurisdiction is a reasonable application of the effects doctrine). This Court concludes that just as the United States has exercised its authority to prescribe civil tort remedies for acts occurring outside its territorial jurisdiction, the State of Florida has a similar interest in protecting its citizens from tortious conduct directed against an aircraft in international airspace which has a detrimental effect on its citizens after their return to the State. Permitting a State to extend its civil tort law to protect one of its citizens against a private individual who engages in such conduct does not conflict with any constitutional limitation or federal law. The Court fails to see what federal interest would be served by allowing private individuals to escape civil liability for tortious acts having effects within a State because the conduct occurred outside the territorial jurisdiction of this nation. Since a private individual who has committed such an act can be held liable under Florida law, so too can a foreign nation whose immunity has been waived.

In summary, the Court concludes, pursuant to 28 U.S.C. § 1606, that the cause of action of assault exists under Florida law against a private individual for engaging in the extraterritorial conduct that allegedly occurred in this case. Accordingly, and because a foreign state is not entitled to immunity under § 1605 for the damages sought in this case, Plaintiff may assert the

claim of assault against Defendants.[15]

C. CAN PLAINTIFF PROCEED AGAINST AND RECOVER PUNITIVE DAMAGES FROM THE CUBAN AIR FORCE?

As previously discussed, at the trial of this case, Plaintiff moved to amend his complaint to add the Cuban Air Force as a defendant. The purpose of adding that entity as a party was to allow Plaintiff to seek an award of punitive damages. The FSIA precludes an award of punitive damages against the foreign state, but that limitation does not apply to "an agency or instrumentality" of the foreign state. 28 U.S.C. § 1606.

In determining whether an entity related to a foreign nation is one of its agencies or instrumentalities or the foreign nation itself, the courts have adopted a "categorical approach": if the core functions of the entity are governmental it is considered the foreign state itself; if commercial, the entity is an agency or instrumentality of the foreign state. Roeder, 333 F.3d at 234 (citing Transaero, Inc., 30 F.3d at 149-53); Segni v. Commercial Office of Spain, 650 F. Supp. 1040, 1041-42 (N.D. Ill. 1986). Clearly, a foreign state's armed forces are governmental in nature and are considered the foreign state itself rather than an agency or instrumentality. Transaero, Inc., 30 F.3d at 149-50; Unidyne Corporation, v. Aerolineas Argentinas, 590 F. Supp. 398, 400 (E.D. Va. 1984) (department of Argentine Navy was a foreign state and not an agency or instrumentality of Argentina). As a result, the Cuban Air Force is a foreign state, and not an agency or instrumentality thereof, within the meaning of § 1606 of the FSIA. Thus, Plaintiff may

[15] The Court notes that the "act of state doctrine" in its traditional formulation also would not preclude Plaintiff from proceeding against the Republic of Cuba since the acts in question were not committed in Cuba's territory. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964).

not recover punitive damages against the Cuban Air Force.[16]

Although the Cuban Air Force is not "an agency or instrumentality" of the Republic of Cuba, but rather is more akin to a political subdivision,[17] it does not follow that the Cuban Air Force is not a separate juridical entity for purposes of service of process. See Marlowe v. Argentine Naval Commission, 604 F. Supp. 703, 707 (D.D.C. 1985) (the fact that the Argentine Naval Commission is a foreign state and not an agency or instrumentality thereof within the meaning of the FSIA does not demonstrate a lack of juridical capacity). The FSIA recognizes that political subdivisions of a foreign state must be served with process just as an agency or instrumentality must. Cf. 28 U.S.C. § 1608(a) (service upon a foreign state or a political subdivision of a foreign state) with 28 U.S.C. § 1608(b) (service upon an agency or instrumentality of a foreign state). Plaintiff has not served the Cuban Air Force. Being a political subdivision of the Republic of Cuba, it too should be served with process in order for Plaintiff to be able to proceed against it. Therefore, the Court concludes that it must dismiss the claims against the Cuban Air Force for failure to effect serve of process. This dismissal,

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[16] The Court recognizes that this holding differs from the holding of the court in Alejandre v. Republic of Cuba, 996 F. Supp. 1239, 1249 n.8 (S.D. Fla. 1997). The court in Alejandre did not discuss the analysis contained in Transaero, Inc. The Alejandre court cited two district court opinions in support of its conclusion that punitive damages could be awarded against the Cuban Air Force. Gibbons v. Republic of Ireland, 532 F. Supp. 668 (D.D.C. 1982); Letelier v. Republic of Chile, 502 F.Supp. 259 (D.D.C. 1980). Those opinions did not analyze the term "agency or instrumentality" of a foreign state relative to core governmental versus commercial functions. Moreover, in Gibbons, no relief was awarded to the plaintiff and the government agencies involved were engaged in commercial activities. In Letelier, it appears that punitive damages were awarded directly against the Republic of Chile in direct contravention of the prohibition contained in § 1606 of the FSIA. This Court finds the rationale adopted by the District of Columbia Court of Appeals more persuasive and follows it here.

[17] A political subdivision of a foreign state includes all governmental units beneath the central government. Unidyne Corporation, 590 F. Supp. at 400.

however, is without prejudice to Plaintiff initiating a new legal proceeding against the defendant and effectuating service of process upon it.

D. HAS PLAINTIFF PROVED THE REPUBLIC OF CUBA AND THE CUBAN AIR FORCE COMMITTED AN ASSAULT AGAINST HIM?

The undisputed evidence at trial demonstrated that Plaintiff, a United States' citizen and resident of Florida,[18] is the founder and president of an organization known as Brothers to the Rescue. The mission of the organization is to assist individuals who are attempting to escape from Cuba by boat to the United States. The members patrol the Straits of Florida by airplane looking for people who are en route to the United States from Cuba. Upon locating potential refugees, the United States Coast Guard is alerted, and aid is rendered. Plaintiff estimates that the organization has saved in excess of thirty thousand people since the founding of the organization in 1991.

On February 24, 1996, three (3) civilian airplanes embarked on a rescue mission leaving from an airport in Miami-Dade County, Florida. Plaintiff piloted one of the aircraft. There were no weapons on any of the planes. During the course of the mission, as the planes approached the 24th parallel in international airspace, the Cuban authorities were notified of their presence in the area. This procedure was consistent with a protocol that had been established with the United States government. The weather and visibility that day were excellent.

After notifying the Cuban authorities of their intention to cross the 24th parallel, Plaintiff and his compatriots were advised that the area which they were planning to search was "active," and that they were "in danger upon crossing the 24th parallel." Plaintiff's Exhibit 1 at 4-

[18] See Amended Complaint, ¶ 4. [DE 21]. Upon the entry of a default, the allegations of the complaint as deemed admitted. Nishimatsu Construction Co., 515 F.2d at 1206.

5. The three planes continued with their mission, never entering Cuban airspace. Trial Transcript at 19. Thereafter, a Cuban Air Force MiG fighter crossed Plaintiff's windshield. Plaintiff exclaimed, "They are going to shoot at us. They are going to shoot at us." Plaintiff's Exhibit 1 at 6. Plaintiff then lost contact with one of the other planes. Plaintiff observed smoke in the distance and could not believe what had occurred; one of the planes had been shot down. Plaintiff continued to fly in an easterly direction. Eight to ten minutes later, Plaintiff observed a second plume of smoke. At that point, Plaintiff changed course and headed in a northerly direction toward a ship he had seen earlier. Plaintiff concluded that if his airplane was going to be shot down, the occupants of the ship could be witnesses. Trial Transcript at 20-22.

Plaintiff was pursued by the Cuban Air Force for approximately thirty (30) minutes. At one point during the incident, Plaintiff stated "we are next." He and the others on board the airplane "were expecting to lose our lives at any time." Id. at 22. Plaintiff "was scared, scared to death" as a result of the attack. Id. at 29. The attack by the Cuban Air Force required Plaintiff to fly the airplane in a manner that was endangering his life and the lives of the others on board. Id. at 22-23. Plaintiff eventually returned safely to Florida after taking evasive measures. Id. at 22-29.

These facts establish both an act of air sabotage as defined by the waiver of immunity provisions of 28 U.S.C. § 1605(a)(7) and an assault under Florida common law. The acts of the Cuban Air Force were acts of violence against persons, including Plaintiff, on board a civilian aircraft in flight which endangered the safety of the aircraft. Additionally, they were intentional, unlawful offers of corporal injury by force toward Plaintiff which created a reasonable fear of imminent peril. Since Fidel Castro Ruz, as Head of State of the Republic of Cuba, took

responsibility for the incident, Plaintiff's Exhibit 3, the Republic of Cuba is liable to Plaintiff for assault.[19]

E. WHAT AMOUNT OF DAMAGE IS PLAINTIFF ENTITLED TO RECOVER?

Because the Republic of Cuba assaulted Plaintiff, he is entitled to an award of damages which includes a component for emotional distress. See n. 8, supra. Plaintiff is seeking an award of compensatory damages of $75,920,000.00, representing $5,000.00 per day from the date of the incident through the time he is expected to live (41.6 years). [DE 27 at 6][20]

Clearly, Plaintiff has and will continue to suffer adversely from the effects of the tragic incident in which four of his compatriots were intentionally and unjustifiably killed. Plaintiff's recovery, however, must be proximately related to the tortious conduct directed toward him. Thus, Plaintiff's damages, including any claim for emotional distress, must derive from the fear of imminent peril which he experienced and the continuing effects that fear will have on him in the future. Plaintiff may not recover for the adverse effects, including emotional distress, attributable to tortious conduct directed toward others, namely, the death of the other members of

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[19] The doctrine of respondeat superior applies in determining the liability of a foreign sovereign under the FSIA. See Joseph v. Office of Consulate General of Nigeria, 830 F. 2d 1018, 1025 (9th Cir. 1987), cert. denied, 485 U.S. 905 (1988); Skeen, 566 F. Supp. at 1417-18. The courts look to state law to resolve such questions. Id. Under Florida's law of respondeat superior, the Republic of Cuba is liable for the acts of the Cuban Air Force which were within the scope of its undertaking and which were expressly authorized by its head of state, Fidel Castro Ruz. Schropp v. Crown Eurocars, Inc., 654 So. 2d 1158 (Fla. 1995) (a principal may be held directly liable for the intentional acts of a person holding a policy making position); Iglesia Cristiana La Casa Del Senor, Inc. v. L.M., 783 So. 2d 353 (Fla. Dist Ct. App. 2001) (a principal can be held liable for the tortious or criminal act of its agent if the act was committed during the scope and course of the agent's undertaking and it was to further a purpose or interest of the principal, however excessive or misguided).

[20] Plaintiff also requested an award of $45,900,000.00 in punitive damages, but the Court has concluded punitive damages cannot be awarded in this case. See § II C, supra.

his organization who perished in the incident.

In Metropolitan Life Ins. Co. v. McCarson, 467 So. 2d 277 (Fla. 1985), the Florida Supreme Court approved § 46 of the Restatement (Second) of Torts (1965). See R. J. v. Humana of Florida, Inc., 652 So. 2d 360, 363 n.2 (Fla. 1995) ("In McCarson, we approved section 46 of the Restatement (Second) of Torts (1965)"). Section 46 provides:

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

Under § 46 of the Restatement, Plaintiff, who is not a family member of the four deceased members of his organization, would have to establish bodily harm in order to recover for emotional distress resulting from their death.[21] The rule is the same under federal common law. Bettis, 315 F.3d at 335-38 (where outrageous conduct causing emotional distress is directed at a third person, only immediate family members of the third person or individuals who are present

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[21] See Bodine v. Federal Kemper Life Assurance Company, 912 F.2d 1373, 1378 n.7 (11th Cir. 1990) (claims for emotional distress stemming from acts directed to third parties are limited to plaintiffs with close family relationships to the persons directly impacted and injured); Reyonlds v. State Farm Mutual Automobile Insurance Company, 611 So. 2d 1294, 1297 (Fla. Dist Ct. App. 1992), cause dismissed, 519 So.2d 986 (Fla. 1993) (fiancé could not sue); Ferretti v.Weber, 513 So.2d 1333 (Fla. Dist. Ct. App.), cause dismissed, 519 So.2d 986(1987) ("live in" boyfriend could not sue)

at the time of the outrageous conduct and suffer bodily harm from the distress can recover damages for emotional distress). The physical manifestations of injury Plaintiff claims to have suffered in this case, namely overeating, weight gain and insomnia,[22] are not sufficient to entitle him to an award of emotional distress damages resulting from the death of the other members of his organization. See Brown v. Cadillac Motor Car Division, 468 So. 2d 903, 904 (Fla. 1985) (demonstrable physical injury needed for recovery of damages for psychological trauma includes death, paralysis, muscular impairment or similar objectively discernible physical impairment); R. J., 652 So. 2d at 364 (hypertension does not meet physical injury requirement); Gonzalez-Jimenez De Ruiz v. United States, 231 F. Supp. 2d 1187, 1201-02 (M.D. Fla. 2002) (exacerbation of pre-existing diabetes and triggering of asthma attacks do not meet physical injury requirement). Thus, Plaintiff cannot recover for the emotional distress he has and will continue to suffer attributable to the death of the four members of the Brothers to the Rescue that were killed by the Cuban Air Force. It is apparent from a review of Plaintiff's testimony, however, that the most significant effects on him resulting from this tragic incident relate to the death of his four companions, and not to the assault. Trial Transcript, at 23-24, 29-30, 31-34.

Focusing solely on the effects of the assault upon him, the record establishes that Plaintiff feared for his life during the entire incident. Plaintiff was pursued for over 30 minutes by military aircraft after realizing that the two other airplanes that accompanied him had perished. Knowing that others had already died could only have exacerbated the trauma that Plaintiff experienced from the assault as he attempted to evade almost certain peril.

The trauma Plaintiff experienced persists today. Plaintiff justifiably continues to fear for

[22] [DE 27 at 6].

his life. In his words, "I have a MiG on my tail for the rest of my life." Trial Transcript at 31. This continued fear has affected his daily activities and ability to enjoy life; such as eating, sleeping, socializing and, not surprisingly, flying. In view of the severe nature of the assault, the prolonged period of time Plaintiff was subjected to the terror of the incident, and the continuing adverse effects this incident has had and will continue to have upon Plaintiff in the future, including emotional trauma and distress, the Court awards Plaintiff compensatory damages in the amount of $1,750,000.00.

III. CONCLUSION

Based upon all of the foregoing, it is hereby ordered and adjudged as follows:

1. Plaintiff shall recover from the Republic of Cuba the amount of $1,750,000.00 in compensatory damages based upon Count I of the Amended Complaint for assault. A judgment shall be entered this date by separate order.

2. Plaintiff's claim asserted in Count II of the Amended Complaint, intentional infliction of emotional distress, to the extent such a cause of action may be asserted against a foreign state, is dismissed against the Republic of Cuba as being duplicative of the relief awarded pursuant to Count I for assault.

3. Plaintiff's claim asserted in Count III of the Amended Complaint is dismissed for failure to state a claim upon which relief can be granted.

4. Plaintiff's claims against Defendants Fidel Castro Ruz, Raul Castro Ruz and the Cuban Air Force are dismissed, without prejudice, for failure to serve these Defendants with process.

5. Any other pending motions are denied as moot.

6. The Clerk may close this case.

DONE AND ORDERED in Chambers at Fort Lauderdale, Florida, Broward County, Florida, this 19th day of January, 2005.

KENNETH A. MARRA
United States District Judge

copies to:

Paul Orfandes, Esq.