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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-2267

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PLAINTIFFS-APPELLEES,

and

REED TRIPLETT,
PLAINTIFF

and

OLLESHA SMITH JEAN; JACK EARL SWENSON,
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v.

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No. 16-2365

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PLAINTIFFS-APPELLANTS,

and

REED TRIPLETT,
PLAINTIFF,

and

OLLESHA SMITH JEAN; JACK EARL SWENSON,
CONSOLIDATED PLAINTIFFS,

v.

REPUBLIC OF SUDAN,
DEFENDANT-APPELLEE.

UNITED STATES OF AMERICA,
AMICUS SUPPORTING APPELLEE.

Argued: October 24, 2017
Decided: January 19, 2018

Before WILKINSON, DUNCAN, and AGEE, Circuit Judges.

OPINION

AGEE, Circuit Judge.

For over a decade, family members of United States sailors killed in the bombing of the *U.S.S. Cole* have pursued litigation in federal court against the Republic of Sudan for its alleged support of Al Qaeda, which was responsible for the bombing. This appeal arises from the latest suit wherein the district court denied Sudan's motion to vacate the default judgments entered against it. Because the Appellees' method of serving process did not comport with the statutory requirements of 28 U.S.C. § 1608(a)(3), we hold the district court lacked personal jurisdiction over Sudan. Accordingly, we reverse the district court's order denying Sudan's motion to vacate, vacate the judgments, and remand with instructions.

I.

On October 12, 2000, Al Qaeda bombed the *U.S.S. Cole*, a United States Navy guided-missile destroyer, as it was refueling in the Port of Aden in Yemen. Seventeen American sailors were killed and forty-two more were injured.

A.

In 2004, family members of the deceased sailors filed a complaint against Sudan in the United States District Court for the Eastern District of Virginia ("the *Rux* litigation").[1] Although foreign states generally enjoy immun-

[1] This summary of the *Rux* litigation is drawn from *Rux v. Republic of Sudan*, 410 F. App'x 581 (4th Cir. 2011); *Rux v. Republic of the Sudan*, 2009 WL 9057606 (4th Cir. July 4, 2009); and *Rux v. Republic of Sudan*, 461 F.3d 461 (4th Cir. 2006). The judgments entered in the *Rux* litigation are final and unaffected by the appeal currently before the Court. We summarize what occurred to provide context for the current lawsuit.

ity from suit in federal courts, 28 U.S.C. § 1604, the Foreign Sovereign Immunity Act ("FSIA") authorizes suits against a foreign state that has provided material support for certain acts of terrorism ("the terrorism exception"). Under the version of the FSIA in effect in 2004, the terrorism exception gave federal courts jurisdiction over the foreign state, but any claims had to be grounded in another substantive area of the law. *See* 28 U.S.C. § 1605(a)(7) (repealed 2008). Accordingly, the *Rux* plaintiffs' substantive claims rested on violations of the Death on the High Seas Act. With limited exceptions, Sudan did not enter appearances or otherwise defend the *Rux* suit. Following a series of rulings and appeals that are not relevant to this appeal, the district court held that Sudan was liable and awarded compensatory damages to the plaintiffs. The *Rux* plaintiffs appealed the district court's denial of their claim for additional damages. During the pendency of that appeal, Congress passed the National Defense Authorization Act for Fiscal Year 2008 ("NDAA"), Pub. L. No. 110–181, § 1083(b)(1)(A)(iii), 122 Stat. 341.

The NDAA, which became effective on January 28, 2008, repealed the prior FSIA terrorism exception to foreign state immunity, reenacted the exception's immunity-stripping language, and created a new substantive cause of action under the FSIA that authorizes recovery of non-economic damages, including solatium and punitive damages. *See* NDAA, Pub. L. No. 110-181, § 1083 (codified at 28 U.S.C. § 1605A). The FSIA's new cause of action also specifically authorizes suit based on certain pre-enactment events so long as delineated criteria are satisfied. § 1605A(b). We granted the *Rux* plaintiffs' motion to remand for further proceedings in the district court in light of the revised statutory framework. *Rux*, 2009 WL 9057606 at *1.

On remand, the *Rux* plaintiffs sought leave to supplement their complaint to include a claim for noneconomic damages under § 1605A(c). The district court denied the motion and the *Rux* plaintiffs again appealed. While that appeal was pending, the *Rux* plaintiffs and four new plaintiffs filed "a new, related action pursuant to 28 U.S.C. § 1605A in the [United States District Court for the] Eastern District of Virginia." *Rux*, 410 F. App'x at 582. In relevant part, we held that the filing of this new complaint rendered moot the *Rux* plaintiffs' arguments and we dismissed that appeal. *Rux*, 510 F. App'x at 586.

B.

The current appeal arises from the district court's adjudication of that "new, related action" brought under the amended FSIA.[2] Kumar filed the current complaint in April 2010, alleging that Sudan's conduct satisfied the immunity-stripping language of § 1605A(a)(1) and caused the death of the seventeen sailors killed on board the

[2] The plaintiffs in this case consist of both the original *Rux* plaintiffs and several new plaintiffs. For purposes of this appeal, this factual difference is of no consequence and they stand on the same legal footing. We refer to the plaintiffs collectively as "Kumar," one of the named plaintiffs.

After Kumar first filed the § 1605A-based complaint, the district court sua sponte concluded that res judicata barred the *Rux* plaintiffs' claims and denied Kumar's motion for entry of default. On appeal, we reversed and remanded the case for further proceedings, *Clodfelter* v. *Republic of Sudan*, 720 F.3d 199, 212 (4th Cir. 2013), which have led to the appeal now before us.

U.S.S. Cole, in violation of the FSIA's new cause of action, § 1605A(c). He sought solatium and punitive damages.

In an effort to effectuate service of process pursuant to 28 U.S.C. § 1608(a)(3), the clerk of court sent the requisite documents "via certified mail, return receipt requested," in an envelope addressed as follows:

> REPUBLIC OF SUDAN
> Serve: Deng Alor Koul,
> Minister of Foreign Affairs
> Embassy of the Republic of Sudan
> 2210 Massachusetts Avenue NW
> Washington, DC 20008

J.A. 158. Someone at the embassy accepted the envelope and signed the certified mail receipt.

Nevertheless, Sudan did not enter an appearance or file any responsive pleadings. Consequently, Kumar moved for entry of default and for the court to schedule proceedings allowing adjudication of a default judgment. Following a bench trial, the district court "found that Sudan's provision of material support and resources to al Qaeda led to the murders of the seventeen American servicemen and women serving on the *Cole*, and entered judgment against Sudan under the FSIA." J.A. 446. To more efficiently resolve the issue of damages, the court divided the suit into seventeen separate cases, each case involving all claims related to one of the seventeen deceased sailors.

In March 2015, after considering additional evidence on the alleged damages, the district court entered separate default judgment orders collectively awarding over $20 million in solatium and approximately $14 million in punitive damages to the Kumar plaintiffs.

In April 2015, just over thirty days after entry of those orders, Sudan entered an appearance and moved to vacate the default judgments under Federal Rules of Civil Procedure 55(c) and 60(b). In the alternative, Sudan requested the district court extend its time to appeal from the default judgments. In support of its motion, Sudan asserted numerous arguments challenging the district court's subject matter and personal jurisdiction, as well as the propriety of punitive damages.

The district court denied the motion to vacate, rejecting each of Sudan's contentions. It did, however, grant Sudan's motion for an extension of time to file a notice of appeal from the March 2015 default judgments. Sudan noted its appeal from both the default judgments and the denial of its post-judgment motions. In addition, Kumar noted a cross appeal challenging the district court's order extending Sudan's time to appeal. We have jurisdiction over both appeals pursuant to 28 U.S.C. § 1291.

II.

Sudan contends the district court lacked personal jurisdiction over it because Kumar did not properly effectuate service of process as required under the FSIA. Specifically, it contends that mailing service to the Sudanese embassy in Washington, D.C., does not satisfy 28 U.S.C. § 1608(a)(3) and contravenes the 1961 Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes ("Vienna Convention"), Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, which provides that a foreign state's diplomatic mission is inviolable. If the district court lacked personal jurisdiction, then the judgment against Sudan is void. *Koehler* v. *Dodwell*, 152 F.3d 304, 306-07

(4th Cir. 1998) ("[A]ny judgment entered against a defendant over whom the court does not have personal jurisdiction is void.").

Because the issue before us is one of statutory interpretation, we review de novo the district court's conclusion that Kumar's method of serving process satisfied § 1608(a)(3).[3] *Broughman* v. *Carver*, 624 F.3d 670, 674 (4th Cir. 2010).

A.

The Federal Rule of Civil Procedure governing service of process provides that "[a] foreign state . . . must be served in accordance with 28 U.S.C. § 1608," *i.e.*, the FSIA. Fed. R. Civ. P. 4(j)(1). That statute, in turn, describes four methods of serving process on a foreign state, listed in hierarchical order. § 1608(a).

The first method is "in accordance with any special arrangement for service between the plaintiff and the foreign state." § 1608(a)(1). If no such arrangement exists,

[3] Although Sudan appeals from both the March 2015 default judgments and the denial of its Rule 60(b) motion, our standard of review is the same in either posture given that the distilled issue before us is one of statutory interpretation: did Kumar's method of serving process comply with § 1608(a)(3)? Because Sudan prevails on this issue regardless of which decision is reviewed, we need not consider Kumar's argument on cross appeal that the district court erred in granting Sudan additional time to file its notice of appeal from the default judgments. *See United States v. Winestock*, 340 F.3d 200 (4th Cir. 2003) ("District court decisions granting or denying Rule 60(b) relief are reviewed for abuse of discretion, although the exercise of discretion cannot be permitted to stand if we find it rests upon an error of law.").

then service may be made "in accordance with an applicable international convention on service of judicial documents." § 1608(a)(2). And "if service cannot be made under [either of these provisions, the specified documents,] together with a translation of each into the official language of the foreign state, [can be sent] by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." § 1608(a)(3). Lastly,

> if service cannot be made within 30 days under [the third method described, then two copies of the documents, along with the requisite translation can be sent] by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

§ 1608(a)(4).

There is no dispute that the first two methods of service described in § 1608(a) were not available to Kumar.[4]

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[4] Sudan and the United States do not have any special arrangement for serving process, and Sudan is not a signatory to the Convention on Service Abroad of Judicial and Extrajudicial Documents, Nov. 15,

Further, Kumar did not attempt to serve process by delivering the requisite documents through diplomatic channels as set out in subsection (a)(4), in part because failure of subsection (a)(3) service is a prerequisite to pursuing service under subsection (a)(4) and no question arose as to the validity of Kumar's method of serving process until after judgment.

The question before the Court, then, is limited to whether Kumar satisfied § 1608(a)(3), which allows service by mail "requiring a signed receipt[] to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state." Specifically, we must decide whether Kumar satisfied the "addressed and dispatched to" requirement when he submitted the packet to be mailed by the clerk of court to the Sudanese embassy in Washington, D.C. Sudan does not contest compliance with the other components of service under subsection (a)(3) and the record shows Kumar instructed the clerk of court to send the requisite documents via the United States Postal Service's certified mail system, which is "a[] form of mail requiring a signed receipt." Consequently, our review is limited to whether delivering process to a foreign nation's embassy and identifying the head of that nation's ministry of foreign affairs as the recipient satisfies subsection (a)(3)'s requirement that the mailing is "addressed and dispatched to the head of the ministry of foreign affairs of the foreign state."

1965, 20 U.S.T. 361, T.I.A.S. No. 6638, commonly known as the Hague Service Convention.

B.

As always, our duty in a case involving statutory interpretation is "to ascertain and implement the intent of Congress." *Broughman*, 624 F.3d at 674.[5] We begin with the statute's text. *Ross v. R.A. North Dev., Inc.* (*In re Total Realty Mgmt., LLC*), 706 F.3d 245, 254 (4th Cir. 2013). In addition, "[t]he Supreme Court has often emphasized the crucial role of context as a tool of statutory construction. For example, the Court has stated that when construing a statute, courts must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155 (4th Cir. 1998). As a result, "the traditional rules of statutory construction to be used in ascertaining congressional intent include: the overall statutory scheme, legislative history, the history of evolving congressional regulation in the area, and a consideration of other relevant statutes." *Id.*

We begin with a general observation: based on § 1608(a)'s four precise methods for service of process and how that language contrasts with § 1608(b), subsection (a) requires strict compliance. Subsection (b), which applies in suits against "an agency or instrumentality of a foreign state," contains both specific methods of serving process, § 1608(b)(1)-(2), and a catchall provision expressly allowing service by any method "reasonably calculated to give actual notice," § 1608(b)(3). Although Congress authorized an array of specific and general service options under subsection (b), it did not include a similar catchall provision in subsection (a). This contrast between

[5] Here, and throughout, we have omitted internal quotation marks, citations, and alterations unless otherwise noted.

two subsections of the same statute suggests that Congress intended that the four methods authorized under subsection (a) be the exclusive and explicit means of effectuating service of process against foreign states. *Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). In other words, had Congress intended for a non-delineated method or actual notice to satisfy the requirements for serving process on a foreign state, it would have indicated as much by including a similar "reasonably calculated" provision in subsection (a). It did not do so.

Thus, a court cannot excuse noncompliance with the specific requirements of § 1608(a). *See Magness* v. *Russ. Federation*, 247 F.3d 609, 612-617 (5th Cir. 2001) ("Based on [other decisions], the express language of section 1608(a), and the United States' interest in ensuring that the proper officials of a foreign state are notified when a suit is instituted, we hold that plaintiffs must strictly comply with the statutory service of process provisions when suing a foreign state . . . under section 1608(a)."); *Transaero, Inc.* v. *La Fuerza Aerea Boliviana*, 30 F.3d 148, 153-54 (D.C. Cir. 1994) ("We hold that strict adherence to the terms of 1608(a) is required.").[6] In short, "[l]eniency" when applying § 1608(a) "would disorder the

[6] The Ninth Circuit has broadly stated that it has adopted "a substantial compliance test for the FSIA[]," but a review of its cases shows that it has only applied that test to a § 1608(a) service of process challenge where the plaintiff personally sent service of process rather than requesting the clerk of court to do so. *See Peterson* v. *Islamic Republic of Iran*, 627 F.3d 1117, 1129-30 (9th Cir. 2010); *Straub v. A P Green Inc.*, 38 F.3d 448, 453-54 (9th Cir. 1994).

statutory scheme" Congress enacted. *Transaero*, 30 F.3d at 154.

We now turn to what, specifically, subsection (a)(3) requires of a plaintiff. First, we note the text does not specify a geographic location for the service of process. Instead, subsection (a)(3) requires that the mailing of process be "addressed and dispatched" to the head of the ministry of foreign affairs. This phrase does not meaningfully limit the geographic location where service is to be made, though it does reinforce that the location must be related to the intended recipient. *See* address, *Oxford English Dictionary* (defining the verb "address" as "[t]o send in a particular direction or towards a particular location" or "[t]o direct (a written communication) to a specific person or destination," "[t]o direct to the attention of, communicate to"); dispatch, *Oxford English Dictionary* (defining the verb "dispatch" as "[t]o send off post-haste or with expedition or promptitude (a messenger, message, etc., having an express destination). The word regularly used for the sending of official messengers, and messages, of couriers, troops, mails, telegrams, parcels, express trains, packet-boats, etc."). As we discuss below, our sister circuits have held that subsection (a)(3) is satisfied where process is mailed to the head of the ministry of foreign affairs at the ministry of foreign affairs' address in the foreign state. *See, e.g.*, *Gates v. Syrian Arab Republic*, 646 F.3d 1, 4-5 (D.C. Cir. 2011); *Peterson*, 627 F.3d at 1129. But Kumar contends that subsection (a)(3)'s silence as to geographic location for the mailing means that the statute does not *require* service to be sent to the foreign state *and* that it allows service delivered to the foreign state's embassy in the United States.

Although Kumar does not advocate such an extreme position, the view that subsection (a)(3) only requires a particular recipient, and not a particular location, would allow the clerk of court to send service to *any* geographic location so long as the head of the ministry of foreign affairs of the defendant foreign state is identified as the intended recipient. That view cannot be consistent with Congress' intent: otherwise, service via General Delivery in Peoria, Illinois could be argued as sufficient.

While it is true that subsection (a)(3) does not specify delivery only at the foreign ministry in the foreign state's capital, Kumar's premise that subsection (a)(3) does not require service to be sent there does not lead to his conclusion that service at the embassy satisfies the obligation under subsection (a)(3). The statute is simply ambiguous as to whether delivery at the foreign state's embassy meets subsection (a)(3) given that while the head of a ministry of foreign affairs generally oversees a foreign state's embassies, the foreign minister is rarely—if ever—present there. Serving the foreign minister at a location removed from where he or she actually works is at least in tension with Congress' objective, even if it is not strictly prohibited by the statutory language.

Because the plain language of subsection (a)(3) does not fully resolve the issue before us, we turn elsewhere for guidance as to Congress' intent. *See Lee* v. *Norfolk S. Ry. Co.*, 802 F.3d 626, 631 (4th Cir. 2015) ("[I]f the text of a statute is ambiguous, we look to other indicia of congressional intent such as the legislative history to interpret the statute."). Here, the FSIA's legislative history, coupled with the United States' obligations under the Vienna Convention, as well as the "great weight" accorded the State

Department's interpretation of such foreign treaty matters, lead us to the conclusion that subsection (a)(3) is not satisfied by delivery of process to a foreign state's embassy

To understand this interplay, we first observe the obligation under the Vienna Convention that "[t]he premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission."[7] Vienna Convention, *supra* art. 22, ¶ 1. Elsewhere, the Vienna Convention protects the inviolability of diplomatic agents. *See id.* art. 29.[8]

The House Judiciary Committee Report regarding the enactment of § 1608(a) shows that the statute is meant to account for the United States' rights and obligations under the Vienna Convention. *See* H.R. Rep. No. 94-1487 (1977), *as reprinted in* 1976 U.S.C.C.A.N. 6604. The FSIA—including § 1608 in its present form—was first enacted in 1976, four years after the Vienna Convention entered into force for the United States. *See Tabion* v. *Mufti*, 73 F.3d 535, 538 n.5 (4th Cir. 1996). Congress knew

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[7] The Vienna Convention sets out certain privileges and immunities governing diplomatic relations between States, including those governing permanent diplomatic missions. The "'premises of the mission' are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission." Vienna Convention, *supra* art. 1(i).

[8] The United States is a signatory to the Vienna Convention and thus bound by its terms. *See* Vienna Convention, *supra* Presidential Proclamation ("I, Richard Nixon, President of the United States of America, proclaim and make public the Convention and the Optional Protocol to the end that they shall be observed and fulfilled with good faith on and after December 13, 1972 by the United States of America[.]").

and considered the Convention's obligations in drafting the FSIA. Specifically, the first draft of the bill allowed for service on a foreign state by "registered or certified mail . . . to the ambassador or chief of mission of the foreign state." S. 566, 93d Cong. § 1608 (2d Sess. 1973). The Department of State recommended removing that option based on its view that this method of service would violate Article 22 of the Vienna Convention. *See* H.R. Rep. No. 94-1487, at 26, *as reprinted in* 1976 U.S.C.C.A.N., at 6625; 71 Dep't of State Bull. 458, 458-59 (1974).

The House Report also took "[s]pecial note" of a "means . . . currently in use in attempting to commence litigation against a foreign state." H.R. Rep. No. 94–1487, at 26, *as reprinted in* 1976 U.S.C.C.A.N., at 6625. Describing "the mailing of a copy of the summons and complaint *to* a diplomatic mission of the foreign state" as a means of serving process that was "*of questionable validity*," the House Report states that "[s]ection 1608 *precludes this method* [*of service*] so as to *avoid questions of inconsistency with section 1 of article 22 of the Vienna Convention on Diplomatic Relations*[.]" *Id.* (emphases added). The Report then reiterates "[s]ervice *on* an embassy by mail would be precluded under this bill." *Id.* (emphasis added). Thus, the House Report confirms that Congress did not intend § 1608 to allow for the mailing of service "to" or "on" a diplomatic mission as such a method would transgress the treaty obligations of the United States under the Vienna Convention.

In previously interpreting other provisions of the Vienna Convention, we have recognized that it "should be construed to give effect to the intent of the signatories," considering both its language and "the context in which the words were used." *Tabion*, 73 F.3d at 537. Moreover,

"[t]reaties generally are liberally construed." *Id.* The question then becomes whether the Vienna Convention's inviolability provision prohibits the application of subsection (a)(3) in the manner that allows service of process as Kumar executed in this case: service delivered to the foreign nation's embassy in the United States. We conclude the Vienna Convention does exactly that.

Kumar contends there is a dispositive difference for purposes of subsection (a)(3) when an embassy itself is served at the embassy's address (which Kumar agrees would violate the Vienna Convention) and when the head of the ministry of foreign affairs is served at the embassy's address (which Kumar contends does not violate the Vienna Convention). We fail to discern any meaningful distinction here. In the first instance, both the embassy and its address are used in an attempt to serve the foreign state; in the second, the embassy address is used as the head of the ministry of foreign affairs' address in an attempt to serve the foreign state. In both cases, a plaintiff has relied on the foreign states' embassy as the vehicle for effectuating service of process on the foreign state. Either action impinges upon the unique characteristics of a diplomatic mission recognized and protected by the Vienna Convention and casts the embassy in the role as agent for service of process. Any distinction between service "on" the embassy or "via" the embassy thus seems a meaningless semantic distinction.[9]

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[9] The Vienna Convention allows "the head of the mission" to waive the inviolability of the premises. *See* Vienna Convention, *supra* art. 22, ¶ 1 ("The agents of the receiving State may not enter [the premises of the mission], except with the consent of the head of the mission."). Here, however, there is no evidence in the record to suggest

In foreign affairs matters such as we consider here, we afford the view of the Department of State "substantial deference." *See Abbott* v. *Abbott*, 130 S.Ct. 1983, 1993 (2010) ("It is well settled that the Executive Branch's interpretation of a treaty is entitled to great weight."); *Tabion*, 73 F.3d at 538 ("Substantial deference is due to the State Department's conclusion" about the meaning of a treaty's provisions). This judicial deference stems in part from the Constitution's grant to the Executive Branch—not the Judicial Branch—of broad oversight over foreign affairs. *Compare* U.S. Const. art. 2, § 2, cl. 2, *and* § 3 (reserving to the Executive Branch the ability to "make Treaties" and "receive Ambassadors and other public Ministers"), *with* U.S. Const. art. 3 (containing no similar oversight of foreign affairs). In this case, the State Department contends that service at an embassy does not satisfy subsection (a)(3) and is inconsistent with the United States' obligations under the Vienna Convention. *See* Br. for the United States as Amicus Curiae in Supp. of Reversal 11 ("There is an international consensus that a litigant's service of process through mail or personal delivery to a foreign mission is inconsistent with the inviolability of the mission enshrined in" Article 22 of the Vienna Convention).

Relatedly, the Court properly considers the diplomatic interests of the United States when construing the Vienna Convention and the FSIA. *See Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984)

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that the Sudanese Ambassador did so. Simple acceptance of the certified mailing from the clerk of court does not demonstrate a waiver. That conclusion follows all the more strongly because the signature does not appear to be that of the Ambassador. Furthermore, no record document shows Sudan's Ambassador has authorized waiver as a general matter or for purposes of service in this case.

(noting that, in construing the FSIA, courts should consider the United States' interest in reciprocal treatment abroad). The United States has represented that it routinely "refuses to recognize the propriety of a private party's service through mail or personal delivery to a United States embassy." Br. for the United States as Amicus Curiae in Supp. of Reversal 13. The following example illustrates the wisdom of deferring to the State Department's interpretation in this area: As noted, citing the Vienna Convention's provisions, the Secretary of State "routinely refuses to recognize" attempts to serve process on the United States by mail sent to U.S. embassies in foreign states. *See* Br. for the United States as Amicus Curiae in Supp. of Reversal 13-14. The legitimacy and sustainability of that position would be compromised were we to countenance Kumar's method of serving process to the Sudanese embassy. Why would a foreign judiciary recognize the United States' interpretation of the Vienna Convention when it comes to rejecting service of process via its own embassies if that same method for purposes of serving process on foreign states were permitted in the United States? Clearly, the United States cannot expect to receive treatment under the Vienna Convention that its own courts do not recognize in similar circumstances involving foreign states. This dilemma is avoided by the construction of subsection (a)(3) urged by the State Department. We find its longstanding policy and interpretation of these provisions authoritative, reasoned, and entitled to great weight.

In view of the ambiguity in § 1608(a)(3) as to the place of service, we conclude the legislative history, the Vienna Convention, and the State Department's considered view to mean that the statute does not authorize delivery of service to a foreign state's embassy even if it correctly

identifies the intended recipient as the head of the ministry of foreign affairs. Put another way, process is not properly "addressed and dispatched to" the head of the ministry of foreign affairs as required under § 1608(a)(3) when it is delivered to the foreign state's embassy in Washington, D.C.

We recognize that this holding adds to the existing tension between the courts of appeals' interpretations of § 1608(a)(3), but it aligns with the greater weight of those holdings. For instance, it is consistent with the approaches taken in the D.C. and Seventh Circuits. Although it has not been confronted with the precise issue raised in this case, the D.C. Circuit has suggested that § 1608(a)(3) requires service on the head of the ministry of foreign affairs in the foreign state. *See Barot* v. *Embassy of the Republic of Zam.*, 785 F.3d 26, 28, 30 (D.C. Cir. 2015) (noting that the district court rejected plaintiff's attempt to serve process at the Zambian Embassy "in Washington D.C., rather than at the Ministry of Foreign Affairs in Lusaka, Zambia, *as the Act required*" and remanding to the district court so the plaintiff had the opportunity "to effect service pursuant to [28 U.S.C. §] 1608(a)(3)" by having the clerk of court send service "to the head of the ministry of foreign affairs in Lusaka, Zambia, whether identified by name or title, and not to any other official or agency"). Similarly, the Seventh Circuit observed that the Vienna Convention and § 1608 both prohibited a plaintiff from effectuating service under subsection (b)(3)'s catchall provision by serving process on a foreign company "wholly owned by the Belarusian government" by delivering it to the Belarusian ambassador at the embassy in Washington, D.C. *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 739, 749-50 (7th Cir. 2007) (holding "service *through* an embassy is

expressly banned both by an international treaty to which the United States is a party and by U.S. statutory law" because the treaty prohibits service on a diplomatic officer and § 1608 does not authorize service of process on an ambassador (emphasis added)).[10]

Our holding conflicts with the view of the Second Circuit, which has held that serving Sudan's head of the ministry of foreign affairs in a package that was delivered by certified mail to the Sudanese embassy in Washington, D.C., satisfies § 1608(a)(3). *Harrison* v. *Republic of Sudan* (*Harrison I*), 802 F.3d 399, 402-06 (2d Cir. 2015), *reh'g denied*, 838 F.3d 86 (*Harrison II*) (2d Cir. 2016) (denying petition for rehearing following further briefing and argument, and elaborating on the reasons for affirmance). The Second Circuit concluded "principles of mission inviolability and diplomatic immunity are [not] implicated" where service is made "*via* the embassy address." *Harrison I*, 802 F.3d at 405; *see also Harrison II*, 838 F.3d at 94 (distinguishing between service "on the Minister of Foreign Affairs at the foreign mission" and service "on the foreign mission itself or the ambassador"). For the

[10] The United States contends the Fifth Circuit has also taken this view of § 1608(a)(3). But the facts of *Magness* bear little relation to what occurred here. There, the plaintiffs attempted to serve process by sending the "complaint to the Texas Secretary of State for forwarding to Boris Yeltsin" and "directly to the Russian Deputy Minister of Culture." *Magness*, 247 F.3d at 613. The plaintiffs in *Magness* never attempted to serve process "through the Ministry of Foreign Affairs," *id.*, but the Fifth Circuit did not address the physical location where such service could be sent.

reasons we've already explained, we find the Second Circuit's reasoning weak and unconvincing.[11] [12]

Several additional grounds the Second Circuit relied on merit brief discussion as well. First, after acknowledging § 1608(a)(3)'s silence as to geographic location, the court noted that "[i]f Congress had wanted to require that the mailing be sent to the head of the ministry of foreign affairs in the foreign country, it could have said so. In § 1608(a)(4), for example, Congress specified that the papers be mailed to the Secretary of State *in Washington, District of Columbia*[.]" *Harrison I*, 802 F.3d at 404; *accord Harrison II*, 838 F.3d at 91 ("If Congress had

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[11] The distinction Kumar advances, and accepted by the Second Circuit in *Harrison*, rests on the artificial, non-textual distinction between service "on" the embassy and "via" the embassy. As noted earlier, we find no such distinction for purposes of subsection (a)(3). In both cases, the embassy is the de facto agent for service of process, something the Vienna Convention does not allow absent a waiver of mission inviolability. Further, although the Second Circuit acknowledged the State Department's view is to be afforded "great weight," *Harrison II*, 838 F.3d at 95, it summarily rejected that position, which seems to accord the State Department's view no weight at all. In contrast, the position we adopt in this case respects the "great weight" the State Department's view merits.

[12] A petition for certiorari in *Harrison* is currently pending before the Supreme Court, and the question presented squarely raises the issue of whether subsection (a)(3) and the Vienna Convention allow service of process "by mail addressed and dispatched to the head of the foreign state's ministry of foreign affairs 'via' or in 'care of' the foreign state's diplomatic mission in the United States." Pet. for a Writ of Cert. at i, *Republic of Sudan v. Harrison*, No. 16-1094 (U.S. Mar. 9, 2017). Shortly before we heard oral argument in this case, the Supreme Court invited the Solicitor General to file a brief expressing the views of the United States. *Republic of Sudan* v. *Harrison*, 138 S.Ct. 293 (2017) (mem.). At present, the Solicitor General has not filed its brief.

wanted to require that the mailing be sent to the minister of foreign affairs at the principal office of the ministry in the foreign country, it could have said so—but it did not."). We do not find this point to be persuasive given that subsection (a)(4) directs attention to one known location for one country—the United States—and so can be easily identified. *See* 28 U.S.C. § 1608(a)(4).

Second, the Second Circuit observed that requiring process "to a ministry of foreign affairs in the foreign country, makes little sense from a reliability perspective and as a matter of policy" given the reliability of a diplomatic pouch. *Harrison I*, 802 F.3d at 406; *accord Harrison II*, 838 F.3d at 90 & n.3 (approving of service on an embassy because such service "could reasonably be expected to result in delivery to the intended person," as the embassy "is the nerve center for a country's diplomatic affairs within the borders of another nation"). This misses the mark for multiple reasons. Reliability and policy concerns have no role when considering what the text of the statute—construed in light of the Vienna Convention—means. Subsection (a)(3) requires plaintiffs to attempt service by mail "requiring a signed receipt," but leaves the specific use of certified mail or other method open to take into account concerns about reliability of service on a particular foreign state. Moreover, § 1608(a) specifically contemplates that service via subsection (a)(3) may not be possible in every foreign state, as recognized by subsection (a)(4), which allows for service under the alternative of using diplomatic channels. If, after thirty days, a plaintiff is unable to effectuate service pursuant to subsection (a)(3), he or she can turn to subsection (a)(4). *That* is the subsection that Congress intended plaintiffs to use to take advantage of the reliability and security of the diplomatic pouch.

Further, the method to effectuate service of process the United States undertakes does not violate the Vienna Convention because it respects international norms of communication via diplomatic channels. *See* Oct. 26, 2017, Letter from the United States as Amicus Curiae 1-2 ("When transmitting legal process through diplomatic channels, the State Department's typical practice is for the United States' embassy in the foreign state to deliver the papers to the state's foreign ministry. In some unusual circumstances, or if the foreign state so requests, the State Department will transmit process to a foreign state's embassy in the United States. In either case, the State Department transmits the papers under cover of a diplomatic note to the foreign state. . . . [T]his *transmission of legal papers from one executive to another* is considered to be communication through diplomatic channels." (emphasis added)). Certified mail sent from the clerk of court to the head of the ministry of foreign affairs at the foreign state's embassy is not of the same level and protocol and does not similarly respect the inviolability of the embassy for purposes of complying with the Vienna Convention.

III.

Because the attempted service of process in this case did not comply with the FSIA's statutory requirements, the district court lacked personal jurisdiction over Sudan and could not enter judgment against it. *See* 28 U.S.C. § 1330(b) ("Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction ... where service has been made under [28 U.S.C. § 1608(a)]."); *see also Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) ("Personal jurisdiction . . . is an essential element of the jurisdiction of

a district court, without which the court is powerless to proceed to an adjudication."). For that reason, the judgments entered against Sudan are void.

We therefore reverse the district court's denial of Sudan's motion to vacate the entry of judgment, vacate the judgments against it, and remand to the district court with instructions to allow Kumar the opportunity to perfect service of process in a manner consistent with this opinion.

REVERSED IN PART, VACATED IN PART, AND REMANDED WITH INSTRUCTIONS.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

LEAD CASE NO. 2:10cv171

CIVIL NOS. 2:13cv618,
2:13cv619, 2:13cv620, 2:13cv621,
2:13cv622, 2:13cv623, 2:13cv624,
2:13cv625, 2:13cv626, 2:13cv627,
2:13cv628, 2:13cv629, 2:13cv630,
2:13cv631, 2:13cv632, 2:13cv633,
2:13 cv634

October 25, 2016

AVINESH KUMAR, et al.,
Plaintiffs,

v.

REPUBLIC OF SUDAN,
Defendant.

OPINION AND ORDER

This matter comes before the Court on the Republic of Sudan's ("Sudan") motion to vacate the default judgments issued against it in this case, and seventeen related cases, on April 29, 2014, and March 13, 17, and 18, 2015.

ECF No. 134. Sudan seeks relief from these judgments pursuant to Federal Rule of Civil Procedure 55(c) or, in the alternative, Federal Rule of Civil Procedure 60(b). Sudan additionally requests an extension of time to file a notice of appeal pursuant to Rule 4(a)(5) of the Federal Rules of Appellate Procedure should its request for vacatur be denied. For the reasons set forth herein, Sudan's Motion to Vacate Default Judgments is **DENIED** as to its request to vacate the default judgments entered against it; however, Sudan is **GRANTED** an extension of time to file a notice of appeal.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arises from the terrorist bombing of the *U.S.S. Cole* ("*Cole*"), an American Navy Destroyer, on October 12, 2000.[1] While the *Cole* was refueling in the Port of Aden in Yemen, two males approached the vessel in a small boat and detonated a suicide bomb. The explosion ripped a thirty-two by thirty-six foot hole in the port side of the *Cole*. The blast and its after-effects killed seventeen Navy sailors, all of them American citizens, and injured

[1] The facts giving rise to this action have been recounted in greater detail in the Court's previous opinion, *Kumar v. Republic of Sudan*, No. 2:10cv171, 2011 WL 4369122, at *1-2 (E.D. Va. Sept. 19, 2011) (drawing extensively from the Court's opinion in *Rux v. Republic of Sudan*, 495 F. Supp. 2d 541, 542-54 (E.D. Va. 2007)). Similarly, much of the procedural history preceding the instant motion has been recounted in previous opinions issued by this Court and the United States Court of Appeals for the Fourth Circuit. *See Clodfelter v. Republic of Sudan*, 720 F.3d 199, 202-04 (4th Cir. 2013); *Kumar v. Republic of Sudan*, No. 2:10cv171, 2015 WL 1291787, at *1 (E.D. Va. Mar. 13, 2015); *Kumar v. Republic of Sudan*, No. 2:10cv171, 2011 WL 4369122, at *1-6 (E.D. Va. Sept. 19, 2011).

forty-two others. The attack was soon determined to have been orchestrated by al Qaeda operatives. The Plaintiffs in this case, divided into seventeen related cases, include sixty-two family members-spouses, siblings, parents, and children-of the seventeen Navy sailors who were killed.[2] Their complaint alleges that Sudan is liable for seventeen counts of wrongful death under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605A, for providing material support and assistance to the al Qaeda operatives who perpetrated the Cole bombing. Compl., ECF No. 1, ¶¶ 24–25.

A. THE *RUX* ACTION

While the instant action commenced on April 15, 2010, its relevant procedural history began in 2004, when fifty-nine of the same family-member Plaintiffs who filed this action sued Sudan in *Rux v. Republic of Sudan*, 495 F. Supp. 2d 541 (E.D. Va. 2007) for its role in the Cole bombing.[3] These individuals (hereinafter, "*Rux* Plaintiffs") brought suit under Section 1605(a)(7) of the Foreign Sovereign Immunities Act ("FSIA"), an exception carved out

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[2] Sixty-one family members of the deceased were originally named as plaintiffs in the complaint filed on April 15, 2010. ECF No. 1. Two additional family members, Jack Earl Swenson and Ollesha Smith Jean, filed a similar suit on October 7, 2010, (No. 2:10cv498), which this Court later consolidated with the instant action (No. 2:10cv171). ECF No. 28. On February 25, 2015, now-deceased plaintiff Reed Triplett was dismissed from the case, *see* ECF No. 118, resulting in a total of sixty-two family member-plaintiffs. The sixty-third plaintiff, Timothy P. Sceviour, was named as personal representative of the estates of the seventeen deceased victims. *See* discussion *infra* Part II.

[3] One of these fifty-nine plaintiffs is now deceased and was dismissed from the current action in 2015. *See supra* note 2.

of the FSIA for state sponsors of terrorism.[4] This section, now repealed, operated to strip these countries of the immunity otherwise provided to them under the FSIA and to confer subject matter jurisdiction over actions brought against them in federal court. But the provision did not provide an independent cause of action. *See Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1034 (D.C. Cir. 2004). The *Rux* Plaintiffs alleged substantive causes of action for wrongful death under the Death on the High Seas Act ("DOHSA"), 46 U.S.C. §§ 30301 *et. seq.*, and state law claims for intentional infliction of emotional distress and maritime wrongful death.

Sudan initially failed to defend the *Rux* suit, and the Clerk of the Court entered default against it on February 16, 2005. No. 2:04cv428, Dkt. No. 18. But on June 17, 2005, after retaining Hunton & Williams LLP as counsel, Sudan entered an appearance and filed a motion to vacate the entry of default judgment, which the Court granted. *See id.*, Dkt. Nos. 29, 35. At the hearing on the motion to vacate, the Court specifically confirmed with Hunton & Williams LLP that it was authorized by Sudan to appear and that it would remain Sudan's counsel throughout the course of the proceedings. *Id.*, Dkt. No. 36, June 30, 2005 Hr'g Tr. 4:23-6:20.

Sudan subsequently filed a motion to dismiss the action for lack of subject matter jurisdiction, which the Court denied on August 26, 2005. *See id.*, Dkt. Nos. 41, 47. Sudan appealed the ruling, which the United States

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[4] Sudan has been designated a "state sponsor of terrorism" by the United States Department of State since August 12, 1993. *See State Sponsors of Terrorism*, U.S. Dep't of State: Diplomacy in Action (Sept. 1, 2016), http://www.state.gov/j/ct/list/c14151.htm.

Court of Appeals for the Fourth Circuit ("Court of Appeals") affirmed. *See Rux v. Republic of Sudan*, 461 F.3d 461, 477 (4th Cir. 2006). Sudan's counsel then notified this Court by letter, dated October 25, 2006, that "Sudan has instructed us that it will not defend or otherwise participate in this proceeding on the merits, and that Hunton & Williams is not authorized to file an answer to the complaint." Because the Court had stated at the outset that counsel could not belatedly participate in the case unless it understood that it must continue as counsel until the conclusion of the case, the Court ordered Sudan to file an answer or other responsive pleading. *See* No. 2:04cv428, Dkt. No. 53. No such pleading was filed, and the Clerk of the Court entered default against Sudan on February 7, 2007. *Id.*, Dkt. No. 61. When the *Rux* Plaintiffs filed their Fourth Amended Complaint on February 20, 2007, Sudan's counsel filed a motion to dismiss, which was denied. *See id.*, Dkt. Nos. 68, 72. The Court again ordered Sudan to file an answer, but Sudan did not comply. *Id.*, Dkt. No. 72. Instead, Hunton & Williams LLP submitted a letter to the Court on March 5, 2007, reiterating that Sudan had withdrawn its authorization to litigate the case on the merits.

After a two-day bench trial on March 13 and 14, 2007, this Court concluded that the *Rux* Plaintiffs had submitted sufficient evidence to establish their DOHSA claims and to merit the entry of default judgment against Sudan pursuant to 28 U.S.C. § 1608(e). On July 25, 2007, the Court issued an Opinion and Order detailing its factual findings and conclusions of law. *Rux v. Republic of Sudan*, 495 F. Supp. 2d 541 (E.D. Va. 2007). As indicated therein, the Court found Sudan liable under DOHSA and ordered it to pay economic damages amounting to $7,956,344 plus post-judgment interest. *Id.* at 569. These damages did not include recovery for non-pecuniary losses, which are not

compensable under DOHSA. The Court dismissed the *Rux* Plaintiffs' remaining state law claims, *id.* at 565, and the *Rux* Plaintiffs appealed.

While the case was pending on appeal, Congress amended the FSIA in 2008 to create a separate federal cause of action for injuries caused by acts of state-sponsored terrorism and to allow plaintiffs to recover "economic damages, solatium, pain and suffering, and punitive damages." 28 U.S.C. *§* 1605A(c). In light of this statutory amendment, the *Rux* Plaintiffs moved for summary disposition of their appeal and filed a motion in this Court on January 29, 2008, to reopen their case and enter judgment under 28 U.S.C. § 1605A. *See* No. 2:04cv428, Dkt. No. 102. The Court of Appeals remanded the case to this Court for further proceedings to determine whether the newly created private right of action under the FSIA took precedence over DOHSA's remedy for death on the high seas where, as here, the deaths were related to terrorist acts. *See Rux v. Republic of the Sudan*, No. 07-1835, 2009 WL 9057606, at *1 (4th Cir. July 4, 2009). The *Rux* Plaintiffs then sought to amend their complaint to add a cause of action under the newly created Section 1605A. No. 2:04cv428, Dkt. No. 114.

After the case was reopened, counsel for Sudan moved to withdraw. *Id.*, Dkt. No. 110 (noting that Sudan failed to pay legal fees and had not communicated with counsel since August of 2007). On September 10, 2009, the Court denied counsel's request and ordered Sudan to respond to the *Rux* Plaintiffs' motion to amend their complaint.[5] *Id.*,

[5] In this order, the Court explained: 'The Court advised Counsel at the outset of these proceedings that withdrawal was not an option. In no uncertain terms, Counsel agreed to represent the Republic of Sudan throughout the entirety of this proceeding, even if payment

Dkt. No. 116. On September 30, 2009, counsel for Sudan advised the Court by letter, which the Court filed, that counsel had no authority to file answers or other documents because "Sudan objects to this Court's subject matter jurisdiction and has instructed us not to defend or otherwise participate in this proceeding on the merits." *Id.*, Dkt. No. 120. The Court subsequently denied the *Rux* Plaintiffs' motion to amend, and the *Rux* Plaintiffs filed a Notice of Appeal. *See id.*, Dkt. Nos. 132, 134.

B. THE CURRENT ACTION

While the case was again pending on appeal before the Court of Appeals, the *Rux* Plaintiffs, along with four additional family members of the deceased *Cole* victims, filed the instant suit.[6] Once again, Sudan failed to enter an appearance, and Plaintiffs moved for an entry of default. ECF No. 15. The Court ordered a hearing on default judgment and, after considering briefs and conducting the hearing, the Court denied default judgment as to the fifty-nine *Rux* Plaintiffs and withheld ruling on default judgment as to the four new plaintiffs. Op. & Order, ECF No. 29. The Plaintiffs appealed, and the Court of Appeals reversed the Court's denial of default judgment as to the fifty-nine *Rux* Plaintiffs and remanded the case to allow the *Rux* Plaintiffs to pursue their Section 1605A claims. *Clodfelter v. Republic of Sudan*, 720 F.3d 199, 212 (4th Cir. 2013). On November 15, 2013, this Court divided the action into seventeen separate but related cases (Nos.

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was not forthcoming.... Counsel accepted an obligation to represent Sudan until the conclusion of this case." *Id.* at 2, 3. *See* discussion *infra* Section III.C.2.

[6] Two of these new plaintiffs, Jack Earl Swenson and Ollesha Smith Jean, were added in 2011 when their separate suit was consolidated with the instant action. *See supra* note 2.

2:13cv618 through 2:13cv634), one for each deceased victim of the *Cole* bombing. ECF No. 55.

On April 29, 2014, after conducting a bench trial, this Court found that Sudan's provision of material support and resources to al Qaeda led to the murders of seventeen American servicemen and women serving on the *Cole*, and entered judgment against Sudan under the FSIA. Mem. Op., ECF No. 98, at 3. The Court took under advisement the issue of damages as to each plaintiff. *Id.* Per the Court's order, the Clerk entered Judgment against Sudan. ECF No. 99. After reviewing deposition testimony and holding an evidentiary hearing, the Court ruled on the issue of damages on March 13, 2015. Mem. Op., ECF No. 120. On March 17, 2015, the Court issued seventeen orders in the related cases setting the amount of damages and post- judgment interest for each family-member plaintiff. *See* ECF No. 3 in Nos. 2:13cv618–2:13cv633; ECF No. 2 in No. 2:13cv634. On March 18, 2015, the Clerk entered seventeen corresponding Judgments. *See* ECF No. 4 in Nos. 2:13cv618–2:13cv633; ECF No. 3 in No. 2:13cv634.

C. SUDAN'S PENDING MOTION TO VACATE

On April 21, 2015, Sudan entered its first appearance in this action, five years after the complaint was filed and almost ten years after Sudan first appeared in *Rux*. ECF No. 121. With its appearance, Sudan submitted a motion and supporting memorandum requesting a status conference and indicated its intent to file a motion to vacate the default judgments entered against it.[7] ECF Nos. 125, 126.

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[7] In its memorandum, Sudan's counsel explained that they "ha[d] been recently retained to represent Sudan in its efforts to address

On May 14, 2015, Sudan filed the instant Motion to Vacate Default Judgments ("Motion to Vacate"), which requests the Court to set aside or vacate the default judgments entered against Sudan under Rule 55(c) or, in the alternative, under Rule 60(b) of the Federal Rules of Civil Procedure. ECF No. 134. Sudan then filed a request for a hearing on the Motion to Vacate on June 3, 2015. ECF No. 140. Subsequently, the Court held a status conference on June 16, 2015, at which counsel for all parties appeared. *See* ECF No. 143. On July 1, 2015, Plaintiffs filed a memorandum in opposition to Sudan's Motion to Vacate. ECF No. 146. Sudan then filed a reply brief on July 24, 2015. ECF No. 147.

On August 17, 2015, Plaintiffs filed a Motion to Strike the Declaration of Ambassador Maowia O. Khalid ("Motion to Strike"), which Sudan had previously submitted in support of its Motion to Vacate. ECF No. 148. The motion was fully briefed, and on October 21, 2015, a hearing was held before the Court regarding both Sudan's Motion to Vacate and Plaintiffs' Motion to Strike. ECF No. 163. The Court ultimately denied the Motion to Strike, holding

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various default judgments that have been entered in actions alleging Sudan's involvement in the heinous attack on the U.S. embassies in Dar es Salaam, Tanzania and Nairobi, Kenya on August 7, 1998, and on the *U.S.S. Cole* on October 12, 2000." ECF No. 126 ¶ 1. However, the Court notes that a year earlier, on April 28, 2014, Sudan filed an Appearance in the United States District Court for the District of Columbia to appeal the default judgments entered against it in three cases relating to the 1998 terrorist bombings of U.S. embassies. See *Dkt.* No. 95 in *Mwila v. Republic of Sudan*, No. 1:08-cv-01377; *Owens v. Republic of Sudan*, No. 1:01-cv-02244; and *Khaliq v. Republic of Sudan*, No. 1:10-cv-0356.

that the Court "will consider the Ambassador's Declaration for the sole purpose of deciding Sudan's Motion to Vacate and not as underlying evidence on the merits." ECF No. 166.

Sudan's Motion to Vacate, however, was held in abeyance for two consecutive 120-day periods, the first beginning on November 25, 2015, and the second beginning on March 30, 2016. *See* ECF Nos. 166, 173. The reason for such a lengthy delay follows. On November 6, 2015, Sudan notified the Court that a Brief of the United States as Amicus Curiae had been filed in support of Sudan's Petition for Rehearing or Rehearing En Banc ("Petition for Rehearing") before the United States Court of Appeals for the Second Circuit in the related case of *Harrison v. Republic of Sudan*, Appeal No. 14-121. *See* ECF No. 165. In its brief, the United States addresses an issue relevant to the Motion to Vacate currently before this Court, namely service of process on a foreign sovereign under § 1608(a)(3) of the FSIA. The Court has addressed this precise question in *Rux v. Republic of Sudan*, No. 2:04cv428, 2005 WL 2086202 (E.D. Va. Aug. 26, 2005), *aff'd in part, appeal dismissed in part*, 461 F.3d 461 (4th Cir. 2006), and reached the same conclusions as courts in *Wye Oak Tech., Inc. v. Republic of Iraq*, No. 1:09cv793, 2010 WL 2613323, at *5-6 (E.D. Va. June 29, 2010), *aff'd*, 666 F.3d 205 (4th Cir. 2011), and *Harrison v. Republic of Sudan*, 802 F.3d 399, 404-05 (2d Cir. 2015). However, the Fourth Circuit has yet to address the question, and the United States' position before the Second Circuit argues against the results reached in these cases. As a result, this Court took Sudan's Motion to Vacate under advisement awaiting the Second Circuit's decision on Sudan's Petition for Rehearing, with the last abeyance period ending in July of 2016.

On September 22, 2016, a panel of the Second Circuit denied Sudan's Petition for Rehearing to the extent it seeks panel rehearing. *Harrison v. Republic of Sudan*, No. 14-121-CV, 2016 WL 5219872 (2d Cir. Sept. 22, 2016). Sudan's Petition for Rehearing En Banc remains pending as of the issuance of this Order. *Id.* at *1. However, with a year having passed since the hearing on Sudan's Motion to Vacate, the interests of justice and judicial economy now weigh in favor of a ruling by this Court.

II. CLARIFICATION OF THE DEFAULT JUDGMENTS AT ISSUE

Sudan's Motion to Vacate asks the Court to set aside or vacate the default judgments entered against it under Rule 55(c) of the Federal Rules of Civil Procedure ("Rule 55(c)") or, in the alternative, under Rule 60(b) of the Federal Rules of Civil Procedure ("Rule 60(b)"). Specifically, Sudan seeks to set aside the Court's Memorandum Opinion and Clerk's Judgment entered on April 29, 2014 ("April 29, 2014 Order"), finding Sudan liable under 28 U.S.C. § 1605A, and the Court's orders and the Clerk's judgments entered in the seventeen related cases on March 17 and 18, 2015, respectively, adjudicating damages ("March Orders"). *See* ECF No. 134 at 1. Rule 55(c) provides that a "court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b)." Fed. R. Civ. P. 55(c) (emphasis added). Therefore, a threshold issue before this Court is

whether the default judgments Sudan seeks to set aside are final judgments.

A. Issues Regarding the Finality of the Default Judgments

Sudan asserts that the March Orders are not final judgments because they do not adjudicate the claims of all named plaintiffs in the action, specifically, those of Timothy P. Sceviour, who is named in the case caption as a plaintiff in his capacity as personal representative of each estate of the seventeen deceased victims of the Cole bombing. In support, Sudan cites to Rule 54(b) of the Federal Rules of Civil Procedure ("Rule 54(b)"), which provides that, unless a court "expressly determines that there is no just reason for delay," an "order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of *fewer than all the parties* does not end the action as to any of the claims or parties[.]" Fed. R. Civ. P. 54(b) (emphasis added). Sudan argues that because Mr. Sceviour's claims were never dismissed or otherwise adjudicated, the fact that the March Orders lack Rule 54(b) certification precludes them from being final judgments. ECF No. 135 at 3.

Plaintiffs reject Sudan's technical premise and respond that "nowhere in the Complaint is there a cause of action pled for the benefit of the estate . . ." Mem. of Law in Opposition ("Opp. Br."), ECF. No. 146, at 3. They explain that Mr. Sceviour was only named as a party "in an abundance of caution" to comply with Virginia law's technical pleading requirements for wrongful death actions, despite Plaintiffs also admitting that the federal statute under which their wrongful death claims are brought, 28 U.S.C. § 1605A, "fully preempts Virginia law in this area."

Id. Nevertheless, Plaintiffs emphasize that only the family-member Plaintiffs allege claims for damages in the complaint, and that there are no unresolved claims pied by Mr. Sceviour or the decedents' estates. *Id.* As such, Plaintiffs maintain that the March Orders adjudicate all of the outstanding claims in the action, leaving nothing to be done except the execution of the judgment, and thus are final judgments. *Id.* at 4 (quoting *Bernstein by Bernstein v. Menard*, 728 F.2d 252, 253 (4th Cir. 1984)).

Upon review of the April 29, 2014 Order as to Sudan's liability and the March Orders as to the plaintiffs' individual damages awards, it is clear that these orders and judgments technically adjudicate "the rights and liabilities of fewer than all the parties," as they do not speak to the rights and/or liabilities of Mr. Sceviour. *See* Fed. R. Civ. P. 54(b). While the Court agrees with Plaintiffs' claim that Mr. Sceviour has no specific claims or requests for relief in the body of the complaint, he is still a named party in the above-captioned case and in the seventeen related cases. Therefore, to qualify as final judgments under Rule 54(b), the March Orders should contain express certification that they are "final" and that "there is no just reason for delay," which, as Sudan correctly points out, they do not. *See Beckette v. U.S. Postal Serv.*, 923 F.2d 847 (4th Cir. 1991) (partial summary judgment order not a final order where district court failed to comply with Rule 54(b) certification requirements).

B. The Court's March Orders Were Intended to Be Final Judgments

However, this Court certainly intended that the March Orders, which incorporate the Court's April 29, 2014 Order on Sudan's liability, to be final judgments at the time they were issued. This intent is evidenced not

only by the fact that the judgments were issued against a defaulting party, but also by the Court's repeated references to deciding the case as to "each plaintiff" in several orders. *See, e.g.*, ECF No. 98 at 3 (finding Sudan liable under Section 1605A and taking "under advisement the issue of damages as to *each plaintiff*") (emphasis added); ECF No. 101 at 1 (ordering that "the Court will hear and consider all evidence in relation to damages for *each and every plaintiff*" in the forthcoming trial on damages and noting that the Court "will not award damages or additional damages to one or more plaintiffs unless all the evidence has been considered for *all of the plaintiffs*") (emphasis added); ECF No. 120 at 1, 2 (noting that, in its April 29, 2014 Order, it found Sudan "liable to *Plaintiffs Avinesh Kumar, et al*" and "took under advisement the issue of damages as to *each plaintiff*") (emphasis added).

Furthermore, Mr. Sceviour was easily overlooked in the non-adversarial proceeding, as he does not make any claims for damages on behalf of himself or the decedents' estates in the complaint's Prayer for Relief. ECF No. 1 at 61-64, ¶¶ 1-8. Nor did Plaintiffs' counsel present any evidence or argument relating to relief sought by Mr. Sceviour or by the decedents' estates at any time during the litigation of this action. Thus, at the time of issuing the final judgments in this case, the Court simply forgot to account for Mr. Sceviour as a named party and to certify the March Orders as final judgments accordingly.

C. Correction of the March Orders Pursuant to Rule 60(a)

While the Court welcomes creative arguments, like Sudan's, that are based on the technical requirements of the Federal Rules of Civil Procedure, these rules do not

require a district court to ratify clerical errors or omissions at the cost of abandoning the clear intent of its orders. Specifically, Rule 60(a) of the Federal Rules of Civil Procedure ("Rule 60(a)") permits a court at any time, on motion or on its own, to "correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record." Fed. R. Civ. P. 60(a). "Such a mistake occurs when there is an inconsistency between the text of an order or judgment and the district court's intent when it entered the order or judgment." *Sartin v. McNair Law Firm PA*, 756 F.3d 259, 265-66 (4th Cir. 2014). Pursuant to this rule, a court is not permitted to "reconsider a matter that has already been decided," but neither is it "confined just to fixing typographical and other clerical errors." *Id.* at 265 (no abuse of discretion to clarify a sanctions order a year after entry to specify that plaintiff was to be sanctioned individually); *see also Caterpillar Fin. Servs. Corp. v. F/V Site Clearance I*, 275 F. App'x 199, 205 (4th Cir. 2008) (unpublished) (no abuse of discretion to correct prior foreclosure orders to specify which permits were to be excluded).

As explained above, the failure to certify the March Orders as final judgments under Rule 54(b) was clearly the result of oversight in a non-adversarial proceeding rather than a substantive decisional error by this Court. As such, the Court's failure to certify the March Orders under Rule 54(b) was clearly a "mistake arising from oversight or omission" that is properly within the scope of Rule 60(a). *See Sartin*, 756 F.3d at 265-66; *see also Roberts v. Bennaceur*, No. 15-2326, 2016 WL 4155021, at *8 (2d Cir. Aug. 5, 2016) (summary order) (finding that the district court's order to (i) clarify that a prior order was intended to be final and (ii) certify the prior order as final under Rule 54(b) was the "type of correction permissible

under Rule 60(a)" and thus was not an abuse of discretion).

Accordingly, pursuant to this Court's authority under Rule 60(a), the March Orders are hereby **CORRECTED** to reflect that each order is a final judgment; and the Clerk is **DIRECTED** to certify each of the March Orders as final judgments pursuant to Rule 54(b), stating on each corresponding docket sheet that the orders are "final" and that there is "no just reason for delay." This order is correcting the final orders dated March 13, 17 and 18 of 2015.

III. SUDAN'S MOTION TO VACATE

In light of the above correction, and having found that the March Orders are indeed final judgments, Sudan's motion to vacate these judgments pursuant to Rule 55(c) is **MOOT**. *See supra* Part II at 9. Accordingly, the Court will only analyze Sudan's Motion to Vacate pursuant to Rule 60(b). In its motion, Sudan presents three main grounds for vacating the default judgments pursuant to Rule 60(b): (1) voidness for lack of subject matter jurisdiction and lack of personal jurisdiction under Rule 60(b)(4); (2) "excusable neglect" under Rule 60(b)(1); and (3) the catch-all provision of Rule 60(b)(6) for "any other reason that justifies relief." The Court will first address the legal standard for vacatur of final default judgments under Rule 60(b) generally, and then address each of Sudan's specific grounds in turn.

A. Legal Standard for Vacating Default Judgments Under Rule 60(b)

Rule 60(b) provides, in relevant part, that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment" on the following grounds:

(1) mistake, inadvertence, surprise, or excusable neglect; . . .

(4) the judgment is void; . . . or

(6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b)(1), (4), (6). Such a motion "must be made within a reasonable time," and for reason (1), "no more than a year after entry of the judgment or order." Fed. R. Civ. P. 60(c). A Rule 60(b) movant must also show a lack of prejudice to the non-movant, and-excluding motions brought under Rule 60(b)(4)-must proffer a "meritorious defense." *See Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.,* 843 F.2d 808, 811 (4th Cir. 1988); *Garcia Fin. Grp., Inc. v. Virginia Accelerators Corp.*, 3 F. App'x 86, 88 (4th Cir. 2001) (unpublished) ("a movant claiming relief under Rule 60(b)(4) need not establish a meritorious defense"). "A meritorious defense requires a proffer of evidence which would permit a finding for the defaulting party or which would establish a valid counterclaim." *Augusta,* 843 F.2d at 812.

Relief under Rule 60(b) is "extraordinary" and is only to be granted upon a showing of exceptional circumstances. *Compton v. Alton S.S. Co.*, 608 F.2d 96, 102 (4th Cir. 1979). To determine whether such exceptional relief is appropriate, the court "must engage in the delicate balancing of 'the sanctity of final judgments, expressed in the doctrine of res judicata, and the incessant command of the court's conscience that justice be done in light of all the facts.'" *Id.* (internal citation omitted). However, where default judgments are at issue, the Court of Appeals has "taken an increasingly liberal view of Rule 60(b)." *Augusta*, 843 F.2d at 810. "Default judgment is a particularly harsh result, and therefore 'any doubt as to

the propriety of giving [such] relief must be resolved in the movant's favor when the movant bears no personal responsibility for the error which led to the default.'" *Point PCS, LLC v. Sea Haven Realty & Constr.*, 95 F. App'x 24, 27 (4th Cir. 2004) (citing *Augusta*, 843 F.2d at 811).

B. THE DEFAULT JUDGMENTS ARE NOT VOID UNDER 60(b)(4)

Sudan argues that it is entitled to relief under Rule 60(b)(4) because the default judgments in this case are void for want of jurisdiction. Sudan argues that the Court lacks subject matter jurisdiction over this case on three separate grounds: (1) that the *Cole* bombing does not qualify as an "extrajudicial killing" or any other predicate act under Section 1605A; (2) that Section 1605A does not withdraw a foreign state's immunity for indirect-victim claims like those asserted by the family-member Plaintiffs in this action; and (3) that Plaintiffs' evidence regarding Sudan's liability in this case was not sufficient to establish jurisdictional causation. Sudan also argues that the default judgments are void for lack of personal jurisdiction because Sudan was not properly served under Section 1608(a)(3).

1. Applicable Standard

Rule 60(b)(4) provides that a judgment may be set aside if it is "void." Fed. R. Civ. P. 60(b)(4). "The concept of a 'void' judgment has been narrowly construed by the courts." *Garcia*, 3 F. App'x at 88. "An order is 'void' for purposes of Rule 60(b)(4) only if the court rendering the decision lacked personal or subject matter jurisdiction or acted in a manner inconsistent with due process of law." *Wendt v. Leonard*, 431 F.3d 410, 412 (4th Cir. 2005). In

this circuit, an error in determining subject matter jurisdiction does not automatically render a judgment void. *Id.* at 413. Rather,

> when deciding whether an order is "void"' under Rule 60(b)(4) for lack of subject matter jurisdiction, courts must look for the "rare instance of a clear usurpation of power." . . . A court plainly usurps jurisdiction "only when there is a 'total want of jurisdiction' and *no arguable basis* on which it could have rested a finding that it had jurisdiction."

Id. (emphasis added) (internal citations omitted); *see also Hawkins v. Borsey*, 319 F. App'x 195, 196 (4th Cir. 2008) (affirming district court's denial of defendants' motion to vacate default judgment applying 'arguable basis' standard).

Sudan argues that the holding of *Wendt* is limited and that the 'arguable basis' standard only applies to cases involving issues of res judicata, in which the movant already appeared and had an opportunity to challenge subject matter jurisdiction. Reply Br., ECF No. 147, at 15. However, this limited reading does not accord with the law in this circuit and several others.[8] Indeed, Sudan's reliance

[8] *See, e.g.*, *United States v. Tittjung*, 235 F.3d 330, 335 (7th Cir. 2000) ("[Rule 60(b)(4)] is narrowly tailored, such that a lack of subject matter jurisdiction will not always render a final judgment 'void.' Only when the jurisdictional error is 'egregious' will courts treat the judgment as void. . . . [T]he error must involve a clear usurpation of judicial power, where the court wrongfully extends its jurisdiction beyond the scope of its authority.") (citation omitted); *Hunter v. Under-*

on *Aurum Asset Managers, LLC v. Bradesco Companhia de Seguros*, 441 F. App'x 822 (3d Cir. 2011) and *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175 (D.C. Cir. 2013) (citing *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1547 (D.C. Cir. 1987)) does not disprove this point but merely identifies the split among the circuits on the proper weight to give the interest in finality when final judgments are subject to collateral attack. Therefore, the Court will apply this circuit's 'arguable basis' standard to Sudan's claims that the default judgments are void for lack of subject matter jurisdiction

2. The Attack on the *U.S.S. Cole* Was an "Extrajudicial Killing" under Section 1605A.

The first of Sudan's jurisdictional arguments is that the *Cole* bombing was not an act of "extrajudicial killing" within the meaning of the FSIA. Section 1605A provides,

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wood, 362 F.3d 468, 476 (8th Cir. 2004) ("An error in interpreting jurisdiction or in assessing jurisdictional facts does not render the judgment a complete nullity or a plain usurpation of power for purposes of Rule 60(b)(4) . . . ."); *Gschwind v. Cessna Aircraft Co.*, 232 F.3d 1342, 1346 (10th Cir. 2000) ("A court does not usurp power when it erroneously exercises jurisdiction."); *Lubben v. Selective Serv. Sys. Local Bd. No. 27*, 453 F.2d 645, 649 (1st Cir. 1972) ("While absence of subject matter jurisdiction may make a judgment void, such total want of jurisdiction must be distinguished from an error in the exercise of jurisdiction. A court has the power to determine its own jurisdiction, and an error in that determination will not render the judgment void."); *see also United Student Aid Funds, Inc. v. Espinosa*, *559* U.S. 260 (2010) ("Federal courts considering Rule 60(b)(4) motions that assert a judgment is void because of a jurisdictional defect generally have reserved relief only for the exceptional case in which the court that rendered judgment lacked even an 'arguable basis' for jurisdiction.").

in relevant part, that a foreign sovereign is not immune from a lawsuit

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

28 U.S.C. § 1605A(a)(1) (emphasis added). In this case, jurisdiction rests on the premise that the *Cole* bombing was an "extrajudicial killing" for which Sudan provided material support or resources. In its Motion to Vacate, Sudan refutes this premise. It argues that an "extrajudicial killing" is limited to instances of summary execution without judicial process, and asserts that acts of terrorism, like the *Cole* bombing, were intentionally excluded from this section of the FSIA. Mem., ECF No. 135, at 5-9. Sudan therefore concludes that it retains sovereign immunity from Plaintiffs' claims and that the judgments against it in this case are void. For the reasons that follow, the Court finds this claim to be without merit.

Section 1605A defines "extrajudicial killing" as the "meaning given th[is] term[] in section 3 of the Torture

Victim Protection Act of 1991" ("TPVA"). 28 U.S.C. § 1605A(h)(7).[9] According to this definition,

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

Pub. L. No. 102-256, §3(a), 106 Stat. 73 (1992). The plain language of this statute clearly encompasses the *Cole* bombing: it was unquestionably a "killing" – a bomb was detonated, causing the death of seventeen sailors; it was "deliberated" – it required advanced planning and careful execution; and it was "not authorized by a previous judgment" by any court or "lawfully carried out under the authority of a foreign nation," as it was orchestrated by al Qaeda operatives.

The inquiry should end here. *Hillman v. I.R.S.*, 263 F.3d 338, 342 (4th Cir. 2001) ("The general rule is that unless there is some ambiguity in the language of a statute, a court's analysis must end with the statute's plain language (the Plain Meaning Rule).") (citing *Caminetti v United States,* 242 U.S. 470, 485 (1917)). Nonetheless, Sudan insists that the TPVA's definition of "extrajudicial

[9] Section 1605(a)(7), now repealed, contained the same definition of "extrajudicial killing." *See* 28 U.S.C. § 1605(e)(1) (2006).

killing" must be interpreted in light of the unspoken intent of Congress to "adopt the international law meaning of that term," which is limited to "summary executions" and excludes "bombings and terrorism generally." Mem., ECF No. 135, at 5, 9. In support, Sudan analyzes the legislative history of both the TPVA and Section 1605A, as well as the history of 'terrorism' as a concept in international law more generally. *Id.* at 5-9.

Such interpretive reaching is improper. "As a rule, '[a] definition which declares what a term 'means' . . . excludes any meaning that is not stated.'" *Colautti v. Franklin*, 439 U.S. 379, 393 n.10 (1979) (internal citation omitted); *see also Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) ("When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning."). Sudan has failed to identify any ambiguity in the TPVA's definition of "extrajudicial killing" that would permit this Court to look beyond the plain language of the statute to interpret its meaning. The *Cole* bombing was clearly an "extrajudicial killing" according to the plain meaning of the statute.

Moreover, the United States District Court for the District of Columbia has also found terrorist bombings to constitute "extrajudicial killings" under Section 1605A. *See, e.g.*, *Owens v. Republic of Sudan*, No. CV 01-2244, 2016 WL 1170919, at *15 (D.D.C. Mar. 23, 2016) (1998 terrorist bombings of U.S. embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania were extrajudicial killings); *Murphy v. Islamic Republic of Iran*, 740 F. Supp. 2d 51, 71 (D.D.C. 2010) (terrorist bombing of U.S. Marine barracks in Beirut, Lebanon was an extrajudicial killing); *Ben-Rafeal v. Islamic Republic of Iran*, 540 F. Supp. 2d 39, 53 (D.D.C. 2008) (terrorist bombing of Israeli embassy in Buenos Aires, Argentina was extrajudicial killing).

For these reasons, Sudan's Motion to Vacate pursuant to Rule 60(b)(4) on the grounds that the *Cole* bombing was not an "extrajudicial killing" under Section 1605A is **DENIED**.

3. Section 1605A Confers Subject Matter Jurisdiction Over Family-Member Claims.

Sudan's second jurisdictional argument is that the Court lacks subject matter jurisdiction over the claims in this case because Plaintiffs are not direct victims of the *Cole* bombing but rather family members of the deceased. Sudan argues that Section 1605A encompasses claims by "the claimant or the victim," which includes only a directly injured person (a "victim") or someone acting as the personal representative of a victim who was killed or incapacitated (a "claimant"). Mem., ECF No. 135, at 9-10. Sudan reasons that, because the family-member Plaintiffs were neither directly injured nor acting as personal representatives of the deceased victims, their claims are not cognizable under Section 1605A. *Id.* Here again Sudan asks the Court to read limiting language into the statute and to abandon clear precedent on the issue.

Section 1605A provides that "[t]he court shall hear a claim under this section if the foreign state was designated as a state sponsor of terrorism at the time the [predicate act] occurred" and "the claimaint or the victim was . . . a national of the United States; a member of the armed forces; or [met certain employment requirements.]" 18 U.S.C. § 1605A(a)(2)(A)(i)(I) and (ii). A "claimant" or "victim" may bring a claim "for personal injury or death caused by acts described in subsection (a)(1) of that foreign state . . . for money damages." *Id.* § 1605A(c). Such damages "may include economic damages, solatium, pain

and suffering, and punitive damages." *Id.* Nowhere in the statute is "personal injury" limited to physical injury. Nor is "claimant" defined as a personal representative of a deceased or incapacitated victim, as Sudan suggests.

Furthermore, Plaintiffs rightly point out that the express inclusion of "solatium" damages shows that the scope of liability under Section 1605A includes non-physical, indirect harm, as these types of damages compensate for sentimental losses and emotional suffering. Opp. Br., ECF No. 146, at 15. *See, e.g.*, *Solatium*, *Black's Law Dictionary* (10th ed. 2014) ("Compensation; esp., damages allowed for hurt feelings or grief, as distinguished from damages for physical injury."); *Dammarell v. Islamic Republic of Iran*, 281 F. Supp. 2d 105, 196 (D.D.C. 2003), *vacated on other grounds*, 404 F. Supp. 2d 261 (D.D.C. 2005) ("A claim for solatium refers to the mental anguish, bereavement, and grief that those with a close relationship to the decedent experience as a result of the decedent's death, as well as the harm caused by the loss of decedent's society and comfort."). Therefore, the statute clearly contemplates that direct-victims' relatives who did not suffer any physical injuries can make claims for damages to compensate for their grief and mental anguish.

Despite this statutory language, Sudan cites to *Cicippio-Puleo v. The Islamic Republic of Iran*, No. CIV.A.01-1496, 2002 WL 34408105, at *1 (D.D.C. June 21, 2002), *aff'd and remanded sub nom. Cicippio-Puleo v. Islamic Republic of Iran,* 353 F.3d 1024 (D.C. Cir. 2004), for the proposition that "Congress did not intend the FSIA to so enlarge the scope of potential liability of sovereign foreign states-even 'terrorist' states-to require them to compensate non-victim plaintiffs for damages." Mem., ECF No. 135, at 10. However, after *Cicippio-Puleo* was affirmed on

appeal by the District of Columbia Circuit, 353 F.3d 1024, it was superseded by the 2008 statutory amendment to the FSIA and thus has questionable persuasive value here. Regardless, the district court in that case evaluated the family-member claims for solatium damages by applying a minority view of "American common law" surrounding emotional-distress torts in this context.[10] The court even acknowledged its departure from precedent, noting that "in other cases in this district court, both children and siblings have been awarded solatium damages to compensate them for their anguish" on similar facts. *Id.* Indeed, since the 2008 amendment to the FSIA, the United States District Court for the District of Columbia has developed a large and consistent body of case law clearly establishing that immediate family members of the victims of terrorist bombings have standing to recover solatium damages under Section 1605A,[11] which this Court explicitly adopted in

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[10] Notably, the district court in that case denied family members' claim for solatium damages not because the claimants were not "direct victims," but because the hostage victim was not killed, reasoning that "American common law has refused to recognize a right to recover [solatium damages]" for injury to a third party where the injury did not result in the third party's death. *Cicippio-Puleo*, 2002 WL 34408105, at *2.

[11] *See, e.g.*, *Estate of Heiser v. Islamic Republic of Iran* ("*Heiser II*"), 659 F. Supp. 2d 20, 27-28 (D.D.C. 2009) (applying tort liability principles for the intentional infliction of emotional distress and the Restatement (Second) of Torts § 46 to the scope of liability of foreign states under Section 1605A, determining that terrorist bombings are "directed at" the family members of the victims of such bombings for purposes of liability even though they were not present during the event, but limiting liability to claims brought by "immediate family" members); *Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52, 80 (D.D.C. 2010) (applying *Heiser II* analysis and determining that the "functional equivalent of immediate family members" can also recover under Section 1605A); *Davis v. Islamic Republic of Iran*, 882

its March 13, 2015 Order on damages. *See* ECF No. 120 at 3.

Finally, the legislative history cited by Sudan fails to persuade this Court that it should abandon the most logical reading of the statute or depart from clear precedent on this issue. First, the 1994 House Report cited by Sudan to suggest that Congress intended to limit "claimants" to personal representatives of deceased victims deals with proposed legislation, H.R. 934, that was never enacted. The Court agrees with Plaintiffs that "unsuccessful attempts at legislation are not the best of guides to legislative intent." Opp. Br., ECF No. 146, at 16-17 (quoting *Beck v. Commc'ns Workers of Am.*, 800 F.2d 1280 (4th Cir. 1986) (citation omitted), *aff'd sub nom. Commc'ns Workers of Am. v. Beck*, 487 U.S. 735 (1988). Proving this point, the "dissenting views" contained in that same House Report contradict Sudan's interpretation of the history:

> This legislation (H.R. 934) would amend the Foreign Sovereign Immunities Act of 1976 to allow U.S. citizens who are the victims *or family members of victims* of torture, extrajudicial killing, or genocide committed abroad by foreign governments to sue those governments in U.S. courts for those acts.

H.R. Rep. 103-702, 103rd Cong., at 11 (as reported by S. Comm. on Judiciary, Aug. 16, 1994) (emphasis added). The second House Report cited by Sudan, which provides

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F. Supp. 2d 7, 15 (applying *Heiser II* analysis and finding that "afterborn children" of surviving terror victims are not eligible to recover solatium damages as immediate family members under Section 1605A).

commentary on a proposed bill (S. 735) that was eventually enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996, is no less muddied. Just below the comment, cited by Sudan, that the Committee expected a lawsuit under this section to be brought by "the victim or on behalf of the victim's estate," the report goes on to state that "the Committee has determined that allowing suits in the federal courts against countries responsible for terrorist acts *where Americans and/or their loved ones suffer injury or death* at the hands of the terrorist states is warranted." H.R. Rep. 104-383, 104th Cong., at 62 (as reported by S. Comm. on Judiciary, April 15, 1996) (emphasis added). This language suggests that Congress anticipated the exact type of emotional-distress and solatium claims by family members that federal courts have consistently found to be cognizable under Section 1605A. At the very least, it casts doubt on Sudan's interpretation of the legislative history, and thus it cannot reasonably be relied upon by this Court.

In light of the statutory language and the clear precedent on this issue, the Court had more than an arguable basis on which to determine that it has jurisdiction over the claims of the family-member Plaintiffs in this action. Accordingly, insofar as Sudan argues that this Court lacked subject matter jurisdiction over the case because Plaintiffs were indirect victims of the *Cole* bombing, its Motion to Vacate is **DENIED**.

4. The Evidence Was Sufficient to Establish Jurisdictional Causation under Section 1605A.

Sudan next argues that the default judgments in this case are void because Plaintiffs failed to present sufficient

evidence of jurisdictional causation and thus the Court lacked subject matter jurisdiction over the case. Specifically, Sudan argues that jurisdictional causation was not established because: (1) the expert testimony at the April 2014 hearing on liability, and the materials on which it relied, were comprised "almost exclusively" of inadmissible evidence; (2) the Court's finding that Sudanese officials and Sudanese military supported al Qaeda was based on insufficient evidence; (3) the Court's finding that one of the planners of the Cole bombing was trained at a camp in Sudan was based on "inadmissible hearsay"; and (4) the Court's finding that Sudan facilitated the transportation of explosives used in the *Cole* bombing was based on disproven evidence as well as other inadmissible expert testimony. Mem., ECF No. 135, at 13-21. Sudan notes that "Plaintiffs appear to have submitted largely the same evidence" as in the *Rux* case, and thus focuses its jurisdictional causation argument almost entirely on the sufficiency of the evidence presented in *Rux*. *Id.* at 14.

In making this argument, Sudan relies on two key premises. First, Section 1605A requires Plaintiffs to show that the *Cole* bombing "was caused by" material support or resources provided by Sudan to al Qaeda in order to establish that the Court has subject matter jurisdiction over this case. Mem., ECF No. 135, at 11. Second, Section 1608(e) requires Plaintiffs to establish this jurisdictional causation by "evidence satisfactory to the court," which-Sudan argues-must be competent and admissible under the Federal Rules of Evidence before the Court has jurisdiction to enter a default judgment. *Id.* (quoting 28 U.S.C. § 1608(e)). While Plaintiffs do not dispute the first, they strongly refute the second. They argue that Section 1608(e) is irrelevant to the jurisdictional inquiry because

determining whether the court has subject matter jurisdiction "does not turn on whether the plaintiff has proven the merits of his claim for purposes of obtaining a judgment." Opp. Br., ECF No. 19, at 19. Sudan disagrees, arguing that jurisdictional allegations must be proved like all other elements of a claim, and thus Section 1608(e) sets the standard for sufficiency of evidence for all of Plaintiffs' claims, including subject matter jurisdiction, before a court may enter a default judgment. Reply Br., ECF No. 147, at 6.

The Court finds that Sudan's first premise—that Plaintiffs must sufficiently allege causation under Section 1605A for the Court to have subject matter jurisdiction—is valid and not in dispute. The procedural history in *Rux* case is relevant here. In that case, Sudan made a similar jurisdictional causation argument on a motion to dismiss. After this Court denied Sudan's motion, the Court of Appeals affirmed, holding that jurisdictional causation under Section 1605(a)(7)—the precursor to Section 1605A—must be established but only by "facts sufficient to establish a reasonable connection between a country's provision of material support to a terrorist organization and the damage arising out of a terrorist attack." *Rux v. Republic of Sudan*, 461 F.3d 461, 473 (4th Cir. 2006) (adopting "proximate cause" as the appropriate "jurisdictional causation" standard) (citing *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d. 1123, 1129 (D.C. Cir. 2004)); *see also Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52, 66 (D.D.C. 2010) (applying this same jurisdictional causation standard to the current iteration of the statute, Section 1605A). The Court of Appeals then analyzed all of the facts pleaded by the *Rux* Plaintiffs and found the allegations sufficient to establish that Sudan's provision of support of material resources to al Qaeda

proximately caused the *Cole* bombing. *Rux*, 461 F.3d at 474.

Therefore, the real issue here is Sudan's second premise: whether the sufficiency of the evidence of jurisdictional causation under Section 1605A must meet a higher standard upon motion for a default judgment, and if so, what that standard is. The Court agrees with Sudan that a court must determine that it has subject matter jurisdiction at every stage of the proceeding. *See Stop Reckless Econ. Instability Caused by Democrats v. Fed. Election Comm'n*, 814 F.3d 221, 228 (4th Cir. 2016) ("[F]ederal courts must determine whether they have subject-matter jurisdiction over a claim before proceeding to address its merits."); *see also Prou v. United States*, 199 F.3d 37, 45 (1st Cir. 1999) (holding that courts are obligated at every stage of the proceedings to consider the question of subject matter jurisdiction). The Court also agrees that Section 1608(e) governs what the nature of that determination should be before a default judgment is entered in cases brought under Section 1605A: "No judgment by default shall be entered by a court of the United States . . . unless the claimant establishes his claim or right to relief by evidence *satisfactory to the court*." 28 U.S.C. § 1608(e) (emphasis added).

However, the Court cannot accept Sudan's argument that Section 1608(e) requires the court to consider only competent and admissible evidence as dictated by the Federal Rules of Evidence. The very case that Sudan cites in support of this proposition, *Kim v. Democratic People's Republic of Korea*, reversed the district court's denial of entry of default judgment based on insufficient evidence, noting that "courts have the authority-indeed, we think, the obligation-to 'adjust [evidentiary requirements] to . . .

differing situations." 774 F.3d 1044, 1048 (D.C. Cir. 2014) (internal citation omitted). In the context of a non-adversarial proceeding against a foreign state, in which the defaulting party does not produce any discovery and is not present to raise evidentiary challenges or cross-examine witnesses, it would be impossible and unjust for the Court to hold Plaintiffs' evidence to the same standard that it would in a full trial on the merits.

This is not to say that courts should abandon the Federal Rules of Evidence when making a Rule 1608(e) determination; courts should at all times vet plaintiff's evidence and accord it proper weight in light of its competency and admissibility under these rules. But evidence can be "satisfactory to the court" under Rule 1608(e) without strict compliance with the Federal Rules of Evidence. *See, e.g.*, *Campuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258, 268 (D.D.C. 2003) ("In FSIA default judgment proceedings, the plaintiffs may establish proof by affidavit" and the court may accept a plaintiff s uncontroverted evidence as true) (internal citation omitted) (*cited in Kumar*, 2011 WL 4369122, at *8 (discussing legal standard for entry of default judgment under Section 1608(e)), *rev'd on other grounds*, *Clodfelter,* 720 F.3d 199).

As to the expert testimony of Mr. Woolsey, Mr. Emerson, Mr. Peterson, and Mr. Vidino, discussed at length by Sudan, the Court reviewed their credentials, their methodology, the substance of their testimony, and the sources on which their testimony relied, and ultimately found satisfactory evidence of jurisdictional causation. Sudan's claims that the various State Department reports, indictments, and other sources on which they relied were inadmissible do not alter this Court's judgment. An opinion recently issued by the United States District Court for

the District of Columbia in *Owens v. Republic of Sudan* is persuasive on this issue. No. CV 01-2244, 2016 WL 1 170919 (D.D.C. Mar. 23, 2016). The district court in that case explained that traditional forms of evidence are "difficult, if not impossible, to obtain in terrorism cases," as "[t]errorist groups and their state sponsors generally wish to hide their activities." *Id.* at *26.

> In light of these circumstances, the opinions of experts who have studied these organizations and their links to state sponsors are extremely useful. Indeed, given the evidentiary difficulties in terrorism cases, discounting the value of expert testimony "would defeat [§ 1605A's] very purpose: to give American citizens an important economic and financial weapon to compensate the victims of terrorism, and in so doing to punish foreign states who have committed or sponsored such acts and deter them from doing so in the future."

Id. (quoting *Kim*, 774 F.3d at 1048 (internal citation omitted)).

Such measured consideration of the evidence is particularly necessary where, as here, the jurisdictional and merits elements of a Section 1605A claim directly overlap. If the evidentiary standard under Section 1608(e) is applied too rigorously to the jurisdictional elements, a defendant would essentially be permitted to use Rule 60(b)(4) to collaterally attack the Court's ruling on liability through the guise of a jurisdictional challenge-a loophole which would undermine the very purpose of the

rule.[12] Given the substance of Sudan's claims regarding the sufficiency, admissibility, and credibility of the evidence establishing Sudan's liability for the *Cole* bombing, this is exactly what is at stake here.

For these reasons, the Court need not address each evidentiary challenge raised by Sudan in its Rule 60(b)(4) motion. It need only determine whether the Court had an arguable basis on which to determine that the evidence was satisfactory to establish jurisdictional causation. *Wendt*, 431 F.3d at 412. This Court conducted a bench trial on April 22, 2014, at which it heard testimony from five witnesses. It also reviewed extensive deposition testimony and considered over 150 exhibits. Based on its review of all the evidence, the Court ultimately found that Plaintiffs presented satisfactory and credible evidence to show that "officials of Sudan, including military personnel, directly and affirmatively supported al Qaeda operations," which proximately caused the *Cole* bombing. ECF No. 98 at 2. Sudan's various evidentiary objections fail to show that there was no arguable basis on which the Court could have found it has subject matter jurisdiction over this case. Accordingly, Sudan's Motion to Vacate on this ground is **DENIED**.

5. Sudan Was Properly Served Pursuant to Section 1608(a).

Sudan's final jurisdictional argument under Rule 60(b)(4) is that Sudan was improperly served by Plaintiffs in violation of Section 1608(a), and thus the Court lacked

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[12] *See generally* Kevin M. Clermont, *Jurisdictional Fact*, 91 Cornell L. Rev. 973, 976-77, 1019, 1019 n.209 (2006) (discussing challenges of jurisdictional proof where merits and jurisdictional elements overlap and collecting cases).

personal jurisdiction over Sudan in this action. The crux of Sudan's claim is that proper service of process under Section 1608(a)(3)—the means of service selected by Plaintiffs in this case—was not satisfied because the required documents were delivered to Sudan's embassy in Washington, D.C. instead of directly to the Minister of Foreign Affairs in Sudan. Mem., ECF No. 135, at 22. This Court has already considered and rejected this argument during the *Rux* litigation. For the reasons that follow, it must do so again.

Section 1608 of the FSIA governs service on foreign states and provides four exclusive means of serving process. See 28 U.S.C. § 1608(a)(1)-(4); *Yousuf v. Samantar*, 552 F.3d 371, 380 (4th Cir. 2009) ("Section 1608 . . . establishes the exclusive means for service of process on a foreign state or its agencies or instrumentalities."), *aff'd and remanded*, 560 U.S. 305 (2010). Section 1608(a)(3), the provision relevant here, states:

> Service . . . shall be made upon a foreign state . . . by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form or mail requiring a signed receipt, *to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs* of the foreign state concerned[.]

Id. § 1608(a)(3) (emphasis added). Sudan does not dispute that the required mailings were addressed to Sudan's Minister of Foreign Affairs. Rather, it contests the place of delivery—Sudan's embassy—and argues that service "on or through" a diplomatic mission does not comply with the statute and, further, that such service is prohibited by

the Vienna Convention on Diplomatic Relations. *Id.* at 22-23.

As noted above, this Court has previously ruled on this issue, holding that "[t]he text of 1608(a)(3) does not prohibit service on the Minister of Foreign Affairs at an embassy address. Indeed, the statute does not prescribe the place of service, only the person to whom process must be served." *Rux v. Republic of Sudan*, No. 2:04cv428, 2005 WL 2086202, at *16 (E.D. Va. Aug. 26, 2005), *aff'd in part, appeal dismissed in part*, 461 F.3d 461 (4th Cir. 2006). This holding has since been adopted and affirmed by other courts. *See Wye Oak Tech., Inc. v. Republic of Iraq*, No. 1:09cv793, 2010 WL 2613323, at *5-6 (E.D. Va. June 29, 2010); *Harrison v. Republic of Sudan*, 802 F.3d 399, 404 (2d Cir. 2015), *adhered to on denial of reh'g*, No. 14-121-CV, 2016 WL 5219872, at *3 (2d Cir. Sept. 22, 2016) (denying Sudan's petition for a panel rehearing).

Sudan tries to evade this Court's clear precedent by arguing that it is against the "weight of authority," ECF No. 135 at 23, to no avail. All of Sudan's cited authority is inapposite, dealing with service of process upon the embassy itself or upon a diplomatic officer, which did not occur in this case. *See Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 747 (7th Cir. 2007) (holding that service on the Belarusian ambassador violated Section 1608 and the Vienna Convention and failed to provide notice to Integral, the instrumentality being sued); *Tachiona v. U.S.*, 386 F.3d 205, 222 (2d Cir. 2004) (addressing Section 1608(b)(2) and "declin[ing] to construe the FSIA as a license to serve process on diplomatic and consular representatives"); *Ellenbogen v. The Canadian Embassy*, No. CIV.A. 05-01553JDB, 2005 WL

3211428, at *2 (D.D.C. Nov. 9, 2005) (holding that service upon the Canadian Embassy rather than the head of the ministry of foreign affairs constituted service "upon the wrong person" and thus did not adhere to Section 1608(a)(3)); *see also Harrison*, No. 14-121, WL 5219872, at *5 (noting that serving papers on an embassy or an ambassador "without addressing them to the minister of foreign affairs" clearly violates Section 1608(a)(3)).

As to Sudan's second argument that serving a foreign state at its embassy violates the Vienna Convention on Diplomatic Relations, this too lacks merit. The primary support for Sudan's position is the United States' amicus curiae brief submitted to the Court of Appeals for the Second Circuit in support of Sudan's Petition for Rehearing in the *Harrison* case, in which the United States argues that permitting service upon foreign states at their embassies is "contrary to the principle of mission inviolability and the United States' treaty obligations" and will compromise the United States' ability to reject such means of service in the future. No. 14-121, Dkt. No. 101, at 9-10. As noted previously, the Second Circuit recently issued an opinion denying Sudan's Petition for Panel Rehearing. *Harrison*, 2016 WL 5219872, at *1. In that opinion, the Second Circuit panel found these concerns of the United States to be unpersuasive for two principle reasons. First, the inviolability of the diplomatic mission was not compromised because process was served on the Minister of Foreign Affairs, not the foreign mission itself, and Sudan consented to accepting service at its embassy. *Id.* at *7. Second, permitting service on a foreign state at its embassy in accordance with Section 1608 does "not preclude the United States (or any other country) from enforcing a policy of refusing to accept service via its embassies"—a policy which Sudan could adopt and enforce at any time. *Id.*

at *6. The Court finds the panel's reasoning to be persuasive.

Accordingly, Sudan's Motion to Vacate on the grounds that the Court lacked personal jurisdiction over Sudan is **DENIED**.

C. SUDAN'S FAILURE TO DEFEND WAS NOT EXCUSABLE NEGLECT UNDER RULE 60(B)(1)

Sudan's secondary argument in its Motion to Vacate is that the Court should set aside the default judgments in this case pursuant to Rule 60(b)(1) due to Sudan's "excusable neglect." Mem., ECF No. 135, at 27-28. Citing the Declaration of Ambassador Khalid ("Khalid Decl."), ECF No. 135-1, Sudan offers several reasons that its failure to timely defend this case is "excusable" under this rule. Mem., ECF No. 135 at 25-26, 28. These include that Sudan had "a fundamental lack of understanding . . . about the litigation process in the United States," Khalid Decl. ¶ 5; that it "failed to appreciate the gravity of the potential consequences of its absence from the *Rux* case and [other cases]," *id.*; and that, from 2006 until 2014, it did not defend against most cases brought against it in the United States due to "well-known civil unrest and political turmoil," including the cession of south Sudan, and various natural disasters that overburdened its government and deflected its resources away from litigation, *id.* ¶ 4. Plaintiffs argue that these excuses are contradicted by Sudan's substantial experience with litigation in the United States and the timing of its selective participation in such lawsuits since 2006. Opp. Br., ECF No. 146, at 28. Plaintiffs also assert that "Sudan's decision not to participate in this litigation was tactical and intentional" and therefore meets none of the requirements of Rule 60(b)(1). *Id.*

1. Applicable Standard

The Court's determination of a Rule 60(b)(1) motion based on excusable neglect is "at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship,* 507 U.S. 380, 395 (1993). These circumstances include: "[1] the danger of prejudice to the [non-movant], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith." *Id.* The third factor—the movant's reason for delay—is the most important to the excusable neglect inquiry. *Symbionics Inc. v. Ortlieb,* 432 F. App'x 216, 219 (4th Cir. 2011).

Furthermore, in the context of default judgments, the system's need for finality and efficiency of litigation predominate where the party is at fault, such that the guilty party must "adequately defend its conduct in order to show excusable neglect" under Rule 60(b)(1). Point PCS, 95 F. App'x at 27 (quoting Augusta, 843 F.2d at 811). In any case, "[e]xcusable neglect is not easily demonstrated." *Thompson v. E.I. DuPont de Nemours & Co.*, 76 F.3d 530, 534 (4th Cir. 1996) (discussing excusable neglect under Federal Rule of Appellate Procedure 4(a)).[13]

[13] "Excusable neglect generally has the same meaning throughout the federal procedural rules." *Martinez v. United States*, 578 F. App'x 192, 194 n.* (4th Cir. 2014).

2. Analysis of Sudan's Excusable Neglect Claim

Sudan has not shouldered this heavy burden. As a threshold matter, it has not set forth a "meritorious defense" as required for Rule 60(b)(1) motions. Sudan insists that is "has set forth several meritorious defenses" including the lack of jurisdictional causation and Sudan's lack of involvement in the *Cole* bombing. Reply Br., ECF No. 147, at 19. Sudan adds that it "anticipates presenting percipient witnesses and contemporaneous documentary evidence to demonstrate that it did not provide material resources or support to al Qaeda for the *U.S.S. Cole* bombing." *Id.* However, for the reasons previously stated, Sudan's jurisdictional causation argument lacks merit. *See supra* Section 111.B.4. And Sudan's conclusory statements regarding its intent to present evidence do not suffice; Sudan must proffer some evidence that, if proved, would permit a finding for Sudan on a defense or counterclaim. *Augusta*, 843 F.2d at 812. Sudan has only made "bare allegations of a meritorious defense," and thus has not satisfied the threshold requirements for obtaining Rule 60(b)(1) relief.[14] *MSSI Acquisition, LLC v. Azmat Consulting, Inc.*, No. 1:11CV01312, at *4, 2012 WL

[14] As for the other threshold requirement, timeliness, Plaintiffs do not contest that Sudan's Rule 60(b)(1) motion was made within a year of entry of the relevant judgment or order as required under Rule 60(c). Nor does timeliness appear to be at issue. Sudan's Motion to Vacate was filed on May 14, 2015, well within a year of the entry of the March Orders on March 17, and 18, 2015. And while the April 29, 2014 Order was entered outside of the one-year timeframe, it did not become a final judgment until the March Orders were issued, making Sudan's Rule 60(b)(1) motion timely as to this order as well.

2871158, at *4 (E.D. Va. July 12, 2012) (citing *Consol. Masonry & Fireproofing, Inc. v. Wagman Constr. Corp.*, 383 F.2d 249, 251-52 (4th Cir. 1967)). On that basis alone, its Rule 60(b)(1) motion must be denied.

Regardless, none of the *Pioneer* factors supports a finding of excusable neglect under Rule 60(b)(1). First, vacating the default judgments in this case poses a clear danger of prejudice to Plaintiffs "beyond that suffered by any party which loses a quick victory." *Augusta*, 843 F.2d at 812. Specifically, as Plaintiffs argue, their ability to conduct discovery is now more impaired than when the suit commenced in 2010, given that the *Cole* bombing occurred over fifteen years ago and relevant evidence has likely been lost or destroyed since this suit was filed. Opp. Br., ECF No 146, at 26. While Sudan correctly points out that Plaintiffs have not identified specific witnesses or records that have become unavailable, Reply Br., ECF No. 147, at 17, even a vague danger of prejudice to Plaintiffs weighs against vacatur when viewed in light of the other *Pioneer* factors, which follow.

Second, Sudan's five-year delay in defending this case was indisputably long and it clearly impacted proceedings. During this period, the Court conducted a bench trial on the issue of liability, and it heard and considered evidence on damages as to each of the sixty-two family-member plaintiffs in this action. Both Plaintiffs and the federal court system incurred significant costs litigating this case for five years, and to vacate this Court's judgments would render those expenses completely wasted. Even when measured from the date of the Court's April 29, 2014 Order on liability, Sudan's delay of more than a year to bring its motion is excessive. *See In re A.H. Robins Co., Inc.*, 221 B.R. 166, 169 (E.D. Va. 1998), *aff'd*, 166

F.3d 1208 (4th Cir. 1998) (waiting over nine months after the entry of the order to bring Rule 60(b)(1) motion was a lengthy delay and weighed against granting the motion).

Sudan's delay is even less reasonable in light of the third and most important *Pioneer* factor, the reason for delay. While the Court does not doubt nor diminish the significant domestic turmoil Sudan has suffered over the last decade, a review of the procedural history in this case suggests that such turmoil was not the actual reason that Sudan neglected to timely defend this action. For instance, the record shows, and Ambassador Khalid even admits in his declaration, that Sudan stopped defending the *Rux* suit in 2006 by conscious choice because its jurisdictional arguments for dismissal did not prevail on appeal. Khalid Decl., ECF No. 135-1, ¶ 3. Third, the October 25, 2006 letter submitted by Sudan's counsel regarding Sudan's instructions to counsel not to participate in the proceedings on the merits did not identify any reasons related to domestic turmoil, natural disasters, or limited resources. *See supra* Section I.A at 3. Nor did Sudan attempt to proffer such justifications to the Court at any point during the eight years of litigation that followed. Furthermore, Sudan's recent litigation history proves that it was capable of defending lawsuits in the United States at least as early as April 28, 2014, when it filed an appearance in the United States District Court for the District of Columbia to defend against default judgments entered by that court. *See supra* note 6. This appearance was filed one day before this Court's ruling on Sudan's liability and one year before its ruling on damages. Thus, even if Sudan were truly unable to defend this action when it was first filed in 2010, it could have intervened at least

a year before the March Orders were entered, but it chose not to.[15]

As to Sudan's claims that it lacked sufficient understanding of the American litigation process, sovereign immunity, and the gravity of this lawsuit; these claims are disingenuous, at best. Plaintiffs rightly point out that Sudan appeared in the *Rux* case, retained highly capable local counsel, Hunton & Williams LLP, and defended against similar claims to those in the current action involving the limits of foreign sovereign immunity in the United States. Opp. Br., ECF No. 146, at 27. Notwithstanding the subsequent amendments to the FSIA in 2008, Sudan was also made acutely aware of the relevant litigation process—not just in the United States but in this very Court—and was on notice of the gravity of the claims asserted by Plaintiffs, fifty-nine of whom carried over from

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[15] Such selective participation in U.S. litigation is also why Sudan's cited case, *FG Hemisphere Associates, LLC v. Democratic Republic of Congo*, is not persuasive here. 447 F.3d 835, 841 (D.C. Cir. 2006) (finding that the Democratic Republic of Congo's ("DRC") delay in responding to litigation was excusable, in part, because it was "plainly hampered by devastating civil war"). In that case, the court ultimately found excusable neglect because "the failure to file a timely response was in considerable measure *out of the DRC's control*." *Id.* at 840 (emphasis added). The court cited to the DRC's clear language translation issues and the fact that the relevant pleading was "bouncing around the various departments within the DRC." *Id.* at 841. The court also noted that the DRC's Office of the Foreign Minister had no record of even receiving the pleading. *Id.* By contrast, Sudan has never suggested that it had difficulty receiving, reading, or understanding the contents of the complaint served on it in 2010. Nor can Sudan credibly argue that it had no control over its ability to litigate this case given its selective participation in other cases, including *Rux*.

Rux into the instant action.[16] Thus, Sudan's decision to defend this action now, after the entry of final default judgments against it, can only be classified as deliberate and strategic. *See Point PCS*, 95 F. App'x at 27-28 (no excusable neglect where party admitted to receiving all pre-default pleadings and was involved in decision-making process to allow default); *Christian Sci. Bd. of Directors of First Church of Christ, Scientist v. Nolan*, 259 F.3d 209, 219 (4th Cir. 2001) (no excusable neglect where party was "concededly aware" of the suit yet failed to respond or appear before entry of default judgment).

For this reason, the final *Pioneer* factor, whether Sudan acted in good faith, also weighs heavily against finding excusable neglect in this case. Indeed, many of Sudan's litigation tactics in this Court display the opposite. Most significantly, the record in the *Rux* litigation indicates that Sudan instructed its counsel, Hunton & Williams LLP, to defy multiple orders of this Court to file pleadings and to continue litigating the case until its conclusion. After Hunton & Williams LLP first appeared on behalf of Sudan in June 2005, the Court made it abundantly clear to counsel, Gregory Stillman, at the hearing on Sudan's then-pending motion to vacate that his firm would not be permitted to withdraw as Sudan's counsel until the conclusion of the case:

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[16] Sudan would have this Court view the instant litigation in a vacuum and disregard its conduct in the *Rux* litigation for purposes of this Motion. Reply Br., ECF No. 147, at 17-18. Such disregard would be inappropriate given that the procedural histories of the two cases are inextricable, which the Court of Appeals has expressly acknowledged. *See Clodfelter v. Republic of Sudan*, 720 F.3d 199, 202 (4th Cir. 2013).

THE COURT: First, Mr. Stillman, are you representing the Republic of Sudan?

MR. STILLMAN: We're here in, in that special capacity, asking the Court to dismiss this for lack of personal jurisdiction.

THE COURT: Stop a minute. I don't play games, Mr. Stillman. If you're here, you're here.

MR. STILLMAN: I'm here.

THE COURT: You're not here, then goodbye.

MR. STILLMAN: I'm here. I'm not virtual. I'm actually here.

THE COURT: Are you representing the Republic of Sudan?

MR. STILLMAN: We represent—

THE COURT: The reason why, is in the papers that have been forwarded to me, it indicated that, at least insofar as your co-counsel are concerned, they had some misgivings at least in one case about representing the Republic of Sudan.

MR. STILLMAN: Well, it wasn't my co-counsel, it was my law firm. And—

THE COURT: Well, whoever it is. And what I'm saying is if you're appearing, you aren't disappearing. Do you understand that?

MR. STILLMAN: I read you loud and clear.

THE COURT: And maybe the money will go, but Stillman will stay. Do you understand?

MR. STILLMAN: I do indeed.

THE COURT: I just want to make it clear at the outset. I want the record to so reflect it. Because I'm not going to be playing games.

MR. STILLMAN: I understand your point, Your Honor.

THE COURT: All right? Just so long as you understand that. Now, you are authorized to represent the Republic of Sudan?

MR. STILLMAN: I am.

THE COURT: And you are authorized to make the motion which you have made?

MR. STILLMAN:	I feel like I'm being sentenced, but yes, I am.
THE COURT:	Sometimes, Mr. Stillman, it's necessary to be sentence[d], do you understand that? It's just so that at the outset we understand the nature of where we're going and what we're doing. And I want you to understand that, lest you have some misgivings, about, well, I'm coming in and then I'm going out. You're not coming in and going out.
MR. STILLMAN:	I understand your point, Your Honor. And we will not do that.

No. 2:04cv428, Dkt. No. 36, June 30, 2005 Hr'g Tr. 4:23-6:20. Nevertheless, Sudan's counsel failed to comply with this Court's orders to file responsive pleadings on three separate occasions: first in October of 2006, *id.*, Dkt. No. 53, second in March of 2007, *id.*, Dkt. No. 72, and then again in September of 2009, *id.*, Dkt. No. 116. Furthermore, in April of 2008, Sudan's counsel filed a motion to withdraw despite the Court's clear instruction to remain as counsel of record until the conclusion of proceedings. *Id.*, Dkt. No. 110. On all four occasions, Hunton & Williams LLP submitted letters to the Court explaining that its hands were tied because Sudan had instructed counsel not to defend or otherwise litigate the case on the merits despite the Court's orders to the contrary. *See supra* Section I.A at 3-5. This is clear evidence of Sudan's bad faith.

See In re McCain, 353 B.R. 452, 464 (Bankr. E.D. Va. 2006) (finding "[d]ilatory tactics such as 'stalling and ignoring direct orders of the court'" relevant to the *Pioneer* good-faith factor) (internal citation omitted). Indeed, Sudan cannot knowingly ignore court orders and direct its counsel not to litigate on the merits in *Rux* and then credibly claim excusable neglect in this directly-related action filed only two years later.

Because Sudan is clearly responsible for the default in this case, it is required to "adequately defend its conduct" before the court will override the interests of finality and efficiency in litigation and grant relief under Rule 60(b)(1). *Point PCS*, 95 F. App'x at 27. For the reasons above, the Court finds no adequate defense. Taking account of all the circumstances surrounding Sudan's default, Sudan has failed to make a showing of excusable neglect. Accordingly, the Court **DENIES** Sudan's Motion to Vacate pursuant to Rule 60(b)(1).

D. SUDAN HAS NOT SHOWN ANY OTHER REASON TO JUSTIFY RELIEF PURSUANT TO RULE 60(B)(6)

As a last resort, Sudan argues that it is entitled to relief from the default judgments in this case pursuant to the catch-all provision of Rule 60(b)(6), which permits vacatur "for any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). In support, Sudan cites to *Ungar v. Palestine Liberation Org.*, 599 F.3d 79, 85-86 (1st Cir. 2010), in which the United States Court of Appeals for the First Circuit vacated a default judgment against the Palestine Liberation Organization ("PLO") under Rule 60(b)(6) despite the fact that the PLO willfully defaulted. *See* Reply Br., ECF No. 147, at 28. Sudan notes that the PLO "had a 'good-faith change of heart' and had 'legitimate, merit-based defenses to the action,'" *id.* (citing *Ungar*, 599 F.3d

at 86), presumably to suggest that the same circumstances apply in this case. In essence, what Sudan before characterized as excusable neglect due to domestic turmoil, it here describes as a willful decision that Sudan now regrets.

Sudan cannot have it both ways. Rule 60(b)(6) "may be invoked in only 'extraordinary circumstances' when the reason for relief from judgment does not fall within the list of enumerated reasons given in Rule 60(b)(1)-(5)." *Aikens v. Ingram*, 652 F.3d 496 (4th Cir. 2011) (citing *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 n.11 (1988)). Not only is Sudan's change-of-heart argument contradicted by its claims of excusable neglect, Sudan also fails to identify any circumstances, much less extraordinary ones, that would justify vacating this Court's final default judgments merely because Sudan changed its mind. For this reason, Sudan's Motion to Vacate pursuant to Rule 60(b)(6) is **DENIED**.

E. SUDAN'S CHALLENGE TO RETROACTIVE PUNITIVE DAMAGES IS NOT A VALID BASIS FOR RULE 60(B) RELIEF

Finally, this Court must address Sudan's argument that Section 1605A(c) does not provide for retroactive punitive damages and thus the Court should vacate the default judgments "to strike the award of punitive damages" as unconstitutional. Mem., ECF No. 135, at 25. Sudan does not expressly state under which ground of its Rule 60(b) Motion to Vacate it classifies this claim, nor is it readily apparent to this Court. In Sudan's brief, the argument is adjacent to its jurisdictional arguments and is perhaps intended as an additional argument that the default judgments are void. However, even if Sudan were correct that the Court's awards of punitive damages in this case

are unconstitutional, this would not make them "void" under Rule 60(b)(4).[17] A judgment is not void "simply because it is or may have been erroneous," nor is Rule 60(b)(4) "a substitute for a timely appeal," at which time such a defense may properly be raised. *Espinosa*, 559 U.S. at 270 (internal citations omitted). "Instead, Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." *Id.* at 271; *see also United States v. Three Hundred Fifty-Three Thousand Six Hundred Dollars, in U.S. Currency*, 463 F.3d 812 (8th Cir. 2006) (challenging the legality of a forfeiture judgment was not proper grounds for a Rule 60(b)(4) motion "[r]egardless of the merits of the claimant's argument").

Therefore, the only way to shoehorn this argument into Sudan's Rule 60(b) motion is to construe it as "any

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[17] It should be noted that this Court finds the substance of Sudan's claim to be without merit. Section 1605A is clear that retroactive application of the statute is permissible, as it expressly permits actions to "be brought or maintained under this section" if "a related action was commenced under section 1605(a)(7) (*before the date of the enactment of this section*) . . . " as long as certain time limitations are satisfied. 28 U.S.C. § 1605A(b) (emphasis added). Contrary to Sudan's position, this language is indeed "so clear that it could sustain only one interpretation." Mem., ECF No. 135, at 24 (quoting *INS v. St. Cyr*, 533 U.S. 289, 317 (2001)). Other federal courts concur and have awarded retroactive punitive damages under Section 1605A. *See, e.g.*, *Leibovitch v. Islamic Republic of Iran*. 697 F.3d 561, 571 (7th Cir. 2012); *Murphy v. Islamic Republic of Iran*, 740 F. Supp. 2d 51, 83 (D.D.C. 2010); *Rimkus v. Islamic Republic of Iran,* 750 F. Supp. 2d 163, 178 (D.D.C. 2010).

other reason that justifies relief" under Rule 60(b)(6).[18] But this too is without merit. As noted above, a movant must show "extraordinary circumstances" to get relief under this rule. *Aikens*, 652 F.3d at 500. Erroneous application of the law does not qualify because such claims can properly be addressed on appeal. *Id.* at 501 ("[I]f the reason asserted for the Rule 60(b)(6) motion could have been addressed on appeal from the judgment, we have denied the motion as merely an inappropriate substitute for an appeal."); *see also Budget Blinds, Inc. v. White*, 536 F.3d 244, 255 (3d Cir. 2008) ("[E]xtraordinary circumstances rarely exist when a party seeks relief from a judgment that resulted from the party's deliberate choices."). Sudan's deliberate choice not to litigate this case precludes a finding of extraordinary circumstances that might in other cases justify a collateral attack on allegedly unconstitutional damages awards.

Accordingly, Sudan's Motion to Vacate is **DENIED** to the extent it seeks to vacate the default judgments in the case in order to strike the punitive damages awards.

IV. SUDAN'S REQUEST FOR EXTENDED TIME TO APPEAL

Sudan finally requests that, in the event its Motion to Vacate were denied, the Court grant an extension of time to appeal under Federal Rule of Appellate Procedure 4(a)(5) ("Rule 4(a)(5)"). The rule states:

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[18] Sudan's retroactivity argument cannot be reasonably construed as raising issues pertaining to inadvertence or excusable neglect (Rule 60(b)(1)); newly discovered evidence (Rule 60(b)(2)); fraud (Rule 60(b)(3)); or the inequitable prospective application of a judgment or a judgment that has been "satisfied, released or discharged" (Rule 60(b)(5)). *See* Fed. R. Civ. P. 60(b).

> The district court may extend the time to file a notice of appeal if:
>
> (i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and
>
> (ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

Fed. R. App. P. 4(a)(5). Sudan argues that it satisfies both requirements: (i) Sudan filed the motion for an extension of time on May 14, 2015, which is within thirty days of April 16 and 17, 2015, the time prescribed for Sudan's appeal under Rule 4(a)(1)(A); and (ii) the "need for this case to be heard in the adversarial context, including on appeal, is paramount" and thus satisfies the good cause standard. Mem., ECF No. 135, at 28. Sudan also points to the domestic turmoil it has suffered and the failure of Plaintiffs to properly serve the March Orders as further evidence of good cause. *Id.* at 29.

There is no question that Sudan filed its motion for an extension of time within the prescribed thirty-day period. *See* Fed. R. App. P. 4(a)(1)(A) and (a)(5). As to which standard the Court should apply to determine if the second requirement is met, the advisory committee's note to Rule 4(a)(5) clarifies that, where a motion for an extension of time is filed within the thirty-day period, the same "good cause" standard under Rule 26(b) should be applied to determine whether to grant the extension. Fed. R. App.

P. 4(a)(5) advisory committee's note to 1979 amendment.[19] The "good cause" standard is more lenient than the "excusable neglect" standard, and it is meant "to accommodate a wider array of circumstances." *Parke-Chapley Const. Co. v. Cherrington,* 865 F.2d 907, 910 n.5 (7th Cir. 1989) (citing 9 J. Moore et al., *Moore's Federal Practice*, ¶ 204.13[1.-2] n.25 (2d ed. 1953)). For this reason, Sudan's desire to challenge the default judgments on the merits as well as the timing of Sudan's Motion to Vacate display sufficient good cause to request an extension. Accordingly, Sudan's motion for an extension of time to appeal is hereby **GRANTED**.

V. CONCLUSION

In summary, for the reasons stated herein, it is hereby **ORDERED** that:

1) The following judgments and orders are **CORRECTED** to reflect that each is a final judgment as to each of the family-member plaintiffs:

   a. ECF No. 120 in Case No. 2:10cv171 (entered March 13, 2015);

   b. ECF No. 3 in Case Nos. 2:13cv618 thru 2:13cv633 (entered March 17, 2015);

   c. ECF No. 2 in Case No. 2:13cv634 (entered March 17, 2015);

   d. ECF No. 4 in Case Nos. 2:13cv618 thru 2:13cv633 (entered March 18, 2015); and

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[19] The "excusable neglect" standard, on the other hand, should be reserved for motions filed outside of the thirty-day period. *Id.*

e. ECF No. 3 in Case No. 2:13cv634 (entered March 18, 2015);

2) The Clerk is **DIRECTED** to certify each of the above-listed orders as final judgments as to each of the family-member plaintiffs pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, stating on each corresponding docket sheet that the order is "final" and that there is "no just reason for delay";

3) Sudan's Motion to Vacate Pursuant to Rule 55(c) of the Federal Rules of Civil Procedure (ECF No. 134) is **MOOT**;

4) Sudan's Motion to Vacate Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure (ECF No. 134) is **DENIED**;

5) Sudan's Motion to Extend the Time to File Notices of Appeal Pursuant to Rule 4(a)(5) of the Federal Rules of Appellate Procedure (ECF No. 134) is **GRANTED** for a period of sixty (60) days from the date hereof; and

6) The Clerk is **DIRECTED** to forward a copy of this Order to all Counsel of Record.

IT IS SO ORDERED.

/s/ Robert G. Doumar
Robert G. Doumar
Senior United States District Judge

Norfolk, VA
October 25, 2016