File Wallenberg

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUY VON DARDEL, Plaintiff, v. UNION OF SOVIET SOCIALIST REPUBLICS, Defendant.	)	Civil Action No. 84-0353

STATEMENT OF INTEREST OF THE UNITED STATES

RICHARD K. WILLARD
Assistant Attorney General

JOSEPH E. diGENOVA
United States Attorney

DAVID J. ANDERSON
ELIZABETH SARAH GERE

Attorneys, Department of Justice
Civil Division, Room 3515
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 633-3403

Attorneys for the United States

OF COUNSEL:

ABRAHAM D. SOFAER
Legal Adviser
ELIZABETH VERVILLE
Deputy Legal Adviser
MARY BETH WEST
BRUCE C. RASHKOW
RICHARD WOHL
CAROL SCHWAB
Attorneys
Department of State
Washington, D.C. 20520

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STATEMENT OF INTEREST OF THE UNITED STATES

STATEMENT

The United States files this Statement of Interest pursuant to the Court's request (Letter of October 19, 1986), and 28 U.S.C. § 517, which authorizes the Attorney General to attend to the interests of the United States in a pending suit.

1. The Instant Proceedings

This suit was brought by Raoul Wallenberg's half brother, Guy von Dardel, and his legal guardian, Sven Hagstromer, against the Soviet Union, alleging that Soviet treatment of Wallenberg violates international law, international agreements and the laws of the United States. The Soviet Union refused to appear, returned the Complaint to the United States Embassy in Moscow and sent a diplomatic note asserting absolute sovereign immunity from suit in non-Soviet courts. On October 15, 1985, the Court granted plaintiffs' Motion for a Default Judgment. 623 F. Supp. 246 (D.D.C. 1985). The default judgment, as amended on November 7, 1986, directed the Soviet Union to produce the person of

Wallenberg or his remains within 60 days of the order, to provide the Court with any documents or information in its custody pertaining to Wallenberg and to pay plaintiffs compensatory damages of $39 million.

When the Soviet Union failed to comply with the judgment and returned the Notice of Default and supporting papers, plaintiffs moved to hold the Soviet Union in civil contempt, and to impose a fine of $50,000 per day which would rise by a factor of two every two weeks to a maximum of $1 million per day. (Plaintiffs' Motion for an Order Holding the Defendant Union of Soviet Socialist Republics in Civil Contempt, filed April 28, 1986.) Recognizing that the entry of such an order would involve important issues of foreign policy, the Court requested the views of the United States. As the Court stated in its October 29, 1986 letter:

> Because the entry of an order of the type that plaintiffs contemplate would involve issues of foreign policy, the Court deems it appropriate to have the views of the United States before proceeding further in this matter.

2. The Foreign Sovereign Immunities Act

Under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602, et seq. (hereinafter referred to as the "FSIA" or "the Act"), immunity decisions are to be made by the courts. Nevertheless, the United States maintains a continuing interest in the interpretation of the Act because of the foreign policy implications of its application, see Letter of Monroe Leigh to Attorney General Edward H. Levy, Nov. 2, 1976, LXXV St.

Dept. Bull. 649 (1976), and, in passing the FSIA, Congress certainly did not intend to preclude the Executive Branch from responding substantively to judicial requests. In response to the Court's request, we therefore offer the United States' views.

Foreign policy concerns are clearly triggered when a court contemplates holding a foreign State in contempt. Congress no doubt assumed in enacting the FSIA that foreign States would respond to suits against them in United States courts. The Department of State has strongly supported Congressional policy in the FSIA by urging all States to respond to such litigation, and the United States responds in foreign courts as the price for enforcing such a policy. The State Department has also explained to foreign States that refusal to appear may lead to entry of default judgments against them. Thus, in principle, the United States supports the rights of aggrieved plaintiffs to sue the Soviet Union in federal court when permitted under the FSIA, and has repeatedly requested the Soviet Union in the strongest terms to respond to suits against it.

Despite Congress' intention and the State Department's strenuous efforts, however, some foreign States have refused to respond to suits in our courts. Those States do not adhere to the widely-held restrictive theory of immunity under international law, on which United States law is based. They subscribe, instead, to the theory of absolute immunity. See generally Jackson v. People's Republic of China, 794 F.2d 1490, 1492-94 (11th Cir. 1986). Some States may also fail to accept

the premise of United States law that any line between immune and non-immune activities is to be drawn by our courts -- an approach to immunity determinations which is not universally practiced even by States adhering to the restrictive theory of immunity. Rather, they see immunity determinations as an issue for diplomatic resolution on a government-to-government basis. Thus, when States fail to respond in United States courts, that action should not necessarily be seen as reflecting any disrespect for our courts. It may instead represent an assertion by that State of its views concerning sovereignty and equality under international law. However much the United States may disagree with such failure to respond, one cannot lightly characterize such conduct as reflecting contemptuous behavior.

3. The Position of the United States

The United States believes that a foreign State's failure to appear should be treated with fairness and great care. While United States courts have the power to decide immunity issues, to issue default judgments, and to enforce those judgments through appropriate means, they should take special care strictly to adhere to all legal requirements and to take into account all relevant implications. Decisions holding a foreign State in default are not always challenged by a foreign State, and often adversely affect this nation's foreign relations -- sometimes seriously. Moreover, to our knowledge, a foreign government has never been held in contempt, a fact which could only be expected severely to compound foreign relations problems if that action

were taken. In view of the importance of these default decisions, the United States will continue, when appropriate, to respond to requests from courts, parties and States for its views, and will act on its own initiative to inform courts of its views, consistent with Congress' policy of having courts decide immunity issues.

The United States believes that the exercise of the contempt powers of the Court in the instant case would be inappropriate because: (1) their exercise would be inconsistent with the purposes of the FSIA, and would be ineffective; and (2) there is serious question concerning the validity of the underlying judgment. The Court therefore should not enter an order of contempt in this case, and should reexamine under the FSIA the jurisdictional bases for its decision.

In stating its views, the United States wishes to make clear that its views on the legal elements of the von Dardel case have no effect on the United States' position concerning Soviet treatment of Wallenberg. The United States abhors the Soviet Union's unjust imprisonment of Wallenberg and continues, through Governmental channels, to seek a full and satisfactory accounting for his fate. The proper forum for such matters, however, is the diplomatic arena and not the courts of the United States.

The United States must also consider the current proceedings in terms of their potential impact on broader foreign policy interests. The imposition of contempt sanctions against the defendant under the circumstances of this case would create a

precedent that could later be applied against other governments here -- and the United States abroad -- in factual situations that are far less sympathetic to plaintiffs.

DISCUSSION

I. The Standards For A Finding Of Contempt

Contempt sanctions would be inappropriate in the instant case for two reasons. First, the imposition of such sanctions would be inconsistent with the legal framework established by Congress in the FSIA for litigation against foreign states, particularly with respect to the enforcement of judgments. Second, such sanctions would be inappropriate because the underlying judgment is of questionable validity.

Courts generally have the inherent authority to enforce their orders and to impose sanctions on individuals who disobey those orders through contempt proceedings. See, e.g., 7 Wright & Miller, Federal Practice and Procedure, § 2960 at 581. However, the authority of our courts in cases against foreign States is circumscribed by the FSIA. To our knowledge, the question of the relationship between contempt and the FSIA is one of first impression.

As a general rule, a respondent may be held in contempt for failure to comply with a lawful court order if the following criteria are satisfied: (1) the order being enforced is clear and unambiguous; (2) proof of non-compliance is clear and convincing; (3) respondent has not exercised reasonable diligence in attempting to comply; and (4) basic standards of due process

such as notice and an opportunity to defend have been met. See, e.g., E.E.O.C. v. Local 638, 753 F.2d 1172 (2d Cir. 1985); 7 Wright and Miller, § 2960 at 588-89.

In the FSIA, however, Congress created a legal framework for litigation against foreign States in which it sought to balance the rights and interests of foreign States against the rights of private litigants. See generally H.R. Rep. No. 1487, 9th Cong., 2d Sess. reprinted in 1976 U.S. Code Cong. & Ad. News 6604, et seq.; McKeel v. Islamic Republic of Iran, 722 F.2d 582 (9th Cir.), cert. denied, 105 S.Ct. 243 (1984). While Congress expressly provided for the enforcement of judgments against such States by attachment and execution, 28 U.S.C. §§ 1609-1611, it did not provide for the imposition of contempt sanctions. In view of this framework, the United States believes such sanctions were considered inappropriate by Congress. At a minimum, before a court considers imposing such sanctions it must, as this Court has decided to do, take into account the character of the defendant as a foreign sovereign and the implications that the contempt sanctions may have on the foreign relations of the United States. Imposing contempt sanctions in this case would set a precedent which could affect our legal and political relationships with all foreign nations potentially subject to the jurisdiction of United States courts. Furthermore, the Court should be cautious in exercising its contempt powers to ensure that the orders it enters will be effective, and that the Court has used the least power possible to achieve its objectives.

See, e.g., Shillitani v. United States, 384 U.S. 364, 371 (1966), citing Anderson v. Dunn, 6 Wheat. 204, 231 (1821).

A finding of contempt which seeks to enforce compliance with the orders of the court or to compensate for losses or damages will not survive if the underlying decree or judgment is found invalid. See e.g., United States v. United Mine Workers, 330 U.S. 258, 294-295 (1947); Latrobe Steel Co. v. United Steel Workers, et al., 545 F.2d 1336, 1342-1348 (3d Cir. 1976). Contempt would be inappropriate in the instant case because an analysis of the jurisdictional requirements of the FSIA casts serious doubt on the validity of the underlying judgment.

II. Contempt Is Inappropriate Under The FSIA And Would Be Ineffective

Courts employ the contempt power either to coerce compliance with their orders or to compensate for losses or damages sustained (civil contempt), or to punish persons for acts against the judicial process or the courts (criminal contempt).[1] In

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[1] The determinative factor in evaluating whether contempt is civil or criminal is the purpose for which the sanction is imposed rather than the nature of the act punished. See, e.g., Shillitani, 384 U.S. at 369-370. In proceedings for civil contempt, the sanctions are intended to coerce compliance with an order of the court, or to compensate for losses or damages as a result of the defendant's non-compliance. See, e.g., Washington Metro. Area transit Auth. v. Amalgamated Transit Union, 531 F.2d 617, 622 (D.C. Cir. 1976). Criminal contempt, by contrast, carries punitive sanctions for past acts and is designed to deter offenses against the public. See, e.g., Consolidation Coal Co. v. Local 1702, UMW, 683 F.2d 827 (4th Cir. 1982). Moreover, while the contemnor can purge himself of civil contempt through compliance with the court's order, the punishment of criminal contempt is unconditional. See United States v. North, 621 F.2d 1255 (3d Cir.), cert. denied, 449 U.S. 866 (1980). Accordingly, civil contempt is always a facet of the principal suit, while (continued...)

either event, recourse to the contempt powers is inappropriate in a case such as this.

The exercise of the contempt powers of the Court in this case would conflict with the delicate balance between the rights and interests of sovereign States and the rights of private litigants that Congress sought to strike in the FSIA. In enacting the FSIA, Congress intended to codify the restrictive theory of sovereign immunity under international law. 1976 U.S. Code Cong. & Ad. News at 6613. The Act provides jurisdiction over actions against sovereign States (and their agencies and instrumentalities) based upon the commercial activities of such States, as well as certain tort actions for monetary damages. 28 U.S.C. § 1605.

The Act establishes a comprehensive mechanism for initiating such actions and for enforcing resulting judgments against foreign States. The FSIA does not expressly provide for the imposition of contempt sanctions, and there is no indication in the history of the legislation that Congress contemplated the imposition of such sanctions under the Act, even with respect to agencies and instrumentalities of foreign States.[2] In the

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[1](...continued)
criminal contempt is a separate action prosecuted in the name of the United States. See In re Stewart, 571 F.2d 958 (5th Cir. 1978).

[2] Plaintiffs concede that the Act contains no provision for, or reference to, contempt sanctions. (Plaintiffs' Memorandum in Support of their Motion for Contempt at 10). Instead, they rely upon a single ambiguous sentence in the legislative history which (continued...)

absence of a clear intention by Congress to the contrary, the Court should be reluctant to go beyond the statutory scheme contained in the FSIA for enforcement of judgments.

Exercise of the contempt power in response to a sovereign's failure to respond to a Court's judgment would be inappropriate because it ignores the basis for the foreign State's refusal. The refusal of a sovereign State to engage in litigation against it from its inception, absent specific evidence to the contrary, should not be considered as an expression of scorn or contempt for which such sanctions are normally imposed. Rather, such a refusal reflects a determination by that sovereign based on its strongly held principles that it is not subject to the jurisdiction of a foreign court and ought not be required to submit to that jurisdiction even for the limited purpose of disputing such jurisdiction. In the view of the foreign State, the refusal to appear in our courts normally reflects a dispute between two sovereigns concerning an issue of foreign relations and international law.[3] Some foreign States also object to the

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[2](...continued)
states that "[A] fine for violation of an injunction may be unenforceable if immunity exists under Section 1609-1610." (Plaintiffs Memorandum at 10, quoting from 1976 U.S. Code Cong. & Ad. News at 6621.) The legislative history does not explain what Congress intended by the use of the word "fines", the circumstances under which those fines could be imposed, nor against whom they could be assessed. And, as discussed, infra, the imposition of contempt is inconsistent with the entire scheme of the Act.

[3] As noted by the Court in this case, the Soviet Union rturned the Complaint to the United States Embassy in Moscow and (continued...)

inconvenience and the cost associated with responding to what they see as unjustifiable attempts to assert jurisdiction over them or their agencies and instrumentalities. They maintain that they do not subject the United States to such actions and expect the United States to extend to them the same respect and courtesy. However much the United States may disagree with the refusal of such States to respond to the jurisdiction of our courts, it is important to note that a number of foreign States share that point of view.

Plaintiffs' proposed use of contempt to enforce the Court's judgment is likewise inappropriate because it ignores the intention of Congress that judgments against foreign states and their agencies and instrumentalities be enforced through attachment and execution. Congress expressly provided for attachment and execution to enforce judgments in certain cases and expressly preserved the immunity of State property in others. 28 U.S.C. §§ 1610, 1611. Thus, while Congress provided for attachment and execution against the commercial property of a State for judgments resulting from actions based upon the commercial activities of such States, Congress distinguished between property of the sovereign States and that of its agencies and instrumentalities. Compare 28 U.S.C. § 1610(a) with 28 U.S.C. § 1610(b). With respect to the foreign State itself,

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[3](...continued)
sent a diplomatic note asserting absolute sovereign immunity from suit in non-Soviet courts. 623 F. Supp. at 250.

Congress authorized attachment and execution only against property which was used for the commercial activity upon which the cause of action is based. 28 U.S.C. § 1610(a).[4] Moreover, Congress deliberately distinguished such commercial actions from tort actions against foreign States. While permitting private litigants to file some non-commercial tort actions against foreign States, 28 U.S.C. § 1605(a)(5), Congress preserved the immunity of those States with respect to attachment and execution against the property of the State to enforce such actions. 28 U.S.C. § 1610-1611. As the Court of Appeals for the Second Circuit recognized in Letelier v. Republic of Chile, 748 F.2d 790 (2d Cir. 1984), cert. denied, 105 S.Ct. 2656 (1985), in such cases Congress, in effect, created a right which may be without an enforceable remedy.

These distinctions reflect a conscious decision on the part of Congress to strike a balance between the rights and interests of the foreign sovereign and the private litigant. Contempt, even to enforce a judgment,[5] is distinct from execution and

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[4] Section 1610(a) of the Act contains other provisions regarding immunity from attachment of State property.

[5] In this instance, the contempt that plaintiffs have requested the Court to impose is civil. The imposition of criminal contempt involves different standards and procedures. Compare 18 U.S.C. § 402 with Rule 70, Federal Rules of Civil Procedure. In any event, it is clear that Congress did not intend to authorize the imposition of criminal contempt or other punishment against foreign States. 1976 U.S. Cong. Code & Ad. News at 6621. The extraordinary sanctions that plaintiffs request in a sense seek to punish the defendant and, for that reason as well, are inconsistent with the intention of Congress.

attachment. It suggests purposeful wrongdoing and would be viewed by the foreign State as a serious charge.[6] For these reasons, a finding of contempt may have more serious consequences for our foreign relations than would normal recourse to the execution and attachment provisions of FSIA.

In view of the sensitivity that the FSIA reflects regarding the imposition of such an extraordinary remedy in litigation against a foreign sovereign, the Court should also consider whether use of the contempt power would be effective. See, e.g., United States v. United Mine Workers, 330 U.S. at 304. The governing principle is that a court should exercise "(t)he least possible power adequate to the end proposed." Shillitani, 384 U.S. at 371, citing Anderson v. Dunn, 6 Wheat. 204, 231 (1821). This is consistent with the general principle of judicial economy that courts should not perform futile acts. In this case the use of contempt would not be effective.[7]

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[6] Emerging international practice among those States that have followed the example of the United States also raises a question whether imposition of contempt sanctions to enforce compliance with a court order is appropriate. Of the six States that have enacted legislation similar to our FSIA, five (UK, Hong Kong, Singapore, Pakistan, and Canada) do not permit injunctive or specific performance relief and limit the imposition of fines. The sixth -- Australia -- permits the courts wide discretion in their orders, but does not provide for imposition of penalties by way of fine. Accordingly, a decision by this Court to impose contempt sanctions on the Soviet Union might conflict with the intent of Congress to enact a statute that incorporates international standards concerning sovereign immunity.

[7] Moreover, any attempt to enforce the contempt order through execution against property of a foreign State would be ineffective since the FSIA does not permit execution against the

(continued...)

The United States' views on Wallenberg are well known, supra, at page 5, and we do not take issue with the Court's condemnation of Soviet conduct in regard to Mr. Wallenberg. The real question, however, is whether in the FSIA Congress intended to resolve these kinds of government to government political issues that we believe fall outside the carefully delimited scope of jurisdiction over foreign States under the Act, or whether such issues are properly left to statecraft and diplomacy.

The United States continues to urge upon the Soviet Union and other governments that they should respond to any and all United States court proceedings brought against them, regardless of their nature. However, whether in their absence in this kind of case the Court should properly find first jurisdiction and then enter contempt sometimes is another matter. For example, in recognition of these concerns, this Court (Robinson, C.J.), recently dismissed an action against the Soviet Union brought by heirs of the passengers killed in the downing of Korean Airlines flight 007. In Re Korean Airlines Disaster of September 1, 1983, M.D.L. DOcket No. 565, (D.D.C., Order of August 1985) (Copy attached as Exhibit 1). While the Court found the Soviets' actions "deplorable," id. at 13, it concluded that it did not have and should not exercise jurisdiction over the Soviet Union

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[7](...continued)
property of a foreign State on a judgment resulting from the non-commercial tortious actions of a State, regardless of how egregious that conduct might have been. Letelier, 748 F.2d at 798-799. Thus, entry of an order of civil contempt would be a futile act.

pursuant to the FSIA or any other of the jurisdictional bases advanced by the plaintiffs.[8]

In light of these considerations and the jurisdictional bounds of the FSIA, we do not believe that the exercise by this Court of its contempt powers is appropriate in this type of case.

III. Contempt Is Inappropriate Because There Are Serious Questions Concerning Jurisdiction In This Case

An order of civil contempt does not survive if the underlying decree or judgment is found invalid. See, e.g., United States v. United Mine Workers, 330 U.S. at 294-295; Latrobe Steel Co. v. United Steel Workers, 545 F.2d at 1342-1348. In the underlying judgment in this case, the Court found that it had jurisdiction under both the FSIA and the Alien Tort Claims Act, 28 U.S.C. § 1350. 623 F.Supp. 246. However, because the defendant did not appear in this proceeding, the Court did not have the benefit of adversarial argument on the merits of the jurisdictional issues. In similar cases which have led to default judgments, it has not been unusual for courts to reexamine the issue of jurisdiction in light of new arguments presented at some later stage in the proceeding. See Jackson v. The People's Republic of China, 794 F.2d 1490; Siderman de Blake v. The Republic of Argentina, CV No. 82-1772-RMT (C.D. Cal. March 7, 1985) (Copy attached as Exhibit 2).

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[8] An additional jurisdictional basis asserted in the KAL litigation, the Aliet Tort Claims Act, was also advanced by the instant plaintiffs and is discussed infra at pp. 24-26.

This Court held in its October 15, 1986 Opinion and Order, 623 F.Supp. 246, that it had subject matter and personal jurisdiction over the Soviet Union under the FSIA, on the following grounds:

(1) sovereign immunity is an affirmative defense that must be pleaded and proved by the sovereign defendant;

(2) the FSIA should be read not to extend immunity to clear violations of universally recognized principles of international law;

(3) the FSIA should be read to permit the full operation of international agreements to which the United States is a party;

(4) in ratifying an international agreement, a foreign sovereign implicitly waives the defense of sovereign immunity with regard to claims based upon violations of such agreements.

The Court also concluded that the Alien Tort Claims Act, 28 U.S.C. § 1350, provides an independent basis for subject matter jurisdiction. Finally, in holding that it had personal jurisdiction over the defendant, the Court reasoned that the minimum contacts required to bring suit against the Soviet Union under 28 U.S.C. § 1330(b) were "clearly satisfied" because the Soviet Union maintains a substantial presence in the District of Columbia.

The United States believes that these jurisdictional findings are subject to serious question. The FSIA was intended to provide jurisdiction generally over commercial actions and over a limited number and type of tort actions. 28 U.S.C.

§§ 1602, 1605. The FSIA provides jurisdiction only for tort actions in which money damages are sought and where the injury occurs in the United States. 28 U.S.C. § 1605(a)(5). The legislative history of this provision, however, reflects that Congress intended that the tortious act or omission must also occur in the United States, 1976 U.S. Code Cong. & Ad. News at 6619. And, virtually every court that has addressed the issue has required that the tortious act or omission occur in the United States. See, e.g., Persinger v. Islamic Republic of Iran, 729 F.2d 835, 842-843 (D.C. Cir. 1984); Asociacion de Reclamantes v. United Mexican States, 735 F.2d 1517, 1524-1525 (D.C. Cir. 1984); Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 379-380 (7th Cir. 1985); Olsen v. Government of Mexico, 729 F.2d 641, 645-646 (9th Cir. 1984).

To the extent that the judgment of this Court would create jurisdiction where none was intended by the FSIA, it exposes the United States to similar jurisdiction abroad. The theory of jurisdiction apparently applied by the Court could expose the United States to jurisdiction abroad for virtually any act said to be inconsistent with international law, as construed by any country in which the United States might be found. For the reasons set forth below, the United States does not believe Congress intended to establish jurisdiction over cases such as this, and would vigorously oppose the assertion of such jurisdiction against the United States abroad. Whatever one thinks of the Wallenberg controversy -- and the United States

abhors the Soviet conduct in this matter -- it clearly was not a commercial matter or a tort that Congress intended to subject to the jurisdiction of courts in the United States. In view of the arguments relating to jurisdiction presented below, the United States invites the Court, sua sponte, to review its findings on jurisdiction.

A. A Foreign Sovereign Does Not Waive Immunity By Failing To Appear

This Court has concluded that sovereign immunity under the FSIA is an affirmative defense that must be specially pleaded, and that failure to assert the defense constitutes a deliberate choice by the defendant State to forego any entitlement to immunity under the Act. 623 F. Supp. at 252-253. In arriving at this conclusion, the Court relied on a statement in the legislative history that "sovereign immunity is an affirmative defense that must be specially pleaded", 1976 U.S. Code Cong. & Ad. News at 6616.

The question whether a foreign sovereign must appear to plead immunity was conclusively resolved by the Supreme Court in Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983). Noting the aforementioned statement in the legislative history, the Supreme Court concluded:

> Under the Act [FSIA], however, subject matter-jurisdiction turns on the existence of an exception to foreign sovereign immunity, 28 U.S.C. § 1330(a). Accordingly, even if the foreign state does not enter an appearance to assert an immunity defense, a district court still must determine that immunity is unavailable under the Act.

461 U.S. at 493-494, n. 20. See also MOL, Inc. v. People's Republic of Bangladesh, 736 F.2d 1326, 1328 (9th Cir. 1984). In view of the Supreme Court's holding, it is inconsistent with the terms of the FSIA and its legislative history to imply a waiver of immunity on the basis that the defendant State failed or refused to make an appearance.

B. Violations Of International Law Do Not Establish Jurisdiction Under The FSIA

The Court concluded that the FSIA should not be read to extend immunity to clear violations of universally recognized principles of international law. 623 F. Supp. at 253-254. This conclusion was based on a statement in the legislative history that the "Act [incorporated] standards recognized under international law," on certain decisions applying the act of state doctrine, and on the notion of "universal jurisdiction" under international law. 623 F. Supp. at 253-254.

The FSIA contains no exception to immunity based on violations of international law, and the United States believes that Congress intended to limit exceptions to immunity to those specified in the Act. The legislative history upon which the Court relied denotes merely that Congress was adopting internationally accepted standards concerning the restrictive theory of immunity. 1976 U.S. Code Cong. & Ad. News at 6613. It does not imply that the Act was intended to establish an exception to immunity for violations of international law. Amerada Hess Shipping Corp. v. Argentina, 85 Civ. 4365 (RCL)

(S.D.N.Y. May 5, 1986) (Slip opinion at 10-11.). (Copy attached as Exhibit 3.)

Decisions applying the act of state doctrine, upon which the Court also relied, do not support its conclusion. Under the act of state doctrine, a court may abstain from adjudicating a proceeding in which it otherwise has jurisdiction if the case requires the court to determine the validity of a public act of a foreign sovereign within the territory of that sovereign, even where the act is alleged to constitute a violation of international law. See, e.g., Banco Nacional De Cuba v. Sabbatino, 376 U.S. 398 (1974). The decisions upon which the Court relied reflect the willingness of courts to adjudicate proceedings in which the act of state doctrine would otherwise permit judicial abstention where international law standards are clearly established. Those decisions, however, do not bear on the central issue of this case -- whether jurisdiction exists in the first instance.[9]

Similarily, the notion of "universal jurisdiction" under international law is not relevant to the FSIA. While the United States may be entitled as a matter of international law to exercise such jurisdiction, federal courts may not exercise that jurisdiction unless empowered by Congress to do so. Owen

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[9] Courts routinely determine whether jurisdiction exists under the FSIA before addressing the applicability of the prudential Act of State doctrine. For example, in Kalamazoo Spice Extraction Co. v. Ethiopia, 729 F.2d 422 (6th Cir. 1983), the court, after finding jurisdiction under the FSIA, refused to dismiss the proceeding on the basis of the Act of State doctrine.

Equipment & Erection Co. v. Kroger, 437 U.S. 365, 372 (1979); Aldinger v. Howard, 427 U.S. 1, 6-16 (1976); Turner v. Bank of North America, 4 Dall. (4 U.S.) 6, 11 (1799). Congress has not so provided. Rather, Congress has determined that the FSIA is the exclusive basis of jurisdiction for suits against foreign States in our courts. See Verlinden, 461 U.S. 480; McKeel v. Islamic Republic of Iran, 722 F.2d 582; Amerada Hess Shipping Corp. v. Argentina, slip. op. at 8-9.

C. Violations Of International Agreements Do Not Establish Jurisdiction Unless Expressly So Stated Or Unless Otherwise In Conflict With The FSIA

This Court has concluded that, where the provisions of the Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, and the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, 28 U.S.T. 1975, have been violated by a defendant, section 1604 of the FSIA confers jurisdiction on United States cCourts to enforce such agreements.[10] 623 F. Supp. at 254-255.

To provide an exception to immunity under the FSIA, however, an international agreement must expressly provide for amenability to suit or otherwise conflict with the FSIA's immunity provisions. See 1976 U.S. Code Cong. & Ad. News at 6616; Amerada Hess Shipping Corp. v. Argentina, slip op. at 10-11. Neither the

[10] Section 1604 provides: "Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."

Vienna Convention[11] nor the Convention on Protected Persons[12] preempts the FSIA's immunity provisions since neither Convention conflicts with the FSIA nor even relates to its subject matter -- lawsuits against foreign States.[13] Thus, neither provides an exception to immunity under the FSIA.

D. A Foreign Sovereign Can Waive Immunity Under The FSIA Only By Express Waiver Or By Clear Conduct

This Court has concluded that, by becoming a party to international agreements containing obligations to respect certain human rights and diplomatic immunities, the Soviet Union implicitly waived its immunity under section 1605(a)(1) of the

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[11] The Vienna Convention is limited to setting forth the scope of privileges and immunities to be accorded to diplomatic missions and their personnel, and does not give rise to an independent basis for asserting jurisdiction over a foreign State which fails to accord such protection. See Skeen v. Federative Republic of Brazil, 566 F. Supp. 1414, 1419 (D.D.C. 1983).

[12] The Convention on Protected Persons requires States to exercise jurisdiction over certain criminal offenses committed by private individuals, but does not deal with the sovereign immunity of States. Moreover, the Convention as well as domestic implementing legislation, 18 U.S.C. § 112, extends only to offenses which have been perpetrated within the territory of, or by a national of, the State exercising jurisdiction. Thus, this Convention would not apply to the case before this Court in any event.

[13] Moreover, unless implemented by legislation, international agreements do not provide the basis for private suits unless they are intended to be self executing. See Diggs v. Richardson, 555 F.2d 848 (D.C. Cir. 1976); Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370. Neither agreement in this case was intended to confer rights on individuals which are judicially enforceable in United States courts. See Skeen, 566 F. Supp. at 1419. And, although the 1973 Convention has been implemented through domestic legislation, 18 U.S.C. § 112, that legislation is criminal and does not apply to the type of case before the Court.

FSIA.[14] 623 F. Supp. at 255-256. In reaching this conclusion, the Court relied on general statements by several scholars that treaty provisions should be carried out by the courts to the fullest extent possible. Prevailing law under section 1605(a)(1), however, holds that waivers of immunity cannot be implied from the broad, general obligations contained in such Conventions.

In accord with the general principle which applies to suits against the United States that waivers of immunity should be strictly construed, the waiver provisions of the FSIA have been construed narrowly, and courts have been reluctant to find waivers of sovereign immunity by international agreement without convincing evidence that the foreign State so intended. Frolova v. Union of Soviet Socialist Republics, 761 F.2d at 376-378; Berkovitz v. Islamic Republic of Iran, 735 F.2d 329, 333 (9th Cir. 1984), cert. denied, 105 S.Ct. 510 (1985); In re KAL Disaster, Slip Op. at 5-6; Rio Grande Transport, Inc. v. Compagnie Nationale Algerienne de Navigation, 516 F. Supp. 1155, 1160 (S.D. N.Y. 1981).

The agreements at issue in this case do not address sovereign immunity. Neither the text of the agreements nor their history indicates that the parties contemplated that by acceding

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[14] Section 1605(a)(1) of the Act provides that foreign countries are not immune in cases "in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver."

they would be waiving any sovereign immunity; nor are we aware of any support for the Court's suggestion that waiver should be implied simply because the agreements set forth recognized principles of international law. Certainly the FSIA, which establishes the sole standard for resolving questions of sovereign immunity, does not so provide. See Letelier v. Republic of Chile, 488 F. Supp. 672 (D.D.C. 1980).

E. The Alien Tort Claims Act Does Not Provide A Basis For Jurisdiction Against A Foreign State

The Court concluded that the Alien Tort Claims Act (hereinafter referred to as 'ATCA') independently provides subject matter jurisdiction over the defendant state in this case. 623 F. Supp. at 256-259. The ATCA gives the district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The ATCA, however, was not intended to establish jurisdiction over a foreign State, and, even if it were, it has been modified by the FSIA.

At the time of enactment of the ATCA, 1789, both international law and United States law generally recognized the absolute immunity of States from suit. The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116, 136-137 (1812). If Congress had intended to limit the well established doctrine of sovereign immunity, it would have done so expressly. It is clear from the silence of the statute and its legislative history that, whatever

jurisdiction the ATCA established in regard to suits by aliens against individuals for torts committed in violation of the law of nations, it did not establish jurisdiction in regard to suits against foreign states. Siderman v. Argentina, Slip Op.; Amerada Hess Shipping Corp. v. Argentina, Slip Op.

Furthermore, the FSIA provides the sole jurisdictional basis for suits against foreign states in United States courts. 1976 U.S. Code Cong. & Ad. News at 6610. Almost without exception, courts interpreting the Act have treated it as the exclusive source of jurisdiction over foreign states. See, e.g., Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. at 496-497; O'Connell Machinery Co. v. M.V. Americana, 734 F.2d 115, 116 (2d Cir. 1984); McKeel v. Islamic Republic of Iran, 722 F.2d 582; Gilson v. Republic of Ireland, 682 F.2d 1022, 1026 (D.C. Cir. 1982).

The instant case aside, there have been four attempts to establish jurisdiction over a foreign state under the ATCA. See, e.g., Hanoch Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984); Siderman v. Argentina, Slip Op.; In re KAL Disaster, Slip Op. at 10-11; Amerada Hess Shipping Corp. v. Argentina, Slip Op.at 6-8. All have failed, including the plaintiffs in Hanoch Tel-Oren, cited by this Court.[15] Thus, whether one concludes

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[15] In Hanoch-Tel-Oren v. Libyan Arab Republic, the Court of Appeals for the District of Columbia Circuit affirmed, per curiam, the district court's dismissal of jurisdiction, with three separate concurring opinions. While the concurring opinions differed widely as to the construction of the ATCA in suits against individuals, two of the three panel members expressly found that suit against Libya was barred by reason of the FSIA. 726 F.2d at 776, n.1 (Edwards, J.), and at 805, n.13 (Bork, J.).

that the ATCA was never intended to establish jurisdiction over States or that the subsequently enacted FSIA became the exclusive remedy against such States, the result is the same -- jurisdiction over foreign States in United States courts is available only in accordance with the FSIA, regardless of the origins of the cause of action.

F. A Foreign State's Diplomatic Presence Alone Does Not Satisfy Constitutional Requirements For Minimum Contacts

As this Court has recognized, 623 F.2d at 251, n.3, jurisdiction over a foreign state under the FSIA must also comport with minimum jurisdictional contacts and due process as required by International Shoe Co. v. Washington, 326 U.S. 319 (1945). This Court concluded that these minimum requirements are "clearly satisfied because the defendant maintains a substantial presence in the District". 623 F. Supp. at 251, n.3. The Court did not elaborate on the presence to which it was referring. The Soviet Union, of course, maintains a diplomatic presence in the District of Columbia through its Embassy. The diplomatic presence of a foreign State, however, would satisfy the requirement for minimum contacts only if the cause of action were expressly related to that presence. See, e.g., Maritime International Nominees Establishment v. Republic of Guinea, 693 F.2d 1094 (D.C. Cir. 1982), cert. denied, 464 U.S. 815 (1983).

In the view of the United States, the diplomatic activities of a foreign State that are not related to a cause of action brought under the FSIA shed no light on whether a foreign State

is amenable to suit under one of the FSIA's exceptions to immunity, and should not be considered for minimum contact purposes. This conclusion serves important policy interests. First, foreign States should not be subject to suit for conducting internationally protected diplomatic activities. A contrary rule, in effect, punishes foreign States for conducting diplomatic relations in the United States. Second, this conclusion is consistent with the primary intention of the FSIA to reach the "commercial" or non-governmental activities of foreign States. Furthermore, this view is supported by the decision of the Court of Appeals for the District of Columbia Circuit in Fandel v. Arabian American Oil Company, 345 F.2d 87, 88-89 (D.C. Cir. 1965).[16]

CONCLUSION

For the foregoing reasons, the United States believes that the exercise of the contempt power in this case would be inappropriate.

Respectfully submitted,

RICHARD K. WILLARD
Assistant Attorney General

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[16] The court in Fandel held that an office maintained by a Saudi Arabian corporation in Washington, D.C., and used to continue relationships with the State Department and other executive agencies of the United States, with diplomatic missions and with other educational and international organizations was not "doing business" in the District, as required under the Washington, D.C., long-arm statute. Fandel is especially significant since the long-arm provisions of the FSIA were patterned on that statute. 1976 U.S. Code Cong. & Ad. News at 6612.

JOSEPH E. diGENOVA
United States Attorney

David J. Anderson
DAVID J. ANDERSON by ESS

Elizabeth Sarah Gere
ELIZABETH SARAH GERE

Attorneys, Department of Justice
Civil Division, Room 3515
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 633-3403

Attorneys for the United States

OF COUNSEL:

ABRAHAM D. SOFAER
Legal Adviser
ELIZABETH VERVILLE
Deputy Legal Adviser
MARY BETH WEST
BRUCE C. RASHKOW
RICHARD WOHL
CAROL SCHWAB
Attorneys
Department of State
Washington, D.C. 20520

CERTIFICATE OF SERVICE

I, Elizabeth Sarah Gere, certify that on this 8th day of December, 1986, a copy of the Statement of Interest of the United States was mailed, via first-class mail, postage prepaid, to the following:

Guy Struve, Esquire
Davis Polk & Wardwell
One Chase Manhattan Plaza
New York, New York 10005

Elizabeth Sarah Gere
ELIZABETH SARAH GERE

FILED

AUG 2 1985

JAMES F. DAVEY, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE KOREAN AIR LINES DISASTER OF SEPTEMBER 1, 1983	MDL DOCKET NO. 565 - MISC. NO. 83-0345
ROBERT HO, Individually and as Personal Representative of the Estate of YUK YEE HO, Deceased, on behalf of himself, of Lam Ho, of Kwan Ho, of Pak On Ho and of Pak Chuen Ho, Plaintiff, v. KOREAN AIR LINES, INC. AND THE UNITED STATES OF AMERICA, Defendants.	DOCKET NO. 83-2794
HO YAN CHEE, Individually, and as Personal Representative of the Estate of HO MING TAK, Deceased, Plaintiff, v. KOREAN AIR LINES, INC. and THE UNITED STATES OF AMERICA, Defendants.	DOCKET NO. 83-3007
LAM LAP CHI, Individually, and as Personal Representative of the Estate of MICHAEL WONG KAI, Deceased, Plaintiff, v. KOREAN AIRLINES CO., LTD., and THE UNITED STATES OF AMERICA, Defendants.	DOCKET NO. 83-3678

EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE KOREAN AIR LINES DISASTER OF SEPTEMBER 1, 1983 : MDL Docket No. 565

: MISC. NO. 83-0345

MEMORANDUM AND ORDER

In this multidistrict litigation, numerous Plaintiffs have brought claims against the Union of Soviet Socialist Republics (U.S.S.R.) for its actions against a commercial airliner, known to the world as Korean Air Lines Flight 007 (KAL 007), destroyed for its intrusion into Soviet airspace. Plaintiffs are heirs of passengers who died on September 1, 1983 as a result of that decision to dispatch SU-15 fighter aircraft to intercept and destroy KAL 007 over the Sea of Japan. With the instant motion Plaintiffs seek an adjudication of default and judgment against the Soviet Union for their wrongful death claims. However, before the Court may examine Plaintiffs' right to relief, it must be satisfied that there is subject matter jurisdiction.

As an issue, subject matter jurisdiction may be raised sua sponte and at any time. See Fed. R. Civ. P. 12(h)(3). It is a principle of first importance that the federal courts are courts of limited jurisdiction. "Federal courts are empowered to hear only such cases as are within the judicial power of the United States, as defined in the Constitution, and have been

entrusted to them by a jurisdictional grant by Congress." C. Wright, Law of Federal Courts 22 (4th ed. 1983). Unless Plaintiffs can sufficiently establish that jurisdiction has been conferred upon this Court, their claims against the Soviet Union must be dismissed. Plaintiffs allege that subject matter jurisdiction is conferred by the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611 and by the Alien Tort Claims Act, 28 U.S.C. § 1350. Upon careful scrutiny of both statutes and all relevant doctrine, the Court is persuaded that there is no basis upon which jurisdiction can be sustained against the Soviet Union. For the reasons set forth below, the Court may not exercise jurisdiction; the claims against the Union of Soviet Socialist Republics must be dismissed.

The Foreign Sovereign Immunities Act

A general principle of international law is that a sovereign may not be sued in a foreign court unless it voluntarily submits to jurisdiction. One stated basis for this doctrine is the comity due from one nation to another. In this country, this broad principle emanates from The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812), which held that foreign sovereigns are absolutely immune from suit in courts of the United States. Except for rare and ad hoc determinations of jurisdiction primarily made in reliance on the suggestions of the Department of State, the doctrine continued to operate absolutely

until 1952. In that year, the celebrated "Tate Letter," from Jack B. Tate, Acting Legal Advisor to the Department of State to Philip Perlman, Acting Attorney General, signalled the American adoption of the "restrictive theory" of sovereign immunity. The "Tate Letter" explained that

> The Department of State has for some time had under consideration the question whether the practice of the Government in granting immunity from suit to foreign governments made parties defendant in the courts of the United States without their consent should not be changed. The Department has now reached the conclusion that such immunity should no longer be granted in certain types of cases. . . .
>
> According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (jure imperii) of a state, but not with respect to private acts (jure gestionis). . . .
>
> Finally, the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.

26 Dept. of State Bull. 984 (1952). Twenty-four years later, the "restrictive theory" of sovereign immunity, that a sovereign is immune only for those acts which are performed in a public or governmental capacity but not for those acts which might be performed by private parties, was codified with the enactment of the Foreign Sovereign Immunities Act in 1976.

The FSIA is structured as a broad statement of policy that foreign sovereigns be immune from suit in United States courts, subject to certain exceptions. Specifically through a presentation of rule and exceptions, the FSIA provides that a recognized foreign state shall be immune from actions sounding in tort or contracts unless (1) the foreign state has waived immunity either explicitly or by implication; (2) the action is based upon a commercial activity of the foreign state whether within the United States or elsewhere which causes direct effect in this country; (3) rights in property taken in violation of international law are at issue and the property, or property exchanged for it, is present in the United States in connection with a commercial activity carried on in this country by the foreign state or rights in property owned or operated by an agency or instrumentality of the foreign state engaged in a commercial activity here; (4) the action involves rights in immovable property in the United States acquired by succession or gift or (5) the action is not encompassed in the "commercial activities" provision but in which money damages are sought for property damage, personal injury or death occurring in the United States which has been caused by the tortious act or omission of the foreign state. Additionally, the FSIA provides an express statement that, notwithstanding the above, subject matter jurisdiction shall not arise for tort claims "based upon the exercise or performance or the failure to exercise or perform a

discretionary function regardless of whether the discretion be abused." 28 U.S.C. § 1605(a)(5)(A).

There is no question that the U.S.S.R. is a "foreign state" within the meaning of the statute. Nor is there any question that the action for which damages are sought occurred outside the United States. Consequently, under the FSIA, the Soviet Union is presumptively entitled to sovereign immunity unless one of the five exceptions apply. In this litigation, Plaintiffs assert only the first two exceptions to immunity. It is obvious on the facts that the military act complained of did not take place within territory controlled by the United States, nor does it involve property situated in this country or property acquired by succession or gift.

Plaintiffs' first assertion is that the Soviet Union has implicitly waived any claim to sovereign immunity by failing to answer any complaint filed against it and by ratifying international agreements which require member nations to respect and observe human rights. In particular, Plaintiffs point to the United Nations Charter, done at San Francisco June 26, 1945, 59 Stat. 1031, T.S. No. 933. The Court is unconvinced by this argument. There is absolutely no doctrinal support, case precedent or legislative history to support this contention. First of all, neither subject matter jurisdiction nor right of action springs from the acceptance of the general principles embodied in the United Nations Charter. Further, as will be discussed, the "Act of State" doctrine precludes the Court's review of the

propriety of action taken by a foreign state within its own borders.

Proceeding to consider Plaintiffs' second contention of waiver, the Court notes that process of service was effected upon the Soviet Union on two occasions in accordance with the FSIA and 22 C.F.R. § 93. The Soviet Union chose not to accept service of Plaintiffs' complaints. Instead the documents were returned accompanied by a diplomatic note asserting that, sovereigns being equal, the Soviet state is immune from the jurisdiction of foreign courts. This is not sufficient to invoke the FSIA according to Plaintiffs. As an example, Plaintiffs offer the case of Jackson v. People's Republic of China, 550 F.Supp. 869 (N.D. Ala. 1982). In that case, the court determined that the action, for default upon the issuance and sale of railroad bonds in the United States, fell within the "commercial activity" exception to foreign sovereign immunity. Upon consideration of the question of in personam jurisdiction, the court had occasion to remark: "Having established subject matter jurisdiction, this Court may exercise jurisdiction over the defendant provided service of process is made in strict compliance with 28 U.S.C. § 1608. Service was made upon the People's Republic of China even though its embassy returned all of the documents to the Director of Special Consular Services approximately one month later." 550 F.Supp. at 873.

As at least one court has noted, the FSIA "purports to provide answers to three crucial questions in a suit against a

foreign state: The availability of sovereign immunity as a defense, the presence of subject matter jurisdiction over the claim, and the propriety of personal jurisdiction over the defendant." Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 306 (2d Cir. 1981), cert. denied 454 U.S. 1148 (1982). This Court would submit that the question of sovereign immunity and the question of subject matter jurisdiction are one and the same under the Foreign Sovereign Immunities Act. In any event, it is easily evident that the presence of subject matter jurisdiction and the propriety of personal jurisdiction are entirely distinct issues; the latter only arises once an affirmative determination is made on the question of subject matter jurisdiction. Since the Court in Jackson had found the "commercial activity" exception to apply in that case, the determination that diplomatic relay of the complaints to the Republic of China was done in accordance with the statute and that there had been sufficient notice of suit to justify an exercise of personal jurisdiction was entirely proper. However, in this litigation the Court need not reach the question of personal jurisdiction.

Reaching Plaintiffs' second theory for jurisdiction, the Court notes that the "commercial activities" exception to the FSIA is the exception most clearly related to the "restrictive theory" of sovereign immunity. "The determination of whether particular behavior is commercial is perhaps the most important decision a court faces in an FSIA suit. This problem is

significant because the primary purpose of the act is to 'restrict' the immunity of a foreign state to suits involving a foreign state's public acts." Texas Trading, 647 F.2d at 306. The exception operates only where there is a "commercial activity" and a "direct effect" in the United States; neither can be found in this case.

Foremost against Plaintiffs' argument for jurisdiction is the uncontroverted fact that the act of the Soviet Union in shooting down the Korean jetliner was not "commercial." In fact, the Court can conceive of no action less "commercial"; or more purely political in nature. Military decisions fall into a category of functions which can only be called "governmental". Even in domestic situations, which do not implicate foreign policy interests, military decisions are purely state action; they may be neither made nor reviewed by courts. See Federal Torts Claims Act, 28 U.S.C. § 2680(a). If the activity is not "commercial" but rather is "governmental," as is true in this case, then the foreign state is entitled to immunity under the law.

The protection of sovereign immunity is available for "governmental" actions, most clearly defined as those actions in which a private person could not engage, even when those actions are motivated by "commercial reasons." Just as "commercial" acts, for instance, entering into contracts for the purchase of military equipment, remain "commercial" in nature regardless of the purpose, acts which are "governmental" do not change when

they are motivated by "commercial" reasons. In Perez v. The Bahamas, 652 F.2d 186 (D.C. Cir.), cert. denied, 454 U.S. 865 (1981), parents of a minor brought suit for injuries sustained by their minor son when Bahamian governmental gunboats fired upon a fishing boat found in their waters. In this case, it was military fighter aircraft, presumably following the dictates of the Soviet political decisionmakers, which fired upon and destroyed KAL 007. As in Perez, the aircraft was fired upon by the enforcement arm of a sovereign while within that sovereign's territory. The state action was governmental in nature, and, not being "commercial" under the claimed exception to sovereign immunity, claims arising from that action can confer no jurisdiction on this Court.

Moreover, the clause of § 1605(a)(2) requiring that a "commercial" act have a "direct effect" in the United States cannot be satisfied here. Plaintiffs assert that the "effect of death is personal and direct -- no matter where death occurs. Plaintiff's Motion at 37. While this may well be true, the case law contradicts Plaintiffs' interpretation of the statute. In Berkovitz v. Islamic Republic of Iran, 735 F.2d 329 (9th Cir. 1984), cert. denied 105 S.Ct. 510 (1985). The wife and children of an American murdered in Iran brought a wrongful death suit against Iran and a revolutionary group as its agent. The Court noted that the political act which caused the death occurred in Iran and had its direct effect there. Holding that "Berkovitz's murder, although the cause of great suffering among his family,

did not have that type of direct effect in the United States which would permit jurisdiction by application of 28 U.S.C. § 1605(a)(2)," the Court upheld dismissal of the action. For this section of the FSIA, courts must apply the common sense interpretation of a "direct effect," which is in essence "one which has no intervening element, but, rather flows in a straight line without deviation or interruption." Upton v. Empire of Iran, 459 F.Supp. 264 (D.D.C. 1978) aff'd without opinion, 607 F.2d 474 (D.C. Cir. 1979); accord Harris v. VAO Intourist, Moscow, 481 F.Supp. 1056 (E.D.N.Y. 1979); Australian Government Aircraft Factories v. Lynne, 743 F.2d 672 (9th Cir. 1984). Consequently, neither the "commercial activity" nor the "direct effect" clauses of § 1605(a)(2) have been satisfied in this instance. Finally, the Court finds that the exercise of military force is a "discretionary function" under 28 U.S.C. § 1605(a)(A). Just as jurisdiction may not be exercised over our own government for such decisions, under this provision of the FSIA, the Court lacks subject matter jurisdiction. Since there has been no waiver of immunity under § 1605(a)(1) and since Plaintiffs do not attempt to remove immunity under any alternative exception, the Court lacks subject matter under the FSIA.

The Alien Tort Claims Act

Alternative to the FSIA, Plaintiffs assert that subject matter jurisdiction can be sustained under the Alien Tort Claims

Act, 28 U.S.C. § 1350. The ATCA provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." There is no question that Plaintiffs' claims are based in tort; there is a question whether claims compensable through this Court have occurred. The Court has already held that the general principles embodied in, for example, the United Nations Charter, do not provide a specific cause of action. Moreover, to hold that the Alien Tort Claims Act gives a cause of action and subject matter jurisdiction where the FSIA forbids it would make a nullity of the Foreign Sovereign Immunities Act. In any event, even if there were subject matter jurisdiction under the Alien Tort Claims Act, this Court holds that the Act of State doctrine precludes the exercise of jurisdiction over these claims. "When a § 1350 action implicates such action by a recognized sovereign, the Act of State Doctrine might bar further inquiry." Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 797 n.30 (D.C. Cir. 1984) (Edwards, J. concurring), cert. denied 105 S.Ct. 1354 (1985). In this case, the Act of State doctrine does bar further injury.

The Act of State Doctrine

The "Act of State" doctrine enjoys a long history in American jurisprudence. The traditional statement of the Act of

State doctrine is found in Underhill v. Hernandez, 168 U.S. 250, 252 (1897), with the Supreme Court declaration that

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

The doctrine does not determine subject matter jurisdiction but operates to bar judicial intrusion into foreign affairs. It is therefore judicially established, deriving from the United States Constitution and the principle of separation of powers. As articulated in the modern statement of the doctrine, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964), the Act of State doctrine has constitutional underpinnings "aris[ing] out of the basic relationships between branches of government in a system of separation of powers." In Sabbatino, the Supreme Court further elaborated:

> [t]he doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.

376 U.S. at 423. Therefore, while the Act of State doctrine is not compelled by the Constitution, it operates to preserve in the political branches the prerogative to determine the foreign policy relationships and objectives of the nation and it reflects

the distribution of functions between the coordinate branches of our government. It is not for the courts to make inquiry into the legality, validity or propriety of the actions taken by foreign governments. The Act of State doctrine precludes the courts of this country from inquiring into the validity [or legality] of public acts a recognized foreign sovereign power [has] committed within its own territory." Arango v. Guzman Travel Advisors, 621 F.2d 1371, 1380 (5th Cir. 1979). However, the doctrine is a narrow one, extending only judicial inquiry into the propriety and motivations of foreign sovereigns acting in their governmental roles within their own boundaries. See Frolova v. U.S.S.R., 558 F.Supp. 358, 363 (N.D. Ill. 1983).

If able to assume jurisdiction in this case, certainly the Court would be called upon to inquire into the motivations of the action taken by the Soviet government within its territory. The state action was taken purportedly as a response to a perceived threat upon the Soviet Union. Inquiry into the truth or falsity of the Soviet claim is beyond the power of this or any court. Therefore, an inquiry into the Plaintiffs' allegations that the U.S.S.R. made the decision to down KAL 007 with "full knowledge". that it was filled with civilians who had no aggressive intentions would without doubt require the Court to make pronouncements which should be left to the discretion of the political branches. The act of shooting down the unarmed aircraft, while deplorable, did take place within Soviet airspace for motives unknown; there has been no argument to the contrary.

The Court can conceive of no action which is more classically political in nature or less open to judicial determination than the decision of a government to exercise its military power.

While it is not quite the same as the "political question" doctrine, the Act of State doctrine operates as an issue preclusion device. The Act of State doctrine was formulated as a "balancing test with the critical element being the potential for interference with our foreign relations." International Association of Machinists v. OPEC, 649 F.2d 1354, 1359 (9th Cir. 1981) cert. denied, 454 U.S. 1163 (1982). Therefore, American courts have held that the doctrine precludes adjudication of claims alleging that immigration decisions were improper, Frolova v. U.S.S.R., 558 F.Supp. 358 (N.D. Ill. 1983), and that inquiry into the propriety or motivation for certain allegedly secret loans could not be made even though the sovereign did not object. DeRoburt v. Gannett Co., Inc., 733 F.2d 701 (9th Cir. 1984) cert. denied, 105 S.Ct. 909 (1985). The Act of State doctrine, therefore, operates to preclude judicial review in sensitive areas of foreign policy. Having concluded that the state action was taken within Soviet borders, that it was based upon political motivations which would involve the Court in matters which should be determined by the political branches in their equal status with Soviet political bodies, the Court is precluded from the exercise of any jurisdiction which might otherwise exist.

CONCLUSION

Doctrine well-established in the law of the United States constrains the exercise of jurisdiction over the Soviet Union in this case. First, the general presumption of immunity, restricted under the FSIA, is not overcome. The restriction on sovereign immunity present in the statute do not allow jurisdiction over the sort of state action present here. Likewise, the claim that the ATCA can provide jurisdiction where the FSIA cannot must fail. To conclude that the Alien Tort Claims Act can provide a cause of action through claimed violations of the United Nations Charter, as Plaintiffs urge, would make a nullity of the Federal Sovereign Immunities Act. Unless Congress is rather specific on the subject, which it can be when it so desires, this result cannot be.

Perhaps more importantly, consideration of the Act of State doctrine in connection with this litigation leads to the inescapable conclusion that the Court should not, if it could, exercise jurisdiction over claims against the Soviet Union. Since that doctrine is formulated to prevent judicial interference in sensitive areas of foreign relations, the Court's jurisdiction must certainly be precluded in this instance. There could be no more appropriate case for the application of the Act of State doctrine. There is no question that the use of force was taken within Soviet boundaries, in territory over which the United States exercises no control. Moreover, the use of

military force is classicly "public" in nature. Therefore, jurisdictional confines and doctrines founded upon the United United States Constitution require the Court to decline to decide issues infringing upon the nation's foreign policy relationship with the Soviet Union. Resolution of such political issues is better left to the political branches.

An appropriate Order accompanies this Memorandum.

Aubrey E. Robinson, Jr.
Chief Judge

DATE: August 1, 1985

FILED

AUG 2 1985

JAMES F. DAVEY, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE KOREAN AIR LINES DISASTER OF SEPTEMBER 1, 1983	MDL Docket No. 565
	MISC. NO. 83-0345

ORDER

The Court having concluded that jurisdiction over the Union of Soviet Socialist Republics would be improper in this case and in accordance with the Memorandum entered this date, it is by the Court this 1st day of August, 1985,

ORDERED, that the claims against the Union of Soviet Socialist Republics are DISMISSED.

Aubrey E. Robinson, Jr.
Chief Judge

(N1)

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AMENDED ORDER

Upon consideration of plaintiffs' Motion to Amend the Court's Order of July 25, 1985, and the reasons stated therein, it is by the Court this 6th day of August, 1985,

ORDERED, that the claims in the above-captioned Complaints against Korean Air Lines are DISMISSED.

Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
CHIEF JUDGE

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SUSANA SIDERMAN DE BLAKE; JOSE SIDERMAN; CARLOS SIDERMAN; and LEA SIDERMAN; individuals, Plaintiffs, vs. THE REPUBLIC OF ARGENTINA, a foreign country; THE PROVINCE OF TUCUMAN OF THE REPUBLIC OF ARGENTINA, a province of a foreign country; OSCAR HONORATO; ABELARDO GARCIA; CARLOS ROSALES; VICTOR EDUARDO MOLINA; GENERAL DOMINGO BUSSI; CAPTAIN ABAS; GENERAL LINO MONTIEL FORZANO; GENERAL ANTONIO MERLO; individuals; INMOBILIARIA DEL NOR-OESTE, S.A., an Argentine corporation, Defendants.	No. CV 82-1772-RMT(MCx) ORDER VACATING DEFAULT JUDGMENT AND DISMISSING ACTION

This matter has come before the court for reconsideration on the issue of foreign sovereign immunity pursuant to this court's order filed herein on October 30, 1984. Since the filing of said order, defendants Republic of Argentina and Province of Tucuman have filed a motion for relief from judgment based on their claim of foreign sovereign immunity.

EXHIBIT 2

The court having duly considered the pleadings and other documents filed herein finds that neither the Foreign Sovereign Immunities Act, 28 U.S.C. §§1330, 1602 et seq., nor the Alien Tort Claims Act, 28 U.S.C. §1350, provides an exemption from defendants' foreign sovereign immunity applicable in this action.

Although it could be argued that 28 U.S.C. §1350 provides an exception to foreign sovereign immunity, said statute in its grant of subject matter jurisdiction is silent as to its intended effect on foreign sovereign immunity. Whether this silence should be interpreted as impliedly effecting an exemption to foreign sovereign immunity requires an examination of the state of the immunity law at the time of enactment. It appears that when 28 U.S.C. §1350 was originally enacted in 1789, the longstanding general rule was the recognition of absolute foreign sovereign immunity, especially as to acts of sovereigns within their own geographic territory. The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812). This immunity was only questioned as to public ships of a foreign sovereign found within the geographic jurisdiction of another sovereign, The Santissima Trinidad, 20 U.S. (7 Wheat.) 283 (1822), because such a case would raise a question as to the strength of the logical corollary to absolute immunity, the corollary being the recognition of a sovereign's absolute jurisdiction over its own territory. Although the Supreme Court in The Santissima Trinidad, supra, explored the extent of foreign sovereign immunity in connection with claims to foreign public ships found within the geographic territory of the U.S., it did not reach

that issue, holding simply that "whatever may be the exemption [(immunity)] of the public ship herself, and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our courts. . ." 20 U.S. at 354.

The longstanding general rule of foreign sovereign immunity recognized in Schooner Exchange, supra, indicates that when 28 U.S.C. §1350 was enacted, the legal status quo was the recognition of immunity. The logical implication would be that if Congress intended to affect that immunity, it would have done so expressly and specifically, such that silence would imply, if anything, no intended affect on the general recognition of foreign sovereign immunity. As such, 28 U.S.C. §1350 does not provide an exemption to foreign sovereign immunity herein.

To the extent plaintiffs argue that their claim is one against Argentina's property located within the geographic territory of the United States, that contention is misapplied. All of plaintiffs claims challenge defendants' acts that occurred in Argentina and are not claims on or to Argentina's property located in the United States. The only connection plaintiffs' claim could have to any Argentina property located in the United States, if any, would be the rights a judgment creditor has to post-judgment attachments. Those rights arise post-judgment and are not in issue herein.

With respect to the Foreign Sovereign Immunities Act, none of the enumerated exceptions to immunity listed in 28 U.S.C. §1605 apply herein. The only arguable exception appears to be the extent to which any international agreement might so provide.

28 U.S.C. §1604.

The United Nations Charter and the Universal Declaration of Human Rights (as well as most other international human rights agreements) are proclamations of aspirations to certain international goals and do not waive immunity from suit.

The Organization of American States ("OAS") through the American Convention on Human Rights has set up the Inter-American Commission on Human Rights ("Commission") and the Inter-American Court of Human Rights. After exhausting domestic remedies, or waiver thereof, an individual can bring a case against a state before the Commission. If the Commission is unsuccessful in settling the case, it can bring the matter before the Inter-American Court of Human Rights. As such, the OAS appears to provide plaintiffs with their remedy, although it provides no basis for waiving immunity herein.

Accordingly,

IT IS ORDERED that the default judgment entered herein is vacated and the action is dismissed.

Dated: MARCH 7, 1985.

ROBERT M. TAKASUGI
United States District Judge