Doe v. Federal Democratic Republic of Ethiopia: The Collapse of the Noncommercial Tort Exception to the Foreign Sovereign Immunities Act in the Digital Age

I. OVERVIEW

John Doe (Kidane) is an American citizen who obtained asylum in the United States in the early 1990s after emigrating from Ethiopia.[1] Kidane lives outside of Washington, D.C., in Silver Spring, Maryland, and has remained active in the Ethiopian-immigrant community, working to "increase awareness of corruption and human rights issues in Ethiopia."[2] In late 2012 or early 2013, Kidane opened an attachment contained in an email he received from a friend.[3] The email had been forwarded and was originally sent from the Ethiopian Government.[4] Once the attachment was opened, Kidane's computer was infected with the software program, FinSpy.[5] FinSpy is sold exclusively to government agencies and is a "system for monitoring and gathering information from electronic devices, including computers and mobile phones, without the knowledge of the device's user."[6] The program began recording Kidane and his family's computer activity and communicated that information back to a server in Ethiopia.[7]

Kidane filed suit against the Republic of Ethiopia, seeking relief under the Wiretap Act, "which prohibits 'any person [from] intentionally

1. Doe v. Fed. Democratic Republic of Eth., 851 F.3d 7, 8 (D.C. Cir. 2017).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 8-9 (citing Amended Complaint ¶ 6, *Doe*, 851 F.3d 7 (No. 16-7081)).
7. *Id.* at 9.

intercept[ing] . . . any wire, oral, or electronic communication,'"[8] and under the Maryland common law privacy tort of intrusion-upon-seclusion.[9] The district court dismissed Kidane's lawsuit, concluding that the relevant Wiretap Act provision could not be used against a foreign government.[10] The district court, then, dismissed Kidane's tort claim for lack of jurisdiction, reasoning that because the entire tort did not occur within the exclusive jurisdiction of the United States, the noncommercial tort exception to the Foreign Sovereign Immunities Act (FSIA) did not apply.[11] Thus, Ethiopia was immune from liability.[12] Kidane challenged the arguments made by the district court in their order for dismissal.[13] On appeal, the court focused only on the matter of the noncommercial tort exception to the FSIA and reasoned that Kidane's claims should be dismissed for lack of jurisdiction.[14] The United States Court of Appeals for the District of Columbia Circuit *held* that the noncommercial tort exception to the FSIA did not apply because the entire tort did not occur within the United States, and thus the court lacked subject-matter jurisdiction. *Doe v. Federal Democratic Republic of Ethiopia*, 851 F.3d 7 (D.C. Cir. 2017).

II. BACKGROUND

A. Foreign Sovereign Immunities Act

The FSIA states that:

> [s]ubject to existing international agreements to which the United States [was] 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.[15]

In *Argentine Republic v. Amerada Hess Shipping Corp.*, the U.S. Supreme Court found that the FSIA is the "sole basis for obtaining jurisdiction over a foreign state in our courts."[16] In general, the FSIA sets forth the rule that foreign states are immune from suits in federal court.[17] The Court further noted that the FSIA must be applied by U.S. courts in

8. *Id.* (citing Wiretap Act, 18 U.S.C. § 2511(1) (2002)).
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. 28 U.S.C. § 1604 (2012).
16. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989).
17. *Id.* at 435.

any action against a foreign sovereign "since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity."[18] The various exceptions listed within the FSIA demonstrate Congress' intent to deny immunity to foreign states when certain criteria are met.[19]

B. Noncommercial Tort Exception

One of the enumerated exceptions within the FSIA provides U.S. courts with subject-matter jurisdiction to hear cases involving noncommercial torts.[20] Specifically, § 1605(a)(5) denies immunity in cases

> in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.[21]

The noncommercial tort exception to the FSIA's general rule of sovereign immunity is, however, limited by its terms—specifically, that the tort take place in the United States.[22]

The Supreme Court explained the limitations of the noncommercial tort exception in *Amerada*, pointing out that Congress' primary goal "in enacting § 1605(a)(5) was to eliminate a foreign state's immunity for traffic accidents . . . committed in the United States."[23] Beyond the legislative intent of the statute, the Court recognized that the exception could extend to other torts but underlined that the tort must take place in the United States.[24]

The facts in *Amerada* presented a unique issue since the alleged tort took place on the high seas.[25] There, the plaintiffs chartered a Liberian ship to transport crude oil from the southern terminus of the Trans-Alaska Pipeline in Valdez, Alaska, around Cape Horn in South America, to the Hess refinery in the U.S. Virgin Islands (USVI).[26] On a voyage

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18. *Id.* at 434-35 (quoting Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 493 (1983)).
19. *Id.* at 435-36.
20. *Id.* at 439.
21. 28 U.S.C. § 1605(a)(5) (2012).
22. *Amerada Hess Shipping Corp.*, 488 U.S. at 439.
23. *Id.* at 439-40 (citing H.R. REP. NO. 94-1487, at 14, 20-21 (1976); S. REP. NO. 94-1310, at 14, 20-21 (1976)).
24. *Id.* at 439-40.
25. *Id.* at 440-41.
26. *Id.* at 431.

from the USVI to Alaska, while on the high seas, the ship passed near the warzone of the Falkland Islands conflict between Great Britain and the Argentine Republic.[27] Previously, the United States had informed Great Britain and Argentina of the location of its vessels and also Liberian vessels owned by American interests.[28] Despite sending a routine message to Argentine officials, who confirmed receipt of the message of the ship's destination and purpose, the plaintiffs' ship was bombed three times by the Argentinian air force, resulting in the crew scuttling the ship.[29] The plaintiffs argued that the FSIA defines the United States as including all "territory and waters, continental and insular, subject to the jurisdiction of the United States."[30] Because the tort took place on the high seas, the plaintiffs argued that they were within the admiralty jurisdiction of the United States.[31] The Court rejected this argument, instead, seeking to pursue a narrower definition of the statute, and reasoned that Congress knew how to extend jurisdiction to the high seas if it wanted, however, it chose not to do so.[32] The Court further reasoned that the "occurring in the United States" limitation of § 1605(a)(5) meant that a state could not be held liable when the event occurred outside the jurisdiction of the United States, even if the "direct effects" were felt in the United States.[33] In sum, the entire tort must occur in the United States.[34]

The Sixth Circuit Court of Appeals followed suit in holding that the entire tort must occur in the United States, while also focusing on the legislative intent of § 1605(a)(5) to eliminate a foreign state's immunity for traffic accidents.[35] In *O'Bryan v. Holy See*, the American plaintiffs filed a class-action suit against the Holy See, a foreign state, claiming negligence and intentional infliction of emotional distress on the part of its agents committing acts of sexual abuse in the United States.[36] The court found that the Holy See could not be held liable under § 1605(a)(5) "based upon the acts of the Holy See that occurred abroad."[37]

The District of Columbia Circuit Court, in *Persinger v. Islamic Republic of Iran*, sought to clarify the "occurring in the United States"

27. *Id.*
28. *Id.*
29. *Id.* at 431-32.
30. *Id.* at 440 (quoting 28 U.S.C. § 1603(c) (2012)).
31. *Id.*
32. *Id.*
33. *Id.* at 441.
34. *Id.*
35. O'Bryan v. Holy See, 556 F.3d 361, 382 (6th Cir. 2009).
36. *Id.* at 369-70.
37. *Id.* at 385-86.

limitation in § 1605(a)(5), concluding that both the tort and the injury must occur in the United States.[38] There, a U.S. marine, stationed at the American embassy in Tehran, was captured and held hostage by the Iranian Government for close to fifteen months.[39] The U.S. marine and his parents sued in federal court, alleging violations of, among other claims, common law tortious acts.[40] The court found that Iran retained its sovereign immunity, even though several tortious acts occurred on the grounds of the U.S. Embassy in Tehran—by extension American territory.[41] The court reasoned, much like the Supreme Court in *Amerada*, that Congress specifically sought to limit the jurisdiction under § 1605(a)(5) to the "continental and insular" territory of the United States, and, thus, the statute did not extend to American embassies abroad.[42] To further justify its point, the court, like others, cited to the legislative history of the statute, noting that Congress intended for § 1605(a)(5) to apply "primarily [to] the problem of traffic accidents."[43] It also noted, however, that while the statute "would deny the defense of sovereign immunity with respect to many torts that occur in the United States," the tort and its injury must occur in the United States.[44]

Likewise, the same year the D.C. Circuit Court decided *Persinger*, the court doubled-down, holding again that both the tort and injury must occur in the United States.[45] In *Asociacion de Reclamantes v. United Mexican States*, writing for the court, then Circuit Judge Scalia held that § 1605(a)(5) should be read narrowly and was not a "broad exception for all alleged torts that bear some relationship to the United States."[46]

The D.C. Circuit Court most recently outlined the "occurring in the United States" limitation to § 1605(a)(5) in *Jerez v. Republic of Cuba*.[47] In *Jerez*, the plaintiff, while incarcerated in Cuba, allegedly endured torture committed by the Cuban Government.[48] The plaintiff also alleged that Cuban officials intentionally injected him with the hepatitis C virus,

38. Persinger v. Islamic Republic of Iran, 729 F.2d 835, 842 (D.C. Cir. 1984).
39. *Id.* at 837.
40. *Id.*
41. *Id.* at 839.
42. *Id.*
43. *Id.* at 840 (citing H.R. REP. NO. 94-1487, at 20-21 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6619).
44. *Id.* at 840, 842.
45. Asociacion de Reclamentes v. United Mexican States, 735 F.2d 1517, 1525 (D.C. Cir. 1984).
46. *Id.*
47. Jerez v. Republic of Cuba, 775 F.3d 419, 424 (D.C. Cir. 2014).
48. *Id.* at 421.

which resulted in cirrhosis of the liver.[49] The court found that, since the injection of the disease occurred in Cuba, the tort did not occur in the United States for purposes of § 1605(a)(5).[50] Again, the court noted the legislative history of the statute, and, in particular, that the statute was passed for purposes of traffic accidents in addition to other torts occurring entirely within the United States.[51] However, the plaintiff argued that the disease continued to replicate itself in his body and that each replication was an independent event and separate tort occurring in the United States, thus, fulfilling the "occurring in the United States" limitation of § 1605(a)(5).[52] The court, however, chose to compare the replication to an ongoing injury that, while occurring in the United States, was the result of a precipitating act that occurred in Cuba.[53] Because both the tort and the injury must occur in the United States, the court affirmed the district court's finding that it lacked jurisdiction.[54]

Despite the continued reference to the legislative intent of § 1605(a)(5), the District Court for the District of Columbia has found jurisdiction in other instances beyond traffic accidents, most notably in *Letelier v. Republic of Chile*.[55] There, family members of deceased Chilean diplomats brought a claim under the statute against the Republic of Chile.[56] The plaintiffs alleged that agents, acting at the direction of the Republic of Chile, and the Chilean intelligence organization, among others, constructed a bomb that was attached to a vehicle in which both diplomats were riding.[57] The bomb exploded, killing both diplomats.[58] The Chilean Government argued that under § 1605(a)(5), Congress intended to limit the types of torts that could be brought against foreign states, most notably to traffic accidents and other private torts.[59] The court promptly rejected the argument and reasoned, instead, that the plain language of the statute governed.[60] In doing so, the court noted that "[n]owhere [in the statute] is there an indication that the tortious acts to which the Act makes reference are to only be those formerly classified as

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49. *Id.*
50. *Id.* at 424.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at 424-25.
55. Letelier v. Republic of Chile, 488 F. Supp. 665, 672 (D.D.C. 1980).
56. *Id.* at 665.
57. *Id.*
58. *Id.*
59. *Id.* at 671.
60. *Id.*

'private.'"[61] Furthermore, the court took it upon itself to reject any narrow view that the statute may only apply to traffic accidents.[62] Referencing the legislative history of the statute, the court noted that "[t]he relative frequency of automobile accidents and their potentially grave financial impact may have placed that problem foremost in the minds of Congress, but the applicability of the Act was not so limited."[63]

Chile also attempted to argue that, as a sovereign state, it was entitled to immunity for the planning of the killings within their country because under the "act of state" doctrine, "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[64] The court distinguished between the planning and the execution of the tortious act, stating:

> [a]lthough the acts allegedly undertaken directly by the Republic of Chile to obtain the death of [the decedent] may well have been carried out entirely within [Chile], that circumstance alone will not allow it to absolve itself . . . if the actions of its alleged agents resulted in tortious injury in [the United States].[65]

Thus, the court concluded that while the planning may take place outside of the United States, as long as the tort and injury takes places within the United States, for the purposes of the FSIA and § 1605(a)(5), U.S. courts will have jurisdiction.[66]

The Ninth Circuit Court of Appeals came to a similar conclusion in *Liu v. Republic of China*, where it held that the Republic of China's planning of an assassination of an American citizen, while not taking place in the United States, did not remove liability for the tortious action.[67] Thus, the argument of the "act of state" doctrine will not prevail where the planned action takes place within the United States.[68]

C. Intrusion-upon-Seclusion

Maryland's intrusion-upon-seclusion tort mirrors the Restatement (Second) of Torts definition.[69] In *Bailer v. Erie Insurance Exchange*, the Maryland Court of Appeals cited to the Restatement, noting that

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61. *Id.*
62. *Id.* at 672.
63. *Id.*
64. *Id.* at 673-74 (citing Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 691 n.7 (1976)).
65. *Id.* at 674.
66. *Id.*
67. Liu v. Republic of China, 892 F.2d 1419, 1422, 1432 (9th Cir. 1989).
68. *Id.* at 1432.
69. Bailer v. Erie Ins. Exch., 687 A.2d 1375, 1380-81 (Md. 1997).

intrusion-upon-seclusion of another occurs when "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."[70] Furthermore, the court held that "wrongful intrusion into private affairs always involves an intentional act."[71]

III. THE COURT'S DECISION

In the noted case, the U.S. Court of Appeals for the District of Columbia Circuit relied heavily on its recent holding in *Jerez*—specifically that the entire tort, "including not only the injury but also the act precipitating that injury[,] must occur in the United States."[72] Without reaching the merits of Kidane's Wiretap Act claim, the D.C. Circuit further reasoned that the district court lacked jurisdiction by referencing Maryland's intrusion-upon-seclusion tort set forth in *Bailer*.[73] The court concluded that because "intent" was an element of the tort and the intent clearly occurred overseas, "whether in London, Ethiopia or elsewhere," the entire tort for purposes of § 1605(a)(5) did not occur in the United States.[74]

Kidane relied on the fact patterns in *Liu* and in *Letelier* to demonstrate that the entire act of intrusion-upon-seclusion took place in the United States.[75] The court rejected Kidane's argument, noting that the actions in the cited cases were, without reference to any action undertaken abroad, tortious.[76] The court reasoned that the character of the action, a type of digital espionage, espoused integral components which lay solely abroad.[77] In sum, the tort was transnational.[78]

The court, like it has in the past, relied on the legislative history and congressional intent of the statute, noting that § 1605(a)(5)'s purpose "was to eliminate a foreign state's immunity for traffic accidents and other torts committed in the United States."[79] Reading the statute

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70. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1977)).
71. *Id.* at 1381 (quoting Snakenburg v. Hartford Cas. Ins. Co., 383 S.E.2d 2, 7 (S.C. Ct. App. 1989)).
72. Doe v. Fed. Democratic Republic of Ethiopia, 851 F.3d 7, 10 (D.C. Cir. 2017) (citing Jerez v. Republic of Cuba, 775 F.3d 419, 424 (D.C. Cir. 2014)).
73. *Id.*
74. *Id.*
75. *Id.* at 10-11.
76. *Id.* at 11.
77. *Id.*
78. *Id.*
79. *Id.*

narrowly, the court concluded that the legislative history of the statute showed that "[i]t is thus unsurprising that transnational cyberespionage should lie beyond section 1605(a)(5)'s reach."[80]

Lastly, the court relied on *Asociacion de Reclamentes* and rejected Kidane's argument that the court use a "point of contact" test, which would allow for jurisdiction if there was contact between the tort and its victim in the United States.[81] The court noted that, according to *Asociacion de Reclamentes*, the entire tort must take place in the United States, not "where the 'gravamen' occurred."[82] Thus, the court agreed with the district court and affirmed its dismissal of Kidane's suit.[83]

IV. ANALYSIS

The most concerning aspect of the court's holding in the noted case is that sovereign immunity was granted to a foreign state that remotely hacked the computer and electronic devices of American citizens in their home in the United States.[84] Prior to appeal, the district court noted that the argument that the foreign-state tortfeasor is immune from U.S. jurisdiction because its action occurred abroad "fails to grapple with the modern world in which the Internet breaks down traditional conceptions of physical presence."[85] The district court recognized that while Congress passed the original legislation to provide American citizens with a remedy in the case of car accidents, it is now possible for a foreign operative to hack into a car's electronics, causing the vehicle to crash.[86] Thus, in both scenarios, the agent of a foreign state injures an American citizen in a car accident, yet only the scenario where the foreign agent is physically in the United States satisfies the "occurring in the United States" limitation under § 1605(a)(5).[87] As Kidane pointed out to the district court, "Ethiopia's alleged surveillance would fall squarely within the 'entire tort' rule had it sent a 'flesh-and-blood agent into [his] house to install a recording device.'"[88]

The D.C. Circuit has also created more ambiguity regarding its interpretation of the impact of the legislative intent of § 1605(a)(5). Before the Supreme Court's decision in *Amerada*, the D.C. Circuit

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80. *Id.*
81. *Id.*
82. *Id.* at 12.
83. *Id.*
84. *Id.* at 8-12.
85. Doe v. Fed. Democratic Republic of Ethiopia, 189 F. Supp. 3d 6, 20 (D.D.C. 2016).
86. *Id.*
87. *See id.*
88. *Id.*

attempted to provide some clarification in *Persinger*.[89] There, the D.C. Circuit used the legislative purpose of the statute—to remedy the problem of traffic accidents caused by foreign agents—to clarify the importance of Congress' "occurring in the United States" limitation under § 1605(a)(5).[90] In other words, it is implicit in the court's reasoning that Congress would not extend jurisdiction to U.S. courts for torts occurring abroad, even if they occurred at a U.S. embassy, because the statute's purpose was to remedy traffic accidents "occurring in the United States."[91]

Conversely, only four years before *Persinger*, the district court favored a broader and more general approach to the meaning of the statute's legislative history when it decided *Letelier*.[92] There, the court overtly claims that the presence of traffic accidents *may* have placed the problem of sovereign immunity for noncommercial torts in the minds of Congress, "but the applicability of the Act [is] not so limited."[93] Then again, the court in *Letelier* was faced with the assassination of Chilean diplomats in Washington, D.C., compared to the *Persinger* scenario, which occurred abroad in Iran.[94] Thus, it seems likely that courts are willing to place less emphasis on the legislative history of the statute concerning torts occurring within the territorial United States and more emphasis when the tort occurs outside.

Lastly, in the noted case, the court reasoned that the "intent" element of the Maryland intrusion-upon-seclusion tort occurred abroad and, for purposes of § 1605(a)(5), the entire tort did not occur in the United States.[95] Referencing prior jurisprudence, the court does not place any emphasis or give reference to the elements of any of the torts alleged by the plaintiffs.[96] However, in *Letelier*, one must assume that the process of ordering agents to create, install on the victims' vehicle, and detonate a bomb requires some form of intent.[97] The court, in the noted case, distinguishes the intent in the intrusion-upon-seclusion tort from the detonation of a car bomb by stating that the bomb exploding is, "without reference to any action undertaken abroad[,] tortious."[98]

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89. Persinger v. Islamic Republic of Iran, 729 F.2d 835, 840 (D.C. Cir. 1984).
90. *Id.*
91. *Id.*
92. Letelier v. Republic of Chile, 488 F. Supp. 665, 672 (D.D.C. 1980).
93. *Id.* (emphasis added).
94. *Id.* at 665; *Persinger*, 729 F.2d at 837; *Letelier*, 488 F. Supp. at 665.
95. Doe v. Fed. Democratic Republic of Eth., 851 F.3d 7, 7 (D.C. Cir. 2017).
96. *See* Jerez v. Republic of Cuba, 775 F.3d 419, 424 (D.C. Cir. 2014); *Persinger*, 729 F.3d at 839-840; *Letelier*, 488 F. Supp. at 671-72.
97. *Letelier*, 488 F. Supp. at 665.
98. *Doe*, 851 F.3d at 11.

However, ignoring the action taken abroad blurs the standard that the entire tort must occur in the United States.

V. CONCLUSION

The court's standard exposes a frightening scenario: an American citizen's computer can be hacked by a foreign agent located abroad, and the agent's state will be immune from liability.[99] This policy concern also exposes a hole in what is likely now an antiquated statute—a statute that was passed by Congress and interpreted by courts to apply to scenarios of traffic accidents.[100] The statute has been extended beyond those traffic accidents in certain scenarios but is evidently limited in its application for tortious acts committed using technology.[101] For citizens, like Kidane, who simply want justice for the intrusive and unwarranted voyeurism taken by a foreign state's government, the conclusion under the court's holding is simple: tough luck.

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99. *See id.* at 8-12.
100. *See id.* at 11.
101. *See id.* at 12.

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