Abur v. Republic of Sudan: The United States District Court for the District of Columbia Denies Extending Jurisdiction over Claims Brought by Nonresidents Against Foreign Sovereigns

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I. OVERVIEW

In 1998, terrorist bombings of the U.S. embassies in Tanzania and Kenya killed 224 individuals and injured over 4000.[1] Two U.S. citizens and 112 Kenyan citizens, victims and relatives of the victims of the embassy bombings, sued the Republic of Sudan, the Islamic Republic of Iran, and certain individuals, seeking over one billion dollars in damages for providing material support to al-Qaeda and Hizbollah.[2] The plaintiffs based their claims on provisions of the Foreign Sovereign Immunities Act (FSIA) that annul jurisdictional protection enjoyed by foreign sovereigns under certain circumstances.[3] When neither sovereign defendant appeared to defend against the claims, the plaintiffs moved for entry of default.[4]

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1. Abur v. Republic of Sudan, 437 F. Supp. 2d 166, 168 (D.D.C. 2006).
2. *Id.* at 168, 170. Al-Qaeda and Hizbollah are the terrorist organizations believed to be responsible for the bombings. *Id.* at 168.
3. *Id.*
4. *Id.* at 169.

Pursuant to Rule 55(a) of the *Federal Rules of Civil Procedure*, the plaintiffs brought a motion for entry of default due to the complexities connected to service of process in civil actions against foreign sovereigns.[5] The court considered the adequacy of the plaintiffs' service and whether subject-matter jurisdiction existed over the defendants.[6] The United States District Court for the District of Columbia *held* that the plaintiffs had properly served the defendants, Sudan and Iran, and that it had subject-matter jurisdiction over Sudan and Iran only for the claims brought by the two U.S. citizen plaintiffs. *Abur v. Republic of Sudan*, 437 F. Supp. 2d 166, 169 (D.D.C. 2006).

II. BACKGROUND

A. *Entry of Default*

The *Federal Rules of Civil Procedure* permit entry of default to protect plaintiffs "when the adversary process has been halted because of an essentially unresponsive party."[7] Pursuant to Rule 55(a), when a defendant fails to plead or defend, the clerk of the court enters the party's default.[8] However, entry of a default judgment is not automatic; a court should first determine that it has personal jurisdiction over an absent defendant.[9] Jurisdiction over any civil claim against a foreign sovereign is governed solely by the FSIA.[10] District courts have original jurisdiction over all nonjury civil actions brought against foreign countries without regard to the amount in controversy when the foreign countries do not enjoy sovereign immunity.[11]

B. *Origins of Foreign Sovereign Immunity*

The international law principle of foreign sovereign immunity arose from the present international system believed to begin with the signing of the Treaty of Westphalia in 1648.[12] Signed at the end of the European

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5. *Id.* (citing FED. R. CIV. P. 55(a)). Proper service is a condition to obtaining personal jurisdiction over sovereign defendants. *Id.* (citing 28 U.S.C. § 1330(b) (2000)).

6. *Id.*

7. Mwani v. Bin Laden, 417 F.3d 1, 7 (D.C. Cir. 2005) (citing Jackson v. Beech, 636 F.2d 831, 836 (D.C. Cir. 1980)).

8. *See* FED. R. CIV. P. 55(a).

9. *Mwani*, 417 F.3d at 6.

10. 28 U.S.C. § 1330 (2000); Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989).

11. 28 U.S.C. § 1330(a).

12. David P. Vandenberg, Comment, *In the Wake of* Republic of Austria v. Altmann*: The Current Status of Foreign Sovereign Immunity in United States Courts*, 77 U. COLO. L. REV. 739, 740 (2006).

religious wars, the treaty attempted to create a balance of power among nations that evolved into a universal concept of state sovereignty.[13] This new notion of international comity precluded states' courts from entertaining suits against other states without consent.[14] In the beginning of the twentieth century, the doctrine of foreign sovereign immunity encompassed two theories.[15] The states that recognized "absolute" immunity prohibited their courts from hearing any claims against other states.[16] Most of the traditional European powers adopted the "restrictive" theory and started refusing immunity in cases characterized as commercial or of a private nature, based on the fact that not all state acts were political and meant to be protected by the doctrine of sovereign immunity.[17]

C. Foreign Sovereign Immunity in the United States

The concept of foreign sovereign immunity in the United States is believed to have originated in Chief Justice Marshall's opinion in *Schooner Exchange v. McFaddon*.[18] Chief Justice Marshall's reasoning is significant in that it notes that foreign sovereign immunity is not a constitutional requirement but instead a matter of "grace and comity."[19] This recognition permitted the United States Supreme Court to defer to Executive Branch determinations of foreign sovereign immunity.[20] To be consistent with Chief Justice Marshall's interpretation, the Court continued to base sovereign immunity decisions on the recommendations of the politically biased Executive Branch, which most often recommended immunity.[21]

Many countries began to practice restrictive immunity in the early twentieth century.[22] As a result, for many years, the United States recognized the immunity of foreign states in which it was subject to suit.[23] Due to this asymmetrical position, the United States Department of State (State Department) altered its foreign sovereign immunity

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13. Leah M. Campbell, Comment, *Defending Against Terrorism: A Legal Analysis of the Decision To Strike Sudan and Afghanistan*, 74 TUL. L. REV. 1067, 1076 (2000).
14. Vandenberg, *supra* note 12, at 741.
15. *Id.*
16. *Id.*
17. *Id.* at 741-42.
18. *Id.* at 742 (citing Republic of Austria v. Altmann, 541 U.S. 677, 688 (2004) (citing Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812))).
19. *Id.* at 743 (citing *Schooner Exchange*, 11 U.S. at 146).
20. *Id.* (citing *Schooner Exchange*, 11 U.S. at 144).
21. *Id.* (citing *Altmann*, 541 U.S. at 689).
22. *Id.* at 744.
23. *Id.*

policy.[24] The State Department officially adopted the restrictive theory of immunity in 1952, when the State Department's legal advisor, Jack B. Tate, sent a letter to the United States Attorney General.[25] The Tate Letter recognized that almost all other countries had abandoned the absolute theory and adopted the restrictive theory of sovereign immunity.[26] The restrictive theory still necessitated a careful consideration of immunity on a case-by-case basis, and the Executive Branch continued to make the decisions.[27] Although immunity determinations were no longer automatic, the fact that the decision-making capacity rested in a political branch produced other problems.[28] Immunity decisions were used as tools for negotiation in international relations.[29] Sometimes the State Department did not provide an opinion and allowed the courts to determine immunity, which led to inconsistent judgments.[30]

D. The Foreign Sovereign Immunity Act

The FSIA codified the restrictive theory into law in 1976.[31] The statute's main legislative purpose was to ensure consistent outcomes in immunity determinations.[32] Congress sought to remove politics from the practice and "standardiz[e] the tools of judicial interpretation."[33] Congress's intent in passing the FSIA was for the statute to be the sole basis for obtaining jurisdiction over a sovereign defendant in U.S. courts.[34] Starting in 1976, the political branches of government were no longer permitted to play a role in making immunity decisions because that task now belonged to the Judicial Branch.[35] The FSIA explicitly specifies the circumstances in which a foreign country is expected to defend itself in U.S. courts, recognizing a foreign state's immunity in all other situations.[36]

The FSIA grants federal courts subject-matter jurisdiction over all civil actions brought against foreign states and over diversity actions

24. *Id.*
25. *Id.* at 744-45. This correspondence is now called the "Tate Letter." *Id.* at 745.
26. *Id.* at 745.
27. *Id.* (citing Republic of Austria v. Altmann, 541 U.S. 677, 690 (2004)).
28. *Id.*
29. *Id.* (citing *Altmann*, 541 U.S. at 690-91).
30. *Id.* at 745-46 (citation omitted).
31. *Id.* at 742 (citing 28 U.S.C. § 1605 (2000)).
32. *Id.* at 746.
33. *Id.*
34. *Id.*
35. *Id.*
36. 28 U.S.C. § 1605.

when the plaintiff is a foreign state.[37] The FSIA lists requirements for venue and removal.[38] It lays down the methods of establishing personal jurisdiction over a foreign state.[39] It sets out the circumstances under which a state's property may be subject to attachment.[40] Most importantly, the FSIA lists certain exceptions to sovereign immunity.[41] These exceptions are crucial to the FSIA's operation.[42] The FSIA condenses personal and subject-matter jurisdiction into a two-part test: (1) whether the plaintiff properly served the sovereign defendant and (2) whether one of the exceptions to sovereign immunity applies.[43]

The United States Court of Appeals for the District of Columbia Circuit requires strict adherence to the terms of the FSIA section on serving foreign states.[44] The FSIA permits four methods of serving a foreign state.[45] Delivery of the summons and complaint "in accordance with any special arrangement for service between the plaintiff and the foreign state"[46] is the preferred method of service. If there is no such arrangement, then the statute permits delivery of the summons and complaint "in accordance with an applicable international convention on service of judicial documents."[47] If neither of the previous methods is available, the plaintiff may mail the summons, complaint, and notice of suit and require a signed receipt.[48] Finally, if service by mail cannot be accomplished within thirty days, the FSIA allows the plaintiff to request that the clerk of the court send two copies of the summons, complaint, and notice of suit (along with a translation into the country's official language) to the Secretary of State, who then "shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted."[49]

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37. *Id.* § 1332(a)(4).
38. *Id.* §§ 1391(f), 1441.
39. *Id.* § 1330(b).
40. *Id.* §§ 1609-1611.
41. *Id.* § 1605.
42. Republic of Austria v. Altmann, 541 U.S. 677, 691 (2004).
43. *See* Mar. Int'l Nominees Establishment v. Republic of Guinea, 693 F.2d 1094, 1099 (D.C. Cir. 1982).
44. Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148, 154 (D.C. Cir. 1994).
45. *See* 28 U.S.C. § 1608(a).
46. *Id.* § 1608(a)(1).
47. *Id.* § 1608(a)(2).
48. *Id.* § 1608(a)(3).
49. *Id.* § 1608(a)(4).

E. Exceptions to Foreign Sovereign Immunity

Once plaintiffs in a case establish proper service of process, a court must decide whether it has subject-matter jurisdiction before proceeding to the merits of the claim. A court will have subject-matter jurisdiction over any claim that falls within one of the exceptions to sovereign immunity.[50] Among the exceptions are: (1) occurrence of tortious injury or death in the United States, (2) provision of material support by an agent of a terrorist-sponsoring state for an act of extrajudicial killing that leads to the injury or death of a United States national, and (3) waiver of immunity by implication.[51]

The first statutory exception to sovereign immunity listed above applies to cases

> in which money damages are sought against a foreign state for personal injury or death . . . 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.[52]

The FSIA defines "United States" to include "all territory and waters, continental or insular, subject to the jurisdiction of the United States."[53] It could be argued in some circumstances that U.S. embassy grounds may be treated as U.S. soil and thus subject to the jurisdiction of the United States.[54] However, controlling precedent rejects an expansive reading of § 1605(a)(5), which was enacted for the purpose of voiding the immunity of foreign diplomats causing traffic accidents on U.S. roads.[55] In *Persinger v. Islamic Republic of Iran*, the D.C. Circuit held that § 1605(a)(5) does not remove a foreign sovereign's immunity for tortious acts taking place at U.S. embassies within its territory.[56] In *Argentine Republic v. Amerada Hess Shipping Corp.*, the Supreme Court interpreted "continental and insular" to include only the continental United States and its islands for the purposes of the FSIA.[57] The D.C. Circuit has noted that the FSIA "is not a particularly generous" jurisdictional grant.[58]

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50. *See id.* § 1605(a).
51. *Id.* § 1605(a)(1), (a)(5), (a)(7).
52. *Id.* § 1605(a)(5).
53. *Id.* § 1603(c).
54. *See id.*
55. Persinger v. Islamic Republic of Iran, 729 F.2d 835, 840 (D.C. Cir. 1984).
56. *Id.* at 842.
57. 488 U.S. 428, 440 (1989).
58. Peterson v. Royal Kingdom of Saudi Arabia, 416 F.3d 83, 86 (D.C. Cir. 2005).

In conjunction with the Anti-Terrorism and Effective Death Penalty Act of 1996, Congress enacted § 1605(a)(7), which provides another exception to sovereign immunity.[59] This section cancels the immunity of foreign states, thereby conferring subject-matter jurisdiction: (1) in any civil action where money damages are sought from a foreign state for personal injury or death (2) caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act (3) if such act or provision of material support is performed by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, (4) except that a court will dismiss a claim if the foreign state was not designated as a state sponsor of terrorism when the act occurred, (5) or if neither the claimant nor the victim was a national of the United States when the act upon which the claim is based occurred.[60]

The terrorist activity exception to foreign sovereign immunity applies only to claims brought by U.S. citizens.[61] Federal courts have held that even "a long period of residence in the United States, military service and/or registration with the Selective Service, and completing a portion of the naturalization process (including an oath of allegiance)" will not grant someone the status of a national under 8 U.S.C. § 1101(a)(22).[62] The United States Court of Appeals for the Fourth Circuit is the only federal court of appeals to interpret § 1101(a)(22) more broadly.[63] However, it is important to note that the broad

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59. 28 U.S.C. § 1605(a)(7).

60. *Id.* The FSIA uses the definition of "material support or resources" in 18 U.S.C. § 2339A, which defines the term as "currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials." 18 U.S.C. § 2339A(b) (2000).

61. 28 U.S.C. § 1605(a)(7). To be a national of the United States within the meaning of this statute, one must be "a citizen of the United States, or a person who, though not a citizen of the United States, owes permanent allegiance to the United States." 8 U.S.C. § 1101(a)(22) (2000).

62. Abur v. Republic of Sudan, 437 F. Supp. 2d 166, 176 (D.D.C. 2006) (quoting Abou-Haidar v. Gonzales, 437 F.3d 206, 207 (1st Cir. 2006) (summarizing cases interpreting 8 U.S.C. § 1101(a)(22))).

63. *See* United States v. Morin, 80 F.3d 124, 126 (4th Cir. 1996) (holding that "a permanent resident alien of the United States who had applied for United States citizenship" qualified as a "national of the United States" under 8 U.S.C. § 1101(a)(22), as included in a federal murder statute).

interpretation of § 1101(a)(22) was not adopted by a subsequent Fourth Circuit panel.[64]

The third exception to foreign sovereign immunity concerns cases "in which the foreign state has waived its immunity either explicitly or by implication."[65] A well-established rule holds that "the implied waiver provision of Section 1605(a)(1) must be construed narrowly."[66] Traditionally, implied waiver comes through forum selection clauses and/or submission of a responsive pleading that does not raise the defense of sovereign immunity.[67] Courts have refused to extend the application of § 1605(a)(1) much beyond the above two examples of implied waiver.[68] In *Princz v. Federal Republic of Germany,* the D.C. Circuit considered and rejected an argument that waiver of sovereign immunity is implied whenever a country violates *jus cogens* norms of the law of nations.[69] The court noted that this interpretation of implied waiver was "incompatible with the intentionality requirement implicit in section 1605(a)(1)."[70] *Princz* held that the appropriate test for the applicability of § 1605(a)(1) is whether a foreign state has demonstrated, "even implicitly, a willingness to waive immunity."[71]

F. Claims Arising from the 1998 U.S. Embassy Bombings in Tanzania and Kenya

Two cases currently on the docket of the D.C. district court were brought by U.S. citizens against Sudan and Iran: *Owens v. Republic of Sudan* and *Khaliq v. Republic of Sudan*.[72] Both cases resulted from the 1998 bombings of the U.S. embassies in Tanzania and Kenya.[73] The

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64. *See* Daly v. Gonzales, 129 F. App'x 837, 840 n.3 (4th Cir. 2005) (unpublished disposition) (holding that *Morin's* interpretation of § 1101(a)(22) "is not controlling" outside the context of the murder statute); *id.* at 842.

65. *See* 28 U.S.C. § 1605(a)(1).

66. Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 243 (2d Cir. 1996) (citing Shapiro v. Republic of Bolivia, 930 F.2d 1013, 1017 (2d Cir. 1991)).

67. Princz v. Federal Republic of Germany, 26 F.3d 1166, 1174 (D.C. Cir. 1994).

68. *See id.*; Doe v. Israel, 400 F. Supp. 2d 86, 105 (D.D.C. 2005) ("Section 1605(a)(1) is construed narrowly; the judiciary is not to re-draft the FSIA so as to force an exception that Congress did not craft.").

69. 26 F.3d at 1174.

70. *Id.*; *see also* Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 444 (D.C. Cir. 1990) ("Congress anticipated . . . that waiver would not be found absent a conscious decision to take part in the litigation and a failure to raise sovereign immunity despite the opportunity to do so." (quoting Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 378 (7th Cir. 1985))).

71. *See Princz*, 26 F.3d at 1174.

72. Abur v. Republic of Sudan, 437 F. Supp. 2d 166, 168 (D.D.C. 2006).

73. *Id.*

plaintiffs in both cases argue that under the FSIA, Sudan and Iran forfeited their right to sovereign immunity in U.S. courts by providing material support to al-Qaeda and Hizbollah.[74] The *Owens* case is on appeal to the D.C. Circuit where the defendant Sudan is contesting the denial of its objection to jurisdiction.[75] The plaintiffs in the *Khaliq* case are trying to perfect service of process on the defendant countries.[76]

G. Claims Brought by Foreigners Against Foreign Sovereigns

The FSIA's language is clear on its face. The statute grants jurisdiction over "any nonjury civil action against a foreign state . . . with respect to which the foreign state is not entitled to immunity."[77] The statute provides no indication of any restriction based on the nationality of the plaintiff.[78] The congressional report regarding the FSIA contains two conflicting notions.[79] On the one hand, the report claims that the FSIA's goal is to address the circumstances under which *parties* can bring suit against a foreign sovereign.[80] On the other hand, the report also addresses Congress's desire to guarantee American citizens access to the courts when filing suits against foreign states.[81] Despite this reference to American citizens, the Supreme Court in *Verlinden B.V. v. Central Bank of Nigeria* held that the FSIA permits a nonresident to maintain a lawsuit against a foreign sovereign in U.S. courts as long as the substantive conditions of the statute are met.[82] The Court noted that Congress was aware of the potential danger of U.S. courts transforming into international claims courts because of suits brought by foreigners.[83] However, the Court recognized that Congress guarded against this threat not by keeping foreign plaintiffs out, but instead by incorporating certain provisions requiring sufficient contact with the United States.[84]

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74. *Id.*
75. *Id.* at 169 n.3.
76. *Id.*
77. Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 489-90 (1983) (citing 28 U.S.C. § 1330(a) (2000)).
78. *Id.* at 490.
79. *Id.* (citing H.R. REP. NO. 94-1487, at 6, 13 (1976)).
80. *Id.* (citing H.R. REP. NO. 94-1487, at 6 (emphasis added)).
81. *Id.* (citing H.R. REP. NO. 94-1487, at 6).
82. *Id.* at 489.
83. *Id.* at 490.
84. *Id.*

III. THE COURT'S DECISION

In the noted case, the D.C. District Court applied a rigid interpretation of the FSIA.[85] The court initially discussed the underlying facts and procedural history of the plaintiffs' claims.[86] The court held that (1) the entries of defaults were permitted because successful service was established, (2) the exception creating jurisdiction in actions based on state sponsorship of terrorist acts did not apply to the actions brought by Kenyans killed or injured in the bombings, and (3) the district court had subject-matter jurisdiction over Sudan and Iran only for the claims of the two U.S. citizens.[87]

The court first determined that the plaintiffs had successfully served the defendants.[88] The court found that the plaintiffs used the appropriate method for serving legal process on a foreign state, which was § 1608(a)'s third option (any form of mailing requiring a signed receipt).[89] This third option was the best available method because the plaintiff had no "special arrangement" for service with the defendant countries and because neither defendant was a member of an "international convention on service of judicial documents."[90] The court held that because the plaintiffs had satisfied the central purpose of service and had complied with the statute's requirements, the court had properly obtained personal jurisdiction.[91]

The court next turned to the issue of whether it had subject-matter jurisdiction over the plaintiffs' claims.[92] The court first considered the exception to foreign sovereign immunity for when a tortious injury or death occurs in the United States and rejected the plaintiffs' theory that a U.S. embassy should be considered the United States for FSIA purposes.[93] The court based this holding on controlling precedent that precludes the court from freely interpreting the terms of the FSIA to apply in circumstances not clearly contemplated by Congress.[94]

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85. Abur v. Republic of Sudan, 437 F. Supp. 2d 166, 175 (D.D.C. 2006) ("[T]his court will not liberally construe the terms of the statute to extend to situations not clearly contemplated by Congress.").
86. *Id.* at 168-72.
87. *Id.* at 179.
88. *Id.* at 173.
89. *Id.*; 28 U.S.C. § 1608(a)(3) (2000).
90. *Abur*, 437 F. Supp. 2d at 173; 28 U.S.C. § 1608(a)(2), (a)(3).
91. *Abur*, 437 F. Supp. 2d at 173.
92. *Id.* at 174.
93. *Id.* at 174-75.
94. *Id.*

The court next considered the exception to the FSIA concerning material support by a terrorist-sponsoring nation for extrajudicial killing.[95] The court found that it had subject-matter jurisdiction over only the two American plaintiffs' claims because money damages were being sought against Sudan and Iran for personal injury or death that was caused by the material support provided by Iran and Sudan (designated as state sponsors of terrorism) to the responsible terrorist organizations.[96] The court held that this exception applied only to the claims brought by individuals who were nationals of the United States and with one possible exception, there were no assertions that the Kenyan citizens fell into this category.[97] The court spent some time explaining that the Kenyan plaintiff who was married to a U.S. citizen was not considered a U.S. citizen under the statute's definition.[98]

Finally, the court considered the exception to the FSIA for implicit waiver of sovereign immunity based on state conduct.[99] The court rejected the plaintiffs' interpretation that § 1605(a)(1) "would create a form of supplemental subject-matter jurisdiction over claims for terrorism-related injuries brought by non-U.S. nationals."[100] The court found that the plaintiffs' argument did not fall under the two traditional examples of implied waiver (waiver through a forum selection agreement or failing to plead a sovereign immunity defense).[101] The court also found that such a reading of § 1605(a)(1) would require a judicially created amendment to the declination clause of § 1605(a)(7) (that necessitates U.S. claimants or victims), which was outside the scope of the court's authority.[102] The court further noted that allowing such an exception would "eliminate a key part of the 'delicate legislative compromise' reflected in section 1605(a)(7)."[103] The court also looked closely at the language of the provision and noted that had Congress wanted to permit non-U.S. citizens to bring claims, it would have incorporated a slightly different provision: "the court shall decline to hear a claim under this paragraph . . . if . . . neither the claimant nor *any*

95. *Id.* at 175-77.
96. *Id.* at 177.
97. *Id.* at 176.
98. *Id.* ("By any measure, marriage alone does not confer 'national' status on a non-U.S. citizen.").
99. *Id.* at 177-78.
100. *Id.* ("[I]n plaintiffs' view, if Sudan and Iran are subject to suit in this Court by U.S. nationals under section 1605(a)(7), then they also are subject to suit here by aliens for the same conduct, based on implied waiver.").
101. *Id.* at 178.
102. *Id.* at 177-78.
103. *Id.* at 179.

victim was a national of the United States," instead of what it actually reads, which is: "neither the claimant nor *the* victim was a national of the United States."[104]

IV. ANALYSIS

The allegations made by the plaintiffs in the noted case are identical to those made in two other cases on the court's docket: *Owens v. Republic of Sudan* and *Khaliq v. Republic of Sudan*.[105] The plaintiffs in all three cases correctly contend that Sudan and Iran gave up their right to sovereign immunity in U.S. courts when they provided material support to al-Qaeda and Hizbollah.[106] Unlike the plaintiffs in *Owens* and *Khaliq*, most of the plaintiffs in the noted case were Kenyan citizens.[107] That fact alone is why the court in the noted case refused to grant subject-matter jurisdiction over the claims brought by the Kenyan plaintiffs, who were innocent bystanders to this horrific act directed at U.S. citizens.[108] In light of this new era of terrorists bombing U.S. embassies, the court erred in maintaining a rigid interpretation of the statute by precluding situations not clearly contemplated by Congress.[109]

In dismissing the applicability of the exception to foreign sovereign immunity for tortious injury or death in the United States, the court erred in not considering a U.S. embassy as being part of the United States for FSIA purposes.[110] The FSIA defines "United States" to include all "territories and waters, continental and insular, subject to the jurisdiction of the United States."[111] U.S. embassy grounds should be treated as U.S. soil, and, thus, subject to the jurisdiction of the United States. The court incorrectly relied on the D.C. Circuit's view in *Persinger* that countries enjoy immunity with respect to tortious acts occurring in U.S. embassies within its territory.[112] The court failed to consider the difference in circumstances between the two cases. In the noted case, the embassies

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104. *Id.* (emphasis added).

105. *Id.* at 168.

106. *See id.*

107. *Id.* at 168-69.

108. *See id.*

109. *See id.*; *see* Dammarell v. Islamic Republic of Iran, No. Civ. A. 01-2224JDB, 2005 WL 756090, at *1 (D.D.C. Mar. 29, 2005) (recognizing that the 1983 bombing giving rise to the action was "the first large-scale attack against a United States embassy anywhere in the world, and marked the onset of two decades of terrorist attacks on the United States and its citizens overseas and at home").

110. *Abur*, 437 F. Supp. 2d at 174-75.

111. *Id.* at 174 (citing 28 U.S.C. § 1603(c)).

112. *Id.* (citing Persinger v. Islamic Republic of Iran, 729 F.2d 835, 840, 842 (D.C. Cir. 1984)).

where the tortious acts occurred were not within the territory of either of the foreign sovereign defendants, while in *Persinger*, the acts took place at an embassy in the defendant's territory.[113]

The court also improperly relied on *Amerada Hess*'s holding that, for purposes of the FSIA, the United States only includes the continental United States and the islands that are part of its possessions.[114] The court failed to distinguish between the circumstances of this case and those in *Amerada Hess*. In *Amerada Hess*, the tort occurred on the high seas, 5000 miles from the shores of the United States, while the torts in the noted case occurred on U.S. embassy grounds, which are subject to the concurrent jurisdiction of the United States.[115] The court also failed to consider that the FSIA's legislative history does not directly define what territory is subject to the jurisdiction of the United States.[116]

In considering the second FSIA exception (material support by a terrorist-sponsoring nation for extrajudicial killing), the court erred in holding that this exception did not apply to the Kenyan plaintiffs' claims. The court concluded that this exception applies only to claims brought by "a national of the United States."[117] Despite *Verlinden*, where the Supreme Court held that foreign plaintiffs could sue sovereign defendants under the FSIA in U.S. courts, the court in the noted case erroneously determined that it did not have subject-matter jurisdiction over the Kenyan plaintiffs' claims because they were nonresidents.[118] The Kenyan plaintiffs had "substantial contact with the United States" to bring an action against the sovereign states because they were either employed by or visiting the embassies.[119] The court failed to recognize that § 1605(a)(7) directly contradicts Chief Justice Burger's holding in *Verlinden* that the FSIA does not limit jurisdiction solely to actions brought by Americans.[120]

In dismissing the applicability of the third exception to the Kenyan plaintiffs' claims, the court incorrectly concluded that the defendants were not subject to suit based on implied waiver. The circumstances of this case are so complex (defendant governments were accused of aiding terrorists who attacked American embassies not within their territory and

113. *Id.*

114. *Id.* (citing Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 440 (1989)).

115. *Compare Amerada Hess*, 488 U.S. at 440, *with Abur*, 437 F. Supp. 2d at 168.

116. *Persinger*, 729 F.2d at 839.

117. *Abur*, 437 F. Supp. 2d at 175 (citing 28 U.S.C. 1605(a)(7) (2000)).

118. *Id.* at 169.

119. *Id.* at 170; Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 490 (1983).

120. *Verlinden*, 461 U.S. at 490.

proximately caused the death or physical injury of the non-U.S. citizen plaintiffs) they should not be considered in light of the court's past decisions.[121] The court failed to consider the principle adopted in *Princz* that countries have to prove, even implicitly, some kind of willingness to give up immunity.[122] By providing material support to terrorist groups that intended to target American citizens in Kenya, Sudan and Iran willingly waived their immunity from suits by Kenyans who were also injured by their conduct.

There are a number of factors in favor of allowing the Kenyan plaintiffs' claims to proceed that the court failed to consider in reaching its holding. Opening a U.S. court to the resolution of conflicts between aliens and foreign countries could promote U.S. interests and supply a neutral ground for the parties.[123] The court failed to consider that the plaintiffs' claims might be barred in other countries' courts if they still practice the doctrine of absolute sovereign immunity.[124] Even if the Kenyan plaintiffs' actions are not barred, there is the potential that the defendant states' own courts will be biased.[125] The Kenyan plaintiffs might have been trying to benefit from a helpful substantive law rule by bringing suit in the United States.[126] The court failed to consider the notion of promoting judicial economy because it decided to hear the identical claims of the U.S. citizens. Granting subject-matter jurisdiction could serve U.S. policy interests.[127] Some U.S. laws are intended to prevent undesirable behavior towards the United States, and, in certain situations, these policies will be adequately protected only by the enforcement of U.S. law even if the parties to the dispute are foreigners.[128] Permitting nonresident-foreign sovereign suits in U.S. courts can help promote U.S. human rights policies as well.[129] These suits may help "diplomatic, judicial and statutory efforts to protect individuals against repressive measures by other states" when the foreign or international

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121. *See Abur*, 437 F. Supp. 2d at 177-78.

122. Princz v. Federal Republic of Germany, 26 F.3d 1166, 1174 (D.C. Cir. 1994).

123. Note, *Suits by Foreigners Against Foreign States in United States Courts: A Selective Expansion of Jurisdiction*, 90 YALE L.J. 1861, 1861 (1981).

124. *Id.* at 1868.

125. *Id.* at 1868-69.

126. *Id.* at 1869 ("This could happen, for example, when United States law applies under United States choice of law rules but not under the choice of law rules of the alternative forum, and where United States law is more favorable to the plaintiff than foreign law. A foreigner might also want to take advantage of United States procedural rules such as the liberal federal discovery rules.").

127. *Id.* at 1870.

128. *Id.*

129. *Id.*

law at issue mirrors American ideas of fairness.[130] The court also failed to recognize that speedy and accurate adjudication of claims arising out of terrorist events should always be of concern to U.S. courts.[131]

In addition to the reasons in the court's opinion, there are other reasons that support the refusal to grant jurisdiction over the Kenyan plaintiffs' claims. In certain cases, it might be more convenient for the parties and for the United States to allow these claims to be resolved in foreign forums.[132] Hearing the case might negatively affect U.S. foreign relations if a foreign state objects to a U.S. court's assertion of jurisdiction.[133] A foreign court may be able to "assert jurisdiction over the defendant, award complete relief on related claims, and enforce any favorable judgment."[134] For example, it could be more suitable if compulsory process over witnesses and documents can be acquired in another forum.[135] In this case, a view of the location of the bombings would be desirable and litigating the case in a Kenyan court might be more convenient for both the Kenyan plaintiffs and the defendants.[136] Even if subject-matter jurisdiction were granted, the case might be subject to dismissal under the doctrine of forum non conveniens.[137] However, this doctrine only is considered if a suitable alternative forum is available.[138]

The FSIA was enacted to end deferral to the Executive Branch on issues of sovereign immunity.[139] There has been a recent wave of litigation where plaintiffs seek damages for tortious acts committed abroad.[140] This growing trend has forced U.S. courts to contemplate the impact of their decisions in the "quintessentially political realm of foreign policy."[141] The Supreme Court still hears cases concerning foreign affairs; the doctrine of separation of powers instructs courts to

130. *Id.* at 1870-71.
131. *Id.* at 1871.
132. *Id.* at 1861.
133. *Id.*
134. *Id.* at 1871.
135. *Id.* at 1871-72.
136. *Id.* at 1872.
137. *Id.* at 1873. Usually, the plaintiff's choice of forum is given great deference and is overcome only when the defendant succeeds in showing that another forum would be more convenient. *Id.*
138. *Id.*
139. *Vandenberg*, *supra* note 12, at 746.
140. Recent Case, *Separation of Powers—Foreign Sovereign Immunity—Second Circuit Uses Political Question Doctrine To Hold Claims Against Austria Nonjusticiable Under Foreign Sovereign Immunity Act*, 119 HARV. L. REV. 2292, 2292 (2006).
141. *Id.*

avoid "political questions," not "political cases."[142] The Court recently suggested that it should defer its decisions to the Executive Branch's foreign policy interests in dismissing cases.[143] In light of this notion of foreign policy deference, the court in the noted case should have considered the current antiterrorism era and the importance of protecting foreign victims of terror attacks against U.S. citizens. However, because sovereign immunity raises separation of powers issues, Congress may wish to enact a contemporary amendment to the FSIA. Whether it is done by Congress's enactment of an amendment or by a U.S. court's less-rigid application of the FSIA provisions, the inconsistencies regarding the claims brought by foreign and American plaintiffs must be reconciled.

V. CONCLUSION

The U.S. district court's decision in the noted case may be overturned in the near future. Although the court remains hesitant to rule on issues Congress has not specifically contemplated, it will not be given such a luxury in an era characterized by increasing terrorist attacks targeted against U.S. citizens. Increasing numbers of nonresident plaintiffs will seek to bring claims against foreign sovereigns in U.S. courts as long as terrorist organizations continue to bomb U.S. embassies. The FSIA's history reveals an internal contradiction in need of clarification. While Congress did not intend to leave foreign plaintiffs out of the FSIA, the exception of providing material support to terrorists is limited to American claimants and victims. This provision stands in contradiction to Congress's stated purpose behind the Act. The court also applied a rigid interpretation of the waiver exception without considering the FSIA's evolving nature. U.S. courts need to apply less rigid interpretations of the FSIA provisions or Congress needs to amend the FSIA to protect innocent foreign victims of attacks against Americans.

Zeynep Gunday[*]

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142. *Id.*

143. *Id.* (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004); Republic of Austria v. Altmann, 541 U.S. 677, 701-02 (2004)).

* J.D. candidate 2008, Tulane University School of Law; B.A. 2003, University of California—Berkeley. The author would like to thank Anne, Baba, and Jazz for their constant support and encouragement.