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DRAFT BRIEF CONCERNING CLAIMS TO FOREIGN SOVEREIGN IMMUNITY AND HUMAN RIGHTS: NONIMMUNITY FOR VIOLATIONS OF INTERNATIONAL LAW UNDER THE FSIA

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INTRODUCTION

When U.S. or foreign plaintiffs have sued foreign governments for alleged violations of human rights law, they have often been faced with foreign state claims to immunity from suit in the United States. The basis for such a claim to immunity more recently has been the general grant of immunity contained in Section 1604 of the Foreign Sovereign

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Within this draft, brackets are used to set off material that may or may not be argued in a given case.

Immunities Act of 1976 (28 U.S.C. §§ 1330, 1602-1611) (FSIA). What is too little known are the exceptions to immunity for violations of international law that are also based on the language of the FSIA or on other federal statutes and case trends dating back to the founding of the United States. Such exceptions to immunity are of obvious import for those litigating human rights claims against a foreign government, based as they are on international law.

Recently, the Human Rights Advocacy Interest Group of the American Society of International Law has been concerned about the lack of adequate awareness of the existence of such exceptions to immunity and of several other aspects concerning the litigation of human rights in domestic courts. The following draft, although not approved by each member of the Group, is offered to judges and practitioners as an initial draft brief for plaintiffs faced with a predictable claim to immunity. It is hoped that with publication of this initial draft the Group will be able to benefit from comments by others and to produce a better working draft brief on this issue, and that, in the meantime, judges and practitioners will find useful guidance on important matters concerning the litigation of human rights in our courts.

The initial draft is organized around general sets of claims and relevant sections of the FSIA. An effort has been made to anticipate claims and arguments by foreign state defendants, some of which may not be relevant in an actual case, and to present an appropriate plaintiff's brief.

I. GENERAL RESPONSE TO ARGUMENT ABOUT ABSOLUTE IMMUNITY

[Defendant might assert, incorrectly, that from the time of the Alien Tort Act (28 U.S.C. § 1350) to the mid-20th century there was absolute immunity] In fact, there was no absolute immunity prior to the Supreme Court's opinion in *The Schooner Exchange* (11 U.S. (7 Cranch) 116 (1812)), nor did the Court recognize the concept of absolute immunity in *The Schooner Exchange*. See, e.g., G. Badr, *State Immunity: An Analytical and Prognostic View* 9, 12-13 (Martinus Nijhoff Pub. 1984); Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine*, 23 Va. J. Int'l L. 191, 239-41 (1983), and references cited; *The Schooner Exchange*, 11 U.S. at 145-46; *Verlinden v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983) ("As *The Schooner Exchange* made clear, . . . foreign sovereign immunity is a matter of grace and comity on the part of the United States. . .").

Badr adds that the very concept of sovereignty is a western concept and one not shared by all legal systems. See Badr, *supra*, at 75, *passim*.

The same is true with regard to immunity hinged upon such a concept. An East German author has also written: "Just as there cannot be absolute sovereignty there is no absolute immunity either. Both have their limits in the sovereignty of other states." See Enderlein, *The Immunity of State Property from Foreign Jurisdiction and Execution: Doctrine and Practice in the German Democratic Republic*, 10 Neth. Yrbk. of Int'l L. 111, 113 (1979). See also H. Wheaton, *Elements of International Law* 119-20 (3 ed. 1846) (sovereignty was not absolute and could not be exercised even within a state's own territory in a manner "inconsistent with the equal rights of other States."); L. Wildhaber, *Sovereignty and International Law*, in *The Structure and Process of International Law* 425, 426 (William of Ockham, Bracton, Coke on limited sovereignty), 430 (Grotius, Bk. I, Chpt. 3, § 16 (sovereignty is limited by and all kings are bound to observe the law of nations); Vattel; Locke), 432, 437-38 (sovereignty is limited by international law), 440-41 (R. MacDonald & D. Johnston eds. 1983). Actually, Article III of the Constitution and section 13 of the first Judiciary Act had early confirmed a jurisdictional competence, and therefore nonimmunity, with respect to certain suits "against ambassadors," "public ministers" and "foreign States." See U.S. Const., Art. III, Sec. 2, cl. 1; Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73 (1789).

In this case, not only was there a violation of international law, for which there is no immunity, but [the acts in question also took place within foreign territory. Any immunity that might arguably attach with regard to acts completed within a state's own territory certainly cannot apply to acts that occur in or continue into the territory of another sovereign and which are violative of the law common to all sovereigns, i.e., international law. For this reason also, *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 588 (9th Cir. 1984), *cert. denied*, — U.S. —, 105 S. Ct. 243 (1985), is not relevant. There, the Ninth Circuit dealt with "events occurring wholly within" a foreign state's own territory and an exception to immunity under Section 1605(a)(5). See also *Olsen by Sheldon v. Government of Mexico*, 729 F.2d 641, 645-46 (9th Cir. 1984) (acts partly within U.S. are sufficient for § 1605(a)(5)), *cert. denied*, 105 S. Ct. 80 (1984); *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 844 (D.C. Cir. 1984) (Edwards, J., dissenting) (only the injury would have to occur within the U.S.), *cert. denied*, 105 S. Ct. 117 (1984); Comment, *The Former American Hostages' Human Rights Claims Against Iran: Can They Be Waived?*, 4 Hous. J. Int'l L. 101, 115-17 (1981). Here, Plaintiff did not rely on Section 1605(a)(5), but on Sections 1330(a), 1604, 1605(a)(1), and/or 1605(a)(3)].

With regard to the Supreme Court's decision in *The Santissima*

Trinidad, 20 U.S. (7 Wheat.) 283, 350-55 (1822), the Court's statement about nonimmunity for foreign state violations of international law was made just ten years after *The Schooner Exchange*, and it was made expressly to affirm nonimmunity for violations of international law. As Professor Paust has written:

[I]n an important early Supreme Court case on the nonimmunity of foreign sovereigns for violations of international law, the Court recognized that property taken 'tortiously' by a foreign sovereign (because its capture by the foreign sovereign on the high seas as a prize was actually in violation of the law of nations) is subject to judicial control and disposition when brought subsequently within our territorial jurisdiction. As the Supreme Court noted, it did not matter that the violator of international law was a public or private perpetrator, nor that 'the goods are landed from the public ship in our ports, by the express permission of our own government, . . . since it involves no pledge that if illegally captured they shall be exempted from the ordinary operation of our laws.' Thus, international law was applied despite the fact of a foreign government violation and any lurking 'foreign affairs' implications. Law, after all, is what the Court seems bound to apply.

Paust, *Litigating Human Rights: A Commentary on the Comments*, 4 Hous. J. Int'l L. 81, 85 (1981); see also *id.* at 89-90; Paust, *Federal Jurisdiction*, *supra*, at 239-41. It has also been noted that:

[T]he *Santissima Trinidad* represents the first Supreme Court recognition and application of the principle of nonimmunity with regard to governmental acts in violation of international law. Thus, in context, it becomes equally relevant that the Court noted further that if a foreign sovereign himself 'comes personally within our limits, although he generally enjoys a personal immunity, he may become liable to judicial process in the same way, and under the same circumstances, as the public ships of the nation.'

Paust, *Federal Jurisdiction*, *supra*, at 240.

Further, as noted herein, there were several instances of nonimmunity recognized with respect to foreign public ships of war or other sovereign acts or entities. See, e.g., Paust, *Federal Jurisdiction*, *supra*, at 238-41, and references cited. Several instances of nonimmunity also involved a state's breach of neutrality laws. See, e.g., Paust, *id.* at 239-40 nn.199-200; see also *United States v. Pirates*, 18 U.S. (5 Wheat.) 184, 201-02 (1820) (fact that a person who violated the law of nations had a commission from a foreign government did not allow immunity from criminal sanctions); *The Estrella*, 17 U.S. (4 Wheat.) 298, 299-301, 304, 307-09

(1819) (exception to immunity of privateer with commission from government of Venezuela when the neutral nation examines “whether a trespass has been committed on its own neutrality by the vessel which has made the capture”—i.e., treated like a violation of the law of nations exception to immunity when such vessel acts “illegally”); *L’Invincible*, 14 U.S. (1 Wheat.) 238, 257-58 (1816) (exception to immunity of privateer with French commission where neutral’s own rights under law of nations are invaded); *Dole v. New England Mutual Marine Ins. Co.*, 7 F. Cas. 837, 847 (C.C.D. Mass. 1864) (No. 3, 966) (Clifford, J., on circuit) (pirate “cannot upon any ground claim immunity from the tribunal”).

Presenting nearly the same issues as those raised in *The Santissima Trinidad* was a case arising out of the impermissible action of a German warship of the Imperial German Navy during World War I addressed in *Berg v. British and African Steam Navigation Co.* (The Prize Ship “Appam”), 243 U.S. 124, 153-56 (1917), quoting from *The Santissima Trinidad*, *id.* at 154-55. In that case, alien private plaintiffs were allowed to sue for “restitution . . . conformably to the laws of nations and the treaties and laws of the United States” for the German government’s violation both of the law of nations and relevant treaties. Importantly, the Supreme Court recognized jurisdiction and the right to a remedy despite the intervention of the German ambassador, the claim that the U.S. court lacked jurisdiction, and the claim that since other proceedings had been instituted in Germany, the U.S. court should decline jurisdiction. See *id.* at 147, 152. The Court also noted that “an illegal capture would be invested with the character of a tort.” See *id.* at 154.

It is also relevant that in a reverse situation, when foreign plaintiffs sue the United States for a violation of the law of nations by seizure of a foreign ship in foreign territory, the private plaintiffs are entitled to damages, including attorney fees, travel expenses to bring suit, and punitive damages for an intentional act committed in violation of international law. See, e.g., *The Apollon*, 22 U.S. (9 Wheat.) 362, 371, 374, 376-79 (1824); see also *Cook v. United States*, 288 U.S. 102, 120-21 (1933); *The Paquete Habana*, 175 U.S. 677 (1900) (seizure of foreign vessel by U.S. in time of war in violation of customary international law—recovery of money damages and costs); *The Flying Fish*, 6 U.S. (2 Cranch) 170, 178-79 (1804). The British also recognized the liability of their government for related violations of international law. See, e.g., *The Felicity*, 2 Dodson 381 (1819); see also *The Acteon*, 2 Dodson 48 (1815); *The Maria*, 1 C. Rob. 341 (1799). The Russian Supreme Court ordered compensation to be paid in several cases where Russian naval forces destroyed neutral vessels in violation of international law during the Russo-Japanese War.

See, e.g., F. Smith, *The Destruction of Merchant Ships Under International Law* 91-94 (U.K. 1917). On the general duty of governments to compensate private owners for the destruction of neutral vessels, see *id.* at 75, 80, 85, 98; see also *id.* at 83-84 ("international law . . . is the inevitable and predominating criterion when other states are concerned," adding: "and commanders acting in accordance with such invalid regulations would be guilty, along with their governments, . . .").

These cases actually represent further evidence of a shared expectation among nation-states that immunity is not permissible for acts in violation of international law even if immunity might otherwise exist for more ordinary tortious acts engaged in by the same government completely within its own territory. Importantly also, suits against the U.S. government for its violations of international law were possible at least since 1824, after nonimmunity of foreign governments was recognized in *The Santissima Trinidad*. These cases demonstrate not only the recognition of nonimmunity of governmental acts in violation of international law, but also individual standing, a cause of action, and the right to an effective remedy in domestic courts.

On the use of the Alien Tort Act and other bases of jurisdiction for private litigants with respect to violations of international law, see also Paust, *Litigating Human Rights*, *supra*, at 84-88, 90-91; Randall, *Federal Jurisdiction Over International Law Claims: Inquiries Into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 473 (1985) (pts. 1 & 2). As an early federal case also recognized: "Among states as well as among men, justice is a sacred law . . . On states as well as individuals the duties of humanity are strictly incumbent." See Paust, *Litigating Human Rights*, *supra*, at 91, quoting *Henfield's Case*, 11 F. Cas. 1099, 1107 (C.C.D. Pa. 1793) (Wilson, J., on circuit, charge to the grand jury).

In view of the numerous cases in U.S. history involving the litigation of international law by private plaintiffs, even against foreign governmental actions here or abroad, Defendant's assertion that individuals could only assert such claims against a foreign state through diplomatic channels is incorrect and misleading. As textwriters have demonstrated:

[T]he early opinions of our Attorneys General recognized necessarily that an individual could both sue and be sued; and early cases recognized a private right to relief for the seizure of, or damage to, vessels or other property in violation of international law, a private right exercised later [by foreign plaintiffs] even against actions taken under the authority of the President of the United States in time of war. . . . Several other court decisions have recognized the propriety of private causes of action involving rights under, or violations of, international law . . . it was, and is, simply not true that individuals could not

benefit directly from international law or be subject either to civil or criminal sanctions for violations of international law.

See Paust, *Litigating Human Rights, supra*, at 87-88, and references cited; Randall, *supra*, at 20-21, 41, 48-50, 492-94, 496-501; Report to the Committee on Human Rights of the American Branch of the International Law Association, *Human Rights Law, The U.S. Constitution and Methods of Judicial Incorporation, Proceedings* 56, 64-65 (1983-84); see also *La Abra Silver Mining Co. v. United States* 175 U.S. 423, 458, 461 (1899) (even where claims at the international level were those of governments, private company also had a right under a treaty which was undoubtedly "susceptible of judicial determination"); *Fletcher v. Peck*, 10 U.S. (10 Cranch) 87, 133 (1810) (Marshall, C.J., opinion) (our tribunals "are established . . . to decide on human rights"). Thus it is evident that an assertion that acts of foreign governments outside the territorial limits of the United States have never been subject to judicial scrutiny would be incorrect.

From all of the above, it is also apparent that *Siderman v. The Republic of Argentina*, C.D. Cal., No. CV 82-1772-RMT (MCx) (March 7, 1985) was decided incorrectly when the district court assumed that "when 28 U.S.C. § 1350 was originally enacted in 1789, the longstanding general rule was the recognition of absolute foreign sovereign immunity. . . . This immunity was only questioned as to public ships of a foreign sovereign found within the geographic jurisdiction of another sovereign. . . ." *Id.* at 2, lines 14-20. Not only was there no absolute immunity, but the claims to immunity were seriously questioned whenever public acts involved a violation of international law. See, e.g., Paust, *Federal Jurisdiction, supra*, at 239-41, and references cited; see also *id.* at 221-32.

Moreover, 28 U.S.C. § 1305 (the Alien Tort Act) must be interpreted today, as any federal statute, with reference to present international legal norms. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 880-85 (2d Cir. 1980). Since present international law also grants no absolute immunity and, in fact, recognizes the precept of nonimmunity for violations of international law (see Paust, *Federal Jurisdiction, supra*, at 221-32; see also *id.* at 233-47), this court should recognize, contrary to the ruling in *Siderman*, that 28 U.S.C. Section 1350 does impliedly provide an exception to immunity in the case of a foreign state violation of international law. See also *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246, 254 (D.D.C. 1985) (violation of § 1350 exists and "[i]f the FSIA was interpreted to bar suits against foreign governments under § 1350, . . . it would act pro tanto to repeal" such statute. "Statutory interpretation that would effect such a repeal is not favored; . . . and is

therefore rejected by this court.”). Bazylar, *Litigating the International Law of Human Rights: A “How to” Approach*, 7 Whittier L. Rev. 713, 733-34 (1985); Randall, *supra*, at 509.

There was no legislative grant of immunity to foreign states until 1976. Silence in the Alien Tort Act, therefore, actually cuts against the reasoning of the district court in *Siderman*. If Congress had intended to grant immunity, it would have had to have done so expressly. Its silence indicates approval of the precept of nonimmunity for violations of international law, especially after *The Santissima Trinidad*.

It is important to note that none of the cases relied on by Defendant actually addressed Sections 1330(a) or 1604 and the general precept of nonimmunity under international law for violations of international law. For this reason, each of the cases cited is inapposite. Also, the FSIA, as any federal statute, must be interpreted consistently with the norms of international law. As documented herein, international law actually requires recognition of nonimmunity for violations of international law. Thus, Defendant cannot avoid the central thrust of Plaintiff’s argument concerning nonimmunity for violations of international law.

Similarly, Defendant’s argument about more ordinary torts under Section 1605(a)(5) of the FSIA is inapposite. This case is distinguishable from an ordinary tort within the coverage of 1605(a)(5) precisely because international law is the basis of the claim. Further, [jurisdiction exists under 28 U.S.C. § 1350, and nonimmunity exists thereunder (impliedly), and] nonimmunity exists also under Sections 1330(a) (expressly) and 1604 (expressly) of the FSIA [as well as expressly under Sections 1605(a)(3) thereof].

Defendant also asserts incorrectly that public acts of a sovereign state are not subject to the jurisdiction of U.S. courts. First, it must be understood that nearly everything that a foreign state does is a public act. The state acts really in no other way, for no other purpose. *See also The Pesaro*, 277 F. 473, 482 (S.D.N.Y. 1921). Thus, Defendant’s statement is too broad and can mislead this court. Second, the FSIA expressly recognizes several exceptions to immunity that can apply with respect to public acts *jure imperii*. *See, e.g.*, 28 U.S.C. §§ 1330(a) [violation of international law exception], 1604 [violation of international law exception], 1605(a)(1) [waivers, express or implied], 1605(a)(3) [governmental takings of property in violation of international law]. *See also Olsen by Sheldon v. Government of Mexico*, 729 F.2d 641, 645 (9th Cir. 1984) (Mexico’s argument “that governmental acts are automatically read out of section 1605(a)(5) . . . is . . . untenable”); *De Sanchez v. Banco Central de Nicaragua*, 515 F. Supp. 900, 914 (E.D. La. 1981); *Letelier v. Republic of Chile*, 488 F. Supp. 665, 670 (D.D.C. 1980), 502 F. Supp. 259 (D.D.C.

1980) (on the merits). In truth, there simply is no blanket immunity for public acts, nor even for public acts *jure imperii*.

Finally, it is worth noting that even if the FSIA preempts other federal law "for according" immunity [see House Report No. 94-1487, at 1610], this certainly does not require a finding that the FSIA preempts other federal law *denying* immunity (expressly or by implication). See *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. at 254. Such a result would contradict the purpose of the FSIA, "which is to 'serve the interests of justice and . . . protect the rights of both foreign states and litigants in United States courts.'" See also *Olsen by Sheldon v. Government of Mexico*, 729 F.2d at 646, quoting § 1602. In this regard it is also useful to recall that by express direction in the Act, questions concerning nonimmunity are turned over to the courts. See 28 U.S.C. § 1602; House Report No. 94-1487, at 6606, 6610, 6613. Indeed, the House Report clearly recognizes that Congress left these "decisions exclusively . . . [with] the courts." House Report No. 94-1487, at 6610. While addressing § 1602, the Report adds that "the central purpose" of the Act was fulfilled by leaving decisions on claims to immunity with the judiciary "on the basis of a statutory regime which incorporates standards recognized under international law." See *id.* at 6613; see also *id.* at 6606 ("thereby . . . assuring litigants that these often crucial decisions are made on purely legal grounds"), *id.* at 6615 ("courts would have a great deal of latitude"), and *id.* at 6613 (abroad, "specific content and application have generally been left to the courts").

It is not irrelevant that in other instances where Congress has incorporated international standards by reference, the courts have recognized the need to identify, clarify and apply relevant international legal precepts. See, e.g., *Ex parte Quirin*, 317 U.S. 1, 27-28 (1942); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-62 (1820); *Filartiga v. Pena-Irala*, 630 F.2d 876, 880, *passim* (2d Cir. 1980); see also *Hilton v. Guyot*, 159 U.S. 113, 163 (1895) (custom when no statute); *The Nereide*, 13 U.S. (9 Cranch) 388, 421 (1815) (same). Again, one international legal precept highly significant to the FSIA is the norm of nonimmunity for violations of international law, a norm of which all nation-states are clearly on notice.

II. NONIMMUNITY FOR VIOLATIONS OF INTERNATIONAL LAW

As recognized now by numerous textwriters who have addressed the subject, under both international and U.S. law, it is appropriate if not required to refuse immunity to foreign states for their violations of international law. See, e.g., Paust, *Federal Jurisdiction*, *supra*, at 220-47 and

numerous references cited; Bazylar, *supra*, at 732-35; Comment, *The Foreign Sovereign Immunities Act and International Human Rights Agreements: How They Co-Exist*, 17 U.S.F. L. Rev. 71 (1982); Comment, *The Former American Hostages' Human Rights Claims Against Iran: Can They Be Waived?*, 4 Hous. J. Int'l L. 101, 114-17 (1981); *c.f.* Randall, *supra* at 509; Halberstam, *Sabbatino Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law*, 79 Am. J. Int'l L. 68 (1985). On the meaning of *Sabbatino* today, compare Halberstam, *supra*, with letter, 18 Va. J. Int'l L. 601 (1978). Since several of these articles were published, the Sixth Circuit has also recognized a "treaty exception" to the act of state doctrine (the sister doctrine to sovereign immunity) which obviously can apply in the present case. See *Kalamazoo Spice Extraction Co. v. The Provisional Military Government of Socialist Ethiopia*, 729 F.2d 422, 425-27 (6th Cir. 1984); see also *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1534, 1540-41 (D.C. Cir. 1984) (en banc), *vac. & remanded on other gds.*, 105 S. Ct. 2353 (1985); *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. at 253-56; *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 862 (E.D.N.Y. 1984) (where clear violation of international law exists it is appropriate for judicial application and "there is no . . . justifiable offense to" a foreign state when jurisdiction is exercised); *American Int'l Group v. Islamic Republic of Iran*, 493 F. Supp. 522, 524-26 (D.D.C. 1980); Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), *reprinted in* 19 Int'l L. Mat. 585, 604 (ASIL 1980); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 707-11 (1976) (app. 1, Letter from the Legal Adviser, U.S. Dep't of State); Leigh & Sandler, *Dunhill: Toward a Reconsideration of Sabbatino*, 16 Va. J. Int'l L. 685, 697 (1976); Paust, *Federal Jurisdiction, supra*, at 242-44, and numerous references cited; *contra Siderman v. The Republic of Argentina, supra*. In addition to the cases on nonimmunity cited in Paust, *Federal Jurisdiction, supra*, see *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C.D. Mass. 1821) (No. 15,551) (law of nations "may be enforced by a court of justice, whenever it arises in judgment" and re: "an offence against the universal law of society . . . no nation can rightfully permit its subjects to carry it on, or exempt them . . . [and] no nation can privilege itself to commit a crime against the law of nations. . . ."); 2 Op. Att'y Gen. 725, 726 (1835) (Vattel thinks that a foreign consul should be immune from criminal jurisdiction "unless he violate the law of nations by some enormous crime"), quoting I Kent's *Commentaries on American Law* Lect. 2, at 44 (1826), quoting D. de Vattel, *The Law of Nations* Book II, Ch. 2, sec. 34 (1758); *Triquet v. Bath*, 3 Burr. 1478 (K.B. 1764)

("This privilege of foreign ministers . . . depends upon the law of nations").

As recognized implicitly in the U.N. Charter and, when human rights are at stake, in the Universal Declaration of Human Rights, the pretended cloak of sovereignty ends where international law begins. *See generally*, Paust, *Federal Jurisdiction, supra*, at 221-25, 229-31, and references cited; 79 Proceedings, Am. Soc. Int'l. L. (1985); *see also* Universal Declaration of Human Rights, art. 2, para. 2 (no distinction in rights protection on the basis of full or limited "sovereignty" of the country or territory to which a person belongs), art. 8 (right of all persons to an effective remedy in domestic courts); Part IV *infra*.

Indeed, "sovereignty" is conditioned on obedience to international law, the law upon which sovereignty rests. *See also* Universal Declaration of Human Rights, art. 21(3); 1949 Draft Declaration on Rights and Duties of States, art. 14, Report of the International Law Commission, 4 U.N. GAOR, Supp. (No. 10) 7, 10, U.N. Doc. A/925 (1949) ("the sovereignty of each State is subject to the supremacy of international law"); Paust, *Authority: From a Human Rights Perspective*, 28 Am. J. Jurisp. 64 (1983); Paust, *Political Oppression in the Name of National Security: Authority, Participation, and the Necessity Within Democratic Limits Test*, 9 Yale J. World Pub. Ord. 178 (1982). One such condition involves the duty of every state, through joint and/or separate action, to respect and observe "human rights and fundamental freedoms in accordance with the Charter." *See* 1970 Declaration on Principles of International Law, G.A. Res. 2625, 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1970); *see also* U.N. Charter, preamble, arts. 1(3), 55(c), 56. Another condition involves the duty to refrain from impermissible use of force against other states and their people or property. *See, e.g., id.* and U.N. Charter, art. 2(4). Similarly, judicial deference to foreign state acts is rightly conditioned upon foreign state respect for international law.

For these reasons, it should be universally recognized that an illegal act is incapable of protection by the judiciary. To hold otherwise would be to further illegality, give it legal effect, and fulfill its illegal nature at the hands of a court of law. This a court of law cannot do. Thus, a violation of law poses the one necessary exception to immunity, one implicitly necessary in any truly legal system.

Similarly, acts taken in violation of international law are not and cannot be acts performed in the exercise of a state's legitimate sovereign authority since no state has the authority to violate international law. Moreover, such acts are treated as if they are outside the sovereign function and merely "private acts." *See, e.g., Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980), where the court declared:

[T]here is no discretion to commit, or to have one's officers or agents commit, an illegal act Whatever policy options may exist for a foreign country, it has no "discretion" to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law. Accordingly there would be no "discretion" within the meaning of section 1605(a)(5)(A) to order or to aid in an assassination . . . [and a]s a consequence, the Republic of Chile cannot claim sovereign immunity *Id.* at 673.

See also Estate of Domingo & Viernes v. Republic of the Philippines, Doc. No. C-82-1055 (W.D. Wash. 1985) ("acts alleged . . . are clearly beyond the defendant's discretion" and outside delegated authority); *pet. for leave to appeal denied*, DC No. CV-82-1055 DSV (9th Cir. 1985); *Persinger v. Islamic Republic of Iran*, 690 F.2d 1010, 1018-19 (D.C. Cir. 1982) (advance sheets; opinion excluded from bound volume), *reprinted in* 22 I.L.M. 404, 412 (1983), *vacated on other grounds*, 729 F.2d 835 (D.C. Cir. 1984) (no discretion to violate international law); *La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C.D. Mass. 1821) (No. 15,551) ("no nation can rightfully permit [a violation] . . . no nation can privilege itself to commit a crime against the law of nations by a mere municipal regulation of its own"); *Henfield's Case*, 11 F. Cas. 1099, 1104 (C.C.D. Pa. 1793) (No. 6,360) (Jay, J., charge to grand jury) (foreign "sovereign having no right to command what is contrary to the law of nature"); House Report No. 94-1487, at 6605, 6613, 6616 ("private" acts of government are meant to be outside grant of immunity); *Olsen by Sheldon v. Government of Mexico*, 729 F.2d at 645 (no immunity for "private or commercial acts (jure gestionis)"); *Jimenez v. Aristeguieta*, 311 F.2d 547, 557-58 (5th Cir. 1962), *cert. denied sub nom.*, *Jimenez v. Hixon*, 373 U.S. 914 (1963) (even "common crimes" of a dictator "were not acts of . . . sovereignty," acts of state, or acts "in an official capacity" entitled to any sort of immunity, but were "crimes committed by the Chief of State done in violation of his position" despite a claim to the contrary); *The Pesaro*, 277 F. at 476, also quoting Chief Justice Marshall in *The Schooner Exchange* (11 U.S. at 145: "a manifest distinction between the private property of the person who happens to be a prince and the military force"); E. de Vattel, *The Law of Nations* Book I, Ch. IV, sec. 54 (1758) ("The Prince . . . who would in his transports of fury take away the life of an innocent person, divests himself of his character, and is no longer to be considered in any other light than that of an unjust and outrageous

enemy”); *id.* Book II, sec. 213 (“all the private obligations of the sovereign, are naturally subject to the same rules, as those of private persons”), *quoted in United States v. Wilder*, 28 F. Cas. 601, 604 (C.C.D. Mass. 1838) (No. 16,694) (Story, J.) and *The Pesaro*, 277 F. at 477.

Similarly, there is no threat to a foreign state’s legitimate “independence” posed by application of the precept of nonimmunity for violations of international law because no state is “independent” in an absolute sense and no state’s relative “independence” allows it to violate international law. Thus, no state is “independent” of international law. *See also Olsen by Sheldon v. Government of Mexico*, 729 F.2d at 650 (FSIA reflects realities of interdependence and jurisdiction thereunder does not pose an impermissible affront to sovereignty); *The Peterhoff*, 72 U.S. (5 Wall.) 28, 57 (1866) (“we administer the public law of nations, and are not at liberty to inquire what is for the particular . . . disadvantage of our own or another country”); H. Wheaton, *Elements of International Law* 119-20 (3 ed. 1846) (even outside intervention by military force could be permissible because sovereignty was not absolute even within a state’s own territory and it could not be exercised in a manner “inconsistent with the equal rights of other States.”); Wildhaber, *Sovereignty and International Law*, *supra*, Part I, also quoting Austro-German Customs Regime case, P.C.I.J. Ser. A/B no. 41 (1931), at 57 (Anzilotti, J., sep. op.).

III. FSIA SECTIONS 1330(a) AND 1604

[extracted primarily from 23 Va. J. Int’l L. at 233-36]

The broad exception to sovereign immunity that is built into two major provisions of the FSIA is an example of legislative recognition of the principle of nonimmunity. 28 U.S.C., § 1330(a) declares that district courts shall have original jurisdiction over “any nonjury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under §§ 1605-1607 of this title or under any applicable international agreement.” Thus, at least with regard to civil actions, a foreign State is subject to jurisdiction with respect to certain causes of action where “the foreign state is not entitled to immunity . . . under any applicable international agreement.” One might call this the international agreements exception to sovereign immunity.

Under § 1604, a foreign State’s immunity is “[s]ubject to existing international agreements to which the United States is a party. . .,” and so is subject to exceptions to immunity based on such agreements. When read together, §§ 1330(a) and 1604 confirm that there is an international agreements exception to immunity that is clearly independent of other

provisions of the Act, such as §§ 1605-1607, which pose alternative exceptions to immunity. *See generally* Paust, *Federal Jurisdiction, supra*, at 233-36; Bazylar, *supra*, at 732-33; *see also Gayda v. LOT Polish Airlines*, 702 F.2d 424, 425 (2d Cir. 1983) (“the Foreign Sovereign Immunities Act is by its very terms ‘[s]ubject to existing international agreements to which the United States is a party. . . .’ 28 U.S.C. § 1604. And the legislative history supports the proposition that if an international agreement . . . conflicts with the Act, the international agreement is controlling.”); *Harris Corp. v. National Iranian Radio & Television*, 691 F.2d 1344, 1350 (11th Cir. 1982) (“FSIA does not purport to limit the extent of waiver of sovereign immunity through the effect of a treaty . . . [and] contact requirements [in §§ 1605-1607] do not impose a barrier on the exercise of jurisdiction based on the waiver of sovereign immunity by treaty. This is confirmed by the legislative history. . . .”); *Von Dardel v. Union of Soviet Socialist Republics, supra* at 253-55 (§§ 1330 and 1604 provide an international agreements exception to immunity; “[u]nder § 1604, . . . in the present case, the Soviet Union must be denied immunity;” and Congress had intended “in enacting the FSIA to preserve existing remedies for violations of international law”); *Castillo v. Shipping Corp. of India*, 606 F. Supp. 497, 500 (S.D.N.Y. 1985) (§ 1604 “limits the applicability of that immunity. First, the grant may be subject to international agreements.”); *Asociacion de Reclamantes v. United Mexican States*, 561 F. Supp. 1190, 1194 (D.D.C. 1983) (“Plaintiffs do not rely on an ‘existing international agreement’” within 1604); *Gibbons v. Udaras na Gaeltachta*, 549 F. Supp. 1094, 1108 n.4 (S.D.N.Y. 1982) (“The Court recognizes that the FSIA is, by its terms, ‘[s]ubject to existing international agreements . . .’ 28 U.S.C. § 1604. Thus, where there is a manifest conflict between the FSIA and a pre-existing international agreement, the pre-existing international agreement controls.”); *In re Rio Grande Transport*, 516 F. Supp. 1155, 1160 (S.D.N.Y. 1981) (international agreements exception not applicable under the circumstances); *Perez v. The Bahamas*, 482 F. Supp. 1208, 1209 (D.D.C. 1980); *Reading & Bates Corp. v. National Iranian Oil Co.*, 478 F. Supp. 724, 728 (S.D.N.Y. 1979) (under § 1604, a treaty “may alter the provisions of the FSIA”); *Behring Int’l v. Imperial Iranian Air Force*, 475 F. Supp. 383, 389-90, 393 (D.N.J. 1979) (international agreements exception applied); *cf. Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373, 376 n.9 (7th Cir. 1985) (at 373: “the international agreement exception found in 28 U.S.C. § 1604”; at 376 n.9: “In the context of waiver of immunity by treaty, §§ 1605(a)(1) and 1604 obviously overlap to some extent. If an international agreement is self-executing and may therefore be the basis of an action under § 1604—that is, if it creates rights enforceable by private

litigants—then, in addition, it almost certainly waives sovereign immunity under § 1605(a)(1), thus providing a dual basis for district court jurisdiction.”).

Conspicuously out of line with the above cases and writings (which were seemingly unknown to the court) are the unreasoned conclusions of Judges Edwards and Bork in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 776 n.1 (Edwards, J.), 805 n.13 (Bork, J.) (D.C. Cir. 1984), *cert. denied*, — U.S. — (1985), 105 S. Ct. 1354. *See also Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 843 n.12 (D.C. Cir. 1984) (Bork, J., opinion) (same erroneous conclusion). As noted in *Von Dardel*, “Judge Bork did not consider the intent of Congress in enacting the FSIA to preserve existing remedies for violations of international law.” 623 F. Supp. at 254 n.9. In *Tel-Oren*, Judge Edwards nearly admitted a lack of “working familiarity” with international law and its incorporation into domestic law. *See* 726 F.2d at 782.

In *Siderman*, Judge Takasugi implicitly recognized the § 1604 exception but declared wrongly that the U.N. Charter and Universal Declaration are only aspirational and do not “waive” immunity. On this last set of issues, *see, e.g.*, Paust, *Human Rights* [Book Review], 56 N.Y.U. L. Rev. 227, 230-44 (1981) and references cited; Paust, *Federal Jurisdiction*, *supra*, at 221-32; section IV of this brief, *infra*. Also in error are cases stating flatly that foreign states and their property are immune unless an exception set forth in §§ 1605 to 1607 or 1610 to 1611 applies. *See, e.g.*, *Letelier v. Republic of Chile*, 748 F.2d 790, 793 (2d Cir. 1984). Compare *Von Dardel*, as quoted at the end of this part, *infra*.

It might also be noted that although § 1330(a) expressly refers to “any applicable agreement,” § 1604 refers merely to “agreements to which the United States is a party at the time of enactment of . . . [the] Act.” The legislative history of the Act explains, however, the general expectation that a “future” international agreement “would, under article VI of the Constitution, take precedence, whether or not the bill was made expressly subject to a future international agreement.” H.R. Rep. No. 94-1487, at 6604, 6608. Thus “[m]ention of future agreements was found to be unnecessary . . . [although] reference to existing international agreements is essential to make it clear that this bill would not supersede” certain present agreements. H.R. Rep. No. 94-1487, at 6608. It seems fair to conclude therefore that application of the international agreements exception recognized in §§ 1330(a) and 1604 should involve a consideration of any relevant international agreement, past or future.

Other parts of the legislative history further supplement the general

expectation that international law is meant to condition grants of immunity otherwise available under the Act. It is expressly stated, for example, that the "statutory regime . . . incorporates standards recognized under international law," adopts "the so-called 'restrictive' principle . . . recognized in international law," and is not at all intended to "supersede" or "preempt . . . applicable international agreements." See H.R. Rep. No. 94-1487, at 6613, 6605, 6608 & 6610 respectively. More important perhaps is the express recognition that "[a]ll immunity provisions in section 1604 through 1607 are made subject to 'existing' treaties and other international agreements to which the United States is a party. In the event an international agreement expressly conflicts with this bill, the international agreement would control." See H.R. Rep. No. 94-1487, at 6616. This expectation should also apply in the case of "future" agreements. It is commonly recognized that where there is no conflict between a prior treaty and a subsequently enacted statute, the treaty may be used to supplement the meaning of relevant statutory provisions or otherwise aid in the resolution of problems concerning gaps and ambiguities.

Two further points about the legislative history of the FSIA are important. First, it refers at several places to international law in addition to standards recognized under treaty law. It therefore seems entirely plausible that the international agreements exception was meant to apply also to cases where customary international law denied immunity, whether or not the customary rule was itself based partly on some treaty to which the United States was a signatory. This interpretation of the Act would be consistent with the fact that customary international law has always been subject to judicial recognition. See also *Von Dardel v. Union of Soviet Socialist Republics*, *supra* at 253-54 (regarding customary international law and jurisdiction over matters of universal concern: "Congress was fully aware of these doctrines of international law . . . and meant to incorporate them into the statute. The statute should be read, then, not to extend immunity to clear violations of universally recognized principles of international law.") Earlier in its opinion the *Von Dardel* court declared: "the FSIA incorporates preexisting standards of international law, under which a government is not immune for certain acts in clear violation of the universally accepted law of nations." *Id.*, at 252. It was also recognized that the doctrine of immunity "is inherently limited and appropriately disallowed where the foreign state defendant has acted in clear violation of international law." *Id.*, at 253. And further, it seems significant that the Act was thought to be based in part on Congress' power to define offenses against the law of nations (see H.R. Rep. No. 94-1487, at 6611), a power that has been exercised in connection

with international criminal activity, and a power that clearly would relate to denials under international law of claims to immunity for government officials. Finally, it should be recalled that for our courts to provide immunity where none exists under international law, indeed, where the precept of nonimmunity applies in the case of violations of international law, would contradict the stated purpose of the FSIA, "which is to 'serve the interests of justice and . . . protect the rights of both foreign states and litigants in the United States courts.'" See *Olsen by Sheldon v. Government of Mexico*, 729 F.2d at 646, quoting 28 U.S.C. § 1602. Such a result cannot be allowed. See also *Henfield's Case*, 11 F. Cas. at 1107, quoted in Part I, *supra*; *Fletcher v. Peck*, 10 U.S. at 133 (our courts were established "to decide on human rights"); *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. at 254-55 ("where the substantive provision of the Act would operate in a specific case to interfere with any such international agreement, such [other] provisions [of the FSIA] must be preempted to the extent necessary to permit the full operation of such agreement."); H.R. Rep. No. 94-1487, at 6608, 6610 (FSIA does not "preempt" international agreements); Paust, *Federal Jurisdiction, supra*, at 232-33 (customary and treaty based norm of nonimmunity for violations of international law must be applied).

IV. FSIA SECTION 1605(a)(1)

As recognized in the legislative history of the FSIA, advance consent to arbitration or to submit to the laws of some other state constitutes an implicit waiver of immunity within the meaning of Section 1605(a)(1). See House Report No. 94-1487, at 6617. Such implicit waivers have been recognized by U.S. courts. See, e.g., *Marlowe v. Argentine Naval Comm.*, 604 F. Supp. 703, 708-09 (D.D.C. 1985); *Iptrade Int'l v. Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C. 1978).

The reason for finding such an implied waiver is obvious. By agreeing to be judged by others and/or in accordance with laws and standards other than its own, the state has necessarily waived critical features of its sovereignty with respect to the matter at issue. For the same reason, it is equally clear that recognition of an implied waiver is appropriate where a state has consented by treaty to be judged by others with respect to matters covered by the treaty and/or has agreed to be bound by legal norms, standards or obligations set forth in a treaty (i.e., to be bound by a law other than its own). The implied waiver of immunity is even more obvious whenever a relevant agreement recognizes the right of one injured or deprived by the conduct of a state to an effective remedy or, more specifically, to compensation. See, e.g., Bazylar, *supra*, at 733; Comment, *The Foreign Sovereign Immunities Act and International Human Rights*

Agreements: How They Co-Exist, 17 U.S.F. L. Rev. 71, 81-3 (1982); see also *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d at 376 n.9.

Several international instruments recognize such a right to an effective remedy. See, e.g., Paust, *Litigating Human Rights*, *supra*, at 99 n.123; Paust, *On Human Rights: The Use of Human Right Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts*, forthcoming. Thus, when a fundamental human right guaranteed by such international instruments is at stake and the right to an effective remedy is also guaranteed by such instruments, it is evident that a foreign state signator has impliedly waived any claim to immunity from the exercise of such a right to an effective remedy. It can be recognized, for example, that the right of each person to an effective remedy in domestic courts, guaranteed in Article 8 of the Universal Declaration of Human Rights (which authoritatively supplements the United Nations Charter obligations of all member states to respect and observe human rights), necessarily results in an implied waiver of any claim to immunity from suit in a domestic court brought by a private litigant in order to pursue an effective remedy for an alleged deprivation of a human right. The language of Article 8 of the Universal Declaration can mean no less.

It is important to note that cases holding that there is no waiver of immunity by articles 55 and 56 of the U.N. Charter fail to recognize that the Charter obligations are now authoritatively supplemented by Article 8 of the Universal Declaration. See, e.g., *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d at 373-75. Indeed, in such cases there is simply inadequate awareness of the legal relevance of the Universal Declaration since developments in the 1970s. See, e.g., *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d at 373-75; see also *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring). More recently, *Von Dardel* recognized that a number of legal scholars "have concluded that a sovereign may implicitly waive its immunity for such violations when it ratifies human rights agreements" and that "[b]y explicitly agreeing to be bound by the terms of those agreements," [including the U.N. "'Charter provisions on human rights,'"] the U.S.S.R. "has implicitly waived its immunity in this action alleging their breach." 623 F. Supp. at 255-56, adding: "Any other result would rob each of those agreements of substantive effect, and would render meaningless the act of the Soviet Union in signing them." *Id.* at 256.

Even more generally, and when the immunity of representatives of a state is most important, there is an express "duty" of a state "to waive the immunity" of its representatives to the United Nations "in any case where in the opinion of" such state "the immunity would impede the course of justice." See Convention on the Privileges and Immunities of

the United Nations, art. IV, § 14, 1 U.N.T.S. 15, 21 U.S.T. 1418, T.I.A.S. 6900 (1946).

V. FSIA SECTION 1605(a)(3)

Section 1605(a)(3) of the Foreign Sovereign Immunities Act provides an alternative basis for jurisdictional competence in the face of foreign violations of international law. Not only is it appropriate to consider this section while viewing the whole act (*see* § 1602 and H.R. Rep. No. 94-1487, at 6606, 6610, 6613), but § 1605(a)(3) should also be interpreted by the judiciary in an effort to fulfill the obvious overall purpose of that section and relevant legal policies at stake. By its terms, § 1605(a)(3) applies to claims “in which rights in property taken in violation of international law are in issue. . . .” Precisely that sort of issue is presented when rights in property are taken in violation of human rights law. On the human right to property and the freedom from arbitrary deprivation thereof, *see, e.g.*, Universal Declaration of Human Rights, art. 17; Paust, *On Human Rights, supra*.

Quite clearly also, the “taking” of property can include the purposive damage to or destruction of property. In several instances, federal courts have recognized this point and have even recognized that a “taking” can include purposive governmental action that results in significant damage to or the destruction of property. *See, e.g.*, J. Nowak, R. Rotunda, J. Young, *Constitutional Law* 481, 483-84 (2 ed. 1983). This point is so well-known in U.S. law and practice that it can only be that Congress, in enacting § 1605(a)(3) and using such a well-known phrase, intended the word “taking” to include governmental actions taken against private property which result in significant damage to or the destruction of such property. Moreover, the legislative history of the provision demonstrates that “nationalization” or “expropriation” are merely examples of the means of “taking” property through governmental action. *See* H.R. Rep. No. 94-1487, at 6618 (“term ‘taken’ . . . would include” such). The primary purpose of the section is to assure that any form of “taking” in violation of international law is addressed by our courts and that appropriate relief can be granted for governmental action in violation of international law.

Importantly, this approach also has historical underpinning. As documented in Nowak, Rotunda & Young, *supra* at 481, Grotius’ famous work on international law, *De Jure Belli et Pacis* (1625), recognized that a state has the power to take or destroy property, but that “when the state so acted, it was obliged to compensate the injured property owner

for his losses." This result is all the more understandable when the "taking" results from action in violation of international law. One commentator adds that if *The Schooner Exchange*, which had been captured on the high seas and "taken" in violation of international law, had been the subject of litigation today, nonimmunity should be the result since "this is precisely what Section 1605(a)(3) of the FSIA aims at achieving." See G. Badr, *State Immunity: An Analytical and Prognostic View* 13 (1984). See also *The Santissima Trinidad* and other cases noted in Part I, *supra*.

It cannot matter that the property is incapable of coming into the United States, so that title questions concerning such property can be raised. Where property has been destroyed, title questions are not in issue. "[R]ights in property taken in violation of international law are in issue." § 1605(a)(3). It cannot have been the intent of Congress that the same actions of a government which lead to the taking of property but not its destruction can be litigated, but that a government can avoid its responsibility under international law merely by assuring that property taken is in fact destroyed. When § 1604, which contains the general exception to immunity for violations of international law, and § 1605(a)(3) are considered together, Congress obviously intended no such result. This point is all the more evident when it is realized that there is universal jurisdictional competence over violations of international law. See, e.g., Paust, *Federal Jurisdiction, supra*, at 211-12, and references cited; see also *id.* at 214, 221-32.

For these reasons, it is clear that § 1605(a)(3) provides an alternative basis for nonimmunity of governmental actions taken against plaintiffs' property interests in violation of international law.

VI. BURDEN OF PROOF

It must be recalled that "Sovereign immunity is a derogation from the normal exercise of jurisdiction by the courts and should be accorded only in clear cases." *Victory Transport v. Comisaria General*, 336 F.2d 354, 360 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965). With the passage of the FSIA, this approach has been maintained. As recognized in the House Report, "sovereign immunity is an affirmative defense . . . the burden will remain on the foreign state to produce evidence in support of its claim of immunity . . . The ultimate burden of proving immunity would rest with the foreign state." H.R. Rep. No. 94-1487, at 6616. See also *Letelier v. Republic of Chile*, 488 F. Supp. 665, 672 (D.D.C. 1980); *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. at 252-53.

Here, Defendant fails to meet the burden of proof of immunity. Moreover, Defendant cannot prove that it is entitled to immunity for its violations of international law, since violations of international law form

the basis for nonimmunity under §§ 1330(a) and 1604 of the Act, as well as the basis for Plaintiff's claims to nonimmunity under [§§ 1605(a)(1) and 1605(a)(3)].

VII. CONTACTS WITH THE FORUM ARE NOT NECESSARY WITH REGARD TO VIOLATIONS OF INTERNATIONAL LAW

[If the Defendant seeks to mislead the court by arguing that there is a requirement in all cases that "contacts" exist with the United States, one should point out that, actually, no such requirement has ever existed in our courts with respect to clear violations of international law. Moreover, no such requirement appears in either the Alien Tort Act or the Foreign Sovereign Immunities Act, and no such novel requirement should now be implied by the court].

As the Supreme Court has stated: "both statutory subject-matter jurisdiction . . . and personal jurisdiction [under the FSIA] turn on application of the substantive provisions of the Act. Under § 1330(a), federal district courts are provided subject-matter jurisdiction if a foreign state is 'not entitled to immunity either under §§ 1605-1607 . . . or under any applicable international agreement.'" *Verlinden v. Central Bank of Nigeria*, 461 U.S. 480, 485 n.5 (1983); see also *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. at 251 ("The absence of immunity thus establishes both subject matter and personal jurisdiction"). Thus, whenever under any portion of the Act (e.g., under §§ 1330(a), 1604, 1605(a)(1), or 1605(a)(3)) the foreign state is not entitled to immunity there is both statutory subject-matter jurisdiction and personal jurisdiction, assuming adequate service.

Importantly, no "contacts" are required with regard to nonimmunity for violations of international law under §§ 1330(a) and 1604. See *Harris Corp. v. National Iranian Radio & Television*, 691 F.2d 1344, 1350 (11th Cir. 1982). No mention of "contacts" is made in either of these sections. Additionally, no mention of "contacts" is made with respect to § 1605(a)(1). Of course, 1605(a)(1) applies in the case of a waiver, express or implied (e.g., through treaty requirements and/or duties owed to the international community). The alleged "contacts" requirement simply does not exist with respect to all sections of the Act or all circumstances of recognized nonimmunity.

There is universal jurisdictional competence over violations of international law—the very violations of law that form the basis for nonimmunity recognized in both 1330(a) and 1604 and that are relevant, moreover, to Plaintiff's claims under Sections [1605(a)(1) and 1605(a)(3)]. Importantly also, universal jurisdictional competence forms the basis for jurisdiction under 28 U.S.C. § 1350. See, e.g., *Filartiga v.*

Pena-Irala, 630 F.2d 876, 878, 880-87, 890 (2d Cir. 1980); Paust, *Federal Jurisdiction*, *supra*, at 211-13; *see also* Paust, *Human Rights: From Jurisprudential Inquiry to Effective Litigation*, 56 N.Y.U. L. Rev. 227, 231-32, 242-44 (1981), and Randall, *supra*, at 67,500. The Second Circuit in *Filartiga* also affirmed that "international law has an existence in the federal courts independent of acts of Congress." *See* 630 F.2d at 887 n.20. Here there are two relevant acts of Congress, both of which expressly refer to international law and which incorporate international law by reference to provide a jurisdictional basis for [plaintiff's] claims. On incorporation by reference, *see also Ex parte Quirin*, 317 U.S. 1, 27-30 (1942); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-62 (1820); *Filartiga v. Pena-Irala*, 630 F.2d at 880; Paust, *After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 Tex. L. Rev. 6, 10-11 (1971), reprinted in IV *The Vietnam War and International Law* 447 (ASIL 1976); Paust, *Federal Jurisdiction*, *supra*, at 213-14.

Additionally, as recognized by the Second Circuit in *Filartiga*, the tort claims are transitory. *See* 630 F.2d at 885. Similarly, there is a well-recognized fiction under international law that civil claims follow the person. *See, e.g.,* J. Sweeney, C. Oliver, N. Leech, *The International Legal System* 128 (2 ed. 1981); *see also* Wroth, *The Massachusetts Vice Admiralty Court and the Federal Admiralty Jurisdiction*, 6 Am. J. L. Hist. 250, 264-67, *passim* (1962) (early practice in Massachusetts was to blend admiralty *in rem* jurisdiction against a vessel within the state with common law personal jurisdiction over transitory claims against a person within the state so that a personal obligation followed one's property in addition to one's person). [Although these bases of jurisdictional competence may not form the direct bases for plaintiff's claims, they are relevant to demonstrate that jurisdiction is proper in several instances where there are no "contacts" with the forum].

VIII. FSIA SECTIONS 1609, 1610, 1611

Importantly, § 1609 of the FSIA has the same international agreements exception as that contained in § 1604. Thus, where there is nonimmunity from jurisdiction under § 1604 for violations of international law, there should be no immunity from attachment in aid of execution or from execution upon a judgment entered against the foreign state. In such a circumstance, none of the conditions to nonimmunity recognized in §§ 1610 and 1611 would have to be applicable, since the general grant of immunity of foreign state property from attachment and execution is itself conditioned by the international agreements exception. As a result, when the basis for jurisdiction and plaintiff's claim both involve foreign state violations of international law, there can be no immunity of

the violator state's property from subsequent execution of judgment. Sections 1604 and 1609 thus provide a consistent remedial scheme.

Also of import is the recognition in *Von Dardel*, while addressing similar language in § 1604, that "where the substantive provisions of the Act [as in §§ 1610-1611] would operate . . . to interfere with any such international agreement, such other provisions must be preempted to the extent necessary to permit the full operation of the agreement." 623 F. Supp. at 254-55; *see also* H.R. Rep. No. 94-1487, at 6608, 6610 (FSIA does not "preempt" international law); *id.* at 6608, 6625 (§ 1609 contains same international law exception as that in 1604). Applying the *Von Dardel* recognition, any of the conditions to nonimmunity of foreign state property set forth in §§ 1610 or 1611 that operate in a manner that interferes with "the full operation of such agreement" must be preempted.

Clearly the fundamental human right of all persons to "an effective remedy" in domestic courts for a violation of their human rights (*see* Part IV, *supra*) must necessarily include the right to an effective execution of judgment against the violator of human rights law. Clearly also, because such a right is guaranteed through the U.N. Charter (as well as through other agreements), any interference with the full operation of the guarantee of an effective remedy for human right deprivations must be preempted by the international agreements exception contained in § 1609. Actually, by application of its language, § 1609 provides the statutory basis for the guaranteed right to an effective remedy, a statutory basis that executes the obligation of the United States under the U.N. Charter, as supplemented by Article 8 of the Universal Declaration, and that is free from any of the qualifications that condition other exceptions to immunity contained in §§ 1610 and 1611. Additionally, since the human right to an effective remedy is also constitutionally protected (*see* Paust, *On Human Rights, supra*), the right to a remedy for human rights violations must be protected from any inconsistent statutory interpretation alleged by the Defendant.

Moreover, to the extent that a waiver of immunity is recognized under § 1605(a)(1) [*see* Part IV, *supra*], the same waiver should apply at least implicitly within the meaning of § 1610(a)(1) or (b)(1) in the case of human rights violations. *See* H.R. Rep. No. 94-1487, at 6627-6628 ("governed by the same principles" and "may have been waived . . . by the provisions of a treaty" or even by "an official statement"). Again, the guarantee of the right to an effective remedy for human rights violations necessitates judicial recognition of the right to an effective execution of judgment.

Property covered under § 1610(a)(1) is limited to property of a foreign state "used for commercial activity in the United States," but is not limited to property tied somehow to plaintiff's claim (as in § 1610(a)(2) or (3)). Property covered under § 1610(b)(1) includes "any property in the United States of an agency or instrumentality of a foreign state" if such agency or instrumentality is itself "engaged in commercial activity in the United States." See also H.R. Rep. No. 94-1487, at 6627 (waiver re: agency or instrumentality can "be made either by the agency or instrumentality or the foreign state itself," expressly or by implication). Section 1609, however, can reach other properties of the foreign state and its entities where international law has been violated. Such a result is consistent with the overall purpose of the FSIA to serve the interests of justice and protect the legitimate rights of the parties, while also assuring that international obligations of the United States (such as the duty to provide an "effective remedy" for human rights deprivations) are fulfilled. See, e.g., 28 U.S.C. §§ 1330(a), 1602, 1604, 1609; H.R. Rep. No. 94-1487, at 6605, 6608, 6610, 6613, 6616. See also H.R. Rep., *supra*, at 6626 ("in international law, there is a marked trend toward limiting the immunity from execution"). Justice also demands that a state seeking to take advantage of our markets should be subject to execution of judgments at least against its commercially related properties. It is difficult even to imagine that Congress would allow foreign states to reap benefits from our markets and the protection of our laws, but tolerate a foreign state immunity from execution of judgments based on a foreign state violation of international law, law that is also supreme federal law within Article III, Section 2, and Article VI, clause 2, of the U.S. Constitution. Necessarily, § 1609 compels a different understanding.

Similarly, recognition of a separate corporate form under such circumstances would "defeat legislative policies" as well as "internationally recognized equitable principles" and would "work fraud or injustice." See *First National City Bank v. Banco para el Comercio (Bancec)*, 462 U.S. 611, 629-30, 633 (1983). For this reason, the property of a foreign state entity should also be subject to execution under §§ 1609 and 1610(b)(1) or (2) for the foreign state's violations of international law. "To hold otherwise would permit governments to avoid the requirements of international law. . . ." *Bancec, supra*, at 633.

It is worth noting in this regard that the Circuit Court decision in *Letelier* is clearly distinguishable, since plaintiffs there did not use, nor did the court consider, § 1609 or the human rights claim to an "effective remedy" within the domestic jurisdiction of the United States. See *Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984). The court even

nearly admitted that human rights claims present a different circumstance where human rights law provides "a judicial remedy." See 748 F.2d at 798. Further, *Letelier* is not relevant to execution against the property of the state itself under §§ 1609 and 1610(a)(1), nor did *Letelier* address § 1610(b)(1) and the issue of implicit waiver with respect to violations of international human rights law.

