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## Foreign Sovereign Immunity After *Amerada Hess Shipping Corp. v. Argentine Republic*: Did It Go Down with the Hercules?

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# Foreign Sovereign Immunity After *Amerada Hess Shipping Corp. v. Argentine Republic*: Did It Go Down with the *Hercules*?

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## **Abstract**

This Comment argues that, contrary to the *Amerada Hess* ruling, the FSIA is the sole means of obtaining jurisdiction over a foreign sovereign. Part I discusses the *Amerada Hess* decision. Part II examines the FSIA and the ATS and how they have been judicially interpreted. Finally, Part III concludes the *Amerada Hess* decision is incorrect and suggests an alternate interpretation of the FSIA and the ATS.

## COMMENT

### FOREIGN SOVEREIGN IMMUNITY AFTER *AMERADA HESS SHIPPING CORP. v. ARGENTINE REPUBLIC*: DID IT GO DOWN WITH THE *HERCULES*?

#### INTRODUCTION

United States federal courts have generally held that they may obtain jurisdiction over a foreign sovereign only if the claim falls within one of the enumerated exceptions to the Foreign Sovereign Immunities Act of 1976<sup>1</sup> ("FSIA").<sup>2</sup> The United States Court of Appeals for the Second Circuit, however, has recently held in *Amerada Hess Shipping Corp. v. Argentine Republic*<sup>3</sup> that a U.S. federal court has jurisdiction, pursuant to the Alien Tort Statute<sup>4</sup> ("ATS"), over a claim brought by two alien corporations against the government of Argentina for a violation of international law. The court concluded that this claim was not barred by the FSIA, even though it did not fall within an FSIA exception.

This Comment argues that, contrary to the *Amerada Hess* ruling, the FSIA is the sole means of obtaining jurisdiction over a foreign sovereign. Part I discusses the *Amerada Hess* decision. Part II examines the FSIA and the ATS and how they have been judicially interpreted. Finally, Part III concludes that the *Amerada Hess* decision is incorrect and suggests an alternate interpretation of the FSIA and the ATS.

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1. Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1332, 1391, 1441(d), 1602-11 (1982)).

2. See, e.g., *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983) (claim must fall within an FSIA exception for jurisdiction to exist in case involving breach of contract claim brought against Nigeria); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370 (7th Cir. 1985) (FSIA barred wife's claim for damages from Soviet Union's refusal to allow her husband, a Soviet citizen, to emigrate); *O'Connell Mach. Co. v. M.V. Americana*, 734 F.2d 115 (2d Cir.), cert. denied, 469 U.S. 1086 (1984) (no jurisdiction in tort action against an instrumentality of Italy for damages to a generator shipped on the defendant's vessel absent an FSIA exception).

3. 830 F.2d 421 (2d Cir. 1987), cert. granted, 56 U.S.L.W. 3712 (U.S. Apr. 18, 1988) (No. 87-1372).

4. 28 U.S.C. § 1350 (1982). The ATS was originally enacted as part of the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77. In 1948 it was incorporated, with very little change, into 28 U.S.C. § 1350. See Act of June 25, 1948, ch. 646, § 1350, 62 Stat. 869, 934.

I. AMERADA HESS SHIPPING CORP. v.  
ARGENTINE REPUBLIC

During the afternoon of June 8, 1982, Argentine military aircraft bombed the *Hercules*, a Liberian oil tanker, while the tanker was in the South Atlantic Ocean, well within international waters.<sup>5</sup> Argentina was then in the midst of an armed dispute with the United Kingdom over the sovereignty of the Falkland Islands.<sup>6</sup> No warning was given to the *Hercules*, a neutral ship, before the bombings.<sup>7</sup>

At the time of the attack the *Hercules* was owned by United Carriers, Inc. ("United"), and was under a long-term charter to Amerada Hess Shipping Corp. ("Amerada").<sup>8</sup> Pursuant to this agreement, Amerada used the *Hercules* to transport oil from Alaska to its refinery in the United States Virgin Islands.<sup>9</sup> Both Argentina and the United Kingdom had been notified regularly by the United States Maritime Administration of the presence of U.S. and Liberian flagships in the South Atlantic.<sup>10</sup> Accordingly, five days before the attack, Argentina received notice of the *Hercules*.<sup>11</sup>

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5. *Amerada Hess*, 830 F.2d at 423. The *Hercules* was approximately 600 nautical miles off the coast of Argentina and 500 nautical miles off the coast of the Falkland Islands when she was attacked. *Id.* This location was well outside of the declared war zones. Appellants' Joint Brief at 5-6, *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421 (2d Cir. 1987) (No. 86-7602, 86-7603), *cert. granted*, 56 U.S.L.W. 3712 (U.S. Apr. 18, 1988) (No. 87-1372) [hereinafter Appellants' Joint Brief].

6. *Amerada Hess Shipping Corp. v. Argentine Republic*, 638 F. Supp. 73 (S.D.N.Y. 1986), *rev'd*, 830 F.2d 421 (2d Cir. 1987), *cert. granted*, 56 U.S.L.W. 3712 (U.S. Apr. 18, 1988) (No. 87-1372). During this conflict, the United Kingdom requisitioned over 60 privately owned ships to mobilize its military forces. P. CALVERT, *THE FALKLANDS CRISIS* 84-85 (1982). These ships brought troops and supplies from every direction to the South Atlantic. *Id.* at 84-88. One of the largest ships requisitioned was the *QE2*, a luxury cruise liner that transported an entire infantry brigade. *Id.* at 85.

7. *Amerada Hess*, 830 F.2d at 423. After the final bombing, the *Hercules* received two warnings to change course or suffer attack; the first came 55 minutes after the third bombing; the second, one hour and 35 minutes after the third bombing. Appellants' Joint Brief, *supra* note 5, at 6.

8. *Amerada Hess*, 830 F.2d at 423.

9. *Id.*

10. *Id.*

11. *Id.* Argentina had had prior dealings with the *Hercules*. *Amerada Hess Shipping Corp. v. Argentine Republic*, 638 F. Supp. 73, 73-74 (S.D.N.Y. 1986), *rev'd*, 830 F.2d 421 (2d Cir. 1987), *cert. granted*, 56 U.S.L.W. 3712 (U.S. Apr. 18, 1988) (No. 87-1372). In fact, one month earlier, while on its way to St. Croix, the *Hercules* had departed from its planned course at the request of the Argentine Navy to assist in

After the bombing, the severely damaged *Hercules* managed to reach port in Rio de Janeiro, where an undetonated bomb was found in one of its fuel tanks.<sup>12</sup> Because both the risk of explosion and cost of repair were great, the *Hercules* was scuttled in the South Atlantic.<sup>13</sup>

Shortly after the attack, Amerada and United obtained independent counsel in New York.<sup>14</sup> On August 3, 1983, Amerada's attorneys submitted a report to the Argentine Embassy in Washington, D.C., with a demand for compensation.<sup>15</sup> Following five unsuccessful attempts over the next six months to learn of Argentina's position, Amerada was told by the First Secretary of the Embassy to pursue the claim directly with the Ministries of Defense and Foreign Affairs in Buenos Aires.<sup>16</sup>

Amerada then hired an Argentine attorney who conditioned his retention on the stipulation that he would not have to litigate this claim in the Argentine courts.<sup>17</sup> His demands for compensation from the Argentine government over the next two months were not met.<sup>18</sup> By May 1984, with only two weeks left before its claim would be barred by Argentina's two-year statute of limitations, Amerada had received no payment from the Argentine government.<sup>19</sup> Amerada then contacted several other Argentine law firms, all of which refused to accept the case.<sup>20</sup>

On the last day to bring the claim in Argentina, Amerada's U.S. attorneys contacted the Ministry of Foreign Affairs in Buenos Aires and the Argentine Embassy in Washington and re-

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searching for survivors from the prior sinking of an Argentine cruiser. 638 F. Supp. at 73-74.

12. *Amerada Hess*, 830 F.2d at 423.

13. *Id.*

14. Appellants' Joint Brief, *supra* note 5, at 8.

15. *Id.* at 9.

16. *Id.*

17. *Id.*

18. *Id.* at 9-10.

19. *Id.* at 9-11.

20. *Id.* One firm cited Amerada's unlikelyhood of success in the Argentine courts as its reason for refusing to take the case. *Id.* at 10. Another said it did not wish to engage in litigation against the Argentine government with the Falklands War still in progress. *Id.* at 10-11. After initially accepting the case, a third firm reneged, stating that after reviewing the records it believed that the *Hercules* was not a neutral ship, but one directed by the English fleet. *Id.* at 11.

quested a one-year toll of the statute of limitations.<sup>21</sup> Amerada never received a response.<sup>22</sup> Having exhausted all possible means of settlement in Argentina,<sup>23</sup> Amerada and United brought suit in the United States District Court for the Southern District of New York seeking monetary relief.<sup>24</sup>

It was not clear, however, whether the district court had jurisdiction over the claims. Plaintiffs argued that the sinking of the *Hercules* was a violation of international law and, thus, subject matter jurisdiction existed under the ATS.<sup>25</sup> The ATS grants jurisdiction to the federal courts in civil cases involving violations of the law of nations or treaties of the United States.<sup>26</sup> Argentina moved to dismiss for lack of subject matter jurisdiction under the FSIA.<sup>27</sup> The FSIA provides personal and subject matter jurisdiction over foreign sovereigns, but only for acts that fall into one of its enumerated exceptions,<sup>28</sup> for instance, the expropriation of property by a foreign sovereign.<sup>29</sup> The Southern District of New York granted Argen-

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21. *Id.* at 12.

22. *Id.* United's attorneys were kept informed of Amerada's progress. *Id.* On March 27, 1985, United's attorneys met unsuccessfully with the Vice Chancellor of the Ministry of Foreign Affairs and Culture. *Id.*

23. *Id.* at 12-13. Liberia ruled itself out as a forum for adjudication on the ground that a Liberian judgment would be meaningless because of Argentina's lack of assets in Liberia. Brief for the Republic of Liberia as *Amicus Curiae* at 9, *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421 (2d Cir. 1987) (No. 86-7602, 86-7603), *cert. granted*, 56 U.S.L.W. 3712 (U.S. Apr. 18, 1988) (No. 87-1372).

24. *Amerada Hess*, 830 F.2d at 423. United Carriers sought US\$10,000,000 for the loss of the *Hercules* and Amerada sought approximately US\$2,000,000 for the fuel lost when the *Hercules* was scuttled. *Id.*

25. *Amerada Hess*, 638 F. Supp. at 74. Amerada also argued in the district court that jurisdiction existed under the doctrine of universal jurisdiction. *Id.* at 74. This doctrine states that jurisdiction exists when a defendant is found guilty of criminal conduct that is prohibited by every nation. George, *Defining Filartiga: Characterizing International Torture Claims in United States Courts*, 3 DICK. J. INT'L L. 1, 30-31 (1984). The district court rejected this contention because universal jurisdiction can support jurisdiction only in criminal cases. *Amerada Hess*, 638 F. Supp. at 77.

26. See *Amerada Hess*, 638 F. Supp. at 75-76.

27. *Amerada Hess*, 638 F. Supp. at 73.

28. See *infra* notes 80-86 and accompanying text. FSIA's exceptions include: actions in which the foreign sovereign has waived its immunity, 28 U.S.C. § 1605(a)(1) (1982); the case is based upon commercial activity in the United States, *id.* § 1605(a)(2) (1982); property is taken in violation of international law and that property is located in the United States, *id.* § 1605(a)(3) (1982); the case involves rights in property in the United States acquired by succession or gift, *id.* § 1605(a)(4) (1982); and the case is based on a non-commercial tort committed in the United States, *id.* § 1605(a)(5) (1982).

29. See 28 U.S.C. § 1605(a)(3).

tine's motion to dismiss,<sup>30</sup> holding that the FSIA provides the exclusive means of obtaining jurisdiction over a foreign sovereign.<sup>31</sup> Therefore, if an act does not fall into one of the FSIA's enumerated exceptions, the sovereign is immune.<sup>32</sup> The court then analyzed the relationship between the FSIA and the ATS and concluded that the FSIA did not pre-empt the ATS; it simply narrowed the class of possible defendants under the ATS to non-sovereigns.<sup>33</sup>

Amerada and United then appealed to the Second Circuit.<sup>34</sup> Reversing the district court ruling, the Second Circuit held that jurisdiction existed under the ATS.<sup>35</sup> The court agreed with the district court that the FSIA is the sole means by which a foreign sovereign can obtain immunity in U.S. courts.<sup>36</sup> However, it disagreed with the lower court's finding that the FSIA is the exclusive means of obtaining jurisdiction over a foreign sovereign.<sup>37</sup> The court held that in addition to the FSIA's enumerated exceptions, there is jurisdiction in U.S. courts over foreign sovereigns under the ATS for claims involving torts committed in violation of international law.<sup>38</sup>

The Second Circuit first determined that, taking Amerada's and United's complaints as true,<sup>39</sup> Argentina's acts violated well-established principles of international law.<sup>40</sup> The court, looking to its prior decision in *Filartiga v. Peña-Irala*<sup>41</sup> to ascertain what constituted a violation of international law, reasoned that Argentina's conduct violated the law of nations and international treaties regarding rights of neutral ships on the

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30. *Amerada Hess*, 638 F. Supp. at 77.

31. *See id.* at 74-77.

32. *See id.* at 75.

33. *See id.* at 76.

34. *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421 (2d Cir. 1987), *cert. granted*, 56 U.S.L.W. 3712 (U.S. Apr. 18, 1988) (No. 87-1372).

35. *Id.* at 422-23.

36. *Id.* at 428.

37. *Id.* at 428-29.

38. *Id.*

39. *Id.* at 423. Federal courts may dismiss for lack of subject matter jurisdiction by relying on "any of three separate bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir.), *cert. denied*, 454 U.S. 897 (1981).

40. *Amerada Hess*, 830 F.2d at 423.

41. 630 F.2d 876 (2d Cir. 1980).

high seas.<sup>42</sup> The court equated Argentina's act with piracy,<sup>43</sup> an act long recognized as a violation of international law.<sup>44</sup>

Moreover, the circuit court rejected Argentina's argument that the drafters of the ATS intended to preserve the status quo, that is, absolute immunity of foreign sovereigns, when the ATS was enacted in 1789.<sup>45</sup> Regardless of whether immunity existed then, the court continued, the ATS should be interpreted as it exists today.<sup>46</sup> The court adhered to the "modern view"<sup>47</sup> that sovereigns are not immune from claims for violations of international law.<sup>48</sup>

As to the FSIA, the court found that Congress did not consider violations of international law to be within the FSIA's scope when it enacted the statute.<sup>49</sup> Citing legislative history, the court held that the three goals of the FSIA were: to codify the restrictive theory of sovereign immunity; to give the judiciary the exclusive power to decide questions of sovereign immunity; and to set forth uniform procedures for bringing

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42. See *Amerada Hess*, 830 F.2d at 423-24. The court cites several treaties, including the Pan American Maritime Neutrality Convention, signed Feb. 20, 1928, 47 Stat. 1989, T.S. No. 845, 135 L.N.T.S. 187, and the International Convention Concerning the Rights and Duties of Neutral Powers in Naval War, signed Oct. 18, 1907, 36 Stat. 2415, T.S. No. 545, 1 Bevans 723, in support of its finding that Argentina's conduct violated international law. *Id.* at 424.

43. *Id.* ("Where the attacker has refused to compensate the neutral, such action is analogous to piracy . . .").

44. See *United States v. Smith*, 18 U.S. 71, 75, 5 Wheat. 153, 161 (1820) ("So that, whether we advert to writers on the common law, or the maritime law, or the law of nations, we shall find, that they universally treat of piracy as an offence against the law of nations, and that its true definition by that law is robbery upon the sea."). However, a necessary element of piracy is the taking on the high seas for one's personal gain. Convention on the High Seas, Apr. 29, 1958, art. 15, 13 U.S.T. 2312, 2317, T.I.A.S. No. 5200, at 6, 450 U.N.T.S. 82, 90.

45. See *Amerada Hess*, 830 F.2d at 424-25. Argentina argued that had Congress intended to change the established practice of foreign sovereign immunity, it would have done so expressly. *Id.* at 425.

46. *Id.* (citing *Filartiga v. Peña-Irala*, 630 F.2d 876, 881 (2d Cir. 1980)).

47. *Id.* The "modern view" has its roots in *The Paquete Habana*, 175 U.S. 677 (1900), where the Supreme Court held that international law can be ascertained by looking to "the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators." 175 U.S. at 700. The most famous modern-day case dealing with violations of international law has subscribed to this view. See *Filartiga v. Peña-Irala*, 630 F.2d 876, 880-81 (2d Cir. 1980).

48. *Amerada Hess*, 830 F.2d at 424-25.

49. *Id.* at 426-27.



claims against foreign sovereigns.<sup>50</sup> Stressing its view that the FSIA was intended for commercial purposes,<sup>51</sup> the court deemed that the FSIA did not pre-empt the jurisdictional grant of the ATS for violations of international law by foreign sovereigns.<sup>52</sup>

After concluding that subject matter jurisdiction existed under the ATS, the court next determined that Argentina had sufficient national contacts with the United States to be subject to the personal jurisdiction of U.S. courts.<sup>53</sup> The court found the following contacts persuasive: Argentina was aware of U.S. interest in the *Hercules* by virtue of the notice given by the United States Maritime Administration;<sup>54</sup> the *Hercules* was involved in U.S. domestic trade;<sup>55</sup> the *Hercules*' contract required payment in the U.S.;<sup>56</sup> Argentina had benefited from the freedom of the high seas;<sup>57</sup> and Argentina would not be burdened by defending a suit in the United States.<sup>58</sup> However, it seems clear that the court was sympathetic to the plaintiffs' jurisdictional arguments because of fairness considerations based on Amerada's claim that it could not obtain a hearing in Argentina.<sup>59</sup>

In contrast, the dissent in the Second Circuit pointed to what it found to be clear Congressional intent to prohibit U.S. jurisdiction under circumstances such as these. Relying on the

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50. *Id.* (citing H.R. REP. NO. 1487, 99th Cong., 2d Sess. 7, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6605-06).

51. *Id.* at 427. The court stated that Congress, concerned with the increase in commercial transactions between U.S. citizens and foreign sovereigns, enacted FSIA primarily to provide U.S. citizens with a forum for adjudication of contractual disputes stemming from these transactions. *Id.*

52. *Id.*

53. *Id.* at 428.

54. *Id.* at 423.

55. *Id.* at 428.

56. *Id.*

57. *Id.*

58. *Id.*

59. *See id.* ("Considerations of fairness also weigh in favor of exercising jurisdiction since appellants have sought redress of their grievances in Argentina and were unable to obtain even a hearing."). Further evidence of the court's sympathy for the plaintiffs can be seen in its conclusion. After setting forth a landmark argument, the court retreated, calling its opinion a "narrow one." *Id.* at 428-29. It referred to the great burden on the plaintiff to prove a violation of international law under ATS. *Id.* at 429. Finally, the court concluded that FSIA was not totally inapplicable in this case because the procedural requirements of FSIA would still have to be considered. *Id.*

legislative history of the FSIA, the dissent argued that the FSIA was intended to pre-empt any state or federal law that granted immunity to foreign sovereigns,<sup>60</sup> thereby leaving the FSIA as the sole standard for resolving questions of foreign sovereign immunity.<sup>61</sup> In the dissent's view, jurisdiction exists only when a claim falls within an FSIA exception.<sup>62</sup> The dissent deemed it significant that Congress had in fact considered violations of international law when it enacted the FSIA, as demonstrated by the FSIA's expropriation exception.<sup>63</sup> This exception denies immunity for claims involving "rights in property taken in violation of international law."<sup>64</sup> Thus, the dissent concluded that because Argentina's acts did not fall within one of the FSIA's exceptions, there was no jurisdictional basis for Amerada's and United's claims in U.S. federal courts.<sup>65</sup>

## II. THE ALIEN TORT STATUTE AND THE FOREIGN SOVEREIGN IMMUNITIES ACT

### A. *The Foreign Sovereign Immunities Act*

Although it was generally believed at the time the ATS was enacted that foreign sovereigns enjoyed absolute immunity,<sup>66</sup> until the middle of the twentieth century there was no set policy in the United States of foreign sovereign immunity.<sup>67</sup>

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60. *Id.* at 429-30 (Kearse, J., dissenting) (citing H.R. REP. NO. 1487, 94th Cong., 2d Sess. 12, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6610).

61. *Id.* at 430 (Kearse, J., dissenting).

62. *Id.*

63. *Id.* at 430-31.

64. 28 U.S.C. § 1605(a)(3). The expropriation exception grants jurisdiction for claims brought against foreign sovereigns involving rights in property taken in violation of international law when the property, or property exchanged for it, is present in the United States. *Id.*

65. *Amerada Hess*, 830 F.2d at 431 (Kearse, J., dissenting).

66. "For more than a century and a half, the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1982). Judicial recognition of the doctrine of foreign sovereign immunity can be traced back to *The Schooner Exchange v. McFaddon*, 11 U.S. 74, 7 Cranch 116 (1812). In that case immunity was granted from a claim that sought to attach a vessel in a U.S. port that was allegedly taken on the high seas under the orders of Napoleon, Emperor of France. *Id.* The Supreme Court expressed its intent to bring the United States in line with other nations with respect to recognition of absolute immunity for sovereigns in foreign courts. *Id.* at 90-91, 7 Cranch at 143-45.

67. See H.R. REP. NO. 1487, 94th Cong., 2d Sess. 8 [hereinafter HOUSE REPORT], reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6606-07; von Mehren, *The*

When a claim was brought in a U.S. court against a foreign sovereign, and the sovereign wished to be granted immunity, the sovereign would ask the State Department to intervene in its favor.<sup>68</sup> Such requests put the State Department in the awkward position of having to grant or deny the foreign sovereign's wishes.<sup>69</sup> The State Department sought to follow the practice of other nations by applying a restrictive approach in granting requests for immunity;<sup>70</sup> that is, it granted immunity for the sovereign's public acts,<sup>71</sup> but no immunity for its private or commercial acts.<sup>72</sup> The Department sometimes departed from this approach, however, because of diplomatic pressures brought by foreign sovereigns.<sup>73</sup>

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*Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 36-37 (1978). The "erosion" of the doctrine of absolute immunity for foreign sovereigns in U.S. courts began at the end of the nineteenth century and continued into the twentieth century until it was replaced with the doctrine of restrictive immunity. von Mehren, *supra*, at 36-37.

68. HOUSE REPORT, *supra* note 67, at 7, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6605-06; see, e.g., *Mexico v. Hoffman*, 324 U.S. 30, 31-33 (1945) (State Department communicated, without endorsing, Mexican government's request for immunity from claim for damages caused by vessel owned, but not possessed, by Mexican government); *Ex parte Republic of Peru*, 318 U.S. 578, 581 (1943) (State Department responded to Peru's request to intervene in judicial proceedings then pending in the U.S. District Court for the Eastern District of Louisiana). Courts gave great deference to the immunity determinations of the State Department. Note, *The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day in Court*, 46 FORDHAM L. REV. 543, 547 (1977).

69. HOUSE REPORT, *supra* note 67, at 8, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6606-07; Note, *The Foreign Sovereign Immunities Act of 1976 and Jurisdiction Under the Commercial Activities Exception: Vencedora Oceanica Navegacion, S.A. v. Compagnie Nationale Algérienne de Navigation*, 4 B.U. INT'L L.J. 125, 128 (1986).

70. HOUSE REPORT, *supra* note 67, at 8, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6606-07. Before FSIA was enacted, "all of the important trading and industrial countries of the Western world, with the sole exception of the United Kingdom, had adopted some form or other of the restrictive doctrine of foreign sovereign immunity." von Mehren, *supra* note 67, at 38. In 1977, the United Kingdom adopted the doctrine of restrictive immunity for actions brought in personam. See *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 1 Q.B. 529 (C.A.).

71. HOUSE REPORT, *supra* note 67, at 8, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6607. Public acts of a sovereign have been defined as internal administrative acts, legislative acts, acts concerning the armed forces, acts concerning diplomatic activity and public loans. *Victory Transp. Inc. v. Comisaria Gen.*, 336 F.2d 354, 360 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965).

72. HOUSE REPORT, *supra* note 67, at 7, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6605. Private acts of a state have been defined as those that are commercial rather than political in nature. *Id.* at 8, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6607.

73. *Id.* at 7, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6606. As a

In an attempt to formalize the procedure, the State Department officially adopted the restrictive theory of sovereign immunity in the Tate Letter of 1952.<sup>74</sup> This attempt did not, however, fully solve the problem because the State Department still had to decide, without the benefit of a legal determination by a U.S. court, whether a case involved a sovereign's private or public acts.<sup>75</sup>

Congress responded to the problem in 1976 by enacting the FSIA.<sup>76</sup> The purposes of the FSIA were clearly set forth in its legislative history. First, the FSIA provides specific guidelines for determining when a foreign sovereign is immune

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result of diplomatic pressures, immunity determinations were largely inconsistent. Note, *The Supreme Court's Verlinden Decision: A Retreat to Activism*, 16 VAND. J. TRANS-NAT'L L. 1081, 1099-1100 (1983). In addition to the lack of uniformity among the State Department decisions, the courts had discretion to determine questions of immunity in cases in which the State Department refused to participate. *Id.*

74. HOUSE REPORT, *supra* note 67, at 8, reprinted in U.S. CODE CONG. & ADMIN. NEWS at 6607 (citing Letter from Jack B. Tate, Acting Legal Advisor of the Department of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952), reprinted in 26 DEP'T ST. BULL. 984 (1952)).

75. HOUSE REPORT, *supra* note 67, at 8, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6607; see also Note, *supra* note 68, at 549 (the State Department did conduct "informal hearings" but these hearings were a far cry from judicial proceedings). The State Department's decisions were always subject to change because of the political climate.

76. Pub. L. No. 94-583, 90 Stat. 2981 (codified at 28 U.S.C. §§ 1330, 1332, 1391, 1441(d), 1602-11 (1982)). The pertinent provisions of FSIA are as follows:

§ 1604. Immunity of a foreign state from jurisdiction

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

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication . . . ;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside of the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state . . .

from claims in U.S. federal courts,<sup>77</sup> thereby implementing the restrictive doctrine of foreign sovereign immunity.<sup>78</sup> Second, it shifts to the judiciary the authority to decide when a foreign sovereign is immune under the statute.<sup>79</sup> Third, in cases where the sovereign is not immune, the FSIA provides specific procedures for bringing claims and obtaining personal jurisdiction over a foreign state.<sup>80</sup> Lastly, it sets forth the means to execute a judgment against a foreign sovereign.<sup>81</sup>

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(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue; or

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state

....  
28 U.S.C. §§ 1604-1605 (1982).

77. HOUSE REPORT, *supra* note 67, at 7, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6605. Foreign sovereigns are immune from claims in U.S. courts if the claim does not fall within an FSIA exception. See 28 U.S.C. § 1604-1607.

78. HOUSE REPORT, *supra* note 67, at 7, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6605. Foreign sovereign immunity is to be granted only in actions involving the sovereign's public acts (*jure imperii*). *Id.* Immunity should not be granted in actions involving a sovereign's private acts (*jure gestionis*). See *supra* notes 71-72 and accompanying text.

79. HOUSE REPORT, *supra* note 67, at 7, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6605-06. Unlike the State Department, courts can determine whether immunity exists without pressures from foreign sovereigns. *Id.* This would ensure uniformity in immunity determinations. *Id.*

80. *Id.* at 8, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6606. All of FSIA's exceptions require some form of minimum contacts with the United States. *Id.* at 13, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6612. FSIA also sets forth procedures for service of process on a foreign state. *Id.* at 23-26, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6622-25; see 28 U.S.C. § 1608 (1982).

81. HOUSE REPORT, *supra* note 67, at 8, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6606; see 28 U.S.C. §§ 1609-1611 (1982). For further discussion of FSIA's procedural requirements, see Kane, *Suing Foreign Sovereigns: A Procedural Com-*

Congressional intent that the FSIA be the exclusive means of obtaining jurisdiction over foreign sovereigns is also evident from the legislative history<sup>82</sup> and has been so interpreted by the Supreme Court in *Verlinden B.V. v. Central Bank of Nigeria*.<sup>83</sup> In *Verlinden*, a unanimous Supreme Court reversed a Second Circuit ruling that had denied jurisdiction over a claim brought under the FSIA by an alien plaintiff against an alien defendant.<sup>84</sup> The Supreme Court held that the FSIA is applicable in all cases involving foreign sovereigns and only where an exception to the FSIA exists will subject matter jurisdiction be found.<sup>85</sup> Therefore, unless one of the FSIA's exceptions applies, a court has no power to hear the case.<sup>86</sup>

Moreover, the FSIA specifically states that it applies only to foreign sovereigns<sup>87</sup> and their agencies and instrumentalities.<sup>88</sup> Nowhere does it state that it applies to state actors.<sup>89</sup> This limitation is consistent with the restrictive theory of im-

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*pass*, 34 STAN. L. REV. 385 (1982); Note, *Sovereign Immunity*, 18 HARV. INT'L L.J. 429 (1977).

82. HOUSE REPORT, *supra* note 67, at 12, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 6610. The legislative history states that the FSIA

sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States. It is intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities.

*Id.*

83. 461 U.S. 480, 496-97 (1982) (claim brought by Dutch corporation for breach of contract against instrumentality of Nigerian government). "[I]f a court determines that none of the exceptions to sovereign immunity applies, the plaintiff will be barred from raising his claim in any court in the United States . . ." *Id.* at 497.

84. *Id.* at 497-98, *rev'g* 647 F.2d 320 (2d Cir. 1981). The Second Circuit ruled that actions brought under FSIA by foreign plaintiffs exceeded the jurisdictional grant of article III of the Constitution. 461 U.S. at 485; *see* 647 F.2d at 325.

85. 461 U.S. at 493. The Court found that the jurisdictional grant of FSIA would support a claim brought by an alien. *Id.* at 489-91. The Second Circuit had ruled that the "arising under" clause of article III of the Constitution is too narrow to support jurisdiction over a foreign defendant when the plaintiff is also an alien. *Id.* at 485; *see* 647 F.2d at 325. In reversing, the Supreme Court held that the "arising under" clause of article III is sufficiently broad to support subject matter jurisdiction in actions brought by foreign plaintiffs under FSIA. 461 U.S. at 489-91.

86. *Id.* at 493-94.

87. 28 U.S.C. §§ 1602-1603 (1982).

88. Section 1603 provides:

- (b) An "agency or instrumentality of a foreign state" means any entity—
  - (1) which is a separate legal person, corporate or otherwise and
  - (2) which is an organ of a foreign state or political subdivision

munity, which would not grant public officials immunity from personal liability for "acts carried out in their official capacity."<sup>90</sup>

### B. *The Alien Tort Statute*

The Alien Tort Statute, which is derived from the First Judiciary Act of 1789,<sup>91</sup> provides:

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.<sup>92</sup>

The ATS has no legislative history.<sup>93</sup> It has been referred to as "a kind of legal Lohengrin,"<sup>94</sup> and courts have struggled over its meaning and application.<sup>95</sup> In an action brought pursuant to the ATS, the plaintiff must show that there has been a violation of the law of nations or of a treaty of the United States.<sup>96</sup> Although treaty violations clearly trigger jurisdiction under the ATS, only one claim for a treaty violation has thus far been successful.<sup>97</sup>

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thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603 (1982).

89. *See id.*

90. J. SWEENEY, *THE INTERNATIONAL LAW OF FOREIGN IMMUNITY* 53 (1962) (public officials and agents of a state are entitled to immunity for acts performed in their official capacity when a claim is brought against a state).

91. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77.

92. 28 U.S.C. § 1350 (1982).

93. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 812 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 470 U.S. 1003 (1985). The Senate debates over the Judiciary Act were not recorded and the House debates do not directly or indirectly mention ATS. *Id.*; *see also* D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62 (1988) (ATS was enacted for national security purposes); Randall, *Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1 (1985) (although there is no legislative history on ATS, the author suggests that the drafters of ATS were responding to several tortious acts that had been committed in the United States on foreign ambassadors).

94. *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (although the ATS "has been with us since the first Judiciary Act . . . no one seems to know whence it came").

95. *Tel-Oren*, 726 F.2d at 775.

96. 28 U.S.C. § 1350.

97. *See Bolchos v. Darrell*, 3 F. Cas. 74 (D.S.C. 1795) (No. 1,607) (14th article of

Judges disagree over what constitutes a violation of the law of nations that would be actionable under the ATS. Judge Kaufman, writing for a Second Circuit panel in *Filartiga v. Peña-Irala*,<sup>98</sup> argued that the law of nations is ever-changing and must be interpreted that way—"courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."<sup>99</sup> This view was followed by Judge Edwards of the District of Columbia Circuit in his concurring opinion in *Tel-Oren v. Libyan Arab Republic*.<sup>100</sup> By contrast, in his separate concurring opinion in *Tel-Oren*, Judge Bork argued that the only violations actionable under the ATS are those recognized when the ATS was enacted in 1789.<sup>101</sup>

Since its enactment in 1789, there have been approximately forty reported cases brought pursuant to the ATS,<sup>102</sup>

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the treaty between the United States and France required that slaves recaptured by their owner be returned to party who seized them). Courts have generally held that treaties do not provide individuals or party nations with rights unless the treaty so provides. *Tel-Oren*, 726 F.2d at 808 (Bork, J., concurring) (citing *Foster v. Nielson*, 27 U.S. 195, 239, 2 Pet. 253, 314 (1829), *overruled on other grounds*, *United States v. Percheman*, 32 U.S. 38, 7 Pet. 51 (1833); *Canadian Transp. Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980); *Dreyfus v. Von Finck*, 534 F.2d 24, 29-30 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976)). This is the doctrine of non-self executing treaties. *See id.* (Bork, J., concurring). When the treaty does provide a right to sue, the remedy is limited to that specified in the treaty. *Seth v. British Overseas Airways Corp.*, 329 F.2d 302, 306-07 (1st Cir.), *cert. denied*, 379 U.S. 858 (1964) (plaintiff's recovery for lost luggage was limited to amount provided by Warsaw Convention); *Upper Lakes Shipping Ltd. v. International Longshoremen's Ass'n*, 33 F.R.D. 348 (S.D.N.Y. 1963) (federal courts cannot maintain action when litigants are parties to treaty expressly providing disputes are to be settled and remedies granted by International Joint Commission).

98. 630 F.2d 876 (2d Cir. 1980).

99. *Id.* at 881 (citing *Ware v. Hylton*, 3 U.S. 158, 3 Dall. 199 (1796)).

100. 726 F.2d 774, 777 (D.C. Cir. 1984) (Edwards, J., concurring), *cert. denied*, 470 U.S. 1003 (1985). Each judge in *Tel-Oren* wrote his own opinion concurring in the result. *See* 726 F.2d at 775-98 (Edwards, J.); *id.* at 798-823 (Bork, J.); *id.* at 823-27 (Robb, J.).

101. *Id.* at 812-13 (Bork, J., concurring). Judge Bork, looking to Blackstone, cites three international law violations recognized in 1789: violations of safe conducts, infringement of the rights of ambassadors, and piracy. *Id.* at 813 (citing 4 W. BLACKSTONE, COMMENTARIES 68, 72, *quoted in* 1 W.W. CROSSKEY, POLITICS AND CONSTITUTION IN THE HISTORY OF THE UNITED STATES 459 (1953)). Under Judge Bork's view, current international law does not give private parties a cause of action under the ATS. *Id.* at 810-16.

102. *See, e.g., In re Korean Air Lines Disaster of September 1, 1983*, Misc. No. 83-0345 (D.D.C. Aug. 2, 1985); *Siderman v. Argentina*, No. CV 82-1772-RMT (MCx) (C.D. Cal. Mar. 7, 1985) (order vacating default judgment and dismissing action); *see also* Randall, *supra* note 93, at 4-5 nn. 15-17 (listing reported cases brought under the



only four of which involved foreign sovereigns as defendants.<sup>103</sup> In each of these four cases, the claimant had the burden of proving that jurisdiction existed over the foreign sovereign under the FSIA before the court would consider its claims under the ATS.<sup>104</sup> As a result, only one case brought under the ATS, *Von Dardel v. Union of Soviet Socialist Republics*,<sup>105</sup> has been able to survive this threshold inquiry.<sup>106</sup>

*Tel-Oren v. Libyan Arab Republic*,<sup>107</sup> a District of Columbia Circuit decision and the first of these four cases, involved an attack by the Palestine Liberation Organization on a civilian bus in Israel.<sup>108</sup> All three judges, in separate concurring opin-

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ATS). Only four cases brought for violations of the law of nations or treaties of the United States have been successful. See *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246 (D.D.C. 1985) (violation of diplomatic immunity found actionable under ATS in claim for damages and injunctive relief on behalf of Swedish diplomat Raoul Wallenberg); *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (sister and father of Paraguayan tortured to death by police officer in Paraguay, in violation of that country's laws, recovered damages under ATS); *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961) (mother's concealing daughter's true identity and taking her from country to country to avoid being located by child's father, who was entitled to custody of child under Lebanese law, held violation of law of nations and actionable under the ATS); *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607) (treaty between United States and France required that slaves recaptured by their owner be returned to party who seized them).

103. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) (discussed *infra* notes 108-11 and accompanying text); *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246 (D.D.C. 1985) (discussed *infra* notes 119-31 and accompanying text); *In re Korean Air Lines Disaster of September 1, 1983*, Misc. No. 83-0345 (D.D.C. Aug. 2, 1985) (discussed *infra* notes 112-14); *Siderman v. Argentina*, No. CV 82-1772-RMT (MCx) (C.D. Cal. Mar. 7, 1985).

104. See *infra* notes 107-19 and accompanying text.

105. 623 F. Supp. 246 (D.D.C. 1985).

106. See *id.* at 250-56. The *Von Dardel* case has been criticized as misinterpreting the FSIA. See *Amerada Hess Shipping Corp. v. Argentine Republic*, 638 F. Supp. 73, 77 (S.D.N.Y. 1986) (arguing *Von Dardel* was incorrectly decided), *rev'd*, 830 F.2d 421 (2d Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3592 (U.S. Feb. 16, 1988) (No. 87-1372); Brief for the United States as *Amicus Curiae* at 4-5, *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421 (2d Cir. 1987) (Nos. 86-7602, 86-7603), *cert. granted*, 1988 U.S. LEXIS 1697 (Apr. 18, 1988) (No. 87-1372) [hereinafter Brief for the United States] (United States asked court to re-examine its default judgment against the Soviet Union under FSIA).

107. 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).

108. 726 F.2d at 775. The Libyan Arab Republic's co-defendants in this suit were the Palestine Liberation Organization, the Palestine Information Office, the National Association of Arab Americans, and the Palestine Congress of North America. *Id.*

ions, agreed that jurisdiction did not exist in U.S. courts,<sup>109</sup> and two judges specifically held that the claim against Libya was barred because it did not fall within one of the FSIA exceptions.<sup>110</sup> Similarly, in *In re Korean Air Lines Disaster*,<sup>111</sup> a case involving the wrongful-death claims against the Union of Soviet Socialist Republics for the bombing of a Korean Air Lines commercial airliner,<sup>112</sup> the U.S. District Court for the District of Columbia held that there can be no jurisdiction under the ATS when there is none under the FSIA.<sup>113</sup>

*Siderman v. Republic of Argentina*,<sup>114</sup> the third case in which an action was brought against a foreign sovereign pursuant to the ATS, involved a claim against the government of Argentina for the government-sponsored torture of an Argentine citizen.<sup>115</sup> The District Court for the Central District of California held that Congress did not intend to affect the immunity of foreign sovereigns when it enacted the ATS, as indicated by Congressional silence on the subject at a time when "the legal status quo was the recognition of immunity."<sup>116</sup> Therefore, the court concluded that the ATS did not provide an independent means of obtaining jurisdiction over a foreign sovereign.<sup>117</sup>

Thus, the only case prior to *Amerada Hess* in which a federal court exercised jurisdiction over a foreign sovereign pursuant to the ATS was *Von Dardel*.<sup>118</sup> This case involved a claim brought for damages and injunctive relief for the arrest, deten-

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109. *Id.* at 775.

110. *Id.* at 775-76 n.1 (Edwards, J., concurring); *id.* at 805 n.13 (Bork, J., concurring). Judge Robb held that jurisdiction was barred by the political question doctrine. *Id.* at 823.

111. Misc. No. 83-0345 (D.D.C. Aug. 2, 1985).

112. *Id.* at 1.

113. *Id.* at 11. "Moreover, to hold that the Alien Tort Claims Act gives a cause of action and subject matter jurisdiction where the FSIA forbids it would make a nullity of the Foreign Sovereign Immunities Act." *Id.*

114. No. CV 82-1772-RMT (MCx) (C.D. Cal. Mar. 7, 1985) (order vacating default judgment and dismissing action).

115. No. CV 82-1772-RMT (MCx) (C.D. Cal. Sept. 28, 1984) (LEXIS, Genfed library, Dist file) (entering default judgment against Argentina), *vacated*, No. CV 82-1772-RMT (MCx) (C.D. Cal. Mar. 7, 1985).

116. No. CV 82-1772-RMT (MCx), slip op. at 3 (C.D. Cal. Mar. 7, 1985).

117. *See id.* at 2-3. The court then analyzed the plaintiffs' claims under the FSIA and determined that they did not fall within a FSIA exception and, therefore, the court lacked jurisdiction over the claims. *Id.* at 3-4.

118. 623 F. Supp. 246, 256-59 (D.D.C. 1985).

tion, and possible death of Raoul Wallenberg, a Swedish diplomat.<sup>119</sup> In *Von Dardel*, the District Court for the District of Columbia examined whether jurisdiction existed under the ATS, but did so only after finding that there was jurisdiction under the FSIA.<sup>120</sup>

The court addressed a number of factors prompting a determination of jurisdiction pursuant to FSIA. First, the Soviet Union, by defaulting, had failed to raise the affirmative defense of sovereign immunity.<sup>121</sup> Second, the district court reasoned, Congress intended to incorporate recognized standards of international law, namely universal jurisdiction<sup>122</sup> and protection of diplomats<sup>123</sup> into the FSIA. Next, relying on the "'subject to' international agreements" language of the FSIA,<sup>124</sup> the district court held that Congress intended existing international agreements to remain intact.<sup>125</sup> Thus, the district court continued, if any conflict arose between an existing international agreement and the FSIA, the international agreement would prevail.<sup>126</sup> The court found that the Soviet Union violated the Vienna Convention on Diplomatic Relations<sup>127</sup> and the 1973

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119. *Id.* at 248. Wallenberg, a Swedish diplomat, was arrested in Hungary during World War II while working to save Jews from deportation to Nazi extermination camps. *Id.* His work was funded by the United States. *Id.* at 248-49. The Soviet Union's claims that Wallenberg died in 1947 have been questioned by fellow prisoners who claim to have seen him alive as recently as 1981. *Id.* at 249-50.

120. *See id.* at 250-56.

121. *Id.* at 252-53; *see* 28 U.S.C. § 1604 (1982). 'The FSIA's legislative history expressly states that sovereign immunity is an affirmative defense that must be specifically pleaded. *See* HOUSE REPORT, *supra* note 67, at 17, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 6616. Yet, the Supreme Court in *Verlinden B.V. v. Central Bank of Nigeria* held that if a foreign state fails to appear in court, the court must make a determination whether an exception to FSIA applies or immunity should be granted. 461 U.S. 480, 493-94 n.20 (1983).

122. *Von Dardel*, 623 F. Supp. at 253-54. However, universal jurisdiction does not exist in civil cases. George, *supra* note 25, at 30-31.

123. *Von Dardel*, 623 F. Supp. at 253-54. The legislative history of the FSIA expressly states that sovereign immunity and diplomatic immunity are distinct concepts and the FSIA was not intended to address diplomatic immunity. HOUSE REPORT, *supra* note 67, at 12, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 6610.

124. 28 U.S.C. § 1604 (1982).

125. *See Von Dardel*, 623 F. Supp. at 254-55. The "'subject to international agreements'" language was intended to ensure that specific procedures established in existing international agreements would remain in force. HOUSE REPORT, *supra* note 67, at 10, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 6608.

126. *Von Dardel*, 623 F. Supp. at 254-55.

127. Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95.

Convention on Internationally Protected Persons,<sup>128</sup> and therefore, jurisdiction existed under the FSIA.<sup>129</sup> Finally, the district court held that the Soviet Union waived its immunity by subscribing to treaties that recognize human rights.<sup>130</sup> Once jurisdiction was found under the FSIA, the court then determined that jurisdiction also existed under the ATS because the Soviet Union's treatment of Wallenberg constituted a violation of international law.<sup>131</sup>

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128. Dec. 28, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, 1035 U.N.T.S. 167.

129. *Von Dardel*, 623 F. Supp. at 254-55. Neither of these treaties has provisions that mandate enforcement in U.S. courts. The Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95, sets forth certain diplomatic rights that member nations agree to recognize. It does not have any provisions for its enforcement. *See id.* The Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 28, 1973, art. 3, 28 U.S.T. 1975, 1979, T.I.A.S. No. 8532, at 5, 1035 U.N.T.S. 167, 169-70, sets forth when and how a state should prosecute those accused of performing criminal acts against diplomats. Article 13 sets out procedures for the resolution of disputes, none of which include adjudication in U.S. courts. 28 U.S.T. at 1983-84, T.I.A.S. No. 8532, at 9-10, 1035 U.N.T.S. at 171-72. Although the Soviet Union is a party to the treaty, it expressly reserved upon signing that it would not be bound by article 13. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL, STATUS AS AT 31 DECEMBER 1985, at 84 [hereinafter MULTILATERAL TREATIES].

130. *Von Dardel*, 623 F. Supp. at 255-56. The legislative history of the FSIA provides that foreign states may explicitly waive immunity by subscribing to a treaty that expressly waives such rights. *See* HOUSE REPORT, *supra* note 67, at 18, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6617. Implicit waiver may be made in any of the following three ways: (1) by agreeing to arbitration in another country, (2) by agreeing that a contract be bound by the laws of another country, or (3) by filing a responsive pleading in an action before raising the defense of foreign sovereign immunity. *Id.* But merely subscribing to a treaty that recognizes certain rights does not constitute a waiver. *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 376-78 (7th Cir. 1985).

131. *Von Dardel*, 623 F. Supp. at 256-59. The district court applied the three tests set forth in the concurring opinions in *Tel-Oren v. Libyan Arab Republic*, 726 F. Supp. 774 (D.C. Cir. 1984), and concluded that jurisdiction over the Soviet Union existed under each test. Under Judge Edwards's view, the arrest and detention for over 35 years of a diplomat clearly violated a "principle of international law on which the community of nations has reached a consensus." *Von Dardel*, 623 F. Supp. at 257. Infringement of the rights of ambassadors was recognized as a violation of international law in 1789, and thus, the court concluded under Judge Bork's test, that the Soviet Union's treatment of Wallenberg was actionable under the ATS. *Id.* at 258. Also, the district court reasoned that Judge Robb would uphold jurisdiction because the rights of diplomats are so well recognized that a lawsuit in U.S. courts would not embarrass the United States. *Id.* at 258-59. What the district court failed to acknowledge is that both Judges Edwards and Bork held that jurisdiction over foreign sovereigns can be obtained only through FSIA. *See supra* note 110 and accompanying text.

### III. HARMONIZING THE ALIEN TORT STATUTE AND THE FOREIGN SOVEREIGN IMMUNITIES ACT

The Second Circuit found compelling reasons why Argentina's bombing of the *Hercules* violated the modern view of the law of nations, and should therefore be subject to scrutiny under the ATS.<sup>132</sup> Certainly the bombing of a neutral ship in international waters is a heinous act that would be condemned by most nations.<sup>133</sup> The argument, however, is less compelling with respect to finding a treaty violation under the ATS because Argentina is not bound by any treaty with the United States that recognizes the rights of neutral ships on the high seas.<sup>134</sup>

Regardless of how deplorable Argentina's acts were in bombing the *Hercules*, neither the Southern District of New York nor any other U.S. court is the proper forum for adjudication of this dispute. The sweeping language in the legislative history of the FSIA,<sup>135</sup> coupled with that of the Supreme Court in *Verlinden*,<sup>136</sup> unequivocally demonstrate that the FSIA provides the sole means of obtaining jurisdiction over a foreign sovereign in U.S. federal courts. Thus, because Argentina's bombing of the *Hercules* does not fall within an FSIA exception,<sup>137</sup> there is no jurisdiction in U.S. courts for Amerada's and United's claims. The view that the FSIA pre-empts the

132. See *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 423-24 (2d Cir. 1987), *cert. granted*, 56 U.S.L.W. 3712 (U.S. Apr. 18, 1988) (No. 87-1372).

133. See 830 F.2d at 423-24. *Amerada Hess* lists several treaties that recognize the rights of neutral ships on the high seas. *Id.*

134. *Id.* The Second Circuit noted that both the United States and Argentina are signatories to The Geneva Convention of the High Seas of 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82. *Amerada Hess*, 830 F.2d at 423-24. Although Argentina did sign The Geneva Convention of the High Seas, it never ratified it. MULTILATERAL TREATIES, *supra* note 119, at 684.

135. See *supra* note 82 and accompanying text.

136. 461 U.S. 480, 493-94 (1982); see *supra* notes 83-86 and accompanying text.

137. *Amerada Hess Shipping Corp. v. Argentine Republic*, 638 F. Supp. 73, 75 (S.D.N.Y. 1986), *rev'd*, 830 F.2d 421 (2d Cir. 1987), *cert. granted*, 56 U.S.L.W. 3712 (U.S. Apr. 18, 1988) (No. 87-1372). The majority in the Second Circuit never addressed the question whether plaintiffs' claims in *Amerada Hess* fell within an FSIA exception. Both the dissent in the Second Circuit and the district judge agreed that the case did not fall within an FSIA exception. See 830 F.2d at 430 (Kearse, J., dissenting); 638 F. Supp. at 75. This determination is consistent with past judicial interpretations of FSIA. The exceptions contained in FSIA are clearly not applicable because the bombing of the *Hercules* was neither a commercial act, expropriation, nor a

ATS when foreign sovereigns are defendants, in addition to being consistent with that of the United States Supreme Court,<sup>138</sup> was the controlling precedent when *Amerada Hess* was decided,<sup>139</sup> and is supported by the Department of Justice,<sup>140</sup> the Attorney General,<sup>141</sup> and the Department of State.<sup>142</sup>

Congressional intent to grant immunity in a case such as *Amerada Hess* is indicated not only by its failure to enact an exception to the FSIA encompassing torts committed outside of the United States in violation of international law, but also by the legislative history of the FSIA.<sup>143</sup> The FSIA was intended to codify the restrictive theory of foreign sovereign immunity, which recognizes immunity from claims involving a sovereign's

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right in property acquired by gift or immovable property situated in the United States.

Under the FSIA, a foreign sovereign may waive immunity. 28 U.S.C. § 1605(a)(1) (1982). The waiver argument, however, was not available to the plaintiffs in *Amerada Hess* because Argentina: (1) had not subscribed to any treaties that waived immunity; (2) did not agree to arbitration in another country; (3) did not agree to be bound by the laws of another country; and (4) did not file a responsive pleading in *Amerada Hess*. See *supra* note 130.

The bombing of the *Hercules* also does not fall within the non-commercial tort exception to the FSIA, 28 U.S.C. § 1605(a)(5) (1982). Courts have consistently interpreted this section as requiring that the tort have occurred in the United States. See *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 379 (7th Cir. 1985) (rejecting plaintiff's claim that Soviet Union's detention of her husband, a Soviet citizen, was a tort actionable under non-commercial tort exception of FSIA); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 588 (9th Cir. 1983), *cert. denied*, 469 U.S. 880 (1984) (suit brought by former American hostages against the government of Iran deemed barred by FSIA because American embassies located abroad are not considered United States territories for FSIA purposes).

138. See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493-94 (1982); see also *supra* notes 83-86 and accompanying text (discussing the *Verlinden* opinion).

139. See *O'Connell Mach. Co. v. M.V. Americana*, 734 F.2d 115, 116 (2d Cir.), *cert. denied*, 496 U.S. 1086 (1984) ("The Foreign Sovereign Immunities Act insulates foreign states from the exercise of federal jurisdiction except under the conditions specified in the act.").

140. See Brief for United States, *supra* note 106, at 2-4.

141. See *id.*

142. See *id.* After the Second Circuit decision, the United States filed a brief in the Second Circuit requesting a rehearing, reinforcing its view that the FSIA preempts the ATS when foreign sovereigns are defendants. See Brief for the United States as *Amicus Curiae* in Support of Appellee's Petition for Rehearing and Suggestion for Rehearing *En Banc* or, in the Alternative, Petition for Rehearing and Suggestion for Rehearing *En Banc* at 2-4, *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421 (2d Cir. 1987) (Nos. 86-7602, 86-7603), *cert. granted*, 56 U.S.L.W. 3712 (U.S. Apr. 18, 1988) (No. 87-1372) [hereinafter Brief for the United States Suggesting Rehearing *En Banc*].

143. See *supra* notes 76-81 and accompanying text.

public acts, but denies immunity from claims relating to their private or commercial acts.<sup>144</sup> An act of a government's military forces during wartime clearly falls within the category of public acts and would be accorded immunity under the restrictive view.<sup>145</sup> Therefore, as Congress intended the FSIA to adopt this restrictive doctrine, it seems clear that Congress intended to deny jurisdiction in a case such as *Amerada Hess*.

In support of its view that the FSIA does not pre-empt the ATS, the Second Circuit asserted that the FSIA is a commercial statute only and that Congress was not considering violations of international law when it was enacted.<sup>146</sup> The Second Circuit thus ignored the expropriation exception of the FSIA.<sup>147</sup> Also, the Court gave scant consideration to the non-commercial tort exception of the FSIA, which denies immunity for claims brought against foreign sovereigns for torts committed in the United States.<sup>148</sup>

In addition, it should be noted that the Second Circuit could not point to one U.S. case involving violations of international law in which a sovereign's request for immunity was denied. Rather, it relied on the the Nuremberg trials of Nazi war criminals conducted by the International Military Tribunal.<sup>149</sup> However, U.S. federal courts are courts of limited juris-

144. See *supra* notes 70-72 and accompanying text.

145. *In re Korean Airlines Disaster of September 1, 1983*, Misc. No. 83-0345, slip op. at 8 (D.D.C. Aug. 2, 1985) (military decisions are strictly governmental in nature; the shooting down of a Korean commercial jet was a purely political act).

146. See *Amerada Hess*, 830 F.2d at 427.

147. 28 U.S.C. § 1605(a)(3) (1982) (this exception denies immunity when rights in property are taken in violation of international law); see *supra* text accompanying notes 63-64.

148. 28 U.S.C. § 1605(a)(5) (1982). The Second Circuit in *Amerada Hess* mentioned the non-commercial tort exception parenthetically. *Amerada Hess*, 830 F.2d at 427. This exception has been the source of a significant amount of litigation and is demonstrative of the FSIA's reach into non-commercial areas. See, e.g., *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511 (9th Cir. 1987) (assault, kidnapping, interrogation, and taking plaintiff's camera and leaflets constituted torts actionable under FSIA's non-commercial tort exception); *MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918 (D.C. Cir. 1987) (Peru's use of building as chancery in neighborhood zoned for residential purposes constituted interference with private use and enjoyment of land and actionable under FSIA's noncommercial tort exception); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370 (7th Cir. 1985) (rejecting claim that denial of exit visa to Soviet citizen was tort actionable under 28 U.S.C. § 1605(a)(5)).

149. *Amerada Hess*, 830 F.2d at 426. International Military Tribunals are a branch of the International Court of Justice and are set up by states to investigate

diction<sup>150</sup> and are neither bound by the decisions of international military tribunals,<sup>151</sup> nor free to exceed the jurisdictional grant accorded to them by Congress and Article III of the Constitution.<sup>152</sup> The Second Circuit seems to have been swayed by the unusual circumstances of *Amerada Hess*. Claimants' frustrated attempts at negotiating with the Argentine government, coupled with the probability that they would have been unable to bring their claim in an alternate forum, made them very sympathetic plaintiffs. But sympathy for such plaintiffs cannot override clear Congressional intent to prohibit jurisdiction in these circumstances.

Policy considerations support the view that U.S. federal courts have no jurisdiction over claims against foreign sovereigns for violations of international law. The Second Circuit's decision in *Amerada Hess* undermined the purpose of the FSIA by opening up the doors of U.S. federal courts to claims that Congress never intended to address.<sup>153</sup> This decision may make U.S. federal courts the proper forum for the adjudication of disputes between aliens and foreign sovereigns whenever the alien can make any colorable claim for a violation of international law. Thus, these courts are now in the undesirable position of deciding and enforcing claims that are typically of a sensitive political nature. It will also be interesting to see how the district court, on remand, will enforce a judgment against Argentina if *Amerada* and *United* are successful on the merits.<sup>154</sup>

*Amerada Hess* also effectively repeals the expropriation exception of the FSIA because U.S. courts would no longer be bound by the FSIA's restriction that the property taken in vio-

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sensitive issues. I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 24 (3d ed. 1979).

150. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 371-72 (1977) (federal court's subject matter jurisdiction is limited by article III of the Constitution's "arising under" clause and acts of Congress).

151. U.N. CHARTER art. 59 ("The decision of the court has no binding force except between the parties and in respect of that particular case.").

152. *Owen Equip.*, 437 U.S. at 371-72.

153. See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 490 (1982) (Congress, in enacting FSIA, set forth "substantive provisions requiring some form of substantial contact with the United States").

154. The ATS has no execution provisions. See 28 U.S.C. § 1350 (1982). The Second Circuit suggested that the district court follow the execution provisions of FSIA. *Amerada Hess*, 830 F.2d at 429.



lation of international law be located in the United States. Under *Amerada Hess*, any claim for unlawful expropriation brought by an alien could be enforced under the ATS, regardless of the location of the property, as long as the court has personal jurisdiction over the foreign sovereign. Moreover, the United States government itself has expressed concern for the implications of the *Amerada Hess* decision on national and foreign policy interests.<sup>155</sup> Specifically, the government fears that foreign sovereigns will retaliate by stripping the United States of its immunity, thereby exposing it to liability in foreign courts for claims involving violations of international law.<sup>156</sup>

The ATS, however, retains some vitality. It can still support a claim brought against a *non-sovereign*. Several plaintiffs have been successful in prosecuting violations of human rights, particularly claims involving torture by non-sovereigns. In the landmark decision of *Filartiga v. Peña-Irala*,<sup>157</sup> the Second Circuit held that jurisdiction existed under the ATS to hear a claim brought against a former police officer of Paraguay for the torture death of the plaintiffs' decedent.<sup>158</sup> The court determined that torture is a modern violation of international law.<sup>159</sup> More recently, in *Forti v. Suarez*,<sup>160</sup> the Northern District of California upheld jurisdiction pursuant to the ATS over a torture claim brought against a former Argentine general.<sup>161</sup> While the ATS's future role as the basis for bringing such claims appears promising, it will be limited by courts' ability to obtain personal jurisdiction over the defendant.<sup>162</sup>

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155. Brief for the United States Suggesting Rehearing En Banc, *supra* note 142, at 4. The United States did not condone Argentina's acts, but suggested that Amerada and United pursue their claim through diplomatic channels. *Id.*

156. *Id.* at 4-5.

157. 630 F.2d 876 (2d Cir. 1980).

158. *Id.* at 878.

159. *Id.* at 880-85.

160. No. 87-2058 DLJ, slip op. (N.D. Cal. Oct. 6, 1987), *discussed in* Sherman, *Aliens May Sue for Torts Abroad*, NAT'L L.J., Nov. 2, 1987, at 17, col. 1.

161. Sherman, *supra* note 160, at 17, cols. 2-3.

162. The court was able to obtain personal jurisdiction over both of these alleged torturers because they were incarcerated in U.S. prisons on unrelated charges when process was served. *Filartiga v. Peña-Irala*, 630 F.2d 876, 879 (2d Cir 1980); *Forti v. Suarez*, No. 87-2058 DLJ, slip op. (N.D. Cal. Oct. 6, 1987), *discussed in* Sherman, *supra* note 160, at 17, col. 3. For further discussion on the use of the ATS in prosecuting human rights violations, see Bazzyer, *Litigating the International Law of Human Rights: A How-To Approach*, 7 WHITTIER L. REV. 713 (1985); Note, *Terrorism as a Violation of the Law of Nations*, 6 FORDHAM INT'L L.J. 236, 251-52 (1982).

### CONCLUSION

The Second Circuit in *Amerada Hess Shipping Corp. v. Argentine Republic* has, in effect, introduced an additional exception to the FSIA. In so doing, the Second Circuit has undermined the purpose of the FSIA by providing a United States forum for the settlement of international disputes. In light of the *Amerada Hess* decision, it is time for legislative reform of the ATS. Congress should formally limit the ATS to cases involving non-sovereign defendants, so that the ATS and the FSIA can harmoniously coexist.

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