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Von Dardel v. Union of Soviet Socialist Republics: Overcoming the Defense of Foreign Sovereign Immunity in Cases under the Alien Tort Claims Act

I. INTRODUCTION

Over the past few years, there have been several U.S. court cases involving issues of human rights and international law. These may be more than merely a steady trickle of anomalous cases. Rather, these cases could set a trend presaging a flood of similar litigation which may transform U.S. federal courts into forums for litigating international human rights violations.

Three factors have contributed to the paucity of international human rights litigation in U.S. courts. First, international law traditionally has been "statist," recognizing rights in nations, not individuals. Second, human rights plaintiffs are often unable to assert a basis for federal subject matter jurisdiction when the defendant is a foreign government or its agent. Third, even when subject matter jurisdiction exists, many cases are precluded from judicial consideration by the Foreign Sovereign Immunities Act (FSIA).

1 In the past two years, such cases have included Von Dardel v. Union of Soviet Socialist Republics, 623 F. Supp. 246 (D.D.C. 1985); Sanchez-Espoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985); Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370 (7th Cir. 1985); Siderman v. Argentina, No. CV 82-1772 RMT (MCx) slip op. (C.D. Cal. Mar. 7, 1985).


5 Normally, state courts, as courts of general jurisdiction, would have subject matter jurisdiction over any claim brought before them. In cases involving foreign sovereigns, however, state courts are subject to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1352(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1976), and its provisions regarding personal jurisdiction over a foreign state. See H.R. REP. No. 94-1487, 94th Cong., 2d Sess. 14, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6610 [hereinafter House Report]. As the House Report specifically states: "the [Foreign Sovereign Immunities Act] . . . 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." Id. at 6610.
Recent events, however, have reduced the applicability of the first two factors. Due primarily to the United Nations’ efforts, the influence of the statist viewpoint has diminished with the increased recognition of individual rights under international law. Furthermore, as to subject matter jurisdiction, the court in *Filartiga v. Pena-Irala*, held that jurisdiction did exist under the Alien Tort Claims Act (ATCA) in a suit between aliens involving a tort in violation of the international law of human rights.

The last factor, foreign sovereign immunity, still presents an obstacle to human rights litigants. The FSIA confers a broad general grant of immunity upon foreign states subject to enumerated exceptions. The majority of the FSIA’s exceptions are designed to accommodate plaintiffs in commercial litigation or disputes regarding property. The single “non-commercial tort” exception concerns acts committed in U.S. territory only. These exceptions, therefore, have been of little assistance to human rights plaintiffs seeking to establish jurisdiction in U.S. courts.

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7 630 F.2d 876 (2d Cir. 1980).
9 630 F.2d at 887.
11 Jurisdictional Considerations, supra note 10, at 68–9. 28 U.S.C. § 1604 grants immunity to foreign sovereigns subject to existing international agreements to which the United States was party on October 21, 1976, when the FSIA was enacted. (This “subject to” exception is discussed in detail infra, text accompanying notes 182–236.)
28 U.S.C. § 1605 sets forth exceptions to this general grant of immunity. Section 1605(b) covers exceptions to immunity applicable in admiralty cases. 28 U.S.C. § 1605(b). Section 1605(a) covers a variety of other exceptions, which are detailed infra at notes 56–60.
15 See, e.g., *Persinger v. Islamic Republic of Iran*, 729 F.2d 835 (D.C. Cir. 1985) (jurisdiction under noncommercial tort exception denied where tortious act alleged did not occur on U.S. territory).
In *Berkovitz v. Islamic Republic of Iran*, 735 F.2d 329 (9th Cir. 1984), cert. denied, 469 U.S. 1035 (1984), § 1605(a)(5) jurisdiction was denied on grounds similar to *Persinger*; § 1605(a)(2)’s commercial exception was denied because the alleged tort of wrongful death by assassination was insufficiently connected to defendant’s commercial activity, id. at 332; and a treaty provision establishing a limited
The FSIA also restricts the availability of judicial remedies for human rights plaintiffs by limiting the scope of other jurisdictional statutes. For example, the ATCA establishes subject matter jurisdiction for claims by aliens alleging torts "committed in violation of the Law of Nations or a treaty of the United States."16 Where the defendant is a foreign sovereign or its agent, however, the FSIA would appear to bar suit regardless of the ATCA unless an exception to immunity applies.17 Thus, the FSIA has limited the ATCA's utility to cases involving private persons as defendants.18

One recent decision, Von Dardel v. Union of Soviet Socialist Republics,19 suggests several possible means by which international human rights plaintiffs may overcome the problem of foreign sovereign immunity. The Von Dardel case is particularly interesting in that other recent decisions on similar issues have upheld defenses of sovereign immunity.20 It is therefore uncertain exactly what the present U.S. law of sovereign immunity is. This Comment will first examine the development of the U.S. law of sovereign immunity, with particular emphasis upon the FSIA. The Comment then reviews recent litigation under the Alien Tort Claims Act, including a discussion of the Von Dardel case in some depth. The next section of the Comment examines the arguments against sovereign immunity which prevailed in Von Dardel in light of the legislative and judicial history of the FSIA. The author concludes by considering whether the Von Dardel case presents a workable model for applying the FSIA in future human rights cases.

II. THE ROLE OF SOVEREIGN IMMUNITY IN INTERNATIONAL HUMAN RIGHTS LITIGATION

Although commercial litigants have regularly invoked several of the enumerated exceptions to the FSIA,21 these provisions have not proven useful in

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establishing jurisdiction over human rights claims. Congress enacted the FSIA primarily in response to the increase in commercial activity by states. Although the non-commercial tort exception potentially is applicable to cases involving human rights violations, the exception requires that the tortious act occur in the United States. This territorial requirement bars many human rights plaintiffs from bringing suit under § 1605(a)(5). Because human rights plaintiffs could not obtain subject matter jurisdiction under the FSIA, U.S. courts adjudicated few international human rights cases until 1980, when the Filartiga court held that the Alien Tort Claims Act provided an independent basis for subject matter jurisdiction.

A. The Role of Foreign Sovereign Immunity in U.S. Law

Sovereign immunity is a principle of "grace and comity" between nations under which one nation is immune from suit in the courts of another. Arising out of Mexican bank's sale of certificate of deposit to U.S. investor; Velidor v. L/P/G Benghazi, 653 F.2d 812 (3d Cir. 1981), cert. denied, 455 U.S. 929 (1982) (Yugoslavian seaman's breach of contract action against Algerian government for wages owed under the Seaman's Wage Act, 46 U.S.C. §§ 596-97 falls under "commercial activity" exception). For an overview of commercial cases under the FSIA, see Annotation, supra note 12. See also infra notes 56, 57.


23 House Report, supra note 5, at 6605: "In a modern world where foreign state enterprises are every day participants in commercial activities [the FSIA] is urgently needed legislation." Id.

24 The noncommercial tort exception provides that

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

(5) ... 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.

25 Courts have strictly construed § 1605(a)(5)'s requirement that a tortious act be committed on U.S. territory. The plaintiffs in both McKee v. Islamic Republic of Iran, 722 F.2d 582 (9th Cir. 1983) and Persinger v. Islamic Republic of Iran, 729 F.2d 835 (D.C. Cir. 1984) sought damages for injuries suffered during the occupation by terrorists of the U.S. Embassy in Tehran, Iran in 1979-1980. The courts in both cases denied jurisdiction under § 1605(a)(5), finding that the embassy and its grounds were not U.S. territory within the meaning of the FSIA.


27 630 F.2d 876, 887 (2d Cir. 1980).

other. Sovereign immunity was first expressed in U.S. law in The Schooner Exchange v. M'Faddon, where the Supreme Court held that the doctrine of sovereign immunity barred the arrest of a French warship in a U.S. harbor. The Schooner Exchange ruling rested upon a theory of absolute immunity, under which a foreign sovereign may not be sued in U.S. courts for any reason. Although some subsequent Supreme Court rulings implied that sovereign immunity might be less than absolute under certain circumstances, the Court continued to apply absolute immunity through the early part of the twentieth century. Indeed, while Congress and the State Department have moved away from absolute immunity, the Court has never explicitly rejected the principle.

A pronounced movement away from absolute immunity nevertheless began within the international community in the early part of this century. This shift was triggered largely by an increase in state involvement in commercial activities, especially among socialist nations. This led to the development of a restrictive theory of sovereign immunity. Under the restrictive theory, a sovereign may be sued in foreign courts for its private acts but retains immunity for its public acts.

The 1945 Supreme Court decision, Republic of Mexico v. Hoffman, reflected the growing influence of the restrictive theory of immunity. In Hoffman, the

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29 Id.
30 11 U.S. (7 Cranch) 116 (1812).
31 Id. at 147.
32 Id. at 137. See generally Note, The Supreme Court's Verlinden Decision: A Retreat to Activism, 16 Vand. J. Transnat'l L. 1081, 1097–98 (1983) [hereinafter Retreat To Activism]; Jurisdictional Considerations, supra note 10, at 60.
33 See, e.g., Bank of the United States v. Planter's Bank of Georgia, 22 U.S. (9 Wheat.) 904 (1824). That case arose out of a dispute involving a corporation partly owned by the state of Georgia. In dictum, Chief Justice Marshall stated that "[i]t is ... a sound principle, that when a government becomes a partner in any trading company, it devests [sic] itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen." Id. at 907. See also The Santissima Trinidad & the Saint Ander, 20 U.S. (7 Wheat.) 283 (1822) (sovereign immunity does not bar in rem jurisdiction over pirated goods).
34 See, e.g., Berrizi Bros. Co. v. Steamship Pesaro, 271 U.S. 562 (1926) (absolute theory of immunity applied in dispute involving a commercial vessel wholly owned by a foreign government.) See also Ex Parte Peru, 318 U.S. 578 (1943) (Peruvian-owned vessel held immune from suit in contract dispute).
37 G. von Glahn, Law Among Nations: An Introduction to Public Int'l Law 142 (4th ed. 1981). Von Glahn asserts that "the process of restricting state immunity was hastened, in part because the Soviet Union had adopted state-conducted monopolies in foreign trade and shipping." Id. This phenomenon originated during the nineteenth century, when many nations established State-sanctioned monopolies in particular trades, and also began operating railway, shipping, and postal services.
38 Retreat to Activism, supra note 32, at 1098.
39 House Report, supra note 5, at 6605.
40 324 U.S. 30 (1945).
Court permitted jurisdiction over a commercial vessel owned by Mexico. The Hoffman court, however, did not expressly base its decision on restrictive immunity. Rather, the Court concluded that because the Executive branch had not recommended immunity, national policy now permitted the court not to extend immunity in certain cases.

In 1952, the State Department endorsed the adoption of the restrictive theory of sovereign immunity in the famous "Tate letter." The Tate letter approach allowed the foreign sovereign to petition the State Department for a determination of immunity, with the State Department then recommending to the judiciary whether immunity was appropriate. Generally, these recommendations were respected by the courts. Where the State Department declined to make a recommendation, the courts determined whether immunity was appropriate.

This bifurcated system for determining immunity created several problems. First, the State Department placed itself "in the awkward position of a political institution trying to apply a legal standard to litigation already before the courts." Additionally, this system allowed the foreign state discretion as to whether to petition the State Department for immunity or leave the matter to the courts, an arrangement which further politicized the process. This resulted in considerable uncertainty for plaintiffs, who could not be sure what standards would be applied to resolve a defense of sovereign immunity.

The Foreign Sovereign Immunities Act remedied these problems by setting forth a single standard for deciding questions of sovereign immunity in U.S. courts. Intending to codify the restrictive theory of sovereign immunity, Congress modeled the Act after a long-arm statute. The FSIA therefore provides

41 Id. at 38.
42 Id.
43 Id.
44 26 DEPT. ST. BULL. 984–85 (1952) (Letter from Acting Legal Advisor to Secretary of State, Jack B. Tate, to Acting Attorney General Phillip B. Perlman, May 19, 1952).
46 Id. See also Jurisdictional Considerations, supra note 10, at 63; Retreat to Activism, supra note 32, at 1099–1100.
47 Id. See also Jurisdictional Considerations, supra note 10, at 63; Retreat to Activism, supra note 32, at 1099–1100.
48 House Report, supra note 5, at 6607.
49 Id.
50 Id.
52 House Report, supra note 5, at 6610.
both personal and subject matter jurisdiction in cases involving foreign sovereigns and their agencies or instrumentalities. 54

The FSIA confers immunity upon the foreign sovereign subject to enumerated exceptions. 55 Under the FSIA, the foreign sovereign is subject to suit: (1) if it has expressly or impliedly waived immunity; 56 (2) if its actions are connected with a commercial activity having some relation to the United States; 57 (3) if its

Congress therefore enacted the FSIA, intending it "to provide a long-arm statute that makes attachment for jurisdictional purposes unnecessary in cases where there is a nexus between the claim and the United States." Id. at 6626. Specifically, Congress patterned the Act after the District of Columbia long-arm statute. Id. at 6612. See also Jurisdictional Considerations, supra note 10, at 59.

54 House Report, supra note 5, at 6611. Personal jurisdiction is established by 28 U.S.C. § 1330(b) for any claim falling under one of the exceptions to immunity enumerated in 28 U.S.C. §§ 1604, 1605, and 1607. When an exception exists, subject matter jurisdiction is provided for by 28 U.S.C. § 1330(a).

FSIA § 1603(a) defines a "foreign state" so as to include "a political subdivision of a foreign or an agency or instrumentality of a foreign state as defined in subsection (b).

Section 1603(b) of the Act provides that

[a]n "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 the foreign state or political subdivision 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 [28 U.S.C. § 1332(c), (d)] nor created under the laws of any third country.


55 House Report, supra note 5, at 6616. These exceptions are contained in 28 U.S.C. §§ 1604, 1605, and 1607. This rule of general immunity subject to limited exceptions is in contrast to the position adopted prior to the enactment of the FSIA in Victory Transport v. Comisaria General, 336 F.2d 354 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965). Under the Victory Transport rule courts would deny immunity to a foreign sovereign's acts unless they fell into one of five categories: (1) internal administrative acts; (2) legislative acts; (3) military acts; (4) acts of diplomacy; or (5) public loans. Id. at 360.


For a detailed discussion of some cases interpreting § 1605(a)(1), see infra notes 151–60, 162–75 and accompanying text. See also Annotation, supra note 12, at 108–114 (1982).

57 28 U.S.C. § 1605(a)(2). This section of the FSIA provides an exception to immunity in any case 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 the territory of the United
actions involve rights in property taken in violation of international law; \(^{58}\) (4) if its actions involve immovable property in the United States or rights in property acquired by succession or gift; \(^{59}\) and (5) if its actions comprise a non-commercial tort where the tortious act occurred in the United States. \(^{60}\) Although immunity is an affirmative defense, a plaintiff may not obtain a default judgment without demonstrating that one of these exceptions applies. \(^{61}\)

B. Recent Human Rights Case Law Under the Alien Tort Claims Act

1. Development of Individual Rights Under International Law

The evolution of international law with regard to individual rights has come nearly full circle since the late eighteenth century. \(^{62}\) When the Judiciary Act of 1789 \(^{63}\) established the federal courts in the United States, international law was largely derived from the Roman conception of *jus gentium*. \(^{64}\) Under this approach, international law governed not only the relations between states, but also disputes between states and individuals. \(^{65}\)

The "statist" model of international law became predominant with the upsurge of positivism in the nineteenth century. \(^{66}\) Under the positivist view, states alone, and not individuals, are subjects of international law. This theory, while well suited for disputes between nations, obliged jurists to adopt awkward and unconvincing rationales for international disputes concerning individuals. \(^{67}\) In such cases, traditional international law employed a legal fiction wherein ostensible injury to the individual claimant's state was alleged. \(^{68}\) Only in this fashion could an injured person receive redress in an international forum. \(^{69}\)

This conception of the international legal order prevailed throughout the

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60. 28 U.S.C. § 1605(a)(5).
62. D'Amato, supra note 2, at 104.
63. Judiciary Act of 1789, Ch. 20, 1 Stat. 73 (1789).
64. D'Amato, supra note 2, at 105.
66. D'Amato, supra note 2, at 102–05.
67. Id. at 102.
68. Id.
69. Id. at 102–05.
early part of the twentieth century.\textsuperscript{70} The modern trend, however, harks back to the pre-positivist recognition that individual rights exist at international law.\textsuperscript{71} This shift in opinion was prompted largely by the lessons of World War II and the Nuremberg trials.\textsuperscript{72} Various declarations and agreements promulgated by the newly established United Nations in the early post-war period further evidenced recognition of individual human rights under international law.\textsuperscript{73}

Established principles of customary international law are always incorporated into the law of the United States.\textsuperscript{74} Such rules of international law are not static, but develop over time, and U.S. courts are obliged to recognize such principles as have received "the general assent of civilized nations."\textsuperscript{75} It has therefore been argued that, since individuals have rights under international law,\textsuperscript{76} and because U.S. law incorporates this law, established principles of international human rights law may be invoked in U.S. courts.\textsuperscript{77}

2. The Alien Tort Claims Act as a Basis for Subject Matter Jurisdiction

Claims alleging violations of international human rights were not numerous in U.S. courts prior to 1980.\textsuperscript{78} This was in part because most claims arising

\textsuperscript{70} Id. at 104; see generally D'Zurilla, supra note 3, at 187–89.
\textsuperscript{71} D'Amato, supra note 2, at 104; D'Zurilla, supra note 3, at 189. But see Brownlie, supra note 10, at 572. Brownlie, when addressing the issue of individual rights at international law, has stated: "Customary international law still maintains the rule that it is the state which has the capacity to present international claims, even though in many cases the claim is substantially that of a private person." Id.
\textsuperscript{72} D'Zurilla, supra note 3, at 189.
\textsuperscript{74} See generally Dickinson, The Law of Nations as Part of the National Law of the United States, 101 U. Pa. L. Rev. 26 (1952). Under Article VI of the Constitution of the United States, treaties are the supreme law of the land. U.S. Const. art. VI, cl. 2. The Supreme Court has held that "where there is no treaty ... resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators." The Paquete Habana, 175 U.S. 677, 700 (1900).
\textsuperscript{75} The Paquete Habana, 175 U.S. at 694.
\textsuperscript{76} In the field of human rights, these include at least the right to be free from slavery, official torture, summary execution, and genocide. See J. Blum & R. Steinhardt, Federal Jurisdiction Over Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala, 22 Harv. Int'l L.J. 53, 90–92 (1981).
\textsuperscript{77} See Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980), aff'd on other grounds sub nom. Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981), in which the District Court held an excludable Cuban refugee's detention in maximum security prison pending deportation to be a violation of international law. 505 F. Supp. at 798. Although the Appeals Court's affirmance rested on constitutional grounds, that court in its decision noted that "[i]t seems proper ... to consider international law principles for notions of fairness as to propriety of holding aliens in detention" and found that "[n]o principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment." 654 F.2d at 1388.
under international human rights law involved two alien parties. Plaintiffs, therefore, were hard pressed to assert a basis for subject matter jurisdiction in the federal courts. Even when federal subject matter jurisdiction was otherwise established, the Foreign Sovereign Immunities Act could bar a human rights claim by eliminating the court's personal jurisdiction over the parties.

The Alien Tort Claims Act, which provides that "[t]he 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," may become the primary vehicle for asserting jurisdiction in future human rights cases. A major breakthrough for foreign nationals seeking to litigate international human rights claims in U.S. courts occurred in the 1980 decision of Filartiga v. Pena-Irala. Dr. Joel Filartiga alleged that his seventeen-year-old son Joelito was kidnapped and tortured to death by the defendant Pena-Irala, a Paraguayan police official. Dr. Filartiga and his daughter Dolly brought a wrongful death action in U.S. District Court, asserting that jurisdiction existed under the ATCA, then regarded as an obscure section of the U.S. Judicial Code. The Second Circuit Court of Appeals agreed, ruling that the statute

79 One commentator has stated that "[i]t is undeniable that the grossest violations of human rights take place by governments against their own nationals. There are very few cases in which this is not the case." Hassan, Panacea or Mirage? Domestic Enforcement of International Human Rights Law: Recent Cases, 4 Hous. J. Int'l L. 13, 19 (1981).


80 Such cases could presumably have been brought in state courts, but the likelihood of removal to federal court would be great. In addition, one jurist suggests that state court determination of international law questions may pose serious problems of separation of powers and federalism. See Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 804-05 n.11 (D.C. Cir. 1984) (Bork, J., concurring), cert. denied, 470 U.S. 1003 (1985). Moreover, although suit could be brought under the FSIA after its enactment in 1976, this is unlikely for reasons discussed supra at notes 12-15 and accompanying text.

81 See, e.g., Siderman v. Argentina, No. CV 82-1772 RMT (MCx) slip op. (C.D. Cal. Mar. 7, 1985) (FSIA bars action alleging torture in violation of international law despite existence of ATCA jurisdiction) (discussed infra text accompanying notes 107-19); cf. Tel-Oren 726 F.2d 774, 775-76 n.1 (Edwards, J., concurring) (had ATCA jurisdiction existed, sovereign immunity would have barred suit against state defendant); id. at 805 n.13 (Bork J., concurring) (same).


83 630 F.2d 876 (2d Cir. 1980).

84 Id. at 878. Dr. Filartiga and his daughter Dolly Filartiga, claiming that Joelito was tortured to death in retaliation for his father's antigovernment activities, brought an apparently fruitless criminal action against Pena-Irala in the Paraguayan courts. Id. Meanwhile, in 1978 Pena-Irala arrived in the United States under a visitor's visa and remained illegally. Id. Dolly Filartiga, then living in Washington, D.C., learned of Pena-Irala's illegal presence in the United States and notified the Immigration and Naturalization Service (INS). Id. at 879. While Pena-Irala was in the custody of the INS, Dolly Filartiga served him with a summons and filed an action in the District Court for the Eastern District of New York. Id.

85 Id.

86 One respected federal appeals court judge had characterized the ATCA as a "legal Lohengrin," because "no one seems to know whence it came." ITT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir.
allowed suits by alien plaintiffs alleging violations of generally recognized international human rights norms.87

The Filartigas maintained that their cause of action arose under various international declarations,88 and the proscription of "official torture" under customary international law.89 Judge Kaufman of the Second Circuit Court of Appeals agreed in his decision that a proscription against official torture "ha[d] become part of customary international law,"90 and concluded that international law's prohibition of official torture allowed no distinction between a nation's treatment of aliens and its own citizens.91 Because Pena-Irala had committed a tort in violation of the norms of international human rights law, Judge Kaufman reasoned that jurisdiction existed under the ATCA.92

The next U.S. court interpretation of the ATCA in a human rights context was Tel-Oren v. Libyan Arab Republic.93 In Tel-Oren, the plaintiffs, survivors of a Palestine Liberation Organization (PLO) raid, brought suit against the PLO, Libya, and several Arab-American organizations.94 The complaint alleged multiple tortious acts in violation of the law of nations and various treaties of the United States, and cited the ATCA as a basis for jurisdiction.95
Both the District Court96 and the D.C. Circuit Court of Appeals97 denied jurisdiction under the ATCA and dismissed the plaintiffs' claims.98 In addition to issuing a brief per curiam opinion,99 each of the three Circuit judges in Tel-Oren wrote a lengthy concurrence explaining his reasoning. Judge Robb concluded that the political question doctrine barred consideration of the case.100 Judge Bork reasoned that the ATCA merely established jurisdiction in federal courts for tort claims involving international law, but did not create an independent right to sue.101 Judge Edwards approved of the Filartiga holding, but found that the state action necessary to establish a violation of international law was not present in Tel-Oren.102

Although the issue of sovereign immunity was not addressed, Tel-Oren is nonetheless illustrative of a problem likely to plague potential plaintiffs under the ATCA. As in Filartiga, the alleged tort was "official torture," an established violation of international human rights standards.103 The international agree-

98 The District Court's dismissal can be found at 517 F. Supp. at 551. The Court of Appeals' affirmance of the dismissal is at 726 F.2d at 775.
99 726 F.2d at 775.
100 Id. at 823. The political question doctrine provides that certain issues are not susceptible of judicial resolution, either because (1) their resolution has been constitutionally committed to another branch; (2) a decision would require the employment of standards defying judicial application or involving the judiciary in unwarranted policymaking; or (3) although not precluded by either of the two preceding considerations, a decision on the merits would embarrass or indicate a lack of respect for a coordinate branch, or would overturn a political decision already made, to which unquestioned adherence is required. See Baker v. Carr, 369 U.S. 186, 217 (1962). Finding that all three criteria were present, Judge Robb dismissed the Tel-Oren plaintiffs' claims. 726 F.2d at 827.
101 726 F.2d at 801. Judge Bork acknowledged that, if a cause of action were not explicitly granted by international law or an applicable U.S. treaty, a right to sue might be inferred from the statute itself. Id. He concluded, however, that because "adjudication of [the plaintiffs'] claim would present grave separation of powers problems," id. at 805, the Tel-Oren case was "not . . . appropriate for federal court adjudication . . . without an express grant of a cause of action." Id. at 808.
102 Judge Bork then considered whether the "law of nations" or treaties of the United States cited by plaintiffs independently established a cause of action which would allow them an entrance into U.S. courts under the ATCA. Id. at 808–19. His inquiry was circumscribed by his conception of the ATCA, which he considered to establish jurisdiction only when international law or a U.S. treaty expressly provided a right to sue. Id. at 820. Because he found that no such right existed, Judge Bork dismissed the plaintiffs' claims. For a student Comment supporting Judge Bork's analysis of cause of action under the ATCA, see Note, Torture as a Tort in Violation of International Law: Filartiga v. Pena-Irala, 33 STAN. L. REV. 553 (1981).
103 726 F.2d at 795. Although admitting that two of the offenses alleged by the Tel-Oren plaintiffs, torture and summary execution, violated international law, Judge Edwards nevertheless maintained that international law prohibited such acts only if committed by states or persons acting under color of state law. Id. at 794–95. Judge Edwards therefore concluded that the Tel-Oren plaintiffs' claims must fail because the defendant PLO was neither a recognized state nor acting under color of state law. Id. at 791.
104 Id. at 777 (Edwards, J., concurring), citing Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980).
ments and custom establishing the illegality of such torture indicate, however, that only state-sponsored torture violates international law. This state-sponsorship requirement, common to many human rights violations, forces any plaintiff attempting to invoke ATCA jurisdiction to name either a foreign sovereign or its agent as a defendant, thereby inviting assertion of the foreign sovereign immunity defense.

The 1985 case of Siderman v. Argentina was the first ATCA case squarely confronting the issue of foreign sovereign immunity. The facts of that case are similar to Filartiga. In March, 1976, on the night of a military coup in Argentina, members of the armed forces abducted Jose Siderman from his home. Siderman was held captive for a week, tortured, and repeatedly threatened with death if he and his family did not leave Argentina. Upon his release, the Sidermans fled to the United States, where they have remained since.

The Sidermans filed an action against Argentina in U.S. District Court, alleging jurisdiction under the ATCA. The District Court issued an order finding subject matter jurisdiction over the torture claim under the ATCA and asserting personal jurisdiction over Argentina. Subsequently, the court en-

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104 See, e.g., Declaration on Protection from Torture, supra note 90. The Declaration defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person.” Id. at art. I (emphasis added).

105 One analysis of this issue notes that, although “the instruments prohibiting [slavery and genocide] expressly extend liability to private persons as well as government officials[,] [t]orture and summary execution appear to violate international law only when committed by or at the behest of government officials.” Blum & Steinhardt, supra note 76, at 95–96.

106 This problem was alluded to by two of the three Tel-Oren judges in their concurrences. Judge Edwards found that the PLO, as a non-state actor, could not have committed official torture, 726 F.2d at 791. Yet, he recognized that Libya, the one sovereign among the defendants, was insulated from suit by virtue of sovereign immunity, regardless of jurisdiction under the ATCA. Id. at 776 n.1. Judge Bork held that the ATCA, while conferring a right of entry into the federal courts, did not create a cause of action. According to Judge Bork, unless some independent basis of a right to sue could be adduced, the ATCA did not establish jurisdiction. Judge Bork did agree, however, that suit against Libya was barred by the FSIA. Id. at 805 n.13. Judge Bork went on to suggest that a Filartiga-based interpretation of the ATCA would require courts to resolve “whether the relationship between the PLO and Libya constituted that of agent and principal.” Id. at 821.

107 No. CV 82-1772 RMT (MCx) slip op. (C.D. Cal. Mar 7, 1985) [hereinafter Order Vacating Judgment].

108 Judgment by Default, No. CV 82-1772-RMT (MCx) slip op. at 6 (C.D. Cal. Sept. 28, 1984) [hereinafter Default Judgment].

109 Id.

110 Id.

111 Id. at 1. Also named as defendants were the province of Tucuman, eight individuals, and an Argentine-owned corporation, Inmobiliaria Del Nor-Oeste, S.A. (Nor-Oeste). Id. Nor-Oeste was a closely held corporation owned by the Sidermans which had been seized by the new Argentine regime. Id. at 7.

112 Id. at 2.

113 Id. The government of Argentina refused to appear to contest the action at this point. Id. at 1–2. Instead, it sent a diplomatic note to the U.S. State Department asserting sovereign immunity. Id.
tered a default judgment against Argentina, awarding approximately $2.7 mil-
lion in damages to Jose and Lea Siderman.\textsuperscript{114}

Shortly after the default judgment was delivered, however, the court moved
\textit{sua sponte} to consider the issue of foreign sovereign immunity.\textsuperscript{115} On March 17,
1985, the court issued an order vacating the default judgment and dismissing
the case on grounds of sovereign immunity.\textsuperscript{116}

Using a two-part analysis, the court determined that no exception to immunity
applied in the \textit{Siderman} case.\textsuperscript{117} First, the court examined the ATCA in light of
the rules of immunity prevailing in 1789, the year Congress enacted that statute.
It concluded that the ATCA did not imply an exemption from immunity for
claims arising under the statute.\textsuperscript{118} Second, the court held that none of the
enumerated exceptions found in the FSIA were applicable, so that sovereign
immunity barred the suit.\textsuperscript{119}

3. \textit{Von Dardel v. Union of Soviet Socialist Republics}: A Possible Solution to
Foreign Sovereign Immunity in ATCA Litigation?

\textit{Von Dardel v. Union of Soviet Socialist Republics}\textsuperscript{120} was the first ATCA case in
which a court found an exception to sovereign immunity. In \textit{Von Dardel}, suit
was brought on behalf of Raoul Wallenberg, a Swedish diplomat, by his half-
brother Guy Von Dardel and his legal guardian Sven Hagstrom.\textsuperscript{121} The plaintiffs

\textsuperscript{114} Id. at 8. The court awarded Jose Siderman a total of $2,607,515.63 in damages. Lea Siderman
received an award of $100,000.00. \textit{Id.}

\textsuperscript{115} Order Vacating Judgment, \textit{supra} note 107, slip op. at 1–2. Absence of foreign sovereign immunity
is a jurisdictional prerequisite for a valid judgment. \textit{See} \textit{Verlinden B.V. v. Central Bank of Nigeria},

\textsuperscript{116} Order Vacating Judgment, \textit{supra} note 107, at 4.

\textsuperscript{117} \textit{Id.} at 2–3.

\textsuperscript{118} \textit{Id.} at 3.

\textsuperscript{119} \textit{Id.} at 5–4. According to the \textit{Siderman} court, the "only arguable exception" to immunity in that
case was that an international agreement might remove immunity under FSIA \textsection{}1604. \textit{Id.} The court
found that the agreements cited by the Sidermans did not waive immunity. \textit{Id.} As a result, the court
ordered its previous default judgment vacated. \textit{Id.} at 4.


\textsuperscript{121} \textit{Id.} at 248. Wallenberg was attached to the Swedish diplomatic corps in Budapest during World
War II. \textit{Id.} His station there resulted from a U.S. request that Sweden assist in saving from the Nazis
those Jews then residing in Hungary. \textit{Id.} As a neutral nation, Sweden maintained a diplomatic presence
in Hungary, and therefore could exert efforts in achieving that end which were foreclosed to the
United States. \textit{Id.}

During the six months between Wallenberg's arrival in Budapest and his arrest by the Soviets, he
saved nearly one hundred thousand Jews. \textit{Id.} at 249. He printed and issued thousands of Swedish
passports, purchased or rented scores of houses in Budapest to be used as "safe houses" for refugees,
and literally pulled people off concentration camp deportation trains. \textit{Id.} (quoting \textit{S. REP. NO. 97-169,}
97th Cong. 1st Sess. at 2 (1981)). Wallenberg repeatedly risked his own life taking these actions. As a
alleged that Wallenberg has suffered imprisonment and possibly death since his arrest in Hungary in 1945 by Soviet representatives.  

The plaintiffs contended that the offenses alleged, wrongful imprisonment and wrongful death, were "tort[s] ... committed in violation of the Law of Nations or a treaty of the United States." Because these torts violated Wallenberg's diplomatic immunity, the plaintiffs asserted subject matter jurisdiction under the ATCA. In addition, they asserted both personal and subject matter jurisdiction under the FSIA.

In finding the FSIA's general grant of sovereign immunity inapplicable to the U.S.S.R., the Von Dardel decision suggests several theoretical bases for overcoming the foreign sovereign immunity defense. First, Judge Barrington Parker found in Von Dardel that, because the FSIA incorporates the rules of customary international law, states are not immune for acts committed in clear violation of the law of nations. Second, the court reasoned that, because the FSIA is limited by treaties to which the United States was a party at the time of its enactment, no immunity is accorded to acts which allegedly violate those treaties. Third, the court found that the U.S.S.R. had implicitly waived immunity under the FSIA by being party to those same treaties. For these reasons, the court entered a default judgment in plaintiffs' favor.

result of this heroism Wallenberg became, in 1981, the second person (Winston Churchill being the first) to be voted by Congress an honorary United States Citizen. After the U.S.S.R. conquered Hungary in 1945, the Soviet occupation forces arrested Wallenberg despite his full entitlement to diplomatic immunity. In 1957, a note to the Swedish embassy in Moscow from Soviet Deputy Foreign Minister Andrei Gromyko acknowledged that Wallenberg had indeed been imprisoned by the U.S.S.R. Gromyko asserted that Wallenberg had died in prison of natural causes in 1947. Furthermore, Gromyko blamed Wallenberg's imprisonment on "criminal activity" by Viktor Abakumov, former Soviet Minister of State Security, who had been executed by the U.S.S.R. in 1953. Nevertheless, between 1954 and 1981, a series of reports from former Soviet Prisoners suggested that Wallenberg was in fact alive well after 1947.

122 Id. at 248.
123 Id. at 250. For discussions of Von Dardel's interpretation of the ATCA, see Comment, Alien Tort Claims in the 1980's: Von Dardel v. Union of Soviet Socialist Republics, 12 BROOKLYN J. INT'L L. 469 (1986); Recent Development, 26 VA. J. INT'L L. 785 (1986).
124 Id. Von Dardel was a particularly good test case for litigating FSIA problems in human rights cases. Even the least expansive interpretation of the ATCA, that adopted by Judge Bork in Tel-Oren, would allow jurisdiction under the ATCA for "[v]iolation of safe-conducts" or "[i]nfringement of the rights of embassadors [sic]." 726 F.2d 774, 813–16 (D.C. Cir. 1984) (Bork, J., concurring). Thus, there was little chance of a court barring Von Dardel's claim for lack of ATCA jurisdiction and consequently not reaching the FSIA issue.
125 623 F. Supp. at 250.
126 Id. at 254.
127 Id. at 255. The Von Dardel court specifically found that the Soviet Union had violated the 1961 Vienna Convention on Diplomatic Relations and the 1973 Convention on Internationally Protected Persons, agreements to which both the United States and U.S.S.R. were party. Id.
128 Id. at 256.
129 Id. at 263. The U.S.S.R. declined to answer the complaint, its only response being a diplomatic letter asserting its absolute immunity from suit. Id. at 250.
III. Analysis

The Von Dardel decision was, at the very least, contrary to the disposition of similar issues in Siderman. While it is yet unclear whether Von Dardel will prove a workable model for resolving future sovereign immunity issues in ATCA cases, the approach used by the Von Dardel court merits closer examination in light of the FSIA's legislative and judicial history.

The Von Dardel opinion suggests three novel approaches to the problem of sovereign immunity in ATCA or other human rights claims. First, it asserts that a sovereign may waive immunity by signing international human rights agreements. Second, Von Dardel held that an exception to sovereign immunity exists where the purposes of U.S. treaties in force in 1976 would be frustrated by a grant of immunity. Finally, Judge Parker held that the incorporation into the FSIA of customary international law removes immunity where a violation of international law is alleged. The following section of this Comment will examine these theories in light of the legislative and judicial history of the FSIA.

A. Waiver of Immunity Under § 1605(a)(1)

Section 1605(a)(1) of the FSIA provides that a sovereign may waive its immunity from suit in the United States either explicitly or by implication. In Von Dardel, Judge Parker noted that U.S. courts had “not yet fully explored” the notion that by signing an international agreement, a sovereign waives its immunity for claims alleged to arise under that agreement. Indeed, some cases construing § 1605(a)(1) had expressly rejected this theory.

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130 The Siderman case is discussed supra, text accompanying notes 107–19.
131 No appeal has yet been filed in this case, nor has there been any attempt to execute upon the judgment.
132 623 F. Supp. at 256.
133 The year Congress enacted the Foreign Sovereign Immunities Act. FSIA § 1604 preserves the effectiveness of immunity waivers contained in such treaties. See discussion infra, text accompanying notes 182–236.
135 Id. at 254.
136 28 U.S.C. § 1605(a)(1) states:
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, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.
137 623 F. Supp. at 255.
138 At the time Von Dardel was decided, no U.S. court had adopted the waiver interpretation suggested by Judge Parker. Moreover, the case of Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370 (7th Cir. 1985), had explicitly rejected finding a waiver of immunity in similar human rights agreements. Id. at 378. Similarly, the Court in Siderman had at least implicitly rejected the rationale later approved by Von Dardel. See Order Vacating Judgment, supra note 107, at 4.
Nevertheless, the Von Dardel court, relying primarily upon the opinions of commentators\textsuperscript{139} and the original order regarding jurisdiction in Siderman\textsuperscript{140} concluded that, by signing several international agreements concerning diplomatic immunity,\textsuperscript{141} the Soviet Union impliedly waived sovereign immunity respecting alleged violations of those agreements.\textsuperscript{142} "Any other result," warned Judge Parker, "would rob each of those agreements of substantive effect, and would render meaningless the act of the Soviet Union in signing them."\textsuperscript{143}

The legislative history of the FSIA is of little assistance in clarifying the meaning of implied waiver in human rights cases. The House Report accompanying the Act,\textsuperscript{144} however, suggests a waiver might exist when a foreign state has (1) agreed to arbitration in a foreign country;\textsuperscript{145} (2) agreed that the law of a particular country governs a contract;\textsuperscript{146} or (3) filed a responsive pleading in an action without raising sovereign immunity.\textsuperscript{147}

These exceptions appear to have been intended to apply in commercial litigation rather than human rights actions\textsuperscript{148} and most of the cases construing § 1605(a)(1) have been commercial disputes.\textsuperscript{149} Nevertheless, one recent non-ATCA human rights case has applied § 1605(a)(1) to a claim nearly identical to that in Von Dardel, though with a contrary result.\textsuperscript{150}

In Frolova \textit{v. Union of Soviet Socialist Republics},\textsuperscript{151} the American wife of a Soviet citizen charged the U.S.S.R. with illegally detaining her husband.\textsuperscript{152} The plaintiff


\textsuperscript{140} It is unclear why Judge Parker did not address the Order Vacating Judgment, supra note 107, in his opinion.

\textsuperscript{141} The agreements relied upon in Von Dardel are cited supra at note 127.

\textsuperscript{142} 623 F. Supp. at 256.

\textsuperscript{143} Id.

\textsuperscript{144} House Report, supra note 5, at 6617.

\textsuperscript{145} Id. [hereinafter "waiver by arbitration clause."]

\textsuperscript{146} Id. [hereinafter "waiver by choice of law clause."]

\textsuperscript{147} Id. [hereinafter "waiver by responsive pleading."]

\textsuperscript{148} The Von Dardel court itself noted that "Congress' primary concern [in enacting the FSIA] was to codify jurisdictional standards relating to the burgeoning area of commercial litigation against foreign governments." 623 F. Supp. at 254 n.8. See also supra note 21 and accompanying text.


\textsuperscript{150} Frolova, 761 F.2d 370 (7th Cir. 1985).

\textsuperscript{151} Id.

\textsuperscript{152} Id. at 371. Frolova apparently claimed that her causes of action arose under the U.N. Charter and the Helsinki Accords, \textit{id.} at 373, as well as under common law. \textit{Id.} at 371.
alleged that, by signing the U.N. Charter and the Helsinki Accords, the U.S.S.R. had waived its sovereign immunity with respect to claims involving violations of those two agreements.\textsuperscript{153} The plaintiff therefore asserted jurisdiction under FSIA § 1605(a)(1).\textsuperscript{154}

The \textit{Frolova} court rejected the plaintiff's arguments and declined to infer waiver.\textsuperscript{155} The court examined commercial cases in which plaintiffs alleged implied waiver either by contractual provision or treaty, and found that the implied waiver provision was to be narrowly construed.\textsuperscript{156} Turning to the treaties cited by the plaintiff, the \textit{Frolova} court declined to find an intentional and knowing relinquishment of immunity by the defendant.\textsuperscript{157} According to the court, there was "absolutely no evidence from the language, structure or history of the agreements . . . that implies a waiver" by the U.S.S.R.\textsuperscript{158} Moreover, because the agreements did not relate to adjudication,\textsuperscript{159} the \textit{Frolova} court concluded that the nations which signed them did not anticipate that the documents' provisions would be enforced by U.S. courts.\textsuperscript{160}

Although \textit{Frolova} was the leading pre-\textit{Von Dardel} human rights case interpreting § 1605(a)(1)'s implied waiver provision, the issue of implied waiver had often been addressed in commercial cases. Holdings of implied waiver in such cases have been limited to the three situations suggested by the FSIA's legislative history: (1) waiver by arbitration clause, (2) waiver by choice of law clause and (3) waiver by responsive pleading.\textsuperscript{161}

\textsuperscript{153} \textit{Id.} at 373–78. The plaintiff also claimed jurisdiction under § 1605(a)(5) of the FSIA. \textit{Id.} at 379.

\textsuperscript{154} \textit{Id.} at 376.

\textsuperscript{155} \textit{Id.} at 378.

\textsuperscript{156} \textit{Id.} at 377.

\textsuperscript{157} \textit{Id.} at 378.

\textsuperscript{158} \textit{Id.}

\textsuperscript{159} \textit{Id.} The \textit{Frolova} court noted that there was no "reason to conclude that the . . . parties to these agreements anticipated when signing them that American courts would be the means by which the documents' provisions would be enforced." \textit{Id. See also} Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056, 1058 (E.D.N.Y. 1979). In \textit{Harris}, the court noted that "the [FSIA's] legislative history suggests that . . . implicit waivers are reflected in actions relating to adjudication" and cited the three examples of implied waiver by arbitration clause, choice of law clause and failure to make responsive pleading. \textit{Id.}

\textsuperscript{160} \textit{Frolova}, 761 F.2d at 378.

\textsuperscript{161} \textit{Id.} at 377. \textit{See also} Zernicek v. Petroleos Mexicanos (PEMEX), 614 F. Supp. 407, 411 (S.D. Tex. 1985) ("[s]ince the FSIA became law, courts have been reluctant to stray beyond [the three cited] examples when considering claims that a nation has implicitly waived its defense of sovereign immunity"). It should also be noted that a § 1605(a)(1) waiver, if by treaty, may overlap to some extent with § 1604's "subject to" exception. \textit{See Frolova}, 761 F.2d at 376 n.9. The distinction between the two is that § 1605(a)(1) waiver by treaty applies where the sovereign defendant has signed the agreement, while § 1604's "subject to" exception applies only to those agreements to which the United States was party in 1976 (the year of the FSIA's enactment). For a discussion of cases involving § 1604, see infra text accompanying notes 182–236.
Generally, an agreement to arbitrate, standing alone, is sufficient implicitly to
waive immunity.162 This has been held true even where the agreement specifies
a country other than the United States as a preferred forum for arbitration,163
an interpretation consistent with the FSIA's legislative history.164 A majority of
courts, however, have declined to recognize an implied waiver by arbitration
clause unless the agreement suggests that the United States is at least contem-
plated as a forum.165

The implied waiver by choice of law clause has been interpreted in similar
fashion. Thus, although an agreement to abide by the law of another country
has been held to waive immunity even where that country is not the United
States,166 the preferred view appears to be that U.S. law must be specified for
waiver to be inferred from a choice of law clause.167

162 Birch Shipping Corp. v. Embassy of United Republic of Tanzania, 507 F. Supp. 311, 312 (D.D.C.
1175 (D.D.C. 1980), in which the court found implied waiver by arbitration clause where the sovereign
agreed that arbitration should occur at a place specified either by the parties or by the arbitrators. Id.
at 1178. The court held this language sufficiently broad to imply consent to adjudication of disputes
in the United States. Id.

provision agreeing to submit all disputes to arbitration in Switzerland sufficiently broad to waive by
implication defendant's sovereign immunity in the United States). Id. at 826. This decision is particu-
larly significant because it apparently did not require that the United States be contemplated as a
possible site of arbitration in order to infer waiver. Instead, the Ipitrade holding suggests that immunity
is impliedly waived whenever a sovereign submits to adjudication of disputes in another forum. This
view seems to be the minority approach, however; several cases in which the court declined to find
waiver in similar situations are cited infra at note 165.

164 House Report, supra note 5, at 6617.

165 Frolova, 761 F.2d at 577. See, e.g., Maritime Int'l Nominees Establishment v. Republic of Guinea,
693 F.2d 1094 (D.C. Cir. 1982), cert. denied, 464 U.S. 815 (1983) (agreement to submit future disputes
to arbitration before the Int'l Center for Settlement of Investment Disputes does not waive sovereign's
(agreement to have disputes settled by Paris Int'l Court does not waive immunity in United States);
Chicago Bridge and Iron Co. v. Islamic Republic of Iran, 506 F. Supp. 981 (N.D. Ill. 1980) (immunity
not waived where arbitration clause does not expressly contemplate United States as forum).

agreement to adjudicate contractual disputes under Swiss law and to submit to arbitration by the Int'l
Chamber of Commerce waived its immunity under the FSIA).

have refused to find an implicit waiver of immunity to suit in American courts from a contract clause
providing for arbitration in a country other than the United States"). See also Ohntrup v. Firearms
Center, Inc., 576 F. Supp. 1281 (E.D. Pa. 1981), in which the court stated:

[A] waiver of immunity by a state as to one jurisdiction cannot be interpreted to be a waiver
as to all jurisdictions . . . . While it is reasonable to conclude that an agreement by a foreign
country to either arbitrate disputes in or be governed by the laws of the United States
constitutes an implicit waiver by that state of the defense of sovereign immunity in the courts
of the United States, it is much more difficult to infer such a waiver from the agreement of
a foreign state to submit itself, in the same manner, to the jurisdiction of a state other than
the United States.

Id. at 1285.
Failure to assert immunity as a defense in a responsive pleading is an unlikely basis for implying waiver in ATCA litigation, as most nations can be expected routinely to invoke the FSIA's protection. Moreover, the few cases addressing this issue evidence a judicial reluctance to infer waiver from a sovereign defendant's behavior. Although some courts would allow greater judicial latitude in inferring waiver, implied waiver by responsive pleading is generally difficult to establish.

Thus, the general principle of construction of § 1605(a)(1) in commercial cases is that implied waiver of sovereign immunity should not readily be inferred. Because a waiver must be an intentional and knowing relinquishment of the legal right of immunity, implicit waivers must be reflected in actions relating to adjudication, and thus should not be inferred from unrelated actions.

In conclusion, the legislative history of the FSIA strongly suggests that Congress intended § 1605(a)(1)'s implied waiver provision to govern decisions on immunity in commercial disputes. The three examples of implied waiver

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168 As one commentator has stated:

[It is difficult to think of a state not ... asserting the [doctrine] of immunity ... If a state is really involved in a denial of human rights, it would be naive to think that it will not attempt to defeat the jurisdiction of the United States courts under [this] well-recognized [principle] of international law.

Hassan, supra note 79, at 19.

In addition, many sovereign defendants will simply choose not to appear in court. See infra note 293.


170 See, e.g., Canadian Overseas Ores, Ltd. v. Compania de Acero del Pacifico, S.A., 727 F.2d 274 (2d Cir. 1984), in which it was recognized that the district judge had discretion to infer waiver, even though he chose not to do so. Id. at 278.

171 See supra note 169.

172 See, e.g., Transamerican S.S. Corp. v. Somali Democratic Republic, 590 F. Supp. 968 (D.D.C. 1984), and Paterson, Zochonis (U.K.) Ltd. v. Compania United Arrow, S.A., 493 F. Supp. 621 (S.D.N.Y. 1980), two cases involving boilerplate provisions in shipping contracts. In Transamerican, the foreign sovereign accepted a bill of lading that stated that its provisions were to be construed pursuant to U.S. maritime law. The court refused to infer waiver from this action of the foreign state and dismissed the case. Transamerican, 590 F. Supp. at 974. In Paterson, U.S. law required the sovereign to designate a U.S. agent for service of process pursuant to the federal Water Pollution Control Act. Additionally, the Paterson defendant accepted a bill of lading providing that all disputes arising under the bill be litigated in New York. As in Transamerican, the court found the sovereign's actions in Paterson insufficient to waive immunity. Paterson, 493 F. Supp. at 624-25.


175 See, e.g., Zernick v. Petroleos Mexicanos (PEMEX), 614 F. Supp. 407 (S.D. Tex. 1985), in which no implied waiver was found where the sovereign defendant allowed its contractor freedom to sub-contract and the subcontract contained an agreement that U.S. law would govern all disputes.

176 See supra note 148.
suggested by the legislative history, waiver by arbitration clause, choice of law clause or responsive pleading, seem unlikely to arise in a human rights context. Additionally, courts have been reluctant to interpret § 1605(a)(1) expansively. In *Frolova v. U.S.S.R.*, a recent human rights case, the court refused to infer waiver in a situation similar to *Von Dardel*. Courts in commercial cases have likewise hesitated to read § 1605(a)(1) broadly. *Von Dardel* consequently stands alone in finding that international agreements waive sovereign immunity for alleged violations of the rights they guarantee.

B. The “Subject To” Exception to Immunity Under § 1604

In Section 1604 of the FSIA the general immunity granted to foreign states is limited by existing international agreements to which the United States was a party in 1976 when Congress enacted the FSIA. In *Von Dardel*, the court interpreted § 1604’s “subject to” provision more broadly than suggested by the legislative history. Legislative history indicates that Congress included this language merely to preserve then-existing waivers of immunity in U.S. treaties or other international agreements. According to the *Von Dardel* court, the “subject to” provision did not refer to existing waivers of immunity alone. Instead, it suggested, this language required that the FSIA not be applied where it would frustrate the purpose of any international agreement to which the United States was party.

Judge Parker found two such agreements controlling in *Von Dardel*: the 1961 Vienna Convention on Diplomatic Relations and the 1973 Convention on Internationally Protected Persons.

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177 For a discussion of cases construing implied waiver by arbitration clause, choice of law clause and responsive pleading, see supra notes 162–71 and accompanying text.
178 For a discussion of commercial cases construing this statute, see supra notes 162, 163, 167, 170, 172 and 175.
179 761 F.2d 370 (7th Cir. 1985).
181 For a discussion of commercial cases construing § 1605(a)(1), see supra notes 162–71 and accompanying text.
183 Section 1604 of the FSIA provides:
Subject to existing international agreements to which the United States is party at the time of enactment of this Act [October 21, 1976] 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 [28 U.S.C. §§ 1605, 1607].
184 For a discussion of commercial cases construing § 1604, see supra notes 162–71 and accompanying text.
185 House Report, supra note 5, at 6608, 6616. The legislative history of § 1604 is discussed infra, text accompanying notes 192–96.
187 Id.
ternationally Protected Persons. Finding that these agreements were designed to protect diplomats from offenses against them, Judge Parker reasoned that

[i]n order for the conventions to operate effectively, the perpetrators of such offenses must be subject to liability for their acts. To the extent that the FSIA would shield the Soviet Union from such liability, it is in conflict with the terms of the conventions and thwarts their effective operation.

Judge Parker concluded that immunity under the FSIA must be limited in order to avoid such a result. He therefore denied the Soviet Union immunity.

The legislative history of the FSIA suggests, however, that the “subject to” provision was intended simply to ensure the continued vitality of then-existing immunity waivers. According to the House Report, immunity waivers contained in such agreements would control only where they “expressly conflict” with a provision of the FSIA. This “express conflict” condition may most reasonably be construed to require the agreement in question to concern sovereign immunity; if not, any conflict would necessarily be by implication only.

This interpretation is supported by Congress’ citation of treaties “containing provisions relating to the immunity of foreign states” as the types of agreements contemplated by § 1604. The House Report states that “to the extent such international agreements are silent on a question of immunity, the [FSIA] would control; the international agreement would control only where a conflict was manifest.” Although the Von Dardel court expressly rejects limiting § 1604 to this role, this view is contrary to the majority of cases construing this provision.

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187 Id. at 255.
188 Id.
189 Id.
190 Id.
191 Id.
192 House Report, supra note 5, at 6608, 6616.
193 Id. at 6616.
194 This “conflict by implication” is, of course, the very interpretation of § 1604’s language accepted by the Von Dardel court. See supra text accompanying notes 186–89.
195 House Report, supra note 5, at 6616.
196 Id.
197 623 F. Supp. at 255 n.10 The Von Dardel court acknowledged that “[t]he House Report would limit the immunity of a foreign state under the Act to cases of an express or manifest conflict between the provisions of the Act and those of an international agreement or treaty.” Id. The court nonetheless concluded that “[g]iven the clear and unambiguous language of the statute . . . resort to the legislative history is in this instance unnecessary for interpretive purposes.” Id. See also supra text accompanying notes 186–91.
198 See, e.g., Berkovitz v. Islamic Republic of Iran, 735 F.2d 329, 333 (9th Cir. 1984); Mashayekhi v. Iran, 515 F. Supp. 41 (D.D.C. 1981). In Berkovitz the court read the language of the Treaty of Amity
One possible exception to this general rule that § 1604's "subject to" provision refers only to treaties expressly concerning sovereign immunity is suggested by *Frolova v. U.S.S.R.* Although the issue was not addressed in *Von Dardel*, the *Frolova* opinion implies that a U.S. treaty may divest a sovereign of immunity under § 1604 if it is self-executing.

A self-executing treaty is one which imposes substantive obligations upon its signatories without the need of implementing legislation. If a self-executing treaty concerns human rights, these rights would inhere directly in the individual, and a victim of human rights violations could presumably sue directly upon his rights under the treaty.

In *Frolova*, the U.S. plaintiff sued the U.S.S.R., alleging that its refusal to allow her Soviet husband to emigrate was a violation of international law. She argued that Articles 55 and 56 of the U.N. Charter as well as certain provisions of the Helsinki Accords stripped the U.S.S.R. of its sovereign immunity in any claim alleging a violation of those agreements.

The *Frolova* court found no exception to immunity under § 1604, basing its decision on findings that the agreements relied upon by the plaintiff were "not self-executing." Because the agreements did "not create rights enforceable by private litigants in American courts," they could not divest a sovereign of its immunity.

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between the United States and Iran literally in holding that Iran's waiver under the treaty extended only to enterprises of Iran, and not to Iran itself. 735 F.2d at 333. Similarly, in *Mashayekhi* the court limited application of the treaty's waiver to agencies and instrumentalities of Iran engaged in commerce. 515 F. Supp. at 43. But see *Behring Int'l Inc. v. Imperial Iranian Air Force*, 475 F. Supp. 383 (D.N.J. 1979). In *Behring*, a similar "subject to" provision in FSIA § 1609 regarding attachment was broadly read so as to allow prejudgment attachment in the absence of the explicit waiver usually required. *Id.* at 395.

199 761 F.2d 370 (7th Cir. 1985).
200 *Id.* at 373–76. See infra text accompanying notes 202–16.
201 Non-self-executing treaties, by comparison, merely express the signatories' approval of the agreements' terms and their willingness to promulgate implementing legislation. Absent ratification, however, a non-self-executing treaty creates no enforceable rights. *See, e.g.*, *D'Amato*, supra note 2, at 97–98.

202 761 F.2d 370, 371–72 (7th Cir. 1985).
203 *Id.* at 373–75. Article 55 of the Charter provides:

> With a view to the creation of conditions of stability and well being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

Article 56 provides:

> All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

U.N. CHARTER arts. 55, 56.

204 761 F.2d at 372.
205 *Id.* at 375.
206 *Id.* at 373–76. *See also* *Handel v. Artukovic*, 601 F. Supp. 1421 (C.D. Cal. 1985), which found the
The court nevertheless implied that, had the treaties in question been self-executing, they would indeed have stripped the U.S.S.R. of its immunity in that case. Such an interpretation offers qualified support for Von Dardel's view that § 1604's "subject to" provision should be construed more expansively than it previously had been.

In determining whether a treaty is self-executing, courts will consider several factors, among them:

1. the language and purposes of the agreement as a whole;
2. the circumstances surrounding its execution;
3. the nature of the obligations imposed by the agreement;
4. the availability and feasibility of alternative enforcement mechanisms;
5. the implications of permitting a private right of action; and
6. the capability of the judiciary to resolve the dispute.

Of course, if the parties' intent is clear from the treaty's language courts will not inquire into the remaining factors.

Application of these criteria to the 1961 Vienna Convention on Diplomatic Immunity and the 1973 Convention on Internationally Protected Persons, the two agreements cited by the Von Dardel plaintiffs, yields contrasting results.

The 1973 Convention appears not to be self-executing because its language implies that the agreement was not intended to create enforceable rights. Article 2 of the Convention provides that violations of its terms "shall be made by each State Party a crime under its internal law." The Convention therefore probably does not create enforceable rights, since a treaty providing that sig-


This rationale is implicit in the Frolova court's concentration on the self-execution issue in its discussion of § 1604. 761 F.2d 375–76. Additionally, the Frolova opinion states in a footnote that "if an international agreement is self executing [it] may therefore be the basis of an action under 1604." Id. at 376 n.9. Moreover, the note goes on to assert that a self-executing treaty "almost certainly waives sovereign immunity under § 1605(a)(1)." Id.

See supra text accompanying notes 185–91.

Frolova, 761 F.2d at 373.

In pertinent part, Article 2 provides that:
1. The intentional commission of:
   (a) A murder, kidnapping or other attack upon the person or liberty of an internationally protected person;
   (b) A violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty;
   (c) A threat to commit any such attack;
   (d) An attempt to commit any such attack; and
   (e) An act constituting participation as an accomplice in any such attack shall be made by each State Party a crime under its internal law.
2. Each State Party shall make these crimes punishable by appropriate penalties which take into account their grave nature.

natories are to take measures through their own laws to enforce its provisions is by its own terms non-self-executing.211

The 1961 Vienna Convention,212 however, is more likely to be interpreted as self-executing. Its language suggests that the rights it enumerates are intended to inhere directly in individuals213 without implementing legislation.214 In addition, the Vienna Convention states that its guaranteed rights may be waived only by the state sending the diplomat.215 This provision supports the interpretation that these rights were intended to be enforceable even absent implementing legislation. Finally, the historical recognition of diplomatic immunity under customary international law suggests that the Convention be viewed as merely codifying accepted principles of the law of nations.216 Accordingly, courts could resolve disputes under the terms of the Convention with little fear of unduly disturbing or overturning established principles of international law.

Thus, if the Vienna Convention is found to be self-executing, Frolova implies that it may properly divest signatories of immunity in cases like Von Dardel.217 In this respect, however, Frolova reads § 1604 more expansively than other cases construing this statute. In Chicago Bridge & Iron Company v. Islamic Republic of Iran,218 for example, the plaintiffs brought suit against the Republic of Iran and seven Iranian-controlled corporations alleging breach of contract, lost profits, conversion and expropriation of funds.219 The court rejected the plaintiffs' theory that the Treaty of Amity between the United States and Iran waived

211 Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring).
213 Article 29 of the Vienna Convention states that "[t]he person of a diplomatic agent shall be inviolable." Id. at art. 29.
214 Id. at art. 39(1).
215 Id. at art. 32(1).
216 "The law [of diplomatic relations] has now been codified to a considerable extent in the Vienna Convention." I. BROWNLIE, supra note 10, at 333.
217 It is not entirely clear whether § 1604 requires the sovereign defendant to have been a party to the applicable agreement. The statutory language merely provides that a foreign state's immunity is "subject to existing international agreements to which the United States is party at the time of [the FSIA's enactment in 1976]." 28 U.S.C. § 1604 (1976) (emphasis added). A strict interpretation of this provision would not seem to require that the sovereign defendant have been a party to the agreement in question for § 1604 to apply. This approach, when combined with Von Dardel's expansive reading of § 1604's immunity exception, would divest a state of immunity for any violation of a pre-1976 U.S. treaty even though that state had never signed the agreement.
219 Id. at 982.
Iran’s immunity.\(^\text{220}\) In reaching this conclusion, the court cited its “substantial doubt” whether the Treaty’s waiver of immunity covered acts of Iran within its own borders.\(^\text{221}\) The court also found it significant that, when the Treaty was signed, U.S. law required a plaintiff to demonstrate an independent basis for personal jurisdiction aside from any waiver of sovereign immunity.\(^\text{222}\) It therefore found “no basis for assuming that the contracting parties to the Treaty, by their silence, intended to consent to personal jurisdiction.”\(^\text{223}\)

The court in *In the Matter of Rio Grande Transport, Inc.*\(^\text{224}\) displayed a similar disinclination to construe § 1604 expansively. In a maritime dispute, the *Rio Grande* plaintiffs argued that the 1958 Geneva Convention on the High Seas\(^\text{225}\) created an exception to immunity under § 1604.\(^\text{226}\) Although Article 9 of that Convention provides for the absolute immunity from suit of government-owned ships engaged in non-commercial activity,\(^\text{227}\) the Convention was silent as to the immunity of government-owned ships engaged in commercial service.\(^\text{228}\) The plaintiffs contended that the Convention waived immunity in such situations, relying on the United States’ express objection to a contrary interpretation when it signed that document.\(^\text{229}\) The court rejected this logic, finding that “objections by the United States to the position of other signatories can hardly be considered part of an international agreement.”\(^\text{230}\)

Thus, most cases construing § 1604’s “subject to” provision would restrict its function to simply preserving waivers of sovereign immunity in force at the time of the FSIA’s enactment.\(^\text{231}\) Nevertheless, the broader reading adopted by Judge Parker in *Von Dardel* is not entirely without support in the case law. The case of *Frolova v. U.S.S.R.*\(^\text{232}\) suggests that a self-executing treaty may operate to waive sovereign immunity respecting violations of its terms.\(^\text{233}\) Although the

\(^{220}\) Id. at 987.

\(^{221}\) Id. at 984.

\(^{222}\) Id. at 985. In contrast, under present law (FSIA §§ 1330, 1605(a)(1)) waiver of immunity establishes both personal and subject matter jurisdiction. See supra note 54.

\(^{223}\) 506 F. Supp. at 985. As a long-arm statute, the FSIA is subject to the jurisdictional due process requirements of International Shoe Co. v. Washington, 326 U.S. 310 (1945) and its progeny. House Report, supra note 5, at 6612.


\(^{226}\) 516 F. Supp. at 1160.

\(^{227}\) High Seas Convention, supra note 225, at art. 9.

\(^{228}\) Id., passim.

\(^{229}\) Id., 450 U.N.T.S. at 167. The Soviet bloc signed the agreement subject to the reservation that immunity be extended to commercial as well as noncommercial service. The United States signed with an express objection to this reservation. Id.

\(^{230}\) 516 F. Supp. at 1160 (emphasis in original).

\(^{231}\) See supra note 198 and accompanying text.

\(^{232}\) 761 F.2d 370 (7th Cir. 1985).

\(^{233}\) Id. at 376 n.9. See also supra text accompanying notes 204–08.
Von Dardel court did not address this issue, it seems possible that at least one of the two treaties relied upon by the Von Dardel plaintiffs, the 1961 Vienna Convention on Diplomatic Immunity, is self-executing.234 The holding in Von Dardel is therefore not entirely without precedent. It should be noted, however, that this expansive reading of § 1604 conflicts with the narrower interpretation of that statute suggested by its legislative history235 and other case law.236

C. Incorporation of Customary International Law: An Exception to Sovereign Immunity?

The Von Dardel court reasoned that, because the FSIA must incorporate prevailing standards of international law, immunity does not extend to acts which violate those standards.237 In Von Dardel, Judge Parker held that because the FSIA should be interpreted in such a way as to be consistent with the law of nations,238 the statute should be read not to extend immunity to clear violations of universally recognized principles of international law.239 The implications of this “incorporation” theory are extremely significant. Such reasoning, if adopted, would ensure that any claim that could be brought under the ATCA would now be allowable under the FSIA.240 The reasoning of Von Dardel therefore should be closely scrutinized.

While the incorporation theory rests upon Congress’ express intent that the FSIA reflect existing standards of international law,241 Judge Parker interprets this to mean that no immunity applies to alleged violations of international

234 See supra text accompanying note 209 for a list of factors which courts will consider in determining whether a treaty is self-executing.  
235 See supra text accompanying notes 192–96.  
236 See supra text accompanying notes 218–30.  
238 Id. at 253.  
239 Id. at 254. This would also apply to any treaty of the United States if self-executing or implemented by legislation:  
   The purpose for including the reference [to future international agreements in a previous version of the “subject to” clause] was to take into account the possibility that sovereign immunity might become the subject of an international convention. Such a convention would, under Article VI of the constitution, take precedence, whether or not the bill was made expressly subject to a future international agreement.  
House Report, supra note 5, at 6608.  
240 Under Von Dardel, the FSIA would establish subject matter jurisdiction in U.S. courts over any suit in which a foreign state or its agency is charged with a violation of international law. Von Dardel, 623 F. Supp. at 254. The FSIA would therefore establish U.S. jurisdiction over any claim which could currently be brought under the ATCA—specifically, those suits alleging “tort[s] . . . committed in violation of the law of nations.” 28 U.S.C. § 1350 (1982). Von Dardel’s interpretation of the FSIA thus would render the ATCA almost completely superfluous as a jurisdictional tool.  
law. Von Dardel cites the principle of universal jurisdiction over certain violations of international law as one of the standards incorporated into the FSIA and concludes that incorporation of such standards into the FSIA waives immunity for any violation of international law. It is not at all apparent, however, that Von Dardel fairly characterizes Congress' intent.

The House Report on the FSIA indeed states that Congress intended the Act to reflect existing standards of international law. The context of this statement regarding incorporation of international legal standards strongly suggests, however, that Congress was referring solely to international principles of sovereign immunity. For example, the House Report indicates that the FSIA is intended to codify the "restrictive" principle of sovereign immunity as presently recognized in international law. Von Dardel cites no authority to the effect that the restrictive principle, as recognized in 1976, provided for automatic waiver of sovereign immunity in cases alleging a breach of an internationally recognized duty.

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243 Id. The principle of universal jurisdiction is a rule of international law categorizing certain types of conduct which any sovereign may legitimately regulate. The definition of the term quoted in Von Dardel states that "[a] state may exercise jurisdiction to define and punish certain offenses recognized by the community of nations as of universal concern." Restatement of Foreign Relations Law of the United States, (Revised) § 404 (Tent. Draft No. 2, 1981). Another authority states that principles of universal jurisdiction "determine under what circumstances and to what extent a state may participate in the repression of the particular crime" in question. J. Sweeney, C. Oliver & N. Leech, Cases & Materials on The Int'l Legal System 121 (2d ed. 1981) [hereinafter Sweeney]. Among the offenses which are recognized subjects of universal jurisdiction are genocide, hijacking, slave trade, and acts of violence against diplomats. Id.
244 Von Dardel, 623 F. Supp. at 254.
245 Id.
246 House Report, supra note 5, at 6613.
247 Id. After noting that "decisions of claims by foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime which incorporates standards recognized under international law," the House Report devotes a paragraph to a discussion of international standards of sovereign immunity, and nowhere mentions or implies a general incorporation of all rules of international law. Id.
248 House Report, supra note 5, at 6605.
249 In 1976, when Congress enacted the FSIA, the major sovereign immunity controversy was whether a state's traditional immunity for commercial acts should be abolished. See, e.g., House Report, supra note 5, at 6605; I. Brownlie, supra note 10, at 319–27; G. von Glahn, Law Among Nations: An Introduction to Public Int'l Law 147 (2d ed. 1976). Even after 1976, authorities focused on the commercial/public distinction as the major point of controversy in the international law of sovereign immunity. See generally G. Badr, supra note 10. See also G. von Glahn, supra note 37, at 142–48. None of these authorities even addressed the issue of whether immunity should be denied for any act in violation of international law.

Notably, even such a well-known advocate of international human rights as Sir Hersch Lauterpacht did not support so great a diminution of sovereign immunity in the name of human rights as advised by Von Dardel. Although arguing for a considerably restricted view of sovereign immunity, Lauterpacht acknowledged that:

there must be immunity from jurisdiction in respect of the executive and administrative acts of the foreign State within its territory, such as alleged . . . wrongful imprisonment . . . . In particular, no action should lie with regard to torts committed by foreign States and their
Although the Von Dardel court failed to cite any case or principle of international law directly supporting the incorporation theory, it did argue by analogy to similar cases. For example, the court quoted Justice White's dissent in Banco Nacional de Cuba v. Sabbatino for the proposition that sovereign power must be exercised consistently with rules of international law. It should be noted, however, that Justice White was referring to application of the Act of State Doctrine, a judicially created principle of abstention, rather than to the FSIA, a statute enacted by Congress.

The Von Dardel court also cited the case of Bernstein v. Nederlandsche-Amerikaansche Stoomvaart Maatschappij as supporting the "incorporation theory." Bernstein involved a claim that the Nazi government had wrongfully seized the plaintiff's property because he was Jewish. The District Court in Bernstein initially held that the case could not be heard because of the Act of State Doctrine, but the Court of Appeals reversed, holding that the case could be heard because of the incorporation theory of sovereign immunity. The Supreme Court of the United States affirmed the judgment of the Court of Appeals.


For another article supporting the meaning of Von Dardel, see Paust, supra note 249, at 220–42. It is surprising that the Von Dardel opinion does not cite Professor Paust's article, since it is an exhaustively documented argument against granting immunity to human rights violators. Drawing extensively upon the works of commentators and inferences drawn from U.S. court decisions, Professor Paust presents a persuasive argument for the view of sovereign immunity adopted by Von Dardel. Nevertheless, from 1976 when the FSIA was enacted to 1985, when Von Dardel was decided, no U.S. court had adopted Professor Paust's view of immunity. For discussion of cases rejecting the approach suggested by Professor Paust and followed in Von Dardel, see notes 151–60, 204–06, 266–80 and accompanying text.

161 Id. at 457 (White, J., dissenting).
162 The Act of State Doctrine is a common law principle counseling judges to refrain from considering a case if a decision on the merits would require judgment on the legality of a foreign act or its agent within that state's borders. J. Brownlie, supra note 10, at 494–95.
163 Sabbatino, 376 U.S. at 423. The Supreme Court has stated that the Act of State Doctrine merely "expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state" may unduly intrude upon the area of foreign policy. Id. The Doctrine does, however, have "constitutional underpinnings," id., although its application is "compelled by neither international law nor the Constitution." Id. at 427. It should also be noted that the merits of Justice White's position are still in dispute. See, e.g., First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 750 (1972). In First National, four justices on a divided court followed the Sabbatino majority; three, including Justice White, adopted the Sabbatino exception; one (Powell) followed White's dissent in Sabbatino; and Justice Douglas concurred on unrelated grounds.
164 210 F.2d 375 (2d Cir. 1954).
trine.\textsuperscript{257} Subsequently, however, the court reversed its holding of nonjusticiability.\textsuperscript{258} In doing so, the \textit{Bernstein} court relied upon a U.S. Department of State letter advising it that the Executive branch's policy was "to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials."\textsuperscript{259}

The \textit{Von Dardel} court's reliance on this case is problematic. \textit{Bernstein}, like \textit{Sabbatino}, involved the Act of State Doctrine, not sovereign immunity.\textsuperscript{260} In addition, the \textit{Bernstein} court had been advised by the State Department that the Act of State Doctrine need not be applied in deference to the Executive's jurisdiction over the conduct of foreign affairs.\textsuperscript{261} No such circumstances counseled judicial involvement in \textit{Von Dardel}. Rather, strong arguments may be made for noninterference by courts in international human rights disputes.\textsuperscript{262}

Another major difficulty with \textit{Von Dardel}'s "incorporation" theory is that, in FSIA § 1605(a)(3),\textsuperscript{263} Congress specifically included an exception to immunity in cases where property is expropriated in violation of international law.\textsuperscript{264} This clearly lessens the force of \textit{Von Dardel}'s logic, for if \textit{Von Dardel} is correct, § 1605(a)(3) becomes redundant. If all violations of international law waive immunity under the FSIA, as \textit{Von Dardel} asserts, it is unclear why Congress should specify any particular type of violation as effecting such a waiver. Had Congress truly intended that any alleged violation of international law operate to waive immunity, it would have had no reason to include FSIA § 1605(a)(3).\textsuperscript{265}

\footnotesize{\textsuperscript{257} Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (2d Cir. 1947).
\textsuperscript{258} Bernstein v. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954).
\textsuperscript{259} State Dept. Press Release, April 27, 1949, 20 DEP'T ST. BULL. 592.
\textsuperscript{260} 210 F.2d at 375.
\textsuperscript{261} Id. at 376.
\textsuperscript{262} See, e.g., Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 798–823 (D.C. Cir. 1984) (Bork, J., concurring); id. at 823–27 (Robb, J., concurring); Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985).
\textsuperscript{264} 28 U.S.C. § 1605(a)(3) reads:
A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case —
(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; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.
\textit{Id.}
\textsuperscript{265} It is unclear whether there are any offenses for which a foreign state could retain immunity after \textit{Von Dardel}. That decision implies a view of sovereign immunity so constricted as to be virtually nonexistent. In addition to the enumerated FSIA exceptions to immunity, a sovereign would be amenable to suit for any violation of customary international law, any act contrary to the provisions of a pre-1976 U.S. treaty or international agreement, and any acts in violation of an international agreement which it has signed. Presumably, a sovereign would retain immunity for violations of municipal law. It is difficult, however, to envision any such offense which could not be rendered
In addition, courts have consistently refused to assert jurisdiction in the face of arguments similar to those which prevailed in Von Dardel. In Berkovitz v. Islamic Republic of Iran266 the plaintiffs, the widow and children of a retired U.S. Air Force officer, alleged that his wrongful death was caused by the Iranian government and its agent, a revolutionary group.267 Among the plaintiffs’ arguments against sovereign immunity was the claim that the “private and unfriendly nature of political assassinations” should divest Iran of its immunity.268

The Berkovitz court rejected this argument. Although failing to address directly the issue of whether violations of international law deprive a nation of immunity under the FSIA, the Berkovitz opinion does support the broader proposition that the nature of an alleged tort is immaterial to jurisdictional analysis.269 Because none of the FSIA’s enumerated exceptions to immunity applied in Berkovitz, the court considered it irrelevant that the torts alleged in that case were of a “private and unfriendly nature.”270 By implication, it would be equally irrelevant were the acts complained of violations of international law. Because the FSIA “sets forth the sole and exclusive standards” for resolving questions of sovereign immunity in U.S. courts,271 a sovereign is immune for all acts not falling within an FSIA exception.272


266 735 F.2d 329 (9th Cir. 1984), cert. denied, 469 U.S. 1035 (1984).
267 Id. at 330. Kavin, the revolutionary group named as Iran’s agent, “distribut[ed] ... posters pointing out Berkovitz’s Jewish background, accusing him of spying and warning him or other Americans to leave Iran.” Id.
268 Id. at 331.
269 Id. This principle was reiterated by the court in Persinger v. Islamic Republic of Iran, 729 F.2d 835 (D.C. Cir. 1984). See infra text accompanying note 280.
270 Berkovitz, 735 F.2d at 331. By characterizing political assassination as a “private” act, the Berkovitz plaintiffs appeared to suggest that Iran’s actions fell under the rubric of acts jure gestionis (private acts), for which a sovereign is not immune under the restrictive theory of immunity.

It is true that the traditional restrictive doctrine of immunity distinguishes between acts jure gestionis, for which a sovereign is not immune, and acts jure imperii, for which nations retain immunity. House Report, supra note 5, at 6605. It is nonetheless clear that jure gestionis traditionally refers to commercial acts only. Id. Extending the concept of acts jure gestionis to embrace acts such as political assassinations is problematic for two reasons.

First, this interpretation of jure gestionis is inconsistent with the purpose of the FSIA, which was intended primarily to assist commercial plaintiffs in gaining jurisdiction over foreign states. See supra notes 11–15 and accompanying text.

Second, it is not at all apparent that there is anything inherently “private” about political assassinations. Admittedly, it is increasingly difficult to confine the effects of political violence to public figures, as evidenced by the increase in terrorist activities. The same could be said, however, of countless acts of a sovereign, such as acts of warfare, universally regarded as public. It is therefore difficult to envision how, absent a complete transformation of the law of sovereign immunity, the theory implied by the Berkovitz plaintiffs could be accepted as a rule of sovereign immunity in U.S. courts.

271 House Report, supra note 5, at 6610.
272 See Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 485 ("if none of the exceptions to
Persinger v. Islamic Republic of Iran addresses the “incorporation” issue more directly. Persinger arose out of the 1979 takeover of the U.S. Embassy in Tehran, Iran. The plaintiffs, a former hostage and his parents, alleged injuries suffered during the takeover resulting from actions of the Iranian government or its agents in violation of international law and various treaties. Although the plaintiffs’ primary basis for pleading jurisdiction under the FSIA was the non-commercial tort exception, they also argued that jurisdiction should lie because the attack on the Embassy was an international crime over which “every nation has jurisdiction to prescribe and enforce laws.”

Judge Bork, writing for the majority, dismissed this argument. Although conceding that the alleged actions of the Iranian defendants clearly violated international law, the Persinger court found this fact insufficient to overcome Iran’s assertion of immunity under the FSIA. According to Judge Bork, “neither the substantive basis of the tort, nor the seriousness of the crime, is relevant to the question of jurisdiction.”

Finally, one subsequently decided case has expressly rejected the “incorporation” theory relied upon in Von Dardel. In Amerada Hess Shipping Corp. v. Argentine Republic, a shipping company brought an ATCA claim for damages arising out of Argentina’s unprovoked attacks on the plaintiff’s cargo ship during the Falklands/Malvinas war. The Amerada Hess plaintiff based its argument against allowing Argentina sovereign immunity upon the “incorporation theory set forth in the [FSIA] applies, the District Court lacks both statutory subject matter jurisdiction and personal jurisdiction”).

274 Id. at 836–37.
275 28 U.S.C. § 1605(a)(5). Section 1605(a)(5) allows jurisdiction over a foreign state for noncommercial torts occurring in U.S. territory. The Persinger plaintiffs argued that, because the alleged injuries to Sergeant Persinger had occurred on U.S. embassy grounds, § 1605(a)(5) divested Iran of its immunity. Persinger, 729 F.2d at 839. Alternatively, Sergeant Persinger’s parents claimed that, because they suffered mental and emotional distress within the United States, § 1605(a)(5) should enable them to bring their claims. Id. at 842. The Persinger court rejected both arguments. Id. at 842–43.
277 729 F.2d at 843 n.12.
278 Id.
279 Id.
280 Id. Persinger is factually similar to Von Dardel because the international crimes of which Iran was guilty comprised the very same offenses alleged in Von Dardel; namely, violation of diplomatic immunity as guaranteed by the 1961 Vienna Convention on Diplomatic Relations, supra note 215, and the 1973 Convention, supra note 210. Nevertheless, even though Persinger was controlling authority, the Von Dardel court declined to adopt its reasoning, holding that to do so would, in effect, repeal the ATCA. 623 F. Supp. at 254.
282 Id. at 74.
tion” theory.283 The court rejected this argument, which it deemed to have been “incorrectly” accepted in Von Dardel,284 stressing that “nothing in the FSIA or its legislative history supports” the incorporation theory.285

Several factors favor adoption of this view that issues of jurisdiction and immunity should be unaffected by the nature of the alleged act and whether it violates international law. A substantial number of countries still adhere to the absolute theory of sovereign immunity, at least in principle.286 Although perhaps espoused by a minority of nations today, the absolute theory is nonetheless an accepted principle of international law squarely conflicting with the Von Dardel holding. Moreover, the Von Dardel opinion fails to cite any instance where immunity was withheld from a sovereign because its alleged actions were violations of international law.287

The practice of the International Court of Justice is another factor weighing against adopting Von Dardel as a model for determining sovereign immunity. That tribunal, which exclusively considers questions of international law, admits to having no jurisdiction over sovereigns except by their consent.288 This further suggests that little support exists in international law for the view of sovereign immunity articulated in Von Dardel.

VII. Conclusion

The case of Von Dardel v. U.S.S.R. represents a significant development in the U.S. law of sovereign immunity, as embodied in the Foreign Sovereign Immunities Act. In delivering a default judgment against the Soviet Union for violation of diplomatic immunity, the Von Dardel court ruled that (1) because the FSIA incorporates international law, a nation is not immune from suit for violations

283 Id. at 76–77.
284 Id. at 77.
285 Id.
286 It is unclear precisely how many adherents the absolute theory still retains. One commentator suggests that “the majority of nations” still adhere to the doctrine of absolute immunity, at least in principle. G. von Glahn, supra note 37, at 145. Another authority, while noting the “quantum increase” in the number of states applying the restrictive doctrine, admits that an unspecified number of states, “belong[ing] mainly to the Socialist bloc or the newly independent states of Africa or Asia,” still “persist in proclaiming their adherence to the absolute doctrine of state immunity.” G. Badr, supra note 10, at 39.
287 Von Dardel, 623 F. Supp. at 253–54. The court relied instead on the Bernstein case and Justice White’s dissent in Sabbatino, two opinions addressing the Act of State doctrine. These cases are discussed supra at text accompanying notes 251–62.
288 The Statute of the Int’l Court of Justice, art. 36, para. 1, restricts the court’s jurisdiction to (1) cases referred to it by the parties; (2) special matters provided for in the U.N. Charter; and (3) cases which the parties agree by treaty to submit to the court. Id. Article 36, paras. 2 and 3 of the Statute provide that states may submit themselves to the compulsory jurisdiction of the International Court of Justice, either unconditionally, or on condition that the opposing party has made a similar agreement. Id. at paras. 2, 3.
of customary international law; (2) by signing an international agreement, a
nation waives its immunity under FSIA § 1605(a)(1) respecting violations of that
agreement; and (3) in cases where a finding of sovereign immunity would
frustrate the purpose of an international agreement signed by the United States
prior to enactment of the FSIA, § 1604 of the Act prevents a finding of
immunity. Although the last of these three theories finds some support in the case
of Frolova v. U.S.S.R., other cases construing § 1604 suggest a narrower reading
of that statute. Moreover, Von Dardel’s “incorporation” and implied waiver the­o­ries run counter to both the FSIA’s legislative history and available case law.

Despite the Von Dardel reasoning being either weakly supported or flatly
contradicted by available authority, significant policy considerations nevertheless
may counsel adoption of Von Dardel’s approach. First, a legitimate concern for
eliminating injustice renders Von Dardel’s “incorporation” theory an attractive
reformulation of sovereign immunity law. In addition to its ethical attractiveness,
the theory has a plausible theoretical basis. One commentator, discussing an
analogous issue, surmises that jurisdiction could be asserted on the basis of a
quid pro quo: the United States, in return for allowing alien defendants to
establish their presence within its borders, should be entitled to assert
jurisdiction over such defendants for their violations of international law.

There are, however, countervailing policy arguments. First, the adoption of
Von Dardel would tend to embroil the judiciary in international disputes, thereby
impinging upon the Executive branch’s exclusive control of foreign affairs. Because it is unlikely that Congress intended such a result when it enacted the
FSIA, several jurists have argued that separation-of-powers concerns preclude
U.S. courts deciding such cases.

Moreover, it is questionable whether implementing the Von Dardel approach
would have any real effect on human rights violators, absent a general accep­tance
of Judge Parker’s doctrine throughout the international community. To
the extent that the deterrent effect of allowing suit against sovereigns for human
rights violations depends upon the threat of execution upon judgments, such
deterrence is unlikely to be any more effective than in the analogous case of
unilateral economic sanctions. Alternatively, to the extent that such suits are
merely intended as an instrument of moral censure, there is no reason to

289 Specifically, the commentator proposes a theoretical justification for asserting ATCA jurisdiction
over the PLO in the Tel-Oren case. See D’Amato, supra note 2, at 93–94.
290 Id.
291 See House Report, supra note 5, at 6606. Congress specifically intended the Act to “reduc[e] the
foreign policy implications of immunity determinations” by removing the Department of State from
the process of determining immunity. Id.
292 See cases cited supra note 262.
suppose they will be any more effective than the tools presently at the United States' disposal.293

The conflicting considerations outlined above might perhaps best be reconciled by means of an international agreement on the subject of sovereign immunity. Such an approach was suggested as early as 1951 by Sir Hersch Lauterpacht. According to Lauterpacht, it would be “in the long run undesirable that the modification of [the sovereign immunity] doctrine should take place by way of national action which is unilateral, sporadic and unco-ordinated.”294 Because the “lack of uniformity” resulting from such an approach “would be bound to contribute to friction and confusion,” Lauterpacht urged that any reform in the doctrine of sovereign immunity be accomplished by means of an international agreement on the subject.295 Such a course, were it feasible, would avoid the many pitfalls implicit in the approach recommended by Von Dardel.

Ultimately, then, the problem of foreign sovereign immunity which currently faces human rights claimants under the Alien Tort Claims Act is unlikely to be resolved by the Von Dardel decision. Although that decision proposes three avenues of relief for ATCA plaintiffs who might be barred from bringing suit by the FSIA, all are flawed in several significant respects. Specifically, the legislative history of the Foreign Sovereign Immunities Act, as well as case law construing that statute, do not support the holding in Von Dardel. In addition, the holding in that case conflicts with the customary international law governing sovereign immunity. Finally, significant policy reasons counsel against adopting the holding in Von Dardel.

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293 This is especially so since most defendants will undoubtedly choose not to appear, happily accepting a default judgment, after which they may freely maintain their innocence of any wrongdoing. See, e.g., Von Dardel, 623 F. Supp. 246 (D.D.C. 1985) (default judgment entered after Soviet Union declines to appear at trial; no appeal docketed as of March 1, 1986); Siderman, No. CV 82-1772 RMT (MCx), slip op. (C.D. Cal. Sept. 28, 1984) (default judgment entered after Argentina refuses to appear at trial; judgment subsequently vacated for lack of jurisdiction). Such defendants would, of course, insist that their decision not to appear was motivated entirely by principled adherence to traditional theories of sovereign immunity, and point out that the merits of the case were never resolved against them.

294 Lauterpacht, supra note 249, at 345.

295 Id.