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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUY VON DARDEL, et al.,

Plaintiffs,

v.

UNION OF SOVIET SOCIALIST REPUBLICS,

Defendant.

Civil Action
No. 84-0353 (BDP)

STATEMENT OF INTEREST OF THE UNITED STATES

STATEMENT

The United States files this Statement of Interest pursuant to 28 U.S.C. § 517, which authorizes the Attorney General to attend to the interests of the United States in pending suits. The United States previously filed Statements of Interest in this case, at the invitation of the court, in connection with the issue of whether contempt will lie to enforce judgments against a foreign state under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602, et seq. Since that time, the United States has continued its efforts to persuade the Soviet Union to appear in this case and to present its defenses to the court. Now that the Soviet government has appeared and has moved to vacate the default judgment and to dismiss, the United States takes this opportunity to reiterate to the court its views on the important jurisdictional issues presented by this case.

1. The Instant Proceedings

This suit was brought in February, 1984 by Raoul Wallenberg's half brother, Guy von Dardel, and his legal guardian, Sven Hagstromer, against the Soviet Union. Plaintiffs allege that the Soviet's treatment of Wallenberg violates international law, international agreements and the laws of the United States. The Soviet Union did not appear, returned the Complaint to the United States Embassy in Moscow and sent a diplomatic note asserting absolute sovereign immunity from suit in non-Soviet courts. On October 15, 1985, the Court granted plaintiffs' unopposed Motion for a Default Judgment. Von Dardel v. Union of Soviet Socialist Republics, 623 F. Supp. 246 (D.D.C. 1985). The default judgment, as amended on November 7, 1985, directed the Soviet Union to produce the person of Wallenberg or his remains within 60 days of the Order, to provide the Court with any documents or information in its custody pertaining to Wallenberg within 30 days and to pay plaintiffs compensatory damages of $39 million.

When the Soviet Union failed to comply with the judgment and returned the Notice of Default and supporting papers, plaintiffs moved to hold the Soviet Union in civil contempt, and to impose a fine of $50,000 per day which would rise by a factor of two every two weeks to a maximum of $1 million per day. The Court recognized that entry of such an order would involve important issues of foreign policy and, in October, 1986, requested the views of the United States. In December, 1986, the United States

filed a Statement of Interest in which it took the position that contempt was inappropriate under the FSIA because it would be inconsistent with the purpose of the Act and would be ineffective, and because there were serious questions about whether the court had jurisdiction to issue the default judgment. Plaintiffs' motion remains under submission.[1]

The Soviet Union has recently obtained United States counsel who, on June 8, 1989, filed a Motion for Relief From Judgment by Default and for Dismissal on its behalf.

2. Interest of the United States

The Soviet Union has long held and asserted the principle that it and its agencies and instrumentalities are entitled under international law to absolute immunity from the jurisdiction of foreign courts and cannot properly be compelled to appear in foreign courts. For several years, representatives from the Departments of State and Justice have met with high-ranking Soviet officials to explain the United States legal system and our law on foreign sovereign immunity and to urge the Soviet Union to obtain United States counsel to assist it in participating in and resolving cases brought against the Soviet Union and its instrumentalities in United States courts. The United States Government has undertaken these efforts with the Soviet Government and other foreign governments because we believe that their participation in our judicial system serves

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[1] In Febraury, 1987, the United States also filed a Reply to Plaintiffs' Response to the Statement of Interest of the United States.

the interests of justice and of all concerned parties, including U.S. plaintiffs. These representatives advised the Soviet officials that it could appear in United States courts to assert its immunity without either conceding its principled adherence to the theory of absolute sovereign immunity or waiving its claim to immunity. In addition, these representatives explained that it was desireable for the courts to have all factual and legal arguments before them prior to entering judgments and that, in appropropriate cases, the United States Government would file Statements of Interest to set forth the United States' views on the correct interpretation and application of the Foreign Sovereign Immunities Act.

As a result of these discussions, the Soviet Union has appeared in several cases which involved its commercial activities or those of its instrumentalities. The Soviet Union, however, had chosen not to appear in this case because it believed that its immunity relieved it of any obligation to appear in cases which implicated its sovereign and political rather than commercial functions. The Soviet Government's decision to appear in this case is very important because it is the first time that the Soviet Union has appeared in a proceeding that relates solely to allegations concerning its governmental acts. This appearance, we believe, indicates the Soviet Union's intent to regularize its activities in the United States further and to participate in cases against it in United States courts. Given the extensive U.S. diplomatic efforts to this end, the

Soviet Government's decision to appear in this case and to present its jurisdictional defenses to the court is thus very much in the interest of U.S. foreign policy.

Furthermore, the United States maintains a strong interest in the correct interpretation and implementation of the FSIA. Misinterpetations of the FSIA may encourage plaintiffs to file frivolous cases against foreign sovereigns and to discourage foreign states from appearing in cases brought against them properly under the FSIA. In addition, departure from a strict adherence to the jurisdictional requirements of the FSIA may adversely affect United States relations with foreign sovereign defendants and may lead to retaliatory applications of foreign law against the United States in foreign courts.

In stating its views, the United States wishes to make clear that its views on this court's jurisdiction to entertain this suit have no impact on the United States' position concerning the Soviet Government's treatment of Mr. Wallenberg. The United States abhors the Soviet Union's unjust imprisonment of Mr. Wallenberg and continues, through governmental channels, to seek a full and satisfactory accounting for his fate. The proper forum for such matters, however, is the diplomatic arena and not the courts of the United States.

DISCUSSION

I. THE COURT SHOULD SET ASIDE THE DEFAULT JUDGMENT ENTERED AGAINST THE SOVIET UNION BECAUSE THE JUDGMENT IS VOID FOR LACK OF JURISDICTION.

Fed. R. Civ. P. 60(b) provides that:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, . . . for the following reasons: . . . (4) the judgment is void.

As indicated in our prior statements, the United States believes that the default judgment entered against the Soviet Union on October 15, 1985 and amended on November 7, 1985 is void because, as developed infra, the Soviet Union has sovereign immunity under applicable U.S. law from this lawsuit. Because this Court lacks subject matter and personal jurisdiction over the Soviet Union, the default judgment is void and should be set aside.

This Court recently granted a foreign sovereign's Rule 60(b)(4) motion in circumstances nearly identical to the ones presented in this case. In Practical Concepts, Inc. v. Republic of Bolivia, 613 F. Supp. 863 (D.D.C. 1985) (Parker, J.), vacated on other grounds, 811 F.2d 1543 (D.C. Cir. 1987), plaintiff sued Bolivia for breach of contract. Like the Soviet Government here, Bolivia acknowledged receipt of service, but chose not to enter an appearance in defense of the suit. Practical Concepts, 613 F. Supp. at 865. Subsequently, as it did here, the Court entered a default judgment against Bolivia. Id. at 864. When plaintiff commenced proceedings to execute on the judgment, Bolivia appeared in the district court and moved, pursuant to Rule 60(b)(4), to vacate the default judgment on the ground the Court lacked jurisdiction to enter it. Id.

In response, plaintiff argued that, even if the Court did lack jurisdiction to enter a default judgment, the judgment was

merely erroneous, not void. Id. at 867. The Court rejected this argument, holding:

> . . . where, as here, the defendant never appeared in the original suit and thus has not yet litigated the point, he is not excepted from the rule that a jurisdictional defect renders a judgment void. "A defendant is always free to ignore the judicial proceedings, risk a default judgment and then challenge that judgment on jurisdictional grounds in a collateral proceeding."

Id. (quoting Insurance Corporation of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 706 (1982)). The Court proceeded to determine whether the FSIA entitled Bolivia to sovereign immunity, thus depriving the Court of subject matter and personal jurisdiction. Id. It determined that the suit was indeed barred by the FSIA and thus set aside the default judgment as void and dismissed the case for lack of jurisdiction. Id. at 872.[2]

Defendant's motion to set aside the default judgment pursuant to Rule 60(b)(4) is controlled by Practical Concepts. There, as here, the foreign sovereign elected not to appear,

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[2] On appeal, the United States Court of Appeals for the District of Columbia Circuit upheld the Court's decision to set aside the default judgment pursuant to Rules 60(b)(4) and (6), Practical Concepts v. Republic of Bolivia, 811 F.2d 1543, 1545-48 (D.C. Cir. 1987), but held that the district court erred in finding Bolivia immune from suit under 28 U.S.C. § 1605(a)(2) and in dismissing the Complaint. Id. at 1548-51. The Court remanded the case to the district court for consideration of any alternate defenses by Bolivia. Id. at 1551. However, the Court did not require the district court to reinstate immediately the default judgment, noting that foreign policy considerations support setting aside default judgments entered against foreign sovereigns pending a resolution of legal arguments relating to immunity defenses. Id. at 1551-52.

suffered a default judgment, and subsequently moved to have it set aside as void. We show in Part II that, under the FSIA, subject matter and personal jurisdiction over the Soviet Union are absent. Because the Soviet Union is entitled to immunity, the default judgment entered against it should be vacated as void. See Jackson v. People's Republic of China, 794 F.2d 1490, 1496 (11th Cir. 1986) (noting that district court relied on Rule 60(b)(4) to set aside default judgment entered against People's Republic of China after China failed to appear because the court identified "pregnant questions relative to the jurisdiction of the Court"), cert denied, 480 U.S. 917 (1987); Brazosport Towing v. 3,838 Tons of Sorghum, 607 F. Supp. 11 (S.D. Tx. 1984) (granting Rule 60(b)(4) motion to set aside default judgment against instrumentality of Mexican government which had not previously appeared), aff'd mem., 790 F.2d 891 (5th Cir. 1986); Castro v. Saudi Arabia, 510 F. Supp. 309 (W.D. Tx. 1980) (setting aside default judgment entered against Saudi Arabia which had not previously appeared). See generally Watts v. Pinckney, 752 F.2d 406 (9th Cir. 1985) (voiding default judgment); 11 Wright & Miller, Federal Practice & Procedure: Civil § 2862 at 198 (1973).[3]

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[3] Defendant's motion is timely. The one-year time limit which applies to motions made pursuant to Rules 60(b)(1), (2) and (3) expressly does not apply to Rule 60(b)(4) motions. Rather, Rule 60(b) generally provides that a motion shall be made "within a reasonable time;" but even this requirement "cannot be enforced with regard to this class [60(b)(4)] of motions," 11 Wright & Miller, Federal Practice and Procedure at 197. See In Re Center Wholesale, Inc., 759 F.2d 1440, 1448 (9th Cir. 1985) (Rule (continued...)

II. SUBJECT MATTER AND PERSONAL JURISDICTION OVER THE SOVIET UNION ARE LACKING.

In granting plaintiffs' unopposed motion for default judgment, this Court held that it had subject matter and personal jurisdiction over the Soviet Union under the FSIA on the following grounds:

(1) because sovereign immunity is an affirmative defense that must be pleaded and proved by the sovereign defendant, by initially deciding not to appear, the Soviet Union failed to raise and thus waived this defense, 623 F. Supp. at 252-53;

(2) the FSIA incorporates recognized standards of international law and therefore does not extend immunity to clear violations of such principles, 623 F. Supp. at 253-54;

(3) immunity under the FSIA is "subject to" international agreements to which the United States is a party, which preempt provisions of the FSIA insofar as the FSIA provisions would extend immunity to violations of such agreements, 623 F. Supp. at 254-55;

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[3](...continued)
60(b)(4) motion may be brought at any time); Crosby v. Bradstreet Co., 312 F.2d 483, 485 (2d Cir.) (court vacates order as void 30 years after entry), cert. denied, 373 U.S. 911 (1963); Practical Concepts, 613 F. Supp. at 866 (reasonable time limitation does not apply to 60(b)(4) motions). Nor may a Rule 60(b)(4) motion be barred by laches. Austin v. Smith, 312 F.2d 337, 343 (D.C. Cir. 1962); Practical Concepts, 613 F. Supp. at 866. Therefore the only question before the Court is whether the default judgment is void. If it is, the judgment is a legal nullity and must be set aside. Covington Industries, Inc. v. Resintex A.G., 629 F.2d 730, 733 n.3 (2d Cir. 1980); Jordon v. Gilligan, 500 F.2d 701, 704 (6th Cir. 1974), cert. denied, 421 U.S. 991 (1975); Austin, 312 F.2d at 343.

(4) in ratifying certain international agreements, the Soviet Union implicitly waived the defense of sovereign immunity with regard to claims based upon violations of such agreements, 623 F. Supp. at 255-56.[4]

The Court also concluded that the Alien Tort Claims Act, 28 U.S.C. § 1350, provided an independent basis for subject matter jurisdiction. 623 F. Supp. at 256-59. Finally, in holding that it had personal jurisdiction over the defendant, the Court reasoned that the minimum contacts required to bring suit against the Soviet Union under 28 U.S.C. § 1330(b) were "clearly

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[4] Plaintiffs argued, fifth, that the actions of the Soviet Union constituted non-commercial torts within the meaning of 28 U.S.C. § 1605(a)(5) for which there is no sovereign immunity. The Court regarded grounds (1) through (4) as "far more compelling" to find jurisdiction than ground (5). 623 F. Supp. at 251. The Court did not discuss this ground further and therefore it does not appear to have relied upon it as an independent base of jurisdiction. Nevertheless, § 1605(a)(5) expressly provides jurisdiction over cases alleging non-commercial torts only if the "personal injury or death, or damage to or loss of property, occurr[ed], in the United States." (emphasis added). Relying on clear legislative history, H. R. Rep. No. 1487, 94th Cong., 2d Sess at 20-21, 1976 U.S. Code Cong. & Ad. News. at 6619; S. Rep. No. 1310, 94th Cong., 2d Sess. at 20, courts have further held that both the injury and the tortious act or omission must occur within the United States for § 1605(a)(5) to permit jurisdiction over tort claims. See Argentine Republic v. Amerada Hess Shipping Corp., 109 S.Ct. 683, 690-91 (1989); Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 379 (7th Cir. 1985); Asociacion de Reclamantes v. United Mexican States, 735 F.2d 1517, 1524 (D.C. Cir. 1984), cert. denied, 470 U.S. 1051 (1985); Persinger v. Islamic Republic of Iran, 729 F.2d 835, 842 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984); English v. Thorne, 676 F. Supp. 761, 764 (S.D. Miss. 1987). Here, the injuries suffered by Wallenberg and the alleged tortious conduct which caused these injuries occurred outside the United States. The Court correctly chose not to rely on § 1605(a)(5) as a basis of jurisdiction in this case.

satisfied" because the Soviet Union maintained a substantial presence in the District of Columbia. Id. at 251 n.3.

Plaintiffs have recognized that the Supreme Court's recent decision in Argentine Republic v. Amerada Hess Shipping Corp., 109 S.Ct. 683 (1989), affects this case. Specifically, plaintiffs correctly concede that Amerada Hess "precludes using the Alien Tort Claims Act [28 U.S.C. § 1350] as a basis for jurisdiction in this case." Plaintiffs' Supplemental Statement of Points and Authorities Concerning the Supreme Court Decision in Argentine Republic v. Amerada Hess Shipping Corp. (hereinafter "Plaintiffs' Supplemental Statement") at 3. See Amerada Hess, 109 S.Ct. at 688-90, 692.[5] Plaintiffs also concede that Amerada Hess precludes jurisdiction under ground (2), supra, which was based solely on a finding that the Soviet Union's conduct violated principles of international law. Plaintiffs' Supplemental Statement at 3.[6] As discussed, infra, it is the position of the United States that the remaining three bases of jurisdiction advanced by plaintiff and previously accepted by the Court do not, in fact, support the conclusion that subject matter

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[5] The Supreme Court in Amerada Hess held that the FSIA is the sole basis for obtaining jurisdiction over a foreign sovereign in U.S. courts. Id.

[6] The Supreme Court in Amerada Hess held that sovereign immunity is available in cases involving alleged violations of international law which do not fall within one of the FSIA's exceptions to immunity. Amerada Hess, 109 S.Ct. at 688. Accordingly, this Court's holding that the FSIA generally incorporates principles of international law and does not extend immunity to violations of such principles, Von Dardel, 623 F. Supp. at 254, does not survive Amerada Hess.

and personal jurisdiction exist in this case. The recent Practical Concepts case confirms that sovereign immunity is not waived for failure to appear. In addition, Amerada Hess undermines this Court's rulings that found exceptions to sovereign immunity in § 1604 and § 1605(a)(1) to apply in this case. This subsequent authority makes it clear that the Soviet Union enjoys sovereign immunity from this suit.[7]

A. A Foreign Sovereign Does Not Waive Immunity By Failing To Appear.

This Court concluded that sovereign immunity under the FSIA is an affirmative defense that must be specially pleaded, and that the Soviet Government's failure to assert the defense properly (by appearing in Court rather than by diplomatic note) constituted a deliberate choice by the Soviet Government to forego any entitlement to immunity under the Act. 623 F. Supp. at 252-53. The United States Court of Appeals for the District of Columbia Circuit, however, has recently ruled to the contrary. In Practical Concepts, Inc. v. Republic of Bolivia, 811 F.2d 1543 (D.C. Cir. 1987), the Court rejected plaintiff's argument that Bolivia, which had acknowledged service but previously failed to appear and had defaulted in a breach of contract action, was not

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[7] 28 U.S.C. § 1330(b) provides personal jurisdiction only when subject matter jurisdiction exists under § 1330(a). Section 1330(a) provides the court with subject matter jurisdiction only if the foreign sovereign is not entitled to immunity. Because the Soviet Union enjoys immunity, the Court lacks subject matter jurisdiction over this case and therefore personal juridiction over the Soviet Union. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 485 n.5 (1983); Maritime International Nominees Establishment v. Republic of Guinea, 693 F.2d 1094, 1099 (D.C. Cir. 1982), cert. denied, 464 U.S. 815 (1983).

entitled to challenge the district court's jurisdiction in a Rule 60(b)(4) motion filed after judgment execution proceedings commenced. Id. at 1547-48.

The Court held that a defendant which believes the court lacks jurisdiction may either appear and raise the jurisdictional objection, or choose not to appear, thus risking a default judgment. Id. at 1547. Should the defendant chooses the latter course, the default judgment will be set aside if it prevails on the jurisdictional objections. If, however, it does not prevail, the defendant ordinarily loses the right to defend on the merits. Id.

This Court's determination that the Soviet Union's failure to raise immunity as an affirmative defense deprives it of immunity overlooks the fact that foreign sovereigns are entitled to this choice. To require the foreign sovereign to plead sovereign immunity affirmatively at the outset of the litigation deprives them, as a practical matter, of the choice to not appear until later in the case. The Practical Concepts court's recognition that foreign sovereigns may choose not to appear initially and later advance their jurisdictional objections necessarily means that foreign sovereigns do not waive immunity and, therefore, subject matter jurisdiction by choosing not to appear until a default judgment is entered against them.[8]

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[8] 28 U.S.C. § 1608(e) also suggests that a default judgment may not be entered simply because of a State's non-appearance. It provides that no court may enter a default judgment against a foreign sovereign unless the claimant "establishes his claim or

(continued...)

Plaintiffs nevertheless continue to argue that the foreign sovereign waives immunity and therefore consents to subject matter jurisdiction, see 28 U.S.C. § 1330(a), if it fails to appear and assert its immunity. Plaintiffs' Supplemental Statement at 5. This position clashes with the observation made by the Supreme Court in Verlinden, 461 U.S. at 493-94 n.20:

> The House Report on the Act states that "sovereign immunity is an affirmative defense which must be specially pleaded." H.R. Rep. No. 94-1487, p. 17 (1976). Under the Act [FSIA], however, subject matter-jurisdiction turns on the existence of an exception to foreign sovereign immunity, 28 U.S.C. § 1330(a). Accordingly, even if the foreign state does not enter an appearance to assert an immunity defense, a district court still must determine that immunity is unavailable under the Act.

See also Frolova, 761 F.2d at 373, 378; MOL, Inc. v. People's Republic of Bangladesh, 736 F.2d 1326, 1328 (9th Cir.), cert. denied, 469 U.S. 1037 (1984). See also Meadows v. Dominican Republic, 628 F. Supp. 599, 603 (N.D. Cal. 1986), aff'd, 817 F.2d 517 (9th Cir.), cert denied, 108 S.Ct. 486 (1987) (defendants do not waive jurisdictional defenses by failing to appear). If the failure to appear automatically waives sovereign immunity and thus confers jurisdiction on the court, a district court need not "determine" whether the FSIA entitles the foreign sovereign to immunity. The requirement that it do so logically precludes the

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[8](...continued)
right to relief by evidence satisfactory to the court." Compare Fed. R. Civ. P. 55(e).

conclusion that immunity is automatically waived by non-appearance.

B. Alleged Violations Of International Agreements Do Not Establish Jurisdiction Under Section 1604 Unless The Agreements Expressly Conflict With The FSIA.

Plaintiffs have argued, and this Court has previously concluded, that when the provisions of pre-existing international agreements, such as the Vienna Convention on Diplomatic Relations, April 24, 1964, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 (the "Vienna Convention") and the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, December 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, 1035 U.N.T.S. 167 (the "1973 Convention"), have been violated by sovereign state, § 1604 confers jurisdiction on United States courts to enforce such agreements. 623 F. Supp. at 254-55. Section 1604 provides that:

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

Thus, according to the Court, if the FSIA would entitle a foreign sovereign to immunity from acts which violate an international agreement, the "subject to" language of § 1604 operates to preempt immunity "to the extent necessary to permit the full operation of each agreement." Von Dardel, 623 F. Supp. at 254-55.

In Amerada Hess, however, the Supreme Court rejected the notion that the alleged violation of an international agreement in and of itself eliminates the immunity conferred in § 1604. Rather, the Court stated that a foreign sovereign loses immunity under § 1604 only where the "international agreements 'expressly conflic[t]' with the immunity provisions of the FSIA." Amerada Hess, 109 S.Ct. at 692. Amerada Hess found support for that view in the House Report to the FSIA which states that:

> In the event an international agreement expressly conflicts with [the FSIA], the international agreement would control. . . . 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.

H.R. Rep. No. 1487, 94th Cong., 2d. Sess. 17-18, reprinted in 1976 U.S. Code Cong. & Admin. News 6604, 6616 (emphasis added).

Since plaintiffs concede that the Vienna Convention contains no provisions which expressly conflict with the FSIA, Plaintiffs' Supplemental Statement at 9,[9] the remaining issue is whether the 1973 Convention contains any such provisions. It clearly does not; there are no provisions which declare that signatory states waive immunity from suits claiming breaches of the Convention by private individuals in the courts of the United States. The Convention requires States to exercise jurisdiction over certain criminal offenses committed by private individuals, but does not

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[9] The Convention contains no provisions which waive a signatory State's immunity from suits brought by private individuals alleging a breach of the Convention.

deal with the sovereign immunity of states. Because the Convention is silent on the issue of sovereign immunity, there can be no "manifest" or "express" conflict with FSIA provisions on immunity. See Colonial Bank v. Compagnie Generale Maritime et Financiere, 645 F. Supp. 1457, 1460 n.5 (S.D.N.Y. 1986). Therefore, the Soviet Union's adherence to, or even its alleged breach of, this Convention does not deny it the sovereign immunity conferred by § 1604.

In support of its conclusion that the international agreements reviewed in Amerada Hess did not expressly conflict with the FSIA's immunity provision, the Supreme Court noted that these agreements did not create private rights of action for foreign corporations to recover for the alleged breach of such agreements against foreign sovereigns in U.S. courts. Amerada Hess, 109 S.Ct. at 692. Similarly, the 1973 Convention does not create private rights of action for individuals to sue foreign sovereigns in United States courts for alleged violations of the Convention. This bolsters the conclusion that the Soviet Union did not waive its immunity from suit pursuant to § 1604 by signing the Convention.

A treaty does not provide enforceable rights in United States courts to individuals unless the treaty is self-executing. See Head Money Cases, 112 U.S. 580, 598-99 (1884); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring), cert. denied, 470 U.S. 1003 (1985); Haitian Refugee Center, Inc. v. Gracey, 600 F. Supp. 1396, 1405-06

(D.D.C. 1985), aff'd, 809 F.2d 794 (D.C. Cir. 1987). See generally Restatement (Third) of Foreign Relations Law of the United States, section 907, comment a. A self-executing treaty is one which does not require domestic legislation to give the treaty the force and effect of law within the United States. See Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984). The Convention provision which plaintiffs suggest expressly conflicts with FSIA immunity provisions, Article 3, is by its very nature not self-executing.

Together, Articles 2(2) and 3(1) commit signatory states to create domestic legislation to criminalize certain acts against internationally protected persons in particular circumstances. Article 2(2) commits States to make certain enumerated crimes punishable by appropriate penalties. Article 3(1) requires States to assert jurisdiction over crimes committed in particular factual circumstances. "Because these passages contemplate further action by the participating states to carry out the provisions that follow, it is obvious that the agreement is not self-executing." Frolova, 761 F.2d at 376. See also Tel-Oren, 726 F.2d at 809. Articles 2(2) and 3 impose obligations among signing states rather than confer private rights of action on individuals. See Frolova, 761 F.2d at 374; Diggs v. Richardson, 555 F.2d 848, 851 (D.C. Cir. 1976).[10]

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[10] It must be observed, moreover, that plaintiffs do not claim that the Soviet Union violated Articles 2(2) or 3(1) by failing to enact domestic laws to criminalize the specified Acts against protected persons. The essence of the claim is that the (continued...)

Furthermore, the Act for the Protection and Punishment of Crimes Against Internationally Protected Persons (the "Act"), Pub. L. No. 94-467, 90 Stat. 1999, the domestic legislation enacted to implement the Convention, does not create a private right of action for individuals to enforce its provisions with civil lawsuits. This Act makes criminal the assault or intimidation, 18 U.S.C. § 112; killing, 18 U.S.C. § 1116; kidnapping, 18 U.S.C. § 1201, or threat to assault, kill or kidnap, 18 U.S.C. § 878, foreign officials, official guests and internationally protected persons. It is also now a crime to damage or destroy property belonging to such individuals. 18 U.S.C. § 970. These statutes provide only for the fining and imprisonment of offenders. There are no provisions for civil enforcement of these statutes.

To establish that legislation implies a private right of action, plaintiffs bear a "relatively heavy" burden of showing that Congress "affirmatively or specifically" contemplated private enforcement when enacting the statute. Samuels v. District of Columbia, 770 F.2d 184, 194 (D.C. Cir. 1985). The inquiry is a matter of statutory construction, see Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979), and "[t]he federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." California

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[10](...continued)
Soviet Union violated the domestic criminal statutes enacted to implement the Convention. As we demonstrate infra, these statutes afford plaintiffs no private right of action.

v. Sierra Club, 451 U.S. 287, 297 (1981); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16 (1979).[11] There is no indication in either the legislative history or the logic of the Act supporting any intention by Congress to create a private right of action to enforce the Act.

First, the Act was not created to benefit legal guardians or relatives of internationally protected individuals. Rather, the Act was enacted to implement the Convention, which was aimed at safeguarding internationally protected persons against crimes as such crimes "seriously threaten the maintenance of normal international relations." H.R. Rep. No. 94-1614, 94th Cong., 2d. Sess. 2, reprinted in 1976 U.S. Code Cong. & Admin. News 4481; S. Rep. 94-1273, 94th Cong., 2d Sess. 5 (1976) [Exhibit 1].

Second, assuming arguendo that a foreign sovereign, as

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[11] In Cort v. Ash, 422 U.S. 66, 78 (1975), which rejected the implication of a private cause of action from a criminal statute, the Court set forth four factors to be used to determine if a statute implies a private right of action: (1) whether plaintiff was one of the class of individuals for whose "especial" benefit the statute was created, (2) whether the legislative history reflects the intent to create a private right of action, (3) whether it is consistent with the purposes of the statute to imply a remedy for the plaintiff and (4) whether the cause of action is traditionally relegated to state law. However, it has been observed that "there has been a distinct shift away from the full application of the Cort factors to a narrower exercise of statutory construction in order to glean Congressional intent." Rowson v. Sears, Roebuck & Co., 822 F.2d 908, 921-22 (10th Cir. 1987)(rejecting an implied a right of action for civil damages from a penal statute fining employers who discharge employees solely because of age), cert. denied, 108 S. Ct. 699 (1988). See Middlesex County Sewerage Authority v. National Sea Clammers Ass'n., 453 U.S. 1, 13 (1981).

opposed to a foreign national, can violate the Act,[12] it is not consistent with the purposes of the statute to imply a remedy for the plaintiff. Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985), is instructive in this regard. In Sanchez-Espinoza, several Nicaraguans sought damages for the United States' alleged violation of the Neutrality Act, 18 U.S.C. § 960, a criminal statute forbidding preparations for a military expedition against a foreign state, by arming the Contras. The Court held that the Act did not imply a private right of action:

> since this would have the practical effect of eliminating prosecutorial discretion in an area where the normal desirability of such discretion is vastly augmented by the broad leeway traditionally accorded the Executive in matters of foreign affairs.

Sanchez-Espinoza, 770 F.2d at 210.

Similarly, here, the purpose of the Convention and Act are to reduce international tensions caused when crimes are committed against internationally protected persons. Private suits against foreign sovereigns may well exacerbate the international tensions the Convention and Act seek to avoid.

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[12] There is no indication in the Convention that signatory States agreed to include other foreign sovereigns as either potential civil or criminal defendants in their domestic legislation. The Convention, for example, defines "alleged offender" as "a person as to whom there is sufficient evidence to determine prima facie that he has committed or participated in one or more of the crimes set forth in article 2." Art. 1(2) (emphasis added). See 18 U.S.C. § 1116(a) (any person found guilty of first degree murder shall be sentenced to life imprisonment and any person found guilty of attempted murder shall be imprisoned for not more than twenty years). See also Restatement (Third) of Foreign Relations Law of the United States, section 461, comment c ("A state itself is generally not subject to the criminal process of another state. . .").

Third, the legislative history is devoid of any indication that the purpose of the Act was do anything more than to meet the obligation of the United States under the Convention to enact legislation to criminalize certain acts against internationally protected persons. See H. R. Rep. No. 94-1614 at 3; S. Rep. No. 94-1273 at 5. The Convention does not commit the United States to give interested third parties a right to sue alleged offenders of the Convention. There is no indication whatsoever that the Act expanded upon the Convention to provide this right of action. Indeed, such a right would not advance the purpose of the Convention or the Act. The signatories to the Convention believed that crimes against such individuals threaten the maintenance of normal international relations and obviously sought to reduce the incidence of such crime. See Preamble to the 1973 Convention. There is no reason to believe, however, that the threat of civil litigation adds in any way to the deterrence inherent in the criminal statutes which impose substantial fines and prison terms. Cf. Giano v. Martino, 673 F. Supp. 92, 95 (E.D.N.Y.) (Federal Kidnapping Act, 18 U.S.C. § 1201, is not intended to confer rights on the victims of kidnapping), aff'd mem., 835 F.2d 1429 (2d Cir. 1987).

The Supreme Court has cautioned that, "[i]n the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." Middlesex County, 453 U.S. at 15. That proviso applies full force in this case, where

Congress has evidenced no intent to provide a private cause of action to enforce these criminal statutes. Compare Federal Savings & Loan Insurance Corp. v. Reeves, 816 F.2d 130, 137-38 (4th Cir. 1987)(declining to find private cause of action in criminal code provisions dealing with embezzlement, fraud and misrepresentation); Creech v. Federal Land Bank of Wichita, 647 F. Supp. 1097, 1099 (D. Colo. 1986)(no private right of action under 18 U.S.C. 1951 which prohibits interference with commerce by threat of violence); Gramercy 222 Residents Corp. v. Gramercy Realty, 591 F. Supp. 1408, 1410 n.2 (S.D.N.Y. 1984) (no private right of action under criminal mail fraud statute).

In the absence of an express conflict between the 1973 Convention and the immunity provisions of the FSIA and any private right of action that can be implied from either the Convention or the Act, the Soviet Union remains immune from this suit under § 1604.

C. The 1973 Convention and Vienna Convention Do Not Contain An Implied Waivers of Sovereign Immunity Under Section 1605(a)(1).

This Court has held that the Soviet Union implicitly waived its immunity under § 1605(a)(1) by becoming a party to international agreements containing obligations to respect certain human rights and diplomatic immunities. 623 F. Supp. at 255-56. Section 1605(a)(1) provides that foreign sovereigns are not immune in cases:

> 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.

The Supreme Court in Amerada Hess, however, has rejected the proposition that the act of acceding to an international agreement in itself effects an implicit waiver of sovereign immunity in cases alleging a breach of such agreements. The Court observed:

> Nor do we see how a foreign state can waive its immunity under § 1605(a)(1) by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States.

Amerada Hess, 109 S.Ct. at 692.

Amerada Hess reaffirms a growing body of case law which has narrowly construed implicit waivers of sovereign immunity under 28 U.S.C. § 1605(a)(1). See Joseph v. Office of Consulate General of Nigeria, 830 F.2d 1018, 1022 (9th Cir. 1987), cert. denied, 108 S.Ct. 1077 (1988); Frolova, 761 F.2d at 377; Colonial Bank, 645 F. Supp. at 1461. Such waivers are ordinarily found only where: "(1) a foreign state has agreed to arbitration in another country; (2) a foreign state has agreed that a contract is governed by the law of a particular country; and (3) a foreign state has filed a responsive pleading in a case without raising the defense of sovereign immunity." Joseph, 830 F.2d at 1022 (quoting Frolova, 761 F.2d at 377).[13] This case appears to

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[13] These three circumstances in which courts have implied waivers of sovereign immunity are those listed in the legislative history to the FSIA. H. R. Rep. No. 1487, 94th Cong., 2d Sess, reprinted in 1976 U.S. Code Cong. & Ad. News 6604, 6617; S. Rep. No. 1310, 94th Cong. 2d Sess. 18. [Exhibit 2].

be the only one in which a Court has implied a waiver of sovereign immunity in a factual setting not listed by Congress in the legislative history as warranting an implied waiver.

Furthermore, these three prerequisites to a waiver of sovereign immunity have themselves been narrowly interpreted to avoid a substantial increase in federal court jurisdiction over these kinds of cases which raise difficult foreign policy questions. See Maritime Ventures Int'l v. Caribbean Trading & Fidelity, 689 F. Supp. 1340, 1351 (S.D.N.Y. 1988). Although the first ground suggests there is an implied waiver of immunity from suit in United States courts when an agreement refers to arbitration in any country, courts have nevertheless not implied waivers when the agreement specifies that arbitration is to occur in a foreign country. Ohntrup v. Firearms Center Inc., 516 F. Supp. 1281, 1284-85 (E.D. Pa. 1981), aff'd mem., 760 F.2d 259, 263 (3rd Cir. 1985); Verlinden B.V. v. Central Bank of Algeria, 488 F. Supp. 1284, 1300-02 (S.D.N.Y. 1980), aff'd, 647 F.2d 320 (2d Cir. 1981), rev'd on other grounds, 461 U.S. 480 (1983). See also Maritime Int'l. Nominees Establishment, 693 F.2d at 1102-04 (immunity is not waived when agreement did not contemplate role for United States courts, although arbitration would probably take place in U.S.). Similarly, although the second ground suggests that a foreign sovereign's agreement that a contract would be governed by the laws of any country implicitly waives immunity, courts have rejected claims of implied immunity when the contract simply provides for resort to the laws of foreign

countries. See Zernicek v. Brown & Root, Inc., 826 F.2d 415, 419-20 (5th Cir. 1987), cert. denied, 108 S.Ct. 775 (1988); Falcoal, Inc. v. Turkiye Komur Isletmeleri Kurumu, 660 F. Supp. 1536, 1539 (S.D. Tx. 1987).[14] But see Ipitrade Int'l. v. Federal Republic of Nigeria, 465 F. Supp. 824, 826 (D.D.C. 1978) (contract's choice of Swiss laws and European forum to resolve disputes waived sovereign immunity in U.S. Courts).

Since plaintiffs do not and cannot argue that the 1973 Convention contains an express waiver of immunities of signatory states from suits in the United States which allege breaches of the Convention, the question here is whether the 1973 Convention contains an implied waiver of sovereign immunity.[15] Quite clearly, this case falls outside those three circumstances listed above which were recognized by Congress as sufficient to effect an implied waiver of immunity. Plaintiffs therefore have attempted to squeeze within the narrow view of implied waiver suggested by Amerada Hess by arguing that the 1973 Convention "mentions . . . the availability of a cause of action in the United States." Plaintiffs' Supplemental Statement at 12.

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[14] It is worth noting that the legislative history's specific mention that implied waivers may be found under grounds (1) and (2) underscores the well-established point that the FSIA's primary purpose was to permit suits against foreign sovereigns in their commercial, rather than sovereign, capacities. Transamerica Steamship Corp. v. Somali Democratic Republic, 767 F.2d 998, 1001 (D.C. Cir. 1983).

[15] Plaintiffs' Supplemental Statement does not argue that the Soviet Government's signing of the Vienna Convention implies a waiver of immunity from this suit.

Unlike contracts or agreements which contain choice of law provisions governing the resolution of disagreements arising from the agreement, see, e.g., Marlowe v. Argentina Naval Commission, 604 F. Supp. 703, 708-09 (D.D.C. 1985), the 1973 Convention contains no provision suggesting that a cause of action is available to private citizens in the United States who allege a violation of the Convention. Plaintiffs nevertheless contend that Article 3, which directs the United States to assert jurisdiction over crimes committed against particular persons, creates a cause of action sufficient to effect an implied waiver.

Plaintiffs' argument is wholly contingent on the existence of private causes of action under the criminal statutes created to effectuate the United States' obligations under the Convention. As demonstrated above, these criminal statutes do not create a private right of action. Enforcement of these statutes is left to domestic law enforcement authorities rather than interested individuals who believe that our criminal laws have been violated by a foreign sovereign. Without a private right of action to enforce these criminal provisions, no cause of action in the United States is available. Amerada Hess therefore dictates that no implied waiver of immunity may be found in Article 3 of the Convention.

CONCLUSION

For the foregoing reasons, the United States believes that defendant's Rule 60(b)(4) motion should be granted and this case

dismissed with prejudice for lack of subject matter and personal jurisdiction.

Respectfully submitted,

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Dated: June 29, 1989