

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

ASHRAF TULTY, <i>ET AL.</i> ,	)	
	)	
	)	
Plaintiffs,	)	
	)	Civil Case No. 04-1780 (JDB)
v.	)	
	)	
THE SOCIALIST PEOPLE’S LIBYAN ARAB	)	
JAMAHIRIYA, AND MUAMMAR QADHAFI,	)	
	)	
Defendants.	)	

**MOTION TO DISMISS**

Defendants, The Socialist People’s Libyan Arab Jamahiriya (hereafter “Libya”) and Muammar Qadhafi move to dismiss plaintiffs’ complaint for lack of subject-matter jurisdiction, personal jurisdiction, and in the alternative for failure to state a claim upon which relief can be granted pursuant, respectively, to the Federal Rules of Civil Procedure 12(b)(1), 12(b)(2) and 12(b)(6). A memorandum of points and authorities in support of the motion is attached hereto.

Dated: July 14, 2005

Respectfully submitted,

    //s//      
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	)	
Defendants.	)	

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
DEFENDANTS’ MOTION TO DISMISS FOR LACK OF  
SUBJECT MATTER AND PERSONAL JURISDICTION  
AND FAILURE TO STATE A JUSTICIABLE CLAIM**

**FACTUAL ALLEGATIONS**

The Plaintiffs in this suit assert claims against the Socialist People’s Libyan Arab Jamahiriya (“Libya”) and Muammar Qadhafi (“Qadhafi”) -- Libya’s head of state – for uncompensated “seizures” of a number of the plaintiffs’ properties in Libya as well as the alleged torture and subsequent killing of Ahmed Tulty in Libya, the brother of plaintiff Ashraf Tulty.<sup>1</sup>

**JURISDICTIONAL ALLEGATIONS**

Plaintiffs invoke the Court’s subject-matter jurisdiction under the Foreign Sovereign

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<sup>1</sup> Plaintiffs’ complaint is completely lacking any detail regarding the allegations of torture, killing, and the seizure of property and the alleged dates of occurrence. Defendants reserve the right to challenge any jurisdiction details which may subsequently be provided by plaintiffs.

Immunities Act, 28 U.S.C. §§1330(a), 1605(a)(7); and under the Alien Tort Claims Act, 28 U.S.C. § 1350 (“ATCA”). (Amend. Compl. ¶12).

### **STATUTES INVOLVED**

29 U.S.C. § 1330:

#### **§ 1330. Actions against foreign States**

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

28 U.S.C. § 1605(a)(7):

#### **§1605. General exception to the jurisdictional immunity of a foreign state**

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

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph –

(A) if the foreign state was not designated as a state

sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act; and

(B) even if the foreign state is or was so designated, if –

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

28 U.S.C. § 1350:

**§ 1350. Alien’s action for tort**

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

**ARGUMENT**

**INTRODUCTION**

The Foreign Sovereign Immunities Act of 1976 (“FSIA”) starts with the general rule that foreign states are immune from suit in the United States courts; it also lists the limited circumstances under which a foreign state will be denied immunity and establishes that the Act is the sole basis for asserting jurisdiction over foreign nations in United States Courts. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 443 (1989). The Supreme Court has

held that “a foreign state is presumptively immune from jurisdiction of United States courts, and that unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state.” Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993); 28 U.S.C. § 1604.

In 1996, as part of the comprehensive Antiterrorism and Effective Death Penalty Act (“AEDPA”), Pub.L. No. 104-132, §221(a), 110 Stat. 1214 (Apr. 24, 1996) (1996 Amendment), Congress amended the FSIA to add a new exception to immunity where money damages are sought against foreign states that have been designated as state sponsors of terrorism by the Secretary of State. Suit may be brought under the 1996 Amendment for *personal injury or death* caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act. 28 U.S.C. § 1605(a)(7); *see Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 87 (D.C. Cir. 2002) (hereafter “Price D”).

Six months later, in the Omnibus Consolidates Appropriations Act, Pub.L. No. 104-208, §589, 110, Stat. 3009, 3009-172 (1997), Congress passed the Civil Liability for Acts of State Sponsored Terrorism which is codified as a note (but not a part of) § 1605(a)(7) of the FSIA. 28 U.S.C. § 1605(a)(7) note; *see also Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 329-30 (D.C. Cir. 2003). This provision, commonly known as the “Flatow Amendment”, creates a cause of action for “non-economic and punitive damages against an official, employee, or agent of a foreign stated designated as terrorist” [internal quotes omitted]. *Id.*

## I. THE COURT LACKS SUBJECT-MATTER JURISDICTION

### A. *Plaintiffs not Nationals of the United States*

The Court lacks subject-matter jurisdiction under the FSIA to hear any claims asserted by the plaintiffs who are not nationals of the United States. The FSIA entitles Libya to immunity from civil suits in United States courts, with specific exceptions. Simpson v. Socialist People's Libyan Arab Jamahiriya, 326 F.3d 230, 233 (D.C. Cir. 2003) (hereafter "Simpson II"); Price v. Socialist People's Libyan Arab Jamahiriya, 389 F.3d 192, 196 (D.C. Cir. 2004) (hereafter "Price II") ("A foreign state is immune from suit in both federal and state courts, 28 U.S.C. § 1604, unless the case comes within an express exception in the FSIA"). "If no exception applies, a foreign sovereign's immunity under the FSIA is complete: The district court lacks subject matter jurisdiction over the plaintiff's case." *Id.* (Citing Phoenix Consulting v. Republic of Angola, 216 F.3d 36, 39 (D.C. Cir. 2000)).

For a United States court to have subject-matter jurisdiction pursuant to 1996

Amendment

to the FSIA codified under § 1605(a)(7), the plaintiff must generally demonstrate the following:

- “(1) that personal injury or death resulted from an act of torture, extrajudicial killing, aircraft sabotage, or hostage taking; and
- (2) the act was either perpetrated by the foreign state directly or by a non- state actor which receives material support or resources from the foreign state defendant; and
- (3) the act or the provision of material support or resources is engaged in by an agent, official or employee of the foreign state while acting within the scope of his or her office,

agency or employment; and

(4) that the foreign state be designated as a state sponsor of terrorism either at the time the incident complained of occurred or was later so designated as a result of such act; and

(5) if the incident complained of occurred with [sic] the foreign state defendant's territory, plaintiff has offered the defendants a *reasonable opportunity to arbitrate the matter*; and

(6) either the plaintiff or the victim was a United States national at the time of the incident; and

(7) similar conduct by United States agents, officials, or employees within the United States would be actionable.”

Simpson v. Socialist People’s Libyan Arab Jamahiriya, 180 F.Supp.2d 78, 83 (D.D.C. 2002)

(hereafter “Simpson I”) (*Citing* 28 U.S.C. § 1605(a)(7)). The question in this case, as in all sovereign immunity cases, is whether the plaintiffs' claims fall within the exception, upon which the jurisdiction of the district court depends. Kilburn v. Socialist People's Libyan Arab Jamahiriya, 376 F.3d 1123, 1127 (D.C. Cir. 2004). The answer in the instant suit is unquestionably no in that the plaintiffs cannot satisfy the requirements for falling under the exception to immunity codified under § 1605(a)(7) (or any section of the FSIA). Plaintiffs’ amended complaint concedes that plaintiffs Ashraf Tulty ( as well as the alleged victim Ahmed Tulty), Mohammed Busier, and Jaballa M. Hasan are not nationals of the United States. (Amend. Compl. ¶¶ 7, 14, 16).

Section 1605(a)(7), in relevant part, states:

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

(7) . . . except that the court shall decline to hear a claim under this paragraph

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act; and

(B) even if the foreign state is or was so designated, if –

. . . .

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

Section 1605(a)(7)(B)(ii) instructs the court to decline to hear a claim under the 1996 Amendment to the FSIA if the claimant (or the victim) are not nationals of the United States. The Court’s inquiry in this case is immediately at end as plaintiffs concede that plaintiffs Ashraf Tulty (as well as the Ahmed Tulty), Mohammed Busier, and Jaballa M. Hasan are currently not nationals of the United States.

Subsection (B)(ii) also requires that the claimant (or the victim) must have been a national of the United States “when the act upon which the claim is based occurred”. (*Emphasis added*). The amended complaint (as well as the original complaint) is completely bereft of any dates on which the alleged seizures of property of the claimants who are now United States “citizens” occurred. Libya is left to guess as to whether the citizen plaintiffs acquired their



American citizenship after the alleged seizure of property upon which the plaintiffs' base their claim. If so, the Court must also decline to hear the claims of the plaintiffs who are currently citizens of the United States but were not nationals of the United States at the time of the alleged seizure of land. As the nationality of the plaintiffs is a threshold jurisdictional defect which can never be cured the Court must grant Libya's motion to dismiss the complaint for lack of subject-matter jurisdiction and dismiss the complaint with prejudice.

*B. An Offer for Arbitration Was Not Made*

Section 1605(a)(7)(B)(i) of the FSIA also imposes a jurisdictional arbitration requirement.

Section 1605(a)(7), in relevant part, states:

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

(7) . . . except that the court shall decline to hear a claim under this paragraph

–

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act; and

(B) even if the foreign state is or was so designated, if –

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

The plaintiffs concede in their complaint that all alleged acts on which the suit is based occurred in Libya. (Amen. Comp. ¶¶ 8, 9, 11, 13, 15, 17, 19, 21). Plaintiffs, in suits pursuant to §1605(a)(7), must offer “the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration if the act occurred in the foreign state against which the claim has been brought.” Simpson II, 236 F.3d at 233. An offer to arbitrate the claims has not been made. The Court is consequently without subject-matter jurisdiction and must decline to hear plaintiffs’ claims and dismiss the complaint.

C. *The Court Lacks Subject-matter Jurisdiction  
For Any Claim of Conversion*

The Court of Appeals, in Cicippio-Puleo v. Islamic Republic of Iran, 353 F.3d 1024,  
1032

(D.C. Cir. 2004) commences its opinion by reiterating the general premise that § 1605(a)(7) waives sovereign immunity of a foreign state were money damages are sought for “personal injury or death”. The Court, in relevant part held:

Section 1605(a)(7) waives the sovereign immunity of a designated "foreign state" in actions in which money damages are sought for personal injury or death caused by one of the specified acts of terrorism, if the act of terrorism or provision of material support is engaged in by "an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

*Id.* The Court further held that the language of §1605(a)(7) is clear and limited the application of § 1605(a)(7) to the plain language of the Statute. *Id.* at 1033. Cicippio relied heavily upon § 1605(a)(7)’s legislative history in making its determination. The Court’s analysis in Cicippio warrants restating at length. The Court, in relevant part, held:

When Congress passed section 1605(a)(7), the Conference Committee report explained:

This subtitle provides that nations designated as state sponsors of terrorism under section 6(j) of the Export Administration Act of 1979 will be amenable to suit in U.S. courts for terrorist acts. It permits U.S. federal courts to hear claims seeking money damages for **personal injury or death** against such nations and arising from terrorist acts they commit, or direct to be committed, against American citizens or nationals outside of the foreign state's territory, and for such acts within the state's territory if the state involved has refused to arbitrate the claim.

H.R. Conf. Rep. No. 104-518, at 112 (1996).

*Id.* at 1035. (Emphasis added). The language of the Conference Committee report relied upon by the Court of Appeals in Cicippio's binding opinion makes it clear that § 1605(a)(7) only permits United States federal courts to hear claims seeking money damages for "personal injury or death" and for such acts committed or directed to be committed, against American citizens or nationals. *Id.* Nothing in the Committee Report allows for the extension of claims beyond those for personal injury and/or death. The language is also further limited to American citizens and nationals. The Court admonishes that the "ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law." *Id.* at 1033.

Plaintiffs claim money damages for the alleged seizure and conversion by Libya of property in Libya. These are clearly not claims for personal injury or death and are beyond the clear language of §1605(a)(7). If the Court were to take subject-matter jurisdiction over the conversion claims it would go beyond the congressional intent in amending the FSIA and in effect create a new exception to foreign sovereign immunity. The Court should dismiss

plaintiffs' claims with prejudice for seizure of property in Libya as a matter of law.

*D. The Alien Tort Claim Act Does not Create  
Subject-Matter Jurisdiction Against a Foreign State*

Plaintiffs have asserted the Alien Tort Claims Act as one of the jurisdictional predicates of the Court. It has been long settled that the FSIA is the sole basis for obtaining jurisdiction over a foreign state in United States courts. Argentine Republic, 488 U.S. at 434. The basic premise of the FSIA is that foreign sovereigns are immune from suit in the United States unless the action falls under one of the specific exceptions enumerated in the statute. 28 U.S.C. § 1604; Price II, 389 F.3d at 196.

Although the Supreme Court recently declared that the ATCA is jurisdictional, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004), such jurisdiction does not pertain to suits involving foreign-state defendants. As in all such cases the plaintiffs must prove jurisdiction under the FSIA before any claims under the ATCA can proceed. Argentine Republic, 488 U.S. at 439; Soudavar v. Islamic Republic of Iran, 67 Fed.Appx. 618, 619-20, 2003 WL 21401768, \*1-2 (D.C. Cir. 2003); *see also* Hwang Geum Joo v. Japan, 332 F.3d 679, 687 (D.C. Cir. 2003) (holding that "whatever else the Alien Tort Statute might do, it does not provide the courts with jurisdiction over a foreign sovereign. Only the FSIA can provide such jurisdiction"). Libya is immune from suit in the United States in this case as it does not fall under any of the specific exceptions enumerated in the FSIA (they fail the arbitration requirement, the nationality requirement, as well as claims which are beyond the limited exception to immunity under §

1605(a)(7)) and the Court must dismiss the complaint as plaintiffs may not rely upon the ATCA as the basis for the Court's subject-matter jurisdiction.

*E. Plaintiff May Not Bring a Claim for Punitive Damages*

Plaintiffs may not sustain a claim for punitive damages against Libya pursuant to 28 U.S.C. § 1606. Section 1606 of the FSIA provides, in relevant part, that “a foreign state, except for an agency or instrumentality thereof shall not be liable for punitive damages.” 28 U.S.C. § 1606 (emphasis added). See Weinstein v. Islamic Republic of Iran, 184 F.Supp.2d 13, 24, n.1 (D.D.C. 2002).

**II. HEAD OF STATE IMMUNITY**

Muammar Qadhafi is the head of the Libyan State (as correctly asserted in the complaint ¶23), a foreign sovereign nation. Plaintiffs, however, incorrectly conclude that he is an agent of Libya. The head of a foreign sovereign state is not an agent of that same state.

Qadhafi enjoys head-of-state immunity and the Court should dismiss plaintiffs' complaint against him. The issue of had-of-state immunity has received thorough examination in several cases. Most recently in Ye v. Zemin, 383 F3d 620, 625 (7th Cir. 2004) the Court of Appeals reviewed the history of the immunity and outlined its boundaries. The Court, in relevant part, held:

The FSIA does not, however, address the immunity of foreign heads of states. The FSIA refers to foreign states, not their leaders. The FSIA defines a foreign state to include a political subdivision, agency or instrumentality of a foreign state but makes no mention of heads of state. 28 U.S.C. § 1603(a). Because the FSIA does not apply to heads of states, the decision concerning the immunity of foreign

heads of states remains vested where it was prior to 1976--with the Executive Branch. *Noriega*, 117 F.3d at 1212. ("Because the FSIA addresses neither head-of-state immunity, nor foreign sovereign immunity in the criminal context, head-of-state immunity could attach in cases, such as this one, only pursuant to the principles and procedures outlined in [*McFaddon*] and its progeny. As a result, this court must look to the Executive Branch for direction on the propriety of Noriega's immunity claim.").

*Id.* A sister Court in this Circuit has requested the position of the Executive Branch on head-of-state immunity for Qadhafi. *Collett v. Socialist People's Libyan Arab Jamahiriya*, 362 F.Supp.2d 230, 237 (D.D.C. 2005). The position of the United States Department of State is to be submitted to the Honorable Judge Urbina in the above referenced matter by no later than August 2, 2005.

### **III. THE COURT LACKS PERSONAL JURISDICTION**

#### *A. Court Lacks Personal Jurisdiction Over Defendant Qadhafi*

The Congress of the United States is a legislature of enumerated and specific powers, and can only act in accordance with the limitations imposed by the Constitution. *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 176, 2 L.Ed. 60 (1803). When Congress is required to establish some procedure concerning the deprivations of life, liberty or property, the scope of permissible procedures is limited by specific constitutional guarantees. The civil trial process is regulated by constitutional guarantees of due process restrictions on courts jurisdiction. (*Ibid.*)

The legislative history of the FSIA expresses the design that the assertion of personal jurisdiction over a foreign state must be informed by the due process principles of International Shoe:

(b) Personal Jurisdiction.--Section 1330(b) provides, in effect, a

Federal long-arm statute over foreign states (including political subdivisions, agencies, and instrumentalities of foreign states). It is patterned after the long-arm statute Congress enacted for the District of Columbia. Public Law 91-358, sec. 132(a), title I, 84 Stat. 549. The requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision. Cf. International Shoe Co. v. Washington, 326 U.S. 310 (1945), and McGee v. International Life Insurance Co., 355 U.S. 220, 223 (1957). For personal jurisdiction to exist under section 1330(b), the claim must first of all be one over which the district courts have original jurisdiction under section 1330(a), meaning a claim for which the foreign state is not entitled to immunity. Significantly, each of the immunity provisions in the bill, section 1605-1607, requires some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction. These immunity provisions, therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction.

H.R. Rep. 94-1487 at 13.

A nonresident defendant is constitutionally amenable to a forum's personal jurisdiction if it possesses (1) sufficient minimum contacts with the forum to satisfy due process requirements, and (2) if the forum's exercise of jurisdiction comports with "traditional notions of fair play and substantial justice." International Shoe Co. 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). This two-part test embodies the controlling due process principle that a defendant must have "fair warning" that a particular activity may subject it to the jurisdiction of a foreign court. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985).

To meet constitutionally mandated minimum contacts, the defendant's contacts with the forum must satisfy three criteria:

First, the contacts must be related to the plaintiffs' cause of action or have given rise to it. Burger King, *supra*, 471 U.S. at 472. Second, the contacts must involve "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum . . . ,

thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253 (1958). Third, the defendant's contacts with the forum must be "such that [the defendant] should reasonably anticipate being haled into court there." World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

It is clear that the United States nationality of the plaintiffs does not furnish the requisite nexus with the United States so as to permit the maintenance of this *in personam* action.<sup>2</sup> In Callejo v. Bancomer, S.A., 764 F.2d 1101, 1111 (5th Cir. 1985), the Circuit Court observed that jurisdictional contacts with the United States were purely fortuitous "where they depended solely on the fact that the injured person happened to be American." *See also*, Thos. P. Gonzalez Corp. v. Consejo Nacional De Produccion De Costa Rica, 614 F.2d 1247, 1253-55 (9th Cir. 1980) ("minimum contacts" standard not satisfied when the only link to the United States is plaintiff's nationality).

Although the FSIA (in conjunction with 28 U.S.C. § 1330(b)) established personal jurisdiction over a state, it does not independently establish personal jurisdiction over an individual. I.T. Consultants, Inc. v. Republic of Pakistan, 351 F.3d 1184, 1191 (D.C. Cir. 2003); Price I, 294 F.3d at 96.

The complaint alleges that all alleged seizures of property were in Libya and were the property of then Libyan citizens some of which later acquired United States citizenship while the other plaintiffs are still not nationals of the United States. The alleged acts of torture and subsequent death also took place in Libya, directed at a Libyan national who was never a

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<sup>2</sup> Plaintiffs who are not nationals of the United States cannot even hope to rely on this premise to vest the Court with personal jurisdiction.



national of the United States. Qadhafi has had no contacts with the United States relating to the instant suit. The Court may not assert personal jurisdiction over Qadhafi and must dismiss the complaint against him independent of his head-of-state immunity due to constitutional restrictions upon its jurisdiction.<sup>3</sup>

*B. Court Lacks Personal Jurisdiction Over Libya*

Libya is fully cognizant that the issue of the constitutionality of personal jurisdiction over the state has been decided adversely by this Court in Price I; to preserve the issue for potential further review, the matter is respectfully raised once again in this instant case as the holding in Price I may now be in question due to the language in Republic of Austria v. Altman, 541 U.S. 677, \_\_\_ , 124 S.Ct. 2240, 2262 (2004) , which held:

For one thing, statutes of limitations, **personal jurisdiction** and venue requirements, and the doctrine of *forum non conveniens* will limit the number of suits brought in American Courts.

*Id.* (emphasis added).

#### **IV. FAILURE TO STATE A CAUSE OF ACTION**

Plaintiffs have failed to allege viable state or federal causes of action against the defendants. Although plaintiffs state traditional, generalized claims for torture, extrajudicial

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<sup>3</sup> Qadhafi has never been served in his private capacity. Although the complaint does not indicate whether suit is brought against Qadhafi in his personal/individual or official capacity, plaintiffs' counsel on June 7, 2005, in the status conference held before the Court indicated that the claims against Qadhafi are in his official capacity only. Undersigned counsel has only appeared on behalf of Qadhafi in his official capacity and reserves the right to raise the issue of service of process if claims are asserted against Qadhafi in his personal/individual capacity.

killing, conversion, and intentional infliction of emotional distress, they fail to specify whether these claims are grounded in state common law, state or federal statutory law, or foreign law.<sup>4</sup>

See Bettis, 315 F.3d at 332-333. The complaint fails to “identify a particular cause of action arising out of a specific source of law,” and thus falls short of the standard set in our Circuit in Acree v. Republic of Iraq, 370 F.3d 41, 58-59 (D.C. Cir. 2004) where the Court, in relevant part, held:

[G]eneric common law cannot be the *source* of a federal cause of action. The shared common law of the states may afford useful guidance as to the rules of decision in a FSIA case where a cause of action arises from some specific and concrete source of law. See Bettis, 315 F.3d at 333 (assuming, *arguendo*, that plaintiffs stated a cause of action under the Flatow Amendment and then turning to generic common law to flesh out the controlling substantive law). But there is no support for the proposition that generic common law itself may furnish the cause of action. Rather, as in any case, a plaintiff proceeding under the FSIA must identify a particular cause of action arising out of a specific source of law. (Emphasis added).

*Id.* See also Dammarell v. Islamic Republic of Iran, 2005 WL 756090 (D.D.C. 2005).

The Court should dismiss plaintiffs’ complaint for failure to state a claim upon which relief can be granted.<sup>5</sup>

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<sup>4</sup> Plaintiffs, in their statement of jurisdiction and venue, make a passing reference to genocide. Genocide, however, is not asserted as a cause of action in the complaint and if it were, none of the allegations of the complaint can constitute genocide.

<sup>5</sup> Plaintiffs cite § 1350 sec(b) in Count I and § 1350 (a) of their claims for relief for defining “torture” and “extrajudicial killing” but do not seem to rely on it as a basis for causes of action. (Amend. Compl. ¶¶ 28 and 31). It should be noted 28 U.S.C. § 1350 does not contain any subsections. Plaintiffs are most likely referring to the “Historical and Statutory Notes” to § 1350. Even assuming that the definitions contained in the Historical and Statutory Notes can be relied upon as a cause of action, Section 2 of the “Torture Victim Protection Act of 1991” clearly holds that the “Establishment of Civil Action” may only be against and “individual”. Pub.L. 102-256, Mar. 12, 1992, 106 Stat. 73, Sec. 2. Consequently, plaintiffs may not rely on any section of the Act against Libya or its head-of-state.

**V. JURY TRIAL NOT AVAILABLE IN SUIT AGAINST FOREIGN STATE**

Plaintiffs amended complaint demands a jury trial on all issues in this matter. Assuming that plaintiffs are able to overcome their jurisdictional shortcomings and the suit is set for trial, a jury trial is prohibited against Libya by statute. Section 1330(a) states:

§ 1330. Actions against foreign States

(a) The district courts shall have original jurisdiction without regard to amount in controversy *of any nonjury civil action* against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title under any applicable international agreement. (Emphasis added).

The paragraph speaks for itself. Undersigned counsel has been unable to locate a single case that proceeded against a foreign state by way of a jury trial after the enactment of the FSIA in 1976. The demand for a jury trial is unavailable for the instant suit.

## CONCLUSION

For the foregoing reasons, the Court should grant Libya's motion under Rule 12(b)(1) and (2), F.R.Civ.P., and dismiss this action for lack of subject-matter and constitutional personal jurisdiction over the defendants and, in the alternative, grant Libya's motion under Rule 12(b)(6), F.R.Civ.P., and dismiss the complaint for failure to state claims upon which relief can be granted.

Dated: July 14, 2005

Respectfully submitted,

//s//  
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