

**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.                        | ) |                              |

**DEFENDANTS’ REPLY TO PLAINTIFFS’ OPPOSITION  
TO DEFENDANTS’ MOTION TO DISMISS**

**I. PLAINTIFFS’ CONCEDE LACK OF SUBJECT-MATTER & PERSONAL JURISDICTION**

**A. Explicit Concessions**

Plaintiffs’ opposition to the defendants’ (hereafter “Libya”) motion to dismiss concedes that the Court lacks subject-matter jurisdiction under 28 U.S.C. § 1605(a)(7) to decide the above captioned suit as the plaintiffs have failed to satisfy the requirements for exception to foreign sovereign immunity.

Plaintiffs’ explicitly concede their failure to afford Libya a reasonable opportunity to arbitrate their claims. Plaintiffs also further concede that the Court lacks subject-matter jurisdiction to adjudicate their claims for conversion of property under § 1605(a)(7) as they

cannot meet the nationality requirement contained under that subsection of the FSIA.<sup>1</sup>

Plaintiffs also concede and agree to the dismissal of all claims against defendant Qadhafi for lack of personal jurisdiction as well as head-of-state immunity.

Finally, plaintiffs concede that a jury trial is unavailable against Libya.

*B. Implicit Concessions*

The Court should treat the remainder of Libya's arguments as conceded as plaintiffs have failed to address any of them. United States v. Real Property Identified AS: Parcel 03179-005R, 287 F.Supp.2d 45, 61 (D.D.C. 2003) ("If the opposing party files a responsive memorandum, but fails to address certain arguments made by the moving party, the court may treat those arguments as conceded.").

Plaintiffs concede that plaintiff Ashraf Tulty (as well as the alleged victim Ahmed Tulty) are not United States nationals. Plaintiffs do not advance any other grounds (as they did for the conversion of property claims) for the subject-matter jurisdiction of the Court for the claims of Ashraf Tulty. Thus the Court should treat Libya's argument that it lacks subject-matter jurisdiction for plaintiff Tulty as conceded.

Plaintiffs also do not address Libya's argument that the Alien Tort Claim Act does not create subject-matter jurisdiction against a foreign state. The argument should be treated as

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<sup>1</sup> Libya maintains the position that plaintiffs would not be able to pursue their claims for conversion of property under § 1605(a)(7) even if they did meet the nationality requirement as the subsection only waives a foreign sovereign's immunity when money damages are sought for "personal injury or death". 28 U.S.C. § 1605(a)(7). *See also Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1032 (D.C. Cir. 2004). The issue is, however, moot as the Court must dismiss all claims for conversion under § 1605(a)(7) for lack of subject-matter jurisdiction.

conceded.

The plaintiffs also do not address the issue of punitive damages. 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). There are no agencies or instrumentalities of Libya as party defendants in this case. The Court’s inquiry is at an end as well as the argument being conceded by the plaintiffs.

Finally, plaintiffs completely fail to address Libya’s assertion that they have failed to allege viable state or federal causes of action against Libya. Once again the argument should be treated as conceded. Libya will not repeat its arguments from its motion to dismiss for the above points and respectfully refers the Court to its motion to dismiss.

## **II. SUBJECT-MATTER JURISDICTION MAY NOT BE MAINTAINED UNDER ANY PROVISION OF THE FSIA FOR CONVERSION OF PROPERTY**

As Libya’s opening motion highlighted, the law is settled that the Foreign Sovereign Immunities act of 1976 provides the sole basis for obtaining jurisdiction over a foreign state in United States courts. Argentina Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989). The Amerada Court explained that sections 1604 and 1330(a) of the FSIA work in tandem: §1604 bars United States courts from exercising jurisdiction when a foreign state is entitled to immunity<sup>2</sup>, and §1330(a)<sup>3</sup> confers subject-matter jurisdiction on district courts to hear

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<sup>2</sup> §1604 provides as follows:

**Immunity of a foreign state from jurisdiction**  
Subject to existing international agreements to which the

claims against a foreign state when the foreign state is not entitled to immunity pursuant to §§1605-1607, 488 U.S. at 433-35. Plaintiffs, after conceding that their claims cannot fall under the § 1605(a)(7) exception to immunity, now request that the Court allow them to amend their complaint to assert subject-matter jurisdiction pursuant to §§ 1605(a)(2) and (a)(3) for conversion of property. The Court should not grant plaintiffs request for an amendment as any such amendment would be futile. Subject-matter jurisdiction cannot vest under any subsection of the FSIA for a claim of conversion of property by Libya, which are located in Libya, belonging to Libyan nationals at the time of the alleged act.

A. *The Court Lacks Subject-Matter Jurisdiction  
Under 28 U.S.C. § 1605(a)(2)*

Section 1605 enumerates the exceptions to foreign sovereign immunity. Plaintiffs incorrectly assert that their claims for conversion falls under the exception to sovereign immunity under § 1605(a)(2). That section provides:

**General exceptions to the jurisdictional immunity of a foreign state**

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United States is a party at the time of the 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.

<sup>3</sup> Section 1330(a) provides as follows:

**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 under sections 1605-1607 of this title or under any applicable international agreement.

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

(2) in which the action is based upon a commercial activity carried 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 States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States; (Emphasis added).

A simple review of the plain language of the statute makes it clear beyond any doubt that the claims of the plaintiffs for conversion of property does not satisfy any part of § 1605(a)(2). It is clear that a governmental taking of land in Libya is not a commercial activity by Libya in the United States. As the alleged taking was in Libya the act was not performed by Libya in the United States in connection a commercial activity anywhere else. Finally, the taking could not, and did not, have any effect (direct or indirect) in the United States. The property was in Libya at the time of the alleged taking and the plaintiffs were Libyan nationals. The fact that the plaintiffs later moved to the United States does not create a direct effect as now clearly defined by the Supreme Court. In Republic of Argentina v. Weltover, 504 U.S. 607, 618 (1992) the Court held that “an effect is direct if it follows as an immediate consequence of the defendant’s activity.” At the time of the alleged conversion the plaintiffs lived in Libya and their property was in Libya. Hence, the financial loss, occurred in Libya. The fact that the plaintiffs have since then become United States residents does not alter this analysis. In sum, it is clear from the face of the complaint that the plaintiffs suit is premised on the alleged conversion of property by Libya in Libya, and that the plaintiffs at that time were Libyan nationals and lived in Libya..<sup>4</sup>

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<sup>4</sup> The exact same issue was present in the case of Soudavar v. Islamic Republic of Iran, 186 F.3d 671, 674 (5th Cir. 1999) (“ . . . at the time of the expropriation, plaintiff shareholders

Any suggestion by the plaintiffs that subject-matter jurisdiction may vest under §1605(a)(2) is frivolous. The Court should not allow a meaningless amendment of the complaint and should dismiss the suit for lack of subject-matter jurisdiction.

*B. The Court Lacks Subject-Matter Jurisdiction  
Under 28 U.S.C. § 1605(a)(3)*

The only exception that could conceivably apply to this case is the “international takings exception” in §1605(a)(3). That section provides:

**General exceptions to the jurisdictional immunity of a foreign state**

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

(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 out in the United States by the foreign state; or that property or any property exchanged for such property is owned and 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. (Emphasis added).

Plaintiffs concede that they are not nationals of the United States and were solely nationals of Libya at the alleged time of the conversion. The alleged property that was taken is located in Libya and plaintiffs do not claim that any property exchanged for the confiscated property “is present in the United States in connection with a commercial activity carried on in the United States by [Libya],” §1605(a)(3). Finally, plaintiffs do not meet the prerequisite of §1605(a)(3)

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lived in Iran and their property was in Iran, so that the financial loss occurred in Iran, and the fact that the shareholders subsequently became United States residents did not alter this analysis).

that the property be taken is “in violation of international law” because the taking of property by a sovereign from its own nationals does not involve principles of international law. The international taking exception was analyzed by the Fifth Circuit in De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1395-96 (1985), affirming the dismissal of a suit for the taking of property brought by a Nicaraguan national against Nicaragua. The court stated:

... With few limited exceptions, international law delineates minimum standards for the protection only of aliens; it does not purport to interfere with the relations between a nation and its own citizens. Thus, even if Banco Central’s actions might have violated international law had they been taken with respect to an alien’s property, the fact that they were taken with respect to the intangible property rights of a Nicaraguan national means that they were outside the ambit of international law.

In applying Section 1605(a)(3), our inquiry is narrowly circumscribed. The question is not whether a foreign state’s actions are consistent with United States law or United States conceptions of public policy. Nor are we concerned with whether, on the merits, we should recognize or assist the taking of property by the foreign state. Instead, the question is solely whether any generally accepted norm of *international* law prohibits the defendant’s actions. If not, then unless another exception to sovereign immunity applies, the foreign state is immune from suit and we lack jurisdiction to inquire into the validity of its conduct. (Emphasis in original).

*See also*, Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 711 (9th Cir. 1992)

(international taking exception to sovereign immunity does not apply where a sovereign state expropriates property of its own nationals because such taking does not implicate international law), *cert. denied*, 113 S.Ct. 1812 (1993); Chuidian v. Philippine Nat’l Bank, 912 F.2d 1095, 1105 (9th Cir. 1990) (same).

Assuming the truth of the facts alleged by plaintiffs for the purposes of Libya’s motion to dismiss establish incontestably that plaintiffs’ claims are based on a governmental taking, and

nothing else.

**CONCLUSION**

For the foregoing reasons, the Court should grant Libya's motion and dismiss this action for lack of subject-matter jurisdiction, for lack of personal jurisdiction, and for failure to state a claim upon which relief can be granted.

Dated: August 30, 2005

Respectfully submitted,

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