86-8010

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 86-8010
86-8011

MOISES GARCIA-MIR, ET AL.,
Plaintiffs-Appellees,

-against-

EDWIN MEESE, III, ET AL.,
Defendants-Appellants.

RAFAEL FERNANDEZ-ROQUE, ET AL.,
Petitioners-Appellees,

-against-

EDWIN MEESE, III, ET AL.,
Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLEES

ARTHUR C. HELTON
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Human Rights
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On the Brief:

Michael Delikat, Esq.

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal:

Judge Marvin H. Shoob, U.S. District Court, Northern District of Georgia

Dale M. Schwartz, Counsel of record for appellees

Myron N. Kramer, Counsel of record for appellees

William C. Thompson, Counsel of record for appellees

Deborah S. Ebel, Counsel of record for appellees

Kenneth A. Hindman, Counsel of record for appellees

David A. Webster, Counsel of record for appellees

Steven S. Cowen, United States Attorney, Northern District of Georgia

Sharon Douglas Stokes, Assistant U.S. Attorney, Northern District of Georgia

Barbara Tinsley, Assistant U.S. Attorney, Northern District of Georgia

Richard K. Willard, Assistant Attorney General - Civil Division

Lauri Steven Filppu, Attorney, Office of Immigration Litigation, Civil Division

Madelyn E. Johnson, Attorney, Office of Immigration Litigation, Civil Division

Edwin Meese, III, Attorney General of the United States, Respondent

Norman A. Carlson, Director, Bureau of Prisons, Respondent

Jack A. Hanberry, Warden, Atlanta Federal Penitentiary, Respondent

Phillip N. Hawkes, Director, Office of Refugee Resettlement Program, Respondent

Dr. Otis R. Bowen, Secretary of Health and Human Services, Respondent

All Mariel Cubans who are members of the Plaintiff Class

STATEMENT REGARDING PREFERENCE

This case is entitled to a habeas corpus preference under Eleventh Circuit Local Rule Appendix One, (a) (3). Also, on January 21, 1986, as part of its ruling on the government's motion for stay, the Court ordered that this case be heard in expedited fashion.

STATEMENT REGARDING ORAL ARGUMENT

Amicus does not intend to argue orally.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to U.S.C. §1292(a)(1).

TABLE OF AUTHORITIES

STATEMENT OF AMICUS INTEREST

The Lawyers Committee for Human Rights is a national legal resource center in the areas of refugee and asylum law. Since 1978, the Lawyers Committee has monitored proposed legislation and regulations in the refugee and asylum areas, has engaged in litigation in significant cases in these areas, and has assisted in providing legal representation for numerous applicants for political asylum in the United States from countries all over the world. The Committee filed an *amicus* brief in the District Court below on the international law questions in this case. The Lawyers Committee is dedicated to ensuring that refugees and asylum seekers receive just and equitable consideration under domestic and international law.

All parties have consented to the Lawyers Committee participation as *amicus* herein.

STATEMENT OF THE ISSUE

Whether the actions of the Attorney General resulting in the arbitrary and indefinite detention of class plaintiffs in violation of customary international law should be declared unlawful under the laws of the United States.

STATEMENT OF THE CASE

These consolidated cases are class actions brought on behalf of approximately 1500 Cuban nationals who arrived in the United States in 1980 as part of the "Freedom Flotilla" from Mariel Harbor and who are presently incarcerated at the maximum security federal penitentiary in Atlanta. They are incarcerated because the government of Cuba refuses to accept them back.

Some of the plaintiffs had once been eligible for release consideration under the Attorney General's status review plan. On February 12, 1985, in accordance with recommendations of the Associate Attorney General, an Assistant Attorney General and the Commissioner of the INS, the Attorney General terminated the status review plan. (See Memorandum dated February 12, 1985, annexed hereto as Appendix A). As a result of this decision, a procedure no longer exists to determine whether to incarcerate further or release plaintiffs.

Although the United States signed an agreement with Cuba on December 14, 1984, to permit the return of 2,746 Mariel Cubans, that agreement is no longer in effect. In May, 1985, the government of Cuba renounced the deportation agreement, guaranteeing the continued indefinite detention of all of the Cuban plaintiffs.

In the court below, plaintiffs-appellees petitioned for a Writ of Habeas Corpus on the grounds that their indefinite detention is arbitrary and prolonged, and therefore a violation of customary international law.[1] Plaintiffs also argued that such detention violates a federally-created liberty interest. Defendants moved the court to deny the application on the law as there were no material facts in dispute. The only evidentiary hearing held below involved the presentation of testimony from two experts on international law.

The district court found that the plaintiffs' indefinite detention, without reliable findings that continued detention of each class member was reasonably necessary for early deportation or for the protection of society, violated customary international law. The court reaffirmed the principle that international law forms a part of United States law and may properly be applied as a basis for decision. The Nereide, 13 U.S. (9 Cranch) 388 (1815) at 423, and The Paquete Habana, 175 U.S. 677

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[1] Plaintiffs previously have challenged their continued indefinite detention on several grounds. Plaintiffs argued that their detention violates statutory and constitutional restrictions on the Attorney General's power to detain excludable aliens. Plaintiffs also argued that the Attorney General abused his discretion by failing to follow his own criteria in making parole decisions. This Court rejected these arguments. Fernandez-Roque v. Smith, 734 F.2d 576 (11th Cir. 1984).

(1900). The district court then identified international agreements and instruments which, along with recognized treatises and the testimony of international law experts, establishes the international law norm prohibiting the type of prolonged arbitrary detention to which plaintiffs have been subjected.

Despite its clearly stated conclusion that the indefinite detention of plaintiffs was a violation of international law, the district court held that customary international law does not offer plaintiffs relief because a "controlling executive act", i.e., the Attorney General's abolition of the status review plan, permitted the government to "ignore our country's obligations arising under customary international law." Slip op. at 37.

By equating the actions of every government official and functionary with those of the President, the court nullified the proposition established in The Paquete Habana that international law is the law of the land and should be applied to give effect to the international obligations of the United States. Plaintiffs appeal from this holding with its broad implications to the future applicability of customary international law.

ARGUMENT

CUSTOMARY INTERNATIONAL LAW MUST BE APPLIED TO INVALIDATE THE CONTINUED INDEFINITE DETENTION OF THE PLAINTIFFS

A. The Court's Conclusion Below That The Continued Indefinite Detention of Plaintiffs Violates Customary International Law Was Correct

Although finding that the Attorney General "shares" the power of the President to ignore customary international law, the court below, after a careful analysis of the appropriate sources, held:

> "... that the indefinite detention of plaintiffs, without periodic hearings establishing that the detention of each class member is reasonably necessary for early deportation or for the protection of society from one proven to be dangerous, appears to violate customary international law."

Slip op. at 35, 36.

As discussed in greater detail in Section B, infra, international law is a part of United States law and must be applied to determine plaintiffs' claims under the circumstances of this case. To ascertain "customary international law", in accordance with The Paquete Habana, the court below looked to the "customs and usages of civilized nations" and the "works of jurists and commentators." The district court found as a factual matter that the Attorney General's actions did violate customary

international law as embodied in numerous international instruments which all prohibit prolonged arbitrary detention of the type to which plaintiffs herein have been subjected.[2]

The court drew further support for its conclusion from the revised Restatement, which provides that "[a] state violates international law if, as a matter of state policy, it practices, encourages, or condones ... prolonged arbitrary detention." Restatement (Revised) Section 702(e) (Tent. Draft No. 3, 1982). Finally, the court below reached this determination after conducting a hearing where expert witnesses on international law, Professors Louis Henkin and Harold G. Maier, agreed that prolonged arbitrary detention violates the customary international law of human rights. Finding Professor Henkin's testimony persuasive, and after careful analysis of the appropriate sources of customary international law, the court determined that depriving plaintiffs of the type of periodic, individualized hearings necessary to estab-

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[2] Illustrative international instruments include the 1948 Universal Declaration of Human Rights (Art. 9 and 13(1)); the 1966 International Covenant on Civil and Political Rights (Art. 9(1)); the 1969 American Convention on Civil Rights (Articles 5(3), 7(1) and 7(3)); the 1950 European Convention for the Protection of Human Rights (Article 5(1)); the United Nations Third and Sixth Committees Draft Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment (1983) (Principle 1). See Committee on Foreign Affairs, Human Rights Documents (Sept. 1983).

lish a reasonable and fair basis for continued detention violated those international law standards.

Other courts have also found that customary international law prohibits prolonged arbitrary detention. In Rodriquez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981), the court stated firmly that "[n]o principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment." 654 F.2d at 1388. To support this principle, the court referred directly to the Universal Declaration, Articles 3 and 9, and the American Convention on Human Rights, 77 Department of State Bull. 28 (July 4, 1977), Article 7.

Similarly, in Soroa-Gonzales v. Civiletti, 515 F. Supp. 1049 (N.D. Ga. 1981), where the court relied on a domestic statute, it nevertheless added "[w]ere the Court forced to decide, however, whether [the detention] amounted to 'arbitrary detention' in violation of the Universal Declaration of Human Rights (Article 9), the International Covenant on Civil and Political Rights (Article 9, para. 1), and the American Convention on Human Rights (Article 7, para. 3), the Court would conclude that petitioner's further detention was arbitrary." 515 F. Supp. at 1061, n.18.

Finally, in Von Dardel v. U.S.S.R., Civil Action No. 84-0353 (D.D.C. 1985) (Appendix B), an action brought against the Soviet Union on behalf of the Swedish diplomat Raoul Wallenberg, the court held that the arbitrary detention of Wallenberg constituted "no clearer violation of the law of nations."

In sum, the court below correctly held that plaintiffs are subjected to a type of prolonged arbitrary detention that clearly violates customary international law.

B. Customary International Law's Prohibition of Arbitrary, Prolonged Detention Is Applicable to the Claims of Plaintiffs Herein and Is Enforceable in the United States Courts

Courts have long accepted that international law forms a part of United States law and under appropriate circumstance may form the basis for a decision. In The Paquete Habana, 175 U.S. 677 (1900), the Court held: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." 175 U.S. at 700.

It is the court's responsibility to ascertain customary international law from the appropriate sources which include not only international instruments and

treaties, but "the customs and usages of civilized nations" and the works of respected commentators on the subject of international law. The Paquete Habana at 700. Courts must interpret customary international law as it has "evolved and exists among the nations of the world today." Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980). See also Von Dardel v. U.S.S.R., supra.

Customary international law is a source of rights for an individual before the courts of the United States and must be applied in the absence of any treaty, legislative act or executive act to the contrary. Id. at 700. In 1815 Chief Justice Marshall stated: "Till such an act [of Congress] be passed, the Court is bound by the law of nations which is a part of the law of the land" (emphasis added). The Nereide, 13 U.S. (9 Cranch) 388 (1815) at 423. See also Filartiga v. Pena-Irala, supra, at 887; Von Dardel v. U.S.S.R., supra; L. Henkin, "International Law as U.S. Law", 82 Mich. L. Rev. 1555, 1561 (1984).

This Court has held that neither the Constitution nor any legislative act provides a basis for plaintiffs to challenge their continued imprisonment. Fernandez-Roque v. Smith, supra. Therefore, customary international law is dispositive in this case unless there is a "controlling executive act."

C. There Is No Basis Under the Circumstances of this Case for Overriding International Law

As the Supreme Court held in The Paquete Habana, supra, plaintiffs can rely on customary international law to seek relief only if "there is no treaty and no controlling executive or legislative act or judicial decision." Id. at 700. The court below correctly found that there was no treaty or "controlling legislative act" that would preclude the application of customary international law here. Slip op. at 34. The court expressly and rightly rejected the government's argument that 8 U.S.C. Sec. 1227(a) which is denoted "Immediate deportation of aliens excluded from admission or entering in violation of law" was dispositive. Id. at 34.

However, the court below erred in holding that the Attorney General's termination of the status review, and the indefinite detention to which plaintiffs are thereby subjected, "may" constitute a "controlling executive act" which would deny plaintiffs relief under customary international law. Id. at 35.

The court ruled that because the Attorney General "shares" the authority of the President "to ignore our country's obligations arising under customary international law", the actions of the Attorney General herein were a "controlling executive act". Id. at 37. This

ruling, however, ignores a basic maxim. In order for an act to be "controlling", it must involve an act taken by the President or expressly sanctioned by him. Restatement (Tent. Draft No. 1, 1980) Sec. 131, Comment C. A careful reading of the facts of The Paquete Habana establishes this proposition with clarity.

The Paquete Habana was a fishing sloop seized and thereafter sold at auction by the U.S. Navy as it attempted to return to its home port in Cuba shortly after the commencement of the Spanish American War in 1898. The seizure was specifically authorized by the Secretary of the Navy (an official appointed by the President). The owners of the vessels thereafter brought an action seeking recovery of the proceeds of the auction on the grounds that such seizure was unlawful. The Supreme Court held that the owners of the seized vessels could seek relief based on customary international law in the absence of a treaty or a controlling executive or legislative act or judicial decision. Citing a plethora of international instruments and respected commentators on international law, the Court found customary international law to be that fishing vessels, pursuing their vocation of catching and bringing in fish, are exempt from capture as a prize of war. The Court then applied this rule of customary international law to invalidate the specific act of the

Secretary of the Navy which had authorized the seizure of the ships.

The Court in The Paquete Habana specifically held that actions of U.S. officials, including the Secretary of the Navy, could not be equated with acts of the President and hence were not "controlling executive acts".[3] As Henkin states, "the courts have enforced international law against lower federal officials not directed by the President to disregard international law." Henkin, Foreign Affairs and the Constitution, at 222.

No blanket equation of authority is appropriate. If every action by a U.S. official challenged as a violation of international law is deemed a Presidential decision to override international law, the courts could never apply international law against an action taken by the

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[3] The government conceded this point below:

> "If, for example, in The Paquete Habana, the President had expressly authorized the seizure of the fishing boat, this would have been a 'controlling executive act' taking precedence over international norms to the contrary and would have bound the court. 175 U.S. at 700, 708. It was because there was no 'order of the President' which 'expressly authorized the boat to be taken that it was released.'" Id. at 711.

Defendant's Memorandum in Support of Motion for Denial of Writ of Habeas Corpus on the Issues of International Law at p. 7.

government. Such a result is clearly absurd under The Paquete Habana.

It is the President, and not a lower level official, who has the authority under the Constitution to enforce the international obligations of the United States as domestic law. United States Constitution, Article II, Section 2. As Henkin states:

> "In sum, the courts will enforce principles of international law and self-executing obligations of U.S. treaties and will require officials, federal and state, to comply with them. But the President, in his constitutional capacity to act in foreign affairs, has power under the Constitution to denounce a treaty, effectively terminating the status of that treaty as law in the United States, even if such denunciation is in violation of international law. Similarly, the President, at least by formal official act, can take measures within his constitutional authority that are contrary to a treaty or a principle of customary law."

L. Henkin, "International Law as U.S. Law", 82 Mich. L. Rev. 1555, 1569. (Emphasis added).

In this case, neither the Congress nor the President has acted, formally or informally, evidencing an intent to override international law. Nor is there any evidence in the record that the President authorized, directed or expressly sanctioned the Attorney General's termination of the status review plan. In fact, the Attorney General's Memorandum dated February 12, 1985 by which the Status Review Plan was terminated (annexed hereto as Appendix A), specifically states that the impetus to

terminate the plan was the "joint recommendation" of a group of lower level officials (the Associate Attorney General, an Assistant Attorney General and the Commissioner of the Immigration and Naturalization Service). Conspicuously absent in the February 12, 1985 Memorandum or anywhere in the record below is any indication that the President even knew about the Attorney General's intention to terminate the status review plan, or once aware of that action, expressly sanctioned it. Nor is there any evidence that the Attorney General was expressly authorized by the President or Congress to violate international law. Certainly, a general authorization or grant of discretion to officials such as the Attorney General should not be interpreted as authorizing violations of international law.

Even if the general authorization and discretion placed in the Attorney General by his appointment characterizes his actions as executive acts under The Paquete Habana, the Attorney General's action herein can not be viewed as a "controlling" executive act. To be "controlling" an act must be made with full appreciation that it violates international law. This notion is inherent in the role of the President as an actor in the international arena. The inadvertent consequences of the actions of lower level officials cannot sanction the violation of

international law. In the present case, there is no evidence that the Attorney General appreciated or even considered whether the termination of the status review plan and the resultant indefinite detention of those imprisoned was a violation of international law.

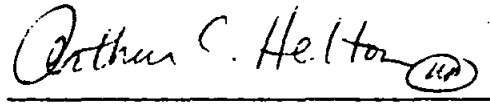
The President has a Constitutional obligation to ensure that the law, including international law, is faithfully executed. A decision to deviate from that obligation is a serious step; it should be taken only by the President, or by those officials expressly empowered by the President to take this deviate action, with full appreciation that it constitutes a violation of international law and after a determination that the national interest requires it. Those essential elements were absent in this case. The court below therefore erred when it held that the Attorney General's actions herein constituted a controlling executive act overriding customary international law.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that Order of the District Court be modified to the extent that it held that the Attorney General could act in violation of customary international law under the facts of this case, that this Court hold that plaintiffs' continued indefinite detention is unlawful and that this case be remanded to the District Court to fashion an appropriate remedy consistent with this conclusion.

February 20, 1986

Respectfully submitted,



ARTHUR C. HELTON
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On the brief:

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Office of the Attorney General

Washington, D. C. 20530

February 12, 1985

MEMORANDUM

TO: D. Lowell Jensen
Associate Attorney General

Stephen S. Trott
Assistant Attorney General
Criminal Division

Alan C. Nelson
Commissioner
Immigration and Naturalization Service

FROM: William French Smith
Attorney General

RE: Attorney General's Status Review Plan and Procedures

I have reviewed your joint recommendation that the Attorney General's Status Review Plan and Procedures be terminated effective immediately in light of the agreement with the Cuban government under which repatriation of Mariel Cubans is now possible.

I find that the underlying rationale for separate treatment of Mariel Cubans has disappeared with the expressed willingness of Cuba to accept return of certain Mariel Cubans and to reinstitute normal immigration relations under which we understand that the government of Cuba has receded from its refusal to meet its obligation under international law to accept repatriation of Cuban nationals. I also find that under the present circumstances there is a significant increase in the likelihood that the detained aliens will abscond if paroled.

Moreover, even if the Government of Cuba subsequently may refuse to accept isolated individuals, I find there is no necessity to continue the special criteria and procedures of the plan in lieu of normal parole criteria and procedures contemplated by 8 U.S.C. § 1182(d)(5) and 8 C.F.R. § 212.5.

Therefore, effective immediately, the Attorney General's Status Review Plan and Procedures are terminated.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUY VON DARDEL, on his own behalf and on behalf of his half brother, RAOUL WALLENBERG,

and

SVEN HAGSTROMER, Legal Guardian of RAOUL WALLENBERG, on behalf of RAOUL WALLENBERG

Plaintiffs,

v.

UNION OF SOVIET SOCIALIST REPUBLICS,

Defendant.

Civil Action No. 84-0353

MEMORANDUM OPINION

Barrington D. Parker, District Judge:

In this proceeding declaratory and injunctive relief and damages are sought against the Union of Soviet Socialist Republics ("Soviet Union" or "USSR") for the unlawful seizure, imprisonment and possibly death of Raoul Wallenberg, a Swedish diplomat. The complaint is brought on behalf of Wallenberg by Guy Von Dardel, his half brother, and Sven Hagstromer his legal guardian. Guy Von Dardel and Sven Hagstromer are Swedish citizens. Hagstromer was appointed guardian of Wallenberg's legal interests by the District Court in Stockholm, Sweden.

The plaintiffs allege that in 1945, Raoul Wallenberg was arrested in Budapest, Hungary by representatives of the Soviet Union and that since then he has suffered imprisonment and possibly death. At the time of his arrest he was acting at the initiation of the United States government in an attempt to save the Jewish population in the Budapest ghetto from deportation to Nazi extermination camps. If these allegations are true, they violated Wallenberg's diplomatic immunity, the laws and treaties of the Soviet Union and the United States, and the law of nations.

BACKGROUND[1]

During the course of World War II, the United States Government, in an effort to save from extermination by the German Nazis the thousands of Jews then domiciled in Hungary, sought the assistance of Sweden, a neutral nation. This was an effort that the United States could not undertake alone. Because the United States was at war with Hungary, its diplomatic presence was withdrawn. Raoul Wallenberg agreed to join the Swedish Legation in Budapest, and to otherwise cooperate with the efforts of Sweden and "to act at the behest of the United States." Joint Resolution of Congress declaring Raoul Wallenberg to be an honorary citizen of the United

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[1] The facts in this proceeding are based on statements of USSR officials, official actions taken by the United States Congress, reports and resolutions of House and Senate Committees and official actions taken by the President. The plaintiffs have filed voluminous appendices in this proceeding.

States, Pub. L. No. 97-54, 95 Stat. 971 (1981) ("Joint Resolution").[2]

Granted full diplomatic status by Sweden, and funded by the United States, Wallenberg arrived in Budapest, Hungary, in July 1944. While stationed there, he served as Secretary of the Swedish Legation and was entitled to full diplomatic immunity. In the next six months, until his arrest by Soviet officials, Wallenberg saved the lives of nearly one hundred thousand Jewish persons providing them with funds and other means of support provided by the United States. While in Budapest he became the counterforce to the notorious German Nazi --Adolf Eichmann. His efforts to save Hungary's Jews from extermination were described in a Senate Report:

> He printed and issued thousands of Swedish protective passports of his own design. He purchased and rented scores of houses in Budapest, declared them to be Swedish Embassy property and equipped them with Swedish flags, and protected and cared for the refugees he gathered within these safe houses. Risking his own life time and time again, Wallenberg followed the "Death Marches" and went daily to the deportation trains where he literally pulled people out of the clutches of the Nazis. And, when the Nazis decided to blow up the ghetto in Budapest and all its inhabitants with it, Wallenberg confronted the Nazi leaders (Adolf Eichmann), threatened to see to it

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2 Mr. Wallenberg became the second person to be voted by Congress an honorary citizen. Winston Churchill was the first. Representative Thomas Lantos of California, a Hungarian Jewish refugee is credited with taking the initiative in making Wallenberg an honorary American citizen. New York Times, April 13, 1985, p. 9.

> personally that they were hanged as war criminals if they proceeded with their plan, and thus prevented its execution.

S. Rep. No. 97-169, 97th Cong., 1st Sess. at 2 (1981) ("Wallenberg Senate Report").

Hungary was later overrun by the Soviets and in early 1945, Wallenberg was arrested by their occupation forces in Budapest. From that time forward, his precise whereabouts and his status within the Soviet Union have not been ascertained. In a note dated August 18, 1947 and delivered to the Swedish Embassy in Moscow by Soviet Foreign Minister, Andrei Ya Vyshinsky it was asserted that "[a]s a result of a thorough investigation it has been established that Wallenberg is not in the Soviet Union and he is not known to us." Affidavit in Support of Plaintiffs' Motion for Default Judgment -- Guy Miller Struve, co-counsel for plaintiffs (June 17, 1984) Ex. D ("Struve Affidavit").

Ten years later, however, in response to renewed diplomatic inquiries based on the testimony of persons released from Soviet prisons that Wallenberg was still alive, Deputy Foreign Minister Andrei A. Gromyko admitted that Wallenberg had been a prisoner in the USSR. He further stated that while imprisoned, Wallenberg had died of natural causes on July 17, 1947. In a note dated February 6, 1957, delivered to the Swedish Embassy in Moscow, Gromyko described the detention of Wallenberg, and the misinformation which made the detention possible, as

"criminal activity," and attempted to fasten the blame for it upon Viktor S. Abakumov, a former Minister of State Security who died in 1953.

> Raoul Wallenberg was apparently among other persons detained in the area of the military operations of the Soviet forces. At the same time it may be considered indubitable that the subsequent detention of Wallenberg, and also the incorrect information about him which was given by certain former leaders of organs of state security to the Ministry of Foreign Affairs of the USSR over the course of a number of years, were the result of criminal activity of Abakumov. As is known, in connection with the grave crimes committed by him, Abakumov, acting in violation of the laws of the USSR and striving in every possible way to inflict harm on the Soviet Union, was condemned and shot by order of the Supreme Court of the USSR.
>
> The Soviet Government sincerely regrets what has occurred and expresses its deep condolences to the Government of Sweden and also to the relatives of Raoul Wallenberg.

Struve Affidavit, supra, Ex. F, pp. 2-3.

However, between 1954 and 1981, a steady flow of reports from former Soviet prisoners indicate that Wallenberg did not die as claimed in the Gromyko note. To the contrary, the reports suggest that Wallenberg remained alive and in the defendant's custody after 1947. Joint Resolution, supra.

There is insufficient evidence before the Court to support a definitive finding as to whether at this time, Wallenberg is dead or alive. While the USSR has continuously represented that Wallenberg died in 1947, those representations are inconsistent with and at odds with credible and uncontroverted evidence presented by the plaintiffs in this

proceeding and they are rejected. On basis of the record here presented, the Court finds that the Soviet Union has always had knowledge and information about Wallenberg; that it has failed to disclose and has concealed that information; and that otherwise, defendant's representations are suspect and should be given little, if any, credit. If alive, Wallenberg would be 72 years of age and he would have been held in custody for nearly 40 years.

The complaint in this proceeding was filed with this Court in February 1984. A request for documents relevant to the issue of jurisdiction was filed along with the complaint. The summons, complaint and discovery request, together with a notice of suit and Russian translations of the documents, were regularly processed through the United States Department of State. The packet of documents was then delivered to and served upon the Soviet Ministry of Foreign Affairs in Moscow in accordance with the Foreign Sovereign Immunities Act ("FSIA" or "Act"), 28 U.S.C. § 1608(a)(4). On May 1, 1984, a certified copy of the diplomatic note evidencing service of the documents was filed by the Department of State with the Clerk of this Court.

The defendant's time to answer or otherwise respond to the complaint expired on June 1, 1984. The Soviet Union did not respond to either the complaint or the document request. On April 19, 1984, the Soviet Ministry of Foreign Affairs returned all of the documents to the United States Embassy in

Moscow, together with a note asserting absolute sovereign immunity from suit in non-Soviet courts. Struve Affidavit, supra, ¶¶4-6 and Ex. B.

Under the circumstances, it is appropriate to consider the plaintiff's application for a default judgment. In the discussion which follows, the Court will address first, the questions of jurisdiction, venue, and statute of limitations. It will then address the merits of the litigations and an analysis of the issues arising under the substantive law. This Court's factual findings are supported by a satisfactory, substantial, and well document record.

JURISDICTION AND VENUE

Several sections of Title 28 United States Code allow this Court to exercise jurisdiction over this action. Under Section 1330(b) of the Foreign Sovereign Immunities Act, personal jurisdiction is present when the defendant may be found in the United States, through its agents and instrumentalities, and because defendant has been duly served with process pursuant to 28 U.S.C. § 1608(a)(4) (Struve Aff., supra, ¶ 3 and Ex. A). Because this is a civil action arising under the "laws, or treaties of the United States," subject matter jurisdiction under FSIA is appropriate pursuant to Sections 1330(a) and 1331. Letelier v. Republic of Chile, 502 F. Supp. 259, 266 (D.D.C. 1980). Additional reasons to support this conclusion are discussed ante at p. 11. Finally, this Court may exercise subject matter jurisdiction over this proceeding under the Alien Tort Claims Act, 28 U.S.C. § 1350

because it is a "civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 813-14 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 1354 (1985), opinion Bork, J.; Letelier, 502 F. Supp. at 266.

Venue is appropriate in the United States District Court for the District of Columbia because the defendant is a foreign state, 28 U.S.C. § 1391(f)(4).

The Foreign Sovereign Immunities Act, 28 U.S.C. § 1602

This Court has subject matter and personal jurisdiction under the Foreign Sovereign Immunities Act. Under the Act, a foreign state is generally immune from the jurisdiction of federal courts, 28 U.S.C. § 1604, subject to a number of exceptions and limitations set forth at §§ 1604 and 1605. Section 1604 provides that the immunity afforded by the Act is "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of [the] Act." Section 1605(a) sets forth several categorical exceptions to immunity, including situations in which the sovereign defendant has waived immunity, § 1605(a)(1), situations involving certain commercial activity or property in the United States, § 1605(a)(2)-(4), and certain non-commercial torts committed by the foreign state or its agent, § 1605(a)(5).

The Act provides the district courts with subject matter jurisdiction over civil cases against foreign governments where immunity is not appropriate under its terms. 28 U.S.C. § 1330(a). Moreover, where the requirements of subject matter

jurisdiction have been met and proper service has been made, the Act operates to create personal jurisdiction over the foreign government defendant. 28 U.S.C. § 1330(b).[3] The absence of immunity thus establishes both subject matter and personal jurisdiction over a case against a foreign government. See, e.g., Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp. 849, 851 (S.D.N.Y. 1978).[4]

In 1976, Congress had a twofold purpose for enacting the Foreign Sovereign Immunities Act: (1) to liberalize the law of immunity by adopting and codifying the doctrine of "restrictive" immunity, and (2) to assure consistent application of the law of sovereign immunity by eliminating the participation of the executive branch of the government so as to "assur[e] litigants that...decisions are made on purely legal grounds and under procedures that insure due process." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 7 (1976), reprinted in

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A court's assertion of jurisdiction over a defendant pursuant to § 1330(b) must also comport with minimum jurisdictional contacts and due process as required by International Shoe Co. v. Washington, 326 U.S. 310 (1945). See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292-93 (1980); Kulko v. California Superior Court, 436 U.S. 84, 92 (1978); Hanson v. Denckla, 357 U.S. 235, 253 (1958). See also Gilson v. Republic of Ireland, 682 F.2d 1022, 1028 (D.C. Cir. 1982). These minimum requirements are clearly satisfied because the defendant maintains a substantial presence in this District.

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As a threshold matter, it is noted that the Supreme Court has upheld the constitutionality of the FSIA's authorization of suits by foreign plaintiffs against foreign states. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 490 (1983).

1976 U.S. Code Cong. & Ad. News 6604, 6606 ("House Report"). To accomplish these objectives, the Act established a set of legal standards governing claims of immunity in civil actions against foreign states. These standards were explicitly intended to incorporate established principles of international law regarding the immunity of sovereigns. House Report, at 14, 1976 U.S. Code Cong. & Ad. News at 6613.

According to the drafters of the FSIA, "sovereign immunity is an affirmative defense which must be specially pleaded, [and] the burden will remain on the foreign state to produce evidence in support of its claim of immunity." House Report, supra, at 17, 1976 U.S. Code Cong. & Ad. News at 6616. Thus, the burden of demonstrating that immunity exists rests upon the foreign state. See, e.g., Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1378 (5th Cir. 1980). In the absence of an appearance by the defendant, however, the Court must make an independent determination that it has subject matter jurisdiction. See, e.g., Letelier v. Republic of Chile, 488 F. Supp. 665, 667 (D.D.C. 1980).

The plaintiff cites five independent reasons why the USSR should not enjoy immunity in this case. The Court has taken note of all these arguments but finds the first four far more compelling than the last. The reasons are as follows: First, by virtue of its decision to default, the USSR failed to raise the defense of sovereign immunity. Second, the FSIA incorporates preexisting standards of international law, under which a government is not immune for certain acts in clear violation

of the universally accepted law of nations. Third, the FSIA is limited by treaties to which the United States is a party; the USSR cannot claim immunity under the FSIA for acts which constitute violations of certain of those treaties, to which the USSR is also a party. Fourth, the USSR waived immunity in this action, and is therefore not entitled to raise it as a defense, pursuant to 28 U.S.C. § 1605(a)(1). And, fifth, the actions of the USSR constitute non-commercial torts within the meaning of 28 U.S.C. § 1605(a)(5); immunity for commission of such is therefore inappropriate under the Act. A fuller discussion of the first four is set out below.

A.

Under the FSIA, sovereign immunity is an affirmative defense that must be pleaded and proved by the sovereign defendant. These obligations were made clear in the documents which were served upon the Soviet Union. Included among them was an explanatory notice of suit and the full text of the FSIA, both with Russian translation. The transmittal note from the United States Embassy accompanying the papers underscored the procedures:

> Please note that under United States law and procedure, neither the Embassy nor the Department of State is in the position to comment on the present suit. Under the laws of the United States, any jurisdictional or other defense including claims of sovereign immunity must be addressed to the court before which the matter is pending, for which reason it is advisable to consult an attorney in the United States. (Struve Aff., Ex. A.)

Moreover, because of prior involvement in FSIA litigation, the procedure is one with which the Soviet Union is fully familiar. Indeed in several reported cases in which the USSR has been a defendant since the passage of the Act, it has appeared through counsel for the purpose of contesting jurisdiction.[5] See Bland v. Union of Soviet Socialist Republics, 17 Av. Cas. (CCH) 17,530 (E.D. N.Y. 1982); Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056 (E.D. N.Y. 1979); United Euram v. Union of Soviet Socialist Republics, 461 F. Supp. 609 (S.D. N.Y. 1978); cf. In re Estate of Petro Seminiw, 78 Ill. App. 3d 570, 397 N.E.2d 64 (1st Dist. 1979); In re Estate of Bari Nabif, 69 A.D.2d 904, 415 N.Y.S.2d 901 (2d Dept. 1979).[6] However, in this proceeding, the USSR has chosen to default and to raise the issue of immunity not by a motion filed with the Court, but merely by a communication addressed to the United States Embassy in Moscow.

In Letelier, supra, 488 F. Supp. 665, 669 n.4, this Court raised the question of whether such a diplomatic assertion of immunity, in lieu of "a formal appearance or the filing of a

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5 The Soviet Union defaulted without comment in Frolova v. Union of Soviet Socialist Republics, 558 F. Supp. 358 (N.D. Ill. 1983), aff'd, 761 F.2d 370 (7th Cir. 1985).

6 The instrumentalities of the Soviet Union have also appeared when sued under the Act. See Houston v. Murmansk Shipping Co., 667 F.2d 1151 (4th Cir. 1982); Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp. 849 (S.D. N.Y. 1978).

pleading," could suffice to raise the defense of sovereign immunity. In that case, the foreign state defendant sent a diplomatic note to the Department of State challenging the jurisdiction of the Court. The Court declined to rule on the sufficiency of this method of raising the affirmative defense of immunity, because the Court found that it had subject matter jurisdiction "even assuming it has been pleaded properly." Id. at 670 n.4.

The degree to which a foreign state is entitled to immunity under the Act is necessarily determined by the procedures set forth by Congress. Congress explicitly intended that sovereign immunity remain an "affirmative defense which must be specially pleaded, the burden [remaining] on the foreign state to produce evidence in support of its claim of immunity." House Report, supra, at 17, 1976 U.S. Code Cong. & Ad. News at 6616. This allocation of the burden of proof was, in fact,one of the bases for Congress' decision to structure the Act as a presumption of immunity subject to a group of exceptions. Id.

In the present case, defendant has not only failed to plead immunity as an affirmative defense, but has chosen to raise immunity in a manner explicitly precluded by the Act. Prior to passage of the FSIA, the defense of immunity could be raised by diplomatic approaches to the Department of State. See, e.g., House Report, supra, at 17, 1976 U.S. Code Cong. & Ad. News at 6605-06; Ex Parte Muir, 254 U.S. 522, 532-33 (1921). It was the express purpose of the FSIA to remove the

executive branch from the determination of such issues. By raising the issue of sovereign immunity in a diplomatic note, the USSR has knowingly chosen a procedure that is no longer available under United States law. As such, it cannot be recognized as an adequate pleading of the defense of immunity. Ex Parte Muir, supra, at 533.

Having failed to raise immunity as an affirmative defense, or to provide even a bare allegation that its acts do not fall into one of the exceptions to the FSIA, defendant has deliberately chosen to forego whatever entitlement it might have had to immunity under the terms of the Act.[7]

B.

The Foreign Sovereign Immunities Act, like every federal statute, should be interpreted in such a way as to be consistent with the law of nations. See, e.g., MacLeod v. United States, 229 U.S. 416, 434 (1913). Congress explicitly anticipated such an interpretation, stating its intent that the Act "[incorporated] standards recognized under international law." House Report, supra, at 14, 1976 U.S. Code Cong. & Ad. News at 6613.

Historically, when a nation has committed a clear and egregious violation of a well-established and universally recognized standard of international law, courts have recog-

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This Court notes plaintiff's further argument that this Court should find subject matter jurisdiction as a sanction for failure to comply with its discovery order but does not find it as persuasive as the others they have offered for consideration.

nized the need for an appropriate exercise of jurisdiction. In Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954), the court deferred to a press release issued by the Department of State in which the Department took the position that in cases seeking reparations for confiscations of property by Nazi officials, American courts should not be restrained by doctrines of international law that, under more routine circumstances, would require a court not to exercise jurisdiction or reach the merits of a claim. 210 F.2d at 375-76. Moreover, the doctrine of sovereign immunity has historically been based on principles of "grace and comity." Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983). As such, the doctrine is inherently limited and appropriately disallowed where the foreign state defendant has acted in clear violation of international law.

In Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, (1964), the Supreme Court held that the act of state doctrine barred consideration of the validity of a Cuban confiscation of property located in Cuba, basing its decision largely on the fact that there is some division in the international community regarding state expropriation of the property of aliens. ("There are few if any issues in international law today on which opinion seems to be so divided..." 376 U.S. at 428). In dissenting, Justice White urged that the act of state doctrine should not shield acts which are clearly violations of international law, even where (unlike the

present case) such acts would otherwise be subject to the act of state doctrine:

> The reasons for nonreview, based as they are on traditional concepts of territorial sovereignty, lose much of their force when the foreign act of state is shown to be a violation of international law. All legitimate exercises of sovereign power, whether territorial or otherwise, should be exercised consistently with rules of international law, including those rules which mark the bounds of lawful state action against aliens or their property located within the territorial confines of the foreign state.

376 U.S. at 457.

The concept of extraordinary judicial jurisdiction over acts in violation of significant international standards has also been embodied in the principle of "universal" violations of international law. See, e.g., Restatement of Foreign Relations Law of the United States (Revised) § 404 (Tent. Draft No. 2, 1981) ("A state may exercise jurisdiction to define and punish certain offenses recognized by the community of nations as of universal concern"). The concept of universal violations is not limited to criminal jurisdiction, but extends to the enforcement of civil law as well. Id. at Comment b.

Congress was fully aware of these doctrines of international law in 1976 when it adopted the FSIA, and meant to incorporate them into the statute.[8] The statute should be read, then, not to extend immunity to clear violations of universally recognized principles of international law.

The violation of the diplomatic immunity of Raoul Wallenberg is such a violation. The ancient and universal consensus on diplomatic immunity places it squarely within even the most restrictive interpretation of the coverage of the Alien Tort Claims Act, 28 U.S.C. § 1350. See discussion at pp. 27-28, infra. As such, the Congress in 1789 opened the district courts of the United States to suits by aliens claiming tortious violations of diplomatic immunity. Congress has also enacted statutes designed to protect internationally protected persons, including diplomats, 28 U.S.C. §§ 1116 and 1201, as to which a private remedy has been implied. See discussion at pp. 36-38, infra. If the FSIA was interpreted to bar suits against foreign governments under § 1350, or to preempt the private rights created by §§ 1116 and 1201, it

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8 The fact that the legislative history of the FSIA does not contain a specific reference to these doctrines is not surprising. Congress' primary concern was to codify jurisdictional standards relating to the burgeoning area of commercial litigation against foreign governments. House Report, supra, at 6, reprinted in 1976 U.S. Code Cong. & Ad. News at 6605. The codification was necessary in order to ensure that these more routine cases did not take on undue political significance through the sometimes inconsistent development of the common law, as influenced by the Executive. See discussion at pp. 10-11, supra.

would act pro tanto to repeal these statutes.[9] Statutory interpretation that would effect such a repeal is not favored, e.g., United States v. United Continental Tuna Corp., 425 U.S. 164, 168-69, 181 (1976), and is therefore rejected by this Court.

C.

Section 1604 of the FSIA provides that immunity is "subject to" international agreements to which the United States was a party at the time of its enactment. Thus, where the substantive provisions of the Act would operate in a specific case to interfere with any such international agreement, such provisions must be preempted to the extent necessary to permit the full operation of such agreement.[10]

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In a footnote appended to the end of the majority opinion in Persinger v. Islamic Republic of Iran, 729 F.2d 835 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 247 (1984), Judge Bork (with Judge Edwards dissenting) rejected plaintiffs' argument that United States courts had jurisdiction over claims for damages arising out of the seizure of the American Embassy in Iran, although this seizure constituted an international crime. 729 F.2d at 843 n.12 (D.C. Cir. 1984). So far as the opinion reveals, Judge Bork did not consider the intent of Congress in enacting the FSIA to preserve existing remedies for violations of international law, as described above, or the effect of 18 U.S.C. §§ 1116 and 1201 or 28 U.S.C. § 1350.

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The House Report would limit the immunity of a foreign state under the Act to cases of an express or manifest conflict between the provisions of the Act and those of an international agreement or treaty. House Report, supra, at 17, reprinted in U.S. Code Cong. & Ad. News at 6616. See, e.g., Mashayekhi v. Iran, 515 F. Supp. 41, 42 (D.D.C. 1981). Given the clear and unambiguous language of the statute, however, resort to the legislative history is in this instance unnecessary for interpretative purposes. See, e.g., Greyhound Corp. v. Mt.

In this proceeding, both the United States and the Soviet Union are parties to two international agreements, the operation of which would be frustrated by any decision granting immunity to the Soviet Union: the Vienna Convention on Diplomatic Relations, April 18, 1961, and the 1973 Convention on Internationally Protected Persons.

The Vienna Convention and the 1973 Convention are both designed to protect diplomats from offenses against them. In order for the conventions to operate effectively, the perpetrators of such offenses must be subject to liability for their acts. To the extent that the FSIA would shield the Soviet Union from such liability, it is in conflict with the terms of the conventions and thwarts their effective operation. Under § 1604, the immunity granted by the FSIA must be limited so as to avoid such a result; in the present case, the Soviet Union must be denied immunity.

This result is particularly just since the Soviet Union is a party to both conventions. Under the Vienna Convention the USSR is pledged to protect the very rights it is violating. Under the 1973 Convention it is pledged to punish the very crimes it is committing. Moreover, the Soviet Union's unlawful treatment of Wallenberg was ongoing even as the

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Hood Stages, Inc., 437 U.S. 322, 330 (1978); National Insulation Transportation Committee v. ICC, 683 F.2d 533, 537 (D.C. Cir. 1982). This reading of the clear language of § 1604 is given further support by the language of 28 U.S.C. § 1330, which gives the federal courts jurisdiction over actions against foreign states with respect to which the foreign state is "not entitled to immunity" under the FSIA "or any applicable international agreement."

Conventions were drafted and signed. Thus, it knowingly accepted the validity of legal standards that it knew at the time were being violated. Against such a backdrop, the denial of immunity against claims seeking relief for such violations does not seem unjust.

D.

Under § 1605(a)(1) of the FSIA, foreign states may waive immunity "either explicitly or by implication." According to the House Report, an example of an explicit waiver under the FSIA might be found in the form of a treaty obligation under treaties of friendship, commerce, and navigation. Neither the statute nor the legislative history, however, makes clear how immunity can be implicitly waived.[11]

The United States courts have not yet fully explored the proposition that by ratifying an international agreement a foreign state implicitly waives a defense of sovereign immunity against claims seeking compensation for acts which constitute violations of such agreements. In Frolova v. Union of Soviet Socialist Republics, 558 F. Supp. 358, 363 n.3 (N.D. Ill. 1983), aff'd, 761 F.2d 370 (7th Cir. 1985), the court in dictum rejected plaintiff's argument that because the Soviet Union's refusal to permit plaintiff's husband to emigrate

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11 The House Report provides two illustrative examples of implied waivers -- an appearance in court by the sovereign defendant, or an agreement by the sovereign defendant to arbitrate claims in another country. House Report, supra, at 18, 1976 U.S. Code Cong. & Ad. News at 6617. These examples, however, are not exclusive.

violated international and Soviet law, it had impliedly waived immunity. In Siderman v. Republic of Argentina, No. Civ. 82-1772-RMT (C.D. Cal. March 12, 1984), however, the court found jurisdiction over the Republic of Argentina for claims related to the torture of one of the plaintiffs "by applying the 'Law of Nations' concept." A number of legal scholars have examined this principle in the context of human rights violations,[12] and have concluded that a sovereign may implicitly waive its immunity for such violations when it ratifies human rights agreements. R. Lillich and F. Newman, International Human Rights: Problems of Law and Policy (1979); Comment, The Foreign Sovereign Immunities Act and International Human Rights Agreements: How They Co-Exist, 17 U.S.F. L. Rev. 71 (1982).

These conclusions are directly relevant to the present case, which involves violations not only of international human rights agreements but also of treaties codifying the fundamental principle of diplomatic immunity, which has been universally recognized as binding since before the times of Blackstone and de Vattel.[13] By explicitly agreeing to be

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12 The importance of looking to the writing of legal scholars in this area of the law was explained by the Supreme Court in The Paquete Habana, 175 U.S. 677, 700 (1900). See also, e.g., Filartiga v. Pena-Irala, 630 F.2d 876, 879 n.4 (2d Cir. 1980).

13 Frolova v. Union of Soviet Socialist Republics, 558 F. Supp. 358 (N.D. Ill. 1983), aff'd, 761 F.2d 370 (7th Cir. 1985), on the other hand, on one interpretation dealt with a legal right -- the right to emigrate -- on which there is not yet such universal agreement among nations.

bound by the terms of those agreements, the USSR has implicitly waived its immunity in this action alleging their breach. As Lillich and Newman have noted with respect to the United Nations Charter,

> it would be most difficult to conclude that the Charter provisions on human rights cannot legitimately be given effect by the courts in appropriate cases. Indeed, it would be contrary to the letter and the spirit of the supremacy clause of the Constitution if the courts did not attempt to carry out a treaty provision to the fullest extent possible.

R. Lillich and F. Newman, International Human Rights, supra, at 76. Any other result would rob each of those agreements of substantive effect, and would render meaningless the act of the Soviet Union in signing them.

The Alien Tort Claims Act, 28 U.S.C. § 1350

The Alien Tort Claims Act, 28 U.S.C. § 1350, was enacted in 1789 by the First Congress of the United States. The section provides that the "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The statute vests this Court with subject matter jurisdiction over this proceeding and the right to determine liability for injuries resulting from violations of the diplomatic immunity of Raoul Wallenberg.

Cf. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 813 (D.C. Cir. 1984) (Bork, J. concurring).

The Court of Appeals for this Circuit recently considered the application of § 1350 in Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984). That case involved a terrorist attack on an Israeli bus by members of the Palestine Liberation Organization. Plaintiffs, survivors of the attack and representatives of some of those killed, asserted jurisdiction under 28 U.S.C. §§ 1331 and 1350.[14] The District Court dismissed the case for lack of jurisdiction, and plaintiffs appealed. The Court of Appeals issued three opinions which affirmed the decision of the District Court, but each opinion stated separate grounds for reaching that result.

Judge Harry Edwards adopted the interpretation of § 1350 previously adopted by the Second Circuit in Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), whereby proof of a tort in violation of international law as that law is currently understood establishes both a cause of action and jurisdiction in the District Court. Judge Robert Bork proposed a more narrow reading of the statute, arguing that the doctrine of separation of powers should be seen to limit the effect of the statute to those violations of international law that were recognized as actionable in 1789 or to those which, though more recently established, explicitly entail a

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14 The District Court held, and plaintiffs conceded, that with regard "to the role of the law of nations," the jurisdictional prerequisites of § 1331 were equivalent to those of § 1350. Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542, 549 (D.D.C. 1981), aff'd, 726 F.2d 774, 800 (D.C. Cir. 1983).

private right of action. Judge Roger Robb concurred on the ground that the political question doctrine precluded judicial consideration of the claims raised by the plaintiffs because the legal issues surrounding terrorism are complex and imprecise. It is clear that even under the narrowest of these standards proposed in Tel-Oren, or adopted in other forums -- § 1350 provides this Court with subject matter jurisdiction to determine the liability for the injury that has resulted from the violation of Raoul Wallenberg's diplomatic immunity.

A.

In Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), a former Paraguayan police official was sued by the father and sister of a young man whose death by torture he was alleged to have caused. The District Court dismissed the case, saying that although official torture violated emerging standards of international law, it was obliged by dicta in prior Second Circuit opinions to rule that § 1350 does not reach a state's behavior towards its own citizens.

On appeal, the Second Circuit reversed. Judge Kaufman wrote that the "law of nations," as used in the statute, is a developing body of principles which must be interpreted "not as it was in 1789, but as it has evolved and exists among the nations of the world today." 630 F.2d at 881.[15] Looking to the sources of international law enumerated by the Supreme

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15 This position was endorsed by the United States Government in an amicus brief submitted by the Departments of State and Justice (Amicus Br. at 4-5).

Court in The Paquete Habana, 175 U.S. 677, 700 (1900) -- "executive or legislative act or judicial decision" and the works of expert "jurists and commentators," 630 F.2d at 880 -- the court found that "the limitations on a state's power to torture persons held in its custody" constitute a principle on which the opinion of civilized nations is so united as to raise it to a norm of international law. 630 F.2d at 881. See also 630 F.2d at 887-89. The court concluded that the cause of action "is properly brought in federal court." 630 F.2d at 887.

In Tel-Oren, Judge Edwards adopted the approach of the Second Circuit. He stated that § 1350 provides jurisdiction in federal district court where a plaintiff alleges a tortious violation of a principle of international law on which the community of nations has reached a consensus. This is true even where no other basis of jurisdiction is present, and regardless of whether or not a "right to sue" on that violation is independently granted by international law. 726 F.2d at 772-82. Applying these standards to the facts in Tel-Oren, Judge Edwards found that, however reprehensible the actions of the defendants may have been, no consensus existed among nations sufficient to warrant an extension of the Filartiga approach to the law of nations to include disapproval of non-state acts of violence or terrorism. 726 F.2d at 791-96.

The facts presented here easily satisfy the criteria set forth by Judge Edwards. An accredited diplomat has been detained and held incommunicado for more than 35 years; his

whereabouts have been concealed; and the defendant may have caused his death. There can be no clearer violation of the law of nations. Under the analysis of Judge Edwards, this proceeding is appropriately before this Court.

B.

Judge Bork concurred in dismissing Tel-Oren on the ground that plaintiffs had failed to meet a more stringent test than proposed by Judge Edwards and relied upon by the Second Circuit. Under Judge Bork's analysis, plaintiffs would have to show not only a violation of the law of nations, but also a source of a right to sue under federal or international law. 726 F.2d at 801, 808. Judge Bork stated that only by limiting § 1350 to cases in which the law of nations clearly envisions judicial involvement would the doctrine of separation of powers be properly served. In cases such as Tel-Oren, where the rule of decision under international law is insufficiently developed, he creates a presumption against jurisdiction which can only be overcome by showing that plaintiffs have been provided with a cause of action under federal or international law. 726 F.2d at 1808.

The facts and allegations of the present case appear to satisfy the requirements set forth by Judge Bork. First, in discussing the unsettled nature of international legal standards regarding terrorism, Judge Bork acknowledges that related areas have been the subject of international consensus through written conventions. 726 F.2d at 806-07. Among the conventions he lists is the 1973 Convention on the Prevention

and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents. Diplomatic immunity is an area in which international legal standards have long been clearly stated, and the Convention complements preexisting international accords on the treatment of diplomats.

In the course of his analysis, Judge Bork notes that he is "guided" by the language of the Supreme Court in Banco Nacional de Cuba supra, p. 16, in which the Court established a sort of sliding scale with respect to judicial application of international law:

> [T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.

726 F.2d at 804. The rules of diplomatic immunity are so well established that judicial determination of a violation of diplomatic immunity poses little or no threat to the doctrine of separation of powers. It is, therefore, fully consistent with the rationale underlying Judge Bork's opinion to permit the federal courts to apply the law of diplomatic immunity.

However, even if his opinion is read to require an explicit showing of a cause of action granted under international law in any case that may touch on foreign relations, plaintiffs' allegations fall within one of the areas that the opinion specifically places within the reach of § 1350.

He stated that the statute is given its more appropriately limited meaning by looking to the "law of nations" as understood in 1789. At that time, the "law of nations" was limited to three primary offenses: "'1. Violation of safe-conducts; 2. Infringement of the rights of embassadors; and 3. Piracy,'" 726 F.2d at 813, quoting 4 W. Blackstone, Commentaries, 68, 72, and Judge Bork concluded that "[o]ne might suppose that these were the kinds of offenses for which Congress wished to provide tort jurisdiction for suits by aliens in order to avoid conflicts with other nations." 726 F.2d 813-14. The American colonies, having adopted the common law of England, adopted a "private cause of action for which section 1350 gave the necessary jurisdiction to federal courts" in these three types of cases. 726 F.2d at 1814 n.22. See also Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 116 (Pa. Ct. Oyer & Term. 1784). Thus, the doctrine of diplomatic immunity is so firmly established as to fall within even the very limited interpretation of § 1350 favored by Judge Bork.

C.

Judge Robb invoked the political question doctrine to dismiss Tel-Oren, based on arguments similar to those used by Judge Bork in defense of the separation of powers. The opinion cautions against judicial interference in a politically sensitive area where the rule of decision is not adequately defined. 726 F.2d at 827 and passim. However, international legal standards with regard to the treatment of

diplomats have long been clearly established, and their application should therefore pose little risk of embarrassing the political branches. As Justice White wrote in his dissent in Banco Nacional de Cuba, while

> political matters in the realm of foreign affairs are within the exclusive domain of the Executive Branch...this is far from saying that the constitution vests in the executive exclusive absolute control of foreign affairs or that the validity of a foreign act of state is necessarily a political question. International law, as well as a treaty or executive agreement, see United States v. Pink, 315 U.S. 203s, provides an ascertainable standard for adjudicating the validity of some foreign acts, and courts are competent to apply this body of law, notwithstanding that there may be some cases where comity dictates giving effect to the foreign act because it is not clearly condemned under generally accepted principles of international law.

376 U.S. 461-62. The political question doctrine should therefore not defeat jurisdiction in this case.

D.

Under any one of the three Tel-Oren opinions, § 1350 provides this Court with subject matter jurisdiction to consider this case. Plaintiffs are aliens; the causes of action they bring are in tort. There has, without question, been a violation of the law of nations, as defined by legal scholars, confirmed in international conventions to which the United States is a party, and codified in United States law. The requisites of the Edwards/Filartiga approach are thus satisfied.

The violations alleged involve an area of international law in which standards and norms have long been well-defined. The underlying rationale of the opinions of Judges Bork and Robb -- a reluctance, where legal standards are uncertain, to permit the courts to enter politically sensitive areas -- is therefore met.

Finally, this case satisfies the most stringent of the requirements set forth by Judge Bork. Well before 1789, the protection and well-being of diplomats were understood to be a part of the law of nations, and English (and then American) common law recognized a private cause of action where the law was violated. This right to sue has recently been reaffirmed by the Congress and this Court with respect to acts of violence against internationally protected persons.

STATUTE OF LIMITATIONS

Plaintiffs' claims against the USSR are not barred by any applicable statute of limitations.[16] Plaintiffs contend that

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The appropriate District of Columbia statutes are applicable to all of plaintiffs' claims, including not only those arising under federal law but also those arising under other sources of law. With respect to plaintiffs' federal law claims, where, as in the present case, Congress has not enacted a statute of limitations governing a particular claim, the courts will look to the statute of limitations of the forum where the district court sits. E.g., Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462 (1975); Forrestal Village, Inc. v. Graham, 551 F.2d 411, 413 (D.C. Cir. 1977). The forum statute of limitations to be applied is that which is applicable to the most closely analogous claim under the forum law, and that which best effectuates the federal policy involved. E.g., McClam v. Barry, 697 F.2d 366, 373-75 (D.C. Cir. 1983); Forrestal Village, Inc. v. Graham, at 413.

With respect to plaintiffs' claims not arising under

Raoul Wallenberg is still alive, and that his unlawful detention is therefore a continuing violation of the laws of the United States, the laws and treaties of the USSR, and the law of nations. In such circumstances, the statute of limitations has not yet begun to run. The tortious conduct by the defendant is an ongoing violation which precludes the running of a limitations period.

In cases involving an ongoing tort, as here, the cause of action does not accrue for purposes of the running of the statute until the last act constituting the tort is complete. See Page v. United States, 729 F.2d 818, 821 (D.C. Cir. 1984) (citing, inter alia, Gross v. United States, 676 F.2d 295, 300 (8th Cir. 1982); Leonhard v. United States, 633 F.2d 599, 613 (2d Cir. 1980), cert. denied, 451 U.S. 908 (1981)).

Moreover, even if Raoul Wallenberg is no longer alive, defendant's concealment of the facts and circumstances surrounding Wallenberg's detention and possible death, since the 1957 Gromyko note, provides two further reasons for this Court to refrain from barring plaintiffs' claims. First,

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federal law, the statutes of limitations of the District of Columbia apply as the law of the forum. E.g., Gilson v. Republic of Ireland, 682 F.2d 1022, 1024-25 & n.7 (D.C. Cir. 1982); Steorts v. American Airlines, Inc., 647 F.2d 194, 197 (D.C. Cir. 1981).

The District of Columbia has several provisions which could arguably apply to one or more of plaintiffs' claims. The statute of limitations for "false arrest and false imprisonment," D.C. Code Ann. § 12-301(4) (1981), and for wrongful death, § 16-2702, are both one year. The D. C. Code also provides a three-year statute of limitations for claims which do not have "specially prescribed" limitations. § 12-301(8) (1981).

under the "discovery rule" of the District of Columbia, plaintiffs' claims have not yet accrued for statute of limitations purposes. Under this rule, a plaintiff's cause of action does not accrue until the plaintiff learns, or with reasonable diligence could have learned, that he has been injured, see, e.g., Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 116-18 (D.C. Cir. 1982); Grigsby v. Sterling Drug, Inc., 428 F. Supp. 242, 243 (D.D.C. 1975), aff'd without opinion, 543 F.2d 417 (D.C. Cir. 1976), cert. denied, 431 U.S. 967 (1977), and that his injury is due to wrongdoing on the part of the defendant, see, e.g., Dawson v. Eli Lilly and Co., 543 F. Supp. 1330, 1333-34 (D.D.C. 1982).[17]

In this proceeding, the plaintiffs have no way of knowing whether Wallenberg is dead, or, if he is dead, the circumstances of his death and the identity of those responsible. The Gromyko note, in light of the weight of contradictory evidence, cannot provide a reasonable basis for holding that plaintiffs have learned that Wallenberg is no longer alive.

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Application of the discovery rule in the District of Columbia is not limited to any specific type of tortious injury. Rather, the rule is applicable to any "tort clai[m] in which the fact of injury may not be readily discernible." Wilson v. Johns-Manville Sales Corp., 684 F.2d at 116. See Burns v. Bell, 409 A.2d 614, 615 (D.C. App. 1979). The Fifth Circuit in Dubose v. Kansas City Southern Ry., 729 F.2d 1026 (5th Cir. 1984), cert. denied, 105 S. Ct. 179 (1984), recently held that the discovery rule applies to all federal causes of action "whenever a plaintiff is not aware of and had no reasonable opportunity to discover the critical facts of his injury and its cause." 729 F.2d at 1030.

Such information remains solely within the control of the USSR.

Second, when a defendant has fraudulently concealed facts giving rise to a cause of action, the statute of limitations is tolled until plaintiffs, employing due diligence, discover or should have discovered the facts giving rise to the claim -- in this case, evidence that Wallenberg is indeed no longer alive and that defendant was involved in his death. Richards v. Mileski, 662 F.2d 65, 68-69 (D.C. Cir. 1981). See also, e.g., Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984), cert. denied sub nom Brennan v. Hobson, 105 S. Ct. 1843 (1985). With respect to the matter of burden of proof and due diligence, our Circuit Court stated in Richards:

> When tolling is proper because the defendants have concealed the very cause of action, or their involvement in a cause of action about which the plaintiff might otherwise be aware, they have the burden of coming forward with any facts showing that the plaintiff could have discovered their involvement or the cause of action if he had exercised due diligence.

662 F.2d at 71. See also Smith v. Nixon, 606 F.2d 1183, 1191 (D.C. Cir. 1979), cert. denied, 453 U.S. 912, 928 (1981). The defendant cannot meet this burden. Since 1945, it has concealed the truth concerning the condition and whereabouts of Raoul Wallenberg.

THE MERITS

A.

There are few principles of international law, if any, that are as universally recognized as the principle of

diplomatic immunity. The seizure and detention of Raoul Wallenberg presents a clear violation of the law of nations as well as a clear violation of the laws and treaties of the United States and the Soviet Union. Moreover, the record in this action is clear, in that it does not show that the Soviet Union has sought, in any manner, to justify its conduct toward Wallenberg. Indeed, the 1957 Gromyko Note, supra pp. 5-6, characterizes his detention and the concealment of his whereabouts as criminal activity.

The history of the diplomatic immunity doctrine is traced from many recognized sources. See D. Michaels, International Privileges and Immunities, 7, 1971; 1 L. Oppenheim, International Law § 386 (1905); Restatement of Foreign Relations Law of the United States (Revised) § 461 (Tent. Draft No. 4, 1983). The concept was a part of the ancient civilizations of China, India and Egypt, United States v. Enger, 472 F. Supp. 490, 504 (D. N.J. 1978).

The present day consensus of the international community on the protection afforded diplomats has been codified in a number of international agreements, primarily the Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502. Article 29 of the Convention states that

> [t]he person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

23 U.S.T. at 3240, T.I.A.S. No. 7502 at 14. Corresponding obligations are imposed upon states other than the receiving state under Article 40 of the Convention. 23 U.S.T. at 3246, T.I.A.S.s No. 7502 at 20-21.

In the 1970s, the community of nations reaffirmed its commitment to the safety of diplomats by entering into 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. The Convention requires signatory nations to take steps to punish the "murder, kidnapping or other attack upon the person or liberty of an internationally protected person," 28 U.S.T. at 1978, T.I.A.S. No. 8532 at 4, as well as other crimes or threats against them. The Soviet Union is a party to both the Vienna Convention and the 1973 Convention.

Wallenberg's treatment at the hands of the Soviet Union also violates a number of international treaties and conventions relating to human rights, all of which have been signed by the Soviet Union. Under Articles 55 and 56 of the United Nations Charter, each member state pledges to take action to promote "universal respect for, and observance of, human rights and fundamental freedoms." 59 Stat. 1033, 1045-46 (1945). These obligations are given further substance in subsequent documents. Article 3 of the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/1810 (1948), mandates the protection of "life, liberty and security of person." Article 9 protects the right not to "be subjected

to arbitrary arrest, detention or exile." Article 10 protects each person's right to a fair and public hearing of criminal charges against him. Article 12 protects the right not to "be subjected to arbitrary interference with...privacy, family, home or correspondence." The international community -- including the Soviet Union -- reaffirmed its commitment to these rights in the International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967),[18] and again in the Final Act of the Conference on Security and Cooperation in Europe (Helsinki 1975), Department of State Bulletin Reprint, Sept. 1, 1975.

B.

United States law has long accepted international standards of diplomatic immunity as part of its common law and has recognized a private civil cause of action for a violation of diplomatic immunity. See Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 814 n.22 (D.C. Cir. 1984). In Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111 (Pa. Ct. Oyer & Term. 1784), the Supreme Court held that the De Longchamps committed "an atrocious violation of the law of nations," when, having first insulted the Consul General of France to the United States, he struck the cane of the diplomat. The Court described De

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18 The United States has signed but not yet ratified this Convention.

Longchamps' actions as gross insults, and diplomats as "the peculiar objects" of the law of nations. 1 U.S. (1 Dall.) at 111, 117.

In 1976, the United States Congress enacted the Act for the Prevention and Punishment of Crimes Against Internationally Protected Persons, 18 U.S.C. §§ 1116, 1201, 112, 970, 878 and 11). That criminal statute proscribes the murder or attempted murder of an internationally protected person, and permits the exercise by the United States of jurisdiction over such an offense "if the alleged offender is present within the United States, irrespective of the place where the offense was committed or the nationality of the victim or the alleged offender." 18 U.S.C. § 1116(c). An "internationally protected person" is defined as including, inter alia,

> any...representative, officer, employee, or agent of the United States Government, a foreign government, or international organization who at the time and place concerned is entitled pursuant to international law to special protection against attack upon his person, freedom, or dignity.

18 U.S.C. § 1116((b)(4)(B). Similar prohibitory and jurisdictional language governs the kidnapping of such a person under 18 U.S.C. § 1201(a)(4) and (e).

At the time of his kidnapping, Raoul Wallenberg was an accredited Swedish diplomat. He was thus an "internationally protected person" within the meaning of §§ 1116 and 1201(a)(4) and (e). His kidnapping was therefore a violation of § 1201(a)(4); if he is no longer alive, § 1116 has also been violated. In enacting these statutes, Congress expressly

declared its intent to prohibit such acts wherever and by whomever committed, and whatever the nationality of the victim.

Moreover, this Court has recognized a civil cause of action under federal law on behalf of private plaintiffs pursuant to 18 U.S.C. § 1116. In Letelier, 502 F. Supp. at 266, jurisdiction was upheld in a suit brought by the surviving spouses of an exiled Chilean diplomat and his co-worker against those responsible for their murder. The same rationale should apply to § 1201(a)(4) and (e). Under both, plaintiffs are entitled to immediate declaratory relief.

C.

The Soviet Union's treatment of Raoul Wallenberg is unlawful even under its own statutes.[19] The Statute on Diplomatic and Consular Representations of Foreign States on the Territory of the USSR, confirmed by edict of the Presidium of the USSR Supreme Soviet on May 23, 1966, set forth in Collected Legislation of the Union of Soviet Socialist Republics and the Constituent Union Republics (Butler ed. 1983), affirms the privileges and immunities due to diplomats, Article 1, as well as the primacy of "international treaty rules" on the subject, Article 3. By its terms, the statute applies to diplomatic or consular representations "on the

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19 In addition to the laws cited in this section, the Soviet Union is party to treaties the terms of which have been violated by the acts against Wallenberg. See discussion at pp. 36-38, supra.

territory of the USSR." Article 1. The "inviolability" while travelling in the "territory of the USSR" of diplomats representing a "foreign state in a third country" is specifically assured in Article 18. The detention of Wallenberg plainly violates the diplomatic immunity guaranteed by the statute.

Wallenberg's detention is also violative of the Criminal Code of the Russian Soviet Federated Socialist Republic, and corresponding provisions of the Criminal Codes of other Republics of the USSR. Article 126 of the Federated Socialistic Republic Criminal Code outlaws any deprivation of freedom that was illegal as of the time committed. Article 178 proscribes an arrest or detention which is known to be illegal and which is illegal in fact. Wallenberg's arrest and detention were and continue to be illegal under principles of international law and international agreements which were in force in 1945 and to which the USSR was a party. Moreover, the 1957 Gromyko Note acknowledged the illegality of Wallenberg's detention and of the misinformation that made it possible.

The Soviet Union's treatment of Raoul Wallenberg is unlawful under any standard of applicable law. It has never argued otherwise; it has denied and disclaimed its actions, but it has never defended them.

CONCLUSION

In many ways, this action is without precedent in the history of actions against foreign sovereigns. It involves

actions which the Soviet Union has already admitted were unlawful. It involves a gross violation of the personal immunity of a diplomat, one of the oldest and most universally recognized principles of international law. Furthermore, this action involves a deliberate default by a defendant which has repeatedly demonstrated its familiarity with the proper means for raising a defense of sovereign immunity under the Foreign Sovereign Immunities Act.

There can be little, if any, doubt that both subject matter and personal jurisdiction are conferred through that Act. Whatever sovereign immunity the defendant might have had, is, by the terms of the Act, subject to international agreements to which the United States was a party when the FSIA was enacted in 1976 which prohibit defendant's actions regarding Mr. Wallenberg.

Additionally, this Court determines that no applicable statute of limitations has begun to run against plaintiff's claims. Because Mr. Wallenberg is still being unlawfully held by the defendants, or alternatively, he is dead, the statute is tolled by the "discovery rule" and/or the law on tolling applicable when one party has fraudulently concealed facts.

For all of these reasons, default judgment is hereby entered against the defendant.

Entered: October 11, 1985

Barrington D. Parker
United States District Judge

CERTIFICATE OF SERVICE

This will certify that I have this day caused to be served a copy of the foregoing Brief of Amici Curiae in Support of Plaintiffs-Appellees by Federal Express fees prepaid, on

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this 20th day of February, 1986.

Michael Delikat