FOREIGN SOVEREIGN IMMUNITY—WHETHER UNITED STATES EMBASSIES ARE JURISDICTIONAL TERRITORY UNDER THE NON-COMMERCIAL TORT EXCEPTION OF THE FOREIGN SOVEREIGN IMMUNITIES ACT

Two recent decisions by different courts of appeals interpret the scope of the non-commercial tort exception of the Foreign Sovereign Immunities Act of 1976 (FSIA).[1] The facts of the two cases were virtually identical. Plaintiffs,[2] former hostages at the United States embassy in Iran,[3] sued the Islamic Republic of Iran for personal damages suffered as a result of their captivity in United States district courts.[4] In one case the United States was joined as a party defendant;[5] in the other the United States intervened as a defendant pursuant to an agreement with Iran.[6] In both cases the

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[1] 28 U.S.C. § 1605(a)(5) (1976).

[2] Plaintiffs in Persinger v. Islamic Republic of Iran, No. 81-00230 (D.D.C. Aug. 24, 1981), were Gregory Allen Persinger, a Marine guard at the United States embassy in Tehran, and his parents. Plaintiffs in McKeel v. Islamic Republic of Iran, Nos. 81-0931, 81-5108, 81-5109, 81-5274, 81-5482 (C.D. Cal. Nov. 20, 1981), were several former hostages and the wives of two former hostages.

[3] On November 4, 1979, the United States embassy in Tehran was seized by Iranian militant students. The embassy personnel were detained by the militants with the tacit approval of the Iranian Government for 444 days. For general discussions of the detention of the embassy personnel, see R. MCFADDEN, J. TREASTER & M. CARROLL, NO HIDING PLACE (1981); M. LEDEEN & W. LEWIS, DEBACLE (1981); K. KOOB, GUEST OF THE REVOLUTION (1982); P. SALINGER, AMERICA HELD HOSTAGE: THE SECRET NEGOTIATIONS (1981).

[4] Persinger v. Islamic Republic of Iran, No. 81-00230 (D.D.C. Aug. 24, 1981). McKeel v. Islamic Republic of Iran, Nos. 81-0931, 81-5108, 81-5109, 81-5274, 81-5482 (C.D. Cal. Nov. 20, 1981). District courts have original jurisdiction of civil actions involving foreign states for which the foreign state is not entitled to immunity. 28 U.S.C. § 1330(a) (1976).

[5] McKeel v. Islamic Republic of Iran, Nos. 81-0931, 81-5108, 81-5109, 81-5274, 81-5482 (C.D. Cal. Nov. 20, 1981). Plaintiffs argued that they had a valid claim against the United States for taking property without just compensation. *Id.*

[6] Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, 81 DEP'T ST. BULL. 1 (Feb. 1981), *reprinted in* 20 I.L.M. 224 (1981)[hereinafter cited as Declaration]. The Declaration settled the hostage situation between the United States and Iran with the government of Algeria acting as arbitrator. The United States agreed, in return for release of the hostages, not to interfere in Iranian affairs, to return Iranian assets, to nullify trade sanctions imposed on Iran, and to withdraw all pending claims and bar all future claims against Iran arising out of the hostage taking. *Id.* at 2-3, 20 I.L.M. at 224-48. President Carter promulgated a series of executive orders to implement the Declaration. Executive Orders 12,276-85, 46 Fed. Reg. 79,123 (1981), *reprinted in* 20 I.L.M. 286 (1981). President Reagan ratified these orders on February 24, 1981. Executive Order 12,294, 46 Fed. Reg. 14,111 (1981). To enforce the agreement barring future claims, the United States intervened in *Persinger*. Persinger v. Islamic Republic of Iran, No. 81-00230 (D.D.C. Aug. 24, 1981). The United States also filed a Statement of Interest in order to fulfill its obligations under the agreement. American Group Int'l, Inc. v. Islamic Republic of

United States moved to dismiss the complaints for lack of jurisdiction[7] and the district courts granted the motions.[8] Plaintiffs appealed. In the Circuit Court of Appeals for the District of Columbia, *held*: Iran was not immune from suit because this situation fell within one of the exceptions of the FSIA.[9] In the Ninth Circuit Court of Appeals, *held*: the exception did not apply and Iran was immune from suit.[10] *Persinger v. Islamic Republic of Iran*, 690 F.2d 1010 (D.C. Cir. 1982), *reprinted in* 22 I.L.M. 404 (1983) *reh'g*

Iran, 657 F.2d 433 (D.C. Cir. 1981).

[7] The United States argued that the district courts lacked jurisdiction over Iran because Iran was immune from suit under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. § 1605(a)(5) (1976). Persinger v. Islamic Republic of Iran, No. 81-00230 (D.D.C. Aug. 24, 1981). McKeel v. Islamic Republic of Iran, Nos. 81-0931, 81-5108, 81-5109, 81-5274, 81-5482 (C.D. Cal. Nov. 20, 1981).

[8] Persinger v. Islamic Republic of Iran, No. 81-00230 (D.D.C. Aug. 24, 1981). McKeel v. Islamic Republic of Iran, Nos. 81-0931, 81-5108, 81-5109, 81-5274, 81-5482 (C.D. Cal. Nov. 20, 1981). Relying on Dames & Moore v. Regan, 453 U.S. 654 (1981), the District Court for the District of Columbia also held that the President had wide latitude during international crises to settle private claims. Persinger v. Islamic Republic of Iran, No. 81-00230 (D.D.C. Aug. 24, 1981). In *Dames & Moore*, the Court relied on the President's power to make executive agreements without the advice and consent of the Senate and congressional acquiesence in the President's power to settle claims. *Dames & Moore*, 453 U.S. at 680-83. Other claims by hostages and their families have been dismissed by the District Court for the District of Columbia for lack of jurisdiction. *See* Williams v. Islamic Republic of Iran, No. 79-3295 (D.D.C.), and Lauterbach v. Islamic Republic of Iran, No. 81-0350 (D.D.C.) (opinion in consolidated cases, June 11, 1981), *aff'd* in Nos. 81-1672, 81-1676 (D.C. Cir. Oct. 19, 1982); Moeller v. Islamic Republic of Iran, No. 80-1171 (D.D.C. Aug. 5, 1981) (no appeal taken). The District Court for the Central District of California held that there was no basis for jurisdiction over Iran under either federal question or diversity jurisdiction. McKeel v. Islamic Republic of Iran, Nos. 81-0931, 81-5108, 81-5109, 81-5274, 81-5482 (C.D. Cal. Nov. 20, 1981).

[9] Persinger v. Islamic Republic of Iran, 690 F.2d 1010 (D.C. Cir. 1982), *reprinted in* 22 I.L.M. 404, 412 (1983) *reh'g granted*. The opinion of the court was not printed in the Federal Reporter at the court's request. *Id.* The Court of Appeals for the District of Columbia also held that the executive orders implementing the Declaration were not an attempt to change the subject matter jurisdiction of any court because the orders were addressed to people, not to courts. 22 I.L.M. at 410. Further, the court agreed with the District Court that the Declaration and executive orders implementing it extinguished plaintiffs' claims against Iran. *Id.* at 418. In reaching this decision, the court placed great emphasis on the tacit congressional approval of the President's action evidenced by Congress' failing to enact any legislation either condemning the agreement or reinstating the claims. *Id.* at 416. As the court pointed out, Congress had even enacted a bill to provide compensation to the former hostages. *Id.* Thus, the final result of the case was that while the FSIA was not a bar to plaintiffs' action, the settlement Declaration precluded the court from granting relief in this case.

[10] McKeel v. Islamic Republic of Iran, Nos. 82-5111, 82-5114, 82-5115, 82-5116, 82-5117, 82-5417 (9th Cir. Dec. 30, 1983). The Ninth Circuit also held that the proper forum for plaintiffs' claim against the United States was the United States Claims Court. *Id.* Moreover, the Ninth Circuit declined to transfer plaintiffs' claim to the Claims Court because plaintiffs could refile their claim themselves. *Id.*

granted.[11] *McKeel v. Islamic Republic of Iran*, Nos. 82-5111, 82-5114, 82-5115, 82-5116, 82-5117, 82-5417 (9th Cir. Dec. 30, 1983).

The FSIA[12] provides, subject to certain express statutory exceptions and existing international agreements,[13] that a foreign state

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[11] The United States petitioned for rehearing contending that the court of appeals had construed the FSIA incorrectly and that construction would only complicate handling diplomatic relations. Petition for Rehearing the Court's Construction of the Foreign Sovereign Immunities Act, filed Nov. 22, 1982, *reprinted in* 22 I.L.M. 419 (1983)[hereinafter cited as United States Petition]. This petition was granted on December 23, 1983; oral arguments were heard on May 19, 1983. *Id.* at 419.

[12] FSIA §§ 1602-1611 (1976). The principle of foreign sovereign immunity holds that foreign states are not subject to the jurisdiction of the courts of other states. *See generally* L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW CASES AND MATERIALS 490-524 (1980)[hereinafter cited as L. HENKIN](traces the development of the principle of sovereign immunity from The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812) through the FSIA). *See also* J. SWEENEY, THE INTERNATIONAL LAW OF SOVEREIGN IMMUNITY (1963). Originally, this immunity was considered absolute. L. HENKIN, *supra*, at 490. The United States first recognized this "classical" theory more than 170 years ago in The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812), where the Supreme Court held that, absent waiver, a foreign state was absolutely immune from suit for any act committed by its agents or instrumentalities. *Id. But see* R. LILLICH, THE PROTECTION OF FOREIGN INVESTMENT 5-6 (1965)(expressing the view that Justice Marshall did not intend for his opinion to be used as support for the classical theory). Later, a more restrictive theory of sovereign immunity emerged which held that a foreign state's governmental (public) activities were immune but its commercial (private) activities were not. Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning & Effect*, 3 YALE STUD. WORLD PUB. ORD. 1, 18 (1976). The restrictive theory emerged due to increased commercial activity by states and demands for greater state responsibility. *Id.* One of the principle problems with the restrictive theory, however, has been the inability to adequately define the distinction between public and private activities and, therefore, the inability to apply the theory. *See* Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220, 222-26 (1951). *See also* J. SWEENEY, *supra*, at 20-23. The restrictive theory was adopted by the United States Department of State with the "Tate Letter" of May 19, 1952. 26 DEP'T ST. BULL. 984 (1952). This was a letter addressed to Attorney General Philip B. Perlman from the State Department's Legal Advisor Jack B. Tate which traced the history of the "newer" or restrictive theory of sovereign immunity and announced the State Department's intention to apply this theory to future questions on the availability of sovereign immunity. *Id.* at 984-85. The Tate Letter, however, failed to correct the major problem with the restrictive theory; it did not define the distinction between public and private activity. For a discussion of the shortcomings of the Tate Letter, see Lowenfield, *Claims Against Foreign States—A Proposal for Reform of U.S. Law*, 44 N.Y.U.L. REV. 901, 907-08 (1969).

The restrictive theory was codified in the FSIA §§ 1602-1611. *See also* H.R. REP. No. 1487, 94th Cong., 2d Sess. 1 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604 (discussion of the codification of the restrictive theory) [hereinafter cited as House Report]. The House Judiciary Committee, in analyzing the FSIA, reported "[this] bill will codify the so-called 'restrictive' principle of sovereign immunity, as presently recognized in international law." *Id.* at 7, 1976 U.S. CODE CONG. & AD. NEWS at 6604-05.

[13] The five exceptions in § 1605(a)(5) are: 1) no immunity when the foreign state has either explicitly or implicitly waived it; 2) no immunity when the foreign state engages in commercial activity either occurring in the United States or having direct effects in the United States; 3) no immunity when rights in property are taken in violation of interna-

is immune from the jurisdiction of the United States courts.[14] The non-commercial tort exception in FSIA section 1605(a)(5) allows United States courts to assert jurisdiction when a claim for damages against a foreign state arises out of a "personal injury or death, or damage to or loss of property occurring in the United States."[15] "United States" is defined as "all territory and water . . . subject to the jurisdiction of the United States."[16] Until *Persinger* and *McKeel*, however, it was unclear whether United States embassies were encompassed by this definition.

European courts which have litigated the issue of whether the receiving state or the sending state has jurisdiction over embassies, have uniformly held that such jurisdiction lies with the receiving state.[17] United States courts, however, had not addressed the question directly. Two district court opinions suggested that the non-commercial tort exception applies only to acts which occur within the geographic territory of the United States. In *Matter of Sedco, Inc.*, Sedco, an offshore drilling corporation, attempted to sue Pemex, a subsidiary of the Government of Mexico, for property damage arising out of an oil well drilling disaster which had oc-

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tional law; 4) no immunity when the litigation concerns rights in real estate or in inherited gift property in the United States; and 5) no immunity for personal injury, wrongful death, or property damage arising out of a tort committed in the United States. FSIA § 1605(a)(1)-(5).

Section 1604 of the bill as proposed included future as well as existing international agreements. House Report, *supra* note 12, at 10, 1976 U.S. CODE CONG. & AD. NEWS at 6608. During committee debate on the bill, the reference to "future" agreements was deleted. *Id.* It had been included in the proposed bill because of the belief that sovereign immunity might become the subject of an international convention. *Id.* The committee thought this language unnecessary because, under article VI of the Constitution, such a convention would take precedence over any statute. *Id.* The committee also thought the language misleading because it seemed to authorize a future international agreement. *Id.*

[14] FSIA § 1604 (1976).

[15] *Id.* § 1603(c) (emphasis added).

[16] *Id.* ("The 'United States' includes all territory and waters, continental or insular, subject to the jurisdiction of the United States."). The House Report does not provide any additional clarification. *See* House Report, *supra* note 12, at 16.

[17] *See, e.g.*, Consul Barat v. Ministere Public, 15 ANN. DIG. PUB. INT'L L. CASES 311 (1948)(adoption under California law of a French child by United States citizens in the United States embassy in Paris declared void; United States embassy in Paris is in French territory and French adoption procedures govern); Afghan Embassy Case, 7 ANN. DIG. PUB. INT'L L. CASES 385 (1934)(Afghani prosecuted in Germany for murder of Afghan minister in Afghani embassy in Germany; no extraterritoriality to defeat German jurisdiction); Status of Legation Building Cases, 5 ANN. DIG. PUB. INT'L L. CASES 305 (1929-30)(German unemployment statute predicated eligibility for compensation on employment "in Germany"; employee of German embassy in London ineligible because was not employed "in Germany").

curred off the coast of Mexico.[18] Plaintiff argued that for the non-commercial tort exception to apply, the tort could occur in whole or in part in the United States. If the acts or omissions cause direct effects in the United States, the tort occurs in part in the United States.[19] The District Court for the Southern District of Texas, holding that the non-commercial tort exception was inapplicable, concluded that "although the exception does apply to all non-commercial torts committed *in this country*, . . . the tort, in whole, must occur in the United States."[20] An even narrower interpretation of the exception was given in *Hanoch Tel-Oren v. Libyan Arab Republic*.[21] *Hanoch Tel-Oren* concerned wrongful death and personal injury actions arising out of an attack in Israel on a bus containing citizens of and visitors to Israel.[22] In holding that the non-commercial tort exception did not apply, the court stated that ". . . it is undoubted that sovereign immunity is still in effect for tort claims unless injury or death occurs *within American borders*."[23] The *Sedco* and *Hanoch Tel-Oren* incidents, however, both occurred within the exclusive jurisdiction of other countries and did not concern any question of concurrent United States jurisdiction or, more particularly, jurisdiction of United States embassies.

In *Persinger*, the District of Columbia Court of Appeals held that for jurisdiction under the FSIA, the phrase "in the United States" includes United States embassies abroad.[24] In reaching this conclusion, the *Persinger* court followed a three pronged analysis.

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[18] 543 F. Supp. 561 (S.D. Tex. 1982). This case involved litigation arising out of "history's worst offshore drilling disaster." *Id.* at 572. Sedco also alleged that the court had jurisdiction over Pemex under the commercial activity exception of § 1605(a)(2) of the FSIA. *Id.* at 564. The court rejected this ground for jurisdiction, holding that the drilling was not a commercial activity but an attribute of sovereignty—control over the foreign state's mineral resources. *Id.* at 566.

[19] *Id.* at 567.

[20] *Id.* (emphasis added). The language "in this country" suggests United States territory. In addition to allowing Pemex's motion to dismiss, the district court denied the motion to dismiss made by Permago, a non-governmental Mexican drilling company, on the ground that Permago was subject to Texas' long-arm statute. *Id.* at 567-70. The court also held that § 1605(a)(5) did not apply because the acts of Pemex were discretionary. *Id.* at 567.

[21] 517 F. Supp. 542 (D.D.C. 1981).

[22] *Id.* at 544. Plaintiffs alleged four separate bases of jurisdiction: 1) federal question jurisdiction (28 U.S.C. § 1331); 2) diversity of citizenship (28 U.S.C. § 1332); 3) Alien Tort Claims Act (28 U.S.C. § 1350); and 4) Foreign Sovereign Immunities Act (28 U.S.C. §§ 1330, 1602-11). The court rejected each of these allegations and held, in addition, that the plaintiff's claims were barred by the applicable statute of limitations. *Id.* at 545.

[23] *Id.* at 550 n.3 (emphasis added). The court also held that the FSIA was inapplicable to some of the defendants because they were not foreign states. *Id.*

[24] Persinger v. Islamic Republic of Iran, 22 I.L.M. at 412.

First, because the legislative history failed to define the scope of "territory . . . subject to the jurisdiction of the United States," the *Persinger* court relied on the language of the FSIA itself to determine the meaning of the phrase.[25] According to the court, that language does not indicate that "territory" means literally only that territory geographically in the United States,[26] but also includes any territory abroad which is under United States jurisdiction.[27] Second, the court stated that, although under international law United States embassies are regarded as United States territory,[28] they are not necessarily excluded from coverage under the FSIA.[29] If it can be shown that the United States exercises some form of jurisdiction over its embassies, they fall within the "territory" contemplated by the non-commercial tort exception.[30] Third, the court reasoned that United States jurisdiction does not have to be exclusive jurisdiction. The term also includes territory subject to concurrent jurisdiction of the United States and another country.[31] The court determined that United States embassies fall under the broad authority of Congress to regulate foreign affairs,[32] that they

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[25] *Id.* at 411. *See supra* note 16 and accompanying text.

[26] Persinger v. Islamic Republic of Iran, 22 I.L.M. at 411. According to the court, "territory" could have two different meanings. It could mean exclusive United States territory in a geographic sense or territory over which the United States exercises some form of jurisdiction. *Id.*

[27] *Id.* The court did not explain why it chose this jurisdictional interpretation of territory. *Id.*

[28] *Id. See* J. BRIERLY, THE LAW OF NATIONS 260-61 (1963); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 77 comment a (1965). *See also supra* note 17.

[29] Persinger v. Islamic Republic of Iran, 22 I.L.M. at 411.

[30] *Id.* By choosing the jurisdictional interpretation of "territory," all that had to be shown for jurisdiction under § 1605(a)(5) was that the foreign state's tortious act occurred somewhere that the United States exercised some form of jurisdiction. *See supra* notes 26 and 27 and accompanying text.

[31] Persinger v. Islamic Republic of Iran, 22 I.L.M. at 411. The court determined that the definition of "United States" in § 1603(c) of the FSIA was broad enough to include not only territory under the exclusive jurisdiction of the United States but also territory over which the United States exercises concurrent jurisdiction. *Id.*

[32] *Id.* Perez v. Brownell, 356 U.S. 44 (1958), involved proceedings to deport a person who was a citizen of the United States by birth. The United States denied that he was a United States citizen because he had voted in a Mexican political election. *See* Nationality Act of 1940, § 401, 8 U.S.C. § 1481 (1970)(anyone who votes in a foreign political election shall lose his United States citizenship). The Court held that Congress had the authority to regulate foreign relations and that this situation fell within that authority. *Perez*, 356 U.S. at 57-62. *See also* United States v. Curtiss-Wright Export Co., 299 U.S. 304, 318 (1935); McKenzie v. Hare, 239 U.S. 299, 311-12 (1915). The court in *Persinger* decided that United States embassies were also subject to this authority to regulate foreign affairs. Persinger v. Islamic Republic of Iran, 22 I.L.M. at 411.

are subject to the authority of the State Department to promulgate regulations governing consular affairs,[33] and that they are subject to the criminal jurisdiction of the United States.[34] *A fortiori*, the court concluded that the United States exercises concurrent jurisdiction over its embassies abroad.[35] Thus, the *Persinger* court held that United States embassies abroad are territory subject to the jurisdiction of the United States; therefore, the Iranian actions on embassy grounds occurred "in the United States" within the FSIA exception.[36] Thus, Iran could not claim immunity under the FSIA and the court had jurisdiction to hear the case on its merits.[37]

In contrast, the *McKeel* court affirmed the lower court's ruling that the FSIA barred suit against Iran.[38] The Ninth Circuit Court of Appeals recognized that a literal reading of the FSIA would yield the result reached in *Persinger*;[39] however, the court refused to accept such a result.[40] Relying primarily on the legislative history behind the FSIA, the court concluded that Congress intended the FSIA to be consistent with prevailing international practice.[41] "That practice is that a state loses its sovereign immunity for tortious acts only when they occur in the territory of the forum state."[42] United States embassies are not within the geographic

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[33] Persinger v. Islamic Republic of Iran, 22 I.L.M. at 411. *See, e.g.*, 22 U.S.C. §§ 2658, 3926-3927 (1976 & Supp. V 1980). Section 2658 deals with the Secretary of State's authority to "promulgate rules and regulations to carry out the functions of his office." Sections 3926-3927 concern the Secretary of State's authority to "prescribe regulations to carry out the provisions of . . . [The Foreign Service] Act."

[34] Persinger v. Islamic Republic of Iran, 22 I.L.M. at 411. *See, e.g.*, United States v. Erdos, 474 F.2d 157 (4th Cir. 1973); United States v. Pizzarusso, 388 F.2d 8 (2d Cir. 1968).

[35] Persinger v. Islamic Republic of Iran, 22 I.L.M. at 411.

[36] *Id.* at 412.

[37] *Id.* The court ultimately held, however, that Iran could not be sued in the instant case because the executive agreement barred claims against Iran arising out of the hostage crisis. *See supra* note 9.

[38] McKeel v. Islamic Republic of Iran, Nos. 82-5111, 82-5114, 82-5115, 82-5116, 82-5117, 82-5417 (9th Cir. Dec. 30, 1983).

[39] *Id.*

[40] *Id.* "When acceptance of the literal meaning of words in a statute leads to results which are absurd or futile or plainly at variance with the policy of the legislation, the legislative purpose will be followed." United States v. American Trucking Ass'n, Inc., 310 U.S. 534, 543-44, *reh'g denied* 311 U.S. 724 (1940). *See also* Trailer Train Co. v. State Bd. of Equalization, 697 F.2d 860, 865 (9th Cir. 1983).

[41] McKeel v. Islamic Republic of Iran, Nos. 82-5111, 82-5114, 82-5115, 82-5116, 82-5117, 82-5417 (9th Cir. Dec. 30, 1983). *See* Texas Trading & Milling Corp. v. Federal Republic of Nig., 647 F.2d 300, 310 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982)("drafters intended to bring American sovereign immunity practice in line with that of other nations"). *See also infra* note 53.

[42] McKeel v. Islamic Republic of Iran, Nos. 82-5111, 82-5114, 82-5115, 82-5116, 82-5117,

territory of the United States;[43] thus, the court held that the non-commercial tort exception does not apply and Iran is immune from suit.[44]

Plaintiffs in *McKeel* also argued that jurisdiction over Iran could be obtained on two other grounds - nationality and the protective principle.[45] Nationality allows a state to obtain jurisdiction over its nationals for wrongful acts, no matter where those acts take place.[46] The protective principle allows a state to punish crimes against its sovereignty regardless of the actor's nationality or where the crime was committed.[47] The court rejected plaintiffs' nationality argument because defendant was not a United States citizen but a foreign sovereign.[48] The court also dismissed plaintiffs' protective principle argument, but only in a footnote with little explanation.[49] The court concluded that the only basis for jurisdiction under the FSIA which the plaintiff could prove is territorial and, because United States embassies are not United States territory, the FSIA does not give the United States jurisdiction over Iran in this case.[50]

Therefore, both courts of appeals address the same facts, but arrive at different conclusions: one, taking a literal approach, determines that Iran is not immune from suit; the other, relying on legislative intent, concludes that Iran is immune from suit. Neither decision is entirely sound, although the result reached in *McKeel* seems more logical for legal and policy reasons.

Looking only at the language of the FSIA, it is possible to conclude, as the *Persinger* court did, that embassies are "in the

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82-5417 (9th Cir. Dec. 30, 1983).

[43] *Id.* *See* Meredith v. United States, 330 F.2d 9 (9th Cir.), *cert. denied*, 379 U.S. 867 (1964). *See also supra* note 28.

[44] McKeel v. Islamic Republic of Iran, Nos. 82-5111, 82-5114, 82-5115, 82-5116, 82-5117, 82-5417 (9th Cir. Dec. 30, 1983).

[45] *Id.*

[46] RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 30 (1965). *See also* Agee v. Muskie, 629 F.2d 80 (D.D.C.), *rev'd on other grounds*, 453 U.S. 280 (1980); United States v. Erdos, 474 F.2d 157 (4th Cir.), *cert. denied*, 414 U.S. 876 (1973).

[47] RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 33 (1965). *See also* Rocha v. United States, 288 F.2d 545 (9th Cir. 1961); United States v. Pizzarusso, 388 F.2d 8 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968).

[48] McKeel v. Islamic Republic of Iran, Nos. 82-5111, 82-5114, 82-5115, 82-5116, 82-5117, 82-5417 (9th Cir. Dec. 30, 1983).

[49] *Id.* The footnote merely sets out the facts of United States v. Pizzarusso, 388 F.2d 8 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968), and states that *Pizzarusso* does not suggest that jurisdiction should be exercised in this case.

[50] McKeel v. Islamic Republic of Iran, Nos. 82-5111, 82-5114, 82-5115, 82-5116, 82-5117, 82-5417 (9th Cir. Dec. 30, 1983).

United States" for jurisdictional purposes.[51] The FSIA definition does not limit coverage to territory under exclusive jurisdiction; thus, territory under concurrent jurisdiction could be included.[52] However, the *Persinger* court's interpretation ignores the legislative history behind the FSIA which indicated that Congress did not intend for any part of the FSIA to be construed contrary to established international practice.[53] The *McKeel* court determined that this congressional intent was controlling.[54] Established international practice shows that embassies are not considered territory of the sending state, which both courts of appeals recognized.[55] Most European authorities consider embassies to be under the jurisdiction of the receiving state and, therefore, not part of the territory of the sending state.[56]

Instead of relying upon European authority, the *Persinger* court cited the Vienna Convention on Diplomatic Relations (Vienna Convention),[57] to which the United States is a party, to support its proposition that international law has substantially removed embassies from the jurisdiction of the receiving state, thus reinforcing the exercise of United States jurisdiction.[58] The Vienna Convention, however, deals primarily with the privileges and immunities of individual diplomats, not with the question of whether the send-

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[51] The United States exercises certain forms of jurisdiction, in particular, criminal jurisdiction, over its embassies abroad; thus, those embassies are "territory . . . subject to the jurisdiction of the United States," and this situation could be interpreted as falling within the non-commercial tort exception to the FSIA. *See supra* notes 24-37 and accompanying text.

[52] *See* FSIA § 1603(c). *See also supra* note 28 and accompanying text.

[53] *See* FSIA § 1604 (1976); House Report, *supra* note 12, at 7, 1976 U.S. CODE CONG. & AD. NEWS at 6605; 122 CONG. REC. 33,532 (1976)(statement by Rep. Danielson). In addition, several Supreme Court decisions have indicated that international law, although not superior to United States law, is to be given due consideration and applied if possible. *See* McCulloch v. Sociedad Nacional de Marineros, 372 U.S. 10, 21-22 (1936)(need for "clear expression" of congressional intent for statute to be construed contrary to international law); Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 60, 118 (1804) (laws of the United States "ought never to be construed to violate the laws of nations, if any other possible construction remains").

[54] McKeel v. Islamic Republic of Iran, Nos. 82-5111, 82-5114, 82-5115, 82-5116, 82-5117, 82-5417 (9th Cir. Dec. 30, 1983). *See also supra* note 40.

[55] Persinger v. Islamic Republic of Iran, 22 I.L.M. at 411. McKeel v. Islamic Republic of Iran, Nos. 82-5111, 82-5114, 82-5115, 82-5116, 82-5117, 82-5417 (9th Cir. Dec. 30, 1983). *See also supra* notes 28 and 43.

[56] *See supra* note 17.

[57] Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 [hereinafter cited as Vienna Convention].

[58] Persinger v. Islamic Republic of Iran, 22 I.L.M. at 411. The court did not cite a specific article of the Vienna Convention. *Id.*

ing state or receiving state has jurisdiction over the embassy premises.[59] Although the Vienna Convention states that mission premises are inviolable,[60] inviolability and immunity from jurisdiction are distinct legal principles.[61] Inviolability protects the embassy premises from entry by agents of the receiving state, but does not insulate the embassy premises from the jurisdiction of the receiving state.[62] The Vienna Convention does not examine the issue of whether jurisdiction lies with the receiving state or with the sending state; it merely sets out diplomatic immunities and exceptions.[63] Therefore, the Vienna Convention arguably adds little to the resolution of the issue in *Persinger* and, if the non-commercial tort exception is to be construed in conformity with international law and practice, as Congress intended, embassy premises should not be considered United States territory for jurisdictional purposes.

In addition, the *Persinger* court seemed to confuse jurisdiction over embassy personnel with jurisdiction over embassy premises. This distinction is important because, for the non-commercial tort exception to apply, the tort must have occurred on territory under United States jurisdiction and not necessarily on the person of a United States citizen.[64] Jurisdiction over embassy personnel may

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[59] Vienna Convention, *supra* note 57, at preamble.

[60] *Id.* art. 22.

[61] Inviolability and jurisdictional immunity of diplomats are dealt with in two separate articles of the Vienna Convention. Article 29 makes the person of a diplomat inviolable and article 31 exempts him from the jurisdiction of the receiving state. *Id.* arts. 29 and 31. *See also* E. DENZA, DIPLOMATIC LAW 90 (1976).

[62] *See* E. DENZA, *supra* note 61, at 90-92. Denza argues that, although there is no provision in the Vienna Convention which provides for the institution of legal proceedings in the receiving state against the sending state respecting embassy premises, under the restrictive theory of sovereign immunity, "a foreign state is not immune from proceedings relating to land which it holds in the jurisdiction." *Id.* at 91. Therefore, the sending state is probably subject to the jurisdiction of the receiving state with respect to its embassy premises. *Id.* at 91-92. Under this analysis, the court's finding that the Vienna Convention substantially removes the embassy from the jurisdiction of the receiving state is unsupportable. *See supra* note 58 and accompanying text. Article 31(1)(a) of the Vienna Convention protects a diplomat from legal proceedings if the embassy premises are in his name and Denza points out that a State could achieve a higher degree of immunity by putting its embassy premises in the name of its ambassador. E. DENZA, *supra* note 61, at 91-92. Denza, however, overlooks the failure of article 31(1)(a) to prohibit suit against the sending state; it only prevents suit against its diplomats. Vienna Convention, *supra* note 57, art. 31(1)(a).

[63] Vienna Convention, *supra* note 57, preamble.

[64] Although plaintiff's complaint is based on personal injury and not property damage and plaintiff was part of the personnel of the embassy, the court should distinguish between jurisdiction over embassy personnel and jurisdiction over embassy premises because, to be actionable under the FSIA, the personal injury must occur *in* "territory . . . subject to the

properly be characterized as concurrent because the United States regulates some of the activities of its embassy personnel,[65] but also requires them to obey the laws of the receiving state.[66] On the other hand, the embassy premises are subject to the jurisdiction of the receiving state.[67] Although the United States may have a property right in the premises,[68] this is not equivalent to a sovereign or jurisdictional right.[69] As explained by Justice Marshall in *The*

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jurisdiction of the United States"; that is, the *premises* must be territory in order for the non-commercial tort exception to be triggered. FSIA, *supra* note 7, § 1605(a)(5) (1976). That the injury occurred to a United States citizen is not in and of itself sufficient to grant United States jurisdiction. Thus, the issue of whether the embassies are territory becomes critical.

[65] For example, embassy personnel may not invest in real estate in the foreign state. 22 C.F.R. 10.735-206(b)(2) (1983). They may not engage in financial or stock transactions. *Id.* at (b)(3). Nor may they engage in any form of currency speculation. *Id.* at (b)(1)-(6). In addition, children born to foreign nationals at United States embassies cannot claim United States citizenship by birth. 8 U.S.C. §§ 1401, 1408 (1976 & Supp. V 1981).

[66] "An employee abroad is . . . required to obey the laws of the country in which he is present." 22 C.F.R. 10.735-215(b) (1983). In addition, the family members of United States embassy employees may not be employed in the receiving state, either on or off embassy premises, if that employment violates the law of the foreign state. 22 C.F.R. 10.735-206(c) (1983). Also, the United States will not recognize marriages performed on United States embassy premises unless performed in accordance with local law. 7 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 358-59 (1970).

[67] *See* 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 562-66 (1942); 7 M. WHITEMAN, *supra* note 66, at 353-59. The *Persinger* court held, however, that the United States does exercise some forms of jurisdiction over its embassy premises citing United States v. Pizzarusso, 388 F.2d 8 (2d Cir. 1968) and United States v. Erdos, 474 F.2d 157 (4th Cir. 1973). Persinger v. Islamic Republic of Iran, 22 I.L.M. at 411. The jurisdiction exercised in these two cases is distinguishable from that envisioned by the FSIA. *Pizzarusso* involved a false statement on a visa application and was brought under the "protective principle." The Second Circuit asserted jurisdiction in *Pizzarusso* to protect the United States against "an affront to . . . [its] very sovereignty." *Pizzarusso*, 388 F.2d at 10. The court did not consider that the crime had occurred in a United States consulate. *Id. Erdos* involved an appeal from a voluntary manslaughter conviction and the application of a statute which was explicitly intended to extend the jurisdiction of the United States beyond its own territory. *Erdos*, 474 F.2d 157. Neither case involved jurisdiction over a foreign state for acts committed within its own territory. *See* United States Petition, *supra* note 11, at 432.

[68] DENZA, *supra* note 61, at 75. The receiving state must facilitate the sending state's acquisition of premises for its mission. *Id.* This acquisition may be a leasehold interest or title to the real estate according to the laws of the receiving state. *Id.* Thus, the sending state enjoys all of the rights incident to property ownership allowed by the laws of the receiving state.

[69] A sovereign right is "[a] right which the state alone, or some of its governmental agencies, can possess . . . distinguished from such 'proprietary' rights as a state, like any private person, may have in property . . . which it owns." BLACK'S LAW DICTIONARY 1252 (5th ed. 1979). *See* Tietz v. People's Republic of Bulgaria, 28 INT'L L. REP. 369 (1963).

> When a foreign (or sending) sovereign purchases real property situated within the frontiers of the local (or receiving) sovereign, the foreign sovereign unquestionably acquires the ownership—the *dominium*—of that property (assuming that the laws

Schooner Exchange v. M'Faddon, historically "[a] prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and asuming the character of a private individual . . . ."[70] Accordingly, the United States, having acquired property in a foreign state, should be considered as having laid down its role as sovereign and having subjected itself to the territorial jurisdiction of that foreign state.[71] The United States, therefore, would not have concurrent jurisdiction over its embassies abroad, but only a proprietary right subject to the territorial jurisdiction of the receiving state.

Perhaps the most serious flaw in the *Persinger* court's analysis, however, is the broad effect the court's interpretation could have on other sections of the FSIA and on United States foreign relations both abroad and in the United States. Because the phrase "in the United States" appears elsewhere in the FSIA, the court's interpretation would affect those sections also.[72] For example, section 1605(a)(2) provides that a foreign state is barred from claiming sovereign immunity in an action "based upon a commercial activity carried on *in the United States* by a foreign state; or upon an act performed *in the United States* in connection with a commercial activity of the foreign state elsewhere."[73] After *Persinger*, the scope of the commercial exception could be broadened so that any foreign corporation run by a foreign state which has commercial contacts on or with United States embassies could be subject to the jurisdiction of United States courts even if the corporation had no other commercial contacts with the territorial United States.[74]

> of the local sovereign allow of such purchase) in exactly the same way, and to exactly as great an extent, as any ordinary private person would acquire its *dominium*. However, and just as a private person does not acquire any *imperium* [sovereignty over all of the land which lies within the local sovereign's frontiers] over the land merely by purchasing the *dominium*, so similarly a foreign sovereign does not acquire any *imperium* over the land merely by making such a purchase of the *dominium*.

Id. at 376.

[70] 11 U.S. (7 Cranch) 116, 145 (dictum).

[71] *See generally* R. LILLICH, *supra* note 12, at 5-6.

[72] *See* FSIA § 1605(a)(2)-(4).

[73] FSIA § 1605(a)(2) (emphasis added).

[74] For example, members of a foreign country's law enforcement agency arguably could not enter United States embassy premises to assist in quieting a disturbance, even at the specific request of the head of the embassy, without potentially subjecting the foreign country to suit in United States courts. United States Petition, *supra* note 11, at 428.

Congress clearly did not intend the exception to be so expansive.[75] Such an extension of *Persinger* could hamper the effective operation of United States embassies because foreign corporations may decide not to pursue commercial contacts either on or with United States embassies due to the cost involved in litigating claims arising out of these contacts in the United States.[76] In addition, because the United States exercises the same type of jurisdiction over other United States facilities, United States jurisdiction could be extended to non-commercial torts occurring on these properties under *Persinger*.[77]

A construction of the FSIA allowing United States courts to exercise jurisdiction over foreign states by virtue of acts committed by foreign agents or instrumentalities on embassy premises abroad also directly conflicts with most foreign states' conceptions of sovereignty.[78] This could create hostility and strain relations between the United States and other nations.[79] To avoid United States jurisdiction, foreign states could even forbid their agents to enter United States embassy premises, thereby making it difficult for the embassies to perform effectively.[80] The *Persinger* court's interpre-

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[75] *See supra* notes 65 and 66. These regulations are applicable to all United States employees in foreign countries whether they are employed at embassies or other United States facilities. *Id.*

[76] *See* House Report, *supra* note 12, at 13, 1976 U.S. CODE CONG. & AD. NEWS at 6612. The exception was intended to codify the effects doctrine. *Id.*

[77] United States Petition, *supra* note 11, at 427. No historical support exists for this conclusion, however, the interpretation of the *Persinger* court makes this development possible. Whether a United States court will attempt to assert jurisdiction in such a case is an open question.

[78] *Id.* The United States Petition asserts that, in practice, the court's decision makes United States embassies part of the territory of the United States for jurisdictional purposes. *Id.* Because most foreign states consider themselves sovereign over territory within their borders, such an assertion of jurisdiction would conflict with their view. *See supra* note 69 and accompanying text.

[79] For example, a foreign state may perceive that such an assertion of jurisdiction encroaches on its sovereignty and refuse to acknowledge any judgment so obtained. *See, e.g.*, British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd., [1953] Ch. 19; [1952] 2 All E.R. 780 (British court rejected decision of United States district court extending United States jurisdiction to the business affairs of persons and corporations in British patent litigation). Thus, the United States would be faced with the difficult task of trying to enforce the judgment.

[80] United States Petition, *supra* note 11, at 427. The embassies would be less effective because a great deal of business is transacted on embassy grounds. Statement of Louis B. Sohn, Woodruff Professor of International Law at the University of Georgia, School of Law (Feb. 8, 1984). Thus, if foreign agents were forbidden by their governments to enter United States embassy premises, embassy personnel would have to leave the premises in order to conduct business.

tation, however, is unlikely to result in such action because it would be tantamount to breaking off diplomatic relations.[81] In an age of increasing political and economic interdependence, few foreign states would be willing to go that far.[82]

Finally, the court's interpretation could seriously affect the United States government's relations with foreign embassies in the United States. The principle of reciprocity[83] could subject the United States to foreign jurisdiction for United States governmental activities occurring on foreign embassy premises in the United States if *Persinger* were followed.[84] This may have the same consequences for effectively conducting United States foreign relations in the United States that it could have for conducting them in foreign states—the United States may hesitate to allow its agents to enter foreign embassy premises in the United States for fear of submitting to other nations' jurisdiction.[85] Arguably, the United States will also be constrained by its need to keep its lines of communication with foreign countries open.

The *McKeel* court, while avoiding the potentially disastrous consequences of *Persinger*, fails to deal effectively with plaintiffs' argument that jurisdiction over Iran can be obtained under the protective principle.[86] The protective principle allows a nation to reach "conduct abroad that threatens the nation's security as a state or the operation of its governmental functions, provided . . .

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[81] Statement of Louis B. Sohn, Woodruff Professor of International Law at the University of Georgia School of Law (Feb. 8, 1984).

[82] Statement of Dean Rusk, former Secretary of State and Sibley Professor of International Law at the University of Georgia School of Law (Sept. 7, 1983). The very reason for the emergence of the restrictive theory of sovereign immunity was the increase in intercourse between countries. *See supra* note 12. Countries have become so interdependent upon one another, especially economically, that no government would be willing to restrict its access to information from another government. More likely, a foreign country will just ignore a judgment obtained based upon embassy jurisdiction. *See supra* note 79.

[83] 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 580-82 (1968). "The principle of reciprocity consists in the recognizing or denying of jurisdictional immunity by one State with respect to another State to the same extent as the latter recognizes or denies immunity in relation to other States." *Id.* at 580. For a criticism of this principle, see Lauterpacht, *supra* note 12, at 220, 245-46.

[84] United States Petition, *supra* note 11, at 428.

[85] *See* United States Petition, *supra* note 11, at 428. In addition, this interpretation may frustrate the purpose of the Foreign Missions Act, 22 U.S.C. § 4301 (1982), which allows the Department of State to provide benefits to foreign missions in the United States. 22 U.S.C. § 4304 (1982).

[86] McKeel v. Islamic Republic of Iran, Nos. 82-5111, 82-5114, 82-5115, 82-5116, 82-5117, 82-5417 (9th Cir. Dec. 30, 1983). *See supra* note 49 and accompanying text.

it is recognized generally, as criminal conduct."[87] Although the actions of the Iranian militants clearly fall within this principle,[88] the *McKeel* court, in a footnote, merely states that the protective principle is inapplicable when a more detailed explanation appears necessary.[89]

Despite this flaw in the *McKeel* court's analysis and although a literal reading of the FSIA might suggest that United States embassies should be included as "territory . . . under the jurisdiction of the United States," the better approach probably is that of the *McKeel* court which is to exclude United States embassies from coverage. This is because the *McKeel* opinion takes into consideration the legislative intent in enacting the statute and avoids the unwanted impact on foreign relations that would result if the *Persinger* decision were followed. The *McKeel* approach allows foreign nations to commit wrongful acts on United States embassies with relative impunity, but *Persinger*'s use of the FSIA would break established international practice and set a precedent which could ultimately have more harmful repercussions. The *Persinger* court may very well reverse itself on the rehearing because the arguments for exclusion of embassy premises from the FSIA exception are persuasive. If the *Persinger* court affirms its prior holding, however, the conflict between the circuits is likely to come before the Supreme Court. The Supreme Court will probably adhere to its previous holdings that United States law is to be interpreted in conformity with international law and practice. Thus, the Supreme Court will most likely agree with the *McKeel* court's opinion and hold that embassies are excluded under the FSIA non-commercial tort exception.

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[87] United States v. Daniszewski, 380 F. Supp. 113, 114 (E.D.N.Y. 1974) (citing United States v. Pizzarusso, 388 F.2d 8, 10-11 (2d Cir. 1968), *cert. denied*, 392 U.S. 936 (1968)).

[88] The Iranian actions threatened the United States "governmental functions" by disrupting its diplomatic activity in Iran. That Iran's actions were "recognized generally, as criminal conduct" was settled by the International Court of Justice. Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3.

[89] McKeel v. Islamic Republic of Iran, Nos. 82-5111, 82-5114, 82-5115, 82-5116, 82-5117, 82-5417 (9th Cir. Dec. 30, 1983). Theoretically, the protective principle would apply to this situation. The House Report on the bill, however, makes it clear that the FSIA "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states." House Report, *supra* note 12, at 12, 1976 U.S. CODE CONG. & AD. NEWS at 6610.