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The Application of the Foreign Sovereign Immunities Act to an Action Against the French Railroad for Transporting Thousands of Jews and Others to Their Deaths: Abrams v. SNCF

By Malvina Halberstam*

A class action was recently brought in the Federal District Court for the Eastern District of New York against the Societe Nationale des Chemins de Fer Francais (SNCF), the French Railroad, charging that between 1942 and 1944 the French Railroad transported 72,000 Jews and tens of thousands of others to Nazi death camps for profit. Fewer than 3% survived. Many died en route because of the horrible conditions in which they were transported.


2. Included among the plaintiffs are several of the more than 60 U.S. pilots shot down over France and transported to Auschwitz and Buchenwald by SNCF. See forms on file with Harriet Tamen, attorney for the plaintiffs. See also Ralph Blumenthal, U.S. Suit Says French Trains Took Victims to the Nazis, N.Y. TIMES, June 13, 2001, at A19. See generally Associated Press, WWII Victims Sue French Railroad (June 13, 2001), available at <http://www.codoh.com/newsdesk/2001/010613b.html> (discussing the extent SNCF was used to transport people to concentration camps).

3. See Associated Press, WWII Victims Sue French Railroad (June 13, 2001), available at <http://www.codoh.com/newsdesk/2001/010613b.html> (confirming that the plaintiffs accuse the French Railroad of transporting 72,000 people to Nazi death camps); see also Matthew Lippman, Fifty Years After Auschwitz: Prosecutions of Nazi Death Camp Defendants, 11 CONN. J. INTL L. 199, 208-209 (1996) (describing how French officials were charged with War Crimes for deporting Jews to Auschwitz). See generally Vivian Grosswald Curran, Deconstruction, Structuralism, Antisemitism and the Law, 36 B.C. L. REV. 1, 29 (1994) (offering that the French treatment of Jews during World War II may have been more severe than the Germans').


5. Abrams, 175 F. Supp. 2d at 425. See Ralph Blumenthal, U.S. Suit Says French Trains Took Victims to the Nazis, N.Y. TIMES, June 13, 2001, at A19 (noting the atrocious environment the holocaust victims were subjected to while transported by the railroad); Alan Riding, The Painful Past Still Eludes France, N.Y. TIMES, June 13, 1993, at E4 (indicating the low survival rate of holocaust victims transported to Germany from France).

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train left the French holding camp at Compiegne on July 2, 1944, with 2,166 passengers. When it arrived in Dachau three days later, one quarter—536—were already dead.

One of the plaintiffs, Nicole Silberkleit, said, "there was no room to sit . . . no food and no water. A bucket in the corner—that was the bathroom. Once in a while they would open the cars to throw out the dead people."8

One of the defenses raised by the French Railroad is that the action is barred by the Foreign Sovereign Immunities Act of 1976 (FSIA).9 The FSIA defines a foreign state to include "a separate legal person corporate . . . or otherwise . . . a majority of whose shares . . . is owned by a foreign state . . ."10 The French Railroad argues that since it is wholly owned by the French government it is entitled to immunity under the FSIA.11

The FSIA was intended to limit sovereign immunity.12 It adopted the restrictive theory of immunity13 and denied states immunity in various categories of cases,14 including commercial

activities. However, the commercial activity exception applies only if the commercial activity is carried on in the U.S., an act is performed in the U.S. in connection with the commercial activity elsewhere, or there is a direct effect in the U.S. Unless one interprets the last clause very broadly, to include the loss of a relative by someone in the U.S., the commercial activity exception does not apply. Nor does the case fit into any of the other exceptions.

The paradox is that long before the U.S. adopted the FSIA—as far back as the 1920s—a rule developed, known as the “separate entity” rule, under which there was a presumption against immunity for commercial corporations, even if they were wholly owned by a state. This rule was applied in numerous U.S. cases before the adoption of the FSIA and still applies in many states, including Germany, Switzerland and France. Thus, adoption of the


17. For example, Sumner Moore Kirby, an American Protestant millionaire, heir to the Woolworth fortune, was arrested in Nice in 1944 and transported on the French Railroad in convoy 81 to Buchenwald, where he died. See Ralph Blumenthal, U.S. Suit Says French Trains Took Victims to the Nazis, N.Y. TIMES, June 13, 2001, at Al9.

18. See Hoffman, supra note 12, at 545–46 (declaring that when commercial corporations were owned in any way by a foreign state, they lost the presumption of immunity unless the corporation was deemed a public agency or instrumentality of the state); see also Jane H. Griggs, The Foreign Sovereign Immunities Act: Do Tiered Corporate Subsidiaries Constitute Foreign States?, 20 W. NEW ENG. L. REV. 387, 390–91 (1998) (relating that the Supreme Court first delineated the “separate entity” rule in 1824, stating that although a foreign state may own a corporation, the corporation retains a separate legal identity and is subject to lawsuits as a private corporation); Sunil R. Harjani, Litigating Claims over Foreign Government-Owned Corporations under the Commercial Activities Exception to the Foreign Sovereign Immunities Act, 20 J. INT’L L. BUS. 181, 199–200 (1999) (asserting that under the “separate entity” rule, separate commercial entities are presumed to be independent of a foreign state unless the court finds that the entity and the foreign state are essentially the same).


FSIA, which was intended to limit immunity, had the effect of expanding it with respect to commercial entities that are government owned.\textsuperscript{21} This was not the intent of Congress.\textsuperscript{22} It was inadvertent and needs to be corrected.

In their action in the district court, plaintiffs argued that the FSIA does not apply retroactively.\textsuperscript{23} There is broad language in \textit{Amerada Hess}\textsuperscript{24} that the FSIA “provides the sole basis for obtaining jurisdiction over a foreign state.”\textsuperscript{25} However, the issue in \textit{Amerada Hess} was not retroactivity. Thus, even though the broad language in \textit{Amerada Hess} would appear to apply regardless of when the events giving rise to the claim occurred, the Supreme Court never considered the question of retroactivity. Some lower courts that have considered the question have held that the FSIA is not retroactive.\textsuperscript{26}

This issue was recently argued before Judge Trager in \textit{Abrams v. Societe Nationale des Chemins de Fer Francais} (SNCF).\textsuperscript{27} In his decision granting the defendant’s motion to dismiss, Judge Trager did not decide the retroactivity question. Although he questioned the continued validity of the Carl Marks decision, he took the position that even if the FSIA did not apply retroactively and SNCF did not have immunity, the plaintiffs’ action could not be maintained.

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\item \textsuperscript{21} See Danny Abir, \textit{Foreign Sovereign Immunities Act: The Right to a Jury Trial in Suits Against Foreign Government-Owned Corporations}, 32 \textit{Stan. J. Int’l L.} 159, 159 (1996) (noting that after the Foreign Sovereign Immunities Act was passed in 1976, foreign government-owned corporations were provided with immunities granted to foreign sovereigns “including the exclusion of jury trials”); \textit{see also} Harjani, supra note 18, at 195 (stating that it is generally easy for a foreign government-owned corporation to claim immunity under the Foreign Sovereign Immunities Act). \textsuperscript{But} see Kimberly K. Hill, \textit{Foreign Government-Owned Corporations, the Foreign Sovereign Immunities Act, and the Right to Jury Trial}, 1982 \textit{Duke L.J.} 1071, 1075 (1982) (noting that acts performed by foreign government-owned corporations prevent them from receiving the protection granted by foreign sovereign immunity).
\item \textsuperscript{22} See Teresa M. O’Toole, \textit{Amerada Hess Shipping Corp. v. Argentine Republic: An Alien Tort Statute Exception to Foreign Sovereign Immunity}, 72 \textit{Minn. L. Rev.} 829, 857 (1988) (discussing the limiting language of Congress in regard to the FSIA); see also Curtis A. Bradley, \textit{The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law}, 86 \textit{Georgetown L.J.} 479, 500 (1998) (discussing the courts’ interpretation of how Congressional intent should not be read more broadly than it was expressly intended); William F. Webster, \textit{Amerada Hess Shipping Corp. v. Argentine Republic: Denying Sovereign Immunity}, 39 \textit{Hastings L.J.} 1109, 1124 (1988) (explaining that the intent of Congress in regard to the FSIA was to restrict sovereign immunity).
\item \textsuperscript{24} Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989).
\item \textsuperscript{25} \textit{Id.} at 439.
\item \textsuperscript{26} \textit{See}, e.g., Carl Marks & Co., Inc. v. Union of Soviet Republics, 841 F.2d 26 (2d Cir. 1988) (holding that the Foreign Sovereign Immunities Act was not intended to confer jurisdiction for pre-1952 claims); Jackson v. People’s Republic of China, 794 F.2d 1490, 1498–99 (11th Cir. 1986).
\item \textsuperscript{27} 175 \textit{F. Supp.} 2d 423 (E.D.N.Y. 2001).
\end{itemize}
because there was no statutory provision on which to base jurisdiction. He stated, "Carl Marks may no longer be good law, or may, at least, be limited in its application, in the wake of the Supreme Court’s decision in Landgraf v. US Film Products, 511 U.S. 244 (1994)." He concluded:

There is no need to decide, however, whether or not plaintiffs here are prejudiced in an impermissibly retroactive way by the application of the FSIA to this case, since, as we have already seen, even if they were prejudiced and even if the FSIA’s sovereign immunity law were, consequently, not applicable here—that is, even if older sovereign immunity law could be applied—there would still be no way to restore the jurisdictional regime of a bygone era and exercise jurisdiction over SNCF under § 1331 or the Alien Tort Claims Act.

It is asserted that the conclusion that the Alien Tort Claims Act cannot provide a jurisdictional basis, even if there is no sovereign immunity, misinterprets Amerada Hess. In that case, the Supreme Court held that the Alien Tort Claims Act could not be used as a basis for denying sovereign immunity—in addition to the bases provided for in the FSIA, as the Court of Appeals had done, that the exceptions to immunity listed in the FSIA were the only bases for denying sovereign immunity. The Supreme Court never considered whether the Alien Tort Claims Act could be used to establish jurisdiction if there was no immunity. There would appear to be no logical reason why the Alien Tort Claims Act, which has not been repealed, cannot be a basis for jurisdiction if there is no immunity. Therefore, if the court determines that the FSIA does not apply to events that occurred before its adoption, and if under the law that existed at the time of the events in question SNCF would not have been entitled to immunity, there is no reason that the Alien Tort Claims Act cannot be invoked in this case as in any other case in which it applies by its terms.

28. Id. at 436.
29. Id. at 434.
30. Id. at 444–45.
32. See Argentine Republic v. Amerada Hess Shipping Corp., 830 F.2d 421 (2d Cir. 1987).
34. See generally id.
35. Judge Trager questioned whether, even under the law that applied pre-FSIA, SNCF would have been denied immunity. Abrams v. Societe Nationale des Chemins de Fer Francais (SNCF), 175 F. Supp. 2d 423 (E.D.N.Y. 2001).
36. See Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).
The FSIA should be amended to deny sovereign immunity for human rights violations. However, it should not be limited to *jus cogens* violations.37 *Jus cogens* is very narrow; it is also very unclear.38 This would result in tremendous litigation as to whether a rule of international law is or is not a rule of *jus cogens*. An amendment should be passed that would permit actions against a state for violations of specific human rights treaties, provided that the state has ratified the treaty.

In the last fifty years there has been a revolution in substantive international human rights law, but no remedies have been established.39 Until recently, international law has exclusively focused on states.40 Individuals did not have rights under international law.41 In the last fifty years, a large number of states have ratified treaties that deal with individual human rights, such

37. See Prinç v. Federal Republic of Germany, 26 F.3d 1166, 1184–85 (D.C. Cir. 1994) (Wald, J., dissenting) ("I believe that the only way to interpret the FSIA in accordance with international law is to construe the Act to encompass an implied waiver exception for *jus cogens* violations"); Robert A. Ramey, *Armed Conflict on the Final Frontier: The Law of War in Space*, 48 A.F. L. REV. 1, 158 (2000) (noting that the concept of *jus cogens* embraces "preemptory norms of general international law"); see also Vienna Convention on the Law of Treaties, May 23, 1969, art. 53. U.N. Doc. A/Conf. 39/27, 8 I.L.M. 679, 699 (describing *jus cogens* as those "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character").


as the Genocide Convention,\textsuperscript{42} the Covenant on Civil and Political Rights,\textsuperscript{43} the Convention on Racial Discrimination\textsuperscript{44} and the Convention on the Elimination of All Forms of Discrimination Against Women.\textsuperscript{45} All of these protect individual human rights. There are, however, very few remedies for violations of these conventions.\textsuperscript{46} Permitting civil actions in U.S. courts for monetary damage would transform a theoretical right into a meaningful right.

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\item Each of the Conventions require the state parties to submit a report periodically to a Committee established by the Convention. See, e.g., International Covenant on Civil and Political Rights, supra note 43, art. 40. Some also permit communications by another state alleging violations of the Convention. See id. art. 41. Others permit communication by an individual. See, e.g., Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force on Mar. 23, 1976. However, in the end, all the Committee can do is issue a report. See id.