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THE FROLOVA CASE: A PRACTITIONER'S VIEW

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The Frolova case came my way obliquely. In the spring of 1982 my former student Susan Keegan, a practicing lawyer in Chicago, called me at home in the evening on behalf of her friend, Lois Frolova, who needed practical advice on how to handle a press conference the next morning. Susan said that Lois had just begun a total hunger strike in sympathy with that of her husband Andrei Frolov who had begun his hunger strike in Moscow and resolved to continue it "to the death if necessary." The problem was that the Soviet Union would not let Andrei out of the country to join his wife Lois in Chicago.

I had a long talk with Susan and then, later that same evening, with Lois. I knew very little about the "divided families" issue in the developing international law of human rights other than what I had read in the newspapers regarding Soviet Jewry wishing to emigrate. Lois's situation did not fit that latter category; although she is Jewish, Andrei is not, and their problem was neither religious nor ethnic.

But *why* wouldn't the Soviet Union give Andrei an exit visa? Lois could not satisfactorily answer this question. To be sure, she gave me various "answers"—Soviet intransigence, the cold war, bureaucratic obduracy, jealousy on the part of minor Soviet officials who themselves would like to leave Russia and thus did not want to see any one else leave, and perhaps the fact that Andrei was a freelance photojournalist by profession. None of these reasons seemed to me to be particularly important. In his job Andrei had not seen anything regarding national security; his work was equivalent to photojournalism for our National Geographic Magazine. Yet I persisted in asking Lois these questions, out of a general lawyer's caution that there might be more to the Soviet refusal than met the eye.

Lois's answers were clear. She met and fell in love with An-

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drei while researching her dissertation on nineteenth-century Soviet liberalism during a student-exchange trip to Moscow, and they were married in the spring of 1981 at the Palace of Marriages. A month later Lois's visa expired and she was compelled to leave the Soviet Union without her husband. She saw him again a year later while on a nineteen-day tourist visa.

In preparation for the next days news conference I asked Lois an embarrassing question that was likely to arise: "If you love your husband so much that you're willing to go on a total hunger strike for him, why don't you move to the Soviet Union and become a Soviet citizen and live with him there?" Lois replied that Andrei had no close relatives in the Soviet Union, whereas Lois had her parents (one of whom was recently hospitalized for a long time) in Chicago. Besides, she added, she simply did not want to live in the Soviet Union, whereas Andrei was willing to live in the United States. But the best answer to such a question, we later decided, was the simple truth that Lois did not want to bring up her children as Soviet citizens.

Then it was Lois's turn to ask me a question: was she taking a risk in holding a press conference? Might the Soviets arrest Andrei if she made a big fuss in the United States? Might he be the victim of an "accident"? I hesitated, because we were speculating, after all, about a human life. Moreover, I was glad that Lois asked me this question, because it indicated that she had not made up her mind about holding the press conference, and therefore she was genuinely asking me for advice rather than simply eliciting information from me about how to hold a press conference. I think the client-attorney relationship between Lois and me in fact began at that moment.

"What do you think they might do?" I asked Lois, first of all.

"Well," she replied, "when Andrei requested permission to emigrate to the United States, they suggested that he first resign from his union, the Committee of Literary Workers. So he resigned. Then he discovered that he was unemployable because he was not in a union. They denied him his exit permit, and he no longer was able to get his stories or photographs published. He was completely out of a job."

"Who is 'they'?" I asked.

"In Russia, 'they' is usually a man dressed in civilian clothes

whom citizens can 'spot' just from the way he talks and carries himself. The man tells you something authoritative, something that he probably would not know unless he were officially connected with the government. But he never produces any papers and never puts anything in writing. Yet Andrei can tell when it's the secret police or a government agent. Once they came to his flat and told him to go along with them."

"What did he do?"

"Nothing. He refused to go along."

"What happened?"

"Nothing. I guess he called their bluff. Or maybe they didn't want to officially arrest him."

Lois continued her account. Andrei was desperate to leave the Soviet Union now that he was out of a job. He heard of four other persons who had begun a hunger strike to join their spouses in the United States and in Western Europe (they were two men and two women). He agreed with them to join their effort. (A photo later appeared in *The New York Times* of the hunger strikers leaning out of an apartment in Moscow, the photo having been taken from the street below.)

Lois found out about Andrei's decision to go on a hunger strike from a reporter for the *Chicago Tribune* who was stationed in Moscow. (Andrei could not call her; she arranged, through friends, to call him at specific times, but the telephoning process was laborious. Recently, the Soviet Union has made it even more difficult for their citizens to engage in transatlantic phone calls.)

When Lois received the word from the *Tribune* reporter, she was in the midst of breakfast. She said, simply, that from then on she could not eat. Her body had made the decision for her—to engage in a parallel hunger strike. But now she was asking me whether telling the press about it might endanger Andrei.

"Your husband has already taken the decisive step," I replied. "The Soviets are already mad at him. If they are going to do anything to him, they already have enough excuse to do it. Of course, I'm only guessing, but I think that you can only help him by generating publicity here in Chicago. My guess is that there is a certain safety in a lot of publicity. If he's in the limelight, he probably is safer than he would be if you do nothing. I can't be

sure of this, and it has to be your own decision, Lois, but my recommendation would be for you to go ahead with the press conference.”

Lois agreed. What Andrei had done was out of her hands. Publicity, if anything, might help ensure his safety. On the other hand, we agreed that it had to be responsible, serious publicity; a life was at stake.

We agreed to hold the press conference at Northwestern University School of Law. The law school would be an appropriate place, I thought, both to emphasize the seriousness of the situation and perhaps to create a favorable precedent for others. To Lois's great credit, throughout the ups and downs of the coming weeks, she invariably coupled her case with those of the many other persons in the Soviet Union who were seeking to leave to be reunited with their spouses or relatives. Lois would have made an ideal law student if she had not decided to pursue a Ph.D. in history at Stanford. She understood the immediate relevance, as a matter of principle, of her case to the situations of others whose lives were so devastatingly impacted by the refusal of a government to allow them to live with their spouses.

The press conference the next morning attracted major media attention, and from then on Lois was one of the most recognized persons in Chicago. People stopped her on the street to say that they had seen her on television, or to ask about the latest developments in her situation that they had heard about on radio or seen in the daily papers. Lois appeared on national television on an evening program devoted in part to the “divided families” issue; Lois was the only spouse in this country on a parallel hunger strike. She made an enormous impact. At one point she was asked what the Department of State was doing in her behalf, and she replied, “they won't even return my phone calls.” The next morning, at 8 a.m., she was awakened by an apologetic phone call from the State Department.

Lois consulted Dr. Sheldon Berger, a specialist in food deprivation and reported to him regularly. It seemed that her hunger strike was contagious. In the next few weeks, I found myself losing weight! Lois's mother's first reaction was, “A hunger strike can be a good thing. If you must fast, you must fast. Just be sure to eat a little something.”

Lois was certainly getting publicity, but there seemed to be

no effect upon the Soviet Union. We began to wonder whether now that we had achieved national publicity the Soviets would never give in, lest they seem to be caving in simply because of the power of a free press. And Lois was losing weight rapidly and looking pale. In Moscow, Andrei Frolov and his fellow hunger-strikers were also weakening physically, and unlike Lois they had no benefit of medical advice.

Frustrated and unable to sleep, an idea popped into my head about 3 a.m.: why not sue the Soviet Union? No one had ever sued that nation in a United States court on a human-rights matter, but why couldn't there be a first time? But who was the plaintiff? Clear-headed reflection the next morning led to the conclusion that Lois, and not Andrei, was the plaintiff. The Soviet Union was harming her directly; it was interfering with her relational interest in living with her husband. And because of the harm to Lois, the "tort" was located where Lois was, namely, in Chicago.

Excited, I asked Lois to come to my office, and I also invited a colleague, Professor Steven Lubet of the Northwestern Legal Clinic, a specialist in immigration law. Lois was somewhat flabbergasted at the idea of suing the Soviet Union. Steve was of the opinion that, regardless of the merits, a lawsuit would probably work to secure added safety to Andrei in the same way that publicity probably had served to add to his personal safety. Lois was convinced. She was already doing everything else—writing letters to Members of Congress, appearing on radio and television talk shows, forming (with the help of the Young Republicans) a National Coalition for Divided Families, and hounding the Office of Human Rights of the State Department (which she said was singularly unsympathetic to her situation).

Professor Lubet and I went to work immediately on drafting a Complaint. We agreed that an action for monetary damages might present intractable problems of collection if we got a judgment, and that the Soviets knew this, but that issue seemed almost irrelevant. Our main purpose was to bring pressure upon the Soviet Union to let Andrei Frolov emigrate to the United States. We were working under the shadow of Andrei's vow to fast to the death, and Lois had assured us that her husband was a most serious and stubborn Russian.

The first thing I looked up was the Foreign Sovereign Im-

munities Act of 1976.¹ Congress' intention in that Act was to remove the defense of sovereign immunity when foreign governments or their instrumentalities were sued in American courts with respect to their commercial activities.² Was Lois's human-rights problem a "commercial activity"?³ Clearly not.

But there was another provision in the Act relating to torts, intended to handle the problem of diplomatic immunity.⁴ Under traditional international law, and by virtue of specific conventions, foreign diplomats are not personally subject to the court jurisdiction of the host country.⁵ Nevertheless, if they commit a tort, it is reasonable that the countries they represent be liable for damage caused. Under the 1976 Act, there is no sovereign immunity defense available to a foreign state for tortious acts attributable to that state committed in the United States.⁶

Certainly Congress had not contemplated a case such as Lois's in this "diplomatic" section of the Act. Yet the Act speaks of a "tortious act or omission" of the foreign state or its agents with the personal injury "occurring in the United States."⁷ It seemed clear that under the plain meaning of these terms, the Soviet Union's tortious act (refusing to let Andrei leave the country) directly caused harm to Lois (her relational interest) in Chicago. Did Congress intend to cover such a case? There was no evidence that Congress did *not* so intend. Congress probably never thought of the possibility. But Lois's case seemed clearly to fit within the statute, was not inconsistent with its purpose, and after all, the very process of legislation is designed to enact general rules that may encompass future cases that could not

1. 28 U.S.C. §§ 1330, 1602-1611 (1976).

2. *Id.* at § 1602.

3. *See id.* at § 1603. *See generally* H.R. REP. No. 94-1487, 94th Cong., 2nd Sess. 16-18 (1976) (for examples of what constitutes a "commercial activity").

4. 28 U.S.C. § 1605(5) (1976) (providing that a foreign state shall not be immune from the jurisdiction of the courts of the United States in a case "in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.").

5. *See generally* B. SEN, A DIPLOMAT'S HANDBOOK OF INTERNATIONAL LAW AND PRACTICE (1979); E. DENZA, DIPLOMATIC LAW (1976) (for an overview of the various types of diplomatic immunities).

6. 28 U.S.C. § 1605(5) (1976).

7. *Id.*

have been specifically foreseen by the legislators.

Further research indicated that we might make out a case for the tortious interference with an internationally protected right—the right of persons to live together as a family. We would attempt to show that, by intentionally depriving the plaintiff of her right to live with her husband, the defendant had committed a clear violation of international law that is binding on all nations and enforceable in American courts as “part of our law.”⁸

International law, I would argue later in my Memorandum to the court,⁹ consists of two parts: customary and conventional. Taking up customary law first, customary international law is binding upon all nations and has been explicitly recognized in an official text of the Soviet Union as binding upon it.¹⁰ Customary international law is made up of “rules which have acquired legal significance as a result of their application by States over a prolonged period.”¹¹ These rules may be “general principles of law recognized by civilized nations” that have their origin in treaties or in the constitutions and laws of the nations themselves.¹²

All the civilized nations of the world recognize the right of marriage and the legal status that marriage confers upon the partners to a marriage. The right of a man and woman to be married is one of the clearest general principles of law recognized by civilized nations.¹³ The Soviet Constitution is exemplary:

The family enjoys the protection of the state. Marriage is based on the free consent of the woman and the man; the spouses are completely equal in their family relations.¹⁴

The right to get married and concomitantly the right to prevent

8. *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law. . .”).

9. Memorandum of Law Regarding Jurisdiction in Support of Plaintiff’s Motion for Preliminary Injunction, *Frolova v. Union of Soviet Socialist Republics*, 558 F. Supp. 358 (N.D. Ill. 1983), *appeal docketed*, No. 83-1451 (7th Cir. Mar. 11, 1983).

10. Y.A. KOROVIN, *INTERNATIONAL LAW* 7-8, 11-12 (1960).

11. *Id.* at 12.

12. *Id.*

13. See Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, G.A. Res. 217, U.N. Doc. A/810 at 71 (1948).

14. КОНСТИТУЦИЯ (Constitution) art. 53 (U.S.S.R.).

the state from interfering with the marriage has become part of the international law of human rights, enforceable by individuals (in appropriate forums) against states.¹⁵ The provisions regarding the right to marry and found a family contained in the Universal Declaration of Human Rights of 1948, Articles 12 & 16¹⁶ (subscribed to by the Soviet Union) have passed into customary international law.¹⁷

In the present case, the court would not be called upon to determine whether there is a right of emigration under customary international law. Even so, the Universal Declaration of Human Rights, subscribed to by the Soviet Union in 1948, states in Article 13(2):¹⁸ "Everyone has the right to leave any country, including his own, and to return to his country."¹⁹ Thus the combination of Article 13(2) with the clear human right of a family to live together means that the Soviet Union and/or its officials or employees have violated the law in intentionally depriving the plaintiff of her right to be with her husband and to found a family.

Of great impact upon the content of the customary international law of human rights was the Helsinki Accords of 1975,²⁰ officially known as the Final Act of the Conference on Security and Cooperation in Europe.²¹ Adopted by numerous states including the Soviet Union and the United States, the human rights provisions therein are evidence of an underlying consensus of the content of customary international law. For example, the Helsinki Accords explicitly provide that the parties will act in conformity with the Universal Declaration of Human

15. See generally L. SOHN & T. BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 517-52 (1973) (discussing the rights of individuals to enforce provisions of international human rights declarations, which have become a part of customary international law).

16. Universal Declaration, *supra* note 13, art. 12 at 73-74, art. 16 at 74.

17. See generally SOHN & BUERGENTHAL, *supra* note 15. Cf. *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980) (describing the evolution of a customary international law prohibition against torture and other human rights violations).

18. Universal Declaration, *supra* note 13, art. 13(2) at 74.

19. *Id.*

20. Final Act of the Conference on Security and Cooperation in Europe, August 1, 1975, [hereinafter cited as Final Act], reprinted in I. BROWNLIE, *BASIC DOCUMENTS ON HUMAN RIGHTS* at 320-32 (2d ed. 1981) [hereinafter cited as BASIC DOCUMENTS].

21. See generally T. BUERGENTHAL & T. HALL, *HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORDS* (1977).

Rights.²² Part IV contains the following provisions that apply to the plaintiff's claims in the present case:

1.(a). Applications for temporary visits to meet members of their families will be dealt with without distinction as to the country of origin or destination. . . .

1.(b). The participating States will deal in a positive and humanitarian spirit with the applications of persons who wish to be reunited with members of their family They will deal with applications in this field as expeditiously as possible.

1.(c). The participating States will examine favourably and on the basis of humanitarian considerations requests for exit or entry permits from persons who have decided to marry a citizen from another participating State.

The processing and issuing of the documents required for the above purposes and for the marriage will be in accordance with the provisions accepted for family reunification.

In dealing with requests from couples from different participating States, once married, to enable them and the minor children of their marriage to transfer their permanent residence to a State in which either one is normally a resident, the participating States will also apply the provisions accepted for family reunification.²³

Turning to conventional international law (the law of treaties), it is clear that the illegality of the acts or omissions of the defendant are clearly established by treaties that the defendant has ratified.

The Soviet Union ratified in 1973 the International Covenant on Civil and Political Rights, which entered into force in 1976.²⁴ (The United States has signed but has not ratified this treaty, although the objections to the treaty voiced in the United

22. Final Act, *supra* note 20, Part I(a)(VII), reprinted in BASIC DOCUMENTS, *supra* note 20, at 325.

23. Final Act, *supra* note 20, Part IV(1)(a)(b) & (c), reprinted in BASIC DOCUMENTS, *supra* note 20, at 356-58. These provisions were explicitly violated by the defendant in its first denial of the plaintiff's husband's request for a visa. That request was denied on the basis of "bad relations with the United States."

24. International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 at 52 (1966).

States Senate have not included the provisions relevant to the present case.) The Covenant includes the following provisions:

Art. 12 (2). Everyone shall be free to leave any country, including his own.

Art. 23 (1). The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Art. 23 (2). The right of men and women of marriageable age to marry and to found a family shall be recognized.²⁵

Thus, as a matter of binding treaty obligation freely accepted by the Soviet Union, the latter has violated international law in frustrating the plaintiff's right to live with her husband and to found a family by denying her husband his right to leave his own country to be with his wife.

Additionally, the defendant has violated the most fundamental treaty in the international system, the Charter of the United Nations, which provides in Article 55 for the promotion of "universal respect for, and observance of, human rights and fundamental freedoms for all"²⁶ This provision links with the Universal Declaration of Human Rights of 1948 and with the development in many treaties since that time of the rights of married people to live together to to found a family.

Both customary and conventional international law, therefore, work together and interact with each other to provide with exceptional clarity the right of married people to live together and to found a family. This international law, external to the Soviet Union, is binding upon it as a member state of the international legal system. Reinforcing the binding quality of international law is the provision of the Soviet Constitution, previously quoted, that "the family enjoys the protection of the state."²⁷ The sum total of all these rules is that the defendant and/or its officials or employees have acted illegally in forcibly barring the plaintiff's husband from leaving his country to live with her and to found a family.

Thus, the outline of Lois's case had become clear: the Soviet

25. *Id.* Part III, arts. 12(2), 23(1), & 23(2), at 55, 57.

26. U.N. CHARTER art. 55.

27. КОHCТУТЫНР (Constitution) art. 53 (U.S.S.R.).

Union committed an intentional tort on Lois's relational interest by unlawfully denying her husband his right to leave the Soviet Union and join his wife.

In drafting the Complaint and formulating a strategy for the case, two extremely significant suggestions resulted in important modifications. The first came from Luis Kutner, a famous human-rights attorney in Chicago. Kutner suggested that we sue the United States as well as the Soviet Union. The refusal by the State Department to help Lois, established a basis for Lois to sue the United States for failing to protect her human rights vis-a-vis the Soviet Union. Theoretically, it seemed to me that the idea fused the classical and the modern concepts of international law. Under the classical concept, an individual does not have "standing" to sue a foreign government; only that individual's government may act on behalf of the individual.²⁸ Under the modern concept of human rights, there has been a loosening of the "standing" requirement (for example, explicitly, in the European Commission of Human Rights).²⁹ Along with that loosening is the concept that an individual may sue his own government as well as a foreign government—the primacy of "human rights" suggests that no government should be immune, including one's own government. Merged, these conceptions yield the theory that the United States owed to Lois a human-rights obligation to sponsor her claim against the Soviet Union, and thus she had a human-rights claim against the United States for failing to act in her behalf.

But perhaps even more important than these theoretical concerns was the practical consequence that suing the United States would surely be the quickest and most effective way to bring Lois's case to the attention of senior officials of the Soviet

28. See, e.g., Memorandum for the United States as Amicus Curiae, Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976), reprinted in 19 INT'L LEGAL MATERIALS 585, 602 (1980) ("[A] corollary to the traditional view that the law of nations dealt primarily with relationships among nations rather than individuals was the doctrine that generally only states, not individuals, could seek to enforce rules of international law. Just as the traditional view no longer reflects the state of customary international law, neither does the later doctrine."). See also Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 422-23 (1963); SEN, *supra* note 5, at 343.

29. See generally 1 K. VASEK, THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS, 34-39 (1982) (discussing the use of regional Conventions as a means of ensuring individuals' access and standing before courts).

Union. We were fighting against time; Andrei, in his small Moscow flat, was losing weight rapidly. By implicating the United States in our lawsuit, we might underline the significance and immediacy of Lois's claim. And certainly it would not be frivolous to implicate the United States, for the theoretical reasons given above.

But there was even a better way to implicate the United States than simply to add a second defendant to the lawsuit. Under the Federal Rules of Civil Procedures, it was possible to bring in the United States as co-plaintiff.³⁰ Accordingly, with Lois's consent, I added the United States of America as "Necessary Co-Plaintiff," under the claim that to the extent under international law that Lois's rights were enforceable by the United States in its sovereign capacity the United States should be joined as plaintiff against the Soviet Union. By this tactic, the United States might find itself in an adversarial relationship with the Soviet Union in a federal court in Chicago. Surely if the United States found *this* position unpalatable, the case would get prominent attention in Washington's diplomatic circles.

As expected, the United States Attorney resisted being dragged into Lois's case, and therefore I had to argue that the United States was an "involuntary co-plaintiff," which again was a permissible position under the Rules of Civil Procedure.³¹

The second significant modification of the Complaint came from a suggestion by Susan Keegan and her senior partner Michael Coffield. They advised me to file for an injunction as well as going for damages. Although the Foreign Sovereign Immunities Act of 1976 only provided jurisdiction for cases involving "money damages,"³² the Act might be construed as not explicitly prohibiting injunctions. In my later Memorandum of Law, I contended that Lois's case came under the terms of the Act because it was one "in which money damages are sought against a foreign state." The request for an injunction was in addition to the money damages. Moreover, I argued that the possibility of an injunction should fairly be implied in the case of a continuing tort where the threat of money damages may be ineffectual. The

30. FED. R. CIV. P. 19(a).

31. *Id.*

32. 28 U.S.C. § 1605(a)(5) (1976).

Act was passed, after all, in the context of the complete merger in federal courts of law and equity jurisdiction.

Therefore I added to the Complaint a Motion for Preliminary Injunction, asking the federal district court in Chicago to bar the Soviet Union from engaging in any commercial transactions in the Northern District of Illinois unless and until Andrei Frolov was allowed to emigrate to the United States. Since Soviet transactions on the Board of Trade in Chicago in commodities such as wheat and gold run to the many millions of dollars, there was considerable "bite" in the threat of injunction. Indeed, all the Chicago papers and television stations immediately focused on the possible injunction against wheat purchases and gold sales as soon as the case was filed. The headline in the *Chicago Tribune* read, "Suit Seeks to Bar Soviet Dealings in N. Illinois."

Lois asked what chance there was that the court would grant the injunction. I told her that all these legal actions had a very low probability of actual success on their own terms, and not to get overly enthusiastic about the legal maneuvers. At the same time, how does the Soviet Union know what a district court judge in Chicago might do? For all they know, they might find themselves severely interrupted in their major commercial transactions—and if they are interrupted once, it could happen again with respect to other cases in the future. They would thus have to ask themselves whether keeping Andrei Frolov in Moscow was really worth the chance, at whatever level of probability they might assign to that chance, of such an injunction being issued against them.

I filed the Complaint and Motion for a Preliminary Injunction in federal court on the morning of May 20, 1982. A few days later I submitted my Memorandum of Law, which dealt with the basis for jurisdiction.³³

The Memorandum asserted that under 28 U.S.C. § 1605(a)(5) of the Foreign Sovereign Immunities Act of 1976 the court had jurisdiction over the defendant foreign state because of the exception to that state's immunity for

personal injury or death, or damage to or loss of property, occurring in the United States and caused by the

33. See Memorandum of Law, *supra* note 9.

tortious act or omission of that foreign state.³⁴

I cited *Letelier v. Republic of Chile*,³⁵ for the proposition that a foreign state may be sued under the Foreign Sovereign Immunities Act for setting in motion a tortious act that occurred within the United States. In *Letelier*, the alleged decision to order a political assassination within the United States occurred within the territory of Chile; nevertheless, jurisdiction was found under § 1605(a)(5) since the injury or death occurred within the United States.³⁶ § 1605(a)(5) excepts from immunity the “foreign state or . . . any officer or employee.”³⁷ Clearly the foreign state itself can never be present “in the United States.” Hence, I argued, § 1605(a)(5) necessarily contemplates that the injury complained of occurring in the United States could have been set in motion—could have been the direct effect of—acts or omissions of foreign governments in foreign lands. Furthermore, the phrasing of the statute separates the “injury . . . occurring in the United States” from the rest of the sentence “caused by the tortious act or omission of that foreign state”³⁸—setting apart conceptually the site of the injury and the party responsible for the harm.

I also asserted that the “act of state” doctrine did not apply in the *Letelier* case, and should not apply in Lois’s case, for two reasons. First, the “act of state” doctrine should not allow sovereign immunity to reenter through the back door when the Foreign Sovereign Immunities Act had provided for a restrictive theory of sovereign immunity.³⁹ Under the traditional “act of state” doctrine American courts were not permitted to sit in judgment of the acts of a foreign government done within its

34. *Id.*

35. 488 F. Supp. 665, (D.D.C. 1980), *judgment entered for plaintiffs*, 502 F. Supp. 259 (D.D.C. 1980).

36. 488 F. Supp. at 673, 674.

37. 28 U.S.C. § 1605(a)(5) (1976) (emphasis added).

38. *Id.*

39. Memorandum for the United States as Amicus Curiae at 41, *Dunhill*, 425 U.S. 682 (1976); *quoted with approval in Letelier v. Chile*, 488 F. Supp. at 674 and H.R. REP. No. 94-1487, 94th Cong., 2d Sess. 20 n.1 (1976) (The Solicitor General of the United States argued that to elevate the foreign state’s acts to the protected status of “acts of state” would “frustrate the modern development [of restrictive sovereign immunity] by permitting sovereign immunity to reenter through the back door, under the guise of state doctrine.”).

own territory.⁴⁰ However, in the most recent act-of-state case in the Supreme Court, the Court refused to apply the act of state doctrine once an exception to sovereign immunity was established saying:

we hold that the mere assertion of sovereignty as a defense to a claim arising out of purely commercial acts by a foreign sovereign is no more effective if given the label "act of state" than if it is given the label "sovereign immunity."⁴¹

Next I argued that the "act of state" doctrine should not apply to Lois's case because here, the foreign state's act violated international law. By establishing that the defendant's action or omission in denying Andrei his right to emigrate to the United States to join his wife was illegal, several logical requirements of the argument in the case were satisfied. First, an illegal act cannot be "discretionary" and would therefore not come within subsection (A) of the Foreign Sovereign Immunities Act, which provides immunity for "discretionary function[s]."⁴² As the court stated in *Letelier*, "there is no discretion to commit, or to have one's officers or agents commit, an illegal act."⁴³ Second, a showing of illegality established the tortious nature of the defendant's act or omission within the Soviet Union resulting in injury to Lois within the United States. Finally, regarding the traditional fear behind the "act of state" doctrine that a court might be frustrating the foreign-policy objectives of the other branches of the federal government, there was good language to quote in the Memorandum filed by the United States Department of State as amicus in the recent case of *Filartiga v. Pena-Irala*.⁴⁴ When an individual has suffered a denial of his human rights as guaranteed by international law, the State Department brief said,

40. *Dunhill*, 425 U.S. at 691 n.7 ("[E]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgement on the acts of the government of another done within its own territory.") (quoting *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)).

41. *Dunhill*, 425 U.S. at 705.

42. 28 U.S.C. § 1605(a)(5)(a) (1976).

43. *Letelier*, 488 F. Supp. at 673.

44. 630 F.2d 876 (2d Cir. 1980).

there is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights.⁴⁵

Lois held a second press conference the morning that the case was filed. Dr. Sheldon Berger stated that, in the eleventh day of her hunger strike, Lois's weight had dropped from 112 pounds to 98 pounds. The *Chicago Tribune* reporter wrote in his news story that Lois "looked weak and wan."

Service of process against a foreign government is a difficult procedure under the Foreign Sovereign Immunities Act.⁴⁶ Complete translations of all the papers filed in the case and all the relevant statutes must be provided. It would be a while before we could get all the translations, which would be prepared by Lois and her friends. However, because I moved for a preliminary injunction, I notified the Soviet Embassy in Washington D.C. by telegram (both in English and in Russian), and sent them as a preliminary matter copies of the Complaint and Motion by express mail. My guess is that the Soviet officials first received word of the case from the lawyers in the Department of Justice who had to cope with the possibility that they would be involved in a lawsuit against the Soviets in Chicago.

In any event, on the fifth day after sending the telegram of notification to the Soviet Embassy in New York, Andrei Frolov in Moscow was told to go to the passport office. (We heard word of this through the *Chicago Tribune* reporter who was keeping regular tabs on Andrei in Moscow.) When he went there, "they" told him that, if he wished, he could re-apply for an exit visa. They did not indicate to him what the disposition would be, but they assured him that his re-application would be given "immediate consideration." I appeared in court on the Motion for a Preliminary Injunction, and requested a week's continuance on the ground that there seemed to be positive developments in Andrei's situation.

45. Memorandum for the United States as Amicus Curiae at 22-23, *Filartiga v. Pena-Irala*, 630 F.2d 876. See also Memorandum for the United States as Amicus Curiae, *Dunhill*, reprinted in 19 INT'L LEGAL MATERIALS 585, 604.

46. 28 U.S.C. § 1608 (1976).

Andrei's re-application was duly processed. Then word was finally given to the group of hunger strikers in Moscow that Andrei would be given his exit visa. When the others heard this, they burst into cheers and applause. In Chicago, Lois sat down to a hearty meal.

Nothing was done by the Soviet Union about the four other hunger strikers for two long months; then, two of them were told they would get their exit papers. Nevertheless, Andrei's case must have had a beneficial impact upon the other hunger strikers, for it would have been tactically unwise of the Soviet Union only to release the person who sued them. That would have invited many future lawsuits.

At the same time, the Soviet Union would not want to convey the message that going on a hunger strike was a way to get exit papers. For there are many thousands of Jews, among other citizens, wishing to emigrate from the Soviet Union. The hunger strike as a tactic therefore must be officially disavowed. The Soviet Union did nothing for Yuri Balovlenkov, one of the hunger strikers, and Yuri almost died as a result of his strike. At present writing Yuri is alive, has given up his hunger strike, and is still in the Soviet Union without any present prospects of being allowed to leave.

Andrei Frolov arrived at O'Hare International Airport in Chicago on the bright Sunday afternoon of June 20, 1982. He was tired and carried with him his entire worldly possessions. The front pages of the next day's Chicago papers were headlined, "From Russia, With Love." In front of the TV cameras and press representatives on the afternoon of Andrei's arrival, Lois Frolova said, "My joy of this day stands in stark contrast to the other divided families who have been deprived of their elemental human rights." She used the time and TV cameras to name the individuals still seeking to emigrate from the Soviet Union, and described their individual situations briefly.

In court two days later, I dropped the Motion for a Preliminary Injunction but retained the action for legal damages. I also acceded to the United States' motion that it be dropped as Necessary Co-Plaintiff. Judge Stanley Roskowski asked me if Andrei Frolov was in the courtroom. I replied that he was. The judge invited Andrei to stand up from the audience. With the American flag behind him, the judge said simply, "Welcome to the

United States.”

However, much later, on January 26, 1983, Judge Roskowski filed a brief opinion dismissing the cause of action in *Frolova v. Union of Soviet Socialist Republics* on the basis of the act of state doctrine.⁴⁷ He wrote that the “act of state doctrine operates to preclude United States courts from ruling on the validity of foreign governmental acts so as not to hinder or embarrass the Executive Branch in its foreign policy endeavors.”⁴⁸ I immediately filed a motion for reconsideration, stating that the act of state doctrine needs further examination both as a general proposition and as applied to Lois’s case. However, Judge Roskowski denied the motion for reconsideration. I then filed an appeal with the Seventh Circuit Court of Appeals, and on August 15, 1983, I filed a fifty-page brief. Hopefully Lois’s case will provide the Court of Appeals with a substantial basis for continuing the recent trend away from the unfortunate decision in *Banco Nacional de Cuba v. Sabbatino*,⁴⁹ which may some day be viewed as the “last gasp” of the act of state doctrine as an impediment to the realization of the international rule of law.

47. 558 F. Supp. 358 (N.D. Ill. 1983), *appeal docketed*, No. 83-1451 (7th Cir. Mar. 11, 1983).

48. *Frolova*, 558 F. Supp. at 363.

49. 376 U.S. 398 (1964).