The FSIA Reasoning In High Court's USS Cole Decision

By **Lisa Savitt** (March 29, 2019)

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On March 26, 2019, in the case Republic of Sudan v. Harrison et al,[1] in an 8-1 decision, the U.S. Supreme Court reversed the decision of the U.S. Court of Appeals for the Second Circuit — and, in effect, an underlying decision of the U.S. District Court for the District of Columbia — in a ruling about service of process under the Foreign Sovereign Immunities Act.

The seemingly mundane issue of service of process has been an issue under the FSIA, with what is required under the FSIA being a source of contention among the circuit courts. While a mostly procedural question has now been resolved by the U.S. Supreme Court, the short-term effect for the families of the victims of the USS Cole is that they may not be able to collect on the $314 million default judgment against the Republic of Sudan. What the decision, and its reasoning, means for other cases will be discussed below.

Background

The history of this case is quite interesting. The factual context arises out of the Oct. 12, 2000, bombing of the USS Cole, a United States Navy guided-missile destroyer, while the Cole was docked for refueling at the port of Aden in Yemen. Seventeen crew members were killed, and many crew members were injured. al-Qaeda claimed responsibility for the bombing. Families of the victims of the bombing initiated a lawsuit in 2010 in the District of Columbia against Sudan under the "state-sponsored terrorism" exception to the FSIA,[2] claiming that Sudan had provided support for al-Qaeda. Sudan has been designated as a state sponsor of terrorism.[3]

Foreign Sovereign Immunities Act

The FSIA was initially adopted in 1976 to codify common law in cases where suits were brought against foreign states or its political subdivisions, agencies or instrumentalities. The FSIA placed limits on how and when a foreign "state" could be sued in the United States. Following various terrorist acts against the U.S., Congress first amended the FSIA in 1996 to remove immunity of foreign states for certain acts of state-sponsored terrorism. In 2008, Congress further amended the FSIA by broadening the exception, stating that designated state sponsors of terrorism have no immunity where:

money damages are sought for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.[4]

Service of Process on a Foreign State Under the FSIA

The FSIA details how service is to be made on a foreign state. Improper service will result in lack of personal jurisdiction over the state. 28 U.S.C. § 1608 sets out several methods of service of process on a foreign state. The method at issue in this case is under § 1608(a)(3) which requires service by:

sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned.

Procedural History

The plaintiffs in the District of Columbia suit filed the summons and complaint in 2010 and effected service by mailing the summons and complaint via registered mail, return receipt requested to the minister of foreign affairs of the Republic of Sudan at the address for the Embassy of Sudan in Washington, D.C. The signed return receipt was returned to the clerk of the court. No attempt was made to serve Sudan in its home country and Sudan did not enter an appearance.

Referencing 28 U.S.C. § 1608(a)(3), the D.C. district court noted that "Sudan accepted service" and such service "obligated Sudan to serve an answer or other responsive pleading within 60 days of service. 28 U.S.C. § 1608 (d)."[5] Following Sudan's failure to appear in this case, the court proceeded, after an evidentiary hearing, to enter a default judgment in the amount of $314,705,896. Service of the default judgment was effectuated in the same manner as service of the underlying summons and complaint.

The plaintiffs registered the default judgment in the U.S. District Court for the Southern District of New York seeking to enforce the judgment against various New York banks. The Southern District issued turnover orders to the banks in 2013 and 2014. Finally, in 2014, Sudan filed a notice of appearance in the Southern District, challenging jurisdiction, and filing appeals to the Second Circuit on the turnover orders, claiming, inter alia, that service of process of the summons and complaint in the D.C. district court case did not comply with the service requirements of the FSIA.

The Second Circuit looked at the issue of whether service on the minister of foreign affairs at the Sudanese Embassy in Washington, D.C., was proper. Specifically, Sudan had argued that service did not comport with 28 U.S.C. § 1608(a)(3) and that service should have been effected by sending the summons and complaint to Sudan's minister of foreign affairs at the Ministry of Foreign Affairs in Khartoum.[6]

Interestingly, counsel for Sudan had argued that the minister did not have notice of the suit as Sudan was at that time in the final months of a coalition government before South Sudan became independent and, because of a power-sharing agreement, the minister of foreign affairs would not have received the notice from the embassy, which was controlled by the opposition.[7]

The Second Circuit noted that the restrictive reasoning of Sudan had already been rejected by the U.S. District Court for the Eastern District of Virginia, and that cases where service under § 1608(a)(3) was held to be ineffective were factually distinct for a variety of reasons including one case where service was on an ambassador rather than the minister of foreign affairs.[8] The Second Circuit concluded that the plaintiffs had complied with the plain language of 28 U.S.C. § 1608(a)(3).[9] Following a petition for rehearing by Sudan and further consideration, the Second Circuit affirmed its decision.[10]

U.S. Supreme Court Decision

The question of whether service on the ministry of foreign affairs of a foreign state in the

U.S. is valid has resulted in a split among several circuits.[11] Upon appeal by Sudan from the Second Circuit decision, the U.S. Supreme Court reversed the Second Circuit, with Justice Samuel Alito writing for the majority, and Justice Clarence Thomas providing the sole dissent.

A number of amicus curiae briefs had been filed in this case, with support for the Sudan position coming from countries such as Saudi Arabia and Libya. The United States also submitted an amicus curiae brief in support of Sudan's position.[12] The Veterans of Foreign Wars of the United States filed an amicus curiae brief in support.[13]

Justice Alito concluded that: "[M]ost naturally read, § 1608(a)(3) requires that a mailing be sent directly to the foreign minister's office in the minister's home country."[14] In his opinion, Justice Alito focused on the "natural" reading of the statute as requiring service by mailing directly to the foreign minister's office in the foreign state.[15]

Justice Alito dissected the meaning of the wording of § 1608(a)(3) including the words "addressed" and "dispatched." Citing to such sources as the "Webster's Third New International Dictionary," the word "addressed" is defined as the place where a person is found or can be communicated with.[16] Justice Alito noted that a foreign nation's embassy in the United States is not a place where a country's foreign minister can customarily be found, and, thus, common understanding of the word "addressed" is inconsistent with the interpretation posed by the Second Circuit.[17] A similar analysis was applied to the word "dispatched."

A concern raised was whether the opinion would run afoul of the service provisions of the Federal Rules of Civil Procedure and the Vienna Convention on Diplomatic Relations. Justice Alito's opinion addresses these issues, finding that the court's application of the ordinary meaning of the terms "addressed" and "dispatched" avoids any potential tension.[18]

In the amicus curiae brief of the United States, the U.S. argued that Article 22(1) of the Vienna Convention precludes service on a foreign state by mailing process to the foreign state's embassy in the United States. It was pointed out, inter alia, that U.S. embassies do not accept service of process when the U.S. is sued in a foreign court. Justice Alito essentially punted on having to interpret the obligations of the U.S. under the Vienna Convention — "[b]y giving § 1608(a)(3) its most natural reading, we avoid the potential international implications of a contrary interpretation."[19]

Takeaways From U.S. Supreme Court Decision

The media's take on the decision has, to some extent, focused on the unfairness of the decision to victims of terrorism.[20] Justice Alito addressed the elephant in the room in his opinion — the "unfair" effect of this decision as seemingly throwing out a judgment in a high-profile case on a technical procedural argument, by referring to the rule of law as "demanding adherence to strict requirements even when the equities of a particular case may seem to point in the opposite direction."[21]

It was probably also of some import that counsel for respondents noted that they could go back and attempt service again in compliance with the ruling of the U.S. Supreme Court.[22] It is not clear whether respondents would then have to start the case all over again, and, assuming service was properly made, whether there would be proceedings on the merits with Sudan entering a defense.

The Supreme Court reversed the judgment of the Second Circuit and also remanded it "for

further proceedings consistent with this opinion."[23] It will be interesting to see what the parties will do next, and how the lower court — and which lower court — might handle the proceedings in light of the ruling. There is significant money at stake in this case, as well as the public interest in "punishment" for alleged state-sponsored terrorism.

It is somewhat noteworthy that this decision, which has as its underlying issue the immunity of foreign nations from lawsuits in the courts of another country, never really addresses the international law aspects of this issue. The brief of the United States mentions treaty obligations and discusses at some length the Vienna Convention on Diplomatic Relations. It was pointed out by the United States in its brief that, when a foreign litigant or court officer attempts to serve the United States in one of its embassies abroad, the United States sends a diplomatic note to the foreign ministry in that country stating that it does not recognize that there has been service consistent with international law.[24] The court does discuss the Vienna Convention, but it sidesteps having to consider what would happen to international relations if the court had come to a different decision.[25]

While the extremely narrow focus on the meaning of specific words in the statute could be read as a limited reasoning particular to this one part of the FSIA, it will be interesting to see how Webster dictionary meanings pop up in other cases where it is argued that the "natural" reading of a statute should be determinative. The court barely looked at the congressional intent of the FSIA.[26]

Another aspect of this case is how it compares to service provisions under the Federal Rules of Civil Procedure for service on foreign parties. Justice Alito does not spend much time on Federal Rule of Civil Procedure 4(i), which provides for service on parties in a foreign country, other than to point out that it should not be easier for plaintiffs to obtain proper service over a foreign state than it is to obtain proper service over an individual. There is also no comparison to requirements under the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Service Convention).

Bottom line for practitioners — whether you are serving a foreign state, a foreign state designated as a state sponsor of terrorism, or a foreign corporation or person from another country, strict adherence to the letter of the applicable statute or rule is warranted. It is not difficult today to find ways to effectuate service in foreign countries. Consideration of such service may be well worth the effort in avoiding the type of outcome that the respondents now face.

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[1] Republic of Sudan v. Harrison, et al., 587 U.S. _ , No. 16-1094 (March 26, 2019).

[2] Pub. L. No. 110-181, § 1083, codified at 28 U.S. C. § 1605A.

[3] Harrison v. Republic of Sudan, 882 F.Supp. 2d 23, 32 (D.D.C. 2012).

[4] 28 U.S.C. § 1605A(a)(1)(2010).

[5] Harrison v. Republic of Sudan, 882 F.Supp. 2d at 23.

[6] Harrison v. Republic of Sudan, 802 F.3d 399, 404 (2d. Cir. 2015).

[7] 802 F.3d at 403, n. 5.

[8] Id. at 404-405.

[9] Id. at 406.

[10] Harrison v. Republic of Sudan, 838 F.3d 86 (2d Cir. 2016).

[11] Circuits including the DC Court of Appeals, the Fourth, Fifth and Seventh Circuits have required strict adherence and that service must be made to the head of the ministry at the physical address in the home country.

[12] The United States had also filed an amicus curiae brief in support of Sudan's position in the Second Circuit case.

[13] Brief for Amicus Curiae Veterans of Foreign Wars of the United States in Support of Respondents, Republic of Sudan v. Harrison, et al., 587 U.S. _ , No. 16-1094 (March 26, 2019).

[14] Republic of Sudan, slip op. at 1.

[15] Id.

[16] Id., slip op. at 6.

[17] Id.

[18] Id., slip op. at 13.

[19] Id.,slip op. at 15.

[20] See, e.g., Jessica Gresko, Supreme Court Tosses $315 Million Award in USS Cole Lawsuit, AP News (March 26, 2019), https://www.apnews.com/6cfcd87d63964b0297f301b334790b22.

[21] Republic of Sudan, slip op. at 17.

[22] Id.

[23] Id.

[24] Brief for the United States as Amicus Curiae, Republic of Sudan v. Harrison, 587 U.S._ (March 26, 2019); Brief at 14.

[25] The larger issue of immunity for foreign states who are accused of responsibility for terrorist attacks was the focal point of a ruling from a Luxembourg Court on March 27, 2019. September 11 victims were seeking $1.6 billion in Iranian assets after receiving a default judgment in that amount in the U.S. The victims were trying to seize Iranian assets in Europe. A panel of judges in Luxembourg issued a 160-page ruling that determined that there was no terrorism exception to sovereign immunity under Luxembourg law. The New York Times article here raises the international law as well as political dimensions of this ruling. https://www.nytimes.com/2019/03/28/us/politics/iran-september-11th-victims.html.

[26] The Second Circuit in its opinion noted that "The legislative record on § 1608(a)(3) is sparse, and sheds little light on the question." 802 F. 3d. at 405. The Amicus Curiae Brief of the United States to the U.S. Supreme Court sets out the legislative history which the United States claims the court of appeals disregarded. (Brief for the United States as Amicus Curiae, Republic of Sudan v. Harrison, 587 U.S. _ , No. 16-1094 (March 26, 2019)).