ORAL ARGUMENT SCHEDULED FOR FEBRUARY 2, 2017

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-7081

JOHN DOE, A.K.A. KIDANE,

Plaintiff-Appellant

v.

FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA,

Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA CASE NO. 1:14-CV-00372, JUDGE RANDOLPH D. MOSS

FINAL BRIEF FOR APPELLEE

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December 28, 2016

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. All Parties, Intervenors, and *Amici*

A. Parties

1. Plaintiff

- John Doe, also known as Kidane

2. Defendant

- Federal Democratic Republic of Ethiopia

B. Intervenors

None.

C. *Amici*

1. David Kaye, United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression
2. Maina Kiai, United Nations Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association
3. Michel Forst, United Nations Special Rapporteur on the Situation of Human Rights Defenders

II. Ruling Under Review

The ruling under review is as follows:

- *Doe v. Fed. Democratic Republic of Ethiopia,* No. 1:14-cv-00372, 2016 U.S. Dist. LEXIS 67909 (D.D.C. May 24, 2016)

III. Related Cases

None.

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ISSUES PRESENTED

1. Does a U.S. court have jurisdiction over a foreign state under the so-called "tort exception" to immunity of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(5), when the tortious act of that foreign state occurs outside the United States but results in an injury in the United States?

2. Does the gathering of intelligence for national security purposes by a foreign state constitute a discretionary function of that state under the tort exception of the FSIA?

3. Does the exemption for claims arising out of misrepresentation or deceit under the tort exception of the FSIA apply where "trickery" is used to cause a recipient of computer spyware to open an attachment that infects the recipient's computer with the spyware?

4. Does 18 U.S.C. § 2520(a), which provides for civil liability against a "person or entity" that violates the Wiretap Act, provide for civil liability against a foreign state for a violation of 18 U.S.C. § 2511(1), the so-called "interception provision" of the Wiretap Act, which applies only to "persons"?

5. Has the Appellant failed to adequately allege the element of intent for intrusion upon seclusion where the intrusion was allegedly intended for a third party? Does the Wiretap Act preempt the common-law tort of intrusion upon seclusion?

STATEMENT OF THE CASE

This case has been brought by an Ethiopian-born citizen of the United States who is suing anonymously and who alleges that he provides technical and administrative support to Ginbot 7, a political group that has publicly advocated for the violent overthrow of the government of the Federal Democratic Republic of Ethiopia ("Ethiopia") and has been designated by Ethiopia as a terrorist organization. Appellant alleges that Ethiopia used "FinSpy," a type of computer spyware, to "trick" him into accepting and opening an email attachment. As a result, the computer spyware infected his home computer.

Appellant alleges that he is the victim of a conspiracy by Ethiopia to control his personal computer in Silver Spring, Maryland, from Ethiopia, even though he acknowledges that he was not the intended victim of the computer spyware. Instead, Appellant alleges that another person, located in London,[1] received a threatening document via email, which Appellant assumes must have been sent by Ethiopia. *See* FAC at ¶ 5, JA 431. According to the anonymous Appellant, his anonymous acquaintance in London, not Appellant, was the target of the email,

[1] The original recipient of the email containing the computer spyware appears to have been in London. *See* Plaintiff's First Amended Complaint ("FAC") ¶ 5, Deferred Joint Appendix ("JA") at JA 431 ("Plaintiff is informed and believes that his computer became infected because of an email containing a Microsoft Word document attachment, sent by or on behalf of Defendant, *that was thereafter forwarded to Plaintiff*.") (emphasis added); ¶ 56, JA 443 (referring to Exhibit C of the FAC as the "email forwarded to Plaintiff"); Exh. C, JA 475 (stating to the original recipient of the email that "[y]ou took your family to London").

and it was the anonymous acquaintance who forwarded the threatening document to the Appellant. According to Appellant, the tainted document made its way into his acquaintance's computer from another computer that used an Ethiopian routing address, and, from this, he infers that Ethiopia "controlled" the spyware and was responsible for its remote installation.

According to Appellant, the computer spyware is attached to an image or Word document. It "attempt[s] to trick the victim into believing the opened file is not malicious." FAC, Exh. B at 9, JA 468. Once infected, the program, according to Appellant, allows an overseas operator to receive and read documents stored on the computer and to receive and read emails that have already been sent or already been received, web searches that have already been conducted, and computer-based phone calls that have already taken place.

After tricking Appellant into believing that the document was harmless, the spyware "then took what amounts to complete control over" Appellant's computer. *Id*. at ¶ 5, JA 431; *see id*. at ¶ 41, JA 440, and Exh. B at 9, JA 468. Appellant alleges that the spyware thereafter began copying information about his activities and those of his family onto files on his computer and then sending that information from those files to a server in Ethiopia. *See id*. at ¶ 5, JA 431. Appellant also alleges that "the FinSpy Master server *in Ethiopia* . . . is the same server that *controlled the FinSpy target installation on [Plaintiff's] computer*." *Id*.

at ¶ 8, JA 432 (emphasis added). The FAC goes on to allege that the spyware "create[d] contemporaneous recording [on Appellant's computer] of his activities in Maryland, which the FinSpy programs then sent to the FinSpy Master server *located in Ethiopia*." *Id*. at ¶ 10, JA 432 (emphasis supplied). Appellant alleges that "the FinSpy Relay and FinSpy Master servers with which Plaintiff's computer was controlled are *located inside Ethiopia* and controlled by Defendant Ethiopia." *Id*. at ¶ 85, JA 448 (emphasis added).

Appellant further alleges that, as a result of this computer spyware, he has suffered statutory damages under the federal Wiretap Act and unspecified damages for "intrusion upon seclusion."[2] As such, he instituted this suit against Ethiopia for declaratory relief and for money damages claiming that the District Court had jurisdiction under 28 U.S.C. § 1330 by virtue of the tort exception to the FSIA.

[2] The arguments set forth in the brief filed by *Amicus Curiae* on November 1, 2016, *see* Brief of Amicus Curiae United Nations Human Rights Experts in Support of Plaintiff-Appellant and Reversal, address various aspects of international human rights law that are entirely irrelevant to the legal questions before the Court. The focus of the *amicus* brief is on the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, a non-self-executing treaty that provides for no private right of action. *See Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 257-58 & n. 35 (2d Cir. 2003); 138 CONG. REC. 8068, 8071 (1992). In any event, Appellant is not seeking liability for a violation of international law. Rather, he seeks to establish liability, as he must, under domestic tort law. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439-40 (1989) ("Congress' primary purpose in enacting § 1605(a)(5) was to eliminate a foreign state's immunity for traffic accidents and other torts committed in the United States, for which *liability is imposed under domestic tort law*.") (emphasis added).

See 28 U.S.C. § 1605(a)(5). In a Memorandum Opinion ("Mem. Op.") issued on May 24, 2016, the District Court dismissed the case, concluding that the entire tort did not occur in the United States, as required by the tort exception, and that the Wiretap Act did not create a civil cause of action against a foreign state for interceptions of wire, oral, or electronic communications. JA 666.

SUMMARY OF THE ARGUMENT

Ethiopia is entitled to sovereign immunity under the FSIA and, therefore, U.S. courts lack subject-matter jurisdiction in this case for three independent reasons.

First, under the law of this Circuit, the tort exception only applies if "the entire tort," *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1524-25 (D.C. Cir. 1984), "occur[s] in the United States," *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 842 (D.C. Cir. 1984). This makes sense given that the exception was designed to provide Americans with a remedy against a foreign state should they be injured by a diplomat in a traffic accident in the United States. Here, the tortious intent was allegedly formulated in Ethiopia and the tortious acts allegedly took place in Ethiopia. The actors who committed the alleged tort, according to Appellant, were operating in Ethiopia, the computer servers were located in Ethiopia, the spyware was maintained in Ethiopia, the commands came from Ethiopia, and, while there is no allegation that Ethiopia ever viewed

Appellant's materials, that viewing would have occurred, if ever, in Ethiopia. Thus, the tort exception does not apply and, absent that exception, Ethiopia is immune from suit and U.S. courts lack subject matter jurisdiction. *See* 28 U.S.C. §§ 1330(a) & 1604. The District Court below agreed and dismissed Appellant's suit on this ground. *See* Mem. Op. at 14-30, JA 679-95.

Second, the tort exception, by its express terms, only applies to non-discretionary functions of a government. 28 U.S.C. § 1605(a)(5)(A). Appellant's claim is based upon Ethiopia's collection of intelligence for purposes of its national security. Appellant has acknowledged providing technical assistance to the group Ginbot 7, which has publicly advocated for the violent overthrow of the Ethiopian Government and has been designated by Ethiopia as a terrorist organization. The gathering of intelligence for national security purposes by a government, even if the allegations were true, is inherently a discretionary function and, therefore, not subject to a private civil action in a U.S. court.

Third, the tort exception, by its express terms, does not apply to any claim that arises as a result of a misrepresentation or deceit. If the misrepresentation or deceit is a "crucial element of the chain of causation" from Ethiopia's alleged tortious act to Appellant's injury, Ethiopia maintains its immunity. *JBP Acquisitions, LP v. United States*, 224 F.3d 1260, 1265 (11th Cir. 2000) (quoting *Rey v. United States*, 484 F.2d 45, 49 (5th Cir. 1973)). Computer spyware, such as

the type alleged to have infected Appellant's computer, operates exclusively by tricking Appellant and his computer into believing that the document hosting the spyware is benign, which then allows the spyware to infect the machine. Accordingly, both of Appellant's claims arise out of alleged deceit and, thus, neither is actionable under the tort exception.

Moreover, and separate from the subject-matter jurisdiction issues under the FSIA, the Wiretap Act does not apply here. The alleged violation of the Wiretap Act, the so-called "interception" provision set forth in 28 U.S.C. § 2511(1) applies only to "persons." A foreign state is not a person, and, therefore, the Wiretap Act does not apply. The District Court below agreed and dismissed Appellant's Wiretap Act claim on this ground as well. *See* Mem. Op. at 6-13, JA 671-78. Further, Appellant has not properly pled the tort of intrusion upon seclusion, which, in any event, is preempted by the Wiretap Act.

ARGUMENT

I. The District Court Correctly Found That It Lacked Subject-Matter Jurisdiction Because Ethiopia Is Immune From This Lawsuit under the Foreign Sovereign Immunities Act

U.S. courts lack subject-matter jurisdiction over this lawsuit because Ethiopia is immune from suit under the FSIA. The FSIA is the sole basis on which

a U.S. court can exercise jurisdiction over a foreign state.[3] *Amerada Hess*, 488 U.S. at 439. A foreign state is presumptively immune from the jurisdiction of U.S. courts unless one of the specifically enumerated exceptions to immunity set forth in the FSIA applies. *See* 28 U.S.C. § 1604; *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488-89 (1983). If no exception applies, then the court lacks subject-matter jurisdiction. *Mwani v. bin Laden*, 417 F.3d 1, 15 (D.C. Cir. 2005). Exceptions to sovereign immunity are to be strictly and narrowly construed in favor of the foreign state. *Federal Aviation Admin. v. Cooper*, 132 S.Ct. 1441, 1448 (2012); *MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 921, *modified on other grounds*, 823 F.2d 606 (D.C. Cir. 1987). Further, as a jurisdictional statute, the FSIA "does not directly regulate conduct or afford relief." *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 12, 133 S.Ct. 1659, 1664 (2013).

The sole exception to immunity pled by Appellant in this case is § 1605(a)(5), the tort exception. Section 1605(a)(5) provides that

> [a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any 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

[3] Ethiopia agrees with Appellant's conclusion that "[b]ecause Ethiopia's immunity is central to this case and dispositive of these claims, this Court should resolve the FSIA issue first." Opening Brief for Appellant John Doe ("App. Br.") at 10.

> that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—
>
> (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
>
> (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights….

28 U.S.C. § 1605(a)(5). When it was drafted, §1605(a)(5) was "directed primarily at the problem of traffic accidents" with foreign-state-owned vehicles. H.R. Rep. No. 94-1487, p. 20 (1976), U.S. Code Cong. & Admin. News 1976, p. 6619; *see also Amerada Hess*, 488 U.S. at 439-40; *Persinger*, 729 F.2d at 841.

Section 1605(a)(5) does not apply here because the "*entire tort*" must occur in the United States for U.S. courts to have subject-matter jurisdiction; the allegations as pled, however, describe a quintessential *trans-boundary* tort. Moreover, claims based upon discretionary acts of the foreign state are not excepted from immunity under § 1605(a)(5). Here, Appellant's claim is based upon Ethiopia's collection of intelligence for purposes of its national security; such an action falls squarely within the discretion of a sovereign state. Appellant also pleads that Ethiopia used "trickery" in deploying the computer spyware; accordingly, Appellant's claim arises out of misrepresentation or deceit and does not fall under § 1605(a)(5).

A. The "Entire Tort" Did Not Occur in the United States.

Appellant argues (incorrectly) that both the *tortious act* and the *injury* giving rise to his Wiretap Act and intrusion-upon-seclusion torts occurred in the United States and, therefore, the entire-tort rule is satisfied. App. Br. at 12-19. According to Appellant's theory, the "interception and recording of [Appellant's] computer activities" constitute "the acts precipitating [Appellant's] injuries" and those "acts" occurred in the United States. App. Br. at 12. Appellant's argument fundamentally misconstrues the law. Rather, as set forth below, the torts alleged by Appellant did not occur in their entirety in the United States because a *tortious act* must be committed by an actor (not a computer or software) and the tortious acts allegedly committed by Ethiopia were undertaken by actors in Ethiopia.

1. The FSIA Requires that the "Entire Tort" Must Occur within the Jurisdiction of the United States

Section 1605(a)(5) does not apply to trans-boundary torts such as the torts pled by Appellant here. While § 1605(a)(5) states that the "personal injury" must "occur[] in the United States," it is silent on whether the "tortious act" giving rise to the personal injury must also occur in the United States. Because of the structure of the FSIA, this silence results in ambiguity. *See Persinger*, 729 F.2d at 842 ("Section 1605(a)(5) is ambiguous on this point."). When Congress wanted a particular provision of the FSIA to apply to an act committed by a foreign state outside of the United States, it explicitly said so. *Asociacion de Reclamantes*, 735

F.2d at 1524 ("Although the statutory provision is susceptible of the interpretation that only the effect of the tortious action need occur here, where Congress intended such a result elsewhere in the FSIA it said so more explicitly."). This can be seen in § 1605(a)(2), the exception to immunity for commercial activities. Section 1605(a)(2) has three prongs which delineate where the act of the foreign state must take place in order for a U.S. court to have subject-matter jurisdiction over the foreign state under that exception. The third of these prongs provides jurisdiction over a foreign state based upon an "*act outside the territory of the United States* in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2) (emphasis added).

Similarly, in the recently passed Justice Against Sponsors of Terrorism Act, Congress enacted a new exception to immunity for foreign states "for physical injury to person or property or death occurring in the United States and caused by … an act of international terrorism in the United States" and "a tortious act or acts of the foreign state, or of any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, *regardless where the tortious act or acts of the foreign state occurred*." Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, 130 Stat. 853, § 3(a) (enacted as 28 U.S.C. § 1605B(b)) (emphasis added). In enacting this provision,

Congress made it clear that its purpose in doing so was "to provide civil litigants with the broadest possible basis … to seek relief against persons, entities, and foreign countries, *wherever acting and wherever they may be found*, that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States." *Id*. § 2(b) (emphasis added).

This Court has made it clear that had Congress intended for § 1605(a)(5) to apply to tortious acts committed outside the United States, it would have expressly said so (just as it did in §§ 1605(a)(2) and 1605B(b)). *See Persinger*, 729 F.2d at 842-43 ("The commercial activity exception expressly provides that a foreign sovereign's commercial activities 'outside the territory of the United States' having a 'direct effect' inside the United States may vitiate the sovereign's immunity. Any mention of 'direct effect [s]' is noticeably lacking from the noncommercial tort exception."). This interpretation is fully consistent with the general presumption against extraterritorial application of statutes. *See RJR Nabisco, Inc. v. European Cmty.*, 136 S.Ct. 2090 (2016); *Kiobel*, 133 S.Ct. at 1664 ("We typically apply the presumption [against extraterritoriality] to discern whether an Act of Congress regulating conduct applies abroad."); *Morrison v. Nat'l Australian Bank*, 561 U.S. 247, 248 (2010) ("When a statute gives no clear indication of an extraterritorial application, it has none.").

This interpretation is also fully consistent with the legislative history of the FSIA, which leaves no room for doubt. The House Committee Report that accompanied the bill that ultimately became the FSIA states that "the *tortious act* or omission must occur within the jurisdiction of the United States." H.R. Rep. No. 94-1487, p. 21 (1976), U.S. Code Cong. & Admin. News 1976, p. 6619 (emphasis added); *see also Asociacion de Reclamantes*, 735 F.2d at 1524 ("The legislative history makes clear that for the exception of § 1605(a)(5) to apply 'the tortious act or omission must occur within the jurisdiction of the United States.'").

Accordingly, this Court and other circuit courts have repeatedly and consistently found that the "entire tort" must occur in the United States, *i.e.*, *both* the *tortious act* of the foreign state and the plaintiff's *injury* must occur in the United States. *See Jerez v. Republic of Cuba*, 775 F.3d 419, 424 (D.C. Cir. 2014) ("The law is clear that 'the entire tort' – including not only the injury but also the act precipitating that injury – must occur in the United States."); *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164, 169 (D.C. Cir. 1994) ("We have held that this exception requires that both the tortious act as well as the injury occur in the United States."); *Asociacion de Reclamantes*, 735 F.2d at 1524-25 (finding that § 1605(a)(5) did not apply because "the entire tort would not have occurred" in the United States); *Persinger*, 729 F.2d at 842 ("[B]oth the tort and the injury must occur in the United States."); *see also In re Terrorist Attacks on September 11,*

2001, 714 F.3d 109, 116 (2d Cir. 2013); *O'Bryan v. Holy See*, 556 F.3d 361, 382 (6th Cir. 2009); *Cabiri v. Gov't of Republic of Ghana*, 165 F.3d 193, 199-200 & n.3 (2d Cir. 1999); *Jones v. Petty-Ray Geophysical, Geosource, Inc.*, 954 F.2d 1061, 1065 (5th Cir. 1992); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 379-80 (7th Cir. 1985); *Olsen v. Gov't of Mexico*, 729 F.2d 641, 646-47 (9th Cir.), *cert. denied*, 469 U.S. 917 (1984).[4]

2. Ethiopia's Alleged Tortious Act Occurred in Ethiopia

As shown above, § 1605(a)(5) requires that the money damages sought by a plaintiff must be "caused by the tortious *act*" of the foreign state, 28 U.S.C. § 1605(a)(5) (emphasis added), and this Court has held that "the tortious *act* … must occur within the jurisdiction of the United States" *Asociacion de Reclamantes*, 735 F.2d at 1524 (quoting H.R. Rep. No. 94-1487, p. 21 (1976), U.S. Code Cong. & Admin. News 1976, p. 6619) (emphasis added). In an effort to sidestep this requirement, Appellant argues that the "interception and recording of [Appellant's] computer activities" constitute "the acts precipitating [Appellant's] injuries" and those "acts" occurred in the United States. App. Br. at 12. This argument, however, is inconsistent with the law.

[4] Contrary to Appellant's assertion that only the Second, Sixth, and Ninth Circuits have joined this Court in adopting the entire-tort rule, *see* App. Br. at 11 n.14, the Fifth and Seventh Circuits have as well.

The RESTATEMENT (SECOND) OF TORTS states that "[t]he word '*act*' is used … to denote an external manifestation of the actor's will and does not include any of its *results*, even the most direct, immediate, and intended." RESTATEMENT (SECOND) OF TORTS § 2 (1977) (emphasis added). The commentary to this section goes on to explain that

> [t]he word "act" includes only the external manifestation of the actor's will. It does not include any of the effects of such manifestation, no matter how direct, immediate, and intended. Thus, if the actor, having pointed a pistol at another, pulls the trigger, the act is the pulling of the trigger and not the impingement of the bullet upon the other's person. So too, if the actor intentionally strikes another, the act is only the movement of the actor's hand and not the contact with the other's body immediately established.

Id. § 2, cmt. 3. Further as the definition and commentary make clear, an act requires an actor, *i.e.*, a person. *See id.* § 2 ("The word 'actor' is used throughout the Restatement of this Subject to designate either the person whose conduct is in question as subjecting him to liability toward another, or as precluding him from recovering against another whose tortious conduct is a legal cause of the actor's injury.").

Here, the *acts* allegedly committed by Ethiopian agents consisted of the key strokes that an Ethiopian government operator would have made as he or she was

deploying and controlling the computer spyware.[5] Akin to the pulling of a trigger or the movement of one's hand to strike someone, these key strokes were the "external manifestation of [Ethiopia's] will." According to the FAC, these *acts* occurred wholly within in Ethiopia. *See* FAC ¶¶ 5, 8, 85, JA 431, 432, 448.

The alleged interception and recording of Appellant's Skype calls and emails by the computer spyware, on the other hand, are not the relevant acts, but rather are the *results* or *effects* of Ethiopia's acts. These subsequent events are akin to "the impingement of the bullet upon the other's person" or "the contact with the other's body immediately established." RESTATEMENT (SECOND) OF TORTS, § 2, cmt. 3.

That some of these results or effects occurred "*automatically*, 'without intervention of the Ethiopian master server," does not change the analysis. App. Br. at 15 (quoting FAC ¶ 65, JA 445). As noted above, an act is done by a person, and the subsequent automation of certain functions of the computer spyware is still the *result* or *effect* of a person's act that occurred in Ethiopia. Likewise, Appellant's suggestion that the District Court's analysis "is erroneous because it considers only the acts of flesh-and-blood individuals, and ignores the acts carried out by technological devices at the behest of those individuals" ignores basic

[5] Reading of and/or listening to the recordings that were made may also have constituted an act, but Appellant makes no allegation that anyone ever actually listened to any of the recordings that were made. In any event, the act of reading or listening to the recordings would have occurred in Ethiopia.

principles of law and logic. App. Br. at 17. Devices do not act; persons do. *See* RESTATEMENT (SECOND) OF TORTS, §§ 2, 3. While the site of interception may be the linchpin for determining whether a particular court has jurisdiction in a Wiretap Act case, *e.g.*, to issue a warrant, *see* App. Br. at 19-22, here, the relevant jurisdictional statute is the FSIA, and the FSIA requires that the *act* of the foreign state occur in the United States.

In short, the *act* at issue here occurred in Ethiopia; some of the *results* or *effects* may have occurred in the United States. Accordingly, the entire tort did not occur in the United States, and U.S. courts lack jurisdiction.

Case law supports this conclusion. For example, in *Jerez*, the plaintiff brought claims against the Cuban Government for injecting him with the hepatitis C virus while he was detained in Cuba and failing to warn him of the harms. *See Jerez*, 775 F.3d at 421. In holding that it did not have jurisdiction under § 1605(a)(5), this Court concluded that the tortious acts of Cuba occurred in Cuba. *See id.* at 424. With respect to the failure to warn in particular, this Court observed that

> to the extent that such warnings might have had any value to Jerez after he reached the United States, the omissions might seem to have taken place in the United States. But *none of the defendants sued here was within the United States*, and we agree with the district court that under those circumstances the *omissions* cannot reasonably be said to have occurred within the United States.

Id. (emphasis added). Based on this language, and contrary to Appellant's assertion to the contrary, *see* App. Br. at 33-40, there is a physical-presence requirement in § 1605(a)(5).

The *O'Bryan* case further supports Ethiopia's position on where the relevant act occurred. In that case, alleged victims of sexual abuse committed by Roman Catholic clergy brought claims against the Holy See under § 1605(a)(5). Consistent with the cases noted above, the Sixth Circuit concluded that "any portion of plaintiffs' claims that relies upon acts committed by the Holy See abroad cannot survive." *O'Bryan*, 556 F.3d at 385. Accordingly, the Sixth Circuit dismissed claims based on the Holy See's own negligent supervision and for promulgating certain policies that may have been a causative factor in the dispute because such acts occurred abroad. At the same time, the Sixth Circuit found that U.S. courts had jurisdiction over certain claims where the tortious act occurred in the United States. In particular, the Sixth Circuit found that jurisdiction would exist under § 1605(a)(5) where certain priests, archbishops, and other Holy See personnel *located in the United States* (and acting within the scope of their employment) had negligently supervised priests in the United States who engaged in alleged abuse in the United States or failed to act in the United States on knowledge of such abuse in the United States. *Id*. Under those circumstances, both the act and the injury would have occurred in the United States.

Appellant's strained effort to distinguish the *Jerez* case described above fundamentally misconstrues the Court's analysis in that case. Appellant is correct that this Court held in *Jerez* "that an 'entire tort' has two components: (1) the injury and (2) the act precipitating that injury." App. Br. at 11. However, Appellant is wrong in its assertion that the Court held in *Jerez* "that a means for determining where the precipitating acts occurred is by examining where the infliction of injury occurred." App. Br. at 12. The Court did no such thing in *Jerez*. Nor did the Court conclude, as Appellant asserts, that "[u]nder this Court's rule in *Jerez*, the acts that precipitate a plaintiff's injury occur in the United States when the 'defendants' infliction of injury' on the plaintiff 'occur[s] entirely in the United States." App. Br. at 12.

Rather, in attempting to circumvent the fact that both the precipitating act and the injury occurred in Cuba (when Cuban officials injected the plaintiff with hepatitis C in a Cuban prison), the plaintiff in the *Jerez* case put forth a novel theory that a distinct tort occurred each time the virus replicated in his body in the United States. *Jerez*, 775 F.3d at 424. The Court rejected this theory, concluding that it "was an ongoing *injury* that he suffers in the United States as a result of the defendant's acts in Cuba. The law is clear that 'the entire tort' – including not only the injury but also the act precipitating that injury – must occur in the United

States." *Id.* (citing *Asociacion de Reclamantes*, 735 F.2d at 1525) (emphasis in the original).

The Court then went on to address an example put forth by the plaintiff in which a foreign agent mailed an anthrax package or bomb into the United States. *See id.*; *see also* Opening Brief for Appellant Nilo Jerez at 25, *Jerez v. Republic of Cuba*, 775 F.3d 419 (D.C. Cir. 2014), No. 13-7141, 2014 WL 1713091. The Court observed (in *dicta*) that "here the defendants' infliction of injury on Jerez occurred entirely in Cuba, whereas the infliction of injury by the hypothetical anthrax package or bomb would occur entirely in the United States." *Jerez*, 775 F.3d at 424. Thus, the Court's analysis was focused entirely on *where the injury occurred*. The Court was not considering where the *act* of the foreign state occurred and made no suggestion that the phrase "infliction of injury" was equated with or had anything to do with the term "act." As with the examples above, the infliction of injury would be a result or effect of the act.

Appellant's reliance on *OBB Personenverkehr AG v. Sachs*, 136 S.Ct. 390, 393-96 (2015), also misses the point. *OBB* was a commercial-activity-exception case brought under § 1605(a)(2), not a tort-exception case brought under § 1605(a)(5). It is important to note in this regard (as discussed above) that § 1605(a)(2), unlike § 1605(a)(5), expressly provides an exception to sovereign immunity for acts occurring outside the United States. The plaintiff in *OBB* was

injured as she attempted to board a train at a station in Austria as a result of an act of the foreign state that occurred at that station in Austria. *Id.* at 393. The plaintiff argued that she had purchased the ticket for the train she was boarding in the United States and maintained that a U.S. court had jurisdiction over the case because "the action is based upon a commercial activity carried on in the United States by the foreign state," *i.e.*, the sale of the train ticket here. *Id.* at 393-94 (quoting 28 U.S.C. § 1605(a)(2)). Thus, the Court had to determine whether the claim was "based upon" the sale of the train ticket in the United States or on the tort that occurred in Austria. The Court concluded that the case sounded in tort, not in contract, and dismissed the case. Accordingly, the *OBB* case is an analysis of the "based upon" language in § 1605(a)(2) and is entirely irrelevant to the question under § 1605(a)(5) as to where the act of the foreign state occurred.

The other cases on which Appellant relies are also inapposite. *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980), involving the assassination of a former Chilean diplomat in Washington, DC, came down before this Court adopted the entire-tort rule in *Persinger* and *Asociacion de Reclamantes* and, therefore, did not analyze the facts of the case within that context.[6] *Liu v. Republic*

[6] Appellant's suggestion that this Court cited *Letelier* with approval in *MacArthur*, 809 F.2d at 918, is misleading. App. Br. at 25, 26. This Court did not cite the section of *Letelier* addressing the location of the tort; rather, it cited the part of *Letelier* addressing whether criminal acts of a foreign state can be considered discretionary acts. *MacArthur*, 809 F.2d at 922 n.4.

of China, 892 F.2d 1419 (9th Cir. 1989), involved a conspiracy by officials of the Republic of China and their agents to engage in a contract killing in California. The district court in that case found that the individuals who committed the murder in California were "agents of the [foreign state] acting with the scope of their employment," *Liu v. Republic of China*, 642 F. Supp. 297, 304 (N.D. Cal. 1986), and the Ninth Circuit left that finding undisturbed. Accordingly, *Liu* involved an act of a foreign state – a shooting – that occurred in the United States.

3. International Law and Foreign Laws Likewise Limit Jurisdiction Over Acts of Foreign States That Occur Outside the State Asserting Jurisdiction

Section 1605(a)(5)'s requirement that the "entire tort" must occur in the United States, including the tortious act of the foreign state, is fully consistent with international law on foreign sovereign immunity and the national law of other countries. As described by the District Court, the FSIA was passed as the European Convention on State Immunity was about to come into force. Mem. Op. at 29-30. During the hearings before the U.S. House of Representatives leading up to the enactment of the FSIA, the Legal Adviser to the U.S. State Department testified that there were no inconsistencies between the FSIA and the European Convention on State Immunity (other than with respect to the execution of judgments against foreign states). *See Hearings on H.R. 11315 Before the Subcomm. on Admin. Law & Gov't Relations of the H. Comm. On the Judiciary*,

94th Cong. 37 (1976) ("1976 Hearings"). Like the FSIA, the European Convention on State Immunity has a personal-injury provision that provides that

> [a] Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and *if the author of the injury or damage was present in that territory at the time when those facts occurred*.

European Convention on State Immunity, Art. 11, reprinted in 1976 Hearings at 39 (emphasis added).

In almost identical terms, Article 12 of the United Nations Convention on Jurisdictional Immunities for States and Their Property[7] likewise provides that

> a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and *if the author of the act or omission was present in that territory at the time of the act or omission*.

[7] While the United Nations Convention on Jurisdictional Immunities for States and Their Property has not yet entered into force and has not been ratified by the United States, it "is the first modern multilateral instrument to articulate a comprehensive approach to the question of the immunity of sovereign states from suits in foreign courts. It was intended to codify *existing principles of customary international law* and to provide a basis for substantial harmonization of national laws in a vital areas of transnational practice." David P. Stewart, *The Immunity of State Officials Under the UN Convention on Jurisdictional Immunities of States and Their Property*, 44 VANDERBILT J. TRANSNAT'L L. 1047, 1050 (2011) (emphasis added).

United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, Annex, U.N. Doc. A/RES/59/38, Art. 12 (Dec. 2, 2004) (emphasis added). In its commentary on an earlier draft of the UN Convention on Jurisdictional Immunities for States and Their Property (which contained a identical version of Article 12), the International Law Commission, which advises the UN General Assembly on international law and its codification, stated the following about Article 12:

> The second condition, namely the presence of the author of the act or omission causing the injury or damage within the territory of the State of the forum at the time of the act or omission, has been inserted to *ensure the exclusion from the application of this article of cases of transboundary injuries or trans-frontier torts or damage, such as export of explosives, fireworks or dangerous substances which could explode or cause damage through negligence, inadvertence or accident. It is also clear that cases of shooting or firing across a boundary or of spill-over across the border of shelling as a result of an armed conflict are excluded from the areas covered by article 12*. The article is primarily concerned with accidents occurring routinely within the territory of the State of the forum….

Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries, 1991, Art. 12, Cmt. 7 (emphasis added) ("Draft Articles").[8]

[8] Even with the limiting criterion of the entire-tort rule in Article 12, some members of the International Law Commission nevertheless "expressed reservations about the very broad scope of the article and on the consequences that might have for State responsibility. In their view, the protection of individual victims would effectively be secured by negotiations through diplomatic channels or by insurance." Draft Articles, Art. 12, Cmt. 12.

Accordingly, both conventions require the actor to be physically present in the territory of the state seeking to exercise jurisdiction, which is achieved as well under the FSIA through the entire-tort rule. Put another way, the entire-tort rule gives rise to a physical-presence test, which is the test provided for under international law.

The FSIA's requirement that the act of the foreign state must occur within the state asserting jurisdiction is also present in the national law on sovereign immunity in several other countries. *See, e.g.*, Australian Foreign Sovereign Immunities Act 1985, § 13 ("A foreign State is not immune in a proceeding in so far as the proceeding concerns: (a) the death of, or personal injury to, a person; or (b) loss of or damage to tangible property; *caused by an act or omission done or omitted to be done in Australia*.") (emphasis added); UK State Immunity Act 1978, § 5 ("A State is not immune as respects proceedings in respect of – (a) death or personal injury; or (b) damage to or loss of tangible property, *caused by an act or omission in the United Kingdom*.") (emphasis added); Singapore State Immunity Act of 1979, § 7 ("A State is not immune as respects proceedings in respect of – (a) death or personal injury; or (b) damage to or loss of tangible property, *caused by an act or omission in Singapore*.") (emphasis added).

B. Intelligence Gathering for National-Security Purposes Is Squarely Within a Sovereign State's Discretion

Ethiopia is also immune from suit under the FSIA because the activity complained of here – the gathering of intelligence for national-security purposes – is a discretionary act. Section 1605(a)(5)(A) does "not apply to … any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused." 28 U.S.C. § 1605(a)(5)(A). This discretionary-function exemption was modeled on a similar exemption found in the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 *et seq*.[9] The Supreme Court has construed the discretionary-function provision of the FTCA as intending to preserve immunity for "decisions grounded in social, economic, and political policy." *United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines),* 467 U.S. 797, 814 (1984). According to the Supreme Court, a discretionary act is one in which "there is room for policy judgment and decision." *Dalehite v. United States*, 346 U.S. 15, 36 (1953). The Supreme Court has also held that it is "the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *Varig Airlines*, 467 U.S. at 813.

[9] Courts frequently look to this exemption in the FTCA when interpreting the FSIA's discretionary-function exemption. *De Sanchez v. Banco Central De Nicaragua*, 770 F.2d 1385, 1399 n.19 (5th Cir. 1985); *Olsen*, 729 F.2d at 646-47.

Courts use a two-step analysis to determine whether challenged conduct falls under the discretionary-function exception. First, one determines whether the challenged actions involve "an element of judgment or choice." *United States v. Gaubert*, 499 U.S. 315, 322 (1991) (quotation omitted). If the challenged actions involve an element of judgment or choice, a court must determine "whether that judgment is of the kind that the discretionary function exception was designed to shield." *Id.* at 322-23. More specifically, if the judgment involves considerations of social, economic, or political policy, the exception applies. *See Varig Airlines*, 467 U.S. at 814; *MacArthur*, 809 F.2d at 922.

The acts and events alleged in this case are quintessentially political in nature, a fact acknowledged by Appellant when he argues that the electronic surveillance has "strong indications of politically-motivated targeting." *See* FAC, Exh. B at 1, JA 460. As such, the alleged activities are, by definition, discretionary functions within the meaning of the FSIA.

This is especially so here, where the Appellant has acknowledged working for the group Ginbot 7. Members of Ginbot 7 have "publicly advocated violent overthrow of the [Ethiopian] government." U.S. State Department, 2010 Human Rights Reports: Ethiopia <http://www.state.gov/j/drl/rls/hrrpt/2010/af/154346.htm> (last visited November 22, 2016). Such statements and other

activities of Ginbot 7 have also prompted the Ethiopian Government to designate the group as a terrorist organization. FAC, Exh. B at 9, JA 468.

Appellant specifically alleges that he provides "technical support and assistance to members of" this terrorist organization, *see* Declaration of John Doe (AKA "Kidane") in Support of Motion for Leave to Proceed in Pseudonym ¶ 9, JA 017, and does so on a "consistent[]" basis, *see* Brief of *Amicus Curiae* United Nations Human Rights Experts in Support of Plaintiff-Appellant and Reversal at 20 (stating that Appellant "'consistently use[s]' a pseudonym when he provides technical support and assistance to Ginbot 7"). Accordingly, the electronic surveillance allegedly engaged in by Ethiopia encompasses national security, a fundamentally important subset of political activity. The decision by a sovereign state as to whether and how to gather intelligence for national-security purposes, by definition, involves an element of choice. *See, e.g.*, *Burnett v. Al Baraka Invest. and Dev. Corp.*, 292 F. Supp. 2d 9 (D.D.C. 2003) (holding that decisions by the director of Saudi Arabia's intelligence service to authorize funding for certain organizations, some of which ultimately participated in the attacks of September 11, 2001, were inherently discretionary functions and not subject to the tort exception of the FSIA); *Jin v. Ministry of State Security*, 475 F. Supp. 2d 54, 67 (D.D.C. 2007) (holding that actions by the Chinese Ministry of State Security and others for harassing and threatening plaintiffs, who were members of the Falun

Gong, a religious minority in China, in the United States were discretionary, especially defendants' "decisions regarding its thugs [hired to injure and intimidate members of the Falun Gong in the United States] *e.g.*, hiring, training, and supervising … [which] clearly 'involve a measure of policy judgment'").

The District Court concluded that "in creating a discretionary function exception under the FSIA, Congress did not mean to shield 'discretionary' acts by foreign states when those acts involve serious violations of U.S. criminal law" and that "it did not have the "necessary record upon which to draw a conclusion" on whether Ethiopia's alleged conduct amounted to a serious criminal act. Mem. Op. at 34-36, JA 699-701. Accordingly, the District Court did not render a decision on the applicability of the discretionary-function exception.

However, the allegations made here do provide an adequate record on which to base a conclusion and compel the finding that the discretionary-function exception does apply to Ethiopia's conduct. The case law shows that a foreign state's discretionary act is immune from suit unless that act is *malum in se*.

MacArthur, 809 F.2d at 919, is instructive in this regard. In that case, a neighborhood association in Washington, DC, sued Peru for using a building zoned for residential use as a chancery. The plaintiffs maintained that Peru's alleged violation of zoning laws amounted to criminal acts. *See id.* at 922 n.4. This Court concluded that "it is hardly clear that, even if a criminal act were shown, it would

automatically prevent designation of Peru's acts as discretionary. The cases on which appellant relies involve criminal acts of a rather different character and order." *Id*. (citing *Letelier*, 488 F. Supp. at 665, which involved an "assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law"); *see also Liu*, 892 F.2d at 1419 (also refusing to apply the discretionary-function exemption in the context of an assassination). This Court went on to conclude that violation of a zoning ordinance would not "rise to the level of actions *malum in se*." *MacArthur*, 809 F.2d at 922 n.4; *see also Risk v. Halvorsen*, 936 F.2d 393 (9th Cir. 1991) (stating that "it cannot be said that every conceivable illegal act is outside the scope of the discretionary function exception" and concluding that a diplomat aiding a Norwegian citizen in returning to Norway with her children in violation of a state court custody order was a discretionary function). These cases show that an act must be *malum in se* for the discretionary-function exemption not to apply.

Here, the gathering of intelligence for reasons of national security is not *malum in se*. Spying and intelligence gathering are not viewed with the universal scorn necessary to obviate the discretionary function exemption, and sovereign states engage in such activities on a regular basis. *See, e.g.*, Dan Kedmey, *Report: NSA Authorized to Spy on 193 Countries*, TIME, July 1, 2014 ("The National Security Agency exempted four countries from its list of places where it could

rightfully intercept information, leaving the world's 193 other countries open to surveillance…."). Indeed, it is perfectly proper under U.S. law and the law of nations for one sovereign to spy on another and to spy on the residents of the other. The Central Intelligence Agency is authorized by the National Security Act of 1947, 50 U.S.C. § 3002 *et seq.*, to conduct, as appropriate, overseas intelligence activities. Further, the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801 *et seq.*, permits the United States to engage in electronic surveillance abroad.

The cases cited by the District Court, *see* Mem. Op. at 32, 697, involved situations in which Central Intelligence Agency ("CIA") officials were clearly acting outside the scope of their authority when they were opening private mail in the United States. *See Birnbaum v. United States*, 588 F.2d 319, 329 (2d Cir. 1978) ("It is common ground that there is no statute or regulation which sanctions the mail opening procedure engaged in by the CIA."). The CIA's governing statute only permitted the CIA to gather intelligence outside the United States, not domestically.

As the Supreme Court has noted, "[t]he discretionary function exception … marks the boundary between Congress' willingness to impose tort liability upon the United States [under the FTCA and a foreign state under the FSIA] and its desire to protect certain governmental activities from exposure to suit by private individuals." *Varig Airlines,* 467 U.S. at 808; *see also Persinger*, 729 F.2d at 841

("If Congress had meant to remove sovereign immunity for governments acting on their own territory, with all of the potential for international discord and for foreign government retaliation that that involves, it is hardly likely that Congress would have ignored those topics and discussed instead automobile accidents in this country."). The gathering of intelligence for purposes of national security is a governmental activity that should be shielded from exposure to suit by private individuals. The text of § 1605(a)(5)(A) requires it, and international comity, as well as the interests of the United States, demands it. If suits of this type are permitted in the United States, then foreign states may reciprocate against the U.S. Government. Accordingly, the proper mechanism for protecting the rights of individuals in this regard is through diplomatic channels.

C. Ethiopia Is Immune From Suit Because Appellant's Claim Arises Out of Misrepresentation or Deceit

Section 1605(a)(5)(B) contains a so-called "intentional-tort exemption" that bars "any claim arising out of malicious prosecution, abuse of process, libel, slander, *misrepresentation, deceit*, or interference with contract rights." 28 U.S.C. §1605(a)(5)(B) (emphasis added); *see also Tifa, Ltd. v. Republic of Ghana*, Civ. A. No. 88-1513, 1991 WL 179098 (D.D.C. Aug. 27, 1991) ("The clear language of subsection 1605(a)(5)(B) bars suits for misrepresentation or deceit."). Here, Appellant's claims necessarily arise out of deceitful conduct. The purpose of the computer spyware, as Appellant alleges, is to "*trick*" the recipient "into opening"

an infected file. FAC ¶ 41, JA 440 (emphasis added). According to Appellant, "[t]he target is therefore unaware that his computer has been infected." *Id*. The computer spyware, as allegedly employed by Ethiopia, "attempt[s] to *trick* the victim into believing the opened file is not malicious." *Id*., Exh. B at 8, JA 467 (emphasis added). Trickery, however, is nothing more than "decei[t]," *see* BLACK'S LAW DICTIONARY 1738 (10th ed. 2014), and the FSIA bars such suits.

The District Court erroneously concluded that Appellant's claims do not arise out of misrepresentation or deceit because neither of the torts he alleges requires him to prove misrepresentation or deceit as an element. Mem. Op. at 18, JA 683; *see also* App. Br. at 10 n.13. That, however, is not the test. Rather, the misrepresentation or deceit need only be a "crucial element of the chain of causation" from Ethiopia's tortious act to Appellant's injury. *JBP Acquisitions*, 224 F.3d at 1265 (quoting *Rey*, 484 F.2d at 49); *see also Cabiri*, 165 F.3d at 200 (dismissing a claim for intentional infliction of emotional distress because "the wrongful acts alleged to have caused the injury are misrepresentations made to [the plaintiff, who was the wife of an individual who had allegedly been unlawfully detained in Ghana] concerning her husband's whereabouts"). Here, trickery was a "crucial element of the chain of causation" that commenced with the alleged act of deploying the software in Ethiopia and ultimately resulted in the Appellant's injury in Maryland. Appellant alleges that he was tricked into opening what appeared to

be a benign document (from an acquaintance in London) that contained the hidden computer spyware at issue. Appellant has pled trickery, a form of deceit, and he cannot now run from it.

In its analysis, the District Court relied on *Black v. Sheraton Corp. of Am.*, 564 F.2d 531, 541 (D.C. Cir. 1977), an FTCA case involving improper government eavesdropping, to conclude that torts such as invasion of privacy and intrusion upon seclusion are not among the enumerated torts in the intentional-tort exemption and that "the mere fact that the allegedly illegal surveillance was conducted surreptitiously is insufficient to bar [Appellant's] claim." Mem. Op. at 18, JA 683. However, there is nothing to indicate that the plaintiff in *Black* ever alleged that he was deceived or tricked by the government as is the case here. *Black* involved traditional eavesdropping that did not require trickery in order for that eavesdropping to occur. Thus, the issue of deceit was never raised by any of the parties or addressed by the court in *Black*.

II. The Wiretap Act Does Not Create a Private Cause of Action Against a Foreign Sovereign for Unlawful Interceptions

The District Court properly found that the Wiretap Act does not apply to foreign states. Mem. Op. at 7-13, JA 672-78. Under the Wiretap Act, "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used *in violation of this chapter* may in a civil action recover from the person or entity, other than the United States, which engaged in that violation such

relief as may be appropriate." 18 U.S.C. § 2520(a) (emphasis added). Here, Appellant alleges that Ethiopia violated the interception provision in § 2511(1) of the Wiretap Act "by [the] unlawful interception of Plaintiff's communications." FAC ¶¶ 15, 91, JA 433, 449. No other provisions of the Wiretap Act are referenced in the FAC.

The "interception" provision of § 2511(1) reads as follows:

> Except as otherwise specifically provided in this chapter *any person* who—
>
> (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication….
>
> shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

18 U.S.C. § 2511(1) (emphasis added).

Thus, by its terms, only a "person" can violate § 2511(1). The Wiretap Act defines a "person" as "any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation." *Id.* at § 2510(6). As so defined, the term "person" excludes foreign sovereigns. This is consistent with the "longstanding interpretive presumption that 'person' does not include the sovereign." *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780-81 (2000); *see also Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 96 (D.C. Cir. 2002) ("[W]e hold that foreign states are not 'persons' protected by

the Fifth Amendment.").[10] Here, the presumption is conclusive. The definition of person includes certain sovereigns, such as the domestic states and their political subdivisions, but does not include the United States or foreign states.

Appellant argues that because § 2520(a), which authorizes a civil action for a violation of a provision of the Wiretap Act, uses the terms "person or entity," and because an entity can include a foreign state, a foreign state can be civilly liable under the Wiretap Act. App. Br. at 44-51. The problem for Appellant, however, is that § 2520 itself creates no substantive rights. Rather, it simply provides a cause of action to vindicate rights identified in other portions of the Wiretap Act. 18 U.S.C. § 2520(a). In this sense, § 2520 is like 42 U.S.C. § 1983. *See Gonzaga Univ. v. Doe,* 536 U.S. 273 (2002); *Lugar v. Edmondson Oil Co*., 457 US 922, 924 (1982); *Samuels v. District of Columbia*, 770 F.2d 184, 193 (D.C. Cir. 1985) ("By its terms, of course, [§ 1983] does not create substantive rights; instead it provides an express federal remedy against state officials for deprivations of rights established elsewhere in federal law.").

[10] If this Court were to hold that "person" includes a foreign state, then that meaning should also apply to all due process considerations, and Ethiopia's motion to dismiss filed in the District Court should also be construed as a motion to dismiss under Federal Rule of Civil Procedure 12(b)(2) for lack of minimum contacts and hence lack of personal jurisdiction, notwithstanding 28 U.S.C. § 1330. Appellant has not alleged minimum contacts under the Due Process Clause sufficient to support personal jurisdiction.

Thus, the Court must look to the scope and nature of the specific substantive right that Appellant accuses Ethiopia of violating to determine whether Appellant may assert that right against Ethiopia. Here, Appellant accuses Ethiopia of violating the interception provision in § 2511(1), which prohibits "*any person*" from intentionally intercepting any wire, oral, or electronic communication. 18 U.S.C. § 2511(1). Thus, § 2511(1) protects only against actions taken by a "person" as defined in the statute, which does not include foreign states. *See Seitz v. City of Elgin*, 719 F.3d 654, 658 (7th Cir. 2013). Put another way, only a "person" can violate § 2511(1) and, as explained above, a foreign state is not a "person." Accordingly, no substantive rights have been violated under the Wiretap Act.

Section 2520(a)'s provision for a civil remedy against a "person or entity, other than the United States" when § 2511(1) provides that only a "person" can violate the interception provision of the Wiretap Act is perfectly in line with the view that Congress intended for there to be a civil remedy for certain violations of the Wiretap Act but not others. This is because when Congress added the term "entity" to § 2520(a), it also added a new § 2511(3)(a) to the Wiretap Act (a section of the Wiretap Act that has *not* been pleaded by the Appellant) that prohibits certain conduct by any "person or entity." 18 U.S.C. § 2511(3)(a) (prohibiting a "person or entity providing an electronic communication service to

the public [from] intentionally divulg[ing] the contents of any communication . . . while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication"); *see also* App. Br. at 52-53, 54-56. Because Congress allowed for an "entity" to violate this provision, it made the corresponding change to § 2520(a). *See* Mem. Op. at 11-12, JA 676-77. However, a change to § 2520(a) to accommodate the new provision in § 2511(3)(a) does not mean that Congress intended to expand the scope of the interception provision in § 2511(1).

Appellant also maintains that a foreign state can be vicariously liable for the actions of its agents, officials, or employees even if the foreign state is not itself subject to § 2511(1). *See* App. Br. at 48-51. This argument too is misguided. *See* Mem. Op. at 12-13, JA 677-78. That an agent, official, or employee of a foreign state may be individually liable for an act committed in his or her official capacity without subjecting the foreign state to liability is well established. *See Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1702-03 (2012) (noting that the Torture Victim Protection Act provides for liability against "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation" commits acts of torture and extrajudicial killings but not against the foreign state itself); *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1036 (D.C. Cir. 2004) (declining to extend liability to a foreign state under a statute that was limited to "an official,

employee or agent of a foreign state designated as a state sponsor of terrorism"). Here again, had Congress intended to subject the foreign state itself to liability – rather than solely a "person" working for a government – it would have said so in the statute.

III. Appellant Failed to Allege a Violation of Intrusion Upon Seclusion

While the District Court did not address this issue below, Appellant's intrusion-upon-seclusion claim also fails because Appellant has not pled the elements of intrusion upon seclusion and, in any event, the common-law tort of intrusion upon seclusion is preempted by the Wiretap Act.

1. Appellant Does Not Allege That Ethiopia Intentionally Intruded on Appellant's Seclusion

The tort known as "intrusion upon seclusion" is committed when

> [o]ne who *intentionally* intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Bailer v. Erie Ins. Exch., 687 A.2d 1375, 1380-81 (Md. 1997) (emphasis in original). "The tort [of intrusion upon seclusion] cannot be committed by unintended conduct amounting merely to lack of due care. Intentional conduct is a necessary element of the cause of action." *Id*. (quoting *Snakenberg v. Hartford Casualty Ins. Co.*, 383 S.E.2d 2, 7 (S.C. Ct. App. 1989)); *see also Mauri v. Smith*, 929 P.2d 307, 311 (Or. 1996).

Accordingly, the "intrusion" must be intentional. Here, however, the alleged intrusion occurred when Appellant was tricked into opening a document that an acquaintance in London had forwarded to him. This document, which allegedly contained the computer spyware, was not addressed to Appellant, and there is no allegation that Ethiopia emailed or sent the document to Appellant. Nor is there any allegation that Appellant was the intended target of the email carrying the alleged computer spyware. To the contrary, even as hypothesized by Appellant, he was not the intended target; his unidentified acquaintance may have been the intended target, but that acquaintance is not a party to this suit.

Appellant argued below that, as long as Ethiopia intended to spy upon someone (*i.e.*, the acquaintance in London), that is all that is required. *See* Plaintiff's Opposition to Defendant's Motion to Dismiss First Amended Complaint 14 ("Pl. Opp."), JA 528. However, that argument assumes that the concept of transferred intent governs intrusion upon seclusion as pled in this case. It does not. The concept of transferred intent only applies to the torts of "battery, purposeful infliction of bodily harm, assault, or false imprisonment." RESTATEMENT (SECOND) OF TORTS § 110. The concept does not apply to torts like intrusion upon seclusion. Not surprisingly, therefore, Ethiopia is unaware of any reported case applying transferred intent to intrusion upon seclusion, and Appellant has pointed to none. *See Bourne v. Mapother & Mapother, P.S.C.*, 2014 WL 555130 (S.D.

W.Va. Feb. 12, 2014) (concluding that transferred intent does not apply to a claim for intentional infliction of emotional distress and finding it unnecessary to decide whether it applies to an invasion of privacy).

Appellant also argued below that there was an *ongoing* "intrusion." *See* Pl. Opp. at 14, JA 528. However, the word "intrusion," by definition, is not a continuous activity any more than "breaking and entering" is a continuous activity. *Mauri*, 929 P.2d at 311 ("A person intrudes by thrusting himself or herself in without invitation, permission, or welcome."). Once one has "intruded" the intrusion has been completed. The intrusion must co-exist with the intent to intrude on a particular person; absent transferred intent, which is not applicable, there was no intent to intrude into Appellant's computer, and none is alleged.

In short, there is no allegation that Ethiopia intended to invade Appellant's seclusion and, therefore, Appellant has failed to plead a claim for which relief can be granted.

2. The Common-Law Tort of Intrusion Upon Seclusion Is Preempted by the Wiretap Act

Appellant has failed to state claim for intrusion upon seclusion because the Wiretap Act expressly preempts any state common law claim for relief, as follows:

> The remedies and sanctions described in this chapter with respect to the interception of electronic communications are the only judicial remedies and sanctions for nonconstitutional violations of this chapter involving such communications.

18 U.S.C. § 2518(10)(c); *see Bunnell v. Motion Picture Ass'n of America*, 567 F. Supp. 2d 1148, 1154 (C.D. Cal. 2007); *see also Quon v. Arch Wireless Operating Co., Inc.*, 445 F. Supp. 2d 1116, 1138 (C.D. Cal. 2006) *aff'd in part, rev'd in part on unrelated grounds*, 529 F.3d 892 (9th Cir. 2008) *rev'd and remanded sub nom. City of Ontario, Cal. v. Quon*, 560 U.S. 746 (2010) (holding that 18 U.S.C. § 2708, which states that "[t]he remedies and sanctions described in this chapter are the only judicial remedies and sanctions for nonconstitutional violations of this chapter," preempted state law claims of invasion of privacy). Accordingly, Appellant's tort claim for intrusion upon seclusion is preempted by the Wiretap Act.

Appellant argued below that the Wiretap Act does not "completely preempt" state law. *See* Pl. Opp. at 30-31, JA 544-45. In making this argument, however, Appellant confuses two concepts – "ordinary preemption" and "complete preemption" – that have little to do with each other. *See Elam v. Kansas City S. Railway Co*., 635 F.3d 796, 803 (5th Cir. 2011) (discussing the distinction between ordinary preemption and complete preemption). Ordinary preemption, which is at issue here, occurs where a federal law either expressly or by implication displaces a state law, including common law torts. *See Riegel v. Medtronic, Inc*., 552 U.S. 312 (2008) (concluding that the Medical Device Amendments expressly preempts most tort actions). Preemption is an affirmative defense and may not be used as the

basis to remove a case to federal court. *See Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804 (1986).

In contrast, "complete preemption" is a jurisdictional doctrine. If a statute "completely preempts" state law, any claims under that state law are not only displaced but a state court also lacks any jurisdiction to entertain the case; jurisdiction is exclusively within the purview of the federal courts. The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, is an example of one of those rare laws that completely preempts state law. *See Metropolitan Life Ins. Co. v. Taylor*, 481 U. S. 58 (1987). Thus, the fact that the Wiretap Act does not completely preempt state law is irrelevant. It is one of many federal laws that have ordinary preemptive effect.

Even though a foreign state cannot violate the Wiretap Act (as set forth above) and, therefore, a remedy is not available under the Wiretap Act here, the Court must nevertheless dismiss the common-law claim because it is powerless to provide any remedy by the plain language of the Wiretap Act. Absent the ability to provide a remedy, a federal court lacks Article III jurisdiction. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).[11] Thus, by way of example, if

[11] Some courts have held that the Wiretap Act does not preempt state law because the Act only sets minimum standards for the protection of privacy, leaving the states free to provide remedies beyond those provided for by the Wiretap Act. *See, e.g.*, *Valentine v. NebuAd, Inc.*, 804 F. Supp. 2d 1022, 1029 (N.D. Cal. 2011); *Lane v. CBS Broad. Inc.*, 612 F. Supp. 2d 623 (E.D. Pa. 2009). However, those courts

this Court were to find that the Wiretap Act had been violated, but that the claim for statutory damages was insufficient to trigger the tort exception, the common-law claim would be preempted by the clear language of the Wiretap Act.

CONCLUSION

For the reasons set forth above, Ethiopia respectfully requests the Court to affirm the judgment of the District Court.

Respectfully submitted,

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did not address the Article III implications of their holdings. Under Article III, a plaintiff must plead and prove that he or she has standing by showing, among other things, that the court can remedy the alleged injury. *Lujan*, 504 U.S. at 561. In the present case, the statute precludes a court from providing any remedy beyond that which is provided by the Wiretap Act. Therefore, the Appellant lacks Article III standing to pursue any claim other than a claim under the Wiretap Act. *See City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (holding that standing is a claim-by-claim, remedy-by-remedy undertaking).

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 32(a)(3)(B) because this brief contains 11,147 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(2). This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2010 version of Microsoft Word in 14 point Times New Roman.

s/ Robert P. Charrow
Robert P. Charrow

CERTIFICATE OF SERVICE

I, Robert P. Charrow, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am counsel for appellant and am authorized to electronically file the foregoing FINAL BRIEF FOR APPELLEE with the Clerk of Court using the CM/ECF System, which will serve via e-mail notice of such filing to all counsel registered as CM/ECF users, including the following:

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