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International Law - Extrajudicial Killings: Acts of Terrorism Or Acts of Elaborate Cover-Ups: Sullivan v. Republic of Cuba, 891 F.3D 6 (1st Cir. 2018)

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INTERNATIONAL LAW—EXTRAJUDICIAL KILLINGS: ACTS OF TERRORISM OR ACTS OF ELABORATE COVER-UPS?—*SULLIVAN V. REPUBLIC OF CUBA*, 891 F.3D 6 (1ST CIR. 2018).

Ordinarily, a country is immune from being subjected to legal proceedings in another country.¹ To enumerate this protection, the United States codified the Foreign Sovereign Immunities Act (“FSIA”), which limits the possibility for foreign sovereign nations to be sued in United States’ courts.² The United States Court of Appeals for the First Circuit faced the issue in *Sullivan v. Republic of Cuba*³, of whether the Foreign Sovereign Immunities Act’s terrorism exception applies to the extrajudicial

¹ See JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL31258, SUITS AGAINST TERRORIST STATES BY VICTIMS OF TERRORISM: BACKGROUND ON STATE IMMUNITY 3–5 (2008) (explaining immunity custom afforded to sovereign states); see also Peter-Tobias Stoll, *State Immunity*, OXFORD PUB. INT’L LAW, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1106?print=pdf> (last updated Apr. 2011) [<https://perma.cc/A93H-6BMA>] (defining state immunity). “State immunity protects a State and its property from the jurisdiction of the courts of another State. It covers administrative, civil, and criminal proceedings (jurisdictional immunity), as well as enforcement measures (enforcement immunity).” Stoll, *supra*, note 1. See *How Do You Go About Suing a Country?*, NPR (Oct. 8, 2016, 8:29 AM), <https://www.npr.org/2016/10/08/497164736/how-do-you-go-about-suing-a-country> [<https://perma.cc/94MW-MQFZ>] (describing purpose of state immunity). It is preferred that disputes between two states “be resolved at the diplomatic stage as opposed to the private civil litigation stage.” *Id.*

² See 28 U.S.C. § 1604 (2015) (defining immunity of foreign state from United States jurisdiction). “Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States” *Id.* See JENNIFER K. ELSEA, CONG. RESEARCH SERV., RS22094, LAWSUITS AGAINST STATE SUPPORTERS OF TERRORISM: AN OVERVIEW, 1 (2005) (describing Foreign Sovereigns Immunity Act).

Ordinarily, foreign States, including their agencies and instrumentalities, may not be sued in U.S. courts unless they waive their sovereign immunity or an exception under the Foreign Sovereign Immunities Act (FSIA) (28 U.S.C. §§ 1602 *et seq.*) applies. The FSIA provides a list of circumstances where U.S. federal courts will not recognize foreign sovereign immunity. In these circumstances, U.S. courts may exercise jurisdiction over a dispute and treat a foreign state as if it were a private entity.

Id.; see Amy Howe, *Opinion Analysis: Court Upholds Narrow Construction of Foreign Immunity Law in Terrorism Case*, SCOTUSBLOG (Feb. 21, 2018, 2:14 PM), <https://www.scotusblog.com/2018/02/opinion-analysis-court-upholds-narrow-construction-foreign-immunity-law-terrorism-case/> [<https://perma.cc/6VB2-WNCM>] (processing case history of FSIA terrorism exception case).

³ 891 F.3d 6 (1st Cir. 2018).

killing of a United States citizen that Cuba allegedly committed.⁴ The First Circuit held that the previous default judgment against Cuba for allegedly committing the extrajudicial killing lacked subject matter jurisdiction, and could not be enforced.⁵

In October 1963, Geoffrey Sullivan, who served in the United States Air Force and the Army National Guard, disappeared.⁶ This prompted his daughter, Sherry Sullivan (“Sullivan”) to attempt to uncover what happened to her father by gathering evidence pertaining to his disappearance.⁷ Sullivan concluded that during a mission against Cuba, her father was captured, imprisoned, and later died in custody.⁸ This provoked Sullivan to sue the

⁴ See 28 U.S.C. § 1605A(a)(1) (2008) (providing terrorism exception to jurisdictional immunity of foreign states).

A foreign state shall not be immune from the jurisdiction of courts of the United States . . . which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, [or] extrajudicial killing . . . 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.

Id.; see *Sullivan*, 891 F.3d at 11–12 (finding that terrorism exception does not apply); see also Ruthanne M. Deutsch, *Suing State-Sponsors of Terrorism Under the Foreign Sovereign Immunities Act: Giving Life to the Jurisdictional Grant After Cicippio-Puleo*, 38 INT’L LAWYER 891, 891 (2004), available at <https://scholar.smu.edu/cgi/viewcontent.cgi?article=2307&context=til> [<https://perma.cc/HU9R-MQQC>] (explaining option to sue foreign states after acts of terrorism). “In 1996, Congress enacted legislation to allow American citizens harmed by terrorist acts to use the U.S. courts to seek money damages from the responsible state sponsors of terrorism.” Deutsch, *supra* note 4, at 891.

⁵ See *Sullivan*, 891 F.3d at 10 (affirming dismissal of action). Sullivan failed to prove that Cuba was not immune to the action. *Id.* at 9. If a FSIA exception does not apply, the foreign state will be immune from any lawsuits because the exceptions present the only basis to get jurisdiction over a foreign sovereign. *Id.* (citing *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993); *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 443 (1989)).

⁶ See *Sullivan v. Republic of Cuba*, 289 F. Supp. 3d 231, 233 (D. Me. 2017), *aff’d* 891 F.3d 6 (1st Cir. 2018) (explaining Geoffrey Sullivan’s past).

⁷ See *Sullivan*, 891 F.3d at 8 (stating plaintiff’s research). Sullivan discovered the timeline of her father’s death by “contacting dozens of federal agencies and officials and filing a Freedom of Information Act (“FOIA”) request.” *Id.* (internal quotation marks omitted). Sullivan also had evidence that her father died in 1982 while in the custody of the Cuban government, which was a significant time later than his disappearance date in October 1963. *Id.* at 7–8.

⁸ See *Sullivan*, 289 F. Supp. 3d at 234 (describing evidence revealing Geoffrey Sullivan was shot down and imprisoned in Cuba). The evidence presented included: (1) a variety of reports stating that someone resembling Geoffrey Sullivan was taken aboard a Cuban vessel; (2) United States Department of State records describing rumors from Cuban refugees that Geoffrey Sullivan crashed his plane near Cuba; (3) reports from Americans who were imprisoned in Cuba stating that the name Sullivan sounded familiar; (4) a report from an American pilot stating he was detained in Cuba next to an American claiming to be “Mr. Sullivan” who was detained for “almost ten years;” (5) a radio talk show report detailing that Geoffrey Sullivan was engaged in combat with a Cuban governmental aircraft when he was shot down; (6) a previously imprisoned Cuban émigré statement

defendant, the Republic of Cuba (“Cuba”), in 2007 for wrongful death.⁹ Despite being properly served, Cuba did not appear in Maine Superior Court, and Sullivan was subsequently awarded “\$21 million in damages for loss of support, severe emotional distress, and damages to her father’s estate, including compensation for his pain and suffering.”¹⁰

Despite the judgment, Sullivan was unable to collect any of her awarded damages from Cuba and sought to enforce the default judgment in the United States District Court for the District of Maine.¹¹ The federal district court asked Sullivan to determine if there was proper subject matter jurisdiction for the original action and to provide sufficient evidence of the extrajudicial killing.¹² After hearing Sullivan’s arguments, the court denied the motion for default judgment, dismissed the case for lack of subject matter jurisdiction, and found that Geoffrey Sullivan was not extrajudicially killed by Cuba.¹³

to the FBI and CIA that an American had been at a prison hospital seeking treatment for burns after the time of Geoffrey Sullivan’s disappearance; and (7) two previously imprisoned Cuban Americans statements describing that there was a prisoner named “Sullivan” in 1991. *Id.*

⁹ See *Sullivan*, 891 F.3d at 7 (explaining initial suit brought by plaintiff in Maine Superior Court). The state court claimed to have subject matter jurisdiction because it concluded that Cuba did not have immunity from the case as it committed an extrajudicial killing, which falls under the terrorism exception of the FSIA. *Id.* at 8. The state court also found that Sullivan could be entitled to damages because she is “the successor to, heir to and guardian of her father’s estate.” *Id.* (quoting *Sullivan*, 289 F. Supp. 3d at 233).

¹⁰ See *Sullivan*, 891 F.3d at 8 (describing outcome of wrongful death suit). The Maine Superior Court agreed with the proposed facts and legal conclusions presented by Sullivan regarding the background information of her father’s disappearance. *Id.* On August 10, 2009, the Maine Superior Court entered a default judgment for Sullivan. *Id.* Before Sullivan was awarded damages, a hearing was conducted in which Cuba again did not appear for, prompting the Maine Superior Court to award Sullivan the damages. *Id.*

¹¹ See *id.* at 8–9 (outlining process Sullivan took after damages were awarded). On June 21, 2016, Sullivan filed suit to enforce the default judgment, however, despite being properly served, Cuba again failed to appear. *Id.* Sullivan moved for entry of default on May 12, 2017. *Id.*

¹² See *id.* at 9 (interpreting district court’s concern about validity of default judgment). A hearing was scheduled on August 28, 2017 for the district court to analyze Sullivan’s arguments. *Id.*

¹³ See *id.* (explaining why case was without merit). At the August 28, 2017 hearing, Sullivan attempted to support her case by presenting herself and an attorney as a witness, in addition to several exhibits. *Id.* Such exhibits included a letter from Sullivan’s mother providing information that Geoffrey Sullivan was in a plane crash and later imprisoned in Cuba, “second- and third-hand reports” of Geoffrey Sullivan allegedly being in Cuban prisons, notes from the show *Unsolved Mysteries* regarding Geoffrey Sullivan’s disappearance, and other governmental documents which confirmed Geoffrey Sullivan’s disappearance. *Id.* (citing *Sullivan v. Republic of Cuba*, 289 F. Supp. 3d 231, 237–38 (D. Me. 2017), *aff’d* 891 F.3d 6 (1st Cir. 2018) (internal quotation marks omitted)). Despite the evidence, the district court found it lacked subject matter jurisdiction to hear the case because Sullivan failed to support her argument that the terrorism exception to the Foreign Sovereign Immunities Act applied. *Sullivan*, 289 F. Supp. 3d at 244.

In 1976, the Foreign Sovereign Immunities Act set the legal standard for foreign state immunity in civil actions.¹⁴ As a result of this immunity, plaintiffs are forced to find an exception that will allow them to sue a foreign sovereign nation.¹⁵ In 2008, Congress amended the FSIA to add the terrorism exception, which gave plaintiffs a greater opportunity to sue foreign states.¹⁶ However, for a court to hear a claim under the terrorism exception, the state being sued must be a state sponsor of terrorism at the time of the specific act or when the claim was filed.¹⁷ Thus, if a plaintiff is

¹⁴ See 28 U.S.C. § 1604 (1976) (setting immunity standard for foreign sovereigns); see also *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488–89 (1983) (explaining purpose of Foreign Sovereign Immunities Act). The Act was passed “to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to [assure] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process . . .” (alteration in original) (internal quotation marks omitted). *Verlinden B.V.*, 461 U.S. at 488. If, however, an exception under 28 U.S.C. § 1605 or 28 U.S.C. § 1607 applies, the foreign sovereign might not be immune from legal actions. *Id.*

A foreign state is normally immune from the jurisdiction of federal and state courts . . . subject to a set of exceptions specified in §§1605 and 1607. Those exceptions include actions in which the foreign state has explicitly or impliedly waived its immunity . . . and actions based upon commercial activities of the foreign sovereign carried on in the United States or causing a direct effect in the United States When one of these or the other specified exceptions applies, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.

Id. at 488–89 (citations omitted) (internal quotation marks omitted).

¹⁵ See 28 U.S.C. § 1604 (providing exceptions in sections 1605 to 1607); see also *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 439 (1989) (detailing certain exceptions that may apply to sovereign immunity). “[T]he FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court . . .” *Argentine Republic*, 488 U.S. at 443 (Blackmun, J., concurring).

[T]he exceptions enumerated in the Act . . . include cases involving the waiver of immunity, § 1605(a)(1), commercial activities occurring in the United States or causing a direct effect in this country, § 1605(a)(2), property expropriated in violation of international law, § 1605(a)(3), inherited, gift, or immovable property located in the United States, § 1605(a)(4), noncommercial torts occurring in the United States, § 1605(a)(5), and maritime liens, § 1605(b).

Id. at 439; see *Saudi Arabia v. Nelson*, 507 U.S. 349, 363 (1993) (rejecting respondent’s action to sue Saudi Arabia as FSIA did not confer jurisdiction over suit). The Court found that the tortious acts that the plaintiff allegedly sustained did not qualify under the Act’s commercial activity exception. *Nelson*, 507 U.S. at 358.

¹⁶ See 28 U.S.C. § 1605A(a)(1) (2008) (outlining terrorism exception to jurisdictional immunity of foreign state); see also David P. Stewart, *The Foreign Sovereign Immunities Act: A Guide for Judges*, FED. JUD. CTR. INT’L LITIG. GUIDE, 81 (2013), <https://www.fjc.gov/sites/default/files/2014/FSIAGuide2013.pdf> [<https://perma.cc/BW5Q-9ZEJ>] (explaining increase of cases, especially those against Cuba, after adoption of exception).

¹⁷ See 28 U.S.C. § 1605A(a)(2)(A)(i)(I) (deciding when terrorism exception applies).

arguing that an extrajudicial killing occurred, the requisite elements for an extrajudicial killing must first be proven.¹⁸ Then, the plaintiff must also prove that the state committed the killing when it was a state sponsor of terrorism.¹⁹

It is not uncommon for a foreign sovereign to be sued in a United States court, fail to appear despite being properly served, and have a default

The court shall hear a claim under this section if the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section.

Id.; see also *Kim v. Democratic People's Republic of Korea*, 774 F.3d 1044, 1048 (D.C. Cir. 2014) (“Congress aimed to prevent state sponsors of terrorism . . . from escaping liability for their sins”); *State Sponsors of Terrorism*, U.S. DEP'T OF ST., <https://www.state.gov/j/ct/list/c14151.htm> (last visited Mar. 20, 2019) [<https://perma.cc/YK6Q-TDYY>] (listing state sponsors of terrorism). Currently, North Korea, Iran, Sudan, and Syria, are the only state sponsors of terrorism. *State Sponsors of Terrorism*, *supra* note 17.

¹⁸ See 28 U.S.C. § 1605A(h)(7) (stating extrajudicial killing definition is codified in Torture Victim Protection Act of 1991); Torture Victim Protection Act of 1991 § 3, 28 U.S.C. § 1350 (1992) (defining extrajudicial killing).

[T]he term extrajudicial killing means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

28 U.S.C. § 1350 (internal quotations omitted). See *Kim*, 774 F.3d at 1050–51 (explaining need for evidence of extrajudicial killings). “Maltreatment is actionable under the FSIA only if purposeful and particularly harsh and that killings are prohibited only if they occur outside the limits of the normal legal process.” *Id.* at 1050. Thus, a plaintiff needs to show sufficient evidence that the killing was done by the government without a formal legal process. *Id.* at 1051; see also *Mamani v. Berzain*, 654 F.3d 1148, 1155 (11th Cir. 2011) (finding no showing of extrajudicial killing). Plaintiffs must produce sufficient facts that the killing was deliberately committed by the government. *Mamani*, 654 F.3d at 1155; see also *Shoham v. Islamic Republic of Iran*, No. 12-cv-508, 2017 U.S. Dist. LEXIS 84119, at *34–37 (D.D.C. June 1, 2017) (finding Iran not entitled to sovereign immunity as rock throwing was deemed as extrajudicial killing).

¹⁹ See 28 U.S.C. § 1605A(a)(2)(A)(i)(I) (approved Nov. 8, 2019) (requiring state sponsor of terrorism); see also Krishnadev Calamur, *Who's On the List of State Sponsors of Terrorism, and Why*, NPR (Apr. 15, 2015, 12:26 PM), <https://www.npr.org/sections/thetwo-way/2015/04/15/399809412/whos-on-the-list-of-state-sponsors-of-terrorism-and-why> [<https://perma.cc/8LJH-LZZ5>] (discussing nations considered state sponsors of terrorism and rationale for why they are listed). In 2015, President Obama removed Cuba as a state sponsor of terrorism. Calamur, *supra* note 19. “Cuba was previously accused by the State Department of being a safe haven for armed left-wing groups from Columbia and Spain . . . there was no indication that the Cuban government provided weapons or paramilitary training to terrorist groups.” *Id.* (internal quotation marks omitted).

judgment entered against them.²⁰ Whereas a default judgment might seem like an agreeable outcome to the plaintiff, it actually requires the federal court to inspect the claim for jurisdiction before attempting to seek the default judgment.²¹ For that reason, courts always have to determine if jurisdiction is proper, and if the claim is being enforced against a foreign sovereign under the terrorism exception of the FSIA, the court must determine if that exception even applies.²² Despite the fact that a default

²⁰ See FED. R. CIV. P. 55(b)(1) (entailing default judgment); see e.g. *Vera v. Republic of Cuba*, 91 F. Supp. 3d 561, 563 (S.D.N.Y. 2015) (noting prior default judgments granted to plaintiffs); *McCarthy v. Republic of Cuba*, 354 F. Supp. 2d 1347, 1347-48 (S.D. Fla. 2005) (granting default judgment on sixty-seven million dollar award for plaintiff whose husband was extrajudicially killed); *Colvin v. Syrian Arab Republic*, 363 F. Supp. 3d 141, 146 (D.D.C. 2019) (understanding default judgment entered against Syria for failing to appear); see also Laurel Pyke Malson et al., *The Foreign Sovereign Immunities Act: 2009 Year in Review*, CROWELL & MORING LLP, 36 (2010), <https://www.crowell.com/files/The-Foreign-Sovereign-Immunities-Act-2009-Year-in-Review.pdf> [<https://perma.cc/CBF6-96TD>] (explaining reasoning behind courts granting default judgments). Default judgments “are not uncommon in foreign sovereign litigation, as foreign states often choose to ignore claims asserted against them in U.S. courts, for political, economic, practical, or other reasons.” *Malson, supra* note 20.

²¹ See *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 287 (2d Cir. 2011) (requiring courts to consider subject matter jurisdiction sua sponte); see also *Coll. Standard Magazine v. Student Ass’n of State Univ. of N.Y.*, 610 F.3d 33, 35 (2d Cir. 2010) (refusing to grant relief if there is lack of jurisdiction); *Hawley v. Murphy*, 736 A.2d 268, 271 (Me. 1999) (finding default judgment may not be enforced if court does not have jurisdiction). “[A]n entry of default against an individual does not serve as a bar to that individual’s right to challenge the subject matter jurisdiction of the court.” *Hawley*, 736 A.2d at 271.

²² See 28 U.S.C. § 1330(a) (1976) (authorizing courts to have jurisdiction against foreign states).

The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title [28 USCS § 1603(a)] as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title [28 USCS §§ 1605-1607] or under any applicable international agreement.

Id. (alteration in original); see *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 489 (1983) (explaining 28 U.S.C. § 1330(a) with relation to FSIA). The FSIA allows suits to be brought against foreign sovereigns in either state or federal court. *Verlinden B.V.*, 461 U.S. at 489.

[FSIA] guarantees foreign states the right to remove any civil action from a state court to a federal court The Act also provides that any claim permitted under the Act may be brought from the outset in federal court. If one of the specified exceptions to sovereign immunity applies, a federal district court may exercise subject-matter jurisdiction under § 1330(a); but if the claim does not fall within one of the exceptions, federal courts lack subject-matter jurisdiction. In such a case, the foreign state is also ensured immunity from the jurisdiction of state courts by § 1604.

Id.; see *Mwani v. Bin Laden*, 417 F.3d 1, 15 (D.C. Cir. 2005) (reasoning if no statutory exception applies then court does not have subject matter jurisdiction).

judgment was already awarded, the plaintiff will not have standing if the court does not have subject matter jurisdiction.²³ If a defendant would like to remove the default judgment, they have to argue to set the entry of default aside.²⁴ In addition to the jurisdiction requirement, under the FSIA, a default judgment will not be granted unless the plaintiff presents satisfactory evidence to support their claim or right to relief.²⁵

²³ See case cited *supra* note 21 and accompanying text (discussing need to inspect claims for jurisdiction); see also *Vera*, 867 F.3d at 320 (concluding that Full Faith and Credit Act does not establish jurisdiction under § 1331(a)); *Espinal-Dominguez v. Puerto Rico*, 352 F.3d 490, 495 (1st Cir. 2003) (“[F]ederal courts are powerless to act in the absence of subject matter jurisdiction . . .”).

²⁴ See Mary Kay Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 STAN. L. REV. 385, 395 (1982) (stating requirements for defendants who want to set aside entry of default).

[F]our elements support a showing of good cause: (1) there is some excuse for allowing the default; (2) a meritorious defense to the action exists; (3) the plaintiff will not be seriously prejudiced if the default is set aside; and (4) the motion was made promptly upon learning of the default entry.

Id.

²⁵ See 28 U.S.C. § 1608(e) (1976) (prohibiting default judgment unless claimant establishes right to relief); see also *Owens v. Republic of Sudan*, 864 F.3d 751, 785 (D.C. Cir. 2017) (providing evidence standard similar to Fed. R. Civ. P. 55(d)). “A default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court.” FED. R. CIV. P. 55(d). The *Owens* court reasoned that a “lenient standard is particularly appropriate for a FSIA terrorism case, for which firsthand evidence and eyewitness testimony is difficult or impossible to obtain from an absent and likely hostile sovereign.” 864 F.3d at 785; see *Lasheen v. Embassy of the Arab Republic of Egypt*, 625 Fed. App’x 338, 340 (9th Cir. 2015) (finding no abuse of discretion in entering default judgment because evidence was satisfactory); *Kim v. Democratic People’s Republic of Korea*, 774 F.3d 1044, 1046 (D.C. Cir. 2014) (reconciling unclear standard of what quality of evidence must be produced); *Compania Interamericana Exp.-Imp., S.A. v. Compania Dominicana de Aviacion*, 88 F.3d 948, 951 (11th Cir. 1996) (“[E]stablish entitlement to relief by providing satisfactory evidence as to each element of the claims upon which relief was sought”); *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 242 (2d Cir. 1994) (reasoning plaintiff’s allegations should be supported by evidence but no evidentiary hearing requirement); *Alameda v. Sec’y of Health, Educ. & Welfare*, 622 F.2d 1044, 1048 (1st Cir. 1980) (“the quantum and quality of evidence that might satisfy a court can be less than that normally required.”); but cf. *Clodfelter v. Republic of Sudan*, 720 F.3d 199, 210 (4th Cir. 2013) (differentiating from custom of analyzing plaintiff’s *prima facie* case for satisfactory evidence). “[A] district court may properly take a close look at a plaintiff’s case” when determining if the plaintiff met the satisfactory evidence burden. *Clodfelter*, 720 F.3d at 210; see *Saludes v. Republica de Cuba*, 577 F. Supp. 2d 1243, 1246 (S.D. Fla. 2008) (allowing courts to accept plaintiff’s “uncontroverted evidence” to establish claim of relief against foreign states); Joseph M. Terry, Comment, *Jurisdictional Discovery Under the Foreign Sovereign Immunities Act*, 66 U. CHI. L. REV. 1029, 1042 (1999) (explaining high evidentiary burden is difficult for plaintiff’s to prove statutory exceptions apply). “Plaintiffs are often unable to prove an exception to the FSIA without significant discovery. Proof of an exception to immunity is highly fact dependent and may require evidence that is in the exclusive possession of defendants.” Terry, *supra* note 25, at 1042.

Judgments might not be enforced in federal court despite the Full Faith and Credit Clause of the United States Constitution.²⁶ The Full Faith and Credit Clause will not bind a federal court to a state court's finding of jurisdiction.²⁷ For example, if a state court did not have subject matter jurisdiction when entering a default judgment, the federal court will not enforce the judgment.²⁸

In *Sullivan v. Republic of Cuba*, the court affirmed the dismissal of the action because Sullivan did not sufficiently prove that Cuba's conduct fell under the FSIA terrorism exception, resulting in a lack of jurisdiction over Cuba.²⁹ However, the court assumed *arguendo*, that the Full Faith and

²⁶ See U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."); see also *Nevada v. Hall*, 440 U.S. 410, 421 (1979) ("A judgment entered in one State must be respected in another provided that the first State had jurisdiction over the parties and the subject matter."); *V.L. v. E.L.*, 136 S. Ct. 1017, 1020 (2016) (analyzing when states can and cannot abide by Full Faith and Credit Clause).

²⁷ See *Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n.*, 455 U.S. 691, 705 (1982) (requiring inquiry into jurisdiction standing of court's judgment). "[B]efore a court is bound by the judgment rendered in another State, it may inquire into the jurisdiction basis of the foreign court's decree. If that court did not have jurisdiction over the subject matter or the relevant parties, full faith and credit need not be given." *Id.*; see also *Durfee v. Duke*, 375 U.S. 106, 110 (1963) ("[A] judgment of a court in one State is conclusive upon the merits in a court in another State only if the court in the first State had power to pass on the merits – had jurisdiction, that is, to render the judgment."); *Vera*, 867 F.3d at 320 (rejecting argument that Full Faith and Credit Act establishes jurisdiction under § 1331(a)).

[T]he Full Faith and Credit Act, which requires state court judgments to receive the same credit, validity, and effect in every other court in the United States, has no bearing on the question of whether a district court has subject matter jurisdiction to hear a claim . . . [A]n attempt to obtain a federal judgment on the strength of a state court judgment is not a case arising under the Constitution, laws, or treaties of the United States that would trigger federal question jurisdiction.

Vera, 867 F.3d at 320 (citation omitted).

²⁸ See *Jerez v. Republic of Cuba*, 775 F.3d 419, 422 (D.C. Cir. 2014) ("[A] court asked to enforce a default judgment must entertain an attack on the jurisdiction of the court that issued the judgment. If it finds that the issuing court lacked jurisdiction, it must vacate the judgment."); see also *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1181 (D.C. Cir. 2013) ("A judgment remains void even after final judgment if the issuing court lacked subject-matter jurisdiction, regardless of whether there existed an 'arguable basis' for jurisdiction.").

²⁹ See *Sullivan v. Republic of Cuba*, 891 F.3d 6, 9 (1st Cir. 2018) ("The Republic of Cuba is presumptively immune from suit unless Sullivan can prove that its alleged conduct falls under one of the exceptions specified in the FSIA.").

Sullivan argues that the district court erred in dismissing her complaint because the Maine Superior Court had expressly found that the terrorism exception to the FSIA applies to the alleged extrajudicial killing of her father. Sullivan asserts that by "'looking behind' the factual findings of the Maine Judgment and determining . . . that there was no evidence of an extra-judicial killing," the district court violated the Full Faith and Credit Act ("FFCA") . . . which requires "judicial proceedings" to be given "the same

Credit Clause applied and the district court's finding of subject matter jurisdiction under FSIA was valid.³⁰ Through its analysis, the court explained that the dismissal of the case was proper under the FSIA for lack of subject matter jurisdiction.³¹ As a result of its reasoning, the court found that Sullivan produced insufficient evidence to establish that the FSIA terrorism exception applied.³² The court even refused to lower the high

full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." We find no error and affirm the dismissal of this action.

Id. at 9–10 (alterations in original) (internal citation omitted); see *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989) (explaining how FSIA provides jurisdiction to sue foreign states in U.S. courts). "[The FSIA] provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country . . ." *Argentine Republic*, 488 U.S. at 443.

³⁰ See *Sullivan*, 891 F.3d at 10 (attempting to find valid argument that district court had proper jurisdiction). The court asserted that Sullivan's best argument was that full faith and credit must be given because Maine Superior Court awarded her a default judgment. *Id.* This argument, however, would still fail because default judgments can be attacked on the grounds of subject matter jurisdiction. *Id.* The court also relied on Me. R. Civ. P. 12(h)(3) which states, "[w]henver it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." *Id.* As a result, "even if the Maine Superior Court's default judgment were to be accorded full faith and credit, a federal court would not be precluded from determining, de novo, whether the state court had subject matter jurisdiction to enter that judgment." *Id.* The court used the decisions in *Vera* and *Underwriters National Assurance Co.*, to find that when a matter is being brought under the FSIA, "as a matter of federal law, the FFCA [Full Faith and Credit Act] does not apply to default judgments rendered in excess of the court's subject matter jurisdiction." *Id.*; see *Underwriters Nat'l Assurance Co.*, 455 U.S. at 705 (requiring inquiry into jurisdictional basis of judgments). "If that court did not have jurisdiction over the subject matter . . . full faith and credit need not be given." *Sullivan*, 891 F.3d at 10 (citing *Underwriters Nat'l Assurance Co.*, 455 U.S. at 705); see *Vera*, 867 F.3d at 321 (discussing proper subject matter jurisdiction). As a result, the *Sullivan* court held that the federal district court is permitted to "independently review whether Sullivan's case fell within the terrorism exception to the FSIA," allowing it to determine if jurisdiction is valid. 891 F.3d at 10.

³¹ See *Sullivan*, 891 F.3d at 11 (determining whether dismissal was proper). The court reviewed "the district court's findings of fact for clear error and its legal conclusions de novo." *Id.* Acts of terrorism, i.e. extrajudicial killings, allow plaintiffs to sue foreign states under the terrorism exception of FSIA if sufficient evidence is presented. *Id.* The court held the dismissal of the case for lack of subject matter jurisdiction was proper as the application of the terrorism exception was not sufficiently proven. *Id.* at 8.

³² See *id.* at 11 (describing evidence required to prove extrajudicial killing). However, Sullivan must prove that Cuba extrajudicially killed her father and that Cuba was a state sponsor of terrorism. *Id.* The court inferred that the evidence Sullivan produced, at best, showed that her father was captured and incarcerated by Cuba, not killed. *Id.* The Maine Superior Court erred in awarding default judgment despite no evidence of a deliberate killing, which it was not authorized to do under the FSIA or the Torture Victim Protection Act. *Id.* Further, Cuba was not even designated as a state sponsor of terrorism in 1963, which was when Geoffrey Sullivan was legally declared dead by the United States Social Security Administration. *Id.* at 8.

evidentiary standard of proving an extrajudicial killing to award Sullivan damages.³³

Despite the unfair outcome to Sullivan, the court appropriately resolved the issue at bar by applying existing case precedent.³⁴ When applying the two-prong test to determine if the terrorism exception to the FSIA applied, the court correctly held that Sullivan did not produce sufficient evidence to find that Cuba extrajudicially killed her father.³⁵ As a result, the court properly dismissed the case for lack of subject matter jurisdiction and held that it was not bound by the Full Faith and Credit Act.³⁶ While it is

³³ See *id.* at 12 (finding lack of subject matter jurisdiction as terrorism exception does not apply). The court rejected Sullivan's suggestion to lower the evidentiary standard of producing evidence that an extrajudicial killing occurred. *Id.* at 11. The court stated Sullivan misread *Kim*, which supported a more lenient evidentiary standard. *Id.* The *Kim* court stated, "[r]equiring a plaintiff to produce direct, first-hand evidence of the victim's torture and murder would . . . thwart the purpose of the terrorism exception: holding state sponsors of terrorism accountable for torture and extrajudicial killing." *Kim v. Democratic People's Republic of Korea*, 774 F.3d 1044, 1045 (D.C. Cir. 2014). The *Sullivan* court found that even though Sullivan was not required to produce direct firsthand evidence that her father was murdered, she still did not produce enough evidence. 891 F.3d at 12. "Sullivan failed to provide any evidence, circumstantial or otherwise, that the Cuban government killed her father after keeping him incarcerated for at least twenty years, let alone that Cuba acted extrajudicially." *Id.*

³⁴ See *Sullivan*, 891 F.3d at 11–12 (dismissing suit for lack of subject matter jurisdiction); see also *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989) (providing that jurisdiction over foreign sovereign is only proper under FSIA); *Vera*, 867 F.3d at 320 (determining jurisdiction is still required when enforcing state judgment); *Jerez v. Republic of Cuba*, 775 F.3d 419, 422–23 (D.C. Cir. 2014) (clarifying full faith and credit is not binding on federal courts regarding determination of jurisdiction); *Kim*, 774 F.3d at 1050–51 (requiring some type of evidence supporting foreign sovereign killing of another without due process); *Mamani v. Berzain*, 654 F.3d 1148, 1155 (11th Cir. 2011) (relying on deliberate, not accidental, evidence for extrajudicial killing); *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 287 (2d Cir. 2011) (explaining court requirement to always evaluate whether subject matter jurisdiction is proper).

³⁵ See *Sullivan*, 891 F.3d at 11–12 (holding that claim will fail without showing of sufficient evidence that exception applies); see also *Owens v. Republic of Sudan*, 864 F.3d 751, 779 (D.C. Cir. 2017) (allowing default judgment only if claimant establishes evidence satisfying to court); *Lasheen v. Embassy of The Arab Republic of Egypt*, 625 F. App'x 338, 340 (9th Cir. 2015) (allowing default judgment as plaintiff alleged satisfactory evidence); *Kim*, 774 F.3d at 1050–51 (recognizing evidence supporting allegation that extrajudicial killing was committed); *Mamani*, 654 F.3d at 1155 (requiring evidence of intentional extrajudicial killing); *Compania Interamericana Exp.-Imp., S.A. v. Compania Dominicana de Aviacion*, 88 F.3d 948, 951 (11th Cir. 1996) (mandating satisfactory evidence for each wanted relief); *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 242 (2d Cir. 1994) (requiring allegations to be supported by evidence); *Saludes v. Republica de Cuba*, 577 F. Supp. 2d 1243, 1246 (S.D. Fla. 2008) (permitting affidavit as partial proof of plaintiff's evidence).

³⁶ See *Sullivan*, 891 F.3d at 12 (dismissing case for lack of subject matter jurisdiction); see also *Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n.*, 455 U.S. 691, 705 (1982) (allowing courts to not award Full Faith and Credit if prior court was without jurisdiction); *Vera*, 867 F.3d at 320 (refusing to apply Full Faith and Credit Act if jurisdiction is

unfortunate that Sullivan did not obtain relief for her father's death, there must be a standard to hold a foreign sovereign accountable for alleged horrendous acts.³⁷

The crux of this case turned on whether there was sufficient evidence of the extrajudicial killing that warranted Sullivan to be awarded the default judgment.³⁸ This is because the only way for a United States court to have jurisdiction over Cuba is for Sullivan to produce sufficient evidence that her father was extrajudicially killed, as required under the terrorism exception of the FSIA.³⁹ The court relied on precedent to determine if the evidence was sufficient and held that the evidence produced was inadequate to show Geoffrey Sullivan was killed by Cuba, because it merely speculated how he died and did not prove that Cuba actually caused his death.⁴⁰ This

not proper); *Jerez*, 775 F.3d at 423 (determining default judgments are not bound by Full Faith and Credit Act if improper jurisdiction); *Hawley v. Murphy*, 736 A.2d 268, 271 (Me. 1999) (finding no bar to subject matter jurisdiction challenge despite default judgment entered).

³⁷ See § 1605A(a)(1) (holding foreign states accountable for acts of extrajudicial killings); see also *Sullivan*, 891 F.3d at 7–8 (describing Sullivan's struggle to learn what happened to her father). “[Sullivan] has . . . dedicated much of her life to discovering the truth about [her father's] disappearance, including contacting dozens of federal agencies and officials and filing a Freedom of Information Act . . . request.” *Sullivan*, 891 F.3d at 7–8 (internal quotation omitted). The court required Sullivan to meet the test under § 1605A(a)(1). *Id.* at 11. It expected Sullivan to show proof “that (1) Cuba committed an ‘extrajudicial killing,’ which is defined . . . as ‘a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court,’ and that (2) Cuba was ‘designated as a state sponsor of terrorism at the time the [extrajudicial killing] occurred’” *Id.* (citations omitted) (alteration in original).

³⁸ See *Sullivan*, 891 F.3d at 9 (reviewing federal district court's holding). The court found that Sullivan failed to provide evidence that proved Geoffrey Sullivan was killed deliberately by Cuba. *Id.* at 11. The court found “[t]he record . . . empty of ‘any evidence that [Sullivan's] father was the victim of an intentional killing by Cuba and that any such killing was committed in the absence of legal process.’” *Id.* (quoting *Sullivan v. Republic of Cuba*, 289 F. Supp. 3d 231, 244 (D. Me. 2017), *aff'd* 891 F.3d 6 (1st Cir. 2018)) (alteration in original).

³⁹ See *Sullivan*, 289 F. Supp. 3d at 244–45 (concluding insufficient evidence presented to apply terrorism exception). The court found that, “[e]ven accepting as true Sullivan's uncontroverted evidence, which is mired in multiple levels of hearsay and often relies on speculation, she has shown, at best, that her father was incarcerated in Cuba after the date when Cuba was placed on the state sponsors of terrorism list. *Id.*; see *Deutsch*, *supra* note 4, at 903 (describing process of determining liability under FSIA). “First, plaintiffs must satisfy the jurisdictional prerequisite by establishing that the conditions of one of the relevant exceptions to foreign sovereign immunity are met. Second, liability must be proven for the specific relief that is sought” *Deutsch*, *supra* note 4, at 903.

⁴⁰ See *Sullivan*, 289 F. Supp. 3d at 243–44 (comparing Sullivan's evidence to precedent). The court states that an error occurs when there is a “clearly erroneous factual finding” and such factual finding is relied upon, as in *Vera*. *Id.* at 243 (citing *Vera*, 867 F.3d at 317). The court also permits a somewhat “lenient” approach when determining if evidence is sufficient for the terrorism exception of FSIA, but it cannot be too lenient. *Id.* at 244.

In *Han Kim v. Democratic People's Republic of Korea* . . . [i]n determining that the plaintiffs had presented sufficient evidence to support their claim, the appeals court

requirement is at an appropriate threshold because it would be unfair to sue foreign sovereigns for acts that cannot be supported by sufficient evidence.⁴¹

The court's decision may have an effect on future cases, as any prospective plaintiff (1) must ensure that they have sufficient evidence to prove an extrajudicial killing occurred, and (2) that the accused country is a state sponsor of terrorism.⁴² If Sullivan appealed this to the Supreme Court, she would have needed to locate additional evidence that supported her argument that Cuba extrajudicially killed her father during the time Cuba was a state sponsor of terrorism.⁴³ Thus, despite the difficulty in finding

stated that evidentiary standards must necessarily be relaxed where a foreign sovereign like North Korea has "made [the victim] unavailable to testify on his own behalf, refused to appear in court and subject itself to discovery, and is known to intimidate defectors and potential witnesses."

Id. (quoting *Kim*, 774 F.3d at 1048) (second alteration in original). The *Sullivan* court further determined that the plaintiffs in *Kim* presented "circumstantial evidence that their relative had been tortured and killed," while Sullivan did not do so. 289 F. Supp. 3d at 234. Sullivan only produced evidence that Geoffrey Sullivan "was shot down over Cuba," and was "imprisoned by the Castro regime." *Id.*

⁴¹ See *Sullivan*, 289 F. Supp. 3d at 245 (stating Sullivan's failure to provide sufficient evidence of extrajudicial killing).

[S]ullivan's failure to present any evidence that her father was extrajudicially killed by Cuba would mean that she has failed to "establish her claim or right to relief by evidence satisfactory to the court." This Court recognizes that some degree of leniency in assessing evidentiary burdens is warranted in a situation, such as this one, in which a plaintiff has understandable difficulty getting information out of a secretive and hostile nation.

Id. (original alterations omitted) (citation omitted); see also *Howe*, *supra* note 2 (explaining difficulty on winning claim under FSIA's terrorism exception); *but cf.* *Terry*, *supra* note 25, at 1055–56 (providing alternative for plaintiffs to produce sufficient evidence). Providing that plaintiffs should be required to prove "some . . . evidence exists" and that through discovery, more evidence will be found and will make it easier for the plaintiff to establish their case. *Terry*, *supra* note 25, at 1056.

⁴² See *Sullivan*, 289 F. Supp. 3d at 237–39 (explaining evidence that was later deemed insufficient). The court emphasized that the second and third-hand reports, the heavily redacted government documents, and a Social Security Administration document declaring Geoffrey Sullivan dead in 1963, was not sufficient to meet the threshold needed to prove that Cuba extrajudicially killed him. *Id.*; see also *Elsa*, *supra* note 2, at 2 (describing difficulty of success against designated State sponsors of terrorism); *Howe*, *supra* note 2 (explaining Supreme Court denial to be lenient with FSIA terrorism exception); *Calamur*, *supra* note 19 (explaining why Cuba was removed from state sponsor of terrorism list).

⁴³ See *Sullivan*, 289 F. Supp. 3d at 245–46 (stating court cannot find extrajudicial killing with evidence presented). "[T]he record before this Court lacks any evidence . . . that Geoffrey Sullivan was deliberately subjected to poor conditions that caused his death. Nor can this Court simply infer from his detention that Geoffrey Sullivan was killed in the absence of legal process." *Id.* Sullivan would need to find evidence that Geoffrey Sullivan was killed by Cuba when Cuba was a designated state sponsor of terrorism in 1982. *Sullivan*, 891 F.3d at 11.

sufficient evidence to prove a foreign sovereign committed an extrajudicial killing, this decision will help future plaintiffs gauge how much evidence is sufficient to be awarded judgment under the FSIA terrorism exception.⁴⁴

Sufficient evidence must be presented to establish that a sovereign nation extrajudicially killed a United States citizen. Without such evidence, courts will not have the proper subject matter jurisdiction to enforce judgments against sovereign states. The *Sullivan* court correctly found that the FSIA and its exceptions do not provide subject matter jurisdiction over Cuba. Despite the high standard of evidence required, it is justifiable to hold proper sovereigns accountable for their actions when there is adequate proof.

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⁴⁴ See Malson, *supra* note 20, at 37 (discussing difficulty foreign sovereigns have in overturning default judgments); see also Kane, *supra* note 24, at 415 (criticizing plaintiff and defendant burdens of proof).

Congress envisioned a more complex scheme in which the foreign state merely has the burden to produce prima facie evidence of immunity . . . [and] the plaintiff must show that the state's activities fall into one of the statutory exceptions to immunity, and the state retains the ultimate burden of proving immunity. How these rather artificial shifting burdens will operate is yet to be seen.

Kane, *supra* note 24, at 415–16.