No. 03-562

In the Supreme Court of the United States

MERANIA MURINGU MACHARIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners are a prospective class of more than 5000 Kenyan citizens and businesses injured in the 1998 bombing of the United States Embassy in Nairobi, Kenya. This suit alleges that the United States negligently failed to secure the Embassy and to warn of the potential for a terrorist attack. The questions presented are:

1. Whether petitioners' claim under the Federal Tort Claims Act is barred by that statute's exceptions for conduct involving a discretionary function, claims arising in a foreign country, and conduct by independent contractors.

2. Whether the court of appeals correctly affirmed dismissal of petitioners' claims under the International Convention on Civil and Political Rights and customary international law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 334 F.3d 61. The opinion of the district court (Pet. App. 16a-46a) is reported at 238 F. Supp. 2d 13.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 2003. The petition for a writ of certiorari was filed on October 9, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, waives the United States' immunity to suit

for damages arising from "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government * * * if a private person * * * would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). The waiver of immunity is limited by several exceptions, three of which are relevant here. First, the discretionary function exception bars claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). Second, the foreign country exception provides that the FTCA does not extend to any "claim arising in a foreign country." 28 U.S.C. 2680(k). Third, the waiver of sovereign immunity excludes suits arising from the conduct of contractors. In particular, the FTCA's waiver of immunity extends only to tortious acts committed by "officers or employees of any federal agency * * * and persons acting on behalf of a federal agency in an official capacity," which "does not include any contractor with the United States." 28 U.S.C. 2671. This Court has referred to that exclusion as "the independent contractor exception." *United States* v. *Orleans*, 425 U.S. 807, 814 (1976).

2. In August 1998, an explosives-laden truck dispatched by the al Qaeda terrorist network approached the entrance gate to the rear parking lot of the United States Embassy in Nairobi, Kenya. See Pet. App. 2a. An embassy guard refused to open the gate. The guard was a Kenyan who worked for a company that provided security services under contract with the State Department. See *ibid.* Blocked from entering the compound,

one of the two terrorists began shooting; the other threw a flash grenade at one of the guards. See *ibid.* Unarmed and unable to notify the Embassy's detachment of United States Marines either by telephone or radio, the guards ran for cover. *Ibid.* The terrorists detonated their explosives, causing massive damage to the Embassy and the surrounding areas. The explosion killed forty-four Embassy employees and approximately 200 Kenyan citizens; it injured 4000 others; and it caused the collapse of an adjacent building. *Ibid.*

Following the bombing, petitioners filed this action in the United States District Court for the District of Columbia on behalf of a prospective class of all Kenyan citizens and businesses injured in the bombing. Petitioners allege that government actions and inactions led to the bombing and exacerbated their injuries. See Pet. App. 2a-3a. Counts I and II of the complaint, brought under the FTCA, allege that the United States Embassy was inherently dangerous; that State Department employees knew or should have known about a likely attack on the Embassy; that, despite that knowledge, the State Department employees failed to warn their superiors, the Embassy, and Kenyan citizens; that the State Department failed to provide properly trained security personnel to the Embassy and to take necessary security precautions to prevent an attack; and that, as a result of those alleged shortcomings, the Embassy had become a private and public nuisance. See *id.* at 3a. Counts I and II also sought to hold the United States liable for the negligence of the Kenyan security guards employed by the private contractor. See *ibid.*

In Count III of the complaint, petitioners alleged that the government's security failures violated customary international law, the Kenyan Constitution, and the

International Covenant on Civil and Political Rights. See Pet. App. 3a. Count IV sought the formation of a constructive trust to hold any assets or funds seized by the United States from Osama bin Laden or al Qaeda for the benefit of plaintiffs and prospective class members. See *ibid.*

After jurisdictional discovery closed, the district court dismissed the complaint under Federal Rule of Civil Procedure 12(b)(1). See Pet. App. 16a. The court first held that petitioners' objections to the level of security surrounding the Embassy and the failure to warn of possible terrorist threats was barred by the discretionary function exception to the FTCA, 28 U.S.C. 2680(a). "The decisions made by [the United States] regarding the security of the Embassy and warnings of possible threats," the court stated, "are clearly discretionary in nature and grounded in policy and therefore[] do not fall within the FTCA's waiver of sovereign immunity." Pet. App. 34a.

The district court also dismissed the claims based on the alleged negligence of the Embassy guards, holding them barred by the FTCA's independent contractor exclusion. The guards, the court held, were employees of an independent contractor, not employees or officers of the United States within the meaning of 28 U.S.C. 2671. Pet. App. 36a. The court also held that the claims relating to the guards' alleged negligence were barred by the FTCA's foreign country exception, 28 U.S.C. 2680(k). That alleged negligence occurred in a foreign country, as did the allegedly negligent failure to supervise the guards properly. Pet. App. 34a-40a.

Finally, the court dismissed petitioners' claims under the Kenyan Constitution, the International Covenant on Civil and Political Rights, and customary international law. Pet. App. 41a- 45a. The United States, the

court explained, is immune from suit in its own courts unless it has expressly waived its sovereign immunity. The court found that the United States had not waived its immunity to suit under the Kenyan Constitution or the International Covenant on Civil and Political Rights. See *id.* at 40a-41a. In addition, with respect to the international law claims, the court rejected petitioners' attempt to characterize the actions of the United States, immediately before and after the bombing, as violations of peremptory (or *jus cogens*) norms of customary international law. Petitioners, the court explained, "fail[ed] to allege even the basic elements of a violation" of international custom. *Id.* at 44a. Finally, the district court dismissed the claim for a constructive trust asserted in Count IV, explaining that "a constructive trust is not an independent cause of action." *Id.* at 45a.

3. The court of appeals affirmed. Pet. App. 6a. Like the district court, the court of appeals concluded that petitioners' claims relating to security at the Embassy and the failure to issue warnings were barred by the discretionary function exception to the FTCA. Applying a two-part test to determine whether the discretionary function exception applies, see *United States* v. *Gaubert*, 499 U.S. 315, 322 (1991), the court first concluded that petitioners had failed to establish that any "federal statute, regulation, or policy specifically prescribe[d]" a course of action that was not followed. See Pet. App 6a (quoting *Gaubert*, 499 U.S. at 322). Even if petitioners were correct that government officials had failed to follow an unwritten policy, the court continued, the alleged negligence regarding Embassy security involved broad concerns of social, political and public policy—precisely the sort of considerations the discre-

tionary function exception was designed to shield from judicial second-guessing. See *id.* at 10a-11a.

The court of appeals also agreed with the district court that the negligence claim concerning the conduct of the Embassy guards was barred by the contractor and foreign country exceptions to the FTCA. Pet. App. 13a-15a. First, the court observed that the guards were not officers or employees of a federal agency within the meaning of the FTCA. See *id.* at 13a-14a. Even if the guards' day-to-day activities were supervised by a federal employee, the court also held, that supervision took place entirely overseas and thus was barred by the foreign country exception. See *id.* at 14a. In addition, the court noted that the particular aspects of supervision alleged to be negligent or inadequate all involved discretionary functions. See *ibid.* Finally, the court concluded that there was no basis to question the district court's disposition of the remaining claims. See *id.* at 15a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. The court of appeals correctly determined that petitioners' claims of inadequate Embassy security and negligent failure to warn of possible terrorist actions against the Embassy were barred by the FTCA's discretionary function exception, 28 U.S.C. 2680(a). Under that exception, the alleged negligence of a federal employee is excluded from the waiver of immunity in the FTCA if it involves "acts that are discretionary in nature" and that involve "an element of judgment or choice" of the sort that the "exception was designed to

shield," *i.e.*, those "based on considerations of public policy." *United States* v. *Gaubert*, 499 U.S. 315, 322-323 (1991).

The court of appeals concluded that petitioners had failed to show that government employees acted contrary to the requirements of a specific, mandatory directive, and petitioners do not challenge that holding. See Pet. 16 n.8. Petitioners argue, however, that the court of appeals erred in determining that the decisions at issue were "of the kind that the discretionary function * * * was designed to shield," *Gaubert*, 499 U.S. at 322-323. According to petitioners, the court of appeals erred in grouping their allegations of negligence into six categories.[1]

Petitioners do not suggest that those categories were inaccurate or incomplete. And nothing in the cases cited by petitioners suggests that a court errs in its application of the discretionary function exception merely because it groups individual allegations of negligence into categories for purposes of analysis. To the contrary, other courts of appeals have used similar descriptions in analyzing FTCA claims. See, *e.g.*, *Nurse* v. *United States*, 226 F.3d 996, 1001 (9th Cir. 2000) (categorizing one part of the plaintiff's claim as alleging

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[1] The six categories identified by the court of appeals were:

> 1) a failure to provide guidance and advice on improving security at the Embassy, 2) a failure to provide security equipment to the Embassy, 3) a failure to train adequately Embassy personnel and contractors to deal with various security threats, 4) a failure to warn adequately Embassy personnel, and others, of potential terrorist threats, 5) an improper classification of the level of security risk at the Embassy, or 6) falsely leading Embassy personnel to believe that security analyses had been conducted or would be conducted.

Pet. App. 9a-10a.

"negligent and reckless employment, supervision and training" of customs officers by policy-makers).

Petitioners also err in contending that the court of appeals' decision effectively carved out from the FTCA "all security-related actions and decisions." Pet. 17. The court of appeals recognized that decisions pertaining to *embassy* security will often implicate the discretionary function exception where no mandatory directive governs the conduct at issue. Pet App. 10a-11a. That observation is surely correct. As the court noted, embassy security decisions typically involve accommodations between different embassies, between embassies and other programs, between security and accessibility for employees and visitors, and also involve foreign relations considerations. See *ibid.* Those are precisely the type of "decisions grounded in social, economic, and political policy" that are protected by the discretionary function exception. *Gaubert*, 499 U.S. at 323.

Although petitioners cite several cases from other courts of appeals, those cases arise from conduct wholly different from that at issue here. For example, the sort of judgment employed in the allegedly negligent cutting of timber at issue in *Marlys Bear Medicine* v. *United States*, 241 F.3d 1208 (9th Cir. 2001), see Pet. 20, encompasses none of the social, economic, political, and foreign relations policy considerations involved in determining what sort of security should be provided at United States embassies throughout the world.[2] Nor do *Andrulonis* v. *United States*, 924 F.2d 1210 (2d Cir.), vacated, 502 U.S. 801, reinstated, 952 F.2d 652 (2d Cir.

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[2] Petitioners' reliance on *Couzado* v. *United States*, 105 F.3d 1389 (11th Cir. 1997), is similarly misplaced; that case did not involve the discretionary function exception.

1991), cert. denied, 505 U.S. 1204 (1992), or *Dube* v. *Pittsburgh Corning*, 870 F.2d 790 (1st Cir. 1989), conflict with the decision in this case. See Pet. 21. *Androlunis* concerned the failure to warn a laboratory worker of "the extreme danger created by" manipulating a concentrated, lethal virus in a "leaky aerosolizing machine," 924 F.2d at 1221, while *Dube* concerned the failure to warn of the health risks from exposure to asbestos dust, 870 F.2d at 797. The decisions to warn (or not) in those cases quite obviously did not involve the sort of inherently discretionary and sensitive foreign policy and political decisions involved in deciding whether to warn foreign nationals of the potential for a terrorist attack on a U.S. embassy.

2. Petitioners similarly fail to demonstrate that the court of appeals and district court erred in holding that the FTCA's foreign country exception bars their claims based on the allegedly negligent supervision of the Embassy guards.[3] Contrary to petitioners' assertions, the court of appeals did not hold that negligent conduct occurring in the United States necessarily falls within the scope of the exception simply because its effects occur abroad. The court simply had no reason to address the so-called "headquarters" doctrine, Pet. 24-25, because it found that the allegedly negligent supervision—the negligent conduct itself and not merely the effects thereof—took place in a foreign country. See Pet. App. 14a. Petitioners cite no case recognizing a so-

[3] The court of appeals also held that the negligence of the guards themselves could not be attributed to the United States because the guards were employees of an independent contractor. Pet. App. 13a-14a. See *United States* v. *Orleans*, 425 U.S. 807, 815 (1976). Petitioners do not challenge that holding.

called "headquarters" claim where the relevant negligence was found to have occurred abroad.[4]

To the extent petitioners purport to identify conduct inside the United States that the court of appeals allegedly overlooked, that case-specific claim of error does not warrant this Court's review. Besides, much of the domestic activity cited by petitioners—such as approving payment to the contractor who supplied the guards, Pet. 23-24—was neither negligent nor the cause of petitioners' injuries. Furthermore, to the extent petitioners appear to challenge the decision to use local guards to protect U.S. embassies, the scope of their use, or the type of training provided to them, those decisions once again are the sorts of discretionary political and policy determinations protected by the discretionary function exception. See Pet. App. 14a.

3. Finally, petitioners urge this Court to review the court of appeals' decision affirming dismissal of petitioners' claims under the International Covenant on Civil and Political Rights and customary international law. As an initial matter, the court of appeals' decision makes no law with respect to those matters. The court merely declared that it had "considered [petitioners'] remaining arguments" and found "no basis for questioning the district court's disposition." Pet. App. 15a. There is no compelling reason for further review of that summary statement.

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[4] For that reason, there is no reason to hold this case pending the Court's decision in *United States* v. *Alvarez Machain*, cert. granted, No. 03-485 (Dec. 1, 2003). That case concerns whether the foreign country exception applies where the conduct at issue was allegedly planned in the United States, but is alleged to be tortious only because it was undertaken abroad. In this case, the district court and court of appeals agreed that the relevant conduct occurred solely abroad.

Petitioners' claims are, in any event, foreclosed for at least three independent reasons. First, petitioners have failed to establish that the International Covenant on Civil and Political Rights affords them a private right of action. When the Senate ratified the International Covenant, it did so with a declaration that Articles 1 to 27 were not self-executing. 138 Cong. Rec. S4784 (daily ed. Apr. 2, 1992). As the district court explained, a court lacks authority to enforce a treaty that is not self-executing. Pet. App. 42a. The courts of appeals have thus uniformly concluded that the International Covenant does not provide privately enforceable rights. *Flores* v. *Southern Peru Copper Corp.*, 343 F.3d 140, 163 & n.35 (2d Cir. 2003); *United States* v. *Duarte-Acero*, 296 F.3d 1277, 1283 (11th Cir.), cert. denied, 537 U.S. 1038 (2002); *Hain* v. *Gibson*, 287 F.3d 1224, 1243 (10th Cir. 2002), cert. denied, 537 U.S. 1173 (2003); *United States ex rel. Perez* v. *Warden, FMC Rochester*, 286 F.3d 1059, 1063 (8th Cir.), cert. denied, 537 U.S. 869 (2002); *Buell* v. *Mitchell*, 274 F.3d 337, 371 (6th Cir. 2001); *Beazley* v. *Johnson*, 242 F.3d 248, 267 (5th Cir.), cert. denied, 534 U.S. 945 (2001); *Igartua De La Rosa* v. *United States*, 32 F.3d 8, 10 n.1 (1st Cir. 1994), cert. denied, 514 U.S. 1049 (1995) (per curiam).

Petitioners similarly cite no authority demonstrating that "customary international law" by itself creates a cause of action for damages enforceable in the courts of the United States, much less one actionable against the United States. See *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 777-778 & 780 n.4 (D.C. Cir. 1984) (Edwards, J., concurring) (explaining that international law generally does not create private causes of action to remedy violations, but rather leaves it to each nation to define the remedies that are available), cert. denied, 470 U.S. 1003 (1985); cf. *Buell*, 274 F.3d at 374 ("There

is no reported case of a court in the United States recognizing a cause of action under *jus cogens* norms of international law for acts committed by United States government officials against a citizen of the United States.").[5]

Second, even if petitioners had a right of action, petitioners cite no statute waiving the United States' sovereign immunity to damages actions brought under the International Covenant or customary international law. That is fatal to their claims. "It is an 'established principle of jurisprudence' that the sovereign cannot be sued in its own courts without its consent." *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 67 (1989); *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983) (The United States "may not be sued" in its own courts "without its consent," and "the existence of consent is a prerequisite for jurisdiction.").[6]

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[5] Petitioners do not assert a cause of action under the Alien Tort Statute, 28 U.S.C. 1350. Accordingly, this case does not present any of the questions at issue in *Sosa* v. *Alvarez-Machain*, cert. granted, No. 02-385 (Dec. 1, 2003).

[6] Insofar as petitioners assume that no waiver of the United States' immunity is required for violations of *jus cogens* norms of international law, that assumption is incorrect. While some courts have addressed the claim that *foreign* nations may have impliedly waived their immunity for such violations under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, see *Sampson* v. *Federal Republic of Germany*, 250 F.3d 1145, 1150-1153 (7th Cir. 2001) (rejecting such a claim); *Princz* v. *Federal Republic of Germany*, 26 F.3d 1166, 1173-1174 (D.C. Cir. 1994) (same), cert. denied, 513 U.S. 1121 (1995), no court to our knowledge has suggested that such a theory could apply to the *United States' immunity to suit in its own courts*, which is not governed by the FSIA. In any event, the immunity of a sovereign from suit in its own courts—which "has been enjoyed as a matter of absolute right for centuries" and can be overcome only by "the sovereign's

Third and finally, petitioners do not show how the lower courts erred in rejecting their claim that the conduct of United States officials in the immediate aftermath of the terrorist bombing of the Embassy and their effort to aid victims amidst the chaos could plausibly be thought to have violated peremptory international norms. None of the Fourth Amendment or "systematic" discrimination cases cited by petitioner (Pet. 28-30) establish a conflict in the circuits or otherwise suggest that this case warrants further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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own consent"—is distinct from the immunity that a foreign sovereign might claim in another sovereign's courts. See *Nevada* v. *Hall*, 440 U.S. 410, 414 (1979). Unlike the United States' constitutional immunity to suit in its own courts, "foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).