

Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law

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[T]he law is like the pants you bought last year for a growing boy, but it is always this year and the seams are popped and the shankbone's to the breeze. The law is always too short and too tight for growing humankind. The best you can do is do something and then make up some law to fit and by the time that law gets on the books you would have done something different.

—Robert Penn Warren¹

INTRODUCTION

In the development of international law, few subjects are more perplexing than the scope of a sovereign state's immunity from the jurisdiction of another state's domestic courts. It is widely accepted that a foreign state enjoys some jurisdictional immunity in the domestic courts of another state. This judicial practice, however, examined against the evolving nature of international law and the backdrop of changing international, political, economic, and social factors has been increasingly regarded as "artificial, unjust, and archaic."² In the United States, for

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1. R. WARREN, *ALL THE KINGS MEN* 136 (Bantam Modern Classic ed. 1968).

2. Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 *BRIT. Y.B. INT'L L.* 220, 221 (1952). Lord Wilberforce once stated that sovereign immunity "is a concept devised by lawyers in the 19th century [and] is now being used by nations generally as a technique for denying compliance with obligations." Wilberforce, Address to the Fifty-Eighth Conference of the International Law Association, *reprinted in* INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FIFTY-EIGHTH CONFERENCE 513, 515 (1980).

example, current doctrine suggests that a foreign sovereign may remain immune from suit even if it has violated a fundamental norm of international law. The recent series of decisions in *Amerada Hess Shipping Corp. v. Argentine Republic*,³ illustrates the problems that foreign sovereign immunity can create, especially when courts try to avoid what they view as its unjust application.

In *Amerada Hess*, Argentine military aircraft destroyed a Liberian oil tanker in international waters during the 1982 Falkland/Malvinas war between Great Britain and Argentina. In determining whether it had subject matter jurisdiction over a damage claim by the Liberian corporate owner of the oil tanker, the Second Circuit refused to follow the conventional interpretation of the Foreign Sovereign Immunities Act of 1976 ("FSIA")⁴ as providing the exclusive basis for subject matter jurisdiction in suits against foreign states.⁵ Instead, the court found an independent source of jurisdiction over Argentina under the Alien Tort Claims Act,⁶ reasoning that Congress could not have intended to exempt foreign states from the jurisdiction of U.S. courts when those foreign states commit violations of international law.⁷

The U.S. Supreme Court reversed.⁸ It found that Congress intended the FSIA to be the exclusive basis for jurisdiction over foreign sovereigns, and that none of the exceptions to immunity in the act applied to this case. It thus apparently endorsed the view that a foreign state is still entitled to sovereign immunity when it violates international law.⁹ This Comment will argue, however, that when a state violates one of a core group of fundamental norms,¹⁰ it impliedly waives its immunity from the jurisdiction of a U.S. court under the FSIA.¹¹ This Comment thus attempts to preserve the principle animating the Second Circuit's decision in *Amerada Hess*—providing a remedy for individuals injured by the actions of a state in egregious violation of international law—while rec-

3. 830 F.2d 421 (2d Cir. 1987), *rev'd*, 109 S. Ct. 683 (1989).

4. Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1982)).

5. H.R. REP. NO. 1487, 94th Cong., 2d Sess. 12, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6610-11 [hereinafter HOUSE REPORT].

6. 28 U.S.C. § 1350 (1982).

7. *Amerada Hess*, 830 F.2d at 425.

8. *Argentine Republic v. Amerada Hess Shipping Corp.*, 109 S. Ct. 683 (1989).

9. Argentina's attack without warning on a neutral ship on the high seas, and its subsequent failure to compensate, seem to constitute a clear violation of international law. *See Kirgis, Alien Tort Claims, Sovereign Immunity and International Law in U.S. Courts*, 82 AM. J. INT'L L. 323, 324 & n.3 (1988) (discussing *Amerada Hess*).

10. International law recognizes a core group of fundamental norms, embodied in the concept of *jus cogens*, from which states may not derogate. *See infra* Part II, notes 65-156 and accompanying text.

11. *See infra* Part III, notes 153-196 and accompanying text.

onciling this result with the FSIA and the underlying theory of international law and sovereign immunity that it reflects.

Part I of this Comment discusses the existing legal framework of sovereign immunity law in the United States as codified in the FSIA. It then turns to the facts and legal proceedings in *Amerada Hess* and concludes that, although the Supreme Court was undoubtedly correct in holding that the FSIA provides the sole basis for exercising jurisdiction over foreign sovereigns, the Court should nevertheless have recognized that suits alleging violations of fundamental norms of international law can be brought under the FSIA itself, using the FSIA's implied waiver provision.

Modern international law recognizes a core group of fundamental norms, from which—by definition—states may not derogate, under the concept of *jus cogens*. Part II explores the legal basis for incorporating *jus cogens* into the doctrine of sovereign immunity. It first examines the evolution of the doctrine of sovereign immunity and its relationship to the development of the concept of sovereign power under international law. It argues that the changing structure of the international legal system, including the recognition that individuals now have rights under international law, dictates an evolutionary approach to the doctrine of sovereign immunity. It then traces the parallel development of the concept of *jus cogens* and its limitation of state power. Based upon this analysis, Part II concludes that the modern law recognition of *jus cogens* norms requires that municipal courts deny sovereign immunity when a state's violation of a rule of *jus cogens* injures an individual, because that state's action is not recognized as a sovereign act.

Part III argues that the FSIA already contains a mechanism by which this international law principle can be accommodated: the implied waiver provision in § 1605(a)(1).¹² The legislative history of the FSIA suggests that Congress intended to incorporate principles of international law into the Act.¹³ Accordingly, this Comment argues that as part of the FSIA's scheme, U.S. courts should recognize a waiver implied by operation of law when states injure individuals in violation of *jus cogens* norms.

Finally, Part IV explores objections to this proposal, including those posed by a lack of execution mechanisms, a potential flood of litigation, and the threat of retaliatory jurisdiction abroad. Part IV concludes that these potential objections are outweighed by the U.S. and international interest in adjudicating violations of fundamental norms. Because the world community has come to recognize a core of fundamental norms

12. 28 U.S.C. § 1605(a)(1) (1982).

13. See *infra* notes 172-173 and accompanying text.

that states may not violate, and because no effective international judicial body exists for individual enforcement of these fundamental rights, domestic courts must place legal limits on state immunity in order to serve internationally shared conceptions of basic justice.

I

THE EXCLUSIVE JURISDICTION OF THE FSIA, INTERNATIONAL LAW VIOLATIONS, AND *AMERADA HESS*

Claims in U.S. courts against foreign sovereigns are governed by the Foreign Sovereign Immunities Act.¹⁴ The FSIA provides that foreign states are immune from jurisdiction in U.S. courts except in a few limited circumstances. These exceptions are mainly related to commercial activity, and do not encompass suits alleging torts committed outside the U.S. in violation of international law. Individual plaintiffs injured by a state's tortious actions abroad, no matter how egregious, cannot now bring suit in a U.S. court under the FSIA.

In *Amerada Hess*, the federal courts squarely faced the question whether a court should protect the right of a sovereign state to immunity over the rights of an individual injured by that state's action in violation of international law. The Second Circuit concluded that it should not, finding a basis of jurisdiction over foreign sovereigns in the Alien Tort Claims Act.¹⁵ On appeal, the Supreme Court reversed, holding that the FSIA is the exclusive basis of jurisdiction over foreign sovereigns in U.S. courts, and that the Alien Tort claims act could not furnish an independent basis of jurisdiction.¹⁶

A. *The Foreign Sovereign Immunities Act*

Prior to enactment of the FSIA in 1976, United States law on sovereign immunity bordered on the incoherent. In 1952 the State Department, in the Tate Letter,¹⁷ announced that it would abandon the absolute theory of sovereign immunity and follow the restrictive theory of immunity in considering requests by foreign states for immunity.

14. *Supra* note 4.

15. *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421 (2d Cir. 1987), *rev'd*, 109 S. Ct. 683 (1989).

16. *Argentine Republic v. Amerada Hess Shipping Corp.*, 109 S. Ct. 683 (1989).

17. Letter from Jack B. Tate, Acting Legal Adviser to the Secretary of State, to Phillip B. Perlman, Acting Attorney General of the United States (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL. 984 (1952) [hereinafter Tate Letter]. With the publication of the Tate Letter in 1952, the executive branch signalled its shift from the absolute to the restrictive theory of sovereign immunity, which extends immunity for public acts (*jure imperii*) but not private or commercial acts (*jure gestionis*) of a foreign government. See HOUSE REPORT, *supra* note 5, at 8, 1976 U.S. CODE CONG. & ADMIN. NEWS, at 6607.

This change in executive policy produced great confusion among U.S. courts in applying the doctrine of sovereign immunity. Jurisdiction was frequently founded, or denied, on the basis of nonlegal factors. For example, foreign states often requested that the State Department make a recommendation of immunity to the court, and courts almost always followed the State Department's immunity determination.¹⁸ However, this determination frequently was affected by a state's ability to bring diplomatic pressure to bear on the State Department, and not the specific circumstances of the case or the cause of action.¹⁹ In other cases, foreign states would seek immunity decisions directly from the court, in which case the courts generally decided the issue without reference to the foreign policy concerns of the State Department.²⁰ This dichotomy, combined with a lack of clear standards governing a state's entitlement to immunity under the restrictive theory, led to inconsistent results.²¹ Further, even if a party was able to get a judgment, its ability to execute that judgment was extremely limited because the United States still adhered to a doctrine of absolute immunity from execution.²²

18. See *Southeastern Leasing Corp. v. Stern Dragger Belogorsk*, 493 F.2d 1223, 1224 (1st Cir. 1974). In *Ex parte Republic of Peru*, 318 U.S. 578, 588 (1943), and *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34-36 (1945), the Supreme Court suggested that State Department decisions on sovereign immunity were to be conclusive on the courts. Lower courts, however, disagreed on whether State Department decisions were, in fact, binding. Compare *Renchard v. Humphreys & Harding, Inc.*, 381 F. Supp. 382, 384 (D.D.C. 1974) (State Department determination is binding) with *Ocean Transport Co. v. Government of the Republic of the Ivory Coast*, 269 F. Supp. 703, 705 (E.D. La. 1967) (State Department determination may not be binding but is entitled to great weight). For a general discussion of this issue, see Cardozo, *Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper?*, 48 CORNELL L.Q. 461 (1963). In the late 1960s the State Department routinized the procedure by which foreign states presented their immunity claims, providing for informal, quasi-judicial hearings where both sides presented written and oral arguments to the Department's Office of the Legal Adviser. See OFFICE OF THE LEGAL ADVISER, DEPARTMENT OF STATE, 1977 DIGEST OF U.S. PRACTICE IN INT'L LAW 1018-19 (1977).

19. For examples of cases in which it appeared that political considerations determined a grant of immunity where the criteria of the Tate Letter did not call for it, see *Rich v. Naviera Vacuba, S.A.*, 295 F.2d 24 (4th Cir. 1961); *Spacil v. Crowe*, 489 F.2d 614 (5th Cir. 1974). See generally Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 YALE STUD. IN WORLD PUB. ORD. 1, 34-36 (1976) (discussing the impact of political considerations on State Department immunity determinations, with specific reference to *Rich* and *Spacil*).

20. See *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965). These divergent practices encouraged forum shopping by state defendants between the State Department and the courts. Weber, *supra* note 19, at 11.

21. Compare *Et Ve Balik Kurumu v. B.N.S. Int'l Sales Corp.*, 25 Misc. 2d 299, 204 N.Y.S.2d 971 (Sup. Ct. 1960), *aff'd*, 17 A.D.2d 927, 233 N.Y.S.2d 1013 (1962) (contract to purchase provisions for use by the Turkish army is a private act not entitled to immunity) with *Aerotrade, Inc. v. Republic of Haiti*, 376 F. Supp. 1281 (S.D.N.Y. 1974) (contract for purchase of military equipment is a public act entitled to immunity). The distinction between public and private acts of a state has proven conceptually difficult to apply. See *infra* note 78.

22. See Feldman, *The United States Foreign Sovereign Immunity Act in Perspective: A Founder's View*, 35 INT'L & COMP. L.Q. 302, 304 (1986). Although property owned by foreign sovereigns was absolutely immune from execution, courts allowed property owned by foreign

In an attempt to bring order to the U.S. law on foreign sovereign immunity, Congress enacted the FSIA in 1976. One of its principle objectives was to transfer determinations of sovereign immunity from the State Department to the courts, freeing the executive branch from case-by-case diplomatic pressures and relieving due process concerns about the State Department's ability to bind the courts.²³ The FSIA also sought to codify the restrictive theory of immunity in order to clarify the governing legal standards and to establish uniform procedures for litigation against foreign states in U.S. courts.²⁴

As a general framework, the FSIA starts from a presumption that states are immune and then creates exceptions to that rule.²⁵ The exceptions to immunity set forth in the act focus mainly on commercial activity.²⁶ The FSIA also provides jurisdiction in cases of waiver (express and implied),²⁷ expropriation in violation of international law,²⁸ noncommercial torts occurring in the United States,²⁹ and disputes over rights in real property and estates located in the United States.³⁰

The FSIA, however, does not contain an express exception for torts in violation of international law. The exclusive nature of the FSIA therefore creates a significant obstacle for anyone attempting to bring an action against a foreign state for a tort in violation of international law. If an individual is unable to fit her claim within one of the exceptions to immunity provided in the FSIA, the doctrine of sovereign immunity effectively allows states to escape all legal responsibility in the U.S. for acts in violation of international law that injure individuals. This last aspect apparently animated the Second Circuit to pursue a novel approach to limiting the FSIA in *Amerada Hess*.

B. *The Amerada Hess Decision*

During the 1982 war between Great Britain and Argentina over the

sovereigns to be attached for purposes of asserting personal jurisdiction over the sovereign. See Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 STAN. L. REV. 385, 407 n.116 (1982).

23. See HOUSE REPORT, *supra* note 5, at 7, 1976 U.S. CODE CONG. & ADMIN. NEWS at 6605-06; Feldman, *supra* note 22, at 304.

24. See HOUSE REPORT, *supra* note 5, at 7, 1976 U.S. CODE CONG. & ADMIN. NEWS at 6605-06.

25. Section 1604 of the FSIA provides that, subject to existing international agreements, "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604 (1982). Section 1330(a) complements section 1604 by providing subject matter jurisdiction over claims against foreign states only in cases in which a state "is not entitled to immunity either under §§ 1605-1607 of this title or under any applicable international agreement." *Id.* § 1330(a) (1982).

26. See 28 U.S.C. §§ 1605(a)(2), 1605(b) (1982).

27. *Id.* § 1605(a)(1).

28. *Id.* § 1605(a)(3).

29. *Id.* § 1605(a)(5).

30. *Id.* § 1605(a)(4).

Falkland/Malvinas Islands, Argentine aircraft, without warning or provocation, repeatedly attacked a neutral, unarmed oil tanker in international waters.³¹ The tanker, owned by a Liberian corporation and chartered to another Liberian corporation for use in the U.S. domestic oil trade,³² suffered severe damages and eventually was scuttled.³³

Argentina refused to compensate the Liberian corporations for the loss of the tanker. The corporations also were unable to gain access to Argentina's domestic court system.³⁴ Because diplomatic remedies proved unavailable, the corporations' sole remaining alternative was to pursue their claim in the domestic courts of another nation. They brought suit in the United States, claiming jurisdiction under the Alien Tort Claims Act, general admiralty and maritime jurisdiction, and the principle of universal jurisdiction.³⁵

31. On June 3, 1982, in an effort to protect United States interest ships, the United States informed Argentina and Great Britain of the location of those neutral vessels, including the tanker *Hercules*, that would be traversing the South Atlantic. On June 8 the *Hercules* was attacked without warning in three separate bombing strikes by Argentine aircraft using bombs and air-to-surface rockets. At the time of the attacks, the *Hercules* was about 600 nautical miles off the Argentine coast and nearly 500 miles from the Falkland/Malvinas Islands, in international waters, and well outside the exclusion zones declared by both belligerents. *Argentine Republic v. Amerada Hess Shipping Corp.*, 109 S. Ct. 683, 686 (1989).

32. *Amerada Hess Shipping Corp.*, a Liberian corporation controlled by U.S. interests, chartered the oil tanker *Hercules* from United Carriers, Inc., also a Liberian corporation controlled by U.S. interests. *Amerada Hess* used *Hercules* to carry oil from Alaska, around the southern tip of South America, to its refinery in the U.S. Virgin Islands. *Id.*

33. Damaged but not destroyed, the *Hercules* found refuge in a Brazilian port. On finding an undetonated bomb in one of the *Hercules*' tanks, however, United Carriers decided to scuttle the vessel rather than risk accidental detonation. United Carriers estimated its loss at \$10 million for its ship, and *Amerada Hess* valued its lost fuel at \$1.9 million. *Id.* at 686-87.

34. *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 423 (2d Cir. 1987), *rev'd*, 109 S. Ct. 683 (1989). *Amerada Hess* made a series of attempts to enter into negotiations with Argentina, all of which failed. It also attempted to retain four of the leading law firms in Argentina to pursue its claim in the Argentine courts, but none would take the case. Joint Brief for Appellants at 8-13, *Amerada Hess*, 830 F.2d 421 (Nos. 86-7602, 86-7603).

35. *Amerada Hess*, 109 S. Ct. at 687. The Alien Tort Claims Act was originally a provision of the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (1789). It currently provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (1982). For an excellent discussion of the origins, purposes, and potential future applications of the Alien Tort Claims Act, see Randall, *Federal Jurisdiction Over International Law Claims: Inquiries Into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL'Y 1 (1985) [hereinafter Randall I]; Randall, *Further Inquiries Into the Alien Tort Statute and a Recommendation*, 18 N.Y.U. J. INT'L L. & POL'Y 473 (1986) [hereinafter Randall II].

Following its enactment in 1789, the Alien Tort Claims Act effectively vanished from the face of American jurisprudence for nearly 200 years, supporting jurisdiction in only two reported cases over 150 years apart. See Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53, 55 (1981); Randall I, *supra*, at 4-5; *infra* note 56. However, in 1980 the Second Circuit, in its landmark decision *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), resuscitated the Alien Tort Claims Act, holding that the Act conferred jurisdiction over a tort claim brought by two Paraguayans against a former Paraguayan police inspector general for the torture death of their relative. Although the

1. *The Lower Court Opinions*

The district court dismissed the suit, holding that Argentina was immune from suit under the FSIA.³⁶ The Court of Appeals for the Second Circuit reversed.³⁷ Although the court found that this case did not fit under any of the exceptions from immunity provided in the FSIA, it nevertheless concluded that the Alien Tort Claims Act provided an independent basis for jurisdiction over the claim.³⁸

The Second Circuit's decision rested on two findings. First, that under international law, foreign states are not entitled to immunity from suit in cases involving violations of international law, and second that the Alien Tort Claims Act provides jurisdiction over foreign sovereigns in such cases.³⁹ Because U.S. statutes are construed, where possible, so as not to bring them into conflict with international law,⁴⁰ the court reasoned that it could interpret the FSIA as abrogating the jurisdictional grant of the Alien Tort Claims Act only if Congress clearly expressed such an intent.⁴¹

Examining the legislative history of the FSIA, the court noted that "Congress sought to achieve three major goals,"⁴² none of which suggested an intention "to remove existing remedies in United States courts for violations of international law of the kind presented here."⁴³ Although the Court noted that the seemingly comprehensive language of the FSIA previously had been interpreted as providing the sole basis for

defendant in *Filartiga* was an individual, the decision signalled to human rights advocates that the Alien Tort Claims Act potentially could be used against foreign sovereigns to enforce violations of international law in federal courts.

36. *Amerada Hess Shipping Corp. v. Argentine Republic*, 638 F. Supp. 73 (S.D.N.Y. 1986).

37. *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421 (2d Cir. 1987), *rev'd*, 109 S. Ct. 683 (1989).

38. The court found that the appellants met the three requirements for jurisdiction under the Alien Tort Claims Act: (1) appellants were aliens, because they are Liberian corporations; (2) the suit was in tort; and (3) the suit alleged a violation of international law (the bombing of an unarmed ship upon the high seas without compensation). *Id.* at 425.

39. *Id.* The court relied on two law review articles as authority for this proposition. See Bazylar, *Litigating the International Law of Human Rights: A "How To" Approach*, 7 WHITTIER L. REV. 713, 732-34 (1985); Paust, *Federal Jurisdiction over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 221-32 (1983).

40. "Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987).

41. *Amerada Hess*, 830 F.2d at 426.

42. *Id.*:

First, it intended to incorporate into United States law the "restrictive" theory of sovereign immunity in accordance with international law (no immunity for "commercial or private" sovereign acts). Second, it sought to make certain that the judicial rather than the executive branch would apply the law. . . . Third, it hoped to eliminate many of the procedural problems that suits against foreign sovereigns create.

43. *Id.*

jurisdiction over foreign sovereigns, the court found that Congress' chief focus in enacting the FSIA was on commercial concerns and that Congress simply did not address international law violations outside of the commercial context.⁴⁴ In cases where an alien sued a foreign sovereign for a violation of international law, the court reasoned, Congress had already provided subject matter jurisdiction under the Alien Tort Claims Act.⁴⁵ Unable to find congressional intent to eliminate this jurisdictional grant or to contradict the immunity rules of international law, the court concluded that the FSIA did not preempt the Alien Tort Claims Act.⁴⁶

2. *The Supreme Court Decision*

The United States Supreme Court reversed.⁴⁷ It held that the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in United States courts, and that none of the FSIA's exceptions to foreign sovereign immunity applied on the facts in this case.⁴⁸

The Court based its decision on the comprehensive nature of the FSIA's legislative scheme. As the Court noted, the FSIA, by its terms, bars U.S. courts from exercising jurisdiction whenever a claim against a state does not fall within one of the exceptions enumerated in §§ 1605-1607 or an applicable international agreement, and confers subject matter jurisdiction only in cases where the foreign state is not entitled to immunity under the act.⁴⁹ As the Court observed, the legislative history to the FSIA confirms the exclusive nature of the Act.⁵⁰

44. *Id.* at 427.

45. *Id.*

46. *Id.* This decision was legally unsound for several reasons. First, it ignored the clear mandate of the FSIA and its legislative history that the Act is the exclusive basis of jurisdiction over foreign sovereigns in U.S. courts. See *infra* notes 49-54 and accompanying text. Second, it provided a remedy in U.S. courts for aliens against foreign states that was not available to U.S. citizens, because only aliens may invoke the Alien Tort Claims Act. See 28 U.S.C. § 1350 (1982); see also *Martin v. Republic of South Africa*, 836 F.2d 91, 95 (2d Cir. 1987) (Second Circuit's holding in *Amerada Hess* not applicable because plaintiff is a U.S. citizen); *infra* text accompanying notes 253-254. Finally, its finding that international law would deny sovereign immunity for all violations of international law swept too broadly, because international law only denies sovereign immunity in cases involving the most egregious violations of international law. See *infra* Part II, notes 65-156 and accompanying text.

47. *Argentine Republic v. Amerada Hess Shipping Corp.*, 109 S. Ct. 683 (1989).

48. *Id.*

49. *Id.* at 687-88; see 28 U.S.C. §§ 1330(a), 1604 (1982).

50. *Id.* at 688 n.3 (quoting HOUSE REPORT, *supra* note 5, at 12, 1976 U.S. CODE CONG. & ADMIN. NEWS at 6610; S. REP. NO. 1310, 94th Cong., 2d Sess. at 11-12 (1976) [hereinafter SENATE REPORT] (FSIA "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States," and "prescribes . . . the jurisdiction of U.S. district courts in cases involving foreign states")). Similar points are made throughout the legislative history. See, e.g., HOUSE REPORT, *supra* note 5, at 1, 1976 U.S. CODE CONG. & ADMIN. NEWS at 6604; SENATE REPORT, *supra*, at 1 (FSIA's purpose was "to define the jurisdiction of United States courts in suits against foreign states [and] the

In reaching its decision, the Court rejected the Second Circuit's argument that Congress did not focus on violations of international law when it enacted the FSIA and so could not have intended to eliminate existing remedies under U.S. law for violations of international law.⁵¹ Pointing to FSIA § 1605(a)(3), which denies immunity in suits where rights in property taken in violation of international law are at issue,⁵² and to the fact that Congress rested the FSIA, in part, on its constitutional authorization to define and punish violations of international law,⁵³ the Court inferred that Congress clearly intended to grant immunity in cases alleging violations of international law that did not fall within one of the exceptions to immunity contained in the Act.⁵⁴

The Court also rejected the Second Circuit's argument that the FSIA does not "preempt" the jurisdictional grant of the Alien Tort Claims Act because Congress did not intend to remove existing remedies in U.S. courts.⁵⁵ The Court reasoned that Congress' failure to amend or repeal the Alien Tort Claims Act when it enacted the FSIA could be explained by a lack of knowledge on the part of Congress that the Alien Tort Claims Act even applied to foreign states. As the Court noted, in the nearly two hundred years between enactment of the Alien Tort Claims Act and enactment of the FSIA, no one ever attempted to invoke the Alien Tort Claims Act against a foreign sovereign.⁵⁶ Further, given

circumstances in which foreign states are immune from suit."); HOUSE REPORT, *supra* note 5, at 6, 1976 U.S. CODE CONG. & ADMIN. NEWS at 6604; SENATE REPORT, *supra*, at 8 (FSIA was designed "to provide when a foreign state is entitled to sovereign immunity."); HOUSE REPORT, *supra* note 5, at 13, 1976 U.S. CODE CONG. & ADMIN. NEWS at 6611; SENATE REPORT, *supra*, at 12 (The FSIA "provides a comprehensive jurisdictional scheme in cases involving foreign states."); HOUSE REPORT, *supra* note 5, at 14, 1976 U.S. CODE CONG. & ADMIN. NEWS at 6613; SENATE REPORT, *supra*, at 13 ("Since jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 [diversity jurisdiction] becomes superfluous.").

51. *Amerada Hess*, 109 S. Ct. at 688.

52. 28 U.S.C. § 1605(a)(3) (1982).

53. U.S. CONST. art. I, § 8, cl. 10. See HOUSE REPORT, *supra* note 5, at 12, 1976 U.S. CODE CONG. & ADMIN. NEWS at 6611; SENATE REPORT, *supra* note 50, at 12.

54. *Amerada Hess*, 109 S. Ct. at 688.

55. *Id.* at 689.

56. *Id.* In fact, prior to the enactment of the FSIA, plaintiffs successfully invoked the Alien Tort Claims Act against private defendants on only two occasions over 150 years apart. *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961) (sustaining subject matter jurisdiction under the ATCA for a child custody suit between two Lebanese nationals, on the ground that the wrongful withholding of custody was a tort and that defendant's falsification of the child's passport constituted a violation of the law of nations); *Bolchos v. Darrell*, 3 F. Cas. 810 (D.S.C. 1795) (sustaining subject matter jurisdiction for a suit seeking restitution for a neutral's cargo of slaves which was taken off board a Spanish ship seized as a prize of war by a French privateer and sold in a U.S. port); see also *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194 (9th Cir. 1975) (implying that jurisdiction under the Alien Tort Claims Act might be available, but declining to decide issue); *Seth v. British Overseas Airways Corp.*, 329 F.2d 302 (1st Cir. 1964) (acknowledging the ATCA as a possible alternative basis of jurisdiction over a case properly within the court's federal question jurisdiction). Two early opinions

the comprehensiveness of the FSIA's legislative scheme, the Court concluded, "we doubt that even the most meticulous draftsman would have concluded that Congress also needed to amend *pro tanto* the Alien Tort Statute and . . . other grants of subject-matter jurisdiction in Title 28."⁵⁷

Having found that the FSIA is the exclusive basis of jurisdiction over foreign states in U.S. courts, the Court then turned to whether any of the exceptions to immunity contained in the FSIA applied on the facts in this case,⁵⁸ specifically examining three exceptions: the noncommercial tort exception,⁵⁹ the international agreements exception,⁶⁰ and the waiver exception.⁶¹ The Court found that the noncommercial tort exception did not apply because the tort did not occur within the United States as required by the Act.⁶² The Court also rejected the argument that the Geneva Convention on the High Seas or the Pan-American Maritime Neutrality Convention, both signed by the United States and Argentina, created an exception to the FSIA under § 1604, because neither convention is self-executing.⁶³ Similarly, the Court concluded that neither con-

of United States Attorneys General also recognized the availability of jurisdiction under the Alien Tort Claims Act. 26 Op. Att'y Gen. 250 (1907); 1 Op. Att'y Gen. 57 (1795).

Further, it is unclear whether the Alien Tort Claims Act was ever intended to apply to foreign sovereigns. The legislative and historical background surrounding enactment of the statute indicate that its drafters were primarily concerned with ensuring access to federal courts for aliens injured by persons acting under color of United States authority, such as letters of marque. See 1 *The Records of the Federal Convention of 1787* 18-19 (E. Randolph), 316 (J. Madison) (M. Farrand ed. 1937) (debates at the Constitutional Convention reflecting the delegates' concern that the young nation's ability to maintain peaceful foreign relations would depend mainly on its compliance with the law of nations and that a major shortcoming of the Confederation had been its inability to punish judicially violations of treaties or the law of nations). Its main purpose was to vindicate any incident which, if mishandled by a state court, might provoke an international crisis. See *Randall I*, *supra* note 35, at 11-23; Note, *A Legal Lohengrin: Federal Jurisdiction Under the Alien Tort Claims Act of 1789*, 14 U.S.F. L. REV. 105, 113-15 (1979) (authored by Jay M. Lewis Humphrey); see also *THE FEDERALIST* Nos. 3 & 64 (J. Jay), No. 42 (J. Madison), and No. 80 (A. Hamilton) (evidencing the pressing need felt at this time to assure aliens access to federal courts in matters implicating foreign relations).

57. *Amerada Hess*, 109 S. Ct. at 689.

58. *Id.* at 690-92. As the concurrence noted, the Court should not have reached this issue since the Second Circuit did not decide this question, specifically reserving it, the petition for certiorari did not present it, and it was not necessary to the disposition of the case. See *id.* at 692-93 (Elackmun, J., concurring in part).

59. 28 U.S.C. § 1605(a)(5) (1982).

60. *Id.* § 1604.

61. *Id.* § 1605(a)(1).

62. *Amerada Hess*, 109 S. Ct. at 690-91. The Court rejected Respondents' argument that since the high seas are within the admiralty jurisdiction of the United States, the attack occurred in the United States. It limited the statutory definition of United States to the continental United States, its islands, and its three mile territorial sea. *Id.* at 691.

63. *Id.* at 691-92. Section 1604 states that immunity under the Act is "[s]ubject to international agreements to which the United States [was] a party at the time of [its] enactment." 28 U.S.C. § 1604 (1982). This exception applies when international agreements "expressly conflict" with the immunity provisions of the FSIA. HOUSE REPORT, *supra* note 5, at 17, 1976 U.S. CODE CONG. & ADMIN. NEWS at 6616; SENATE REPORT, *supra* note 50, at 17.

vention nor the Treaty of Friendship, Commerce and Navigation between the United States and Liberia constituted a waiver of immunity under § 1605(a)(1) because none of these international agreements contains a waiver of immunity to suit in U.S. courts or to the availability of a cause of action in the United States.⁶⁴

C. *Towards a Solution*

The Supreme Court decision clearly forecloses any attempt to find a basis for jurisdiction over a foreign state outside the FSIA. It also narrowly construes existing treaties for purposes of finding an exception to immunity under the FSIA. It does not, however, close off the possibility of finding jurisdiction within the FSIA exceptions for suits challenging acts in violation of international law.

The disagreement between the Supreme Court and the Second Circuit in *Amerada Hess* highlights the basic tension between the rights of an individual who has been injured in violation of international law and the doctrine that one nation should not adjudicate disputes arising from the acts of another nation. The Supreme Court's reading of the FSIA is probably correct under conventional analysis, but it ignores the special problems that arise from freezing in place an otherwise dynamic body of international law. Although the Second Circuit relied on faulty reasoning in finding that courts should grant jurisdiction in these cases, its fundamental premise—that states should not be entitled to sovereign immunity when they violate international law—seems correct if limited to a core group of peremptory norms.

Current international law recognizes these fundamental norms under the concept of *jus cogens*; however, the effect of *jus cogens* on the doctrine of sovereign immunity has not been fully explored. Part II of this Comment looks to the evolution of the concept of sovereign immunity, trends in the notion of sovereign power, and the relationship between the two. It argues that, under international law, sovereigns are not entitled to immunity when they violate a *jus cogens* norm.

II

THE EVOLUTION OF THE CONCEPT OF STATE SOVEREIGNTY UNDER INTERNATIONAL LAW: THE EROSION OF SOVEREIGN IMMUNITY AND THE RISE OF *JUS COGENS*

The fallacy of the Second Circuit's decision in *Amerada Hess* may not have been in recognizing an exception to sovereign immunity for acts that violate international law, but in not properly limiting the scope of

64. *Amerada Hess*, 109 S. Ct. at 692. See *infra* notes 180-181 and accompanying text.

this exception. Current international law recognizes a core group of fundamental norms, embodied in the concept of *jus cogens*, which states may not violate. This group of fundamental norms possesses a unique character that differentiates it from other principles of international law.⁶⁵ This section argues that, if properly limited to this fundamental group of norms, the result reached by the Second Circuit may be defensible under the implied waiver provision of the FSIA—that is, a state forfeits its sovereign immunity when it injures an individual in violation of a *jus cogens* norm.

The relationship between *jus cogens* and sovereign immunity has not been clearly established in international law, perhaps because the doctrines have developed independently. This section explores the evolution of the doctrine of sovereign immunity and its relationship to the development of the concept of *jus cogens* in international relations. First, it traces the development of the doctrine of sovereign immunity from its beginnings as a mere principle of comity, through its evolution to an absolute legal requirement, to its current restrictive form. This historical analysis demonstrates that, as the role of the sovereign state has evolved over time, so has the doctrine of sovereign immunity. As a consequence, the evolving concept of sovereign power in international law, specifically the new limitations placed upon this power after World War II, necessarily implicates the doctrine of sovereign immunity. Because *jus cogens*, by definition, is a set of rules from which states may not derogate, a state act in violation of such a rule will not be recognized as a sovereign act by the community of states, and the violating state therefore may not claim the right of sovereign immunity for its actions. Just as under the restrictive theory of sovereign immunity, where states are not entitled to immunity for commercial acts, states should be amenable to suits in the courts of another nation when their actions represent a clear violation of a peremptory norm of international law.

A. *The Development of the Theory of Absolute Sovereign Immunity*

Although the formulation of the sovereign immunity doctrine can

65. The court, however, implicitly recognized that the class of international law violations for which a state forfeits its immunity must be restricted to serious violations of international law. To demonstrate that international law denies sovereign immunity for violations of international law, the court stated that "the emerging international law prohibition of genocide . . . would make little sense, even in theory, if sovereign states were not covered by the prohibition." *Amerada Hess*, 830 F.2d at 426. The court quoted the Nuremberg court: "The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law." *Id.* (quoting International Military Tribunal (Nuremberg), Judgment and Sentences (1946), reprinted in 41 AM. J. INT'L L. 172, 221 (1947)). Later, in its discussion of personal jurisdiction, the court referred to "certain universal offenses, like piracy and genocide [that] are offenses against the law of nations wherever they occur." *Amerada Hess*, 830 F.2d at 428.

be traced to the feudal era when most states were ruled by kings and princes,⁶⁶ the doctrine of state immunity did not become the established practice of a large number of sovereign states until the nineteenth century. The earliest judicial expression of state immunity in United States law is contained in the United States Supreme Court's decision in *The Schooner Exchange v. M'Faddon*.⁶⁷

In *The Schooner Exchange*, Chief Justice John Marshall, writing for the Court, grounded the legal basis for state immunity in the notions of the independence, equality, and dignity of states.

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other . . . [has] given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.⁶⁸

Since all states were coequal sovereigns in the world community, the exercise of jurisdiction over a foreign state was deemed incompatible with the foreign state's dignity and equality. Consequently, the established rule became "that between two equals, one cannot exercise sover-

66. Frenchman Jean Bodin wrote the first systematic treatment of the concept of sovereignty during the reign of Henry III (1551-1589). Bodin, reacting to the system of states which had emerged from medieval society,

attempted to justify in the domain of law, philosophy and morals, that rule of absolutism which alone had made it possible for the French kings of the 14th and 15th centuries to create the united Kingdom of France . . . by the gradual extinction of royal suzerainty over the feudal lords of the realm.

J. MATTERN, CONCEPTS OF STATE, SOVEREIGNTY AND INTERNATIONAL LAW 1 (1928). The theory of sovereign immunity fit neatly into the scheme of monarchical absolutism providing "the monarch with rationalization and justification for establishing absolute control over society." G. BADR, STATE IMMUNITY 74 (1984). The states emerging during this period were ruled by personal sovereigns; the impersonal state had not yet appeared. Thus international law addressed the personal relationships between individual sovereigns. "In such a period . . . the exercise of authority on the part of one sovereign over another inevitably indicated either the superiority of overlordship or the active hostility of an equal. The peaceful intercourse of States could be predicated only on the basis of respect for other sovereigns." Research in International Law, *Draft Conventions on Diplomatic Privileges and Immunities, and Legal Position and Functions of Consuls*, 26 AM. J. INT'L L. 527 (Supp. 1932). As a consequence, a significant factor in the development of sovereign immunity was courtesy for fellow sovereigns.

67. 11 U.S. (7 Cranch) 116 (1812).

68. *The Schooner Exchange*, 11 U.S. at 136-37. In England, equality and independence played an important part in the explanation of foreign state immunity.

[A]s a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise by means of any of its courts, any of its territorial jurisdiction over the person of any sovereign . . .

The Parlement Belge, 5 P.D. 197, 217 (1880). Similarly, Lord Macmillan invoked "dignity, equality and independence" of foreign states as the foundation of their immunity. *The Christina*, 1938 A.C. 485, 498.

eign will or power over the other, '*par in parem non habet imperium*.'"⁶⁹

The Schooner Exchange, however, did not hold that a foreign state had an absolute right to jurisdictional immunity in another state's territory. Rather, Marshall's decision rested on the basic principle that each state had "full and absolute jurisdiction" within its own territory.⁷⁰ Consequently, the immunity granted the foreign state was based on the local state's voluntary waiver of its jurisdiction. The waiver was not binding or universal; the local state could withdraw it whenever it chose to exercise the plenitude of its territorial sovereignty. In other words, *The Schooner Exchange* stood for the proposition that foreign state immunity was a matter of "grace and comity on the part of the United States, and not a restriction imposed by [either] the Constitution,"⁷¹ or a peremptory norm of international law.⁷²

The absolute theory of sovereign immunity established in *The Schooner Exchange* was based on the limited role that sovereign states played at the time. *The Schooner Exchange* was decided in an era when the critical function of government was "limited more or less . . . to problems of internal administration or to the pursuit of diplomatic and military objectives."⁷³ Because states engaged exclusively in political and governmental acts, the sovereign immunity doctrine applied in all cases involving foreign sovereigns. As a consequence, the doctrine became crystallized into a complete and unlimited exemption for all state acts from the territorial jurisdiction of other nations.

1. *The Rise of Restrictive Immunity*

During the twentieth century, changes in the role of the state led to modification of the doctrine of absolute immunity. Modern states took on increasing roles in commercial and trading activities. As commercial relationships between states and private individuals increased, so did litigation over disputes arising from these relationships. State claims of immunity in these situations brought about fundamentally unfair results because aggrieved individuals were often denied a legal remedy "for rea-

69. Sucharitkul, *Immunities of Foreign States Before National Authorities*, in 1976-1 RECUEIL DES COURS 87, 117 (1976).

70. *The Schooner Exchange*, 11 U.S. at 136.

71. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).

72. Commentators have rejected the theory that the doctrine of state immunity derives from a rule of international law. See G. BADR, *supra* note 66, at 13 (arguing that *The Schooner Exchange* did not stand for the proposition that absolute immunity was a peremptory rule of international law); see also Lauterpacht, *supra* note 2 at 228 ("there is at present no rule of international law which obliges states to grant jurisdictional immunity to other states [Such a proposition] finds no support in classical international law.").

73. T. GIUTTARI, *THE AMERICAN LAW OF SOVEREIGN IMMUNITY* 3 (1970).

sons totally unrelated to the substance of their causes of action."⁷⁴ Thus, there was a "growing tendency in the jurisprudence of many countries to emphasize exceptions to state immunity rather than to emphasize the basic rule itself."⁷⁵

The absolute theory of sovereign immunity enabled the foreign state to avoid the economic risks of legal liability from commercial activity thereby shifting the risks of the marketplace onto the shoulders of private parties. Allowing the state to participate in the international marketplace in this fashion, without being subject to the rule of law, impaired the ability of the market to function properly. To preserve order in the marketplace, it became necessary to place legal limitations on the power of the state. In the interests of justice, courts allowed individuals legal access to domestic courts in commercial and other private law disputes against the state.⁷⁶

International law theory therefore evolved to fit the realities brought about by the industrial revolution. The doctrine of absolute sovereign immunity developed into a new restrictive theory. In contrast to the absolute theory in which every state act was considered a sovereign act, the restrictive theory distinguishes between the public and private acts of a state⁷⁷ and generally accords immunity to a foreign sovereign defendant only where its public acts are at issue. A state exercises its sovereignty mostly within the domain of public law.⁷⁸ Because commercial transactions are governed by private law, the state's commercial activity is outside the sphere of sovereign authority. Immunity is not warranted because the state's public attributes are not encroached upon by a foreign

74. Trooboff, *Foreign State Immunity: Emerging Consensus on Principles*, 200 RECUEIL DES COURS 235, 268 (1986).

75. Research in International Law, *Competence of Courts in Regard to Foreign States*, 26 AM. J. INT'L L. 455, 473-74 (Supp. 1932).

76. See, e.g., I Congreso del Partido, [1983] A.C. 244, 262.

77. The restrictive theory recognizes the dual capacity of the state as a political power with sovereign prerogatives and as a juristic person capable of entering into private law relationships. For a discussion of the distinction between public and private acts of state, see Lauterpacht, *supra* note 2, at 222-26. See also Tate Letter, *supra* note 17 (official adoption by the State Department of the restrictive theory of sovereign immunity).

78. The exercise of jurisdiction based upon the distinction between sovereign acts (*jure imperii*) and nonsovereign acts (*jure gestionis*) has proved difficult in practice, often resulting in contradictory results. See Sinclair, *Law of Sovereign Immunity-Recent Developments*, 167 RECUEIL DES COURS, 113, 210 (1980); cf. G. BADR, *supra* note 66, at 63-70 (proposing criteria for distinctions between public and private acts of state); Trooboff, *supra* note 74, at 275-318 (clarifying the distinction between public and private acts of state.). As Professor Brierly adds:

The distinction between acts *jure imperii* and acts *jure gestionis*, although superficially attractive as a means of keeping state immunity within reasonable limits, does not rest on any sound logical basis; it involves making assumptions as to what are the proper functions of government which might be justifiable assumptions according to the *laissez-faire* theories of the nineteenth century but may seem arbitrary today in a world community which contains socialist and communist as well as capitalist states."

J. BRIERLY, *THE LAW OF NATIONS* 250 (6th ed. 1963).

court's exercise of jurisdiction. Consequently, when a foreign state enters the marketplace as a merchant, it is held accountable for its commercial obligations and no longer has the absolute right to claim immunity when the suit is brought in the domestic courts of another sovereign. The foreign state's private law relationship with individuals or a corporation is governed by the rule of law enacted and enforced by the local authority.

The restrictive theory thus undermines the basic foundational elements of state immunity established in *The Schooner Exchange*. The maxim *par in parem non habet imperium*, which led to the development of the absolute theory of state immunity, is now applicable only in "state-to-state relationships."⁷⁹ The changing role of the state in the modern world has resulted in an evolution of the state immunity doctrine. This doctrinal evolution, in turn, reflects a changed view of the relationship between courts and sovereigns. No longer does the mere presence of a sovereign as a party render the courts impotent. All the rights of a state in the international arena have been reduced to one: "the right to respect in the exercise of its [sovereign powers] within the limits recognized by international law."⁸⁰

B. Changes In the Limitations on State Power Through International Law: The Development of Jus Cogens

Just as the economic role of the state has changed, so too has the structure of international law. Prior to World War II, the concept of state sovereignty was synonymous with unrestricted power. Today, however, international law has imposed significant limitations on a state's freedom of action in order to protect peaceful relations among states. Restrictions on a state's sovereign power are designed to promote coexistence and interdependence in the international community. The following is a discussion of developments in the international community that have led to a recognition of such limitations in international law in the form of jus cogens.

79. G. BADR, *supra* note 66, at 89. Lauterpacht concluded that, although practical necessity seemed to point to the abolition of the state immunity doctrine, there were four areas in which state immunity should continue to be recognized:

1) Legislative acts of a foreign state and measures taken in pursuance thereof; 2) Executive and administrative acts of a foreign state within its territory; 3) Contracts which by virtue of the operation of rules of private international law, lie outside the jurisdiction of local courts; and 4) Diplomatic immunities.

Lauterpacht, *supra* note 2, at 237-39.

80. Friedman, *Some Disputed Applications of Principle of State Immunity*, 22 AM. J. INT'L. L. 566, 571 (1928) (justifying the distinction between acts *jure imperii* and acts *jure gestionis* as the "only solution compatible with respect due to the local sovereign.").

1. *The Earliest Limitation on State Power: Natural Law as the Basis of Classical International Law*

The emergence of separate nation-states during the fifteenth century brought with it the need to reconcile the independence of the state with the demands of order within the system of states. All states were committed to the ideal of sovereign independence, however, each was also a member of international society. International order required a system of laws to regulate the mutual relations among states.

The classical system of international law, first formulated by Grotius, posited rules that limited the independence of sovereign states to promote their peaceful coexistence.⁸¹ This system, the law of nations, was comprised of divine law of revelation, natural law, and custom.⁸² The latter two elements represent the first recognition of two different kinds of international law: the necessary law of nations embodying the law of nature, and the positive law created by agreement and custom.

The necessary law of nations comprised those principles that were fundamental to a civilized society.⁸³ Because necessary law derived from the natural law, nations could not alter it unilaterally or by agreement with other nations.⁸⁴ The law binding upon sovereign states was not solely the product of their express will. As Professor Lauterpacht stated:

The significance of the law of nature in [Grotius'] treatise is that it is the ever-present source for supplementing the voluntary law of nations, for judging its adequacy in the light of ethics and reason, and for making the reader aware of the fact that the will of states cannot be the exclusive or even, in the last resort, the decisive source of the law of nations.⁸⁵

The necessary law of nations thus imposed fundamental restrictions on sovereign power, implicitly recognizing that the absolute power of the sovereign needed to be checked if there was to be order in international

81. W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 60 (1964). As Grotius described, international relations in his time were chaotic: "I saw pervailing throughout the Christian world a licence in making war of which even barbarous nations should be ashamed; men restoring to arms for trivial or for no reasons at all . . ." J. BRIERLY, *supra* note 78, at 29 (quoting H. GROTIUS, *PROLEGOMENA* 28 (1625) (Introduction to *De jure belli ac pacis libri tres*)).

82. E. DICKINSON, *THE EQUALITY OF STATES IN INTERNATIONAL LAW* 41 (1920).

83. Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1134 (1985). The most basic principles of the natural law were "the respect for promises given and treaties signed . . . the respect for other people's property and the restitution of gain made from it, the reparation of damage caused by one's fault and the recognition of certain things as meriting punishment." W. FRIEDMANN, *supra* note 81, at 75.

84. Vattel described the immutable quality of the necessary law of nations:

[T]he necessary Law of Nations consists in applying the natural law to States, and since the natural law is not subject to change, being founded on the nature of things and particularly upon the nature of man, it follows that the necessary Law of Nations is not subject to change.

E. VATTEL, *THE LAW OF NATIONS* 4 (J.B. Scott ed. 1916).

85. Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L L. 1, 21-22 (1946).

relations.⁸⁶

2. *The Rise of Positivism*

The Grotian system of natural law governing international relations was challenged and eroded by the application of the ideas of Thomas Hobbes to international relations. Hobbes reasoned that the individual had the power "to do everything necessary for self-preservation, and to be supreme judge as to what was necessary to that end."⁸⁷ In Hobbes' theory, power, rather than some moral principle, determined the extent of an individual's rights. To preserve existence, it was necessary for individuals to abandon the state of nature and to establish through social contract the sovereign state. Hobbes conceived the sovereign state as a supreme and unlimited power.⁸⁸ Because the will of the state was the sole source of all right, Hobbes rejected the Grotian notion of a "necessary" law of nations. Hobbes believed that the "law of nature as applied to states [was] not a law at all in the sense of a legal and moral precept."⁸⁹ Rather, it consisted only of the natural right to self-preservation.⁹⁰ Consequently, a state submitted "to no higher law than the safety of its own realm."⁹¹

Hobbesian philosophy greatly influenced the positivist school of thought in the nineteenth century which rejected the Grotian vision of world order.⁹² International law, according to the positivists, was based on certain fundamental principles. First, all sovereign states were considered absolutely equal and independent. Inherent in this system of absolute equality was a tendency towards anarchy.⁹³ States followed only those rules that were necessary to protect their vital interests and "when these interests came into conflict . . . the only arbiter was brute

86. Bodin also recognized limits to absolute sovereign power. The absence of a higher authority necessitated a rule of law for states in their mutual relations. International order thus required that sovereign power be limited by principles of morality. See F. POLLOCK, *AN INTRODUCTION TO THE HISTORY OF THE SCIENCE OF POLITICS* ch. II (Rev. ed. 1911).

87. E. DICKINSON, *supra* note 82, at 72-73; see also T. HOBBS, *LEVIATHAN* ch. XIV (C.B. MacPherson ed. 1968).

88. *Id.* at ch. XVIII.

89. Lauterpacht, *Spinoza and International Law*, 8 BRIT. Y.B. INT'L L. 89, 95 (1927).

90. See C. MURPHY, *THE SEARCH FOR WORLD ORDER* 53 (1985). The natural conflict between individuals that existed in the state of nature was transferred to the relations between sovereigns. States "because of their Independency, are in continuall jealousies, and in the state and posture of Gladiators; having their weapons pointing, and their eyes fixed on one another . . . which is a posture of war." T. HOBBS, *supra* note 87 at ch. XIII.

91. C. MURPHY, *supra* note 90, at 53.

92. Lauterpacht, *supra* note 89, at 106-07.

93. "The states of the world lived in that condition of natural equality described by Hobbes where each was the potential enemy of every other." Humphrey, *On the Foundations of International Law*, 39 AM. J. INT'L L. 231, 231 (1945).

force."⁹⁴ Thus, the interests of the world community as a whole were subservient to the interests of individual states.

Second, international law consisted of only those rules that a state consented to follow. The positivists rejected the natural law constraints on sovereign power proposed by Grotius. Sovereign power, according to the positivists, was absolute; if international law was to bind the states, that law needed to emanate from the states themselves.⁹⁵ Because sovereign states were bound by international law only through their consent, international law was followed only as long as it suited the self-interest of the state. Consequently, as most legal scholars admitted, "a self-imposed limitation [was] no limitation at all . . . therefore so-called international law [was] nothing but 'external public law' binding the state only because, and only so long as, it consent[ed] to be bound."⁹⁶

Finally, states were the only actors on the international legal plane. The positivist system of international law was the law between states.⁹⁷ Individuals, according to the positivist formula, could not acquire any rights or duties under international law because "international rights and duties [could] exist only between states."⁹⁸ Individuals could sue for violations of international law only indirectly, under the rule that "a state could consider any injury to its citizens as an injury to itself and therefore could attempt to obtain reparation for it."⁹⁹ The state, however, was under no duty to vindicate the rights of its citizens.¹⁰⁰ The positivist doctrine of international law thus provided no guarantees that the fundamental rights of individuals would be protected.

During the nineteenth century, when positivist theory formed the basis of international law, the international community comprised a small homogeneous group of Western European nations and their

94. *Id.*

95. "Either a state is sovereign, in which case it cannot be bound by any law higher than its own, or it is bound by law, in which case it ceases to be sovereign." *Id.* at 233.

96. J. BRIERLY, *supra* note 78, at 53 (emphasis omitted).

97. L. OPPENHEIM, *INTERNATIONAL LAW* 20-21 (4th ed. 1928).

98. *Id.* at 520.

99. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U.L. REV. 1, 9 (1982). According to Oppenheim, nationality was the key that unlocked the benefits to be gained from international law. Individuals who did not possess any nationality enjoyed no protection from the Law of Nations. "As far as the Law of Nations is concerned . . . there is no restriction whatever to cause a State to abstain from maltreating to any extent such stateless individuals." L. OPPENHEIM, *supra* note 97, at 522.

100. Further, as Sohn points out, "international law had little to say about mistreatment of persons by their own government." Sohn, *supra* note 99, at 9. Professor D'Amato underscores this point: "[i]n the mid-1930's, when Stalin supervised the genocide of ten million Russian kulaks, the world took little notice; under positivist theory, what a nation did to its own citizens did not amount to a breach of 'international law.'" D'Amato, *What Does Tel-Oren Tell Lawyers? Judge Bork's Concept of the Law of Nations Is Seriously Mistaken*, 79 AM. J. INT'L L. 92, 104 (1985).

descendants across the Atlantic.¹⁰¹ Thus, the rules necessary for international order grew from a common ground of economic and social philosophy and state organization. Given this homogeneity, international order, for the most part, could be maintained under the positivist structure of international law.¹⁰² Significantly, during this period the state immunity doctrine was founded and subsequently developed. Although the restrictive theory eventually limited the doctrine's use to the sovereign or public acts of state, nineteenth-century positivist law recognized no external limitations upon these sovereign acts. Thus, in the sovereign sphere, states were free to do as they pleased and the doctrine of state immunity provided a shield from any possible legal repercussions.

3. *The Return of Natural Law: The Rise of Jus Cogens*

In the first half of the twentieth century the so-called "civilized nations" twice became embroiled in fierce conflicts of previously unknown magnitude. The physical and emotional damage inflicted by both World Wars changed the face of international society forever. As one scholar wrote:

[W]ars, revolutions, [and] rebellions . . . are problems of law-making, of politics of law, for which rigid positivism has no answers. It is, therefore, understandable that positivism had to suffer a crisis, as a consequence of the fact and of the far-reaching consequences of World War I. . . . Then there were the terrible experiences before, in, and after World War II, the unheard-of cruelties toward men by totalitarian regimes, the abuse of law for purposes of injustice, torture, and extermination, total war, the appearance of nuclear weapons, the bitter struggle in a world torn by an ideological abyss. Such periods of profound crisis foster a flight into natural law as ideas and values on which man can rely as a barrier against the misuse of law.¹⁰³

In the aftermath of World War II, the Nuremberg tribunals returned to international law the external restraints on sovereign action that predated the positivists. The judgments of Nuremberg were largely based on the theory that "the individual [has] a legal obligation to disregard immoral superior orders in the name of a 'higher' moral law."¹⁰⁴ Duties

101. W. FRIEDMANN, *supra* note 81, at 4. Together they formed "a community of nations, united by religion, manners, morals, humanity and science, and united also by the mutual advantages of commercial intercourse, by the habit of forming alliances and treaties with each other, of interchanging ambassadors, and of studying and recognising the same writers and systems of public law." KENT'S COMMENTARY ON INTERNATIONAL LAW 8 (J.T. Abdy 2d ed. 1878).

102. G. POGGI, *THE DEVELOPMENT OF THE MODERN STATE* 89 (1978). Anand argues that traditional international law has always been the law of the strong. Even within the narrow circle of civilized states "[t]he result was that the international society was always a hierarchical society controlled by a few great powers who exercised the right of life and death over the smaller States." Anand, *Sovereign Equality of States in International Law*, 197 RECUEIL DES COURS 17, 190 (1986).

103. J. KUNZ, *THE CHANGING LAW OF NATIONS* 149 (1968).

104. W. FRIEDMANN, *supra* note 81, at 5. "The very essence of the [Nuremberg] Charter [was]

imposed on an individual in violation of this "natural law" were to be discarded as "null and void."¹⁰⁵ Nuremberg thus reestablished the hierarchy of legal norms to govern conflicts between international and national law first proposed by the naturalists in the seventeenth and eighteenth centuries.

Since Nuremberg, international law has come to recognize the concept of *jus cogens* as the primary source of such legal norms external to States.¹⁰⁶ *Jus cogens* then has revived the natural law idea of a law binding irrespective of the will of the sovereign states.¹⁰⁷ Because *jus cogens* norms are hierarchically superior to the positivist or voluntary laws of consent, they absolutely restrict the freedom of the state in the exercise of its sovereign powers.¹⁰⁸

The concept of *jus cogens* has been widely accepted as a principle of international law.¹⁰⁹ Principles of *jus cogens* are incorporated into the Vienna Convention on the Law of Treaties¹¹⁰ and the Restatement of the Foreign Relations Law of the United States.¹¹¹ International and domestic courts have also recognized principles of *jus cogens*.¹¹² For example, in the *Barcelona Traction Light and Power Company Case*¹¹³ the International Court of Justice drew an essential distinction between "the obligations of a State towards the international community as a whole,"¹¹⁴ and those obligations arising among individual states. The former, the Court stated, were the concern of all states. Because all states had an interest in

that individuals have international duties which transcend the national obligations of obedience imposed by the individual state." 1 International Military Tribunal, Trial of the German Major War Criminals 171, 223 (1946).

105. Lobel, *supra* note 83, at 1136.

106. Although the origin of *jus cogens* may be traced to Roman Law, "it is only recently that it has begun to assume any importance in international practice and the thinking of statesman." MCKEAN, *EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW* 278 (1983).

107. Suy, *The Concept of Jus Cogens in Public International Law* 19, reprinted in PAPERS AND PROCEEDINGS II THE CONCEPT OF *JUS COGENS* IN INTERNATIONAL LAW, CONFERENCE ON INTERNATIONAL LAW LAGONISSI (1967).

108. Akehurst, *The Hierarchy of the Sources of International Law*, 47 BRIT. Y.B. INT'L L. 273, 281-82 (1974-5) (concluding that all of the sources of law recognized by the International Court of Justice must be "subject to the rules of international law concerning *jus cogens*").

109. Abi-Saab, *Introduction* 14, reprinted in PAPERS AND PROCEEDINGS II THE CONCEPT OF *JUS COGENS* IN INTERNATIONAL LAW, CONFERENCE ON INTERNATIONAL LAW LAGONISSI (1967). Suy, in an analysis of the views of eminent writers on this point, found great support for the existence of *jus cogens* in international law. See Suy, *supra* note 107, at 26-49.

110. Vienna Convention on the Law of Treaties, May 23, 1969, reprinted in 63 AM. J. INT'L L. 875 (1969).

111. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 comment k (1987).

112. See generally Parker & Neylon, *Jus Cogens: Compelling the Law of Human Rights* (forthcoming in 12 HASTINGS INT'L & COMP. L. REV. (1989)).

113. 1970 I.C.J. Reports 3.

114. *Id.* at 32.

their protection, "they [were] obligations erga omnes."¹¹⁵

A recent opinion by a United States court also included a discussion of the concept of jus cogens. In *Committee of U.S. Citizens of Nicaragua v. Reagan*,¹¹⁶ the Court of Appeals for the District of Columbia Circuit recognized that principles of jus cogens existed in international law and that these principles might have a domestic legal effect.¹¹⁷ The court gave an example: "If Congress adopted a foreign policy that resulted in the enslavement of our citizens or of other individuals, that policy might well be subject to challenge in domestic court under international law."¹¹⁸

4. *The Current Understanding of Jus Cogens and Its Limitation on State Power*

In every civilized community there are certain principles of law that are indispensable and necessary to the continued existence of an ordered society.¹¹⁹ Jus cogens represents "the body of those general rules of law whose non-observance may affect the very essence of the legal system to which they belong to such an extent that the subjects of law may not, under pain of absolute nullity, depart from them."¹²⁰ The public order of the international community requires that certain norms and values receive absolute protection.¹²¹

115. *Id.*

116. 859 F.2d 929 (D.C. Cir. 1988).

117. The court stated that such a conclusion was "implicit in the landmark decision in *Filartiga v. Pena-Irala*," and that peremptory norms of international law "may well restrain our government in the same way the Constitution restrains it." *Id.* at 941.

118. *Id.*

119. However, judicial and arbitral practice contain few indications regarding the application of this rule. McNAIR, *THE LAW OF TREATIES* 213-14 (1961). "[T]he idea of international jus cogens has not yet penetrated into the day-to-day thinking and action of governments." Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AM. J. INT'L L. 946, 956 (1967). But cf. Mann, *The Doctrine of Jus Cogens in International Law* in Festschrift für ULRICH SCHEUNER 418 (1973) ("*Jus cogens* . . . derives its momentum from the International Court of Justice which in the short space of about five years extended it from the law of treaties to reservations, diplomatic protection and recognition.").

120. Suy, *supra* note 107, at 18. Article 53 of the Vienna Convention on the Law of Treaties, *supra* note 110 states:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

121. As Judge Mosler stated:

In any legal community there must be a minimum of uniformity which is indispensable in maintaining the community. This uniformity may relate to legal values which are considered to be the goal of the community or it may be found in legal principles which it is the duty of all members to realize. It may relate to legal rules which are binding within the community. The whole of this minimum can be called a common public order (*ordre*

The introduction or reaffirmation of *jus cogens* in international law required a definition that distinguished the peremptory norms of international law from other categories of norms and principles. However, while the notion of *jus cogens* has widespread appeal in the abstract, it is very difficult to identify rules of "higher law." Most general rules of international law are not considered *jus cogens* principles, and "there is as yet no simple criterion by which to identify a general rule of international law as having the character of *jus cogens*."¹²² Thus, although almost all representatives of the Vienna Convention accepted the concept of *jus cogens*,¹²³ the scope and content of the concept were unclear. This lack of agreement precluded the International Law Commission from establishing an objective criterion for determining a rule of *jus cogens*.

In 1965, Germany's Federal Constitutional Tribunal provided one of the first judicial expressions of general criteria for peremptory norms:

The quality of such peremptory norms may be attributed only to such legal rules as are firmly rooted in the legal conviction of the community of nations and are indispensable to the existence of the law of nations as an international legal order, and the observance of which can be required by all members of the international community.¹²⁴

Scholars have attempted to deduce more precise definitions than that offered by the West German court. For example, Ulrich Scheuner suggested three distinct groups of *jus cogens* norms:

The first that come into consideration are the maxims of international law which protect the foundations of law, peace and humanity in the international order and which at present are considered by nations as the minimum standard for their mutual relations. . . .

A second group of rules and principles are comprised in the rules of peaceful cooperation in the sphere of international law which protect fundamental common interests. . . .

A third sphere of imperative norms regards the protection of humanity, especially of the most essential human rights. . . . [T]hose rules which protect human dignity, personal and racial equality, life and personal freedom can certainly be acknowledged as inalienable law.¹²⁵

public international). The international community cannot dispose with this minimum of principles and rules as without them it would cease to exist.

Mosler, *International Society as a Legal Community*, 140 RECUEIL DES COURS 1, 33 (1974).

122. Y.B. INT'L L. COMM'N 247-48 (Vol. II, 1966).

123. Lobel, *supra* note 83, at 1139-40.

124. 18 BVerfGE 441, 448 (1965) quoted in Riesenfeld, *Jus Dispositivum and Jus Cogens in International Law: In the Light of a Recent Decision of the German Supreme Constitutional Court*, 60 AM. J. INT'L L. 511, 513 (1966).

125. Scheuner, *Conflict of Treaty Provisions with a Peremptory Norm of General International Law*, 27 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 520, 526-27 (1967). Scheuner admits that the question of which rules of international law are peremptory cannot be answered definitively; "one can only make suggestions." *Id.* at 526.

A number of other scholars are in basic agreement with Scheuner's construct. See Christenson,

The factor that distinguishes these norms from others not included within this set is universality. *Jus cogens* exists not to satisfy individual state needs, but in "the higher interest of the whole international community."¹²⁶

Using Scheuner's basic analytical structure, we can identify several fundamental norms as *jus cogens* for the purposes of this Comment. In the first group of norms, encompassing the protection of minimum standards of public order, are the prohibition of genocide, slavery, and the unjustified use of force. The second group includes those norms necessary for the maintenance of international cooperation to maintain common interests. The principle of freedom of the seas, particularly prohibition against using the seas for piracy and the slave trade, is an example of a norm in this category. The final group, relating to protection of the most fundamental human rights, includes protection against torture and arbitrary deprivations of life and liberty.¹²⁷

The difficulty at the Vienna Convention in reaching a consensus on the content of *jus cogens* reflected the "ideological differences and disparities of wealth between the individual nation States which make up the international community."¹²⁸ The danger implicit in recognizing rules of *jus cogens* was that these rules would be used to serve particular ideological or political goals and not reflect the "legitimate political diversity" that exists in the world today. However, by limiting the concept of international *jus cogens*, as Scheuner's construct does, to those norms that are universally accepted by the international community as a whole, there is less danger of cultural bias. As a consequence, the very definition of *jus cogens* limits the scope and quantity of these "higher rules."

C. *Application of Jus Cogens to Sovereign Immunity*

The law of treaties introduced the modern concept of *jus cogens* into

Jus Cogens: Guarding Interests Fundamental to International Society, 28 VA. J. INT'L L. 585, 615-20 (1988) (proposing four groups of *jus cogens* norms: (1) rules protecting the foundations of law, peace and humanity; (2) rules which place limits on a State's authorization for violation of human rights; (3) rules which distinguish "ordinary international delicts from international criminal responsibility from which no derogation is possible; and (4) rules governing peaceful cooperation); Haimbaugh, *Jus Cogens: Root & Branch (an Inventory)*, 3 Touro L. Rev. 203, 212 (1987) (classifying *jus cogens* into two general branches: (1) rules that protect the independence and security of states; (2) rules that protect "individuals of life, liberty or property without due process of law").

For additional discussions on the content of *jus cogens*, see I.M. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 215-18 (2nd ed. 1984); see also MCKEAN, *supra* note 106, at 279-84; Whiteman, *Jus Cogens in International Law, With a Projected List*, 7 GA. J. INT'L & COMP. L. 609 (1977) (listing 20 matters which should be outlawed under *jus cogens*).

126. Suy, *supra* note 107, at 28 (quoting Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT'L L. 571-77 (1937)).

127. Scheuner, *supra* note 125, at 526-27.

128. I.M. SINCLAIR, *supra* note 125, at 222.

international law. In general, it was applied to limit the scope of treaties, such that a treaty concluded in violation of a *jus cogens* norm was null and void.¹²⁹ However, in practice, violations of *jus cogens* norms are more likely to result from the unilateral action of states. Consequently, some writers have maintained that *jus cogens* principles apply not only to treaties, but also to "any other act or action of States."¹³⁰ The Conference on International Law at Lagomissi concluded that this opinion was entirely justified:

If an international *jus cogens* exists it must, indeed, make necessarily null and void any of those legal acts and actions of States whose object is unlawful. If an agreement which does not conform with the rules of the *jus cogens* is considered null and void the reason is that its *effects* are contrary to international public policy. In that case it is inconceivable that this effect should not extend to any act or action having in the hierarchy of legal norms a lower rank than treaties. Any legal act of whatever nature and, hence, any international agreement is unlawful in so far as it infringes a rule of the *jus cogens*.¹³¹

Applying *jus cogens* principles to the unilateral acts of a state implicates the doctrine of state immunity. State immunity rests on the foundation that sovereign states are equal and independent¹³² and thus cannot be bound by foreign law without their consent. *Jus cogens*, however, is a set of peremptory norms which does not depend on the consent of any individual state for its validity. The very existence of *jus cogens* limits "state sovereignty in the sense that the 'general will' of the international community of states [takes] precedence over the individual wills of states to order their relation."¹³³ Thus, the concept that a sovereign is

129. Vienna Convention on the Law of Treaties, *supra* note 110, art. 53, at 296, 63 AM. J. INT'L L. at 891.

130. Suy, *supra* note 107, at 75; see also Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 19-21 (1986).

131. Suy, *supra* note 107, at 75. Responding to critics who would limit the effect of *jus cogens* violations to the invalidation of treaties, John Dugard wrote:

The criticism of any attempt to extend *jus cogens* beyond the confines of the law of treaties is firmly premised on an outmoded perception of the contemporary international legal order. Traditional international law drew no distinction between different categories of illegal acts of the kind known to municipal systems of law. The distinction between crimes and delicts (torts) was unknown, and there was no hierarchy of norms, some of which were serious and illegal *erga omnes* and others of which were less serious and illegal only vis-a-vis another State. But this has all changed. Today international law does distinguish between peremptory norms and ordinary norms, between crimes and delicts and between acts illegal *erga omnes* and acts illegal only against specific States. In such a legal order the objection to the extension of the rules of *jus cogens* to unilateral acts disappears.

J. DUGARD, *RECOGNITION AND THE UNITED NATIONS* 142 (1987).

132. See *supra* note 68 and accompanying text.

133. Turpel & Sands, *Peremptory International Law and Sovereignty: Some Questions*, 3 CONN. J. INT'L L. 364, 365 (1988).

subject to no restraints except those imposed by its own will is inconsistent with the definition of *jus cogens* as peremptory law.

The emergence of *jus cogens* as peremptory norms of international law implicitly suggests that "[t]he traditional concept of sovereignty has become particularly inconsistent and outmoded in the present-day world."¹³⁴ In the last half-century, the structure of the international community has undergone a profound transformation as the number of nations in international society has expanded.

[S]cores of new nations in Asia, Africa and the Pacific, with their teeming millions, which had thus far no status and no voice and had been considered as no more than objects of international law, have emerged as full-fledged members of the international society. A growing majority of these so-called "new" states are neither European nor Western, but represent former colonies and vassals of the Western world with completely different social and legal backgrounds and their own set of cultural and moral values. [I]n spite of all their differences . . . they all claim to be sovereign and equal . . .¹³⁵

A significant result of this expansion in the number of sovereign states is the "increasing dilution of the homogeneity of values and standards,"¹³⁶ which constitutes the basis of classical international law. Unlike the homogeneity that characterized the small group of Western nations that founded the principles of classical international law, today's family of nations comprises the entire spectrum of social, economic, and political organization.¹³⁷ As a consequence, "[t]he survival of each political community and its capacity to develop according to its own preferences, depends upon a minimal number of common norms to which all members have allegiance."¹³⁸

One result of these changes has been the division of the family of nations into groupings of states that share the same ideologies. The primitive legal order of classical international law with its "loose, unor-

134. Anand, *supra* note 102, at 31.

135. *Id.* at 18-19; see also Friedmann, *The Changing Dimension of International Law*, 62 COLUM. L. REV. 1147, 1150-53 (1962).

136. W. FRIEDMANN, *supra* note 81, at 6.

137. See Bozeman, *The International Order in a Multicultural World*, in *THE EXPANSION OF INTERNATIONAL SOCIETY* 387, 404 (H. Bull & A. Watson eds. 1984). A parallel may be drawn between today's multiplicity of existing and emerging states and the growth of nationalism and the nation-state in 15th century Europe. As Murphy noted, in the 15th century, "[d]ifferences in language, custom, and institutions accelerated the antagonisms between the various peoples of the continent. Some superior authority was needed to contain the warfare that had become increasingly destructive and threatened the peace of the Christian community." C. MURPHY, *supra* note 90, at 1. The result was the Grotian vision of world order and the regulation of sovereign power by universal principles of natural law. *Id.* at 1-28.

138. Bozeman, *supra* note 137, at 134 (referring to the emergence of the United Nations and the post-World War II world order).

ganized society of sovereign states"¹³⁹ has been replaced by an increasingly organized and interdependent international community.¹⁴⁰ International society is now characterized by an increasing volume of state cooperation in matters of common concern.¹⁴¹ The result has been a decreased emphasis on the classical notions of sovereignty in an effort to foster cooperation among the community of nations. This evolution of international society into an organized and integrated community of states is incompatible with the positivist notion that sovereignty implies unlimited power. Order can only exist in an organized society to the degree that state conduct conforms to fundamental rules of existence.¹⁴² Thus, coexistence requires a concept of sovereignty that places a restraint on absolute sovereign power: a definition of sovereignty that includes both rights and duties. *Jus cogens* norms represent the fundamental duties incident to international life. They are an essential component of the modern law definition of sovereignty.¹⁴³

D. *The Position of the Individual in International Law*

The evolution in international society described above has created a need for legal rules that foster and maintain international order. The notion that states are absolutely independent, which served as the basis for the positivist conception of international law, has become increasingly invalid.¹⁴⁴ A further result of the evolution in international society is a significant change in the focus of international law. In *The Common Law of Mankind*, Wilfred Jenks noted this change:

[T]he emphasis of the law is increasingly shifting from the formal struc-

139. J. KUNZ, *supra* note 103, at 6.

140. See W. FRIEDMANN, *supra* note 81, at 18. Professor Friedmann posits that changes in the structure of international relations, particularly present day military, political, and economic realities, renders the doctrine of national sovereignty obsolete. See *id.* at 35-39. Perhaps the best example of this type of reduced sovereignty is the European Community as it moves toward economic, and perhaps ultimately, military and political unification.

141. *Id.* at 37-38.

142. Suy, *supra* note 107, at 70. At the 1969 sessions of the Vienna Conference on the Law of Treaties, the representative of the Federal Republic of Germany (Groepper) observed:

The emergence of the notion of *jus cogens* in international law was a direct consequence of social and historical evolution, which had had a far-reaching influence on the development of international law. Technical interdependence and the multiplication of links between States had produced a situation where the ordered coexistence of States became impossible not only in the absence of some sort of international public order but also for want of certain concrete rules from which derogation was not permitted.

2 U.N. Conference on the Law of Treaties, Official Records (19th plen. mtg.) at 95-96, U.N. Doc. A/Conf. 39/11/Add. 1, U.N. Sales No. E. 70 v.6 (1970).

143. As Professor Suy stated: "if public international law wishes to transform itself from a primitive legal system into a highly organized legal system then *international jus cogens* must develop." Suy, *supra* note 107, at 71.

144. The emergence of *jus cogens* as a principle of international law reflects the essential reality of international coexistence—states are dependent upon one another. See C. MURPHY, *supra* note 90, at 95; *supra* note 140.

ture of the relationships between States and the delimitation of their jurisdiction to the development of substantive rules on matters of common concern vital to the growth of an international community and to the individual well-being of the citizens of its member States.¹⁴⁵

Since the Second World War, the status of individuals under international law has undergone a fundamental change. The revolution in international human rights law has transformed the individual from "an object of international compassion into a subject of international right."¹⁴⁶ Consequently, individuals are now said to possess substantive international rights vis-a-vis states.¹⁴⁷

The recognition that individuals have rights on the international legal plane is entirely consistent with the emergence of jus cogens as peremptory norms of international law. If the starting point of international law is the individual, rather than the absolute sovereignty of states, "the rights and obligations of man under international law receive a foundation independent of the arbitrary will of states."¹⁴⁸ The irreducible element becomes the sovereignty of the individual, not the sovereignty of states.¹⁴⁹ As Professor Waldron has stated, respect for individual rights "is the new criterion of political legitimacy."¹⁵⁰ Governments that violate individual rights should be "shunned in the international community."¹⁵¹

The most fundamental individual rights are embodied in the concept of jus cogens.¹⁵² For example, a state policy of genocide, torture, or slav-

145. W. JENCKS, *THE COMMON LAW OF MANKIND* 17 (1958).

146. H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 4 (1968). Sohn posits that individuals gained rights under international law in four stages:

assertion of international concern about human rights in the U.N. Charter; listing of those rights in the Universal Declaration of Human Rights; elaboration of the rights in the International Covenant on Civil and Political Rights and in the International Covenant on Economic, Social and Cultural Rights; and the adoption of some fifty additional declarations and conventions concerning issues of special importance . . .

Sohn, *supra* note 99, 11-12 (footnotes omitted). For a comprehensive list of human rights treaties, agreements and declarations, see *INTERNATIONAL HUMAN RIGHTS INSTRUMENTS* (R. Lillich ed. 1985).

147. See Blum & Steinhardt, *supra* note 35, at 64-67. In *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), the Second Circuit recognized this expansion of international law to include individuals' rights against states by holding that the right to be free from torture was a fundamental right enforceable by an individual in domestic courts. *Id.* at 885.

148. P. REMEC, *THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW ACCORDING TO GROTIUS AND VATTTEL* 40 (1960).

149. Lauterpacht, *The Law of Nations, the Law of Nature, and the Rights of Man*, 29 *THE GROTIUS SOCIETY, TRANSACTIONS* 1, 29 (1944).

150. J. WALDRON, *Introduction*, in *NONSENSE ON STILTS* 1 (J. Waldron ed. 1987).

151. *Id.*

152. The suggestion has been made that the Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/180 at 71 (1948), reprinted in *INTERNATIONAL HUMAN RIGHTS INSTRUMENTS*, *supra* note 146, at § 440.1, has "the attributes of jus cogens." M. McDOUGAL, H. LASSWELL & L. CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER* 274 (1980).

ery, some of the worst violations of individual rights, is generally accepted as violating jus cogens norms. The nature of these violations make them particularly appropriate for individual enforcement because the individual, injured by an act in violation of a jus cogens norm, has a legitimate and fundamental interest in enforcing the norm. Consequently, the position of the individual in international law is intrinsically connected to the enforcement of jus cogens norms.

E. Conclusion

The principle underlying the Second Circuit's decision in *Amerada Hess* that an individual's suit for damages against a foreign state for an action in violation of international law is not barred by the doctrine of sovereign immunity makes sense only if it is limited to the small group of norms that compose the concept of jus cogens. The existence of a system of rules that states may not violate implies that when a state acts in violation of such a rule, the act is not recognized as a sovereign act. When a state act is no longer recognized as sovereign, the state is no longer entitled to invoke the defense of sovereign immunity. Thus, in recognizing a group of peremptory norms, states are implicitly consenting to waive their immunity when they violate one of these norms. The following section argues that under the FSIA, this implicit waiver would provide jurisdiction to U.S. courts over a foreign sovereign who has violated a jus cogens norm.

III

JUS COGENS AND THE FSIA: THE UTILITY OF THE IMPLIED WAIVER PROVISION

As discussed above, a suit against a foreign sovereign in a U.S. court may only be brought under the FSIA.¹⁵³ The FSIA, however, contains no general exception to immunity for violations of international law,¹⁵⁴ and thus does not appear to furnish a basis for suit against a foreign sovereign in a U.S. court for violation of a peremptory norm of international law. The Second Circuit in *Amerada Hess* unsuccessfully tried to resolve this problem by finding a basis for jurisdiction over foreign states outside of the FSIA.¹⁵⁵ Such extraordinary legal contortions, however, are unnecessary. As this Comment argues, the FSIA itself provides U.S. Courts with jurisdiction over torts in violation of peremptory norms of international law, under its implied waiver provision.

153. *Supra* note 4.

154. *See supra* notes 25-30 and accompanying text. FSIA § 1605(a)(3) does provide jurisdiction in cases involving expropriation of property in violation of international law. 28 U.S.C. § 1605(a)(3) (1982).

155. *See supra* text accompanying notes 47-64.

A. The Doctrine of Implied Waiver in the U.S. Law of Sovereign Immunity

Sections 1605 and 1607 of the FSIA set forth a series of exceptions to the general rule of immunity for foreign states.¹⁵⁶ Incorporating the well-established principle that a foreign state can waive its immunity,¹⁵⁷ § 1605(a)(1) provides that a foreign state shall not be immune from jurisdiction in any case "in which the foreign state has waived its immunity either explicitly or by implication."¹⁵⁸

The actual parameters of the implied waiver provision, however, are unclear.¹⁵⁹ The House Report to the FSIA provides several illustrations of implied waivers of immunity:

With respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract. An implicit waiver would also include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity.¹⁶⁰

This list is by no means comprehensive,¹⁶¹ and the FSIA's legislative history offers no other guidance on the meaning of this provision. The fact that Congress derived these examples from case law, however, suggests that Congress intended the scope of the implied waiver provision to be informed by prior case law on the subject.

U.S. courts, prior to the passage of the FSIA, long used the doctrine of implied waiver as a rationale for denying immunity for the commercial acts of sovereign states. In 1824 Chief Justice Marshall explicitly endorsed the doctrine of implied waiver in the commercial context:

It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. . . . [Such action] strips [the state] of its sovereign character . . . and waives all the privileges of that character.¹⁶²

Before the adoption of the restrictive theory of immunity in the Tate

156. 28 U.S.C. §§ 1605, 1607 (1982).

157. See *Ervin v. Quintanilla*, 99 F.2d 935, 938 (5th Cir. 1938), *cert. denied*, 306 U.S. 635 (1939); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 456 (1987).

158. 28 U.S.C. § 1605(a)(1) (1982).

159. See Comment, *The Foreign Sovereign Immunities Act and International Human Rights Agreements: How They Co-Exist*, 17 U.S.F. L. REV. 71, 81 (1982) (authored by Jeffrey A. Blair & Karen E.M. Parker).

160. HOUSE REPORT, *supra* note 5, at 18, 1976 U.S. CODE CONG. & ADMIN. NEWS at 6617.

161. See Kahale & Vega, *Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States*, 18 COLUM. J. TRANSNAT'L L. 211, 232 (1979).

162. *Bank of United States v. Planters' Bank of Georgia*, 22 U.S. (9 Wheat.) 904, 907-08 (1824).

Letter,¹⁶³ while the United States was following a rule of absolute immunity, U.S. courts relied on the doctrine of implied waiver to find jurisdiction over trading corporations owned or controlled by a foreign government.¹⁶⁴ For example, in *United States v. Deutsches Kalisyndikat Gesellschaft*¹⁶⁵ the court reasoned:

[The foreign sovereign], therefore, cannot claim as a matter of comity or otherwise . . . that a suit against the agent is in fact a suit against the sovereign. This is especially so when such alleged agent is a foreign corporation, or an officer, agent, or employec of a foreign corporation, which is doing business here only by consent, which cannot be assumed to be given, except on condition that they shall be subject to our laws.¹⁶⁶

Thus, the court relied on the notion of implied waiver to find jurisdiction and evade the doctrine of absolute immunity. At a time when international law was beginning to move towards the theory of restrictive immunity,¹⁶⁷ and other countries in practice had largely abandoned the doctrine of absolute immunity,¹⁶⁸ U.S. courts used implied waiver to accomplish essentially the same results.

In a sense, the doctrine of restrictive immunity is no more than a judicially constructed blanket waiver of immunity for private or commercial acts. Whether or not states intend to waive their immunity by conducting commercial activities in foreign states, their actions are not recognized as sovereign acts and are not accorded immunity under the restrictive theory of immunity.¹⁶⁹ Similarly, because, under international law, states are not recognized as acting within their sovereign capacity when they derogate from a rule of *jus cogens*, they should not be entitled to claim sovereign immunity.¹⁷⁰

163. See *supra* note 17.

164. See S. SUCHARITKUL, *STATE IMMUNITIES AND TRADING ACTIVITIES IN INTERNATIONAL LAW* 187-89 (1959).

165. 31 F.2d 199 (S.D.N.Y. 1929).

166. *Id.* at 203.

167. See Lauterpacht, *supra* note 2, at 220.

168. See Riesenfeld, *Sovereign Immunity in Perspective*, 19 VAND. J. TRANSNAT'L L. 1 (1986). France began exercising jurisdiction over actions against foreign states or instrumentalities based on commercial activities in 1929. See Judgment of Feb. 19, 1929, 1929 Dalloz. *Receuil Periodique et Critique* (D.P.) I 73; Riesenfeld, *supra*, at 4. Similarly, Italy's highest court, the Corte de Cassazione, adopted the restrictive theory at the end of the 19th century; this practice was affirmed in 1925 in Judgment of June 12, 1925, Corte Cass., Italy, 1925 *Giurisprudenza Italiana* [Giup. Ital.] I 1024, and in 1926 in Judgment of March 13, 1926, Corte Cass., Italy, 1926 *Giup. Ital.* I 774. See Riesenfeld, *supra*, at 10-11.

169. See *supra* notes 77-78 and accompanying text.

170. See *supra* Part II, Section C, notes 129-143 and accompanying text; Lobel, *supra* note 83, at 1134-42. As discussed above, *jus cogens* represents the minimum of public law necessary in today's interdependent world.

B. Application of Implied Waiver to the FSIA: An Evolutionary Approach

Although the legislative history to the FSIA contains no evidence that Congress intended the waiver provision to include constructive waivers by operation of international law,¹⁷¹ it also contains no evidence that Congress intended to exclude such waivers from the scope of this provision. The legislative history to the FSIA, moreover, demonstrates that Congress intended international law to help inform decisions interpreting the Act.¹⁷² The House Report states that, "the central premise of the bill [is that] decisions on claims by foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime which incorporates standards recognized under international law."¹⁷³ Because Congress intended the FSIA to be informed by international law, the FSIA should respond where possible to continuing developments under international law; the implied waiver provision constitutes one mechanism for incorporating changes in international law.

One of the primary purposes of the FSIA was to take the decision whether a particular state action was commercial or not out of the hands of the State Department.¹⁷⁴ Congress intended to respond to constitutional concerns that arose when the State Department determined, with potentially binding effect on the courts, whether a state was entitled to sovereign immunity. It also intended to provide a coherent doctrine of foreign sovereign immunity. Thus, Congress codified certain international law exceptions that were recognized at the time the FSIA was enacted. However, Congress never faced the question whether in 1976 it wanted to exclude forever further developments in international law.

As Professor Riesenfeld argues, it is unsound to consider state codifications of sovereign immunity law to be comprehensive.¹⁷⁵ Statutory codifications of international law doctrines should leave room for developments in international law. The concept of sovereign power is constantly evolving, as demonstrated by the substantial limitations

171. The only type of waiver mentioned in the legislative history are waivers implied in fact—that is, situations in which courts assumed that the state *intended* to waive its immunity to suit *in the United States*. See *supra* text accompanying note 160.

172. See I.M. SINCLAIR, *supra* note 125, at 247-48; Note, *Sovereign Immunity: Limits of Judicial Control*, 18 HARV. INT'L L.J. 429, 451-53 (1977).

173. HOUSE REPORT, *supra* note 5, at 14, 1976 U.S. CODE CONG. & ADMIN. NEWS at 6613; see also *id.* at 9, 1976 U.S. CODE CONG. & ADMIN. NEWS at 6608 ("In virtually every country, the United States has found that sovereign immunity is a question of international law to be determined by the courts."); *Id.* at 8, 1976 U.S. CODE CONG. & ADMIN. NEWS at 6606 ("Sovereign immunity is a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state.").

174. See HOUSE REPORT, *supra* note 5, at 7, 1976 U.S. CODE CONG. & ADMIN. NEWS at 6605-06.

175. Riesenfeld, *supra* note 168, at 16-17.

placed on this power since World War II.¹⁷⁶ To freeze the development of sovereign immunity law at one point in time forecloses the responsiveness of U.S. law to further evolutions in the scope of sovereign power. If the FSIA is effectively to be a "statutory regime which incorporates standards recognized under international law,"¹⁷⁷ then the implied waiver provision should include cases in which states violate peremptory norms of international law.

The incorporation of international law into U.S. domestic law also suggests that the implied waiver provision should be read to include waivers implied by operation of international law. Under the U.S. Constitution, international law is part of the law of the land.¹⁷⁸ The Constitution does not freeze international law to its state of development in 1789; rather, as international law evolves over time, so too does U.S. law.¹⁷⁹

The Supreme Court briefly considered the implied waiver issue in *Amerada Hess*. Respondents there argued that certain international agreements¹⁸⁰ entered into by Argentina provided a basis for an implied waiver of immunity. The Court held that these agreements could not provide a basis for waiver, because they "contained no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States."¹⁸¹ The Court thus narrowly construed an implied waiver exception based on the language of international agreements.

The Court's decision confirms an earlier holding of the Seventh Circuit Court of Appeals. In *Frolova v. U.S.S.R.*,¹⁸² the plaintiff sued for damages caused by mental anguish when the Soviet Union would not allow her husband to emigrate. She alleged that the U.S.S.R. had implicitly waived its immunity to suit by signing the United Nations Charter and the Helsinki Accords, which pledged all signatories to respect human rights and permit family reunification. The Seventh Circuit found no implicit waiver, holding that "Courts have generally required convincing evidence that a treaty was intended to waive sovereign immu-

176. See *supra* discussion in Part II, Section B, *supra* notes 79-128 and accompanying text.

177. HOUSE REPORT, *supra* note 5, at 14, 1976 U.S. CODE CONG. & ADMIN. NEWS at 6613.

178. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice"); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 & Introductory Note, ch. 2 (1987).

179. *The Paquete Habana*, 175 U.S. 677 (1900); see *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980).

180. The Geneva Convention on the High Seas, 13 U.S.T.S. 2312 (1962), the Pan American Maritime Neutrality Convention, 47 Stat. 1989, 1990-91, T.S. No. 845 (1928), and the Treaty of Friendship, Commerce and Navigation, United States-Liberia, 54 Stat. 1739, T.S. No. 956 (1938).

181. *Argentine Republic v. Amerada Hess Shipping Corp.*, 109 S. Ct. 683, 692 (1989).

182. 761 F.2d 370 (7th Cir. 1985).

nity before holding that a foreign state may be sued in this country.”¹⁸³ The court pointed to the “vague, general language” of the agreements at issue and to the lack of expectations of the signatories that the agreements would be enforced in domestic courts.¹⁸⁴

Nevertheless, the proposal advanced in this Comment differs from the arguments in both *Amerada Hess* and *Frolova*, and from proposals by other commentators,¹⁸⁵ because of the nature of the expectations involved. The international agreements cited in *Frolova* were arguably aspirational. Subsequent human rights agreements, although intended to be binding on signatories, still rely on notions of consent of the state involved for their force, as do customary law norms. Jus cogens norms, by contrast, do not depend on the consent of individual states, but are universally binding by their very nature. Therefore, no explicit consent is required for a state to accept them; the very fact that it is a state implies acceptance. Also implied is that when a state violates such a norm, it is not entitled to immunity.

C. Application of Implied Waiver to the FSIA: Analogous Cases

U.S. courts have used similar reasoning to interpret the scope of sovereign immunity under § 1605(a)(5), the FSIA’s exception for non-commercial torts that occur on U.S. territory.¹⁸⁶ Section 1605(a)(5) expressly grants immunity to a foreign sovereign in such cases for its discretionary functions, that is, public acts of the state.¹⁸⁷ In *Letelier v. Republic of Chile*¹⁸⁸ and *Liu v. Republic of China*,¹⁸⁹ two federal district courts nevertheless refused to apply discretionary function immunity to

183. *Id.* at 378. Frolova also claimed an exception to sovereign immunity under the prior international agreement exception of 28 U.S.C. § 1604. The court held that, because neither the U.N. Charter nor the Helsinki Accords were self-executing, they did not create rights enforceable by private litigants and therefore could not form the basis of a waiver of immunity. *Id.* at 373-76. The court left open the possibility of finding a waiver under either § 1604 or § 1605(a)(1) in the case of self-executing treaties.

184. *Id.* at 378.

185. See Bayzler, *Litigating the International Law of Human Rights in U.S. Courts: A How-To Approach*, 7 WHITTIER L. REV. 713 (1985); Paust, *Draft Brief Concerning Claims to Foreign Sovereign Immunity and Human Rights*, 8 HOUSTON J. INT’L L. 49 (1983); Paust, *Federal Jurisdiction over Foreign Violators of International Law*, 23 VA. J. INT’L L. 191 (1983); Comment, *supra* note 159.

186. 28 U.S.C. § 1605(a)(5) (1982). This section provides in part that a foreign state shall not be immune 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 that foreign state while acting within the scope of his office or employment.

187. 28 U.S.C. § 1605(a)(5)(A) (1982).

188. 488 F. Supp. 665 (D.D.C. 1980). The Leteliers won a default judgment against the Republic of Chile in the District of Columbia, 502 F. Supp. 259 (D.D.C. 1980), which they attempted to execute by attaching Chilean property in New York. The Second Circuit, overruling a New York district court decision, held that those assets were not subject to execution. 748 F.2d 790

admittedly governmental state acts resulting in torts in the U.S. when those acts were not recognized as sovereign acts under international and national law.

In *Letelier*, the survivors of Orlando Letelier, former Chilean Ambassador to the United States during the Allende regime, sued Chile for its role in the assassination of Letelier by car-bomb in Washington, D.C. The district court noted that a foreign state's decision "calculated to result in injury or death to a particular individual or individuals . . . would be one most assuredly involving policy judgment and decision and thus exempt as a discretionary act under section 1605(a)(5)(A)."¹⁹⁰ However, the court refused to apply the discretionary function exception, reasoning that states have no discretion to violate fundamental international norms:

Whatever policy options may exist for a foreign country, it has no "discretion" to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law.¹⁹¹

Similarly, the *Liu* case involved a suit against the Republic of China for the wrongful death of a Taiwanese dissident in California. The court, relying on *Letelier*, held that the suit could not be dismissed on sovereign immunity grounds because "planning and conducting the murder of Henry Liu could not have been a discretionary function as defined by the FSIA."¹⁹² The court added that "[t]he killing of Americans residing in the United States is not a policy option open to foreign countries."¹⁹³

The fundamental premise underlying both these decisions is that, although political assassination can be viewed as a public act by a state, there is a strong international consensus that such acts are not sovereign acts.¹⁹⁴ The courts in *Letelier* and *Liu* denied immunity because the acts, although performed by the government, were not recognized as state acts under national and international law. If U.S. courts refuse to accord sovereign immunity under § 1605(a)(5) when those types of cases occur within the United States, there is no reason why sovereign immunity should be accorded in those types of cases when the act occurs outside

(2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985). For a discussion of the attachment proceedings, see *infra* text accompanying notes 200-209.

189. 642 F. Supp. 297 (N.D. Cal. 1986).

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

191. *Id.*

192. *Liu*, 642 F. Supp. at 305.

193. *Id.*

194. See Crawford, *A Foreign Sovereign Immunities Act for Australia?*, 8 AUSTL. Y.B. INT'L L. 71, 89 & n.81 (1983) (states do not claim "sovereign authority" to carry out assassination on foreign territory).

the territory of the United States.¹⁹⁵

Similarly, international courts have begun to recognize a duty of nonrecognition for sovereign acts that violate principles of jus cogens.¹⁹⁶ Nonrecognition is based on the principle that "acts contrary to international law are invalid and cannot become a source of legal rights for the wrongdoer."¹⁹⁷ Because a state act in violation of a rule of jus cogens is not recognized as a sovereign act, the violating state has no legal right to claim immunity.¹⁹⁸

D. Application of Implied Waiver to the FSIA: A Conclusion

It is not altogether clear that Congress meant to freeze completely the law of implied waiver when it enacted § 1605 of the FSIA. Indeed, the legislative history and the judicial doctrine of incorporation of international law into domestic law suggest the opposite—that the implied waiver was meant to allow for changes in international law that affect sovereign immunity.

In light of the modern recognition of jus cogens and the case law in analogous areas of sovereign immunity jurisprudence, it seems logical that the FSIA, through the implied waiver provision, should incorporate an implied waiver of sovereign immunity against states acting in violation of principles of jus cogens. Without such a rule, states can continue to flout basic and necessary principles of international law in violation of shared international conceptions of justice.

IV

ANALYSIS OF THE PROPOSED APPROACH

The Second Circuit's effort to exempt international law violations from the scope of sovereign immunity suffered from two critical flaws—it

195. There is no constitutional bar to U.S. courts hearing such cases as long as the nexus to the United States is sufficient to satisfy due process standards. See *infra* Part IV Section (A)(2), notes 223-237 and accompanying text.

196. In a 1971 opinion by the International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. Reports 16 (advisory opinion of June 21, 1971), the Court advised that South Africa's continued presence in South West Africa (Namibia) was illegal and that "other states were obliged . . . to refrain from any dealings with South Africa which were inconsistent" with the preceding declaration. M. AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 250 (1982). F.A. Mann, analyzing the court's opinion, suggested that a duty of nonrecognition existed in the case where a rule of jus cogens has been violated. Mann, *supra* note 119, at 415-17.

197. H. LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 420 (1947).

198. If a domestic court grants sovereign immunity to a state that has violated a rule of jus cogens, it is recognizing a sovereign right which does not exist. The tribunal could be viewed as violating the principle of nonrecognition and thus be considered an accomplice to the act. As F.A. Mann stated, "he who assists in the consummation of an illegal act must be treated as a party to it." Mann, *supra* note 119, at 415.

departed from both domestic and international law. First, as the Supreme Court noted, it misread federal law by holding that the FSIA was not the exclusive basis for obtaining jurisdiction over a foreign sovereign. Second, the court mischaracterized international law by concluding that sovereign immunity should be denied for all violations of international law.

The proposal advanced by this Comment remedies these flaws. First, it recognizes the exclusivity of the FSIA. Second, by limiting jurisdiction in U.S. courts to those state actions that violate peremptory norms of international law, this Comment limits jurisdiction to cases in which international law would deny sovereign immunity based on an emerging international consensus that some restrictions must be placed on unlimited state power.

Despite these advantages, extending jurisdiction over foreign sovereigns for violations of peremptory norms raises other potential problems. Possible objections to such jurisdiction include: (1) the inability to execute judgments against a foreign sovereign under the execution provisions of the FSIA, notwithstanding a grant of adjudicatory jurisdiction; (2) the possibility of retaliatory jurisdiction abroad; and (3) fear of a flood of international litigation with little or no connection to the United States and little or no U.S. interest in its resolution. As this section demonstrates, however, the risk of these problems occurring is outweighed by the compelling federal and international interests in adjudicating violations of fundamental international norms.

A. Possible Objections to Denying Immunity

1. Right Without a Remedy

The FSIA severely limits the execution of a judgment against a foreign sovereign. It permits execution of judgment on assets of a foreign sovereign only if the assets were used for the commercial activity upon which the claim was based.¹⁹⁹ Consequently, a foreign sovereign can be denied jurisdictional immunity for its acts under the FSIA, yet still be granted immunity from the enforcement of judgments arising from those same acts.

For example, the FSIA establishes jurisdiction over a foreign sovereign in both tort and commercial claims, yet only allows commercial creditors to execute on their judgments. The case of *Letelier v. Republic of Chile*²⁰⁰ illustrates this result. The plaintiffs brought a wrongful death action against the Republic of Chile as survivors of two people killed within the U.S. in a state-initiated assassination. The U.S. District Court

199. 28 U.S.C. § 1610(a) (1982).

200. 748 F.2d 790 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985).

granted a default judgment against Chile, finding subject matter jurisdiction under the tort exception to immunity in § 1605(a)(5) of the FSIA.²⁰¹

Plaintiffs next attempted to execute the judgment on property belonging to the Chilean national airline. The Second Circuit denied the plaintiffs relief, holding that "Congress provided [under the FSIA] for execution against property used in commercial activities upon which the claim is based. An act of political terrorism is not the kind of commercial activity that Congress contemplated."²⁰² Most claims brought under the theory proposed in this Comment will not be commercial claims. Consequently, a plaintiff using our theory will not escape the harsh result of *Letelier*.

However, as the *Letelier* court noted, "[a]lthough tenuous, other remedies may be available."²⁰³ First, as the court suggested, the United States could be persuaded to bring the claim before an international tribunal.²⁰⁴ Second, if there were sufficient U.S. interest, plaintiffs could persuade the United States government to espouse²⁰⁵ the claim through diplomatic channels.²⁰⁶ Especially in cases where U.S. citizens or interests were involved, it would not be extraordinary for the United States government to decide that such claims are meritorious and that "the fail-

201. *Letelier v. Republic of Chile*, 502 F. Supp. 259 (D.D.C. 1980); see *supra* notes 188-191 and accompanying text.

202. *Letelier*, 748 F.2d at 799. The *Letelier* plaintiffs had argued that they came under the "commercial activity" exception of § 1610(a)(2) because the airline had brought the assassin to the U.S. and because airline pilots and personnel knew about and helped in the assassination plot. The court found that, even so, complicity in assassination was not the "commercial activity" of the airline, and therefore § 1610(a)(2) did not apply. Note that § 1610(b)(2), relating to execution on a judgment against an agency or instrumentality of a foreign state engaged in commercial activity in the U.S. (as opposed to the state itself, the only defendant in *Letelier*), does permit execution on property regardless of whether the property is or was used for the activity upon which the claim is based.

203. *Id.* at 799 n.4.

204. *Id.* This option may prove problematic since the Reagan administration withdrew U.S. acceptance of compulsory jurisdiction before the International Court of Justice after Nicaragua successfully sued the United States for mining its ports and aiding antigovernment rebels. See *United States: Statement on the U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice*, 24 INT'L LEGAL MATERIALS 246 (1985). By rules of reciprocity, the U.S. cannot sue any other state under the ICJ's compulsory jurisdiction. However, if both the U.S. and the foreign state consented, an international tribunal could arbitrate a dispute.

205. "The legal procedure is called espousal because the Government espouses the claims of individuals seeking compensation for injuries inflicted by a foreign government in violation of international law." N.Y. Times, Oct. 13, 1988, at A3, col. 1.

206. For example, in 1988, eight years after the assassination, the United States government took over the claims to press for payment on behalf of the relatives of Orlando Letelier and Ronni Moffitt. *Id.* In February 1989, the Chilean and U.S. governments agreed to set up a commission to investigate the assassination and decide on further action. S.F. Chronicle, February 22, 1989, at A13, col. 1. In this case, Moffitt and his widow were U.S. citizens, Letelier's widow a long-time U.S. resident, and the crime occurred in the U.S. United States interest in the case may have been based in part on these factors.

ure to make compensation constitutes an injury to the United States."²⁰⁷

Third, plaintiffs could seek legislation amending the FSIA to eliminate the incongruity between the jurisdictional and execution provisions of the Act. Such an amendment was proposed, but not passed, during the one hundredth Congress.²⁰⁸ Finally, the plaintiff could seek legislation providing for sanctions against the foreign sovereign until collection was made on the judgment.²⁰⁹ Thus, despite difficulties inherent in each of these solutions, the problem of a right without a remedy is not insurmountable.

2. Retaliatory Jurisdiction Abroad

A second possible objection to the exercise of jurisdiction in cases involving violations of *jus cogens* is that it may precipitate retaliatory liability abroad.²¹⁰ Two considerations, however, mitigate this concern.

First, there is nothing inherently wrong with subjecting the United States to liability abroad. If the United States violates a fundamental principle of international law, it should be liable internationally for such a violation. The possibility of being haled into court and held legally responsible for egregious violations of international law would deter unlawful U.S. conduct as well as that of other nations. Moreover, the exercise of municipal jurisdiction over these types of cases may spur the development of international forums with effective authority to resolve individual claims. All nations would be likely to prefer a neutral forum to decide these disputes, rather than municipal courts which they might view as biased or unfair. Thus the United States, if unhappy with the scheme proposed here, could play a leading role in the progressive development of international law in this area.²¹¹

Second, in those countries in which the United States believes that justice is not available, the attachment of U.S. assets could happen in any

207. Federal News Service, October 13, 1988 (State Dept. briefing of Charles Redman).

208. H.R. 1888, 100th Cong., 1st Sess. (1987). This bill would have "permit[ted] tort claimants who are provided with a cause of action under the Foreign Sovereign Immunities Act to execute upon any property of a foreign state intended to be used for commercial activity in the United States." *Foreign Sovereign Immunities Act: Hearings on H.R. 1149, H.R. 1689, and H.R. 1888 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. of the Judiciary*, 100th Cong., 1st Sess. 55 (1987) (statement of Rep. Howard Berman). It may prove easier for a plaintiff, unenforceable judgment in hand, to secure amendment of the execution provisions of the FSIA than it would for a now-barred litigant to secure changes in the exceptions to immunity.

209. See Democracy in Chile Act of 1987, H.R. 1561, 100th Cong., 1st Sess. § 4 (1987) (conditioning continuing certain U.S. support to Chile upon Chile "mak[ing] appropriate compensation to the members of the Letelier and Moffitt families for the murders of Orlando Letelier and Ronni Moffitt.")

210. See U.S. Amicus Brief, *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421 (2d Cir. 1987), *rev'd*, 109 S. Ct. 693 (1989); see also Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L L. 1, 33 & n.137 (1987).

211. See *infra* note 259 and accompanying text.

event, and the fact that it does not is more a testament to the realities of power politics than to any respect for the rule of law. Further, despite significant limitations,²¹² the United States is more liberal than most nations in allowing the execution of judgments against foreign sovereigns. Most nations still adhere to a theory of absolute immunity from execution of judgments against foreign sovereigns.²¹³ Thus, it would be even more difficult to execute against U.S. assets abroad than it is to execute against foreign sovereign assets in the U.S.

3. *Potential Flood of Litigation*

One obvious objection to providing jurisdiction in U.S. courts over cases in which foreign states violate peremptory norms of international law is that it would open U.S. courts to a flood of international litigation. The inherently limited nature of the underlying cause of action, however, coupled with existing procedural barriers, significantly minimize this concern.

a. *Limited Nature of Universal Jus Cogens Norms.*

Perhaps the most significant limitation on the number of cases that could be brought in U.S. courts is the sparseness of the class of possible violations embodied in the concept of jus cogens.²¹⁴ Because jus cogens represents universal and peremptory rules of international law, only a small class of the most egregious violations would constitute an implied waiver of immunity. U.S. courts could entertain only suits involving one of this small class of violations.

b. *Domestic Legal Restrictions on Hearing Suits.*

Several domestic legal doctrines serve, at least potentially, to limit the number of cases that could be brought under the implied waiver section of the FSIA. The two most important are the discretionary doctrine of forum non conveniens, and the need for the court to exercise personal jurisdiction over the defendant.²¹⁵

212. See *supra* notes 199-209 and accompanying text.

213. Fox, *States and the Undertaking to Arbitrate*, 37 INT'L & COMP. L.Q. 1, 11 (1988).

214. See *supra* notes 121-128 and accompanying text. The determination of which norms are jus cogens would depend on the current state of international law, and would therefore change over time.

215. An additional possible barrier to bringing suit under an implied waiver theory in U.S. courts is the act of state doctrine. Although any detailed treatment of the applicability of act of state to suits for torts in violation of jus cogens norms is beyond the scope of this Comment, arguments against recognizing sovereign immunity in such suits apply with equal force to the use of act of state. For a discussion of act of state in the context of torture, see Blum & Steinhardt, *supra* note 37, at 107; see also *Letelier v. Republic of Chile*, 488 F. Supp. 665, 674 (D.D.C. 1980) (suit charging Chile with killing dissident leader not subject to act of state).

i. Forum Non Conveniens

Even if a U.S. court properly has jurisdiction under the FSIA, it may refuse to exercise jurisdiction if the suit could be brought in a more appropriate forum.²¹⁶ Forum non conveniens dismissal is discretionary, and is based on convenience to the parties. Factors relevant to dismissal include location of the evidence, costs of producing witnesses, the source of governing law, and injustice to the parties.²¹⁷

Forum non conveniens dismissal is not permitted if there is no other forum in which the suit can be prosecuted. In *Amerada Hess*, the fact that an Argentine forum was not available²¹⁸ prevented the Second Circuit from dismissing the suit on this basis. Even if another forum exists in theory, the court must examine its adequacy. As the Supreme Court said in *Piper Aircraft Co. v. Reyno*, "[i]n rare circumstances, . . . the other forum may not be an adequate alternative Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute."²¹⁹ Serious doubts about a foreign court's impartiality will defeat a motion to dismiss on the grounds of forum non conveniens,²²⁰ but the mere fact that U.S. law is more favorable to the plaintiff is insufficient.²²¹

Application of the doctrine of forum non conveniens can address concerns about the propriety of U.S. courts hearing cases under the implied waiver provision that more properly should be pursued in another forum. The tribunals of a state accused of violating a peremptory norm will rarely be impartial enough to allow for a dismissal on forum non conveniens grounds. However, in some cases involving an alien plaintiff the courts of the plaintiff's state might provide an acceptable alternative to U.S. courts.²²²

ii. Personal Jurisdiction

The FSIA, by its terms, mixes questions of personal jurisdiction,

216. J. FRIEDENTHAL, M. KANE & A. MILLER, *CIVIL PROCEDURE* 88-89 (1985).

217. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257-61 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

218. See *supra* note 34 and accompanying text.

219. *Piper Aircraft Co.*, 454 U.S. at 254 n.22. The Court added that an alien plaintiff will receive less deference in his choice of forum. *Id.* at 256.

220. *Phoenix Canada Oil Co. v. Texaco*, 78 F.R.D. 445 (D.Del. 1978), *rev'd in part on other grounds*, 842 F.2d 1466 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 259 (1988).

221. *Piper Aircraft Co.*, 454 U.S. at 247 ("the possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry.").

222. Kane, *supra* note 22, at 411 n.135 ("Indeed, when alien plaintiffs sue foreign states in actions in which the underlying transaction has little connection with the United States, the use of forum non conveniens can eliminate burdensome litigation in which the United States has no interest.").

subject matter jurisdiction, and sovereign immunity.²²³ As a statutory question, the act grants personal jurisdiction over a foreign state whenever subject matter jurisdiction exists, as long as service of process is properly made.²²⁴ A finding of statutory jurisdiction is not enough, however, courts must also perform a separate constitutional due process inquiry. In *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*,²²⁵ the court held that the due process clause was applicable to a foreign state. Therefore, a court must determine whether minimum contacts exist between the defendant and the forum sufficient to meet due process requirements.²²⁶ Because the FSIA contemplates nationwide service of process, the relevant area for delineating contacts is the entire U.S.²²⁷

The Supreme Court has recognized two types of personal jurisdiction in recent years. If a suit arises out of or is related to the defendant's contacts with the forum, the court has specific jurisdiction; if the contacts are unrelated, the court may have general jurisdiction.²²⁸ General jurisdiction requires continuous and systematic contacts with the forum more substantial than those required for specific jurisdiction.²²⁹ Whether due process personal jurisdiction concerns will be determinative in many or few cases alleging implied waiver based on violations of jus cogens norms depends on whether the courts require specific or general jurisdiction.

The nonwaiver exceptions in the FSIA practically ensure that courts will require specific personal jurisdiction in cases brought under these provisions because the statutory language incorporates a territorial connection between the claim, the foreign state's activity, and the U.S.²³⁰ Courts have required a clear nexus between the underlying claim and commercial activity in, or having a direct effect in, the U.S.²³¹ Similarly,

223. See *Kirgis*, *supra* note 9, at 323; *Kane*, *supra* note 22.

224. 28 U.S.C. § 1330(b) (1982).

225. 647 F.2d 300, 308 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

226. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

227. *Texas Trading*, 647 F.2d at 314; see HOUSE REPORT, *supra* note 5, at 13, 1976 U.S. CODE CONG. & ADMIN. NEWS at 6614 (Congress intended that the FSIA be "a federal long-arm statute over foreign states"); *Kane*, *supra* note 22, at 405 & n.104 (1982) (agreeing with the Second Circuit's holding in *Texas Trading*).

228. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 nn.8-9 (1984). On the distinction between specific and general jurisdiction, see Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966); Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988).

229. *Helicopteros*, 466 U.S. at 414; *Perkins v. Benguet Consolidated Mining*, 342 U.S. 437, 447 (1952); see also *Keeton v. Hustler Magazine*, 465 U.S. 770, 779-80 (1984) (activities of defendant enough to support exercise of specific jurisdiction, but insufficient for general jurisdiction).

230. 28 U.S.C. § 1605(a)(2)-(5) (1982).

231. A claim under 28 U.S.C. § 1605(a)(2) can only be brought if "the action is based on a commercial activity carried on in the U.S. . . .; an act performed in the U.S. in connection with a commercial activity . . . elsewhere; or . . . an act outside the . . . U.S. in connection with a

the expropriation provisions of § 1605(a)(3) require the property at issue to be in the U.S., and the noncommercial tort exception of § 1605(a)(5) only applies if the tort occurred in the U.S. Thus, any case that satisfies the statutory criteria of the nonwaiver exceptions should also satisfy due process concerns.

No similar nexus requirement exists in the waiver provisions, probably because personal jurisdiction may be established by the defendant's consent.²³² However, a court might read such a nexus requirement into the provision given that Congress carefully drafted nexus requirements into other provisions of the Act. If the courts took this route, they would refuse to hear most suits involving violations of peremptory norms. The plaintiff would have to show a link between the act complained of and the U.S.²³³

There is no reason, however, why a court, in the absence of a specific statutory provision to the contrary, cannot apply a theory of general jurisdiction in these cases. No constitutional bar exists to exercising general jurisdiction over foreign defendants.²³⁴ Although the Supreme Court has explicitly declined to decide the issue,²³⁵ a 1984 circuit court of appeals decision noted in dictum that, in a wrongful death action brought against the government of Mexico, jurisdiction could be founded on substantial, continuous, and systematic contacts with the forum unrelated to the cause of action.²³⁶

If general jurisdiction suffices for a finding of minimum contacts, due process requirements would not present much of a barrier to suits under an implied waiver theory. The activities of the foreign country's embassy or tourist promotion agency, or its use of U.S. courts for unrelated disputes, would provide sufficient contacts.²³⁷ However, even gen-

commercial activity . . . elsewhere . . . that causes a direct effect in the U.S." Merely "doing business" in the U.S., which might subject the party to general jurisdiction, is not enough to bring a claim within the first clause of 1605(a)(2); a nexus between the commercial activity in the U.S. and the underlying lawsuit is necessary. *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation (C.N.A.N.)*, 730 F.2d 195, 202-03 (5th Cir. 1984).

232. *National Equipment Rental v. Szukhent*, 375 U.S. 311 (1964) (no due process inquiry necessary when defendant implicitly consents to jurisdiction); see *Weber*, *supra* note 19, at 29.

233. Though difficult, such a nexus test would not be impossible to meet. A plaintiff might show, for instance, that he entered into a contract with the defendant in the U.S., that the equipment used in commission of the act at issue came from the U.S., or that the U.S. trained the military or security personnel involved.

234. See *Helicopteros*, 466 U.S. at 414. Under the FSIA, once the court finds that one of the specified exceptions to immunity applies, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606 (1982).

235. See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 490 n.15 (1983) ("We need not decide whether, by waiving its immunity, a foreign state could consent to suit based on activities wholly unrelated to the United States.").

236. *Olsen by Sheldon v. Government of Mexico*, 729 F.2d 641, 648 (9th Cir.), *cert. denied*, 469 U.S. 917 (1984).

237. See, e.g., *Meadows v. Dominican Republic*, 628 F. Supp. 599 (N.D. Cal. 1986) (the fact

eral jurisdiction would be difficult to obtain over foreign states with no diplomatic or consular presence in the U.S. At least to that admittedly minimal extent, personal jurisdiction even under a general theory does set some limit on the number of cases that can be brought in U.S. courts.

Whether the defendant's contacts with the forum are general or specific, the exercise of personal jurisdiction must still satisfy "traditional notions of fair play and substantial justice."²³⁸ The factors a court must consider include "the burden on the defendant, the interests of the forum state, and the plaintiff's interest in obtaining relief. It must also weigh in its determination . . . the shared interest of the several States in furthering fundamental substantive social policies."²³⁹

The Supreme Court in *Asahi Metal Industry Co. v. Superior Court* gave great weight to the "unique burdens" placed on a private foreign defendant and urged "great care and reserve" in the international field.²⁴⁰ However, the burdens of distance, inconvenience, and unfamiliarity with the U.S. legal system are at least minimized in the case of foreign states, which already have embassies, conduct business in the U.S., and in many cases have personnel familiar with the U.S. legal system.

Further, part of the burden on the defendant is the unforeseeability of litigation in U.S. courts; a defendant must "reasonably anticipate being haled into court."²⁴¹ A waiver of immunity by operation of law is not as easily anticipated as an express or implied-in-fact waiver. When jurisdiction is based on an implied-in-fact waiver, consent to suit in the United States may be inferred from words or conduct of the defendant. Implied-in-fact cases have found jurisdiction based on contractual choice-of-law or arbitration clauses.²⁴² On the other hand, suits claiming implied

that the foreign state had in the past sought relief in U.S. courts and engaged in airline operations and tourist promotion in the U.S. sufficed to find minimum contacts) *aff'd*, 817 F.2d 517 (9th Cir.), *cert. denied*, 108 S. Ct. 486 (1987); *Rush-Presbyterian-St. Lukes v. Hellenic Republic*, 690 F. Supp. 682 (N.D. Ill. 1988) (as part of due process inquiry, court pointed, *inter alia*, to maintenance of a consular office in the state); *see also* *Kirgis*, *supra* note 192, at 328 (in *Amerada Hess*, activities of Argentine embassy in the U.S. might render Argentina amenable to suit under a theory of general jurisdiction).

238. *International Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

239. *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113 (1987) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

240. *Id.* at 115 (quoting *United States v. First National City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)). Several commentators have argued that courts should exercise additional circumspection in finding personal jurisdiction when the defendant is a foreign government. *See, e.g., Eskridge, The Iranian Nationalization Cases: Toward a General Theory of Jurisdiction Over Foreign States*, 22 HARV. INT'L L.J. 525, 560-62 (1981); *Kirgis*, *supra* note 9, at 328.

241. *World-Wide Volkswagen*, 444 U.S. at 297.

242. *See, e.g., Ipitrade International, S.A. v. Federal Republic of Nigeria*, 465 F. Supp. 824, 826 (D.D.C. 1978); *see also* the illustrations listed in the HOUSE REPORT, *supra* note 5, at 18, 1976 U.S. CODE CONG. & ADMIN. NEWS at 6617.

waiver based on international agreements have not reached the issue of minimum contacts.²⁴³

Unlike "ordinary" international agreements, the very definition of a peremptory norm carries with it the idea that violation of the norm is universally proscribed, and therefore subject to sanction by any nation. A state, having shed its sovereign immunity through its own acts, should only expect to be haled into court anywhere in the world to answer for such a violation. Indeed, the concept of universal jurisdiction implies that those who violate certain fundamental international norms can, and must, expect to be subject to jurisdiction anywhere.²⁴⁴ The Second Circuit in *Amerada Hess* raised, but did not answer, the question of universal jurisdiction; the Supreme Court did not address this issue.²⁴⁵

The *Asahi* court also recognized that "often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant."²⁴⁶ The plaintiff's interest in bringing his case before a U.S. court is clear: in almost all cases, she will have no alternative tribunal.²⁴⁷ The remedies available in the international legal system still reflect the positivist notion that states are the only actors on the international legal plane. Thus, access to international tribunals is restricted to states. A notable example is the Statute of the International Court of Justice which provides that "[o]nly states may be parties before the Court."²⁴⁸ Moreover, although diplomatic remedies

243. See *supra* notes 180-185 and accompanying text.

244. The RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987) defines universal jurisdiction:

A state has jurisdiction to define and punish certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes and perhaps certain acts of terrorism, even where [territorial, nationality, protective or passive personality jurisdiction] is not present.

The list of offenses closely matches that of offenses considered violations of jus cogens norms. See *supra* note 127 and accompanying text; see also Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988). Traditionally, universal jurisdiction has been regarded as a doctrine that applies to individuals rather than states, and to criminal rather than civil jurisdiction. *Id.* at 830. The comments to the RESTATEMENT § 404 specifically expand the idea to civil as well as criminal law.

245. *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 428 (2d Cir. 1987), *rev'd*, 109 S. Ct. 683 (1989). For a critique of the Second Circuit's use of universal jurisdiction in this case, see Kirgis, *supra* note 9, at 327.

246. *Asahi*, 480 U.S. at 114.

247. The Second Circuit in *Amerada Hess* pointed to the lack of an alternative forum, *inter alia*, as a reason for finding personal jurisdiction over the defendants. *Amerada Hess*, 830 F.2d at 428.

248. Statute of the International Court of Justice, art. 38, para. 1, *appended to U.N. CHARTER*. The European Court of Human Rights also allows only state parties to bring cases before the Court. Individuals are allowed to petition the European Commission on Human Rights, however, only the Commission or a state may present the petition before the Court. See J. BRIERLY, *supra* note 78, at 296-98. See generally M. McDUGAL, H. LASSWELL & L. CHEN, *supra* note 152, at 192-98 (discussing access to international arenas).

might be available for individuals,²⁴⁹ this option, like access to international tribunals, leaves individuals highly dependent on their states for the vindication of their rights. If the state, for political or economic reasons, decides not to pursue the claim, the individual is deprived of a remedy.²⁵⁰ A domestic court in another state then may be the only effective way an individual can obtain a remedy for violations of a jus cogens norm. Thus, the issue for the plaintiff is not whether another forum would prove more or less convenient or favorable: it is whether any remedy exists at all for a violation of his basic rights.

Inquiry into the U.S. interest in permitting suit under a due process analysis for personal jurisdiction purposes merges with the more general question of U.S. interest in permitting the implied waiver exception of the FSIA to apply in cases of violation of peremptory norms. It is to that broader inquiry that we now must turn.

B. *U.S. Interest in Adjudicating International Law Disputes*

In the case of an injured U.S. citizen or resident, the United States' interest in hearing the dispute is clear. A State has an interest in redressing injuries against its residents.²⁵¹ The obligation to provide a remedy to citizens, at least in some cases involving violations of peremptory international law, may also be established in international law.²⁵²

249. One commentator has questioned "why rights acknowledged to be 'fundamental' must depend for their vindication on the diplomatic process, which is ponderous, unreliable, and perhaps ineffective." Comment, *Enforcing the Customary International Law of Human Rights in Federal Court*, 74 CALIF. L. REV. 127, 168 (1986) (authored by Andrew M. Scoble).

250. Robertson points out perhaps the major weakness in the international legal system's protection of individual rights:

If an individual's rights are violated, it will in the great majority of cases be the result of acts by organs or agencies of the State of which he is a national. It is therefore nonsense to say that his rights will be championed by the State of which he is a national when that State is *ex hypothesi* the offender.

A.H. ROBERTSON, *HUMAN RIGHTS IN THE WORLD* 54-55 (1982).

251. See *Kecton v. Hustler Magazine*, 465 U.S. 770, 780 (1984) (plaintiff's residence may play an important role in determining the propriety of suit in the forum); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957) (state has a "manifest interest" in providing its residents with a convenient forum for redressing injuries).

252. Provision of a judicial remedy to a U.S. citizen may be required by customary international law. The Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810, at 71 (1948), states in Article 8 that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." The Universal Declaration is considered by many scholars to form part of customary international law. See, e.g., Sohn, *The Shaping of International Law*, 8 GA. J. OF INT'L & COMP. L. 1, 21 (1978). Subsequent international conventions, including the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966), the American Convention on Human Rights O.A.S.T.S. No. 36, at 1 (1979) and the Convention Against Torture, G.A. Res. 46, 37 U.N. GAOR Supp. (No. 51) at 197 (1984), also provide a right to a judicial remedy for individuals. While these phrases arguably refer only to a citizen's right to a remedy for violations committed by his own government, the language itself discloses no such limitation and focuses on the need of the individual plaintiff for a forum rather than the identity or culpability of the government involved. Note that

The case of *Martin v. Republic of South Africa*²⁵³ illustrates the forum's interest in allowing an implied waiver for violations of jus cogens norms. Martin, a U.S. citizen, was involved in a car crash during a dance tour in South Africa. He was denied medical treatment under the apartheid system because he is black, and was left permanently paralyzed as a result. He sued the government hospitals that were responsible, but was unable to maintain his suit in a U.S. court. The Court of Appeals, in upholding the denial of jurisdiction, found that his case did not come within the commercial exception to sovereign immunity, and could find no other relevant exception.²⁵⁴

Under our proposed interpretation of the FSIA, Martin could argue that violation of a jus cogens norm prohibiting apartheid gave a U.S. court jurisdiction to hear the case. The United States' interest in adjudicating the case is high—a U.S. citizen has been injured, with life-long costs both to his citizen family and to medical and social services in the U.S. The injury is a result of racial policies roundly condemned in U.S. civil rights and antiapartheid legislation. Yet without recourse to an implied waiver exception, that U.S. interest will be defeated.

The options left for the United States to obtain redress for citizens unable to use the courts include espousal of the individual's claim before an international tribunal, diplomatic pressure, or recourse to the traditional self-help measures of international law. The first two options are unlikely, and are both slow and uncertain.²⁵⁵ The third implies economic or other forms of sanctions which would produce a greater economic and diplomatic cost than allowing access to the courts. Individual remedies for individual harm provide a sharply tuned instrument of justice, while self-help measures are frequently blunt and problematic.

In sum, the proposed interpretation advanced in this Comment responds not only to the plaintiff's need for a forum, but also takes into account the United States' interest in avoiding escalation of international disputes and in allowing its citizens to obtain redress. It advances the "shared interest of the several States" in furthering the "fundamental social polic[y]"²⁵⁶ of worldwide respect for universally recognized norms

the U.S. has signed but not ratified the latter three agreements. However, the widespread acceptance of this requirement of judicial remedy may indicate its transformation into customary law, binding on the U.S. even without signature.

253. 836 F.2d 91 (2d Cir. 1987).

254. Martin's sole claim on appeal was that the South African hospital's conduct produced a "direct effect in the United States" within the meaning of 28 U.S.C. § 1605(a)(2). The court disagreed. *Id.* at 93.

255. See *supra* note 249. The *Letelier* case, see *supra* notes 206-207 and accompanying text, illustrates the protracted and uncertain nature of diplomatic channels.

256. *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113 (1987).

of conduct. Although this argument is most compelling where the potential plaintiff is a U.S. citizen, it is also valid for noncitizens.

In the case of noncitizens, the most obvious objection is that of comity; foreign governments might be offended if the U.S. allowed that government's citizens to sue in U.S. courts.²⁵⁷ But the fact that any suit would only be heard if based on a violation of a peremptory norm mutes this objection. Violations of universally recognized, peremptory norms of international law are of legitimate concern to all governments, and governments necessarily accept some outside scrutiny of their compliance with such norms.²⁵⁸ The rule of law in at least this limited area allows states to coexist. Enabling individuals to litigate their claims in a domestic court permits the world community to enforce, in the absence of international tribunals, those rights that are nonderogable and universally binding.²⁵⁹

The United States has often expressed a commitment to the development and enforcement of fundamental human rights norms. For example, in *Filartiga v. Pena-Irala*,²⁶⁰ the State and Justice Departments submitted an *amicus* brief urging that the court exercise its jurisdiction. The brief argued that where a law recognized by the international community has clearly been violated, "a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights."²⁶¹

257. Lauterpacht rejected the notion that dignity and comity between nations provided a rational basis for the application of the state immunity doctrine:

A state does not derogate from the dignity of another state by subjecting it to the normal operation of the law under proper municipal and international safeguards The dignity of foreign states is no more impaired by their being subject to the law, impartially applied, of a foreign country than it is by submission to their own law.

Lauterpacht, *supra* note 2, at 231.

258. See GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE xiii (Hannum, ed. 1981); see also discussion on sovereignty and *jus cogens*, *supra* Part II notes 65-156. For an argument that international human rights law similarly subjects states to domestic enforcement of human rights norms, see Comment, *supra* note 249, at 168; see also Committee of U.S. Citizens in Nicaragua v. Reagan, 859 F.2d 929, 941 (D.C. Cir. 1988) (discussing whether *jus cogens* "might" have a domestic legal effect).

259. Several scholars have called for an international tribunal to litigate these claims. See, e.g., Bassouini, *The Prosecution of International Crimes and the Establishment of an International Criminal Court*, in III INTERNATIONAL CRIMINAL LAW 3 (Bassouini, ed. 1987). The Genocide Convention, 78 U.N.T.S. 277 (1948), recently ratified by the U.S., calls for the creation of an international court to try alleged cases of genocide, but signatory states have never proved willing to take concrete steps towards its formation. This leaves domestic courts as the only possible forums.

260. 630 F.2d 876 (2d Cir. 1980).

261. Amicus Curiae Brief of U.S. State and Justice Departments at 22-23, *Filartiga v. Pena-Irala*, No. 79-6090, reproduced in 19 INT'L LEGAL MATS. 585, 604 (1980). Recall that both plaintiff and defendant in that case were aliens, and that defendant, while not a representative of the state, had been police chief at the time of the alleged offenses and argued that he had been carrying out an official policy. Thus many of the same foreign relations concerns present in suits against foreign states were at issue in *Filartiga* as well. Also, although *jus cogens* and human rights are not completely coextensive categories, the fundamental human rights of freedom from torture and

More recently, Congress passed, and then-President Reagan signed, a joint resolution regarding implementation of the U.S. government's policy of opposition to the practice of torture by any foreign government.²⁶² The political branches of the U.S. government, therefore, have recognized the importance of allowing domestic courts to hear these kinds of claims. Because forum non conveniens and personal jurisdiction already bar access to plaintiffs and defendants with absolutely no ties to the U.S., other suits by noncitizens should be permitted.

A related and oft-raised objection is that "federal judges typically are not experts in international law" and therefore will be unable to make reasoned decisions concerning their jurisdiction over foreign sovereigns.²⁶³ This objection, however, ignores the long history of U.S. incorporation of international law into our law. The Judiciary Act of 1789²⁶⁴ originally provided for jurisdiction over violations of the law of nations without further implementing legislation.²⁶⁵ Congress in this century has authorized the court of claims to decide a case according to international law principles,²⁶⁶ and courts have frequently used international law in deciding pre-FSIA sovereign immunity cases and in expropriation cases.²⁶⁷ Moreover, by hearing these cases, U.S. courts would aid the progressive development of international law in the areas of defining jus cogens and protecting individual rights.

CONCLUSION

The Supreme Court's decision in *Amerada Hess* correctly found that

summary execution probably would be considered peremptory. See *supra* note 152 and accompanying text.

262. Torture by Foreign Governments: Joint Resolution regarding the Implementation of the Policy of the United States Government in Opposition to the Practice of Torture by any Foreign Government, Pub. L. No. 98-447, 98 Stat. 1721, (1984), codified at 22 U.S.C. § 2656 (Supp. IV 1986). The prohibition on torture is almost certainly a jus cogens norm. See *supra* notes 125-127. Congress in 1987 also considered, and the House passed, legislation allowing torture victims to bring suit in U.S. courts against both private individuals and states. Torture Victim Protection Act, H.R. 1417, 100th Cong., 1st Sess. (1987). The bill stated: "Every person who, under actual or apparent authority of any foreign nation, subjects any person to torture or extrajudicial killing shall be liable to the party injured . . . in a civil action. The district courts shall have jurisdiction over civil actions [under this section]." Note that the language of the bill does not distinguish between citizen and alien plaintiffs.

263. Kirgis, *supra* note 9, at 327.

264. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

265. Lillich, *Domestic Institutions*, in IV THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 390 n.40 (Black & Falk, eds. 1972).

266. Act of March 3, 1927, ch. 463, 44 Stat. 1838.

267. Lillich, *supra* note 265, at 397-411; see also *The Paquete Habana*, 175 U.S. 677, 700 (1900); *supra* note 178. A full treatment of the incorporation of international law into U.S. law and its application by domestic courts is well beyond the scope of this Comment. Excellent treatments include R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER (1964); Blum & Steinhardt, *supra* note 35; Lillich, *supra* note 265.

the FSIA provides the sole basis for obtaining jurisdiction over foreign states in United States courts. The decision leaves open the possibility of finding jurisdiction within the FSIA itself for cases involving violations of peremptory norms of international law. The implied waiver provision of the FSIA is the proper vehicle for doing so. Because *jus cogens* norms are obligatory for states, an act that violates these norms loses its character as a sovereign act. Therefore, the state impliedly waives its immunity for claims arising out of such an act.

The proposed interpretation advanced in this Comment would allow U.S. sovereign immunity law to incorporate changes in international law. Recognizing that the FSIA's drafters never intended to freeze U.S. law, this proposal allows United States courts the necessary flexibility to apply the FSIA in light of future trends. As international law increasingly looks to individual rights and individual causes of action as proper subjects, the implied waiver exception will provide a way for U.S. law to take these changes into account.

It may be that, in the long run, violations of peremptory international norms will be redressed through international tribunals established by all states or through regional courts modeled after the European or Interamerican Human Rights Courts. Other forums where individuals may seek justice for wrongs committed by their own or another state may eventually arise. International law has changed dramatically over the last half-century. It will no doubt continue in flux as the old, state-bound and consent-bound rules give way to notions of individual rights and *jus cogens*. This proposal fits within this transitional framework, recognizing both the individual's need for a remedy and the lack of international enforcement bodies. During this evolutionary stage, domestic courts are the appropriate forums to hear claims alleging violations of peremptory international law.

