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COMMENTS

SIDERMAN DE BLAKE v. REPUBLIC OF ARGENTINA: CAN THE FSIA GRANT IMMUNITY FOR VIOLATIONS OF *JUS COGENS* NORMS?

The search for peace and justice also means respect for human dignity. All the signatories of the United Nations Charter have pledged themselves to observe and to respect basic human rights. Thus, no member of the United Nations can claim that mistreatment of its citizens is solely its own business. Equally, no member can avoid its responsibilities to review and to speak when torture or unwarranted deprivation occurs in any part of the world.

—President Jimmy Carter¹

I. INTRODUCTION

Historically, the king could do no wrong. As a sovereign, he was immune from suit. Monarchies slowly gave way to republics, and this rule was extended to “acts of state,” at least insofar as other nations’ courts were concerned. That is, one state was considered immune from the judgment of another state’s courts.² A fundamental problem arises, however, when the sovereign nation is alleged to have violated norms of international law from which *no* derogation is permitted by the international community of nations’ *jus cogens* norms.³ Since no

1. President Jimmy Carter, Peace, Arms Control, World Economic Progress, Human Rights: Basic Priorities of U.S. Foreign Policy, Address Before the United Nations (Mar. 17, 1977), in 78 DEP’T ST. BULL., Apr. 1977, 329, 332. [hereinafter Address by President Jimmy Carter].

2. See *infra* notes 43-55 and accompanying text regarding sovereign immunity.

3. See *infra* notes 19-42 and accompanying text concerning *jus cogens*.

state can ever consent to such a violation, and since such acts are not even considered sovereign acts, it follows that allegations of such wrongs can never be dismissed by a reviewing court by simply appealing to sovereign immunity.

Nevertheless, in a recent Ninth Circuit decision, the court found Argentina to be immune from the jurisdiction of United States courts by way of the Foreign Sovereign Immunities Act (FSIA), despite a strong finding that Argentina had violated a *jus cogens* norm. In *Siderman de Blake v. Republic of Argentina*,⁴ the Ninth Circuit found that since the FSIA did not specifically refer to *jus cogens* as one of the exceptions to the FSIA, Congress did not intend for *jus cogens* to act as an exception to the FSIA's cloak of immunity.⁵ This interpretation not only raises an important question about the FSIA's applicability when violations of *jus cogens* norms are involved, but also of the ability of the judiciary to interpret any legislative act in a manner that is not in accord with accepted principles of international law which would deny Argentina immunity in this instance.

This Comment examines the relevant international legal doctrines surrounding the Ninth Circuit's decision in *Siderman* and discusses these doctrines in light of domestic law. It points out that whereas *jus cogens* norms have only been scantily addressed in domestic law, the common law is replete with discussions of sovereign immunity. Congress even codified its interpretation of the doctrine of sovereign immunity in 1976 by enacting the FSIA.⁶ However, in keeping with past practice, the FSIA did not address the issue of *jus cogens* norms in either the text or the legislative history. As such, where *jus cogens* norms are involved, case law compels us to interpret the FSIA in light of modern international law principles. Such principles dictate a waiver of immunity for violations of *jus cogens* norms and a corresponding exercise of jurisdiction.

The Ninth Circuit easily concluded that the allegations of torture leveled against the Republic of Argentina in *Siderman* violated peremptory norms of international law known as *jus*

4. 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993).

5. The Ninth Circuit based its decision on the recent Supreme Court case of *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428 (1989).

6. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1602-11 (1976)) [hereinafter FSIA].

cogens. Nevertheless, it accepted Argentina's defense of sovereign immunity, based on the FSIA. This Comment will conclude that the court erred in its findings due to a flawed interpretation of the FSIA.

Finally, this Comment will discuss the importance of using domestic courts to remedy heinous acts of state. At some point in the future, there may be international courts to hear individual⁷ claims of *jus cogens* violations and squarely enforce their decrees. Until such time, however, a transitional system for redress must be in place. Domestic courts provide such a means. They are indispensable fora for upholding such universal norms.

II. FACTS OF *SIDERMAN DE BLAKE v. REPUBLIC OF ARGENTINA*

The facts of *Siderman de Blake v. Republic of Argentina* consist only of the alleged statements in the complaint submitted by the Siderman family,⁸ but they paint a "horrific tale of the violent and brutal excesses of an anti-Semitic military junta that ruled Argentina."⁹

During the mid-to-late 1970s, a "dirty war" was waged by the military in Argentina that was designed to purge the country of suspected subversive activity. In 1975, then-President

7. The International Court of Justice does not provide such a forum. The Statute of the International Court of Justice specifies that, "[o]nly states may be parties in cases before the Court." Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179, art. 34, § 1. Thus, an individual may not appeal to this body for redress, except by way of the individual's government. Note that there have been many proposals to create international criminal courts where individuals could bring claims.

8. It can be argued that it is particularly burdensome to call upon a sovereign nation to defend itself against allegations that are simply asserted by an individual in another nation's courts. Indeed, this is one of the reasons for the development of the doctrine of sovereign immunity. Based on this theory, the plaintiffs' action should not be sustainable when a charge is leveled in this way. This Comment, however, will show that violations of *jus cogens* norms are an exception to this theory. In addition, the FSIA, which codifies the United States' restrictive principles concerning sovereign immunity, recognizes that such a blanket assertion is faulty. Even under the most narrow interpretation of the FSIA, a party can simply make assertions that deal with certain injustices and expect that the sovereign nation will be taken to court to defend itself in the matter. See 28 U.S.C. § 1605 (1988) for the exceptions to the FSIA which allow United States courts to assert jurisdiction over sovereign nations by simply claiming a violation.

9. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 703 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993).

María Estela Perón was prompted to declare a "state of siege," whereby she entrusted the Argentine Armed Forces with the responsibility of stifling acts of terrorism. Perón's downfall, however, came about on March 24, 1976, when the Argentine Armed Forces staged a successful *coup d'état* and replaced her with a military junta.¹⁰

That same night, contend the plaintiffs, ten masked men entered the home of José and Lea Siderman and, under the direction of the Military Governor of the province, maliciously ransacked the Sidermans' home, blindfolded and shackled sixty-five-year-old José Siderman, and tossed him into a waiting car. For seven days, he was allegedly beaten and tortured, as the captors howled anti-Semitic remarks, including "Jew Bastard" and "Shitty Jew."

When José was finally released, he claimed he was told that he and his family faced death if they remained in Argentina. That day, he and his wife fled to another part of the country, and their son Carlos followed shortly thereafter. In June 1976 they arrived in the United States, the home of their daughter, Susana Siderman de Blake, who was the final plaintiff in the action. At that point, they had lost their home, most of their possessions, and were forced to sell José's vast property interests at a deep discount. Furthermore, contend the plaintiffs, the Argentine government even altered real property records to show that José's interest in real property was not 127,000 acres but 127. The government then instituted action against him in Argentina for selling off property interests that did not belong to him. The government, which by then presented itself as the legitimate government of Argentina, sought the help of the Los Angeles Superior Court to gain in personam jurisdiction over José Siderman. But the government was ultimately unsuccessful in this regard.

In 1982, the family, by then permanent residents of the United States, filed a complaint against the Republic of Argentina, asserting eighteen causes of action based on the torture and harassment of José Siderman by Argentine officials and the subsequent expropriation of the Sidermans' property and

10. A general description of the *coup d'état* can be found in *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1536 (N.D. Cal. 1987). See also *Human Rights in the World: Argentina*, 31 INT'L COMM'N OF JURISTS REV. 1 (1983) (discussing the junta and its efforts to purge Argentina of alleged subversives).

business by officials of the Tucumán Province of Argentina. In 1984 the district court dismissed the expropriation actions,¹¹ and in 1985 the torture claims were dismissed on the grounds of Argentina's immunity under the FSIA.¹² The Sidermans appealed both of these decisions.

In 1992 the Court of Appeals for the Ninth Circuit heard the case. They addressed the expropriation¹³ and torture claims separately. With respect to the torture claims, which are the focus of this Comment, the court first looked to the concept of *jus cogens* norms,¹⁴ which encompass certain fundamental norms from which no derogation by any country is permitted. Concluding that torture is a *jus cogens* violation, the court had no problem deciding that the actions of the Argentine officials, as alleged by the plaintiffs, were a notorious violation of *jus cogens* norms. The difficulty, found the court, is that "we do not write on a clean slate We must interpret the FSIA through the prism of *Amerada Hess*."¹⁵ The Supreme Court, in *Argentine Republic v. Amerada Hess Shipping Corp.*,¹⁶ had declared that immunity is only "granted in those

11. On March 12, 1984, the expropriation claims were dismissed *sua sponte* on the basis of the Act of State doctrine. *Siderman*, 965 F.2d at 704. The Sidermans moved for reconsideration of the court's dismissal of the expropriation claims. This motion was denied on September 24, 1984, but a default judgment on the torture claims was entered. The Sidermans were awarded a total of \$2.7 million. *De Blake v. Republic of Argentina*, No. CV 82-1772-RMT, 1984 WL 9080, at *3 (C.D. Cal. Sept. 28, 1984).

12. The damages award finally prompted the Republic of Argentina to respond. They filed a motion for relief from judgment on the ground that they were immune from suit under the FSIA. On March 7, 1985, the district court vacated the default judgment and dismissed the Sidermans' action based on Argentina's immunity under the FSIA. *Siderman*, 965 F.2d at 704. The Sidermans filed a timely notice of appeal. *Id.* at 705.

13. Addressing the expropriations claims, the court cited *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1389 (5th Cir. 1985), which stated that, "[b]ecause sovereign immunity is jurisdictional and the act of state defense is not, we must consider sovereign immunity before reaching the act of state doctrine." Therefore, the court addressed the jurisdictional issue first and found that the Sidermans' allegations of jurisdiction by way of both the "commercial activity" and the "international takings" exceptions of the FSIA were valid. In light of this, the court remanded the expropriations claims to the district court in order to further develop the factual record, and it gave plaintiffs leave to cure any jurisdictional defects. *Siderman*, 965 F.2d at 722.

14. For a discussion of *jus cogens* norms and their application to *Siderman de Blake v. Republic of Argentina*, see *infra* notes 165-66 and accompanying text.

15. *Siderman*, 965 F.2d at 718.

16. 488 U.S. 428 (1989).

cases involving alleged violations of international law that do not come within one of the FSIA's exceptions."¹⁷ Thus, since nothing in the text or legislative history of the FSIA specifically addresses the effect of *jus cogens* on the issue of jurisdiction, the Ninth Circuit reluctantly found that jurisdiction could not be maintained on this basis.¹⁸

III. RELEVANT LEGAL DOCTRINE

A. *Jus Cogens*

Jus cogens literally means cogent law,¹⁹ but this definition is insubstantial in the face of the vast body of legal thinking that has gathered around its precepts. As such, many scholars have attempted to define *jus cogens* in a more substantive and thus useful way, but no standard definition has emerged.

The most widely used, modern definition for *jus cogens* is found in the Vienna Convention on the Law of Treaties.²⁰ The Vienna Convention defines *jus cogens* as a "peremptory norm of general international law . . . a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted" ²¹ Various

17. *Id.* at 436. The Court was referring to the exceptions explicitly expressed under 28 U.S.C. § 1605 (1988).

18. The issue of torture, though, was again remanded to ascertain whether the Argentineans had impliedly waived their right to immunity by attempting to use the United States courts to prosecute José Siderman. This is supported by the legislative history of the FSIA, which, following an explanation of the implied waiver provision of the FSIA, 28 U.S.C. § 1605 (1988), gave three examples of an implied waiver:

With respect to implied 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.

H.R. REP. No. 1487, 94th Cong., 2d Sess. 18 (1976) [hereinafter HOUSE REPORT].

19. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (unabridged) 440 (1986) ("cogent: . . . L. *cogens*, pres. part. of *cogere* to drive together, collect, compel, having the power of compelling or constraining; . . . appealing persuasively to the mind or reason; . . . convincing").

20. The Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969 (entered into force Jan. 27, 1980) 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969) [hereinafter Vienna Convention].

21. *Id.* at art. 53. *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k (1987) [hereinafter RESTATEMENT].

human rights instruments have also used other terms when referring to *jus cogens* norms which are now commonly seen. For example, the Universal Declaration of Human Rights²² refers to inherent "dignity"²³ when defining this principle, while the American Convention on Human Rights²⁴ refers to certain essential rights which all nations are obligated to respect.²⁵

For the purpose of this Comment, the definition of *jus cogens* expressed by Mr. Suarez, Mexican delegate to the United Nations Conference on the Law of Treaties, is most useful. He declared that, "[t]he rules of *jus cogens* [are] those rules which derive from principles that the legal conscience of mankind deem[s] absolutely essential to coexistence in the international community."²⁶

This notion of coexistence is not new. The classical system of international law, first formulated by Grotius in the seventeenth century, incorporated rules that limited the independence of sovereign states in an effort to promote peaceful coexistence.²⁷ This system was called the "law of nations," and it was comprised of the divine law of revelation, natural law, and custom.²⁸ By the late eighteenth century, the domestic applicability of the "law of nations" was taken for granted, "adopted [in England] in its full extent by the common law, and . . . held to be a part of the law of the land."²⁹ At that time, Blackstone

22. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

23. *Id.* at art. I. Article I reads, "All human beings are born free and equal in dignity and rights" *Id.*

24. American Convention on Human Rights, Nov. 22, 1969 (*entered into force* July 18, 1978) O.A.S. Official Records OEA/Ser.K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1, *reprinted in* 9 I.L.M. 673 (1970).

25. *Id.* at art. I. Article I lays out the format for the American Convention on Human Rights, while the rest of the convention discusses the specific rights in detail. It provides that "[p]arties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination" *Id.*

26. United Nations Conference on the Law of Treaties, 1st Sess. Vienna, Mar. 26 - May 24, 1968, U.N. Doc. A/CONF.39/11/Add. 1 (1969) (statement of Mr. Suarez (Mexico) at 294) [hereinafter Statement of Mr. Suarez].

27. See WOLFGANG G. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 60 (1964).

28. EDWIN D. DICKINSON, *THE EQUALITY OF STATES IN INTERNATIONAL LAW* 41 (1920).

29. 4 WILLIAM BLACKSTONE, *COMMENTARIES* 66-67 (reprint 1775).

described the "law of nations" as "a system of rules deducible by natural reason and established by universal consent among the civilized inhabitants of the world."³⁰

Jus cogens norms are at the top of the hierarchy of the "law of nations." They function as a "very strong rule of customary international law,"³¹ acting as the "immutable" or "necessary" law of nations.³² The difference between customary laws that are considered peremptory and those that are merely convenient rules of conduct among nations is that peremptory norms do not depend on the will of the governing executive or legislative authority for their legality.³³ The convenient rules are referred to as *jus dispositivum* norms, and their applicability is limited to those states consenting to be governed by them, based merely on the self-interest of those participating states.³⁴ *Jus cogens* norms, on the other hand, are based on the idea of the good per se as derived from values taken to be fundamental to the international community as a whole.³⁵ Since *jus cogens* norms are based on what the world considers just, as opposed to what one particular nation considers just, no state may attempt to violate or alter *jus cogens*, whereas *jus dispositivum* norms may be changed by a particular state's violation of them and subsequent encouragement of other states to follow suit.³⁶

A most telling example of this distinction can be seen in the conviction of Nazi war criminals following World War II in Nuremberg, Germany. It appeared that those convicted were being tried for acts which were "legal" in the defendants' state at the time of their commission because they were acting under the laws of the sovereign. However, genocide is considered

30. *Id.*

31. ANTHONY A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 132 n.73 (1971).

32. 3 EMER DE VATTEL, *THE LAW OF NATIONS* 346-47 (Joseph Chitty ed. 1852).

33. David F. Klein, Comment, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 YALE J. INT'L L. 332, 351 (1988).

34. Alan Brudner, *The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework*, 35 U. TORONTO L.J. 219, 249-50 (1985).

35. *Id.* at 231.

36. Jonathan I. Charney, *The Power of the Executive Branch of the United States Government to Violate Customary International Law*, 80 AM. J. INT'L L. 913, 914 (1986).

a violation of *jus cogens* norms,³⁷ and such acts can never be made legal. It is not for any particular state to choose whether or not it will abide by *jus cogens*. The very fact that a state is a state implies acceptance; therefore, no authority other than customary international law need be cited for prosecution of those guilty of violating its precepts.

In this sense, *jus cogens* is a self-executing principle, because it does not need any implementing legislation in order for the doctrine to operate. Normally, in order for domestic courts to apply treaty law and other international rights established by express accord, the treaties must contain within them the terms of their application. This can either be expressly stated through implementing legislation or by reference to contextual factors found in the language and legislative history of the norms involved.³⁸ The fundamental idea is that there be an intent to enforce them locally. If such an intent exists, these agreements are regarded as self-executing and can thus be implemented. By contrast, a claim based on a *jus cogens* violation should be actionable independent of the signing of a treaty or any intent to enforce them locally, since such a claim asserts fundamental rights that are already generally accepted by the world community.³⁹

37. See Robert H. Jackson, Final Report to the President on the Nuremberg Trials (Oct. 7, 1946) (cited in ROBERT H. JACKSON, *THE NÜRNBERG CASE* xiv-xv (1947)). Justice Jackson writes:

[The trials] for the first time made explicit and unambiguous what was theretofore, as the tribunal has declared, implicit in international law, namely, that to prepare, incite, or wage a war of aggression . . . and that to persecute, oppress, or do violence to individuals or minorities on political, racial, or religious grounds in connection with such a war, or to exterminate, enslave, or deport civilian populations, is an international crime.

Id.

38. In *People of Saipan v. United States Dep't of Interior*, 502 F.2d 90, 99 (9th Cir. 1974), for example, the court held that domestically enforceable treaty obligations could arise when the parties to the treaty expressed their will that domestic means of enforcement be available. The contextual factors which they cited to determine this were: a) "the purpose of the treaty and the objectives of the creators"; b) "the existence of domestic procedures and institutions appropriate for direct implementation"; c) "the availability and feasibility of alternate enforcement methods and long range social consequences of self or non-self exclusion." *Id.*

39. Cf. Stefan Riesenfeld, *The Doctrine of Self-Executing Treaties and United States v. Postal: Win at Any Price?*, 74 AM. J. INT'L L. 892, 900-01 (1980). Professor Riesenfeld asserts that the self-execution of treaties is favored when they grant rights to persons, when the parties lack discretion to fulfill any obligation, and

Although much has been written on the "law of nations," *jus cogens* norms, as a subset of those laws, have not been fully defined. Courts seeking to determine whether a norm of customary international law has attained the status of *jus cogens* must look "to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators"⁴⁰ In addition, it must be determined "whether the international community recognizes the norm as one 'from which no derogation is permitted.'"⁴¹ The Restatement lists several examples of norms currently recognized as having achieved peremptory status. It specifies that genocide, slave trade, slavery, murder, torture, and systematic racial discrimination are all violations of *jus cogens* norms.⁴²

B. *The Problem of Sovereign Immunity*

Although *jus cogens* norms are fundamental norms requiring no consent for their strict adherence,⁴³ many nations use the doctrine of sovereign immunity to argue that claims against the sovereign for violations of peremptory norms cannot be adjudicated by another nation's courts. So, although no derogation is permitted from *jus cogens* norms, this competing doctrine makes it difficult for the principle of *jus cogens* to be enforced on an international level. Lord Wilberforce stated the problem succinctly when he remarked 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."⁴⁴

Sovereign immunity refers to certain powers that states claim for themselves in their mutual relations and the power

when no further congressional action is necessary to fulfill the treaty obligations. An analogous argument can be seen with respect to *jus cogens* norms. *Id.*

40. *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)); see also DICKINSON, *supra* note 28 regarding the traditional composition of the "law of nations."

41. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992) (quoting Committee of United States Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988)).

42. RESTATEMENT, *supra* note 21, § 702 cmt. n.

43. See Brudner, *supra* note 34, at 231.

44. Lord Wilberforce, Address to the Fifty-Eighth Conference of the International Law Association (1980), in INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FIFTY-EIGHTH CONFERENCE 513, 515 (1980).

to act without restraint on their freedom.⁴⁵ It derives its power from the notion that "[e]very sovereign State is bound to respect the independence of every other sovereign State, and [that] the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."⁴⁶

Though many countries, including the United States,⁴⁷ adhere to the doctrine of sovereign immunity in their dealings with other countries, many commentators question the role that sovereign immunity should play in the post-World War II world. "The traditional concept of sovereignty has become particularly inconsistent and outmoded in the present-day world,"⁴⁸ laments one academic, while another, more idealistic academic has remarked that, "Only law is sovereign,"⁴⁹ not nations. And Sir Hersch Lauterpacht, arguably the dean of modern international law doctrine, has proclaimed:

The science of international law, while recognising that it is the business of international lawyers to expound law, as it is and not as it should be, is now increasingly realizing that dogmatic positivism as taught by a generation of priests fascinated by the splendour of the doctrine of sovereignty is a barren idea foreign both to facts and to the requirements of a scientific system of law.⁵⁰

At the heart of this erosion of the usefulness of sovereign immunity is the expansion of the number of sovereign states and the consequent "dilution of the homogeneity of values and standards"⁵¹ that formed the foundation of classical international law. That is, unlike the homogeneity that characterized the small group of white, Western European nations that formed the principles of classical international law, today's

45. Ram P. Anand, *Sovereign Equality of States in International Law*, 197 RECUEIL DES COURS 38 (1986).

46. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

47. See Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1602-11 (1976)).

48. Anand, *supra* note 45, at 31.

49. Anand, *supra* note 45, at 38 (quoted in MAREK S. KOROWICZ, *Some Present Aspects of Sovereignty in International Law*, 102 COLLECTED COURSES 24-25 (1961-I)).

50. HERSCH LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW* 51, 58 (1927).

51. See FRIEDMANN, *supra* note 27, at 6.

states cut across the entire spectrum of social, economic, cultural and political makeup.⁵² As a consequence, the family of nations cannot depend upon all nations to apply international norms domestically that were once universally accepted.⁵³ Each community must exist according to its own cultural standards. However, the 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. Thus, coexistence in today's heterogeneous society requires a limit on sovereign power, since abuse of that power is no longer checked by cultural uniformity.

Jus cogens norms represent that limit, since, as asserted by Mr. Suarez,⁵⁴ they make coexistence possible. In addition, as one professor contends, "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."⁵⁵ The clear way to implement such a limit would be to waive sovereign immunity automatically with respect to the claim being made whenever a sovereign nation has been accused of violating a *jus cogens* norm.

C. *Jus Cogens Violation as a Waiver of Sovereign Immunity*

Sovereign immunity cannot be applied when violations of international law are involved. This was the conclusion of the Judgment of the International Military Tribunal at Nuremberg. In discussing sovereign immunity, they declared that, "Th[is] 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."⁵⁶

52. Adda Bozeman, *The International Order in a Multicultural World*, in *THE EXPANSION OF INTERNATIONAL SOCIETY* 387, 404 (Hedley Bull & Adam Watson eds., 1984).

53. *Id.*

54. See Statement of Mr. Suarez, *supra* note 26 and accompanying text.

55. Eric Suy, *The Concept of Jus Cogens in Public International Law*, reprinted in *PAPERS AND PROCEEDINGS II THE CONCEPT OF JUS COGENS IN INTERNATIONAL LAW*, CONFERENCE ON INTERNATIONAL LAW LAGONISSI 71 (1967).

56. Judgment of the International Military Tribunal (Nuremberg 1946), reprinted in 41 AM. J. INT'L L. 172, 221 (1947).

Certainly, violations of *jus cogens* norms would preclude the defense of sovereign immunity, since they consist of the most heinous crimes in international law. In addition, modern international law recognizes that a state act in violation of *jus cogens* cannot even be recognized as a sovereign act.⁵⁷ Thus, a state that violates *jus cogens* cannot be accorded sovereign immunity from adjudication, since the state was not acting within its right as a sovereign nation at the time it committed the act.⁵⁸

Sir Hersch Lauterpacht broadened this notion by viewing sovereign immunity more as the exception than the rule where violations of international law are concerned. He contended that "acts contrary to international law are invalid and cannot become a source of legal rights for the wrongdoer."⁵⁹ A grant of sovereign immunity is not a convenient method by which a state escapes punishment; it is a significant legal right. At least one court has recognized this view, finding that immunity should only be accorded in "clear" cases.⁶⁰ The court based its

57. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 718 (9th Cir. 1992). See also *Suy*, *supra* note 55, at 75 ("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.").

58. *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 425 (2d Cir. 1987) ("That international law currently denies immunity for violations of international law is not surprising when one considers that international law consists primarily of rules guiding the conduct of nations. If sovereign acts were immunized today from scrutiny under international law, the exception would nearly swallow the rule. For example . . . since the sinking of a neutral vessel on the high seas without justification violates a substantive principle of international law, no matter who does the sinking, there is no immunity under international law in this case."). See also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 457 (1963) (White, J., dissenting) ("The reasons for nonreview, based as they are on traditional concepts of territorial sovereignty, lose much of their force when the foreign act of state is shown to be a violation of international law. All legitimate exercises of sovereign power . . . should be exercised consistently with the rules of international law . . ."); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 694 (1976) (An act of state is the "public act of those with authority to exercise sovereign powers.").

Any act that violates peremptory norms of international law is done *ultra vires*; it exceeds the scope of authority. An argument might be made that apparent authority, or authority by virtue of the way the circumstance appears, instead of true authority, would allow those relying on such authority to escape liability for their acts on behalf of the sovereign. However, one can never claim apparent authority to do an illegal act.

59. *HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW* 420 (1947).

60. *Victory Transport, Inc. v. Comisaria General de Abastecimiento y Transportes*, 336 F.2d 354, 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

finding on the idea that a wrongdoer cannot be accorded special privileges, especially when such fundamental violations of international law are involved. Sovereign immunity, after all, is not based on precepts of natural law as is *jus cogens*. Sovereign immunity is based more on notions of comity and international courtesy.⁶¹ Nations that violate *jus cogens* norms should not be granted a courtesy.

Furthermore, as one scholar has phrased the rule, "courts have clearly recognized that the act of state defense will not shield governmental acts that fail to meet a minimum standard of legality under the sovereign's *own* laws."⁶² Thus, the inconsistency in granting immunity in the face of these violations is made even more striking when one considers that violations of *jus cogens* norms are theoretically illegal under the laws of every sovereign nation.

In sum, by granting immunity to a state that has violated a rule of *jus cogens*, a court is recognizing a sovereign right which, in effect, could not exist because the state is not acting as a sovereign. By doing so, the court can be considered to be sanctioning and promoting an act that is condemned by the

61. See *infra* notes 105-07 and accompanying text regarding "comity of nations."

62. Ronald G. Haron, *Recent Developments: Alien Tort Claims Act*, 27 VA. J. INT'L L. 433, 443 (1987) (emphasis added). Note that the "act of state defense" is not the same as the doctrine of sovereign immunity, though the theory behind both is the same. An "act of state" is "an act done by the sovereign power of a country, or by its delegate, within the limits of the power vested in him. An act of state cannot be questioned or made the subject of legal proceedings in a court of law." BLACK'S LAW DICTIONARY 32 (5th ed. 1979). Sovereign immunity obliges states to "respect the independence of every other sovereign state, and [espouses that] the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). Thus, the two doctrines are very similar in effect, both preventing domestic courts from adjudicating claims against foreign sovereigns concerning acts done on their sovereign territory. The difference seems to lie in the fact that [t]he act of state doctrine . . . is not a rule of international law, but a domestic rule developed by the United States Supreme Court. It is a rule of judicial self-restraint, not unlike other prudential rules of judicial self-restraint. It may apply to foreign acts that raise no issues under international law.

LOUIS HENKIN ET AL., INTERNATIONAL LAW 162 (2d ed. 1987). Thus, sovereign immunity is a doctrine of international law that deals with the way countries relate to one another, while the "act of state" defense deals with the way suits that involve foreign sovereigns will be viewed in domestic courts. For purposes of this explanation, however, they are used interchangeably. See also *supra* notes 43-55 and accompanying text for a more thorough description of sovereign immunity.

international community.⁶³ Some might even argue that this makes the court an "accomplice to the act,"⁶⁴ for "he who assists in the consummation of an illegal act must be treated as a party to it."⁶⁵ Accordingly, domestic treatment of issues of sovereign immunity must conform with modern standards of international law. It must be found that when a state violates a peremptory norm of international law, it has automatically and impliedly waived all legal right to the benefits of sovereign immunity. This waiver is not something to which a state grants its consent. Rather, it is part of the premise of *jus cogens*, whose adherence requires no consent by the individual state, merely universal consent by the family of nations.⁶⁶

D. *Jurisdiction Over Sovereign Nations*

In order for a state to review the actions of another state, it must have jurisdiction to do so. International law provides principles that determine when this is the case. For example, a domestic court may have jurisdiction under the territoriality or objective territoriality principle,⁶⁷ the nationality principle,⁶⁸ the passive personality principle,⁶⁹ or the protective princi-

63. Jordan J. Paust, Note, *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, 248 (1983). The full statement reads as follows:

For the judiciary to reverse these trends and grant immunity to violators of international law would be to compromise its commitment to law, to threaten its independence, and, in effect, to sanction and promote official lawlessness that is otherwise condemned by the international community. Such a result must not be allowed.

Id.

64. Adam C. Belsky et al., Note, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CAL. L. REV. 365, 401 n.198 (1989).

65. F.A. Mann, *The Doctrine of Jus Cogens in International Law*, in FEST-SCHRIFT FÜR ULRICH SCHEUNER 415 (1973) (quoted in Belsky et al., *supra* note 64, at 401 n.198).

66. See *supra* notes 29 and 34 and accompanying text regarding universal consent to *jus cogens* norms.

67. The territoriality and objective territoriality principles apply to offenses that occur within the state that is claiming jurisdiction or that intentionally have effects within that state. HENKIN, *supra* note 62, at 828-29.

68. The nationality principle applies to cases where a court is trying to gain jurisdiction over one who is a national of that state. RESTATEMENT, *supra* note 21, § 402 cmt. b.

69. The passive personality principle is the converse of the nationality princi-

ple.⁷⁰ However, none of these principles justify the jurisdiction of a domestic court to review violations that occur outside the state by foreign nationals or sovereigns. This is the case with many violations of peremptory norms. Thus, only the "universality principle" would justify jurisdiction in such a case, since under this principle, any nation is permitted "to prosecute offenders for certain crimes even when the prosecuting nation lacks a traditional nexus with either the crime, the alleged offender, or the victim."⁷¹

States originally developed this doctrine in order to gain jurisdiction over those who had committed acts of piracy on the high seas. The premise was that the pirate represented the enemy of all people—*hostis humani generis*⁷²—and therefore any state that captured the perpetrator was entitled to try and punish the criminal on behalf of all nations of the world.⁷³

Following the Second World War, the universality principle was expanded to include jurisdiction over wartime offenses, including war crimes⁷⁴ and crimes against humanity,⁷⁵ principally under the auspices of the International Military Tribunal at Nuremberg.⁷⁶ One scholar comments: "Nuremberg was a watershed event that pointed international law towards a more humane and enlightened interpretation and application . . . It helped to revive universal jurisdiction."⁷⁷

In the wake of this movement, the United Nations drafted its charter,⁷⁸ which made clear that in this modern age, a

ple. It applies to cases where a victim, who is a national of the state that is claiming jurisdiction, is involved. See, e.g., *United States v. Wright-Barker*, 784 F.2d 161, 167 n.5 (3d Cir. 1986).

70. The protective principle is evoked when a particular offense threatens the state's security or a basic governmental function. HENKIN, *supra* note 62, at 855-56.

71. Kenneth C. Randall, Note, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988).

72. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

73. RESTATEMENT, *supra* note 21, § 404.

74. War crimes included the mistreatment and murder of prisoners of war and civilians in occupied territory. Randall, *supra* note 71, at 802-03.

75. Crimes against humanity usually involved the persecution and extermination of civilians, including nationals of the prosecuting state, on political, racial or religious grounds. Randall, *supra* note 71, at 803.

76. See Steven Fogelson, Note, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S. CAL. L. REV. 833, 884-85 (1990), which declares that the "Nuremberg Charter effectively made Crimes Against Peace, War Crimes, and Crimes Against Humanity subject to universal jurisdiction."

77. *Id.* at 885.

78. Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3

state's proper treatment of its own citizens is not simply a matter of national concern, but international concern. Each signatory state pledged to take action to promote such proper treatment on an international level.⁷⁹ And this multilateral treaty was subsequently signed and ratified by most of the world's nations, including the United States.⁸⁰

With that foundation, the doctrine of universal jurisdiction has expanded to cover other human rights violations considered as heinous as the pirates and slave traders of old.⁸¹ In fact, various postwar conventions have specifically addressed the question of jurisdiction over offenses with which the prosecuting state has no connection. Most notable of the postwar conventions that deal with this issue are the four Geneva Conventions of 1949.⁸² In discussing the Geneva Conventions,

Bevans 1153 (entered into force Oct. 24, 1945).

79. It provides, in part:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations . . . the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinctions as to race, sex, language or religion.

Id. at art. 55.

Article 56 goes on to provide that "[a]ll Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55." *Id.* at art. 56. See also Address by President Jimmy Carter, *supra* note 1 and accompanying text.

80. See PETER H. ROHN, *TREATY PROFILES* 238 (1976).

81. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980), which declares that the "torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind."

82. There are four conventions that comprise the Geneva Conventions of 1949: Convention for the Amelioration of the Condition of the Wounded and Sick of Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

The Geneva Conventions all provide that "[e]ach party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, . . . grave breaches, and shall bring such persons, *regardless of their nationality, before its own courts*. Geneva Convention I, *supra* at art. 49 (emphasis added); Geneva Convention II, *supra* at art. 50 (emphasis added); Geneva Convention III, *supra* at art. 129 (emphasis added); Geneva Convention IV, *supra* at art. 146 (emphasis added).

Professor Oscar Schachter of Columbia University posits: "[T]he adoption of such a convention—under which state parties may voluntarily undertake to exercise jurisdiction in given situations—implies that all states have the right to do so. It follows that while nonparties have no *obligation* to exercise jurisdiction, they have the *right* to exercise jurisdiction."⁸³ Such an assertion makes it clear that the widespread acceptance of the Geneva Conventions and other similar conventions dealing with human rights confer a right of universal jurisdiction over certain offenses on all nations, not just on the parties to the conventions.

These offenses, over which universal jurisdiction is encouraged by way of international conventions, overwhelmingly involve *jus cogens* norms, such as apartheid,⁸⁴ torture,⁸⁵ genocide,⁸⁶ and terrorism.⁸⁷ Furthermore, even though several of the documents granting universal jurisdiction for violations of *jus cogens* norms have not been ratified by each country, including the United States, they can be considered customary international law because of the widespread acceptance that these conventions have received. Thus, it can be generalized that the current state of customary international law provides for universal jurisdiction for offenses that involve

83. Randall, *supra* note 71, at 825 n.233 (quoting telephone interview with Oscar Schachter, Professor of International Law and Diplomacy, Columbia University (May 7, 1987) (emphasis added)) [hereinafter Interview with Oscar Schachter].

84. International Convention on the Suppression and Punishment of the Crime of Apartheid, *adopted* Nov. 30, 1973 (entered into force July 18, 1976), 1015 U.N.T.S. 245, *reprinted in* 13 I.L.M. 50 (1974). Article V provides that violators can be tried in a domestic tribunal of any state or by an international penal tribunal, and Article VI obliges state parties to adopt any measures necessary to allow domestic jurisdiction.

85. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/Res/39/51 (1985), *reprinted in* 23 I.L.M. 1027 (1984), as modified 24 I.L.M. 535 (1985) [hereinafter Torture Convention]. Article 5.3 provides for jurisdiction over any offender found in a state territory. Article 14 requires states to allow victim suits to redress torture, including "an enforceable right to fair and adequate compensation."

86. Convention on the Prevention and Punishment of the Crime of Genocide, *signed* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) Article VI provides for universal jurisdiction.

87. The Convention to Prevent and Punish Acts of Terrorism Against Persons of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413. Article 5 of the Convention provides that when extradition for a convention crime is not in order, the requested "state is obliged to submit the case to its competent authorities, as if the act had been committed in its territory."

violations of *jus cogens* norms. Under such a mandate, the United States, for example, even if not a party to the specific convention, is empowered to grant jurisdiction over violations of *jus cogens* norms if Congress should choose to enact such legislation.⁸⁸

Finally, it is clear not only that the doctrine of universal jurisdiction exists and that sovereign nations have a right to use it under customary international law, but also as a family of nations, customary international law obliges us to use it. It is an obligation *erga omnes*—literally obligations flowing to all. The International Court of Justice addressed this issue in dictum to the *Barcelona Traction* case,⁸⁹ finding that in contrast to a state's obligations "arising vis-à-vis another State, . . . [obligations *erga omnes*] are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection."⁹⁰ Hence, each state, according to this doctrine, is legally obliged or compelled to protect certain rights, since all states are interested parties. At a minimum, rights that are *jus cogens* or "compelling"⁹¹ fall within this category, since the international community has declared them to be the most fundamental of all rights from which no derogation is permitted. Thus, under the *erga omnes* doctrine, each state has an obligation to protect peremptory norms of international law due to their shared interest in that protection. Assertion of universal jurisdiction is an accepted method for protecting those rights.

E. Private Cause of Action

The obligation to exercise universal jurisdiction can be extended to a private cause of action, since a private cause of action is at the heart of the doctrine of universal jurisdiction.

88. The courts of the United States may not assert jurisdiction without appealing to a domestic statute. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 886 (2d Cir. 1980).

89. *In re Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, 1970 I.C.J. 4 (Feb. 5).

90. *Id.* at 32. See also *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) ("In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest.").

91. See *supra* note 19.

That is, "if the individual human being and his nature are taken as the starting point, then the rights and obligations of man under international law receive a foundation independent of the arbitrary will of states."⁹² Since universal jurisdiction is premised on the idea that boundaries and notions of sovereignty lose their meaning when peremptory norms are violated, such a triumph of the individual paves the way for recognition and enforcement of universal jurisdiction. Such a view focuses on the individual and his or her rights, not on arbitrary boundaries, in order to decide whether or not rights will be protected.

Some commentators have suggested that the International Court of Justice's *Barcelona Traction* dictum⁹³ may have a broader meaning than simply an interpretation of the *erga omnes* doctrine. Its language gives sanction to a type of *actio popularis*—a cause of action given to the people in general.⁹⁴ Additionally, the Second Circuit in *Filartiga* recognized this right of the individual when it held that the right to be free from torture was a fundamental right enforceable by an individual in domestic courts.⁹⁵ Individuals possess international rights of their own "vis-à-vis their own governments."⁹⁶ *Filartiga* makes it clear that although the mechanism of government is still essential in achieving justice for human rights violations, the government's political and economic needs may have become secondary to that of the individual's need to pursue his cause of action. One commentator notes:

92. PETER P. REMIC, *THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW ACCORDING TO GROTIUS AND VATTEL* 40 (1960).

93. *In re Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, 1970 I.C.J. 4 (Feb. 5).

94. Egon Schwelb, *The Actio Popularis and International Law*, *ISR. Y.B. H.R.* 46, 55-56 (1972).

95. *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980). Note that the court in *Filartiga* dealt with asserting jurisdiction over an individual, not a sovereign nation. Thus, although the court's recognition of the rights of the individual and its ability to enforce those rights was an important declaration, the court's method of asserting jurisdiction is not germane to this discussion. The Second Circuit looked to the Alien Tort Statute, 28 U.S.C. § 1350 (1988), to provide jurisdiction over the defendants, which only applies to cases involving individual defendants. 28 U.S.C. § 1330 (1988) governs actions against foreign states, and it is part of the FSIA.

96. *Id.* at 885.

[T]he emphasis of the law is increasingly shifting from the formal structure 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.⁹⁷

In sum, the irreducible element becomes the sovereignty of the individual, not the sovereignty of states.⁹⁸

Jus cogens norms are at the forefront of this empowerment of the individual, since violations of its norms represent the most fundamental attacks on the individual's sovereignty interests. An individual must be free to guide his own destiny, free from intolerable human rights abuses. Thus, at least with respect to violations of peremptory norms, it can be asserted that current trends in international law look towards the granting of a private cause of action to the individual by way of the doctrine of universal jurisdiction. Although the political machinery might be slow to recognize this ultimate state in which individuals will easily be able to assert their rights, possibly before an international body, domestic courts can bridge that gap by functioning as "double agents (*dédoublement fonctionnel*) of both national and international legal orders."⁹⁹

IV. UNITED STATES LAW

A. *Jus Cogens Norms In Domestic Law*

The Supreme Court has held that the "law of nations" is part of the "law of the land"; thus, the United States must abide by these international norms.¹⁰⁰ In addition, Article I,

97. C. WILFRED JENKS, *THE COMMON LAW OF MANKIND* 17 (1958).

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

99. Kenneth C. Randall, *Federal Questions and the Human Rights Paradigm*, 73 *MINN. L. REV.* 349, 423 (1988). In referring to *dédoublement fonctionnel*, Professor Randall was making a reference to a term described by George Scelle which deals with the dual and multiple functions played by single institutions in particular domestic and international contexts. See Georges Scelle, *Règles Générales du Droit de la Paix*, in 46 *RECUEIL DES COURS* 1, 358-59, 421-27 (1933).

100. *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 of appropriate jurisdiction, as often as questions of right depending upon it are duly

section 8 of the Constitution specifically authorizes Congress "to define and punish . . . offenses against the law of nations."¹⁰¹ Therefore, not only must the United States abide by the "law of nations," as defined by Congress, but it is empowered by the Constitution to punish those who transgress such laws. Violations of *jus cogens* norms, as a subset of violations of the "law of nations," may thus be defined and punished by Congress.

Congress has been slow to define specifically those acts which violate the "law of nations" and thus slow to punish foreign defendants under this authority. To compensate for this reluctance and to create some basis for punishing foreign defendants, the judiciary has stated that sources outside the decrees of Congress may be used to determine the "law of nations."¹⁰² The Supreme Court has declared that the "law of nations . . . may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognising [sic] and enforcing that law."¹⁰³ Therefore, although no official list of violations of the "law of nations," and thus *jus cogens* norms, exists under United States law, a framework is in place for ascertaining what would be accepted in a domestic court.

B. Sovereign Immunity in the United States

In contrast to the infrequent references in the history of United States jurisprudence which define the "law of nations," considerations of the doctrine of sovereign immunity are manifold. Most historians begin with the Supreme Court decision in *The Schooner Exchange v. M'Faddon*¹⁰⁴ to find that absolute immunity was the standard when this country was founded. In granting sovereign immunity to France in a suit for possession of a schooner, this 1812 case held that sovereign immunity was

presented for their determination."). See also *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (U.S. courts are "bound by the law of nations which is part of the law of the land."); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) ("When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.").

101. U.S. CONST. art. I, § 8, cl. 10.

102. See *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820).

103. *Id.* at 160-61.

104. 11 U.S. (7 Cranch) 116 (1812).

not based on any particular rule of law or precedent, but merely on general principles of comity among nations.¹⁰⁵ This notion of comity was later defined by the Supreme Court as the "recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."¹⁰⁶ It is a code of conduct which is "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will upon the other."¹⁰⁷

However, this doctrine was not so entrenched as some claim. In 1794, eighteen years earlier than the decision in *The Schooner Exchange*, the Attorney General recognized that in appropriate cases, a foreign ship of war and its commander were not immune.¹⁰⁸ In addition, the United States government recently expressed concern that the opinion in *The Schooner Exchange* was not being read properly.¹⁰⁹ The government noted that absolute immunity was not granted in that case. It contended that "Chief Justice Marshall held that the federal courts have the authority to adjudicate claims against foreign governments, but that, in appropriate cases, they should relinquish that power so as not to violate widely accepted principles of international law."¹¹⁰ Thus, sovereign immunity was not as clear in every case in the history of this nation as is maintained by supporters of the doctrine.

Nevertheless, whether clear or not, sovereign immunity became an accepted part of domestic law. In fact, it became such a familiar doctrine that eventually the Supreme Court began taking a politicized view towards it rather than a legal stance, placing less emphasis on whether immunity was sup-

105. *Id.* at 136.

106. *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

107. *Id.* at 163-64.

108. 1 Op. Att'y Gen. 47 (1794) (William Bradford Att'y Gen.). See also 1 Op. Att'y Gen. 87 (1799) (Charles Lee Att'y Gen.) (absent a statutory provision, "it is lawful to serve civil or criminal process upon a person on board a British ship-of-war lying in" a United States harbor); *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 352 (1822) (Grounds for immunity were "not founded upon any notion that a foreign sovereign had an absolute right.").

109. Brief for the United States of America as Intervenor and Suggestion of Interest, *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094 (D.C. Cir. 1982), reprinted in 20 I.L.M. 1436 (1981).

110. *Id.* at 1461.

ported by the law and practice of nations, and more on whether those making the decision were adhering to the practices and policies of the State Department.¹¹¹ In response to this problem, the State Department penned the famous Tate Letter of 1952, which announced its adoption of the "restrictive" theory of sovereign immunity.¹¹² That is, foreign sovereigns are immune from suits regarding their "public acts (*jure imperii*)," but not in cases based on commercial or "private acts (*jure gestionis*)." It was thought that this would bring our policies in line with developments in international law.¹¹³

Because the Tate Letter left the power to grant sovereign immunity in the hands of the executive branch, which is seemingly subject to diplomatic pressure,¹¹⁴ Congress acted to change the policy. Thus, in 1976, in an effort to cure this problem and "bring U.S. practice into conformity with that of most other nations by leaving sovereign immunity decisions exclusively to the courts,"¹¹⁵ the Legislature enacted the FSIA.¹¹⁶ The FSIA codified the "restrictive" theory of sovereign immunity, placed the interpretation of the FSIA, and thus questions of immunity, in the hands of the judiciary, and made it clear that subject matter jurisdiction is lacking if sovereign immunity exists.¹¹⁷

It is apparent under most interpretations of the FSIA that Congress was not very eager to grant United States courts the power to adjudicate the majority of claims that involve foreign sovereigns, for the FSIA appears only to grant jurisdiction for limited purposes. This is probably due to a fear of undermining the "comity of nations,"¹¹⁸ as well as the notion that the sepa-

111. HOUSE REPORT, *supra* note 18, at 7. This trend "reached its culmination" in *Ex Parte* Republic of Peru, 318 U.S. 578, 581 (1943) (reference is made to the practice of judicial deference to "suggestions of immunity" from the executive branch) and *Mexico v. Hoffman*, 324 U.S. 30, 35-36 (1945).

112. Letter from Jack B. Tate, Acting Legal Advisor, Dep't. of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), in 26 DEPT. ST. BULL., Jan. 7, 1952, at 984-85.

113. HOUSE REPORT, *supra* note 18, at 7.

114. HOUSE REPORT, *supra* note 18, at 7-8.

115. HOUSE REPORT, *supra* note 18, at 75.

116. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1602-11 (1976)).

117. 28 U.S.C. § 1330(a) (1988).

118. In *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-04 (1918), the Supreme Court stated that,

[t]he principle that conduct of one independent government cannot be

ration of powers would be disrupted by the courts interfering with the agenda of the executive and legislative branches with respect to foreign policy. That is, many of the issues that might be brought before a domestic court might have an impact on relations between the United States and the alleged violating nation and thus may infringe upon areas traditionally left to the other branches of government.¹¹⁹ However, as judicial bodies, the courts have leeway to interpret the FSIA liberally or conservatively, as they see fit in a particular circumstance, and these interpretations, more than the precise language of the FSIA or considerations of foreign policy, establish the limits or scope of the FSIA.

C. *Jus Cogens as an Exception to the FSIA*

The FSIA must be read by courts to deny immunity when a *jus cogens* violation is alleged to have occurred. This reading must be so whether or not Congress specifically made reference to *jus cogens* norms in the FSIA.

successfully questioned in the courts of another . . . rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would very certainly "imperil the amicable relations between governments and vex the peace of nations."

(citation omitted). *But cf.* William F. Webster, *Amerada Hess Shipping Corp. v. Argentine Republic: Denying Sovereign Immunity to Violators of International Law*, 39 HASTINGS L.J. 1109 (1988). Webster comments that the effect on comity of a grant of immunity would be positive. He states, "The effect on foreign relations would, for the most part, be positive, since the United States would be demonstrating its commitment to international order and stability and to the development of an international legal order in areas of emerging importance." *Id.* at 1146.

119. To this end, the Supreme Court elucidated a test in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), for deciding whether or not an action should be dismissed on the ground that it will unduly interfere with United States foreign policy. *Id.* at 428. The test requires balancing three factors: 1) the degree of codification or consensus regarding the applicable international legal principles, 2) the significance of the issue for United States foreign policy relations, and 3) the status of the government whose act is under question. *Id.*; see also *Amicus Curiae Brief by the United States Department of Justice and State at 22-23, Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090) (This brief looked to foreign policy considerations for deciding whether or not to grant a cause of action, as it points out that since there was a clear violation of international law, "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.").

As the codification of the policy of the United States government towards sovereign immunity, the FSIA was important legislation, but its enactment did not signal an end to uncertainty over questions of immunity. It merely shifted the burden to the courts, leaving the same questions unanswered. The significance of the FSIA is not that it assimilates established precedent and custom with current international norms such that every situation that might then arise will precisely conform to an intended standard, but that a body, free from political and economic pressure, may now draw upon all available doctrines to arrive at an equitable answer. The FSIA provides a procedural framework, and it is left to the judiciary to give the FSIA breadth and scope.

The text of the FSIA does not resolve how sovereign immunity will be reconciled with the principle of *jus cogens*. The problem is that sovereign immunity rests on the foundation that sovereign states are equal and independent;¹²⁰ therefore, they are not bound to abide by international law absent their consent. *Jus cogens* norms, however, require no individual consent in order to make them binding on all states.¹²¹ In a sense, the "general will of the international community of states [takes] precedence over the individual wills of states to order their relations."¹²² The very existence of *jus cogens* is a boundary on state sovereignty. It must be so in order to maintain minimum standards of coexistence.

Thus, a *jus cogens* exception must be read into the FSIA in light of the tenet of statutory construction uttered almost two hundred years ago by Chief Justice Marshall: "[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains."¹²³ Since international law would hold that a country has waived all rights to sovereign immunity by violating a *jus cogens* norm, the FSIA must be construed in line with this principle. Arguably, immunity could only be granted if Congress specifically accorded immunity for such a violation. Since Congress did not in any

120. *The Schooner Exch. v. M'Faddon*, 11 U.S. (7 Cranch) 116, 136-37 (1812).

121. See Brudner, *supra* note 34, at 231.

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

123. *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953) (citing *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).

way address the issue of *jus cogens* in the statute, it is tenable that the FSIA denies immunity for all violations of *jus cogens* norms.

Indeed, it seems unlikely that by way of the FSIA, Congress was looking to expand the scope of sovereign immunity to violations of international human rights law. Prior to the enactment of the FSIA, foreign sovereigns were in the position of requesting immunity from the State Department.¹²⁴ The political and diplomatic problems inherent in allowing State Department policy to guide decisions of immunity were remedied by the enactment of the FSIA. Its three purposes¹²⁵ were: 1) to incorporate the "restrictive" theory of sovereign immunity into United States law, which denied immunity for "commercial or private" sovereign acts;¹²⁶ 2) to place these decisions in the hands of the judiciary, rather than the executive branch, in order to insure that the decisions would be made on legal grounds and under procedural due process; and, 3) to codify the procedures required to bring suit against a foreign sovereign. These purposes were tailored to resolve the immunity problems of the post-World War II years, not to expand immunity to areas never before covered. Specifically, no mention of human rights issues is ever made in the legislative history of the FSIA. This is highlighted when one considers the great extent to which commercial concerns were addressed throughout the FSIA.¹²⁷

Thus, any interpretation of the FSIA as an act which expands the cloak of immunity to cover human rights violations is ill-founded. This is especially manifest when one considers that a "central premise" of the FSIA was that "decisions on claims by foreign states to sovereign immunity are best made by the judiciary on that basis of a statutory regime which in-

124. HOUSE REPORT, *supra* note 18, at 9. Due to the awkward position in which this puts both the violating country and the United States, questions of immunity were uncertain. In addition, requests by the United States for sovereign immunity in foreign courts frequently failed to the point that by the 1960s the United States attempted to invoke immunity in few cases. See HOUSE REPORT, *supra* note 18, at 9.

125. HOUSE REPORT, *supra* note 18, at 7.

126. See *supra* note 112-13 and accompanying text regarding the "restrictive" theory of sovereign immunity.

127. See *infra* notes 151-52 and accompanying text regarding FSIA's focus on commercial activity.

corporates standards recognized under international law."¹²⁸ A denial of sovereign immunity for violations of *jus cogens* norms is an accepted principle under international law.¹²⁹ Thus, any interpretation that grants immunity for violations of *jus cogens* norms not only ignores the circumstances surrounding the enactment of the FSIA, but also flouts its basic premise.

Simply stated, the FSIA should be interpreted to read that a party impliedly waives his sovereign immunity if he commits acts which violate peremptory norms. Since no act of Congress can be read in a way that violates international law, and international law is the "law of the land,"¹³⁰ the FSIA must incorporate standards of international law. And since international law would deny a state immunity for violations of *jus cogens* norms,¹³¹ the language of the FSIA must be interpreted to create the mechanism for denying immunity.¹³² Section 1605(a)(1) of the FSIA states that "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the foreign state has waived its immunity either explicitly or by implication."¹³³ Thus, the implementing language is already present in the FSIA for an implied waiver of immunity under circumstances of a violation of peremptory norms.

Furthermore, Congress refuses to accord sovereign immunity when torts occur in the United States, as demonstrated in section 1605(a)(5) of the FSIA.¹³⁴ Thus, from a common sense

128. HOUSE REPORT, *supra* note 18, at 14 (emphasis added).

129. See *supra* notes 43-55 and accompanying text regarding sovereign immunity.

130. See *The Paquete Habana*, 175 U.S. 677, 700 (1900).

131. Since a *jus cogens* violation is not a sovereign act, it will not be accorded sovereign immunity. See *supra* notes 57-58 and accompanying text.

132. One commentator has gone so far as to propose an amendment to § 1605(a)(1) of the FSIA which provides that a party implicitly waives sovereign immunity if it commits acts which violate international law. For purposes of the amendment, a "violation of international law" is interpreted as a "violation of a rule of international law that is universally accepted among civilized nations." That is essentially the definition of a *jus cogens* norm. The proposed amended § 1605(a)(1) would, in pertinent part, read as follows: "A foreign state shall not be immune from the jurisdiction of the United States Courts . . . in any case . . . in which the foreign state has impliedly waived its immunity by committing an act which violates international law." Webster, *supra* note 118, at 1133.

133. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1602-11 (1976)).

134. 28 U.S.C. § 1605 (1988) reads:

approach to section 1605 of the FSIA, there should be no basis for finding sovereign immunity in those cases where the same tortious act occurs outside the territory of the United States.¹³⁵ A sovereign that commits a tortious act should not be granted immunity under the FSIA no matter where that act occurs.

Another basis for implying a waiver within the FSIA framework is the fact that the FSIA may not preempt "applicable international agreements."¹³⁶ This means that any international agreement that conflicts with the FSIA will result in a dismissal of the immunity provisions of the FSIA where that agreement is concerned. It can be argued that such agreements include norms of current international law that, as the "law of nations,"¹³⁷ bind the United States. In this case, since the notion that states are not immune from jurisdiction for violations of *jus cogens* norms is internationally agreed upon, it acts as a codified international agreement. Thus, any interpretation of the FSIA which does not take this international agreement into account arguably has violated an underlying premise of the FSIA.

Finally, although only Congress may grant a domestic court jurisdiction over violations of *jus cogens* norms, the doctrine of universal jurisdiction¹³⁸ can lend support to a finding

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the states in any case . . . in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment

135. Belsky et al., *supra* note 64, at 400-01.

136. HOUSE REPORT, *supra* note 18, at 17. The "international agreements" exception is codified in 28 U.S.C. § 1604. A discussion of the "international agreements" exception is beyond the scope of this paper; however, it should be noted that such an interpretation of the exception has not yet been accepted. The courts have taken a narrow view on this issue, referring to it as the "existing treaty exception," rather than the "international agreements exception." See, e.g., *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 719 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993). The courts have interpreted the exception to refer to international agreements that specifically provide private causes of action to a plaintiff in direct violation of the FSIA. See, e.g., *id.* at 719.

137. See *supra* notes 100-01 and accompanying text regarding the adoption of the "law of nations" as the "law of the land."

138. See *supra* notes 71-91 and accompanying text regarding universal jurisdiction.

of implied waiver of sovereign immunity. The judiciary is free to draw upon international legal principles of jurisdiction to determine whether an implied waiver of sovereign immunity is justified,¹³⁹ as long as it appeals to a domestic statute to exercise that jurisdiction. The United States has recognized the doctrine of universal jurisdiction as an international law principle in numerous cases.¹⁴⁰

D. The Amerada Hess Decision and its Distinguishability From Cases Involving Jus Cogens Norms

The Supreme Court addressed the scope of the FSIA in its recent decision in *Argentine Republic v. Amerada Hess Shipping Corp.*¹⁴¹ Although later courts have interpreted the Court's holding in this case to have comprehensively defined the scope of the FSIA, the logic behind its arguments points to a more limited use. The decision appears to support the notion

139. *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 of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."). *See also*, *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (U.S. courts are "bound by the law of nations which is part of the law of the land."); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) ("When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.").

140. *See, e.g.*, *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246, 254 (D.C. Cir. 1985) (The court made reference to the concept of universal jurisdiction and then proclaimed that, "[t]he reasons for nonreview . . . lose much of their force when the foreign act of state is shown to be a violation of international law' . . ." (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 457 (1964) (White, J., dissenting)). (The concept of extraordinary judicial jurisdiction over acts in violation of significant international standards has also been embodied in the principle of 'universal' violations of international law [which] . . . extends to the enforcement of civil law.") (citation omitted); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781, 788 (D.C. Cir. 1984) (*per curiam*) (Edwards, J., concurring) (made several references to domestic jurisdiction over extraterritorial offenses under the universality principle), *cert. denied*, 470 U.S. 1003 (1985); *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (made reference to the torturer as being *hostis humani generis*, the enemy of all mankind, which is the term used to justify universal jurisdiction over acts of piracy); *In re Demjanjuk*, 612 F. Supp. 544, 555 (N.D. Ohio) (the court determined that Israel's jurisdiction to prosecute a concentration camp guard "conforms with the international law principle of 'universal jurisdiction.'"), *aff'd sub nom. Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); and *United States v. Layton*, 509 F. Supp. 212, 223 (N.D. Cal.) (recognizing universal jurisdiction to define and punish terrorist acts against internationally protected persons), *appeal dismissed*, 645 F.2d 681 (9th Cir.), *cert. denied*, 452 U.S. 972 (1981).

141. 488 U.S. 421 (1989).

that since the FSIA's entire focus is on commercial concerns, it is more akin to suits involving violations of *jus dispositivum* norms than *jus cogens* norms.¹⁴²

The plaintiff in *Amerada Hess* was a shipping corporation that sent an empty oil tanker in May 1982 from the Virgin Islands to Alaska. Although this was during the war between Great Britain and Argentina over the Falkland Islands,¹⁴³ both of the warring parties were notified of the tanker's presence and purpose. Off the Argentine coast, but well in international waters, the tanker was attacked by Argentine aircraft and, though not destroyed, eventually had to be tanked off the coast of Brazil.¹⁴⁴ While the Second Circuit found that the attack of a neutral ship in international waters without apparent justification was a clear violation of international law,¹⁴⁵ the Supreme Court found Argentina to be immune from suit under the FSIA.

This holding made clear that immunity would still be granted where violations of international norms had occurred. However, the type of violation in *Amerada Hess* is distinguishable from a *jus cogens* violation. Under no interpretation of international law would attacking a ship rise to the level of *jus cogens*, since it is not part of the customarily accepted class of norms from which no derogation is permitted.¹⁴⁶ It is merely a violation of *jus dispositivum* norms or rules of international conduct.¹⁴⁷ Thus, although it is debatable whether the Supreme Court was just in granting immunity to Argentina, any court seeking to apply the same interpretation to cases involving *jus cogens* norms would be basing its analysis on an inter-

142. For a comparison of the two doctrines, see *supra* notes 33-36 and accompanying text.

143. The Falklands are known as Islas Malvinas to the Argentineans.

144. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 432 (1989).

145. *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 426 (2d Cir. 1987) ("[T]he sinking of a neutral vessel on the high seas without justification violates a substantive principle of international law, no matter who does the sinking . . .").

146. For a general discussion of what *jus cogens* is and what violations would be considered violations of *jus cogens* norms, see *supra* notes 19-42 and accompanying text.

147. See *supra* notes 33-36 and accompanying text regarding *jus dispositivum* norms.

pretation of the FSIA that did not address such serious violations.

The fundamental difference between the two types of international law violations justifies the granting of immunity in one case but not the other. *Jus cogens* norms require no consent for their adherence, while *jus dispositivum* are only adhered to at the will of the sovereign. Thus, when a nation violates *jus dispositivum*, there is apparent justification for denying the assertion of jurisdiction over that nation in domestic courts, since international customary law is not forcing them to abide by certain norms, it is only encouraging them. When the violation reaches the level of *jus cogens*, that justification falls away, since no nation has a choice about whether or not to comply with those norms.

In *Amerada Hess*, the Supreme Court failed to address any distinction between *jus cogens* and *jus dispositivum* norms in finding that the FSIA was meant to apply to all violations of international law. The Court found that since Congress specifically referred to certain violations of international law in the waiver section of the FSIA,¹⁴⁸ the FSIA was intended to cover all violations of international law within its scope. By example, the Court cited section 1605(a)(3),¹⁴⁹ which refers to "property taken in violation of international law," as justification for finding that "Congress had violations of international law by foreign states in mind when it enacted the FSIA."¹⁵⁰ The Court then concluded that since Congress intended to encompass international law within its scope, any state accused of a violation of international law will be immune from suit in United States courts if no specific exemption is made by Congress in the FSIA. The Court's major rationale for interpreting

148. 28 U.S.C. § 1605 (1988).

149. 28 U.S.C. § 1605(a)(3) reads:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the State in any case in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by any agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

150. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 435 (1989).

the FSIA in the way that it did was thus primarily based on a *jus dispositivum* argument, since the taking of property does not rise to the level of peremptory status. One can deduce that since the Court refers to a *jus dispositivum* example in its holding and *jus cogens* violations are so fundamentally disparate from *jus dispositivum* violations, the Court's holding was impliedly limited to cases involving *jus dispositivum* norms.

Additionally, the exceptions to sovereign immunity denoted under the FSIA deal almost exclusively with commercial activity.¹⁵¹ The entire international focus of the FSIA is on international commercial activity, not on international human rights violations. This fact is apparent from the "Statement" of the FSIA,¹⁵² which cites as an important reason for creating the FSIA the fact that "American citizens are increasingly coming into contact with foreign states and entities owned by foreign states," and that "these interactions arise in a variety of circumstances, . . . call[ing] into question whether our citizens will have access to the courts in order to resolve ordinary legal disputes." As examples of such instances, the "Statement" of the FSIA looks not to human rights violations, but first to the American businessman who sells goods to foreign trading companies, and second to the seller of real estate who sells property to a foreign government entity. Therefore, although the Court made a case for finding that violations of *jus dispositivum* norms, especially with regard to commercial activity, fall within the FSIA's purview, its analysis and the legislative history make it clear that neither it nor Congress considered violations of *jus cogens* norms.

Thus, whether or not the Supreme Court adequately supported its decision to grant immunity from suit for a violation of *jus dispositivum* norms,¹⁵³ it is apparent that any application of the Supreme Court's decision in *Amerada Hess* to violations of peremptory norms of international law would be an arbitrary use of case law that is distinguishable. The courts must still apply domestic precedent, custom, and current standards of international law in reaching their conclusions con-

151. 28 U.S.C. § 1605 (1988). The one major exception to this is § 1605(a)(5) which deals with private torts.

152. HOUSE REPORT, *supra* note 18, at 6-8. See also Klein, *supra* note 33, at 359.

153. Such a discussion is beyond the scope of this Comment.

cerning application of the FSIA where violations of *jus cogens* norms are involved. In light of this, any attempt to limit the FSIA's exceptions for all time to those specified in section 1605 would be fundamentally flawed.

V. ANALYSIS OF *SIDERMAN DE BLAKE V. REPUBLIC OF ARGENTINA*

Armed with this understanding of current principles of international law and their relation to domestic application, I now turn to a discussion of the recent Ninth Circuit decision in *Siderman de Blake v. Republic of Argentina*. In *Siderman*, the court properly interpreted *jus cogens*, holding that the Republic of Argentina's alleged torture of José Siderman represented a fundamental violation of those norms. Based on this finding, the court was obliged to grant jurisdiction to the plaintiffs under the FSIA and customary international law. Nevertheless, it granted immunity to the Republic of Argentina. The court based this finding on the holding in *Argentine Republic v. Amerada Hess Shipping Corp.*,¹⁵⁴ but *Siderman* is easily distinguished from *Amerada Hess*. Thus, the court erred in its determination that the FSIA granted immunity from judicial review to the Republic of Argentina.

A. *Torture as a Violation of Jus Cogens*

Torture is defined in part as "any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering . . . , whether physical or mental, is intentionally inflicted on that individual for such purposes as . . . discrimination."¹⁵⁵ It is universally condemned. It is not only prohibited in the Constitution of the United States¹⁵⁶ but, according to one survey, by the Constitutions of

154. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 718-19 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993).

155. See 137 CONG. REC. H11,244-04 (daily ed. Nov. 25, 1991) (provision of the Torture Victim Protection Act of 1991, as read by the Clerk); see also Torture Convention, *supra* note 85, at art. 1 for similar language.

156. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII, XIV. During a debate in the House of Representatives, Representative Fascell conveyed the enmity American society feels towards torture: "Torture is a . . . violation of international law. But more important than being a violation of any laws, torture like murder, is a violation of the very nature and fabric of human society." 134 CONG.

fifty-five nations.¹⁵⁷ Likewise, all major human rights agreements and instruments contain a prohibition against torture¹⁵⁸ and permit no derogation from this norm.¹⁵⁹ Some treaties even encourage universal jurisdiction over claims of torture.¹⁶⁰ As such, the right to be free from torture rises to the level of a *jus cogens* norm,¹⁶¹ since *jus cogens* norms are essentially those from which no derogation is permitted.¹⁶²

Nevertheless, the universal condemnation of torture is only the case in theory, not necessarily in practice. The reality is that more than one-third of the world's governments "engage in, condone, or encourage systematic torture."¹⁶³ One congressman has stated that "In the last decade alone, hundreds of thousands of people have been killed by state authorities,

REC. H9692-02 (daily ed. Oct. 5, 1988) (statement of Rep. Fascell).

157. *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 n.12 (2d Cir. 1980) (citing 48 REVUE INTERNATIONALE DE DROIT PENAL Nos. 3 & 4, at 208 (1977)).

158. See, e.g., Universal Declaration, *supra* note 22, at art. 3; American Convention on Human Rights, Nov. 22, 1969, O.A.S. Official Records OEA/Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1, *reprinted in* 9 I.L.M. 673 (1970), art. 5 (entered into force July 18, 1978); International Convention on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, *reprinted in* 6 I.L.M. 368 (1967), art. 5 (entered into force Mar. 23, 1976) [hereinafter International Covenant on Civil and Political Rights]; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5, art. 3 (entered into force Sept. 3, 1953); African (Banjul) Charter on Human and People's Right, June 27, 1981, O.A.U. Doc. CAB/LEG67/3 rev. 5, *reprinted in* 21 I.L.M. 58 (1982), art. 5 (entered into force Oct. 21, 1986); Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), U.N. GAOR, 14th Sess., Supp. No. 16, at 19, U.N. Doc. A/4354 (1959), principle 9; Code of Conduct of the United Nations for Law Enforcement Officials, G.A. Res. 34/169, U.N. GAOR, 34th Sess., Supp. No. 46, at 185, U.N. Doc. A/34/46 (1980), art. 5; International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, *reprinted in* 5 I.L.M. 352 (1966), art. 5 (entered into force Jan. 4, 1969); and Principles of Medical Ethics, G.A. Res. 3/194, U.N. GAOR, 37th Sess., Supp. No. 51, at 510, U.N. Doc. A/37/51 (1983), principle 2.

159. All of the documents cited *supra* note 158 contain such a provision. See, e.g., International Covenant on Civil and Political Rights, *supra* note 158, at art. 4.

160. See, e.g., Torture Convention, *supra* note 85. Article 5.3 provides for jurisdiction over any offender found in a state territory. Article 14 requires states to allow victim suits to redress torture, including "an enforceable right to fair and adequate compensation."

161. See, e.g., RESTATEMENT, *supra* note 21, § 702 cmt. n.

162. See Vienna Convention, *supra* note 20.

163. See 137 CONG. REC. E1444-02 (daily ed. April 24, 1991) (statement of Rep. Yatron).

and thousands more have been persecuted and intimidated into silence through torture."¹⁶⁴

The only way to combat such heinous acts is to bring these governments to task for their crimes. It is clear that mere assertions of good intent will not enforce established norms of international law. Indeed, it is hypocritical under the weight of these facts, and in light of torture's status as a violation of *jus cogens* norms, to simply expect documents to ameliorate the situation. Recognizing the horrifying implications of the pervasiveness of torture, the Ninth Circuit in *Siderman de Blake v. Republic of Argentina*¹⁶⁵ easily found that the systematic torture of José Siderman was a violation of *jus cogens* norms.¹⁶⁶ However, the court maintained the trend toward good intent but little action by interpreting the FSIA to grant immunity in spite of the fact that a violation of such peremptory norms was involved. The court's mistake was that such an interpretation essentially leaves the enforcement of these norms to nonexistent bodies.

Beyond the deceptively simple reason for denying immunity—that instances of torture must be thwarted—is the idea that accepted principles of international law deny immunity for violations of *jus cogens* norms. The Ninth Circuit's narrow interpretation ignores these principles in favor of outdated notions of state sovereignty. Thus, with the weight of a *jus cogens* violation bearing down on the court, the Ninth Circuit was obliged to deny immunity to the Republic of Argentina and hear the plaintiffs' complaint.

B. Allowing the Sidermans' Torture Claims To Be Adjudicated in United States Courts

As a defense to José Siderman's allegations of torture in *Siderman de Blake v. Republic of Argentina*, the Republic of Argentina raised the shield of the FSIA in order to avoid the jurisdiction of the United States' courts.¹⁶⁷ The Ninth Circuit accepted this defense, basing its interpretation of the FSIA on

164. *Id.*

165. 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993).

166. The Ninth Circuit held that, "[u]nder international law, any state that engages in official torture violates *jus cogens*." *Id.* at 717.

167. *Id.* at 804.

that established by the Supreme Court in *Argentine Republic v. Amerada Hess Shipping Corp.*¹⁶⁸

Although *Amerada Hess* dealt with interpreting the scope of the FSIA, it offered an interpretation based on a violation of *jus dispositivum* norms, not on *jus cogens* norms, such as the torture claim in *Siderman*.¹⁶⁹ *Amerada Hess* involved the attack of a neutral ship in international waters without apparent justification. Such an act is a clear violation of international law; however, under no interpretation of international law would such a violation rise to the level of *jus cogens*.¹⁷⁰ *Siderman*, on the other hand, deals with the problem of systematic torture, which is at the top of the hierarchical pyramid of violations¹⁷¹ and is a well-accepted violation of *jus cogens* norms.¹⁷² Thus, the *Amerada Hess* decision is distinguishable on its facts, and its interpretation of the FSIA is not applicable when violations of *jus cogens* norms are involved.¹⁷³ The Ninth Circuit's mistake in *Siderman* was not in its interpretation of the *Amerada Hess* decision, but in its decision to base its holding on a case that dealt with a fundamentally different situation and different international norms.

The decision in the *Amerada Hess* case seems to be the only reason that the court decided the way that it did in *Siderman*. The court admits that, although Argentina would not be granted immunity under international law, it "must interpret the FSIA through the prism of *Amerada Hess*."¹⁷⁴ This is particularly erroneous in light of the fact that the legislature, in deciding to place the question in the hands of the judiciary by enacting the FSIA, specified that one important

168. 488 U.S. 428 (1989).

169. See *supra* notes 141-53 and accompanying text regarding an analysis of the Court's decision in *Amerada Hess*.

170. For a general discussion of what *jus cogens* is and what violations would be considered violations of *jus cogens* norms, see *supra* notes 19-42 and accompanying text.

171. Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 2 (1986).

172. See *supra* notes 155-66 and accompanying text regarding torture as a violation of *jus cogens* norms.

173. See *supra* notes 141-53 and accompanying text regarding the distinguishability of the *Amerada Hess* decision from cases involving *jus cogens* norms.

174. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 718 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993).

guideline in doing so is that standards under international law must be incorporated when interpreting the statute.¹⁷⁵ Thus, if *Amerada Hess* is the court's only reason for granting immunity, in the face of all the legal arguments put forth that deny immunity, then the Ninth Circuit has failed to support its holding.

Rather than relying on the specific exceptions in section 1605 of the FSIA, the Ninth Circuit was obliged to look to the implied waiver exception, codified in section 1605(a)(1) of the FSIA.¹⁷⁶ By way of this exception, sovereign immunity should automatically be waived when a state is accused of having violated a *jus cogens* norm. This waiver is premised on the notion that since violations of *jus cogens* norms are, by their nature, not sovereign acts, a sovereign nation impliedly waives its immunity when it commits such an act.¹⁷⁷ Since the Ninth Circuit recognizes that "no state claims a sovereign right to torture its own citizens"¹⁷⁸ and that under international law, a state that commits torture "would not be entitled to . . . immunity,"¹⁷⁹ the court has already made the necessary findings to invoke the "implied waiver" provision of the FSIA. In addition, such an interpretation of the FSIA, argues one commentator,¹⁸⁰ would be in accordance with the first purpose of the legislature in enacting the FSIA—"to codify the so-called 'restrictive' principle of sovereign immunity, as presently recognized under international law."¹⁸¹ That is, since the restrictive theory only grants immunity for public acts and "governments do not generally commit torture as a matter of public policy,"¹⁸² it follows, in theory, that they should not be im-

175. See *supra* notes 128-29 and accompanying text regarding the fact that the judiciary must use international law to interpret the FSIA.

176. See *supra* note 132-33 and accompanying text regarding an implied waiver exception based on 28 U.S.C. § 1605(a)(1) (1988).

177. See *supra* notes 56-66 and accompanying text regarding international principles which deny sovereign immunity to one who violates *jus cogens* norms.

178. *Siderman*, 965 F.2d at 717.

179. *Id.* at 718.

180. Matthew H. Murray, Note, *The Torture Victim Protection Act: Legislation to Promote Enforcement of the Human Rights of Aliens in U.S. Courts*, 25 COLUM. J. TRANSNAT'L L. 673 (1987).

181. HOUSE REPORT, *supra* note 18, at 7.

182. Murray, *supra* note 180, at 706. It might be argued that since Argentina had just experienced a coup d'état which resulted in the assumption of power by a military junta (see section II of this Comment for a brief discussion of the circumstances surrounding the plaintiff's alleged torture), then the act of torture was not

mune from suit when charged with committing such an act.

Accordingly, the Republic of Argentina impliedly waived its rights to sovereign immunity when it was accused of committing an act that was not within its sovereign rights to commit. Any other finding by the Ninth Circuit is akin to sanctioning the behavior, since the state is recognizing a sovereign right which does not exist under international law.¹⁸³ Although it cannot be said that by doing so, we are literally excusing the behavior, our action is akin to excusing it. In light of this finding, the following diatribe by Representative Breuter bears reprinting here:

[W]e in the United States are a nation where rule of law and respect for the individual are recognized as paramount virtues. However, there is no disguising the fact that such is not the situation in many other nations that do not follow the U.S. example. With disturbing frequency, certain regimes and juntas employ terror and torture to maintain control.

Torture is a pervasive, insidious threat to the well-being of mankind. Those dictators who engage in torture seek to dehumanize their populations, turning the people into cogs in a totalitarian regime. Of course, the practice of torture violates the most basic of democratic values. We do not tolerate the practice of torture in the United States. Nor should we excuse torture if practiced by others, whether they are friends or adversaries.¹⁸⁴

committed by the sovereign Republic of Argentina and thus the democratic successor to that regime should not be held accountable for its actions. Although it is beyond the scope of this paper to address all of the moral and political considerations that are inherent in such a discussion, it is noted in United States case law that "if the party seeking to dislodge the existing government succeeds, and the independence of the government it has set up is recognized, then the acts of such a government, from the *commencement* of its existence, are regarded as those of an *independent* nation." *Underhill v. Hernandez*, 168 U.S. 250, 253 (1897) (emphasis added). By the time this action was decided by the District Court, a democratic government had already been installed in power, however, that happened eight years after the coup d'état. In the meantime, the junta was recognized as the governing entity, and, thus, all of its actions are regarded by the United States to be those of a sovereign nation, whether or not they are sovereign acts.

183. See *supra* notes 63-65 and accompanying discussion regarding the notion that by granting sovereign immunity, in spite of a *jus cogens* violation, a nation is in effect sanctioning that violation.

184. See 135 CONG. REC. H6423-01 (daily ed. Oct. 2, 1989) (statement of Rep. Breuter). That statement was made as part of a show of support for the Torture Victim Protection Act, legislation designed to establish an action for recovery for one who has been the victim of torture, whether a citizen of the United States or

Although not explicitly stated, the implication of this statement is that if we fail to provide domestic jurisdiction with respect to instances of torture, then we are on some level condoning the act.

Finally, as a member of the "family of nations," we are simply not allowed to consent to immunity for a violation of *jus cogens* norms, since violations of such peremptory norms are not recognized as sovereign acts under international law. Thus, even if the Ninth Circuit finds that the FSIA's implied waiver exception was not meant to include violations of *jus cogens* norms, the FSIA must somehow be interpreted to include such a provision. A basic tenet of statutory construction is that any act of Congress must never be construed to violate the law of nations if at all possible. A grant of immunity to the Republic of Argentina in the *Siderman* case represents such a violation. The Ninth Circuit itself has stated: "A state's violation of the *jus cogens* norm prohibiting official torture . . . would not be entitled to the immunity afforded by international law."¹⁸⁵ In light of this acknowledgment, there is no principled basis for United States courts to consent to a grant of immunity when requested to adjudicate over such a claim if any other interpretation of the FSIA is possible.¹⁸⁶ Therefore, such an interpretation must be read into the FSIA.

In sum, although Congress did not specifically delineate violations of *jus cogens* norms as exceptions to the FSIA, the FSIA cannot be interpreted to grant immunity in the face of allegations of such violations. Any other result would be violative of customary international law and thus domestic law, since the law of nations is the law of the land.¹⁸⁷ While the Ninth Circuit correctly found that José Siderman's allegations

an alien. It was introduced as the Torture Victim Protection Act of 1986, but was not passed until 1992.

185. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 718 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993).

186. For example, the court dismissed the "international agreements" exception, adopting the narrow interpretation of *Amerada Hess*. The Ninth Circuit held that the "Sidermans have failed to identify an international agreement to which the United States is a party that 'expressly conflict[s] with the immunity provisions of the FSIA.'" *Id.* at 720 (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989)).

187. *See The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law . . .").

of torture against the Republic of Argentina were an obvious violation of *jus cogens* norms, it erroneously granted immunity to Argentina under the FSIA by incorrectly interpreting international legal doctrine and the extent of the Supreme Court's holding in *Amerada Hess*.

VI. CONCLUSION

In 1946 Justice Robert H. Jackson stated:

By the agreement and this trial we have put International Law squarely on the side of peace as against aggressive warfare, and on the side of humanity as against persecution. In the present depressing world outlook it is possible that the Nuremberg trial may constitute the most important moral advance to grow out of this war.¹⁸⁸

A great deal of hope has come from the Nuremberg trials that now, with the eyes of all nations focused on one another, we would soon fulfill, as the court in *Filartiga* phrased it, "that ageless dream to free all people from brutal violence."¹⁸⁹ That time has not yet come.

On an international level, human rights are still not adequately enforced. This is primarily because there is no supranational body to enforce claims by individuals against their nations. Indeed, individuals are not even allowed to bring their claims before the International Court of Justice.¹⁹⁰ They must depend on their own state to deem their case important enough to bring it before the International Court of Justice.

It is not as if the entire process that started at Nuremberg has somehow been stifled or completely failed. Much progress has been made, as reflected in current international legal principles propounded by conventions, the United Nations, an overwhelming number of scholars, and persuasive case law. However, as a noted professor points out, "we are presently in a temporal gap between the conception of international rules of domestic jurisdiction and the implementation of those

188. Jackson, *supra* note 37.

189. *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

190. The Statute of the International Court of Justice specifies that, "[o]nly states may be parties in cases before the court." Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1153, art. 34, § 1.

rules.”¹⁹¹ The Ninth Circuit’s decision in *Siderman de Blake v. Republic of Argentina*¹⁹² was a setback for this process. It shows that in the face of myriad legal principles to the contrary, as well as a defined moral justification, man has chosen change as his enemy rather than the capricious will of his fellow man.

For some, this is acceptable, but for Jacobo Timerman, another Jewish victim of the brutal, anti-Semitic military junta that overtook Argentina in 1976, this is unfathomable. Timerman would like to think that after the horrific, genocidal atrocities committed by the Nazis during World War II, mankind had somehow learned the devastation that his abuses and excesses could effect, and do anything within his power to curb that activity. He writes:

How can a nation reproduce in every detail, though employing other forms, in every argument, though employing other words, the same monstrous crimes explicitly condemned and clearly expounded so many years before? That is the Argentine mystery: the fact that the world has been unable to avoid something seemingly destroyed forever in 1945, in the ashes of Berlin, in the gallows of the Nuremberg Trials, and in the United Nations Charter. The fact that, in the 1970s, a nation of no great importance, undergoing an explosion of lustful, murderous drives, has found coexistence with the world at large, without need of ideology and without need of despair. Merely as a bad hangover of that bygone era, and a forewarning that these hangovers still prevail and can recur, time and again, with barely a trace of hope.¹⁹³

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191. Randall, *supra* note 71, at 840.

192. 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993).

193. JACOBO TIMERMAN, PRISONER WITHOUT A NAME, CELL WITHOUT A NUMBER 157-58 (1981).