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Dr. William F. Pepper

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ARTICLES

IRAQ'S CRIMES OF STATE AGAINST INDIVIDUALS, AND SOVEREIGN IMMUNITY

A COMPARATIVE ANALYSIS AND A WAY FORWARD

*Dr. William F. Pepper**

I. INTRODUCTION

In the aftermath of Iraq's invasion of and subsequent ejection from Kuwait, significant issues and challenges inevitably confront both international law and the municipal law of the nations involved. Serious questions arise about the capacity of the existing structure, policies and procedures of either legal system to adequately respond to the enormity of the destruction resulting from the events of the Gulf War. Primary attention thus far has been focused on the physical reconstruction of Kuwait itself and the environmental rehabilitation of the Persian Gulf and the region. There is, however, also massive personal damage and human misery that will result in a legion of other claims which will stretch existing legal institutions, policies and procedures to their limits. The range of injury and loss visited upon the unfortunate individuals who did not leave Kuwait and the unfortunate residents of Kurdistan clearly constitutes criminal offenses. Yet it is conceivable, in the absence of an international criminal court, that the only avenue of redress for monetary compensation for these victims is the possibility of their commencing civil proceedings before applicable municipal courts, unless the acts are also crimes under the relevant national law with provisions

* Barrister, Lincoln's Inn, England, Attorney and Counsellor at Law. B.A. 1959, Columbia College; M.A. 1960, Columbia University; Certificate 1961, London School of Economics and Political Science, University of London, England; Ed.D. 1973, University of Massachusetts; J.D. cum laude, 1975, Boston College.

for compensation for victims.

Despite the fact that comparable injury and loss of life often result from criminal acts and civil tortious behavior, there is, particularly in common law jurisdictions, a traditional separation between civil and criminal proceedings. In some previous instances, however, (notably after World Wars I and II) monetary reparations similar to those apparently envisioned by United Nations Resolution 674¹ were awarded to individual victims of comparable aggressive war and occupation activity. Where, as a practical matter, in the instance of Iraq's assault on Kuwait and Kurdistan, the civilian residents may only obtain relief from state reparations, the rationale for the existing bar of state immunity, under current sovereign immunity practice, must be reconsidered. Indeed, the recent events compel a consideration of a new multilateral treaty which explicitly eliminates the availability of state immunity from the sovereign states of the world, except for a very limited number of sovereign acts and assets. Sovereign immunity would then become the exception and not the rule. Such a treaty could also establish as a part of the International Court of Justice (ICJ) new civil and criminal divisions which would be available to hear individual petitions and claims against states. If a new tribunal is not established, the principles of universal jurisdiction should be relied on so that violations of customary international law can be reviewed by municipal courts.

This article attempts to examine the situation in which many thousands of ordinary residents of Kuwait and Kurdistan alike now find themselves as to their legal standing to sue and their ability to recover compensation and damages for their or their deceased relatives' individual injuries, suffering and loss. The analysis will assume that neither the ruling Baath Party itself nor the Iraqi individuals and officials responsible (with the exception of Saddam Hussein, the Iraqi President who may have amassed a considerable fortune) will personally be able to satisfy any judgment awards resulting from their actions in Kuwait and Kurdistan. While individual officials, including the members of the Iraqi Revolutionary Command Council, may be joined in any action, the primary possibility of such claims being met lies in

1. U.N. Resolution 674 explicitly provides notice to Iraq that under international law it will bear full liability for loss, damage and injury suffered by individuals as well as entities as a result of its aggression. U.N. SCOR, 2951st mtg. at 1, U.N. Doc. S/RES/674 (1990).

the enforcement of judgments against the State of Iraq itself. Consequently, the principal focus here will be on a consideration of the basis, forum, jurisdiction and venue of such actions as well as the extent to which Iraq or its President, in particular, might be able to claim sovereign immunity from such legal actions.

Part two of this article will focus on the types of injuries inflicted on the Kuwaiti and Kurdish victims which provide the basis for their claims. Part three will survey the relevant municipal laws and practices of Kuwait, the United Kingdom and the United States in bringing such actions and the status of state immunity which might be asserted by Iraq. In considering the immunity afforded to foreign states under United States law, the act of state doctrine is also examined. Part four asserts and examines the principle that sovereign immunity should finally be deemed to be inapplicable to states which as a matter of policy violate the most basic norms of customary international law — the *jus cogens*. Professor Brownlie noted that norms of customary international law are rules which “. . . cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect”² In the course of this analysis the growth of customary international law, the relationship between international law and municipal law, and the applicability of the *jus cogens* violations to Iraqi actions in Kuwait and Kurdistan are discussed, as are the historical precedents for intervention in such cases.

Part five comments on the possibility of the establishment of an independent international tribunal to hear such cases. Part six argues that, in the absence of such a tribunal, the principles of universal jurisdiction and *erga omnes* have historical and contemporary relevance as to the obligations of all states to prohibit and review *jus cogens* violations so that their municipal courts may be utilized to provide fora to consider the claims. Finally, part seven examines the most significant obstacles and objections to the application of the doctrine of universal jurisdiction to the courts of the United States in such cases.

Excluded from this consideration is the functioning of the United Nations Compensation Commission which was established to function along the lines of the United States/Iran Claims Tribunal. It is, however, interesting to note that Charles

2. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 499 (2d ed. 1973).

Brower, a judge of the Iran-United States Claims Tribunal at the Hague since 1984, stated that the attempt to establish a similar tribunal to handle the hundreds of thousands of individual claims against Iraq would be wholly unworkable. He noted that nearly eight years after beginning to review claims the Iran/United States Tribunal and its panel of nine judges were still at work on the last of the nearly 4,000 claims filed, and that it would have been worse had the United States and Iran not settled 2,500 small claims as a group.³ Nevertheless, the United Nations decided to establish yet another claims tribunal to assess damage claims submitted by individual states on behalf of their nationals and impose binding awards upon Iraq. I believe it to be inevitable that the Compensation Commission will focus on the types of damage referred to above (physical, environmental and corporate) to the detriment of the claims of the individuals whose injuries, deaths and losses are always more expedient to ignore.

II. THE RANGE OF CLAIMS

Both the Kuwaitis and the Kurds suffered at the hands of the Iraqi forces; both have potential claims. As is usual in war, the civilians left behind were, in large part, the most helpless members of Kuwaiti society. Those able to do so fled to safety. Thousands of others without the resources or opportunity to exercise mobility were left behind to face the tender mercies of three separate Iraqi intelligence groups — the Army, the Baath party and the Government (the Mukhabarat) — who were clearly ordered to systematically suppress any resistance to the Kuwaiti annexation through the institutionalized use of massive intimidation and terror. Non-Kuwaitis included in this group who stayed and suffered were Egyptians, Pakistanis, Filipinos and Palestinians. The most powerless of these — the “Bedouin” — who cannot own property, have no identification and are not allowed to work without a respectable Kuwaiti’s recommendation, suffered the most, and yet will be the easiest to ignore when it comes to compensation.

In view of the extensive publicity — indeed media overload — surrounding the incidents of torture, other assaults and injuries visited upon the residents of Kuwait who remained during

3. Charles Brower, *United Nations Considers how Iraq Should Pay Reparations*, FIN. TIMES, Apr. 11, 1991, at 10.

Iraq's occupation, as well as upon the Kurds who were trapped by the advancing Iraqi forces, it is sufficient to summarize here the types of injury for which relief is entitled. Further details, as documented and provided by official Kuwaiti sources, is included at a later point.

On the basis of present information and evidence, much of which is derived from eyewitness accounts and the various tools of torture left behind, there is no doubt that the deaths and injuries resulted from serious crimes perpetrated on civilians, and not from the commission of delicts, torts or "civil wrongs." The offenses include summary execution and criminal assaults, beatings, systematic torture including rape, very often — in light of the extreme pain and suffering — relieved by death. Children were tortured in front of their parents and *vice versa*. Members of families were randomly executed before their relatives who were compelled to watch, and bodies were publicly hanged near their former homes. Young girls and women suffered torture by rape at the hands of marauding soldiers and intelligence operatives, often in front of members of their families.

Many disappeared, taken from their homes to one or another "interrogation" center, never to be seen again. Post occupation visitors to these places have reported dried blood, remnants of human flesh and organs and the tools and equipment of torture everywhere. In the last days of the Iraqi occupation, there seemed to be a concerted attempt by the occupying forces to eliminate the evidence of the brutalization through what appears to be a systematic effort to round up previous victims, murder them and fill unmarked mass graves in trenches dug outside of the city. Finally, although not the specific concern of this article, there was a wide range of looting, transportation of property to Iraq and destruction of property, not only public property but that belonging to private individuals. The destruction, damage and loss is virtually incalculable. These acts provide the basis for the claims by thousands of Kuwaiti residents.

Similar treatment was meted out to the Kurds by advancing Iraqi forces in Kurdistan (northern Iraq) as a part of a systematic attempt to eliminate all Kurdish opposition. The systematic assaults focused on the Kurds was genocidal, causing approximately two and a half million persons to flee from their homes, villages and cities to uncertain fates in the surrounding mountain ranges. Pursued relentlessly by Iraqi soldiers, countless survivors of the original attacks were ultimately murdered in flight

or died from the intolerable conditions.

Documents obtained by Kurdish Peshmerga soldiers reveal the official state policy of the Iraqi Government toward the Kurds. One such document is an Order signed by the Dohok Province Security Director providing instructions to army officers and noncommissioned officers on how to deal with any anti-government civilian unrest, or demonstrations and demonstrators. The Order requires that any such groups be surrounded and all routes of escape cut off and then:

4. After implementing the above and surrounding the enemy elements firearms force to be used under Central Commanders Instructions to kill 95% of them leaving the remainder for interrogation.⁴

III. CLAIMS FOR PERSONAL INJURY AND/OR WRONGFUL DEATH BY THE VICTIMS OF IRAQI AGGRESSION

The Kuwaiti and Kurdish victims could conceivably bring actions in either Kuwait, the United Kingdom or the United States. However, substantial problems in obtaining adequate compensation exist in each jurisdiction.

A. *Kuwaiti Jurisdiction*

1. The Causes of Action

Primary jurisdiction for the commencement of any personal injury and/or wrongful death claims on behalf of Kuwaiti residents obviously resides in Kuwait itself as the place of injury. If a conventional claim is prosecuted through the domestic courts of Kuwait with local law being applied as the *lex loci delicti* the provisions of the Kuwait Civil Code (the Civil Code) would govern. The Civil Code contains standard provisions identifying tortious conduct as injurious acts upon another person or persons whereby liability is lodged not only with the tortfeasor, but also with any "incitor" or "abettor."⁵ The Civil Code explicitly provides that: "Each one of the several persons whose fault has caused the harm shall be liable to the party who suffered the

4. Dohok Province Security Directorate, Ref. 48, Order of March 6, 1991 (on file with author).

5. Kuwait Civil Code, Division 1, Rights in Personam (Personal Rights) or Obligations Book 1, Part 1, Ch. 3 — Injurious Acts, 1 Responsibility for Unlawful Acts, Article 227(1).

harm for reparation of the harm caused.”⁶

Reparations are required to be paid by the tortfeasor — or the state if the tortfeasor cannot be found⁷ — and are based upon any loss naturally resulting from the injury as well as “. . . sorrow and anguish . . . (and) emotional loss of love and tenderness (compassion) resulting from the death of a dear one.”⁸ In the instance of wrongful death, right of action vests in surviving “. . . spouses and relatives to the second degree.”⁹

The Civil Code contains one curious provision, however, which should be noted:

A public official shall not be held responsible for an act committed by him which caused injury to another person if he had implemented the provisions of law or complied with an order given by a superior if he had or believed on acceptable grounds he had to obey, and if he proves that he had reasonable grounds which made him believe that the act committed by him to be legitimate and that in carrying out his act he exercised due care.¹⁰

If Kuwaiti substantive law was to apply to actions against any Iraqi officials acting on the orders of their superiors, this provision could constitute an obstacle to the establishment of liability, although it clearly was not intended to hold harmless officials of a foreign occupying state who commit acts of torture, rape and summary murder on civilians residing in the occupied territory.

Compensation under the Civil Code is to be determined by a judge in currency in accordance with the rules of the Shari’a diyet (blood money) without any distinction being made between the status of individuals.¹¹ The diyet award is, in addition to compensation, required to make the victim whole, although the local standards are quite different from those observed in the West.¹² A full diyet — *e.g.* for loss of life — is fixed at 10,000 Dinars (approximately £2,000 or \$4,000 as of 30-5-91),¹³ so, by western standards, and certainly those currently followed in the

6. *Id.* art. 230(1).

7. *Id.* art. 256.

8. *Id.* art. 231.

9. *Id.*

10. *Id.* art. 237.

11. *Id.* art. 248.

12. *Id.* art. 247.

13. *Id.* art. 251.

United States and the United Kingdom, the compensation must be regarded as minimal.

Consequently, with the exception of the provision indemnifying individuals for officially sanctioned acts reasonably believed to be legitimate, there are clear grounds for actions to be brought under Kuwaiti substantive law.

2. Jurisdictional Immunities of Foreign States

Kuwaiti municipal law appears to contain no restrictive provisions as to sovereign immunity, and hence full state immunity would likely attach to Iraq and its President. One of the very few doctrinal references to state immunity from proceedings — although in a commercial context — stated that state or governmental agencies are considered to have waived their immunity if they enter into agreements to arbitrate in commercial disputes.¹⁴ Victims seeking relief in Kuwait, however, would doubtless argue that Iraq has waived its immunity by acceding to a host of international treaties, conventions, agreements and protocols which explicitly prohibit the type of conduct which provides the basis for the actions.

B. *United Kingdom Jurisdiction*

1. The Causes of Action

A number of Kuwaiti and Kurdish residents with one or more claims resulting from Iraq's aggression fled to the United Kingdom and took up residence there during or after the occupation. In many instances, aggrieved families and individuals may wish to initiate legal action against Iraq in the High Court of England and Wales. Under English law, torts committed abroad are justiciable in England and such actions are possibly subject to two conditions which establish the rule of double actionability.

In *Phillips v. Eyre*,¹⁵ Judge Willes set forth the general rule for acts committed abroad: "in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in Eng-

14. See SAMIR SALEH, COMMERCIAL ARBITRATION IN THE ARAB MIDDLE EAST 260 (1984).

15. [1870] 6 L.R.-Q.B. 1 (Eng.).

land Secondly, the act must not have been justifiable by the law of the place where it was done"¹⁶ Conduct that is "not justifiable," according to the House of Lords in *Boys v. Chaplin*,¹⁷ is confined to that which is civilly actionable in the country of commission, clearly establishing the principle as a rule of double actionability by civil law. As to the applicable law to be applied, Lords Wilberforce and Hodson in *Boys v. Chaplin* espoused a flexible correlation between the *lex fori* and the *lex loci delicti* to the extent that there was acceptance of the "significant relationship" test which requires that the applicable law be that of the place which has the most significant relationship with the place of occurrence and the parties.

In the instance of any Kuwaiti and Kurdish tort-based actions, there would appear to be little doubt that the substantive law of Kuwait or Iraq would be applied, though the action may be brought in England. The obvious problem is that the plaintiff victims would be no closer in their attempt to secure adequate compensation (by Anglo-American standards) by bringing their actions in England since the compensation level under Kuwaiti law is minimal. Compensation could be adequate, however, if the court's consideration of damages was not regarded as a part of the substantive law governing the case, but rather interpreted as procedural and therefore to be determined by the *lex fori*. Although the House of Lords in *Boys v. Chaplin* disagreed on the issue of how damages were to be considered,¹⁸ it appears that, in principle, matters of quantification or assessment of damages have generally come to be regarded as being procedural, whereas the actionability of a particular type of damages is substantive.¹⁹

Consequently, it appears that violations of international law, which may also be viewed as foreign torts, are justiciable in England. The English Courts generally may exercise a discretionary control over the choice of forum. It should also be noted that the *Brussels Convention of 1968* (art. 5(3)),²⁰ which is ap-

16. *Id.* at 28-29.

17. [1971] App. Cas. 356 (appeal taken from Eng.).

18. In *Boys v. Chaplin*, Lords Hodson, Wilberforce and Pearson regarded damages as substantive, and thus governed by applicable law; Lords Donovan and Guest regarded damages as procedural, hence the *lex fori*. *Id.*

19. ALBERT V. DICEY & JOHN H.C. MORRIS, *THE CONFLICT OF LAWS* 1405-07 (Lawrence Collins et al. eds., 11th ed. 1987).

20. Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, reprinted in 8 I.L.M. 229 (1969), revised by Convention on Accession to the Convention on Jurisdiction and Enforcement of Judgments in Civil

plied to the United Kingdom by the Civil Jurisdiction and Judgments Act of 1982,²¹ allows for an action in tort where the harm took place. The European Court has held that this gives a plaintiff the dual option of suing where the harm originated or where the resulting damage occurred.²² Further, even though the likely governing law of the case would be the law of Kuwait, the quantification of the damages would likely be considered a procedural matter and fixed in accordance with English law, allowing those victims with standing to sue in England to realize compensation in an amount far greater than that possible in the Kuwaiti courts.

2. Jurisdictional Immunities of Foreign States

In 1783, Blackstone described the law of nations as a ". . . system of rules deducible by national reason and established by universal consent among the civilized inhabitants of the world . . . adopted (in England) in its full extent by the common law and held to be part of the law of the land."²³ It would take, however, nearly another two hundred years for the government of his native land to begin to move away from its historical refusal to apply any part of the law of nations to other sovereign states.

Only very gradually has the English law abandoned the common law doctrine of absolute immunity of foreign sovereigns. A more restrictive view of the state immunity doctrine began to emerge in the late 1970s with the Privy Council ruling in 1977 that immunity did not extend to actions *in rem* against foreign government vessels engaged in purely trading activities.²⁴ In a different case the restriction was further extended to actions *in personam*.²⁵ On November 22, 1978 Parliament replaced the common law doctrine with the State Immunity Act of 1978 (the

and Commercial Matters, Oct. 9, 1978, *reprinted in* 18 I.L.M. 8 (1979).

21. Civil Jurisdiction and Judgments Act, 1982, § 2 (Eng.).

22. Case 21/76, *Bier v. Mines Potassies d'Alsace*, 1976 E.C.R. 1735, 1 C.M.L.R. 284 (1977).

23. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (G. Chase ed., 4th ed. 1923) (1783).

24. *The Phillipine Admiral*, [1977] App. Cas. 373 (Eng. P.C. 1975) (appeal taken from H.K.).

25. *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 1 Q.B. 529 (Eng.). See also *Hispano Americano Mercantil S.A. v. Central Bank of Nigeria*, [1979] 2 Lloyd's Rep. 277 (Eng. C.A.); *The I Congresso del Partido*, [1980] 1 Lloyd's Rep. 23 (Eng.), *rev'd*, [1983] 1 App. Cas. 244 (appeal taken from Eng.); *Planmount v. Republic of Zaire*, [1980] 2 Lloyd's Rep. 393 (Eng. C.A.).

Act), which had the effect of restricting the immunity of foreign states from the jurisdiction of the courts of the United Kingdom in cases where the cause of action relates to commercial transactions undertaken by the foreign state or where the commission of a wrong in the United Kingdom makes it appropriate for the obligations of the foreign state to be determined by United Kingdom courts.

Although the Act provides a broad definition of those commercial transactions to which the restriction applies, injury must be based upon an act or omission occurring in the United Kingdom. Further, any acts in the exercise of sovereign authority are excluded. Therefore, even for activity in the United Kingdom, if a state can show that it acted in its governmental capacity, its immunity will hold good under the Act. However, an entity separate from the state with an independent legal personality is excluded from state immunity under the Act, except if its actions constitute an exercise of sovereign authority that would provide immunity to the state itself.²⁶

Collecting judgments under the Act will be difficult. Even if proceedings may be initiated against foreign states, their assets and property are basically exempt from remedies generally available in the English courts. Excepting clearly identifiable commercial assets, accounts or property, foreign states are generally immune from the execution of judgments from the English courts against their property. The onus of proving that particular property is exempt from the protection of section 13 of the Act clearly falls upon a judgment creditor. It is ironic that while the effect of the Act, and its intention, was to generally codify the restriction of state immunity, as to enforcement it has had the opposite effect. Attachment of or execution upon any assets held in the United Kingdom by a state's central bank, or other monetary authority is not allowed, subject to the possibility of assets being regarded as used or intended for commercial purposes and thus attachable for that limited purpose.²⁷ Thus, state banks have more explicit privileges conferred upon them by the Act than they may have had at common law.

It may be argued that in agreeing to accept and abide by the United Nations Resolutions, including Resolution 674 on

26. State Immunity Act, 1978, § 14(2) (Eng.).

27. *Id.* § 14(4); *Hispano Americano Mercantil S.A. v. Central Bank of Nigeria*, [1979] 2 Lloyd's Rep. 277 (Eng. C.A.).

reparations,²⁸ Iraq has, as to the Kuwaiti victims, by implication waived its state immunity as to the personal injuries, death and damage caused by the invasion and occupation. Such waiver or agreement to submit to the jurisdiction, even if allowed, however, does not imply any submission to the enforcement jurisdiction of the courts under the Act. To the contrary, it appears clear that a separate consent is required in order to allow enforcement to be effected.²⁹ Consequently, absent a substantive change in the way that the United Kingdom courts currently interpret the Act, where there would be an exclusion of immunity in cases involving *jus cogens* violations under international law, it appears that it would likely be a frustrating and unproductive exercise for Kuwaiti and Kurdish victims residing in the United Kingdom to attempt to proceed in the courts of England with conventional tort actions against Iraq.

The claims of the Kuwaiti victims appear to be actionable and justiciable in the United Kingdom, with Kuwaiti substantive law and English procedural law likely to be applied. However, the absence of any explicit waiver or relevant restriction of Iraq's sovereign immunity in such cases, the probable reluctance of the court to infer waiver from Iraq's agreement to Resolution 674³⁰ and the likely unavailability for attachment and examination of Iraq's United Kingdom property and assets appear to be insurmountable obstacles.

C. *United States Jurisdiction*

1. The Causes of Action

The ability of any Kuwaitis and Kurds who have taken up residence in the United States during or subsequent to the invasion and occupation to mount viable tort actions in that country appears, at first glance, to be equally dismal.

Since 1789, there has been statutory authority under the Alien Tort Statute (section 1350) for the federal district courts to assume original jurisdiction of any civil action brought by an alien for a tort which is committed in violation of the law of nations or a treaty of the United States.³¹ The action may only

28. See *infra* note 73.

29. State Immunity Act, 1978, § 2(2) (Eng.).

30. See *infra* note 73.

31. Act of Sept. 24, 1789, § 9, 1 Stat. 73, 77 (codified as amended at 28 U.S.C. § 1350 (1982)).

be for tortious conduct, and there is no jurisdictional or diversity requirement. The drafters of section 1350, who appear to have been influenced by Blackstone, authorized actions based on civil as well as criminal acts. Thus, even if international criminals escaped prosecution elsewhere for their acts, they could still be sued in the courts of the United States and required to pay compensation to victims for the damage and loss resulting from their actions.

During the nineteenth century, the earlier application of the "law of nations" to criminal and civil injuries and its extension to the regulation of matters between individuals, individuals and states and between states, whereby individuals could sue and be sued thereon, became statist in orientation, excluding individual or nonstate parties from international legal proceedings. Thus, during this period, individuals assumed a much reduced role with, by and large, no legal capacity to enforce their rights. They were deemed to be objects of international law whose claims could be vindicated only through actions of their sovereign states.³² Throughout this period, the actions of states toward their citizens were regarded as being entirely domestic concerns for which they were not obliged to answer under international law. The rights of citizens, such as they were at that time, were vicariously related to their status; an injury to a citizen outside of his or her state could only be addressed as an injury to the citizen's state itself.

Section 1350 was virtually unused for nearly 200 years, although it was initially considered in 1795 shortly after the passage of the First Judiciary Act.³³ In that same year, Attorney General William Bradford issued an opinion stating that aliens injured in an episode involving the plundering of a British settlement on the African Coast could bring a suit under section 1350 as to acts that violated the law of nations.³⁴ More than a century later, Attorney General Charles Bonaparte stated that section 1350 could provide aliens with a "forum" and a "right of action."³⁵ He referred, however, to both section 1350 and the di-

32. See George Manner, *The Object Theory of the Individual in International Law*, 46 AM. J. INT'L L. 4281 (1952); Andrew M. Scoble, *Enforcing the Customary International Law of Human Rights*, 74 CAL. L. REV. 127, 130-31 (1986).

33. *Bolchos v. Darrel*, 3 F. Cas. 810 (D.C.S.C. 1795) (No. 1607).

34. 1 Op. Att'y Gen. 57 (1795).

35. 26 Op. Att'y Gen. 250 (1907).

versity statute, section 1332, so some ambiguity resulted.³⁶

It was only following the two world wars, and World War II in particular, that a fundamental change took root in the status and rights of the individual, reflected in the status of international human rights in international law. Accordingly, in line with this change of international perspective, in 1961 federal subject matter jurisdiction in United States courts was finally formally held to vest in section 1350. In that year in *Abdul-Rajman Omar Adra v. Clift*,³⁷ the Maryland district court, though ultimately rejecting the plaintiff's claim, nevertheless assumed jurisdiction of a tort involving international law (passport falsification) and noted that such law does apply in regards to the rights of individuals, stating that private individuals must learn that ". . . there are acts of which that law . . . (international law) itself forbids the commission by any one whomsoever."³⁸

a. Cases Where Section 1350 Jurisdiction Has Been Denied

In general, actions under section 1350 have been declined by federal district courts as a result of the plaintiff's failure to demonstrate that there has been a violation of international law or a treaty of the United States.³⁹ For example, in *Lopes v. Reederei Richard Schroder*,⁴⁰ the court held that, both in respect of the law of nations as it was in 1789 and international law as it had evolved since that time, negligence had never cus-

36. *Id.*

37. 195 F. Supp. 857 (E.D. Pa. 1961).

38. *Id.* at 864.

39. See, e.g., *Huynh Thi Anh v. Levi*, 586 F.2d 625, 629 (6th Cir. 1978) (child custody not a rule of international law); *Benjamins v. British European Airways*, 572 F.2d 913, 916 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979) (air crashes); *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (Eighth Commandment not part of law of nations); *Abiodun v. Martin Oil Serv.*, 475 F.2d 142, 144-45 (7th Cir. 1973), *cert. denied*, 414 U.S. 866 (1973) (fraudulent failure to train plaintiffs as executives not a violation of international law); *Khedivial Line, S.A.E. v. Seafarers' Int'l Union*, 278 F.2d 49, 52 (2d Cir. 1960) (law of nations does not give universal right of unimpeded access to harbors); *Jafari v. Islamic Republic of Iran*, 539 F. Supp. 209, 215 (N.D. Ill. 1982) (government's expropriation of property of its own nationals not prohibited by law of nations); *Valanga v. Metropolitan Life Ins. Co.*, 259 F. Supp. 324, 327-29 (E.D. Pa. 1966) (claim for proceeds from life insurance policy did not allege tort in violation of law of nations or U.S. Treaty).

40. 225 F. Supp. 292 (E.D. Pa. 1963).

tomarily been regarded as a violation thereof.⁴¹ The *Lopes* court also implied, but did not make explicit, that a state's treatment of its own citizens would not be a concern of the law of nations.⁴²

Subsequently, in 1976 the Second Circuit in *Dreyfus v. Von Finck*,⁴³ denied plaintiff's claim for relief based on alleged violations of four treaties to which the United States was a party.⁴⁴ The court held that the four treaties in question did not contain provisions relating to the expropriation by Germany of property owned by German nationals and thus conferred no private rights or causes of action regarding such property that were enforceable in the courts of the United States.⁴⁵ The court went on to state, similar to *Lopes*, that violations of international law cannot be deemed to have occurred when the victims are nationals of the offending state.⁴⁶ It should be noted that the *Dreyfus* court did not distinguish or discuss the *Abdul-Rahman* case referred to above.⁴⁷

In retrograde fashion, the courts in *Lopes* and *Dreyfus* adopted a statist conception of international law in respect of section 1350 that was conclusively rejected by the Second Circuit in *Filartiga v. Pena-Irala*,⁴⁸ four years after the same court affirmed *Dreyfus*. *Filartiga* was an action brought against a Paraguayan citizen personally, and not against the State of Paraguay, by the sister and father of a man tortured to death in Paraguay by the defendant, a government official. The district court dismissed the action on the grounds that two prior Second Circuit cases had established that a nation's treatment of its own citizens was beyond the reach of jurisdiction under section 1350.⁴⁹ The Second Circuit upheld the entertainment of jurisdiction under section 1350. On remand the district court awarded

41. *Id.* at 296-97.

42. *Id.* at 297.

43. 534 F.2d 24 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976).

44. *E.g.*, Four Power Occupation Agreement on Control Machinery in Germany, Nov. 14, 1944, 5 U.S.T. 2062, 236 U.N.T.S. 359; Kellogg-Briand Peace Pact, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57; Treaty of Versailles, June 28, 1919, 225 Con. T.S. 188 (submitted to Congress but not ratified); Hague Convention No. IV, Oct. 18, 1907, 36 Stat. 2277, 205 Con. T.S. 277 [hereinafter Hague Convention IV].

45. *Dreyfus*, 534 F.2d at 30.

46. *Id.* at 31.

47. *Abdul-Rajman Omar Adra v. Clift*, 195 F. Supp. 292 (E.D. Pa. 1961).

48. 630 F.2d 876 (2d Cir. 1980).

49. *See, e.g.*, *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975) (quoting *Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292, 297 (E.D. Pa. 1963)); *see also Dreyfus*, 534 F.2d at 30-31.

compensatory and punitive damages. In reversing and remanding, the Second Circuit examined a wide range of sources,⁵⁰ and in a landmark decision held that:

1. The "law of nations" under Section 1350 includes the evolving international law of human rights, and federal courts in considering whether or not to assume jurisdiction under the statute should interpret international law as it exists at the time of the case and not as it was in 1789.⁵¹
2. By international consensus a universal law of human rights had emerged in treaties and customary international law, which affords substantive rights to individuals from which no state may derogate and which places limits on the treatment of its citizens by any state.⁵²

Judge Irving Kaufman stated that a rule of international law could only provide a basis for an action under section 1350 if it was clearly a part of such substantive law, and that the test must be a stringent one so one nation's courts would not be tempted to impose "idiosyncratic" legal rules on others under the guise of international law. He attributed the dearth of cases under section 1350 to this stringent requirement and noted that this threshold difficulty resulted in more dismissals than occur under other jurisdictional statutes. He concluded that previous section 1350 cases had not involved such well established norms of international law as those raised by *Filartiga*.⁵³

Four years after *Filartiga* and a change in United States political administration, the District of Columbia Court of Appeals, with each judge writing a separate and differing opinion in justification, rejected a claim made under section 1350 that was prompted by a terrorist attack allegedly involving the Palestine Liberation Organization.⁵⁴ Judge Edwards upheld section 1350 jurisdiction in such cases, but said it only extended to acts traditionally warranting universal jurisdiction such as piracy or slave

50. For example, U.N. Charter, various U.N. Resolutions, a range of treaties, covenants and protocols, the Constitutions of the United States and Paraguay and various writings of jurists. The court also took into consideration an *amicus curiae* brief jointly submitted by the Departments of State and Justice which stated that there was a consensus among nations that the prohibition of torture was currently customary international law.

51. *Filartiga*, 630 F.2d at 881-84.

52. *Id.* at 878, 881-85.

53. *Id.* at 887-88.

54. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).

trading or other offenses which comparably contravened current norms of international law.⁵⁵ Judge Bork voted to dismiss based upon both an absence of an explicit cause of action under section 1350 and the principle of the separation of powers, which mandated consideration of the act of state doctrine and the political question doctrine.⁵⁶ Judge Robb also affirmed dismissal on the basis that the case presented a nonjusticiable political question, though he conceded that such cases could stand as limited exceptions.⁵⁷ Reflecting, it appears, the change in political orientation represented by the Reagan Administration after that of the Carter Administration during the *Filartiga* period, the government, by way of an *amicus* brief, urged the Supreme Court to deny certiorari, which it did without comment.⁵⁸

The district court of the District of Columbia similarly dismissed on political question grounds the plaintiff's section 1350 claims in *Sanchez-Espinoza v. Reagan*,⁵⁹ which were based on acts and consequences arising out of United States intervention in Nicaragua. In affirming the district court's decision, Judge Scalia — then on the D.C. Court of Appeals — went out of his way to state that the holding in *Sanchez-Espinoza* did not necessarily conflict with *Filartiga*⁶⁰ since domestic sovereign immunity and not foreign sovereign immunity was involved. He wrote: “. . . it does not necessarily follow that an Alien Tort Statute suit filed against the officer of a foreign sovereign would have to be dismissed. Thus, nothing in today's decision conflicts with the decision of the Second Circuit in *Filartiga v. Pena-Irala*”⁶¹

Then, in *Farag M. Mohammed Saltany v. Ronald M. Reagan*, the District of Columbia district court dismissed on sovereign immunity and political question grounds, the various section 1350 and other claims based upon the resulting death, personal injury and destruction arising from air strikes conducted by the United States military on targets in Libya during April 1986.⁶² The D.C. Court of Appeals affirmed but reversed as

55. *Id.* at 781.

56. *Id.* at 801-20 (Bork, J., concurring).

57. *Id.* at 823, 825 (Robb, J., concurring).

58. *Tel-Oren v. Libyan Arab Republic*, 470 U.S. 1003 (1985).

59. 568 F. Supp. 596 (D.D.C. 1983), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985).

60. 770 F.2d 202 (D.C. Cir. 1985).

61. *Id.* at 207.

62. 702 F. Supp. 319 (D.D.C. 1988).

to the issue of sanctions against plaintiff's counsel.⁶³ The Supreme Court denied certiorari.⁶⁴

The United States Government's view, when it submitted its *amicus* brief in *Filartiga*, was that individuals should have the right to sue under section 1350 in order to enforce their rights. It thereby confirmed that United States law incorporates international law and was thus in accord with the emerging views of the courts of other countries.⁶⁵ Under this view, evolving international law provides to individuals substantive and justiciable rights which may be enforced in municipal courts. In the United States, federal common law and the jurisdiction available for the adjudication of such claims under section 1350 provides the statutory foundation for enforcement.

It should thus appear settled that, as under English law, actions by resident aliens may be brought in the United States federal courts for these kinds of foreign acts; but any summary of this aspect of law must take into account the political climate and administration policy since 1980, which seems intent upon reducing the impact of *Filartiga*. The Justice Department's *amicus* brief in the consolidated cases of *Trajano v. Marcos*⁶⁶ would

63. *Saltany v. Reagan*, 886 F.2d 438 (D.C. Cir. 1989).

64. *Saltany v. Reagan*, 495 U.S. 932 (1990). The imposition of monetary and professional sanctions against plaintiff's counsel under Rule 11 of the Federal Rules of Civil Procedure appears to be a growing practice, particularly in civil rights cases in the United States. Ostensibly used to discourage "frivolous" law suits, such orders can only have significant political consequences resulting in a chilling effect upon the desire to resort to the courts by individuals and groups whose rights have been violated or denied. One must wonder what will become of the anger, hurt and frustration of such victims if they have no hope of seeking redress by going to law before an independent judiciary. The transfer of an airing of these grievances from the courtroom to the streets, once again, could well result in demonstration of the shortsightedness of such judicial policy.

65. Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), reprinted in 19 I.L.M. 585, 602-03 n.44 (1980), citing cases from the Constitutional Court of Germany, the Supreme Court of the Philippines and the Court of First Instance of Courtrai (Belgium); see also *The Paquette Habana*, 175 U.S. 677 (1900).

66. No. 86-2448 (9th Cir. Aug. 20, 1986) (unpublished), *aff'd*, 1992 WL 295673 (9th Cir. Oct. 21, 1992). See also *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980), 502 F. Supp. 259 (D.D.C. 1980), 748 F.2d 790 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985); *Nielson v. Johnson*, 279 U.S. 47, 52 (1929); *Maiorana v. Baltimore & O.R.R.*, 213 U.S. 268, 272-73 (1909); *The Paquette Habana*, 175 U.S. 677 (1900); *Hilton v. Guyot*, 159 U.S. 113 (1895); *Head Money Cases*, 112 U.S. 580, 598-99 (1884); *Haustein v. Lynham*, 100 U.S. 483 (1879); *Fremont v. United States*, 58 U.S. (17 How.) 542, 557 (1854); *Strother v. Lucas*, 37 U.S. (12 Pet.) 410, 483 (1838); *Carneal v. Banks*, 23 U.S. (10 Wheat.) 181 (1825); *Hughes v. Edwards*, 22 U.S. (9 Wheat.) 489 (1824); *Orr v. Hodgeson*, 17 U.S. (4 Wheat.) 453 (1819); *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259 (1817); *Harden v. Fisher*, 14 U.S. (1 Wheat.) 300 (1816); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7

limit jurisdiction to torts committed by United States citizens or other persons subject to its jurisdiction and to situations where the United States might be held similarly accountable to the offended state. On its face, a plain reading of section 1350 denies the validity of this interpretation; the Ninth Circuit agreed in *Trajano* when it held for the first time that United States courts can exercise jurisdiction over causes of action based on the mistreatment by a foreign leader of his own subjects.⁶⁷

It appears evident, however, that the recent administrations have taken a political foreign relations decision contrary to the result in *Trajano*, and courts routinely influenced by Justice Department *amicus* briefs may reasonably be expected to issue decisions in conflict with the law in the Ninth Circuit. Moreover, as under English law, the cause of action is one thing, but the right and standing of individuals to bring such actions not only against other individuals, but against sovereign states, is critical to the determination of whether the existing right at law has a correlative remedy under United States law.

2. Jurisdictional Immunities of Foreign States

The immunity of foreign states as a principle of international law was first recognized by the courts of the United States in 1812 in the case of *The Schooner Exchange v. M'Fadden*.⁶⁸ In that case, Chief Justice Marshall upheld the immunity from seizure and court action of a vessel of a foreign sovereign, at peace with the United States, coming into a United States port. He noted that the recognition of immunity, though not a right compelled by law, was based upon notions of grace and comity between nations. With the passage of time such determinations of sovereign immunity became closely connected to ". . . reliance upon the practices and policies of the State Department."⁶⁹

In May 1952, in accordance with the "Tate Letter" practice issued by the Department of State,⁷⁰ a restrictive approach to

Cranch) 603 (1812); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796); *Abdul-Rahman Omar Adra v. Clift*, 195 F. Supp. 857, 864-65 (E.D. Md. 1961); Jordan J. Paust, *Litigating Human Rights: A Commentary on the Comments*, 4 Hous. J. INT'L L. 81 (1981).

67. It should be noted in passing that the *per curiam* opinion in *Trajano*, by direction of the court, will not be published but will stand only as the law of the instant case.

68. 11 U.S. (7 Cranch) 116 (1812).

69. *Ex Parte Republic of Peru*, 318 U.S. 578 (1943); *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945).

70. 26 DEP'T ST. BULL. 984 (1952).

the immunity of foreign states was adopted which recognized immunity only in respect of a foreign sovereign's public acts, but not in instances involving its private or commercial activities. No consideration appears to have been given or reference made at that time to the issue of immunity attaching to torts/crimes such as those which have occurred in Kuwait and Kurdistan.

The "Tate Letter" practice, however, provided an unsatisfactory situation since a political institution was empowered to provide *ad hoc* legal standards to litigation already commenced, and where various diplomatic pressures and political trade-offs would inevitably tarnish the development of an objective standard of law. This anomaly eventually resulted in the passage of the Foreign Sovereign Immunities Act of 1976 (FSIA).⁷¹

The FSIA statute was designed to incorporate the restrictive theory of sovereign immunity, thus formally ending the practice of judicial deference to suggestions from the executive branch. The inescapable legislative intent has to be that since the issues of state immunity were to be judicially determined any political intervention by the executive would thereafter be inappropriate.

Section 1330 of the FSIA provides for subject matter and personal jurisdiction of the federal district courts over foreign states, including political subdivisions, agencies and instrumentalities of the foreign state. Jurisdiction extends to any claim for which the foreign state is not entitled to immunity as set forth in sections 1605 to 1607. Pursuant to section 1604, a foreign state waives immunity by acceding to existing treaties or other international agreements in existence at the time of passage of the FSIA, and to which the United States is a party. Section 1604 is explicit, stating that:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign State shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.⁷²

The language of this section must be interpreted in light of the fact that Iraq and the United States had at all relevant times acceded to the multilateral treaties of the United Nations Char-

71. 28 U.S.C. §§ 1602-1611 (1988).

72. *Id.*

ter (Charter) and the Fourth Geneva Convention (Geneva Fourth), as well as voting for and accepting the Universal Declaration of Human Rights (the Universal Declaration) and Resolutions 666, 670, 674 and the terms of the ceasefire set out in Resolution 687.⁷³ Iraq formally accepted the terms of Resolution 687

73. U.N. CHARTER arts. 55, 56; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]. Universal Declaration of Human Rights, G.A. Res. 217 A, 3(1) GAOR Res. 71, U.N. Doc. A/810 (1948). U.N. SCOR, 2939th mtg. at 1, U.N. Doc. S/RES/666 (1990); U.N. SCOR, 2943d mtg. at 1, U.N. Doc. S/RES/670 (1990); U.N. SCOR, 2951st mtg. at 1, U.N. Doc. S/RES/674 (1990); U.N. SCOR, 2981st mtg. at 1, U.N. Doc. S/RES/687 (1991).

The U.N. Charter, Article 55 states:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

c. universal respect for, and observance of, human rights, fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56 states: "All 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."

The Universal Declaration

Article 2 states: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Article 3 states: "Everyone has the right to life, liberty and the security of person."

Article 5 states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

Article 8 states: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

Article 9 states: "No one shall be subjected to arbitrary arrest, detention or exile."

Article 10 states: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

Article 17 states: "1. Everyone has the right to own property alone as well as in association with others. 2. No one shall be arbitrarily deprived of his property."

Article 30 states: "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."

Geneva Fourth

Article 2 states:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if said occupation meets with no armed resistance

Article 27 states:

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault

.....

Article 29 states: "The party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred."

Article 31 states: "No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties."

Article 32 states:

The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.

Article 33 states: "No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Pillage is prohibited. Reprisals against protected persons and their property are prohibited."

Article 34 states: "The taking of hostages is prohibited."

Article 49 states: "Individuals or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."

Article 53 states: "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organisations, is prohibited, except where such destruction is rendered absolutely necessary by military operations."

Article 57 states:

The Occupying Power may requisition civilian hospitals only temporarily and only in cases of urgent necessity for the care of military wounded and sick, and then on condition that suitable arrangements are made in due time for the care and treatment of the patients and for the needs of the civilian population for hospital accommodation.

The material and stores of civilian hospitals cannot be requisitioned so long as they are necessary for the needs of the civilian population.

Article 68 states:

... The death penalty may not be pronounced against a protected person unless the attention of the court has been particularly called to the fact that since the accused is not a national of the Occupying Power, he is not bound to it by any duty of allegiance.

In any case, the death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence.

Article 71 states: "No sentence shall be pronounced by the competent courts of the Occupying Power except after a regular trial."

Article 75 states:

In no case shall persons condemned to death be deprived of the right of petition for pardon or reprieve. No death sentence shall be carried out before the

after the fact.⁷⁴ In addition, though not relevant to the Kuwaiti victims, Iraq and the United States are both parties to the 1948 United Nations Convention on the Prohibition of Genocide (the Genocide Convention) which is directly applicable to the aggressive actions by Iraq against the Kurdish people in northern Iraq, both before and in the aftermath of the invasion and occupation of Kuwait.⁷⁵

expiration of a period of at least six months from the date of receipt by the Protecting Power of the notification of the final judgment confirming such death sentence, or of an order denying pardon or reprieve.

Resolutions 666, 670, 674 and 687

Resolution 666 states: ". . . 2. *Expects* Iraq to comply with its obligations under Security Council resolution 664 (1990) in respect of third State nationals and reaffirms that Iraq remains fully responsible for their safety and well-being in accordance with international humanitarian law including, where applicable, the Fourth Geneva Convention; . . ."

Resolution 670 states:

. . . 13. *Reaffirms* that the Fourth Geneva Convention applies to Kuwait and that as a High Contracting Party to the Convention Iraq is bound to comply fully with all its terms and in particular is liable under the Convention in respect of the grave breaches committed by it, as are individuals who commit or order the commission of grave breaches.

Resolution 674 states: ". . . 8. *Reminds* Iraq that under international law it is liable for any loss, damage or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq; . . ."

Resolution 687 (the cease-fire resolution) states:

The Security Council . . .

Noting the importance of Iraq ratifying this Convention *Noting* that . . . many Kuwaiti and third country nationals are still not accounted for . . . *Recalling* the International Convention against the Taking of Hostages, opened for signature on 18 December 1979, which categorises all acts of taking hostages as manifestations of international terrorism, . . .

1. *Affirms* all thirteen resolutions noted above except as expressly charged below to achieve the goals of this resolution, including a formal cease-fire;

11. *Invites* Iraq to reaffirm unconditionally its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons of 1 July 1968; . . .

16. *Reaffirms* that Iraq, without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through the normal mechanisms, is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait; . . .

18. *Decides also* to create a fund to pay compensation for claims that fall within paragraph 16 above and to establish a Commission that will administer the Fund;

74. See Alan Cowell, *After the War; Baghdad Formally Agrees to 'Unjust' U.N. Conditions for Permanent Cease-Fire*, N.Y. TIMES, Apr. 7, 1991, at A1 (the message of acceptance was delivered to the United Nations by Iraqi Ambassador Abdul Amir A. Al-Anbari).

75. Convention on the Prevention and Punishment of the Crime of Genocide,

It is clear that should any existing treaty or other international agreements conflict with a provision of the FSIA, then the language of the relevant treaty or agreement would control.⁷⁶ As originally drafted, the FSIA section 1604 provision referred to "future" as well as "existing" agreements, but the House Judiciary Committee struck the reference to any future agreements, stating that such agreements would control in any event and hence the language was unnecessary.⁷⁷

Section 1605 of the FSIA sets out exceptions to the principle of immunity of which only two relate to the individual Kuwaiti and Kurdish claims, namely, 1605(a)(1) (explicit or implicit waiver of immunity by the foreign state), and 1605(a)(5) (personal injury or death occurring in the United States caused by the tortious act or omission of the foreign state or any official or employee of that state within the scope of office or employment). In the event that a foreign state is not entitled to immunity from jurisdiction, FSIA section 1606 follows current international practice⁷⁸ by prohibiting the award of punitive damages against a foreign state itself or any subdivision thereof, though not of an agency or instrumentality of the state.

Under existing law and practice it appears that even if actions on behalf of Kuwaitis and Iraqis were maintainable against Iraq, the all pervasive immunity of property and assets of a foreign state from attachment and execution would frustrate enforcement of any judgment. Section 1609 of the FSIA explicitly immunizes such property and prohibits executions except in the instance of waiver by the state or of property specifically connected with commercial activity. For instance, in the *Letelier v. Republic of Chile*,⁷⁹ the claim against the Republic of Chile was based on an act of political assassination on the streets of Washington D.C. The plaintiff could not obtain execution against the assets of the defendant's national airline since the court held that the claim did not arise from commercial activity. This result has been viewed as a clear illustration of the existence of a

opened for signature, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

76. H.R. REP. No. 1487, 94th Cong., 2d Sess. 20 (1976), reprinted in 1976 U.S.C.C.A.N. 6604.

77. *Id.*

78. 5 GREEN H. HACKWORTH, DIGEST OF INTERNATIONAL LAW 723-26 (1948); *Francisco v. Garcia-Amador, State Responsibility*, 94 HAGUE RECUEIL DES COURS 365, 476-81 (1958).

79. 488 F. Supp. 665 (D.D.C. 1980).

right without a remedy.⁸⁰

The right without a remedy result constitutes a major flaw in the FSIA. Section 1605(a)(5) makes foreign states liable *in personam* for the acts of their officials and employees, with certain exceptions which are not relevant to a case such as *Letelier* or the instant cases. Section 1610(b)(2) does provide for enforcement in such an instance of tort liability for physical injury or death but does so solely against an agency or instrumentality of such state which itself is engaged in carrying on commercial activity in the United States. In the case of a tort by the state there is no counterpart provision for execution against property of the state itself. Section 1603(b)(1), (2), (3) defines an "agency or instrumentality of a foreign state" as an entity which is a separate legal person, created by the laws of the state and capable of suing and being sued in its own right and name. Thus, we have a legal result in *Letelier* as follows:

(a)The Republic of Chile is liable for tortious acts committed in the United States (1605(a)(5)).

(b)However, property of the State may not be subject to execution for such a non-commercial wrong (1610(a)).

(c)Property of an "agency" or "instrumentality" of the state may be executed upon for such torts as come under 1605(a)(5), but obviously the agency or instrumentality itself, having a separate legal identity, would have to be sued in its own name and found liable for execution to be allowed (1610(6)(2)).

(d)Since the Chilean national airline was not itself responsible for the crimes and torts in *Letelier* (although it was alleged that the explosives used were transported by the airline) its property could not be executed upon and, similarly, no other property of the state could be seized since commercial activity was not involved.

The legislative drafting that provides for liability of foreign states without a counterpart provision for a remedy must be viewed not only as ludicrous but as bringing the law into disrepute. It only partially lowers the barrier to individual actions against states and generally codifies the traditional view of the United States that the property of foreign states is virtually absolutely immune from execution.⁸¹ If one adds to this tortious

80. *Letelier v. Republic of Chile*, 567 F. Supp. 1490, 1500 (S.D.N.Y. 1983).

81. See *Dexter and Carpenter Inc. v. Kunglig Jarnvagsstyrelsen*, 43 F.2d 705 (2d Cir. 1930); *Weilamann v. Chase Manhattan Bank*, 192 N.Y.S.2d 469, 473 (Sup. Ct. 1959).

picture the blanket immunity provided under section 1611 for property of a foreign state if that property belongs to a foreign central bank or monetary authority, or is under the control of a foreign military authority or defense agency, the possibility of relief being obtained in the United States by the victims is even more remote. Thus, it appears quite clear that in seeking to ensure reciprocal security, protection and immunity for its own property outside of the United States, as well as to secure a more friendly environment for United States corporations and state agencies, instrumentalities and quasi-governmental entities, the United States Government, through the FSIA, has created a formidable barrier to noncommercial actions against foreign states.

The contribution of the United States Supreme Court to this current orientation is clearly evident in the case of the *Argentine Republic v. Amerada Hess Shipping Corp.*⁸² In *Amerada Hess*, the court held that the FSIA was the sole basis for obtaining jurisdiction over foreign states, stating that section 1604 bars state and federal courts from exercising jurisdiction when a state is entitled to immunity and that section 1330(a) confers jurisdiction when the foreign state is not entitled to immunity.⁸³ In *Amerada Hess*, two Liberian corporations sued the Argentine Republic to recover in tort for damages to their vessels allegedly caused by Argentine armed forces in violation of international law during the Falklands war. The district court dismissed for lack of subject matter jurisdiction, holding that the FSIA barred the actions.⁸⁴ The Second Circuit reversed, holding that the FSIA was not meant to preclude relief or ". . . remove existing remedies in the United States courts for violations of international law."⁸⁵ In reversing, the Supreme Court did not refer to human rights issues in respect of FSIA actions against sovereign states.⁸⁶ If, however, one assumes that the FSIA is applicable to actions arising out of violations of *jus cogens* norms and other crimes under international law (as argued later on in this article), *Amerada Hess* on its face appears

82. 488 U.S. 428 (1989).

83. *Id.* at 434.

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

85. *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 426 (2d Cir. 1987) (emphasis added).

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

to explicitly limit or preclude suits against foreign states based on section 1350 unless the acts being complained of come within one of the exceptions to immunity set out in the FSIA.

In this context, it is important to note the decision of the Eleventh Circuit Court of Appeals in the case of *Nelson v. Saudi Arabia*.⁸⁷ This case involved an engineer recruited in the United States for work in Saudi Arabia. While on the job in Saudi Arabia, he complained about certain construction project violations, and he was subsequently arrested and tortured. The district court dismissed on FSIA grounds, stating that the foreign tort did not fall within one of the exceptions. The Eleventh Circuit reversed, holding that there were sufficient commercial contacts and actions inside the United States to convey jurisdiction.⁸⁸ At this time, certiorari has been granted to the Supreme Court where the court's ruling must face an uncertain fate.

If a section 1350 action is to be sustained on behalf of the Kuwaiti and Kurdish victims of Iraqi activities, then the Supreme Court's interpretation of sections 1609 and 1610 of the FSIA to date will have to change concerning human rights claims.

a. *Acts of State Under United States Law*

Aside from the consideration of state statutory immunity which must be overcome by individual victims, it must be noted in passing that even if such statutory immunity is restricted in cases involving violations of treaty, *jus cogens* norms or other aspects of customary international law and recognized crimes, such individual actions may still be barred in the United States under the act of state doctrine. The development of the doctrine in United States jurisprudence is clearly related to United States municipal law and not to international law.⁸⁹ Historically, it may be differentiated from sovereign immunity in that an act of state finding is a rule of substantive law and is unrelated to jurisdiction.⁹⁰ In modern times it has become a catch-all prohibition against judicial interference in the executive's conduct of foreign affairs.⁹¹ Having first surfaced in United States jurispru-

87. 923 F.2d 1528 (11th Cir. 1991), *cert. granted*, 112 S. Ct. 2937 (1992).

88. *Id.*

89. *E.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421 (1964).

90. *See Liu v. Republic of China*, 642 F. Supp. 297, 300-01 (N.D. Cal. 1986).

91. *See, e.g.*, *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 775 (1972); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918); *Texas Trading and Mill-*

dence in the eighteenth century, it became well established by Chief Justice Fuller's opinion in the often cited case of *Underhill v. Hernandez*.⁹² He wrote:

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.⁹³

Beginning in 1964 the Supreme Court reexamined the doctrine as the result of a number of cases arising out of Cuban expropriation of American assets. In *Sabbatino*,⁹⁴ the Court held that the act of state doctrine applied to such acts of expropriation as alleged. Justice Harlan stated that the act of state doctrine rested upon "constitutional underpinnings" and was not compelled by the nature of sovereign authority nor any principle of international law.⁹⁵ He noted that it was essential to consider the "degree of codification or consensus" of a particular area of international law or norm alongside the foreign relations — or political question — issue.⁹⁶ Justice Harlan further stressed that the ruling in *Sabbatino* on the issue of expropriation was in no way to be interpreted as foreclosing consideration of questions of international law by United States courts.⁹⁷

In two subsequent cases eight and twelve years later,⁹⁸ the court reaffirmed the basic outlines of the doctrine, although its underlying rationale continued to be the subject of debate. From the outset, questions have been raised about the doctrine's relevance or applicability to claims based on human rights violations.⁹⁹ In any event, section 1350's jurisdictional requirement of

ing Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 316 n.38 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982).

92. 168 U.S. 250, 252 (1897).

93. *Id.*

94. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

95. *Id.* at 423.

96. *Id.* at 428.

97. *Id.* at 430 n.34.

98. *Alfred Dunhill of London Inc. v. Republic of Cuba*, 425 U.S. 682 (1976); *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972).

99. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (Kaufman, J.); Richard Lillich, *The Role of Domestic Courts in enforcing International Human Rights Law*, reprinted in *THE GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE*, 223, 227 (H. Hannum ed., 1984); Jeffrey Blum & Ralph Steinhardt, *Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena*

consensus regarding the specific aspect of international law allegedly violated overcomes the *Sabbatino* test articulated by Justice Harlan. *Sabbatino* itself was overruled as to such expropriations by passage of the Hickenlooper Amendment in 1965 which compelled United States courts to decide such cases on the merits in accordance with the principles of international law.¹⁰⁰

There has emerged since *Filartiga* increasing support for denying application of the doctrine in human rights cases involving a state condoning or encouraging, as a matter of policy, acts of genocide, slavery or slave trading, summary murder or the forced disappearance of individuals, torture or other inhuman or degrading treatment or punishment, prolonged arbitrary detention or systematic racial discrimination. The provisions of the Restatement (Third) of the Foreign Relations Law of the United States (Restatement (Third)) may be exemplary in this regard.¹⁰¹

It is, however, evident that "executive suggestion," sometimes referred to as the "Bernstein exception," whereby the executive branch may communicate its opinion to the court concerning the foreign policy impact of a case does, and will, take place.¹⁰² Such reassertion through, the back door, of the executive's preeminence in the foreign policy field where legitimate justiciable issues are present is reminiscent of the previous "Tate Letter" practices, which, it is widely assumed, passed

Irala, 22 HARV. INT'L L.J. 53, 64-75 (1981).

100. Foreign Assistance Act of 1965, Pub. L. No. 89-171, 79 Stat. 653 (codified as amended at 22 U.S.C. § 2370(e)(2) (1982)).

101. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 701, 702 (1987) [hereinafter RESTATEMENT (THIRD)]. Section 702 states:

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A state violates international law if, as a matter of state policy, it practices, encourages, or condones

- (a) genocide,
- (b) slavery or slave trade,
- (c) the murder or causing the disappearance of individuals,
- (d) torture or other cruel, inhuman, or degrading treatment or punishment,
- (e) prolonged arbitrary detention,
- (f) systematic racial discrimination, or
- (g) a consistent pattern of gross violations of internationally recognized human rights.

102. *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 173 F.2d 71 (2d Cir. 1949), *modified* 210 F.2d 375 (2d Cir. 1954); *see also* *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 419-20 (1964).

from the scene with the enactment of the FSIA. Thus, the potential exists for a revitalized use of the act of state doctrine in the United States, whereby a particular political question, separation of powers or foreign policy issue may be seized upon by a state at any stage of proceedings against it to deny justiciability of a claim.

Nonetheless, the possibility of the doctrine being applied in human rights cases is still very real, as the *Liu* case reveals.¹⁰³ The district court opinion in the case of *Liu v. Republic of China* is an example of the executive branch seeking to claw back, by means of the act of state doctrine, any perceived lost power in the decision making as to whether or not sovereign states may be sued in the courts of the United States. It was the first time in this century that a court applied this judge-made foreign relations legal doctrine in such a blatant way to shield a foreign state from having to defend itself against liability claims for personal injury or death which occurred on United States soil.¹⁰⁴ The *Liu* case, like the *Letelier* case before it, was essentially an action for wrongful death. It appears to be unique in this respect since most other acts in which the act of state doctrine has been applied dealt with nationalization or expropriation of property by a state or with other types of commercial transactions.¹⁰⁵

Henry Liu was a journalist who left Taiwan in 1967 and settled in the United States. His ongoing writings were critical of the Taiwanese Government, and at the time of his death he was preparing to publish two books that reportedly would have caused the government serious embarrassment. On October 15, 1984, he was shot to death by two gunmen at his home. A Taiwanese court found the director and several subordinates of Taiwan's Defence Intelligence Bureau guilty of conspiring to murder Liu, but also found that this plot was kept secret from

103. *Liu v. Republic of China*, 642 F. Supp. 297 (N.D. Cal. 1986), 892 F.2d 1419 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 27 (1990).

104. *Liu*, 642 F. Supp. at 300-03.

105. See, e.g., *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1278 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976), *cert. denied*, 472 U.S. 1032 (1985); *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 173 F.2d 71 (2d Cir. 1949), *modified*, 210 F.2d 375 (2d Cir. 1954).

the director's supervisors in the government. The Taiwanese court thus determined that the perpetrators had acted as individuals without the knowledge of any senior officials. One of the assassins refuted this story and asserted at his trial that he was persuaded by high ranking government officials that the assassination of Liu would be a patriotic act and a great contribution to his country. After the murder, he said he was greeted and praised by senior officials. He categorically stated that the murder was an act of the Government of Taiwan.

In the United States, the court denied the plaintiff widow's complaint and dismissed the case against the defendant Government, applying the act of state doctrine. The act of state was not the assassination, but rather the ruling of the Taiwanese court that absolved the Taiwanese Government of liability. Plaintiff's case was clearly aimed at having declared invalid the findings of the foreign court which the court regarded, because of its seriousness, as effectively an act of state and not a routine adjudication.

This court ruling stood United States' law on sovereign immunity on its head. Acts of state apply to acts of general applicability by legislatures and executives of a state whereby policy is made. Never before has the doctrine been applied to a ruling of a foreign court.¹⁰⁶ In any event, the very definition of the act of state set out in *Underhill*¹⁰⁷ restricts the legal pronouncements of the Taiwanese Court as a legal finding in that country. It is in no way binding upon or even by comity restrictive of the *Liu* widow in her United States action. The lower court's ruling in the *Liu* case also directly contravenes section 1605(a)(5) of the FSIA discussed above, which explicitly provides for United States Court jurisdiction over foreign states in such cases.¹⁰⁸

The act of state doctrine had therefore become a means to allow the "Bernstein exception" or "Tate Letter" control by the executive to re-enter through the back door, emasculating what little progress has been made through the enactment of the FSIA. Around the time of enactment of the statute in 1976, Congress itself raised this spectre and called for judicial vigilance to

106. *Liu v. Republic of China*, No. C-85-7461 EFL, 1987 WL 49413 (N.D. Cal. Aug. 27, 1987).

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

108. *Liu v. Republic of China*, No. C-85-7461 EFL, 1987 WL 49413 (N.D. Cal. Aug. 27, 1987).

prevent this from occurring.¹⁰⁹ On appeal, however, the Ninth Circuit reversed the district court's dismissal, holding that subject matter jurisdiction existed under the FSIA and that California, as the place of the murder, had a relationship with the tort at least as significant as that of the Republic of China, and accordingly, California's law of *respondeat superior* applied.¹¹⁰ As to the act of state doctrine, the court further held that while there may be particular instances where the FSIA will confer jurisdiction and yet the act of state doctrine will mandate judicial abstention, this was not one of those cases.¹¹¹ By implication from the court's reasoning, neither would any such bar be applied if there was a consensus in international law in respect of condemnation for the wrongful acts.¹¹²

Even more significant was the Ninth Circuit's *en banc* ruling in *Trajano v. Marcos*,¹¹³ overturning a district court ruling that sustained an act of state defense in an action by torture victims against Ferdinand E. Marcos for acts committed in the Philippines while he was President. In *Trajano* the Ninth Circuit extended the principles in the *Liu* case to include acts committed by a leader of a foreign state against its own citizens within its own territory. *Trajano* specifically was the consolidated appeal of five cases that alleged that Marcos and others tortured, kidnapped and imprisoned plaintiffs and killed their decedents in violation of municipal and international law.¹¹⁴

Though restricted as to precedential use and limited to the facts of the case, Trajano, for the first time, affirmed the right of foreign victims to bring actions and seek relief against their own leaders under section 1350.¹¹⁵ This is the first appellate court to have endorsed the use of the courts of the United States by such victims who otherwise have nowhere else to go. It is a natural progression from the Second Circuit's ruling in *Filartiga*.

109. H.R. REP. No. 1487, 94th Cong., 2d Sess. 20 n.1 (1976), reprinted in 1976 U.S.C.C.A.N. 6604.

110. *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989).

111. *Id.* at 1432.

112. *Id.* at 1433.

113. No. 86-2448 (9th Cir. Aug. 20, 1986) (unpublished).

114. *Id.*

115. See Steven M. Schneebaum, *Yes: Freedom From Torture is a Legal Right*, 76 A.B.A. J. 34 (1990).

D. Sovereign Immunity in Other States

The status of sovereign immunity as it is reflected in the municipal law of the three states discussed in this article is largely representative of comparable laws enacted by other major world states. Either in principle or as a result of legislation or judicial decisions, some thirty-eight states have embraced the concept of restrictive immunity.¹¹⁶ However, while there is a definite trend toward restrictive immunity by contemporary state governments, a number have yet to clarify their position. In addition, at least sixteen states still accept the principle of absolute immunity unless the offending state consents to jurisdiction.¹¹⁷

Nearly all of the more recent codifications of state immunity withdraw immunity for those acts of foreign states which cause death or injury (a notable exception is the Pakistan State Immunity Ordinance).¹¹⁸ However, the most limiting common characteristic of the new statutes which include the torts exception is the requirement that the tort complained of must be committed inside the forum state.¹¹⁹ The FSIA differs slightly in this regard in that it simply refers to the resulting damage as ". . . occurring in the United States."¹²⁰ Consequently, the statutes tend to be much more restrictive of state immunity in the determination of whether the act in question was public or private, reflecting the traditional considerations of *jure gestionis* and *jure imperii*, and they also tend to be much more limiting of jurisdiction in respect of the *locus commissi* of the illegal act.¹²¹

Thus, even if human rights violations were exceptions to existing statutory sovereign immunity protections, there would remain the requirement that the act be committed in the forum state. The more recent torts exception to sovereign immunity is indeed an improvement, as is the general movement away from a structural approach, where the relationship of the entity to the state is the focus, to a consideration of the actual function being performed. German practice, for example, has to date categori-

116. See BROWNIE, *supra* note 2, at 320.

117. See BROWNIE, *supra* note 2, at 320.

118. See Pakistan, State Immunity Ordinance, 1981 reprinted in *Materials on Jurisdiction Immunities of States and their Property* 28, U.N. Doc. ST/LEG/SER.B/20 (1982).

119. See cases cited in 65 I.L.R. (Elihu Lauterpacht ed., 1984).

120. 28 U.S.C. § 1605(a)(5) (1988).

121. See *supra* note 119.

cally been that separate legal entities of a foreign state (separate judicial persons) are distinct from the state itself and enjoy no immunity,¹²² whereas the French, with some exceptions, hold that the identity or structure is irrelevant and immunity is based on the nature of the activity and not the status of the acting entity.¹²³ The views of the other European states tend to be less clear, though by and large the courts seem to be moving in the direction of determining state immunity on the basis of particular acts and not the entities involved.¹²⁴

Though there is an undeniable trend away from absolute immunity from execution, unfortunately, at the present time the possibility of the enforcement of tort or noncommercial judgments against states is, for the most part, as severely restricted throughout the rest of the world as it is by statute in the United States and the United Kingdom. For instance, the European Convention on State Immunity generally prohibits any enforcement measures absent an express waiver,¹²⁵ but also requires member states to abide by final judgments against them which are arrived at in accordance with conventions, restrictions as to jurisdiction and certain other safeguards.¹²⁶ A special proceeding may also be initiated before the European Tribunal of State Immunity.¹²⁷

A number of states, in particular Greece¹²⁸ and Italy,¹²⁹ strictly adhere to the requirement of executive authorization be-

122. *Central Bank of Nigeria Case*, 65 I.L.R. 131 (Provincial Ct. of Frankfurt 1976).

123. *Administration de Chemins de Fer du Gouvernement Iranien v. Société Le Vant Express Transport*, 52 I.L.R. 315 (Ct. of Cassation 1969) (Fr.); *see also Renfe v. Cavaille*, 65 I.L.R. 41 (Montpellier Court of Appeal 1968) (Fr.).

124. *Banco de la Nacion, Lima v. Banca Cattolica del Veneto*, BGE 110 Ia 43 (1984) (Switz.); *Societe Anonyme "Dhellelmes et Masurel" v. Banque Centrale de la Republique du Turquie*, 45 I.L.R. 85 (Ct. App. 1972) (Belg.); *Hungarian Papal Institute v. Hungarian Institute (Academy) in Rome*, 40 I.L.R. 59 (Cour De Cassation 1960) (Italy); *Consorio Agrario Della Tripolitania v. Federazione Italiana Consorziagrari and Cassa Di Risparmio Della Libia*, 65 I.L.R. 265 (Ct. of Cassation 1966) (Italy); *NV Exploitatie-Maatschappi, Bengkalis v. Bank of Indonesia*, 65 I.L.R. 348 (Ct. App. 1984) (Neth.); *N.V. Cabolent v. National Iranian Oil Co.*, 47 I.L.R. 138 (Dist. Ct. of The Hague 1968); *Caisse d'Assurance Vieillesse des Non-Salaries v. Caisse Nationale des Barreaux Francais*, 65 I.L.R. 70 (Ct. of Cassation) (Fr.).

125. *European Convention of State Immunity*, May 22, 1985, art. 23, Europ. T.S. No. 74.

126. *Id.* art. 20.

127. *Id.* art. 23.

128. *Sale of British Embassy Building Case*, 65 I.L.R. 247 (Ct. of Cassation 1962) (Greece).

129. *Prefect of Milan v. Federici and Savoldi*, 65 I.L.R. 270, 271 (Ct. of Cassation 1968) (Italy).

ing obtained prior to any enforcement measures against foreign states. This obviously poses a serious threat to the functioning of an independent judiciary.

The largest number of states, illogically in my view, treat the question of enforcement as an issue distinct from jurisdictional immunity, with a tendency to allow enforcement with regard to commercial property but to deny or prohibit it if the assets appear to be used for public or state purposes. This is reflected in comments and decisions of the courts in Austria,¹³⁰ Germany,¹³¹ France,¹³² Belgium,¹³³ and the Netherlands.¹³⁴

Switzerland, on the other hand, has consistently held that execution is a logical consequence of jurisdiction.¹³⁵ Swiss practice will, however, not accept jurisdiction over a state solely because there are assets of that state in the country, and Swiss practice is clearly to permit execution only of property and assets not designated for official or public use.¹³⁶ It is clear that even if enforcement immunity is overcome in a particular instance in principle, then an analysis of the use of the available state-related assets is necessary in almost every case in order to determine whether sovereign (state) or commercial (private) functions are being financed.¹³⁷

The potential, then, for victims such as those in Kuwait and Kurdistan to recover compensation for wrongful deaths and massive criminal injuries under existing state immunity statutes,

130. I. Seidl-Hohenveldern, *State Immunity: Austria*, 10 NETH. Y.B. INT'L L. 97, 106 (1979).

131. I. Seidl-Hohenveldern, *State Immunity: Federal Republic of Germany*, 10 NETH. Y.B. INT'L L. 55, 66 (1979).

132. Jan-Anders Paulsson, *Sovereign Immunity from Execution in France*, 11 INT'L LAW. 673 (1977).

133. Joe Verhoeven, *Immunity from Execution of Foreign States in Belgium Law*, 10 NETH. Y.B. INT'L L. 73 (1979).

134. C.C.A. Voskvil, *The International Law of State Immunity, as Reflected in the Dutch Civil Law of Execution*, 10 NETH. Y.B. INT'L L. 245 (1979).

135. *Griechenland v. Julius Bar*, BGE 82 Ia 75 (1956) (Switz.); *United Arab Republic v. Mrs. X*, BGE 86 Ia 23 (1960) (Switz.); *Banque Centrale de la Republique de Turquie v. Weston Compagnie de Finance et d'Investissement SA*, BGE 104 Ia 367 (1978) (Switz.); *Banque Commerciale Arabe SA*, 65 I.L.R. 412 (Fed. Trib. 1984) (Switz.); *Banco de la Nacion (Lima) v. Banca cattolica del Veneto (Vicenza)*, BGE 110 Ia 43 (1984) (Switz.); *Republique de Guinee v. M.*, 42 Schw JIR 69 (1986); *Italien g. X.*, BGE 111 Ia 52, (1985) (Switz.).

136. See Jean-Flavien Lalive, *Swiss Law and Practice in relation to Measures of Execution Against the Property of a Foreign State*, 10 NETH. Y.B. INT'L L. 153, 165 (1979).

137. *Id.*

procedures and interpretations of law appears to be minimal.

IV. THE INAPPLICABILITY OF SOVEREIGN IMMUNITY TO VIOLATIONS OF THE BASIC NORMS OF CUSTOMARY INTERNATIONAL LAW — THE *Jus Cogens*

A. *The Prevailing View*

Current national court systems and their presiding judges clearly wish to avert their eyes to violations by sovereign states of established customary international law concerning human rights. In the present context, if the United States does not lead the way in effecting a change in judicial policy and FSIA statutory interpretation, or if new international civilian and criminal courts are not established to adjudicate individual claims in cases of state sponsored injury, torture and death, then individual Kuwaiti and Kurdish victims will be deprived of not only a remedy — as in *Letelier* — but even a cause of action.¹³⁸

What can one say in defense of the quality of law in modern nations whose values are represented by legal systems which allow sovereign states to be called to the bar of justice and be accountable for their commercial misdeeds and breaches of contract and yet allow them to totally avoid responsibility for the most grievous crimes against individual victims. The argument here is that given the history of the development of customary international law on this issue and the existing treaty and statutory language which has evolved, this should not be the case and that judicial interpretations to the contrary are bad law and should be overturned. Though international tribunals should in the long term be established to adjudicate these acts, in the short term there is ample existing authority for states to undertake universal jurisdiction and make available their municipal courts and legal systems for the litigation of claims based on violations of those international rules of conduct which have come to be part of the *jus cogens*. The following parts of this article discuss the formulation of this approach in accordance with international law and the authority for the assumption of this role by municipal systems of law.

B. *The Growth of the Body of International Law*

That *corpus* of law which is currently regarded as “interna-

138. See *supra* note 1.

tional" consists of a vast array of substantive material. It covers an enormous range of subject matters from maritime trade and the law of the sea, to space exploration, aviation, the allocation of broadcasting frequencies and the conduct of war and diplomacy. This article is concerned with that aspect of international law which deals with acts and omissions of such a grievous nature that the conduct may no longer be regarded as civil wrongs, but as contravening the *jus cogens* norms or fundamental principles of law. There is international acceptance of the concept that human rights violations contravene customary international law, though less than unanimity as to its evolving content. Over time, such abhorrent conduct has come to be universally acknowledged as constituting the most serious of crimes, the prohibition of which is not only universally accepted as a fundamental part of the customary law of nations, but also is explicitly embodied in a variety of multinational treaties and covenants. The protection in international law of the most fundamental individual rights is then clearly embodied in the concept of *jus cogens*. Consequently, state acts involving torture (including rape), genocide, political assassination, hostage taking, and indiscriminate murder and forced disappearance of civilians are all included.

These *jus cogens* norms of behavior, protections and prohibitions are so fundamental that they do not rely on a state's consent for it to be bound; neither can a state derogate from its duty to act accordingly.¹³⁹ International treaties, conventions, agreements and declarations may be indications of affirmative state action but in fact and in law no explicit consent is or should be required for a state to be bound; the very fact that the actor is a state implies acceptance and when a state violates such a norm or principle it is not entitled to immunity. State immunity rests upon the principle that states cannot be bound by any aspect of international law without their consent, but the *jus cogens* is a set of peremptory norms which does not depend on any state's consent for its validity. Its very existence

139. See J.G. STARKE, *INTRODUCTION TO INTERNATIONAL LAW* 53, 54 (9th ed. 1984); Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law*, 30 *BRIT. Y.B. INT'L L.* 1, 3 (1953); L.C. Green, *Canadian Law, War Crimes and Crimes Against Humanity*, 59 *BRIT. Y.B. INT'L L.* 217, 224-25 (1988); Egon Schwelb, *The Actio Popularis and International Law*, 2 *ISR. Y.B. H.R.* 46, 56 (1972); H. Lauterpacht, *Sovereignty Over Submarine Areas*, 27 *BRIT. Y.B. INT'L L.* 376, 397-98 (1950).

and emergence in importance takes precedence over the individual wills of states and suggests that the traditional concept of state sovereignty is inconsistent and outmoded in modern times. The modern evaluation of international society as an organized and integrated community of states is incompatible with the earlier positivist notion that sovereignty implies unlimited power.

Historically, states have assumed jurisdiction over civil litigation as well as criminal investigations or prosecutions where the acts involved were alleged to have been committed, or at least the effects of the illegal acts were felt, in their own territory. This rule and practice derived from the doctrine of national sovereignty which respected the right of states to administer and enforce their own systems of law. With the expansion of the catalogue of acts covered by *jus cogens* and the list of "international crimes" gradually increasing from the time of the initial agreement concerning piracy, it was inevitable that municipal courts would extend their jurisdiction in the continued absence of any permanent international tribunal having jurisdiction. Consequently, since the second half of the nineteenth century it has been generally acknowledged that international law imposes criminal responsibility on individuals as well as upon states, and for which punishment may be imposed, either by properly empowered international tribunals, military tribunals or municipal courts.

The Charter of the International Military Tribunal (the Nuremberg Charter) annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed on August 8, 1945, provides in article 6 that:

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

- (a) Crimes against Peace: namely, planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
- (b) War Crimes: namely, violations of the laws or customs of war . . .
- (c) Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or reli-

gious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

In its judgment the Tribunal Stated:

[The fact] that international law imposes duties and liabilities upon individuals as upon States has long been recognized. . . . [T]he very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State, if the State in action moves outside its competence under international law.¹⁴⁰

The Agreement [annexed to the Charter of the Tribunal] was signed by the United States, United Kingdom, France, and Union of Soviet Socialist Republics. There is no question that article 6 of the Nuremberg Charter has ever since been part of and represented customary international law. At the time, the trial was a precedent setting event, with the exception of the ultimately ignored provisions of the 1919 Treaty of Versailles in respect of the German Emperor, for state officials had never been held personally responsible for their illegal acts. For the first time, the principle was established that if any representatives of a state were ever faced with the choice of complying with the legal requirements of their states or international laws, then they had better opt for the latter or risk being held personally accountable and liable for their acts. The very essence of the rulings at Nuremberg was, and remains today, the principle that individuals as well as states have international duties which transcend obligations of obedience imposed by their municipal law.

The next step in the development of an agreed body of international human rights law was the adoption of the Charter adopted in San Francisco on June 26, 1945. This followed naturally from the 1944 Dumbarton Oaks Conference attended by twenty-six allied nations which proposed the establishment of an organization designed, among other things, to promote respect for human rights and fundamental freedoms. The Charter thus became the first multinational treaty to deal with the entire

140. See BROWNIE, *supra* note 2, at 545.

spectrum of human rights and to recognize this obligation as being no longer the exclusive concern of individual states but a legitimate issue of the whole international community.

Article 56 of the Charter explicitly states that all of the members pledge themselves to take joint and separate action in cooperation with the U.N. in order to accomplish the obligations of the Charter.

The Charter did not, however, specifically define the human rights and fundamental freedoms being guaranteed, protected and ensured. This was done by resolution of the U.N. General Assembly some three years later on December 10, 1948, through the adoption of the Universal Declaration on Human Rights (the Universal Declaration). The adoption was by a vote of the then fifty-six members with forty-eight in favor, eight abstaining and none against.¹⁴¹

Since its adoption, the Universal Declaration has stood as the first detailed catalogue of human rights and fundamental freedoms to be formally recognized by the international community of sovereign states. By 1991, a generation later, there should be little doubt that both the Charter — the status of which in international law has never been in doubt — and the Universal Declaration should be regarded as part of customary international law. Any doubt as to this status may be dispelled by awareness of the following:¹⁴² one, between 1958 and 1972 alone, references to the Universal Declaration were included in twenty-five new national constitutions and eight domestic legislative acts; and two, its provisions have been invoked on countless occasions by international institutions, including the ICJ, and a considerable number of international legal scholars.

For instance, at the U.N. International Conference on Human Rights in Teheran between April 22 and May 13, 1968, attended by eighty-four nations, a Proclamation was issued

141. The abstentions were cast by Byelorussia, Czechoslovakia, Poland, Saudi Arabia, South Africa, Ukraine, Union of Soviet Socialist Republics and Yugoslavia. PAUL SIEGHART, *THE INTERNATIONAL LAW OF HUMAN RIGHTS* 24 (1983).

142. Oscar Schachter, *International Law Implications of U.S. Human Rights Policies*, 24 N.Y.L. SCH. L. REV. 63 (1978). Oscar Schachter, *The Charter and the Constitution: The Human Rights Provisions in American Law*, 4 VAND. L. REV. 643 (1951); V. Voitto Saario & Rosemary Higgins Cass, *The United Nations and the International Protection of Human Rights: A Legal Analysis and Interpretation*, 7 CAL. W. INT'L L.J. 591, 596 (1977); John P. Humphrey, *The Implementation of International Human Rights Law*, 24 N.Y.L. SCH. L. REV. 31, 32 (1978); PAUL SIEGHART, *THE INTERNATIONAL LAW OF HUMAN RIGHTS* 53, 54 (1983).

which confirmed the status of the Universal Declaration as an obligation for the member states, therefore assuring its status as a part of customary international law. The Proclamation contained the following clause: "2. The Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community."

In addition, Iraq (though not the United States) became a member of the International Covenant on Civil and Political Rights on January 25, 1971 (the Covenant entered into force on March 23, 1976) and its provisions are generally considered as part of customary international law.

Article 6 provides that:

1. Every human being has the inherent right to life No one shall be arbitrarily deprived of his life.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

Article 7 provides that:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment

Article 10 requires that:

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

Customary international law in respect of the treatment of property and persons in occupied territory is also similarly embodied and detailed in the Hague Regulations — Hague Convention IV, 1907 (Hague IV) and the Fourth Geneva Convention 1949 (Fourth Geneva).¹⁴³ Finally, the Iraqi Civil Law no. 40 (the

143. Article 43 of the Hague Convention IV provides that, the authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country. *See* Hague Convention IV, *supra* note 44.

Article 46 requires that family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected and further that private property cannot be confiscated.

In Article 47, pillage is formally forbidden.

Hague IV, Article 50 states that no general penalty, pecuniary or otherwise, shall be

Law) enacted in 1951 provides that all matters are to be deter-

inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible and Article 55 states that the occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

Finally, Article 56 provides that the property of municipalities, that of institutions dedicated to religion, charity and education, the art and sciences, even when State property, shall be treated as private property and that all seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

The Fourth Geneva Convention (1949) (Fourth Geneva) regulates the treatment of civilian persons in times of armed conflict. At the time of the Iraq invasion (August 2, 1990) 166 states including Iraq, the United States and Kuwait were parties to the Convention.

It provides that civilians as "protected persons" are entitled to humane treatment and to be protected against all acts of violence. Women are to be especially protected against rape, enforced prostitution or any form of indecent assault (art. 27).

No physical or moral coercion is to be used in efforts to obtain information, and hostage taking and indiscriminate and collective punishment is prohibited (arts. 31-34).

The Occupying Power, as Iraq was for over six months, is required to the fullest extent possible to maintain health care and hospital facilities, and the material and stores of the civilian hospitals, required for the civilian needs may not be requisitioned (art. 57).

Article 75 provides that in no instance where a person is condemned to death shall such person be deprived of the right of petition for pardon or reprieve nor shall the sentence be carried out before the expiration of a period of six months from the date of the final judgment.

Articles 146-147 of the Fourth Geneva convey jurisdiction in the courts of each Contracting Party in respect of the prosecution of violations of the provisions of the Convention and each party undertakes to enact any legislation necessary to effect penal sanctions against those responsible for any of the offenses summarized in Article 147 as ". . . wilful killing, torture or inhuman treatment . . . wilfully causing great suffering or serious injury to body or health . . . wilfully depriving a protected person of the rights of fair and regular trial . . . extensive destruction and appropriation of property . . . carried out unlawfully and wantonly."

Fourth Geneva contains provisions concerning the repression of abuses and infractions which obligate the parties to the following:

1. "to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to committed" what are called "grave breaches" of the Convention — violations involving "wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, . . . and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;"
2. "to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches" and to "bring such persons, regardless of their nationality, before its own courts" or to "hand such persons over for trial to another High Contracting Party concerned;" and
3. to "take measures necessary for the suppression" of violations of the Convention that do not amount to "grave breaches."

As with the Hague Conventions, violations are punishable under United States law by military courts under jurisdiction conferred by the Uniform Code of Military Justice

mined by applying the written law of the Civil Code, except when no provision is available, and then justice shall be administered by the courts according to custom, the Islamic Code or ultimately according to the ". . . general principles of justice." This provision appears to be a direct reference to and incorporation of the *jus cogens*. The Iraqi law also provides that ". . . the courts shall be guided in all matters of principle by solutions adopted by judicial decisions and writers in Iraq and in other countries, the laws of which are similar to Iraqi law."

It is next necessary to assess the relationship between this developed body of international law and municipal law as it relates to the obligations of states.

C. The Relationship Between International Law and the Municipal Law Concerning the Obligations of States

As to the relationship of international law to municipal law, international lawyers are generally split into dualists or monists or some variation thereof. Considering the existing nuances and variations, it is not always helpful to classify the issues in these two terms, however, the basic positions must nonetheless be noted.

By way of summary, dualists traditionally focus on what they regard as the essential difference between the two systems. They view international law as that system of laws which regulates relations between states, while municipal law is seen as applying only within states, regulating the relations among citizens and their government. This view holds that neither legal order has the power to create or amend the rules of the other and that if a state provides that international law applies in its jurisdiction, this is merely an exercise of its municipal law. In the event of a conflict, the dualist would expect that a municipal court would apply municipal law.

Monists regard this approach as effectively denying the reality of international law to most of the peoples of the world, with the absence of a superior legal order leaving them and the rule of law hostage to the spectacle of nearly two hundred sovereign states, each claiming to be the highest authority of law within its national territory. Monists argue that if certain standards of conduct are accepted as the norm, then this type of

(10 U.S.C. § 818, 821 (1956)).

universal basic norm should be binding upon all states and enforceable in and by their municipal courts.

One would have thought that the question has been settled as to the relationship between the two types of law. A state cannot assert provisions or deficiencies of its own law as a defense to a claim against it for an alleged breach of its obligations under international law.¹⁴⁴ It would also appear that nations have a general duty to bring their municipal law into conformity with customary international law and their various treaty obligations.¹⁴⁵ A direct breach of international law occurs when a state fails to observe its obligations on a particular occasion and not, generally, because it fails to take the necessary steps to conform its municipal law to prevailing international law. A growing number of states expressly accept international law as a part of their municipal law.¹⁴⁶ Where this is the case, the international law provisions are "self-executing" and the rights are directly enforceable. The Constitution of the United States (article VI sec. 2), for example, includes international treaties which bind the United States as not only being part of United States law but to be regarded as ". . . the supreme Law of the land."

Other countries such as France¹⁴⁷ and the Federal Republic of Germany¹⁴⁸ assign to such obligations of international law a place and rank superior to all prior and subsequent domestic legislation. An ever increasing number of states are enacting constitutional provisions requiring that all municipal laws conform to customary international law. Article 10 of the 1947 Italian Constitution is exemplary in this respect.

The United Kingdom, on the other hand, as a dualist state, generally requires that Parliament enact specific legislation for any provisions of international law in order for it to be considered as part of the municipal law. In practice, however, such provisions of law are incorporated in United Kingdom law and enforced to the extent that they are not inconsistent with Acts

144. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 27, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

145. See BROWNIE, *supra* note 2, at 38.

146. *E.g.*, Argentina, Austria, France, Luxembourg, Belgium, Greece, Germany, Spain, Netherlands, Switzerland, United States, USSR and Mexico. See BROWNIE, *supra* note 2, at 52 n.3.

147. CONST. art. 55.

148. Basic Law of May 8, 1949, as amended on Jan. 1, 1966, art. 25 (F.R.G.).

of Parliament or prior judicial decisions and *stare decisis*.¹⁴⁹

Difficulties arise in instances where the acts or omissions complained of, like those suffered by the Kuwaiti and Kurdish victims, (1) occur outside of the national territory being asked to assume jurisdiction; (2) occur inside a state, being committed against the offending state's own people in violation of both the state's municipal law and international law, requiring external intervention, as in the case of the Kurds; and/or, (3) are committed by a state under a claim of *jure imperii* or *ratione materiae*. Consequently, it is necessary next to analyze the applicability of the relevant *jus cogens* aspects of customary international law and treaty provisions to Iraq's aggression in Kuwait and Kurdistan.

D. The Applicability of the Relevant Jus Cogens Norms of Customary International Law and Treaty Provisions to the Iraqi Occupation of Kuwait and the Aggression Against the Kurds

The factual setting to consider in determining whether Iraq violated customary international laws is as follows: some sixteen formal letters from the Permanent Representative of Kuwait to the United Nations Secretary-General between August 5, 1990 and November 28, 1990 contained numerous allegations of human rights violations;¹⁵⁰ it is evident that during the months of March and April 1991 units totalling some five divisions of the Iraqi army descended on each and every Kurdish occupied city, town and village, backed by tanks and helicopter gunships, and randomly slaughtered any civilian men, women and children who were unable to flee; Iraq and the United States have mutually signed and agreed to be bound by and obligated under the

149. See BROWNIE, *supra* note 2, at 45.

150. 1. Summary execution of civilian men, women and children; 2. individual and gang rapes of girls and women; 3. torture of every conceivable kind; 4. dismemberment of human bodies, including decapitation and castration; 5. desecration of human remains; 6. use of hospital facilities for purposes of torture; 7. immolation of human beings; 8. random beatings of the population; 9. confiscation of private and personal property; 10. theft of all kinds of public equipment; 11. group executions, and mass burials; 12. random looting and pillage; 13. theft of livestock and 200 other animals; 14. kidnapping, deportation to Iraq of large numbers of individuals, presumably for hostage purposes; 15. transportation of large numbers of Iraqi families to Kuwait for the purpose of their occupying the former residences of Kuwaitis; 16. random burning of buildings and homes and desecration of places of worship. THE KUWAIT CRISIS: BASIC DOCUMENTS 267-276 (Elihu Lauterpacht et al. eds., 1991).

terms of the Charter, the Universal Declaration and the Geneva Fourth concerning the treatment of civilians in times of armed conflict; the Nuremberg Charter and the Hague Convention IV, concerning the treatment of property and persons, have by now become part of international customary law and thus binding on all nations of the international community; Iraq has acceded to and agreed to be bound by the articles of the International Covenant on Civil and Political Rights; and Iraq's own Civil Law no. 40 ultimately looks to the "... general principles of justice ..." in respect of determining the legality of "... all matters ..." and acts.

Iraq's singling out of the Kurds constitutes a clear violation of the U.N. Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) to which Iraq acceded on January 20, 1959, and which has also been ratified and acceded to by the United States and eighty-four other states.¹⁵¹ The Genocide Convention is now incorporated into and

151. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature*, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

THE CONTRACTING PARTIES,

HAVING CONSIDERED the declaration made by the General Assembly of the United Nations in its resolution 96(I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world; . . .

HEREBY AGREE AS HEREINAFTER PROVIDED:

Article I

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; . . .

Article III

The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide

Article IV

Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials, or private individuals.

implemented by United States law (18 U.S.C. §§ 1091-1093) which was enacted pursuant to the Genocide Convention Implementation Act of 1988 in which forms of genocide which involve actual killing are punishable by life imprisonment and a fine of not more than 1 million dollars, other forms of genocide by not more than twenty years imprisonment, and/or a fine of 1 million dollars and incitement to genocide by not more than five years imprisonment and/or a fine of 500,000 dollars.

It is indisputable that Iraq has committed grave breaches and violations of its explicit international treaty and covenant obligations, as well as of the *jus cogens*.

E. The Imputability and Responsibility of Iraq Under International Law

There is a possibility, however, that Iraq could pass off state responsibility and liability to the individual soldiers, intelligence interrogators and other governmental, military and Baath Party officials who were the direct perpetrators of the illegal acts. Since individuals are often made the scapegoats for criminal acts of the states they serve, it is necessary to examine this issue.

Imputability — the basic notion in the concept of state responsibility — is the juridical attribution of a particular act or acts by persons, or a group of persons to a state whereby it is regarded as the act of the state itself. When unlawful acts in international law are imputable to a state, responsibility or liability arises immediately at the time of commission.¹⁵²

There can no longer be any question that the state is a person in law. The state is a juridical person with responsibility for the acts of its officers in the exercise of public authority. The state has responsibility for damages caused to foreigners, for which it can be held bound to indemnify for any damage and loss caused by its agents.¹⁵³ In fact, states can obviously only act

Article V

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in Article III

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152. *Ambatielos Case* (Greece v. U.K.) 1952 I.C.J. 28 (July 1).

153. *de Brissot Case* (U.S. v. Venez.), 3 Int. Arb. 2949, 2952-53 (1885); *see also* BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 181 (1987).

through their agents, officials and representatives.¹⁵⁴

Iraq, then, like every other state, is the aggregate of all of its citizens and its officials, but it can only act through its government and the officials and representatives thereof. So, the imputability of governmental acts to the state is derived from the imputability of the acts of its officials, agents and representatives, of whatever rank.¹⁵⁵ Further, there can be no question that the Iraqi officials and armed forces who waged aggressive war and occupation against Kuwait, as well as the genocidal operations against the Kurds, were acting on behalf of the Government of Iraq. Hence, responsibility is imputed to the State of Iraq as well as to the particular individuals involved for the criminal acts.

Numerous tribunals and rulings have upheld this dual liability in similar cases.¹⁵⁶

Indeed, as to state liability, when an official — of whatever rank or position — acts in his or her official capacity, such acts are imputable to the state irrespective of whether he has acted in error¹⁵⁷ or without authorization.¹⁵⁸ Neither may the imputability to the state of acts of violence by its armed forces be lessened by the fact that such acts are in violation of the municipal law.

In the *Youmans* case (1926), ten Mexican soldiers sent to protect some Americans at Angangueo against mob violence instead participated in committing acts of violence against the victims. The Mexican-United States General Claims Commission (1923) held that these acts could not be regarded as acts committed in their private capacity when it was clear that the perpetrators were on duty and under the immediate supervision of a commanding officer.¹⁵⁹ The Commission stated that:

. . . Soldiers inflicting personal injuries or committing wanton destruction or looting always act in disobedience of some superior authority. There could be no liability whatever for such misdeeds if the view were taken that any acts committed by

154. Advisory Opinion No. 6, *German Settlers in Poland*, 1923 P.C.I.J. (ser. B) No. 6, at 22, Adv. op. B6, 22. See ICJ *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174 (Apr. 11).

155. See CHENG, *supra* note 153, at 184.

156. See CHENG, *supra* note 153, at 189, 197.

157. See CHENG, *supra* note 153, at 202.

158. See CHENG, *supra* note 153, at 202.

159. CHENG, *supra* note 153, at 202.

soldiers in contravention of instructions must always be considered as personal acts.¹⁶⁰

The Commission thus clearly regarded the acts of these soldiers as acts of the government and as such imputable to the state. It must be so; otherwise, a state could by its municipal law provide that none of its officials should be competent to perform an act which contravenes an international obligation of the state and thus deny the imputability to it of any such illegal acts or conduct on the part of its officials or representatives. As noted in the summary conclusion on this point by Bin Cheng in his work *General Principles of Law as applied by International Courts and Tribunals*:¹⁶¹ "Municipal law as such, therefore, has no operative effect in international law and, in consequence, imputability in international law should not be governed, and need not be justified, by provisions of municipal law."¹⁶²

F. Historical Precedents For Restricting Sovereign Immunity and Intervention In Instances of State Violations of International Law

As early as the nineteenth century, there developed in international law a doctrine of legitimacy for the limitation and denial of sovereign immunity in instances of clear violations of the developing *jus cogens* where, such as in the Iraqi invasion and occupation of Kuwait, an aggressive state committed acts which shocked the conscience of humankind. The protective cloak of state immunity has also come to be denied in respect of conduct like the Kurdish massacres where the acts took place on the offending state's own territory against its own subjects. This was settled long before the 1951 date of effect of the Genocide Convention.

The hollow, plaintive pleas of there being "no authority" for intervention in Iraq's internal affairs, which emanated from nearly all of the coalition allies, is ludicrous if not Kafkaesque in light of the plain meaning of the U.N. Convention and the relevant historical precedents. Numerous examples illustrate the "authority" to intervene:

1. Such considerations have never before prevented the United

160. CHENG, *supra* note 153, at 203.

161. CHENG, *supra* note 153, at 207.

162. CHENG, *supra* note 153, at 207.

States from intervening in the internal affairs of sovereign states and even assisting in changes of government when it was perceived to be — however wrongly — in the political interests of the United States. Among others, the following United States government forays spring readily to mind: Guatemala (1954); Iran (1954-55); Cuba; Dominican Republic; Chile (Allende); Nicaragua (covert); Panama; Grenada; the Congo (Katanga); Indonesia (Sukarno); and Australia (for the demise of Gough Whitlam). Article 2(7) of the U.N. Charter, the non-intervention clause, now frequently cited, was certainly not a consideration in these and many other instances of United States intervention in the internal affairs of other states.

2. Following the First World War, the League of Nations guaranteed treaties designed to protect the rights of linguistic and ethnic minorities residing in the new territories created by the Treaties of Versailles and St. Germain.¹⁶³

3. The German-Polish Convention of May 15, 1922 in respect of Upper Silesia provided for access by individual claimants to the Upper Silesian Arbitral Tribunal and over 4,000 cases were filed.¹⁶⁴

4. France had much earlier invoked this principle in 1827 on behalf of the Greek people and again in 1860-66 in Syria. The massacre of some 12,000 Christian civilians by irregular Ottoman troops in 1876 again provided a basis for the denial of sovereign immunity to the Ottoman State.

The intrusion into a state's internal affairs may also be seen in the international collaboration which has resulted in the prohibition of the authority of individual states to legalize slavery as well as a number of other protections and prohibited national acts contained in the Hague and later the Geneva Conventions. In each instance, state immunity has given way not to the rights of states against other states but to the legitimate assertion of the rights of specific individuals against sovereign states.

In light then of the Genocide Convention, the fact and generally accepted legitimacy of these interventions beginning over 160 years ago, and the more recent activities of the United States, it is impossible for the allies, and in particular the United States, to justify standing by while fully mobilized, thus passively collaborating in clear violation of their own obligations

163. See, e.g., German-Polish Convention Relating to Upper Silesia, May 15, 1922, in ELIHU LAUTERPACHT, *ASPECTS OF THE ADMINISTRATION OF INTERNATIONAL JUSTICE* 67 (1991) [hereinafter LAUTERPACHT].

164. *Id.*

under international law. Consequently, even in light of practice under article 2(7) of the Charter, there has undeniably emerged a situation whereby a range of international precedents, agreements, treaties and covenants exist, some of which have been acceded to and are binding upon sovereign states such as Iraq, and which define, create and seek to protect specific rights for individuals who are not themselves parties to the agreements.¹⁶⁵

It is generally recognized in law that for every right there must be a correlative duty imposed on someone other than the holder of the right — here the relevant state — and a remedy which is attached to the right and which flows from its violation. The existence of a right without this correlative duty and remedy renders the right itself meaningless and effectively nonexistent. The most basic of these protected *jus cogens* rights are properly called human rights. They are not acquired, nor can they be transferred, disposed of or extinguished by any sovereign act or event. They belong to each human being for the entirety of his or her life. They are truly inalienable and the correlative duties and remedies required for their existence fall primarily upon sovereign states, their public authorities, agencies and officials. Thus, signatory states to these various treaties, covenants and agreements, such as Iraq and the United States, as well as the community of nations in respect of customary international law, have clear obligations not only to restrict and regulate their own use of power and force upon their own citizens but also to respond to those situations and acts occurring beyond their national boundaries where illegal acts are committed in violation of the human rights of the citizens of other states.

In short, there must be some procedure whereby the individual victims of the criminal acts such as those perpetrated by Iraq in the invasion and occupation of Kuwait and upon its own Kurdish citizens have an effective remedy against the State of Iraq itself. In fact, there is such a procedure available. All of the major undertakings and treaties referred to above — which are

165. See The Nurnberg Trial, 6 F.R.D. 69 (1946); U.N. CHARTER arts. 55, 56; Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 2, 999 U.N.T.S. 171; Charter of the Organization of American States, *opened for signature* Apr. 30, 1948, art. 51, 2 U.S.T. 2394; American Declaration of the Rights and Duties of Man, May 2 1948, arts. I-IV, XVIII, XXV-XXVI, O.A.S. Off. Rec. OEA/Ser.L/V/I.4 Rev. (1965); Geneva Convention IV, *supra* note 73, arts. 146-47.

binding upon the United States, the United Kingdom, and Iraq — impose on the acceding states an express obligation to provide such recourse through their internal fora. Thus, there is not only historical precedent for intervention and denial of immunity to states which act as Iraq has done, but there are also ample existing international treaties, conventions, agreements and enabling provisions to which Iraq, the United States, the United Kingdom and other allied nations are parties.

In the long term, the restriction of state immunity in cases involving *jus cogens* violations may be best served by exploring the establishment, through the United Nations, of new international tribunals attached to the ICJ where individuals have standing to sue for civil and/or criminal claims they may have against states. In the short term, however, in the absence of such tribunals, it is necessary to explore how the immediate application of the concept of universal jurisdiction might be applied by Kuwaiti and Kurdish victims to the system of law in the United States where the Genocide Convention has explicitly been incorporated into the statutory law of the land.

V. THE DENIAL OF SOVEREIGN IMMUNITY AS TO *Jus Cogens*: VIOLATIONS THROUGH THE GRANT OF JURISDICTION TO PERMANENT INTERNATIONAL TRIBUNALS ESTABLISHED FOR THAT PURPOSE

The reputation for impartiality and the international credibility of the ICJ is virtually undisputed. The limitation of the ICJ to protect individual human rights is, of course, embodied in its exclusive mandate to only undertake adjudication of disputes between sovereign states. In spite of this limited mandate, the ICJ regularly receives applications from individuals seeking redress against states. For example, between April 1, 1988 and July 31, 1989, some 1,200 such requests were received.¹⁶⁶

The time has long since arrived for the United Nations to place a new convention before the members of the General Assembly which would enable private individuals, non-governmental organizations, the United Nations Commission on Human Rights, regional human rights commissions and other certified entities to file complaints or raise petitions concerning criminal or civil disputes or claims against sovereign states, individual officials or governmental agencies, departments or other entities.

166. LAUTERPACHT, *supra* note 163, at 67 n.13.

While details would obviously have to be worked out, it is possible to envision the establishment of two new divisions of the ICJ for this purpose: a Criminal Division to effectively try those cases jurisdictionally defined as involving crimes under current customary international or treaty law, and a Civil Division to similarly entertain and hear cases involving purely civil disputes which may not be properly raised in the relevant municipal fora.

The rules of jurisdiction, as well as all other procedures of the new judge centered court, would be established by the tribunal itself. A rotating panel of three ICJ Judges could sit as an appellate court hearing on certiorari those appeals which two of the three, at any time, believed had merit. Since this new convention would effectively require signing states to pass any necessary implementing municipal legislation, the judgments, orders and rulings of the new court would be capable of being ultimately enforced through the relevant state municipal systems. Those states which elected to withhold agreement to the new convention would, of course, not be bound by proceedings brought and heard in absentia against them, but it is anticipated that such states would increasingly become pariahs in the eyes of the rest of the world, which status would be exacerbated by any ongoing unwillingness to appear and consent to jurisdiction. Criminal complaints could take a form similar to private prosecutions in the United Kingdom (a procedure unknown in the United States), whereby individual victims themselves, their heirs, successors, assigns or a certified representative or organization on their behalf, may initiate and carry out a prosecution on their behalf, with a tribunal empowered to adjudicate the charges and, if sustained, to award them compensation.

This is not the place for a detailed discussion of the many factors and issues which surround the proposal to establish such "People's Courts." It is, however, timely, in light of the difficulties existing under present international law and practice facing the quest for justice by the victims of recent events in Kuwait and Iraq, that such discussions begin at once and come quickly to the floor of the General Assembly.

VI. THE APPLICATION OF UNIVERSAL JURISDICTION IN CASES INVOLVING *Jus Cogens*: VIOLATIONS BY INDIVIDUAL STATES AND IN PARTICULAR UNDER THE LAW OF THE UNITED STATES

The creation of new tribunals within the ICJ is clearly long overdue and badly needed. In their absence, however, victims

are left with only the possibility of recourse to municipal courts when their human rights have been so violated that the acts clearly constitute international crimes. In such cases, the municipal courts of acceding nations may accept jurisdiction of such cases.

Historically, the concept of codifying international crimes and enforcement thereof has been associated with the movement for the establishment of an international criminal court. The establishment of such a court, however, is clearly not essential. In fact, the latest draft of the International Law Commission's (ILC) Draft Code of Offenses Against the Peace and Security of Mankind (the Code) is based upon the premise that enforcement would be carried out by municipal courts.

The usual basis of jurisdiction recognized in international law over such offenses is the principle of universal jurisdiction. It is jurisdiction to enforce sanctions on behalf of the international community against the contemporary enemies of mankind or the current *hostis humani generis*.¹⁶⁷ Enforcement proceedings against such abominable acts as those contravening the *jus cogens* compel the application of the doctrine of universal jurisdiction. In light of current United States practice, it appears most appropriate for the United States federal courts to lead the way.

The Restatement (Third) of the Foreign Relations Law of the United States (Restatement (Third)) explicitly sets a framework for United States federal court jurisdiction in such cases. Section 701 states the following:

- A state is obligated to respect the human rights of persons subject to its jurisdiction
- (a) that it has undertaken to respect by international agreement;
 - (b) that states generally are bound to respect as a matter of customary international law (§ 702); and
 - (c) that it is required to respect under general principles of law common to the major legal systems of the world.

Section 702 lists the now generally recognized *jus cogens* norms among the customary international law of human rights as follows:

167. MYRES M. McDUGAL ET AL., INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE Ch. 12, § 5 (1991).

A state violates international law if, as a matter of state policy, it practices, encourages, or condones

- (a) genocide,
- (b) slavery or slave trade,
- (c) the murder or causing the disappearance of individuals,
- (d) torture or other cruel, inhuman, or degrading treatment or punishment,
- (e) prolonged arbitrary detention,
- (f) systematic racial discrimination, or
- (g) a consistent pattern of gross violations of internationally recognized human rights.

Section 703, in setting out remedies for violations of human rights obligation states that “. . . an individual victim of a violation of a human rights agreement may pursue any remedy provided by that agreement or by another applicable international agreement.” Section 711 holds a state responsible under international law for any injury to a national of another state where the injury is caused by an act or acts which violate a human right, and it also reiterates the notion that the state’s obligation runs to all persons subject to its jurisdiction. In order for state liability to exist for violation of customary international law for acts or practices set out in Section 702, the abuse must be a matter of state policy and the practice or practices must be officially encouraged and condoned as to the state’s own citizens and/or aliens.¹⁶⁸

It is clear from the range of equipment and machinery left behind by fleeing Iraqis that was used exclusively for the purpose of torture, and the appearance and reports of victims inside Iraq as well as Kuwait, that torture and assassination are practices officially sanctioned and routinely used by the Iraqi Government. Under Section 713, Iraq has state responsibility for the injuries to and deaths of aliens resulting from violations of customary international law or any applicable international agreement, and the victims, as nationals of other states, pursuant to Section 711, have rights to any remedy provided by: Section 713(2)(a) international agreement between the injuring state and the state of nationality; 713(2)(b) the law of the injuring state; and 713(2)(c) the law of any other state. An action in the courts of the United States by Kuwaiti victims is thus possible under

168. RESTATEMENT (THIRD), *supra* note 101, § 702.

Section 713(2)(c).

It is indisputable that Iraq has violated the *jus cogens* and committed other violations of customary international law in contravention of multilateral treaties and agreements to which it has acceded and to which the United States has also acceded. It is also historically established that nations of the world have at various times intervened or taken jurisdiction to provide remedies to victims of such abuse. Penal compensation, for instance, was paid to victims of such violations of international law after both world wars.

As previously shown, the principle of the Restatement (Third) supports the exercise of United States court jurisdiction in cases of human rights abuses in violation of international law. Further, this concept has been upheld by the Second Circuit Court of Appeals in the *Filartiga* case.¹⁶⁹ Similarly, the principle of a sovereign state being liable for violations of the law of nations and human rights abuses was confirmed in the *Letelier* case, where a judgment was obtained after an assassination took place on the streets of Washington, D.C.¹⁷⁰

The argument here is that such *jus cogens* violations as those committed by Iraq, which are prohibited practices set out in Section 702 of the Restatement (Third), should be outside any protection of state immunity. Also, act of state considerations are in this analysis deemed to be inapplicable to such situations. Accordingly, the principle proposed is that such egregious international crimes may never be immunized and that to the extent that violators are protected, then international law is proportionately diminished. This idea is neither original nor new. Lord Wilberforce in addressing the fifty-eighth conference of the International Law Association stated that sovereign immunity “. . . is a concept devised by lawyers in the 19th century (and) is now being used by nations generally as a technique for denying compliance with [*jus cogens*] obligations.”¹⁷¹

The *Amerada Hess*¹⁷² opinion, must be distinguished from the Kuwaiti and Kurdish victims' cases in that it does not involve any *jus cogens* violations or Restatement (Third) Section

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

170. *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980).

171. INTERNATIONAL LAW ASSOCIATION, REPRINT OF THE FIFTY-EIGHTH CONFERENCE 513, 515 (1980); see also Hersch Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220, 221 (1951) [hereinafter Lauterpacht].

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

702 conduct or practices. Section 1605(a)(1) of the FSIA provides the basis for an exception to immunity as to Iraq in these kinds of cases. The section sets out an exception to immunity in those situations “. . . in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect, except in accordance with the terms of the waiver.”

Thus, if a state violates any of the fundamental norms embodied in the concept of *jus cogens* from which states may not derogate, then such state impliedly waives its immunity under the FSIA. *Jus cogens* principles of law undeniably go to the very essence of the public order of the international community and have in the twentieth century, after two disastrous world wars, come to be recognized as requiring absolute protection. The concept is even applied to limit treaties so that a treaty concluded in violation of a *jus cogens* norm is null and void.¹⁷³ It must be applied with even greater force to the unilateral acts of states which do not have the authority of treaty status. Accordingly, it is surely unwise to freeze in time any particular codification of sovereign immunity law when the development of international law itself is dynamic and constantly evolving. The FSIA, as with other such state immunity statutes, must be able to incorporate the developing standards in international law.

The days are long gone when one should even contemplate the necessity of requiring a state to explicitly provide consent and waive immunity for acts like genocide, and indiscriminate torture, including rape, of civilians in occupied territory. There is certainly no reasonable justification to expect that a state being accused of officially condoning and committing savage crimes against innocent civilians, inside and outside of its territory, will consent to be sued. The absurdity of the assertion of such a legal requirement for jurisdiction boggles the mind in this day and age, and brings the law into contempt. In the absence of any international tribunals where subject matter and personal jurisdiction may be based, at least in respect to this particularly small class of egregious *jus cogens* violations — acts which without doubt are unanimously condemned by the people and their governments throughout the world — the concept and practice

173. See Vienna Convention, *supra* note 144. See also Lauterpacht, *supra* note 171, at 221.

of universal jurisdiction must be applied.

Universal jurisdiction provides every state with jurisdiction of a limited number of criminal acts and claims, regardless of the *situs* of the offense and the nationalities of the offender and victim. While other types of claims require direct connections between the prosecuting state and the offense, the universality principle attached to *jus cogens* violations compels each and every state to have an interest in, and indeed a duty to, exercise jurisdiction over such serious violations of law.

Indeed, for centuries, individuals acting in their public or private capacities who committed such criminal acts have been regarded as *hostis humani generis* and the universality principle has long been applied to such persons.¹⁷⁴ Piracy, for instance, is the oldest offense invoking universal jurisdiction. Jurisdiction over the offense originally evolved under customary international law,¹⁷⁵ and it was eventually given Treaty recognition in the U.N. Convention on the Law of the Sea.¹⁷⁶ Treaty signatories have the right to assume jurisdiction over acts of piracy even if they have no connection with the piracy. Nonparties may assert universal jurisdiction over such acts under customary international law.

The next notable instance in the application of the *jus cogens* universality principle evolved with the trading of slaves, which is now also clearly a crime subject to every state's jurisdiction. States can recognize universal jurisdiction over slave trading by referring to customary international law,¹⁷⁷ the 1982 U.N.

174. Yoram Dinstein, *International Criminal Law*, 5 ISR. Y.B. H.R. 55, 55-68 (1975); L.C. Green, *International Crimes and the Legal Process*, 29 INT'L & COMP. L.Q. 567, 568-70, 573-75 (1980); Clarence J. Mann, *Personnel and Property of Transnational Business Operations*, in LEGAL ASPECTS OF INTERNATIONAL TERRORISM 399, 461 (Alona E. Evans & John F. Murphy eds., 1978); Jordan J. Paust & Albert P. Blaustein, *War Crimes Jurisdiction and Due Process: The Bangladesh Experience*, 11 VAND J. TRANSNAT'L L. 1 (1978); 1 Op. Att'y Gen. 509, 513 (1821) (citing Grotius). See also *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 116 (1784) ("crime against the whole world"); 1 Op. Att'y Gen. 509, 515 (1821) (universal jurisdiction recognized in cases concerning "crimes against the human family"); EMMERICH DE Vattel, *LAW OF NATIONS* 464-65 (Joseph Chitty ed., 1863) (recognizing violence against foreign ambassador as a "crime against mankind" and an "offence against the law of nations").

175. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 158 (1820); J.L. BRIERLY, *THE LAW OF NATIONS* 311-14 (6th ed. 1963).

176. U.N. Convention on the Law of the Sea, Dec. 10, 1982, art. 105, U.N. A/CONF.62/122. Convention on the High Seas, Apr. 29, 1958, art. 19, 13 U.S.T. 2312 (entered into force Sept. 30, 1962).

177. See Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 798 (1988); M.C. Bassiouni & Ved P. Nanda, *Slavery and Slave Trade*:

Convention on the Law of the Sea¹⁷⁸ and the Conventions aimed at abolishing the slave trade.¹⁷⁹ As with piracy under customary international law, a number of nineteenth century English international treaties developed a consensus that jurisdiction over slave traders was permissible in the absence of any connection between slave trading and the adjudicating state.

In the aftermath of the Second World War, universal jurisdiction was extended to several offenses other than piracy and slave trading. The post-war trials focused on a range of war crimes and crimes against humanity which then clearly became part of the *jus cogens*. These cases were frequently premised upon the universality principle, thereby extending the use of universal jurisdiction since courts of one state frequently tried and punished crimes committed outside of the state by foreign nationals.¹⁸⁰ For instance, the State of Israel's prosecution of Adolph Eichmann in 1961 and the recent trial of John Demjanjuk for crimes they allegedly committed before Israel was a state are clear examples of the exercise of universal jurisdiction for the adjudication of *jus cogens* violations. The Nuremberg, Tokyo and world wide affiliated trials discussed previously clearly extended the roster of crimes included under the *jus cogens* universality principle; indeed, the very establishment of the special tribunals themselves was based on a recognition of this principle.

More recently, universal jurisdiction has been expanded to cover other *jus cogens* violations involving terrorist acts and human rights violations which have come to be condemned by world opinion. This extension is reflective of the post-World War II awareness and concern of the international community and its unwillingness to further tolerate the types of egregious criminal acts which shock the conscience of the civilized world.

Steps Toward Eradication, 12 SANTA CLARA L. REV. 424 (1972); MAX SORENSON, MANUAL OF PUBLIC INTERNATIONAL LAW 365 (1968).

178. See *supra* note 176.

179. See, e.g., Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, T.S. No. 778; Protocol Amending the Slavery Convention, opened for signature Dec. 7, 1953, 1 U.S.T. 479; Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 3 U.S.T. 3201.

180. Willard B. Cowles, *Trials of War Criminals (Non-Nuremberg)*, 42 AM. J. INT'L L. 299 (1948); Telford Taylor, *The Nuremberg War Crimes Trials — War Crimes and International Law*, 1949 INT'L CONCILIATION 241; Quincy Wright, *War Criminals*, 39 AM. J. INT'L L. 257, 275-79 (1945); William Allen Zeck, *Nuremberg: Proceedings Subsequent to Goering et al.*, 26 N.C. L. REV. 350 (1948).

Moreover, a range of post-war treaties and conventions, as well as evolving customary international law, have been concerned with the jurisdiction of states to adjudicate and prosecute such crimes with which that state has no direct connection. Prominently included in the list of treaties are the four Geneva Conventions of 1949.¹⁸¹ *Jus cogens* violations under the Conventions are designated as "grave breaches" and include offenses such as torture, kidnapping, willful killing, biological experiments and the willful cause of great suffering or serious injury to body or health. Each party to the Geneva Conventions has legislative, adjudicatory and enforcement jurisdiction over the commission of these crimes, even if it has no connection with them and is not engaged in the armed conflict or occupation in the course of which the offense occurs.

In addition to and subsequent to the Genocide Convention of 1948 and the Geneva Conventions, a number of particular treaties and conventions have been signed which have the effect of applying the universality principle to other crimes, including the hijacking and sabotage of aircraft, hostage taking, crimes against internationally protected persons, the suppression and punishment of apartheid, and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁸² As noted, among others, by Professor Randall, the

181. The United States became a party to the Geneva Conventions on February 2, 1956. See generally Joyce Ada Cooke Gutteridge, *The Geneva Conventions of 1949*, 26 BRIT. Y.B. INT'L L. 294 (1949); Raymond T. Yingling & Robert W. Ginnane, *The Geneva Conventions of 1949*, 46 AM. J. INT'L L. 393 (1952); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armed Forces in the Field, August 12, 1949, art. 2, T.I.A.S. No. 3362, at 1; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, art. 2, T.I.A.S. No. 3363, at 1; Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, art. 2, T.I.A.S. No. 3364, at 1; Geneva Convention IV, *supra* note 73, at art. 2.

182. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565 (entered into force Jan. 26, 1973) [hereinafter Montreal Convention]; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, (entered into force Oct. 14, 1971) [hereinafter Hague Convention]. The United States became a party to the Hague Convention on September 14, 1971, and a party to the Montreal Convention, T.I.A.S. No. 7570 at 571, on February 28, 1973. A description of the Hague Convention, following the International Civil Aviation Organization's approval of the treaty, is contained in 64 DEP'T ST. BULL. 50 (1971); International Convention Against the Taking of Hostage, Dec. 17, 1979, *reprinted* in 18 I.L.M. 1456 (1979), G.A. Res. 34/146, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (1979) [hereinafter Hostage Convention]. The United States is a party. The Convention To Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, Feb. 2,

universality principle underlies and runs through each of these Conventions.¹⁸³ For example, the Hostage Convention states:

The State Party in the territory of which the alleged offender is found shall, *if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory*, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.¹⁸⁴

Consequently, though a number of these *jus cogens* violations have been part of customary international law for varying periods of time and became explicitly incorporated into interna-

1971, 27 U.S.T. 3949, [hereinafter OAS Convention], is a precursor to the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomats Agents, Dec. 14, 1973, 28 U.S.T. 1975, [hereinafter Internationally Protected Persons Convention]. See Edward Mickolus, *Multilateral Legal Efforts To Combat Terrorism: Diagnosis and Prognosis*, 6 OHIO N.U. L. REV. 13, 27-29 (1979). The OAS 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 for prosecution, as if the act had been committed in its territory" OAS Convention, *supra*, art. 5. The OAS Convention obliges the parties to prosecute only if extradition is not in order, as compared to the type of jurisdictional provision that obliges the parties either to extradite or prosecute. The second convention, the Convention on the Physical Protection of Nuclear Material, *opened for signature* Mar. 3, 1980, art. 10, 18 I.L.M. 1422, 1427, contains language that requires parties either to extradite or prosecute. Hence, this convention, as implemented in Convention on the Physical Protection of Nuclear Materials Implementation Act of 1982, Pub. L. No. 97-351, 96 Stat. 1663 (codified at 18 U.S.C. § 831, 1116 (1982)), may rely on the universality principle similar to the Hostage and Internationally Protected Persons Conventions. The Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 853, 896 (1986) (codified at 18 U.S.C. § 2331 (1987)), is noteworthy. The statute confers federal jurisdiction over extra-territorial terrorist acts against United States nationals. In connection with this statute, Senator Specter referred to universal crimes and the ability of any nation to prosecute those who commit the crimes. 132 CONG. REC. S8435-38 (daily ed. June 25, 1986) (statement of Sen. Specter). The Statute is exemplary of the proposition that universal jurisdiction today may evolve without deriving from an international agreement. Convention on the Suppression and Punishment of the Crime of Apartheid, adopted Nov. 30, 1973, 1015 U.N.T.S. 243, G.A. Res. 3068, U.N. GAOR, 28th Sess., Supp. No. 30, at 75, U.N. Doc. A/RES/3068 (1973), *reprinted in* 13 I.L.M. 50 (1974). The United States is not a party; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 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 (1984), *reprinted in* 23 I.L.M. 1027 (1984) [hereinafter Torture Convention]. This reprint of the Torture Convention is the draft form; minor revisions are indicated in 24 I.L.M. 535 (1985). Inexplicably, the United States is not a party. The offense may derive from crimes against humanity.

183. See *supra* note 177.

184. Hostage Convention, *supra* note 182, art. 8(1). For similar provisions see Torture Convention, *supra* note 182, art. 7(1); Internationally Protected Persons Convention, *supra* note 182, art. 7; Montreal Convention, *supra* note 182, at art 7; Hague Convention, *supra* note 182, art. 7.

tional criminal law after World War II, more recently a vast array of conventions and protocols have been opened and ratified by various states to formalize global concerns with such heinous activity.

In addition, those *jus cogens* norms protected by the U.N. Declaration of Human Rights have also been included in regional human rights declarations, conventions, protocols, resolutions and municipal law statements such as the Restatement (Third). Also, just as individuals and states have never been able to derogate from responsibility in respect of adherence to this compelling law, neither, it appears, does there exist any basis for derogation by a "perpetual objector" individual or state which has not signed a particular relevant Convention.

In his recently published work, *Aspects of the Administration of International Justice*, Elihu Lauterpacht specifically notes the occurrence of what he terms ". . . an expansion of jurisdiction in the delicate area of compliance with human rights." He refers to a ". . . relaxation of the standards of consent required to support an exercise of international jurisdiction,"¹⁸⁵ citing as a particular example the manner in which the Inter-American Commission on Human Rights (IACHR) conducts its proceedings of petitions on behalf of individuals filed against members of the Regional Organization of American States (OAS) which are *not* parties to the American Convention on Human Rights (the American Convention). Though the American Convention is not binding upon four states at the present time —Chile, Cuba, Paraguay and the United States — and thus is not legally applicable to them, the IACHR has nonetheless applied to those nonparties the human rights provisions of the American Declaration of the Rights and Duties of Man (the American Declaration). The IACHR has conveyed normative status upon the American Declaration as a result of its being adopted as a resolution by the General Council of the OAS of which Chile, Paraguay, Cuba and the United States are members.¹⁸⁶

This practice is little known but is quite significant in light of the common belief that the United States has consistently refused to be subject to any binding obligations in respect of human rights. In fact, the United States has accepted IACHR

185. LAUTERPACHT, *supra* note 163, at 30.

186. LAUTERPACHT, *supra* note 163, at 31.

jurisdiction over a number of individual human rights petitions filed against it alleging noncompliance with the standards set out in the American Declaration.¹⁸⁷

Thus, in light of the tendency toward flexibility in accepting universal jurisdiction because of the growing recognition of the importance of human rights, the case for recognition and acceptance of fundamental overriding principles of international law which are binding on all states is overwhelming. The least controversial of the *jus cogens* class of laws are the laws of genocide and crimes against humanity, the prohibition against piracy, the trade in slaves, apartheid and racial or ethnic discrimination, aggressive war, torture (which includes rape), hostage taking, summary murder or forced disappearance of individuals, aircraft hijacking and sabotage, and crimes against internationally protected persons. Hence, this relatively small number of fundamental norms is binding upon states in all circumstances, and persons or governments which violate any of these norms are the contemporary *hostis humani generis*. All states thus have not only the right but also the obligation to prosecute these offenses. As noted by dictum in the *Barcelona Traction* case:

An essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State By their very nature the former 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; they are obligations *erga omnes*.¹⁸⁸

Literally, then, the international obligations of upholding and prosecuting violations of the *jus cogens* rules are obligations *erga omnes*. They "flow to all" states, and just as states cannot derogate responsibility for obeying this fundamental code of behavior, neither should they abrogate responsibility to prosecute violating persons or other states.

As noted above, the ILC, following a directive of the General Assembly, has submitted a Code which identifies various acts as "crimes under international law." The Code has not yet been adopted by the General Assembly. In respect of state criminal responsibility, which concerns us here, the ILC defines an international crime — as contrasted with a delict or tort — as

187. LAUTERPACHT, *supra* note 163, at 31.

188. *Barcelona Traction, Light and Power Company, Ltd.*, 1970 I.C.J. 4, 33 (Feb. 5).

an act by a state which breaches an international obligation or right deemed essential and fundamental by the world community; i.e. the *jus cogens*. So, once again, it is clear that in the absence of an appropriate international tribunal or a formally adopted Code by the U.N. General Assembly, any prosecutions must depend upon individual state actions and recourse to relevant municipal and international laws and judicial fora.

In addition, while the concept of universal jurisdiction has usually been applied to individuals, there is no sound reason why it should not also apply to states whose criminal acts have contravened the *jus cogens* norms. Article 2(7) of the Charter is the most cited authority for the principle of nonintervention in the domestic affairs and jurisdiction of sovereign states. The language of 2(7) actually states that such “. . . matters which are essentially within the domestic jurisdiction of any state . . .” shall not be subject to intervention. *Jus cogens* violations, regardless of where they occur, are not only by their very nature not “essentially within” the domestic jurisdiction of an offending state, but compel the concern of every state and thus require the application of universal jurisdiction and responsive action by or on behalf of the international community.

It is compelling then, that in the face of such blatant contravention of *jus cogens* norms as in the Iraqi invasion and occupation of Kuwait and the recurring genocidal attacks on the Kurds, that obligations *erga omnes* exist. As such, they are imposed on the other states of the international community with the obligation to act only possibly being fulfilled, in the absence of an appropriate international tribunal, by one or another state accepting universal jurisdiction over the claims. This would result in formal charges and claims being filed and sustained against the State of Iraq, President Saddam Hussein, the members of its Revolutionary Command Council, the General Intelligence Department (the Mukhabarat), relevant members of the Officer Corps and all others whose involvement in the commission of the crimes recorded may be legally established.

The state best equipped to lead the way — and no small amount of fortitude, political and judicial will is required — is the United States where, to a very large extent, the ground has already been laid. In the *Letelier* case the United States District Court for the District of Columbia emphatically and clearly stated that no state has the “. . . discretion to commit or, to have one's officers or agents commit, an illegal act . . . to perpe-

trate conduct . . . contrary to the precepts of humanity as recognized in both national and international law”¹⁸⁹ Moreover, in *Filartiga* and *Trajano* the Court of Appeals for the Second and Ninth Circuits, respectively, clearly confirmed that 28 U.S.C. § 1350 provided the legal basis and necessary statutory authority for aliens to bring before the courts of the United States those individuals, including their leaders, who have violated the *jus cogens* norms of international law. The Supreme Court in *The Paquete Habana* recognized that federal courts must ascertain and apply international law “. . . as often as questions . . . depending upon it are duly presented for their determination (and that customary international law must be applied even in the absence of a treaty or other specific legislation).”¹⁹⁰

Iraq and its officials may also be viewed as clearly having waived any conceivable shred of immunity as a result of its acceptance of the terms of ceasefire contained in Security Council Resolution No. 687, which also requires Iraq’s acceptance of the terms of the previous Resolutions and in particular acceptance of liability and the responsibility to compensate all those injured and damaged by its acts.¹⁹¹ In addition, its waiver of immunity in respect of such offenses may be evidenced by its accession to the extensive list of international treaties, agreements and conventions discussed above, in which it has agreed to accept the obligation to adhere to a wide range of human rights protections and obligations.

Further, since the United States is also a party to a number of the relevant treaties, agreements and conventions which bind and require it to protect basic human rights, such as would be violated by the conduct and practices set out in section 702 of the Restatement (Third), the United States courts have ample authority to entertain jurisdiction on behalf of appropriate alien victims of crimes such as the Kuwaiti and Kurdish victims.

If the FSIA is applied, the problems of enforcing a judgment, which frustrated the plaintiff/victims in *Letelier*, are very real obstacles unless the courts interpret 28 U.S.C. § 1609 as confirming that immunity of a foreign state from attachment and execution (as in section 1604) does not apply when there

189. *Letelier v. Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980).

190. *The Paquete Habana*, 175 U.S. 677, 700 (1900); see also *Fernandez v. Wilkinson*, 505 F. Supp. 787, 798-99 (D. Kan. 1980).

191. SCOR Res. 687, U.N. SCOR, 2981st mtg., at 7, U.N. Doc. S/RES/687 (1991).

exist — as here — *international agreements in effect at the time of enactment of the FSIA (1976) to which the United States is a party*. As discussed earlier, all of the previously discussed treaties and covenants are relevant, and the letter and spirit of these international obligations do not envision enumerating rights under international law without correlative responsibilities and remedies being available in the event of their contravention.

While the argument advanced in this article is that the FSIA should not be applied in *jus cogens* violations cases, even if the FSIA is applied, to the extent that the Kuwaiti and Kurdish victims may bring an action under 28 U.S.C. § 1350 against the State of Iraq and immunity does not attach, then it is only a fair reading of the enforcement provisions in such cases that immunity should not be allowed to frustrate a judgment obtained by protecting property and assets of the very state in respect of which immunity is restricted. Since, however, the compelling logic is that the FSIA should never be applicable in such cases, this consideration would not have to be raised.

Aside from the FSIA, Iraq should clearly not be allowed to assert the act of state doctrine. Acts and practices complained of by the Kuwaiti and Kurdish victims can in no way be regarded as typical acts of state. Such a typical act of state may be the condemnation of land or the expropriation of property by a state within its own territory. *Jus cogens* violations should never again be cloaked with the political protection of state immunity, in any guise. The Restatement (Third) also clearly provides that claims arising from such acts and practices cannot be absolved by invoking the act of state doctrine.

VII. OBSTACLES AND OBJECTIONS TO THE DENIAL OF SOVEREIGN IMMUNITY TO IRAQ BY UNITED STATES COURTS

A. *Recovery — A Right Without A Remedy*

As we have seen, even if a foreign sovereign or state is denied jurisdictional immunity under the FSIA, there are severe restrictions imposed upon a judgment creditor's execution or enforcement against state assets. Though both commercial and tort claims may give rise to jurisdiction, presently only commercial creditors may execute on their judgments.

Successful plaintiffs in cases such as those under discussion here, would, in my view, have to obtain recovery through: one,

the introduction of a private bill granting a particular exception in these cases; or two, conversion of the United States judgment in a foreign state, such as the Federal Republic of Germany, where municipal law would allow enforcement against the state's assets in that jurisdiction. If, however, as argued above (see VI), United States courts (having to date never ruled on the issue) finally sustain subject matter jurisdiction holding that in respect of *jus cogens* violations state immunity can never attach, then the problem would not arise.

B. Increase in Litigation

A frequently heard argument is that should the United States federal courts become the "world's courts" for such human rights claims, then the result would be a vast increase in litigation which would provide additional stress to an already over-burdened system. The suggestion here is that it is more likely that the United States courts would provide an example for other municipal fora to follow and certainly not carry out this task by itself any more than it should seek to be the world's policeman. At this point in time, it is simply constitutionally and legally able to provide leadership. It must be stressed, in any event, that there is a built in limitation on the number of cases that could be brought since the class of offenses which may contravene the *jus cogens* is quite small. Since *jus cogens* represents only universal and peremptory norms of international law, only the most egregious violations would qualify for consideration by the courts.

C. Domestic Legal Doctrines and Procedural Practices as Barriers

Having disposed of the act of state doctrine, perhaps the two most significant domestic doctrinal or procedural barriers to such claims being heard are the discretionary doctrine of forum non conveniens and the need for the court to exercise personal jurisdiction over the defendant.

1. Forum Non Conveniens

The doctrine is discretionary with the court and is based on convenience to the parties in such a way that even if a district court has jurisdiction, it may refuse to hear a case if the action could be brought in a more appropriate forum. Relevant factors

include the cost of producing witnesses, the source of governing law, injustice to the parties and the location of evidence.

Dismissal under the doctrine is not permitted if there is no other forum in which the action may be brought, where the alternative forum does not permit litigation of the subject matter in dispute¹⁹² or where impartiality of the foreign forum is not present.¹⁹³ In the instance of the Kuwaiti/Kurdish claims, this would clearly appear to be the case; the true alternative fora would be Kuwait — where under municipal law the bar of absolute state immunity exists — and Iraq where not only is this also the case, but it is evident that no impartial proceedings could be held under current circumstances.

2. Jurisdiction

Under both 28 U.S.C. § 1350 and the FSIA, where subject matter jurisdiction exists, personal jurisdiction is conveyed subject to proper service of process and fulfillment of the requirements of due process. In *Texas Trading and Milling Corp.*¹⁹⁴ it was held and affirmed that the due process clause was applicable to a foreign state. Consequently, a court must determine whether minimum contacts exist between the defendant state and the forum sufficient to satisfy due process requirements.¹⁹⁵

Two types of personal jurisdiction have been recognized by the Supreme Court. If the claim is related to or arising out of a defendant's contacts with the forum, then specific jurisdiction exists. If the contacts are not connected with or so related then the court cannot exercise specific jurisdiction but may have general jurisdiction, which requires systematic, continuing contacts with the forum of a more material nature than those conveying specific jurisdiction.¹⁹⁶

In the instance of the Kuwaiti and Kurdish claims there would appear to be no reason why an appropriate federal district court may not exercise general jurisdiction over Iraq. Not only is

192. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981), *reh'g denied*, 455 U.S. 928 (1982).

193. *Phoenix Canada Oil Co. v. Texaco*, 78 F.R.D. 445 (D. Del. 1978), *aff'd*, 842 F.2d 1466 (3d Cir. 1988), *cert. denied*, 488 U.S. 908 (1988).

194. *Texas Trading and Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

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

196. *Helicopteros Nacionales de Colombia S.A. v. Hall*, 466 U.S. 408 (1984); *Perkins v. Benguet Consol. Mining*, 342 U.S. 437 (1952), *reh'g denied*, 343 U.S. 917 (1952).

there no constitutional bar to such jurisdiction,¹⁹⁷ but the Ninth Circuit Court of Appeals, with certiorari denied by the Supreme Court, has stated that such jurisdiction could be sustained against the Republic of Mexico based on that state's substantial, continuous, and systematic contacts with the United States, even though said contacts were not related to the specific cause of action.¹⁹⁸ Iraq's ongoing activities in the United States, its entering into a number of bilateral treaties with the United States and its previous use of the United States courts for unrelated disputes provide sufficient contacts to satisfy due process¹⁹⁹ as well as the requirements of fair play and substantial justice.²⁰⁰

Accordingly, on the basis of obstacles or objections based upon the requirements of law and practice, there is no sound reason to bar such claims as concern us here. Only political intervention, the death knell of an independent judiciary, can defeat the compelling exercise of jurisdiction by the appropriate federal district courts.

VIII. CONCLUSION

As discussed previously, there are adequate provisions in the substantive municipal laws of Kuwait (with some reservation), the United Kingdom and the United States, whereby causes of action exist for the acts and practices which resulted in the massive injury and deaths of innocent Kuwaiti and Kurdish victims of Iraq's aggression. It is also clear that the current municipal judicial posture in applying the relevant foreign state immunity statutes of all the three countries is discouraging in entertaining jurisdiction for actions against Iraq. Additionally, it is settled that the acts complained of constitute international crimes since these acts violate the *jus cogens* norms of customary international law and contravene a number of treaties acceded to by Iraq, the United Kingdom, and the United States.

The varying status and relationship of relevant international laws and treaties to municipal law in Kuwait, the United

197. *Helicopteros*, 466 U.S. at 414.

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

199. *See, e.g., Meadows v. Dominican Republic*, 628 F. Supp. 599 (N.D. Cal.), *aff'd*, 817 F.2d 517 (9th Cir. 1986), *cert. denied*, 484 U.S. 976 (1987); *Rush-Presbyterian — St. Luke's Medical Center v. Hellenic Republic*, 690 F. Supp. 682 (N.D. Ill. 1988) *aff'd*, 877 F.2d 574 (7th Cir.); *cert. denied*, 493 U.S. 937 (1989).

200. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

Kingdom, and the United States has also been discussed. In focusing on the latter in this article, it is evident that such international law and obligations form part of the municipal law of the United States with jurisdiction entertained under the doctrine of universal jurisdiction. In this context, the application of state immunity in instances of fundamental human rights abuses and international war crimes clearly indicates that such protection has historically evolved to become not only restricted, but inapplicable.

It is also clear that acts such as those committed in Kuwait and later in Iraq itself may be imputed to sovereign states which then must bear responsibility and liability. Additionally, the availability of a remedy for the victims and their families is a necessary correlative right to each cause of action, without which the law will lose credibility.

Finally, principles gleaned from the foregoing and applied to the laws of the United States, in particular to section 1350 and the FSIA, confront any Kuwaiti or Kurdish victim seeking to bring an action against the Government of Iraq in the United States courts.

Applicable causes of action under United States law clearly exist but the victims must distinguish *jus cogens* violations from standard torts in an action against a sovereign state. In the Kuwaiti/Kurdish/Iraqi context, this is not very difficult.

Prosecution against the State of Iraq and its previously mentioned officials is possible even under the FSIA: one, by attributing a waiver of immunity to Iraq in light of the acceptance of liability²⁰¹ and because of its violation of internationally accepted criminal acts in which it has agreed it will not engage; two, by interpreting the FSIA as being subject to the prohibition of those acts by the previous multilateral treaties of the Charter, the Universal Declaration, the Hague IV, and the Fourth Geneva, acceded to by both the United States and Iraq, with the result that such adjudication and enforcement is outside the FSIA protection; or three, as the preferred course, by breaking new ground and holding — in accord with, for example, the State Immunity Statute of the Federal Republic of Germany — that international law and the laws of the United States require that state immunity may not be applied in cases involving international crimes so egregious to be classified as part of the *jus*

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

cogens.

The act of state doctrine is clearly inapplicable in such cases and, with the ruling in the *Trajano* case, though particular in scope, a foundation has been laid for these types of cases to be brought before the courts of the United States.

No justification exists for considering the protection of a state by use of the political question doctrine any more than it does for sovereign immunity to state acts of the type discussed here. No sovereign state should be immune on grounds of political considerations from civil and criminal prosecution for the types of crimes committed against the Kuwaiti or Kurdish victims. Each state has an obligation to amplify the cries for justice uttered by those who have been maimed, tortured, brutally injured and killed by such systematic processes officially sanctioned as policy by a sovereign state. In the absence of an international tribunal, civilized nations must accept the obligation to provide, *erga omnes*, their municipal fora for such proceedings to take place.

It may be true that the criteria of impartiality would be better satisfied if the proceedings could be held before an established international tribunal, as discussed above, or in a more politically neutral country like Ireland or Holland. If the exercise of universal jurisdiction could be entertained in such a place, this might be explored. If not, in an imperfect world, rather than not going forward at all, the federal courts of the United States should at this time entertain jurisdiction and hear these cases. The alternative and easiest path is to do nothing, but this would produce a totally unacceptable result and heighten the contempt for the rule of law and legal systems everywhere.

This article therefore proposes that victims or their legal representatives should begin to file complaints in the district courts of the United States under section 1350 (28 U.S.C. § 1350, the Alien Torts Statute), on behalf of those eligible Kuwaiti and/or Kurdish victims. This is the first necessary step to ensure that justice is not only seen to be done, but in fact is done, on behalf of victims, many of whose interests will inevitably be unmet by the U.N. Compensation Commission.

Such a commitment by the United States to the rule of law in the world will set a precedent that will certainly, from time to time, be uncomfortable to its political and economic interests. It may even result in its being embarrassed or humbled on occa-

sion and will inevitably require the restraint of interventionary activity on the part of the world's most powerful nation. In the long term, however, surely the enhancement of the processes of law which require the nonviolent resolution of disputes and the protection of universally agreed fundamental rights — the hallowed *jus cogens* norms — will more likely produce the much articulated desire for peace and security.

Now it is time to clearly affirm and demonstrate that no sovereign state and no government official of even the highest rank is above the agreed fundamental norms of customary international law; this article shows that the *jus cogens* is firstly and indisputably embodied in customary international law as well as in a plethora of treaties, covenants, conventions and related protocols and agreements. It must emerge that states are subject to and not above the internationally accepted rules of law and are liable for appropriate sanctions and penalties if they are contravened. The tragic, cataclysmic events of the Persian Gulf War have provided us with the most significant possibility since the Second World War to affirm the rule of law and the inviolability of the basic rights of each individual member of the global community.

Perhaps, as never before, we have confronting us, as a result of massive human suffering, misery and death, an opportunity to create enduring international legal precedents and structures that will guarantee the principle that those basic rights of individual human beings are at least as sacred as the sovereignty of states. As always, pressures abound for this opportunity to be missed. This must not be allowed.