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Mathias Reimann
University of Michigan Law School

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A HUMAN RIGHTS EXCEPTION TO SOVEREIGN IMMUNITY: SOME THOUGHTS ON *PRINCZ v. FEDERAL REPUBLIC OF GERMANY*

Mathias Reimann*

INTRODUCTION

In a recent decision, the United States Court of Appeals for the District of Columbia Circuit granted sovereign immunity to the Federal Republic of Germany with regard to acts committed by the Nazi regime.¹ It thus dismissed the suit of a Jewish-American Holocaust survivor without considering the merits. The U.S. Supreme Court has denied certiorari.² Since the defendant has persistently refused to pay more than token compensation and since all diplomatic efforts on behalf of the claimant have failed, the plaintiff is left without any legal remedy against Germany.³

I should make it clear at the outset that I am not concerned here with the substantive merits of the plaintiff's claim. Whether he should actually receive the multimillion compensation sought, or whether he should be entitled to no more than the few thousand dollars offered by the defendant is an issue about which reasonable people can differ.⁴ Nor

* Professor of Law, University of Michigan Law School. Dr. jur., University of Freiburg, Germany (1982); LL.M., University of Michigan (1983). I thank Jose Alvarez, Jochen Frowein, John Jackson, Eric Stein, and Andreas Zimmermann for helpful comments on earlier drafts. I should point out that their willingness to help and comment does not mean they share the views presented here.

1. *Princz v. F. R. G.*, 26 F.3d 1166 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 923 (1995). The responsibility of the Federal Republic of Germany for acts committed by the Third Reich is not disputed since the Federal Republic considers itself legally identical with the German Reich. *See* 36 BVerfGE 1, 16 (1973).

2. 115 S. Ct. 923 (1995).

3. He is currently suing the successors of the companies for which he was forced to perform slave labor. *See infra* note 45 and accompanying text. These companies do not enjoy sovereign immunity, though they may have a variety of other defenses, such as statutes of limitations.

4. On the one hand, the amount offered by the German government is extremely small in comparison not only to the plaintiff's claim but also to the harm suffered. *See infra* note 39 and accompanying text. On the other hand, the offer allegedly amounts to what similarly situated claimants received under the overall compensation scheme worked out between the German government and the organizations representing the holocaust survivors; for a detailed description of these compensation plans, *see* BERICHT DER BUNDESREGIERUNG ÜBER WIEDERGUTMACHTUNG UND ENTSCHÄDIGUNG FÜR NAZIONALSOZIALISTISCHES UNRECHT SOWIE ÜBER DIE LAGE DER SINTI, ROMA UND VERWANDTER GRUPPEN, Deutscher Bundestag, 10 Wahlperiode, Drucksache 10/6287 of Oct. 31, 1986; for a brief summary, *see* Note Verbale of

must one overlook the fact that Germany has already spent and continues to disburse billions of dollars to compensate millions of holocaust victims.⁵

Instead, I am concerned with the fact that this victim of egregious human rights violations was denied even the opportunity to argue his case on the merits. It is in denying the plaintiff his day in court that *Princz v. Federal Republic of Germany* attests to a more general and disconcerting phenomenon. It vividly demonstrates that a victim of human rights abuses cannot sue the foreign sovereign who committed them in an American court.⁶ This is true even if the violations are undisputed, even if they are universally recognized as illegal as are torture or genocide, and even if the victim is an American citizen.

In an age of international recognition of human rights,⁷ and especially in a country priding itself on their promotion, such a situation is troublesome. It is true that victims of human rights violations can sue the (foreign) individuals who committed them in American courts⁸

the Embassy of the German Federal Republic No. 42/93 to the State Department (dated July 1993), reprinted in the appendix to the Brief for the Respondent in Opposition to the Petition for Certiorari in the Supreme Court of the United States at 1a-6a, *Princz v. F. R. G.*, cert. denied, 115 S. Ct. 923 (1995) (No. 94-909) [hereinafter *Brief*]. Also, the plaintiff apparently failed to apply for compensation when he was eligible under the compensations schemes set up and financed by the German government. *Brief* at 5. According to the defendant's counsel, even now the plaintiff is eligible under a compensation scheme implemented by the German government in 1992 for a lump sum of approximately \$3,400 and a monthly pension of \$340 (beginning August 1995) but refuses to apply. *Id.* at 5-6.

5. See BERICHT, *supra* note 4; according the defendant's counsel, Germany had paid approximately \$75 billion to some two million claimants as of 1994. *Brief, supra* note 4, at 5. For further details, see Zimmerman, *Sovereign Immunity and Violations of International Jus Cogens — Some Critical Remarks* (in this issue).

6. Under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1602-11 (1976), there are several exceptions to this rule, but they rarely apply in human rights cases. See *infra* notes 26-38 and accompanying text.

7. On the most recent developments, see Louis Henkin, *Preface* to HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY vii-xx (Louis Henkin & John Lawrence Hargrove eds., 1994) [hereinafter HENKIN & HARGROVE].

8. Suits can be brought either under the Alien Tort Claims Act, 28 U.S.C. § 1350 (1789), which allows actions by aliens only, and under the more recent Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note (Supp. IV 1992), which gives a cause of action to American citizens as well. These statutes are of little help in suits against foreign states, however. The Torture Victim Protection Act clearly applies only to individuals, not to states. See S. REP. NO. 249, 102d Cong., 1st Sess. 7 (1991). Whether the Alien Tort Claims Act can be invoked against foreign states is not entirely clear. See *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 436-37 (1988) (leaving the question open). The statutory language is not limited to individual defendants, and at least one court has applied the act against a state. *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246 (D.D.C. 1985) (alternative holding). Yet, even if the act does apply against states, foreign sovereigns sued under it can still invoke immunity under the FSIA. See *Amerada Hess*, 488 U.S. at 433-36. For an overview of current avenues of civil redress, see Diane F. Orentlicher, *Addressing Gross Human Rights Abuses: Punishment and Victim Compensation*, in HENKIN & HARGROVE, *supra* note 7, 425, at 448-59.

because such individuals normally are not entitled to sovereign immunity.⁹ While plaintiffs have occasionally been successful in such suits,¹⁰ in most cases actions against individuals will not help the victims. The individual torturer will often be personally unidentifiable, beyond the personal jurisdiction of American courts,¹¹ judgment proof, or, as is likely in the *Princz* case, dead. Thus in most cases, the victim's only hope for redress will be to sue the foreign state itself. The state, however, normally escapes liability by invoking sovereign immunity.¹²

In the last few years, there have been several suggestions and attempts to close off this escape route.¹³ Yet so far the efforts to exclude at least massive human rights violations from sovereign immunity protection have not borne fruit. This may change. Last term, a bill providing for such an exclusion was introduced into Congress and passed in the House of Representatives,¹⁴ but died before the term ended. There are plans, however, to reintroduce the bill.¹⁵ *Princz* and this pending legislation make it timely to bring the issue to the attention of the legal community again.

The scope of this brief comment is narrow. It is neither a full-fledged survey of all legal and political aspects of the problem, nor does it reiterate or take issue with existing case law and scholarship. It merely analyzes the *Princz* case and the Congressional bill in the context of

9. The FSIA applies only to states and their agencies and instrumentalities, but not to individuals. 28 U.S.C. § 1603(a-b). *But cf.* *Trajano v. Marcos* (*In re Estate of Marcos Litigation*), 978 F.2d 493, 497 (9th Cir. 1992), *cert. denied sub nom. Marcos-Manotoc v. Trajano*, 113 S. Ct. 2960 (1993) (FSIA trumps Alien Torts Claims Act when an individual is sued in his or her capacity as a state official). Individuals may, however, be protected by immunity because they are a (current) head of state, *Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994), or because of their diplomatic or consular status, *see Tom Lininger, Overcoming Immunity Defenses to Human Rights Suits in U.S. Courts*, 7 HARV. HUM. RTS. J. 177, 190-91 (1994).

10. The best known example is *Filartiga v. Pena Irala*, 630 F.2d 876 (2d Cir. 1980). *See generally Anne-Marie Burley, The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 462 (1989).

11. In personam jurisdiction is clearly required. *See S. REP. NO. 249*, 102d Cong., 1st Sess. 7 (1991). Individual defendants therefore cannot be haled into American courts if they neither come to and are served with process in, nor have at least minimum contacts with, the United States.

12. The Supreme Court's latest decision in the area of sovereign immunity provides another example. *Saudi Arabia v. Nelson*, 113 S. Ct. 1471 (1993) (involving alleged groundless and inhuman imprisonment and beatings).

13. *See infra* notes 27-38 and accompanying text. *See also Jordan J. Paust, Draft Brief Concerning Claims to Foreign Sovereign Immunity and Human Rights*, 8 HOUS. J. INT'L L. 49 (1985).

14. *See infra* note 77 and accompanying text.

15. *See Holocaust Victim Loses Court Fight Against Germany*, LEGAL TIMES, Jan. 23, 1995, at 19.

the debate about human rights and sovereign immunity. Part I outlines the legal developments preceding the case. Part II presents the courts' decisions, explaining why after *Princz* any initiative rests in the hands of Congress. Part III briefly summarizes the arguments in favor of denying sovereign immunity for massive human rights violations. Finally, Part IV considers the impact of the act of state doctrine on human rights cases. Some of the thoughts presented here have been explored in greater depth by others, and some will need to be fleshed out in greater detail.¹⁶

Though narrow in scope, this article is emphatic in its message. It is time to deny immunity to foreign sovereigns for torture, genocide, or enslavement, at least when they are sued by Americans in American courts.¹⁷ Such a denial would be consonant with two developments that have marked international law since World War II: the restriction of sovereign immunity and the expansion of human rights protection.

I. BACKGROUND: IMMUNITY DESPITE VIOLATION OF *JUS COGENS*

A. *Human Rights Law and Foreign Sovereign Immunity Law*

It is important to recognize at the outset that the plaintiff's dilemma in cases like *Princz v. Federal Republic of Germany* is the result of a clash between two sets of rules — and of a particular way to resolve it.

On the one hand, fundamental human rights are part of international law, as a plethora of conventions illustrates.¹⁸ More importantly, a small core of such rights is now widely accepted as *jus cogens*, i.e., as that part of international law which is not only binding on all states regardless of their consent, but which also permits no derogation.¹⁹ Whatever other human rights may fall into this category, it is established that among them are protections against genocide, enslavement, murder, and

16. See also Paul L. Hoffman & Nadine Strossen, *Enforcing International Human Rights Law in the United States*, in HENKIN & HARGROVE, *supra* note 7, at 477, 493–502 (making various suggestions how the Clinton administration should strengthen the protection of human rights).

17. For the reasons for this limitation, see the discussion in Part III.

18. The most important conventions are reprinted in BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW: SELECTED DOCUMENTS AND NEW DEVELOPMENTS* 339–475 (1994); for overviews, see 1 LASSA OPPENHEIM, *OPPENHEIM'S INTERNATIONAL LAW* 983–1030 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 553–602 (4th ed. 1990).

19. On the concept of *jus cogens*, see Article 53 of the Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969); BROWNLIE, *supra* note 18, at 512–15.

torture.²⁰ A state that commits or permits such acts indisputably violates international law, irrespective of membership in a human rights convention. Since customary international law, including *jus cogens*, is part of the municipal law of the United States,²¹ such a state violates U.S. law as well.²²

On the other hand, foreign states are, as a general rule, immune from suit in the courts of another sovereign. This general rule is not only part of customary international law,²³ but a part of municipal law as well. In the United States, it was statutorily enacted by Congress in the Foreign Sovereign Immunities Act of 1976 (FSIA).²⁴

These rules come into conflict when a plaintiff sues for a massive human rights violation in an American court because the first rule establishes the wrongfulness of the act while the second prevents American courts from hearing complaints about it. At this point one needs to decide which set of rules trumps. On the international level, the core provisions of human rights law are arguably superior to sovereign immunity law, because the former is *jus cogens* while the latter is only a non-peremptory rule. On the domestic level, both have equal rank as federal law. Nonetheless, it is generally accepted that the FSIA takes precedence as far as it applies. This acceptance rests on two important premises: that international law imposes no obligation to provide access to domestic courts for claims that its norms have been violated, and that Congress therefore has the power to limit the jurisdiction of both federal

20. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) [hereinafter RESTATEMENT (THIRD)], § 702 note 11; Comm. of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 940-42 (D.C. Cir. 1988) (prohibition of slavery and murder); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 717 (9th Cir. 1992) (torture); Princz v. F. R. G., 26 F.3d 1166, 1174, 1179-81 (D.C. Cir. 1994); Jeffrey M. Blum & Ralph G. Steinhard, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53 (1981); BROWNIE, *supra* note 18, at 153 (for genocide, enslavement, and crimes against humanity); MENNO T. KAMMINGA, INTER-STATE ACCOUNTABILITY FOR VIOLATIONS OF HUMAN RIGHTS 158 (1992) (torture, slavery, and right to life). Particularly genocide and torture are outlawed by international conventions. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (ratified by the U.S. on Nov. 4, 1988, and codified at 18 U.S.C. § 1091); Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027 (1984), *modified by* 24 I.L.M. 535 (1985) (ratified by the U.S. on Apr. 30, 1994, and codified at 18 U.S.C. § 2340).

21. The Paquete Habana, 175 U.S. 677, 700 (1900); Rest. 3d § 111 (1).

22. This does not necessarily mean that a plaintiff has a cause of action or an actual remedy for such a human rights violation, only that international and thus domestic American law establish the wrongfulness of the act. In fact, international law normally does not establish a cause of action, but (foreign or domestic) municipal law often will, e.g. in the law of torts.

23. See *infra* notes 80-84 and accompanying text.

24. 28 U.S.C. §§ 1330, 1602-11 (1988).

and state courts in cases against foreign sovereigns.²⁵ In short, suits against foreign states — even for violations of international law — are allowed only to the extent permitted by domestic law, i.e. by the FSIA.

B. *Human Rights Claims under the Foreign Sovereign Immunities Act*

The crucial question therefore is whether the FSIA allows suits against foreign sovereigns in cases of massive human rights violations committed in a foreign country. A plain reading of the act suggests that it does not. The FSIA lists several explicit exceptions to the general rule of immunity, most importantly for commercial activities, but it contains no such exception for infractions of human rights.²⁶ Yet, far from settling the issue, this is only the beginning of the debate about the relationship between sovereign immunity and violations of international law. Plaintiffs and scholars have contended that notwithstanding the lack of an explicit exception in the FSIA, immunity should not be granted where the foreign sovereign has violated international law. This argument proceeds on two levels.

On the first level, the argument is that violations of international law are not governed by the FSIA at all because Congress did not intend to affect remedies for such violations.²⁷ This proposition was rejected in *Argentine Republic v. Amerada Hess Shipping Corp.*²⁸ The plaintiff sought compensation under the Alien Tort Statute (ATS) for the loss of a ship which the Argentine Air Force allegedly had damaged in violation of international law during the Falklands war. A unanimous Supreme Court, pushing aside the ATS, first decided that the FSIA is "the sole basis for obtaining jurisdiction over a foreign state in our courts."²⁹ It then held that Congress did not intend to exclude violations of international law from the immunity rule under the FSIA. The Court's interpretation of the act is plausible. The FSIA in fact contains one explicit, though very limited, exception for violations of internation-

25. This authority is part of the foreign affairs powers granted to Congress under Article I, Section 8 of the United States Constitution; with regard specifically to the federal courts, it can also be justified under Article III, Section 1.

26. See 28 U.S.C. § 1605 (1988).

27. See *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246, 253-54 (D.D.C. 1985) (FSIA does not apply to acts in clear violation of international law); but cf. notes 48-50 and accompanying text *infra*.

28. 488 U.S. 428 (1988).

29. *Id.* at 434. Justices Blackmun and Marshall concurred in part because they did not agree with the majority's decision regarding the various exceptions to immunity under the FSIA; unlike the majority, they did not consider them to be properly before the Court. *Id.* at 443-44.

al law³⁰ which in turn suggests that the immunity rule applies in all other situations. In sum, "immunity is granted in those cases involving alleged violations of international law that do not come within one of the FSIA's exceptions."³¹

This leaves only arguments on the second level, namely that one or more of the FSIA's exceptions indeed apply. In *Amerada Hess*, the Supreme Court gave those invoked by the plaintiff short shrift. The exception for torts occurring within the territorial jurisdiction of the United States was quickly rejected since the attack on the ship had taken place in the South Atlantic. The court also found the act's treaty and waiver exceptions inapplicable for reasons that are best considered in the context of the *Princz* decision, discussed below.³²

A student comment responded to *Amerada Hess* and pointed out that there remained a way to allow suits for massive human rights violations in spite of the Supreme Court's holdings.³³ The decision left open the option to consider a violation of international *jus cogens* as an implicit waiver of immunity under the FSIA. The authors suggested that in cases of massive human rights violations, immunity be denied on this ground.³⁴ This approach fits traditional conceptions of waiver poorly since it construes waiver where there is no indication of any actual will to forego protection.³⁵

This waiver rationale was recently rejected, albeit with obvious regret, in *Siderman de Blake v. Republic of Argentina*.³⁶ The plaintiffs sued, among other things, for injuries suffered from unlawful detention and torture. The Ninth Circuit Court of Appeals recognized especially torture as a clear violation of international *jus cogens*.³⁷ It also endorsed the student comment's argument for denying immunity, but only as matter of international law. Nonetheless, the court felt, the Supreme Court's unequivocal message in *Amerada Hess* demanded strict

30. 28 U.S.C. § 1605(a)(3) (1988) provides an exception from immunity in certain cases "in which rights in property taken in violation of international law are in issue."

31. *Amerada Hess*, 488 U.S. at 436 (1988).

32. *Infra* notes 48-54 and accompanying text.

33. Adam C. Belsky et al., Comment, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CAL. L. REV. 365 (1989) [hereinafter *Implied Waiver*].

34. *Id.*

35. Even aside from waiver, the comment presented an interesting argument in favor of denying immunity for *jus cogens* violations, relying on the nature and function of *jus cogens* particularly in the area of human rights. We will turn to the substance of this argument when we consider the desirability of legislative changes, in Part III, *infra*.

36. 965 F.2d 699 (9th Cir. 1992).

37. *Id.* at 716-17.

adherence to domestic law, i.e. to the limits set by the FSIA. Since the violation of *jus cogens* on foreign soil did not fall under any of the act's exceptions, immunity could not be denied on this ground.³⁸

Amerada Hess and *Siderman* made clear that every plaintiff suing a foreign sovereign for human rights violations in an American court was fighting a very difficult uphill battle. When *Siderman* was decided, however, Hugo Princz's case against the Federal Republic of Germany was already pending in the Federal District Court for the District of Columbia.

II. THE *PRINCZ* CASE: AFFIRMATION AND EXTENSION

A. A Holocaust Survivor's Tale³⁹

When World War II broke out in 1939, seventeen-year old Hugo Princz and his family were American citizens living in Czechoslovakia, a German-occupied protectorate of the Third Reich. In 1942, shortly after Germany's declaration of war on the United States, they were arrested as enemy aliens, as was the internationally recognized routine in such cases. Normally, foreign nationals were then exchanged to their home country. Since the Princz family was Jewish, however, the German authorities disregarded their American citizenship and sent them to a concentration camp.

Hugo Princz's fate between 1942 and 1945 is a tale of horror. He was separated from his parents and his sister, who died probably in the Treblinka concentration camp. Hugo and his brothers were interned at Auschwitz and then leased as slave laborers to German industrial concerns supporting the war effort. When his brothers suffered work injuries, they were starved to death virtually before the plaintiff's eyes in the Birkenau "hospital." After a few months in the Warsaw ghetto, Hugo Princz was again forced to perform slave labor under inhuman conditions, this time in an underground facility of the Messerschmidt aircraft factory. Towards the end of the war, he and his fellow prisoners were herded into cattle cars and were en route to execution when American soldiers finally liberated him.

Since the Nazis had stenciled "USA" on Princz's clothing, American

38. *Id.* at 718-19. The court found, however, that Argentina had waived its immunity by using the assistance of American courts in the persecution of the victims, *id.* at 720-22.

39. The following fact summary is based on the two decisions rendered in the case, *Princz v. F. R. G.*, 813 F. Supp. 22, 23-25, 28 (D.D.C. 1992) and *Princz v. F. R. G.*, 26 F.3d 1166, 1168-69, 1176-78 (D.C. Cir. 1994), as well as the original complaint, *Princz v. F. R. G.*, (D.D.C. 1992) (No. 92-0644) (on file with the author). The facts are essentially undisputed.

army personnel recognized him as a fellow citizen. Therefore he was not brought to a Center for Displaced Persons like other prisoners, but was checked into an American army hospital. He later returned to the United States and now lives in New Jersey.

Princz's many efforts to get compensation for his suffering ultimately failed. He found himself disqualified from all compensation funds for varying reasons — because at the time of his enslavement he was an American citizen, because he had not been processed through a Center for Displaced Persons, because he failed to apply before an extended deadline of which he was not aware, etc.⁴⁰ In 1986, Mr. Princz began to seek an *ex gratia* payment from the German government. Despite the support of Senator Bradley, the State Department, both Houses of Congress,⁴¹ and ultimately President Clinton himself,⁴² the German government adamantly refused to make such a payment, fearing an avalanche of claims.⁴³ Instead, the defendant referred the plaintiff to the awards available under the general compensation schemes. The plaintiff and his lawyers, however, refused such small sums as an offense to Mr. Princz's dignity.⁴⁴ In March of 1992, Princz filed suit.⁴⁵

B. *The Case in the District Court*

It seemed that after *Amerāda Hess* and *Siderman*, the Federal Republic of Germany was entitled to sovereign immunity as a matter of course. But after an "explosive hearing,"⁴⁶ Judge Stanley Sporkin denied

40. In a letter to the *New York Times*, the defendant's counsel alleged that the plaintiff did not file a claim with the Jewish Claims Commission in New York which distributed funds to Nazi victims. See *Germany Offers Fair Holocaust Reparations*, N.Y. TIMES, Oct. 10, 1994, at A10. Allegedly, the plaintiff also refused to apply for a lump sum payment and a monthly pension under a scheme implemented by the German government and the Claims Conference in 1992. See *supra* note 4.

41. See S. Res. 162, 103d Cong., 1st Sess. (1993); H. R. Res. 323, 103d Cong., 2d Sess. (1994).

42. President Clinton raised the matter personally with German Chancellor Helmut Kohl at a meeting on Jan. 31, 1994. *Princz v. F. R. G.*, 23 F.3d 1166, 1177 (1994) (Wald, J., dissenting).

43. See Eva M. Rodriguez, *Survivor Can't Sue Germany*, LEGAL TIMES, July 11, 1994, at 6. Compensation for slave labor performed during World War II is currently much debated and actually litigated in Germany, particularly with regard to Eastern European victims; see ALBRECHT RANDELZHOFFER & OLIVER DÖRR, *ENTSCHÄDIGUNG FÜR ZWANGSARBEIT* (1994).

44. See Rodriguez, *Survivor Can't Sue Germany*, *supra* note 43, at 6.

45. Plaintiff demanded \$17,000,000 as compensation for the slave labor he was forced to perform, but listed as causes action false imprisonment, assault and battery, infliction of emotional distress, and quantum meruit. Complaint at 12-17, *Princz v. F. R. G.*, 813 F. Supp. 22 (D.D.C. 1992) (No. 92-0644).

46. See Eva M. Rodriguez, *Germans Still Cool to Princz's Claim*, LEGAL TIMES, Feb. 14, 1994, at 16. The article does not specify what exactly transpired at the hearing. The transcripts of the hearings on Dec. 11, 1992 and on Apr. 4, 1993 show that Judge Sporkin was

the defendant's motion to dismiss and found that the court had jurisdiction.⁴⁷ In his indignant opinion one can identify three reasons for this surprising result.

First, the court found the FSIA inapplicable. It recognized that according to *Amerada Hess*, the act was the sole basis for jurisdiction, but Judge Sporkin insisted that "the Foreign Sovereign Immunities Act has no role to play where the claims alleged involve undisputed acts of barbarism committed by a one-time outlaw nation."⁴⁸ Judge Sporkin tried to distinguish *Amerada Hess* by writing that "the Supreme Court did not have such extraordinary facts as those presently before this Court in rendering its decision."⁴⁹ He also refused to believe "that, in enacting the Foreign Sovereign Immunities Act, Congress contemplated a factual scenario akin to that at bar."⁵⁰ In short, he held that notwithstanding the FSIA and the Supreme Court's insistence that the act permitted no unwritten exception, there was no immunity for human rights violations of such magnitude.

Second, the court denied the defendant the right to invoke the FSIA because a "government which stands in the shoes of a rogue nation the likes of Nazi Germany is estopped from asserting U.S. law in this fashion."⁵¹ The justification for this unusual argument was that "to allow otherwise would create a severe imbalance in the reciprocity and mutual respect which must exist between nations, and would work intolerable injustice against the plaintiff and the principles for which this country stands."⁵²

Finally, Judge Sporkin found that the plaintiff had a right of access to the courts because of his American citizenship. "If Mr. Princz's citizenship means anything, it must mean that he can seek vindication of

unwilling to listen to defense counsels' legal arguments; the respective excerpts from the transcripts are reprinted in the appendix to the *Brief, supra* note 4, at 58a-63.

47. *Princz v. F. R. G.*, 813 F. Supp. 22 (D.D.C. 1992).

48. *Id.* at 26. Judge Sporkin's refusal to apply the FSIA created a problem of its own. If the FSIA is the only basis for jurisdiction over a foreign sovereign (as *Amerada Hess* indicates), finding the FSIA inapplicable left not only the German government without immunity, but the court without jurisdiction, and thus it could not possibly help the plaintiff. Judge Sporkin did not address, and perhaps overlooked, this problem, but it played a major role in the decision on appeal. The Court of Appeals found that even if the FSIA was inapplicable to events occurring over thirty years before its enactment, the action still had to be dismissed, because the federal courts lacked a jurisdictional basis. *Princz v. F. R. G.*, 26 F.3d 1166, 1176 (D.C. Cir. 1994). At least theoretically, however, this left open the possibility of refileing the case in state court.

49. 813 F. Supp. 22, 26 (D.D.C. 1992).

50. *Id.*

51. *Id.*

52. *Id.*

his rights in the courts of this nation An American court must be available to the plaintiff, particularly since every other avenue of redress has been foreclosed to him."⁵³ Closing the court doors would mean to inflict "another horrendous indignity" upon the plaintiff who had already suffered enough.⁵⁴

To criticize these arguments as untenable under the FSIA and according to conventional legal reasoning is easy but would miss the point. Judge Sporkin did not endeavor to write a conventional opinion. Instead, his very point was to deny immunity despite all authority to the contrary because he strongly felt that justice forbade closing the court's doors to the plaintiff. As a matter of such higher justice, his reasoning is neither absurd nor unappealing. The problem is only that, as the Court of Appeals put it, "such is not the law."⁵⁵

C. The Case in the Court of Appeals

A divided panel of the Court of Appeals reversed. It granted the defendant immunity, consequently found that the court lacked jurisdiction, and dismissed the case.⁵⁶

Much of the long and complex opinion dealt with the question whether the FSIA applied retroactively to events that occurred more than thirty years before its enactment. This aspect is of little interest here, and the majority left the retroactivity question open. We will focus on the part of the opinion that proceeded on the assumption that the FSIA applied.

In contrast to Judge Sporkin below, the Court of Appeals took a conventional approach. Both the majority and the dissent cited *Amerada Hess* at the outset⁵⁷ and never doubted that human rights violations by a foreign sovereign are actionable in American courts only to the extent permitted by the FSIA (assuming its retroactive effect). This narrowed the inquiry dramatically because at this point the only remaining question was whether any of the FSIA's exceptions from the rule of immunity applied. It is here that the majority and the dissent parted ways.

Judge Ginsburg, writing for the majority, considered and rejected three possibilities. He began with the commercial acts exception and discussed whether the defendant's leasing of the plaintiff as a slave laborer to private corporations amounted to a "commercial activity" as

53. *Id.* at 27.

54. *Id.*

55. *Princz v. F. R. G.*, 23 F.3d 1166, 1169 (D.C. Cir. 1994).

56. *Id.*

57. *Id.* at 1169, 1178.

defined in the FSIA. He considered the question a close one but ultimately irrelevant. Even when a sovereign defendant's activity is indeed "commercial," it triggers the exception from immunity only if it is connected with the United States. At minimum, the activity must cause a "direct effect" in the U.S.; Judge Ginsburg concluded that merely the continued suffering of Mr. Princz in the United States was not a sufficiently direct effect.⁵⁸

The treaty exception was rejected as well. In *Amerada Hess*, the Supreme Court had pointed out that according to the legislative history, this exception required that international agreements "expressly conflict" with the FSIA's immunity provisions.⁵⁹ The Court had interpreted this to mean that a treaty must "create private rights of action . . . to recover compensation from foreign states in United States courts."⁶⁰ Yet, Article 52 of the Hague Convention on land warfare, on which Mr. Princz relied,⁶¹ had consistently been read not to provide such a right.⁶²

The most difficult issues were presented by the waiver exception. Certainly, Germany had never expressly consented to being sued for Nazi atrocities in American courts. But under the FSIA, a foreign sovereign may also waive immunity "by implication."⁶³ This raised the question whether the Third Reich had implicitly waived its immunity by violating *jus cogens*. Judge Ginsburg considered the constructive waiver argument made in the student comment cited above,⁶⁴ but concluded that "an implied waiver depends upon the foreign government's having at some point indicated its amenability to suit."⁶⁵ Following *Siderman*, he found that violations of *jus cogens* in and of themselves do not amount to such an indication. He thus rejected the waiver exception as well.⁶⁶

58. *Id.* at 1171-73.

59. 488 U.S. at 442 (quoting H. R. REP. NO. 1487, 94th Cong., 2d Sess. 17 (1976); S. REP. NO. 1310, 94th Cong., 2d Sess. 17 (1976)).

60. *Id.*

61. Convention with Respect to the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, reprinted in THOMAS BARCLAY, INTERNATIONAL LAW AND PRACTICE 130-43 (1917). This was apparently the only convention invoked by the plaintiff. Both the United States and Germany are parties to the convention.

62. *Princz v. F. R. G.*, 26 F.3d 1166, 1175 (1994).

63. 28 U.S.C. § 1605(a)(1).

64. Implied Waiver, *supra* note 33.

65. *Princz v. F. R. G.*, 26 F.3d 1166, 1174 (1994).

66. The waiver argument also depended on another assumption, namely that Nazi Germany had actually violated *jus cogens*. The problem here was not whether genocide, enslavement, and similar acts were prohibited by absolutely binding norms of international law — Judge Ginsburg followed *Siderman* in holding that they were — but whether such *jus cogens* existed in 1942-45. This was doubtful because massive human rights infringements

Judge Wald's disagreement with the majority opinion was narrow but decisive.⁶⁷ In her long and spirited dissent, she focused on the waiver issue. She essentially endorsed the argument of the student comment, which she duly cited, and concluded that violations of *jus cogens* should be considered an implicit waiver of immunity. A state committing such violations, she maintained, loses its claim to immunity under international law.⁶⁸ Since domestic law must be construed consistently with international law, this justifies a denial of immunity under the FSIA as well. Judge Wald found such a construction possible in light of the inconclusive language of the FSIA and of its legislative history. She also considered her approach compatible with the intentionality requirement of the waiver exception because, at least in this case, "Germany could not have helped but realize that it might one day be held accountable for its heinous actions by any other state, including the United States."⁶⁹

D. *The Significance of the Case for Human Rights Suits*

For those wishing to sue foreign sovereigns in American courts for human rights violations suffered abroad, *Princz* destroyed whatever hopes were left after *Amerada Hess* and *Siderman* through a combination of two elements.

On the one hand, the decision affirmed the principle that the FSIA is the exclusive jurisdictional basis in such suits. After *Amerada Hess* had established this principle generally for violations of *jus cogens*, and *Siderman* had endorsed it specifically for human rights cases, *Princz* now strengthened it further. By rejecting the District Court's arguments, the Court of Appeals refused to limit or evade this fundamental rule, either on account of the unprecedented scale of the human rights violations involved or because of the plaintiff's American citizenship.

On the other hand, the case demonstrated that it is nearly impossible for plaintiffs successfully to invoke any of the FSIA's exceptions. Most importantly, the treaty exception to the FSIA turns out to be worthless to human rights plaintiffs. If a treaty, in order to warrant denial of immunity, must grant a private cause of action to sue in American courts, this rules out not only the Hague Convention on land warfare

were first openly recognized as violations of international law in the Nuremberg Trials, i.e. after World War II. Nonetheless, Judge Ginsburg wrote, without further analysis, that the Third Reich had violated *jus cogens* norms on an unprecedented scale. *Id.* at 1174.

67. *Id.* at 1176-85.

68. *Id.* at 1183.

69. *Id.* at 1184.

invoked by Hugo Princz, a largely forgotten and rarely applicable instrument, but virtually *all* modern human rights conventions as well. Since none of those ratified by the United States grants a private right to sue a foreign sovereign in American courts,⁷⁰ it appears that they cannot trigger the treaty exception of the FSIA. The commercial exception will normally not help a plaintiff, even if he is enslaved abroad for commercial gain, since the "direct effect" requirement is not fulfilled by the continued suffering in the United States.⁷¹ Finally, the waiver exception will hardly ever apply if violations of *jus cogens* do not count as constructive waiver. It is almost unthinkable that a foreign sovereign will openly consent to being sued in American courts on human rights violations.⁷² That leaves only cases in which the defendant is deemed to have waived its immunity in some other manner, although not really intending to do so. Such cases will be very rare.⁷³

If *Princz* makes the situation of human rights plaintiffs so hopeless, did the Court of Appeals get the law wrong? Unfortunately, the answer is no, at least if wrong means contrary to existing authority and accepted rules of legal reasoning.

The insistence on the general applicability of the FSIA even to violations of *jus cogens* was largely dictated by *Amerada Hess*. It is true

70. The Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 20, provides no private cause of action. The International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (ratified by the United States on June 8, 1992) requires the signatory states to provide effective remedies for violations of its provisions (art. 2) but is not self-executing. See Sen. Comm. on Foreign Relations, Report on the International Covenant on Civil and Political Rights, S. REP. NO. 23, 102d Cong., 1st Sess. 19 (1992). Under Article 14 of the Convention Against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment, *supra* note 20, the signatories must provide victims with remedies and a right to compensation. The convention was implemented by the Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note, which, however, grants remedies only against individuals, not against states, and does not affect the sovereign immunity of foreign states. See *supra* note 8.

71. It is noteworthy that the Supreme Court recently construed "direct effect" very broadly in a purely commercial context. When a debtor obligated to deposit money into a New York bank account failed to pay, the default was held to create a "direct effect" in the United States although both debtor and creditor were foreign parties. *Republic of Argentina v. Weltover*, 112 S. Ct. 21, 60 (1992). A cynic will note that apparently the suffering of a foreigner's American bank account is a better reason to deny immunity than the continued impairment of an American citizen's personal well being. To be sure, *Weltover* and *Princz* are distinguishable because in *Weltover* the effect was immediate (no money in the New York account when the debtor defaulted) while in *Princz* there was a time lag between the injury suffered and the plaintiff's return to the United States. Whether this justifies the difference in outcomes is, of course, another question.

72. Occasionally, however, sovereigns have consented to suits against their former officials, see *Paul v. Avril*, 812 F. Supp. 207 (S.D. Fla. 1993).

73. But they do exist. See, e.g., *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992).

that *Amerada Hess* involved loss of property, not a violation of human rights, but the Supreme Court's language was so broad and unequivocal that a distinction on these grounds would have been highly implausible, as the Ninth Circuit in *Siderman* recognized. Moreover, Judge Sporkin's reasons in the court below for deviating from *Amerada* in *Princz* are indefensible if one takes the statute seriously. Nothing in its structure, language, or legislative history suggests that it is inapplicable to outlaw governments and their successors or to particularly egregious wrongs. Nor does it allow a preferential treatment of American citizens since it currently does not distinguish between American and foreign plaintiffs. Unsurprisingly, Judge Sporkin cited no support for his conclusions.

Most of the Court of Appeals' interpretation of the various exception clauses was likewise required by caselaw and statutory language. The narrow reading of the treaty exception was, again, not Judge Ginsburg's idea, but demanded by *Amerada Hess*. The refusal to consider continued suffering a sufficiently "direct effect" in the United States of potential commercial activity abroad only endorsed the prevailing view and was well supported by case law.⁷⁴

The only truly debatable conclusion was the majority's interpretation of the waiver exception. The Supreme Court had not decided the issue and, while the Ninth Circuit had, *Siderman* was not binding precedent in *Princz*. Thus there was room for disagreement between majority and dissent. Yet, one need not decide this dispute in order to conclude that the majority's decision was correct in the sense defined above. Judge Ginsburg's refusal to consider the violation of international *jus cogens* a "waiver" of immunity is supported by the plain meaning of the term which implies some expression of intent to renounce protection, the use of the term in the FSIA,⁷⁵ the legislative materials cited,⁷⁶ and the general message of *Amerada Hess* to take the language of the act seriously. This is not to say that Judge Wald's contrary conclusion is indefensible. Yet, even Judge Wald did not maintain that her colleagues were off limits, only that a more liberal construction of the waiver exception was both possible and preferable.

Thus, if there is a problem with *Princz*, it is not that the decision is wrong, but that it is right. In other words, the problem is not how the Court applied the law, but how the law conceives of the importance of

74. See *Princz v. F. R. G.*, 26 F.3d 1166, 1173 (1994), and the cases cited therein.

75. 28 U.S.C. § 1605(a)(1) preserves the sovereign's right to withdraw a waiver in accordance with its terms, which suggests that giving a waiver requires a more or less conscious decision.

76. See 26 F.3d at 1174.

human rights vis-à-vis sovereign immunity.

After *Princz* (and *Siderman*), one must acknowledge that the efforts to persuade the courts to recognize a human rights exception to sovereign immunity have failed. The lesson of *Princz* is that in order to allow claims for human rights violations against foreign sovereigns in American courts, Congress would have to change the FSIA. It should.

III. AMENDING THE FSIA: THE CASE FOR ALLOWING SUITS FOR MASSIVE HUMAN RIGHTS VIOLATIONS

Last term, Congress had before it a bill to amend the FSIA by adding a new exception to immunity from 28 U.S.C. § 1605.⁷⁷ Immunity would be denied in actions

in which money damages are sought against a foreign state for the personal injury or death of a United States citizen occurring in such foreign state and caused by the torture or extrajudicial killing of that citizen, or by an act of genocide committed against that citizen, by such foreign state or by any official or employee of such foreign state while acting within the scope of his or her office or employment⁷⁸

It is important to note that the envisaged denial of immunity is carefully limited in three ways. It applies only to the most horrible and undisputed human rights violations, only to suits by American plaintiffs, and it requires the prior exhaustion of "adequate and available remedies in the place in which the conduct giving rise to the claim occurred." Its limitation periods and definitions of the most important terms track those in the international conventions against torture and genocide.⁷⁹ If such a bill were enacted, American victims abused abroad but without legal recourse there may sue foreign states for some of the most egre-

77. The originally proposed legislation was not a direct reaction to the *Princz* decision, which was handed down after the introduction of the bill, but more generally to the physical abuse of United States citizens by foreign sovereigns "in recent years." H. R. REP. NO. 702, 103d Cong., 2d Sess. 3 (1994). However, there were later versions which responded directly to the Court of Appeals' rejection of Mr. *Princz's* claim. They provided specifically for denial of immunity to the German Federal Republic for acts of genocide committed against American citizens during World War II. H.R. 934, 103d Cong., 2d Sess., version 3 of October 10, 1994 and version 4 of October 13, 1994. These later versions are not my concern here. I do not wish to support such legislation aimed solely at one particular country.

78. H.R. 934, 103d Cong., 1st Sess. 1 (1994). The bill was passed by the House of Representatives on Oct. 7, 1994. 140 CONG. REC. D 1243 (1994), and was referred to the Senate Judiciary Committee on Oct. 8, 1994. 140 CONG. REC. S. 14827.

79. See *supra* note 70.

gious human rights violations in American courts.

The case for such a legislative change rests on several major arguments. It is best to think of them as a *prima facie* case for allowing suits for human rights violations on the one hand and a series of rebuttals to the major defense — sovereign immunity — on the other.

A. *The Prima Facie Case for Denying Immunity*

The *prima facie* case is plain but powerful. To close the court doors to victims of extreme human rights violations is a complete denial of access to justice in cases that cry out for legal remedies perhaps more than any other. The injuries inflicted by torture, genocide, or extrajudicial killing are the gravest imaginable. Denial of court access is especially serious when it occurs in the victim's home country. In such a case, the very government that demands loyalty from, and thus owes protection to, the plaintiff, refuses to assist him in the vindication of his undisputed rights. As a result, the state deprives him of what is normally his only hope for compensation.

Three important conclusions flow from this fairly obvious argument. First, a denial of access to justice based on sovereign immunity is an exception to the basic principle that victims of wrongs ought to have their day in court. It is thus misleading to think of a human rights clause in the FSIA as an "exception"; the true exception is immunity. A human rights clause restores the general principle of court access in deserving cases. Second, since closing the court doors is the exception rather than the rule in human rights cases, it is granting sovereign immunity, not denying it, that requires specific justification. Third, since the principle of access to justice is of the greatest importance in a society committed to the rule of law, the justification for an exception (denying access on grounds of immunity) ought to be very strong indeed. In short, immunity in human rights cases should be granted only if there are compelling reasons.

The most obvious response is, of course, that the courts of one sovereign should not sit in judgment on another sovereign. But this is only a restatement of the traditional rule, not a reason for it. Surely, reasons do exist, but are they strong enough even in human rights cases to support an exception to access to justice? The main arguments worth considering may be that granting sovereign immunity is legally required, politically necessary, and practically useful. Even a brief survey suggests that in human rights cases, these justifications are weak.

B. Legal Perspectives

There is a serious question whether such a (partial) denial of immunity would violate international law.⁸⁰ A first glance suggests that it would.⁸¹ There is widespread agreement that under international law one state is not subject to the jurisdiction of the courts of another with regard to sovereign acts (as opposed to commercial activity).⁸²

Yet, closer examination quickly reveals that the issue is more complicated than that. Since the sovereign immunity rule is neither a matter of *jus cogens* nor provided by treaty, it is only a rule of customary international law. And like all such law, it is not cast in stone. Instead, it is somewhat amorphous in two respects. First, its content and contours are not precise to begin with, thus there is room for debate about its scope.⁸³ Second, it is subject to constant development and refinement, as especially the trend from an absolute to a restrictive concept of immunity has illustrated in the past decades.⁸⁴ As a result, sovereign immunity today is not so much a yes or no question but a matter of changing practice, of degree, and of argument.

The crucial question then becomes whether a human rights exception is supported by reasons sufficiently convincing to justify a further restriction of sovereign immunity. Some such reasons have already been suggested by plaintiffs and academic writers⁸⁵ and have occasionally been accepted by the bench.⁸⁶ At their core, these arguments are rather straightforward, and a brief summary will suffice. In essence, the proposition is that since the human rights considered here are today⁸⁷ part of

80. In contrast, it is clear that the U.S. Constitution does not stand in the way since it does not require granting sovereign immunity. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).

81. See Zimmerman, *supra* note 5.

82. The Schooner Exchange, 11 U.S. (7 Cranch) 116 (1812); RESTATEMENT (THIRD), *supra* note 20, Ch. 5 Subch. A., Introductory Note, and § 451; ALFRED VERDROSS & BRUNO SIMMA, *UNIVERSELLES VÖLKERRECHT* 763 (3d ed. 1984). See also International Law Commission, Draft on Jurisdictional Immunities of States and Their Property, Report of the International Law Commission on the Work of its Forty-Third Session 29 Apr.-19 July 1991, U.N. G.A.O.R., 46th Sess., Supp. No. 10 (A/46/10).

83. See BROWNIE, *supra* note 18, at 329-36.

84. See especially the so-called "Tate Letter." Letter from the Acting Legal Advisor of the Department of State, Jack B. Tate, to the Department of Justice, May 19, 1952, 26 DEP'T ST. BULL. 984 (1952); BROWNIE, *supra* note 18, at 326-29.

85. See Implied Waiver, *supra* note 33, for further references.

86. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 718 (9th Cir. 1992); *Princz v. F. R. G.*, 26 F.3d 1166, 1182 (D.C. Cir. 1994) (Wald, J., dissenting).

87. Not necessarily, however, at the time when Hugo Princz suffered in the German

international *jus cogens* and therefore by definition unconditionally binding on all states, a state cannot demand sovereign immunity for their violation. This proposition goes back to the Nuremberg International Tribunal's denial of immunity to the Nazi defendants for their crimes against humanity.⁸⁸ In the main, two particular explanations are proffered for this proposition. One is that norms of *jus cogens* automatically limit the very sovereignty of the states. Sovereignty thus never extends beyond the limits drawn by the unconditionally binding rules of international law. Consequently, an act violating *jus cogens* is not a sovereign act and thus, like a commercial act, is not entitled to immunity.⁸⁹ The other rationale is that *jus cogens* has a higher rank than plain customary international law, and since core human rights are part of the former, while sovereign immunity is only part of the latter, human rights trump the claim to immunity.

These explanations are not implausible, but they have a conceptualist air about them. They also suggest troublesome consequences. It appears to follow from them that sovereign immunity not only *may*, but *must* be denied in cases of *jus cogens* violation.⁹⁰ This would go too far. Just as no state has to sanction another state's violation of international law, the forum state must remain free to grant immunity under its municipal law in all cases, and to whom, it sees fit. One state's violation of law cannot deprive another state of its right to control access to its own courts.

There are other arguments, though, that are at least equally convincing but less far reaching. They suggest only that the forum *may*, or at most *should* (but not *must*) deny immunity for massive human rights violations. These arguments are best understood in the context of the two major principles underlying the sovereign immunity rule, namely noninterference with another state's internal affairs, and equality of sovereigns.⁹¹

concentration camps and factories, see *supra* note 66, and accompanying text.

88. See *Princz*, 26 F.3d at 1181.

89. Implied Waiver, *supra* note 33, at 377, 390-91; Mary Ellen Turpel & Philippe Sands, *Peremptory International Law and Sovereignty: Some Questions*, 3 CONN. J. INT'L L. 364, 365-66 (1988); *Princz v. F. R. G.*, 26 F.3d 1166, 1182 (Wald, J., dissenting); see also *Hilao v. Estate of Marcos (In re Estate of Marcos, Human Rights Litigation)*, 25 F.3d 1467, 1470-71 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995) (acts of torture, execution, and disappearance committed by head of state were not covered by FSIA because they were not covered by official authority).

90. Since these rationales are proffered in the context and in support of the waiver argument, it is not clear whether the proponents actually assume that the forum state is under an obligation to deny sovereignty. See Implied Waiver, *supra* note 33, at 389-90; *Princz*, 26 F.3d at 1179-80, 1183 (Wald, J., dissenting).

91. See BROWNLIE, *supra* note 18, at 324 n.25.

Sovereign immunity is granted in part in order to avoid the possibility that the courts of one state will interfere with the affairs of another. While the principle makes general sense, it fails with regard to the FSIA amendment here in question. Protection of human rights, at least of those that are *jus cogens*, is no longer a purely internal matter of any individual state but recognized today as a concern of the community of all nations.⁹² Of course, this justifies primarily collective action and does not necessarily make it appropriate for a state to open its courts to plaintiffs from all over the world. Instead, an individual country's courts should hear only cases in which this country has a specific and legitimate concern. The human rights amendment reflects such a concern: the interest in the treatment of one's own citizens. Where Americans have been abused by foreign sovereigns, as required for the exception to kick in, the adjudication of their claims is not an undue interference with another country's purely internal affairs.⁹³ In fact, the FSIA already reflects a similar consideration in that it denies immunity for tortious acts committed in United States territory.⁹⁴ Thus the proposed change supplements the territorial exception already in place by extending it on grounds of the victim's citizenship.

In order to avoid undue interference with the defendant state's interests, it is important not to apply American law and compensation standards in an uncritical manner. Instead, we need to develop a choice of law approach for human rights cases against foreign sovereigns that takes the international nature of the dispute and the foreign state's legitimate interests into account. International law will normally only establish the *prima facie* wrongfulness of the act so that other issues must be decided under municipal rules. How to choose, or how to find a compromise, between them raises difficult issues that must be left for another day. Suffice it to say that in order to enhance the international acceptability of results, courts in human cases against foreign sovereigns should tread lightly and err on the side of deference to the defendant state's law as long as such law is acceptable under international standards.⁹⁵

92. U.N. CHARTER art. 1, para. 3, art. 55(c), art. 56; Rest. 3d, *supra* note 20, § 702 cmt. o; OPPENHEIM, *supra* note 18, at 1000.

93. The new exception would also require that the plaintiff exhaust available remedies in the foreign country involved. H.R. 934, 103d Cong., 1st Sess. (1994) (concerning 28 U.S.C. 1605(a)(7)(B) (1988)). This would thus give the defendant state a chance to avoid a lawsuit in the United States altogether.

94. 28 U.S.C. § 1605(a)(5).

95. In light of the long tradition and widespread international acceptance of the principle that tort liability is governed by the law of the place of the wrong, much can be said in favor of a *prima facie* territorial approach.

Sovereign immunity is also a manifestation of the principle that all states are considered equals in the international community. They should thus treat each other with deference and mutual respect rather than sit in judgment over one another. Yet, this principle makes sense only as long as these states mutually adhere at least to the norms that are considered indispensable for the community of which they wish to be a member. Where a nation violates *jus cogens*, however, it steps outside the boundaries drawn by the international community for itself. It thus forfeits the privileges accorded to the members. In other words, as an outlaw, it has no claim to deference and respect. This is essentially what Judge Sporkin meant when he denied immunity to Germany as a former rogue government.⁹⁶

There may have been a time when sovereign immunity was granted unconditionally. Today, it should be considered a privilege contingent on compliance with at least the most fundamental rules which the community of nations has set for itself. It makes no sense to recognize unconditionally binding norms of international law and at the same time to shield perpetrators who violate these norms from legal action.

C. Political Considerations

Since, as a matter of international law, these considerations only allow, but do not require, the denial of immunity, the decision Congress has to make about the amendment of the FSIA is largely political. Here, the concerns are of three kinds. They pertain to the relationship between the branches of government, to considerations of efficiency in human rights enforcement, and to the risk of suffering retaliation by foreign states. In all these respects, the arguments point both ways.

The relationship between the branches of government is an issue because court judgments against foreign sovereigns could interfere with the foreign policy of the political branches. This concern, however, should not be overstated. While it may loom large when the courts act on their own initiative, it is much diminished when the political branches, notably Congress, decide to empower the courts to hear suits against foreign sovereigns, as would be the case with the human rights amendment. Moreover, where the political branches have committed themselves openly to the international promotion of human rights, occasionally even through military intervention, a major conflict between these branches and the judiciary should be the exception rather than the rule. Where a judgment

96. See *supra* note 51 and accompanying text. While there is no place for this argument under current domestic American law (i.e., the FSIA), it is permissible and, indeed, plausible as a matter of international law.

is rendered against a military dictatorship, it may actually strengthen the foreign policy directed against such regimes. Where it concerns a close ally, it is unlikely to do much damage. After all, it is hard to believe that German-American relations would have suffered significantly had a United States court held Germany liable to Hugo Princz.

Possible interference is also a risk in the commercial area, yet the commercial exception to sovereign immunity is almost universally accepted today and clearly stated in the FSIA.⁹⁷ It is true that human rights are politically much more sensitive, and that sitting in judgment over another sovereign's alleged violations may strain international relations and cause friction with other countries. Yet, even this argument goes only so far. While adjudicating massive human rights violations may have political effects, so does shielding them from judicial action. Granting immunity means protecting a foreign sovereign with regard to outrageous and almost indisputably illegal acts. It would be naive to ignore that such protection may support foreign governments in their policies either to violate human rights or at least to tolerate such violations. In short, stripping perpetrators of their immunity will undoubtedly make some foreign countries nervous, but where massive human rights violations are at issue, such nervousness is not necessarily harmful and may help United States foreign policy.

From an effectiveness perspective, it is worth asking whether human rights are better protected if their enforcement is left to the political branches.⁹⁸ The answer is not clear,⁹⁹ whether in individual cases, vis-à-vis particular countries, or in the grand picture. The executive's influence in individual cases is hard to predict. In *Princz*, for example, political action was plentiful but availed the plaintiff nothing.¹⁰⁰ The success of the political branches with regard to particular states depends on a variety of uncertain factors, prominent among them the willingness to risk American access to foreign markets, and here the record is certainly mixed. On a worldwide level there may be a concern that subjecting foreign states to liability for human rights violations could make them more reluctant to enter into human rights conventions lest they be bound by them. This

97. 28 U.S.C. § 1605(a)(2) (1988).

98. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423, 431-32 (1964) (supporting the application of the act of state doctrine with the argument that political and diplomatic action may be more effective than court proceedings to secure the rights of American parties allegedly violated by foreign governments).

99. See H. R. REP. NO. 702, 103d Cong., 2d Sess. (1994) (expressing doubts about the effectiveness of action taken by the State Department).

100. See *supra* notes 41-43 and accompanying text.

concern is largely speculative, particularly since *jus cogens* binds even those states not signatories to any convention so that non-membership is not an excuse for violating basic human rights. To the extent that there may be an actual deterrent effect, it will be small and a price worth paying for making perpetrators accountable.

With regard to all these concerns, it is important to remember that allowing courts to hear human rights cases against foreign sovereigns does not prevent the political branches from promoting human rights on their own. They may actually find themselves in a more advantageous position if some of the responsibility is shifted to the courts. As in cases of commercial activity, the executive could plausibly argue vis-à-vis the foreign sovereign that its hands are tied while at the same time trying to defuse the conflict and to facilitate a settlement. Also, the possibility that court action may jeopardize long-term political goals is small comfort to the individual victim who finds her interests sacrificed on the altar of a future, and often elusive, common good. In a society committed to individual rights, such a price should not be demanded lightly.

Finally, further restricting the immunity of foreign states in American courts entails the risk of retaliation. Foreign states may in turn allow their courts to sit in judgment on the United States in certain cases. This is tolerable where the denial of immunity is appropriately limited, as under the envisaged FSIA amendment, and where the foreign tribunal ensures a minimum of procedural and substantive fairness. After all, if the United States should torture or murder a foreign national and then fail to provide the plaintiff with a sufficient remedy in its own courts, it should have to answer in neutral forums of the claimant's home country. Yet, there is no guarantee either that retaliatory immunity exceptions will be so limited, nor that all foreign tribunals will provide an acceptable level of impartiality and fairness. While in case of an adverse decision the United States may still be able to avoid the financial cost by refusing to recognize the judgment,¹⁰¹ it could not avoid the political cost of being adjudged, perhaps unfairly, a human rights perpetrator. How large that risk is is hard to tell. At the end of the day, whether to accept it or not is a political choice. Acceptance requires some self-confidence and courage. It would fit a nation committed to the promotion of international human rights much better to show than to lack these qualities.

101. Provided, of course, that the respective immunity exception does not extend to the execution of a judgment against government assets such as diplomatic or consular missions.

D. Practical Concerns

Nor do practical concerns make it unwise to amend the FSIA. The danger of human rights suits flooding American courts is small since the number of acts of torture, genocide, and extrajudicial killing committed against American citizens abroad is and will remain tiny in comparison to the overall docket. The courts will not be at a loss to find standards for adjudication because the wrongfulness of the acts in question is already beyond doubt and causes of action can be determined under traditional choice of law principles. The taking of evidence and the execution of judgments present problems of their own, but that is true in many other cases and hardly justifies closing the courts to plaintiffs altogether.¹⁰²

In sum, the arguments against immunity for massive human rights violations are strong. Even though there are reasons for sovereign immunity in general, in human rights cases they do not weigh heavily. They are insufficient to deny victims of torture, genocide, or extrajudicial killing access to justice. In fact, the same could be said for other core human rights recognized as *ius cogens*, like enslavement or systematic racial discrimination, and it would be desirable to include these wrongs in the proposed amendment.

Though the United States should not become the courthouse of the world, Congress should give those to whom it owes protection their day in court against a foreign state that has violated their rights in a manner condemned by domestic as well as international law.

IV. FURTHER HURDLE: THE ACT OF STATE DOCTRINE

Beyond the obstacle of sovereign immunity, a plaintiff in a human rights case against a foreign sovereign faces another potential hurdle: the claim will normally arise from acts of a foreign government within its own territory and thus implicate the act of state doctrine.¹⁰³ If a court finds the doctrine applicable, a human rights exception to sovereign immunity is virtually meaningless. The plaintiff could now drag the defendant into court, but the case would still be dismissed without a hearing on the

102. For an analysis of a variety of other legal and practical issues, see Implied Waiver, *supra* note 33, at 402–11.

103. The act of state doctrine holds that courts in the United States “will not sit in judgment on the acts of the government of another [state] done within its own territory.” *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); see also Rest. 3d, *supra* note 20, § 443(1). The act of state doctrine is not required by international law but is a matter of American municipal law only.

merits.¹⁰⁴ Whether the proponents of the human rights amendment to the FSIA were aware of this problem is not clear,¹⁰⁵ but it is clear that they should consider it.

The act of state doctrine is an amorphous construct, based on many unclear and sometimes contradictory grounds.¹⁰⁶ A thorough analysis of its impact on human rights cases could well fill a book, and this is not the place to write it. It will suffice here to explain the doctrine, show briefly why it should not apply, and to suggest that Congress dispel any doubts by statute.

A. *The Shadow of Sabbatino*

The act of state doctrine presents a problem for human rights plaintiffs mainly because of the U.S. Supreme Court's decision in *Banco Nacional de Cuba v. Sabbatino*.¹⁰⁷ In *Sabbatino*, the Court held that the doctrine governs even when the act complained of is a violation of international law. Whether the Court was right or wrong is not the issue here.¹⁰⁸ The fact is that this decision conflicts with a denial of immunity in human rights cases. While sovereign immunity would be denied largely because massive human rights infractions violate international law, the act of state doctrine would apply even though they do.

It is not difficult to distinguish *Sabbatino* from the cases here in question. Like most modern precedents in this area, *Sabbatino* concerned expropriation, not human rights. It also did not involve *jus cogens*, but only customary international law which was neither accepted as uniformly nor considered as essential to the international community as is the prohibition of genocide or torture. Yet it is not clear that the act of state doctrine as proclaimed in *Sabbatino* and its progeny does not apply to human rights cases. Surely it is a doctrine pertaining generally to

104. The act of state doctrine has repeatedly led courts to deny review in cases where sovereign immunity was not even an issue because the defendant was a private individual; see, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246 (2d Cir. 1947). In *Princz*, the Federal Republic of Germany invoked the doctrine as well. [Defendant's] Motion to Dismiss for Lack of Subject Matter Jurisdiction at 7-8, *Princz v. F. R. G.*, 813 F. Supp. 22 (D.D.C. 1992) (No. 92-0644) (on file with the author).

105. H. R. REP. NO. 702, 103d Cong., 2d Sess. (1994) does not consider the act of state doctrine.

106. See JOSEPH W. DELLAPENNA, *SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS* 276-94 (1988).

107. 376 U.S. 398 (1964).

108. The reasons against the application of the act of state doctrine were powerfully argued by Mr. Justice White in his dissenting opinion. 376 U.S. at 439-72.

sovereign acts on foreign soil¹⁰⁹ and, while there is some authority for a human rights exception,¹¹⁰ such an exception is far from firmly established.

B. *Why the Act of State Doctrine Should Not Apply*

Whatever the precise meaning of the act of state doctrine, it is clear that it concerns only sovereign acts. It is possible to argue, as noted above,¹¹¹ that violations of *jus cogens* are not sovereign acts per se, and therefore the doctrine does not apply. Such a proposition is rather conclusory and begs more questions than it answers. Yet, acts of torture or genocide will most likely violate the domestic law of the foreign state as well. This is a proper reason not to recognize such acts as official and thus to exclude them from the ambit of the act of state doctrine.¹¹²

Nonetheless, the crucial question must be whether the doctrine should apply in light of the policies which it embodies. There is little agreement regarding the exact nature, the respective weight, and the interrelationship of these policies.¹¹³ Even so, one can perhaps identify five major aspects.

One reason behind the act of state doctrine is respect for the separation of powers between the branches of government. The doctrine serves to avoid judicial interference with the executive's prerogative in the area of foreign relations.¹¹⁴ For the reasons explained above, this concern is relevant but also easily overrated in human rights cases. Moreover, if Congress denies sovereign immunity for human rights violations, it will be difficult for an executive branch expressly committed to the protection

109. The first act of state doctrine case in the United States, *Underhill v. Hernandez*, 168 U.S. 250 (1897), for example, did not concern property, but an action for unlawful detention and personal maltreatment.

110. RESTATEMENT (THIRD), *supra* note 20, § 443 cmt. c; *see also* *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1546 (N.D.Cal. 1987) (violations of fundamental human rights committed by subordinate government official are not acts of state).

111. *See supra* note 89 and accompanying text.

112. *Filartiga v. Pena-Irala*, 630 F.2d 876, 889 (2d Cir. 1980) (doubting whether acts in violation of the Constitution and laws of foreign state can properly be characterized as acts of state); *Hilao v. Estate of Marcos (In Re Estate of Marcos, Human Rights Litigation)*, 25 F.3d 1467, 1471 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995) *citing* *Trajano v. Marcos*, 878 F.2d 1439 (9th Cir. 1989) (unpublished table decision holding that acts of torture, execution, and causing disappearance were outside official authority and thus not acts of state); *see also* S. REP. NO. 249, 102d Cong., 1st Sess. 8 (1991) (act of state doctrine not applicable with regard to acts covered by the Torture Victim Protection Act).

113. In its most recent decision about the doctrine, the U.S. Supreme Court construed it narrowly. *W. S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 406 (1990) (doctrine involved only where "a court *must decide* . . . the effect of official action by a foreign sovereign . . .") (emphasis in original).

114. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

of human rights to argue that acts of genocide or torture directed against American citizens must remain unreviewable as a matter of national interest.

Second, in another sense, the doctrine is also derived from the principle of comity. Here it demands respect for the other co-equal sovereign with regard to acts committed in its own territory which are essentially considered the foreign state's own business.¹¹⁵ Today, however, violations of core human rights are an international concern,¹¹⁶ and neither respect nor comity are due when a sovereign violates *ius cogens*.

One can also see the doctrine from a third perspective as a form of abstention in cases where there are no reliable standards for adjudication. From this view, it is closely related to the political question doctrine.¹¹⁷ Such a lack of standards may have been an issue in expropriation cases like *Sabbatino*,¹¹⁸ but this is not a problem with regard to human rights. Human rights and prohibitions of their violation are embodied in a panoply of international declarations and conventions, and there is no doubt that at least as a matter of international law, acts of genocide or torture are illegal.¹¹⁹ In light of these international agreements, it may even be possible to invoke the treaty exception to the act of state doctrine.¹²⁰

There is also some authority for a fourth proposition: that the doctrine is primarily a choice of law principle, although what exactly such a principle commands is not clear.¹²¹ If it simply means that acts of state must be judged by the domestic law of the foreign state, the doctrine would rarely help perpetrators in cases of extreme human rights violations since their acts are normally illegal even under their own state's law. In

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

116. See *supra* note 18 and accompanying text.

117. Whether there is room for the political question doctrine beyond the act of state doctrine is not clear. See DELLAPENNA, *supra* note 106, at 287-94; see also *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 823-27 (D.C. Cir. 1984) (Robb, J., concurring, applying the political question doctrine in a case of terrorist attack and murder).

118. 376 U.S. at 428-30 (emphasizing lack of international agreement regarding the legality of expropriations by a government).

119. *Filartiga v. Pena-Irala*, 630 F.2d 876, 881-85 (2d Cir. 1980) (official torture clearly and unambiguously prohibited by international law).

120. At least some courts have applied the treaty exception even though the treaty did not expressly grant a private cause of action. *Kalamazoo Spice Extraction Co. v. Ethiopia*, 729 F.2d 422 (6th Cir. 1984). Still, there is much uncertainty in this area. See DELLAPENNA, *supra* note 106, at 306-07.

121. See DELLAPENNA, *supra* note 106, at 279-81 (with further references); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 438 (1964); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 705 n.18 (1976). Justice Marshall made the same point in his dissent. *Id.* at 726. Most recently, the Supreme Court has again called the doctrine a "principle of decision." *W. S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 427 (1990) (citing *Sabbatino*, 376 U.S. at 427).

the exceptional cases where foreign municipal law justifies such acts, however, there is indeed good reason to apply it, at least presumptively.¹²² Yet one does not need a separate doctrine for that purpose because it can be accomplished through the regular choice-of-law process.

Finally there may be a fifth rationale underlying the doctrine which is, however, not openly stated in the leading cases. Refusal to review acts of foreign sovereigns in their own territory can function as a quasi-res judicata principle on an international level with regard to public acts. The goal here would be to protect reliance on the validity of these acts.¹²³ This rationale makes sense in expropriation cases, but where human rights are violated, such protection is not due because it could benefit no one but the perpetrator.

It is no accident that the act of state doctrine is inappropriate for much the same reasons that weigh against sovereign immunity in human rights cases. Both concepts reflect many of the same policies and goals. Just as foreign sovereigns sued for genocide, torture, or random killings of American victims should not enjoy immunity from American jurisdiction, neither should their acts be insulated from judicial scrutiny.

C. *The Need for Clarification*

While there is much to be said against, and little for, applying the act of state doctrine to a foreign sovereign's human rights violations, the content and the contours of the doctrine are so uncertain that the matter is not entirely free from doubt. Certainly, if Congress amended the FSIA to allow such suits, it would make little sense for the courts to deny adjudication under the act of state doctrine, but there is no guarantee against that. A court might, for example, be persuaded by the argument that Congress did not wish to affect the act of state doctrine since the lawmakers were surely aware of it and yet left it untouched. This is not entirely implausible, since in the expropriation context Congress did in fact severely limit the doctrine.¹²⁴ Nor would it completely nullify a human rights exception to the FSIA because there are scenarios to which it might not apply. The *Princz* case is an example — since most of the acts were not committed on German territory but in an occupied

122. See *supra* note 20 and accompanying text.

123. DELLAPENNA, *supra* note 106, at 282–84.

124. See 22 U.S.C. § 3270(e) (Hickenlooper Amendment to § 620(e) of the Foreign Assistance Act).

country, the acts may be beyond the doctrine's territorial reach.¹²⁵ Those cases, however, will be rare.

Congress should not run the risk that human rights claims which the amendment to the FSIA would make possible will be defeated by the act of state doctrine. It should clarify the matter and include in the amendment a statement that to the extent immunity is denied, the act of state doctrine shall not defeat the claim.

CONCLUSION

Princz is not a landmark decision but it is a case that sends a strong and troubling signal. It forcefully illustrates how much protection even barbaric foreign governments enjoy in American courts, and how little access to justice their victims have, even if they are Americans seeking such justice in their own land. When an American holocaust victim demanding compensation from Germany for suffering beyond imagination finds the courts of the United States closed, such is indeed the law. For the reasons angrily shouted by Judge Sporkin and more moderately stated by some of his colleagues, it should be changed. Whatever the substantive merits of Mr. Princz's or other plaintiffs' claims, victims of massive human rights abuses deserve a decision on these merits, not a denial of their day in court. The proposal before Congress last term points in the right direction. Such a proposal is not radical, since it only would allow American plaintiffs to sue for some of the most egregious human rights violations, and would require the prior exhaustion of remedies in the defendant state. It is a minimal measure and should be enacted, particularly since there is little reason to fear that it will wreak havoc with the United States' relations with foreign countries.

Foreign sovereigns have increasingly been denied immunity in the last half century, and some exceptions, notably for commercial activities, are now firmly in place. As international interdependence grows and traditional notions of sovereignty are eroded, this is a natural trend. A human rights exception to sovereign immunity is a proper next step. Ideally, of course, this step would be taken by the community of nations in an international convention, rather than unilaterally by individual members, but there is no indication that such a convention may be concluded in the foreseeable future. Human rights are too essential, and the suffering of the victims is too real, to postpone unlocking the court

125. See Eric Stein, *United States: Recovery of Property Confiscated by Enemy Occupant*, 1 AM. J. COMP. L. 261, 264 (1952) (discussing *State of the Netherlands v. Federal Reserve Bank of New York*, 99 F. Supp. 655 (S.D.N.Y. 1951)).

doors indefinitely. In an era marked by almost universal agreement about core human rights, it is no longer appropriate to allow a state to violate them with impunity.¹²⁶

Amending the FSIA by inserting a human rights exception would help not only the victims. It would also send a clear message to the perpetrators that they can no longer hide behind their sovereign status, at least not in the courts of the victim's home. And it would be a signal, both domestically and internationally, that at least the most essential human rights are taken seriously, even if that comes at a political cost.

Finally, the amendment would be a modest but much needed contribution to the actual enforcement of human rights. In the long run, this contribution would perhaps not be so modest after all. It could set an example that other nations may follow. In that case, overruling *Princz* and similar decisions by Congressional statute could eventually lead to a human rights exception to sovereign immunity even as a matter of international law. It would be a small step for one country, but a giant leap for mankind.

126. It is true, of course, that many states pay only lip service to human rights, but that should be all the more reason to hold them accountable for violations.