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A Proposal to Deny Foreign Sovereign Immunity to Nations Sponsoring Terrorism

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COMMENT

A PROPOSAL TO DENY FOREIGN SOVEREIGN IMMUNITY TO NATIONS SPONSORING TERRORISM

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INTRODUCTION

On July 10, 1985, French secret service agents bombed the Rainbow Warrior, a ship owned by Greenpeace.[1] The bomb killed one crew member and destroyed the boat.[2] Prior to the bombing, the vessel was docked in Auckland Harbor, New Zealand, preparing for a voyage to Mururoa Atoll to protest French nuclear testing in the South Pacific.[3] On September 22, 1985, the French government admitted that it had orchestrated the attack on the Rainbow Warrior.[4] France then began discussions with Greenpeace to ascertain adequate compensation for Greenpeace's injury.[5] When the parties were unable to agree, they de-

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1. Meisler, *France Probing Charges Its Agents Sank Protest Ship*, L.A. Times, Aug. 9, 1985, at 30 (noting that Greenpeace is a private international organization dedicated to environmental protection and nuclear disarmament).

2. *See generally* D. ROBIE, EYES OF FIRE, THE LAST VOYAGE OF THE RAINBOW WARRIOR (1986) (recounting the French bombing of the Rainbow Warrior).

3. Branigin, *Antinuclear Tensions Gain in Pacific*, Wash. Post, Sept. 12, 1985, at A25 (analyzing the growing antinuclear sentiment that is causing friction between Pacific nations and western powers).

4. *See* Bernstein, *France Concedes its Agents Sank Greenpeace Boat*, N.Y. Times, Sept. 23, 1985, at 1 [hereinafter Bernstein, *France Concedes*] (reporting France's admission that its intelligence service sank the Rainbow Warrior); Shabecoff, *France Must Pay Greenpeace $8 Million in Sinking of Ship*, N.Y. Times, Oct. 3, 1987, at A2 (commenting that the Rainbow Warrior affair provoked an international scandal that damaged relations between France and New Zealand); Lewis, *Paris Paper Says the French Sank Greenpeace Boat*, N.Y. Times, Sept. 18, 1985, at 1 (reporting the findings of *Le Monde*, which revealed that French military saboteurs bombed the Rainbow Warrior).

5. Pugh, *Legal Aspects of the Rainbow Warrior Affair*, 36 INT'L & COMP. L.Q. 655, 657-58 (1987). While France was negotiating with Greenpeace, it was also negoti-

cided to refer their dispute to arbitration.[6] The arbitral tribunal ordered France to pay Greenpeace U.S. $8 million, an unusually large award.[7]

Arbitration was the most viable means for Greenpeace to secure just compensation from France. If Greenpeace had attempted to file suit against France in a New Zealand domestic court, France probably would have invoked sovereign immunity[8] to defeat the court's jurisdiction over France.[9] While it is uncertain whether France would have won the sovereign immunity argument, the proceedings would have delayed a settlement even further. Thus, arbitration was the crucial method that allowed Greenpeace to avoid jurisdictional barriers to adjudication and to obtain a settlement through non-judicial means.

The Rainbow Warrior affair established an important precedent for holding nations responsible to private parties for state-sponsored terror-

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ating with New Zealand to determine adequate compensation for violating New Zealand's territorial waters and to decide the fate of the French secret service agents detained in New Zealand. *Id.* at 657. When negotiations between the two countries faltered, France and New Zealand decided to submit the dispute to the United Nations Secretary General for a binding arbitral award. *Id.*

6. Clark, *State Terrorism: Some Lessons from the Sinking of the "Rainbow Warrior"*, 20 RUTGERS L.J. 393, 400 (1989) (stating that the parties agreed to submit their dispute to arbitration when good faith negotiations to determine compensation failed); *see* Shabecoff, *supra* note 4, at A2 (reporting that the arbitration agreement signed between France and New Zealand established that each party would choose one member of the tribunal). If the two countries could not agree on the third member, the Swiss Federal Tribunal would nominate him or her. *Id.* Pursuant to this agreement, the three people chosen for the tribunal were Professor Terre of France, Justice Woodhouse of New Zealand, and Professor Reymonde of Switzerland. Clark, *supra*, at 400.

7. *See* Shabecoff, *supra* note 4, at A2 (noting that the arbitral award specified that France should pay U.S. $5 million for the destruction of the Rainbow Warrior, U.S. $1.2 million for "aggravated damages," and U.S. $1.9 million for the legal fees, expenses, and interest). Lloyd Cutler, counsel for Greenpeace, remarked that large awards for aggravated damages are generally given only when the illegal conduct warrants special condemnation. *Id.*; *see La Nouvelle Affaire Greenpeace*, MINUTE, Aug. 20, 1987, at 1-2 (reporting that the 32-year old Rainbow Warrior was worth 40 times less than the U.S. $5 million that Greenpeace requested for the construction of a new vessel); Clark, *supra* note 6, at 401 (noting that only the amount of the award became public knowledge).

8. *See* BLACK'S LAW DICTIONARY 1252 (5th ed. 1979) (defining sovereign immunity as the doctrine which prevents a private party from asserting an otherwise meritorious claim against a foreign state in a court of law, unless that state consents to the suit); Interview with Michael Van Walt, counsel for Greenpeace, in Washington, D.C. (Oct. 2, 1989) [hereinafter Van Walt Interview] (explaining that arbitration allowed Greenpeace to receive compensation without having to defeat the sovereign immunity plea France would probably have raised had Greenpeace attempted to sue France in a New Zealand court); *infra* notes 56-81 and accompanying text (discussing the basic premises of the sovereign immunity doctrine).

9. Telephone interview with Duncan Currie, General Counsel for Greenpeace International, in the Netherlands (Oct. 18, 1989) [hereinafter Currie Interview] (discussing why it would have been difficult for Greenpeace to sue France in New Zealand).

ism.[10] Historically, private entities were unable to sue foreign governments for their tortious acts because of the sovereign immunity doctrine.[11] Under this doctrine, a domestic court does not have jurisdiction to adjudicate claims against a foreign government.[12]

The sovereign immunity doctrine does not necessarily grant absolute immunity, however. Capitalist countries[13] generally follow the restrictive theory of immunity, whereby governments are immune from claims based on governmental acts—*jure imperii*—but not from claims arising out of acts that private entities perform—*jure gestionis*.[14] The *jure gestionis* activities primarily cover commercial transactions that foreign governments undertake. This constitutes the commercial exception to the sovereign immunity doctrine.[15]

In addition to this well-known commercial torts exception, several state statutes,[16] a multilateral convention,[17] and two international com-

10. *See* Shabecoff, *supra* note 4, at A2; *infra* note 52 and accompanying text (confirming that the arbitration between France and Greenpeace was the first arbitration involving a non-commercial tort committed by a state); Van Walt Interview, *supra* note 8 (explaining the important precedent that the arbitration between France and Greenpeace established and recounting that France agreed to arbitration after Greenpeace threatened to sue France in a New Zealand court).

11. *See* BLACK'S LAW DICTIONARY, *supra* note 8, at 1252 (noting that states have traditionally enjoyed foreign sovereign immunity from tort liability).

12. L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW 892 (1987) [hereinafter INTERNATIONAL LAW] (explaining that jurisdictional immunity arises when a claim is brought in the court of one state against another state).

13. *See* Trooboff, *Foreign State Immunity: Emerging Consensus on Principles*, 200 RECUEIL DES COURS 252, 271 (1986) (discussing the seven countries that passed legislation adopting the restrictive theory of sovereign immunity). The United States was the first country to codify the restrictive principle of sovereign immunity in the Foreign Sovereign Immunities Act of 1976 (FSIA). *Id.* Subsequently, the United Kingdom, Australia, Singapore, South Africa, Pakistan, and Canada enacted statutes that codified the restrictive theory as well. *Id.*

14. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 451 comment a (1986) [hereinafter THIRD RESTATEMENT]. *See* Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 YALE STUD. IN WORLD PUB. ORD. 1, 18 (1976) (explaining that judicial practice, bilateral treaties, multilateral conventions, and the writings of publicists all indicate that a state is not immune from jurisdiction for activities that are private, commercial, or *jure gestionis*, while it is immune for activities that are governmental, sovereign, or *jure imperii*).

15. THIRD RESTATEMENT, *supra* note 14, § 453 comment a (affirming that under the restrictive theory, foreign states are not immune from suits concerning commercial activity).

16. *See* Comment, *Immunity of States for Noncommercial Torts: A Comparative Analysis of the International Law Commission's Draft*, 75 CALIF. L. REV. 1849, 1851 n.7 (1987) [hereinafter Comment, *Immunity of States*] (noting that the United States, United Kingdom, Australia, Singapore, South Africa, and Canada codified the non-commercial torts exception); *infra* note 86 and accompanying text (discussing the state statutes that adopt the non-commercial torts exception to sovereign immunity).

missions[18] each have established a non-commercial torts exception to sovereign immunity. The non-commercial torts exception covers acts which cause "injury to persons or damage to property."[19] This exception is based on the need for private parties tortiously injured by foreign governments to have access to judicial remedies.[20] The availability of judicial remedies is particularly important because sovereign immunity does not affect a state's international responsibility.[21] While sovereign immunity grants immunity from jurisdiction, it does not grant immunity from substantive liability.[22]

This Comment suggests that nations should re-examine the sovereign immunity doctrine in the context of political terrorism so that legitimate claims under international law may be satisfied. Part I analyzes the Rainbow Warrior affair and suggests that it establishes a strong precedent for holding nations liable to private parties for state-sponsored terrorism. Part II examines the sovereign immunity doctrine and discusses the restrictive theory of the doctrine which encompasses the commercial and non-commercial torts exceptions. In addition, Part II argues that courts must devise a method of enforcing judgments against foreign governments. Part III recommends that domestic courts should assume jurisdiction over nations sponsoring terrorism. Alternatively, Part III proposes that victims of non-commercial torts should use international arbitration as a means of receiving compensation.

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17. *See infra* note 72 and accompanying text (discussing the European Convention on State Immunity).

18. *See infra* notes 74-75 and accompanying text (addressing the International Law Commission's and International Law Association's adoption of the restrictive theory of immunity).

19. *See infra* notes 82-125 and accompanying text (discussing the injury to persons or damage to property exception to sovereign immunity).

20. *See* THIRD RESTATEMENT, *supra* note 14, at 391 introductory note (explaining that absolute immunity is neither required nor desirable under international law when it denies parties a judicial remedy).

21. *See infra* note 62 and accompanying text (reiterating that sovereign immunity laws pertain to jurisdictional immunity and not immunity from liability); Trooboff, *supra* note 13, at 254 (stating that sovereign immunity does not shield states from their international legal responsibility to other states); *see also* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 357 (1966) (elaborating that an act which is a *prima facie* breach of a legal obligation engenders state responsibility under international law, regardless of whether the obligation stems from a treaty, custom, or other source). The law of state responsibility may require the payment of compensation for damages caused by illegal acts. *Id.* at 354.

22. I. BROWNLIE, *supra* note 21, at 354 (stressing that sovereign immunity is merely a jurisdictional principle).

I. A CASE STUDY: THE RAINBOW WARRIOR AFFAIR

A. FRANCE'S INTERNATIONAL RESPONSIBILITY

When agents of France's secret service, the *Direction Gênêrale des Services Extêrieurs*, bombed the Greenpeace vessel, France became internationally responsible for its illegal action.[23] France was unable to deny that responsibility when the New Zealand police discovered that senior government officials had ordered the attack.[24] Furthermore, the French government remained internationally responsible for the bombing irrespective of the sentencing and punishment of the two French agents[25] that the New Zealand police arrested.[26]

France was responsible for the bombing of the Rainbow Warrior on two separate accounts. First, France violated New Zealand's territorial sovereignty.[27] Second, in addition to France's responsibility vis-a-vis New Zealand, France was liable to Greenpeace for the destruction of the Rainbow Warrior.[28]

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23. *Id.* at 394 (affirming that France became internationally responsible for violating international law and New Zealand's territorial sovereignty).

24. *See* Dobbs, *Hernu on Comeback Trail*, Wash. Post, Dec. 29, 1985, at A14 (stating that incriminating press articles and the New Zealand criminal investigation caused France to admit that its agents sank the Greenpeace vessel); Bernstein, *France Blames 2 Aides in Ship Raid*, N.Y. Times, Sept. 26, 1985, at 12 [hereinafter Bernstein, *France Blames*] (reporting the admission by the French prime minister, Laurent Fabius, that the defense minister, Charles Hernu, and the head of the secret services agency, Pierre Lacoste, were responsible for the bombing of the Rainbow Warrior).

25. *See* Reed, *Rainbow's End*, TIME, July 21, 1986, at 24 (reporting that New Zealand initially sentenced each French agent to a ten-year prison term in New Zealand); *United Nations Secretary General: Ruling Pertaining to the Differences Between France and New Zealand Arising from the Rainbow Warrior Affair*, July 6, 1986, at 1370, *reprinted in* 26 I.L.M. 1346 (1987) [hereinafter *U.N. Ruling*] (concluding that France negotiated for the release of the agents from the New Zealand jail, and the United Nations Secretary General finally ruled that the agents would be delivered to French military authorities and then transferred to a French military facility on a Pacific island).

26. *See* Pugh, *supra* note 5, at 664 (arguing that one of the notable aspects of the Greenpeace affair is that New Zealand secured redress from both the French agents and the French government).

27. *See International Law and the Sinking of the "Rainbow Warrior"*, 60 AUSTRALIAN L.J. 51, 52 (1986) [hereinafter *Sinking the Rainbow Warrior*] (establishing that every nation has an international obligation to refrain from conducting activities on another nation's territory without that nation's consent); Wexler, *The Rainbow Warrior Affair: State and Agent Responsibility for Authorized Violations of International Law*, 5 B.U. INT'L L.J. 389, 392 (1987) (asserting that France's bombing of the Greenpeace vessel in New Zealand's territorial waters without New Zealand's consent violated the latter's right to freedom from outside intervention); Clark, *supra* note 6, at 401 (explaining that New Zealand argued that France was internationally responsible for the bombing because it violated New Zealand's sovereignty and the Charter of the United Nations).

28. *Sinking the Rainbow Warrior*, *supra* note 27, at 52 (affirming that France was responsible to Greenpeace for France's breach of international law when it destroyed

Once France conceded its responsibility vis-a-vis New Zealand, the two countries began negotiations to determine the compensation that France owed New Zealand and to decide the sentencing of the French agents.[29] When the two countries were unable to reach an agreement, the United Nations Secretary General referred the dispute to an arbitral tribunal, which issued a binding award.[30] The resolution of the political and legal impasse between France and New Zealand indicates that arbitration is a viable means of recognizing state responsibility and overcoming sovereign immunity obstacles to solving international disputes.[31] It is unlikely that a New Zealand court would have granted immunity to France if New Zealand had filed suit in one of its domestic courts because New Zealand would have asserted territorial sovereignty.[32] Nevertheless, the resort to arbitration avoided the sovereign immunity problem entirely.[33]

France's consent to submit the conflict with Greenpeace to an arbitral tribunal prevented it from raising a sovereign immunity defense.[34] The arbitration between France and Greenpeace confirmed France's responsibility for damaging Greenpeace's property and enabled Greenpeace to collect damages.[35] Greenpeace, a private party, sought redress

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the Rainbow Warrior). France was also liable to the family of the dead crew member. *Id.*; *see Sinking of Vessel is Laid to a Bomb*, N.Y. Times, July 12, 1985, at 3 (confirming that the explosion of the Rainbow Warrior killed Fernando Pereira, a Portuguese-born Dutch citizen); *U.N. Ruling*, *supra* note 25, at 1346 (revealing that the United Nations Secretary General ordered France to pay 2,300,000 French Francs to Pereira's family).

29. Bernstein, *Greenpeace Case Yields New Dispute*, N.Y. Times, Nov. 6, 1985, at A8 [hereinafter Bernstein, *Greenpeace Case*] (discussing New Zealand's and France's negotiations, which began September 23, 1985, and led to the dropping of murder charges against the two French agents).

30. *See generally U.N. Ruling*, *supra* note 25 (setting forth the terms of the arbitral award); Pugh, *supra* note 5, at 657 (describing the provisions of the Secretary General's award); *see also* Wexler, *supra* note 27, at 399-411 (analyzing the arbitral award and discussing why France and New Zealand agreed to arbitration).

31. Wexler, *supra* note 27, at 391 (arguing that arbitration offers a peaceful solution to international disputes).

32. *See infra* notes 93-95 and accompanying text (noting that territorial sovereignty takes precedence over a claim of sovereign immunity).

33. *Id.*

34. *See infra* notes 36-55 and accompanying text (analyzing why France agreed to waive a potential claim of sovereign immunity and accept arbitration).

35. *See* Braitberg, *Greenpeace: Et la France Devra Rembourser les Ecolos*, Le Quotidien de Paris, Sept. 3, 1987, at 19 (reporting that on Dec. 23, 1985, the French government signed an arbitration agreement with Greenpeace whereby it assumed responsibility for the bombing of the Rainbow Warrior and agreed to compensate Greenpeace in the amount that the arbitral tribunal determined). France and Greenpeace stipulated in their agreement that the arbitration would be binding on both parties. *Id.*; *see* Shabecoff, *supra* note 4, at A2 (discussing the compensation France delivered to Greenpeace).

from a sovereign nation. If Greenpeace had attempted to sue France in a New Zealand court, it could not have countered France's potential sovereign immunity defense with a territorial sovereignty claim. Thus, Greenpeace's success in recovering damages was an even stronger endorsement for resolving international conflicts through arbitration than was New Zealand's success, since Greenpeace did not have the advantage of being a sovereign state.

B. GREENPEACE'S VICTORY OVER SOVEREIGN IMMUNITY

Several reasons underlay France's concession to withhold a sovereign immunity claim if Greenpeace agreed to arbitration. First, France was determined to avoid a public trial that would reveal detailed evidence of the French secret service operation.[36] While Greenpeace would have had difficulty suing France in a New Zealand court if France had asserted sovereign immunity, it is unclear whether France would have won the sovereign immunity argument.[37] Thus, France feared that Greenpeace would successfully file suit in New Zealand, where the judges would not be amenable to the French position.[38]

Second, France agreed to arbitration because it wanted the New Zealand authorities to release the French agents.[39] New Zealand asserted in its negotiations with France that no settlement between the two countries would be possible unless France offered adequate compensation to Greenpeace.[40] Furthermore, if France had not agreed to resolve the dispute through arbitration, Greenpeace could have pursued

36. *See* Bernstein, *Greenpeace Case*, *supra* note 29, at A8 (explaining that France did not want its agents tried in New Zealand to avoid a public hearing of evidence against the French government).

37. *See* Pugh, *supra* note 5, at 662 (stating that if Greenpeace had attempted to bring the French government to trial in New Zealand, the New Zealand court may have had jurisdiction over France because New Zealand follows the restrictive theory of sovereign immunity).

38. *See* Shabecoff, *supra* note 4, at A2 (stating that France consented to arbitration when Greenpeace threatened to sue the French government in a New Zealand domestic court).

39. *See* Pugh, *supra* note 5, at 399 (claiming that securing the release of the French agents from the New Zealand authorities was one of France's primary concerns); Bernstein, *Greenpeace Case*, *supra* note 29, at A8 (repeating the claim made by the French Foreign Minister that France would make every possible effort to ensure the release of the two agents).

40. *See U.N. Ruling*, *supra* note 25, at 1346-47 (indicating that New Zealand would not settle with France unless France paid sufficient damages to Greenpeace and unless binding arrangements existed to ensure that satisfactory compensation would be given).

legal action on its own initiative to prevent the agents from leaving New Zealand.[41]

Third, political considerations played a crucial role in France's decision to submit to arbitration. Tremendous pressure existed within France for the French government to settle with Greenpeace as quickly as possible. The Rainbow Warrior affair, ironically referred to as "UnderWatergate,"[42] was deemed the worst political crisis since the Socialists came to power in 1981.[43] Opposition leaders of the Right demanded resignations of senior government officials,[44] including Prime Minister Laurent Fabius and President Mitterrand.[45] The Socialists feared for their seats in the National Assembly as they faced legislative elections the following March.[46]

The international community also urged France to solve the crisis speedily through arbitration. The Greenpeace affair received extensive news coverage, and nations around the world condemned the bombing.[47] When France launched an economic embargo of New Zealand products,[48] the European Community encouraged France to settle with

41. Currie Interview, *supra* note 9 (assessing France's incentives to submit to arbitration rather than attempt to defend a suit in a New Zealand court).

42. Smart, *French Newspaper Stirs Up Trouble for Mitterrand*, Christian Sci. Monitor, Sept. 19, 1985, at 9 (remarking that the bungled Rainbow Warrior spy mission and government cover-up created a French "UnderWatergate"); *Le Watergate*, N.Y. Times, Sept. 25, 1985, at 18 (mocking the French political crisis as a mortifying repeat of the American Watergate).

43. Bernstein, *France Blames*, *supra* note 24, at 12 (addressing press reports that discredited government assertions that Prime Minister Laurent Fabius and President Mitterrand had no advance knowledge of the bombing).

44. Smart, *supra* note 42, at 9 (describing President Mitterrand's government as plagued by complete disarray).

45. Bernstein, *France Concedes*, *supra* note 4, at 1 (predicting that the political uproar was likely to continue until the French government publicly revealed the entire truth about the Rainbow Warrior affair).

46. *French Confession*, Wash. Post, Sept. 24, 1985, at A20 (pondering how the political scandal would affect the forthcoming legislative elections in March 1986); *Le Watergate*, *supra* note 42, at 18 (stating that it was expected that the Socialists would lose their majority in Parliament and would have to govern with the opposition); Bernstein, *France Concedes*, *supra* note 4, at 1 (remarking that President Mitterrand's most serious problem was not the bombing but rather the plummeting credibility of officials who were asserting that the government was not involved in the attack).

47. *See* Pugh, *supra* note 5, at 666 (noting that the European Parliament criticized France's attack on the Rainbow Warrior).

48. Lewis, *Sanctions Can Work*, N.Y. Times, July 10, 1986, at A23 (reporting that France banned the import of New Zealand wool and lamb brains into France and threatened to prevent New Zealand from selling butter to the European Community); Pugh, *supra* note 5, at 667 (stating that France admitted that it was banning New Zealand produce from importation for non-commercial reasons). New Zealand exports to France decreased by approximately forty percent from January to April 1986. *Id.* On April 4, 1986, the European Community Trade Commissioner upheld New Zealand's claim that France was obstructing New Zealand imports. *Id.* at 657.

New Zealand and Greenpeace before the conflict escalated further.[49] Finally, because the Rainbow Warrior was an English ship, the bombing placed the United Kingdom in a delicate position vis-a-vis its French ally.[50] The United Kingdom sought to avoid protracted tensions with France and consequently exhorted the French government to settle with New Zealand and Greenpeace expeditiously.[51]

As a result, France decided that waiving a potential claim of sovereign immunity and agreeing to arbitration were in its best interest. The arbitration between France and Greenpeace became the first arbitration over a non-commercial tort between a foreign sovereign and a private party.[52] While the details of the arbitration remain secret, the amount of the award, totalling U.S. $8 million, was released to the public.[53]

The Rainbow Warrior affair supports the proposition that states which pursue terrorism must be held internationally accountable for their tortious acts.[54] Moreover, states conducting illegal activities owe a duty to compensate individuals and private organizations as well as other sovereign nations.[55] Thus, the Greenpeace case sets a strong precedent for preventing states from asserting sovereign immunity in instances of state-sponsored terrorism.

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49. Currie Interview, *supra* note 9 (commenting that Ruud Lubbers, Prime Minister of the Netherlands and President of the European Council of Ministers, was one of the heads of state that met with the French Prime Minister to encourage a speedy settlement).

50. Pugh, *supra* note 5, at 666 (explaining that the United Kingdom refused to initiate judicial proceedings against France to avoid aggravating the situation).

51. *See id.* (explaining that although the United Kingdom, an ally of both France and New Zealand, had initially remained passive, Mrs. Thatcher, the British Prime Minister, eventually urged France to settle the dispute quickly).

52. *See* Shabecoff, *supra* note 4, at A2 (noting that Greenpeace's attorney, Lloyd Cutler, affirmed that this arbitral agreement was the first resolution of a non-commercial tort dispute between a sovereign nation and a private entity through arbitration).

53. *See Impliquée dans L'Affaire Greenpeace, Dominique Prieur Promue Commandant*, Le Monde, July 12, 1989, at 10 (announcing that France financed Greenpeace's new vessel, replacing the old Rainbow Warrior with the U.S. $8 million award payment).

54. *See* Clark, *supra* note 6, at 413 (arguing that the international community must recognize state responsibility in instances of government-sponsored terrorism); *see also French Confession*, *supra* note 46, at A20 (repeating New Zealand's assertion that the bombing of the Rainbow Warrior was state-sponsored terrorism).

55. *French Confession*, *supra* note 46, at A20.

II. BASIC PRINCIPLES OF SOVEREIGN IMMUNITY

A. ORIGINS OF SOVEREIGN IMMUNITY: THE ABSOLUTE THEORY

Under the absolute theory of sovereign immunity, a domestic court may not exercise jurisdiction over a foreign nation.[56] A sovereign cannot be made a defendant in a local court of another nation without the sovereign's consent.[57] If, however, a state waives its right to immunity, the domestic court of a foreign country may subject that state to its own judicial process.[58]

This principle stems from the fundamental equality and independence of states.[59] Because all nations are considered equal, one nation cannot exercise its sovereign power over another.[60] Furthermore, states traditionally have hesitated to sue foreign countries in their domestic courts to avoid damaging their economic and political ties with those foreign nations.[61]

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56. *See* SENATE COMM. ON THE JUDICIARY, TO DEFINE THE JURISDICTION OF U.S. COURTS IN SUITS AGAINST FOREIGN STATES, S. REP. NO. 1310, 94th Cong., 2d Sess. 9 (1976) [hereinafter SENATE REPORT] (statement of Monroe Leigh, Legal Advisor, Department of State) (explaining the history of the Foreign Sovereign Immunities Act of the United States); HOUSE COMM. ON THE JUDICIARY, TO DEFINE THE JURISDICTION OF U.S. COURTS IN SUITS AGAINST FOREIGN STATES: HEARINGS ON H.R. 11315 BEFORE THE SUBCOMM. ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS, H.R. REP. NO. 1487, 94th Cong., 2d Sess. 25 (1976) [hereinafter HOUSE REPORT] (explaining the essence of the absolute immunity theory while offering historical background on the United States Foreign Sovereign Immunities Act).

57. Letter from Acting Legal Adviser Jack Tate to the Acting Attorney General (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL. at 984 (1952) [hereinafter Tate Letter] (summarizing the old theory of absolute immunity); *see* Weber, *supra* note 14, at 29 (stating that international law applying the absolute immunity theory only proscribes domestic exercises of jurisdiction over foreign states that have not consented to adjudication).

58. *See infra* notes 137-141 and accompanying text (discussing how implicit and explicit waivers nullify a state's right to sovereign immunity).

59. *See* Trooboff, *supra* note 13, at 252 (noting that foreign sovereign immunity has its roots in state sovereignty and the equality of states). The doctrine is founded on the principle that all states are equally sovereign, and consequently one state cannot exert its will over another. *Id. see also* The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 137 (1812) (holding that the French government was immune from the jurisdiction of the courts of the United States when French agents seized an American ship and transformed it into a warship); SENATE REPORT, *supra* note 56, at 10 (explaining that *The Schooner Exchange* is famous for being the first case to recognize the principle of sovereign immunity in the United States); Comment, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CALIF. L. REV. 365, 378-79 (1989) [hereinafter Comment, *Implied Waiver*] (discussing the pivotal role of *The Schooner Exchange* in the development of sovereign immunity in the United States).

60. *See* I. BROWNLIE, *supra* note 21, at 250 (explaining that because states are equal and possess legal personality, sovereignty is a legal relationship to other states).

61. *See* Weber, *supra* note 14, at 2 (criticizing the United States State Department's predisposition for granting immunity to certain foreign sovereigns to further the

While the sovereign immunity doctrine prevents a foreign state from being tried in the domestic court of another nation, every state remains liable for its international law violations.[62] Sovereign immunity does not destroy legal obligations.[63] It merely prevents domestic courts from asserting adjudicatory jurisdiction over foreign states.[64] Thus, even when a nation successfully asserts sovereign immunity, it remains substantively liable for its illegal acts.

B. SOVEREIGN IMMUNITY TODAY: THE RESTRICTIVE THEORY

Today most states follow the restrictive approach to sovereign immunity[65] which limits immunity to suits involving a state's public acts. This approach does not extend immunity to suits involving a state's commercial or private acts.[66] The restrictive theory gained broad ac-

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Department's own institutional goals and placate those nations exhibiting hostility towards the United States).

62. *See* I. BROWNLIE, *supra* note 21, at 282 (emphasizing that under the sovereign immunity doctrine, foreign states are immune from local jurisdiction but not from legal responsibility). Sovereign immunity does not address the merits of a claim, but rather it attempts to designate the appropriate forum for the litigant's cause of action. *Id.*

63. *See* THIRD RESTATEMENT, *supra* note 14, § 451 comment b (explaining that the sovereign immunity doctrine neither creates nor destroys legal obligations).

64. *Id.*

65. *See* Comment, *Implied Waiver*, *supra* note 59, at 380 (recounting the evolution of the absolute theory of sovereign immunity into the restrictive theory); *Report of the Commission to the General Assembly on the Work of Its Thirty-fifth Session*, [1983] 2 Y.B. INT'L L. COMM'N 27, U.N. Doc. A/CN.4/SER.A/1983/Add.1 (Part 2) [hereinafter *I.L.C. Commission Report*] (stating that when a claim concerns one of the accepted exceptions to immunity, a domestic court has jurisdiction over a foreign sovereign regardless of whether that sovereign has consented to the proceedings).

In some contexts, the term "restrictive theory" describes the approach to immunity which distinguishes claims arising out of governmental activities from claims arising out of activities of a private nature, such as commercial acts. THIRD RESTATEMENT, *supra* note 14, § 451 comment a. In other contexts, the phrase may more generally denote any approach differing from the absolute theory of immunity. *See, e.g.*, International Law Commission, *Fifth Report on Jurisdictional Immunities of States and Their Property*, at 9, U.N. Doc. A/CN.4/363/Add.1 (1983) [hereinafter *Fifth Report of the I.L.C.*] (referring interchangeably to the "more restrictive principle" and the "less absolute principle" of state immunity). This Comment intends the term "restrictive approach" to denote all non-absolute theories of immunity, regardless of whether they encompass the distinction between commercial and governmental activities.

66. SENATE REPORT, *supra* note 56, at 9; HOUSE REPORT, *supra* note 56, at 25; United States of America Questionnaire on the Topic "Jurisdictional Immunities of States and Their Property," *reprinted in Materials on Jurisdictional Immunities of States and Their Property*, at 630, U.N. Doc. ST/LEG/SER.B/20, U.N. Sales No. EF.81V.10(1982) [hereinafter United States Questionnaire] (explaining that the FSIA allows foreign immunity when suits concern public acts, but it denies immunity when claims involve private or commercial acts); United Kingdom of Great Britain and Northern Ireland Questionnaire on the Topic "Jurisdictional Immunities of States and Their Property," *reprinted in Materials on Jurisdictional Immunities of States and Their Property*, *supra* at 624, 626, (1982) [hereinafter United Kingdom Question-

ceptance in the twentieth century,[67] as states increasingly engaged in commercial activities.[68] Immunity for states performing commercial transactions with private entities was undesirable because it deprived private parties of their judicial remedies.[69] As a result, the international community felt that domestic courts should protect the rights of parties conducting business transactions with foreign governments.[70]

Early in the twentieth century, several international conventions implemented the restrictive theory of sovereign immunity for cases involving state vessels in commercial use.[71] In 1972, the European Convention on State Immunity devoted fourteen articles to exceptions to the

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naire] (affirming that the State Immunity Act distinguishes *jure imperii* activities, which are conducted in the exercise of sovereign authority, from *jure gestionis* transactions, which are not sovereign acts).

The rationale for the restrictive theory is that since commercial activities are governed by private law, a state operates outside the scope of sovereign authority when it engages in commercial transactions. Comment, *Implied Waiver*, *supra* note 59, at 380. The restrictive approach to immunity acknowledges the dual nature of the state as a political power with sovereign privileges and as an entity capable of pursuing private law relationships. *Id.* at 380 n.77.

67. *See* THE AUSTRALIAN LAW REFORM COMMISSION, FOREIGN STATE IMMUNITY, REP. NO. 24, at 51 (1984) [hereinafter AUSTRALIAN LAW REFORM COMMISSION] (noting the shift from absolute to restrictive immunity during the 20th century). *But see* Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 238 (1983) (stating that the United States government and the Supreme Court both rejected the theory of absolute immunity before the twentieth century when the United States declared that it had jurisdiction over foreign vessels and their commanders stationed in American ports).

68. Tate Letter, *supra* note 57, at 985; Weber, *supra* note 14, at 18 (explaining that increases in the commercial activities of states and stronger demands for state responsibility eliminated the absolute theory of immunity); *see* Trooboff, *supra* note 13, at 268 (commenting that the Tate Letter, which announced that the State Department of the United States would follow the restrictive theory, was a landmark shift in the immunity policy of the United States). *But see* Loftis, *Securing Arbitral Awards: Waiving Immunity Under the Foreign Sovereign Immunities Act and Ensuring Equitable Remedy by Pre-award Attachment Under the New York Convention*, 9 SUFFOLK TRANSNAT'L L.J. 235, 240 (1985) (criticizing the Tate Letter for failing to stipulate how the State Department of the United States would distinguish between sovereign and private state activities, and for neglecting to provide sufficient specificity).

69. THIRD RESTATEMENT, *supra* note 14, at 391 introductory note (explaining that states adopted the restrictive theory in the twentieth century because it was undesirable to insulate foreign nations acting like private parties from liability for their tortious acts).

70. *See* Tate Letter, *supra* note 57, at 985 (articulating the reasons why the State Department of the United States deemed it necessary to formally adopt the restrictive theory of immunity).

71. *See* Weber, *supra* note 14, at 19 (describing the Brussels Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels of 1926, the Convention on the Territorial Sea and the Contiguous Zone of 1958, and the International Convention on Civil Liability for Oil Pollution Damage of 1969).

principle of sovereign immunity.[72] The Organization of American States also drafted a convention which espoused the restrictive theory.[73] In addition, the International Law Commission[74] (I.L.C.) and the International Law Association[75] (I.L.A.) each proposed draft treaties adopting the restrictive theory of sovereign immunity.

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72. European Convention on State Immunity, May 16, 1972, Europ. T.S. No. 74, art. 11 [hereinafter European Convention] (codifying the non-commercial torts exception to foreign sovereign immunity); *Chart Showing Signatures and Ratifications of Conventions and Agreements Concluded within the Council of Europe*, COUNCIL OF EUROPE, DIRECTORATE OF LEGAL AFFAIRS, 39 (1990) (indicating that the European Convention entered into force on June 11, 1976 and was ratified by Austria, Belgium, Cyprus, Luxembourg, the Netherlands, Switzerland, and the United Kingdom). The countries ratified the Convention in an effort to codify international law restricting sovereign immunity. *See* European Convention, *supra*, preamble (announcing that the Convention takes into account the tendency in international law to curtail state immunity claims).

73. Inter-American Draft Convention on Jurisdictional Immunity of States, Jan. 21, 1983, *reprinted in* 22 I.L.M. 292 (1983) [hereinafter Inter-American Draft Convention]. While the Draft Convention has not entered into force as of the summer of 1990, it does indicate support within the Organization of American States for limiting the sovereign immunity principle. *See Fifth Report of the I.L.C.*, *supra* note 65, at 14 (citing the Inter-American Draft Convention as an example of regional efforts to adopt the restrictive theory). Article 6(e) states that nations are not immune "in proceedings for losses and damages on tort liabilities" arising from claims relating to trade or commercial activities. Inter-American Draft Convention, *supra*, art. 6(e).

74. *See* International Law Commission, *Draft Articles on Jurisdictional Immunities of States and Their Property*, 41 U.N. GAOR Supp. (No. 10) at 23, U.N. Doc. A/41/498 (1986) [hereinafter *Draft Articles on Jurisdictional Immunities*] (presenting a set of draft articles to the United Nations General Assembly in 1986 in the eighth and final report of the International Law Commission); THIRD RESTATEMENT, *supra* note 14, at 391-92 (stating that the Commission issued eight reports, each of which contained a provision granting domestic courts jurisdiction over sovereign nations for non-commercial torts). In 1986, in its eighth and final report, the Commission approved articles for a proposed codification. *Id.*; *see* Comment, *Immunity of States*, *supra* note 16, at 1851 (specifying that the I.L.C. began drafting articles on sovereign immunity at the invitation of the United Nations in 1978); Franck & El Baradei, *The Codification and Progressive Development of International Law: A UNITAR Study of the Role and Use of the International Law Commission*, 76 AM. J. INT'L L. 630, 630-31 (1982) (stating that the I.L.C., as the main legislative organ of the United Nations, encourages the codification of progressive developments in international law).

75. *See* INTERNATIONAL LAW ASSOCIATION, REPORT OF THE SIXTIETH CONFERENCE HELD AT MONTREAL (1983) [hereinafter INTERNATIONAL LAW ASSOCIATION] (adopting a Draft Convention which establishes a non-commercial torts exception to sovereign immunity); *Fifth Report of the I.L.C.*, *supra* note 65, at 15 (stating that the International Law Association, a group of international attorneys from various legal systems throughout the world, adopts the restrictive approach); Note, *The International Law Association Convention on Foreign Sovereign Immunity: A Comparative Approach*, 23 VA. J. INT'L L. 635, 639 (1983) [hereinafter Note, *I.L.A. Convention*] (explaining that the I.L.A. Committee on State Immunity, established in 1979 by the Executive Council of the I.L.A., issued a Draft Convention on sovereign immunity, which the I.L.A. adopted at its sixtieth conference in Montreal, Canada, in 1982).

Finally, seven nations enacted statutes that codified the restrictive theory as well.[76] These codifications further indicate that the general trend in international law favors limiting sovereign immunity.[77] The United States was the first nation to codify its restrictive approach to sovereign immunity in the Foreign Sovereign Immunities Act of 1976 (FSIA).[78] Other nations subsequently used the statute of the United States as a model for their own legislation, particularly with respect to the FSIA's distinction between commercial and governmental activities.[79] Furthermore, case law reveals that many nations have adopted

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76. *See, e.g.*, United States Sovereign Immunities Act, 28 U.S.C. §§ 1602-11 (1982) (codifying the restrictive immunity theory); United Kingdom of Great Britain and Northern Ireland State Immunity Act, 1978, *reprinted in Materials on Jurisdictional Immunities of States and Their Property*, *supra* note 66, at 41, [hereinafter U.K. State Immunity Act] (codifying the restrictive immunity theory); Australian Foreign States Immunities Act, AUSTL. ACTS P. (1985) (codifying the restrictive immunity theory).

77. *See* AUSTRALIAN LAW REFORM COMMISSION, *supra* note 67, at 11 (stating that the practice of governments evidences a world-wide penchant towards restrictive immunity); United States Questionnaire, *supra* note 66, at 630 (noting that the Foreign Sovereign Immunities Act codifies the restrictive principle of immunity which is currently followed in international law); United Kingdom Questionnaire, *supra* note 66, at 620-21 (explaining that the United Kingdom codified the restrictive theory in its State Immunity Act to respect modern international law, which has rejected the absolute theory of immunity embodied in old English case law); Letter Concerning the Topic of Jurisdictional Immunities of States and Their Property Submitted by the United Kingdom Government to the Secretariat (July 3, 1979), *reprinted in Materials on Jurisdictional Immunities of States and Their Property*, *supra* note 66, at 96-97 (acknowledging that the State Immunity Act was necessary to bring English law into conformity with obligations incurred under the European Convention on State Immunity, which is viewed as an accurate reflection of general state practice in the area of immunity). In addition, many nations which have not yet codified their law on sovereign immunity have applied the restrictive principle for many years. *See* THIRD RESTATEMENT, *supra* note 14, § 451 reporters' notes (stating that Austria, Belgium, Egypt, France, Greece, Italy, and Switzerland have long practiced restrictive immunity).

78. *See* Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 (1982); SENATE REPORT, *supra* note 56, at 9 (claiming that a main reason for enacting the FSIA was to avoid excessive allowance of immunity). Previously, a nation seeking immunity asked the Department of State to deliver a formal suggestion of immunity to the court. *Id.* This process tended to encourage absolute immunity, since the State Department sought to preserve friendly relations with foreign governments. Weber, *supra* note 14, at 9; *see* Trooboff, *supra* note 13, at 269-71 (discussing why Congress and the President decided to promulgate the Foreign Sovereign Immunities Act).

Since 1952, the Tate Letter, announcing the policy on sovereign immunity of the United States, remained the only guideline given to the United States State Department for deciding immunity issues. Consequently, immunity decisions frequently were inconsistent. *See id.* at 268-70 (noting that the State Department decided immunity claims on a case-by-case basis, depending on whether the Tate Letter mandated a denial of immunity). Thus, Congress found it necessary to transfer immunity determinations from the executive to the judiciary. SENATE REPORT, *supra* note 56, at 9.

79. *See* Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2) (1982) (stating that states are not immune from the jurisdiction of American courts where commercial activities are concerned); U.K. State Immunity Act, 1978, § 3 (providing that states

the American test for assessing whether a state's activity should be considered public or private.[80] According to this test, the nature of an activity and not its purpose determines whether it is commercial or sovereign.[81]

III. THE INJURY TO PERSONS OR DAMAGE TO PROPERTY EXCEPTION TO SOVEREIGN IMMUNITY

A. EXTENSION OF THE RESTRICTIVE THEORY: THE NEED FOR JUDICIAL REMEDIES

The exception to sovereign immunity for torts that cause injury to persons or damage to property is an extension of the restrictive theory.[82] International law recognizes that in commercial situations parties injured by foreign governments deserve to have their rights determined in a court of law.[83] It is increasingly acknowledged that victims of non-commercial torts should also have access to these jurisdictional remedies.[84] Under the restrictive theory, states that commit torts incur lia-

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may not claim immunity with respect to proceedings regarding commercial transactions); Australian Foreign States Immunities Act, AUSTL. ACTS P. § 11 (1985) (establishing that states are not immune from proceedings in Australian courts concerning commercial dealings).

80. *See* Weber, *supra* note 14, at 20 n.128 (detailing numerous European courts that applied the FSIA's nature versus purpose test); United Kingdom Questionnaire, *supra* note 66, at 625 (explaining that the exceptions to immunity set forth in the English Act focus on the objective nature of an activity rather than on the purpose of the transaction, even though the Act does not explicitly require that the nature of an activity be the determinative inquiry).

81. Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(d) (1982) (defining "commercial activity" as a regular course of commercial conduct or a specific transaction of a commercial nature). For instance, if the nature of the state activity were a commercial contract, the state would not be immune from jurisdiction, regardless of whether the activity served an important government purpose. *See* HOUSE REPORT, *supra* note 56, at 27 (giving an example of a commercial transaction); United Kingdom Questionnaire, *supra* note 66, at 625 (illustrating that an English court would deny immunity to a foreign state in a dispute concerning a contract for the sale of goods, regardless of whether the contract served a sovereign or public function).

82. *See* Van Walt Interview, *supra* note 8 (affirming that the non-commercial torts exception to immunity is a natural extension of the internationally recognized restrictive theory); *Summary Records of the Meetings of the Thirty-Fifth Session*, [1983] 1 Y.B. INT'L L. COMM'N 76, U.N. Doc. A/CN.4/SER.A/1983 [hereinafter *I.L.C. Summary Records*] (discussing the emerging trend towards restricting immunity in cases concerning injury to persons or damage to property). Increasing international acceptance of domestic court jurisdiction over foreign sovereigns committing non-commercial torts stems from the principles of justice and reasonableness, which originally fueled the restrictive theory of immunity. *Id.*

83. Tate Letter, *supra* note 57, at 985.

84. *See Fifth Report of the I.L.C.*, *supra* note 65, at 7 (arguing that the failure to exercise jurisdiction over foreign states that commit torts leaves injured parties remediless and without alternate recourse); *I.L.C. Summary Records*, *supra* note 82, at 75

bility as though they were private entities, just as they would if they had committed commercial delicts.[85] Thus, several state statutes,[86] the European Convention,[87] the International Law Commission Report[88] and the International Law Association Report[89] refuse to grant immunity to foreign sovereigns that commit torts causing personal injury or property damage.[90]

(declaring that the injury to persons or damage to property exception upholds justice). The inability of local courts to exercise jurisdiction over foreign sovereigns committing torts results in a legal vacuum that leaves the victim at the mercy of the foreign nation. *Id.* at 77. Diplomatic negotiations are an inadequate substitute for local court jurisdiction because they fail to produce specific determinations of legal rights and obligations under domestic law and public international law. *Id.* at 90.

85. *See* Foreign Sovereign Immunities Act, 28 U.S.C. § 1606 (1982) (establishing that a state which is not immune from jurisdiction is liable in the same fashion and to the same degree as a private entity under similar circumstances); THIRD RESTATEMENT, *supra* note 14, § 454 comment b (stating that the restrictive theory assimilates the liability of foreign governments to that of private entities, regardless of whether the government has committed an intentional wrong or has simply been negligent).

86. *See* Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(5) (1982) (providing that states are not immune from jurisdiction where "money damages are sought against a foreign state for personal injury or death, or damage to or loss of property"); U.K. State Immunity Act, 1978, § 5 (establishing that states are not immune to proceedings for "(a) death or personal injury; or (b) damage to or loss of tangible property"); Australian Foreign States Immunities Act, AUSTL. ACTS P. § 13 (1985) (stipulating that under Australian law, states are not immune from proceedings concerning "(a) the death of, or personal injury to, a person; or (b) loss of or damage to tangible property caused by an act or omission done or omitted to be done in Australia"); Canadian State Immunity Act, CAN. REV. STAT. ¶ 6 (1981), *reprinted in Materials on Jurisdictional Immunities of States and Their Property*, at 7, U.N. Doc. ST/LEG/SER.B/20 (1982) (proclaiming that under Canadian law states may not receive jurisdictional immunity in proceedings relating to "(a) any death or personal injury, or (b) any damage to or loss of property that occurs in Canada"); South African Foreign Sovereign Immunity Act ¶ 6 (1981), *reprinted in Materials on Jurisdictional Immunities of States and Their Property*, *supra* note 66, at 34 (stating that South African courts have jurisdiction over proceedings concerning "(a) the death or injury of any person; or (b) damage to or loss of tangible property, caused by an act or omission in the Republic"); Singapore State Immunity Act ¶ 7 (1979), *reprinted in Materials on Jurisdictional Immunities of States and Their Property*, *supra* note 66, at 28 (affirming that a foreign state is not immune from the jurisdiction of local courts in matters pertaining to "(a) death or personal injury; or (b) damage to or loss of tangible property, caused by an act or omission in Singapore"). While all six statutes codify the non-commercial torts exception to sovereign immunity, this Comment only discusses the American, English, and Australian statutes.

87. European Convention, *supra* note 72, art. 11 (providing that domestic courts have jurisdiction over foreign states in proceedings relating to "redress for personal injury or damage to tangible property.").

88. *Draft Articles on Jurisdictional Immunities*, *supra* note 74, art. 14 (establishing that states are not immune from suits arising from death or injury, or damage to tangible property).

89. INTERNATIONAL LAW ASSOCIATION, *supra* note 75, art. III(F) (setting forth death or personal injury, or damage to property as an exception to immunity).

90. *See Fifth Report of the I.L.C.*, *supra* note 65, at 12-17 (discussing national legislation, the European Convention, and international opinions which established non-

B. Departure from the Distinction between Sovereign and Private Activities

The non-commercial torts exception to sovereign immunity is not based on the traditional distinction between private or *jure imperii* acts, and public or *jure gestionis* acts.[91] Indeed, the denial of immunity for injury to persons or damage to property applies to all torts, including those committed during an exercise of sovereign power.[92] Rather than relying on the distinction between sovereign and private activities, jurisdiction over foreign states that injure persons or damage property is based on the principle of territoriality.[93]

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immunity for states causing personal injuries or damage to property); *see also I.L.C. Commission Report*, *supra* note 65, at 76 (explaining that the I.L.C.'s Fifth Report considers state practice, which the Special Rapporteur gleaned through judicial decisions, national legislation, international conventions, and international legal writers).

91. *See Fifth Report of the I.L.C.*, *supra* note 65, at 6 (asserting that domestic courts have jurisdiction over states which perform tortious acts that could be categorized as *acta jure imperii* and that are not commercial in character). The distinction between governmental and private acts has little or no bearing on the non-commercial exception to immunity. *Id.* The Australian Law Reform Commission indicates that any single distinction between private or commercial acts and governmental or sovereign acts is artificial. Australian Law Reform Commission, *supra* note 67, at 50.

The Commission even refuses to adopt this formulaic dichotomy for its commercial exception to immunity. Indeed, the Australian Law Reform Commission Report states that the nature versus purpose test used by the United States and other countries to assess the character of an activity is unworkable. *Id.* at 50-51. The Australian Foreign States Immunities Act of 1985 follows the Commission's recommendations and provides its own definition of what constitutes commercial activity. *See* Australian Foreign States Immunities Act, Austl. Acts P. § 11(3) (1985) (defining "commercial transaction"). Finally, the Australian approach affords greater flexibility to injured parties, who may sue a foreign state for a tort under the commercial exception if the suit cannot be brought under the tort exception. Australian Law Reform Commission, *supra* note 67, at 51.

The International Law Association's Report supports the traditional distinction between governmental and private acts when it provides that a state is generally immune from jurisdiction for its sovereign acts. International Law Association, *supra* note 75, art. II. The Report enumerates, however, a series of exceptions to immunity which grant domestic courts jurisdiction over states regardless of the sovereign or private nature of the state acts. *Id.* art. III.

92. Australian Law Reform Commission, *supra* note 67, at 66 (interpreting the recommended exception to immunity for personal injury or damage to property); *see I.L.C. Commission Report*, *supra* note 65, at 27 (noting that sovereign immunity may be restricted irrespective of the capacity in which the foreign government acted or the category of the activities conducted by the state); *see also infra* note 108 and accompanying text (discussing the landmark case in the United States which obviated the distinction between sovereign and private acts in immunity determinations).

93. *See* I. Brownlie, *supra* note 21, at 274 (defining territorial sovereignty as the privilege which grants a state exclusive power to regulate and enforce decisions pertaining to its territory and population); *I.L.C. Commission Report*, *supra* note 65, at 19 (stating that the legal basis for the non-commercial torts exception is derived from the link between the location where the illegal act was committed and the physical nature of the harm perpetrated); International Law Commission, Sixth Report of the

Territorial sovereignty implies that foreign states have no privilege to commit torts of any kind in other jurisdictions.[94] Domestic courts have jurisdiction over foreign governments in non-commercial torts situations because states have no right to commit local offenses.[95] Furthermore, since the non-commercial torts exception to immunity is based on the concept of territoriality, it does not violate the fundamental principle of state equality that initially gave rise to the absolute theory of immunity.[96]

INTERNATIONAL LAW COMMISSION, at 15, U.N. Doc. A/CN.4/376/1984 (affirming that the principle of territoriality overrides all other principles, notably that of sovereign immunity); *Fifth Report of the I.L.C.*, *supra* note 65, at 15 (arguing that the *locus delicti commissi*, the place where the tortious act was committed, presents an internationally accepted criterion for the exercise of jurisdiction over foreign sovereigns).

94. AUSTRALIAN LAW REFORM COMMISSION, *supra* note 67, at 67; *Fifth Report of the I.L.C.*, *supra* note 65, at 8 (affirming that a state which conducts activities in a foreign nation must respect local laws and regulations). Immunity must be denied to foreign states that commit torts abroad to protect the citizens, residents, and tourists of the forum state. *Id.* Indeed, rigid concepts of sovereign immunity should not affect a foreign state's obligation to respect local laws, which are created to protect people within the territory of the forum nation. *I.L.C. Summary Records*, *supra* note 82, at 77. Finally, every state has an interest in restricting the immunity of foreign nations in cases concerning injury to persons or damage to property because the need to safeguard people within the state's borders overrides the fear of disrupting friendly diplomatic relations with foreign sovereigns. *Id.* at 87. Ultimately, suits for non-commercial torts against foreign states do not impede international relations to such a degree as to supersede the need to provide a judicial forum for victims of illegal activity. *Id.* at 88.

95. AUSTRALIAN LAW REFORM COMMISSION, *supra* note 67, at 69; *I.L.C. Summary Records*, *supra* note 82, at 77 (arguing that granting jurisdiction to courts in the state where the tort occurs encourages predictable judgments, uniform results, and effective administration of justice); *Fifth Report of the I.L.C.*, *supra* note 65, at 7 (asserting that the exercise of jurisdiction by a court located in the country where the damage occurs offers the best guarantee that justice will quickly and soundly be served). Domestic court jurisdiction represents the most convenient means of adjudication and takes advantage of local facilities for establishing or disproving evidence and determining compensation. *Id.*

96. *I.L.C. Summary Records*, *supra* note 82, at 75 (finding that the non-commercial torts exception to immunity does not defeat the sovereign equality of states); *Fifth Report of the I.L.C.*, *supra* note 65, at 8 (establishing that state sovereignty is not challenged when states are internationally responsible for injuries to persons or damage to property). Assisting an injured party in obtaining justice is not contrary to statehood or sovereignty. *Id.* Indeed, the non-commercial torts exception to immunity may be considered an extension of state practice allowing citizens to sue states domestically for government caused injuries. *I.L.C. Summary Records*, *supra* note 82, at 87. Furthermore, granting jurisdiction to local courts actually reinforces the sovereignty of the forum state, as it allows the forum nation to assume legal control over the activities occurring within its borders. *Id.* at 90. Finally, removing the blanket rule of immunity in situations involving non-commercial torts does not deny the foreign sovereign its right to defend itself. *Id.* at 79. It merely eliminates the procedural bar to the initiation of legal proceedings. *Id.*

C. JURISDICTIONAL LINKS TO THE FORUM STATE

Various codifications of the non-commercial torts exception to immunity establish different jurisdictional requirements regarding the location of the injurious act, the occurrence of damages, and the presence of the perpetrator in the forum state. When the government's tortious conduct and the injury itself both occur in the forum state, a domestic court has the strongest case for maintaining jurisdiction over the foreign nation.[97] When the state's tortious acts occur in one nation and the damage occurs in another, or when the acts which cause the injury take place in different nations, the jurisdiction of the domestic court will depend on the particular jurisdictional links required in the applicable codification of sovereign immunity.

Only the United States Foreign Sovereign Immunities Act bases the jurisdiction of local courts on whether the injury occurs in the United States.[98] The United Kingdom State Immunity Act,[99] the Australian Foreign States Immunities Act,[100] and the International Law Association Report[101] grant jurisdiction to domestic courts if the act that causes the injury occurs in the forum state. The European Convention[102] and the International Law Commission Report[103] limit sovereign

97. AUSTRALIAN LAW REFORM COMMISSION, *supra* note 67, at 66 (noting that when the illegal act and the injury take place in the same state, the local court provides the obvious and convenient remedy).

98. *See* Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(5) (1982) (providing that states are not immune from local jurisdiction if the injury to person or damage to property occurs in the United States); THIRD RESTATEMENT, *supra* note 14, § 454 comment e (elaborating that a court in the United States may only have jurisdiction over a foreign government if the injury occurs in the United States, irrespective of the location of the act or omission which caused the damage). Even if indirect effects of the injury are experienced in the United States, this fact would not suffice to grant jurisdiction to a domestic court. *Id.*

99. U.K. State Immunity Act, 1978, § 5 (establishing that states are not immune for injuries to persons or damage to property performed in the United Kingdom).

100. Australian Foreign States Immunities Act, AUSTL. ACTS P. § 13 (1985) (stipulating that Australian domestic courts may hear cases concerning injury to persons or damage to property that foreign states perpetrate in Australia).

101. INTERNATIONAL LAW ASSOCIATION, *supra* note 75, art. III, § F (providing that the non-commercial torts exception applies only if the act which causes the damage occurs at least in part in the forum state).

102. European Convention, *supra* note 72, art. 11 (affirming that a state may not claim immunity if the injury takes place in the state or the perpetrator of the damage is present in the state when the injury occurs).

103. *Draft Articles on Jurisdictional Immunities*, *supra* note 74, art. 14 (stating that a foreign sovereign cannot assert immunity if the harmful act occurs wholly or partially in the forum state and the perpetrator of the act is present in that territory when the act takes place); *see I.L.C. Summary Records*, *supra* note 82, at 76 (revealing that the Special Rapporteur of the I.L.C. believed that domestic courts should have jurisdiction over foreign nations even when the illegal act is committed in one state and the results occur in another). Yet, the Special Rapporteur feared that the

immunity only if the tortious activity occurs in the forum state and the perpetrator of the injury was present in the forum state at the time the damage took place.[104] In addition, the I.L.C. and I.L.A. Reports adopt a slightly more flexible approach by granting jurisdiction to domestic courts as long as the tortious act occurred at least partially within the forum state.[105] Thus, the success of a claim against a foreign sovereign for injury to persons or damage to property depends on whether the particular jurisdictional requirements of the relevant immunity law are met.

D. THE FOREIGN SOVEREIGN IMMUNITIES ACT'S DISCRETIONARY FUNCTION: TERRORISM AS A FOREIGN POLICY OPTION?

The United States Foreign Sovereign Immunities Act contains a provision not present in other non-commercial torts codifications. This provision proclaims that a foreign government retains its immunity, even when it has injured persons or damaged property, if the plaintiff's claim is based on a state exercise of a "discretionary act."[106] Discretionary acts may include the initiation of operations, the formulation of plans, and the acts of state agents executing those governmental activities.[107]

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non-commercial torts exception established in the I.L.C. Report does not cover such situations. *Id.*

104. *See* Comment, *Immunity of States*, *supra* note 16, at 1859-60 (criticizing the requirement that the perpetrator of the injury be in the forum state); *I.L.C. Summary Records*, *supra* note 82, at 76 (questioning whether the presence reservation is justified in view of the current increase in terrorism). State practice does not reflect the requirement that the author of the injury be present in the forum at the time of the illegal act. *Id.*

105. *Draft Articles on Jurisdictional Immunities*, *supra* note 74, at 14; INTERNATIONAL LAW ASSOCIATION, *supra* note 75, art. III, § F; *see* Comment, *Immunity of States*, *supra* note 16, at 1858 (noting the importance of recognizing that a series of acts in various nations may cause an injury).

106. Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(5)(A) (1982) (stating that the injury to persons or damage to property exception to sovereign immunity does not apply to a claim based on the performance or non-performance of a discretionary act, regardless of whether an abuse of discretion exists). This provision of the FSIA is modeled after a corresponding provision in the United States Federal Tort Claims Act. United States Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2680(a), (h) (1982); THIRD RESTATEMENT, *supra* note 14, § 454 comment d; SENATE REPORT, *supra* note 56, at 20. The United States Supreme Court established that an act is discretionary under the Federal Tort Claims Act if "there is room for policy judgment and decision." Note, *The Letelier Case: Foreign Sovereign Liability for Acts of Political Assassination*, 21 VA. J. INT'L L. 251, 262 (1981) [hereinafter Note, *The Letelier Case*] (quoting Dalehite v. United States, 346 U.S. 15, 36 (1953)).

107. THIRD RESTATEMENT, *supra* note 14, § 454 reporters' note 3 (describing acts which previous judicial decisions have labeled discretionary); *see* BLACK'S LAW DIC-

In the 1980 landmark case *Letelier v. Republic of Chile*,[108] an American court held that a foreign state never has discretion to commit an illegal act.[109] *Letelier* involved a suit against the Chilean government, which orchestrated the assassination of the former Chilean foreign minister Orlando Letelier on September 21, 1976 in Washington, D.C.[110] This was the first time that the non-commercial torts provision of the FSIA granted an American court jurisdiction over a foreign government sponsoring terrorism.[111] While the Chilean government argued that the injury to persons or damage to property provision in the FSIA refers only to torts such as automobile accidents, the court held that the provision applies to all tort actions not covered by the commercial exception.[112] Thus, *Letelier* set a clear precedent for denying immunity to states conducting terrorist activities in foreign countries.[113]

TIONARY, *supra* note 8, at 419 (defining a discretionary act as an act for which no course of conduct is legally required).

108. Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980), *cert. denied* 471 U.S. 1125 (1985).

109. *Id.* at 673. The *Letelier* court held:

> [T]here is no discretion to commit, or to have one's officers or agents commit, an illegal act . . . . Whatever policy options may exist for a foreign country, it has no "discretion" to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law. *Id.*

110. Letelier v. Republic of Chile, 488 F. Supp. at 665.

111. Singer, *Terrorism, Extradition, and FSIA Relief: The Letelier Case*, 19 VAND. J. TRANSNAT'L L. 57, 67 (1986) (concluding that *Letelier* proved to be a landmark case which provided the means to confront state-sponsored terrorism); Letelier v. Republic of Chile, 488 F. Supp. at 671 (specifying that because the FSIA is the sole standard by which claims of immunity may be decided in the United States, distinctions between public and private government acts no longer determine whether a foreign government is immune from local jurisdiction); Note, *Sovereign Immunity: Jurisdiction Over Foreign States Committing Torts in the United States*, 21 HARV. INT'L L.J. 793, 797 (1980) (arguing that the *Letelier* court repudiated the notion that the distinction between public and private acts constitutes the threshold determination of whether a state may invoke sovereign immunity); Note, *The Letelier Case*, *supra* note 106, at 253 (finding that *Letelier* requires that immunity decisions be based solely on the FSIA and not on customary distinctions between sovereign and commercial acts).

112. Letelier v. Republic of Chile, 488 F. Supp. at 671-72 (referring to the Senate and House Reports on the FSIA which specify that although the non-commercial torts exception mainly addresses transportation accidents, the provision is cast in general terms which include all tort claims for money damages); SENATE REPORT, *supra* note 56, at 20; HOUSE REPORT, *supra* note 56, at 20-21 (refusing to limit the injury to persons or damage to property exception to automobile accidents).

113. *See* Letelier v. Republic of Chile, 488 F. Supp. at 673 (refusing to grant discretion to foreign governments committing illegal acts).

E. THE NEED FOR JUDGMENT ENFORCEMENT

In spite of the precedent established in *Letelier*[114] for granting domestic courts jurisdiction over foreign sovereigns, the case revealed an urgent need to establish a mechanism for enforcing judgments against foreign nations.[115] While the *Letelier* court ordered Chile to pay damages to the victim's family, the Chilean government refused to comply with the judgment.[116] The injured party attempted to establish jurisdiction to collect damages under the FSIA provision which permits execution upon the property of a foreign state.[117] Letelier's family has not yet received the compensation to which it is entitled, however, because the FSIA only allows execution upon foreign property for claims brought under the commercial exception to immunity.[118] Furthermore, the FSIA mandates that the foreign property be directly related to the plaintiff's claim.[119] Since the *Letelier* court initially granted relief to the injured party under the non-commercial torts exception, it refused to enforce its judgment under the commercial exception.[120] The unjust result of *Letelier* will undoubtedly recur as long as courts require a nexus between non-commercial torts claims and the foreign property

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114. *Id.* at 665.

115. *See* AUSTRALIAN LAW REFORM COMMISSION, *supra* note 67, at 71 (remarking that little value exists in granting rights to victims of illegal government acts by restricting jurisdictional immunity if the judgments obtained cannot be enforced). Exercising jurisdiction over a foreign state includes the right to enforce the resulting judgment by necessary means. *Id.*

116. *See* Letelier v. Republic of Chile, 567 F. Supp. 1490, 1494 (S.D.N.Y. 1983) (stating that the 1983 case arises from Letelier's attempt to enforce the judgment entered against Chile); Note, *The Letelier Case*, *supra* note 106, at 70 (noting that although the *Letelier* court ordered Chile to pay damages to Letelier's family, the FSIA provided no means for enforcing the judgment).

117. Singer, *supra* note 111, at 70-71 (recounting that when the Chilean government refused to comply with the judgment, Letelier's family attempted to secure their compensation by filing suit against the state-owned Chilean National Airline, which had assisted the Chilean agents in executing the assassination).

118. Foreign Sovereign Immunities Act, 28 U.S.C. § 1610 (1982) (establishing that foreign property used in the United States for commercial purposes may be attached to execute a judgment).

119. *Id.* (stating that the property must be used for the commercial activity upon which the claim is founded, unless the state owning the property waives its immunity from execution or the judgment being enforced relates to property rights). Since states do not readily waive their right to immunity from execution and most non-commercial torts cases do not concern property rights, plaintiffs are left with the difficult task of proving that their non-commercial claims are linked to commerce. *Id.* This requirement that the claim itself be based on the property which the injured party is seeking to attach is the most stringent requirement of all the codifications which deny immunity from execution. *Id.*

120. Letelier v. Republic of Chile, 748 F.2d 790, 799 (2d Cir. 1984) (holding that the Chilean National Airline was not accountable for Chile's actions).

sought to be levied.[121] Indeed, non-commercial torts claims generally are not linked to any property.[122] Thus, while the FSIA creates a right for victims of terrorism under the injury to persons or damage to property provision, it denies them a remedy.

All sovereign immunity codifications establish that a nation generally may not attach foreign property in the forum state to satisfy a judgment against a foreign government unless that government waives its right to immunity from execution.[123] Nevertheless, all codifications provide exceptions to this general rule of immunity from enforcement. The exception to immunity in the United States FSIA is the least permissive because it requires that the plaintiff's claim actually be based on the foreign property sought to be attached. Other codifications permit the enforcement of judgments concerning claims which bear only a remote link to commercial activity.[124]

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121. Comment, *Immunity of States*, *supra* note 16, at 1867 (affirming that the nexus requirement prevents victims of non-commercial torts from enforcing their judgments through the commercial exception to immunity from execution).

122. *See id.* (citing cases in which non-commercial torts were not connected to any property); AUSTRALIAN LAW REFORM COMMISSION, *supra* note 67, at 76 (arguing that there is no justification for requiring the victim's claim to be linked to the property executed upon). This limitation on enforcement invites the foreign state not to comply with the judgment entered against it, since most claims are not related to specific property. *Id.*

123. *See, e.g.*, U.K. State Immunity Act, 1978, § 13(2)-(3) (providing that the property of a foreign state may not be used for the execution of a judgment or arbitration award unless the foreign nation consents in writing); Australian Foreign States Immunities Act, AUSTL. ACTS P. §§ 30-31 (1985) (stipulating that foreign property may not be levied for judgment satisfaction); European Convention, *supra* note 72, art. 23 (affirming that no state may undertake measures of execution against another state's property unless that state has expressly consented in writing). Immunity from execution has traditionally been considered completely separate from jurisdictional immunity. *See* United Kingdom Questionnaire, *supra* note 66, at 629 (explaining that since jurisdictional immunity is a separate issue from execution immunity, a waiver in jurisdictional proceedings does not obviate the need for a separate waiver in execution proceedings); AUSTRALIAN LAW REFORM COMMISSION, *supra* note 67, at 71 (noting that the courts treat execution immunity separately from jurisdictional immunity).

124. *See* U.K. State Immunity Act, 1978, § 13(4) (providing that a court may enforce a judgment by levying property which is currently in use or intended for use in commercial activities). The English statute carves an exemption for states party to the 1972 European Convention on State Immunity from this exception to immunity from execution. *Id.* In spite of this exemption for several favored nations, the State Immunity Act constitutes a positive step toward judgment enforcement for England. Indeed, prior to the Act, an English court had never attached the property of a foreign state to execute a judgment. United Kingdom Questionnaire, *supra* note 66, at 629. *See also* Australian Foreign States Immunities Act, AUSTL. ACTS P. §§ 32-33 (1985) (detailing the types of commercial and immovable property that may be attached to secure a judgment).

While all sovereign immunity laws allow a forum state to attach foreign property to execute a judgment in limited situations, these laws also provide loopholes to judgment enforcement. The Australian Act establishes that no penalties shall be imposed for any

All sovereign immunity laws, however, fail to provide for the enforcement of judgments rendered under the non-commercial torts exception. As a result, sovereign immunity laws grant greater immunity from enforcement of judgments than from adjudicatory jurisdiction over claims which are unrelated to commercial activity.[125] Victims of non-commercial torts will remain uncompensated under the injury to persons or damage to property exception to sovereign immunity until this discrepancy is eliminated.

IV. RECOMMENDATIONS

The sovereign immunity principle must not be permitted to shield states from their responsibility for their criminal activities under international law.[126] Since sovereign immunity does not mitigate the liability incurred by governments pursuing international terrorism, jurisdictional considerations must not prevent injured parties from holding these governments liable and receiving adequate relief. International law imposes fundamental restrictions on sovereign power.[127] Indeed, numerous treaties and conventions prohibit states from conducting ter-

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failure to conform to a judgment rendered against a foreign government in an Australian court. *Id.* at § 34. *See also* European Convention, *supra* note 72, art. 20(2)(a) (providing that a contracting state need not enforce a judgment that is manifestly contrary to its public policy); *Draft Articles on Jurisdictional Immunities*, *supra* note 74, Part IV, art. 22 (setting forth the parameters of immunity from enforcement); INTERNATIONAL LAW ASSOCIATION, *supra* note 75, art. VIII(A)(3). The I.L.A. Report also states that in exceptional circumstances, a domestic court may order interim measures against foreign property if the injured party presents a *prima facie* case that the property risks being removed. *Id.* art. VIII(D). This provision, however, generally does not appear to ensure the enforcement of judgments issued under the non-commercial torts exception. *Id.*

125. Comment, *Immunity of States*, *supra* note 16, at 1862-63 (commenting that while all states offer greater immunity from execution than from jurisdiction, the discrepancy is particularly striking in the I.L.C. draft).

126. *See* Paust, *supra* note 67, at 223-25 (stating that foreign governments are not immune from jurisdiction when they violate human rights, the laws of war and genocide, interdictions on apartheid, or when they obstruct self-determination or pursue international terrorism).

127. Comment, *Implied Waiver*, *supra* note 59, at 382-83 (stating that sovereigns should not have absolute power so that international relations do not become chaotic). Since the Nuremberg Trials, which established that individuals must disregard immoral superior orders for the sake of a higher moral law, nations increasingly recognize the principle of *jus cogens*. *Id.* at 385-86. According to this concept, nations may not violate peremptory norms of international law, which deserve absolute protection. *Id.* at 387. Thus, foreign governments are not entitled to immunity when they conduct activities which violate *jus cogens* norms. *Id.* at 396.

rorist activities.[128] It is essential that sovereign immunity considerations not be allowed to thwart the intent of these treaties and conventions.

A. Domestic Court Jurisdiction over Foreign Governments

1. The Injury to Persons or Damage to Property Exception

The most viable means of holding states liable for their acts of terrorism is to grant domestic courts jurisdiction over foreign governments. The effective way of achieving this jurisdiction under existing law is to allow injured parties to file claims for state-sponsored terrorism under the injury to persons or damage to property exception to immunity. *Letelier* proved that this exception provides a remedy against state-sponsored terrorism. The International Law Commission also proclaimed that the non-commercial torts exception to immunity covers intentional damage to property, arson, and political assassination.[129] Under this definition of the non-commercial torts exception, Greenpeace could have sued the French government for its bombing of the Rainbow Warrior in a domestic court in New Zealand.[130] Tribunals throughout the world must be more willing to adopt the *Letelier* court's and the International Law Commission's interpretation of the non-commercial torts exception to establish jurisdiction over foreign governments which commit international crimes.

2. The International Agreements and Implied Waiver Theories

Aside from the injury to persons or damage to property exception, two other theories may grant domestic courts jurisdiction over foreign sovereigns. The first approach, entitled the "international agreements"

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128. *See, e.g.*, Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, *reprinted in* 27 I.L.M. 668 (1988); International Convention Against the Taking of Hostages, Dec. 17, 1979, *adopted by* G.A. Res. 34/146, 34 U.N. GAOR Supp. (No. 46) at 245, U.N. Doc. A/34/46 (1980); European Convention on the Suppression of Terrorism, Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532 1035 U.N.T.S. 167; Convention for the Prevention and Punishment of Terrorism, 19 League of Nations O.J. 23 (1938), *reprinted in* R. Friedlander, Terrorism: Documents of International and Local Control 253 (1979).

129. *Fifth Report of the I.L.C.*, *supra* note 65, at 8 (affirming that the injury to persons or damage to property exception covers not only transportation accidents but also crimes such as murder and political assassination).

130. *See* Clark, *supra* note 6, at 401-06 (arguing that the French destruction of the Greenpeace vessel was a terrorist act).

exception to immunity,[131] applies to the United States FSIA provision establishing that a foreign government is not immune from jurisdiction if an international agreement precludes immunity.[132] This provision signifies that international agreements denying sovereign immunity override the FSIA provisions granting immunity.[133]

This exception's ability to deny immunity to states sponsoring terrorism depends on the interpretation of "international agreements." Under a liberal interpretation of the provision, an agreement made after the United States enacted the FSIA overrides FSIA immunity requirements.[134] Consequently, the international agreements provision will become an even more powerful instrument for securing judgments against foreign sovereigns when nations promulgate additional international agreements proscribing terrorism.

According to the expansive interpretation of the international agreements exception, customary international law precludes grants of immunity under the FSIA as effectively as written treaties.[135] When sponsoring terrorism, a foreign sovereign is not immune from prosecution since customary international law proscribes criminal activity.[136] A liberal construction of the international agreements provision thus constitutes an effective means of denying immunity to nations conducting terrorism.

A second theory for securing jurisdiction over foreign sovereigns, aside from the injury to persons or damage to property exception, is the "implied waiver" approach. This concept is rooted in sovereign immu-

131. Paust, *supra* note 67, at 234 (explaining that the international agreements exception to immunity functions as an alternative to the FSIA provision denying immunity for injury to persons or damage to property).

132. Foreign Sovereign Immunities Act, 28 U.S.C. § 1604 (1982) (establishing that immunity grants are subject to international agreements to which the United States was a party when the Congress of the United States passed the FSIA); *see* United States Questionnaire, *supra* note 66, at 633 (citing eleven treaties of friendship, commerce, and navigation enacted between the United States and nations around the world as examples of agreements that take precedence over FSIA allowances of immunity).

133. *See* United States Questionnaire, *supra* note 66, at 633 (asserting that the FSIA clearly stipulates that international agreements concerning sovereign immunity prevail over FSIA rules).

134. *See* Paust, *supra* note 67, at 234-35 (arguing that any applicable international agreement denying jurisdictional immunity overrides FSIA provisions allowing immunity, regardless of whether the agreement existed when Congress passed the FSIA).

135. *See id.* at 235 (suggesting that the international agreements provision applies to international criminal activities for which states were not immune from jurisdiction under customary international law).

136. *See id.* at 237 (arguing that *Letelier* could also have been decided under the international agreements exception, because international law does not grant foreign governments discretion to conduct political assassinations).

nity codifications that recognize explicit and implicit waivers of immunity.[137] Internationally accepted instances of implied waivers include situations in which a foreign state participates in the proceedings of the forum state or consents to arbitration.[138]

In addition, some authorities assert that waivers must be implied when a nation acts in a flagrantly reprehensible manner. An offending nation implicitly waives its right to immunity because it may not expect to receive immunity when violating international law.[139] Indeed, when a state commits an international crime such as terrorism, it behaves outside its sovereign capacity.[140] Consequently, that state loses its right to immunity through constructive waiver by operation of international law.[141]

3. *A Potential State-Sponsored Terrorism Exception*

Amending the existing codifications of sovereign immunity to include a specific exception for state-sponsored terrorism is another means of

137. *See* Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(1) (1982) (providing that a foreign state is not immune from jurisdiction when that state waives its right to immunity either explicitly or implicitly); INTERNATIONAL LAW ASSOCIATION, *supra* note 75, art. III(A) (affirming that sovereign immunity will be denied when a foreign state has waived its immunity expressly or implicitly); Weber, *supra* note 14, at 28-29 (establishing that a waiver may exist by express agreement or by acquiescence).

138. *See* Australian Foreign States Immunities Act, AUSTL. ACTS P. §§ 10, 17 (1985) (recognizing implied waivers when a foreign state submits to the jurisdiction of local Australian courts or consents to arbitral proceedings); U.K. State Immunity Act, 1978, §§ 2(1), 9(1) (following the implied waiver theory by specifying that foreign states shall not be granted sovereign immunity when they submit to the jurisdiction of English courts or agree to arbitration); European Convention, *supra* note 72, arts. 2, 3, 12 (establishing that a foreign state may not claim immunity when it submits to the jurisdiction of the forum court, participates in the litigation concerning the merits of the claim, or agrees to submit to arbitration); *Draft Articles on Jurisdictional Immunities*, *supra* note 74, arts. 9, 20 (denying immunity to foreign states that participate in the proceedings of a forum court or consent to arbitration); United States Questionnaire, *supra* note 66, at 632 (noting that examples of implicit waivers include situations where a foreign state agrees to submit its dispute to arbitration or to follow the law of the forum nation); Weber, *supra* note 14, at 28-29 (noting that a state may implicitly waive its right to jurisdictional immunity when it makes a court appearance or conducts itself in a manner which clearly implies that it does not intend to raise a claim of immunity).

139. *See* Comment, *Implied Waiver*, *supra* note 59, at 394-401 (arguing that the implied waiver provision grants jurisdiction to the courts of the United States over nations which violate peremptory norms of international law); *see also supra* note 126-128 and accompanying text (discussing that states should not have the right to jurisdictional immunity when they commit torts in violation of peremptory norms of international law, known as *jus cogens* norms).

140. *See* Comment, *Implied Waiver*, *supra* note 59, at 396 (asserting that jurisdictional immunity should not be extended to states which violate *jus cogens* norms).

141. *See id.* at 398 (asserting that international law concepts of *jus cogens* mandate constructive waivers of immunity through operation of international law).

establishing jurisdiction over foreign states in domestic courts. It remains doubtful, however, that nations will agree to such an explicit provision because they are concerned with preserving their political and economic relations with other countries. Thus, the injury to persons or damage to property exception offers the most realistic channel of relief to victims of state-sponsored terrorism.

4. Judgment Execution

Regardless of the theory used to establish domestic jurisdiction, a mechanism must be created for enforcing judgments against foreign states.[142] Current codifications of the non-commercial torts exception to immunity deny jurisdictional immunity while granting immunity from judgment execution.[143] A possible solution to this enforcement problem is to adopt the general models of the English and Australian Acts, the International Law Commission Report and the International Law Association Report. These models allow judgments to be levied on the commercial property of a foreign nation. To lend meaning to these interpretations, however, lawmakers must add a clause specifying that judgments rendered on a non-commercial torts claim may be enforced by attaching foreign commercial property.

A preferable solution to the existing judgment execution loophole may be to adopt the European Convention's approach. This Convention requires states to abide by any judgment rendered by a domestic court of another state, subject to exceptions.[144] If this approach were followed, it would be necessary to vitiate the existing exception to non-immunity for judgments which foreign governments consider contrary

142. *See* SENATE REPORT, *supra* note 56, at 9 (addressing the problem of victims who obtain judgments against a foreign sovereign but are unable to enforce the judgment). The United States legislative history for the Foreign Sovereign Immunities Act indicates that one of the goals of the Act was to reduce the discrepancy between the execution immunity rules and the jurisdiction immunity rules. *Id.* The execution provisions in the Act sought to provide judgment creditors a remedy if a foreign state refused to comply with a judgment entered against it. *Id.* While the legislative history for the FSIA was primarily concerned with judgments rendered under the commercial exception to immunity, this rationale extends to the injury to persons or damage to property exception. *Id.* at 20.

143. *See supra* notes 114-125 and accompanying text (exploring the gap between limited jurisdiction immunity and extensive enforcement immunity).

144. *See* European Convention, *supra* note 72, ch. III, art. 20(1) (listing conditions mandating that contracting states give effect to adverse judgments issued by the court of another contracting state); *Resolution (72)2 of the Committee of Ministers of the Council of Europe Concerning the European Convention on State Immunity*, May 16, 1972, Europ. T.S. No. 74 (affirming that one of the main purposes of the European Convention was to ensure compliance with the judgments rendered against foreign states).

to their public policy.[145] Either of these two approaches would eliminate the current injustice of granting rights to injured parties while preventing them from collecting compensation.

B. International Arbitration as a Means of Avoiding Sovereign Immunity

An alternate solution to granting jurisdiction to domestic courts over foreign sovereigns is to allow arbitral tribunals to decide claims of state-sponsored terrorism. A foreign state may agree to arbitration in cases in which it would not voluntarily relinquish its right to immunity from judicial jurisdiction.[146] Solving disputes through arbitration rather than judicial settlement provides several advantages for the foreign state.[147]

First, arbitration mitigates the political stigma of a public trial, particularly if the parties agree to keep the award secret.[148] Second, arbitration solves the dispute without subjecting a foreign nation to an unfamiliar jurisdiction.[149] Finally, arbitration grants the parties more flexibility by allowing them to appoint arbitrators of their choice,[150] establish procedure, and indicate applicable law.[151]

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145. *See* European Convention, *supra* note 72, ch. III, art. 2(a) (providing that a contracting state may be exempt from enforcing a judgment of another contracting state when enforcement is contrary to public policy). This type of loophole encourages foreign states to flout judgments which are not in their favor and thus thwarts the interests of the forum state. *See* Australian Law Reform Commission, *supra* note 67, at 73-74 (affirming that the forum state's interest in allowing judgment creditors to obtain satisfaction outweighs its reluctance to damage diplomatic and economic relations with a foreign sovereign).

146. *See supra* notes 36-55 and accompanying text (discussing why France agreed to arbitration with Greenpeace while it would probably have fought to retain immunity had Greenpeace attempted to sue France in a New Zealand court).

147. International Law, *supra* note 12, at 589 (affirming that most states prefer arbitration to other means of adjudication).

148. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, art. 48(5), 17 U.S.T. 1270, 1288 T.I.A.S. No. 6090, at 1314, 575 U.N.T.S. 159, 188 [hereinafter ICSID Arbitration Convention] (establishing that the press may not publish awards without the consent of the parties); Rules of Procedure of the Inter-American Commercial Arbitration Commission, Apr. 1, 1982, art. 32(5) (providing that the award may be revealed to the public only if both parties consent).

149. Loftis, *supra* note 68, at 262 (arguing that arbitration enhances legal relations by granting remedies to claimants without placing them in foreign jurisdictions).

150. European Convention on International Commercial Arbitration, Apr. 21, 1961, art. I, para. 2(b), 484 U.N.T.S. 364, 366, [hereinafter European Arbitration Convention] (noting that arbitrators may be chosen on an *ad hoc* basis, or by permanent arbitral institutions).

151. International Law, *supra* note 12, at 587-88; I. Brownlie, *supra* note 21, at 544 (stating that arbitration is more flexible than compulsory jurisdiction).

International arbitrations are a promising alternative to domestic court jurisdiction over foreign states because they do not raise sovereign immunity issues and are legally binding.[152] However, arbitration awards face the same enforcement problems as judicial settlements when the losing party refuses to comply with the award.[153] The crucial question becomes whether domestic courts may have jurisdiction over foreign sovereigns to execute the arbitral award.[154] Recent cases, statutes, and treaties establishing international arbitration rules indicate a trend toward liberalizing arbitration rules to increase award enforcement.[155] Furthermore, most sovereign immunity codifications provide that a state which submits to arbitration waives its right to protest do-

152. *See* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *done at New York*, June 10, 1958, art. III, 21 U.S.T. 2517, T.I.A.S. No. 6997, at 2519, 330 U.N.T.S. 38, 40 [hereinafter New York Arbitration Convention] (ordering that states accept arbitral rulings as binding and enforce them according to applicable procedural rules); ICSID Arbitration Convention, *supra* note 148, preamble, art. 53(1) (asserting that arbitration awards are unappealable and binding on the parties unless the Convention provides for other relief); Convention for the Execution of Foreign Arbitral Awards, *done at Geneva*, Sept. 26, 1927, art. 1, 92 L.N.T.S 302, 305 [hereinafter Geneva Arbitration Convention] (stating that arbitral awards made pursuant to the Geneva Protocol on Arbitration Clauses are binding); Inter-American Convention on International Commercial Arbitration of Panama, Jan. 30, 1975, art. 4, OAS/Ser. A/20 (SEPF) *reprinted in* 14 I.L.M. 336 (1975) [hereinafter Inter-American Arbitration Convention] (providing that definitive arbitral awards have the force of final judicial judgments); United Kingdom Arbitration Act, 1975, art. 3(2) (stipulating that any award made under the New York Arbitration Convention is binding); United States Arbitration Act of 1925, 9 U.S.C. § 201 (1982) (establishing that courts of the United States shall enforce the New York Arbitration Convention).

153. *See supra* notes 114-125 and accompanying text (analyzing the need to create a mechanism for enforcing judicial settlements).

154. *See supra* notes 138 and accompanying text (discussing arbitration as a waiver of sovereign immunity).

155. *See* Delaume, *Foreign Sovereign Immunity: Impact on Arbitration*, 38 ARB. J. 34, 35 (1983) (affirming that modern state statutes and conventions have expanded transnational arbitration rules and increased the effectiveness of arbitral awards against foreign states); *id.* at 45 (explaining that the ICSID Arbitration Convention prevents a foreign state from raising a defense of sovereign immunity when a domestic court attempts to enforce an arbitral award). Under the ICSID Arbitration Convention, a foreign government waives a claim of immunity when immunity would obstruct ICSID procedures and contradict the foreign state's consent to arbitration. *Id.*; *see* Loftis, *supra* note 68, at 243-46 (arguing that recent case law reveals that consent to arbitration constitutes a waiver of immunity regarding award enforcement); ICSID Arbitration Convention, *supra* note 148, art. 54 (establishing that federal courts of the states that are parties to the Convention must enforce arbitral awards as if they were final judicial settlements); *see also* European Convention Providing a Uniform Law on Arbitration, *done at Strasbourg*, Jan. 20, 1966, Europ. T.S. No. 56, art. 6, Annex arts. 29-31 [hereinafter European Uniform Arbitration Law] (stating that parties may agree to an award enforcement formula); Geneva Arbitration Convention, *supra* note 152, art. 5 (establishing that parties may execute their awards to the extent that the law or the treaty obligations of the state where the award is sought to be enforced allows).

mestic court jurisdiction if proceedings to enforce the arbitral award become necessary.[156]

Despite these arbitration and immunity laws that encourage award enforcement, other statutory provisions and case law prevent domestic courts from executing arbitration awards.[157] Several arbitration statutes and conventions contain execution loopholes, whereby state domestic courts are not required to honor awards that are deemed contrary to public policy.[158] Until it is internationally established that arbitral awards are enforceable in domestic courts, award recipients will continue to be plagued by the same execution problems they would face in a judicial settlement.[159]

In addition to award enforcement issues, victims of terrorism face another obstacle to receiving compensation through arbitral proceed-

156. *See, e.g.*, U.K. State Immunity Act, 1978, § 9(1) (establishing that a foreign state is not immune to proceedings in English domestic courts relating to the enforcement of an arbitral award); European Convention, *supra* note 72, art. 12 (stating that a nation which agrees to arbitration may not claim immunity from local court jurisdiction in proceedings concerning the arbitration); INTERNATIONAL LAW ASSOCIATION, *supra* note 75, art. III(A)(2)(b) (asserting that states which agree to submit their dispute to an arbitral tribunal waive their immunity with respect to domestic proceedings designed to enforce the award).

157. Australian Foreign States Immunities Act, AUSTL. ACTS P. § 17(2) (1985) (establishing that foreign sovereigns are immune from local jurisdiction regarding the execution of arbitral awards unless the domestic court could have exercised jurisdiction over the foreign state regarding the initial claim); *see* AUSTRALIAN LAW REFORM COMMISSION, *supra* note 67, at 62-63 (arguing that a foreign state which agrees to arbitration waives its right to sovereign immunity solely in those states that could have originally exercised jurisdiction over the underlying dispute); *see also*, Loftis, *supra* note 68, at 246-51 (recounting the decisions of the United States which refused to view an agreement to arbitrate as an implied waiver of jurisdictional immunity); Note, *Arbitration Clauses as Waivers of Immunity from Jurisdiction and Execution Under the Foreign Sovereign Immunities Act of 1976*, 5 N.Y.L. SCH. J. INT'L & COMP. L. 409, 412-23 (1984) [hereinafter Note, *Arbitration Clauses as Waivers*] (discussing the judicial controversy over whether an agreement to submit to arbitration constitutes a waiver of jurisdictional immunity in domestic courts).

158. *See* United Kingdom Arbitration Act, 1978, § 5(3) (providing that the United Kingdom does not have to enforce arbitral awards that contradict public policy); Inter-American Arbitration Convention, *supra* note 152, art. 5(2)(b) (establishing that arbitral decisions opposing the *ordre public*, or public policy, may be rejected); Geneva Arbitration Convention, *supra* note 152, art. 1(e) (affirming that valid awards must comport with public policy); European Uniform Arbitration Law, *supra* note 155, art. 24 (stipulating that arbitral awards have the authority of *res judicata* unless they are contrary to the *ordre public*). *But see*, ICSID Arbitration Convention, *supra* note 148, art. 52 (omitting a public policy exception to award enforcement); Delaume, *supra* note 155, at 45 (noting that the ICSID Arbitration Convention constitutes a major improvement over previous codifications of arbitration because it contains no public policy exception to the binding nature of awards).

159. *See* Note, *Arbitration Clauses as Waivers*, *supra* note 157, at 423, 425, 430 (arguing that an agreement to arbitrate must be construed as a waiver of jurisdiction and execution immunity in order for arbitrations to resolve international disputes successfully).

ings. With the exception of the Rainbow Warrior affair, arbitral tribunals have only settled disputes between states and private parties over commercial issues. Most arbitration statutes and conventions address only commercial claims.[160] A few statutes and conventions, however, are sufficiently general to encompass other disputes.[161] Nations should expand international arbitration laws so that all codifications allow arbitrations between states and private entities that are not linked to commerce. Arbitral tribunals could then adjudicate claims of state-sponsored terrorism.

The successful arbitration between France and Greenpeace in the Rainbow Warrior affair demonstrates that international law is becoming more receptive to allowing non-commercial arbitrations between sovereign nations and private parties. Despite the difficulties involved in securing arbitral awards, arbitration remains a viable means of protecting the rights of victims of political terrorism and ensuring that compensation is delivered.

CONCLUSION

With the increase in state-sponsored terrorism, it has become imperative that private parties have rights and remedies against foreign governments. Whenever a state conducts terrorist activities, it has a duty to compensate all victims, whether they are public entities or private persons. Conversely, an injured party should have access to legal remedies regardless of whether the defendant is a state or a private entity.[162] Traditional principles of sovereign immunity must not prevent victims

160. *See* European Arbitration Convention, *supra* note 150, art. I, ¶ 1(a) (establishing that the Convention applies only to disputes arising from international trade); ICSID Arbitration Convention, *supra* note 148, art. 1(2) (explaining that the Convention addresses investment disputes); Protocol on Arbitration Clauses, *done at Geneva*, Sept. 24, 1923, art. 1, 27 L.N.T.S. 158, 168 (providing that parties to a contract may agree to submit a conflict concerning that contract to arbitration); Inter-American Arbitration Convention, *supra* note 152, art. 1 (stating that parties may submit a dispute regarding a commercial transaction to arbitration); The United States Arbitration Act, 9 U.S.C. § 2 (1982) (stipulating that the Act concerns commercial and maritime transactions).

161. New York Arbitration Convention, *supra* note 152, art. II(1) (providing that states must recognize arbitration agreements regardless of whether they concern a contractual relationship); European Uniform Arbitration Law, *supra* note 155, preamble, Annex I, art. 1 (establishing that the Convention covers civil and commercial matters, and that any dispute which arises out of a particular legal relationship may be referred to arbitration); United Kingdom Arbitration Act, 1975, ch. 3, ¶ 1(2) (specifying that the Act applies to all non-domestic arbitration agreements).

162. *Fifth Report of the I.L.C.*, *supra* note 65, at 7 (arguing that in the interest of law and justice, an injured party should have a remedy regardless of the character of the illegal actor).

of terrorism from having their rights adjudicated in court. Indeed, the respect that domestic courts normally pay to policy decisions of foreign countries does not extend to criminal acts that violate fundamental principles of international law.[163] Since foreign states remain internationally responsible for their illegal actions, they must not circumvent justice through jurisdictional stratagems.

Clearly the emerging trend in international law favors the injury to persons or damage to property exception to immunity.[164] Under this exception, domestic courts now have jurisdiction over foreign states regardless of whether the claim arises from a sovereign exercise of power. *Letelier* demonstrates that the non-commercial torts exception is sufficiently broad to encompass state terrorism. The Rainbow Warrior affair further supports the precedent set in *Letelier* for preventing foreign governments from invoking sovereign immunity in instances of state-sponsored terrorism. When foreign governments realize that they may not hide behind the sovereign immunity doctrine to shirk their international obligations, they may reconsider engaging in terrorism.

163. Comment, *Immunity of States*, *supra* note 16, at 1880-81 (asserting that a foreign nation's policy choices should not be recognized if that state intentionally commits an illegal act in another jurisdiction).

164. *See supra* notes 86-90 and accompanying text (supporting the international trend toward denying immunity to state perpetrators of non-commercial torts).