

# THE FOREIGN SOVEREIGN IMMUNITIES ACT AND THE HUMAN RIGHTS VIOLATIONS

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The Foreign Sovereign Immunities Act (FSIA) was enacted in 1976 and provides the sole basis for obtaining jurisdiction over a foreign state in the federal courts.<sup>1</sup>

Until 1952 the United States, as a matter of grace and comity, granted foreign sovereigns “virtually absolute immunity” from the suit in the courts of this country.<sup>2</sup> The judicial branch consistently deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities.

In the first half of the twentieth century, as the commercial and trading activities increased, the “restrictive” theory of sovereign immunity gained international acceptance. Under this approach, immunity is confined to the sovereign or public acts of the foreign state and does not extend to its commercial or private acts. The Department of State, through its famous Tate Letter<sup>3</sup>, embraced the restrictive theory of immunity in 1952. Thereafter, the State Department continued to advise courts on a case-by-case basis to determine whether to extend immunity. If in a particular case no advice was forthcoming, then the courts would independently determine whether immunity was appropriate. By enacting the FSIA in 1976, Congress substantially codified the restrictive theory of

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1. *Amerada Hess Shipping Corp. v. Argentina Republic*, 638 F. Supp. 73 (S.D.N.Y. 1986) *rev'd*, 830 F.2d 421 (2d. Cir. 1987) *cert. granted*, 485 U.S. 1005 (1988) *rev'd* 488 U.S. 428 (1989).

2. *The Schooner Exchange v. M'Faddon*, 11 U.S. 116 (1812). Later, the notion of Comity was defined as “recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.” *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

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

sovereign immunity.<sup>4</sup> FSIA effectively transferred the determination of the immunity question from the Executive Branch to the Judicial Branch.

The Foreign Sovereign Immunities Act of 1976 provides that foreign sovereigns are immune from the jurisdiction of the United States courts except under limited stated circumstances.<sup>5</sup> In order to bring a suit against a foreign sovereign, the case has to be brought within one of the exceptions enumerated in the Act.<sup>6</sup> The relevant exceptions for the human rights analysis are:

1. Waiver of immunity by the foreign state either explicitly or by implication;<sup>7</sup>
2. Commercial activity exception in which the foreign state carries on commercial activity in the United States or the activity carried on outside of the United States territory that has direct effect on the United States;<sup>8</sup>

These comments will first discuss the efforts that have been made to address the human rights violations using the argument that a foreign government waives its immunity by engaging in actions that amount to a violation of *jus cogens* principles. It will then discuss the various amendments and proposed amendments to the FSIA that would allow suites to be brought for human rights abuses.

In discussing the waiver of immunity argument for human rights abuses, one must start with the case of *Argentine Republic v. Amerada Hess Shipping Corp.*, decided by the United States Supreme Court in 1989. In that case, two Liberian corporations sued Argentine in the United States District Court to recover damages for a tort, allegedly committed by its armed forces on the high seas in violation of international law. The Plaintiffs alleged that the defendant's attack on the neutral ship violated international law and thus triggered the District Court's jurisdiction under the Alien Tort Statute (ATCA).<sup>9</sup> The ATCA, enacted in 1982, provides

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4. FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1602-11 (1976)).

5. 28 U.S.C. § 1604 reads: "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."

6. *Amerada Hess Shipping Corp.*, 488 U.S. at 439.

7. 28 U.S.C. § 1605(a)(1).

8. 28 U.S.C. § 1605(a)(2).

9. ALIEN TORT CLAIMS ACT OF 1982, 28 U.S.C. § 1350 (1982), was originally passed as a provision of JUDICIARY ACT OF 1789, ch. 20, § 9, 1 Stat. 73, 77 (1789). The Act was not used widely by the courts until its revival by the Second Circuit in 1980 decision of *Filartiga v.*

that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>10</sup> They also argued jurisdiction under the general admiralty and maritime jurisdiction, and the principle of universal jurisdiction.<sup>11</sup> The District Court dismissed the suit for lack of subject matter jurisdiction, ruling that the Plaintiffs’ suit was barred by the FSIA.<sup>12</sup> The Second Circuit reversed and held that a cause of action did exist under the Alien Tort Claim Statute. The Court reasoned since the bombing of an unarmed vessel on the high seas was a tort, and it was done in violation of an international law, the ATCA conferred jurisdiction on the United States Courts.<sup>13</sup>

The United States Supreme Court reversed, holding explicitly that the FSIA was the sole basis for obtaining jurisdiction over a foreign government in the courts of the United States. Even if the case involves a violation of an international law, the cause of action must fit within one of the exceptions of the FSIA in order for the Federal Courts to have jurisdiction.

The Plaintiffs in the *Amerada Hess* case argued that the international agreements entered into by United States and the Defendants were sufficient to create an exception to immunity under the FSIA.<sup>14</sup> Their argument was based on the language of the Act which provided that the FSIA was adopted “subject to international agreements to which the United States was a party at the time of its enactment.”<sup>15</sup> They then referred to the Geneva Convention on the High Seas and the Pan American Neutrality Convention as constituting an implied waiver of exception under § 1605(a)(1). However, the Court ruled that the international agreements would constitute a waiver only when they expressly conflict with the immunity provisions. It rejected the idea that a foreign nation could waive its immunity simply by “signing an agreement that makes no mention of waiver of immunity to suits in the United States or even the availability of a cause of action in the United States.”<sup>16</sup>

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*Pena-Irala*, 630 F.2d 876 (2d. Cir. 1980), when it conferred jurisdiction against former Paraguayan police inspector general for the torture and death of Plaintiffs’ relatives.

10. 28 U.S.C. § 1350 (1982).

11. *Amerada Hess Shipping Corp.*, 488 U.S. at 428.

12. *Argentine Republic*, 638 F. Supp. at 77.

13. *Argentine Republic*, 830 F.2d at 426.

14. *Amerada Hess Shipping Corp.*, 488 U.S. at 442.

15. 28 U.S.C. § 1604.

16. *Amerada Hess Shipping Corp.*, 488 U.S. at 442.

In order to circumvent the unambiguous language of the *Amerada Hess* case to allow suits against the foreign governments for alleged human rights abuses, several creative arguments have been developed over the years. Some have been based upon a *jus cogens* exceptions to immunity. This argument was discussed in a creative 1989 law review article entitled *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*.<sup>17</sup>

In *Princz v. Federal Republic of Germany*,<sup>18</sup> the *jus cogens* argument was urged. In that case, an American citizen who survived the Holocaust sued the Federal Republic of Germany to recover money damages for injuries he suffered, and slave labor he performed, while a prisoner in Nazi concentration camps. The United States District Court for the District of Columbia allowed subject matter jurisdiction over the survivor's claim. However, in an opinion written by Justice Ruth Bader Ginsberg, the D.C. Circuit reversed the lower court decision, rejecting Princz's claim that Germany waived its immunity by violating *jus cogens* norms.<sup>19</sup> The Court focused on the intent requirement that is implicit in the FSIA and held that Germany did not display any intention of waiving its immunity by violating these principals.<sup>20</sup>

This comment will discuss only that aspect of the case that pertains to the claim of implied waiver of immunity.

In *Princz*, the Plaintiff had argued that the Third Reich impliedly waived Germany's sovereign immunity under the FSIA by violating *jus cogens* norms of the law of nations. It was argued that "A foreign state that violates these fundamental requirements of a civilized world thereby waives its right to be treated as a sovereign."<sup>21</sup>

According to the Vienna Convention on the Law of Treaties, a *jus cogens* norm is a principle of international law that is "accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."<sup>22</sup> They prevail over and invalidate international agreements and

17. Adam C. Belsky, Comment, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Preemptory Norms of International Law*, 77 CAL. L. REV. 365 (1989).

18. *Princz v. Federal Republic of Germany*, 26 F.3d. 1166 (D.C. Cir. 1994).

19. *Federal Republic of Germany*, 26 F.3d at 1176.

20. *Id.* at 1174.

21. *Id.* at 1173.

22. The Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969 (entered into force Jan. 27, 1980) 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679, 699 (1969).

other rules of international law in conflict with them. According to the Restatement, a state violates *jus cogens*, if it “practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment of gross violations of internationally recognized human rights.”<sup>23</sup> In *Princz*, Justice Ginsberg noted that the Nuremberg trials

for the first time made explicit and unambiguous what was theretofore, . . . implicit in International Law, namely, . . . and that to persecute, oppress, or do violence to individuals or minorities on political, racial, or religious grounds in connection with such a war, or to exterminate, enslave, or deport civilian populations, is an international crime.<sup>24</sup>

She noted further that “the universal and fundamental right of human being identified by Nuremberg—rights against genocide, enslavement, and other inhuman acts . . . are the direct ancestors of the universal and fundamental norms recognized as *jus cogens*.”<sup>25</sup> Justice Ginsburg acknowledged that it was doubtful that any state had ever violated *jus cogens* norms on a scale rivaling that of the Third Reich. Thus it was argued that interpreting the FSIA to imply a waiver where a violation of *jus cogens* norms has occurred “would reconcile the FSIA with accepted principles of international law.”<sup>26</sup>

The court held, however, that the *jus cogens* theory of implied waiver is incompatible with the intent requirement that is implicit in the FSIA. It referred to the examples of implied waiver set forth in the legislative history of the Act.<sup>27</sup> These examples all arose either from the foreign state’s agreement to arbitrate, or to a choice of law, or from its filing a responsive pleading without raising the defense of sovereign immunity. The court also observed, “[s]ince the FSIA became law, courts have been

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23. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702, comment n.

24. *Federal Republic of Germany*, 26 F.3d at 1174.

25. *Id.* at 1174 (quoting *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992)).

26. *Id.* at 1174 (citing Adam Besky, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CAL. L. REV. 365 (1989)).

27. H.R. REP. NO. 1487, 94th Cong. 2d Sess., 18 (1976); S. REP. NO. 1310, 94th Cong. 2d Sess., 18 (1976).

reluctant to stray beyond these examples when considering claims that a nation has implicitly waived its defense of sovereign immunity."<sup>28</sup>

In sum, an implied waiver depends upon the foreign government's having at some point indicated its amenability to suit. In the *Princz* case, however, the court found, that neither the present government of Germany nor the predecessor government of The Third Reich actually indicated, even implicitly, a willingness to waive immunity for actions arising out of the Nazi atrocities. Thus, the court concluded that the violation of *jus cogens* norms by the Third Reich did not constitute an implied waiver of sovereign immunity under the FSIA. Rather, a clear intention by a foreign sovereign to waive its immunity is required before the federal court could assume jurisdiction over human rights abuses. The court noted further that the expansive reading of the FSIA urged by the Plaintiff would place not only a strain on the federal courts but also, and perhaps more importantly, upon the United States' diplomatic relations with the foreign governments.<sup>29</sup>

However, there was a strongly worded dissent by Judge Patricia Wald. She argued that Germany implicitly waived its immunity by engaging in atrocities in this case. Reminding the court that American law incorporates international law, Judge Wald concluded that as a matter of proper statutory construction, "the only way to reconcile the FSIA's presumption of foreign sovereign immunity with international law is to interpret the act as encompassing the principle that a foreign state implicitly waives its right to sovereign immunity in United States court by violating *jus cogens* norms."<sup>30</sup>

Earlier, the Ninth Circuit has also rejected the *jus cogens* argument. The 1992 case of *Siderman de Blake v. Republic of Argentina*,<sup>31</sup> involved allegations of official torture against the government of Argentina. The plaintiffs argued that when a foreign state's acts violate *jus cogens*, the state is not entitled to sovereign immunity with respect to those acts. This argument was based on the notion that *jus cogens* norms "enjoy the highest status within international law,"<sup>32</sup> and thus "prevail over and invalidate . . . other rules of international law in conflict with them."<sup>33</sup>

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28. *Federal Republic of Germany*, 26 F.3d at 1174 (citing *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir. 1985)).

29. *Federal Republic of Germany*, 26 F.3d at 1174.

30. *Id.* at 1184.

31. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992).

32. *Id.* at 715 (quoting *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988)).

33. *Id.* at 716 (citing RESTATEMENT (THIRD) § 102, cmt. k).

Since sovereign immunity itself is a principle of international law, it is trumped by *jus cogens*. In short, they argued that when a state violates *jus cogens*, the cloak of immunity provided by international law falls away, leaving the state amenable to suit. The Ninth Circuit agreed that official torture is a violation of the *jus cogens* principle of international law. However, it found no implied waiver of the FSIA. The court noted that the FSIA contains no exception to immunity based on *jus cogens*. It then felt constrained to follow *Amerada Hess*, holding that “if violations of *jus cogens* committed outside the United States are to be exceptions to the immunity, Congress must make them so.”<sup>34</sup>

Several other lower court cases have been based on the *jus cogens* exception to the immunity. Although the courts found the arguments “appealing” and cited the law review articles with approval, they felt themselves bound by the explicit words of the statute and the restrictive reading given to it by the Supreme Court. They dismissed suits for lack of jurisdiction.<sup>35</sup>

Congress has amended the FSIA in the past to address specific concerns. Addressing the problem of terrorism, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996. This Act amended section 1605 of the FSIA by adding a new subsection, which created a new exception to foreign sovereign immunity. Under this section United States nationals may bring suit against foreign sovereigns for personal injury resulting from “torture, extra judicial killing, air sabotage, hostage taking or provision of material support or services . . . for such an act” if the foreign state is designated as a state sponsor of terrorism.<sup>36</sup>

This amendment to the FSIA followed the original drafting pattern used in the FSIA, and simply added an additional exception to the original five exceptions. Although very broad, this exception has several limitations on its applicability. The amendment will apply only if the foreign state is designated as a state sponsor of terrorism by the State Department. Even if a state is so designated, courts will deny jurisdiction if the victim was not a national of the United States, or if a plaintiff cannot

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34. *Id.* at 719.

35. *Smith v. Socialist People's Libyan Arab Jamahiriya*, 886 F. Supp. 306 (N.Y. 1996), *aff'd* 101 F.3d 239, (even though Libya's connection to bombing of Pan America flight 103 was in violation of *JUS COGENS*, there is no implied waiver under FSIA); *Hirsh v. State of Israel*, 962 F. Supp. 377 (S.D.N.Y. 1997), (denied implied waiver under the FSIA, relying on *Smith*); *Sampson v. Federal Republic of Germany*, 250 F.3d 1145 (7th Cir. 2001), (implied waiver exception under FSIA should be construed narrowly and does not include violations of *jus cogens*).

36. ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT, 28 U.S.C § 1605(a)(7) (1996). States so designated include Libya, Sudan, Iraq, Iran, Syria, Cuba and North Korea.

show that the offending state was afforded “a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration.”<sup>37</sup>

However, as reported in the *New York Times* of October 25, 2001, in the last five years, judgments under the Act have brought verdicts of hundreds of millions of dollars and more than \$200 million have been paid from frozen assets and from the United States which has a right to recover from those assets.<sup>38</sup> A suit has been filed against Osama Bin Laden, al Qaeda, Afghanistan and the Taliban based upon the September 11th attacks.

In addition, it should be noted that the Torture Victims Protection Act (TVPA) created a civil cause of action for all individuals—aliens and United States citizens alike—who are victims of torture or extra judicial killing. The language of the act limits the jurisdiction of the courts to suits against individuals acting “under actual or apparent authority, or color of law, of any foreign nation.”<sup>39</sup> By limiting the act to individuals, the drafters avoided the issue of sovereign immunity and the new law’s relationship to the FSIA. They did so, however, at great cost to the effectiveness of the legislation. The tension created is evident in the language of the TVPA itself, which expressly targets official torture, yet does not reach the state sponsoring the activity.

An amendment to the FSIA could be made to allow for suits based upon violations of human rights norms that violate *jus cogens* principles. The reasons for providing such an exception are indeed compelling and would create a remedy to victims of human rights violations and deter future breaches of international human rights laws. The state violators would no longer have protection in United States courts for their transgressions.

It is clear from the cases that the courts are sympathetic to the loss of the plaintiffs in cases of human rights abuses committed by state actors. However, they have been reluctant to challenge the restrictive reading of the FSIA because of the floodgates of litigation argument and also the judgment that such decision is best left to the political branches of the government. Therefore, at this juncture, any change in this act has to come from Congress. The amendment that extends jurisdiction to terrorism-related actions is a positive first step.

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37. 28 U.S.C 1605(a)(7).

38. William Glaberson, *Attack Victims Are Expected to Turn Law Against Terrorists*, N.Y. TIMES, Oct. 25, 2001 at A9.

39. TORTURE VICTIMS PROTECTION ACT, § 2(a), 28 U.S.C § 1350 (2)(a) (1994).



An amendment to the Act similar to the Anti-terrorism Act to address the concerns regarding the scope of the *jus cogens* violations is warranted. Such an exception would be a narrow one and would apply only to the most grave human rights abusers. On a practical level, an exception designed to cover *jus cogens* abuses with a narrow focus is more likely to gain Congressional approval than a proposal that covers all human rights abuses. In fact, several legislative proposals have been introduced to amend the FSIA to add an exception for immunity in cases of human rights violations but without success.<sup>40</sup>

In view of the unwillingness of the courts to accept jurisdiction without a clear expression from Congress, it seems appropriate to urge Congress to express such intent. Despite the fact that suits against foreign governments could have broad political consequences, Congress has not been hesitant to step into the area where terrorism is concerned. It could also do so where grave human rights abuses are concerned and indeed *Amerada Hess*, and its reliance on congressional intent supports this approach.

In drafting this amendment, several questions remain. Should such suits be limited to those states branded as terrorist states by the State Department? Certainly, in this time of heightened political sensitivities and awareness, there is a question as to whether it would be prudent to allow such suits against states not on the list but are known abusers of human rights, such as China. Should such legislation permit suits to non-nationals as well as nationals? These questions should be answered before one can draft an effective immunity exception to the Act.

We do not accept state-sponsored terrorism and we ought not accept other serious violations of human rights. The 1966 Anti-Terrorism Amendment has opened the door to restricting immunity for illegal acts. A human rights exception to the FSIA would be consistent with that approach.

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40. H.R. 2357, 102d Cong., 2d Sess. (1992) (introduced by Representative Lawrence J. Smith), H.R. 934, 103d Cong., 1st Sess. (1993) (introduced by Representative Mazzoli), H. R. 2363, 103d Cong., 1st Sess. (1993) (introduced by Representatives Schumer and Pallone).