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Protecting U.S. Citizens Abroad: Why Foreign States Should Not Be Immune from Suit in the United States for Their Mistreatment of Prisoners

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PROTECTING U.S. CITIZENS ABROAD: WHY FOREIGN STATES SHOULD NOT BE IMMUNE FROM SUIT IN THE UNITED STATES FOR THEIR MISTREATMENT OF PRISONERS

I. INTRODUCTION

The Eighth Amendment to the U.S. Constitution protects U.S. citizens from "cruel and unusual" punishment.[1] U.S. citizens in foreign countries, however, do not benefit from this protection. For example, James Smrkovski, a U.S. citizen working for Saudia Airlines, was a prisoner in a Saudi Arabian jail for 454 days because he refused to inform police about a friend suspected of drug and arms smuggling.[2] While imprisoned, he was "repeatedly forced to maintain uncomfortable body positions or do knee bends till fully exhausted, subjected to humiliation, death threats, beatings, electric shocks and at one point even mutilation of six toenails."[3] Although the U.S. government is aware of the mistreatment of its citizens in foreign prisons,[4] it does not provide them an expedient means to redress such abuse. The Foreign Sovereign Immunities Act of 1976[5] denies U.S. citizens the opportunity to hold foreign states accountable in U.S. courts for mistreatment of U.S. citizens in their prisons.

This Comment examines the soundness of granting a foreign state immunity from suits in U.S. courts brought by U.S. citizens for inhumane treatment in foreign prisons. Part II of this Comment examines international laws governing the treatment of prisoners, which serve as the foreign equivalent of the Eighth

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1. U.S. CONST. amend. VIII.

2. *See* Robert Green, *American Businessmen Say They Were Tortured in Saudi Jails*, REUTER BUS. REP., June 15, 1987, *available in* LEXIS, News Library, Arcnws File.

3. *Id.*

4. *See, e.g., Problems Confronting American Businessmen in Saudi Arabia: Hearing Before the Subcomm. on Europe and the Middle East of the House Comm. on Foreign Affairs*, 100th Cong. 142 (1987) [hereinafter *1987 Hearing*].

5. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-11 (1995)).

Amendment's prohibition against "cruel and unusual" punishment.[6] Compliance with these laws is mandatory for Middle Eastern countries because they are signatories to the United Nations Charter and the laws themselves. It appears, however, that Middle Eastern countries still maintain a harsh administration of criminal justice. Part III of this Comment discusses Middle Eastern countries' present practices toward prisoners, which reflect the countries' failure to adopt international law standards. Part IV documents U.S. citizens' past experiences in the prisons of a particular Middle Eastern country, Saudi Arabia.

U.S. citizens released from Middle Eastern prisons experience only short-term gratification upon their return to the United States. They often find that the extent of restitution for their mistreatment abroad is limited to the cessation of being subjected to the inhumane practices in Middle Eastern prisons. Beyond that, their complaints fall mainly on "deaf ears." Part V of this Comment addresses the options available to U.S. citizens to redress violations of their rights as prisoners.

A civil suit in the United States against the foreign state would be the ideal option to compensate U.S. citizens for mistreatment in Middle Eastern prisons, as well as to deter foreign states from abusing other U.S. citizens. Part VI of this Comment explores the current law governing the ability of U.S. citizens to sue foreign states in U.S. courts. As recently as 1993, the U.S. Supreme Court upheld foreign states' immunity from such suits.[7] This leaves U.S. citizens who suffered in foreign prisons with no recompense, and U.S. citizens who visit or reside in the Middle East with no certain recourse if they also fall victim to prison abuse. Thus, part VII of this Comment proposes how the law should be changed.

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6. The U.S. Constitution has greatly impacted the development of international human rights law. It "has helped to shape the norms found in the principal international human rights instruments and, at least initially, to assist in their clarification." Richard B. Lillich, *The United States Constitution and International Human Rights Law*, 3 HARV. HUM. RTS. J. 53, 56 (1990).

7. *See* Saudi Arabia v. Nelson, 507 U.S. 349 (1993).

II. INTERNATIONAL HUMAN RIGHTS LAWS GOVERNING THE TREATMENT OF PRISONERS

A. The Development of International Human Rights Law Applicable to Prisoners

After witnessing the blatant disregard of human rights during World War II, the international community abandoned its belief that human rights were a matter to be left to the states' domestic jurisdiction.[8] Post-war efforts to protect people from abuse by their own governments laid the foundation for the development of international human rights law.[9] Such efforts began with the formation of the United Nations in 1945.[10] The international community established this organization to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."[11] One of the main purposes of the United Nations was "[t]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in *promoting and encouraging respect for human rights and for fundamental freedoms for all* without distinction as to race, sex, language, or religion."[12] The U.N. Charter clearly called for collective action, and by ratifying the Charter, member states surrendered their "reserved domain" with regard to human rights and pledged "to take action in co-operation [sic] with the Organization itself."[13]

The United Nations' first major step towards the creation of international human rights law was the adoption of the Universal Declaration of Human Rights (Universal Declaration) on December 10, 1948.[14] The United Nations intended the Universal Decla-

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8. *See* NIGEL S. RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 2 (1987).

9. *See id.* at 3.

10. *See* David Weissbrodt, *An Introduction to the Sources of International Human Rights Law*, C399 A.L.I.-A.B.A. 1, 8 (1989).

11. U.N. CHARTER pmbl.

12. *Id.* art. 1, para. 3. (emphasis added).

13. PIETER N. DROST, HUMAN RIGHTS AS LEGAL RIGHTS 29-30 (1965).

14. G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948).

ration to elaborate on the Charter.[15] At the time of its adoption, however, the Universal Declaration was "[n]ot intended as a source of legal obligations on the part of states or of legal rights on the part of individuals."[16] Because the United Nations adopted the Universal Declaration only as a recommendation of the General Assembly,[17] it was not a treaty and its provisions were not binding.[18] As international human rights law developed, however, the United Nations codified many of the Universal Declaration's significant provisions in multilateral treaties and "established procedures for their implementation, both in the treaties and in the organs of the U.N. itself."[19] The Universal Declaration has since been "recognized as providing the most authoritative definition of the human rights obligations that governments undertake in joining the U.N."[20]

The Universal Declaration was merely the first part of what became known as the International Bill of Human Rights. The United Nations completed the Bill in 1966 with the adoption of the International Covenant on Civil and Political Rights, along with an Optional Protocol;[21] and the International Covenant on Economic, Social and Cultural Rights.[22] These two Covenants "make

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15. *See* DROST, *supra* note 13, at 33. For example, one of the Charter's purposes is "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." U.N. CHARTER art. 1, para. 2. Article 3 of the Universal Declaration states: "Everyone has the right to life, liberty and security of person." G.A. Res. 217A, *supra* note 14, at 72.

16. DROST, *supra* note 13, at 34.

17. The General Assembly is one of the six principal organs of the United Nations; the other five are the Security Council, the Economic and Social. Council, the Trusteeship Council, the International Court of Justice and the Secretariat. *See* DEP'T OF PUBLIC INFO., UNITED NATIONS, EVERYONE'S UNITED NATIONS 11 (9th ed. 1979). The General Assembly is composed of all U.N. members. *See id.* It has broad authority and may consider "any question or any matter within the scope of the [U.N.] Charter or relating to the powers and functions of any organ provided for in the Charter." *Id.*

18. *See* DROST, *supra* note 13, at 32.

19. Weissbrodt, *supra* note 10, at 9.

20. *Id.* This recognition is significant to the treatment of prisoners because article 5 of the Universal Declaration states: "No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment." G.A. Res. 217A, *supra* note 14, at 73.

21. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 6 I.L.M. 368; Optional Protocol to Recognize Competence of Human Rights Committee to Consider Complaints, *opened for signature* Dec. 19, 1966, 6 I.L.M. 383.

22. International Covenant on Economic, Social and Cultural Rights, *opened for sig-*

the provisions of the Universal Declaration into legally binding treaties, provide greater detail about the rights protected,[23] and supply implementation procedures the states parties must follow."[24] Professor David Weissbrodt makes an interesting observation about these two covenants:

> The two Covenants distinguish between the implementation appropriate for civil and political rights, on the one hand, and economic, social, and cultural rights, on the other. Civil and political rights, such as freedom of expression and the right to be free from torture or arbitrary arrest, are immediately enforceable. Economic, social, and cultural rights are to be implemented "to the maximum of available resources, with a view to achieving progressively the full realization of the rights . . . by all the appropriate means, including particularly the adoption of legislative measures." *In other words, governments that ratify the Covenants must immediately cease to torture their citizens, but they are not immediately required to feed, clothe, and house them. These latter obligations are to be accomplished only progressively as resources permit.*[25]

The persuasive norms of the International Bill of Human Rights are echoed in customary international law, which reflects "a general practice of governments accepted as law."[26] Although unanimous acceptance of a government practice is not required to bring the practice under customary international law, such law "binds all governments, including those that have not recognized it, so long as they have not expressly and persistently objected to

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nature Dec. 19, 1966, 6 I.L.M. 360.

23. For example, article 10 of the International Covenant on Civil and Political Rights requires that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." International Covenant on Civil and Political Rights, *supra* note 21, art. 10, para 1, at 371.

24. Weissbrodt, *supra* note 10, at 10. The implementation procedures have become more explicit in recent years: "For example, the Human Rights Committee, which monitors compliance with the Covenant [on Civil and Political Rights], has repeatedly asserted that states parties must investigate torture, disappearances, and extra-legal executions and *attempt to bring the wrongdoers to justice.*" AM. SOC'Y OF INT'L LAW, NO. 26, HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 428 (Louis Henkin & John Lawrence Hargrove eds., 1994) (emphasis added).

25. Weissbrodt, *supra* note 10, at 10 (emphasis added) (footnote omitted).

26. *Id.;* FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS 594 (1990).

its development."[27] Thus, the norms in the International Bill of Human Rights bind even states that are not parties to the instruments.[28] In the United States, the Supreme Court has held that customary international law is "part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of rights depending upon it are duly presented for their determination."[29]

B. Documents Representative of International Human Rights Law Relating to the Treatment of Prisoners

Of all the intergovernmental organizations, the United Nations has devoted the most attention to the problem of torture and other ill-treatment.[30] The United Nations' formulation of standards relating to this problem is significant to the treatment of prisoners because most victims of torture are imprisoned or otherwise detained.[31]

Although no international convention currently deals exclusively with the treatment of prisoners or prisoners' rights, several U.N. documents are considered very influential.[32] One such document is the Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules), which the U.N. Economic and Social Council (ECOSOC)[33] formally approved in 1957.[34] ECOSOC designed the Standard Minimum Rules to "set out in detail the minimum rights and facilities [that] should be made available to the prisoners."[35] The Standard Minimum Rules, how-

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27. NEWMAN & WEISSBRODT, *supra* note 26, at 594-95.

28. *See* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 79-80 (1989).

29. The Paquete Habana, 175 U.S. 677, 700 (1900).

30. *See* RODLEY, *supra* note 8, at 18.

31. *See* Suzanne M. Bernard, *An Eye for an Eye: The Current Status of International Law on the Humane Treatment of Prisoners*, 25 RUTGERS L.J. 759, 766 (1994).

32. *See id.* at 770.

33. Article 62 of the U.N. Charter authorizes ECOSOC to "'make recommendations for the purpose of promoting respect for, and observance of human rights and fundamental freedoms for all.'" U.N. CHARTER art. 62, para. 2.

34. E.S.C. Res. 663C, U.N. ESCOR, 24th Sess., Supp. No. 1, U.N. Doc. E/3048 (1957) (amended 1977), *reprinted in* SATISH CHANDRA, INTERNATIONAL DOCUMENTS ON HUMAN RIGHTS 229-49 (1990).

35. HURST HANNUM & RICHARD B. LILLICH, MATERIALS ON INTERNATIONAL HUMAN RIGHTS AND U.S. CONSTITUTIONAL LAW 45 (1985). For example, rule 27 pro-

ever, do not have the force of law because ECOSOC has no legislative authority.[36] But author Nigel Rodley notes that the Standard Minimum Rules may provide guidance

> in interpreting the general requirement of Covenant [on Civil and Political Rights] article 10(1) of humane treatment and respect for human dignity, as well as the specific requirement in Covenant article 10(3) which states that "the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."[37]

Furthermore, three U.N. General Assembly resolutions have advised member states to implement the Standard Minimum Rules in the administration of penal and correctional institutions.[38] In the United States, the Standard Minimum Rules have been adopted as guidelines in several states and "have been cited as evidence of contemporary standards relevant to the scope of the Eighth Amendment's embodiment of 'broad and idealistic standards of decency that mark the progress of a maturing society.'"[39]

Another significant document addressing the treatment of prisoners is the Declaration on the Protection of All Persons from Being Subjected to Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment (Declaration Against Torture), which the U.N. General Assembly adopted in 1975.[40] The Declaration Against Torture expanded and refined the content of the

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vides: "Discipline and order shall be maintained with firmness, but with no more restriction than is necessary for safe custody and well-ordered community life." E.S.C. Res. 663C, *supra* note 34, at 234. Rule 35(1) states: "Every prisoner shall be provided with written information about the regulations governing the treatment of prisoners of his category, the disciplinary requirements of the institution, [and] the authorized methods of seeking information and making complaints . . . ." *Id.* at 236. Rule 65 indicates: "The treatment [of prisoners] shall be such as will encourage their self-respect and develop their sense of responsibility." *Id.* at 243. Rule 66(1) adds: "To these ends, all appropriate means shall be used, including religious care in the countries where this is possible, education, vocational guidance and training, social casework, employment counselling, physical development and strengthening of moral character, in accordance with the individual needs of each prisoner . . . ." *Id.*

36. *See* Bernard, *supra* note 31, at 771.

37. RODLEY, *supra* note 8, at 222-23.

38. *See* Bernard, *supra* note 31, at 773 (citing G.A. Res. 2858, U.N. GAOR, 26th Sess., Supp. No. 29, at 94, U.N. Doc. A/8588 (1971); G.A. Res. 3144, U.N. GAOR, 28th Sess., Supp. No. 30, at 85, U.N. Doc. A/9425 (1973)).

39. HANNUM & LILLICH, *supra* note 35, at 45.

40. G.A. Res. 3452, U.N. GAOR, 30th Sess., Supp. No. 34, at 91, U.N. Doc. A/1034 (1975).

Universal Declaration of Human Rights.[41] When the General Assembly adopted the Declaration Against Torture, however, the international community hesitated to accept specific implementation measures pertaining to torture.[42] Thus, the General Assembly adopted the Declaration Against Torture only as a "guideline" for member states.[43] It was not until the 1980s when the General Assembly requested the Commission on Human Rights to draft a convention based on the Declaration Against Torture that included implementation measures.[44] The United Nations adopted the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture) in 1984.[45] The Convention Against Torture requires each member state to "ensure that all acts of torture are offences under its criminal law" and to "make these offences punishable by appropriate penalties [that] take into account their grave nature."[46]

Both the Standard Minimum Rules and the Declaration Against Torture set forth guidelines for U.N. member states regarding the treatment of prisoners. International law does not impose a very high standard of treatment for prisoners, as countries are merely responsible for following *minimum* rules.[47] Neverthe-

41. *See* RODLEY, *supra* note 8, at 61. For example, article 5 of the Universal Declaration states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." G.A. Res. 217A, *supra* note 14, at 73. Article 2 of the Declaration Against Torture indicates: "Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights." G.A. Res. 3452, *supra* note 40, at 91.

42. *See* RODLEY, *supra* note 8, at 111.

43. G.A. Res. 3452, *supra* note 40.

44. *See* RODLEY, *supra* note 8, at 126. The Commission on Human Rights' competence to deal with human rights violations stems from ECOSOC resolutions 1102 and 1164, General Assembly resolution 2144, and Commission on Human Rights resolutions 2, 8 and 9. *See* B.G. RAMCHARAN, THE CONCEPT AND PRESENT STATUS OF THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS: FORTY YEARS AFTER THE UNIVERSAL DECLARATION 63 (1989). The Commission has publicly considered human rights violations each year since 1966. *See id.* at 65.

45. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, 23 I.L.M. 1027 (entered into force June 26, 1987) [hereinafter Convention Against Torture].

46. *Id.* art. 4, paras. 1-2, at 1028.

47. *See* RODLEY, *supra* note 8, at 221.

less, "[t]he international prohibition of 'torture' or 'cruel, inhuman, or degrading treatment or punishment' is clearly broader than the 'cruel and unusual punishment' standard of the Eighth Amendment [of the U.S. Constitution], at least in its inclusion of '*treatment*' as well as punishment."[48]

C. The Applicability of International Instruments Addressing the Treatment of Prisoners to Middle Eastern Countries

As U.N. members,[49] Middle Eastern countries must comply with the standards set forth in various U.N. documents dealing with the treatment of prisoners. The United Nations is continuously working to implement the laws embodied in its official documents. For example, the Standard Minimum Rules now require member states to report to the Secretary General every five years on the "extent of the implementation and the progress made with regard to the application" of the rules.[50] The Secretary General then uses these responses to prepare periodic reports detailing which countries have yet to implement the Standard Minimum Rules and what obstacles to the rules' implementation currently exist.[51]

Similarly, article 20 of the Convention Against Torture provides a procedure whereby the Committee Against Torture may monitor states' practices:

> [W]here the Committee 'receives reliable information which appears to it to contain well-founded indications that torture is being practised systematically in the territory of a State Party, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations' on the information.[52]

If the state party's response does not satisfy the Committee, "or if

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48. HANNUM & LILLICH, *supra* note 35, at 43-44 (emphasis added) (footnote omitted).

49. Egypt, Iran, Saudi Arabia, and Turkey joined the United Nations in 1945, and Morocco became a U.N. member in 1956. *See* THE WORLD ALMANAC AND BOOK OF FACTS 1995, at 845-46 (Robert Famighetti ed., 1994).

50. *Procedures for the Effective Implementation of the Standard Minimum Rules for the Treatment of Prisoners,* E.S.C. Res. 1984/47, U.N. ESCOR, 76th Sess., Annex 1, at 30, U.N. Doc. E/1984/84 (1984) (procedure 5).

51. *See* Bernard, *supra* note 31, at 774.

52. RODLEY, *supra* note 8, at 130.

'other relevant information' suggests that 'a confidential inquiry' is warranted, the Committee may designate one or more of its members to make such an inquiry and to report back to it 'urgently.'"[53] After the inquiry, the Committee reviews the findings and sends them with its own comments and suggestions to the state party involved. Once the Committee has consulted with the state, the Committee may attach a summary of the proceedings in its annual report.[54] "This procedure is potentially the most important element in the Committee's powers to implement the major obligation of the Convention."[55]

III. THE FAILURE OF MIDDLE EASTERN COUNTRIES TO ADOPT INTERNATIONAL HUMAN RIGHTS LAW STANDARDS

In order to reshape the unfavorable public perception of their region, Middle Eastern countries have made efforts to improve human rights practices within their borders. For example, the Arab League's revised Pact states that one of its purposes is "'to guarantee to man his fundamental liberties, and to consider him as the goal of all political, economic and social action.'"[56] In another instance, in 1992, Turkish legislators submitted a draft law to improve prison conditions and to give prisoners greater rights for parliamentary action.[57] More importantly, several Middle Eastern countries, including Egypt, Libya, Morocco, and Turkey, have ratified the Convention Against Torture.[58] Such acts, however, are hardly illustrative of the actual human rights principles followed by Middle Eastern countries. The following reports depict

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53. *Id.* at 131 (footnote omitted).

54. *See id.*

55. *Id.*

56. Istvan Pogany, *Arab Attitudes Toward International Human Rights Law*, 2 CONN. J. INT'L L. 367, 372 (1987).

57. *See Turkey: Draft Law Improving Prison Conditions is Submitted to Government for Parliamentary Action*, MIDDLE E. ECON. DIG., Sept. 4, 1992, at 29, *available in* LEXIS, World Library, Allwld File.

58. *See* INTERNATIONAL HUMAN RIGHTS INSTRUMENTS: A COMPILATION OF TREATIES, AGREEMENTS AND DECLARATIONS OF ESPECIAL INTEREST TO THE UNITED STATES 221.34-221.35 (Richard B. Lillich ed., 2d ed. 1990) (listing State Parties to the Convention Against Torture as of January 1, 1990); *Morocco Human Rights Practioes, 1994*, U.S. DEP'T OF STATE DISPATCH (U.S. Dep't of State, Washington, D.C.), Mar. 1995.

ongoing Middle Eastern human rights practices aimed at prisoners.

A. Turkey

The U.S. Department of State reported that, "[d]espite the Constitution's ban on torture, Turkey's accession to the U.N. and European Conventions Against Torture, and public pledges of successive governments to end torture, the practice [has] continued."[59] According to the report of the Human Rights Foundations' Torture Treatment Centers, commonly employed methods of torture include: high-pressure cold water hoses, electric shock, beating the soles of the feet, hanging by the arms, blindfolding, sleep deprivation, and systematic beating.[60] Judicial authorities seldom investigate complaints against officials accused of using such methods, and they often impose light punishment, such as suspension, on convicted officials.[61]

B. Saudi Arabia

Respect for human rights is similarly lacking in Saudi Arabia. Prison officials routinely use torture to force confessions from detainees. Some of the torture treatments utilized include: forcing detainees to do deep knee bends with a rod strapped to the back of their knees, beating the bare soles of detainees' feet with wire cables or wooden rods "'until their feet bleed and their toe nails are raised,'" immersing detainees in drums full of cold water, and administering electric shock treatments.[62]

C. Morocco

According to the U.S. Department of State, "[a]lthough Morocco ratified the United Nations' Convention Against Torture in 1993, security forces continued to subject detainees to abuse—including the use of torture in cases involving state security."[63] In

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59. *Turkey Human Rights Practices, 1994,* U.S. DEP'T OF STATE DISPATCH (U.S. Dep't of State, Washington, D.C.), Mar. 1995.

60. *See id.*

61. *See id.*

62. Jacqueline M. Young, Note, *Torture and Inhumane Punishment of United States Citizens in Saudi Arabia and the United States Government's Failure to Act,* 16 HASTINGS INT'L & COMP. L. REV. 663, 674 (1993).

63. *Morocco Human Rights Practices, 1994,* U.S. DEP'T OF STATE DISPATCH (U.S.

recent years, only the severity of torture has changed. The current guidelines from the Ministry of Interior prohibit only methods "likely to leave visible marks or permanent disabilities."[64] The most common methods of interrogation under this new rule include sleep deprivation, chemical inducement of vomiting, and beating under immobilizing restraint.[65]

D. Iran

Amnesty International reported that prisoners have been whipped in Iran as judicial punishment or as a way to extract information or confessions, and these whippings have been harsher than those prescribed by law. "Although some victims have claimed that the lashes were delivered with minimal force, others . . . [have been] lashed very hard by several officers in turn, and that the pain was so intense that they lost consciousness."[66] Amnesty International also stated that, in some cases, severe whipping resulted in prolonged medical treatment of damage to internal organs.[67]

E. Egypt

The Middle East Watch report indicated that Egyptian authorities utilize several forms of torture in prisons, including "beatings, kickings, electric shock, psychological harassment and hanging prisoners from their bound wrists."[68] The torturous activities are not limited to the prisoners themselves. Not only are the prisoners sexually abused, but they are also harassed with threats of torture or sexual abuse of their wives, daughters or other female relatives.[69]

IV. U.S. CITIZENS' EXPERIENCES IN SAUDI ARABIAN PRISONS

Middle Eastern prison officials even-handedly implement

Dep't of State, Washington, D.C.), Mar. 1995.

64. *Id.*

65. *See id.*

66. NEWMAN & WEISSBRODT, *supra* note 26, at 313.

67. *See id.*

68. Bahaa Elkoussy, *Rights Group Accuses Egyptian Authorities of Torturing Detainees*, Proprietary to the UPI, July 27, 1992, *available in* LEXIS, World Library, Allwld File.

69. *See id.*

harsh prison practices on all prisoners, natives and foreigners alike. Although Middle Eastern prison officials repeatedly deny the use of torture,[70] many U.S. citizens have publicly recounted their experiences in the prisons of a particular Middle Eastern country, Saudi Arabia.

Scott Nelson, a monitoring engineer from North Carolina, worked for the King Faisal Specialist Hospital in Riyadh, Saudi Arabia.[71] Saudi Arabian police held Nelson for thirty-nine days in a rat-infested prison cell, where they repeatedly shackled, tortured, and beat him.[72] As a result, Nelson underwent numerous operations on his knees and suffered panic attacks.[73] Furthermore, his wife, Vivian, claimed that the Saudi police offered to free her husband in return for sexual favors.[74]

Henry S. Ramsey, a senior planning and programs analyst, worked for the Arab-American Corporation (ARAMCO).[75] Police arbitrarily arrested Ramsey at the Dhahran International Airport for "drug smuggling."[76] While in prison, the guards tortured Ramsey by tying a dowel behind the bend of his knees with a small rope and forcing him to do repeated deep knee bends for approximately ten to fifteen minutes until he finally collapsed.[77] As he bent down, he heard his knees crack and felt the joints separate.[78]

Alvin Levine, a Houston engineer, was another ARAMCO

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70. *See, e.g., Court Nixes Suit Against Saudi Arabia,* PLAIN DEALER, Mar. 23, 1993, at 11A, *available in* LEXIS, News Library, Arcnws File.

71. *See* Richard Carelli, *Supreme Court Protects Foreign Governments Against Suits*, AP, Mar. 23, 1993, *available in* LEXIS, News Library, Arcnws File.

72. *See id.*

73. *See id.*

74. *See id.*

75. *See* Young, *supra* note 62, at 676 (citing *1987 Hearing*, *supra* note 4, at 62-63 (testimony of Henry S. Ramsey)).

76. *See id.*

77. *See id.* at 676-77. A dowel is "a piece of wood driven into a wall so that other pieces may be nailed to it." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 681 (1986). The dowel tied to Ramsey "was approximately three feet long and one and one-quarter to one and one-half inches in diameter." Young, *supra* note 62, at 676-77 (citing *1987 Hearing*, *supra* note 4, at 62-63 (testimony of Henry S. Ramsey)).

78. *See* Young, *supra* note 62, at 677 (citing *1987 Hearing*, *supra* note 4, at 62-63 (testimony of Henry S. Ramsey)).

employee who suffered similar abuse.[79] He encountered Saudi police at his home located in a compound for ARAMCO employees.[80] The police held a machine gun to his wife's head as they searched for pornography.[81] After his arrest, the police kept Levine in a desert confinement for two weeks with no air and no fan, and repeatedly beat him with a hose on the kidneys and bamboo poles to the feet.[82]

These accounts depict a few instances of U.S. citizens' mistreatment in a particular Middle Eastern country's prisons. With thousands of U.S. citizens visiting and living in Saudi Arabia and the Middle East,[83] similar incidences are likely to continue.

V. U.S. CITIZENS' LIMITED OPTIONS TO REDRESS VIOLATIONS OF THEIR RIGHTS IN MIDDLE EASTERN PRISONS

The United States signed the U.N. Convention Against Torture on April 18, 1988, and the Senate ratified it on October 27, 1990.[84] One of the United States' obligations under the Convention is to provide a means of civil redress to victims of torture.[85] At the time of the signing of the Convention, the Alien Tort Claims Act (ATCA)[86] was the primary means of civil redress. The ATCA provides jurisdiction in U.S. district courts for "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."[87] The statute's reach, however, is significantly limited. First, it provides a remedy

79. *See* Geoff Davidian, *Houstonian Says Americans' Abuse by Saudis Ignored*, HOUS. CHRON., May 10, 1992, at A1, *available in* LEXIS, News Library, Arcnws File.

80. *See id.*

81. *See id.*

82. *See id.*

83. In 1986, the State Department issued a statement indicating that approximately 45,000 U.S. citizens live and work in Saudi Arabia. *See 4 Businessmen Say Saudis Abuse Americans*, N.Y. TIMES, Nov. 23, 1986, § 1, at 21, *available in* LEXIS, News Library, Arcnws File. Impliedly, over a million U.S. citizens may live and work throughout the Middle East.

84. *See* H.R. REP. NO. 102-367, pt. 1 at 3 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84.

85. *See id.*

86. Alien Tort Claims Act, ch. 646, § 1, 62 Stat. 934 (1948) (codified at 28 U.S.C. § 1350 (1995)).

87. *Id.*

only to aliens, not to U.S. citizens or permanent residents.[88] Also, sovereign foreign states and individual government officials acting within the scope of their official duties are immune from suit.[89] Such limitations reflect the irony created by recognizing each foreign state's sovereignty under international law: while international law imposes an obligation upon states to make their territories safe for foreign nationals, no parallel obligation exists with regard to their own citizens.[90]

After hearing about the terrible conditions in Middle Eastern prisons, Congress recently devised a more modern cause of action for torture.[91] In 1992, Congress passed The Torture Victim Protection Act of 1991 (TVPA),[92] which was intended to "carry out obligations of the United States under the U.N. Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing."[93] Unlike the ATCA, the TVPA extends a civil remedy to U.S. citizens who were tortured abroad.[94] The TVPA, however, is as narrow in scope as the ATCA. The TVPA's limitations include: requiring plaintiffs to exhaust all adequate remedies available in the place in which the conduct giving rise to the claim occurred,[95] and applying only to individuals "acting under color of official author-

88. *See id.; see also* Russell G. Donaldson, Annotation, *Construction and Application of Alien Tort Statute (28 U.S.C.S. § 1350), Providing for Federal Jurisdiction over Alien's Action for Tort Committed in Violation of Law of Nations or Treaty of the United States*, 116 A.L.R. FED. 387, 448 (1993) (citing Jones v. Petty Ray Geophysical Geosource, Inc., 722 F. Supp. 343 (S.D. Tex. 1989), Tel-Oren.v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (Edwards, J., concurring)).

89. *See* Donaldson, *supra* note 88, at 449-51 (citing Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989)).

90. *See* PAUL SIEGHART, THE INTERNATIONAL LAW OF HUMAN RIGHTS 11-12 (1983).

91. *See* Davidian, *supra* note 79.

92. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. 1350 (1995)).

93. *Id.*

94. *See* H.R. REP. NO. 102-367, pt. 1 at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84.

95. *See id.* at 5. Congress believed that this requirement would ensure that "U.S. courts [would] not intrude into cases more appropriately handled by courts where the alleged torture or killing occurred." *Id.* Furthermore, "[i]t [would] avoid exposing U.S. courts to unnecessary burdens, and [could] be expected to encourage the development of meaningful remedies in other countries. *Id.*

ity" and not to foreign states or their agencies or instrumentalities.[96] The exhaustion of local remedies requirement is advantageous for foreign states because it gives "the state an opportunity to redress an alleged breach of international human rights through its own apparatus and under its national law before the claim becomes admissible for consideration by an international authority."[97] This requirement, however, delays a remedy for tortured U.S. citizens and forces them to adjudicate their claims in a less democratic system of justice. Consequently, U.S. citizens have few options for redressing their mistreatment abroad as current laws preclude them from suing in the United States the foreign governments responsible for perpetuating harsh practices in prisons.

VI. FOREIGN SOVEREIGN IMMUNITY

A. Basis of Doctrine

The U.S. Constitution makes no mention of a foreign government's immunity from suit. In fact, Article III grants federal courts subject matter jurisdiction over suits against "foreign states."[98] But as early as 1812, the U.S. Supreme Court ruled that foreign sovereigns were immune from suits in U.S. courts.[99] The Court's justifications for recognizing sovereign immunity included "the need to protect the dignity of the foreign sovereign, the inability of [a U.S.] court to enforce a judgment against a foreign sovereign, and the desire for reciprocal immunity for the United States from suits in foreign countries."[100]

B. Absolute v. Restrictive Immunity

The U.S. Supreme Court's initial adjudications on the issue of

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96. *See id.*

97. MERON, *supra* note 28, at 174.

98. Article III states: "The judicial Power shall extend to all Cases . . . between a State, or the Citizens thereof, and *foreign States*, Citizens or subjects." U.S. CONST. art. III, § 2 (emphasis added). *See* Beverly May Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice*, 33 SW. L.J. 1009, 1011 (1980).

99. *See* The Schooner Exch. v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812) (granting absolute protection of an armed vessel in the services of a friendly sovereign).

100. Carl, *supra* note 98 (citing Comment, *Sovereign Immunity and the Foreign-State Enterprise in Alaska*, 4 UCLA-ALASKA L. REV. 343, 347-48 (1975)).

sovereign immunity created absolute immunity.[101] In *United States v. Diekelman*,[102] the Court explained more fully its reasons for establishing an absolute doctrine:

> A sovereign [may not] be sued in his own courts without his consent. His own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereignty, except in performance of his obligations, by treaty or otherwise, voluntarily assumed. Hence, a citizen of one nation wronged by the conduct of another nation, must seek redress through his own government. His sovereign must assume the responsibility of presenting his claim, or it need not be considered. If this responsibility is assumed, the claim may be prosecuted as one nation proceeds against another, not by suit in the courts, as of right, but by diplomacy, or, if need be, by war. It rests with the sovereign against whom the demand is made to determine for himself what he will do in respect to it. He may pay or reject it; he may submit to arbitration, open his own courts to suit, or consent to be tried in the courts of another nation. All depends upon himself.[103]

In contrast to the absolute theory of sovereign immunity, the restrictive theory

> tr[ies] to accommodate the interest of individuals doing business with foreign governments in having their legal rights determined by the courts, with the interest of foreign governments in being free to perform certain political acts without undergoing the embarrassment or hindrance of defending the propriety of such acts before foreign courts.[104]

The restrictive theory distinguishes acts of sovereignty (public acts), which are exempted from jurisdiction, from acts of jure ges-

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101. For example, in *The Schooner Exch.*, Chief Justice John Marshall stated:

> The jurisdiction of the nation within its own territory is necessarily exclusive and *absolute*. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

11 U.S. (7 Cranch) at 136 (emphasis added).

102. 92 U.S. 520 (1875).

103. *Id.* at 524.

104. Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 360 (2d Cir. 1964).

tionis (private acts or acts of private law), which are within the jurisdiction of local courts.[105]

The United States did not abandon the theory of absolute immunity until 1952. The State Department enunciated its adoption of the restrictive theory in a letter, written by Acting Legal Adviser Jack B. Tate to Acting Attorney General Philip B. Perlman on May 19, 1952 (Tate Letter).[106] The Tate Letter "announced that, consistent with emerging international law, foreign states would be accorded immunity from suit in [U.S.] courts for causes of action arising out of their sovereign or public acts, but not for those arising out of their commercial or private activities."[107]

Because the Tate Letter did not offer any guidelines or criteria for differentiating between a sovereign's private and public acts,[108] courts could not rely on a definite test to determine whether a particular act was governmental or commercial. Consequently, courts frequently used a variety of tests, including one that examined the purpose of the act and another that looked at the nature of the act.[109] Using another approach, the Second Circuit "established five categories as governmental acts per se [that] conferred sovereign immunity":[110]

1) internal administrative acts, such as expulsion of an alien;
2) legislative acts, such as nationalization;
3) acts concerning the armed forces;
4) acts concerning diplomatic activity; and
5) public loans.[111]

None of these tests, however, provided a clear-cut way to classify

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105. *See* E. H. Schopler, Annotation, *Modern Status of the Rules as to Immunity of Foreign Sovereign From Suit in Federal or State Courts*, 25 A.L.R.3d 322, 335 (1969).

106. *See* Letter from Jack B. Tate, Acting Legal Adviser, U.S. Department of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952), *in* DEP'T ST. BULL., June 1952, at 984 [hereinafter Tate Letter].

107. Patricia Hunt Holmes, *Establishing Jurisdiction Under the Commercial-Activities Exception to the Foreign Sovereign Immunities Act of 1976*, 19 HOUS. L. REV. 1003, 1005 (1982) (citing *id.* at 984-85).

108. *See* Schopler, *supra* note 105, at 337.

109. *See* Holmes, *supra* note 107, at 1005 n.14.

110. *Id.* (citing Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964)).

111. *Victory Transport*, 336 F.2d at 360.

an act as governmental or commercial.

C. The Foreign Sovereign Immunities Act of 1976

To deal with the dilemma of determining whether a foreign sovereign should be granted immunity, Congress passed the Foreign Sovereign Immunities Act of 1976 (FSIA).[112] Congress intended the FSIA "[t]o define the jurisdiction of [U.S.] courts in suits against foreign states,[113] the circumstances in which foreign states are immune from suit[114] and in which execution may not be levied on their property,[115] and for other purposes."[116]

1. Significance of the Act

In *Argentine Republic v. Amerada Hess Shipping Corp.*,[117] the U.S. Supreme Court held that the FSIA provides the *sole* basis for obtaining jurisdiction over a foreign state in U.S. courts.[118] The Supreme Court thus affirmed its statements in *Verlinden B.V. v. Central Bank of Nigeria*[119] that "[t]he [FSIA] must be applied by the District Courts in every action against a foreign sovereign, [because] subject matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity" and "*if a court determines that none of the exceptions to sovereign immunity applies, the plaintiff will be barred from*

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112. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-11 (1995)).

113. Section 1330 provides:

> (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title [28 USCS § 1603(a)] as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity under sections 1605-1607 of this title [28 USCS §§ 1605-1607] or under any applicable international agreement.
>
> (b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title [28 USCS § 1608].

28 U.S.C.S. § 1330 (Law Co-op. 1995).

114. *See id.* § 1604.

115. *See id.* §§ 1609-1611.

116. Foreign Sovereign Immunities Act of 1976, sec. 1, 90 Stat. at 2891.

117. 488 U.S. 428 (1989).

118. *See id.* at 434.

119. 461 U.S. 480 (1983).

raising his claim in any court in the United States."[120]

More importantly, the FSIA provides courts with a test to classify a foreign sovereign's activity as governmental or commercial. The test determines the commercial character of an activity "by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."[121] Thus, the FSIA narrows the inquiry to the "nature-purpose distinction"[122] that courts previously used to determine whether to grant immunity to a sovereign.[123]

Aside from providing a way for courts to distinguish between governmental and commercial acts, Congress indicated that "the general purposes of the [FSIA] were:

1) to codify the restrictive principle of sovereign immunity of states;

2) to remove decisions on sovereign immunity from the executive branch and give them to the judiciary;

3) to provide a method of service of process for foreign state defendants; and

4) to establish a method of satisfying in personam judgments."[124]

2. Entities to Which the FSIA Provides Immunity

It is clear from the FSIA's title that Congress intended to provide immunity to foreign states. Section 1603(a) further delineates entities that courts may construe as a "foreign state" in addition to the entire foreign state itself. The section indicates that the FSIA grants immunity to a political subdivision or an agency or instrumentality of a foreign state.[125] To be considered

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120. *Id.* at 493, 497 (emphasis added).

121. 28 U.S.C.S. § 1603(d) (Law. Co-op. 1995).

122. The U.S. Supreme Court clarified the nature-purpose distinction in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), by creating a "private player test." *See* Deirdre E. Whelan, Note, *The Commercial Activity Exception in the Foreign Sovereign Immunities Act: Saudi Arabia v. Nelson*, 27 CREIGHTON L. REV. 1069, 1088 (1994). The "test provided that where a foreign government acts as a market participant, or 'private player,' rather than a market regulator, its activities are commercial in nature for purposes of the FSIA." *Id.*

123. *See* Whelan, *supra* note 122, at 1088.

124. H.R. REP. NO. 94-1487, at 7-8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604.

125. *See* 28 U.S.C.S. § 1603(a).

an "agency or instrumentality of a foreign state," an entity must meet all of the following criteria:

(1) It must be a separate legal person, corporate or otherwise;

(2) It must be an organ or political subdivision of a foreign state, or a foreign state or a political subdivision must own a majority of the entity's shares; and

(3) It must neither be a citizen of a State of the United States, as defined in section 1332 (c) and (d), nor created under the laws of any third country.[126]

3. Exceptions to Immunity

The FSIA does not completely preclude suits against foreign states. Section 1605 does not recognize sovereign immunity:

(1) when the foreign sovereign nation explicitly waives it;

(2) when the action is based on commercial activity carried on within the United States or materially affects U.S. interests;

(3) where property is taken in violation of international law;

(4) where property rights in gifts of immovable property are involved;

(5) where a foreign state or its agent has committed a tort in the United States;[127] or

(6) where an agreement to submit to arbitration is to be enforced or an award made pursuant to such an agreement is to be confirmed.[128]

Of these six exceptions, parties and courts utilize the commercial activity exception the most.[129] This exception allows U.S. courts to hear claims against foreign sovereigns that are based upon:

(1) a commercial activity that a foreign state carries on in the United States;

(2) an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or

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126. *See id.* § 1603(b).

127. *See* Deborah L. Zimic, Recent Developments, 28 VA. J. INT'L L. 221, 229-30 (1987) (citing 28 U.S.C. § 1605(a)(1)-(5)).

128. *See* 28 U.S.C.S. § 1605(a)(6).

129. *See* Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1390 (5th Cir. 1985); Whelan, *supra* note 122, at 1083.

(3) an act outside the United States in connection with a commercial activity of the foreign state elsewhere, which causes a direct effect in the United States.[130]

Because Congress intended the courts to have a "great deal of latitude" in applying these provisions, it defined the provisions broadly.[131] Congress defined "commercial activity carried on in the United States by a foreign state" in the first clause of the exception as "commercial activity carried on by such state and having substantial contact with the United States."[132] Congress indicated that the second clause "looks to conduct of the foreign state in the United States [that] relates either to a regular course of commercial conduct elsewhere or to a particular commercial transaction concluded or carried out in part elsewhere."[133] Congress provided that the third clause covers "commercial conduct abroad having direct effects within the United States [that] would subject such conduct to the exercise of jurisdiction by the United States consistent with principles set forth in section 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965)."[134] In providing these general definitions, Congress let the courts define the statute's specific terms and decide immunity on a case-by-case basis.[135]

D. Saudi Arabia v. Nelson

Although Congress intended the FSIA to resolve the problem of recognizing sovereign immunity, courts have been often called upon to clarify Congress' broad definitions of the Act's provisions.

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130. *See* 28 U.S.C.S. § 1605(a)(2).

131. *See* Whelan, *supra* note 122, at 1083.

132. 28 U.S.C.S. § 1603(e).

133. H.R. REP. NO. 94-1487, at 19.

134. *Id.* This section indicates:

> A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or (b) (i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably legal systems.

Restatement (Second) of Foreign Relations of the United States §18 (1965).

135. *See* Whelan, *supra* note 122, at 1083.

In *Saudi Arabia v. Nelson,*[136] the U.S. Supreme Court faced the question of whether to grant immunity to a foreign government in a U.S. court. The Court had to determine whether a foreign government's actions fell under the first clause of the FSIA's commercial activity exception.[137] Despite the courts' wide latitude in interpreting the FSIA, the Court in this case recognized foreign sovereign immunity and barred the suit.

Scott Nelson, a U.S. citizen, found employment as a monitoring systems engineer at the state-owned King Faisal Specialist Hospital in Saudi Arabia[138] through the recruitment efforts of Hospital Corporation of America, Ltd. (HCA) in the United States.[139] He began working at the hospital in December 1993 and "did his job without significant incident until March 1984, when he discovered safety defects in the hospital's oxygen and nitrous oxide lines that posed fire hazards and otherwise endangered patients' lives."[140] When he told hospital officials of the safety defects, the officials instructed him to ignore what he had observed.[141] Nelson's reports to a Saudi government commission likewise went unheard.[142]

The hospital's response to Nelson's reports suddenly changed on September 27, 1984, "when certain hospital employees summoned him to the hospital's security office where agents of the Saudi government arrested him."[143] The government agents put Nelson in rat-infested and overcrowded jail cell where Nelson had to fight other prisoners for food.[144] The agents kept Nelson in jail without informing him of the charges against him.[145] In jail, the

136. 507 U.S. 349 (1993).

137. *See* 28 U.S.C.S. § 1605(a)(2). This clause does not provide immunity for an action based upon a commercial activity that a foreign state carries on in the United States.

138. *See Nelson,* 507 U.S. at 351.

139. HCA is "an independent corporation existing under the laws of the Cayman Islands, [which] recruits Americans for employment at the hospital under an agreement signed with Saudi Arabia in 1973." *Id.* at 351-52.

140. *Id.* at 352.

141. *See id.*

142. *See id.*

143. *Id.*

144. *See id.* at 353.

145. *See id.*

Saudi agents "'shackled, tortured and beat'" Nelson.[146] The agents repeatedly questioned Nelson in Arabic and later forced him to sign a statement without explaining its contents.[147] For several days, the Saudi government did not tell Nelson's family of his whereabouts.[148] Eventually, a Saudi official eventually told Nelson's wife, Vivian, that he could arrange for her husband's release if she provided him with sexual favors.[149] The Saudi government finally released Nelson on November 5, 1984, thirty-nine days after his arrest, at the personal request of U.S. Senator Edward Kennedy.[150]

In 1988, Nelson and his wife filed an action in a district court in Florida against the Kingdom of Saudi Arabia, King Faisal Specialist Hospital and HCA, to seek damages for personal injury.[151] The Nelsons argued that jurisdiction existed under the first clause of section 1605(a)(2) of the FSIA because their action was "'based upon a commercial activity' that petitioners [the Kingdom of Saudi Arabia et al.] had 'carried on in the United States.'"[152] The district court rejected their argument and dismissed the case for lack of subject matter jurisdiction.[153] The court reasoned that, even though "HCA's recruitment of Nelson in the United States might properly be attributed to Saudi Arabia and the hospital, [such action] did not amount to commercial activity 'carried on in the United States' for purposes of the [FSIA]."[154] Furthermore, "there was no sufficient 'nexus' between Nelson's recruitment and the injuries alleged."[155]

The Eleventh Circuit reversed the district court's decision. It "concluded that Nelson's recruitment and hiring were commercial activities of Saudi Arabia and the hospital, carried on in the

146. *Id.*

147. *See id.*

148. *See id.*

149. *See id.*

150. *See id.*; Tony Mauro, *Case Focuses on Rights of U.S. Workers Overseas,* USA TODAY, Nov. 30, 1992, at 8A, *available in* LEXIS, News Library, Arcnws File.

151. *See Nelson,* 507 U.S. at 353.

152. *Id.* at 354.

153. *See id.*

154. *Id.*

155. *Id.*

United States for purposes of the Act, . . . and that the Nelsons' action was 'based upon' these activities within the meaning of [the FSIA]."[156] Also, unlike the district court, the Eleventh Circuit found a "sufficient nexus between those commercial activities and the wrongful acts that had allegedly injured the Nelsons: 'the detention and torture of Nelson are so intertwined with his employment at the Hospital,' . . . 'that they are "based upon" his recruitment and hiring' in the United States."[157]

The U.S. Supreme Court disagreed with the Eleventh Circuit's reasoning and ruled against the Nelsons. It held that the Nelsons' action was not based upon a commercial activity within the meaning of the first clause of section 1605(a)(2) of the FSIA.[158] Although HCA's recruitment and eventual employment of Nelson constituted commercial activities and could be properly attributed to Saudi Arabia, the Court found that they did not form the basis of the Nelsons' suit.[159] It was not enough that these activities had led to the conduct that eventually injured the Nelsons. The Court required the foreign state's activities, which served as the basis of suit, to have "something more than a mere connection with, or relation to, commercial activity," in order for a court to deny immunity under section 1605(a)(2) of the FSIA.[160] Using the "private player" test developed in *Republic of Argentina v. Weltover, Inc.*,[161] the Court did not consider the Saudi government's wrongful arrest, imprisonment, and torture of Nelson to be "commercial activity" under the restrictive theory.[162] According to the Court:

> The conduct [alleged] boils down to abuse of the power of its police by the Saudi Government, and however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature.[163]

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156. *Id.* at 355.
157. *Id.*
158. *See id.* at 356.
159. *See id.* at 358.
160. *Id.*
161. 504 U.S. 607 (1992).
162. *See Nelson*, 507 U.S. at 361.
163. *Id.*

It appears from this decision that "the interest in preserving the sovereign's independence outweighed the *admittedly valid concerns* of Nelson in seeking redress."[164] More importantly, the Court's narrow interpretation of "based upon" erects a substantial barrier for U.S. workers abroad who are suing foreign states because defendants may argue that intentional injury is not based upon commercial activity.[165]

VII. PROVIDING U.S. CITIZENS WITH A MEANS OF REDRESS FOR MISTREATMENT IN MIDDLE EASTERN PRISONS

A. Proposals for Change in the FSIA

Congress has repeatedly considered amendments to the FSIA, but has not enacted any of them. For example, in 1986, several congressmen introduced a bill,[166] which would have amended the FSIA to:

(a) Clarify jurisdiction of the federal courts to enforce arbitration agreements with and arbitral awards made against foreign states and their agencies.

(b) Prohibit application of the Act of State Doctrine[167] in

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164. Whelan, *supra* note 122, at 1102 (emphasis added).

165. *See, e.g.*, Santos v. Compagnie Nationale Air France, 934 F.2d 890, 893 n.3 (7th Cir. 1991), where the Court stated:

> As for injury, this element cannot be "based upon" commercial activity in the United States even in principle. The commercial activity to which the statute [§ 1605(a)(2)] refers is the activity of the defendant foreign government. By definition, the injury that the plaintiff asserts as an element of his case is his own. Injury can still be a basis for jurisdiction, but . . . not [under] the first clause.

166. *See* H.R. 3137, 99th Cong. (1985).

167. The U.S. Supreme Court defined the act of state doctrine in *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897), where it stated:

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

Author Deborah L. Zimic distinguishes the act of state doctrine from the doctrine of sovereign immunity:

> The act of state doctrine, unlike the doctrine of sovereign immunity, is a rule of domestic law [that] prevents [U.S.] courts from adjudicating the acts of foreign governments carried out within their own territorial limits. Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845, 855 (2d Cir. 1962). The *Sabbatino* decision

specified categories of cases brought under the FSIA.[168]

(c) Liberalize instances in which U.S. commercial assets owned by a foreign state may be attached to satisfy a judgment.

(d) Establish conditions permitting prejudgment attachment of property belonging to foreign governments engaged in U.S. commercial activities.[169]

Another bill that was intended to amend the FSIA, House Bill 2357, followed in 1991.[170] Under this proposed amendment, U.S. courts would have jurisdiction over tort suits brought against foreign governments for torture or extrajudicial killing of U.S. citizens.[171] The bill would have also allowed an individual who obtained a judgment against a foreign government to attach that government's property in the United States.[172] During the hearings on House Bill 2357, Professor John R. Schmertz testified that the amendment should be limited to allowing suits by U.S. citizens only when the plaintiff has exhausted all remedies in the foreign state, which "has primary jurisdiction to adjudicate alleged civil wrongs committed within its territorial bounds."[173] His opinion would support foregoing the amendment of the FSIA and urging

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noted that the act of state doctrine was designed to prevent the judiciary from ruling on cases with possibly embarrassing repercussions for the executive and legislative branches of government. Id. at 857. In addition, it proclaimed [U.S.] courts unsuited to make a competent judgment regarding the affairs of a foreign government within its own boundaries since they are too far removed from the situation. Id.

Zimic, *supra* note 127, at 227 n.20.

168. This provision would prevent "foreign nations [from cloaking] commercial acts with the act of state doctrine to avoid the [FSIA]," which foreign nations had been encouraged to do because "[t]raditional application of the act of state doctrine renders a claim nonjusticiable in [U.S.] courts." Antonia Dolar, Comment, *Act of State and Sovereign Immunities Doctrines: The Need to Establish Congruity*, 17 U.S.F. L. REV. 91, 101 (1982).

169. CONGRESSIONAL INFO. SERVICE INC., CIS/ANNUAL 1986: ABSTRACTS OF CONGRESSIONAL PUBLICATIONS AND LEGISLATIVE HISTORIES 355 (1986).

170. *See* H.R. 2357, 102d Cong. (1991).

171. *See* CONGRESSIONAL INFO. SERVICE, INC., CIS/ANNUAL 1992: ABSTRACTS OF CONGRESSIONAL PUBLICATIONS AND LEGISLATIVE HISTORIES 430 (1992).

172. *See id.*

173. *Amending the Foreign Sovereign Immunities Act of 1976: Hearings on H.R. 2357 Before the Subcomm. on Int'l Law, Immigration, and Refugees*, 102d Cong. 83 (1992) [hereinafter *1992 Hearing*] (statement of John R. Schmertz, Jr., Professor, Georgetown University Law Center).

plaintiffs to rely instead on the Torture Victim Protection Act,[174] which also requires the exhaustion of remedies in the state where the alleged wrongful conduct occurred.

Congress considered a bill similar to House Bill 2357 as recently as 1994.[175] House Bill 934 would have added a "new exception to the FSIA that would allow suites [sic] against foreign sovereigns that subject U.S. citizens to torture, extrajudicial killings or genocide and do not provide adequate remedies for those harms."[176] The report on the bill indicated:

> The difficulty U.S. citizens have had in obtaining remedies for torture and other injuries suffered abroad illustrates the need for remedial legislation. A foreign sovereign violates international law if it practices torture, summary execution, or genocide. Yet under current law a U.S. citizen who is tortured or killed abroad [may not] sue the foreign sovereign in U.S. courts, even when the foreign country wrongly refuses to hear the citizen's case. Therefore, in some instance [sic] a U.S. citizens [sic] who was tortured (or the family of one who was murdered) *will be without a remedy*.[177]

Members of Congress who opposed passage of House Bill 934 supported their views by referring to the State Department's objections to a similar Senate bill,[178] which would have "enable[d] U.S. citizens to sue foreign governments in U.S. courts for damages resulting from acts of terrorism committed outside the United States by those governments."[179] State Department representatives testified that the passage of the bill could lead other countries to "modify their laws relating to foreign sovereign immunity, and possibly modify them in ways not limited to torture, with the result being that the United States could be sued in foreign courts for acts which the U.S. Government might take in the United States against foreign nationals."[180] Additionally, the legislation's dissenters pointed out that the "risk to American assets abroad would

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174. *See supra* text accompanying notes 92-96.
175. *See* H.R. 934, 103d Cong. (1994).
176. H.R. REP. NO. 103-702, at 4 (1994).
177. *Id.* (emphasis added).
178. *See* S. 825, 102d Cong. (1991).
179. H.R. REP. NO. 103-702, at 12.
180. *Id.*

be significant should other countries respond to the passage of H.R. 934 by enacting further exceptions to their foreign sovereign immunity laws which are broader in scope that [sic] is H.R. 934."[181]

B. Relief Afforded to Aliens in the United States

Congress' prevailing lack of consensus on the passage of amendments to the FSIA indicates that other interests outweigh giving U.S. citizens the means to redress mistreatment in prisons abroad. Ironically, aliens who file suits in U.S. courts against foreign states fare better than U.S. citizens. In 1995, the Second Circuit held in *Kadic v. Karadzic*[182] that the Alien Tort Claims Act (ATCA) granted a U.S. federal court jurisdiction over a suit brought by Croat and Muslim citizens of Bosnia-Herzegovina against Radovan Karadzic, President of the self-proclaimed Bosnian-Serb republic of "Srpska."[183]

In *Kadic*, appellants (plaintiffs in the first action), supported their claims with the Second Circuit's decision in *Filartiga v. Pena-Irala.*[184] The *Filartaga* court recognized that the ATCA provided jurisdiction for suits alleging torts committed anywhere in the world against aliens in violation of the law of nations.[185] Karadzic argued that "the appellants had not alleged violations of the norms of international law because such norms bind only states and persons acting under color of a state's law, not private individuals."[186] Karadzic, however, claimed to be a private individual while asserting to also be the President of the self-proclaimed Republic of Srpska.[187] The Second Circuit overlooked Karadzic's contradictory assertions and held that "certain forms of conduct [such as genocide and war crimes] violate the law of nations *whether undertaken by those acting under the auspices of a state or only as private*

181. *Id.*

182. 70 F.3d 232 (2d Cir. 1995).

183. *See id.* at 236-37.

184. 630 F.2d 876 (2d Cir. 1980). The case involved a suit by Joel Filartiga and Dolly Filartiga, citizens of the Republic of Paraguay, against Americo Norberto Pena-Irala, the Inspector-General of Police in Asuncion, Paraguay, who kidnapped and tortured to death Joelito Filartiga, son and brother of the plaintiffs.

185. *See id.* at 877.

186. *Kadic*, 70 F.3d at 239.

187. *See id.*

individuals."[188]

The Second Circuit also held that it had jurisdiction over appellants' claims of torture, even though international law proscribed only torture committed by state officials or under color of law, because customary international law "applie[d] to states without distinction between recognized and unrecognized states."[189] The court found that, although not officially recognized as a state, Srpska functioned like one: it had a president, a legislature and its own currency; it controlled defined territory and populations within its power; and it has entered into agreements with other governments.[190] The court found a sufficient basis for jurisdiction and stated that:

> [I]t is likely that the state action concept, where applicable for some violations like "official" torture, *requires merely the semblance of official authority*. The inquiry, after all, is whether a person purporting to wield official power has exceeded internationally recognized standards of civilized conduct, not whether statehood in all its formal aspects exists.[191]

The court further found that Karadzic acted under color of state law when he acted in concert with the former Yugoslavia, whose statehood is not disputed.[192] The court based this conclusion on *Lugar v. Edmondson Oil Co.*,[193] where the U.S. Supreme Court held that a private individual acts under color of state law within the meaning of 42 U.S.C. § 1983 when he acts together with state officials or with significant state aid.[194]

C. Policy Considerations

The *Kadic* court gave great weight to the international law violation in finding jurisdiction over the aliens' claims against a sovereign state. Writing along the same lines, Professor Jordan Paust asserts that:

> [A] State's violation of international law is precisely one of

188. *Id.* (emphasis added).
189. *Id.* at 245.
190. *See id.*
191. *Id.* (emphasis added).
192. *See id.*
193. 457 U.S. 922 (1982).
194. *Id.* at 941 (quoting United States v. Price, 383 U.S. 787, 794 (1966)).

> those circumstances that are not "essentially within" the domestic jurisdiction of a particular State. Thus, even those violations of international law that occur entirely within a particular State's territory *are of international concern and are not immune to responsive action by or on behalf of the international community.*[195]

In another article, Professor Paust notes that "'sovereignty' is conditioned on obedience to international law, the law upon which sovereignty rests."[196] Furthermore, he states that:

> [A]cts taken in violation of international law are not and cannot be acts performed in the exercise of a state's legitimate sovereign authority [because] no state has the authority to violate international law. Moreover, such acts are treated as if they are outside the sovereign function and merely "private acts."[197]

To support this assertion, Professor Paust cites *Letelier v. Republic of Chile*,[198] where the court held that:

> [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 perpetuate 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.[199]

Another policy reason for not granting foreign states immunity for international law violations stems from the "passive personality" principle. This principle is based on "a state's important

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195. Jordan J. 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, 221-22 (1983) (emphasis added) (footnotes omitted).

196. Jordan J. Paust, Document, *Draft Brief Concerning Claims to Foreign Sovereign Immunity and Human Rights: Nonimmunity for Violations of International Law Under the FSIA*, 8 HOUS. J. INT'L L. 49, 59 (1985).

197. *Id.*

198. 488 F. Supp. 665 (D.D.C. 1980). The case involved a suit by survivors of former Chilean ambassador and foreign minister Orlando Letelier and Ronni Moffitt against the Republic of Chile. Plaintiffs alleged that the Republic of Chile had directed the construction, planting, and detonation of the bomb that destroyed Letelier's car and killed both its passengers.

199. *Id.* at 673.

interest in protecting its citizens against wrongful acts committed against them in other states."[200] If the foreign state fails to punish its citizen-wrongdoer, "the United States may do so in the interests of justice and by virtue of its right to protect its citizens."[201] Indeed, by punishing the wrongdoer, the United States would be following paragraph 10 of Resolution 1993/40 of the Commission on Human Rights, in which the Commission:

> [e]ndorses the recommendation of the Special Rapporteur that those who violate article 7 of the Covenant on Civil and Political Rights,[202] whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible and that whenever a complaint of torture is found to be justified, the perpetrators should be severely punished, especially the official in charge of the place of detention where the torture is found to have taken place.[203]

D. The Ideal Amendment to the FSIA

The above policy considerations and the unmatched ability of aliens in the United States to sue foreign governments in U.S. courts make clear that the FSIA should be amended to benefit U.S. citizens who have been mistreated in prisons. The most recent bill considered by Congress[204] provides a satisfactory framework for an amendment. This new law would allow suits against foreign sovereigns that torture U.S. citizens and do not provide adequate remedies for those harms, even if the case does not fall under one of the exceptions in section 1605 of the FSIA. Congressmen's concerns about extending jurisdiction in this manner, such as the danger of losing U.S. assets abroad, are almost inconsequential when compared to leaving a foreign state's mistreatment of U.S. citizens in prison unredressed. Forcing U.S. citizens to litigate their cause

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200. *1992 Hearing*, *supra* note 173, at 91 (statement of John R. Schmertz, Jr., Professor, Georgetown University Law Center).

201. *Id.*

202. This article indicates: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation." International Covenant on Civil and Political Rights, *supra* note 21, art. 7, at 370.

203. Res. 1993/40, U.N. Commission on Human Rights, *reprinted in* 1 INT'L HUM. RTS. REP. 218 (1994).

204. *See* H.R. 934, 103d Cong. (1994).

of action abroad, which the Torture Victim Protection Act requires, would only prolong the harm. A government that condones mistreatment in prisons is unlikely to have courts willing to punish its native wrongdoers. Thus, the FSIA should be amended to allow U.S. citizens to sue foreign states in U.S. courts.

VIII. CONCLUSION

Scott Nelson was neither the first U.S. citizen to be abused in a foreign prison nor will he be the last. Although the recognition of a foreign state's sovereignty is important to maintaining international order, Congress and the courts should strive harder to consider the interests of tortured U.S. citizens in seeking redress of their injuries in the United States as a way of promoting human rights. After all, as the "leader of the free world," the United States ought to set the example in advancing the rights of both its citizens and the foreigners who seek refuge within its borders.

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*J.D. candidate, Loyola Law School, 1997; B.A., University of California, Los Angeles, 1994. I dedicate this Comment to my parents, who taught me that commitment and perseverance are the means to achieve my aspirations. I thank them for their constant love and support. I am also very grateful to the *Journal*'s editors and staff for their assistance in preparing this Comment for publication.