Loyola of Los Angeles International and Comparative Law Review

Volume 21 | Number 1 Article 10

3-1-1999

Holding Foreign Governments Accountable for Their Human Rights Abuses: A Proposed Amendment to the Foreign Sovereign Immunities Act of 1976

G. Michael Ziman

HOLDING FOREIGN GOVERNMENTS ACCOUNTABLE FOR THEIR HUMAN RIGHTS ABUSES: A PROPOSED AMENDMENT TO THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

I. INTRODUCTION

As history marches ever onward, there is a hope—indeed a belief—that mankind is on an inexorable journey to higher and higher moral plateaus. To be disabused of this notion, though, one need only note that some of the greatest atrocities in all of human history—for example, the holocaust, the killing fields of Cambodia—have been committed in the twentieth century. Today, even as this century comes to a close, human rights abuses are rampant throughout the world.

But what can be done to stop these abuses? Many solutions have been offered. Some have advocated that the United Nations wage an all out war against the offending regimes in a new world order. Others have suggested less drastic means such as mobilizing world opinion against those regimes through social, political, and economic isolation. This Comment examines one narrow solution that would punish offending governments and their leaders in a manner that would perhaps inflict the most pain—i.e., financially, through suits for damages brought in United States courts.

Suits for damages, however, are presently limited by legislation, case law, and prudential doctrines of U.S. courts. For example, today a victim can bring suit in U.S. courts for human rights abuses suffered abroad under the Alien Tort Claims Act.[1] But when the defendant is a government or foreign leader, that jurisdiction quickly evaporates and the victim is left without any legal remedy.[2]

Because many human rights abuses are committed by foreign governments or their leaders, a cohesive structure of law that would subject foreign sovereigns to suit for their human rights abuses is badly needed. Some of the essential elements are

---

1. 28 U.S.C. § 1350 (1982).

2. This is basically a result of the Foreign Sovereign Immunities Act and the case law following from it. See discussion *infra* Parts III and IV.

already in place. Nevertheless, the crucial obstacle that inevitably frustrates any attempt to hold abusive regimes accountable is the doctrine of foreign sovereign immunity, which endows these actors with immunity from suit.

Advocates have suggested several ways of reaching foreign sovereigns in court. For example, some have urged the courts to widen their *jus cogens*[3] jurisprudence to include human rights abuses by holding that a sovereign *implicitly* waives its immunity whenever it engages in human rights violations.[4] Others have suggested a legislative approach, proposing various pieces of legislation amending the Foreign Sovereign Immunities Act to include human rights abuses.[5] The question that has to be raised, however, is whether such a proposed legislative amendment would be consistent with the doctrinal underpinnings of the Act.

Part II begins by setting forth the theoretical foundations of foreign sovereign immunity and its historical development. Part III examines the Foreign Sovereign Immunities Act of 1976,[6] and related laws and judicial doctrines. Part IV analyzes cases decided under or impacted by this jurisprudence. With the stage thus set, Part V recommends that the Foreign Sovereign Immunities Act be amended to cover human rights abuses. Part VI argues that Congress has the authority to pass such an amendment, and that the courts could constitutionally uphold and enforce it.

This Comment concludes that the proposed legislative amendment would justifiably fit within the doctrinal underpinnings of the Foreign Sovereign Immunities Act. It would withstand constitutional scrutiny, and thus our courts could render judgments against foreign regimes under it. While human nature may not, in the end, be evolving to ever higher moral plateaus, perhaps our jurisprudence can.

---

3. As defined in the Vienna Convention on the Law of Treaties, a *jus cogens* norm "is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted . . . ." Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 382, 8 I.L.M. 679.

4. Others argue, however, that this might not be effective. *See* David J. Bederman, *Dead Man's Hand: Reshuffling Foreign Sovereign Immunities in U.S. Human Rights Litigation*, 25 GA. J. INT'L & COMP. L. 255, 278 (1996).

5. *See* Bederman, *supra* note 4, at 282–83; *see also* Carolyn J. Brock, *The Foreign Sovereign Immunities Act: Defining a Role for the Executive*, 30 VA. J. INT'L L. 795, 820 (1990).

6. The measure is codified at 28 U.S.C. §§ 1330, 1391(f), 1441(d), and 1602–11 (1997).

II. THE DOCTRINE OF SOVEREIGN IMMUNITY

A. Purpose

The concept of sovereign immunity derived from the ancient maxim *rex not potest peccarre* (i.e., The King can do no wrong.).[7] As between nations, a complimentary notion arose: *par not habet in parem imperium* (i.e., An equal has no authority over an equal.).[8]

Simply put, the purpose of the doctrine of sovereign immunity was and is to avoid friction between nations in the resolution of their disputes.[9] From this simple premise, a large doctrinal body of law has developed over time.

B. Historical Development

One of the earliest U.S. cases involving foreign sovereign immunity involved an admiralty claim against the French government in 1812.[10] Two American citizens arrested a vessel in Napoleon's navy, claiming the vessel had been wrongfully taken from them by the French.[11] The court ruled that there could be no claim against the French government because it was a sovereign nation.[12] As late as 1926, the U. S. Supreme Court continued to apply sovereign immunity principles to foreign state-owned vessels.[13]

As the doctrine evolved further, it became based on notions of comity and customary public international law.[14] A distinction, however, began to develop between causes of action arising out of a foreign state's governmental acts (*jus imperii*) and its commercial acts (*jus gestionis*).[15] Although, a nation's governmental acts were protected, its commercial acts were exempt from this immunity. This was the beginning of the "restrictive" theory of sovereign

---

7. *See* William R. Dorsey, *Reflections on the Foreign Sovereign Immunities Act After Twenty Years*, 28 J. MAR. L. & COM. 257, 257 (1997).
8. *See* Brock, *supra* note 5, at 796–97.
9. *See* Dorsey, *supra* note 7, at 257.
10. *See* Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812).
11. *See id.* at 121.
12. *See id* at 144, 147.
13. *See* Dorsey, *supra* note 7, at 258 (citing Berizzi Brothers Co. v. Steamship Pesaro, 271 U.S. 562, 562, 576 (1926)).
14. *See* Dorsey, *supra* note 7, at 257.
15. *See id. at* 258.

immunity.[16]

In 1926, the International Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels incorporated such a restrictive theory.[17] From its inception through the mid-1900s, the idea that immunity vanishes when a government acts as a market participant or as a private party prevailed. In 1958, the notion that state-owned commercial vessels were not entitled to immunity was incorporated into the Geneva Convention of the High Seas and the Convention on the Territorial Sea and the Contiguous Zone.[18] By 1976 most nations had adopted some form of restrictive sovereign immunity and it was "generally conceded to be the rule of international law."[19]

In the United States, application of foreign sovereign immunity has had an interesting history. In 1943, the Supreme Court ruled that U.S. courts would defer to decisions of the Executive Branch and the Department of State.[20] Further, until 1952 the State Department customarily requested that the courts grant absolute immunity to a foreign sovereign in *any* action brought against it.[21]

In 1952, however, the State Department modified its position and announced that immunity would only apply to suits that arose from a foreign government's public acts.[22] This shift in policy, referred to as the "Tate Letter," left foreign governments exposed to suit for their private or commercial acts.[23] The Tate Letter stated that "the prior absolute rule of foreign sovereign immunity was simply not consistent with modern law."[24]

Unfortunately, this politicized the determination of sovereign immunity. Because the Tate Letter was not binding on the State Department, diplomatic pressures could, and often did, influence

---

16. The doctrine is considered to be "restrictive" because it does *not* extend to cases involving commercial or private acts.

17. *See* Dorsey, *supra* note 7, at 258.

18. *See id.* at 258 (citing the Convention on the High Seas, Apr. 29, 1958, art. 9, and the Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, art. 21).

19. Dorsey, *supra* note 7, at 259.

20. *See Ex Parte* Republic of Peru, 318 U.S. 578 (1943); *see also* Dorsey, *supra* note 7, at 259.

21. *See* Dorsey, *supra* note 7, at 259.

22. *See* Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 DEP'T OF STATE BULL. 984–85 (1952).

23. *See id.*

24. Dorsey, *supra* note 7, at 259.

its decisions.[25] Whenever the State Department filed a recommendation of immunity on behalf of a foreign state, or conversely, if it failed to intercede on behalf of a foreign state, the courts considered it determinative.[26] If the State Department recommended immunity, then the claim was merely shifted to the diplomatic arena for resolution, a forum generally considered to be ill-suited for this purpose.[27] This continued to be the case until Congress passed the Foreign Sovereign Immunities Act in 1976.[28]

C. Problems In Enforcement/Application

Implementation of the Tate Letter was problematic inasmuch the State Department forum was ill-suited for the purpose of resolving legal disputes. A private litigant could never be certain whether legal or political considerations would control a State Department decision. The ad hoc process led to inconsistent results and placed undue pressure on the State Department to intervene in favor of defendant foreign states.[29] There were other problems as well. There were no specific procedures for effecting service on foreign sovereigns (litigants were forced to seize and attach property of foreign sovereigns); seizures could not be used to execute any judgments, absent waiver or consent, because sovereign property was immune; seizures created friction with foreign governments; and most other countries considered sovereign immunity to be not a diplomatic issue, but rather a matter of international law, best determined by their courts.[30]

III. FOREIGN SOVEREIGN IMMUNITIES ACT

A. Passage of the Foreign Sovereign Immunities Act of 1976

In response to these problems, Congress enacted the Foreign Sovereign Immunities Act (FSIA). It embodied the restrictive theory of sovereign immunity as set forth in the Tate Letter. Introduced in January 1973, it was signed into law on October 21,

---

25. *See id.*
26. *See* Brock, *supra* note 5, at 802.
27. *See id.* at 260 (citing *Jurisdiction of U.S. Courts in Suits Against Foreign States, Hearings on H.R. 11315 Before the Subcomm. of Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong. 32 (1976)).
28. *See id.* at 802–03.
29. *See id.* at 818.
30. *See* Dorsey, *supra* note 7, at 260–61.

1976.

B. Purposes of the Act

The purpose of the FSIA was four-fold.[31] First, the Act sought to uphold the general principle of sovereign immunity, while codifying the restrictive principle of sovereign immunity.[32] Second, the Act sought to take the question of immunity out of the hands of the State Department and vest its resolution in the courts.[33] Third, the Act established a statutory procedure for effecting service upon and obtaining *in personam* jurisdiction over a foreign state.[34] Finally, the Act provided for execution of judgments against foreign sovereigns, i.e., it harmonized rules governing jurisdiction with those governing attachment and execution.[35]

C. Structure and Description of the Act

The FSIA consists of ten sections and works in conjunction with accompanying jurisdictional provisions.[36] By far, the most important provisions of the Act are section 1605, which lists the general exceptions to the jurisdictional immunity of a foreign state,[37] and section 1330, which gives the U.S. district courts original jurisdiction over these claims.[38] Other sections deal with findings and declaration of purpose,[39] definitions,[40] immunity of a foreign state from jurisdiction,[41] extent of liability,[42]

---

31. *See id.* at 261.
32. *See id.* (citing H.R. REP. NO. 94-1487, at 7–8 (1976)).
33. *See id.*
34. *See id.*
35. *See id.*
36. 28 U.S.C. §§ 1602–11, and 28 U.S.C § 1330 (1997).
37. 28 U.S.C. § 1605 (1997).
38. 28 U.S.C. § 1330(a) (1997).
39. Section 1602 states the findings by Congress that the determination of immunity by the *courts* would best "serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts." This section excludes a country's commercial activities from such immunity. *See* 28 U.S.C. § 1602 (1997).
40. Section 1603 sets forth the definitions of a foreign state, an agency or instrumentality of a foreign state, the territory of the United States, and commercial activities. *See* 28 U.S.C. § 1603 (1997).
41. Section 1604 stipulates that a foreign state shall be immune from the jurisdiction of U.S. courts except as provided in sections 1605 through 1607. Such immunity is also subject to then-existing international agreements in force at the time of the passage of the Act. *See* 28 U.S.C. § 1604 (1997).
42. Section 1606 establishes that when a foreign state is not entitled to immunity, the

counterclaims,[43] service and time to answer default,[44] immunity from attachment and execution of property of a foreign state,[45] exceptions to the immunity from attachment of execution,[46] certain types of property immune from execution,[47] and venue.[48]

1. 28 U.S.C. § 1605: General Exceptions to the Jurisdictional Immunity of a Foreign State

The most important section of the Act is section 1605, which enumerates the recognized exceptions to the doctrine of foreign sovereign immunity and includes the recently enacted anti-terrorism provision. Most notably, like the anti-terrorism amendment, a parallel provision creating a new exception for human rights abuses could be placed in this section.

There are currently nine[49] recognized and codified exceptions to the jurisdictional immunity of a foreign state: (1) when the foreign state has waived its immunity either explicitly or by implication;[50] (2) when the action is based upon or connected with

---

foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances. *See* 28 U.S.C. § 1606 (1997).

43. Section 1607 merely exempts any counterclaim from immunity if such a claim would not have been entitled to immunity if brought as a separate action. *See* 28 U.S.C. § 1607 (1997).

44. Section 1608 sets forth some of the procedural aspects of the Act. *See* 28 U.S.C. § 1608 (1997).

45. Section 1609 exempts the property in the United States of a foreign state, subject to existing international agreements to which the United States is a party, from attachment, arrest and execution except as provided in sections 1610 and 1611 of the Act. *See* 28 U.S.C. § 1609 (1997).

46. Section 1610 operates in conjunction with section 1609 to modify the immunity from attachment or execution. Notably, the Antiterrorism and Effective Death Penalty Act of 1996, adds a new exception to immunity, providing that the property of a foreign state which is liable under the new section 1605(a)(7) is not immune from execution. *See* 28 U.S.C. § 1610 (1997).

47. Section 1611 operates in conjunction with section 1609 to define the types of property immune from execution. *See* 28 U.S.C. § 1611 (1997).

48. Section 1391(f) provides that venue lies in the U.S. district court in the judicial district: (1) where the events giving rise to the case occurred or where the property subject to suit is located; (2) where the foreign state's vessel or cargo is located in a maritime lien case; (3) where the foreign state's agency or instrumentality is either licensed to do business or is doing business; and (4) in the U.S. District Court for the District of Columbia in cases against a foreign state or its political subdivisions. *See* 28 U.S.C. § 1391(f) (1997). A right of removal from state courts is provided, and trials against foreign states in federal court are non-jury. *See* 28 U.S.C. §§ 1330(a), 1441(d) (1997).

49. The first seven of these are contained in section 1605(a); the remaining two are codified in section 1505 (b) and (d).

50. *See* 28 U.S.C. § 1605(a)(1) (1997).

a commercial activity carried on in the United States by the foreign state;[51] (3) when property is taken in violation of international law and that property is situated in the United States;[52] (4) when rights in property situated in the United States are at issue;[53] (5) when money damages are sought against a foreign state for personal injury or death, or for damage or loss of property caused by the tortious act or omission of a foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment;[54] (6) when seeking enforcement of an agreement by a foreign state to submit to arbitration or to confirm an award made pursuant to such an arbitration;[55] (7) when money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources, if such acts were committed by an official, employee, or agent of such foreign state, while acting within the scope of their office, employment, or agency;[56] (8) when enforcing a maritime lien against a vessel or cargo of the foreign state;[57] and (9) when foreclosing a preferred mortgage, as defined in the Ship Mortgage Act of 1920.[58]

The seventh exception is the new anti-terrorism amendment. It applies only to those states so designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 or section 620A of the Foreign Assistance Act of 1961.[59] This limits the applicability of this exception to only those "rogue" nations. As will be seen, a parallel provision to designate "rogue" states would also be a part of a proposed human rights amendment to improve the chances of its passage in Congress.

2. 28 U.S.C. § 1330: Actions Against Foreign States

Section 1330 gives federal district courts original jurisdiction over any non-jury civil action against a foreign state in which the

---

51. *See* 28 U.S.C. § 1605(a)(2) (1997).
52. *See* 28 U.S.C. § 1605(a)(3) (1997).
53. *See* 28 U.S.C. § 1605(a)(4) (1997).
54. *See* 28 U.S.C. § 1605(a)(5) (1997).
55. *See* 28 U.S.C. § 1605(a)(6) (1997).
56. *See* 28 U.S.C. § 1605(a)(7) (1997). This is the new anti-terrorism amendment.
57. *See* 28 U.S.C. § 1605(b) (1997).
58. *See* 28 U.S.C. § 1605(d) (1997).
59. *See* 28 U.S.C. § 1605(a)(7)(A) (1997).

foreign state is not entitled to immunity (under either sections 1605–07 of this Act or under any applicable international agreement).[60] This section also gives the district courts personal jurisdiction over foreign states for every claim for relief in which these courts have original jurisdiction (pursuant to section 1330(a) where service has been made under section 1608).[61]

Sections 1604 and 1330(a) work together in this way. Section 1604 prevents federal and state courts from exercising jurisdiction when a foreign state *is* entitled to immunity, while section 1330(a) confers jurisdiction on district courts in suits by U.S. citizens and by aliens when a foreign state is *not* entitled to immunity.[62]

> [The] key to understanding the structure and scope of the FSIA is to realize that it is a self-contained long-arm statute. Under § 1330, personal jurisdiction is established if there is subject matter jurisdiction and proper service of the suit is made under § 1608. . . . In other words, personal jurisdiction is based on service and subject matter jurisdiction. Subject matter jurisdiction, as discussed above, is in turn based on those situations defined in the Act in which the foreign state is not immune from action in United States courts.[63]

D. Related Laws and Doctrines

1. Act of State (State Action) Doctrine

The Act of State doctrine is closely related to the concept of sovereign immunity and developed during the same period of history. It is a prudential doctrine of the federal courts,[64] and limits these courts, for prudential rather than jurisdictional reasons, from "inquiring into the validity of a foreign nation's public acts committed within its own territory."[65] The policies underlying the doctrine are "international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its

---

60. 28 U.S.C. § 1330(a) (1997).
61. 28 U.S.C. § 1330(b) (1997).
62. *See* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989).
63. Dorsey, *supra* note 7, at 262.
64. *See* Bederman, *supra* note 4, at 258; *see also* Honduras Aircraft Registry v. Gov't of Honduras, 119 F.3d 1530, 1537 (1997).
65. *Honduras Aircraft Registry*, 119 F.3d at 1537.

conduct of foreign relations . . . ."[66] The Act of State doctrine originally developed as a corollary to the doctrine of sovereign immunity and was intended to provide state officials, when acting in their official capacity, the same protection from suit afforded to the state.[67]

In *Underhill v. Hernandez*, the Supreme Court said in dictum, "[e]very 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."[68] This became the "classic American statement" and the "traditional formulation" of the State Action Doctrine.[69]

Over time, though, the Act of State doctrine changed its focus from a personal immunity basis to include commercial activities as well.[70] This led to an inconsistency. Courts allowed foreign states to assert the Act of State Doctrine as a defense in cases involving clearly commercial activities.[71] This practice prompted the U.S. Solicitor General to comment that:

> To elevate the foreign state's commercial acts to the protected status of 'acts of state' would frustrate this modern development [of restrictive sovereign immunity] by permitting sovereign immunity to reenter through the back door, under the guise of the act of state doctrine.[72]

The Act of State doctrine continued to expand so much that in 1992, after the *Trajano v. Marcos* decision,[73] a concern arose that if a government act was characterized as "official" and "public" the Act of State doctrine might be available on the merits to block consideration of a case involving commercial activities.[74]

While the expanded scope of the Act of State doctrine muddied any distinction between it and the doctrine of sovereign

---

66. W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l, 493 U.S. 400, 408 (1989).

67. *See* Dorsey, *supra* note 7, at 271.

68. *See id.* (citing Underhill v. Hernandez, 168 U.S. 250, 252 (1897)).

69. *See id.* at 272 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964) and Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 691 (1976)).

70. *See id.*

71. *See id.* at 273.

72. *Id.*

73. *See* Trajano v. Marcos, 978 F.2d 493 (9th Cir. 1992).

74. *See* Bederman, *supra* note 4, at 264.

immunity,[75] it has not, however, created a wider definition of public acts than that used for the FSIA. In every instance where a defendant in a human rights case has raised an Act of State defense, that defense has been rejected.[76]

2. Alien Tort Claims Act (Alien Tort Statute)

The Alien Tort Claims Act was enacted in 1789 and provides for federal subject matter jurisdiction over any civil action brought by an alien in U.S. district courts "for a tort only, committed in violation of the law of nations or a treaty of the United States."[77]

For awhile it was thought that the Alien Tort Claims Act (ATCA) could provide a way to reach a foreign sovereign in U.S. courts. As will be shown, however, in the discussion below on the *Argentine Republic v. Amerada Hess* case, that outcome was not reached.[78] The result was that the Foreign Sovereign Immunities Act became the "definitive statement of the United States government in the area of jurisdiction over foreign States; in a conflict, the Foreign Sovereign Immunities Act will trump the Alien Tort Claims Act."[79]

3. Torture Victims Protection Act

The Torture Victims Protection Act (TVPA) was adopted in 1991 and allows suits in federal district courts against individuals acting under the authority of a foreign nation who commit acts of torture or extrajudicial killing.[80] The TVPA, however, contains its own exhaustion requirement. If a case is brought within the purview of the TVPA, it must be shown that the plaintiffs have "exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred."[81] This provision could require cases brought under the TVPA to go through a preliminary phase in which the defendant would attempt to show that local remedies were available in the country in question.[82]

---

75. *See* Dorsey, *supra* note 7, at 273.
76. *See* Bederman, *supra* note 4, at 264.
77. 28 U.S.C. § 1350 (1994).
78. *See* discussion *infra* Part IV.A.5.
79. David S. Bloch, *Dangers of Righteousness: Unintended Consequences of* Kadic v. Karadzic, 4 TULSA J. COMP. & INT'L L. 35, 37–38 n.16 (1996). *See* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 433, 437–39 (1989).
80. *See* 28 U.S.C. §1350(2) (1994).
81. 28 U.S.C. § 1350(2)(b) (1994).
82. *See* Bederman, *supra* note 4, at 277.

This complicates litigation, and indeed forecloses it if the defendant is able to argue successfully that effective local remedies do exist in the subject country. This is a "catch 22" because the plaintiff would not be in U.S. courts if he could have prevailed in the potentially rigged foreign courts in the first place.

4. 1997 Amendments to the Foreign Sovereign Immunities Act

Addressing the problem of terrorism, Congress enacted the Antiterrorism and Effective Death Penalty Act Of 1996.[83] This Act in turn amended section 1605 of the FSIA by adding a new subsection, i.e., 1605(a)(7), which created a new exception to foreign sovereign immunity. Under section 1605(a)(7), U.S. nationals may bring suits against foreign sovereigns for personal injury resulting from "torture, extrajudicial killing, air sabotage, hostage taking or the provision of material support or services . . . for such an act" if the foreign state is designated as a state sponsor of terrorism.[84]

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 under other federal legislation. Even if a state is so designated, courts will deny hearing a claim if the claimant or victim was not a national of the United States, or if a plaintiff cannot show that the offending state was afforded "a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration."[85]

IV. EFFECT OF THE FSIA ON HUMAN RIGHTS CASES

A. Important Cases

Since the passage of the FSIA in 1976, several key cases involving human rights have been decided. The results were mixed, with courts finding that sovereigns could be reached in some circumstances but not in others. In the cases where suits

---

83. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241 (1996).

84. 28 U.S.C. 1605(a)(7) (1997).

85. *Id.*

were successfully brought, however, the courts had to engage in theoretical fictions and doctrinal gyrations to reach those results. In those cases, the courts demonstrated a strong desire to reach the "correct" result.

Several important cases include *Filartiga v. Pena-Irala*,[86] *Chuidian v. Philippine National Bank*,[87] *Trajanos v. Marcos*,[88] *Princz v. Federal Republic of Germany*,[89] and *Argentine Republic v. Amerada Hess*.[90]

1. *Filartiga v. Pena-Irala* (1980)

In this case, where plaintiffs sued a former police official in Paraguay for allegedly torturing their son to death,[91] the Alien Tort Claims Act was "rediscovered" and successfully invoked to defeat the claim of sovereign immunity.[92] The Second Circuit stated:

> [W]e doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could properly be characterized as an act of state. Paraguay's renunciation of torture as a legitimate instrument of state policy, however, does not strip the tort of its character as an international law violation, if in fact it occurred under color of government authority.[93]

To justify its holding, in a sleight of hand reminiscent of the *Ex Parte Young* stripping doctrine in 14th Amendment jurisprudence (and basically to achieve an analogous result),[94] the court had to make a distinction between the two following contradictory assertions. First, to defeat the Act of State doctrine it had to hold that the torture carried out by the defendant was not

---

86. *See* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).
87. *See* Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1102 (9th Cir. 1990).
88. *See* Trajano v. Marcos, 978 F.2d 493 (9th Cir. 1992).
89. *See* Princz v. Federal Republic of Germany, 26 F.3d 1166 (D.C. Cir. 1994).
90. *See* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989).
91. *See* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).
92. *See* Bederman, *supra* note 4, at 256.
93. *Filartiga*, 630 F.2d at 889–90 (citations omitted).
94. The stripping doctrine holds that because a state cannot authorize its officials to act in an unlawful or unconstitutional manner, any state officer who does so is no longer acting in his official state capacity, and thus the 11th Amendment does not bar suit against him. That same official, however, is simultaneously considered to be an official of the state for "state action" purposes of the 14th Amendment. *See Ex Parte* Young, 200 U.S. 123, 160 (1908); Pennhurst v. Halderman, 465 U.S. 89, 102 (1984).

a "public act." Second, to preserve the cause of action under the Alien Tort Statute (i.e., to vindicate its "international character"), it had to simultaneously hold that the torture occurred "under the color of governmental authority" in order to maintain the fiction of attribution to a sovereign power.[95]

2. *Chuidian v. Philippine National Bank* (1990)

In *Chuidian v. Philippine National Bank*, a member of Philippine President Aquino's Good Government Commission ordered a letter of credit to be dishonored. The Court had to decide whether this letter should be honored.[96] The suit was brought against the Commissioner in his personal capacity, and he answered that he was immune under the FSIA. The Ninth Circuit reasoned:

> [W]e cannot infer that Congress . . . intended to allow unrestricted suits against individual foreign officials acting in their official capacities. Such a result would amount to a blanket abrogation of foreign sovereign immunity by allowing litigants to accomplish indirectly what the Act barred them from doing directly. It would be illogical to conclude that Congress would have enacted such a sweeping alteration of existing law implicitly and without comment.[97]

From a human rights standpoint, this case was unfortunate because it extended the doctrine of state or sovereign immunity to individuals acting for the state.

3. *Trajano v. Marcos* (1992)

The distinction between official and personal capacity was continued in *Trajano*, which involved an alleged wrongful death by torture at the hands of the Philippine government.[98] The Ninth Circuit reiterated its holding in *Chuidian* that "the FSIA covers a foreign official acting in an official capacity, but that official is not entitled to immunity for acts which are not committed in an official capacity . . . ."[99] Thus, activities, such as selling personal property or acts beyond the scope of an official's authority (e.g., doing

---

95. Bederman, *supra* note 4, at 265.
96. *See* Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095 (9th Cir. 1990).
97. *Id.* at 1102.
98. *See* Trajano v. Marcos, 978 F.2d 493 (9th Cir. 1992).
99. *Id.* at 497 (citing Chuidian, 912 F.2d at 1106).

something the sovereign has not empowered the official to do) would not be granted immunity.

4. *Princz v. Federal Republic of Germany* (1994)

In this case, involving Nazi war atrocities, the district court initially decided the claim favorably for the plaintiff on the basis of a *jus cogens* theory of violation of international norms.[100] This theory argues that international law does not recognize an act that violates *jus cogens* as a *sovereign* act and it would therefore not be entitled to the immunity afforded by international law.[101] But, this theory was given an "ignominious burial" on appeal before the District of Columbia Circuit Court.[102] One more creative approach was defeated by the courts.

5. *Argentine Republic v. Amerada Hess* (1989)

Amerada Hess Shipping Corporation filed suit against Argentina in federal district court in New York for an attack on a ship during the Falkland Islands war. Amerada Hess argued that the Alien Tort Statute conferred jurisdiction on the district court. The district court, however, dismissed the suit on the grounds that jurisdiction could only be obtained under the FSIA, and that none of the exceptions in the Act applied to the case.[103]

The Second Circuit Court of Appeals reversed, reasoning that Congress' enactment of the FSIA was not meant to eliminate "existing remedies in United States courts for violations of international law" by foreign states under the Alien Tort Claims Act.[104] The Court of Appeals acknowledged that the FSIA's language and legislative history supported the basic idea that the FSIA governed the immunity of foreign states in federal court.[105] It went on to reason, though, that the FSIA's focus on *commercial* concerns and Congress' failure to repeal the Alien Tort Statute indicated Congress' intention "that federal courts continue to

---

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

101. *See* Siderman de Blake v. Argentina, 965 F.2d 699, 718 (9th Cir. 1992).

102. *See* Bederman, *supra* note 4, at 273.

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

104. *See* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 433 (1989) (citing Appeal of District Court Dismissal by Amerada Hess, Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421, 426 (2d Cir. 1987)).

105. *See* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. at 435.

exercise jurisdiction over foreign states in suits alleging violations of international law outside the confines of the FSIA."[106] The Court of Appeals felt that to construe the FSIA in any other way to bar the suit "would 'fly in the face' of Congress' intention that the FSIA be interpreted pursuant to the 'standards recognized under international law.'"[107]

The Supreme Court reversed.[108] In its analysis, the Court noted that the legislative history of the FSIA demonstrated that Congress did indeed have foreign states' violations of international law in mind when it passed the FSIA.[109] The Court cited section 1605(a)(3), which specifically denies foreign states immunity for suits "in which rights in property taken in violation of international law are in issue . . . ."[110] The Court reached the conclusion that the "text and the structure of the FSIA demonstrated Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts."[111]

In so ruling, the Supreme Court established that the sole basis for obtaining jurisdiction over a foreign nation in U.S. courts is through the FSIA.[112] Personal jurisdiction over the foreign sovereign, as well as subject matter jurisdiction, exists only when one of the exceptions to sovereign immunity applies.[113]

Thus, if a suit is brought against a foreign sovereign then it is necessary to bring the case within one of the statutorily-defined exceptions of the FSIA.[114] But this is no easy task because in a typical human rights case, which alleges tortious acts committed in a foreign country, no exception is readily available.[115]

---

106. *Id.*
107. *Id.*
108. *See id.* at 443.
109. *See* Dorsey, *supra* note 7, at 298.
110. 28 U.S.C. § 1605(a)(3) (1997).
111. Dorsey, *supra* note 7, at 298 (citing Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. at 434). As applied to the facts of the *Amerada* case, the Supreme Court ruled, first that the ATCA did not vest federal courts with subject matter jurisdiction over foreign sovereigns and that only the Foreign Sovereign Immunities Act could do so. Second, it held that the narrowly crafted exceptions to the presumptive immunity of foreign sovereigns were not met in that case. This effectively precluded using ATCA and the FSIA as well. *See* Bederman, *supra* note 4, at 257.
112. *See* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989).
113. *See id.* at 435 n.3.
114. *See* Bederman, *supra* note 4, at 270.
115. *See id.* at 270.

The Court held that immunity applied in cases alleging violations of international law that did not fall within one of the Act's exceptions. The Court made it clear that the exceptions would not be satisfied in any other case where the cause of action originated in a tortious violation of the customary international law of human rights.[116] To sum it up, *Amerada Hess* "foreclosed suits against foreign sovereigns for their human rights abuses."[117]

This was a pivotal case and the Supreme Court's decision was a major setback for human rights advocates, particularly in the province of the Alien Tort Statute.[118] Nonetheless, as will be shown, the Court's decision fortunately showed the way out of this human rights quandary.

B. The Necessity for Creative Litigation Strategies

The cases above show that novel jurisprudential doctrines had to be created by judges and litigants to try to achieve the results they desired. One such line of cases involved instances in which foreign sovereigns are considered to have no discretion to carry out illegal acts in this country. In these cases, courts held that while individual acts could be attributed as "public acts" of a state, they did not qualify as a "sovereign act" for purposes of granting immunity for illegal acts carried out in this country.[119]

In *Filartiga*, the Second Circuit similarly contrived a distinction between "public acts" and acts "occurring under the color of governmental authority" to reach the conclusion it desired. In *Filartiga*, the acts occurring abroad had to be defined as not being public acts, so as to evade the Act of State doctrine, while simultaneously being considered a sovereign act (against the law of nations), so as to allow the ATCA to apply. To evade the FSIA, the court had to rule that the FSIA covered only *commercial* acts, thus still allowing violations of international law to be prosecuted under the ATCA.

In *Amerada Hess*, it is interesting to note the arguments used by the Second Circuit Court of Appeals in its decision. The

---

116. *See id.* at 257.

117. *Id.* Finally, the Court held that international agreements entered into by Argentina that did not explicitly mention waiver of immunity to suit or the availability of a cause of action in the United States, did not fall under the existing agreement exception to the FSIA. *See id.* at 270 (citing Argentine Republic v. Amerada Hess, 488 U.S. at 442–43).

118. *See* Bederman, *supra* note 4, at 257.

119. *See id.* at 262–63.

Second Circuit found that jurisdiction under the Alien Tort Statute did in fact apply.[120] It reasoned that the FSIA focused only on commercial concerns, thus leaving the door open to federal courts to exercise jurisdiction over foreign states in suits alleging violations of international law that fell outside the confines of the FSIA.[121]

In addition to creative jurisprudence by judges, plaintiffs have also had to propound novel arguments. The first of these is directed at the FSIA's section 1604. It asserts that if a foreign sovereign violates international human rights norms (*jus cogens* norms) contained in international treaties to which the United States was a party in 1976, it falls within section 1604.[122]

A second argument is that those violations act as an *express* waiver, and are, therefore, covered by the exception in section 1605(a)(1).[123] As seen above, the Supreme Court dealt with both of these in *Amerada Hess* by saying a foreign nation does not waive its sovereign immunity by signing an international agreement unless that agreement explicitly mentions a waiver of immunity and the availability of a cause of action in the United States.[124] In yet another case, *Siderman de Blake v. Argentina*,[125] the Ninth Circuit set forth four criteria to determine if a foreign sovereign waived its immunity under section 1604.[126] It was clear that no generic human rights treaty would meet this test.[127]

A third strategy was to argue that a foreign country's violation of international human rights norms was an *implied* waiver of sovereign immunity under section 1605(a)(1).[128] This was also raised in *Siderman*, where the plaintiffs argued that "[i]nternational law does not recognize an act that violates *jus cogens* as a *sovereign* act. A state's violation of the *jus cogens*

---

120. *See* Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421 (2d Cir. 1987).

121. Dorsey, *supra* note 7, at 298.

122. *See id.* at 270.

123. *See id.*

124. *See id.* at 270 (citing Argentine Republic v. Amerada Hess, 488 U.S. at 442–43).

125. *See* Siderman de Blake v. Argentina, 965 F.2d 699 (9th Cir. 1992).

126. Those four criteria are that the agreement (1) must have been in force before 1976 (the adoption of FSIA); (2) must be an international agreement enforceable between the United States and other foreign states or international organizations; (3) have self-executing provisions; and (4) expressly conflict with the immunity provisions of the FSIA. *See* Bederman, *supra* note 4, at 271–72.

127. *See id.* at 272.

128. *See id.*

norm prohibiting official torture therefore would not be entitled to the immunity afforded by international law."[129] In other words, when a state violates *jus cogens*, the cloak of immunity falls away, leaving the state amenable to suit.[130]

This *jus cogens* argument, to *imply* a waiver of sovereign immunity for humans rights abuses, however, did not convince the court in *Siderman*, which cited *Amerada Hess* as having decided the issue.[131] In *Princz* too, this approach was given the "ignominious burial" mentioned above.[132]

In summary, these contortions demonstrate that in order to attempt to fit a case under one of the FSIA's enumerated exceptions, claimants bringing suit, and the courts ruling for them, had to resort to considerable legal fictions and machinations of law to prevail.

Perhaps the biggest stretch was petitioner's final argument in *Amerada Hess* which asserted that the attack, while 5000 miles away from the closest shore of the United States, had "by statutory definition" occurred in the United States (to fit under the exception in section 1603(c), i.e., within the territory of the United States.).[133]

V. PROPOSED EXTENSION OF FSIA TO HUMAN RIGHTS ABUSES

A. No Jurisdiction Currently Exits over Human Rights Abuses Committed by Foreign Governments

This twisted path that courts and litigants have had to negotiate results simply from the lack of jurisdiction over human rights abuses by foreign governments (or in the case of the TVPA, very limited jurisdiction). These litigation strategies and judicial contortions are shaky at best, and are certainly not guaranteed to be successful in the future. The *Princz* case, where plaintiffs prevailed at the district court level only to be defeated at the appellate level, is but one example of the inadequacies of those ad hoc litigation strategies.

---

129. *Siderman*, 965 F.2d at 718.
130. *See id.*
131. *See* Bederman, *supra* note 4, at 272.
132. *See id.* at 273.
133. The Court stated, "[w]e find this logic unpersuasive." Argentine Republic v. Amerada Hess, 488 U.S. 428, 440 (1989).

This is a real problem. It could be solved, however, by simply creating jurisdiction over the human rights abuses of foreign governments in U.S. courts.

B. Proposed Amendment to the FSIA

This Comment argues that a new exception to immunity for human rights abuses should and could be fashioned. There would be nothing magical about its formulation, and it could roughly parallel the recently passed anti-terrorism exception to the FSIA.[134] The exception would outlaw the most egregious forms of human rights abuses and extend jurisdiction, of the kind extended by ATCA, over foreign states for such human rights abuses. It would provide a way out of the quandary created by *Amerada Hess,* which (by holding the FSIA is the sole means of obtaining jurisdiction over foreign sovereigns) precludes such jurisdiction under the Alien Tort Statute. Such an amendment would also provide for a Congressional gate-keeping function, similar to the one in the Anti-Terrorism Act, to control its applicability to a designated set of countries.[135]

VI. THEORETICAL FOUNDATION FOR A HUMAN RIGHTS EXCEPTION

It must be remembered that in *Amerada Hess* the Court stated there was no enumerated exception to the FSIA that covered the facts of that case. This decision strongly implies that the Court, in finding that no exception applied, presumably meant that were there such an exception, then the foreign sovereign could be reached. This again points to the necessity of a statutorily-defined basis (in the form of a narrowly drawn human rights abuses exception) on which the Court could rely.

The issue presented by such an exception is two-fold. First, could Congress pass such a law? Second, would the courts uphold

---

134. *See* 28 U.S.C. § 1605(a)(7) (1997).

135. It is not necessary to specify here what those abuses would be or which countries would be targeted. That would be left to the political process. The outer bounds of the amendment would, no doubt, turn on political considerations bearing on such an amendment's chances of passing in Congress. Once enacted and successfully litigated, the usual issues of obtaining judgment and the collection of any award would still attach. *See e.g.,* Allison J. Flom, Note, *Human Rights Litigation Under the Alien Tort Statute: Is the* Forti v. Suarez-Mason *Decision the Last of Its Kind?,* 10 B.C. THIRD WORLD L. J. 321, 323, 354 (discussing Forti v. Suarez-Mason, 672 F. Supp. 1531, 1537 (N.D. Cal. 1987)).

and enforce such a provision?[136]

A. Congressional Justification

1. The Principles Underlying Sovereign Immunity

As discussed above, the basic principles underlying sovereign immunity are international comity and reciprocity. Analogous to the doctrine of "unclean hands" in courts of equity, a country could hardly claim the defense of comity when being haled into court for the mass murder of thousands of people. The responsible world community wholeheartedly condemns such abuses; there would be no question among reasonable people as to the legitimacy of an amendment covering such abuses. With a new amendment covering human rights abuses the FSIA's underlying principle of comity would still be intact. The only parties that would complain would be the offending governments themselves.[137]

The concern about reciprocity is similar. The countries which would be affected are those with which we already have difficulty or with which we lack diplomatic relations. These countries are likely to be the same ones targeted by the 1996 anti-terrorism amendment.[138]

As outlined above, with regard to any other countries that might be affected, a proposed human rights amendment, like the 1996 anti-terrorism amendment to the FSIA, would have two facets: (1) a remedies component and (2) a gate-keeping function. Congress would be able to designate a list of countries to which the amendment would apply. Countries such as China, which may be politically difficult to include in the amendment, would not have to be. But like the courts that have grappled with human rights abuses in the past, the attempt here would not be the creation of an ultimate, all-inclusive solution. Rather, it would be

---

136. It should be kept in mind that these questions are interrelated, such that arguments for one can be arguments for the other.

137. And of course the more they complained, the more effective such an amendment would be in achieving the policy goal of discouraging, and hopefully eliminating, human rights abuses.

138. The seven countries on the list of state sponsors of terrorism are Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria. *See* Export Administration Act of 1979 § 6(j), 50 U.S.C. App. § 2405 (j) (1998), and Foreign Assistance Act of 1961 § 620A, 22 U.S.C. § 2371 (1998).

but an evolutionary step to a broader jurisprudence. An old Chinese proverb tells us a long journey begins with the first step. A limited human rights exception amendment would be such a step.

2. Precedent of the 1996 Anti-Terrorism Amendment to the FSIA

Perhaps the strongest argument for the new exception would be legislative precedent. Congress recently passed an amendment to the FSIA with respect to state-sponsored terrorism.[139] This is an extremely crucial point because the issue involved is *nearly* identical—and the remedies and even the affected part of the statute would be *exactly* identical (i.e., an amendment adding a new exception to 28 U.S.C. § 1605(a)).

Until 1996, section 1605(a) of the FSIA codified six exceptions to foreign sovereign immunity. The Anti-terrorism and Effective Death Penalty Act of 1996 amended section 1605(a) to include acts of terrorism committed by foreign states designated as state sponsors of terrorism.

That amendment to the FSIA followed the original drafting pattern used in the FSIA and simply added an additional exception to the original five exceptions. Nor was it the first exception added to the original five. In 1988, actions to enforce agreements to arbitrate and the resulting arbitration awards were exempted from immunity.[140] And as discussed above, the Anti-Terrorism Act of 1996 added the seventh category to the list of exceptions.[141]

These exceptions, therefore, are precedent for expanding the list of exceptions in the first instance. Second, the latest anti-terrorism exception is very closely related to human rights abuses, and it would only be an incremental step to create a new exception dealing with human rights abuses.

Moreover, there can be no doubt that Congress felt that the anti-terrorism amendment enacted in 1996 was consistent with the underlying principles of sovereign immunity.

Finally, it must be pointed out (tautological as it may seem) that the "intent of Congress" was expressly embodied in the

---

139. Anti-terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241 (1996).

140. *See* 28 U.S.C. 1605(a)(6) (1997).

141. *See* 28 U.S.C. 1605(a)(7) (1997).

decision to include the anti-terrorism amendment in the FSIA, thus enabling it to satisfy the courts' oft-stated criteria of divining Congressional intent when interpreting a statute. The same could be said of any new human rights exception passed by Congress. (The "intent of Congress" criteria has often blocked litigants when courts felt a claimant extended the interpretation of a statute beyond the limits intended by Congress.)[142]

B. Judicial Acceptance and Enforcement

The above discussion demonstrates that Congress would be justified in passing such an amendment. Because an exception could easily be created with the requisite legislative will, this section addresses the second part of the two-fold issue introduced above. *Would* the Courts uphold and enforce such a law? The answer is yes.

1. Judicial Willingness to Rule Against Human Rights Abuses

The hoops that courts have been willing to go through, and the fictions they have been willing to entertain, demonstrate their desire to play a role in remedying human rights abuses. The constraints of case law, however, have often precluded the courts from doing so. A statute specifically addressing human rights abuses would provide the courts with a basis to rule for which they are looking, and it would not be inconsistent with the holding in *Amerada Hess*, in which the Court implied that if there was such a statutory exception, it could be used. Courts have wanted to find a way to rule for plaintiffs, but have repeatedly had to rule against them. The discussion above shows that the courts are almost inviting a response from Congress.[143]

2. Judicial Recognition of Congressional Intent

Courts have shown a willingness to discern the intent of Congress when passing on the meaning of a statute. In numerous FSIA cases, courts have shown their desire and obligation to defer to Congressional intent. While this principle was often expounded in cases in which foreign sovereigns were allowed to *escape* liability, the courts enunciated the principle nonetheless.

---

142. *See infra* Part VI.B.2.
143. *See supra* Part IV.B.

Commenting on the possibility that individual state actors might be made subject to suit, the Ninth Circuit in *Chuidian* stated:

> [W]e cannot infer that Congress . . . intended to allow unrestricted suits against individual foreign officials acting in their official capacities. Such a result would amount to a blanket abrogation of foreign sovereign immunity by allowing litigants to accomplish indirectly what the Act barred them from doing directly. It would be illogical to conclude that Congress would have enacted such a sweeping alteration of existing law implicitly and without comment.[144]

In *Amerada Hess*, in debunking petitioner's argument that the attack by definition had occurred within the United States, the Court said, "[w]hen it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute."[145] Again, in *Amerada Hess*, the Court dissected the language of the Act to seek Congress' intent. "Congress's decision to use explicit language in § 1605(a)(2), and not to do so in § 1605(a)(5), indicates that the exception in § 1605(a)(5) covers only torts occurring within the territorial jurisdiction of the United States."[146] This sort of hairsplitting by the Court to determine the intent of Congress further indicates the willingness of the Court to follow that intent.

This is shown again in the Court's analysis of section 1605(a)(3) in *Amerada Hess*. There, the Second Circuit Court of Appeals held that the FSIA applied only to commercial activities—leaving courts free to exercise jurisdiction over foreign governments in suits alleging violations of international law falling outside the "commercial" confines of the FSIA.

In rejecting the Second Circuit's argument that the FSIA only applied to commercial concerns, the Supreme Court noted that the FSIA's legislative history showed that Congress had indeed explicitly considered violations of international law by foreign states when it enacted the FSIA.[147] The Court held that "the text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign

---

144. Chuidian v. Philippine National Bank, 912 F.2d 1095, 1102 (9th Cir. 1990).

145. Argentine Republic v. Amerada Hess, 488 U.S. 428, 440 (1989).

146. *Id.* at 441.

147. The Supreme Court cited section 1605(a)(3), which specifically denies foreign states immunity for suits "in which rights in property taken in violation of international law are in issue."

state in our courts," and therefore ATCA was not applicable to foreign governments.[148]

Another example, again in the area of sovereign immunity, is in *Lafontant v. Aristide*.[149] The *Lafontant* court had to decide if the former head of state of Haiti was entitled to immunity. There the court looked to the legislative history of the Torture Victims Protection Act (TVPA) which indicated it was the *intent of Congress* that the TVPA not displace the common law principles of the head-of-state immunity. It held that the exiled Haitian president, Aristide, was entitled to head-of-state immunity.[150]

In yet another example, *Tel-Oren v. Libyan Arab Republic*,[151] the court held that an implied cause of action could not arise under international law *without congressional approval*.[152]

The key in each of these cases was the willingness of the courts to find and adhere to the intent of Congress. How much easier it would be for the courts in human rights cases if Congress were to pass an amendment explicitly containing such an exception. Having an explicit amendment would allow the courts to avoid legal contortions and simply follow Congress' intent. It would both obviate the Court's need to divine the intent of Congress and would provide a direct basis on which to rule.

3. Congress is the Proper Forum to Make Policy in the Area

Closely related to the above argument is the idea that the courts normally prefer to let Congress make major changes and extensions to existing law. The courts themselves will make those changes and extensions when they must, but the constraints of case law can lead to unintended results that go clearly beyond the limits originally intended by the legislation. When courts push the law past its intended limits, the results are often inefficient, indirect, and ineffective ways of dealing with problems. As the Supreme Court has said, "[a]ll who observe the work of courts are familiar with what Judge Cardozo described as 'the tendency of a principle

148. *See Argentine Republic v. Amerada Hess*, 488 U.S. at 434, 438.

149. *See* Lafontant v. Aristide, 844 F. Supp. 128 (E.D.N.Y 1994).

150. *See* Bederman, *supra* note 4 at 280 (citing Lafontant, 844 F. Supp. at 131–32).

151. *See* Tel Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984)(per curiam).

152. *See* Alan Frederick Enslen, Comment, Filartiga's *Offspring: The Second Circuit significantly expands the Scope of The Alien Tort Claim Act with Its Decision in* Kadic v. Karadzic, 48 ALA. L. REV. 695, 701–03 (1997).

to expand itself to the limit of its logic.'"[153] The fictions entertained by the court in *Filartiga* are a good example of this overreaching. It is at that point that Congress has the proper function to change the law. The Supreme Court has said:

> More than a century ago we recognized that 'the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.' . . . The human condition is one of constant learning and evolution—both moral and practical. Legislatures implement that new learning . . . .[154]

The courts, when grappling with these issues, recognize this, and as we have seen, seek Congressional guidance.

4. Prudential Considerations

Closely related to this argument is the prudential consideration on the part of the Court to respect the legislative and executive branches' actions in political areas. The Supreme Court has held that certain government conduct should not be ruled on by the federal courts, but rather left to these politically accountable branches of government.[155] This is the Court's oft-enunciated prudential "political question" doctrine. The Supreme Court has frequently held that cases presenting issues involving the conduct of foreign affairs pose such political questions, and has thus taken a deferential approach in these areas.[156] The Court has said:

---

153. Korematsu v. United States, 323 U.S. 214, 246 (1944) (J. Jackson dissenting). Sometimes these extensions are inordinate. In *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), plaintiffs, unable to reach the government of Burma because of sovereign immunity, brought a claim against Unocal, a joint-venture partner of the Burmese government, under a joint-tortfeasor theory extension of the Alien Tort Claims Act. Unocal is an unwitting victim in this sort of legal machination—and from the plaintiff's perspective, such "novel" strategies are risky and fraught with uncertainty at best. Clearly, this sort of case law based extension of a statute can go beyond the point where it makes any sense. The Court in this case wants to reach the human rights abuses of the Burmese government and is willing to chart a twisted course to get there. A more straightforward way would be simply to sue the Burmese government directly. A new statutory exception in the FSIA would allow this.

154. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1069 (1992)(Stevens J., dissenting).

155. *See* ERWIN CHERMERINSKY, FEDERAL JURISDICTION 142 (2d ed. 1994).

156. *See id.* at 154.

> The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislature—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.[157]

Thus, if Congress deliberately chose to step into the area of human rights abuses, the Court would take a deferential approach under this "political question" prudential doctrine.

5. Constitutional Mandate

Finally, and most importantly, are the Constitutional provisions and principles governing this area of law. The immunity of a foreign government from suit in a U.S. court "is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution," thereby allowing Congress to alter the law in that area.[158] Presumably, based on their prior decisions, the courts would respect that.

In *Amerada Hess*, the Court said, "[w]e start from the settled proposition that the subject-matter jurisdiction of the lower federal courts is determined by Congress 'in the exact degrees and character which to Congress may seem proper for the public good.'"[159] Thus, by its own words, in the *very case* in which it closed the ATCA door to suits against sovereign nations, the Supreme Court acknowledged that Congress may legislatively define the limits of FSIA's purview.

And it is more than a presumption that the courts would respect this. The Court held that:

> [The] FSIA must be applied by the district courts in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to the foreign sovereign immunity.[160]

The Court has thus stated that once Congress has defined that jurisdiction, the courts would then have to abide by it. Finally, in *Amerada Hess* the Court held that:

---

157. *Id.* (citing Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918).
158. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983).
159. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 433 (1989).
160. *Id.* at 434–35.

> Congress also rested the FSIA in part on its power under Art. I, § 8, cl. 10, of the Constitution "[t]o define and punish Piracies and Felonies committed on the high Seas, and *Offenses against the Law of Nations.*" From Congress' decision to deny immunity to foreign states in the class of cases just mentioned, we draw the plain inference that immunity is granted in those cases involving alleged violations of international law that do not come within one of the FSIA's exceptions.[161]

Thus, if Congress were to create a new human rights abuses exception, the courts would recognize that a sovereign would *not* have immunity in those cases. The Court then reiterated this, saying, "[h]aving determined the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court, we turn to whether any of the exceptions enumerated in the Act apply here."[162]

So the *Amerada Hess* case, which was so devastating to the cause of human rights in the ATCA realm, actually contained the solution to the problem all along. Congress could pass, and the courts would apply, a new sovereign immunity exception in the area of human rights.

VII. CONCLUSION

The passage of a new exception to the Foreign Sovereign Immunities Act that would cover human rights abuses by foreign nations would be welcomed by many. No longer would sovereign immunity be matter-of-factly invoked to shield abusive regimes from having to account for their human rights abuses. No longer would existing laws have to be contorted and assembled in odd combinations in the hope of obtaining theoretical jurisdiction over those regimes. No longer would sympathetic courts have to engage in manipulation, sleight of hand, and judicial fictions to fit such abuses into our existing legal framework.

A new human rights exception would make a more sensible and direct route available to litigants and the courts. The entire jurisprudence in this area—currently spread out between the Alien Tort Claims Act, the State Action Doctrine, the Torture Victims Protection Act, and the Foreign Sovereign Immunities Act—would become more unified and more consistent. A hodgepodge

---

161. *Id.* at 436 (citation omitted)(emphasis added).
162. *Id.* at 439.

would no longer have to be coalesced from all the disparate parts to bring a successful action, and the chances for success would be greatly increased.

We do not accept state-sponsored terrorism—we ought not accept other egregious forms of human rights abuses. The way has already been paved by the 1996 anti-terrorism amendment. A new exception would simply be a further step down that path.

*G. Michael Ziman**

---

* J.D. candidate, Loyola Law School, 1999; B.A., M.S. Stanford University. I dedicate this Comment to my parents and to my daughter, Kirsten Kimberly-Marie, whom I love very much.