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# EXPECTATIONS OF IMMUNITY: REMOVING THE BARRIER TO RETROACTIVE APPLICATION OF THE FOREIGN SOVEREIGN IMMUNITIES ACT TO PRE-1952 EVENTS

## I. INTRODUCTION

In the aftermath of the Holocaust, anti-Semitic violence continued in Poland. As Polish Jews returned home, they arrived to find Poland “in a state of chaos and ruin.”<sup>1</sup> Much of their property had been adversely possessed, appropriated, or confiscated by the Polish government and tensions over that property sparked a renewal of violence against the Jews.<sup>2</sup> During the first two years after the war, more than 1,000 Jews were murdered, beaten, or abused.<sup>3</sup>

Theo Garb, one of the few surviving Polish Jews, encountered these simmering tensions after returning home.<sup>4</sup> Like so many others returning home after the War, he was prevented from reclaiming his property after World War II under the Polish post-war nationalization laws.<sup>5</sup> Mr. Garb believed these laws “were established to legitimize the taking of [Jewish] property.”<sup>6</sup> In an attempt to reclaim this property, Mr. Garb and other Jewish

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1. *Garb v. Republic of Poland*, 207 F. Supp. 2d 16, 17 (E.D.N.Y. 2002).

2. *Id.*

3. *Id.* at 17-18.

4. *See id.*

5. *Id.* at 18. The 1946-47 nationalization laws provided that “‘deserted property’—real property that was confiscated by the Nazis or that was the subject of forced sales— was to be returned to its owners or their legal successors . . . . Conversely, property characterized as abandoned— once belonging to the Third Reich or German citizens— became the property of the Treasury.” Many Jews believed that the true owners of much of the “abandoned property” were Jews. *Id.*

6. *See id.*

Holocaust victims and their heirs brought suit against the Republic of Poland in United States District Court in 2002.<sup>7</sup>

Their suit, *Garb v. Republic of Poland*, alleged that “defendants violated customary international law by creating, participating in, and/or failing to prevent the permanent dispossession of Polish Jews’ property in the aftermath of the Holocaust and that defendants then profited commercially from their management of the properties.”<sup>8</sup> Plaintiffs demanded that the defendants turn over the income and profits of the property and sought restitution from the Polish government.<sup>9</sup>

Despite their attempt to hold Poland accountable for expropriation of their property, the District Court for the Eastern District of New York dismissed the case for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act (FSIA),<sup>10</sup> which the court considers the sole basis for jurisdiction over a foreign state.<sup>11</sup> Under the FSIA, a foreign state is presumptively immune from jurisdiction in respect to claims arising out of governmental activities (*de jure imperii*); it is not immune from claims arising out of activities of a kind carried on by private persons (*de jure gestionis*)<sup>12</sup> unless a specified exception applies.<sup>13</sup> An exception cannot be applied retroactively where it alters law or

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7. *See id.* at 19.

8. *Id.*

9. *Id.*

10. Foreign Sovereign Immunities Act, 28 U.S.C.S. §§ 1330, 1602-11 (Law. Co-op. 2002) (grants the district courts “original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state . . . as to any claim for relief *in personam* with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement”).

11. *Garb*, 207 F. Supp. 2d at 19 (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989)); *see also* *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983) (“[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 foreign sovereign immunity . . .”).

12. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 451 cmt. a (1987).

13. 28 U.S.C.S. § 1604 (Law. Co-op. 2002) (entitles foreign states to immunity from the jurisdiction of federal and state courts “except as provided in sections 1605 to 1607 of this chapter” and “subject to existing international agreements to which the United States is a party at the time of enactment of this Act”); 28 U.S.C.S. § 1605 (Law. Co-op. 2002) (general exceptions to the jurisdictional immunity of a foreign state include explicit or implicit waiver; commercial activity; property taken in violation of international law; rights in property by succession or gift or right is in the U.S.; money damages for personal injury or death; or damages to loss of property noncommercial tort); *see Garb*, 207 F. Supp. 2d at 20 (citing *Saudi Arabia v. Nelson*, 507 U.S. 349, 355, 123 (1993)).

an expectation of immunity that existed before the enactment of the statute in 1976.<sup>14</sup> In *Garb*, the operative events leading to the expropriation of property occurred during a period in which the defendants claim to enjoy immunity from suit for their commercial activities and for the expropriation of Mr. Garb's property.<sup>15</sup> Were these events to occur today, foreign sovereign immunity would not be available. The court, however, observed that Mr. Garb was barred from bringing suit because retroactive application of the FSIA would change prior law and thus alter Poland's expectations of immunity. Therefore, the FSIA could not be applied retroactively in his case.<sup>16</sup>

The issue of retroactivity acted as a barrier to obtaining jurisdiction in *Garb*. This case, however, is inconsistent with decisions from various courts (including the United States Supreme Court, the Court of Appeals for the District of Columbia, and the Ninth Circuit) that addressed the issue of retroactivity and removed it as a barrier to obtaining jurisdiction.<sup>17</sup> From these decisions, two different approaches to retroactive application of the FSIA emerged. Some courts treat the FSIA as an intervening procedural statute which merely confers jurisdiction and does not interrupt a party's substantive rights. Other courts have found that based on customary international law (such as *jus cogens* or peremptory norms), application of the FSIA to pre-enactment events would not "impair rights a party possessed when he acted."<sup>18</sup> When reviewed together, however, these decisions reveal that the FSIA may be applied retroactively without adversely affecting a party's settled expectations of immunity.

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14. *Garb*, 207 F. Supp. 2d at 21 (citing *Carl Marks & Co. v. Union of Soviet Socialist Republics*, 841 F.2d 26, 27 (2d Cir. 1988)). In 1952, the State Department announced that the United States would only recognize immunity in cases based on a foreign state's public acts. After this formal adoption of the restrictive theory of sovereign immunity, foreign sovereigns no longer had an expectation of immunity and the FSIA could be applied to events after this date. H.R. REP. NO. 94-1487, at 8 (1976) *reprinted in* U.S.C.C.A.N. 6604, 6611.

15. *Garb*, 207 F. Supp. 2d at 21.

16. *Id.* at 27.

17. See *Landgraf v. USI Film Products*, 511 U.S. 244, 245 (1994); *Princz v. Fed. Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994); *Creighton Ltd. v. Gov't of the State of Qatar*, 181 F.3d 118, 124 (D.C. Cir. 1999); *Haven v. Republic of Poland*, 68 F. Supp. 2d 943 (N.D. Ill. 1999); *Abrams v. Societe Nationale Des Chemins De Fer Francais*, 175 F. Supp. 2d 423 (E.D.N.Y. 2001); *Altman v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002).

18. *Princz*, 26 F.3d at 1178-79 (quoting *Landgraf*, 511 U.S. at 280).

This Comment analyzes both approaches and argues that the FSIA should apply retroactively to pre-1952 acts that violate customary international law because foreign states did not have settled expectations of immunity for these acts. This Comment, however, does not assert that a foreign sovereign impliedly waives their sovereign immunity by violating a *jus cogens* norm of international law. Rather this Comment focuses on the sovereign's settled expectations prior to the formal adoption of the restrictive principle of sovereign immunity.

Part II discusses the history of sovereign immunity and customary international law. Part III examines the effect and operation of the FSIA on retroactive law. Part IV focuses on how courts have treated the issue of retroactivity after the Supreme Court's landmark decision in *Landgraf v. USI Film Products*.<sup>19</sup> Part V applies the analysis garnered from these decisions and examines how *jus cogens* norms are used to confer jurisdiction. Finally, Part VI concludes that *jus cogens* norms of international law, where established, may be used to defeat the presumption against retroactive application of the FSIA.

## II. BACKGROUND: CUSTOMARY INTERNATIONAL LAW & SOVEREIGN IMMUNITY

The law of sovereign immunity rests on the concept that "a state's consent to suit is a necessary prerequisite to another state's exercise of jurisdiction."<sup>20</sup> Consent to suit is not required, however, where there is a violation of *jus cogens* or peremptory norms of international law. 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 and which can be modified only by a subsequent norm of general international law having the same character."<sup>21</sup> There is general agreement that certain human rights law, such as the prohibitions of slavery, murder, genocide, torture, systematic racial discrimination, and prolonged arbitrary detention, has achieved *jus cogens* status.<sup>22</sup>

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19. *Landgraf*, 511 U.S. at 244.

20. *Princz*, 26 F.3d at 1181.

21. Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 287, 332, [hereinafter Vienna Convention]; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. k, n. 6 (1987) (adopting Vienna Convention's definition of *jus cogens*).

22. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 cmt. n (1987).

As a select and narrow subset of the norms recognized as customary international law,<sup>23</sup> *jus cogens* norms “enjoy the highest status in international law and prevail over both customary international law and treaties.”<sup>24</sup> Because *jus cogens* norms are binding on *all* nations, without the need for treaty,<sup>25</sup> they carry significant implications for the law of sovereign immunity.

To understand the relationship between *jus cogens* and the law of foreign sovereign immunity, it is useful to examine the development of the immunity doctrine.<sup>26</sup> Before 1952, foreign sovereigns were entitled to assert absolute immunity from suit in the United States Courts.<sup>27</sup> Following the State Department’s adoption of the restrictive theory of foreign sovereign immunity in 1952, immunity was only confined to suits involving the foreign sovereign’s public acts.<sup>28</sup> This theory was codified in 1976 when Congress passed the Foreign Sovereign Immunities Act.<sup>29</sup> This Act has been applicable to claims arising both before and after the State Department’s formal adoption of restrictive immunity in 1952.<sup>30</sup> The inconsistent application of the Act is central in the *Garb* court’s retroactivity analysis.<sup>31</sup> The following background will attempt to clarify some of the prevailing issues.

### A. Absolute Immunity

While Article III of the Constitution expressly includes suits against “foreign states” within the subject matter jurisdiction of federal courts,<sup>32</sup> prior to 1952, the United States generally granted foreign sovereigns complete immunity from suit under the

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23. The Restatement (Third) of Foreign Relations Law defines customary international law as the “general and consistent practice of the states followed by them from a sense of legal obligation.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987).

24. *United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 935 (D.C. Cir. 1988).

25. See Vienna Convention, *supra* note 21, art. 53.

26. *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1181 (D.C. Cir. 1994).

27. *Garb v. Republic of Poland*, 207 F. Supp. 2d 16, 21 (E.D.N.Y. 2002).

28. H.R. REP. NO. 94-1487, at 8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611.

29. *Id.* at 7.

30. See cases cited *supra* note 17.

31. See *Garb*, 207 F. Supp. 2d at 25-30.

32. U.S. CONST. art. III, § 2 (“The judicial Power shall extend to all Cases . . . between a State, or the Citizens thereof, and foreign states, Citizens or subjects.”).

doctrine of "absolute sovereign immunity."<sup>33</sup> The doctrine is a product of judicial reluctance to interfere with foreign affairs matters.<sup>34</sup> According to the court in *Garb*, "The doctrine of absolute immunity originated in an era of personal sovereignty when the assertion of jurisdiction by one sovereign over another was thought to constitute an affront to the latter's dignity and independence."<sup>35</sup>

The United States Supreme Court first embraced the concept of absolute immunity in 1812 in *The Schooner Exchange v. M'Faddon*.<sup>36</sup> The court held that, absent consent, a foreign state is entitled to absolute sovereign immunity from the jurisdiction of U.S. courts.<sup>37</sup> Chief Justice Marshall believed the world was "composed of distinct sovereignties, possessing equal rights and equal independence . . ."<sup>38</sup> As such, foreign states enjoyed full and absolute jurisdiction within their own territories.<sup>39</sup>

In addition to formally adopting the theory of absolute immunity, Chief Justice Marshall also embraced the "implied license" theory of immunity. Under this theory, a sovereign enters the territory of a friendly foreign government "in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him."<sup>40</sup>

A foreign sovereign could waive immunity only where it brought suit in the United States or took some other action related to the conduct of litigation that manifested an intention to waive

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33. Michael E. Jansen, *FSIA Retroactivity Subsequent to the Issuance of the Tate Letter: A proposed Solution to the Confusion*, 10 NW. J. INT'L L. & BUS. 333, 345 (1989).

34. Brian S. Fraser, Note, *Adjudicating Acts of State in Suits Against Foreign Sovereigns: A Political Question Analysis*, 51 FORDHAM L. REV. 722, 723 (1983) (comparing the act of state doctrine to doctrine of sovereign immunity).

35. *Garb*, 207 F. Supp. 2d at 21.

36. See *The Schooner Exchange v. M'Faddon*, 11 U.S. (1 Cranch) 116, 135 (1812) (district court lacked jurisdiction over an armed French vessel which was within the territory of the United States).

37. *Id.*

38. *Id.* at 136.

39. Michael W. Hoops, Comment, *Retroactivity, Implied Waiver, and the FSIA: Is it Time to Reform the Law on Sovereign Immunity?*, 24 HOFSTRA L. REV. 515, 519 (1995); see also *Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562, 571-74 (1926) (*Schooner Exchange* regarded as extending virtually absolute immunity to foreign sovereigns, despite narrow holding).

40. *The Schooner Exchange*, 11 U.S. (1 Cranch) at 136.

immunity.<sup>41</sup> Moreover, the Supreme Court viewed the doctrine of immunity as a matter that should be deferred to the executive branch and routinely protected foreign states from suit consistent with the executive branch policies.<sup>42</sup>

### *B. Transition from Absolute to Restrictive Immunity*

The doctrine of absolute immunity began to lose momentum long before the enactment of the FSIA. It was evident that the absolute view of sovereign immunity produced hardships for U.S. citizens involved in contracts with foreign entities or suffering torts committed by foreign entities because they had no opportunity for legal redress in U.S. courts.<sup>43</sup>

By the mid-1940's, the doctrine began to give way to restrictive immunity as the U.S. judiciary adopted a new approach, by deferring to practices and policies of the U.S. Department of State only on a case-by-case basis rather than presumptively following them.<sup>44</sup>

In 1952, the theory of absolute sovereign immunity was formally replaced by the theory of restrictive sovereign immunity in the landmark letter from Jack B. Tate, Acting Legal Advisor, Department of State, to Acting Attorney General Philip B.

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41. See *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1179 (D.C. Cir. 1994) (Wald, J., dissenting); see also H.R. REP. NO. 94-1487, at 12, reprinted in 1976 U.S.C.A.N. 6604, 6617 (illustrations of implied waiver exception).

42. See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983) ("Until 1952, the State Department ordinarily requested immunity in all actions against friendly foreign sovereigns."); see also *Ex parte Republic of Peru*, 318 U.S. 578, 581 (1943) (Court deferred to State Department's formal recognition of the Peruvian government's claim that a merchant vessel owned and operated by it was immune from jurisdiction); *Puente v. British Ministry of War Transp.*, 116 F.2d 43 (1940) (Spanish government held immune upon suggestion of Spanish Ambassador); *Piascik v. British Ministry of War Transp.*, 54 F. Supp. 487 (S.D.N.Y. 1943) (citing *Ex parte Republic of Peru*, 318 U.S. 578, and holding that British Ministry of War Transport was immune upon suggestion of Secretary of State).

43. Sandra Engle, *Choosing Law for Attributing Liability Under the Foreign Sovereign Immunities Act: A Proposal for Uniformity*, 15 FORDHAM INT'L L.J. 1060, 1063 (1992).

44. *Id.* at 1063; see also *Ex parte Republic of Peru*, 318 U.S. 578 (1943); *Compania Espanola De Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68 (1938); *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945); *Victory Transp. Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (2nd Cir. 1964); *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) (Court subjected Merchant vessel owned by Mexican government but not its possession or control to jurisdiction of district courts because the State Department took no position with respect to the vessel's asserted immunity).



Perlman ("Tate Letter")."<sup>45</sup> Under the restrictive theory, the State Department would no longer assert immunity on behalf of friendly foreign sovereigns in suits arising from private or commercial activity.<sup>46</sup> Immunity was confined to the sovereign or public acts of the foreign state and did not extend to its commercial or private acts.<sup>47</sup> Thereafter, this restrictive theory became the prevailing law in the United States.<sup>48</sup> This new policy provided assurance for those engaging in transactions with foreign sovereigns that their rights would be enforced in the courts whenever possible.<sup>49</sup>

### C. Codification of Restrictive Immunity—FSIA

Despite its overwhelming approval, the State Department's new policy did not provide courts with concrete standards for determining whether to assert jurisdiction over suits against foreign states. As a result, numerous problems began to emerge with regard to application and implementation of the new theory.<sup>50</sup> Specifically, decisions regarding immunity were often arbitrary and inconsistent because they were based on politics or current foreign relation policies that were constantly shifting.<sup>51</sup> Courts

45. Jack B. Tate, *Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*, May 19, 1952, U.S. DEP'T ST. BULL. vol. XXVI, no. 678, June 23, 1952 at 984 [hereinafter Tate Letter]. Tate cited the following reasons for adoption of the theory: (i) most civil law countries had already adopted it; (ii) the Government of the United States did not claim immunity when sued in foreign courts in contract or tort; and (iii) the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. *Id.*

46. *Id.*

47. *Id.*

48. Jansen, *supra* note 33, at 346.

49. See Tate Letter, *supra* note 45 ("[t]he widespread and increasing practice on the part of the governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts.").

50. Jansen, *supra* note 33, at 346.

51. *Id.* at 347 (citing *Jackson v. People's Republic of China*, 794 F.2d 1490, 1493 (11th Cir. 1986)). The court summarized the problems emerging from the Tate Letter as follows: After the Tate Letter the executive, acting through the State Department, usually would make "suggestions" on whether sovereign immunity should be recognized by a court, and courts generally abided [by] these suggestions. This proved troublesome, because foreign nations at times placed diplomatic pressure on the State Department, and political considerations led to suggestions of immunity where it was not available under the restrictive theory. . . . Moreover, foreign nations did not always make requests to the State Department, and responsibility fell to the courts to determine whether sovereign immunity

were also unable to distinguish between public and private acts because there was no clear, established method,<sup>52</sup> and there was no clear way to secure *in personam* jurisdiction over a foreign state.<sup>53</sup>

In 1976, with the passage of the Foreign Sovereign Immunities Act, Congress provided such standards. The FSIA codified the restrictive theory of sovereign immunity and conferred on United States Courts subject matter jurisdiction over claims against foreign sovereigns.<sup>54</sup> According to the Department of State, the purpose of the legislation “was to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation . . . .”<sup>55</sup>

The executive branch was persuaded to codify the restrictive theory of sovereign immunity after discovering that almost every country in Western Europe followed the restrictive principle and U.S. pleas of immunity were “routinely denied in tort and contract cases where the necessary contacts with forum were present.”<sup>56</sup> Following codification, the FSIA has had a significant impact on international practice. The United Kingdom<sup>57</sup> and Canada<sup>58</sup> have enacted statutes which apply the same basic principles as the

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existed. With two different branches involved the governing standards were neither clear nor uniform. *Id.*

52. *Id.* at 357 n.95 (“Courts and commentators formulated several tests to distinguish between commercial and governmental acts. Some tests focused on the ‘nature’ of the act, classifying as sovereign those acts which could only be performed by the sovereign, whereas others preferred the “purpose” test, under which an act would be considered sovereign if performed for a public purpose.”).

53. *Id.* at 348; see also H.R. REP. NO. 94-1487, at 8-9 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6611 (describes difficulties arising from the Tate Letter from a legal standpoint, foreign relations standpoint, and the standpoint of a private litigant).

54. *Abrams v. Societe Nationale Des Chemins De Fer Francais*, 175 F. Supp. 2d 423, 428 (E.D.N.Y. 2001) (“The relevant jurisdictional language appears in 28 U.S.C. § 1330(a) which provides that: 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 as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.”).

55. Letter from Robert S. Ingersoll, Deputy Secretary of State and Harold R. Tyler Jr., Deputy Attorney General to Carl O. Albert, Speaker of the House of Representatives (October 31, 1975) in H.R. REP. NO. 94-1487, at 44-46 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6634-35.

56. H.R. REP. NO. 94-1487, at 9 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6611.

57. State Immunity Act, 1978, ch. 33, § 1 (Eng.).

58. State Immunity Act, 1982, ch. 95, 1980-83 S.C. 2949 (Can.).

FSIA.<sup>59</sup> These principals are generally accepted as consistent with international law and practice.<sup>60</sup>

### III. RETROACTIVE APPLICATION OF THE FSIA DOES NOT ADVERSELY AFFECT ANTECEDENT RIGHTS

After 1952, a foreign sovereign could anticipate being sued in the U.S. courts for commercial transactions or private acts. In the interest of protecting the antecedent rights of foreign sovereigns, the FSIA was not applied retroactively to transactions which took place prior to the adoption of the restrictive theory of sovereignty. The following analysis of the effect and operation of retroactive law reveals that the FSIA may be applied retroactively without adversely affecting the antecedent rights of parties.<sup>61</sup>

#### A. *Definition and Interpretation of Retroactive Law*

A retroactive or “retrospective” statute is defined as “one which gives to pre-enactment conduct a different legal effect from that which it would have had without the passage of the statute.”<sup>62</sup> The term also refers to laws which take away, impair, or change rights acquired under existing laws with respect to transactions already past.<sup>63</sup> In general, while statutes are presumed to operate prospectively only,<sup>64</sup> curative statutes may apply retroactively in order to “clarify” existing law or cure a defect in prior legislation.<sup>65</sup>

Where statutes do not specify their temporal reach, courts generally apply two rules. According to the Supreme Court in *Bradley v. School Bd. of Richmond*,<sup>66</sup> the court should apply “the

59. For detailed discussion of the case law addressing sovereign immunity in these and other countries see “X” v. Kaiserreich Iran, 45 I.L.R. 57 (B VerfGE 1963).

60. Mark B. Feldman, *Foreign Sovereign Immunity in the United States Courts*, 19 VAND. J. TRANSNAT’L L. 19, 24 (1986).

61. 45 AM. JR. 2D *International Law* § 86 (2002).

62. Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 71 HARV. L. REV. 692, 692 (1960).

63. BLACKS LAW DICTIONARY 1317 (6th ed. 1990); see also *Sturges v. Carter*, 114 U.S. 511, 519 (1885).

64. Debra L. Bassett, *In the Wake of Schooner Peggy: Deconstructing Legislative Retroactivity Analysis*, 69 U. CIN. L. REV. 453, 466 n.63 (2001).

65. Jan G. Laitos, *Legislative Retroactivity*, 52 WASH. U. J. URB. & CONTEMP. L. 81, 95 (1997).

66. *Bradley v. School Bd. of Richmond*, 416 U.S. 696 (1974) (a statute authorizing the award of attorney’s fees to successful civil rights plaintiffs applied in a case that was pending on appeal at the time the statute was enacted).

law in effect at the time it renders its decision.”<sup>67</sup> In *Bowen v. Georgetown University Hospital*, the Supreme Court further explains that “congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.”<sup>68</sup>

The text of the FSIA does not express a clear congressional intent that the statute be applied retroactively. This creates tension between the two rules because without express language of congressional intent, retroactive application of the FSIA is not possible according to *Bowen*; yet according to *Bradley* the statute may be applied retroactively. This tension acutely manifests itself in a court’s interpretation of the FSIA. The following analysis of case precedent reveals how various courts have diverged in their application of the FSIA to pre-1952 events.

### B. Statutory Interpretation of the FSIA 1984-1994

In the 1980’s, circuit courts in *Jackson v. Republic of China*, *Slade v. United States of Mexico* and *Carl Marks & Co.*, were unwilling to give retroactive effect to the FSIA without “unequivocal and inflexible import of the terms, and the manifest intention of the legislature,” and therefore denied subject matter jurisdiction.<sup>69</sup> Thus “the FSIA would properly apply to events occurring after the issuance of the 1952 Tate Letter.”<sup>70</sup> Consequently, other circuit courts simply deferred to *Jackson*,

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67. *Id.* at 711.

68. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (holding that the Department of Health and Human Services lacked statutory authority to promulgate a rule requiring private hospitals to refund Medicare payments for services rendered before promulgation of the rule).

69. *Union Pacific R. Co. v. Laramie Stock Yards*, 231 U.S. 190, 199 (1913); *see also Jackson v. Republic of China*, 794 F.2d 1490 (11th Cir. 1986); *Slade v. United States of Mexico*, 617 F. Supp. 351 (D.C.D.C. 1985), *aff’d mem.*, 790 F.2d 163 (D.C. Cir. 1986); *Carl Marks & Co. v. Union of Soviet Socialist Republics*, 841 F.2d 26, 27 (2d Cir. 1988).

70. *Altmann v. Republic of Austria*, 317 F.3d 954, 964 (9th Cir. 2002); *see Carl Marks & Co.*, 841 F.2d at 27 (“We believe, as did the district court, that only after 1952 was it reasonable for a foreign sovereign to anticipate being sued in the United States courts on commercial transactions.”); *Jackson*, 794 F.2d at 1497-98 (“We agree that to give the Act retrospective application to pre-1952 events would interfere with antecedent rights of other sovereigns (and also with antecedent principles of law that the United States followed until 1952).”); *Slade*, 617 F. Supp. at 356 (“[T]he Court finds that the FSIA cannot be applied retroactively to this case where all the operative events occurred before 1952.”).

*Slade, and Marks* and refused to apply the FSIA to pre-1952 events.<sup>71</sup>

In 1994, however, the United States Supreme Court diverged from the course charted by the circuit courts and began to reconsider the issue of retroactivity under a different guise. The Court, in *Landgraf v. USI Film Products*, held that a statute which confers jurisdiction may be applied retroactively where it does not interfere with a party's substantive rights.

Specifically, the Court considered whether the Civil Rights Act of 1991 could apply retroactively.<sup>72</sup> In deciding this issue, the Court delivered a new pronouncement on the retroactivity of jurisdictional statutes: A statute "does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law."<sup>73</sup> Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment."<sup>74</sup>

*Landgraf* set out a two-part test for initial retroactivity analysis. The first step is to determine if Congress has expressly stated whether the statute applies retroactively or prospectively.<sup>75</sup> If Congress has prescribed the statute's reach, judicial default rules are unnecessary.<sup>76</sup> If Congress has not provided express direction, the second step is to determine "whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past

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71. See *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428 (1989); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992); *Sampson v. Fed. Republic of Germany*, 250 F.3d 1145 (7th Cir. 2001).

72. *Laitos*, *supra* note 65, at 90.

73. *Id.* at 90 n.26. In 1989 the plaintiff in *Landgraf* brought suit against her employer for allegedly violating Title VII of the Civil Rights Act of 1964. *Landgraf v. USI Film Products*, 511 U.S. 244, 248 (1994). Her complaint was dismissed because she was not entitled to the equitable relief permitted by Title VII, which at that time did not authorize the recovery of damages. *Id.* at 249. While her appeal was pending, the 1991 Act permitting the recovery of damages was signed into law. *Id.* The question before the Supreme Court in *Landgraf* was whether the compensatory and punitive damage provision of § 102 of the 1991 Act should apply, post-enactment, to conduct that occurred before the effective date of the 1991 Act. *Id.* at 250.

74. *Landgraf*, 511 U.S. at 269-70.

75. *Id.* at 280.

76. *Id.*

conduct, or impose new duties with respect to transactions already completed.”<sup>77</sup>

This initial two-part inquiry modified the assumption of statutory prospectivity. The absence of express retroactive intent does not necessarily prevent the court from applying a statutory provision retroactively.<sup>78</sup> The Court explained, “While we have strictly construed the Ex Post Facto Clause to prohibit application of new statutes creating or increasing punishments after the fact, we have upheld intervening procedural changes even if application of the new rule operated to a defendant’s disadvantage in the particular case.”<sup>79</sup>

The Court noted jurisdictional and procedural rules may apply retroactively without an express congressional command because they regulate ‘secondary’ rather than ‘primary’ conduct.”<sup>80</sup> Accordingly, treating the FSIA as a jurisdictional statute regulating secondary conduct “takes away no substantive right but simply changes the tribunal that is to hear the case.”<sup>81</sup> In such situations, the Court found that “present law normally governs.”<sup>82</sup>

While the Court’s willingness to justify the retroactive application of jurisdictional statutes raised important concerns<sup>83</sup> for latter courts attempting to apply the *Landgraf* test to FSIA cases, it established a foundation for retroactive effect of the FSIA.

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77. *Id.*

78. Bassett, *supra* note 64, at 492.

79. *Landgraf*, 511 U.S. at 275 n.28.

80. *Id.* at 274-75 (“Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive.”); *see also* Laitos, *supra* note 65, at 87 (“Primary retroactivity alters the legal consequences of past private action, while secondary retroactivity affects the legality of past private action in the future, after the applicable date of the law.”).

81. *Landgraf*, 511 U.S. at 274 (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)).

82. *Id.*

83. The absence of a clear boundary between substance and procedure within the FSIA raised concerns that retroactive application of the FSIA may interfere with a party’s substantive rights. In addition, there were concerns that *Landgraf* essentially ignores the presumption against retroactivity. For discussion of these concerns see *Landgraf*, 511 U.S. at 264-65 (Scalia, J. concurring); *Hughes Aircraft Co. v. United States ex rel.* 520 U.S. 939, 951 (1997); Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775 (1936); Jansen, *supra* note 33, at 338.

#### IV. POST LANDGRAF JURISDICTIONAL APPROACH TO RETROACTIVITY

*Landgraf v. USI Film Products* laid an important foundation for retroactivity jurisprudence that followed. While many courts have rejected the *Landgraf* approach, others have relied on the jurisdictional retroactivity passage to justify holding that the FSIA, as a jurisdictional statute, is to be applied retroactively to pre-1952 events.<sup>84</sup> In addition, courts began to apply the second prong of the *Landgraf* test to examine whether retroactive application of the FSIA would interfere with the sovereign's settled expectations of immunity.<sup>85</sup> In doing so, customary international law becomes a crucial factor in the court's retroactivity analysis. This new emphasis on custom and peremptory norms raises doubts against the presumption of non-retroactivity.

##### A. *Princz v. Federal Republic of Germany*

A few months after the Supreme Court's holding in *Landgraf*, the D.C. Circuit Court addressed the issue of retroactive application of the FSIA. In *Princz v. Federal Republic of Germany*, an American citizen who survived the Holocaust sued the Federal Republic of Germany, seeking "to recover money damages for injuries he suffered and slave labor he performed while prisoner in Nazi concentration camps."<sup>86</sup> The district court dismissed the case for lack of subject matter jurisdiction because it found that none of the FSIA statutory exceptions to foreign sovereign immunity applied.<sup>87</sup> In reaching this decision, the district court dodged the issue of whether FSIA applies to pre-1952 events.

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84. See *Creighton Ltd. v. Gov't of the State of Qatar*, 181 F.3d 118 (D.C. Cir. 1999); *Haven v. Republic of Poland*, 68 F. Supp. 2d 943 (N.D. Ill. 1999); *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002).

85. *Id.*

86. *Princz*, 26 F.3d at 1168.

87. *Id.* at 1171. The commercial activity exception, the waiver exception, and the treaty provision were all rejected by the district court. The court also concluded that there was no jurisdiction because Mr. Princz's claims arise in tort and quasi contract. A court cannot revive the pre-FSIA jurisdiction of § 1332 over cases brought by a United States Citizen against a foreign state. *Id.*

With respect to retroactivity, the district court merely reviewed the purpose of the FSIA<sup>88</sup> and analyzed a deleted provision<sup>89</sup> from 28 U.S.C. § 1332 for diversity jurisdiction suits brought by a United States citizen against a foreign government. From this brief analysis, the court found that “a strong argument in favor of applying the FSIA retroactively existed.”<sup>90</sup>

The district court postulated that application of the FSIA to acts committed before 1952 would not be retroactive because it “would not alter Germany’s liability under the applicable substantive law in force at the time, i.e., it would just remove the bar of sovereign immunity to the plaintiff’s vindicating his rights under that law.”<sup>91</sup> Thus, if the FSIA did apply in this case, “the FSIA is to be applied to all cases decided after its enactment, i.e. regardless of when the plaintiff’s cause of action may have accrued.”<sup>92</sup> The court added, “[the] application of the FSIA to the pre-1952 events here in suit may not even count as ‘a genuinely ‘retroactive’ effect.’”<sup>93</sup>

Despite the majority’s refusal to determinatively address the issue, Judge Wald for the dissent argued for a definite decision on the retroactive issue and found that the implied waiver exception<sup>94</sup> should apply to claims against Germany by a Holocaust survivor under the theory that all nations are understood to have consented to suits for violations of *jus cogens* norms.<sup>95</sup> She concluded that,

[I]n the absence of any indication that Congress intended to exclude from the scope of 1605(a)(1) the concept that a foreign state waives its immunity by breaching a peremptory norm of international law, I believe that the only way to interpret the FSIA in accordance with international law is to construe the

88. *Id.* (“In declaring the purpose of the FSIA, the Congress directed that ‘[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.’”).

89. *Id.* According to the House Report on the FSIA, “since jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous.” H.R. REP. NO. 94-1487, at 14 (1976), *reprinted in* U.S.C.C.A.N. 6604, 6611.

90. *Princz*, 26 F.3d at 1170.

91. *Id.*

92. *Id.* at 1170.

93. *Id.* (citing *Landgraf v. USI Film Products*, 511 U.S. 244 (1994)).

94. 28 U.S.C.S. § 1605(a)(1) (Law Co-op. 2002) (“A foreign state shall not be immune from the jurisdiction of courts in the United States . . . in which the foreign state has waived its immunity either explicitly or by implication . . .”).

95. *Princz*, 26 F.3d at 1179 (Wald, J., dissenting).



Act to encompass an implied waiver exception for *jus cogens* violations. Congress did not intend to thwart the opportunity of an American victim of the Holocaust to have his claims heard by the United States judicial system.<sup>96</sup>

Judge Wald's view was rejected by the *Princz* majority. Then-Judge Ginsburg writing for the court, found that the "*jus cogens* theory of implied waiver is incompatible with the intentionality requirement implicit in § 1605(a)(1)."<sup>97</sup> That requirement is reflected in the examples of implied waiver set forth in the legislative history of § 1605(a)(1). The House Report notes that implied waiver may be found when a foreign sovereign either: agrees to arbitrate in another country, agrees that the law of another country governs a particular contract, or fails to raise the defense of sovereign immunity in its responsive pleadings.<sup>98</sup> According to Judge Ginsburg, "since the FSIA became law, courts have been reluctant to stray beyond these examples when considering claims that a nation has implicitly waived its defense of sovereign immunity."<sup>99</sup> The court is concerned that "[s]uch an expansive reading of § 1605(a)(1) would likely place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with any number of foreign nations."<sup>100</sup>

While the majority quickly rejected Judge Wald's implied waiver argument, Judge Wald's dissenting opinion raises significant considerations for immunity and retroactivity analysis. Specifically, it demonstrates that following *Landgraf*, the court, or at least certain members, were beginning to recognize that the existence of certain *jus cogens* norms should be taken into consideration when analyzing a foreign sovereign's assertion that it is immune from suit based on their settled expectation of immunity prior to 1952.

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96. *Id.* at 1184-85.

97. *Id.* 1174.

98. *Princz*, 26 F.3d at 1174; H.R. REP. NO. 94-1487, at 18, reprinted in 1976 U.S.C.C.A.N. 6604, 6616-6617.

99. *Princz*, 26 F.3d at 1174; H.R. REP. NO. 94-1487, at 18, reprinted in 1976 U.S.C.C.A.N. 6604, 6616-6617.

100. *Princz*, 26 F.3d at 1174 n.1.

*B. The aftermath of Princz: Creighton Limited v. Government of the State of Qatar & Haven v. Republic of Poland*

The district court was next called upon to address the issue of retroactivity in *Creighton Ltd. v. Government of the State of Qatar*.<sup>101</sup> At this point, the court was still reluctant to conduct a *jus cogens* analysis. Rather, the court merely applied the *Landgraf* jurisdictional approach and found that the FSIA could be retroactively applied to pre-enactment conduct.

In *Creighton*, the District of Columbia Court of Appeals decided the effect of a 1988 arbitration exception<sup>102</sup> to the FSIA. The question was whether the 1988 enactment was applicable in a situation where the arbitration agreement had antedated that enactment.<sup>103</sup> The appeals court held that the 1988 arbitration exception to FSIA conferred subject matter jurisdiction over this case and was not impermissibly retroactive.<sup>104</sup> The arbitration amendment “[spoke] not to the primary conduct of the parties but rather . . . as specifying a forum for adjudication of that primary conduct.”<sup>105</sup> Application of the exception, therefore, “do[es] not affect the contractual right of the parties to arbitration.”<sup>106</sup> The court, however, dismissed the suit for lack of personal jurisdiction over Qatar.<sup>107</sup>

The *Creighton* decision is nevertheless significant because contrary to the decisions in *Jackson* and *Carl Marks & Co.*, it initiated the view that Congress conferred jurisdiction over claims arising before 1952 in enacting the FSIA.

The District Court for the Northern District of Illinois in *Haven v. Republic of Poland* supported the *Creighton* view.<sup>108</sup> In

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101. 181 F.3d 118.

102. See U.S.C.S. § 1605(a)(6) (Law. Co-op. 2002) (“A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case . . . in which the action is brought . . . or to confirm an award made pursuant to . . . an agreement to arbitrate, if (A) the arbitration takes place or is intended to place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section . . .”).

103. *Creighton*, 181 F.3d at 124.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 128.

108. 68 F. Supp. 2d 943 (N.D. Ill. 1999).

*Haven*, plaintiffs brought suit against Poland for the seizure and expropriation of their real property during World War II.<sup>109</sup> The district court denied the Republic of Poland's motion to dismiss for lack of subject matter jurisdiction, holding that the FSIA could be retroactively applied.<sup>110</sup> In conducting its analysis, the court distinguished *Carl Marks, Jackson*, and *Creighton*. The basis for the decisions in *Carl Marks* and *Jackson* were not jurisdictional in the *Landgraf* sense, "that is, whether the Act applies to conduct that predated its grant of subject matter jurisdiction," but rather "how far back the conduct susceptible to relief should go once such jurisdiction has been conferred."<sup>111</sup> The court then concluded that although the question was close, "the District of Columbia view . . . [was] more persuasive."<sup>112</sup> Accordingly, the court found that the FSIA conferred subject matter jurisdiction over the Republic of Poland.

Despite the growing support for retroactive application of the FSIA, not all courts were ready to completely accept this view.<sup>113</sup> The *Garb* court, for example, specifically rejected the *Landgraf* jurisdiction approach. "Nothing in the Court's decision in *Landgraf*," the court noted, "overruled the Second Circuit's ruling in *Carl Marks* that a foreign state's settled expectations of immunity from the jurisdiction of the United States courts 'rises to the level of an antecedent right.'"<sup>114</sup> Relying on *Hughes Aircraft* and *Verlinden*, the *Garb* court determined that "sovereign immunity is an issue of substantive, not merely jurisdictional law."<sup>115</sup>

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109. *Id.* at 944.

110. *Id.* at 946.

111. *Id.*

112. *Id.*

113. See *Abrams v. Societe Nationale Des Chemins De Fer Francais*, 175 F. Supp. 2d 423, 433 (E.D.N.Y. 2001) (court lacked subject matter jurisdiction over claims of Holocaust survivors against French railroad company for violations of customary international law in connection with deportation of Jews from France to various Nazi death camps during World War II). *Id.* at 425.

114. *Garb v. Republic of Poland*, 207 F. Supp. 2d 16, 29 (E.D.N.Y. 2002) (quoting *Carl Marks & Co. v. Union of Soviet Socialist Republics*, 841 F.2d 26, 27 (E.D.N.Y. 2d Cir. 1988)).

115. *Garb*, 207 F. Supp. 2d at 30; see *Hughes Aircraft Co. v. United States*, 520 U.S. 939, 950-951 (1997); *Verlinden B.C. v. Cent. Bank of Nigeria*, 461 U.S. 480, 496-97 (1983) ("The [FSIA] does not merely concern access to the federal courts. Rather, it governs the type of actions for which foreign sovereigns may be held liable in a court in the United States, federal or state. The Act codifies the standards governing foreign sovereign

The *Garb* court, however, did not apply the second step of the *Landgraf* analysis to determine whether application of the FSIA would have “a genuinely retroactive effect” by impairing a party’s settled expectations of immunity.<sup>116</sup> Rather, the court relied on the 1952 Tate Letter as its imaginary boundary for conferring absolute immunity. In doing so, the *Garb* court failed to take into consideration the existence of established norms of customary international law and easily dismissed the argument raised by the dissent in *Princz* that the violation of *jus cogens* by the Third Reich constitutes an implied waiver of sovereign immunity under the FSIA.<sup>117</sup> Following *Garb*, however, courts began to take the existence of *jus cogens* norms more seriously.

C. *Altmann v. Republic of Austria: Customary International Law Approach to Immunity.*

The arguments for retroactive application of the FSIA to pre-1952 events raised in *Princz* influenced the Court of Appeals for the Ninth Circuit to grant jurisdiction in *Altmann v. Republic of Austria*.<sup>118</sup> In *Altmann*, a U.S. citizen sued the Republic of Austria to recover six Gustav Klimt paintings that were allegedly stolen by the Nazis in the 1940’s with Austria’s assistance.<sup>119</sup> In determining whether the district court properly held that the FSIA may be applied to the alleged wrongful appropriation by the Republic, the appeals court examined the issue of retroactivity from a historical perspective and applied the *Landgraf* test to conduct its analysis. The court was also persuaded by the reasoning set forth by Judge Wald in her dissenting opinion in *Princz*.<sup>120</sup>

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immunity as an aspect of substantive federal law . . . ; and applying those standards will generally require interpretation of numerous points of federal law.”).

116. *Landgraf v. USI Film Products*, 511 U.S. 244, 277 (1994).

117. See *Garb*, 207 F. Supp. 2d at 38-39; *Sampson v. Fed. Republic of Germany*, 250 F.3d 1145, 1156 (7th Cir. 2001) (“Congress did not create an [implied waiver] exception to foreign sovereign immunity under the FSIA for violations of *jus cogens*.”); *Siderman de Blake v. Argentina*, 965 F.2d 699, 719 (9th Cir. 1992) (“The fact that there has been a violation of *jus cogens* does not confer jurisdiction under the FSIA.”); *Smith v. Socialist People’s Libyan Arab Jamahiriya*, 101 F.3d 239, 245 (2d Cir. 1996) (“Our rejection of the claim that a *jus cogens* violation constitutes an implied waiver within the meaning of the FSIA rests neither on reading a subjective “intentionality” requirement into section 1605(a)(1), nor on the precedent of *Amerada Hess*.”).

118. *Altmann v. Republic of Austria*, 317 F.3d 954, 962-63 (9th Cir. 2002).

119. *Id.* at 974.

120. *Id.* at 962-63; see *Princz*, 26 F.3d at 1178-79 (Wald, J., dissenting).

Accordingly, rather than analyzing congressional intent, the court turned to the second prong of the *Landgraf* test and examined "whether applying the FSIA would 'impair rights a party possessed when he acted.'"<sup>121</sup> To determine Austria's legitimate expectations during this period, the court looked at the practice of American courts at the time.<sup>122</sup> During the period when the paintings were allegedly seized, the courts employed the practice of "judicial deference 'to the case-by-case foreign policy determinations of the executive branch.'"<sup>123</sup> As explained in Part II above, "[u]ntil 1952, the State Department ordinarily requested immunity in all actions against *friendly* foreign sovereigns."<sup>124</sup> During the period following World War II, however, the court reasoned "Austrians could not have had any expectation, much less a settled expectation, that the State Department would have recommended immunity as a matter of 'grace and comity' for the wrongful appropriation of Jewish property."<sup>125</sup>

In reaching this conclusion the court examined Austria's obligations under the Hague Convention and their actions taken after 1946. The court explained, "Austria was mindful that [discriminatory expropriation of Jewish property] explicitly violated both Austria's and Germany's obligations under the Hague Convention . . . and that Austria's Second Republic officially repudiated all Nazi transactions in 1946 . . . ."<sup>126</sup>

To support the argument that the State Department would not have recommended immunity to Austria prior to 1952, the court points to an April 13, 1949 letter from State Department Legal Advisor, Jack B. Tate announcing the State Department's adoption of a policy to remove obstacles to recovery specifically for victims of Nazi expropriations.<sup>127</sup> The court summarized a press release, which published the letter:

121. *Altmann*, 317 F.3d at 964 (quoting *Landgraf*, 511 U.S. at 280).

122. *Id.*

123. *Id.* (citing *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983)).

124. *Id.* (citing *Verlinden*, 461 U.S. at 486) (emphasis added).

125. *Id.* at 965.

126. *Id.*; see Hague Convention (IV) on the Laws and Customs of War on Land, Oct. 18, 1907, 1907 U.S.T. 29 (entered into force Jan. 26, 1910).

127. *Altmann*, 317 F.3d at 965-66 (referring to Press Release No. 296, United States State Department, Jurisdiction of United States Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers (Apr. 27, 1945), reprinted in *Bernstein v. N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375, 376 (2d Cir.1954) [hereinafter *Press Release No. 296*]).

The letter repeats this Government's opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls; states that *it is this Government's policy to undo the forced transfers and restitute identifiable property to the victims of the Nazi persecution wrongfully deprived of such property*; and sets forth that the policy of the Executive, with respect to claims asserted in the United States for restitution of such property, is to *relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.*<sup>128</sup>

Judge Wardlaw, quoting Judge Wald's dissent in *Princz* also notes that the "1945-46 Nuremberg trials signaled that the international community, and particularly the United States . . . would not have supported a broad enough immunity to shroud the atrocities committed during the Holocaust."<sup>129</sup> Thus Austria could have had no reasonable expectation of immunity in a foreign court.

The appeals court offers three additional reasons for defeating Austria's argument that the FSIA infringes on their rights held at the time the acts at issue occurred. First, Austria had adopted the restrictive theory of sovereign immunity by the 1920s, over thirty years before the issuance of the 1952 Tate Letter.<sup>130</sup> For support, the court points to the Tate letter itself, which made reference to the fact that the courts of Austria already supported the restrictive theory.<sup>131</sup>

Secondly, the court reasoned the FSIA is applicable in this case, "[b]ecause a United States court would apply the international law of takings, which presumably would be applied in any foreign court."<sup>132</sup> Therefore, "the application of the FSIA to the facts of this case 'merely address[es] which court shall have jurisdiction' and thus 'can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties.'"<sup>133</sup> Such an application of the FSIA would

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128. *Id.* at 965-66 (quoting Press Release No. 296, *supra* note 127 (emphasis added)).

129. *Id.* at 966 (quoting *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1179 (D.C. Cir. 1994)).

130. *Id.* at 954, 966.

131. *Id.* at 966 (quoting The Tate Letter, *supra* note 45).

132. *Id.*

133. *Id.* (quoting *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951 (1997) (emphasis in original)).

not be impermissibly retroactive because it "affect[s] only *where* a suit may be brought, not *whether* it may be brought at all . . . ." <sup>134</sup>

Finally, the court distinguished from *Altmann* earlier cases holding the FSIA inapplicable to pre-1952 events. According to the court, the earlier cases "involve economic transactions entered into long before . . . and prior to the defendant country's acceptance of the restrictive principle of sovereign immunity."<sup>135</sup> The disputes in *Carl Marks*, *Jackson*, and *Slade*, unlike the international takings claim asserted in *Altmann*, "essentially involved contracts, an area in which courts have traditionally deferred to the 'settled expectations' of the parties at the time of contracting in recognition of the parties' allocation of risk."<sup>136</sup> The court explains, "such deference is especially due in financial transactions involving foreign debt instruments, where unexpected judicial intrusion essentially would re-write the parties' original bargain."<sup>137</sup> Such a presumption of deference does not apply in *Altmann* because it is inapplicable in an international takings claim.<sup>138</sup> For these reasons, the court held that the FSIA may be applied retroactively to the pre-1952 actions of the Republic of Austria.<sup>139</sup>

#### V. EXPECTATIONS OF IMMUNITY & CIL

The arguments put forth by the dissent in *Princz* and eventually adopted by the court in *Altmann* signal an important change in the court's retroactivity jurisprudence. Examining *jus cogens* norms of international law in conjunction with the practices of the executive and judiciary during the period preceding the formal adoption of the restrictive theory of sovereign immunity in 1952 effectively challenges the presumption against retroactive application of the FSIA. The proceeding analysis examines the various arguments raised by the post-*Landgraf* cases.

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134. *Id.*

135. *Id.* at 967.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

### A. *The Expectation of Immunity Dismantled*

Many courts, including the *Garb* court, are reluctant to disrupt a foreign sovereign's settled expectations of immunity. As a result they subject the FSIA to the traditional presumption against retroactivity. This fear of potential unfairness, however, is inconsistent with the notion that, "[t]he immunity of a foreign state from the jurisdiction of U.S. courts was never considered to be a right per se, but rather, a matter of comity and grace."<sup>140</sup>

Although the Tate Letter is formally recognized as the moment when the restrictive theory of sovereign immunity was formally adopted, there is evidence that this position began to change years earlier.<sup>141</sup> During the period before World War II, the practice of the executive branch was to make immunity determinations on a case-by-case foreign policy basis.<sup>142</sup> Therefore, "[a]ny 'right' to sovereign immunity that a foreign state possessed under pre-FSIA law was, in reality, nothing more than an expectation."<sup>143</sup> Thus, although states may have hoped to receive complete sovereign immunity, there was expectation that they may be sued in some situations.

### B. *The Elusive Jus Cogens Norm*

The question then becomes whether the executive branch would have recommended immunity for perpetrators of *jus cogens* norms. Certain historical events shed light on the early recognition of such a nonderogable principle of customary international law. The following analysis of the Hague Convention and the Nuremberg trials provide evidence that many grappled with the issue of immunity prior to the United States' formal adoption of restrictive theory in 1952.

To ascertain whether accepted norms of customary international law, such as the denunciation of genocide and slavery, are considered *jus cogens* norms, "[j]udges resort to the customs and usages of civilized nations, and, as evidence of these,

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140. Hoops, *supra* note 39, at 533.

141. *E.g.*, Edward D. Re, *Human Rights, Domestic Courts, and Effective Remedies*, 67 ST. JOHN'S L. REV. 581, 583-84 (1993). Judge Re, Chief Judge Emeritus of the Court of International Trade, observed that it was announced in 1948 that the State Department was reconsidering its policy on absolute immunity. *Id.*

142. *See* *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).

143. Hoops, *supra* note 39, at 533.



to the works of jurists and commentators.”<sup>144</sup> The existence, however, of an international consensus endorsing the existence and force of *jus cogens* norms for human rights violations prior to the Nuremberg trials is difficult to ascertain. As Judge Ginsburg explained in *Princz*, “[b]efore the Nuremberg trials, such outrages had not been expressly declared violations of the law of nations.”<sup>145</sup>

As early as 1907, certain acts were explicitly prohibited and recognized by international treaty. The Hague Convention (IV) on the Laws and Customs of War on Land explicitly prohibited discriminatory expropriation and other crimes which were later recognized in the Nuremberg and United Nations Charters as “crimes against humanity.”<sup>146</sup>

While it remained unclear whether certain acts had achieved *jus cogens* status as a result of this treaty, the Nuremberg Tribunal confronted this issue and nonetheless punished Nazi officials for committing crimes against humanity. As Judge Wald explains, they reasoned that “[t]he magnitude of the acts put the perpetrators on notice that they were violating ‘principles common to the major legal systems of the world.’”<sup>147</sup> Therefore, “the possibility of punishment should have been so apparent to the criminals that no one, except a strict formalist, could seriously raise the issue of ex post facto punishment.”<sup>148</sup>

Following the Nuremberg trials, it was made explicit what was theretofore, “implicit in International Law, namely, that . . . to persecute, oppress, or do violence to individuals or minorities on political, racial, or religious grounds . . . , or to exterminate,

144. *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1180 (D.C. Cir. 1994) (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

145. *Id.* at 1173 (referring to David F. Klein, *A Theory for the Application of the Customary Internal Law of Human Rights by Domestic Courts*, 13 YALE J. INT'L L. 332, 340 (1988)).

146. Hague Convention (IV) on the Law and Customs of War on Land, Oct. 18, 1907, 1907 U.S.T. 29 (entered into force Jan. 26, 1910); London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, Aug. 8, 1945, pt. 11, art. 6, 59 Stat. 1544, 1547. (The definition of crimes against humanity included “murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before, or during the war.”)

147. *Princz*, 26 F.3d at 1184 (quoting Report to the President from Robert H. Jackson, Chief Counsel for the United States in the Prosecution of Axis War Criminals, *reprinted in* 39 AM. J. INT'L L. 178, 186 (Supp. 1945)).

148. Steven Fogelson, Note, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S. CAL. L. REV. 833, 844 (1990)(citing BRADLEY F. SMITH, *THE AMERICAN ROAD TO NUREMBERG* 211 (1982)).

enslave, or deport civilian populations, is an international crime.”<sup>149</sup>

Courts have also acknowledged that certain *jus cogens* principles existed prior to the Nuremberg trials. For example, the Ninth Circuit explained in *Siderman de Blake v. Republic of Argentina*, “that universal and fundamental rights of human beings identified by Nuremberg – rights against genocide, enslavement, and other inhumane acts . . . – are the direct ancestors of the universal and fundamental norms recognized as *jus cogens*.”<sup>150</sup> Therefore, expectations of immunity for *jus cogens* violations prior to 1952 may no longer be presumed.

### C. International Exercise of Jurisdiction

The principle of universal jurisdiction is also employed by foreign sovereigns to exercise jurisdiction where no other recognized basis for jurisdiction exists.<sup>151</sup> Under the principle of universal jurisdiction,

A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the basis of jurisdiction indicated in section 402 is present.<sup>152</sup>

This principle has been applied by various foreign states to prosecute foreign individuals and governments for human rights atrocities. Israel, for example, prosecuted Adolf Eichman for his role in organizing the “murder, extermination, enslavement, starvation, and deportation of the civilian Jewish population”

149. Robert H. Jackson, *Final Report to the President on the Nuremberg Trials*, Oct. 7, 1946, U.S. DEP’T ST. BULL. vol. XV, nos. 366-391, Oct. 27, 1946, at 771, 774; see also Affirmation of the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal, G.A. Res. 95(I), U.N. GAOR, 1st Sess., at 188, U.N. Doc. A/236 (1947). (After the Nuremberg War crimes trials, the General Assembly of the United Nations unanimously approved a resolution affirming “the principles of international law recognized by the Charter of the Nurnberg [sic] Tribunal and the judgment of the Tribunal.”)

150. *Siderman de Blake*, 965 F.2d at 715.

151. JEFFRY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, *INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH* 353 (Aspen Law & Business 2002).

152. See RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 404 (1987).

during World War II.<sup>153</sup> The court reasoned, “[I]t is the universal character of the crimes in question which vests in every state the power to try and punish those who participated in their commission.”<sup>154</sup>

In *Prefecture of Voiotia v. Federal Republic of Germany*,<sup>155</sup> the Hellenic Supreme Court of Greece denied immunity to Germany for atrocities committed by the German Occupation forces of the village of Distomo on June 10, 1944. The court concluded that the acts committed by Germany were “in breach of the rules of peremptory international law (Article 46 of the [Hague IV Convention] Regulations), and they were not acts *jure imperii*.”<sup>156</sup> As a result, the Greek court found that Germany waived the privilege of immunity which gave the court jurisdiction to adjudicate the case.<sup>157</sup>

These cases reveal that, “it has become increasingly common for courts to hold that the mere sovereign or public character of an act is not sufficient to guarantee states immunity from the jurisdiction of other states’ courts.”<sup>158</sup> This shift is illustrated in the landmark ruling against President Pinochet of Chile where the House of Lords gave consideration, to the nature of the violated norm—in particular, if it constituted a peremptory norm of international law, before holding that Pinochet was not entitled to head of state immunity.<sup>159</sup>

## VI. CONCLUSION

The only established sanctions for the breach of a *jus cogens* rule at this time are Articles 53 and 64 of the 1969 Vienna Convention.<sup>160</sup> Without more, the *Garb* court has a legitimate fear

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153. *Attorney-General of the State of Israel v. Adolf Eichman*, 36 I.L.R. 277 (S.Ct. 1962).

154. *Id.* at 298.

155. *Prefecture of Voitia v. Fed. Republic of Germany*. Case No. 11/2000. Areios Pagos (Hellenic Supreme Court), May 4, 2000 *cited in* Bernard Oxman & Maria Gavouneli, *Sovereign Immunity—Tort Exception—Jus Cogens Violations—World War II Reparations—International Humanitarian Law*, 95 AM. J. INT’L L. 198 (2001).

156. Oxman & Gavouneli, *supra* note 155, at 200.

157. *Id.*

158. *Id.* at 201.

159. *Regina v. Bow Street Stipendiary Magistrate, ex part Pinochet Ugarte* (no. 3), 2 ALL E.R. 97 (1999) (Majority of House of Lords held that international crimes such as torture cannot constitute official acts of a head of state).

160. Oxman & Gavouneli, *supra* note 155, at 203 (citing Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 UNTS 331) “A treaty is

that retroactive application to pre-1952 events would open the United States to a floodgate of litigation against other Eastern European countries such as Hungary and Romania.<sup>161</sup> Complications may also interrupt treaties made between Poland and the United States as well as remedies made available in Poland. These concerns also influenced the majority in *Princz*.<sup>162</sup>

While the effect of retroactive application of the FSIA to pre-1952 events will no doubt have a major impact on both United States and international courts, the issue of settled expectations deserves a closer examination. After examination of both the statutory reach of the FSIA and customary international law, this threshold question should be resolved. The court must then still proceed with its analysis of whether any FSIA exceptions apply. It is anything but an uphill battle as Hugo Princz, Theo Garb, and Maria Altmann have shown us.

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rendered void if it conflicts with a peremptory norm either at the time of its conclusion or as a result of the emergence of a new norm of that type. Another is arguably proposed in the ILC Draft Articles, provided that the international “crime” articulated in Article 19 is equated with a *jus cogens* rule.” *Id.*

161. See Tom Perrotta, *Holocaust Suit Against Poland Thrown Out*, N.Y. L.J., June 25, 2002, at 17.

162. See *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1174 (D.C. Cir. 1994). The court worried, “Such an expansive reading of 1605(a)(1) would likely place an enormous strain not only upon our courts but, . . . [also] upon our countries diplomatic relations with any number of foreign nations. In many if not most cases the outlaw regime would no longer even be in power and our Government could have normal relations with the government of the day—unless disrupted by our courts, that is.” *Id.*

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