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The Emerging Restrictions on Sovereign Immunity: Peremptory Norms of International Law, the U.N. Charter, and the Application of Modern Communications Theory

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I. Introduction

This article deals with the evolution and status of the international law doctrine of sovereign immunity. The doctrine *Par in parem non habet imperium* ("An equal has no power over an equal")[1] provides that sovereigns are equal as juridical bodies and have no authority to use their own courts to sue other sovereigns without the consent of the latter.[2] This doctrine is an old concept in international law. It initially appeared to endorse an absolutist form of sovereignty, which implied an over-simplified view of the role of sovereigns in a global setting. From an early period, scholars and judges felt that over-extending the doctrine would result in the denial of legitimate legal rights and duties. Still, the doctrine carried a strong imprimatur of impermeability. This is in part due to the historical context of the general

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[1] BLACK'S LAW DICTIONARY 1673 (7th ed. 1999).

[2] *See* Lee Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L. L. 741, 748 (2003); *see also* Sévrine Knuchel, *State Immunity and the Promise of Jus Cogens*, 9 NW. U. J. INT'L HUM. RTS. 149, 150 (2011).

development of the sovereignty principle in international law and, particularly, the emergence of legal positivism, which appeared to provide a strong doctrinal foundation for an absolutist view on the concept of sovereignty. This jurisprudential assumption influenced the emergence of sovereign immunity as well.

The customary international law principle (or rule)[3] of sovereign immunity—also called jurisdictional immunity—has its roots in treaties, domestic statutes, state practice, and the writings of juris consults.[4] The principle is based on the theory that the sovereign has an exclusive monopoly on law-making. For this reason, the legal theorist John Austin denied that international law purporting to bind the sovereign was law at all.[5] In short, the classical understanding was that a sovereign ceased to be sovereign if it was subject to the jurisdiction of the courts of a foreign government. Early in American legal history, Chief Justice Marshall famously propounded that sovereign immunity was based on the "perfect equality and absolute independence of sovereigns."[6]

The problem addressed in this article is that the classical, nineteenth century view of sovereignty, and the theory that supports it, does not provide a concept of sovereign immunity from the jurisdiction of another state's courts that adequately incorporates competing and complementary principles and doctrines of international law. The central question is whether the

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[3] "Rule" may be a loaded term to describe jurisdictional immunity. Finke describes it instead as a principle of international law. Jasper Finke, *Sovereign Immunity: Rule, Comity, or Something Else?*, 21 EUR. J. INT'L L. 853, 857, 872-878 (2010) ("The distinction between rule and principle is more than a mere formality. It determines how we approach the matter and which questions we ask, because a principle, in contrast to a specific rule, allows states to determine the scope of sovereign immunity within their domestic legal orders confined by the limits set by international law."). Nevertheless, jurisdictional immunity is generally referred to as a rule in court cases and most literature. Rule, principle, and doctrine are used interchangeably in this paper.

[4] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: IMMUNITY OF FOREIGN STATE FROM JURISDICTION TO ADJUDICATE: THE BASIC RULE § 451 (1987).

[5] *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 144 (Cambridge Univ. Press 1995) (1832).

[6] Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 137 (1812).

evolution of the international law doctrine of sovereignty itself has generated a concept of rational limitations on the use of sovereign immunity (which is but a specific application of sovereignty). Further, do these limitations suggest that the traditional customary international law of sovereign immunity has evolved so as to limit the absoluteness of its reach? Additionally, does this limitation constitute a rule of customary international law standing on its own? This article maintains that it does. To justify the existence of such a customary international law modification of jurisdictional immunity, this article carefully reviews the evolution of theory and practice from the nineteenth century into the twenty-first century, considering changing expectations as to what is considered customary international law. This focus raises critical issues that relate to the foundational values of modern international law. Moreover, this article explores the evolution of the general sovereignty idea in international law as well as the development of jurisprudential theory supporting it. This will show that the sovereignty of relative antiquity is a vastly different concept from the contemporary theory under U.N. Charter expectations. In short, an un-amended nineteenth century view of sovereign immunity would serve to undermine some of the most important expectations in international law in the twenty-first century.

This article additionally discusses the changing nature of jurisdictional immunity for sovereign states[7] in light of the rising importance of *jus cogens* principles—fundamental rules of international law "from which no derogation is permitted."[8] In the

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[7] The status of statehood is important for the question of jurisdictional immunity, because without statehood, a political entity (such as Taiwan or Palestine) may not be afforded all of the privileges and powers of a state, including immunity. *See* MALCOLM SHAW, INTERNATIONAL LAW 178 (5th ed. 2003) (describing the Montevideo Convention on Rights and Duties of States, which provides the generally accepted elements of statehood: a permanent population, defined territory, a government, and the capacity to enter into relations with other states).

[8] BLACK'S LAW DICTIONARY 937 (9th ed. 2009); *see* Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 (stating "a peremptory 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 . . . .") [hereinafter V.C.L.T.]; *see also* MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 62-63 (4th ed. 2003) ("*Jus cogens* is a norm thought to be so fundamental that it even invalidates rules

last decade especially, a number of events have had a profound impact on the changing nature of sovereign immunity and how it is understood in the context of complementary international law principles such as *jus cogens*. This article shows that both the emerging application of *jus cogens* principles in the area of human rights and humanitarian law generally clearly place limits on state sovereignty and sovereign immunity.[9] Juridically, the most important development was the assertion of jurisdiction over Germany by the Italian *Corte di Cassazione* (Court of Cassation)[10] in civil cases, brought by individual plaintiffs, for human rights violations that occurred during the Second World War.[11] In response, Germany initiated proceedings in the International Court of Justice (ICJ).[12] In February 2012, the ICJ issued its judgment in the case of *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, ruling that: (1) Italy violated international law in asserting jurisdiction over Germany for *jus cogens* abuses and (2) at the time there was no such exception recognized in customary international law.[13] However, the decision was not unanimous; it was contested and strong dissents were written.[14]

The legal analysis the ICJ employed in *Jurisdictional*

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drawn from treaty or custom. Usually, a *jus cogens* norm presupposes an international public order sufficiently potent to control states that might otherwise establish contrary rules on a consensual basis.").

9 *See infra* Part III.B.

10 A court of cassation (literally, "Court of Cancellation") is the highest appellate court in a state. In the United States the court of cassation is called the Supreme Court.

11 *See, e.g.*, Ferrini v. Republica Federale di Germania, Cass. XX un. 11 marzo 2004 n. 5044, reprinted in 128 I.L.R. 658. *Ferrini* Judgment No. 5044/2044, 11 March 2004, Rivista di diritto internazionale 87 (2004), 539; English translation: 128 I.L.R. 658.

12 *See* Press Release, Int'l Court of Justice, Germany Institutes Proceedings Against Italy for Failing to Respect Its Jurisdictional Immunity as a Sovereign State (Dec. 23, 2008), *available at* http://www.icj-cij.org/docket/files/143/14925.pdf; Application Instituting Proceedings, Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), 2008 I.C.J. 143 (Dec. 23, 2008).

13 Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), Judgment, 2012 I.C.J. 143 (Feb. 3).

14 *See id.* (seperate opinions of Judge Cançado Trindade; Judge Yusuf; Judge *Ad Hoc* Gaja), *available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=60&case=143&code=ai&p3=4.

Immunities of the State was not comprehensive and was somewhat incomplete. In determining the state of customary international law, the ICJ erred in focusing myopically on the jurisprudence of national courts. This article maintains that the ICJ should have analyzed jurisdictional immunity using a comprehensive approach, incorporating modern methods of legal analysis, including the use of modern communications theory as applied to international law.[15] International law is not created in the same way as domestic law. There is no international legislature, and few cases are decided by international courts.[16] Customary international law should not be understood within the framework of state practice and *opinio juris* alone. It must be understood within a framework that takes into account what members of the global community (states, courts, interest groups, scholars, legislatures, individuals, etc.) are communicating about their collective understanding on the limits, nature, and applicability of customary international law.

Many of the most important changes to sovereignty generally, and sovereign immunity specifically, appear at first to be anecdotal rather than developed with sophisticated analytical methods of exposition and analysis. If international customary law is approached in the broader context of the global social, power, and constitutive process, the tools of Modern Communications Theory may be utilized to place the doctrine of sovereign immunity in the context of a comprehensive framework. This article intends to demonstrate that the doctrine of sovereign immunity properly contextualized will provide a more realistic exposition of its status in international law, placed at the apex of the evolving trend lines of international legal development. Such an interpretation, this article suggests, will provide a more realistic picture of the scope of sovereign immunity today. The approach

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[15] *See generally* W. Michael Reisman, International Law-making: A Process of Communication, Luncheon Address at Harold D. Lasswell Memorial Lecture 102 (Apr. 24, 1981) [hereinafter Reisman, International Law-making], *available at* http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1719&context=fss_papers ("Formal law bodies . . . emit communications that have the form of law but . . . are not law[]."); *see also* Myres McDougal & Michael Reisman, *The Prescribing Function in World Constitutive Process: How International Law is Made*, 6 YALE J. WORLD PUB. ORD. 249 (1980) [hereinafter McDougal & Reisman, *The Prescribing Function*].

[16] A list of the few ICJ's cases are available at http://www.icj-cij.org/docket/index.php?p1=3&p2=2.

considers domestic courts and diverse international fora, the works of juris consults, and ultimately, the U.N. Charter itself. A contextualized doctrine of sovereign immunity frees the analysis of the scope and reach of sovereign immunity from being sealed in its own self-created doctrinal boundaries and places it in the broader environment of international lawmaking, including international constitutional law, human rights law, as well as developments in related fields of international law. The analysis of jurisdictional immunity within the context of the U.N. Charter is paramount.

It is appropriate to underscore the salience of trends in practice from Nuremburg and the growth of international courts, which have established the principle that an individual cannot claim immunity from war crimes and other grave violations of human rights.[17] A state is a mere vessel by which individuals act in aggregate. If an individual cannot claim the protections of sovereignty when they abuse sovereign privileges and powers by engaging in international crimes, then a state should also lose the protections of sovereign immunity when the doctrine is used as the means to engage in those same international wrongs or to avoid responsibility. Ultimately, the critical question is whether the changes in sovereignty and developments in *jus cogens* provide a foundation for the emergence of a rule of customary international law that requires a restricted version of sovereign immunity.

This article will show that in *Jurisdictional Immunities of the State,* the ICJ ignored both the changing nature of sovereignty in general and the pivotal role of *jus cogens* norms in international law, and gave scant significance to the writings of learned scholars. In international law, the writings of scholars can have legal significance, even within the ICJ's statutory framework, because the statute of the ICJ explains that: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply . . . the teachings of the most highly qualified publicists . . . ."[18] As the U.S. Supreme

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17 *See* Arrest Warrant of 11 April 2002 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 121 (Feb. 14); *see also* R. v. Bow St. Magistrate, ex parte Pinochet, [1999] 2 W.L.R. 827 (H.L.) (U.K.).

18 Statute of the International Court of Justice, June 26, 1945, art. 38(d), 33 U.N.T.S. 993.

Court held in 1900:

> [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.[19]

Moreover, the ICJ formed its conclusions in *Jurisdictional Immunities of the State* narrowly, and clearly left open the possibility for further development on the scope of the rule of jurisdictional immunity in the future.[20] International law is not a reified cake of dogma. It is constantly evolving and adapting to secure its value orientation. This means that, although the ICJ has now ruled on the current scope of immunity, the issue is far from settled.

Among the most important developments directly relevant to jurisdictional immunity is the changing nature of sovereignty in general, discussed in Part II of this article. Part III considers several parallel doctrines of immunity and the specific application of sovereignty in the context of these doctrines. Part IV moves into a discussion of the historical development of the rule of immunity and how it was applied to changing forms of state interaction. In addition to scholarship, sovereign immunity is a product of domestic statutes, treaties, and case law. The next three parts address those topics in turn. Part V examines domestic statutes, paying particular attention to the U.S. statutory regime for immunities of foreign states. Part VI discusses the various

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19 The Pacquete Habana, 175 U.S. 677, 700 (1900) (citing Hilton v. Guyot, 159 U.S. 113 (1895)).

20 Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), 2012 I.C.J. 143, ¶ 65 (Feb. 3) ("The Court considers that it is not called upon in the present proceedings to resolve the question whether there is in customary international law a 'tort exception' to State immunity applicable to *acta jure imperii* in general. The issue before the Court is confined to acts committed on the territory of the forum State by the armed forces of a foreign State, and other organs of State working in co-operation with those armed forces, in the course of conducting an armed conflict"); *id.* at ¶ 91 (emphasizing that the court was propounding upon the law as it "presently stands").

international treaties addressing immunity, and Part VII examines state and international cases that have dealt with the interplay between *jus cogens* violations and jurisdictional immunity. Part VIII more deeply examines the recent ICJ decision in the case concerning *Jurisdictional Immunities of the State.* Part IX analyzes the legal and policy justifications for forum states to waive immunity for *jus cogens* violations.

This article ultimately concludes that the conceptual foundation of the U.N. Charter contains a premise that requires state acceptance of the duty to cooperate in fulfilling obligations under the U.N. Charter, which may include denying immunity to foreign states. The imposition of rational limitations on sovereignty and sovereign immunity are supported by legal scholarship, the understanding of the historical context of immunity, and the necessity to reconcile immunity with *jus cogens* norms. These conclusions are summarized in Part X.

An important theme that pervades this article is the clarification of how customary international law, and international law generally, is made and applied. This article seeks to provide additional guidance about the development of customary international law using the tools of Modern Communications Theory and a clearer explication of the prescribing process in international law.

II. The Foundations of Communications Theory and the Prescription and Application of International Law

It would be useful at this point to briefly describe the Modern Communications Theory, so that sovereign immunity may be placed in a proper, coherent context, rather than being analyzed as a self-contained, isolated doctrine. The Modern Communications Theory was initially developed by scholars of the New Haven School of Jurisprudence.[21] In the context of international law, the theory provides that communications (collective understandings of what the expectations of international law are) must be viewed in terms of the context in which they are made. They must also be

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[21] *See* Myres McDougal, Harold Lasswell & Michael Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 403, 415 (1967); McDougal & Reisman, *The Prescribing Function*, *supra* note 15, at 250.

viewed in terms of the authoritative and controlling decision makers prescribing and applying these juridical communication signals.[22] It is necessary for the interpreter to consider the aggregate of communications of the relevant communicators and the target audience of communicates.[23] What this means practically, in the context of international law, is that courts adjudicating problems of sovereign immunity cannot take into account only the consent and practice of states themselves. The courts must also account for a larger flow of communication signals emanating from a multitude of stakeholder participants in the global community and how, in the aggregate, this realistically contributes to the making and application of international law. Harold Lasswell summarized his understanding of the Communications Theory into six essential questions: "who, says what, [about what], in which channel, to whom, with what effect?"[24]

The "who" focuses on the character of the participants who initiate the communications; "what" examines the content of the communications; "about what" further refines the context of the content; "in which channel" examines the mediums and methods used to transmit the communications; "to whom" focuses on the targeted recipient of the communication; and "with what effect", finally, explores the impacts of the collective communications.[25]

In the context of international law, the "who" is of importance. The communicators of international law are not states alone, but other stakeholders as well. This article will show that the "who" is much broader in scope than that which the ICJ has chosen to consider. The "what" reflects expectations evolving on the limits to sovereign immunity (the "about what"). These groups have

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22 For a more in depth discussion of the Modern Communications Theory approach to international law, see Winston Nagan & Craig Hammer, *Communications Theory and World Public Order: The Anthropomorphic, Jurisprudential Foundations of International Human Rights*, 47 VA. J. INT'L L. 725, 757 (2007) [hereinafter Nagan & Hammer, *Communications Theory*].

23 *Id.*

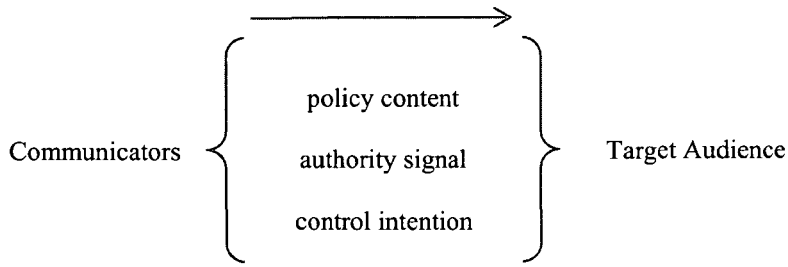
24 Harold Lasswell, *The Structure and Function of Communication in Society, in* THE COMMUNICATION OF IDEAS: A SERIES OF ADDRESSES 37, 37 (Lyman Bryson ed., 1964).

25 Nagan & Hammer, *Communications Theory*, *supra* note 22, at 762.

used the "channels" of jurisprudence, advocacy, expectations, and actions. These communications have been directed at the international community, states, courts, and the ICJ (the "to Whom"). Although the ICJ has presently endorsed an expansive, deferential concept of jurisdictional immunity,[26] the ultimate "effect" of these communications is, as of yet, uncertain.

Myres McDougal and Michael Reisman clarified the law-making or prescriptive function of international law, based on the conceptual foundations of the general communications model summarized above. Here, prescription is a complex interplay of emerging expectations from diverse sources. These complex expectations emerge in the form of prescription or policy and are communicated to the larger target audience. The prescriptions are communicated with the imprimatur of an authority signal as well as a signal indicating an element of efficacy or controlling intention. The following summarizes the model as applied to international law[27]:

Figure 1: McDougal Reisman Framework of International Lawmaking



When these communications are generated and distributed to the target audience—jurists, transnational courts, state courts applying international law, and the ICJ—the active decision makers must then analyze and develop three sequential phases of the prescriptive process to effectively make and apply international law:

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26 *See infra* Part VII.

27 McDougal & Reisman, *The Prescribing Function*, *supra* note 15, at 250.

(1) The first phase is to ascertain expectations about content, authority and control. As McDougal and Reisman explained:

> This task requires a genuine effort to achieve the closest possible approximation to the effective aggregate general community expectation about the content, authority, and control of alleged prescriptive communications. The adequate performance of this task demands a disciplined systematic survey and assessment of all features of the process of communication and its context that may affect expectation.[28]

(2) Decision makers must then supplement incomplete and ambiguous communications. McDougal and Reisman explained this component as requiring "the remedying of the inevitable gaps and ambiguities in prescriptive expectation by reference to more general, basic community policies about shaping and sharing of values."[29] This will be particularly important in Part VI as the ambiguous provisions contained in various treaties on sovereign immunity are addressed.

(3) The final phase involves integrating expectations and basic community policies.[30]

> This [final] task requires decision-makers or other evaluators, recognizing that they are responsible for the total policy of the community which they represent or of which they are members, to reject even the most explicitly, precisely formulated expectations when such expectations are inimical to basic, more intensely demanded community policies. This task is made authoritative with respect to international agreements [by] . . . *jus cogens* . . . .[31]

In short, international jurists must consider sovereign immunity alongside and within the context of general international law expectations, including the protection and promotion of the

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28 *Id.* at 270.

29 *Id.* at 271.

30 *Id.*

31 *Id.*

most important fundamental values upon which the system is based. These values include humanitarian law, human rights law, and the *jus cogens* aspects of international law.

III. Sovereignty[32]

Jurisdictional immunity derives its legal life from the generalized status of sovereignty in international law. It is therefore necessary to place the doctrine of sovereign immunity within the context of the evolution of the doctrine of sovereignty itself.

A. Sovereignty in Historical Thought and Context

The doctrine of sovereignty has evolved from ideas of sovereign absolutism to a focus on the foundations of its legitimacy, rooted in the idea of "we the peoples."[33] Because of this shift of doctrinal focus, sovereignty is now a component of a broader world constitutive process. This development places important boundaries on sovereignty; some of the boundaries strengthen it, while some weaken it. The outcome depends on whether the problems sovereignty confronts strengthen or weaken the fundamental value foundation upon which modern international law is based.

Successive legal and political philosophers have explored the theoretical underpinnings of sovereignty. Collectively, these scholars provide the classical framework for understanding sovereignty.[34] The French political theorist Jean Bodin (1530-

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32 *See generally* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 291 (7th ed. 2008) ("[The term sovereignty is] used to describe the legal competence which states have in general, to refer to a particular function of this competence, or to provide a rationale for a particular aspect of the competence. This jurisdiction, including legislative competence over national territory, may be referred to in the terms 'sovereignty' or 'sovereign rights'. Sovereignty may refer to the power to acquire title to territory and the rights accruing from exercise of the power. The correlative duty of respect for territorial sovereignty, and the privileges in respect of territorial jurisdiction, referred to as sovereign or state immunities, are described after the same fashion. In general 'sovereignty' characterizes powers and privileges resting on customary law and independent of the particular consent of another state.") (internal citations removed).

33 U.N. Charter Preamble.

34 For a more detailed survey of the theoretical foundations of sovereignty contributed by Bodin, Hobbes, Grotius, Moser, Martens, Austin, and others, see

1596) was one of the first to provide a coherent conceptual grounding for sovereignty.[35] Bodin's contribution laid the foundation for sovereign absolutism by supporting the concentration of power in a monarch. Thomas Hobbes (1588-1670) believed that a strong sovereign is necessary to keep man from abusing his fellow neighbor (*Homo homini lupus est,* "Man to Man is an arrant Wolfe").[36] In Hobbes's view, a strong sovereign is part of a social contract whereby individuals acquiesce in the transfer of political and legal power to a sovereign. In return, the sovereign protects his subjects from their fellow man and from foreign invasion. The influence of Bodin and Hobbes was reflected in the Peace of Westphalia[37] in 1648, which ended decades of religious warfare in Europe and ushered in a sovereign-dominated paradigm of political and legal process.[38]

Hugo Grotius (1583-1645), perhaps the most insightful and enduring scholar of classical international law, maintained that the sovereign powers envisioned by Hobbes have limits; Grotius insisted that the exercise of sovereignty must be reasonable.[39] He was "fully convinced . . . that there is a common law among nations, which is valid alike for war and in peace . . . ."[40] Grotius

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generally Winston P. Nagan & Aitza H. Haddad, *Sovereignty in Theory and Practice*, 13 SAN DIEGO INT'L L.J. 429 (2012) [hereinafter Nagan & Haddad, *Sovereignty*].

35 *See* JEAN BODIN, ON SOVEREIGNTY: SIX BOOKS OF THE COMMONWEALTH 40 (M.J. Tooley trans., Alden Press 1955) (1576), *available at* http://www.constitution.org/bodin/bodin.txt (providing in-depth analysis of the "true attributes" of sovereignty).

36 *See* THOMAS HOBBES, DECIVE 2 (Kessinger Publishing Reprints 2004) (1651), *available at* http://www.constitution.org/th/decive.txt; *see also*, THOMAS HOBBES, LEVIATHAN (Michael Oakeshott ed., 3d ed. 1966) (1660), *available at* http://oregonstate.edu/instruct/phl302/texts/hobbes/leviathan-contents.html.

37 Peace of Westphalia (1648), http://avalon.law.yale.edu/17th_century/westphal.asp (last visited Nov. 5, 2012).

38 *See generally* DEREK CROXTON & ANUSCHKA TISCHER, THE PEACE OF WESTPHALIA: A HISTORICAL DICTIONARY (Greenwood Press 2002) (chronicling the historical background of the Thirty Years' War, which resulted in the Treaty and Congress of Westphalia that introduced the standards for our contemporary international political system).

39 *See generally* HUGO GROTIUS, THE LAW OF WAR AND PEACE (DE JURE BELLI AC PACIS) (Francis Kelsey trans., Carnegie 1925) (1625) (asserting that laws and social contracts are not binding on individuals unless they are reasonable).

40 *Id.* at Prol. § 28.

did much to contribute to the notion that there is a discoverable body of natural law and principles, such as those that would justify war in self-defense, or what is today implicated in *jus cogens* norms. Grotius's views were heavily influenced by theology.[41] In his view, natural laws are the product of divine providence. As the late ICJ Justice, Hersch Lauterpacht, wrote,

> The significance of the law of nature in [Grotius's] treatise is that it is the ever-present source for supplementing the voluntary law of nations, for judging its adequacy in the light of ethics and reason, and for making the reader aware of the fact that the will of states cannot be the exclusive or even, in the last resort, the decisive source of the law of nations.[42]

B. The Grotian approach has endured and its spirit permeates the law of the U.N. Charter.

Johann Jakob Moser (1701-1785) and Georg Friedrich von Martens (1756-1821) further contributed to the theoretical foundations of sovereignty and international law, but from a positivist approach.[43] They disagreed with Grotius's assertion that international law is based in morality and natural law, and instead argued that what matters is what sovereigns do and how sovereigns act (today referred to as custom), and the agreements and treaties they enter into with each other.[44] Finally, John Austin (1790-1859) concluded that law simply is what the sovereign says

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41 *See generally id.*

42 Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L L. 1, 21-22 (1946), *cited in* Adam C. Belsky, Mark Merva & Naomi Roht-Arriaza, *Implied Waiver Under the FSIA: A Proposed Expecption to Immunity for Violations of Peremptory Norms of International Law*, 77 CALIF. L. REV. 365, 382 (1989).

43 *See generally* JOHANN JAKOB MOSER, GESAMMLETE LIEDER: SO ZUM THEIL SCHON VORMALS GEDRUCKT, ZUM THEIL ABER BISHERO NOCH UNGEDRUCKT GEWESEN , MIT GEDOPPELTEN REGISTERN (emphasizing postivism in religious texts as an allegory to its relevance to sovereignty); *see also* GEORG FRIEDRICH VON MARTENS, THE LAW OF NATIONS: BEING THE SCIENCE OF NATIONAL LAW, COVENANTS, POWERS & C.; FOUNDED UPON THE TREATIES AND CUSTOMS OF MODERN NATIONS IN EUROPE (4th ed. 1815) (analyzing the sovereignty of the European states by examining the consequences of each nation's laws and rights, and the relationships between those nations); Nagan & Haddad, *Sovereignty*, *supra* note 34, at 451.

44 Nagan & Haddad, *Sovereignty*, *supra* note 34, at 451.

it is, as long as it can be enforced by sanctions.[45] Austin essentially viewed law with a scientific, objective analysis. He insisted upon scientifically stating what law actually is. In this view, norms, values, and morality are natural law—unscientific and not objectively ascertainable. The nineteenth century international lawyer Holland, influenced by the positivist view, stated that international law is the "vanishing point of jurisprudence."[46]

The early twentieth century witnessed a greatly expanded deference to the prerogatives of sovereigns, which was supported by the theoretical underpinnings of these legal theorists, especially Austin.[47] One of the results of this deference was the idea that a sovereign (often in the form of a nation-state by this time) had no clear limits on its exercise of power.[48] This vigorous manifestation of sovereignty contributed to the tragedy of World War I, because one state had no legal authority to check another sovereign's aggression short of war.[49] Despite the excesses absolute sovereignty fostered, during the peace negotiations following World War I, the limits of sovereignty were not seriously contested.[50] For a fleeting moment, it appeared that the League of Nations would impose some restraints on sovereigns. The League, as Woodrow Wilson envisioned it, would require partial relinquishment of sovereign omnipotence to the international community, but this notion was subsumed by the emergence of the unanimity rule for the League.[51] If even a single member-state objected to the action of the League, the organization could not act.[52] Additionally, the League of Nations was handicapped from the outset by the absence of the United States, and it collapsed

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45 *See* AUSTIN, *supra* note 5, at 143.

46 Sir THOMAS HOLLAND, LECTURES ON INTERNATIONAL LAW (Clarnedon Press, Oxford, 1933).

47 *See* Nagan & Haddad, *Sovereignty*, *supra* note 34, at 451.

48 *Id.* at 453.

49 *Id.*

50 *Id.*

51 League of Nations Covenant art. 15, *available at* http://www.unhcr.org/refworld/docid/3dd8b9854.html.

52 Nagan & Haddad, *Sovereignty*, *supra* note 34, at 453.

with the outbreak of the Second World War.[53]

The importance of sovereignty in international law in this era was reflected in the often cited *Lotus Case* of 1926.[54] In this case, the Permanent Court of International Justice, predecessor to the ICJ, established an influential rule that, as international law was then understood, "restrictions upon the [sovereignty] of States cannot therefore be presumed."[55] In short, a state was bound by international law only by consent or a clear rule of custom.

Nazi Germany under Adolf Hitler took the idea of absolute sovereignty to its most extreme: the legal justification for total war.[56] According to Nazi ideology, under the veil of sovereignty, "there was the implicit claim that there were no rules from the law of war that could constrain the prerogatives of the sovereignty."[57] War-making, after all, was one of the most basic and traditional roles of sovereigns.[58] The massive devastation wrought by the Second World War, including some 60 million deaths, gave urgency to attempts to develop rational constraints on sovereign action.[59]

C. Sovereignty in the Modern (i.e., U.N.) Era

As Judge Kaufman noted in *Filartiga v. Pena-Irala*,[60] "spurred first by the Great War, and then the Second, civilized nations have banded together to prescribe acceptable norms of international behavior. From the ashes of the Second World War arose the

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53 *See generally* FRANCIS PAUL WALTERS, A HISTORY OF THE LEAGUE OF NATIONS (1986) (detailing the political success and ultimate failure of the League of Nations).

54 S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

55 *Id.* ¶ 44.

56 *See generally* Tomislav Zelic, The Paradox of Sovereignty in Modern German History Plays (2009) (Ph.D. dissertation, Columbia University), *available at* http://gradworks.umi.com/3348441.pdf.

57 *See* Nagan & Haddad, *Sovereignty*, *supra* note 34, at 455.

58 *See, e.g.*, *id.* (discussing power struggles and the wars they create between sovereigns).

59 *See generally* MARTIN GILBERT, THE SECOND WORLD WAR: A COMPLETE HISTORY (Rev. ed., 2004) (1989) (detailing the various government actions several nations took during World War II, which eventually inspired debate on limiting sovereign immunity).

60 Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

United Nations Organization, amid hopes that an era of peace and cooperation had at last begun."[61] The U.N. Charter is a direct response to Nazi atrocities and to a perceived need to constrain the absolute autonomy and sovereignty of states in the interest of peace.[62] During World War II, President Franklin Roosevelt asserted that the war should not be fought for cynical reasons; there must be some higher cause than simply defeating the Axis powers.[63] To this end, he framed the allied war effort as a war to secure the Four Freedoms: the freedom of conscience and belief, the freedom of speech and expression, the freedom from want, and the freedom from fear.[64] These principles were adopted by Roosevelt and Winston Churchill in the Atlantic Charter, which became the basic framework of the U.N. Charter.[65]

The U.N. Charter, along with various international documents that give it flesh, is seen today as our international constitution.[66] In the modern era of the U.N. system of state interdependence and obligation, the doctrine of the *Lotus* case has become anachronistic. As has been pointed out elsewhere, the U.N. Charter "is an instrument by which members both assert [their sovereignty] and limit their sovereignty."[67] For example, the U.N. Charter stipulates that the "[o]rganization is based on the principle of sovereign equality of all its [member states]."[68] This principle is consistent with the strong (*Lotus*) version of sovereignty and carries the implication of immunity from other sovereign's courts.

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61 *Id.* at 890.

62 *See generally* STEPHEN SCHLESINGER, ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS 29 (2004) (discussing the motivations behind the U.N. Charter, especially influenced by the "growing atrocities overseas").

63 *See* President Franklin D. Roosevelt, Message to Congress (Jan. 6, 1941).

64 *Id.*

65 SCHLESINGER, *supra* note 62, at 31.

66 *See* Declaration on the Right to Development, G.A. Res. 41/128, Annex, 41 U.N. GAOR, Supp. No. 53, U.N. Doc. A/41/53, at 186 (1986); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16, at 52, U.N. Doc. A/6316 (Dec. 19, 1966); *Universal Declaration of Human Rights*, G.A. Res. 217(III)A, art. 25, U.N. Doc. A/RES/217(III), at 71 (Dec. 10, 1948); *see generally* Blaine Sloan, *The United Nations Charter as a Constitution*, 1 PACE Y.B. INT'L L. 61 (1989), *available at* http://digitalcommons.pace.edu/pilr/vol1/iss1/3.

67 Nagan & Haddad, *Sovereignty*, *supra* note 34, at 459.

68 U.N. Charter art. 2, ¶ 1.

However, this provision cannot be read in isolation. The U.N. Charter has broader obligations and these obligations require some subordination of sovereignty in general to the purposes and principles (the basic values) of the U.N. Charter.[69]

The U.N. system redefines sovereignty by transferring some powers away from individual states to the collective international system and also requires restraints on the exercise of sovereignty. For example, the U.N. Charter states that membership in the U.N. is open only to "peace-loving" states (though that should not be read as *pacifist* states).[70] A significant limitation on sovereignty is found in Chapter I, Article 2(4), which requires that "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[71]

The U.N. Charter further mandates the transfer of some sovereign powers to the General Assembly.[72] The U.N. General Assembly, the main constitutive body of nation-states, has the authority to investigate almost anything, imposing a degree of transparency and scrutiny on states.[73] Even more significant powers are transferred from states to the Security Council.[74] Only the Security Council, for example, can legally authorize the use of force for purposes other than self-defense.[75] The Security Council also has the power to

> decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such

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69 *See generally* U.N. Charter (upholding at least four essential human freedoms: freedom of speech, freedom of religion, freedom from want, and freedom from fear).

70 *Id.* at Ch. II, art. 4.

71 *Id.* at Ch. II, art. 2, ¶ 4.

72 *See generally id.* at Ch. IV (granting the General Assembly supreme authority to pass binding resolutions).

73 *Id.* at Ch. IV, art. 10.

74 *See id.* at Ch. V.

75 U.N. Charter Ch. VII, art. 42. One might view this transfer of power as reminiscent of Hobbes's social contract theory: the world community has transferred powers to the Security Council, and in return, the Security Council pledges to uphold world peace and security.

> measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.[76]

Further, the U.N. Charter imposes certain obligations on member-states and raises the importance of the individual vis-à-vis the state. A major purpose of the U.N. Charter is the advancement of human rights.[77] The heightened sense of the importance of the individual in international law and relations under the U.N. Charter system is reflected in its preamble, which begins with the words, "We the Peoples of the United Nations determined . . . ."[78] Elsewhere, it has been argued that this language suggests that "the peoples of the world are the ultimate source of international authority," not the states.[79] Judge Weeramantry made this point in his dissenting opinion in the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, where he argued that the people's "collective will and desire is the very source of the United Nations Charter and that truth should never be permitted to recede from view."[80]

Judge Weeramantry further contended in his dissent that six keynote precepts are expressed in the preamble of the U.N. Charter, of which the first is this notion that the peoples of the world, and not the sovereigns, are the ultimate sources of authority and judicial legitimacy in the world.[81] The second keynote principle of the Charter refers to "the determination of those

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76 *Id.* at Ch. VII, art. 41.

77 *See infra* Part VIII.

78 U.N. Charter, Preamble heading; *see also* Nagan & Haddad, *Sovereignty*, *supra* note 34, at 461 (describing how F.M. Frank and F. Patel have explained that the idea that the authority under the Charter, as derived from the peoples, "ultimately assumes that in the international community, sovereign national authority is itself, in some degree, constrained by the authority of the people it seeks to symbolize or represent. In short, the tacit assumption of the authority of sovereignty is actually rooted in the perspectives of all peoples in the global community who are not objects of sovereignty but subjects of it.").

79 Nagan & Haddad, *Sovereignty*, *supra* note 34, at 461.

80 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8, 1996) (dissenting opinion of Judge Weeramantry), at 441 [hereinafter Legality of Nuclear Weapons].

81 *Id.*

peoples to save succeeding generations from the scourge of war."[82] The third refers to the "dignity and worth of the human person."[83] The fourth precept is the principle of equal rights of nations.[84] The fifth key concept refers to the "maintenance of obligations arising from treaties and '*other sources of international law.*'"[85] Finally, the sixth key precept expressed in the preamble of the Charter is "its object of promoting social progress and better standards of life in larger freedom."[86]

The key principles of the U.N. Charter expressed in the preamble are not merely precatory. Chapter I of the U.N. Charter incorporates the preamble into the purposes of the U.N. Charter, which include "promoting and encouraging respect for human rights and fundamental freedoms."[87] As will be explained more fully in Part IX, this implies that a state may deny immunity, if that is necessary to fulfill the principles and purposes, including the six key precepts, of the U.N. Charter.

Evidence on restrictions of sovereignty apart from the U.N. Charter may also be found, for example, in the *Asylum* case.[88] There the ICJ stressed that customary international law on diplomatic asylum necessarily required a derogation of state sovereignty over its own territory.[89] It should also be recognized that the transfer of sovereign powers away from the states is evidenced by the enormous growth of international judicial tribunals in the last decades, such as the International Criminal Court and various *ad hoc* tribunals such as those in Rwanda and the former Yugoslavia.[90]

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82 *Id.* at 442.

83 *Id.*

84 *Id.*

85 *Id.* (emphasis in original).

86 Legality of Nuclear Weapons, 1996 I.C.J. at 442.

87 U.N. Charter, Ch. I, art. 3.

88 Asylum Case (Colom. v. Peru), 1950 I.C.J. 266 (Nov. 20, 1950).

89 *Id.* at 274-75.

90 *See generally*, Karen J. Alter, Delegating Sovereignty to International Courts, (Northwestern University, draft paper), *available at* http://www.law.duke.edu/cicl/pdf/dsworkshop/alter.pdf (discussing the newly expanded scope of international courts' delegations: from dispute resolution to administrative, constitutional review and even enforcement).

In 1999, then-Secretary General of the U.N., Kofi Annan, proclaimed, "State sovereignty [is] being redefined by the forces of globalization and international cooperation."[91] The modern political and legal system is one significantly dominated by the nation-state.[92] However, the paradigm of state-sovereign domination in international law is ebbing and providing legal space for a human rights-based approach. In Judge Cançado Trindade's separate opinion in the ICJ's Advisory Opinion on Kosovo, he noted this shift, stating that the world community is now moving towards "a normative . . . people-centered outlook . . . ."[93] Judge Bennouna made this same observation in his separate opinion in *Jurisdictional Immunities of the State*, where he stated, "The Westphalian concept of sovereignty is thus gradually receding, as the individual takes centre stage in the international legal system."[94]

The nation-state still is an important part of the global legal landscape. The human species, while capable of incredible compassion, is still one also capable of unfathomable cruelty. Man is still too often a wolf to other men. The nation-state serves to protect individuals, one hopes, more often than to brutalize them, and sovereign nation-states, in the context of international relations, may still serve as a vital protector, arbitrator, and advocate of their people's interests. But the rise of the individual in international law should be noted and celebrated. Finding the appropriate balance of powers between states in protecting human rights and between states and individuals regarding those rights is why jurisdictional immunity of states is at such a crucial crossroads today.

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91 INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 584 (Steiner, Alston eds., 2000), *cited in* Stacy Humes-Schulz, Note, *Limiting Sovereign Immunity in the Age of Human Rights*, 21 HARV. HUM. RTS. J. 105, 111 (2008).

92 *See* Nagan & Haddad, *Sovereignty*, *supra* note 34, at 432.

93 Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, separate opinion of Judge Trindade, 2010 I.C.J. 22, ¶ 170, (July 2010). Although this case was heard in the context of statehood, Judge Trindade's insight is just as relevant in the context of jurisdictional immunity.

94 Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), separate opinion of Judge Bennouna, 2012 I.C.J. 143 ¶ 3 (Feb. 3).

IV. Sovereignty in Context: Competing Doctrines

International law is a system of interlocking principles. It is a complex web of norms, interests, and, often, contending values. Although this paper focuses on the international law of sovereignty in the context of jurisdictional immunity, it is not possible to isolate it from the co-existing doctrines, *inter-alia*, of head of state immunity, universal jurisdiction, and *jus cogens* norms. These doctrines build upon and support one another. They too are expectations creating and influencing the reach of sovereign immunity. It is therefore necessary to briefly consider the legal effects on sovereignty of developments in these other principles of international law.

A. Individual Accountability and Universal Jurisdiction

In the year 43 B.C. Cicero wrote *silent enim legs inter arma* ("laws are inoperative in war").[95] That statement was largely true into the 1940s for the ultimate decision makers behind state coercion, even those leading to atrocities. The protection that high government officials enjoy is known as head-of-state immunity.[96] In the mid-twentieth century, head-of-state immunity was significantly checked, and Cicero's statement lost traction.[97] The genesis of criminal accountability for sovereigns and heads of state can be traced back to the Nuremberg trials following the conclusion of the Second World War.[98] In the most famous post-

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95 THE OXFORD DICTIONARY OF QUOTATIONS *Pro Milone* 151 (3rd ed. 1980) (44-43 B.C.).

96 *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: IMMUNITY OF DIPLOMATIC AGENTS OF OTHER STATES § 464 ¶ 14 (1987) ("Ordinarily, a proceeding against a head of state or government that is in essence a suit against the state is treated like a claim against the state for purposes of immunity.").

97 *See infra* notes 99-100 and accompanying text.

98 Following the First World War, there were efforts to criminally try Kaiser Wilhelm of Germany for war crimes and what would now be called the crime of aggression. Also, some Turkish military leaders were initially charged with crimes that closely resemble crimes against humanity. Both of these efforts failed. In the case of the Kaiser, his criminal indictment was mooted by Holland's granting him amnesty, and in the case of the Turkish generals, political expediency and hopes that Turkey could serve as a buffer to an expanding Soviet Russia meant that all political will to see Turkey undertake serious criminal proceedings ebbed beyond recovery. *See generally* M. Cherif Bassiouni, *World War I: "The War to End All Wars" and the Birth of a Handicapped*

war trial, twenty-four Nazi leaders were tried by the allied powers, and many, including Hermann Göring, were convicted and sentenced to death.[99] Never before had the political and military leaders of a defeated enemy been given a criminal proceeding with legal representation.[100]

The principle lesson of Nuremberg (and Tokyo) was that when officials abuse sovereignty, they lose the protections of sovereignty, and that sovereign omnipotence was limited.[101] This meant that the defeated states' officials could be tried by courts created by agreement among the victor states. The recently-created U.N. endorsed the Nuremberg trials by resolution.[102] Nagan and Hammer have pointed out elsewhere:

> One of the most important outcomes of World War II was the general acceptance of the principle that States that act as aggressors abuse their sovereignty, and their leaders may be accountable directly to the international community . . . . Nuremberg established the principle that State officials could be tried for criminal offenses under international law . . . .[103]

In Nuremberg, the court rejected the claim that the defendants were merely following the orders of the sovereign. The court of law could therefore penetrate the veil of the state and sovereign to hold the decision makers to account. In historic terms, Nuremburg established a critical repudiation of the principle of sovereign absolutism. It effectively repudiated legal theories of sovereignty that sought to shield defendants from responsibility for mass murder.[104]

In early 2012, the Special Court for Sierra Leone convicted

International Criminal Justice System, 30 DENV. J. INT'L L. & POL'Y 244 (2002).

99 *See* ROBERT E. CONOT, JUSTICE AT NUREMBERG 76 (Caroll & Graf eds., 7th ed. 1993).

100 *Id.*

101 *See* Nagan & Haddad, *Sovereignty*, *supra* note 34, at 504.

102 Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, G.A. Res. 95, U.N. Doc. A/64/Add.1, at 188 (Dec. 11, 1946).

103 Winston Nagan & Craig Hammer, *The Changing Character of Sovereignty in International Law and International Relations*, 43 COLUM. J. TRANSNAT'L L. 141, 161-166 (2004).

104 *Id.* at 160 (further discussing the erosion of absolute immunity for heads of state).

Charles Taylor, the former President of Liberia, of various international crimes for acts occurring while he was in office.[105] Taylor's conviction reaffirms the lesson of Nuremberg: sovereignty cannot be used to avoid international criminal responsibility, and sovereign privileges are waived for individuals who abuse their sovereign powers. These cases represent a clear limitation on sovereign omnipotence. The emerging *jus cogens* restriction to jurisdictional immunity takes these lessons and applies them to the state.[106]

Universal jurisdiction is another contending international law principle that further develops the idea that sovereignty is morphed by important values. The Restatement of Foreign Relations Law notes,

> 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 [no other] bases of jurisdiction . . . is present.[107]

In the *Pinochet* case, the U.K. House of Lords dealt with the applicability of the universality principle to former heads of state.[108] The case involved Spain's request to extradite former dictator of Chile Augusto Pinochet from Britain for, *inter-alia*, torture that occurred in Chile.[109] Although Pinochet was eventually returned to Chile due to medical conditions rendering him unfit to stand trial, the House of Lords did conclude that Pinochet could be tried for torture in the United Kingdom.[110] Lord

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105 *See* Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Judgment, (Apr. 26, 2012).

106 Of course, unlike individual accountability, civil claims against a state imply that every individual in the state is responsible, or at least obliged to pay compensation for the crimes of specific individuals. We feel that this is a price worth paying. When a state operates beyond its borders, civil claims against the state will serve as insurance in the event the state is used to violate international law norms, such as *jus cogens*.

107 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: UNIVERSAL JURISDICTION TO DEFINE AND PUNISH CERTAIN OFFENSES § 404 (1987).

108 R. v. Bartle and the Commissioner of Police for the Metropolis and Others ex parte Pinochet, 119 I.L.R. 135 (1999).

109 *Id.*

110 *Id.*

Browne-Wilkinson stated:

> The jus cogens nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed. International law provides that offences jus cogens may be punished by any state because the offenders are "common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution."[111]

This case demonstrates the important extension of jurisdiction over former (and possibly current) heads of states for certain crimes that occurred outside of the forum state. But like the expansion of exceptions to jurisdictional immunity (discussed *infra*), exceptions to head of state immunity have not been universally accepted or embraced by the ICJ.[112]

In the *Pinochet* appeal, Lord Browne-Wilkinson linked "the '*jus cogens* nature of the international crime of torture' to the justification of the use of universal jurisdiction on the part of States."[113] This is the paradigmatic example of a state asserting jurisdiction based on the universality principle for criminal violations, but there are others.[114] Universal jurisdiction allows a state to hear a civil or criminal case regarding a matter in which it normally would have no interest. The state is able to hear these cases under universal jurisdiction because of a case's relevance to world peace or fundamental values of the international community as a whole. Although traditionally this doctrine was meant to apply to piracy, inherently stateless criminal conduct for which no better forum existed, the doctrine has since expanded to include most, if not all, *jus cogens* norms.[115] The universality principle is

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111 *Id.* at 149 (citing Demjanjuk v. Petrovsky 603 F.Supp. 1468; 776 F.2d. 571 (1985)).

112 *See, e.g.*, Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14) (finding that immunity for heads of state is customary international law).

113 BROWNLIE, *supra* note 32, at 597.

114 *See, e.g.*, Indictment, United States v. Emmanuel, No. 06-20263 (S.D. Fla., Apr. 28, 2006); Case of the Plan de Sánchez Massacre v. Guatemala, Inter-Am. Ct. H.R. 7, I/A Court H.R., (Nov. 19, 2007).

115 *See* William J. Aceves, *Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law*, 41 HARV. INTL'L L.J. 129, 180 (2000).

important here because it shows that the traditional sovereign prerogatives, even of prescribing law based on nationality and territory, have been dramatically altered to account for various expectations on the nature of sovereignty.[116] Universal jurisdiction both expands and limits sovereignty. It expands sovereignty by allowing states to assert juridical jurisdiction over certain matters, if the result is to promote global values. On the other hand, universality detracts from some of the previously exclusive prescribing functions of the state, particularly when to do so would be at odds with global values.[117] It is also important to further juxtapose sovereignty with the competing principle of *jus cogens.*

B. Jus Cogens and Obligations Erga Omnes

The era before Nuremberg was a period where natural law was overshadowed by positivist doctrines. The theories of Austin prevailed over those of Grotius.[118] But with Nuremberg, there was a revival of the notion that there existed a natural body of fundamental laws derived from providence or inherent in humanity.[119] *Jus cogens* norms are at the pinnacle of natural law. The *jus cogens* principle is codified in Article 53 of the Vienna Convention on the Law of Treaties.[120] It defines a *jus cogens* as "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."[121] The International Criminal Tribunal for the Former Yugoslavia explained in *Prosecutor v. Furundzija* that a *jus cogens* norm is "a norm that enjoys a higher rank in the international hierarchy than treaty law

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116 *See generally* Garland A. Kelley, *Does Customary International Law Supersede a Federal Statute?*, 37 COLUM. J. TRANSNAT'L L. 507 (1999) (considering the impact of customary international law on ambiguous or contradictory federal statutes).

117 *Id.*

118 *See generally* Nagan & Haddad, *Sovereignty*, *supra* note 34 (describing the evolution from Grotius's discourse on international law and the problem of multiple sovereigns to Austin's more centralized sovereignty ideas)

119 *See* Nagan & Hammer, *Communications Theory*, *supra* note 22, at 160.

120 V.C.L.T., *supra* note 8, art. 53.

121 *Id.*

and even 'ordinary' customary rules."[122]

Jus cogens represent fundamental rights in international law. As Michael Reisman has described them, *jus cogens* are "planks of an international bill of rights" the importance of which "cannot be overstated."[123] *Jus cogens* is such a powerful norm that it even serves to limit the expansive powers of the Security Council.[124] Ian Brownlie has pointed to a case from the European Court of Justice, holding for the proposition that *jus cogens* places a limit upon the otherwise binding effects of Security Council resolutions.[125]

While the *jus cogens* concept was controversial at the time of the conference which produced the Vienna Convention, the principle is generally accepted today, though its breadth and applicability are vigorously contested.[126] Article 53 does not contain a list, or even illustrations, of what might constitute *jus cogens*; the Vienna Convention leaves that to be determined by state practice and the jurisprudence of state and international courts.[127] The criteria used for identifying which international norms have attained *jus cogens* status varies and is disputed.[128] Brownlie has noted in his treatise that "more authority exists for the category of *jus cogens* than exists for its particular content."[129]

Perhaps the closest thing to a codification of the existing *jus cogens* norms is the Rome Statute of the International Criminal Court (ICC), which lists the crimes the Court is competent to hear

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122 Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 153 (Dec. 10, 1998) (further noting that "[t]he most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force").

123 Reisman, International Law-making, *supra* note 15, at 109.

124 BROWNLIE, *supra* note 32, at 511.

125 *Id.*

126 ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 257-258 (1st ed., 2000); *see also,* BROWNLIE, *supra* note 32, at 512.

127 *But see* Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291, 299-302 (2006) (noting that the I.L.C. and the V.C.L.T. have references in their commentaries and discussions of the norms against genocide, slave trading, and the use of force not in self-defense).

128 BROWNLIE, *supra* note 32, at 512.

129 *Id.*

(though it is over-inclusive).[130] The Restatement of Foreign Relations Law also provides guidance as to which acts rise to the level of *jus cogens*.[131] States are not obligated to look to the ICC statute or the Restatement when determining whether an act is a *jus cogens*; however, they may draw from the expectations of emerging international law. This in turn can be strengthened by supplementation with other sources of international law, including the opinions of juris consults.[132]

Genocide, slavery, and a prohibition on the (unjustified) use of force incorporate legal expectations that are the most widely accepted *jus cogens* norms. It is now also generally accepted that torture constitutes a *jus cogens* norm (though as the American water-boarding controversy has shown, there is sharp dispute as to which acts constitute torture).[133] The U.S. Court of Appeals for the Ninth Circuit has written that "the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*."[134] This sentiment has been cited favorably by the U.K. House of Lords and by the International Criminal Tribunal for the Former

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130 Rome Statute of the International Court, art. 5, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) (listing the four umbrella crimes that the Court has jurisdiction to hear: genocide, crimes against humanity, war crimes, and the crime of aggression). Articles 6, 7, and 8 give specific examples of the first three crimes. *Id.* art. 6-8. The Crime of Aggression was not defined until the 2010 amendments to the Rome Statute were adopted. *See id.*

131 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: CUSTOMARY INTERNATIONAL LAW OF HUMAN RIGHTS § 702 (1987) ("A State violates international law if, as a matter of state policy, it practices, encourages or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhumane, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights.") The Restatement notes in comment a that this list is not exhaustive. *Id.* at cmt. A.

132 *See e.g.*, Flores v. S. Peru Copper Corp., 414 F.3d 233, 239 (2d Cir. 2003).

133 *See, e.g.*, Humes-Schulz, *supra* note 91, at 111 (pointing out that academics and jurists generally agree that torture is a *jus cogens*) (referencing Alan Dershowitz, *The Ban on Torture in the Wake of September 11*, 81 TEX. L. REV. 2013, 2024 (2003) (suggesting that in the ticking time bomb scenario, it would be legal, perhaps even mandated, to torture a terrorist in order to give over information to prevent certain death, and because the ban on torture would be curtailed in this situation, it is *ipso facto* not a *jus cogens*)).

134 Siderman De Blake v. Argentina, 965 F.2d 699, 717 (9th Cir. 1991).

Yugoslavia.[135] (It should be noted that the U.N. Convention Against Torture contains provisions obliging states to exercise universal jurisdiction when torturers are found within their territory.[136]) In the celebrated *Filartiga* case, the U.S. Court of Appeals for the Second Circuit applied the Alien Tort Statute[137] and held that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights."[138] As the *Filartiga* court put it:

> In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. Among the rights universally proclaimed by all nations . . . is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him hostis humani generis, an enemy of all mankind.[139]

When a norm attains the character of *jus cogens*, an obligation of *erga omnes* is imposed upon states as a result.[140] The doctrine of *erga omnes*—obligations owed by states to the community of states as a whole—has been affirmed as a principle of international

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135 *See* R v. Bow Street Magistrate and others, ex parte Pinochet Ugarte [2000] 1 A.C. 147 (H.L. 1999) (appeal taken from Q.B.); Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 153 ("Because of the importance of the values [the prohibition on torture] protects, this principle has evolved into a peremptory norm or jus cogens.").

136 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 5-7, Dec. 10, 1984, U.N.T.S. 1465, *available at* http://www.unhcr.org/refworld/docid/3ae6b3a94.html.

137 This case did not rely solely on universal jurisdiction. At issue was the applicability of the Alien Tort Statute, which was enacted by the first Congress in 1789. The statute grants federal courts a mix of universal jurisdiction and territorial jurisdiction for certain civil claims. It provides that U.S. district courts have original jurisdiction over "all cases where an alien sues for a tort only [committed] in violation of the law of nations." 1 Op. Att'y Gen. 57, 59 (1795). However, other aspects of American doctrine of procedure and process require, for example, the individual jurisdiction that is to be asserted to be served with process or located in U.S. territory. Judiciary Act of 1789, ch. 20, §(b), 1 Stat. 73, 77 (1789), codified at 28 U.S.C. § 1350.

138 Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

139 *Id.* at 890.

140 *See* Prosecutor v. Furundzija, Case No. IT-95-17/1-T, ¶¶ 260-62; *see also* BROWNLIE, *supra* note 32, at 597.

law by the ICJ in the *Barcelona Traction Case.*[141] In *Bosnia and Herzegovina v. Yugoslavia (Genocide Case)*, the ICJ articulated an *erga omnes* duty relating to genocide.[142] The court found that every state has a duty to prevent and to punish the crime of genocide, wherever that crime may occur. The court noted "the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge.'"[143] *Erga omnes* further ties the principle of universal jurisdiction and *jus cogens* together. These doctrines, especially *jus cogens* and *erga omnes,* generate legal expectations that modify the concept of sovereignty and form a powerful substantive framework for analyzing the appropriateness of waiving (or granting) jurisdictional immunity to states.

Finally, it should also be briefly noted that the Act of State doctrine serves in a supplemental capacity to sovereign immunity.[144] Simply, the Act of State doctrine provides that one state will not pass judgment upon the lawfulness of the acts of another state taken within their territory if it does not violate international law.[145] Like jurisdictional immunity, exceptions exist to the Act of State doctrine and are expanding, showing that sovereign prerogatives are weakened in the face of competing expectations which incorporate superior values.

V. The Historical Development of Jurisdictional Immunity

The doctrine of jurisdictional immunity takes the abstract concept of sovereignty and applies it to facts on the ground. As the Restatement notes, "[u]nder international law, a state or state

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141 *See* Case concerning the Barcelona Traction, Light and Power Company (Belg. v Spain) 1970 I.C.J. Rep 44, ¶ 33 (Feb. 5).

142 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia), 1996 I.C.J. 595 ¶31 (July 11).

143 *Id.*

144 Myres S. McDougal, *Foreign Sovereign Immunities Act of 1976: Some Suggested Amendments, in* PRIVATE INVESTORS ABROAD – PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1981 4, 4 (Martha L. Landwehr ed., 1981) [hereinafter McDougal, *Foreign Sovereign Immunities Act*].

145 *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (articulating the Act of State Doctrine); *see also* First Nat'l Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972).

instrumentality is immune from the jurisdiction of the courts of another state . . . ."[146] The Restatement further states unambiguously that the rule of sovereign immunity is "an undisputed principle of customary international law."[147] In order to fully appreciate the limits and exceptions to the rule articulated in the Restatement, the historical development of the jurisdictional immunity doctrine itself must first be closely scrutinized.

The doctrine of sovereign immunity is one of the older concepts in customary international law.[148] Immunity from the jurisdiction of another state's courts is conceptually related to the idea of the monarch as sovereign over its territory and people. In medieval Europe, kings were theoretically equal and immune from the courts of another when traveling abroad.[149] Since the Treaty of Westphalia, the basic principle of jurisdictional immunity has been largely uncontroversial.[150] As has been stated elsewhere,

> The Treaty of Westphalia, in effect, recognized that a European body politic would be a decentralized sovereignty-dominated body politic. This meant that the local elites (i.e. dukes, princes,

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146 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: IMMUNITY OF FOREIGN STATE FROM JURISDICTION TO ADJUDICATE: THE BASIC RULE § 451 (1987).

147 *Id.*

148 *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: SOURCES OF INTERNATIONAL LAW § 102(2) (1987) (explaining that "[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation"). Customary international law is evidenced by state practice, supported by *opinio juris*, as well as what other interest groups are communicating about their understanding of international law. In the absence of domestic statutes to the contrary, persistent objection, or treaty agreements, states are obligated to adhere to customary international law. *See also* Statute of the International Court of Justice, June 26, 1945, art. 38, 33 U.N.T.S. 993.

149 In fact, a legal fiction was developed to treat sovereigns as not actually being physically present in the foreign state while visiting it. *See* Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 132 (1812) (discussing arguments by U.S. Attorney General Pinkney in favor of dismissing the case on the basis of France's sovereign immunity, including that "the rights of a foreign sovereign cannot be submitted to a judicial tribunal. He is supposed to be out of the country, although he may happen to be within it").

150 *See* Benjamin Straumann, *The Peace of Westphalia (1648) as a Secular Constitution*, at *13, Constellations, Vol. 15, No. 2, June 2008, INST. FOR INT'L L. AND J. Working Paper No. 2007/07, *available at* http://www.iilj.org/aboutus/documents/Straumann.Westphalia.pdf.

> kings) would now exercise secular sovereign authority over the lands and territories over which they could claim authority and control.[151]

But if sovereigns were to be effectively in control, their authority must not be abrogable. Certainly it could not be waived by the courts of another sovereign.[152]

A. The Absolute Theory

The absolute theory of jurisdictional immunity was famously articulated by Chief Justice Marshall in the case of *Schooner Exchange v. McFaddon*.[153] In the early nineteenth century, American plaintiffs sought to lay claim to a ship which was seized at a U.S. port.[154] The ship belonged to the plaintiffs, but the French Navy, under the command of Napoleon Bonaparte, had seized and commandeered it on the high seas.[155] Justice Marshall, writing for a unanimous Court, held that the French government was entitled to immunity and therefore should retain the vessel.[156] Marshall reasoned that, although the United States had the power to assert judicial jurisdiction over its own territory and over the property and people within it (the territorial principle),[157] that power could be nullified by the jurisdictional immunity of a foreign sovereign:

> This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One

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151 *See* Nagan & Haddad, *Sovereignty, Sovereignty in Theory and Practice, supra* note 34, at 446.

152 *Id.* at 442 (explaining that in medieval Europe it was understood that "[i]n order to discharge the obligation [of a sovereign] to protect, the sovereign needs effective government. To have effective government, its authority must be absolute. It is essential for sovereignty to have certain rights that cannot be tested").

153 11 U.S. (7 Cranch) 116 (1812).

154 *Id.* at 117.

155 *Id.*

156 *Id.*

157 In addition to the universality basis of jurisdiction, international law recognizes four other bases: the objective territorial principle, the protective principle, the nationality principle, and the passive personality principle. *See* United States v. Usama Bin Laden, 92 F. Supp. 2d 189, 195 (S.D.N.Y. 2000).

> sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or 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.
>
> This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to wave the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.[158]

There were no exceptions to the rule of immunity articulated by Marshall, hence the rule was absolute. It may be that Justice Marshall, who had been Secretary of State[159] and was therefore familiar with interstate practices, understood that the recognition of sovereign immunity for foreign states was also a confident assertion of American sovereignty—at a time when the security of the United States was still precarious.[160]

There were practical as well as theoretical groundings for the rule of immunity. Comity and reciprocal treatment meant sovereigns were hesitant to assert jurisdiction over other sovereigns.[161] As sovereign kings gave way to the sovereign nation-state, sovereign immunity was transferred to the new body politic, and considerations of foreign policy and domestic protection justified applying the rule of immunity to the nation-state.[162] Indeed, as McDougal noted in his compelling critique of

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158 *The Schooner Exchange*, 11 U.S. (7 Cranch) at 137 (1812).

159 *See generally,* JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION (1996) (discussing, in part, Justice Marshall's influence as Secretary of State, before his term as Chief Justice of the Supreme Court).

160 *Id.* (detailing the instability of the relatively new nation).

161 *See* Hersch Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220, 220-21 (1951) [hereinafter Lauterpacht, *The Problem of Jurisdictional Immunities*].

162 *Id.*

jurisdictional immunity, "A world largely organized by the institutions of the nation-state could scarcely aspire toward even minimum order in the absence of such reciprocal honoring and protection."[163] Asserting jurisdiction over another state could have a major impact on states' foreign relations.[164] In the 1849 decision *Spanish Government v. Lambege et Pujol,* the Supreme Court of France explained that:

> The reciprocal independence of states is one of the most universally respected principles of international law, and it follows as a result therefrom that a government cannot be subjected to the jurisdiction of another against its will, and that the right of jurisdiction of one government over litigation arising from its own acts is a right inherent to its sovereignty that another government cannot seize without impairing their mutual relations.[165]

A British court echoed this sentiment in *The Parlement Belge* case decided in 1880, where it said,

> As a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign . . . .[166]

These cases reflect the traditional notion of absolute jurisdictional independence and state sovereignty.[167] But even in Marshall's time, the absolute theory was not universally accepted.[168] Additionally, as the world became more integrated, absolute immunity increasingly seemed archaic without

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163 McDougal, *Foreign Sovereign Immunities Act, supra* note 144, at 3.

164 *See generally*, Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1 (1991).

165 JOSEPH M. SWEENEY, U.S. DEP'T OF STATE, THE INTERNATIONAL LAW OF SOVEREIGN IMMUNITY, POLICY RESEARCH STUDY 20 (1963) (quoting Government of Spain v. Lambege et Pujol, Casaux, France. Court of Cassation, January 22, 1849, Sirey (1849), I, 81).

166 *Id.* (quoting The Parlement Belge, 5 P.O. 197, 217 (1879)).

167 *See* Finke, *supra* note 3, at 858-60 (describing the difference between absolute and restrictive immunity).

168 *Id.* at 858.

qualification. McDougal noted, "The notion of an absolute sovereign immunity is recognized to hark back to a time when personal sovereigns were indeed above the law within their own States, and a rational conception of State immunity is seen to have no deeper roots than the reciprocal interests of States in preventing interference with each other's basic governmental activities."[169]

B. Changing Expectations: The Restrictive Theory

Judicially, there was an important nineteenth century effort to provide a restriction on the absolute nature of sovereign immunity. The *Charkieh* case of 1873 involved a vessel owned by the Khedive of Egypt that was being used as a merchant trading vessel.[170] This trading vessel was involved in a collision in England, on the River Thames. Sir Robert Phillimore, the High Court of Admiralty judge hearing the case, presented the problem of the necessity of a restricted view of sovereign immunity as follows:

> No principle of international law, and no decided case, and no dictum of jurists of which I am aware, has gone so far as to authorize a sovereign prince to assume the character of a trader, when it is for his benefit; and when he incurs an obligation to a private subject to throw off, if I may so speak, his disguise, and appear as a sovereign, claiming for his own benefit, and to the injury of a private person, for the first time, all the attributes of his character .... Assuming the privilege to exist, it has been waived with reference to this ship by the conduct of the person who claims it."[171]

Phillimore recognized that under color of sovereignty there may be a multitude of activities, not all of which should be covered by the mantle of sovereign immunity. This of course generated an analysis of: the kind of activity, the participants in that activity, and whether the activity had the essential character of the public orientation of sovereign competence. This analysis did not solve all the problems of sovereign functions that fell inside or

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169 McDougal, *Foreign Sovereign Immunities Act, supra* note 144, at 11.

170 The Charkieh, 4 ADMR. & ECC. 59, 59 (1873), *available at* http://unisetca.ipower.com/other/cs2/LR4AE59.html.

171 *Id.* at 99-100.

outside the reach of sovereign immunity, but it posed questions requiring more careful consideration before conclusions could be reached about whether immunity was appropriate. One should keep in mind that Phillimore's concerns did not necessarily dispose of the essential strength of the principle articulated in *Schooner Exchange v. McFaddon*, *par in parem jurisdictionem non habet*, but only placed it in a context of actual interactions between states.

Increasing commercial interaction between states, such as that which occurred in *Charkieh*, changed the fundamental nature of jurisdictional immunity of states and led to the first categorical exception to the rule: the commercial exception. The emergence of the commercial exception to sovereign immunity was a product of globalization and an increase in cross-border movements of goods, services, communication, people, and capital. The essential question courts posed was whether the acts of a state in question were the traditional public acts of sovereigns or those private acts generally performed by individuals alone.[172] In 1903, the Supreme Court of Belgium gave an early explanation of the distinction between public and commercial acts in the case, *Societe Anonyme des Chemins de Fer Liegeois Luxembourgeois v. the Netherlands*:

> Sovereignty is involved only when political acts are accomplished by the state . . . . However, the state is not bound to confine itself to a political role, and can, for the needs of the collectivity, buy, own, contract, become creditor or debtor, and engage in commerce . . . . In the discharge of these functions, the state is not acting as public power, but does what private persons do, and as such, is acting in a civil and private capacity. When after bargaining on a footing of equality with a person or incurring a responsibility in no way connected with the political order, the state is drawn in litigation, the litigation concerns a civil right, within the sole jurisdiction of the courts . . . and the foreign state as civil person is like any other foreign person amendable to the Belgian courts.[173]

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172 *See, e.g.*, SWEENEY, *supra* note 165, at 20-21 (noting the ability of a state to act outside of its political role in a private capacity).

173 *Id.* at 20-21 (quoting Societe Anonyme des Chemins de Fer Liegeois Luxembourgeois v. Netherlands, Pas. 1, 294, 301 (1903)).

In fact, the Brussels Convention of 1926 was an early treaty restricting sovereign immunity.[174] It required state-owned vessels operating for commercial purposes to subject themselves to local jurisdiction as if they were owned by private individuals.[175] Thus, early experience indicated that when states engage in ordinary transactions they are really no different than ordinary private actors. As a consequence, normal law is appropriate to adjudicate rights and obligations. These experiences, however, do represent the emergence of changed expectations about the reach of the rule of law between public actors and private citizens.

Some states, like the United States, were much slower to recognize the commerce exception to immunity. It was not until the Cold War that the United States finally embraced the exception.[176] In addition to increased interstate trade, the acceptance of the commercial exception was hastened by the communist practice of attributing all commercial activity to the state.[177] In practice, states in the socialist bloc of nations monopolized the economic orderings within their states and were involved in trading relations with private sector actors in the capitalist world.[178] But, because the state owned the means of production, these relationships implied a vastly expanded meaning of sovereign competence. For example, a state might invoke sovereign immunity if it decided not to perform on an ordinary contractual obligation. Since these public actors were effectively behaving like private sector entrepreneurs, the problem became whether a state could use the theory of sovereign immunity to shield itself from domestic courts of a foreign state for

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174 *Id.* at 49 (quoting 1926 International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Vessels, Hudson, *Int. Legis.*, iii, no. 154, Art. II.).

175 *See* BROWNLIE, *supra* note 32, at 329.

176 *See* SWEENEY, *supra* note 166, at 21-22. *But see* Berizzi Bros. Co. v. Pesaro, 271 U.S. 562 (1926) (examining absolute rule of immunity, when it came under attack by a lower court in the 1920s).

177 *Id.*

178 *See generally*, Jack Tate, *Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*, 26 DEP'T ST. BULL. 984 (1952), *reprinted in* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711-15 (1976) [hereinafter Tate Letter].

consequences arising out of ordinary commercial activities. Writing during the Cold War, McDougal noted:

> The increasing entry of States into economic and other activities, not indispensable to government, and still performed in many States by private parties, along with continued insistence upon State immunity, has introduced an element of lawlessness into transactional activities and, hence, of arbitrariness and unfairness to private parties in deprivation both of their reasonable expectations and of recourse to law for the protection of such expectations.[179]

Attempts were made to articulate policy reasons for a more limited form of jurisdictional immunity. In U.S. practice it became appropriate to do so through an instrument known as "the Tate Letter," which was brought to the attention of the courts.[180] The U.S. change in policy was explained in the letter of 1952, where the Acting Legal Advisor for the State Department sent a memorandum to the Attorney General explaining the Department's desire to restrict immunity to traditional acts of states—what is generally called the restrictive theory of jurisdictional immunity.[181] The Tate Letter states:

> The Department of State has for some time had under consideration the question whether the practice of the Government in granting immunity from suit to foreign governments made parties defendant in the courts of the United States without their consent should not be changed. The Department has now reached the conclusion that such immunity should no longer be granted in certain types of cases . . . . The reasons which obviously motivate state trading countries in adhering to the theory with perhaps increasing rigidity are most persuasive that the United States should change its policy. Furthermore, the granting of sovereign immunity to foreign governments in the courts of the United States is most inconsistent with the action of the Government of the United States in subjecting itself to suit in these same courts in both contract and tort and with its long established policy of not claiming immunity in foreign jurisdictions for its merchant

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179 McDougal, *Foreign Sovereign Immunities Act, supra* note 144, at 11.

180 Tate Letter, *supra* note 178.

181 *Id.*

> vessels. Finally, the Department feels that 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. For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.[182]

The restrictive theory is a bifurcation of immunity between commercial and non-commercial activities, as was expressed in the Tate Letter. It is also known as the *acta jure imperii–acta jure gestionis* distinction.[183] Under the traditional restrictive theory, when states engaged in official, sovereign activities (*acta jure imperii*) they were afforded immunity; when states engaged in activities of a private nature (*acta jure gestionis*), such as with commercial activities, they were denied immunity.[184]

The Tate Letter neither is nor was international law by itself. However, it endorsed a trend in legal expectations in the form of evidence brought to the attention of the court as to whether the executive branch believes, as a political matter, that the immunity of a state should be honored in the courts.[185] The Tate Letter created expectations about the restrictive reach of sovereign immunity. It was a clear communication about what the United States understood to be the developing state of an international law doctrine. Following the Tate Letter, neither party to litigation in U.S. courts could assume that immunity was absolute and, therefore, each party had to expect that the Tate Letter might generate restrictive expectations about the reach of sovereign immunity.[186] Further, they had to assume that U.S. practice in

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182 *Id.* American courts were not obliged to follow the recommendations of the State Department; however, the judiciary generally defers to the executive in matters of international relations. *See, e.g., Alfred Dunhill of London, Inc.*, 425 U.S. at 712-13 (embracing the restrictive theory of immunity).

183 *See generally*, Sienho Yee, *Foreign Sovereign Immunities, Acta Jure Imperii and Acta Jure Gestionis: A Recent Exposition from the Canadian Supreme Court*, 2 CHINESE J. INT'L L. 649 (2003) (demonstrating the importance of the distinction between acts of government and acts of commercial entities).

184 *See* Humes-Schulz, *supra* note 91, at 109.

185 Tate Letter, *supra* note 178.

186 *Alfred Dunhill of London, Inc.*, 425 U.S. at 711.

using the letter would, in general, aspire to be consistent. Unfortunately, while the Tate Letter articulated the policy reasons for replacing the absolute theory with the restrictive theory of jurisdictional immunity, it offered little indication as to how restrictive immunity was to be applied.[187] McDougal noted, for example, that the Tate Letter "offered no criteria or procedures for distinguishing public acts from private acts, gave no instructions as to whether the courts or the Department of State was to make such determinations, [and] failed to set forth a viable procedure for serving a foreign State or instrumentality."[188] Nevertheless, the Tate letter was highly influential in U.S. practice before the courts,[189] and states began to recognize the commercial exception adopted by the United States. The restrictive rule of sovereign immunity, based on the *acta jure imperii–acta jure gestionis* distinction, gained traction in the world community.[190]

At the very minimum, the Tate Letter established a breach in the doctrine of jurisdictional immunity. Although incomplete, the Tate Letter also reflected an aspect of international law-making.[191] The letter established the element of a prescriptive content that permitted the limitation on sovereign immunity, which was honored by the judiciary. Additionally, the letter was a strong communication from an important nation-state indicating acceptance of the idea of a limitation on sovereign immunity,

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187 Tate Letter, *supra* note 178.

188 McDougal, *Foreign Sovereign Immunities Act*, *supra* note 144, at 9.

189 *See Alfred Dunhill of London, Inc.*, 425 U.S. at 682 (discussing four justices' support for the restrictive theory of immunity endorsed by the Tate Letter).

190 Germany, for example, took this position in 1963. *See* 16 ENTSHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 27, *translated in* 45 I.L.R. 57; the United Kingdom did not make the departure until 1977, in the case of *Trendtex Trading Corp. v. Central Bank of Nigeria*, 2 W.L.R. 356 (1977); the remaining communist states still adhere to an absolute theory of immunity. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: IMMUNITY OF FOREIGN STATE FROM JURISDICTION TO ADJUDICATE: THE BASIC RULE § 451 (1987) ("Communist states, which carry on substantial commercial activity through state trading companies, have often claimed absolute sovereign immunity with respect to their own activities. The Soviet Union has regarded the restrictive view of sovereign immunity as a 'device invented by bourgeois states for the specific purpose of wrecking the monopoly over foreign trade of the U.S.S.R. and subjecting the Soviet economy to the economies of the capitalist states.'"); *see also* Princz v. Federal Republic of Germany, 26 F.3d 1166, 1169 (D.C. Cir. 1994).

191 Tate Letter, *supra* note 178.

under certain circumstances, in its domestic courts. In short, the Tate Letter initiated a weak form of international expectation creation with regard to the prescriptive content of limits on jurisdictional immunity. The Tate Letter contributed to the emergence of a rule of international custom broadening the scope and character of restrictions on sovereign immunity.

As the Tate Letter noted, states' refusal to grant immunity to other states for commercial activities was consistent with domestic policy voluntarily waiving a state's own immunity for certain acts.[192] The U.S. legislature did this via the Federal Tort Claims Act.[193] Following the Tate Letter, the decision of whether to grant a foreign state immunity was largely an executive decision. The State Department advised the courts on a case-by-case basis whether immunity should be granted.[194] In practice, it was often difficult for the executive to determine, on the basis of principled objectivity, whether a given activity was *acta jure gestionis* or not due to the political considerations weighing upon the branch.[195] This produced inconsistent treatment of states in similar circumstances.[196] As McDougal noted, this "culminated in an almost complete subservience by the courts to the executive, permitting a high degree of politicization of particular

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192 *See id.* Immunity is a defense that must be raised by the state contesting jurisdiction. States are always free to refrain from raising the objection. *See* Finke, *supra* note 3, at 864 ("The very foundation of sovereign immunity—the sovereignty of the foreign state—obviously allows a state to waive its immunity.").

193 Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1982) (waiving immunity for the state in suits "for . . . personal injury . . . caused by the negligent or wrongful act or omission of any [U.S. Government] employee while acting within the scope of his office or employment"); *see also,* Tucker Act, 28 U.S.C. § 1346(a)(2) (1982).

194 *See Princz*, 26 F.3d at 1169 (citing the history of the U.S. application of immunity in *Jackson v. People's Republic of China,* 794 F.2d 1490, 1493 (11th Cir. 1986)).

195 Several approaches to determine whether or not an act was commercial were put forward. One analytical approach was to determine the purpose of the government's acts, while another was to examine the nature of the acts. In practice, an *ad hoc* approach was taken, and the executive struggled with consistency. *See e.g.*, Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

196 *See e.g.*, Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) (leaving room for inconsistent results with its affirmation that sovereign immunity is not absolute).

decisions."[197] To remedy the ambiguities and inconsistencies of the Tate Letter system, Congress reacted and passed the Foreign Sovereign Immunities Act of 1976 (FSIA), codifying the restrictive theory of immunity and putting the power of determining when to grant immunity to foreign states squarely into the hands of the judiciary.[198] The act cleared up many uncertainties, but the basic structure of the act can be perplexing.[199]

The emergence of the *acta jure imperii–acta jure gestionis* doctrine was the first waiver of absolute jurisdictional immunity to crystallize into customary international law. It cracked the edifice of immunity and demonstrated that other important international and national interests, such as fairness, could trump jurisdictional immunity. Other exceptions have emerged,[200] and the question becomes whether *jus cogens* violations constitute another type of exception.

VI. Domestic Statutes Governing Jurisdictional Immunity

Sovereign immunity is a product of treaty law, customary international law, and domestic law. Section 38 of the Statute of the International Court of Justice lists "the general principles of law recognized by civilized nations" as a source of international law.[201] This has been understood to include municipal laws,[202] so

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197 McDougal, *Foreign Sovereign Immunities Act*, *supra* note 144, at 7.

198 *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1604; *see also* Commercial Bank of Kuwait v. Rafidan Bank, 15 F.3d 238, 241 (2d Cir. 1994) ("The 'commercial activity' exception of the FSIA withdraws immunity in cases involving essentially private commercial activities of foreign sovereigns that have an impact within the United States. This reflects the 'restrictive' theory of sovereign immunity that underlies the FSIA."); Finke, *supra* note 3, at 859 (noting that even today, internationally, "the distinction between private and public acts is applied so divergently that it is hard to concede more than a very abstract conformity in state practice").

199 McDougal, *Foreign Sovereign Immunities Act*, *supra* note 144, at 13-14 (describing the act as "a maze, or pinball machine, constituted by a complex of interrelated but ambiguous and highly technical concepts and formulations").

200 *See generally*, *infra* Part VI.A (discussing the tort exception to sovereign immunity).

201 Statute of the International Court of Justice, June 26, 1945, art. 38, 33 U.N.T.S. 993.

202 *See* SHAW, *supra* note 7, at 92-99.

these domestic statutes also feed into the discussion of the nature of jurisdictional immunity in international law. In short, they are creating expectations not only for the nation-state, but also for the international community.

A. The U.S. Foreign Sovereign Immunities Act

In the United States, the FSIA is the primary statute governing the determination of whether an American court will afford a foreign state immunity.[203] The FSIA contains a commercial exception.[204] In testimony before the House of Representatives, the Legal Adviser to the U.S. State Department argued that when "a foreign state enters the marketplace or when it acts as a private party, there is no justification in modern international law for allowing the foreign state to avoid the economic costs of the agreements which it may breach or the accidents which it may cause."[205] This principle was applied to non-commercial activities in the FSIA as well, further elasticizing jurisdictional immunity.[206] For purposes of this article, the most important exceptions are those of tort and waiver, found in FSIA § 1605(a)(5) and §1605(a)(1) respectively. The tort provision explains that immunity will be denied when

> money damages are sought against a foreign state for *personal injury or death* . . . occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope

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203 *See* 28 U.S.C. § 1604; Republic of Austria v. Altmann, 541 U.S. 677 (2004) (noting that the FSIA applies retroactively); Seanna Balfe, *International Law–Retroactive Application of Foreign Sovereign Immunities Act Allows Claims for Pre-Enactment Conduct–*Austria v. Altmann, *124 S.Ct. 2240 (2004)*, 28 SUFFOLK TRANSNAT'L L. REV. 359, 359-60 (2005).

204 28 U.S.C. § 1605(a)(2).

205 *Hearings on H.R. 11315 before the Subcommittee on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong., 2d Sess. 24, 26-27 (1976) (testimony of the Legal Adviser of the U.S. Dep't of State on the Foreign Sovereign Immunities Act of 1976) [hereinafter Legal Adviser Testimony].

206 28 U.S.C. § 1605(a)(1) (finding and exception where a state explicitly or implicitly waives its immunity); 28 U.S.C. § 1605(a)(3) (excepting property disputes); 28 U.S.C. § 1605(a)(4) (excepting disputes of immovable property in the United States); 28 U.S.C. § 1605(a)(5) (excepting certain torts, discussed *infra*); 28 U.S.C. § 1605(a)(6) (excepting arbitration proceedings)).

of his office or employment. [emphasis added][207]

As one writer noted, the tort exception essentially obliterates the *acta jure imperii-acta jure gestionis* distinction.[208] "Discretionary" functions of States are not subject to the tort exception.[209] However, U.S. courts have found that assassinations directed by foreign governments inside the United States are not discretionary state actions, because assassination is never a legitimate state activity.[210] At first glance, § 1605(a)(5) seems to cover human rights violations.[211] Genocide, slavery, and the other *jus cogens* norms are never legitimate actions for a state to engage in, so could these activities also fall under the tort exception?[212] The U.S. Supreme Court interpreted the FSIA tort exception narrowly in *Argentine Republic v. Amerada Hess*, finding that "Congress' primary purpose in enacting § 1605(a)(5) was to eliminate a foreign State's immunity for traffic accidents . . . ."[213]

The narrow construction of FSIA's tort exception is repudiation of one of the most important interpretive principles of

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207 *Id.* at § 1605(a)(5).

208 *See* Sergio Saba, *Personal Injuries and Damage to Property*, *in* STATE PRACTICE REGARDING STATE IMMUNITIES 99 (Hafner, Kohen, & Breau eds., 2006).

209 28 U.S.C. § 1605(a)(5) (explaining immunity is not waived for "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused").

210 *See* Letelier v. Republic of Chile, 488 F. Supp. 665, 673 (D.D.C. 1980); *see also,* Liu v. Republic of China, 642 F. Supp. 297, 305 (N.D. Cal. 1986) (explaining assassination offended immunity because it was "clearly contrary to the precepts of humanity as recognized in both national and international law").

211 Even if there was little risk of foreign states committing human rights abuses in the United States, this is still an important exception, because it bolsters efforts to show that state practice recognizes a tort exception to jurisdictional immunity. U.S. forces are, of course, able to commit human rights abuses in the United States.

212 *See* Alexander Orakhelashvili, *State Immunity and International Public Order*, 45 GER. Y.B. INT'L L. 227, 236 (2002) (arguing that international crimes must be considered as acts which fall outside the legitimate purview of the state).

213 Argentine Republic v. Amerada Hess, 488 U.S. 428, 439-40 (1989). In fact, the year before this case was heard, a Georgian diplomat hit and killed a 17-year-old girl in Washington, D.C., while speeding and driving under the influence of alcohol. *See* Steven Lee Myers, *Envoy Named in Fatal Crash Surrenders to Police*, N.Y. TIMES, Feb. 21, 1997, at A23; *see also* Kevin M. Gray, *Envoy is Sentenced to Prison in Fatal Crash*, N.Y. TIMES, Dec. 20, 1997, at A10. Following negotiations between the United States and the Republic of Georgia, Georgia waived immunity for the diplomat, and he was tried and sentenced to prison. Myers, *supra*; Gray, *supra*.

international law in the domestic courts of the United States. In *The Charming Betsy*, Justice Marshall established the basic canon of interpretation that has been followed by generations of American lawyers:[214] when a court is confronted with two possible interpretations of an American statute, one which may transgress international law and one which affirms the rule of international law, the court must choose the rule or law that affirms or strengthens the international law prescription.[215] Belief that the tort exception should be confined to a few traffic accident cases is incompatible with the idea that a legal wrong creates justifiable expectations of a legal remedy. Furthermore, without compelling circumstances, the doors of legal justice should not be barred to litigants with legal expectations that ordinary rights and duties shall be secured by law. Indeed, it is astonishing that ordinary rights and duties in the context of contractual law receive the protections of ordinary justice, but the victims of wrongs of a tortious nature are largely excluded by this construction of the statute. Although the tort exception was construed narrowly by the Supreme Court,[216] the existence of a tort exception itself is a further communication by a dominant power that immunity will be waived for certain activities—even for activities that have nothing to do with commercial activity.

The waiver exception of the FSIA is uncontroversial in the sense that states can always voluntarily waive immunity.[217] However, the implicit waiver is controversial and therefore fertile ground for dispute. The FSIA contains a waiver exception, which provides that a state shall not be immune from the jurisdiction of the United States when that state "has waived its immunity either explicitly or by implication."[218] A state may implicitly waive its immunity by treaty, diplomatic communication, or submission to the proceedings of a state court;[219] however, "a waiver of

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214 Murray v. The Charming Betsy, 6. U.S. (2 Cranch) 64 (1804).

215 *Id.*; *see generally* Frederick Leiner, The Charming Betsy *and the Marshal Court*, 45 AM. J. LEGAL HIST. 1, 1 (2001).

216 *Amerada Hess*, 488 U.S. at 439-40.

217 *See* Finke, *supra* note 3, at 864 (discussing the ability of a state to waive its own immunity).

218 28 U.S.C. § 1605(a)(1).

219 *See* BROWNLIE, *supra* note 32, at 340.

immunity is not necessarily a consent to jurisdiction . . . . [A] base of jurisdiction must be separately established . . . ."[220] In an often cited case, *Ipitrade International v. Federal Republic of Nigeria,* the D.C. Circuit Court ruled that Nigeria had implicitly consented to waive its immunity when it entered into a contract for cement containing an arbitration clause, because otherwise the arbitration clause would have had no effect.[221] Implicit waiver is not embraced in most other states, but the signal from the United States is strong. Some legal writers have argued that the implicit waiver exception in the FSIA should apply to *jus cogens* violations.[222] The implicit waiver idea further communicates a strong authority signal about the limits of sovereign immunity.

More controversial than implicit waiver is the Antiterrorism and Effective Death Penalty Act of 1996, which amended the FSIA to allow individuals to sue state "sponsors" of terrorism in U.S. courts, if those states are certified as such by the U.S. Government.[223] The acts covered include "torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . [used] by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency."[224] This legislation expands the range of compensable wrongs which may be litigated in the domestic courts of the United States. In this context, Congress has delivered a clear repudiation of the narrow and grudging construction of the tort exception in *Amerada Hess.*[225] These additional changes wed the principles of universality and *jus cogens*, albeit with procedural constraints and for a certain class of

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220 McDougal, *Foreign Sovereign Immunities Act, supra* note 144, at 29.

221 Ipitrade Int'l v. Federal Republic of Nigeria, 465 F. Supp. 824, 826-27 (D.D.C. 1978).

222 *See* Belsky et al., *supra* note 42, at 394-96. *But see* Christian Tomuschat, *The International Law of State Immunity and Its Development by National Institutions*, 44 VAND. J. TRANSNAT'L L. 1105, 1123 (2011) (disagreeing with Belsky, and arguing that "[w]aiver is a deliberate manifestation of will to accept specific legal consequences"). Professor Tomuschat was a co-agent for the Federal Republic of Germany in *Jurisdictional Immunities of the State*, before the ICJ. *Id.*

223 *See* Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §§ 1605, 1610 (2006).

224 28 U.S.C. § 1605A(a)(1) (2006).

225 *See* Argentine Republic v. Amerada Hess, 488 U.S. 428 (1989).

wrongs.

B. Other Countries' Sovereign Immunities Acts

The United Kingdom,[226] South Africa,[227] Australia,[228] Singapore,[229] Argentina,[230] Israel,[231] Japan,[232] Pakistan,[233] and Canada[234] have passed similar legislation to the FSIA.[235] Like the United States, the United Kingdom, in the State Immunity Act (SIA), contains a tort exception.[236] However, the SIA explicitly provides that acts (or omissions) of armed forces do not fall within the scope of the tort exception.[237] The SIA also contains a waiver provision, but U.K. courts require, as Brownlie noted, "a genuine and unequivocal submission in the fact of the court: waiver was not constituted either by a prior contract to submit to the jurisdiction or by an arbitration clause in a contract,"[238] as was the outcome in the Nigeria cement case.[239] The SIA was enacted in

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226 *See* State Immunity Act, 1978, c. 33 (Eng.).

227 *See* Foreign States Immunities Act 87 of 1981 (S. Afr.).

228 *See Foreign States Immunities Act 1985* as amended (Cth) (Austl.).

229 *See* Singapore State Immunity Act, (Chapter 313).

230 *See* Jurisdictional Immunity of Foreign States in the Argentine Courts, Law No. (24.488) 1995 (Arg.) (codifying the restrictive approach).

231 *See* Foreign State Immunity Law, 5769-2008 (Isr.).

232 *See* Act on the Civil Jurisdiction of Japan with Respect to a Foreign State, Law No. 24 of 2009 (Japan).

233 *See* Pakistan State Immunity Ordinance, 1981, *reprinted in* ERNEST BANKAS, THE STATE IMMUNITY CONTROVERSY IN INTERNATIONAL LAW: PRIVATE SUITS AGAINST SOVEREIGN STATES IN DOMESTIC COURTS 449 (2005).

234 *See* State Immunity Act 1982, *reprinted in* 21 I.L.M. 798 (1982).

235 *See* Finke, *supra* note 3, at 858 ("States that for whatever reason have forgone the opportunity to pass national legislation rely on international custom to determine the scope of immunity which foreign states might claim. In doing so, most states—or, to be more precise, their courts—assume that sovereign immunity serves as the basic rule until the existence of an exception has been proven.").

236 State Immunity Act, 1978, c. 33 (Eng.) ("A State is not immune as respects proceedings in respect of—(a) death or personal injury; or (b) damage to or loss of tangible property, caused by an act or omission in the United Kingdom.").

237 *Id.* § 16(2) ("This Part of this Act does not apply to proceedings relating to anything done by or in relation to the armed forces of a State while present in the United Kingdom and, in particular, has effect subject to the Visiting Forces Act 1952.").

238 BROWNLIE, *supra* note 32, at 340.

239 Ipitrade Int'l v. Fed. Republic of Nigeria, 465 F. Supp. 824 (D.D.C. 1978).

order to conform U.K. law with the European Convention on State Immunity.[240] Like the FSIA, the SIA begins with the assumption that immunity applies and then lists a series of exceptions.[241] This is consistent with most statutes' application of immunity, but as will be discussed in Part X, this may be the wrong way to conceptually approach the immunity question.

The FSIA and SIA may appear to be jurisdictional statutes from U.S. and U.K. perspectives, but from the defending states' perspective, these domestic statutes alter the substantive nature of sovereignty. As one writer has pointed out, "the forum state, not the foreign state defendant, enjoys ultimate authority, by operation of its domestic legal system, to modify a foreign state's privileges of immunity."[242] Lord Millet, however, described jurisdictional immunity as flowing from the very concept of sovereignty itself.[243] In any case, these statutes, particularly the existence of tort and waiver exceptions, serve as further evidence that states are communicating an expectation about immunity that is restricted in the interest of fairness and justice.

VII. Conventions on Jurisdictional Immunities of States

The first attempt to create an international convention governing sovereign immunity was in the late nineteenth century.[244] In recent decades, several treaty documents have emerged that attempt to codify the standards of application of

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240 BROWNLIE, *supra* note 32, at 337.

241 *See* State Immunity Act, 1978, c. 33 (Eng.).

242 Caplan, *supra* note 2, at 744.

243 *See generally* Holland v. Lampen-Wolfe, [2000] 1 W.L.R. 1573 (rooting the immunity determination in sovereign nature of activity). We are uncertain what Lord Millet means by "the sovereignty of the United Kingdom itself"; it is unclear whether his Lordship has noted the change in the concept of sovereignty in modern international law. *See id.* Under modern international law sovereignty is rooted in the perspectives of the people themselves. *See supra* Part III.A. Moreover, human rights and humanitarian values have been developed specifically to protect "We the peoples." U.N. Charter Preamble. Thus, the assertion by a stakeholder in the sovereignty of a nation that its sovereignty be used to protect that stakeholders' expectations in the protections of humanitarianism and fundamental human rights represent the most important integration of human rights, humanitarianism, and sovereignty under the U.N. Charter.

244 *See* Rep. of the Int'l Law Comm'n, 32nd sess, May 5-July 25, 1980, U.N. Doc. A/35/10 [hereinafter I.L.C. Rep., 32nd sess]

immunity between states.[245] Other conventions are in the drafting phase.[246] All have met with a lukewarm reception and often confuse emerging issues more often than they clarify or offer guidance on them.[247] Moreover, the drafting process has been dominated by state representatives who possibly see themselves in a position adverse to the imposition of sovereign responsibility and accountability under international law.[248]

A. The U.N. Convention on Jurisdictional Immunities of States

In 2004, the U.N. General Assembly adopted the U.N. Convention on Jurisdictional Immunities of States and their Property (U.N. Convention).[249] The U.N. Convention seeks to harmonize states' treatment of immunity. It is not yet in force because it has not yet been adopted by the requisite number of states to bring the Convention into effect.[250] Though it has only been ratified by a handful of states,[251] it purports to express already existing customary rules of international law.[252] (This endorses the view that emerging custom is law supported by authority and controlling efficacy.) This would bind states that are not parties to the U.N. Convention, at least to some of its provisions.[253] The U.N. Convention is a product of twenty-seven

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245 *See* Finke, *supra* note 3, at 857.

246 *Id.*

247 *See generally id.* at 871 (explaining practice by States has continually been inconsistent even up to 2009).

248 *See generally* I.L.C. Rep., 32nd sess, *supra* note 244 (explaining that state representatives believe necessity may require a state to violate international obligations in some instances).

249 United Nations Convention on the Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, Annex, U.N.Doc.A/RES/59/38 (Dec. 2, 2004) [hereinafter, U.N. Convention on Jurisdictional Immunity], *available at* http://www.unhcr.org/refworld/docid/4280737b4.html (convention not yet in force).

250 *Id.* art. 30(2) (requiring thirty states to ratify the convention before its entry into force).

251 *See* U.N. Convention on Jurisdictional Immunity of States and Their Property, New York, USA, Dec. 2, 2004, U.N. Doc A/59/508, *available at* http://treaties.un.org/doc/publication/mtdsg/volume%20i/chapter%20iii/iii-13.en.pdf.

252 U.N. Convention on Jurisdictional Immunity, *supra* note 249, Preamble.

253 *See* I.L.C. Rep., 32nd sess, *supra* note 244 (stating "the preceding review of

years of labor by the respected International Law Commission (ILC).[254] The Convention's preamble provides that "the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law."[255] It may be true that all states recognize jurisdictional immunity, but they do so only abstractly: there is "substantial disagreement on detail and substance."[256] Article 5 of the U.N. Convention begins by providing, "A State enjoys immunity, in respect to itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention."[257] The U.N. Convention then provides a number of exceptions to jurisdictional immunity,[258] most of which, like the commercial activities

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historical and legal developments of the rule of State immunity appears to furnish ample proof of the foundations of the rule as a general norm of contemporary international law").

254 In 1977, the U.N. General Assembly recommended to the I.L.C. that it take up the study of jurisdictional immunity of states and their property with the aim of drafting a convention developing and codifying that law. *See* G.A. Res. 59/38, U.N. Doc. A/RES/59/38 (Dec. 2, 2004); *see also,* YbILC 1991, Vol. II, Part Two, p. 13. The I.L.C. was created by the U.N. General Assembly in 1948. It is presently comprised of a group of 34 distinguished experts in international law who are charged with drafting proposals for international conventions. For more information on the I.L.C., see http://www.un.org/law/ilc/.

255 U.N. Convention on Jurisdictional Immunity, *supra* note 249, Preamble.

256 Finke, *supra* note 3, at 871. Finke notes that this is not a new revelation. Lauterpacht argued in 1951 that state practice on jurisdictional immunity was too inconsistent to constitute customary law. *See id.* at 870 (referencing Lauterpacht, *The Problem of Jurisdictional Immunities*, *supra* note 161, at 227-28).

257 U.N. Convention on Jurisdictional Immunity, *supra* note 249, art. 5.

258 *See id.* art. 7, (providing that a state cannot invoke immunity if it has "expressly consented to the exercise of jurisdiction" by international agreement, contract, or declaration); *id.* art. 8 (providing that a state cannot claim immunity if it has initiated proceedings or intervened in proceedings in another state's courts); *id.* art. 9 (providing that a State cannot claim immunity for counterclaims arising out of the same facts or relationship as a principle claim); *id.* art. 10 (reiterating the commercial exception); *id.* art. 11 (providing that immunity cannot be claimed in litigation involving certain labor contracts); *id.* art. 12 (containing the tort exception); *id.* art. 13 (containing some property related exceptions, such as when there is immovable property in the forum state's territory); *id.* art. 14 (providing that a state cannot invoke immunity for claims involving intellectual property); *id.* art. 15 (providing that immunity cannot be claimed in where the state wishing to claim immunity has participated in certain international organizations or companies, and a dispute between that organization on the forum state arises); *id.* art. 16 (refering to maritime disputes and states' ownership of ships); *id.* art.

exception,[259] are uncontroversial. Article 12 contains a tort exception which appears very broad in scope. It reads:

> Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury of the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.[260]

ILC commentary notes that the exception to immunity contained in Article 12 "is applicable only to cases or circumstances in which the State concerned would have been liable under the *lex loci delicti commissi* [the law at the place where the tort occurred]."[261] However, "the State is as a rule immune from the jurisdiction of the courts of another State, for this exceptional provision immunity is withheld."[262] This tort exception gives the individuals wrongfully harmed the ability to sue a foreign state in their own domestic courts, provided the tort took place "in whole or in part" in the forum state.[263] The plain language of this article appears to broaden the scope of immunity exceptions to include an individual's suit against a foreign state for human rights violations, such as those that might occur during armed conflict. The Chairman of the *Ad Hoc* Committee introducing its report on the proposed convention to the General Assembly stated, however, that acts or omissions of the armed

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17 (providing that a State cannot claim immunity when it has agreed to submit a commercial matter to arbitration).

259 *Id.* art. 10. If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction. *Id.*

260 *Id.* art. 12.

261 *See* Rep. of the Int'l Law Comm'n, 43d sess, Apr. 29–July19, 1991, ¶ 2, U.N. Doc. A/46/10 (1991) [hereinafter I.L.C. Rep., 43d sess].

262 *Id.*

263 *Id.* ¶ 3.

forces were not covered by the convention.[264]

Article 12 is clearly intended to provide compensation for individuals that otherwise would be barred from suing a state because of jurisdictional immunity. The ICL commentary noted:

> [T]he most convenient court is that of the State where the delict was committed. A court foreign to the scene of the delict might be considered as a *forum non conveniens*. The injured individual would have been without recourse to justice had the State been entitled to invoke its jurisdictional immunity.[265]

There is no language in the U.N. Convention excluding abuses of human rights or *jus cogens*; on the other hand, there is no language expressly including such acts, and one might expect that such a significant development of such a pivotal issue in international law would be made clear.[266] Courts interpreting the tort article of the U.N. Convention have construed it narrowly, even when *jus cogens* violations are in play. For example, Lord Bingham of Cornhill addressed the U.N. Convention in *Jones v. The Kingdom of Saudi Arabia*, and stated:

> [T]he UN Immunity convention of 2004 provides no exception from immunity where civil claims are made based on acts of torture. The Working Group in its 1999 Report makes plain that such an exception was considered, but no such exception was agreed. Despite its embryonic status, this Convention is the most authoritative statement available on the current international understanding of the limits of state immunity in civil cases, and the absence of a torture or jus cogens exception is wholly inimical to the claimants' contention.[267]

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264 U.N. GAOR, 59th Sess., 6th comm., 13th mtg., U.N. Doc. A/C.6/59/SR.13.

265 *See* I.L.C. Rep., 43d sess, *supra* note 261, art. 12(2). It is unclear whether an individual would be required to exhaust remedies available in the offending state before seeking redress in one's own court system as is customary. *See,* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: REMEDIES FOR INJURY TO NATIONALS OF OTHER STATES § 713, cmt. f. (1987) ("[A] state is not required to consider a claim by another state for an injury to its national until that person has exhausted domestic remedies. . . ."). There is an exception to this: The requirement of exhaustion is waived when "such remedies are clearly sham or inadequate, or their application is unreasonably prolonged." *Id.*

266 *See, e.g.*, U.N. Convention on Jurisdictional Immunity, *supra* note 249.

267 Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya [2006] UKHL 26, [2006] 129 I.L.R 713, 727 (U.K.).

In *Jurisdictional Immunities of the State* (discussed *infra* at Part VIII), Germany persuaded the ICJ that the ILC discussed the applicability of Article 12 to human rights abuses caused by military forces in armed conflict—and rejected that argument.[268] The commentary approved by the ILC upon its adoption of the Convention's draft articles in 1991 supported that contention in part, but it also added confusion. The commentary stated:

> The areas of damage envisaged in article 12 are mainly concerned with accidental death or physical injuries to persons or damage to tangible property involved in traffic accidents, such as moving vehicles, motor cycles, locomotives or speedboats. In other words, the article covers most areas of accidents involved in the transport of goods and passengers by rail, road, air or waterways. Essentially, the rule of non-immunity will preclude the possibility of the insurance company hiding behind the cloak of State immunity and evading its liability to the injured individuals.[269]

However, the commentary further articulated, "In addition, the scope of Article 12 is wide enough to also cover intentional physical harm such as assault and battery, malicious damage to property, arson or even homicide, including political assassination."[270] The ILC commentary also expressed some members' reservations on the draft of article 12 for the U.N. Convention because some members felt that the torts encompassed in Article 12 would be more "effectively . . . secured by negotiations through diplomatic channels or by insurance."[271] Interestingly, the final paragraph of the ILC's commentary noted, "Some members expressed reservations about the very broad scope of the article and on the consequences it might have for State responsibility."[272]

Although the ICJ considered in ILC commentary, in *Jurisdictional Immunities of the State*, one scholar has aptly noted

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268 Memorial of Germany, Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), 2008 I.C.J. 143, ¶ 72 (June 12, 2008).

269 *See* I.L.C. Rep., 43d sess, *supra* note 261, art. 12(4) (citing 2 Y.B. Int'l L. Comm'n, 13, U.N. Doc A/54/10; (1991)).

270 *Id.* (referencing *Letelier v. Republic of Chile*, 488 F.Supp. 665 (D.D.C. 1980)).

271 *Id.* art. 12(11).

272 *Id.*

that the authoritative value of the commentary is dubious.[273] Article 31 of the Vienna Convention on the Law of Treaties (VCLT), which is binding on states who are parties to the treaty or bound by it through customary international law,[274] stipulates that a treaty must be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[275] The ordinary meaning of tort is not limited to car accidents. Therefore, relying on ILC commentary for clarification would conflict with another article of the Vienna Convention. VCLT Article 12 explains that preparatory work can be used as a supplemental means of interpretation only when the interpretation of the treaty provision, in accordance with Article 32, remains ambiguous or absurd.[276] But, as one scholar noted, it "is hardly a manifestly absurd and unreasonable result to include personal injuries caused by the armed forces of another state on the territory of the forum state if this actually reflects the current practice of at least some states."[277] It is unfortunate that the ILC provided the international community with such inept guidance. This is particularly so given that the ILC actually established a working group to examine whether a human rights abuse exception should be included in the U.N. Convention.[278] The working group did not

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273 *See* Finke, *supra* note 3, at 863.

274 *See* Gabčikovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. 7 (Sept. 15) (applying the Vienna Convention on the Law of Treaties to the dispute, even though neither state party was a member of the convention because the convention reflected customary international law); *Frequently Asked Questions About Vienna Convention on Law of Treaties*, U.S. DEP'T OF STATE, http://www.state.gov/s/l/treaty/faqs/70139.htm (last visited Nov. 5, 2012).

275 V.C.L.T., *supra* note 8, art. 31.

276 *See* Finke, *supra* note 3, at 863; V.C.L.T., *supra* note 8, art. 32 ("Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (*a*) leaves the meaning ambiguous or obscure; or (*b*) leads to a result which is manifestly absurd or unreasonable.").

277 Finke, *supra* note 3, at 863. Finke also notes that the General Assembly, through Resolution 59/38 of Dec. 2, 2004, did not adopt all of the commentary. What was and was not adopted is somewhat ambiguous.

278 Rep. of the Int'l Law Comm'n, 51st sess., 3 May-23 July, 1999, at 155, ¶ 9, U.N. Doc A/54/10; GAOR 46th Sess., Supp. No. 10 (1991), *reprinted in* [1999] 2 Y.B.

reach consensus[279] and so avoided this issue, suggesting that the ILC knew well that there would be uncertainty in the international community as to the scope of the U.N. Convention's exceptions to immunity.

The scope of Article 12 of the U.N. convention on immunity is still unknown and may be one reason why many states have not adopted it. Some states that have adopted it have felt a need to express their belief, upon ratification, that Article 12 is quite narrow. When Norway ratified the convention, it entered a declaration[280] explaining its understanding that the U.N. Convention "does not apply to military activities, including the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law and activities undertaken by military forces of a State in the exercise of their official duties."[281] Similarly, Sweden entered a declaration upon ratification, stating its "understanding that the Convention does not apply to military activities . . . ."[282] It should not come as a surprise that Norway and Sweden expressed their understandings in this manner; both states contribute heavily to peace-keeping missions abroad.[283] It is the states that deploy their militaries in foreign states (for peace-keeping or for conquest) that have the

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Int'l L. Comm'n 1, U.N. Doc. A/CN.4/SER.A/1999/Add.1 (Part 2).

279 *Id.* at 172, ¶ 13.

280 It is important to recognize that these States were entering declarations, and not reservations. When a state ratifies only parts of a convention, those parts which it refuses to be bound by are reservations. Interpretative declarations are the understandings a state expresses as to a treaty's intent and applicability. *See generally* Rep. of the Int'l Law Comm'n, 50th sess., Apr. 20-June 12, July 27-Aug. 14, 1998 U.N. Doc. A/CN.4/491/Add.4.

281 *See* U.N. Convention on Jurisdictional Immunity, supra note 249, at 2.

282 *Id.*

283 Norway has contributed troops to twenty-five U.N. Peace-Keeping operations since 1945. It currently has troops in Afghanistan and South Sudan. *Peacekeaping Operations*, NORWAY AND THE UNITED NATIONS, http://www.norway-un.org/NorwayandUN/Norwegian-UN-Politcies/Peace_Operations/ (last visited Nov. 5, 2012). For similar information on Sweden, see Sweden and the United Nations, PERMANENT MISSION OF SWEDEN TO THE UNITED NATIONS, http://www.un.int/sweden/pages/sweden.htm (last visited Nov. 5, 2012). Norway is also a member of NATO. *NATO Member Countries*, NORTH ATLANTIC TREATY ORGANIZATION (May 10, 2009), http://www.nato.int/cps/en/natolive/nato_countries.htm (last visited Nov 5. 2012).

most to lose by a waiver of immunity for activities ostensibly *jure imperii*. The problem of Article 12 and the states' responsibility for the wrongs of its armed forces deployed for peace-keeping or peace-enforcing missions should perhaps have been handled differently. The deployment of armed forces is an act *jure imperii*. However, such deployments are not immune to the principles of humanitarian law or human rights law as *jus cogens*. Such deployments may be subject to the exception in which the U.N. creates an administrative tribunal to exclusively respond to specific claims that emerge from such deployments, together with a compensation scheme.[284] This could also include the possibility of insurance for certain classes of wrongs. This would be in keeping with the element of public government function and the expectation of fairness to the victims.[285] The problem should not have been collapsed into the general tort exception because it has elements of both a public and a private character that cannot be easily distinguished.[286]

B. Additional Conventions on Jurisdictional Immunity

The European Convention on State Immunity (European Convention) seeks to codify and standardize states' treatment of jurisdictional immunity across Europe.[287] Unlike the U.N. Convention, the European Convention has entered into force, though it has only been ratified by eight states, with the most recent state (Germany) doing so more than two decades ago.[288] In comparison to the U.N. Convention, the European Convention explicitly excludes the derogation of immunity for acts committed by armed forces in the territory of the forum state.[289] Article 31 of the European Convention states, "Nothing in this Convention shall

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284 *See* I.L.C. Rep., 43d sess, *supra* note 261, at 115 (explaining commission considered compensation scheme regarding injury to a State).

285 *See id.* at 116 ¶ 241.

286 *See* Caplan, *supra* note 2, at 775.

287 European Convention on State Immunity, May 16, 1972, C.E.T.S. No. 074, 11 I.L.M. 470 (1972).

288 The status of the D.C.S.I. is available at http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=074&CM=8&DF=&CL=ENG (last visited Nov. 5, 2012).

289 European Convention on State Immunity, *supra* note 287, at art. 31.

affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State."[290] Since the European Convention preceded the U.N. Convention, it is tempting to find significance in the absence of a military-excluding provision from the U.N. Convention. The drafters of the U.N. Convention were no doubt aware of the European Convention and the inapplicability of its tort exception to activities of armed forces committed in the forum state.

Draft conventions, such as those by the *Institute de Droit International* and the International Law Association (ILA), explicitly provide for pecuniary compensation for certain torts.[291] The *Institute de Droit International* passed a Resolution on State Immunity in 1999 also containing a tort exception.[292] The ILA Draft Convention on State Immunity, adopted in Buenos Aires in 1994, contains a tort exception, which is broader than those of the other conventions, because it only requires the damage "and the act or omission which caused the death, injury or damage either occurred wholly *or partly* in the forum State or if that act or omission *had a direct effect in the forum state*" (emphasis added).[293] The U.N. Convention, conversely, does not extend to torts that were committed outside the forum state's territory, even if they had a direct effect in the forum state.[294] The Organization of American States has also been drafting an immunity treaty.[295]

The force of these conventions is questionable, given states' sparse ratification of them.[296] If the tort exceptions contained in these conventions do not apply to military activities, then customary international law governs the application of immunity for *acta jure imperii*.[297] Not all *jus cogens* violations will be

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290 *Id.*

291 Saba, *supra* note 208, at 98.

292 *Id.* at 99.

293 International Law Association: Draft Convention on State Immunity, art. III, 22 I.L.M. 287 (1983) (emphasis added).

294 Saba, *supra* note 208, at 101.

295 *See* International Law Association: Draft Convention on State Immunity, art. III, 22 I.L.M. 287, 292 (1983).

296 Saba, *supra* note 208, at 102.

297 *Id.* at 99.

committed by military forces, of course, but a conflict environment creates an atmosphere ripe for atrocities. These conventions do not offer clear guidance on jurisdictional immunity questions, and therefore the doctrine has been heavily influenced by the holdings of state courts. What, then, is the solution to the signals about the scope of wrongs immunized from the restrictive theory of sovereign immunity? When viewed in isolation, the signals are ambiguous and essentially provide for a legal vacuum, a circumstance that law generally discourages.[298] The solution to this problem requires that the idea of sovereign immunity be appropriately contextualized to account for a broader social and political reality.[299] Taking that broader perspective, it becomes clear that the values that sustain the global community's constitutional order are implicated. This starting point provides perspectives that more explicitly bring to the enquirer's lens the different streams of expectation creating international law that ultimately have to be integrated and reconciled with the fundamental values of the global constitutional order.[300] This requires clarification of the law that illuminates its incompleteness, supplementation of the gaps and ambiguities by reference to the more comprehensive basic values of the system, and, finally, integration of a defensible prescriptive norm with the fundamental value postulates of the international system, which completes the element of law making.[301]

VIII. Courts Addressing Human Rights Exceptions to Immunity

Jus cogens and jurisdictional immunity have clashed before

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298 *See generally* Caplan, *supra* note 2, at 760 (citing Daniel J. Michalchuk, *Filling A Legal Vacuum: The Form and Content of Russia's Future State Immunity Law Suggestions for Legislative Reform*, 32 LAW & POL'Y INT'L BUS. 487, 497 (2001)) (explaining Russia's lack of state immunity law created a legal vacuum that eventually led to transition from absolute immunity to a restrictive approach).

299 *See generally id.* at 761 (explaining that various countries approach immunity issues in different ways demonstrating that there are various factors and issues inherent in these problems).

300 *See generally id.* (citing Joseph W. Dellapenna, *Foreign State Immunity in Europe*, 5 N.Y. INT'L L. REV. 51, 61 (1992)) (explaining a unifying consensus of foreign state immunity law exists only at a "rather high level of abstraction").

301 *See generally supra* Part I (explaining the Modern Communications Theory).

several national and international courts in recent years. As Brownlie put it, "There is a persistent tension in the case law between the profile of state immunity and the principles of human rights."[302] The way that the courts have judged the two principles has varied greatly. As one treatise concludes, "few, if any, chapters of international law have been more developed by the case law of domestic courts than State immunity."[303]

A. Princz

The federal district court in *Princz v. Federal Republic of Germany*[304] was, in 1992, the first court to find that sovereign immunity must give way in the face of grave human rights abuses. There, a Jewish American citizen had been arrested while in Eastern Europe during World War II.[305] He was forced into slave labor by the Nazis and survived the concentration and extermination camps of Aushwitz, Birkenau, and Dachau.[306] Following the completion of the war, the Federal Republic of Germany set up a reparation system to compensate victims of Nazi atrocities, but for various reasons, including his American citizenship, Mr. Princz was not compensated.[307] The U.S. State Department and several Congressional delegations failed to persuade Germany to voluntarily pay reparations to Mr. Princz.[308] Finally, in 1992, Mr. Princz initiated suit against Germany in the federal district court of Washington, D.C.[309] Germany argued that the court lacked subject matter jurisdiction based on sovereign immunity, because no FSIA exception applied to human rights abuses committed during wartime, and all questions of immunity in U.S. courts had to be considered within the FSIA framework.[310]

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302 BROWNLIE, *supra* note 32, at 347.

303 Saba, *supra* note 208, at 102. (citing Andrea Bianchi, *Denying State Immunity to Violators of Human Rights*, 46 AUSTRIAN J. OF PUB. INT'L LAW, 195, 195-229 (1994)).

304 Princz v. Federal Republic of Germany, 813 F. Supp. 22 (D.D.C. 1992).

305 Princz v. Federal Republic of Germany, 26 F.3d 1166, 1168 (D.C. Cir. 1994).

306 *Id.*

307 *Id.*

308 *Id.*

309 *Princz*, 813 F. Supp. at 33.

310 *Princz*, 26 F.3d at 1169.

The plaintiff did not directly rely upon *jus cogens* in *Princz* because there is no current *jus cogens* exception in the FSIA (though there have been proposals to amend FSIA to include such an exception).[311] Rather, the plaintiff argued that Germany's immunity was waived by the commercial activity exception of the FSIA when the Nazis forced the plaintiff into slave labor.[312] In the alternative, Mr. Princz argued that Germany had implicitly waived its immunity by engaging in gravely reprehensible acts.[313] Nevertheless, the district court was clearly emphasizing *jus cogens* norms when it held that the FSIA "has no role to play where the claims alleged involve undisputed acts of barbarism committed by a one-time outlaw nation which demonstrated callous disrespect for the humanity of an American citizen, simply because he was Jewish."[314] Therefore, the international common law applied, and the court suggested that this would support an implicit waiver of jurisdictional immunity on Germany's part.[315]

The district court's holding stood for only two years before the U.S. Court of Appeals for the District of Columbia overturned the decision in an opinion authored by now Justice of the U.S. Supreme Court Ruth Bader Ginsburg.[316] Ginsburg wrote that the implied waiver exception in the FSIA did not apply to the case because there was no evidence showing that Germany had "indicated, even implicitly, a willingness to waive immunity for actions arising out of the Nazi atrocities."[317] In other words, under the U.S. statutory regime, waiver has a *mens rea* component, and waiver must be intentionally initiated by the state over which jurisdiction is claimed.[318] Although the case was short lived, *Princz* influenced a growing group of jurists uncomfortable with granting sovereign immunity to foreign states when it is used to

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311 *See generally* Belsky et al., *supra* note 42 (proposing amendments to the FSIA, including a *jus cogens* exception).

312 *Princz*, 26 F.3d at 1173; 28 U.S.C. § 1605(a)(2).

313 28 U.S.C. § 1605(a)(1).

314 *Princz*, 813 F. Supp. at 26.

315 *See* Tomuschat, *supra* note 222, at 75.

316 *Princz*, 26 F.3d at 1166.

317 *Id.* at 1174.

318 *Cf.* Ipitrade Int'l v. Federal Republic of Nigeria, 465 F. Supp. 824 (D.D.C. 1978) (finding that Nigeria implicitly waived immunity).

insulate international wrongs from accountability.[319] Although *Princz* ultimately lost, the *Princz* court provided an approach to sovereign immunity that points the way to a comprehensive analysis rooted in the basic values of international legal order. This was an important authority signal about the relevance of legal expectations emerging from other areas of international law having an influence on the scope and reach of sovereign immunity.

B. Distomo

The next state court to waive immunity for *jus cogens* violations committed during armed conflict was the Greek *Areio Pagos* (Hellenic Supreme Court) in *Prefecture of Voiotia v. The Federal Republic of Germany* (the *Distomo* case) decided in 2000.[320] There, Greek plaintiffs sued Germany for human rights wrongs that occurred in the Second World War.[321] After eighteen German soldiers were killed by Greek partisans during the final months of Germany's occupation of Greece, Nazi soldiers retaliated against civilians in the nearby village of Distomo.[322] The village was razed, and more than 200 civilians were killed, mostly women, children, and the elderly.[323] A half-century later, relatives of the victims sought compensation in Greek courts.[324] A lower court in the town of Livadia found that an exception to immunity applied when a state's armed forces commit human

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319 *Princz*, 26 F.3d at 1177.

320 Court of First Instance of Livadeia, 137/1997 (October 30, 1997) *translated in* 50 REVUE HELLÉNIQUE DE DROIT INTERNATIONAL 595 (1997) (with note by Maria Gavouneli) [hereinafter Distomo]. For an analysis of the decision, see Ilias Bantekas, *Case Report: Prefecture of Voiotia v. Federal Republic of Germany*, 92 AM. J. INT'L L. 765 (1998). In Distomo, the trial court issued a default judgment against Germany, who then appealed to the Hellenic Supreme Court. *Id.*

321 Distomo, supra note 320, at 600.

322 *See* MARK MAZOWER, INSIDE HITLER'S GREECE 213-215 (1993); *See generally* Markus Rau, *State Liability for Violations of International Humanitarian Law—The Distomo Case Before the German Federal Constitutional Court*, GERMAN L. J. 2005 Vol 7, No. 7, at 701, *available at* http://www.germanlawjournal.com/pdfs/Vol07No07/PDF_Vol_07_No_07_701-720_Developments_Rau.pdf (discussing the Distomo massacre).

323 *Id.*

324 *Id.*

rights abuses and that customary international law not only allowed a state's court to deny immunity, but actually *required* it.[325]

The Hellenic court first applied the tort exception of the European Convention on State Immunity (both Germany and Greece are parties) and then turned to the application of the military activities exception.[326] The court reasoned that the European Convention incorporated pre-existing customary international laws, including the laws of war.[327] The court, therefore, applied principles from the 1907 Hague IV convention, which implicitly waived immunity where occupying powers abused their sovereignty.[328] German forces had abused the power of sovereignty by committing war crimes. Recalling the reasoning of the district court in *Princz*, the court found that Germany had tacitly waived immunity by breaching peremptory norms of international law.[329] Ultimately, the court found Germany liable for €27 Million and issued a judgment to that effect, but did not order Germany to pay.[330] Germany appealed the default decision and invoked jurisdictional immunity, arguing that no judgment on the merits should have been entered.[331] The *Areios Pagos* dismissed the appeal, effectively affirming the trial court's

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325 The decision of the Livadia court has only been published in Greek. *See* Tomuschat, *supra* note 222, at 1113-14; *see also* Finke, *supra* note 3, at 862; Distomo, *supra* note 320, at 519.

326 *See* Saba, *supra* note 208, at 108-09.

327 *See* Distomo, *supra* note 320, at 599-601.

328 Article 43 of the Annex to the 1907 Hague Convention on the Laws and Customs of War states that "[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." Int'l Comm. of the Red Cross, Convention (IV) respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land art. 43, Oct. 18, 1907, 187 C.T.S. 227, *available at* http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument; *see also*, Saba, *supra* note 208, at 109.

329 Distomo, *supra* note 320, at 599.

330 *Id.*

331 *See* Memorial of Germany, Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), 2008 I.C.J. 143, ¶ 23 (June 12, 2009).

decision.[332]

The plaintiffs then sought to have their judgment enforced. Greek civil procedure, however, requires the authorization of the Minister of Justice before a judgment against a foreign state can be enforced; the Minister refused to do so.[333] Consequently, the judgment remained unexecuted in Greece.[334] Thereupon, the plaintiffs took their judgment before the European Court of Human Rights (ECHR).[335] The plaintiffs invoked Article 6(1) of the European Convention on Human Rights, contending that their right to judicial protection had been violated.[336] In the 2002 *Kalogeropoulou* decision, the ECHR dismissed the case, citing sovereign immunity. The Court stated that it could "not find it established . . . that there is *yet* acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages brought against them in another State for crimes against humanity."[337] In *Jurisdictional Immunities of the State*, Italy stressed the word "yet" in the ECHR's decision, suggesting that a rule by which states are not entitled to immunity when they commit human rights violations was in the process of emerging.[338]

Following *Kalogeropoulou*, the *Distomo* plaintiffs took their judgment to the courts of several European states—including

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332 *Id.* ¶ 34.

333 *Id.* ¶ 35; *see also*, KODIKAS POLITIKES DIKONOMIAS [KPOL.D.] [CODE OF CIVIL PROCEEDURE]: 923 (Greece).

334 *See* Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), 2012 I.C.J. 143, ¶ 31 (Feb. 3).

335 *See* Kalogeropoulou v. Greece, App. No. 59021/00, 2002-X Eur. Ct. H.R. 417, 129 I.L.R. 537 (2002).

336 European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, *avaliable at* http://www.unhcr.org/refworld/docid/3ae6b3b04.html. Article 6(1) states that "[i]n the determination of his civil rights and obligations of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

337 Kalogeropoulou v. Greece, App. No. 59021/00, 2002-X Eur. Ct. H.R. (Admissibility Decision of Dec. 12, 2002) (emphasis added).

338 Counter-memorial of Italy, Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), 2008 I.C.J. 143, ¶¶ 4.97-4.98 (Dec. 22, 2009).

Germany[339]—before turning to Italy.[340] In 2008, Italy's *Corte di Cassazione* declared that the Greek judgment was enforceable in Italy,[341] but the thrust of the *Distomo* decision met with mixed receptions elsewhere. In a 2001 decision, the Constitutional Court of Slovenia, for example, addressed the issue of whether a state could waive immunity for violations of human rights, and found that it could not.[342] The Court declared that the Greek *Distomo* decision did not

> serve as a proof of general state practice recognized as a law and thus as the creation of a rule of international customary law, which would in the case of violations of the cogent norms of international law in the area of human rights protection as a consequence of state activities in the framework of *iure imperii* . . . allow [state] courts to try foreign states in such cases.[343]

Indeed, two years after the *Distomo* decision, the *Anotato Eidiko Diskastirio* (Special Supreme Court) of Greece heard the *Margellos* case.[344] Similar to *Distomo,* the case concerned human rights violations committed by German forces in Greece during World War II.[345] In *Margellos*, however, the Greek court reversed course and concluded that Germany was entitled to immunity.[346] It stated: "This court cannot itself formulate such a rule or confirm its existence in the absence of clear evidence from international practice. Nor can the Court extrapolate such a rule from the

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339 Bundesgerichtshof, [BGH] [Federal Court of Justice] III ZR 245/98, June 26, 2003, 129 ILR (2007) 556, affirmed by the German Constitutional Court, *Bundesgerichtshof,* BverfG, 2 BvR 1476/03, Feb. 15, 2006.

340 Memorial of Germany, Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), 2008 I.C.J. 143, ¶ 37 (June 12, 2009).

341 Counter-memorial of Italy, Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), 2008 I.C.J. 143, ¶ 2.39 (Dec. 22, 2009).

342 *See* Constitutional Court of Slovenia Mar. 8, 2001, Codices SLO-2001-1-001, 28/2001 *Uradni list RS* (Official Gazette), *available at* http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/slo/slo-2001-1-001?f=templates$fn=document-frame.htm$3.0#JD_E_SLO-2001-1-001.

343 *Id.*

344 Anotato Eidiko Dikastirio [A.E.D.] [Special Supreme Court] 6/2002 (Greece), *translated in* Margellos v. Germany 129 I.L.R. 526 (2007).

345 *Id.*

346 *Id.*

principle that States are liable to pay compensation for violations of the laws of war on land."[347] Because of the unique system of Greek courts, *Margellos* did not overturn *Distomo*, however.[348] Like *Princz*, *Distomo* brought to light the rising disunity within the international community about how to reconcile these competing norms of sovereign immunity and fundamental human rights.

C. Ferrini

The Italian *Corte di Cassazione* is the most active court in exercising jurisdiction over states for *acta jure imperii*.[349] Except for Belgium, it is interesting that the Italian courts were the first to recognize the commercial activities exception.[350] The *Corte di Cassazione* has shown the same pioneering assertiveness in cases of human rights violations. The most important case on immunity decided by a state court was the Italian decision, *Ferrini v. Federal Republic of Germany*.[351] That case involved an Italian plaintiff, Luigi Ferrini, who had been arrested in Italy in August 1944 and deported to Germany, where he was forced to labor in the Nazi armaments industry until the end of the war.[352] Although the case was heard nearly sixty years after the fact, the Italian court held that Germany waived its immunity by engaging in gravely reprehensible acts.[353] The Court never explicitly mentioned *jus cogens*, but its invocation was implicit throughout

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347 *Id.* at 533.

348 *Id.*

349 *See, e.g.*, Ferrini v. Republica Federale di Germania, Cass., XX. un, 11 Marzo 2004, n.5044 [hereinafter *Ferrini*], *reprinted in* 128 I.L.R. 658 (extending jurisdiction over Germany for the actions of its government)

350 *See* R. VAN ALEBEEK, THE IMMUNITY OF STATES AND THEIR OFFICIALS IN INTERNATIONAL CRIMINAL AND INTERNATIONAL HUMAN RIGHTS LAW 14 (2008); *see generally* Dralle v. Czechoslovakia, 17 INT'L L. REP. 155 (1950) (discussing the history of the commercial exception).

351 *Ferrini*, 128 I.L.R. at 658.

352 Memorial of Germany, Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), 2008 I.C.J. 143, ¶ 16 (June 12, 2009); *see also* Tomuschat, *supra* note 222, at 1107-10 (describing the historical background of Italy-Germany relations during World War II).

353 Memorial of Germany, Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), 2008 I.C.J. 143, ¶ 16 (June 12, 2009).

the opinion.[354] Although both *Ferrini* and *Distomo* reached the same result, the reasoning of the two courts was quite different.[355]

The Italian court first invoked Article 41(2) of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts.[356] Draft articles have not yet been adopted by states, but their importance should not be discredited. They represent indications of emerging expectations of legal development. By resolution, the General Assembly requested that the ILC study the issue of state responsibility for international wrongful acts.[357] Draft articles are not binding on state courts, but they are persuasive. Article 41(2) provides that "no State shall recognize as lawful a situation created by a serious breach [of *jus cogens* norms], nor render aid or assistance in maintaining that situation."[358] Therefore, a court would be violating this obligation by affording a state jurisdictional immunity. The *Ferrini* court further held that certain violations of human rights had developed in customary international law that would permit derogation of immunity.[359] In other words, sovereign immunity must yield to *jus cogens* norms. The *Corte di Cassazione* held that fundamental human rights

> are protected by norms, from which no derogation is permitted, which lie at the heart of the international order and prevail over all conventional and customary norms, including those, which relate to State immunity . . . . The recognition of immunity from jurisdiction . . . for such misdeeds stand in stark contrast to [this] . . . analysis, in that such recognition does not assist, but rather impedes, the protection of those norms and

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354 *See* Tomuschat, *supra* note 222, at 1127.

355 Saba, *supra* note 208, at 110. In fact, the Italian Court criticized the Hellenic court's "tacit waiver" reasoning. *Id.*; *Ferrini*, 128 I.L.R., at 668 § 8; this is also in line with the D.C. Court of Appeals decision in *Princz*, discussed *infra* at part VI(a) (finding that a state must intend to waive immunity).

356 Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supp. No. 10, U.N. Doc A/56/10, at art. 41(2) [hereinafter *Draft Articles on State Responsibility*], *available at* http://www.unhcr.org/refworld/docid/3ddb8f804.html.

357 G.A. Res. 799 (VIII), GAOR 8th sess., U.N. Doc. A/RES/799(VIII) (Dec. 7, 1953).

358 *Draft Articles on State Responsibility*, *supra* note 356, at art. 41(2).

359 *Ferrini*, 128 I.L.R. at 659.

> principles . . . . There is no doubt that a contradiction between two equally binding legal norms ought to be resolved by giving precedence to the norm with the highest status. [i.e. *jus cogens*][360]

Following *Ferrini*, Italian Courts entered more judgments against Germany in similar cases and actually put a lien on the *Villa Vigoni*, a German-owned property located in Italy.[361] The *Corte di Cassazione* issued several orders on May 29, 2008, including *Mantelli* and *Maietta*, where the Italian court admitted:

> [A]t this time, there exists no definite and explicit international custom according to which the immunity of the foreign State from civil jurisdiction with regard to acts performed by it jure imperii . . . could be deemed to have been derogated from in respect of acts of such gravity as to qualify as 'crimes against humanity.'[362]

The court then boldly stated that it was contributing "to the emergence of a rule shaping the immunity of the foreign State."[363] Further, the Court stated, "it could be presumed that a principle limiting the immunity of a State which has committed crimes against humanity was 'in the process of formation.'"[364]

The Government of Italy was not as enthusiastic as the courts in redefining the nature of immunity. The *Avvocatura Generale dello Stato* (Solicitor General of Italy) submitted to the *Corte di Cassazione* his belief that the 2008 rulings constituted "an *unicum* [unique example] in jurisprudential panorama, be it national or international", and that they do "not seem to be in line with the current position of international law although [the decisions] emphasizes some relevant aspects . . . ."[365] The Italian cases represent an important expansion of individuals' rights.

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360 *Id.*

361 *See* Cass., sez. un., 29 maggio 2008, n.14201; *see also* Memorial of Germany, Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), 2008 I.C.J. 143, ¶ 39-40 (June 12, 2009) (noting that Italy attached a judicial mortgage to the Villa Vigoni, a German owned, but Italian managed cultural exchange center located in Italy).

362 Memorial of Germany, Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), 2008 I.C.J. 143, ¶ 39-40 (June 12, 2009)

363 *See id.* ¶ 27.

364 *See id.* ¶¶ 18, 19.

365 *Id.* ¶ 27.

Heretofore, when a state has committed a wrong against an individual of another state, such as *jus cogens* violations committed by armies in war, the responsibility of the offending state has been to the State of the victimized individual and not to the individual.[366] The *Ferrini* line of cases purport to give individuals who have been egregiously abused claims of their own.

D. Jones

The *Ferrini* decision met with hostility in many other state courts, particularly in the United Kingdom. In *Jones v. Ministry of Interior Al-Mamalaka Al-Arabiya AS Sandiya*,[367] adjudicated by the U.K. House of Lords, Lord Hoffmann wagged a finger at the Italian court, stating that international law "is based upon the common consent of nations. It is not for a national court to 'develop' international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states."[368]

In *Jones*, an Iranian citizen, who later gained British citizenship, was arrested in Riyadh, Saudi Arabia, on suspicion that he had detonated a bomb in the city center.[369] He spent the next sixty-seven days in a Saudi prison where he claimed he was systematically tortured.[370] After returning to England, Jones sued

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366 *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: REMEDIES FOR INJURIES TO NATIONALS OF OTHER STATES § 713 cmt. a (1987) ("In principle, the responsibility of a state under §§ 711 and 712 is to the state of the alien's nationality and gives that state a claim against the offending state. The claim derives from injury to an individual, but once espoused it is the state's claim, and can be waived by the state."). A state can represent an individual before the court, but international law requires a certain degree of connection between the individual and the state. Nottebohm (Lich. v. Guat.) 1955 I.C.J. 4 (Apr. 6) (ruling that Liechtenstein could not represent a man's claim before the ICJ because the man had no real connection to the state). In *Nottebohm*, the Court stated that the person a state is seeking to represent at the international level must be "more closely attached by his tradition, his establishment, his interests, his activities, his family ties, his intentions for the near future to [the state seeking to represent him] . . . than to any other state." *Id.* at 23.

367 Jones v. Ministry of Interior Al-Mamblaka Al-Araibya AS Sandiya [2006] UKHL 26, [2006] I.L.R. 713 (U.K.).

368 *Id.* at ¶ 63 (Opinion of Lord Hoffman).

369 *See generally*, Humes-Schulz, *supra* note 91, at 105 (discussing the *Jones* case).

370 Jones, [2006] UKHL ¶ 37.

Saudi Arabia in British courts, seeking compensation on a number of grounds, including torture.[371] In *Jones*, the question before the House of Lords was whether an Iranian could sue in Britain for alleged acts of torture committed in Saudi Arabia.[372] The Court framed the issues as a balance "between the condemnation of torture as an international crime against humanity and the principle that states must treat each other as equals not to be subjected to each other's jurisdiction."[373] The judges concluded that the U.K. courts lacked jurisdiction because of immunity, and rejected the logic of the Italian courts.[374]

Lord Bingham wrote, "The *Ferrini* decision cannot in my opinion be treated as an accurate statement of international law as generally understood; and [invoking Aristotle] one swallow does not make a rule of international law."[375] In rejecting the *Ferrini* logic, the House of Lords distinguished *Jones* from the *Pinochet* case, which after all, it had decided. Again, Lord Bingham wrote:

> I would not question the correctness of the decision reached by the majority in *Pinochet (No 3)*. But the case was categorically different from the present, since it concerned criminal proceedings falling squarely within the universal criminal jurisdiction mandated by the Torture Convention and did not fall within [the SIA]. The essential ratio of the decision, as I understand it, was that international law could not without absurdity require criminal jurisdiction to be assumed and exercised where the Torture Convention conditions were satisfied and, at the same time, require immunity to be granted to those properly charged. The Torture Convention was the mainspring of the decision, and certain members of the House expressly accepted that the grant of immunity in civil proceedings was unaffected.[376]

The court found that, in order to defeat immunity and be covered by the torture convention, the torture must be "official,"

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371 *Id.*

372 *Id.*

373 *Id.* ¶ 1 (quoting Bouzari v Islamic Republic of Iran [2004] 71 O.R. (3d) ¶ 95, at 675) (Can. Ont. C.A.).

374 *Id.*

375 *Id.* ¶ 22.

376 Jones, [2006] UKHL 26 ¶ 22.

and the plaintiff did not argue that it was.[377] Thus the torture convention did not apply.[378] Of course, from the victim's perspective, whether the torture was official or not was a wholly unimportant distinction. A *jus cogens* norm had been violated, and no one would be held accountable.

E. Al-Adsani

In a similar case, *Al-Adsani,* the plaintiff brought suit in England's High Court against Kuwait, seeking compensation for alleged acts of torture committed in Kuwait.[379] Al-Adsani could not argue that the tort exception of the SIA applied because that exception recognizes torts committed only in the forum state.[380] The plaintiff instead argued that if the United Kingdom did not deny immunity to Kuwait, then it would be in violation of its treaty obligations under the European Convention on Human Rights.[381] The court disagreed and dismissed the case on the grounds that Kuwait was entitled to sovereign immunity under the SIA.[382]

Al-Adsani then took the case before the ECHR, arguing that the U.K. courts denied him access to legal process and failed to protect his right not to be tortured.[383] The human rights court

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377 *Id.*

378 *Id.*

379 Al-Adsani v. Kuwait, 103 I.L.R. 420 (Q.B. 1995), affirmed by the English Court of Appeal, Al-Adsani v. Kuwait, 107 I.L.R. 536 (C.A. 1996), *reprinted in* 34 Eur. Hum. Rts. Rep. 273, 274. Al-Adsani claimed that Sheikh Jaber Al-Sabah Al-Saud Al-Sabah repeatedly submerged Al-Adsani's head in a pool filled with corpses and that his body was badly burned when he was forced into a small room, containing a mattress, which was then set ablaze by the Sheikh. *Id.* at 277. The alleged torture was purported to have been in retaliation after Al-Adsani was accused of releasing sexual video tapes involving the Sheikh. *Id.*

380 *See* Finke, *supra* note 3, at 861-64 (discussing the tort exception to immunity).

381 Al-Adsani v. Kuwait, 34 EUR. HUM. RTS. REP. 273, 273.

382 28 U.S.C. § 1605(a)(2). *See also,* Saba, *supra* note 208, at 104-05 (noting that the *Al-Adsani* case "does not present an example of departure from the [tort rule of the European Convention on State Immunity or the U.N. Convention on Sovereign Immunity] . . . . In this case, the English Court of Appeal applied a strict interpretation of the State Immunity Act 1978 in order to avoid the tort exception provided in Section 5 of the SIA.").

383 Al-Adsani claimed that, *inter alia,* U.K. courts had violated Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms,

reiterated, "sovereign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State."[384] The ECHR stated that it considered the grant of jurisdictional immunity to serve the legitimate aims of international law by promoting "comity and good relations between States through the respect of another State's sovereignty."[385] Even *jus cogens* (here, the prohibition on torture) was not a superior norm to immunity.[386] The ECHR held:

> Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, juridical authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.[387]

But *Al-Adsani* was decided by the slimmest of margins: nine against eight.[388] The dissenting judges on the Court were persuaded to endorse an understanding of immunity where, as one scholar put it, "a state's jurisdictional immunity is abrogated when the state violates human rights protections that are considered peremptory international law norms."[389] The dissenting judges in

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supra note 336.

384 Al-Adsani v. Kuwait, 34 EUR. HUM. RTS. REP. 273, 289.

385 Al-Adsani v. the United Kingdom, 2001-XI Eur. Ct. H.R. 79, ¶ 54; McElhinney v. Ireland, 2001-XI Eur. Ct. H.R. 37, ¶ 35.

386 *Id.*

387 Al-Adsani v. United Kingdom 2001-XI Eur. Ct. H.R. 79, ¶ 61 (joint dissenting opinion of Judges Rozakis, Caflishc, Wildhaber, Costa, Cabral Barreto, and Vajić). Regarding the European Convention on Human Rights, the Court stated, "the Convention, including article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account. The convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity." Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 79, ¶ 55.

388 Tomuschat, *supra* note 222, at 1138.

389 Caplan, *supra* note 2, at 741 (explaining the theory: "because state immunity is not *jus cogens*, it ranks lower in the hierarchy of international law norms, and therefore can be overcome when a *jus cogens* norm is at stake"). *Id.*

Al-Adsani reasoned that a state should not be able to "hide behind the rules on State immunity to avoid proceedings for a serious claim of torture made before a foreign jurisdiction."[390] They further stated their belief that "the acceptance . . . of the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions."[391] The dissent reasoned that sovereign immunity cannot bar claims that are *jus cogens* in nature since the latter represents "the basic values of the international community [and] cannot be subject to unilateral or contractual forms of derogation from their imperative contents."[392]

F. McElhinney and Other Cases

In *McElhinney v. Ireland*, decided the same day as *Al-Adsani*, the ECHR clarified that jurisdictional immunity still applies to claims arising out of military activities.[393] There, a civil suit was filed in the Irish High Court against a British soldier and the British Secretary of the State of North Ireland.[394] The Secretary invoked immunity.[395] The plaintiff argued the tort exception to immunity applied.[396] The ECHR found that *jus imperii* applies to

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390 *Id.*

391 Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 79, ¶ 3 (joint dissenting opinion of Judges Rozakis, Caflishc, Wildhaber, Costa, Cabral Barreto, and Vajić); Saba, *supra* note 208, at 111 ("The characterization of Kuwait's tortious acts as torturer in the terms of Article 3 of the Convention and the peremptory norm status (*jus cogens*) of the prohibition of torture led the minority to argue that if the status of *jus cogens* has any meaning it must have the consequence of lifting State immunity in case of breach of such a norm. Hence, the basic characteristic of a *jus cogens* norm is to override any other rule which does not have the same status and, in the event of a conflict between a *jus cogens* rule and nay other rule of international law, the former prevails.").

392 Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 79, ¶ 2 (joint dissenting opinion of Judges Rozakis, Caflishc, Wildhaber, Costa, Cabral Barreto, and Vajić).

393 McElhinney v. Ireland, 2001-XI Eur. Ct. H.R. 37, ¶ 32.

394 Saba, *supra* note 208, at 104. The plaintiff was an Irish police officer who unintentionally drove into a barrier at a British checkpoint on the Northern Ireland-Republic of Ireland border. A British officer at the scene fired several gunshots at the plaintiff. *Id.*

395 *Id.*

396 *Id.*

a soldier's conduct when acting as a state's servant or agent and that immunity barred the court from asserting jurisdiction—even for acts that occurred in the forum state.[397] The Court echoed the ILC commentary on the U.N. Convention, stating that the expansion of the tort exception primarily refers to

> 'insurable' personal injury, that is incidents arising out of ordinary road traffic accidents, rather than matters relating to the core area of State sovereignty such as the acts of a soldier on foreign territory which, of their very nature, may involve sensitive issues affecting diplomatic relations between States and national security.[398]

However, the Court also noted a "trend" in international law that progressively expands the exceptions to jurisdictional immunity, though it "is by no means universal."[399] In their dissent, Judges Calfisch, Cabral Barreto, and Vajić characterized the tort exception as customary international law and more expansive than merely encompassing traffic accident-related wrongs.[400] Judge Loucaides also dissented and added that the law of jurisdictional immunities

> originated at a time when individual rights were practically non-existent and when States needed greater protection from possible harassment through abusive judicial proceedings. The doctrine of State immunity has in modern times been subjected to an increasing number of restrictions, the trend being to reduce its application in view of developments in the field of human rights which strengthen the position of the individual.[401]

These cases reveal a common theme in jurisdictional immunity litigation: the cases are decided by narrow margins. In many cases, the controlling opinion notes the strong undercurrent emerging in international law flowing against immunity. But the majority of courts still serve as guardians for the old understanding of jurisdictional immunity. For example, the Court of Appeal of

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397 *McElhinney*, 2001-XI Eur. Ct. H.R. 37, ¶ 32.

398 *Id.*

399 *Id.* ¶ 38.

400 *McElhinney*, 2001-XI Eur. Ct. H.R. 37 (dissenting opinion of Judges Caflisch, Cabral Barreto, and Vajić).

401 *McElhinney*, 2001-XI Eur. Ct. H.R. 37 (dissenting opinion of Judge Loucaides, at para. 4).

Ontario, Canada ruled in 2004 in another immunities case, *Bouzari v. Iran*.[402] In *Bouzari*, an Iranian man wished to sue Iran in Canada for alleged acts of torture that occurred in Iran.[403] He argued that a state had an obligation to hear *jus cogens* cases, regardless of where the acts alleged occurred (a duty to protect plus universal jurisdiction argument).[404] The Ontario Court disagreed and approved the opinion of the lower court, which stated:

> An examination of the decisions of national courts and international tribunals, as well as state legislation with respect to sovereign immunity, indicates that there is no principle of customary international law which provides an exception from state immunity where an act of torture has been committed outside the forum, even for acts contrary to *jus cogens*. Indeed, the evidence of state practice, as reflected in these and other sources, leads to the conclusion that there is an ongoing rule of customary international law providing state immunity for acts of torture committed outside the forum state.[405]

In 2008, Brazilian and Israeli courts both declined to assert jurisdiction over Germany for events arising out of the Second World War in cases similar to *Distomo* and *Ferrini*, on the grounds that jurisdictional immunity required the courts to dismiss the claims.[406] Finally, the most recent state courts to pronounce on immunity include the Polish Supreme Court, which decided the *Natoniewski* case in 2010.[407] Again, the facts involved claims against Germany for Nazi human rights violations.[408] There, a raid by German soldiers on a Polish village left the plaintiff partially

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402 Bouzari v. Islamic Republic of Iran (2004) 71 O.R.3d 675, 675 (Can. Ont. C.A.)

403 *Id.* at ¶ 1.

404 For more on Responsibility to Protect (R2P), see generally, Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 WIS. INT'L L.J. 703 (2006) (discussing the development and evolution of the R2P concept).

405 *Bouzari*, 71 O.R.3d ¶ 88 (where the court stated that "*jus cogens* norms do not require Congress (or any government) to create jurisdiction").

406 Arraci Barreto v. Germany, 9.7.2008 (Braz.); CA (TA) 2134/07 Irit Tzemach v. Germany [2009](Isr.).

407 Natoniewski, Judgment of Oct. 29, 2010, Polish Supreme Court, IV CSK 465/09 (Pol.).

408 *Id.*

disabled with permanent burn scars.[409] The Polish court strictly applied jurisdictional immunity and noted that armed conflicts involve hundreds and thousands of potential plaintiffs and declared that large scale human rights violations should not be reduced to individual plaintiffs suing for compensation.[410]

State courts are split, with Italy and the *Areio Pagos* recognizing an exception to sovereign immunity when superior norms are violated, while currently, much of the rest of the world refuses to do so. *Ferrini* is not a judicial albatross. It may perhaps be premature, but it presciently shows the direction in which customary international law on immunity is heading. As one treatise notes, "With respect to State immunity and [its exceptions], it is not possible to conclude from the analysis of the international instruments together with the judicial decisions both at the domestic and international levels the existence of a clear rule in this regard."[411] Courts that have refused to apply a *jus cogens* exception have generally noted a narrowing of immunity but find that state practice is not yet sufficiently compelling to represent customary international law.[412] Given the recent decision of the ICJ, that will likely remain the state of jurisdictional immunity, for at least a period of time.

IX. Jurisdictional Immunities Case Before the ICJ

On February 3, 2012, the ICJ handed down its judgment in the *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)* (hereinafter *Jursidictional Immunities of the State*).[413] The case arose in the wake of *Ferrini* and other cases, in which Italy ordered Germany to pay compensation to Italian and Greek victims of Nazi war crimes.[414]

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409 *See* Tomuschat, *supra* note 222, at 1135.

410 *Id.*

411 Saba, *supra* note 208, at 112.

412 Paul B. Stephan, *The Political Economy of Jus Cogens*, 44 VAND. J. TRANSNAT'L L. 1073, 1092 (2011) (discussing, in particular, the ICJ opinion in Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 3 (Feb. 14)).

413 Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), Judgment, 2012 I.C.J. 143 (Feb. 3).

414 *See generally,* Annalisa Ciampi, *The Italian Court of Cassation Asserts Civil Jurisdiction over Germany in a Criminal Case Relating to the Second World War: The*

In fact, Germany stated that the claims of almost 500 plaintiffs were pending in Italian courts at the time the ICJ began hearing the case.[415] The question before the Court, as framed by Germany, was whether Italy violated international law by denying Germany jurisdictional immunity in these cases.[416] Germany initiated the proceedings[417] and argued that such mass torts should be dealt with by "diplomatic negotiation and intergovernmental agreements."[418] The German memorial to the ICJ cited the U.S. case, *Hwang Geum Joo v. Japan*, where the Court of Appeals for the D.C. Circuit stated that, in a matter involving the claims of Chinese "comfort women" of World War II: "There is no question that this court is not the appropriate forum in which plaintiffs may seek to reopen those [legal matters] a half century later . . . the current claims of the 'comfort women' [should] be addressed directly between governments."[419]

Germany argued in its memorial that:

> To individualize the settlement of war damages by granting every victim a separate claim is a particularly bad solution because domestic judges in the "victim countries" are generally overzealous in allocating to their nationals huge amounts of financial compensation which could easily exceed the financial capabilities of a debtor State.[420]

Civitella Case, 7 J. INT. CRIM. JUST. 597-615 (2009), *available at* http://jicj.oxfordjournals.org/content/7/3/597.full.pdf.html.

415 Memorial of Germany, Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), 2008 I.C.J. 143, ¶ 45 (June 12, 2009).

416 Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), Judgment, 2012 I.C.J. 143, ¶¶ 37, 38 (Feb. 3).

417 Germany initiated proceedings before the ICJ in 2008, challenging Italy's refusal to afford Germany immunity. *See* Application Instituting Proceedings, Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), 2008 I.C.J 143 (Dec. 23). Greece requested permission to intervene in the proceedings.

418 Memorial of Germany, Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), 2008 I.C.J. 143, ¶ 43 (June 12, 2009).

419 Hwang Geum Joo v. Japan, 72 F. Supp. 2d 52 (D.D.C. 2001) *rev'd on other grounds*, 413 F.3d 45 (D.C. Cir. 2005).

420 Memorial of Germany, Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), 2008 I.C.J. 143, ¶ 90 (June 12, 2009); *see also* Tomuschat, *supra* note 222, at 1131 (stating that "[t]he national judges of a victim country are generally ill-suited to administer justice in an impartial and objective way. These judges will always be under hard pressure form their own population.").

As Germany suggested, "no one should be able to destabilize the delicate balance reached [at the end of conflict] by instituting reparation claims before his/her own courts."[421] Germany essentially claimed that the type of large scale compensation claims that arise out of armed conflict are best dealt with by states through inter-governmental negotiation in states' traditional role as arbitrators and advocates of their peoples' disputes.

Unlimited compensation claims ordered to be paid by a co-equal state, Germany argued, could lead to strained relations, counter-claims, and escalation of conflicts, perhaps even the stoking of old animosities.[422] Germany had settled reparations claims for various groups by negotiation previously,[423] and they argued, as the DC court did, that any reparations paid to Mr. Ferrini and the other plaintiffs should be negotiated by the states themselves and not ordered by judicial fiat.[424] Germany further sought to characterize the Italian courts as radicals in perfect and splendid isolation in an otherwise unanimous international community. Germany argued that, "The courts of one nation cannot impose their views on all the other nations. International law is based on consensus. Hegemonic methods are incompatible with its egalitarian nature."[425]

Italy in turn sought to characterize the dispute as involving the denial of justice. In their counter-memorial to the Court, Italy stated that, "The denial of effective reparation by German authorities, and not the decision of Italian courts with respect to the jurisdictional immunity of Germany, must be regarded as the real cause of the present dispute."[426] Italy also pointed to the many vocal dissents in cases upholding immunity and to the writings of

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421 Memorial of Germany, Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), 2008 I.C.J. 143, ¶ 114 (June 12, 2009).

422 *See* Tomuschat, *supra* note 222, at 1105.

423 *See id.* at 1111-13.

424 Memorial of Germany, Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), 2008 I.C.J. 143, ¶¶ 69, 90 (June 12, 2009).

425 Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), Judgment, 2012 I.C.J. 143, ¶ 124 (Feb. 3).

426 Counter-memorial of Italy, Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), 2008 I.C.J. 143, ¶ 2.34 (Dec. 22, 2009).

academics.[427] Further, Italy pointed to the ECHR's 2009 decision in *Grozs v. France*, where the Court found that the right of access to justice does not lead to a derogation of sovereign immunity, but where it also stated that the finding of law at that moment "does not exclude the future development of customary or treaty law."[428] Further, the Italians repeatedly stated that "immunity cannot mean impunity."[429] Whether Germany could negotiate reparations also ignored the fact that sixty-five years after the fact, Germany had not done so, at least not for the class of plaintiffs in question.[430]

The ICJ ultimately ruled in Germany's favor and found that sovereign immunity barred the claims of Mr. Ferrini and the other plaintiffs, even for claims *jus cogens* in nature.[431] The decision was in keeping with the conservative view the court has previously articulated on immunity.[432] Only a decade ago, in *Arrest Warrant of April 11, 2000*,[433] the ICJ indicated a favorable view of immunity for current heads of state.[434] Like in the *Arrest Warrant* case, in *Jurisdictional Immunities of the State*, the ICJ made clear that it considered sovereign immunity to be a procedural right.[435]

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427 *Id.*

428 Grosz v. France, App. no. 14717/06 (Eur. Ct. H.R.) p. 78.

429 Counter-memorial of Italy, Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), 2008 I.C.J. 143, ¶ 2.34 (Dec. 22, 2009) (quoting Arrest Warrant of 11 April 2000 (Dem. Rep. of the Congo v. Belgium), Judgment, 2002 I.C.J. 143, ¶60).

430 *See* Counter-memorial of Italy, Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), 2008 I.C.J. 143, ¶¶ 1.3, 2.45 (Dec. 22, 2009).

431 Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), Judgment, 2012 I.C.J. 143, ¶ 107 (Feb. 3).

432 *See* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) 2002 I.C.J. 3 (setting out a narrow view of sovereign immunity).

433 *Id.*

434 *See id.* ¶ 51 (where the ICJ stated that "in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister of Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal."). The court justified the rule on the grounds that it would "ensure the effective performance of [heads of state's] functions on behalf of their respective States" and that the rule would "protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties." *Id.* ¶¶ 53, 54. *But see id.* (dissenting opinion of Judge Van den Wyngaert), ¶ 23 (finding that there is neither a treaty nor customary international law affording that immunity).

435 Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening),

Presumably, this is a more slender reed to lean upon than is a substantive right. Yet the result was to shield the offending actors from responsibility, which seems to be at odds with the legacy of Nuremberg.

Surprisingly, in *Jurisdictional Immunities of the State*, the ICJ reconciled *jus cogens* and jurisdictional immunity by finding that there was no conflict at all. The ICJ held that jurisdictional immunity was but a procedural rule that determined whether a state could assert jurisdiction[436] and did not have anything to do with whether a given act was an international wrong or not. *Jus cogens*, the Court said, is a substantive rule that is only at issue after a state court can successfully assert jurisdiction.[437] The result seems bizarre because a substantive rule of law cannot conflict with a *jus cogens* norm, so it does not make sense for a procedural rule to be able to do what a substantive rule cannot—especially when procedure is there to give effect to substantive rules in a fair manner.[438] The ICJ sanitized the issue by saying that the procedural rule of immunity meant that the court never got to the issue of *jus cogens*, but the effect on the ground is that sovereignty trumps *jus cogens*. As Judge Yusuf argued:

> The assessment of whether, in the present case, immunity should have been granted or could have been denied under international law by the Italian courts cannot exclude, in my view, the application of the general principles underlying human rights and humanitarian law and embodying basic rights such as the right to an effective remedy, the right to compensation for damages suffered as a result of breaches of humanitarian law . . . .[439]

The Court's judgment also belies state practice. Courts, after

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Judgment, 2012 I.C.J. 143, ¶ 60 (Feb. 3).

436 *Id.* at ¶ 58 (stating that "the law of immunity is essentially procedural in nature.").

437 *Id.*

438 *See generally,* Janeen M. Carruthers, *Substance and Procedure in the Conflict of Laws: A Continuing Debate in Relation to Damages,* 53 INT. & COMP. L.Q. 691, 691-711 (2004) (discussing the irony of a procedural rule that conflicts with substantive international law).

439 Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), Judgment, 2012 I.C.J. 143, ¶ 30 (Feb. 3) (separate opinion of Judge Yusuf).

all, *do* go to the merits of the case to look at the nature of the dispute in order to determine if one of the exceptions—the tort or commercial exception, for example—applies. Applying some exceptions and not others also leads to "the impression of cherry-picking . . . ."[440] And further, "State immunity is, as a matter of fact, as full of holes as Swiss cheese."[441]

Although the ICJ gave attention to the jurisprudence of state courts, it did not go far enough in discovering the wisdom generated in domestic fora. For example, the ICJ failed to consider the *Erie* doctrine developed in American jurisprudence.[442] The U.S. system is a republic of fifty semi-autonomous states bound by a federal government, which is analogous to the international system where nation-states are semi-autonomous but bound by international law. In 1938, the U.S. Supreme Court held, in *Erie Railroad Co. v. Tompkins*,[443] that in cases where the federal courts have jurisdiction based on diversity (a Constitutional grant of jurisdiction to federal courts for claims involving parties from different states),[444] those courts were to apply state substantive law, but federal procedural law.[445] This, of course, raised the question of which laws are procedural and which are substantive. To address this question, the courts developed the "outcome determinative analysis:" if the procedural rule in question is substantially likely to affect the outcome of the case, then it is treated as substantive law; if the rule will not likely affect the outcome, then it is merely procedural.[446] Applying the outcome determinative approach to the doctrine of sovereign immunity, it is clear that the rule is substantive. One cannot deny that the highly deferential application of jurisdictional immunity, as supported by the ICJ, is absolutely outcome determinative and

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440 *Id.* ¶ 23.

441 *Id.* ¶ 26.

442 *See generally* 8 FED. PROC., L. ED. § 20:562 (describing the *Erie* doctrine and the substantive/procedure test in federal court cases based on the diversity jurisdiction clause of the U.S. Constitution).

443 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817 (1938).

444 U.S. Const. art. III, §2.

445 *Erie R.R. Co.*, 304 U.S. at 64 (1938).

446 *See* Guaranty Trust Co. v. York, 326 U.S. 99 (1945); Byrd v. Blue Ridge Rural Electric Coop., 78 S.Ct. 893 (1958); Hanna v. Plumber, 380 U.S. 460 (1965).

therefore, arguably, substantive.

In characterizing immunity as merely procedural, the ICJ further ignored the fact that immunity has elements of a substantive rule apart from the outcome determinative analysis; it is a specific application of the abstract notion of sovereignty and goes to the very core of the state itself.[447] In the U.K. case, *Holland v. Lampen-Wolfe*,[448] Lord Millet described immunity as flowing from the state which jurisdiction is being asserted over: "It is not a self-imposed restriction on the jurisdiction of its courts which the United Kingdom has chosen to adopt. It is a limitation imposed from without upon the sovereignty of the United Kingdom itself."[449] Further, a substantive rule, such as *jus cogens*, must also have a procedural component if it is to be given effect.

The ICJ came to its conclusions by relying almost exclusively on the practice of state courts. As the Court put it, "As between Germany and Italy, any entitlement to immunity can be derived only from customary international law, rather than treaty."[450] Because only Italy, the *Areios Pagos*, and for a brief period, a U.S. district court, recognized an exception to jurisdictional immunity for *jus cogens* violations,[451] it is unsurprising that the ICJ was not compelled to find state practice supportive of an exception to immunity. Italy was not able to show that binding international custom had emerged, which was supported by state practice and *opinio juris* (the legal sense of obligation).[452] Customary international law is formed slowly, by consent and consensus.[453] As an early American court noted, no single nation can change customary international law:

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447 *See* Holland v. Lampen-Wolfe, [2000] 1 WLR 1573.

448 *Id.*

449 *Id.* at 1588.

450 Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), Judgment, 2012 I.C.J. 143, ¶ 54 (Feb. 3).

451 *See id.* ¶¶ 71, 76.

452 *Id.* ¶ 55.

453 As a general rule, states are only bound to abide by those rules of international law to which they agree to be bound by—with exceptions for *jus cogens*. As the Permanent Court of International Justice put it in the venerable *Lotus* decision, "The rules of law binding upon States . . . emanate from their own free will . . . ." S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), ¶ 44.

> The law is of universal obligation and no statute of one or two nations can create obligations for the world. . . . the laws of nations . . . rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct.[454]

The ICJ stated in the *Asylum* case that to constitute custom, there must be some "constant and uniform" practice among states.[455] Further, in the *North Sea Continental Shelf* cases, the ICJ stated:

> Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, . . . should have been both extensive and virtually uniform . . . .[456]

One or two states' practice is not enough to show "international custom" or a "general practice accepted as law";[457] however, state judicial decisions were not the only corpus of law the court should have considered. There is also the fact, as Judge Yusuf wrote in dissent, that grave international crimes were committed and that the fundamental values at the apex of international law had been violated.[458] Judge Cançado Trindade lodged a lengthy and vociferous dissent in the case.[459] It has been noted elsewhere that "the original aim of state immunity law was

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454 The Paquete Habana, 175 U.S. 677, 711 (1900) (quoting *The Scotia*, 81 U.S. 170, 188 (1871)).

455 Asylum case (Colombia v. Peru), 1950 I.C.J. 266, 276 (June 13, 1951) (addressing the case in the context of regional custom).

456 North Sea Continental Shelf cases (F.R. Ger. v. Den.; F.R. Ger. v. Neth.), 1969 I.C.J. 3, at para. 74 (Feb. 20).

457 Statute of the International Court of Justice, June 26, 1945, art. 38, 33 U.N.T.S. 993.

458 Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), Judgment, 2012 I.C.J. 143, ¶ 17 (Feb. 3). (separate opinion of Judge Yusuf); see discussion *infra* Part IX for other law the court should have considered.

459 Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), Judgment, 2012 I.C.J. 143, ¶ 91 (Feb. 3) (dissenting opinion of Judge Cançado Tridade).

to enhance, not jeopardize, relations between states."[460] Judge Cançado Trindade scoffed at what he felt was the false emphasis on the destabilizing effect of abrogating immunity. He argued:

> In my understanding, what jeopardizes or destabilizes the international legal order, are the international crimes, and not the individual suits for reparation in the search for justice. In my perception, what troubles the international legal order, are the cover-up of such international crimes accompanied by the impunity of the perpetrators, and not the victims' search for justice. When a State pursues a criminal policy of murdering segments of its own population, and of the population of other States, it cannot, later on, place itself behind the shield of sovereign immunities, as these latter were never conceived for that purpose. Grave breaches of human rights and of international humanitarian law, amounting to international crimes, are not at all acts *jure imperii*. They are anti-juridical acts, they are breaches of *jus cogens*, that cannot simply be removed or thrown into oblivion by reliance on State immunity. This would block the access to justice, and impose impunity. It is, in fact, the opposite [that] should take place: breaches of *jus cogens* bring about the removal of claims of State immunity, so that justice can be done.[461]

As disappointing as the outcome may have been to human rights activists, the *Jurisdictional Immunities of the State* decision was not surprising. One would not expect, after all, for the ICJ to hand down a ruling recognizing a limitation on sovereign immunity and then still see sovereign states—who are the only parties that *can* come before the ICJ—come back to the ICJ in the future.[462] Perhaps Article 34(1) has blinded the ICJ to the notion that international law includes more diverse participants than the states alone. Nevertheless, the Court did draw its conclusions fairly narrowly and also emphasized that the Court was only taking a snapshot of customary international law at the moment.[463]

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460 Caplan, *supra* note 2, at 744.

461 Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), Judgment, 2012 I.C.J. 143, ¶ 39 (Feb. 3) (Cançado Tridade, J., dissenting).

462 Statute of the International Court of Justice, art. 38, June 26, 1945, 33 U.N.T.S. 993 ("Only states may be parties in cases before the Court.").

463 Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening),

In other words, the ICJ left open the possibility of further developments in the law of jurisdictional immunity. Judge Koroma stressed this point in his separate opinion, where he stated that:

> [N]othing in the Court's Judgment today prevents the continued evolution of the law on State immunity. In the past century, the law on State immunity has evolved considerably in a manner that has significantly circumscribed the circumstances in which a State is entitled to immunity. It is possible that further exceptions to State immunity will continue to develop in the future. The Court's Judgment applies the law as it exists today.[464]

For his part, Judge Bennouna agreed with the outcome of the case but felt that immunity applied because Germany had already conceded its responsibility for the unlawful acts.[465] Presumably there was some mechanism by which Mr. Ferrini and the other plaintiffs could still seek to be compensated (though whether this is really true is as yet uncertain). If, however, Judge Bennouna reasoned, "Germany were to close all doors to such settlement . . . then the question of lifting its immunity before foreign courts in respect of those same wrongful acts could legitimately be raised again."[466]

The ICJ erroneously discounted the changing nature of sovereignty in general. The law on sovereignty has, in fact, evolved, and it is only the inadequacy of legal analysis that has failed to take into account *jus cogens* and fundamental human rights law.[467] Sovereignty is not born in the barrel of a gun. Its legitimacy is derived from the peoples, and the Court's decision dismissed the role of individuals who are, today, the ultimate stakeholders in international law. As McDougal aptly noted, "It is sometimes forgotten that human beings, and not legal artifacts, are the only true participants in global public order and that nation-states, like corporations, are only the creatures of human

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Judgment, 2012 I.C.J. 143, ¶ 91 (Feb. 3).

464 *Id.* (separate opinion of Judge Koroma), ¶ 2.

465 *Id.* (separate opinion of Judge Bennouna).

466 *Id.* ¶ 25.

467 *See* Humes-Schulz, *supra* note 91, at 110-12.

imagination and aspiration."[468] The ICJ also failed to appreciate the writings of the most learned scholars, *juris consults*, who are a source of international law.[469] Significantly, the ICJ failed to recognize a hard body of law changing the scope and reach of sovereign immunity: the U.N. Charter.[470] This article has suggested that utilizing newer techniques of how international law is made, rooted in communications theory and a deeper appreciation of the global prescribing process, lawmakers may approximate a more realistic depiction of the changing character of international law, sovereign immunity, and emerging humanitarian and human rights law.

X. Analyzing the *Jus Cogens* Exception to Sovereign Immunity

As Christian Tomuschat, agent for Germany before the ICJ, argued:

> Although international law evolves in a creeping process similar to the growth of common law, where judges take new directions and open up new horizons, they are invariably required to act *lege artis* in the (sometimes erroneous) belief that the rule applied was developed in a constructive effort to synthesize elements in force as component parts of the legal order. Judges are not called upon to act with the explicit intention to create new law. If they do so, they fail in their professional duties.[471]

Professor Tomuschat is no doubt correct in this regard, but it must be recognized that judges alone do not decide what is international law.[472] The ICJ, and Judges like Lord Hoffman, use an astigmatic view of international law.[473] International law is created by authoritative signals, such as those from the U.N. Charter. International law is also created by the collective

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468 McDougal, *Foreign Sovereign Immunities Act, supra* note 144, at 49.

469 *See* Statute of the International Court of Justice, art. 38(d), June 26, 1945, 33 U.N.T.S. 993; *see also* United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820); Lopes v. Reederei Richard Schroder, 225 F. Supp. 292, 295 (E.D. Pa. 1963).

470 *See* V.C.L.T., *supra* note 8, art. 18 ("A state is obliged to refrain from acts when would defeat the object and purpose of a treaty.").

471 Tomuschat, *supra* note 222, at 1137.

472 *See infra* notes 481-84.

473 *See supra* notes 441, 461.

communications and expressions of understanding signaled by various interest groups such as the Red Cross and Amnesty International, the multitude of national and transnational courts, executives, and the all-important individuals who are the ultimate stakeholders of international law. The ICJ considered jurisdictional immunity only within the parameters of the doctrine itself.[474] It failed to analyze sovereign immunity within a comprehensive framework that considers core principles of law, such as sovereignty in general and its relationship to other fields of international law, including human rights or to value-oriented principles, such as *jus cogens*.[475]

Determining what is international law is a complex process. As Reisman has pointed out, "the familiar tripartite division of formal governmental institutions—executive, legislative and judicial—does not so obviously exist in the international arena."[476] The ICJ statute attempts to provide the international community with a framework for determining the source of international law, but it does not reconcile conflicting sources well. U.S. Supreme Court Justice Cardozo wrote in *New Jersey v. Delaware* that "[i]nternational law . . . has at times, like the common law within [the United States], a twilight existence during which it is hardly distinguishable from morality or justice, till at length the *imprimatur* of a court attests its jural quality."[477] Reisman, however, noted in response, "[s]o few international cases reach courts, that if Cardozo's judicial imprimatur were necessary, most of international law would be consigned to the twilight zone and beyond, indeed to Holland's very 'vanishing point of jurisprudence.'"[478]

In *Jurisdictional Immunities of the State*, the ICJ stressed state practice because it felt there was no other compelling body of law to draw upon.[479] However, Lasswell, McDougal, and Reisman, among other theorists of the New Haven School of Jurisprudence,

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474 *See id.*

475 *See id.*

476 Reisman, International Law-making, *supra* note 15, at 101.

477 New Jersey v. Delaware, 291 U.S. 361, 383 (1934).

478 Reisman, International Law-making, *supra* note 15, at 103.

479 *See supra* text accompanying notes 438-42.

developed a theory of international legal analysis to determine whether a policy had been prescribed and hence should be applied.[480] They proposed the Communications Model (described in more depth in Part I). In Reisman's words, "Put in simplest terms, lawmaking or the prescribing of policy as authoritative for a community is a process of communication."[481] The Communications Model "liberates the inquirer from the limiting and, in the international context, the distorting model of positivism, which holds that law is made by the legislature."[482] Under this model, communications of legal scholars, of advocacy organizations,[483] and especially the resolutions of the U.N. General Assembly are contributions to the process of law-making. This expands the scope of relevant actors the ICJ could have considered beyond simply states and the European judiciaries.

The legal grounds for abrogating immunity for *jus cogens* violations are not, as Professor Tomuschat suggested, "mostly based on fully understandable emotional reasons," but rather on binding treaty law as well as customary law.[484] In fact, the ICJ ignored the most compelling body of *hard* law permitting one state's refusal to grant another state immunity for human rights abuse claims: the U.N. Charter. This contention is supported by the ICJ's own statute.[485] The preamble of Chapter 1, Article 2 of the U.N. Charter provides, "The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance

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480 *See* Reisman, International Law-making, *supra* note 15.

481 *Id.* at 105.

482 *Id.* at 107.

483 *See, e.g.*, AMNESTY INT'L, Germany v. Italy*: The Right To Deny State Immunity When Victims Have No Other Recourse*, http://www.amnesty.org/en/library/asset/IOR53/006/2011/en/ce60b84b-e3a7-4266-a1c3-1fb0277f039f/ior530062011en.pdf (last visited Nov. 5, 2012).

484 Tomuschat, *supra* note 222, at 1140.

485 *See* Statute of the International Court of Justice, June 26, 1945, 33 U.N.T.S. 993. Under the ICJ's statute, the decisions of state courts are of supplemental value, unless they show customary international law—which is what the ICJ found. *See id.* art. 38(d) (stating, "subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."). International conventions have primacy with state jurisprudence and equality with custom, but because the former is not as ephemeral, it is often the more respected body of law. *Id.* art. 38(a).

with the following principles."[486] Article 1 of the Charter lists "purposes and principles" of the U.N. and includes this language: "To achieve international co-operation in . . . promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction."[487] Further, Article 55 of the U.N. Charter states that the U.N. and its members "shall promote . . . (c) universal respect for, and observance of, human rights and fundamental freedoms for all . . . ."[488] Article 56 then states, "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55."[489]

The U.N. Charter, including its provisions on sovereign equality, must be interpreted consistently with the values expressed in Chapter 1 and in the Preamble. The U.N. Charter is a treaty under international law.[490] The Vienna Convention provides that treaties "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[491] Article 18 of the Vienna Convention provides, "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty."[492] Therefore, sovereign equality must be read in the context of promoting human rights. A state should not be allowed to draw benefit from the Principles of Article 2 when they are used to shield a state from scrutiny for violating the very purposes the U.N. Charter is meant to protect and promote.

Together, these provisions establish the impetus that states must cooperate with each other to promote the fundamental principles of the U.N. Charter, which explicitly include human

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486 U.N. Charter art. 2.

487 *Id.* art. 1(3).

488 *Id.* art. 55.

489 *Id.* art. 56.

490 *See* V.C.L.T., *supra* note 8, art. 2(1)(a) (defining treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation").

491 *Id.* art. 31(1).

492 *Id.* art. 18.

rights.[493] This notion is further supported by the U.N. Declaration of Friendly Relations.[494] Although the U.N. General Assembly does not have the power to make binding hard law, declarations (a specific form of resolution) may still, in a sense, be *politically* binding, and in any case, they are almost certainly expectation-forming.[495] Judge Lauterpacht made this observation in a 1955 ICJ Advisory Opinion, stating "[a] Resolution . . . creates *some* legal obligation which, however rudimentary, elastic and imperfect, is nevertheless a legal obligation . . . ."[496] This is true with the Declaration of Friendly Relations.

The Declaration restates throughout that the U.N. system is one built upon "the principle of sovereign equality."[497] The Declaration provides, however, that "States shall co-operate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all."[498] Further, the Declaration provides that members of the U.N. "have the duty to take joint and separate action in co-operation with the United Nations in accordance with the relevant provisions of the Charter."[499] Those provisions include the ones described above. Further, the Declaration provides, "Every State has the duty to

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493 *See, e.g.*, U.N. Charter art. 55, Preamble (reaffirming the United Nation's committement to the protection of Human Rights).

494 *See* Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625(XXV), U.N. Doc. A/RES/2625(XXV) (Oct. 24, 1970) [hereinafter Declaration of Friendly Relations], *available at* http://www.unhcr.org/refworld/docid/3dda1f104.html.

495 *See* Reisman, International Law-making, *supra* note 15, at 102 (noting "As a formal matter, the U.N. General Assembly was not endowed with lawmaking competence. Nonetheless, a number of scholars have ventured that the General Assembly 'sometimes' makes law, whether by a mysterious 'consensus,' as mystical as transubstantiation, by 'instant' custom, or, as one learned professor apparently with interests in culinary matters put it, by 'pressure-cooked custom.'" But Reisman has also described 'law' created by the General Assembly to be a weak, imperfect form of law, or "*lex simulata or lex imperects.*") *Id.*

496 Concerning the Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa, Advisory Opinion 1955 I.C.J. 67 (June 1, 1956) (separate opinion of Judge Lauterpacht), at 55-56.

497 Declaration of Friendly Relations, *supra* note 494, pmbl.

498 *Id.* at (b).

499 *Id.* at (d).

promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter."[500] Similarly, the Draft Articles on State Responsibility—a further communication on point generating expectations about international law norms—provides that "Every internationally wrongful act of a State entails the international responsibility of that State."[501] The Draft Articles also state, as the *Ferrini* court pointed out, "No state shall recognize as lawful a situation created by a serious breach [of *jus cogens* norms] . . . , nor render aid or assistance in maintaining that situation."[502]

The question the ICJ failed to address in *Jurisdictional Immunities of the State* was whether these provisions of the U.N. Charter, coupled with the Declaration on Friendly Relations and the Draft Articles on Responsibility of States, imply appropriateness for the application of human rights principles by domestic courts over foreign states. One way of looking at the issue, in other words, is to ask whether granting a state immunity conflicts with the obligation to cooperate in the promotion and protection of human rights, especially *jus cogens* norms. And further, does granting a foreign state immunity render that state aid and assistance in avoiding responsibility for internationally wrongful acts? Does a forum state's ability to avoid sitting in judgment of the international crimes of a foreign state allow the forum state to, like Pontius Pilot, wipe its hands clean of atrocities?[503] If it does, then by granting immunity to a foreign state that has committed *jus cogens* violations, the forum state may be undermining the purposes of the U.N. Charter and may be in violation of international law. Instead, the ICJ gave every possible deference to the twentieth century understanding of jurisdictional immunity and of sovereignty.[504] In *Jurisdictional Immunities of*

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500 *Id.*

501 *Draft Articles on State Responsibility*, *supra* note 356, art. 1(3).

502 *Id.* art. 41(2); *see also* Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), Judgment, 2012 I.C.J. 143, ¶ 17 (Feb. 3) (separate opinion of Judge Yusuf) (discussing other pertinent documents).

503 *See Matthew* 27:24.

504 *See* Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), Judgment, 2012 I.C.J. 143, ¶ 31-33 (Feb. 3).

the State, the Court provided an understanding of jurisdictional immunity that is dangerously close to creating a concept of sovereignty so strong as to undermine the U.N. Charter, and in the process, undermine the very purposes for which the ICJ was established in the first place.

The ICJ also discounted the writings of scholars on this complex matter. The writings of scholars are one of the enumerated sources of law that the ICJ's statute directs the Court to consider.[505] McDougal produced some of the best analyses of immunity's legitimacies and justifications for rational limitations on it.[506] McDougal noted, "Every State has an interest in immunity, in the sense of noninterference with basic governmental acts, and every State has an interest in how the larger community allocates the competence to make and apply law among the different States."[507] He also noted that in some cases "the common interest of States requires severe limits upon State immunity."[508] When states' interests are in conflict with international law, particularly the preservation or promotion of the most fundamental human rights, the legitimacy in granting immunity is weakened.

McDougal concluded that the interest of states in granting reciprocal treatment to each other's acts is the promotion and maintenance of an ordered world and relative peace.[509] Therefore, "when the acts of a State, whether public or private, are in violation of the rules . . . of international law, there is no rational ground for requiring the courts of another State to honor such acts."[510] Granting states immunity, in other words, communicates

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505 Statute of the International Court of Justice, art. 38(d), June 26, 1945, 33 U.N.T.S. 993.

506 *See generally* McDougal, *Foreign Sovereign Immunities Act, supra* note 144.

507 *Id.* at 10.

508 *Id.* at 11.

509 *Id.* at 3, 13. *See also* Legal Adviser Testimony, *supra* note 205 ("The purpose of sovereign immunity in modern international law is . . . to promote the functioning of all governments by protecting a state from the burden of defending law suits abroad which are based on its public acts.").

510 McDougal, *Foreign Sovereign Immunities Act*, *supra* note 144, at 13; *cf.* Tomuschat, *supra* note 222, at 1120 ("[I]ndividual remedies are highly inappropriate to redress situations of mass injustice where evidence is frequently scarce and unreliable. In this regard, the traditional mechanisms of settling reparations issues within an inter-state context have proven to provide more suitable answers.").

a tacit approval for state omnipotence when it encroaches on human rights, and this is irrational and dangerous. The ICJ failed to appreciate this understanding of the appropriate application of immunity. Many other legal scholars support this position. Humes-Schulz, for example, concluded that "[s]overeign immunity should apply only to acts that are consistent with our global legal ideals, and should be denied for acts that directly contravene mandates of international law."[511] Further, she noted, "Sovereign immunity that prevents a victim from seeking any restitution seems wholly at odds with universal human rights . . . ."[512]

On the other hand, evidence supporting an overly-deferential concept of immunity as embraced by the ICJ is wanting. The U.N. treaty on jurisdictional immunity is ambiguous and incomplete in parts, suggesting that immunity is in a state of flux.[513] It is true that many states have found no immunity exception for *jus cogens* violations, but some have, and in any case, this is just one consideration among many. At the very core of the immunities discourse is the fact that grave harms have been done, and states must be held accountable.[514] In 1928, the Permanent Court of International Justice recognized the importance of compensation for international wrongs, when it stated in *Chorzow*: "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form."[515] And further, that there is "a principle of international law that the reparation of a wrong may consist in an indemnity corresponding

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511 Humes-Schulz, *supra* note 91, at 108; *cf.* Hazel Fox, *In Defence of State Immunity: Why the UN Convention on State Immunity Is Important,* 55 INT'L & COMP. L.Q. 399, 405 (2006) (arguing that sovereign immunity is necessary at the present stage in the development of international law).

512 Humes-Schulz, *supra* note 91, at 112.

513 *See id.* at 111-12.

514 *See id.* at 110 ("The fundamental basis for the immunity doctrine—that a state alone possesses the power to organize its internal affairs—gives the state the discretion to treat its citizens as it wishes. Herein lies the tension between a world of sovereign states and a world striving for the universal recognition of human rights norms: the existence of human rights norms requires a state to treat its citizens with a basic level of human dignity.").

515 Factory at Chorzow (Germ. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9 (July 26), at ¶ 55.

to the damage which the nationals of the injured state have suffered as a result of the act which is contrary to international law."[516] Asserting jurisdiction over, or refusing to grant immunity to, foreign states that commit internationally wrongful acts is in keeping with this lofty principle.

XI. Conclusion

As one American court noted, "In the twentieth century the international community has come to recognize the common danger posed by flagrant disregard of basic human rights . . . ."[517] Human rights norms are gaining force in international law *vis-à-vis* sovereignty. Scholars have written that "traditional concepts of sovereign immunity are under attack as never before";[518] "[s]tate equality is losing its irresistible force and the concept of sovereignty is not as compelling as before";[519] and that sovereignty "sits on a precarious perch."[520] International law is gravitating from a system focused on states and sovereignty to a system focused on people and human rights. Jurisdictional immunity is also following this pattern. As Judge Yusuf noted, the scope of immunity has "been contracting over the past century, in light of the evolution of international law from a State-centred legal system to one which also protects the rights of human beings vis-à-vis the State."[521] As sovereignty weakens relative to human rights norms, jurisdictional immunity becomes less of a compelling force.

Sovereign immunity has a legitimate and important role to play in international relations and law, but it must be tempered

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516 SHAW, *supra* note 7, at 95 (*citing* Chorzow (Germ. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9 (July 26)).

517 Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980).

518 Humes-Schulz, *supra* note 91, at 111.

519 *Id.* at 111-12 (citing ERNEST K. BANKAS, THE STATE IMMUNITY CONTROVERSY IN INTERNATIONAL LAW: PRIVATE SUITS AGAINST SOVEREIGN STATES IN DOMESTIC COURTS 255 (2005)).

520 *Id.* at 112 (citing William J. Aceves, *Relative Normativity: Challenging the Sovereignty Norm Through Human Rights Litigation*, 25 HASTINGS INT'L & COMP. L. REV. 261, 262 (2002)).

521 Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), Judgment, 2012 I.C.J. 143, ¶ 21 (Feb. 3) (separate opinion of Judge Yusuf).

against superior norms of *jus cogens*. Courts, statutes, and treaties have been treating sovereign immunity as the presumption that the forum state must overcome. Perhaps this is the wrong way of approaching the immunity question. A better model would be one where a state claiming immunity had to show why it should be entitled to immunity. McDougal made this very point; he suggested, "States which seek immunity in particular instances [should] have the burden of proving intolerable interference with basic governmental activities."[522] The scholar Rosalyn Higgins made this same observation. She wrote, "An exception to the normal rules of jurisdiction should only be granted when international law requires—that is to say, when it is consonant with justice and with the equitable protection of the parties. It is not to be granted 'as a right.'"[523] Immunity must be understood as a principle based on an ordered world community with the goal of protecting responsible state actors: when states disrupt that order and act in an irresponsible and criminal manner, those states must lose their privilege of jurisdictional immunity.

Jurisdictional immunity is not a static legal concept but an evolving one and in the last decade especially, the international community has struggled to define its boundaries. As Lord Cooke of Thorndon noted, "the boundaries of state immunity are not permanently fixed."[524] They are ebbing. Jurisdictional immunity "is not an immutable value in international law. Its adjustability to the evolution of the international society, and its flexibility, are evidenced by the number of exceptions built gradually into it over the past century . . . ."[525] Jurisdictional immunity, a very old rule, has come into conflict with newer value-oriented principles of international law, like *jus cogens* norms. The ICJ has postponed the emergence of a *jus cogens* exception to immunity, but the customary international law on point will, like the common law,

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522 McDougal, *Foreign Sovereign Immunities Act*, *supra* note 144, at 11, 16.

523 Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), Judgment, 2012 I.C.J. 143, ¶ 3 (Feb. 3) (separate opinion of Judge Bennouna) (quoting Rosalyn Higgins, *Certain Unresolved Aspects of the Law of State Immunity*, 29 NETH. INT'L L. REV. 265, 271 (1982)).

524 *See* Holland v. Lampen-Wolfe, [2000] 1 WLR 1573, ¶ 14.

525 Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), Judgment, 2012 I.C.J. 143, ¶ 35 (Feb. 3) (separate opinion of Judge Yusuf).

creep along regardless.

The development of a *jus cogens* exception will most likely come from the jurisprudence of state courts,[526] and they will likely give greater consideration to the purposes and principles of the U.N. Charter and its supporting documents. National courts were the promoters of human rights long before international courts existed, and there is a long tradition of state courts applying international law.[527] Nuremberg and *Pinochet* showed that individuals lose sovereign protection by abusing sovereign privileges.[528] It makes sense for a state to lose its sovereign protections (here, jurisdictional immunity), as well, when the state abuses its sovereignty by engaging in human rights violations. It is true that a state is not a person, but an amalgamation of individual actors, some of whom will be perfectly innocent of any wrongdoing. But entertaining civil judgments against a nation that has committed the gravest breaches of international law is a strong deterrent to future criminal acts.

This article attempts to show that sovereign immunity must be considered within a holistic framework. Taken together, the international community is communicating a clear expectation that jurisdictional immunity should not be granted when states abuse *jus cogens* norms. The evidence supporting an application of immunity that does not conflict with the U.N. Charter's key precepts, nor with *jus cogens* norms, is compelling. Sovereign omnipotence has weakened vis-à-vis the individual in international law and relations. Accountability has emerged as a recognized goal in international law, and an important limitation on the sovereign immunity doctrine is given for the protection of private property—the commercial exception. There are other extremely important rights in the world community that must be protected and promoted. Waiver of immunity serves as insurance to the

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526 *Id.* ¶ 43 ("The law relating to State immunity has historically evolved through the decisions of domestic courts.").

527 *See generally*, RICHARD FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER (1964) (discussing several instances in which the courts of nation states enforce international law).

528 *See, e.g.*, Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) 2002 I.C.J. 121 (Feb. 14) (finding that immunity for heads of state is customary international law); BROWNLIE, *supra* note 32, at 597.

global community for the potential abuses of sovereignty. In some cases, it will be necessary to abrogate jurisdictional immunity in order to avoid impunity for internationally wrongful acts and breaches of the most fundamental human rights.

In conclusion, the focus used for the description and analysis of modern international law must necessarily be realistic and comprehensive. It must realize that international law, like all law, is a response to the problems that emerge from the give and take of social relations. For law to rationally respond to these challenges it must clearly understand the nature of the challenge. The blunderbuss invocation of the sovereignty symbol does not help in defining the nature of the problem and the important and subtle distinctions and differentiations that must be brought into the calculus of reputable legal analysis. The comprehensive context and the specification contextually of the problems that realistically emerge must be further elucidated by refined tools that guide observation and analysis. Those tools are to be found in the utilization of Modern Communications Theory as applied to the idea of international law-making. That process also includes this refinement of the expectations codified in the evolving prescriptive process.[529] These tools permit a more realistic determination what legal expectations are and how courts and other authoritative decision makers might appropriately respond to the problems that emerge within the framework of legal expectations sustained by elements of authority and control at all levels in the global environment.

529 *See supra* text accompanying notes 28-31.