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A VIOLATION OF JUS COGENS NORMS AS AN IMPLICIT WAIVER OF IMMUNITY UNDER THE FEDERAL SOVEREIGN IMMUNITIES ACT

I. INTRODUCTION

The recent case, *Princz v. Federal Republic of Germany*,¹ exemplifies the fact that foreign sovereigns are irreproachable in the courts of the United States for human rights violations perpetrated abroad. Despite the enactment of the Torture Victim Protection Act² and the Foreign Sovereign Immunity Act³ (hereinafter "the FSIA"), courts of the United States lack jurisdiction over a foreign sovereign when it commits human rights violations against United States citizens and aliens abroad. This note argues that United States courts could exert jurisdiction over a foreign sovereign under the FSIA by accepting a theory of implied waiver of sovereign immunity in cases where a sovereign violates human rights.⁴

Mr. Hugo Princz, a Jewish American who suffered in Nazi concentration camps during World War II, sued the Federal Republic of Germany for reparations in the United States District Court for the District of Columbia in December, 1992.⁵ Germany moved to dismiss the action for lack of federal subject matter jurisdiction.⁶ The district court denied the motion to dismiss and Germany immediately appealed the decision to the United States Court of Appeals for the District of Columbia.⁷ The Court of Appeals held that if the FSIA⁸ applied retroactively to the events occurring between 1942 and 1945, there was no exception to the general grant of sovereign immunity under the act.⁹

1. 26 F.3d 1166 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 923 (1995).

2. Pub. L. No. 102-256, 106 Stat. 78 section 2(a) (codified at 28 U.S.C.A. § 1350 note (West 1993)). The Torture Victim Protection Act allows a United States citizen (or alien) to sue a foreign national for torture or extrajudicial killing, if he acted under actual authority, or under the color of law of any foreign nation.

3. 28 U.S.C. §§ 1330, 1602-11 (1988). The Sovereign Immunity Act (FSIA) revokes a sovereign's immunity for torts committed within the United States.

4. This theory is based on Judge Wald's dissent in *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (1994)(Wald, J., dissenting), *cert. denied*, 115 S. Ct. 923 (1995) and Adam C. Belsky, et al., *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CALIF. L. REV. 365 (1989).

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

6. *Id.* at 23.

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

8. 28 U.S.C. §§ 1330, 1602-11 (1988).

9. *Princz*, 26 F.3d at 1176.

Furthermore, the court held that if the FSIA did not apply retroactively, then the pre-FSIA law of sovereign immunity governed.¹⁰ However, federal jurisdiction was changed after the enactment of the FSIA to allow diversity jurisdiction over a foreign state only insofar as the foreign state was not entitled to sovereign immunity under the FSIA.¹¹ Thus, even if pre-FSIA law applied, the case was not within post-FSIA federal subject matter jurisdiction because there was no applicable exception to the general grant of immunity under the FSIA.¹² The Court of Appeals did not decide whether the FSIA applied retroactively or not because, in either case, Mr. Princz's case lacked federal subject matter jurisdiction.¹³ Thus, the Court of Appeals dismissed Mr. Princz's case against Germany.

However, the majority of the Court of Appeals did not fully consider a finding of federal subject matter jurisdiction based upon an implicit waiver of sovereign immunity under the FSIA.¹⁴ The court could have established jurisdiction under the FSIA by accepting the theory that a violation of *jus cogens* norms¹⁵ constitutes an implicit waiver of sovereign immunity. The concept of *jus cogens* recognizes that there is a fundamental core group of international norms from which sovereigns may not derogate.¹⁶ Genocide, slavery, murder, torture, prolonged arbitrary detention, and racial discrimination are violations of *jus cogens*.¹⁷ As *jus cogens*, by definition, is a set of rules from which states may not derogate, the sovereignty of a state acting in violation of *jus cogens* should not be recognized; and, therefore, that state should not be able to claim sovereign immunity.¹⁸ A state that acts contrary to the norms of *jus cogens* implicitly waives its rights to sovereign immunity.

In this case, Germany enslaved, tortured, arbitrarily detained, and

10. *Id.* at 1175.

11. *Id.*

12. *Id.*

13. *Id.*

14. 28 U.S.C. § 1605(1)(a) provides that:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.

15. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. k (1987).

16. Adam C. Belsky, et al., *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CALIF. L. REV. 365, 367 (1989).

17. REATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 & cmt. n (1987).

18. Belsky, *supra* note 4, at 377.

discriminated against Mr. Princz in contravention of the principles of *jus cogens*. This note, therefore, contends that Germany implicitly waived its privilege of sovereign immunity under the FSIA as a state violating *jus cogens* norms. This theory would establish federal subject matter jurisdiction in Mr. Princz's case and in all other cases where the individual rights of United States citizens and aliens have been violated by foreign nations abroad. However, the Supreme Court of the United States denied Mr. Princz's petition for a writ of certiorari; and, therefore, this theory will not be reviewed as it applies to Mr. Princz's case.¹⁹ Furthermore, this note concludes that the Supreme Court will not find subject matter jurisdiction until Congress explicitly accepts the theory that a foreign sovereign implicitly waives its immunity when it violates a principle of *jus cogens* or Congress amends the FSIA to provide jurisdiction in cases involving torture, extrajudicial killings, or genocide committed in a foreign nation.

II. THE CASE

Mr. Princz's parents were naturalized Americans who had returned to their homeland, now called Slovakia, in the early 1900's.²⁰ Mr. Princz was born in Slovakia, but was a citizen of the United States by birth. Mr. Princz, his parents, three sisters, and two brothers were residing in Slovakia when the United States declared war on Nazi Germany in 1942.²¹ The family was arrested by the Slovak Fascist police, presented to the German SS, and sent to Camp Maidanek in Poland.²² Nazi Germany did not acknowledge the validity of the Princz family's United States passports and barred them from leaving for the United States as part of the International Red Cross civilian prisoner exchange.²³

Mr. Princz believes that his parents and sisters were killed in the concentration camp Treblinka.²⁴ While enslaved at Birkenau, Mr. Princz and his two brothers were leased by the Nazi Germany to the

19. *Princz v. Germany*, 115 S. Ct. 923 (1995).

20. Nora Frenkiel, *The Last Holocaust Victim Trapped in Europe Still Fighting for Reparations*, THE WASH. POST, May 18, 1993, at E1.

21. 141 CONG. REC. E681-02, 104th CONG., 1st Sess. (1995)(quoting Eric Breindel, *Germans Stick to "Principle" - And the Price is Decency*, N.Y. POST, Jan. 19, 1995.

22. *Princz*, 813 F. Supp. at 23.

23. S. Res. 162, 103d Cong., 1st Sess. (1993). The International Red Cross program exchanged Germans living in the United States for Americans living in Nazi Europe. *Princz*, 26 F.3d at 1176.

24. *Princz*, 813 F. Supp. at 23.

German Chemical cartel I.G. Farben.²⁵ His brothers were injured and placed in the hospital where they were intentionally starved to death in the presence of Mr. Princz.²⁶ Later, Mr. Princz was sent to a Warsaw Ghetto Camp and then transferred by death march to Dachau.²⁷ At Dachau he was forced to work at the privately owned Messerschmidt airplane factory.²⁸

As World War II was ending, Nazi Germany tried to destroy incriminating evidence of its war crimes by exterminating its slave labor.²⁹ Mr. Princz was on a death train headed to an extermination camp when United States Armed Forces intercepted it and liberated those on board, including Mr. Princz.³⁰ The United States personnel processing the train's survivors noticed the "USA" stenciled across Mr. Princz's uniform and sent him to an American military hospital instead of a center for Displaced Persons so that he might receive better medical care.³¹ Following his recuperation, Mr. Princz entered communist-occupied Czechoslovakia to search for family members.³² After he determined that he was the sole survivor of his immediate family, Mr. Princz went to America for the first time - not speaking a word of English³³ - to join relatives.³⁴

In the early 1950's, Germany established a reparations program for survivors of the Holocaust.³⁵ Mr. Princz made a timely application, but was denied eligibility for the pension because he was an American citizen at the time of enslavement³⁶ and was never classified as a displaced person, as he was never sent to a Center for Displaced Persons.³⁷

25. *Id.*

26. *Id.* at 23.

27. *Id.*

28. *Id.*

29. S. Res. 162, 103d Cong., 1st Sess. (1993).

30. *Id.*

31. *Id.*

32. *Id.*

33. Nora Frenkiel, *The Last Holocaust Victim; American Trapped in Europe Still Fighting for Reparations*, THE WASH. POST, May 18, 1993, at E1.

34. S. Res. 162, 103d Cong., 1st Sess. (1993).

35. *Id.*

36. *Princz*, 813 F. Supp. at 24.

37. *Id.* The first German compensation act was passed in 1952 to provide reparations to Holocaust survivors. Mr. Princz filed a claim in 1955 and was denied because of ineligibility. In 1965, the act was amended. Mr. Princz did not file a second claim. He contends that the amendment only extended the period during which the survivors could file claims. *Id.* at 24 n.1. Germany, however, argues that the amendment did expand the eligibility pool and that Princz's claim was then permissible. *Id.* Mr. Princz's attorney maintains that his client would still have been denied if he had ap-

In 1984, Mr. Princz turned to his federal senator for help in obtaining payment from Germany.³⁸ The senator sought the assistance of the United States' Department of State.³⁹ Germany informed the State Department that Mr. Princz was not eligible for a pension.⁴⁰ Then Mr. Princz sought an ex gratia payment⁴¹ from Germany, but the German Foreign Ministry would not submit the request to the German Parliament.⁴² Next Mr. Princz's case was brought before the German Supreme Court, which declined to consider it because the statute of limitations for filing claims had run.⁴³ As diplomatic means were of no avail and the German court system was closed to him, Mr. Princz sued Germany in the United States District Court for the District of Columbia in 1992.⁴⁴

Mr. Princz sued for false imprisonment, assault and battery, negligent and intentional infliction of emotional distress, and in quantum meruit for the value of his labor in the I.G. Farben and Messerschmidt plants.⁴⁵ The United States District Court for the District of Columbia denied Germany's motion to dismiss for lack of subject matter jurisdiction in December 1992.⁴⁶ The court held that Germany was estopped from asserting sovereign immunity under the FSIA. The court reasoned that Germany, which had failed to recognize and respect both United States and international law, could not now use United States law as protection against Mr. Princz's claims.⁴⁷ "[T]he 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."⁴⁸ Judge Sporkin, writing for the court, summed up this

plied again. Nora Frenkiel, *The Last Holocaust Victim; American Trapped in Europe Still Fighting for Reparations*, THE WASH. POST, May 18, 1993, at E1. The issue, however, was not before the court.

38. *Princz*, 813 F. Supp. at 24.

39. *Id.*

40. *Id.*

41. Ex gratia payment is a "payment made by one who recognizes no legal obligation to pay but who makes payment to avoid greater expense as in the case of a settlement by an insurance company to avoid costs of suit. It is a payment without legal consideration." BLACK'S LAW DICTIONARY 712 (6th ed. 1990).

42. *Princz*, 813 F. Supp. at 24.

43. *Id.* The 1969 statute of limitations for filing pension petitions had run and no extensions were permitted. *Id.*

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

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

46. *Princz*, 813 F. Supp. at 27.

47. *Id.* at 26.

48. *Id.*

case by saying that it was fundamentally about Germany taking responsibility for its crimes against Mr. Princz. As Judge Sporkin reasoned, this responsibility could not be avoided by using the technicalities of United States' law as a shield against Mr. Princz's claim. Germany then filed a Motion for Stay of Proceedings pending its appeal of the Court's Order denying Germany's motion to dismiss for lack of subject matter jurisdiction.⁴⁹ The district court denied Germany's Motion for Stay, stating that it was not necessary to protect the defendant's rights; as Germany did not plan to contest its responsibility for the Holocaust, the only remaining issue was the amount of damages to be awarded.⁵⁰ However, the next week the Court of Appeals responded to Germany's Motion for Stay⁵¹ holding that the district court's denial of Germany's motion to dismiss on grounds of sovereign immunity was immediately appealable.⁵² Furthermore, it stated that the Motion for Stay was unnecessary because an appeal properly pursued from the district court's order automatically divests the district court of control, and the district court may not proceed to trial until the appeal is resolved.⁵³ The Court of Appeals had to decide whether Germany was protected by sovereign immunity under the FSIA and, if it were, whether Mr. Princz's case had to be dismissed for lack of federal subject matter jurisdiction.

III. SUMMARY OF THE COURT'S REASONING

The Court of Appeals held that subject matter jurisdiction was lacking and dismissed Mr. Princz's case against Germany.⁵⁴ It did not resolve the question of whether the FSIA applied retroactively or not. It simply stated that if it did, there was no applicable exception to the general grant of sovereign immunity. On the other hand, if it did not, there was no federal subject matter jurisdiction based upon pre-FSIA law because diversity jurisdiction over foreign states did not apply unless there was an applicable exception to immunity under the FSIA.⁵⁵

The Supreme Court held in *Argentine Republic v. Amerada Hess Shipping Corp.*⁵⁶ that the FSIA "provides the sole basis for obtaining

49. *Princz v. Federal Republic of Germany*, No. 92-0644, 1993 WL 121501 (D.D.C. Apr. 7, 1993).

50. *Id.* at 2.

51. *Princz v. Federal Republic of Germany*, 998 F.2d 1 (D.C. Cir. 1993).

52. *Id.* at 1.

53. *Id.*

54. *Princz*, 26 F.3d. at 1176.

55. *Id.* at 1168.

56. 488 U.S. 428 (1989).

jurisdiction over a foreign state in federal court.”⁵⁷ Under the FSIA the general presumption is that a sovereign is entitled to immunity subject only to limited exceptions. The Supreme Court has not ruled on whether it applies retroactively to events before its promulgation in 1976. The lower courts are split on this issue. The Court of Appeals for the District of Columbia avoided making a definitive ruling about FSIA’s retroactive application. However, the district court stated that there is good reason to believe that it should apply retroactively. In the FSIA’s declaration of purpose, Congress declared that, “Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.”⁵⁸ This declaration suggests that the FSIA should be applied to all cases decided after its enactment regardless of when the underlying events of the cases took place.⁵⁹ Moreover, after the FSIA was enacted, Congress repealed the portion of 28 U.S.C. § 1332 that provided for diversity jurisdiction over suits brought by a United States citizen against a foreign government.⁶⁰ Thus, it appears that Congress intended all questions of sovereign immunity to be decided in conjunction with the FSIA. It is unlikely that Congress meant to extinguish silently all suits against foreign sovereigns based on the pre-FSIA facts.⁶¹

Yet the Court of Appeals noted that the application of the FSIA to the pre-FSIA facts might not even be considered retroactive after the Supreme Court’s decision in *Landgraf v. U.S.I. Film Products*.⁶² There the Court held that a statute is retroactive only when it “would [not] impair rights a party possessed when he acted, [would] increase a party’s liability for past conduct, or [would] impose new duties with respect to transactions already completed.”⁶³ Here the issue is one of subject matter jurisdiction. It does not affect the substantive rights of the defendant, but the power of the court to hear the case. However, the court refused to rule on the matter of retroactivity because even if the FSIA does apply to the pre-FSIA events, the Court of Appeals found no exception to sovereign immunity under the FSIA applicable to Mr. Princz’s case. According to the Court of Appeals, Germany enjoys sovereign immunity under the FSIA.

57. *Id.* at 439.

58. 28 U.S.C. § 1602.

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

60. *Id.*

61. *Id.*

62. ___ U.S. ___, 114 S. Ct. 1483 (1994).

63. 114 S.Ct. 1505.

The Court of Appeals held that none of the exceptions to FSIA divested Germany of sovereign immunity. An exception under § 1605(2)(a) of the FSIA provides that a foreign sovereign "shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."⁶⁴ The court did not rule on whether leasing prisoners as slave labor constituted commercial activity under the FSIA.⁶⁵ Instead, it denied that such activity had a direct effect in the United States. The court defined a direct effect as "one which has no intervening element, but, rather, flows in a straight line without deviation or interruption."⁶⁶ The court determined that Mr. Princz's work for I.G. Farben and Messerschmidt did not have any direct impact in the United States.⁶⁷ Furthermore, the court said that Germany's use of the United States' postal, wire, and banking system to deliver reparations did not constitute a direct effect as the delivery of reparations is not an immediate consequence of Mr. Princz's enslavement.⁶⁸ Lastly, the court thought that the effects of Mr. Princz's enslavement were directly felt in Poland and Germany where he labored and in Czechoslovakia where he resided immediately after the war before coming to the United States.⁶⁹ According to the court, his suffering in the United States was not sufficient to constitute a direct effect under the FSIA.⁷⁰ Thus, the Court of Appeals held that even if leasing Mr. Princz for slave labor was a commercial act, there was no direct effect suffered in the United States, the establishment of which was necessary for jurisdiction under § 1605(2)(a).

The Court of Appeals also held that there was no exception to sovereign immunity under § 1605(1)(a) of the FSIA.⁷¹ This section provides that a foreign state will not be immune if it has "waived its

64. 28 U.S.C. § 1605(2)(a).

65. *Princz*, 26 F.3d at 1172.

66. *Id.* (quoting *Upton v. Empire of Iran*, 459 F. Supp. 264, 266 (D.D.C. 1978), *aff'd mem.* 607 F.2d 494 (D.C. Cir. 1979)).

67. *Princz*, 26 F.3d at 1172.

68. *Id.*

69. *Id.* at 1173.

70. *See Martin v. Republic of South Africa*, 836 F.2d 91, 95 (2d Cir. 1987). The court held that permanent injuries suffered by an African American because he was denied emergency care while in South Africa did not constitute a direct effect within the United States. Many courts have made similar rulings.

71. 28 U.S.C. § 1605(1)(a).

immunity either explicitly or by implication.”⁷² The court rejected the theory that a violation of *jus cogens* constitutes an implicit waiver of sovereign immunity under the FSIA.⁷³ The court dismissed this argument because there are no cases supporting it and there is one case that rejects the theory in its dicta.⁷⁴ Furthermore, the court argued that the theory is inconsistent with the requirement imposed by several courts that the implicit waiver be intentional.⁷⁵ The Court of Appeals found no justification for holding that Germany implicitly waived its sovereign immunity because Germany never indicated its amenability to suit.⁷⁶

Section 1604 of the FSIA states that a foreign sovereign’s immunity from suit is “[s]ubject to existing international agreements to which the United States [was] a party at the time of enactment of [the FSIA].”⁷⁷ Mr. Princz argued that Nazi Germany’s acts were in contravention of the Hague Convention. Article 52 of the Hague Convention provides that citizens of an occupied country may not be ordered to “tak[e] part in military operations against their own country” and a “belligerent party which violates [this prohibition] shall, if the case demands, be liable to pay compensation.”⁷⁸ From the Nuremberg Trial decision it is clear that Nazi Germany violated the Hague Convention.⁷⁹ Mr. Princz contended that the compensation provision of the Hague Convention conflicted with the FSIA; and, therefore, Germany was not immune because of the prior existing Hague Convention.⁸⁰ However, the Supreme Court held that an international convention that “only set[s] forth substantive rules of conduct and state[s] that compensation shall be paid for certain wrongs . . . [does] not create private

72. *Id.*

73. *Princz*, 26 F. 3d at 1173.

74. Although no case adopts the theory that a violation of *jus cogens* principles constitutes an implied waiver of sovereignty, the Ninth Circuit in dicta has denounced the idea. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 719 (9th Cir. 1992). The court said that the FSIA does not specifically provide for an exception to sovereign immunity based on a violation of *jus cogens*. The court determined that Congress must explicitly state that a violation of *jus cogens* principles constitutes an implicit waiver of immunity.

75. *Princz*, 26 F.3d at 1173.

76. *Id.* at 1174.

77. 28 U.S.C. § 1604.

78. *Princz*, 26 F.3d at 1174 (quoting Article 52 and 3 of the Hague Convention).

79. *Id.* at 1175 (noting 6 F.R.D. 69, 123 (1946)). The Nuremberg Trial decision officially declared that Nazi Germany’s acts were in violation of the Hague Convention. *Id.*

80. *Princz*, 26 F.3d at 1174.

rights of action."⁸¹ The courts have unanimously held that the Hague Convention does not by implication grant individuals a personal right to damages.⁸² Thus, the Court of Appeals reasoned that the treaty exception to sovereign immunity was inapplicable.

Therefore, the Court of Appeals did not need to decide whether the FSIA applies retroactively or not because it held that there was no relevant exception to sovereign immunity. Furthermore, the court held that even if it did not apply retroactively, there was no subject matter jurisdiction. Federal diversity jurisdiction over a case brought by a United States citizen against a foreign state used to be provided by 28 U.S.C. § 1332. However, with the enactment of the FSIA the jurisdiction under § 1332 was expressly repealed. Instead, the new § 1330(a) provides federal jurisdiction over a suit against a foreign state only when the foreign state is not entitled to immunity under the FSIA. The House Report on the FSIA declared that "since jurisdiction in actions against foreign states is comprehensively treated by the new § 1330, a similar jurisdictional basis under § 1332 becomes superfluous."⁸³ As there is no immunity under the FSIA, there is no subject matter jurisdiction under § 1330. Thus, the court did not have to consider the status of sovereign immunity law pre-FSIA as there was no post-FSIA federal subject matter jurisdiction.

Thus, the Court of Appeals concluded that since there was no exception to the FSIA's general grant of sovereign immunity and no subject matter jurisdiction if FSIA did not apply to pre-FSIA facts, Mr. Princz's case against Germany for compensation had to be dismissed.

IV. LEGAL BACKGROUND

A. *The Development of the Restrictive Theory of Sovereign Immunity*

The Supreme Court addressed the issue of sovereign immunity for the first time formally in *The Schooner Exchange v. M'Faddon*.⁸⁴

81. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989)(footnote omitted).

82. *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 810 (D.C. Cir. 1984), *Dreyfus v. Von Finck*, 534 F.2d 24, 30 (2d Cir. 1976), and *Handel v. Artukovic*, 601 F. Supp. 1421, 1425 (C.D. Cal. 1985).

83. *Princz*, 26 f.3d at 1170 (quoting H.R. Rep. No. 1487, 94th Cong., 2d Sess. 1976, at 14 (1976)).

84. 11 U.S. (7 Cranch) 116 (1812). Two Americans filed a complaint in admiralty in the District Court of the United States for the District of Pennsylvania against *The Schooner Exchange*, a ship that was temporarily berthed in Philadelphia's harbor.

Chief Justice Marshall fathered the legal principle that a foreign sovereign, barring extraordinary circumstances, is immune. He stated that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."⁸⁵ However, he continued, since all states are of "perfect equality and absolute independence"⁸⁶ and benefit from mutual exchange, nations must consent to a relaxation of their absolute jurisdiction. Nations should grant sovereign immunity to each other. Accordingly, there is no right to sovereign immunity, but states voluntarily waive their jurisdiction over foreign states. As the Supreme Court later said it is a matter of "grace and comity on the part of the United States, and not a restriction imposed by the Constitution."⁸⁷ *The Schooner Exchange* philosophy crystallized into a doctrine of absolute sovereign immunity for foreign states.⁸⁸

Sovereign immunity was of limited importance at the time of *The Schooner Exchange*. The contact between sovereigns was related to political and governmental acts. Chief Justice Marshall named the common examples of interaction which, in turn, engendered the immunity of a nation upon foreign territory: troops passing through;⁸⁹ vessels seeking shelter from the sea;⁹⁰ the person of the sovereign was exempted from arrest;⁹¹ and foreign ministers, likewise, were free from arrest.⁹² Yet, with the increase of business between nations, disputes developed between trading states and individuals of other nations.

Id. at 116. The Americans claimed that the ship belonged to them and that it had been seized by agents of Napoleon, the Emperor of France, when it was on route from Baltimore, Maryland to St. Sebastians, Spain. *Id.* The Schooner Exchange had become a warship in the service of France. *Id.* at 146. The Executive Department of the United States government intervened, claiming that France was an ally and, therefore, immune to suit. *Id.* at 116. Chief Justice Marshall reasoned that the French warship had entered the port to escape the stress of weather and that friendly ships were so authorized. *Id.* at 141. Thus, The Schooner Exchange was immune because it was simply claiming its "rites of hospitality." *Id.* at 144. Chief Justice Marshall held that "national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction." *Id.* at 145-46.

85. *Id.* at 136.

86. *Id.* at 137.

87. *Verlinden v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).

88. Belsky, *supra* note 4, at 379.

89. *Id.* at 139.

90. *Id.* at 141.

91. *The Schooner Exchange*, 11 U.S. at 137.

92. *Id.* at 138.

When these trading states were held immune, the results were unfair.⁹³ Thus, a new theory developed that was more restrictive than the philosophy espoused in *The Schooner Exchange*. Under this theory, immunity was granted only when a sovereign's public acts were assessed, and when a nation traded, it performed a private act. Therefore in trade cases, the sovereign was treated as a private party, and there was no automatic right to immunity.⁹⁴

In the first half of the twentieth century, the restrictive theory of sovereign immunity gained international acceptance.⁹⁵ Thus, immunity only extended to public acts of nations and not to private acts such as commerce. The Department of State formally recognized the restrictive theory of sovereign immunity in 1952.⁹⁶ The private acts of a sovereign, which primarily are commercial activities, were not entitled to immunity.⁹⁷ The Department of State advised the courts on a case-by-case basis on whether immunity should be granted to a sovereign.⁹⁸ If the Department of State neglected to indicate whether a particular state should be immune, the courts had to surmise how the Department would have decided.⁹⁹ As the courts were not given concrete legislative standards for determining when to assert jurisdiction and when to waive it,¹⁰⁰ the body of law became confusing and unpredictable.

In 1976, the FSIA was enacted by Congress to combat the confusion and to codify the restrictive theory of sovereign immunity. The FSIA states,

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the

93. Belsky, *supra* note 4, at 380.

94. *Id.*

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

96. *Id.* In 1952, Jack Tate, the Acting Legal Advisor of the State Department, sent a letter to the Acting Attorney General announcing that the State Department was adopting the restrictive theory of sovereign immunity. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 705 (9th Cir. 1992). This letter is referred to as the Tate Letter.

97. *Id.*

98. *Id.* Shades of this policy were visible at the time of the decision *The Schooner Exchange v. M'Faddon* 11 U.S. (7 Cranch) 116 (1812). The Executive Department of the United States government intervened on behalf of France and claimed that France, as an ally, was immune from jurisdiction within the United States. *Id.* at 116.

99. *Siderman de Blake*, 965 F.2d 705.

100. *Id.*

courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.¹⁰¹

The general legal principle of *The Schooner Exchange* remains; foreign sovereigns are immune when acting within a political or governmental scope. However, at the time of *The Schooner Exchange*, it was the domestic sovereign who voluntarily waived its jurisdiction over the foreign sovereign. Under the FSIA, the foreign sovereign has a statutory right to immunity unless its activities fall within one of the exceptions.¹⁰² The exceptions primarily concentrate on commercial activities where a foreign sovereign is acting as an individual. Furthermore, as noted earlier, the new section providing for jurisdiction over foreign states, 28 U.S.C. § 1330, echoes the FSIA. Federal diversity jurisdiction exists only when the foreign state is not entitled to immunity under the FSIA.

To maintain a suit under the FSIA there must be both federal subject matter jurisdiction and personal jurisdiction over the foreign nation. Federal subject matter jurisdiction exists if there is no immunity under one of the FSIA's exceptions.¹⁰³ Personal jurisdiction over a foreign state, subject to the Due Process clause's requirement of minimum contacts, exists whenever subject matter jurisdiction exists and process has been served in accordance with the FSIA.¹⁰⁴ Once these

101. 28 U.S.C. § 1604 (1994).

102. 28 U.S.C. § 1605 sets out the exceptions to immunity. In broad terms, the exceptions to immunity are: (1) a foreign state waives its immunity either explicitly or by implication; (2) an action is based on the commercial activity of the foreign state within the United States; or upon an act performed within the United States in connection with the commercial activity of the foreign state elsewhere; or outside the United States with a direct effect in the United States; (3) expropriation in violation of international law; (4) the dispute is over rights in real property and estates located within the United States; (5) the action is based upon noncommercial torts occurring in the United States; (6) an arbitration agreement between a foreign state and private party is at issue; and (7) an action is in admiralty to enforce a maritime lien, which is based upon a commercial activity of the foreign state, against a vessel or cargo of a foreign state.

103. 28 U.S.C. § 1330(a). In actions against foreign states:

[t]he district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in § 1603(a) of this title as to any claims for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

104. 28 U.S.C. § 1330(b). "Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under § 1608 of this title." *Id.*

two requirements are met, the FSIA allows a United States citizen or alien to sue a foreign sovereign for commercial activity that occurs abroad with direct effects felt within the United States.¹⁰⁶ It also permits a United States citizen or alien to sue foreign sovereigns for torts, including gross abuses of human rights, that the foreign sovereigns commit within the United States.¹⁰⁶ However, currently the FSIA does not allow a United States citizen or alien to sue a foreign sovereign for torts, including gross violations of human rights, perpetrated by the foreign sovereign abroad.

Nonetheless, there are remedies for United States citizens and aliens suing not defendant nations, but foreign nationals for torts, including the violations of human rights, that they commit under actual or apparent authority or under the color of law of a foreign nation. The plaintiff can sue under the Torture Victim Protection Act of 1991.¹⁰⁷ It provides,

An individual who, under actual or apparent authority, or color of law, of any foreign nation —

- (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
- (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative or to any pursuant who may be a claimant in an action for wrongful death.

The Torture Victim Protection Act also requires that the remedies of the nation where the tort occurred be exhausted before suing in a United States district court¹⁰⁸ and imposes a ten-year statute of limitation.¹⁰⁹

If the plaintiff is an alien, the plaintiff may also be able to sue under the Alien Tort Claims Act.¹¹⁰ That act provides that "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of

105. 28 U.S.C. § 1605(2)(a).

106. 28 U.S.C. § 1605(5)(a). *See* Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980) and Liu v. Republic of China, 892 F.2d 1419 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 27 (1990).

107. Pub. L. No. 102-256, 106 Stat. 78 § 2(a) (codified at 28 U.S.C.A. § 1350 note (West 1993)).

108. *Id.* at § 2(b).

109. *Id.* at § 2(c).

110. 28 U.S.C. § 1350.

the United States.”¹¹¹ The Supreme Court held in *Argentine Republic v. Amerada Hess Shipping* that if the defendant is a foreign nation, jurisdiction must be established under the FSIA and not under the Alien Tort Claims Act.¹¹² However, the court did not negate the establishment of jurisdiction over a defendant national under the Alien Tort Claims Act.¹¹³ A foreign national who violates a “law of nations,” which means a principle of international law or a United States treaty, may be liable under the Alien Tort Claims Act.¹¹⁴ Thus, the Torture Victim Protection Act of 1991 and the Alien Tort Claims Act provide jurisdiction for the redress of a violation of human rights, but only when the defendant acts as an individual and not when the defendant is a foreign sovereign. There is no forum within the United States for an action against a foreign sovereign who committed a tort abroad that violated the human rights of a United States citizen or alien.

B. *The Emergence of Jus Cogens*

After World War II, the doctrine of *jus cogens* emerged. *Jus cogens* is a special subset of customary international law. Normal customary international law, like a treaty, is based on the consent of the participating nations.¹¹⁵ A state is not bound by customary interna-

111. 28 U.S.C. § 1350.

112. 488 U.S. 428, 438 (1989).

113. *Id.*

114. In re Estate of Ferdinand E. Marcos Human Rights Litigation, 978 F.2d 493, 499 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2960 (1993). In *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980), the Court of Appeals for the Second Circuit held that the Alien Tort Claims Act established jurisdiction over a tort claim brought by two citizens of Paraguay against a former Paraguayan police inspector for the torture and death of a family member in Paraguay. The Court of Appeals held that torture violated the laws of nations. It concluded:

that deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, § 1350 provides for federal jurisdiction.

Id. at 878. This case, generally, has been accepted. However, it has been questioned whether the Alien Tort Claims Act can be used by plaintiffs to establish jurisdiction when the tort has been committed abroad absent a specific cause of action by Congress. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984)(Bork, J. concurring), *cert. denied*, 470 U.S. 103 (1985). The alien can avoid this uncertainty by suing under the Tortured Victim Protection Act. For a general discussion, see S. Rep. 102-249, 102nd Cong., 1st Sess. (1991).

115. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993).

tional law if it does not consent to the law.¹¹⁶ *Jus cogens* norms are also referred to as peremptory norms, and they are peremptory because they "prevail over and invalidate international agreements and other rules of international law in conflict with them."¹¹⁷ Peremptory norms are defined as "norm[s] accepted and recognized by the international community of states as a whole as . . . norm[s] from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."¹¹⁸

Jus cogens norms are binding on all states whether or not the states consent to them.¹¹⁹ "A state that enters the international system after a practice has ripened into a rule of international law is bound by that rule."¹²⁰ Peremptory norms are derived from fundamental, international values from which no state can derogate. A state violates *jus cogens* if it:

practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations or internationally recognized human rights.¹²¹

Violations of *jus cogens* are, in short, violations of human rights.

C. *Jurisdiction Under the FSIA When the Tort Occurs Within the United States*

Section 1605(5)(a) of the FSIA provides that a foreign state will not be immune in a case

in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property 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 of his office or employment; except this paragraph shall not apply to —

116. *Id.*

117. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. k (1987).

118. *Siderman de Blake*, 965 F.2d at 714 (quoting Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332).

119. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. d (1987).

120. *Id.*

121. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §102 cmt. k (1987).

- (A) 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, or
- (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

According to the House and Senate Judiciary Committees, this provision was "directed primarily at the problem of traffic accidents but is cast in general terms as applying to all tort actions for money damages."¹²² The courts have applied this section of the FSIA to non-traffic torts occurring within the United States. There is nothing in its language to suggest a more limited interpretation.

The United States District Court for the District of Columbia considered jurisdiction under § 1605(a)(5) of the FSIA in *Letelier v. Republic of Chile*.¹²³ In 1976, Orlando Letelier, the former Chilean Ambassador to the United States, was assassinated in a car explosion in Washington D.C. His survivors brought suit in 1978 against the Republic of Chile.¹²⁴ They alleged jurisdiction under § 1605(5)(a). Letelier's death was a tort occurring within the United States. The survivor's claim was not subject to the two exceptions which revoke jurisdiction under § 1605(5)(a). The claim clearly did not arise out of "malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."¹²⁵ The survivors' claim was valid.

The second exception provides that immunity will not be revoked if the claim is "based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused."¹²⁶ A discretionary act is one in which "there is room for policy judgment and decision."¹²⁷ The court noted that planning an assassination is an act involving policy judgment and decision.¹²⁸ However, a state possesses no discretion that allows its officials

122. *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980)(quoting H.R. Rep. No. 94-1487 and S. Rep. No. 94-1310).

123. *Id.*

124. *Id.* at 665.

125. 28 U.S.C. § 1605(5)(a)(B). The court did not spend much time reflecting on this first exception. *Letelier*, 488 F. Supp. at 673.

126. 28 U.S.C. § 1605(5)(a)(A).

127. *Letelier*, 488 F. Supp. at 673 (quoting *Dalehite v. United States*, 346 U.S. 15, 36 (1953)).

128. *Id.*

and employees to commit illegal actions.¹²⁹ Thus, "whatever policy options may exist for a foreign country, it has no 'discretion' to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law."¹³⁰ The court, therefore, held that Chile was not entitled to sovereign immunity under the FSIA for the tortious acts it committed in violation of human rights within the United States contrary to the principles of international law.

In 1984, Henry Liu, a Taiwanese dissident was shot to death in California by agents of the Republic of China. His wife brought suit against China in the United States District Court for the Northern District of California. The district court conditionally held that China was not immune under the FSIA in *Liu v. Republic of China*.¹³¹ "The killing of Americans residing in the United States is not a policy option available to foreign countries."¹³² However, the district court ultimately dismissed the action on state doctrine grounds.¹³³ The district court reasoned that inquiry into the Republic of China's involvement in the assassination would challenge findings of Chinese tribunals, and discovery would "involve [intrusion of] the judiciary in the most sensitive areas of a foreign nation's national security and intelligence affairs."¹³⁴

Liu's wife immediately appealed this decision to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals held that the state doctrine did not bar the action.¹³⁵ The Court of Appeals quoted *Letelier*: "[T]o hold otherwise would totally emasculate the purpose and effectiveness of the Foreign Sovereign Immunities Act. . . ."¹³⁶ The Court of Appeals found that the Republic of China was involved in the conspiracy and that the assassin acted within the scope of his employment when he killed Liu. No sovereign immunity based on discretionary acts was granted, and China was denied immunity under § 1605(5)(a).

129. *Id.* (citing *Cruikshank v. United States*, 431 F. Supp. 1355, 1359 (D. Haw. 1977)).

130. *Id.*

131. *Liu v. Republic of China*, 642 F. Supp. 297 (N.D. Cal. 1986).

132. *Id.* at 305.

133. *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989), *cert. denied*, 113 S. Ct. 27 (1990).

134. *Id.* at 1421-22.

135. *Id.* at 1434.

136. *Id.* at 1432 (quoting *Letelier*, 488 F. Supp. 674).

D. No Jurisdiction When Tortious Conduct Occurs Outside the United States

There was no jurisdiction when a Mr. Martin, an American, who was denied emergency care after an automobile accident in South Africa, tried to sue South Africa.¹³⁷ Mr. Martin was abandoned at the scene of the accident, allegedly because he was African American. As a direct result of his abandonment, he became a quadriplegic. Mr. Martin tried to establish jurisdiction under § 1605(2)(a) of the FSIA. This section provides that a foreign state shall not be immune when "an action is based . . . upon an act outside the territory of the United States in connection with commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."¹³⁸ The United States Court of Appeals for the Second Circuit held in *Martin v. Republic of South Africa* that there was no direct effect within the United States. The court reasoned that the initial injury that left Mr. Martin a quadriplegic happened outside the U.S.¹³⁹ and the pain and suffering that Mr. Martin continued to endure in the United States were only indirect consequences.¹⁴⁰ Therefore, the court dismissed the case for lack of subject matter jurisdiction.¹⁴¹

During the Falkland War, an Argentine aircraft, without cause or provocation, repeatedly attacked a neutral, unarmed Liberian oil tanker in international waters.¹⁴² The tanker suffered severe damage and had to be scuttled.¹⁴³ Argentina refused to pay compensation to the Liberian owners for the loss of the tanker.¹⁴⁴ The Argentine courts were closed to the owners. Therefore, the owners brought an action and maintained suit in the United States.¹⁴⁵ The district court dismissed the suit, holding that Argentina was immune under the FSIA.¹⁴⁶ The Court of Appeals for the Second Circuit reversed. It held that although the exceptions to FSIA were inapplicable, the Alien Tort Claims Act¹⁴⁷

137. *Martin v. Republic of South Africa*, 836 F.2d 91 (2nd Cir. 1987).

138. *Id.* at 93 (quoting 28 U.S.C. § 1605(2)(a) (*emphasis added*)).

139. *Id.* at 94.

140. *Id.* at 95.

141. *Id.* at 96.

142. *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 423 (2d. Cir. 1987).

143. *Id.*

144. *Id.* at 424.

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

146. *Id.*

147. 28 U.S.C. § 1350.

provided jurisdiction.¹⁴⁸ The United States Supreme Court granted certiorari to examine the issue of jurisdiction.¹⁴⁹ It held in *Argentine Republic v. Amerada Hess Shipping Corp.* that the FSIA provided the sole basis for obtaining jurisdiction over a foreign state in United States courts.¹⁵⁰ According to the Supreme Court's ruling, all actions against a foreign state must come within the FSIA.

The Court dismissed the case for lack of jurisdiction under the FSIA.¹⁵¹ It held that there was no exception to sovereign immunity.¹⁵² The tort exception of § 1605(5)(a) is limited to damages or loss of property occurring within the United States. The Court noted that this bombing took place in the international waters. Furthermore, the Court stated that there is no exception to the FSIA under § 1604 which provides that a foreign state shall not be immune if an existing international agreement so demands.¹⁵³ The Geneva Convention on the High Seas and the Pan-American Maritime Neutrality Convention were not self-executing agreements which created "private rights of action for foreign corporations to recover compensation from foreign states in United States courts."¹⁵⁴ Moreover, according to the Court, the conventions and the Treaty of Friendship, Commerce and Navigation between the United States and Liberia did not constitute a waiver of immunity to suit in the United States or to the availability of a cause of action in the United States.¹⁵⁵ Thus, the Supreme Court reasoned that the Liberian owners were left without remedy.

In 1982, an Argentine family, the Sidermans (whose members were permanent residents of the United States) filed suit against the Republic of Argentina.¹⁵⁶ After the Argentine military overthrew the government of President Maria Estela Peron in 1976, ten masked men acting under the direction of the new government beat and tortured Mr. Jose Siderman.¹⁵⁷ The family fled. They were forced to sell their 127,000 acres of land at a discount and their business was expropriated.¹⁵⁸ The United States Court of Appeals for the Ninth Circuit held

148. *Amerada Hess Shipping Corp.*, 830 F.2d at 428-29.

149. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989).

150. *Id.* at 434.

151. *Id.* at 429.

152. *Id.* at 443.

153. 28 U.S.C. § 1604.

154. *Amerada Hess*, 488 U.S. at 442.

155. *Id.* at 443.

156. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993).

157. 965 F.2d at 703.

158. *Id.* at 703-04.

that there might be jurisdiction under the FSIA in *Siderman de Blake v. Republic of Argentina*.¹⁵⁹

The court held that torture is a violation of *jus cogens* norms:

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*. The crack of the whip, the clamp of a thumb screw, the crush of the iron maiden, and, . . . the shock of the cattle prod are forms of torture that international order will not tolerate. To subject a person to such horrors is to commit one of the most egregious violations of the personal security and dignity of a human being.¹⁶⁰

The court, however, denied jurisdiction based upon a violation of *jus cogens* norms.¹⁶¹ The court referred to the decision in *Amerada Hess*,¹⁶² in which the Supreme Court refused to deny immunity to Argentina who acted in violation of international law.¹⁶³ The court quoted *Amerada Hess* stating "that immunity is granted in those cases involving alleged violations of international law that do not come within one of the FSIA's exceptions."¹⁶⁴ The court concluded that Congress would expressly have to make violations of *jus cogens* principles an implicit waiver of sovereign immunity.

The Court of Appeals established that there might be jurisdiction in *Siderman de Blake* because Argentina may have waived its sovereign immunity under § 1605(a)(1), which allows a foreign state to waive its immunity implicitly.¹⁶⁵ Argentina had elicited the help of California state courts in obtaining jurisdiction over Jose Siderman in a malicious criminal proceeding against him in Argentina. The California state courts, unaware of the true nature of the proceedings, effected service of process against Jose Siderman.¹⁶⁶ Thus, Argentina by seeking the help of the American legal system, contemplated the involvement of the United States courts in the affairs at issue.¹⁶⁷ The Court of Appeals concluded that the family had presented evidence sufficient to

159. *Id.* at 722.

160. *Id.* at 717.

161. *Id.* at 719.

162. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989).

163. *Id.* at 443 (1989).

164. *Siderman de Blake*, 965 F.2d at 719 (quoting *Amerada Hess*, 488 U.S. at 436).

165. 28 U.S.C. § 1605(a)(1).

166. *Siderman de Blake*, 965 F.2d at 722.

167. *Id.* at 720.

support a finding that Argentina implicitly waived its sovereign immunity.¹⁶⁸ However, the case was remanded to allow Argentina to rebut the family's evidence.¹⁶⁹

The United States Supreme Court again analyzed the FSIA in *Saudi Arabia v. Nelson*.¹⁷⁰ Pursuant to a contract signed with the Kingdom of Saudi Arabia, the Hospital Corporation of America recruited American personnel to work for the King Faisal Specialist Hospital (hereinafter the "Hospital") in Saudi Arabia.¹⁷¹ Mr. Nelson noticed a job advertisement placed by the Hospital Corporation of America in a trade periodical, applied for a position as a monitoring systems engineer, and was hired.¹⁷² Mr. Nelson did not experience any problems in his new position from December 1993 until March 1994.¹⁷³ Then he discovered safety defects in the Hospital's oxygen and nitrous oxide lines that posed fire hazards and other dangers to the patients.¹⁷⁴ He reported the defects for seven months and was repeatedly told to ignore them.¹⁷⁵ Yet, in September 1984, he was summoned to the Hospital's Security office where agents of the Saudi Government arrested him.¹⁷⁶

Mr. Nelson was confined in a jail cell for four days, shackled, beaten, tortured, and deprived of food.¹⁷⁷ He was not told of the charges against him or the contents of the statement he was forced to sign.¹⁷⁸ He was then transferred to a rat-infested, overcrowded prison to await trial.¹⁷⁹ He was released thirty-nine days later at the request of a United States Senator.¹⁸⁰ Mr. Nelson then brought an action against Saudi Arabia alleging intentional torts including battery, unlawful detainment, wrongful arrest and imprisonment, false imprisonment, inhuman torture, disruption of normal family life, and infliction of mental anguish.¹⁸¹ He tried to establish jurisdiction under § 1605(2)(a) which denies immunity when "the action is based upon a

168. *Id.* at 722.

169. *Id.*

170. 113 S. Ct. 1471 (1993).

171. *Id.* at 1474.

172. *Id.*

173. *Id.* at 1475.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 1475-6.

commercial activity carried on in the United States by the foreign state.”¹⁸² Mr. Nelson contended that the Hospital’s recruitment in the United States for American personnel was the “but for” cause of his injuries.¹⁸³

The Supreme Court dismissed the case for lack of jurisdiction under the FSIA.¹⁸⁴ The Court reasoned that it was not Saudi Arabia’s commercial activities within the United States, but its tortious conduct within Saudi Arabia that caused Mr. Nelson’s injuries and formed the basis of his suit.¹⁸⁵ The Court went on to say that “[t]he conduct boils down to abuse of the power of its policy by Saudi Government, and however monstrous such abuse undoubtedly may be, a foreign state’s exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature.”¹⁸⁶ According to the Court, the exercise of police powers is not an act of an individual involved in commerce, but of a sovereign; therefore it is deserving of absolute immunity. In fact, from the Court’s holding it appears that there will never be jurisdiction based on § 1605(2)(a), the commercial activities exception, when there is a violation of human rights.¹⁸⁷

In *DeNegri v. Republic of Chile*,¹⁸⁸ two Chilean families living in exile, one in the United States and one in Canada, sued the Republic of Chile and the Armed Forces of Chile for the injuries to their children. Rodrigo Rojas DeNegri and Carmen Gloria Quintana Arancibia were in Chile in July 1986 and participated in a student protest.¹⁸⁹ They were subsequently detained by a group of Chilean soldiers, doused with gasoline, set on fire, and beaten by the soldiers.¹⁹⁰ They were then denied adequate medical assistance; DeNegri died, and Arancibia was permanently maimed.¹⁹¹ The families sued Chile for violating “basic international mandates prohibiting the violation of preemptory human

182. 28 U.S.C. § 1605(2)(a).

183. *Nelson*, 113 S. Ct. at 1476.

184. *Id.* at 1473.

185. *Id.* at 1478. “Those torts, and not the arguably commercial activities that preceded their commission, form the basis for the Nelsons’ suit.” *Id.*

186. *Id.* at 1479.

187. “[T]he Act’s commercial-activity exception is irrelevant to cases alleging that a foreign state has violated human rights.” *Id.* at 1480 (citing Kenneth C. Randall, *Federal Courts and the Human Rights Paradigm* 93 (1990)).

188. 1992 WL 91914 (D.D.C. Apr. 6, 1992).

189. *Id.* at 1.

190. *Id.* at 1.

191. *Id.*

rights norms."¹⁹²

The United States District Court for the District of Columbia dismissed the case for lack of jurisdiction under the FSIA.¹⁹³ Tort claims against foreign states are permitted only when the tortious act and the injury have happened within the United States. Furthermore, Chile had not waived its immunity through the signing of a treaty or international agreement.¹⁹⁴ The court also refused to accept the theory that Chile implicitly waived its immunity by violating principles of *jus cogens*.¹⁹⁵ It noted that this theory is unsupported by case law, and that while not discussed in *Amerada Hess*, the Supreme Court has strictly interpreted the FSIA.¹⁹⁶ The court concluded that Congress would have to declare officially that the FSIA revokes sovereign immunity when a peremptory norm has been violated.¹⁹⁷

Yet, jurisdiction in *In re Estate of Ferdinand E. Marcos Human Rights Litigation* was successfully established.¹⁹⁸ Ms. Marcos-Manotoc was the National Chairman of the Kabataang Baranggay (which controlled the police and military intelligence personnel) in the Philippines.¹⁹⁹ She gave a speech at an open forum discussion on August 31, 1977, where she was questioned by Archimedes Trajano about her appointment as director of an organization.²⁰⁰ Trajano was then kidnapped, interrogated, and tortured to death by the military intelligence personnel under order from Marcos-Manotoc for his political beliefs and activities.²⁰¹ Trajano's mother, who lived in Hawaii, brought suit against Marcos-Manotoc for the wrongful death of her son.²⁰²

The United States Court of Appeals for the Ninth Circuit determined that the FSIA did not apply. Ms. Marcos-Manotoc, who controlled the police and the military intelligence personnel who tortured and murdered Trajano, acted outside the mandate of her office.²⁰³ Therefore, although the FSIA's definition of a foreign state includes an "agency or instrumentality of a foreign state,"²⁰⁴ Ms. Marcos-Manotoc

192. *Id.*

193. *Id.* at 4.

194. *Id.* at 3.

195. *Id.*

196. *Id.*

197. *Id.*

198. 978 F.2d 493 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2960 (1993).

199. *Id.* at 495.

200. *Id.*

201. *Id.* at 495-96.

202. *Id.* at 495.

203. *Id.* at 496, 498.

204. 28 U.S.C. § 1603(a).

was not entitled to immunity under the FSIA. She had acted under her own authority and not under the authority of the Republic of the Philippines.²⁰⁵ Thus, the Alien Tort Claims Act²⁰⁶ provided jurisdiction over Marcos-Manotoc.²⁰⁷ All the requirements for jurisdiction were present: Trajano's mother was a resident alien, and the torture committed was a violation of the laws of nations.²⁰⁸

As the *Letelier* and *Liu* cases demonstrate, it is not difficult to establish jurisdiction under the FSIA over a foreign sovereign when the case is based upon a tort that occurred in the United States. The Torture Victim Protection Act provides jurisdiction in a cause of action brought by a United States citizen or alien if the defendant is a foreign national whose acts of torture and extrajudicial killing were committed under actual or apparent authority or the color of law of a foreign nation. *In re Estate of Ferdinand E. Marcos Human Rights Litigation* establishes that there is jurisdiction when an alien brings suit against a foreign national who acted outside of his or her office under the Alien Tort Claims Act, although the tort has no nexus to the United States. However, when a violation of human rights is committed by a foreign sovereign abroad, jurisdiction cannot be established.

V. ANALYSIS

The United States Court of Appeals for the District of Columbia held that Germany was immune from the claims of Mr. Princz.²⁰⁹ It declined to hold whether the FSIA applies retroactively to pre-FSIA facts, but stated that such a determination was irrelevant to the case as no exception to sovereign immunity under FSIA was applicable. Furthermore, the court stated, if FSIA were not retroactive, there could be no diversity jurisdiction under § 1330 upon which to base a pre-FSIA action. Therefore, Mr. Princz's claims were dismissed.

205. *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d at 493, 498 (9th Cir. 1992).

206. 28 U.S.C. § 1350 which provides "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

207. *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d at 501. The Court of Appeals for the Ninth Circuit rejected the argument that there is no private right of action because the torture had no nexus with the United States. It, instead, looked at the face of the statute that indicated "no limitations as to the citizenship of the defendant, or the locus of the injury." *Id.* at 500. The case follows the holding in *Filartiga*. The nationality of the parties is irrelevant.

208. *Id.* at 498. See *supra* text accompanying notes 107-09 for the statutory language.

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

However, the court could have held that a foreign state that violates a *jus cogens* norm surrenders its right to immunity because no sovereign may derogate from these peremptory norms. While acting in violation of *jus cogens* norms, the sovereignty of the state is not recognized. Thus, it implicitly waives immunity under § 1605(1)(a) of the FSIA. Judge Sporkin of the United States District Court for the District of Columbia did not find Germany immune.²¹⁰ He distinguished Mr. Princz's case against Germany from *Amerada Hess*. He held that Mr. Princz's case involved "extraordinary facts" that were not before the Supreme Court when it determined the *Amerada Hess* case, and were not contemplated by Congress when it enacted the FSIA.²¹¹ The case is one of first impression. Congress could not have intended to allow Germany, which did not recognize Mr. Princz's United States citizenship in 1942, to raise United States law now as a shield against liability.²¹² Such a result is unjust.

Yet, the Court of Appeals declined to apply what they called an "expansive reading" of the FSIA and to establish jurisdiction based on an implicit waiver of sovereign immunity because Germany violated peremptory norms.²¹³ Justice Wald dissented from the Court of Appeal's dismissal of Mr. Princz's case.²¹⁴ She thought that the FSIA did apply retroactively to pre-FSIA facts.²¹⁵ She reasoned that the declaration of purpose in FSIA states that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter."²¹⁶ The "henceforth" clearly implies Congress's intent that all cases against foreign states be decided in compliance with the FSIA, regardless of when the events occurred.

Furthermore, she noted that Germany could not have expected to be held immune from its acts. The Nuremberg trials show that Ger-

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

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

212. *Id.*

213. *Princz v. Federal Republic of Germany*, 26 F.3d at 1166, 1174.

"We think that something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong."

Id. at 1174 n. 1.

214. *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (1994)(Wald, J., dissenting), *cert. denied*, 115 S. Ct. 923 (1995).

215. *Id.* at 1178.

216. 28 U.S.C. § 1602.

many was held responsible for its atrocities in the pre-FSIA era.²¹⁷ Moreover she reasoned that the application of FSIA to pre-FSIA facts would not impinge on any right held by Nazi Germany at the time of its enslavement and imprisonment of Princz. FSIA deals with the jurisdiction of the courts, not the rights of foreign states.²¹⁸

Justice Wald embraced the theory that a violation of *jus cogens* norms constitutes an implied waiver of sovereign immunity under the FSIA § 1605(1)(a).²¹⁹ She would find jurisdiction because Germany waived its sovereign immunity by “violating the *jus cogens* norms of international law condemning enslavement and genocide.”²²⁰ She poignantly wrote,

When the Nazis tore off Princz’s clothes, exchanged them for a prison uniform and a tattoo, shoved him behind the spiked barbed wire fences of Auschwitz and Dachau, and sold him to the German armament industry as fodder for their wartime labor operation, Germany rescinded any claim under international law immunity from this court’s jurisdiction.²²¹

Germany intentionally waived its right to sovereign immunity and was on notice that it might be subject to jurisdiction within the United States when it inflicted unimaginable atrocities on innocent people during the Holocaust.²²²

Furthermore, international law has been a part of the law of the United States since the early 1900’s.²²³ The Supreme Court has held that “[a]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”²²⁴ The principles of *jus cogens* can be reconciled with the FSIA if a violation of peremptory norms is held to constitute an implicit waiver of immunity by the foreign state. The very horror of human rights violations puts the offending foreign state on notice that it will be subject to jurisdiction within the United States.

If this argument is not accepted by the courts, then victims of human rights violations committed abroad by foreign sovereigns are

217. *Princz*, 26 F.3d at 1178.

218. *Id.*

219. *Id.* at 1184.

220. *Id.* at 1179.

221. *Id.* at 1182.

222. *Id.* at 1184.

223. *The Paquete Habana*, 175 U.S. 677 (1900).

224. *The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

left without a means of compensation within the United States' legal system. The Torture Victim Protection Act only provides jurisdiction when the defendant is a foreign individual and not a foreign sovereign. When the plaintiff is an alien the Alien Tort Claims Act confers jurisdiction over foreign individuals, but not over foreign states.²²⁵ A foreign state should not be allowed to violate human rights abroad and then claim immunity in United States courts based on American law.

Moreover, the FSIA allows foreign nationals to bring suit in the United States courts against their native countries for acts of terrorism occurring within the United States.²²⁶ Courts have held that acts of terrorists are in violation of United States and international laws and, therefore, receive no immunity.²²⁷ There is no reason to distinguish these cases from those occurring abroad where American citizens' rights are violated in contravention of *jus cogens* norms.²²⁸ Jurisdiction under FSIA should be extended to these cases. The courts of the United States have a legitimate interest in resolving claims involving its citizens. Furthermore, the United States would not be subjecting the foreign sovereigns to its own law, but to international law, the principles of *jus cogens* from which sovereigns may not derogate.

There could be problems if the United States embraces the theory that a violation of peremptory norms is an implicit waiver of immunity under the FSIA.²²⁹ The most glaring is the fact that the right to enforce a judgment under the FSIA is extremely limited. Section 1610(a) allows the execution of a judgment on assets of a foreign sovereign only if the assets were used for the commercial activity upon which the claim was based.²³⁰ Thus, although the FSIA establishes jurisdiction over a foreign sovereign in both commercial and tort actions, only the commercial creditors can execute a judgment. Even if the theory of implied waiver based on a violation of peremptory norms is accepted, recovery is not guaranteed. The successful plaintiff must depend on diplomatic and political pressure to enforce judgments.²³¹ This incongruity needs to be addressed by Congress, but is no reason to reject the

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

226. *See Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980); and *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 27 (1990).

227. *Id.*

228. *See Belsky*, *supra* note 4, at 400-01.

229. *See id.* at 402-12.

230. 28 U.S.C. § 1610(a).

231. However, political and diplomatic measures have been to no avail in *Princz's* situation. It is questionable how successful these methods are in executing judgments.

theory of an implicit waiver of sovereign immunity based on a violation of peremptory norms.

Another problem might be that, if the United States takes a more stringent stance on sovereign immunity, it is possible that foreign states will be likely to establish jurisdiction over the United States based on its actions abroad.²³² Perhaps "there is nothing inherently wrong with subjecting the United States to liability abroad."²³³ The United States should be held accountable for its transgressions of peremptory norms. In any event, regardless of the United States' fears that justice is not available in a foreign jurisdiction, attachment of U.S. assets could happen with or without the acceptance of a more limited view of sovereign immunity.²³⁴

There is also the fear that if the United States opens its courts to suits based on the implied waiver of sovereign immunity, there will be a flood of litigation.²³⁵ However, this fear is not realistic; the requirements for a valid action are substantial. First, there must be a violation of a peremptory norm. Peremptory norms occupy a high status among the norms of international law,²³⁶ and, therefore, very few actions will involve these norms. Secondly, there are many domestic restrictions on such suits. The plaintiff must establish personal jurisdiction and venue, and the defendant may move to dismiss for *forum non conveniens*.²³⁷ Thus, given the narrow definition of *jus cogens* principles and the domestic legal restrictions, there will not be a flood of cases.

The courts have been reluctant to find an implied waiver except in the situations mentioned in the legislative history of the FSIA: "(1) where a foreign state agrees to arbitrate in the United States; (2) where a foreign state agrees its contract will be governed by United States law; and (3) where a foreign state files a responsive pleading with a United States court without asserting sovereign immunity."²³⁸ Otherwise, the courts hold that the intentionality requirement for waiver is lacking. The Supreme Court has interpreted strictly the FSIA in *Amerada Hess* and declined to discuss the possibility of an implied waiver based on a violation of peremptory norms. Furthermore, in *Nelson*, the Court was explicit that police power was within the realm of

232. Belsky, *supra* note 4, at 404.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Siderman de Blake*, 965 F.2d at 715-16.

237. See *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d at 500 and Belsky, *supra* note 4, at 405-412.

238. *DeNegri*, 1992 WL at 3.

sovereign activity and not within the powers of an individual engaging in commerce.²³⁹ Since the principle behind the FSIA is that a sovereign will be denied immunity only when it acts as an individual, it seems that an abuse of police power in violation of a citizen of the United States or an alien's human rights is strangely within the province of a sovereign and irremediable in the United States courts.

Congress has not considered the theory that a violation of *jus cogens* principles is an implicit waiver of immunity, although it has considered amending the FSIA. It has thought about amending the FSIA to include another exception that would establish jurisdiction in cases where

money damages are sought against a foreign state for the personal injury or death of a United States citizen occurring in such foreign state and caused by torture or extrajudicial killing of that citizen, or by an act of genocide committed against the citizen, by such foreign state.²⁴⁰

The plaintiff would have to be a citizen of the United States at the time the tort was committed, remedies would have to be exhausted in the place where the conduct giving rise to the claim occurred, and there would be a ten year statute of limitations in which to bring the suit.²⁴¹ The other amendment to the FSIA would allow execution of a judgment against property in such an action regardless of whether the property was involved in the act upon which the claim was based.²⁴² Thus, a citizen of the United States would be able to sue and enforce a judgment against a foreign sovereign for a violation of human rights. The United States House of Representatives' Committee on the Judiciary examining these amendments supported them because they believed that "the right of a U.S. citizen to be compensated by a foreign government for torture is at least as important as the right to sue a foreign government for breach of contract."²⁴³ The committee was referring to the unjust fact that the FSIA currently establishes jurisdiction for commercial actions occurring in a foreign territory with direct effects felt in the United States, but not for violations of United States citizens' human rights perpetrated abroad.

239. *Nelson*, 113 S. Ct. at 1478-79.

240. H.R. REP. No. 103-702, 103d Cong., 2nd Sess. 1 (1994). The new section would be 28 U.S.C. § 1605(7)(a).

241. *Id.* The new section would be 28 U.S.C. § 1610(7)(a).

242. *Id.* at 2.

243. *Id.* at 3.

The committee also concluded that the amendments would not affect the comity between the United States and foreign nations because the amendments required an exhaustion of adequate remedies abroad before action could be brought in the United States.²⁴⁴ Furthermore, this requirement would insulate the United States courts from non-meritorious and frivolous suits.²⁴⁵ The ten year statute of limitations also would ensure that the United States courts would not hear stale actions.²⁴⁶ The committee was not worried about an increased exposure of the United States to suit abroad; it noted that after the *Letelier* decision (which subjected a foreign nation's intelligence agency to suit in the United States), there has not been any known case alleging torture or assassination against the CIA or any other agency of the United States Government.²⁴⁷ If such a case were to arise, there is sufficient recourse within the United States court system for such actions.²⁴⁸ However, despite the warm reception to the amendments by the Committee on the Judiciary, Congress as a whole has not enacted these amendments.²⁴⁹ Furthermore, these amendments would not provide an analogous right to aliens, allowing them to sue foreign sovereigns for violations of their human rights.

VI. CONCLUSION

The issue of sovereign immunity and its relation to subject matter jurisdiction under the FSIA is disputed. The Supreme Court was adamant in *Amerada Hess* that Congress did not intend to provide for jurisdiction under the FSIA every time there was a transgression of international law.²⁵⁰ On the other hand, the Court was not considering the extraordinary facts of Mr. Princz's case or even a case in which an American citizen's human rights were violated by a foreign sovereign. Such an act in contravention of *jus cogens*, the highest of international laws, may drive the Court to accept the theory that an act in contravention of peremptory norms is an implied waiver of sovereign immunity under the FSIA. However, it appears more likely that the Court is

244. *Id.* at 5.

245. *Id.*

246. *Id.*

247. *Id.* (quoting the Senate testimony of Mr. Sofaer on Jun. 21, 1994).

248. *Id.*

249. 140 CONG. REC. E2123-01, 103d Cong., 2d Sess. (1994) (quoting Kimberly J. McLarin, *Hope Fading for Holocaust Survivor's Reparations*, THE N.Y. TIMES, Oct. 3, 1994). See H.R. REP. No. 103-702, 103d Cong., 2d Sess. 1 (1994).

250. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 436 (1989).

waiting for Congress to accept explicitly the theory that a violation of peremptory norms constitutes an implied waiver of sovereign immunity by amending the FSIA.

Mr. Princz's petition for a writ of certiorari in his suit against Germany was denied.²⁵¹ The amendments to the FSIA (providing jurisdiction to the United States district courts in cases involving torture or extrajudicial killing committed abroad and allowing execution of judgments) have not been enacted. Neither the Torture Victim Protection Act of 1991 nor the Alien Tort Claims Act provides any redress for Mr. Princz's claims. Therefore, without legal redress against Germany, Mr. Princz filed a suit against the successors to I.G. Farben and Messerschmidt, four German companies, that had made him and his brothers slave laborers during World War II.²⁵²

House and Senate resolutions²⁵³ were unanimously adopted in early 1995 to encourage President Clinton and the Secretary of State to raise Mr. Princz's case with Germany, but to no avail.²⁵⁴ The German government refused to make good again on Mr. Princz's claim.²⁵⁵ However, on September 19, 1995, a settlement was finally reached between the United States and Germany.²⁵⁶ Mr. Princz and ten other Americans, mostly children of European parents treated as European nationals when they were taken prisoner by the Nazis, will share a \$2.05 million settlement.²⁵⁷ The money will be apportioned according

251. *Princz v. Germany*, 1994 WL 664731 (U.S. Jan. 15, 1995). There were three questions presented for review. The first was procedural asking whether the district court's order denying Germany's motion to dismiss was immediately appealable under the collateral order doctrine and would the proceedings below then be stayed. The second asked if a violation of *jus cogens* principles is an implicit waiver under the FSIA. The third question was whether Mr. Princz's slave labor used in the war effort against the United States in World War II constituted commercial activity with a direct effect in the United States within the meaning of § 1605(2)(a). *Supreme Court Proceedings; Cases Docketed; Subject Matter Summary of Cases Recently Filed*, U.S. Law Week, Jan. 3, 1995.

252. Lyle Denniston and Mark Matthews, *Germany to Pay Camps' Survivors*, THE BALTIMORE SUN, Sept. 19, 1995, at A1.

253. H. R. Res. 323, 103d Cong., 1st Sess. (1994) and S. Res. 162, 103d Cong., 1st Sess. (1994).

254. H. R. Res. 323, 103d Cong., 1st Sess. (1994) and S. Res. 162, 103d Cong., 1st Sess. (1994). "It . . . urges them to take all appropriate steps necessary to ensure that this matter will be expeditiously resolved and that fair reparations will be provided Mr. Princz." *Id.*

255. *Id.* The German word for reparations, Wiedergutmachung, means to make good again.

256. 141 CONG. REC. S14802-02, 104th Cong., 1st Sess. (1995).

257. Lyle Denniston and Mark Matthews, *Germany to Pay Camps' Survivors*,

to the severity of suffering, taking into account the length of imprisonment, injuries, and other indignation.²⁵⁸ Mr. Princz's lawsuit against the German companies has been dismissed by mutual agreement and the settlement does provide an undisclosed payment to Mr. Princz by these companies.²⁵⁹ Thus, Mr. Princz's battle for reparations from Germany that was begun in the 1950's is complete.²⁶⁰

The settlement is not binding on anyone who could raise similar claims and did not join the agreement.²⁶¹ The settlement provides that in two years the governments will begin new negotiations to address claims of other survivors who may exist.²⁶² While, thankfully, survivors of Nazi Germany's atrocities are being compensated, there are still no legal means to ensure such compensation. Victims of human rights violations committed abroad by foreign sovereigns must rely on political means to bring settlement. The courts of the United States will not establish jurisdiction based upon the theory of implied waiver for actions involving violations of human rights under the FSIA. Foreign sovereigns are irreproachable for these violations in the courts of the United States. Their violations against the human rights of United States citizens and aliens will not be redressed within the legal system of the United States unless Congress expressly states that the FSIA denies immunity when a foreign sovereign breaches peremptory norms because the sovereign implicitly waives its immunity, or until Congress amends the FSIA to provide jurisdiction for torture, extrajudicial killing, or genocide committed abroad by a foreign sovereign against United States citizens and aliens.

Thora A. Johnson

THE BALTIMORE SUN, Sept. 19, 1995, at A1.

258. *Id.* at A6.

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

