Penn State International Law Review

Volume 12
Number 2 *Dickinson Journal of International Law*

Article 6

1-1-1994

The Doctrine of Sovereign Immunity-A Jurisdictional Shield for Foreign Nations and their Accountability for Human Rights Violations, Saudi Arabia v. Nelson, 113 S. Ct. 1471 (1993)

Michelle Fastiggi

NOTE

INTERNATIONAL LAW—The Doctrine of Sovereign Immunity—A Jurisdictional Shield for Foreign Nations and their Accountability for Human Rights Violations, *Saudi Arabia v. Nelson*, 113 S. Ct. 1471 (1993).

> The crack of the whip, the clamp of the thumb screw, the crush of the iron maiden, and in these more efficient modern times, the shock of the electric cattle prod are forms of torture that the 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. That states engage in official torture cannot be doubted, but all states believe it is wrong, all that engage in torture deny it, and no state claims a sovereign right to torture . . . .[1]

Recently, in *Saudi Arabia v. Nelson*,[2] the Supreme Court had the unique occasion to declare that the United States, in its dedication to the promotion of human rights, would provide its domestic courts as forums of redress for those suffering human rights abuses at the hands of foreign governments.[3] In particular, *Nelson* involved the claim of an American

---

1. Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 717 (9th Cir. 1992).

2. Saudi Arabia v. Nelson, 113 S. Ct. 1471 (1993). Justice Souter delivered the opinion of the Court. *See id.*

3. *See* Jennie Hatfield-Lyon, *Nelson v. Saudi Arabia: An Opportunity for Judicial Enforcement of Human Rights Standards*, 86 AM. SOC'Y INT'L L. 324, 337 (1992) (proffering that *Nelson* served as an unusual opportunity for U.S. courts to signal to the international community that the United States is a nation that gives preeminence to human rights concerns).

left permanently disabled after thirty-nine days of torture inflicted by Saudi officials.[4] Despite the heinous abuses Nelson endured, the Court opted to dismiss the suit in deference to the sovereign immunity of Saudi Arabia.[5] As a result, the Court forever barred Nelson from receiving any compensation or retribution for his suffering.

The atrocities Nelson suffered began in September 1983, when he accepted a position as monitor systems engineer at the King Faisal Specialist Hospital in Saudi Arabia.[6] Nelson had learned of the position through an employment agency that contracted with Saudi Arabia to recruit Americans for employment at the Saudi hospital.[7] In December 1983, Nelson and his wife departed for Saudi Arabia, and soon after, Nelson began his work at the hospital.[8] In March 1984, Nelson discovered safety defects within the hospital's oxygen and nitrous oxide lines.[9] These defects posed fire hazards for those within the hospital.[10] Trying to effectively perform his duties, Nelson repeatedly reported the hazards to hospital officials for several months, but the officials told him to ignore his discovery.[11] Eventually, Nelson reported the defects to a Saudi government commission.[12]

The United States previously has recognized human rights claims against *individual defendants*. *See* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (holding that jurisdiction over the claim of an individual tortured in Paraguay who later fled to the United States was proper because the victim's oppressor also came to the United States). *Nelson*, however, is an action against a foreign state. Actions like *Nelson*, in which human rights victims initiate litigation against a foreign nation in U.S. courts, are the sole focus of this Note.

4. *Nelson*, 113 S. Ct. at 1475. In his written testimony to the Senate Immigration Subcommittee, Nelson stated that, as a result of his torture, he was unable to work because he had to undergo several medical operations and treatments. *Torture Victim Protection Act of 1989: Hearing on S. 1629 Before the Subcomm. on Immigration and Refugee Affairs of the Senate Comm. of the Judiciary*, 101st Cong., 2d Sess. 68 (1990). In addition, he indicated that he suffered from Post Traumatic Stress Disorder. *Id.*

5. *Nelson*, 113 S. Ct. at 1481. Traditionally, the notion of sovereignty has entailed the self-autonomy of foreign states and their rights to privacy, political independence, and territorial integrity. *See* Louis Henkin, *The Mythology of Sovereignty*, AM. SOC'Y INT'L L. NEWSL. (Am. Soc'y of Int'l Law, Washington, D.C.), Mar.-May 1993, at 5. *See also* Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983) (stating that "a given state's agreement to grant immunity in a particular case is a matter of grace, comity, and respect for the equality and independence of other sovereigns").

6. *Nelson*, 113 S. Ct. at 1475.

7. *Id.* The employment agency was not a U.S. or Saudi Arabian company. Rather, the agency was incorporated under the laws of the Cayman Islands. *Id.* at 1474.

8. *Id.* at 1475.

9. *Id.*

10. *Nelson*, 113 S. Ct. at 1475.

11. *Id.*

12. *Id.*

In retaliation for making these reports, the hospital officials solicited Saudi government agents to arrest Nelson and take him to prison.[13] There, the authorities forced Nelson to do deep knee bends over a rod until his knee joints separated and beat him from head to toe.[14] Moreover, Nelson had to fight other prisoners for food and was only given fresh air and exercise once a week.[15]

Prison guards told Nelson that he was being detained "to await trial on unknown charges."[16] However, the government never informed Nelson's wife of his imprisonment. When she was finally told, the authorities instructed her that she had to provide sexual favors to secure Nelson's release.[17] Finally, upon the request of a U.S. Senator, the Saudi Arabian government released Nelson and returned him to the United States.[18]

The Court's embrace of sovereign immunity in *Nelson* lends credence to an emerging trend of lower federal court decisions in similar human rights litigation.[19] In these decisions, courts have been continually reluctant to confer domestic jurisdiction over human rights disputes arising in foreign states.[20] Accordingly, U.S. courts have set precedent that the claims of human rights victims will be dismissed, leaving these victims no legal recourse for their harm.[21] Moreover, such

---

13. *Id.*

14. *Id. See also Torture Victim Protection Act of 1989: Hearing on S. 1629 Before the Subcomm. on Immigration and Refugee Affairs of the Senate Comm. of the Judiciary*, 101st Cong., 2d Sess. 68 (1990).

15. *Nelson*, 113 S. Ct. at 1475.

16. *Id.*

17. *Id.*

18. *Id.*

19. *See* discussion *infra* parts II.A, II.B.

20. *See id.* Interestingly enough, the U.S. Senate exhibited this same reluctance when it ratified the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, but stipulated that U.S. courts are only obliged to hear torture victims' private actions for damages when the acts of torture occur within its jurisdictional territory. 136 CONG. REC. S17486 (daily ed. Oct. 27, 1990). *See also* In re Estate of Ferdinand E. Marcos, 978 F.2d 493 (9th Cir. 1992).

Moreover, it appears that this tendency prevails throughout the international community. In a statement made to the American Society of International Law (ASIL), Louis Henkin, 1993 President of the ASIL, contended that "'[s]overeignty' is commonly trumpeted today as a basis for resisting external intervention, even by the [U.N.] Security Council." Henkin, *supra* note 5, at 7. Henkin further asserted that sovereignty has evolved to become a means of avoiding international condemnation, as some states use sovereignty to prevent the investigation and discovery of atrocities occurring within their own boundaries. *Id.* at 6.

21. *See* Joan Fitzpatrick, *Reducing the FSIA Barrier to Human Rights Litigation—Is Amendment Necessary and Possible?*, 86 AM. SOC'Y INT'L L. 324, 344 (1992). For the most part, human rights victims like Nelson seek redress in U.S. courts because the courts of the governments inflicting the abuse deny them justice. *Id.* at 344. Such is the case in Saudi Arabia, where "arbitrary detention is

precedent establishes sovereign immunity as a shield for foreign nations and their accountability for human rights violations. Ironically, this trend continues despite the United States' affirmation of the Universal Declaration of Human Rights and its precept that all individuals have the right to an effective legal remedy for violations of fundamental human rights,[22] with no exception being made on the basis of jurisdiction.[23]

I. The American Concept of Sovereign Immunity

To fully comprehend the role of sovereign immunity in human rights litigation brought before U.S. courts, the evolution of the American concept of sovereign immunity must be understood. The United States first acknowledged the doctrine of sovereign immunity in 1812, in *Schooner Exchange v. M'Faddon*.[24] America's early view of sovereign immunity followed the absolute theory.[25] Under this theory, a sovereign

---

routine, torture common, and redress rare for the victims." *Recourse for Americans Abused Abroad*, N.Y. TIMES, Apr. 2, 1993, at A32.

Furthermore, in his testimony before the Senate Subcommittee on Immigration and Refugee Affairs, Nelson indicated that while imprisoned, the Saudi officials made him sign a paper written in Arabic, which he did not understand. *Torture Victim Protection Act of 1989: Hearing on S. 1629 Before the Subcomm. on Immigration and Refugee Affairs of the Senate Comm. of the Judiciary*, 101st Cong., 2d Sess. 68 (1990). Conceivably, this paper could have been a release exculpating Saudi officials from liability within their courts.

22. Article 8 of the Universal Declaration of Human Rights provides: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." *Universal Declaration of Human Rights*, G.A. Res. 217A (III), art. 8, at 71, U.N. Doc. A/810 (1948). The U.S. Constitution guarantees fundamental human rights. Accordingly, human rights advocates have espoused that Article 8 of the Universal Declaration of Human Rights mandates that domestic courts issue an effective remedy of judgment against *any* violator of human rights law. Jordan J. Paust, *Human Rights in U.S. Courts*, 10 MICH. J. INT'L L. 543, 611, 651-52 (1989). *See also* Jordan J. Paust, *Draft Brief Concerning Claims to Foreign Sovereign Immunity and Human Rights: Nonimmunity for Violations of International Law Under the FSIA*, 8 HOUS. J. INT'L L. 49, 71 (1985).

23. Article two of the Universal Declaration of Human Rights provides:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> *Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs*, whether it be independent, trust, non self-governing, or any other limitation of sovereignty.

Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 2, at 71, U.N. Doc. A/810 (1948) (emphasis added).

24. The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812).

25. *See* Joan E. Donoghue, *Taking the "Sovereign" Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception*, 17 YALE J. INT'L L. 490, 495 (1992) (propounding that courts traditionally trace the U.S. doctrine of sovereign immunity to *The Schooner Exchange* case). *See also* Renana B. Abrams, *FSIA: Direct Effect Exception*, 5 EMORY INT'L L. REV. 211, 212 (1991); Melissa L. Werthan et al., Note, *Jurisdiction Over Foreign Governments: A Comprehensive Review of the Foreign Sovereign Immunities Act*, 19 VAND. J.

could never be subject to the jurisdictional authority of another sovereign.[26] Thus, in *Schooner Exchange*, France's immunity defense prevailed over an American's assertion of title over a French warship docked within U.S. territorial waters.[27]

For 140 years following *Schooner Exchange*, the United States continued to adhere to the absolute theory of sovereign immunity.[28] In 1952, however, as U.S. participation in international commercial activity proliferated, commercial litigation increased. U.S. companies needed a means for resolving legal disputes with foreign states with whom they conducted business.[29] Consequently, the Executive Branch commissioned the Tate Letter, which announced the adoption of a restrictive theory of sovereign immunity.[30] Under the restrictive theory, states retain immunity for their governmental or public nature acts (*jure imperii*), but lose immunity for their private or commercial acts (*jure gestionis*).[31]

The United States' modern concept of sovereign immunity is embodied within the Foreign Sovereign Immunity Act (FSIA).[32] Enacted in 1976, the FSIA codifies the restrictive doctrine of sovereign immunity.[33] It grants blanket immunity to foreign states, but enumerates six exceptions to this immunity.[34] Specifically, these exceptions provide that foreign states can be brought before U.S. district courts in instances involving (1) waivers of immunity; (2) commercial activity in the United States or commercial activity in connection with or having a direct effect upon the United States; (3) property taken in violation of international law; (4) immovable property in the United States; (5) noncommercial torts occurring within the United States; and (6) actions brought to enforce arbitration agreements between private parties and foreign states.[35]

TRANSNAT'L L. 119, 121 (1986).

26. MALCOLM N. SHAW, INTERNATIONAL LAW 433 (3d ed. 1991).

27. *The Schooner Exchange*, 116 U.S. (7 Cranch) at 146.

28. *See* Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486.

29. Letter from Jack B. Tate, acting Legal Adviser, Department of State, to acting Attorney General Phillip B. Perlman (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL. 984, 984 (1952).

30. *Id.*

31. *Id.*

32. *See* Foreign Sovereign Immunity Act (FSIA), 28 U.S.C. §§ 1602-11 (1988).

33. Werthan et al., *supra* note 25, at 124.

34. *See* FSIA, 28 U.S.C. §§ 1604-5.

35. *See id.* § 1604. Section 1604 of the FSIA provides:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] a foreign state shall be immune from jurisdiction of the courts of the United States and of the States *except as provided in sections 1605 to 1607 of this chapter.*

II. The FSIA in the Context of Human Rights Litigation

In *Argentine Republic v. Amerada Hess Shipping Corp.*, the Supreme Court affirmed that the FSIA "provides the sole basis for obtaining jurisdiction over a foreign state" in U.S. courts.[36] Therefore, immunity is presumptively granted unless one of the FSIA exceptions can be invoked.[37] Unfortunately for human rights victims, the FSIA exceptions serve as "poorly-fitting garments."[38] Of the six FSIA immunity exceptions, only the language of the waiver and commercial activity exceptions are arguably applicable to cases in which the human rights abuses have occurred in foreign states.[39] Even under these two exceptions, however, the judiciary has been hesitant to confer its jurisdiction over the authority of foreign states. Instead, it has chosen to strictly interpret the language of these two exceptions. Consequently,

---

Id. (emphasis added). *See also id.* § 1605 (enumerating the specific exceptions to immunity as referred to by § 1604); *id.* § 1606 (exempting foreign states from being held liable for punitive damages); 28 U.S.C. § 1607 (delineating the parameters for which foreign states will be granted immunity for counterclaims).

36. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 429, 443 (1989). *Amerada Hess* arose during the Falkland Island War, when Argentinian military aircraft severely damaged a crude oil tanker in international waters. The owners of the tanker, two Liberian companies, attempted to bring suit in U.S. courts under the Alien Tort Statute, 28 U.S.C. § 1350 (1988). *Amerada Hess*, 488 U.S. at 432. The Alien Tort Statute provides that "[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." 28 U.S.C. § 1350 (1988).

The Liberians asserted that jurisdiction under the Alien Torts Statute was appropriate because Congress never repealed the Statute when the FSIA was enacted. *Amerada Hess*, 488 U.S. at 436-39. However, the court refuted this argument, determining that Congress failed to repeal the Alien Tort Statute because it was uncertain as to whether the Statute conferred jurisdiction in suits against foreign states. *Id.* Accordingly, the court concluded that the Alien Tort Statute did not supersede the FSIA. *Id.*

37. *Amerada Hess*, 488 U.S. at 438-39.

38. Fitzpatrick, *supra* note 21, at 341 (asserting that "the drafting of the FSIA means that these [human rights] litigants must attempt to squeeze their cases into one of the poorly fitting garments of the FSIA's codified exceptions, almost always unsuccessfully").

39. The non-commercial tort exception only extends jurisdiction to cases 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." 28 U.S.C. § 1605(a)(5) (emphasis added). Consequently, for human rights victims suffering abuses in foreign states, this exception is inapplicable.

For example, U.S. hostages who brought suit against the Iranians holding them hostage in the U.S. Embassy in Iran in 1979 were denied jurisdiction under this exception. The courts held the exception to be inapplicable, determining that the U.S. Embassy in Iran was not considered territory of the United States for purposes of the non-commercial tort immunity exception. *See, e.g.*, Persinger v. Islamic Republic of Iran, 729 F.2d 835 (D.C. Cir.), *cert. denied*, 469 U.S. 881 (1984); McKeel v. Islamic Republic of Iran, 722 F.2d 582 (9th Cir. 1983), *cert. denied*, 469 U.S. 880 (1984); Ledgerwood v. State of Iran, 617 F. Supp. 311 (D.D.C. 1985).

human rights victims' endeavors to tailor their claims into one of these two exceptions have been unsuccessful.

A. Nelson: An Attempt Under the Commercial Exception

Nelson represents a defeat for human rights victims seeking jurisdiction under the FSIA's commercial activity exception.[40] Under the commercial activity exception, a foreign government will not be immune from suits when

> the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or 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.[41]

In short, a foreign state can be brought before American courts if it (1) engages in commercial acts within the United States; (2) performs acts in the United States that are "in connection" with the foreign states' commercial activity performed elsewhere; or (3) performs commercial acts outside the United States that cause a "direct effect" within the United States.[42]

Arguably, Nelson's claim could be classified under the first or second prong of the commercial exception. Nelson contended that Saudi Arabia's contract with the employment agency to recruit U.S. workers was commercial activity conducted in or at least "in connection with" commercial activity in the United States.[43] However, the Court never even addressed this issue, opining that the employment contract was not the impetus for the claim.[44] Rather, it determined that Nelson's suit revolved around the human rights abuses, and such tortious conduct could not constitute commercial activity.[45] Indeed, the Court concluded that these actions exemplified Saudi abuse of its police power.[46] The Court further noted that "however monstrous such abuse undoubtedly may be," police powers traditionally have been deemed *public, governmental acts*

40. *See* FSIA, 28 U.S.C. § 1605(a)(2).
41. *Id.*
42. *See id.*
43. Saudi Arabia v. Nelson, 113 S.Ct. 1471, 1476 (1993).
44. *Id.* at 1479-80.
45. *Id.*
46. *Id.*

under the FSIA's restrictive theory of sovereign immunity and, for this reason, Saudi Arabia should be afforded immunity.[47]

Nelson is not the only human rights defeat under the commercial activity exception. The Second Circuit Court of Appeals dismissed another analogous human rights case, *Martin v. Republic of South Africa*, a case brought under the third prong of the commercial exception, the "direct effect" exception.[48] In *Martin*, a black professional dancer performing with his troupe in South Africa was injured in an automobile accident while there.[49] Because of the South African policy of apartheid, Martin was denied emergency medical care. As a result of his injuries, Martin became a quadriplegic.[50] Upon his return to the United States, Martin brought suit, contending that the constant pain and treatment he suffered as a result of the permanent injury received in South Africa was sufficient to establish that the injury had a "direct effect" in the United States.[51]

The Second Circuit ultimately determined that Martin's primary injury occurred in South Africa.[52] It reasoned that any pain or medical treatment he endured while in the United States was merely an indirect consequence of the primary injury and, thus, did not satisfy the "direct effect" requirement.[53] In making its determination, the court relied upon *Zernicek v. Brown & Root, Inc.*[54] and *Upton v. Empire of Iran*.[55] In these cases, the courts held that in personal injury or wrongful death cases where the primary injury occurs in a foreign country, any subsequent pain or pecuniary loss suffered after the individual returns to the United States is an indirect consequence of the primary injury.[56] Therefore, the courts denied jurisdiction, deducing that such indirect

47. *Id.* at 1481.

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

49. *Id.* at 92.

50. *Id.*

51. *Id.*

52. *Id.* at 95.

53. *Martin*, 836 F.2d at 95.

54. Zernicek v. Brown & Root, Inc., 826 F.2d 415 (5th Cir. 1987) (holding that an American's subsequent physical pain and medical expenses endured while in the United States after having been exposed to large doses of radiation in Mexico was not a sufficient "direct effect" as defined by the FSIA).

55. Upton v. Empire of Iran, 459 F. Supp. 264 (D.D.C. 1978), *aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979) (determining that even though an injury caused by a roof collapse at a Tehran airport caused subsequent physical pain and suffering for the victim while in the United States, such subsequent pain and suffering did not constitute a direct effect).

56. *Zernicek*, 826 F.2d at 419; *Upton*, 459 F. Supp. at 266.

consequences were too attenuated to be classified as having a "direct effect" upon the United States.[57]

B. Waiver Exception: the Preferred Exception for Human Rights Litigation

Human rights advocates have constructed an especially cogent and convincing argument as to the applicability of the waiver exception to human rights abuses foreign states commit in their countries.[58] Under the FSIA, foreign states currently may be brought before U.S. courts when "the foreign state has waived its immunity either explicitly or by implication."[59] A foreign state can effectuate a waiver of a state's immunity in several ways. It can explicitly waive immunity through express language in contracts or treaties.[60] In addition, the legislative history of the FSIA specifically contemplates three examples of implied waivers. Namely, a state can impliedly waive its immunity when (1) it agrees to arbitrate in another country; (2) it agrees that a contract is governed by the law of a particular country; or (3) it files a responsive pleading in a case without raising the defense of sovereign immunity.[61]

Human rights advocates rely upon the concept of *jus cogens* in extending the waiver exception to the context of human rights. *Jus cogens*, as defined by the Third Restatement of the Foreign Relations Law of the United States, are "rules of international law [that] are recognized by the international community of states as peremptory, permitting no derogation."[62] *Jus cogens* is "so overriding of other legal precepts, so preemptive of sovereignty, that a treaty or other international rule inconsistent with such norms is by definition invalid."[63] *Jus cogens*

---

57. *Zernicek*, 826 F.2d at 419; *Upton*, 459 F. Supp. at 266. *See also* Berkowitz v. Islamic Republic of Iran, 587 F. Supp. 329 (9th Cir.), *cert. denied*, 105 S. Ct. 510 (1984); Close v. American Airlines, Inc., 587 F. Supp. 1062 (S.D.N.Y. 1984); Harris v. VAO Intourist Moscow, 481 F. Supp. 1056 (E.D.N.Y. 1979).

58. *See* Fitzpatrick, *supra* note 21, at 342. *See also* Adam C. Belsky et al., *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CAL. L. REV. 365 (1989). The case, Paul v. Avril, 812 F. Supp. 207 (S.D. Fla. 1993), represents a human rights claim satisfying the express waiver requirement. However, in cases where explicit waivers of immunity do not exist, attempts to satisfy the implicit waiver exception have been made. *See, e.g.*, Denegri v. Chile, No. 86-3085, 1992 U.S. Dist. LEXIS 4233 (D.D.C. Apr. 3, 1992); Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992).

59. FSIA, 28 U.S.C. § 1605(a)(1).

60. Werthan et al., *supra* note 25, at 125-26.

61. *Id.* at 126-27.

62. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k (1987).

63. Pl.'s Supplemental Mem. in Opp'n to Mot. to Dismiss, at 12, Denegri v. Chile, No. 86-3085, 1992 U.S. Dist. LEXIS (D.D.C. Apr. 6, 1992).

proscribes a limited set of activities so reprehensible that a state cannot pursue them under any circumstances.[64] Examples of such acts include genocide, slavery, murder, torture, prolonged arbitrary detention, systematic racial discrimination, and gross violations of internationally recognized human rights.[65]

Accordingly, human rights advocates proffer that when a state performs actions proscribed by *jus cogens*, it impliedly waives its sovereign immunity, as no state is authorized to violate *jus cogens*.[66] In this manner, human rights litigation would appropriately come under the FSIA implied waiver exception. While this argument has been advanced in litigation, U.S. courts have yet to impart jurisdiction under it.

In *Denegri v. Chile*,[67] Chilean soldiers arbitrarily detained two teenage activists participating in a student protest in Chile in 1986. The soldiers then doused the two with gasoline and set them on fire, killing one of the youths.[68] The surviving teenager and her parents along with the deceased child's mother brought suit against the Chilean government in the U.S. District Court. Specifically, the victims asserted that the soldiers' actions of torture violated *jus cogens*, and therefore, Chile impliedly waived its immunity.[69] The court refused to acknowledge this assertion, holding that the argument was a novel one unsupported by case law.[70] Indeed, the FSIA, the FSIA's legislative history, and the Supreme Court's holding in *Amerada* all mandated that the FSIA be strictly interpreted.[71] Consequently, the court opined that Congress did not intend violations of peremptory norms to fall within the purview of the FSIA waiver exception and, thus, dismissed the claim for lack of jurisdiction.[72]

The Ninth Circuit reiterated this position in *Siderman de Blake v. Republic of Argentina*, a case instituted after Argentinian military officials kidnapped and tortured Siderman because he was Jewish.[73] For one week, the soldiers beat and applied electric shock to Siderman. While

64. *See id.*
65. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).
66. *See* Fitzpatrick, *supra* note 21, at 342.
67. Denegri v. Chile, No. 86-3085, 1992 U.S. Dist. LEXIS 4233 (D.D.C. Apr. 6, 1992).
68. *Id.* at *3.
69. *Id.* at *10.
70. *Id.* at *11.
71. *Id.*
72. *Denegri*, No. 86-3085, 1992 U.S. Dist. LEXIS 4233, at *11.
73. Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992).

torturing him, the soldiers repeatedly shouted anti-Semitic epithets.[74] Subsequently, the Sidermans fled to the United States, where they instituted an action against the Republic of Argentina.[75] Similar to *Denegri*, Siderman asserted that torture constituted a violation of *jus cogens*.[76] The court again refused to hold that a violation of *jus cogens* fell under the FSIA exceptions to immunity.[77]

III. Conclusion

The United States enjoys a rich tradition of providing substantial support for human rights.[78] Indeed, concern for human rights has been associated with most of the major politico-legal developments in the United States.[79] Concomitantly, however, the United States has long respected the political sovereignty of foreign states.[80] In cases like *Nelson*, where the two histories conflict, courts have strictly interpreted the provisions of the FSIA, resulting in the preservation of sovereignty and a loss for human rights. Unfortunately, the judiciary appears to have ignored that when human rights are at stake, "the pretended cloak of sovereignty ends where international law begins."[81]

In 1992, Congress attempted to redirect concern for human rights with its enactment of the Torture Victim Protection Act.[82] The Act provides both U.S. citizens and aliens the opportunity to file civil suits

---

74. *Id.* at 703.

75. *Id.* at 703.

76. *Id.* at 715-19.

77. *Siderman*, 965 F.2d at 713-19. Interestingly enough, the Ninth Circuit did acknowledge that U.S. courts may have had jurisdiction over Siderman's claim, but not for reasons of *jus cogens*. Siderman alleged that after he fled from Argentina, the Argentinian government feigned criminal proceedings, claiming that Siderman was guilty of initiating a fraudulent sale of land. *Id.* at 722. The Argentinian government then solicited the Los Angeles Superior Court for help in serving papers giving notice of Siderman's impending prosecution. *Id.* Siderman asserted that the Argentineans merely sought to obtain his return so that they could further torture or even kill him. *Id.* The Ninth Circuit pronounced that if Siderman's allegations were true, Argentina deliberately attempted to involve the United States in its design to torture Siderman. *Id.* at 722-32. In this manner, Argentina would have implicitly waived its immunity before U.S. courts. *Siderman*, 965 F.2d at 722-23. Consequently, the court remanded the case to the lower court for the appropriate factual determination. *Id. Cf.* de Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980) (holding that the FSIA would not protect a foreign state from civil liability if it ordered an assassination that took place in the United States).

78. Jordan J. Paust, *Human Rights in U.S. Courts*, 10 MICH. J. INT'L L. 543, 650 (1989) (documenting the use of human rights precepts in judicial opinions).

79. *Id.*

80. *See* discussion *supra* parts I, II.

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

82. Torture Victim Protection Act of 1989, Pub. L. No. 102-256, 106 Stat. 73 (1992).

against their oppressors in U.S. courts, provided that (1) the torturer acted under the authority of his or her government, (2) the torturer is subject to personal jurisdiction in U.S. courts, and (3) the victim exhausted all available remedies within the country where the torture occurred.[83] However, the Torture Victim Protection Act confers jurisdiction only over individual defendants.[84] Therefore, for cases such as *Nelson*, where the oppressor was a foreign government, victims will still be denied jurisdiction in U.S. courts, unless their claims fall under the FSIA exceptions.

Seemingly, this jurisdictional problem can be resolved by amending the FSIA to include a specific human rights exception.[85] Opponents of such an exception emphasize that some foreign states might perceive the exception as an excessive intrusion into their political autonomy, and in retaliation, these nations may subject Americans to politically motivated litigation within their own foreign courts.[86] Thus, those disagreeing with a human rights exception advocate that U.S. efforts would be better directed toward promoting the existing international fora in which human rights can be vindicated.[87] Currently, however, even these fora are limited, as they only have authority over those nations who consent to being brought before them.[88] Consequently, for individuals victimized

---

83. *See id.* For more discussion on the Torture Victim Protection Act of 1989, see 137 CONG. REC. E1444 (daily ed. Apr. 24, 1991) (statement of Rep. Yatron).

84. Torture Victim Protection Act of 1989, Pub. L. No. 102-256, 106 Stat. 73 (1992).

85. *See* Hatfield-Lyon, *supra* note 3, at 324; Fitzpatrick, *supra* note 21, at 324. Both authors strongly advocate the inclusion of a human rights exception for the FSIA.

86. *See* Fitzpatrick, *supra* note 21, at 343.

87. *See id.*

88. Victims of human rights abuses may bring complaints before both U.N. and regional fora. In particular, victims can submit complaints to committees created by U.N. human rights treaties. *See, e.g., Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. Res. 2200 (XXI), 21 U.N. GAOR, 23d Sess., Supp. 16, at 59, U.N. Doc. A/6316 (1967); *International Convention on the Elimination of All Forms of Racial Discrimination*, May 7, 1966, art. 14, 660 U.N.T.S. 195, 5 I.L.M. 352 (1966); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. 51, at 197, U.N. Doc. A/39/51 (1985). *See also* Cynthia Price Cohen, *International Fora for the Vindication of Human Rights Violated by the U.S. International Population Policy*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 241 (1987). While these committees do not adjudicate *per se*, the committees do publicly condemn states abusing human rights in the hope of deterring future abuses. *Id.* at 253. These U.N. bodies can appropriately review actions of those nations that are signatories to either U.N. human rights treaties or the U.N. Charter itself. *Id.* at 253-55.

Additionally, countries in three regions including Europe, the Americas, and Africa have adopted human rights treaties that provide for the adjudication of human rights complaints before regional human rights commissions. *See, e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, art. 10, 213 U.N.T.S. 222; *American Convention on Human Rights*, Nov. 22, 1969, art. 13, O.A.S.T.S. No. 36, at 1, 9 I.L.M. 673 (1970) (entered into force July 18, 1978); *Banjul Charter on Human and Peoples' Rights*, June 28, 1981, art. 9, O.A.U.

by nations that refuse to consent to the jurisdiction of international fora, the FSIA stands as the only viable means for seeking redress against foreign state oppressors.

At present, the FSIA subsumes human rights values.[89] With the FSIA's apparent inapplicability to human rights contexts, victims are subject to another terrorization, namely the denial of a legal remedy. Accordingly, sovereign immunity serves as both a shield, deflecting any accountability for human rights abuses foreign states commit, and as a sword, destroying any opportunity for human rights victims to obtain the recognition of the inherent dignity owed to all members of the human family.[90] For this reason, Congress must consider a human rights exception. To do otherwise would disrespect the fundamental human rights afforded all peoples.

Michelle Fastiggi

Doc. CAB/LEG/67/3/Rev. 5 (1981) (entered into force Oct. 21, 1986), *reprinted in* 21 I.L.M. 50 (1982). Similar to the U.N. fora, only those nations who are signatories to the treaties can be brought before the regional commissions. Cohen, *supra*, at 263.

89. Henkin, *supra* note 5, at 5. (stating that "'[s]overeignty' sometimes subsumes—and conceals—important values").

90. As enunciated by the Universal Declaration of Human Rights, "Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world." Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, U.N. Doc. A/810 (1948).

SPONSORS OF THE DICKINSON JOURNAL OF INTERNATIONAL LAW

The *Dickinson Journal of International Law* welcomes sponsorship from law firms, corporations, associations, and graduates of the Dickinson School of Law. A minimum donation of $50.00 entitles sponsors to a year-long subscription and a listing in the issues sponsored.

SPONSORS

William J. Kennedy
Robert L. Keuch
Stuart L. Knade
Daniel W. Krane
Gerald F. McCormick
Lawrence J. Persick
Bernard M. Rethore
Paul & Julie Stern
Patricia M. Wilson
*Sandor Yelen

*Special thanks for Sandor Yelen's contribution & dedication to the *Journal*.