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A Critique of Proposals to Amend the Foreign Sovereign Immunities Act to Allow Suits Against Foreign Sovereigns for Human Rights Violations

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Comment

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I. INTRODUCTION

The last century witnessed some of the most egregious human rights violations in the history of mankind. Genocide, torture, summary executions, and disappearances afflicted all regions of the world. Recognizing the destabilizing effect of human rights abuses on democracy and the political order, world leaders united for the common purpose of combating human rights abuses as an international concern. International organizations monitoring human rights have been formed, and over 200 political declarations, resolutions, and treaties establishing principles of human rights have been signed and ratified. One of the more successful examples of these collective efforts occurred in the Americas. The Inter-American Commission on Human Rights[1] and the Inter-American Court of Human Rights[2] were established to oversee, protect, defend, and promote the observance of human rights throughout the Americas. To a large degree, these two organizations have succeeded in redressing human rights violations beyond their European counterparts.

Despite these advances, it is clear that more needs to be done. The U.S. Department of State Human Rights Reports for 1999 states that Colombian government forces continued to commit serious abuses, including extrajudicial killings, at levels similar to those of previous years.[3] While an estimated 2,000 to 3,000 citizens died from extrajudicial killings from non-state actors, members of the security forces were responsible for 24 such killings where the perpetrators could be identified.[4] More than 3,000 cases of forced disappearance have been reported along with 119 complaints of torture.[5] Similarly, in Venezuela,

1. The Inter-American Commission on Human Rights was created in 1959 during the Fifth Meeting of the Consultation of Secretaries of Foreign Affairs in Santiago, Chile. The Inter-American Commission is a principal organ of the Organization of American States [hereinafter Commission].

2. The Inter-American Court of Human Rights was created on November 22, 1969 through the adoption of the American Convention on Human Rights by the Organization of American States in San Jose, Costa Rica [hereinafter Court of Human Rights].

3. 1999 U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, (Feb. 25, 2000), *available at* http://www.state.gov/www/global/human-_rights/1999_hrp_report/colombia.html (last visited October 19, 2000).

4. *Id.*

5. *Id.*

101 extrajudicial killings and 424 cases of torture were documented between October 1998 and September 1999.[6] In Peru, the security forces were responsible for five extrajudicial killings and one disappearance.[7] Security forces continued to torture, beat, and otherwise abuse detainees with impunity, as the report asserted at least a dozen cases of aggravated torture.[8] Another example of the problem is Mexico, where members of the security forces committed widespread political and other extrajudicial killings.[9] In 1998, there were forty-two complaints of disappearance and twenty-one complaints of torture, even though persistent reports by nongovernmental organizations of widespread torture by security forces indicate an understatement of the official reported cases.[10] While these few countries have been included by way of example, the country reports for the entire region are consistent in documenting the continued existence of human rights abuses throughout the Americas.

In attempting to deter these abuses, human rights advocates have suggested that punishing offending governments and leaders through suits for damages in United States courts would be the most effective strategy. Several ideas, both judicial and legislative, have been advanced in this endeavor. For example, today a victim can bring suit in U.S. courts for human rights abuses suffered abroad under the Alien Tort Claims Act.[11] While these suits have been successful in obtaining judgments against individuals, they have not been effective in collecting damages because the individual defendants in many cases do not have assets in the United States to attach. As a result, victims of human rights abuses have turned to the foreign country as an alternative defendant that is not judgment-proof. However appealing this litigation strategy might appear to victims of human rights abuses, a significant hurdle exists in overcoming

6. 1999 U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, (Feb. 25, 2000), *available at* http://www.state.gov/www/global/human_rights/1999_hrp_report/venezuel.html (last visited October 19, 2000).

7. 1999 U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, (Feb. 25, 2000), *available at* http://www.state.gov/www/global/human_rights/1999_hrp_report/peru.html (last visited November 26, 2000).

8. *Id.*

9. 1999 U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, (Feb. 25, 2000), *available at* http://www.state.gov/www/global/human_rights/1999_hrp_report/mexico.html (last visited November 26, 2000).

10. *Id.*

11. Alien Tort Claims Act, 28 U.S.C. § 1350 (1994)(hereinafter ATCA).

the Foreign Sovereign Immunities Act (FSIA), which bars suits against a foreign sovereign unless the suit fits within one of the enumerated exceptions in the act that strips the sovereign of immunity.[12] While the FSIA was recently amended to allow suits by U.S. nationals for certain international crimes and human rights violations against states designated as "terrorist" by the U.S. Department of State,[13] there is currently no blanket human rights exception. Recognizing this statutory barrier, many human rights advocates urge that the FSIA be amended to include a human rights exception.[14] The nature of this proposed exception is similar to the idea of universal jurisdiction in criminal law, where no nexus between the violation and the United States would be required before domestic courts could exercise jurisdiction.[15] While such an amendment would constitute a valid exercise of congressional authority under the Constitution, this comment argues that it should not be adopted as a matter of legislative prudence in light of international law and other foreign policy considerations. When the FSIA was enacted, it ended a period of judicial deference to the Executive Branch and replaced it with a comprehensive legislative framework. It is a framework that acknowledges the general principle that as international trade expands and the world becomes more entrenched in a global economy, the need for providing a predictable forum for resolving disputes necessarily increases. However, the framework that was created also recognized the imprudence of subjecting foreign sovereigns to suit in U.S. courts for all conceivable wrongs. Generally, the framework allows suits against foreign sovereigns when some property or other legal interest within the U.S. is involved. The one exception is the recent amendment to the FSIA mentioned above, which allows actions to be pursued in domestic courts for

12. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1994)[hereinafter FSIA].

13. Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (1996)[hereinafter AEDPA].

14. *See, e.g.*, Jeffrey Jacobson, Note, *Trying to Fit a Square Peg Into a Round Hole: The Foreign Sovereign Immunities Act and Human Rights Violations*, 19 WHITTIER L. REV. 757 (1998); G. Michael Ziman, Note, *Holding Foreign Governments Accountable for Their Human Rights Abuses: A Proposed Amendment to the Foreign Sovereign Immunities Act of 1976*, 21 LOY. L.A. INT'L & COMP. L.J. 185 (1999).

15. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 304 (4TH ED. 1990)(defining universal jurisdiction as the power of domestic courts to prosecute non-national offenders regardless of connection between offender and prosecuting state because nature of crime is of international concern).

some acts that occurred outside the U.S. after the plaintiff first provides the offending state a reasonable opportunity to arbitrate the claim.[16] In short, the FSIA was not intended as a mechanism in which the judiciary could intervene or nullify the actions of the executive branch in conducting foreign relations whenever it thought the executive was not fervently promoting human rights. A human rights amendment to the FSIA would serve as a constant basis for judicial interference with the executive's prerogative in conducting foreign policy. This comment will examine the current conduct of human rights litigation against foreign sovereigns, the difficulties that have arisen within the present framework of litigation, and the possible alternatives that may serve to more effectively redress human rights abuses without encroaching on and undermining the executive's foreign policy strategies.

II. THE STRUCTURE OF THE FSIA AND THE CURRENT FRAMEWORK FOR HUMAN RIGHTS LITIGATION

A. The Effect of the FSIA on the Alien Tort Claims Act (ATCA)

The FSIA starts from a presumption that states are immune from suit unless otherwise provided by international agreement.[17] Thereafter, the statute creates several exceptions to the general rule.[18] Most of these exceptions relate to commercial activities. However, other exceptions cover cases of express or implied waiver, expropriation of property in violation of international law, noncommercial torts occurring in the U.S., and disputes over rights in real property and estates located in the U.S. Until the recently enacted amendments in 1996, the FSIA contained no provision allowing suits against a foreign sovereign for violations of human rights. However other statutes, such as the Alien Tort Claims Act (ATCA), allowed suits against individuals for human rights violations committed in their roles as officials of a state.[19]

16. AEDPA, § 221(a)(7)(B)(i).

17. 28 U.S.C. § 1604 (1994).

18. 28 U.S.C. §§ 1605-1607.

19. The Alien Tort Claims Act, 28 U.S.C. § 1350 [hereinafter ATCA](provides jurisdiction to district courts for "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." It has been the primary

One of the initial questions therefore was whether the ATCA created an exception to foreign sovereign immunity and provided jurisdiction over a foreign sovereign where the FSIA did not. In *Amerada Hess Shipping Corp. v. Argentine Republic*,[20] the Second Circuit Court of Appeals became the first circuit court to find jurisdiction over a foreign sovereign based on the ATCA, despite the FSIA's mandate of immunity. Upon review, the Supreme Court held that the FSIA was "the sole basis for obtaining jurisdiction over a foreign state in our courts."[21] In that case, two Liberian corporations sued the Argentine Republic in a United States district court to recover damages to their vessel that was attacked in international waters by Argentine military aircraft during the war between Great Britain and the Argentine Republic over the Falkland Islands.[22] One of plaintiffs' grounds for asserting federal jurisdiction was the ATCA.[23] The Court reasoned that section 1604 of the FSIA bars federal and state courts from exercising jurisdiction when one of the statutory exceptions do not apply, and section 1330(a) confers jurisdiction on district courts to hear suits brought by U.S. citizens and by aliens when a case falls within one of the exceptions.[24] Thus, since Congress had international law in mind when it enacted the exceptions to the FSIA, the plain implication for this case was that immunity was granted even in those cases where international law was violated, provided the alleged violation did not come within one of the FSIA's exceptions.[25] Although some commentators have suggested that stripping a sovereign's immunity for *jus cogens* (peremptory norms of international law) violations would be consistent with international law,[26] that alone

basis for human rights litigation against foreign officials ever since Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). For an exception under the ATCA that does not require the defendant to be a state official, see Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1994)).

20. Amerada Hess Shipping Corp v. Argentine Republic, 830 F.2d 421 (2d Cir. 1987) cert. granted, 108 S.Ct. 1466 (1988).

21. Argentine Republic v. Ameralda Hess Shipping Co., 488 U.S. 428, 443 (1989).

22. *Id.* at 431-32.

23. *Id.* at 432.

24. *Id.* at 434.

25. *Id.* at 436.

26. *See* Joseph G. Bergen, Note, *Princz v. The Federal Republic of Germany: Why the Courts Should Find That Violating Jus Cogen Norms Constitutes an Implied Waiver of Sovereign Immunity*, 14 CONN. J. INT.L L. 169 (arguing that the Nuremberg Tribunals established that a state loses its sovereign immunity under international law when it violates *jus cogen* norms).

is insufficient to support jurisdiction in U.S. courts. The alleged violation of international law must be one that Congress recognized in one of the statutory exceptions for the district court to exercise subject matter jurisdiction over the claim. Consequently, many plaintiffs have endeavored to litigate human rights violations by fitting their claims within one of the existing exceptions.

B. Trying to Frame Human Rights Violations Within the Statutory Exceptions

1. Implied Waivers

In recent years, plaintiffs have attempted to defeat sovereign immunity through the FSIA's implied waiver provision.[27] That provision states that a foreign state shall not be immune from jurisdiction in any case "in which the foreign state has waived its immunity either explicitly or by implication."[28] As illustrations, the legislative history of the FSIA cites an agreement stipulating to arbitration in another state, a contractual choice-of-law provision, and a responsive filing in an action that does not raise the defense of sovereign immunity.[29] Despite this limited list of examples, plaintiffs and scholars have argued that when a foreign nation violate human rights that are considered *jus cogens*, the sovereign automatically waives any claim to sovereign immunity because the state, "by the very act of holding itself out as a state, impliedly accepts observance of those norms as a condition of statehood."[30] A *jus cogens* or peremptory norm is one "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[31] The

27. FSIA 28 U.S.C. § 1605(a)(1).

28. *Id.*

29. Naomi Roht-Arriaza, *The Foreign Sovereign Immunities Act and Human Rights Violations: One Step Forward, Two Steps Back?*, 16 BERKELEY J. INT'L L. 71, 75 (1998)(citing to House Rept.).

30. *See* Siderman v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992); *see, e.g.*, *supra* note 29 at 75.

31. Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 8 I.L.M. 679, 1155 U.N.T.S. 332.

argument therefore is that because *jus cogens* norms "enjoy the highest status within international law and thus prevail over and invalidate other rules of international law in conflict with them," sovereign immunity, itself a principle of international law, is trumped by *jus cogens*.[32]

To date, no court has held that a violation of a *jus cogens* norm of international law regarding human rights implicitly waives a State's immunity under the FSIA. However, one court has found an implied waiver under a different argument.[33] In *Siderman v. Republic of Argentina*, the plaintiff was an Argentine businessman whose property had been seized and who had been imprisoned and tortured by military authorities.[34] After the plaintiff left Argentina for the United States, Argentine military officers persecuted the plaintiff by initiating a criminal action against him in Argentina that was based on a fraudulent manipulation of property records by the government.[35] Argentina requested, via a letter rogatory, that the Los Angeles Superior Court serve Mr. Siderman with documents relating to the action in order to obtain personal jurisdiction.[36] The plaintiff argued on its torture claim against Argentina that because Argentina had availed itself of our courts in its pursuit of the plaintiff, it waived its immunity in the process.[37] The Ninth Circuit was persuaded by this argument and held the implied waiver exception applied and remanded the case for trial.[38]

Another theory that plaintiffs have used in trying to fit a human rights violation within the statutory exceptions is based on the "international agreement" provision, whereby immunity is "subject to existing international agreements to which the United States is a party."[39] In order for an international agreement to be the basis for a waiver of immunity, the agreement must "create a private cause of action" and not merely "set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs."[40] The agreement must therefore be in the

32. *Siderman*, 965 F.2d at 718.
33. *See id.* at 720.
34. *Id.* at 703.
35. *Id.*
36. *Id.*
37. *Id.* at 720.
38. *Siderman*, 965 F.2d at 722.
39. FSIA 28 U.S.C. § 1604.
40. *Ameralda Hess Shipping Co.*, 488 U.S. at 442.

nature of a self-executing treaty.[41] In *Amerada Hess*, the Court rejected the argument that the Argentine government impliedly waived its immunity by becoming part to the Geneva Convention on the High Seas and the Pan American Maritime Neutrality Convention.[42] The Court stated, "[n]or do we see how a foreign state can waive its immunity under section 1605(a)(1) by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States."[43] The Court also stated that the international agreement provision applies only when the agreement "expressly conflicts" with the immunity provisions of the FSIA.[44] Thus, the Supreme Court's interpretation of the "international agreements" provision has shifted to the executive branch the responsibility of insisting that the parties to an international agreement waive their immunity to allow suit under the agreement's terms. If such a proposition seems implausible because the United States would not want to be subjected to suit abroad, neither should other countries be subjected to suit here under an implied waiver theory devised by the statutory construction of U.S. courts.

Consistent with this approach was the prior case of *Frolova v. U.S.S.R.*, where the plaintiff sued for damages caused by mental anguish when the Soviet Union denied her husband permission to emigrate.[45] Plaintiff argued that certain provisions on free movement of persons of the U.N. Charter and the Helsinki Accords modified the U.S.S.R.'s immunity. The court held that neither agreement could create rights enforceable by private parties because neither was self-executing, and therefore neither could abrogate a state's immunity.[46]

41. *See* Foster v. Neilson, 27 U.S. 253 (1829) (holding that for treaties to be directly enforceable by individuals in domestic courts, the treaty must, without amplification or implementation by additional legislative acts, establish specific rights and obligations in individuals).

42. *Amerada Hess Shipping Corp.*, 488 U.S. at 442.

43. *Id.* at 442-43.

44. *Id.* at 442 (citing to House Rept.).

45. Frolova v. U.S.S.R., 761 F.2d 370 (7th Cir. 1985).

46. *Id.* at 378.

2. Non-Commercial Tort Exception

Another exception commonly used by plaintiffs asserting human rights violations is the non-commercial tort exception.[47] The statute denies jurisdictional immunity in cases involving non-commercial torts when "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."[48] The operative phrase that works to preclude human rights violation claims under this exception is "occurring in the United States." As the majority of these claims are made by U.S. citizens who experienced their injuries abroad, this exception has little value for human rights plaintiffs. An example of when this exception was useful involved a terrorist attack occurring in the United States by the Chilean government against a former Chilean Ambassador to the United States.[49] In *Letelier v. Republic of Chile*, the former Ambassador of Chile and an aide were murdered in Washington, D.C. by a car bomb planted by the Chilean Secret Service in response to the Ambassador's opposition to his country's military regime.[50] The plaintiff in Letelier successfully invoked the non-commercial tort exception as the basis of their claim.[51]

Both the non-commercial tort exception and the commercial activity exception discussed below require a nexus to the U.S. before abrogating immunity. This limitation, ostensibly a response to the personal jurisdiction problem, is precisely the reason the proposed human rights exception would obviate the nexus requirement and allow suits in U.S. courts despite the occurrence of the tort outside the U.S. However, in order for the tortious activity exception to apply, the torts alleged must not involve the exercise of discretionary functions, even if the discretion was abused.[52] The existence of a discretionary function under the FSIA is generally analyzed under the principles

47. FSIA 28 U.S.C. § 1605(a)(5)
48. 28 U.S.C. § 1605(a)(5)
49. Letelier v. Republic of Chile, 488 F. Supp. 665 (D. D.C. 1980).
50. *Id.* at 665.
51. *Id.*
52. FSIA 28 U.S.C. § 1605(a)(5)(A).

developed pursuant to the Federal Tort Claims Act's (FTCA) discretionary function exception.[53] The FTCA operates like the FSIA in that it provides the circumstances in which the U.S. waives its immunity for purposes of suits brought against it. Under the discretionary function exception, the U.S. is immune for torts committed in relation to certain military activities and such common features of human rights oppression as assault, battery, false imprisonment, and malicious prosecution.[54] The FSIA imports this discretionary/ministerial distinction from the FTCA presumably because a foreign nation should be entitled to the same statutory protection for imposing liability as is regarded the U.S. under its own laws when the tort is committed in the United States. Therefore, if one abolishes the nexus requirement as the proposed human rights amendment ultimately urges, one would face a personal jurisdiction problem because foreign sovereigns would be subjected to tort suits in the United States for activities that occurred completely within their territories. Ironically however, the acts giving rise to the suits could well be of a kind to which the United States itself has not waived immunity in its own courts under the FTCA.

3. Commercial Activity Exception

Another failed line of argument has involved the "commercial activity" exception in the FSIA.[55] Under this exception, foreign sovereigns are subject to the jurisdiction of American courts for actions based on: 1) a commercial activity of the sovereign in the United States; 2) an act of the sovereign performed in the United States in connection with a commercial activity of the sovereign outside the United States; or 3) an act of the foreign sovereign performed outside the United States, but having a direct effect in the United States.[56] While the legislative history of the FSIA indicates that Congress expressly intended to give the courts great latitude in determining what actions fell within the commercial exception, Congress did offer some factors that should be considered when making a factual determination

53. *See* United States v. S.A. Empresa de Viacao Aerea Rio Grandense, 467 U.S. 797, 798 (1984).

54. *See* Federal Tort Claims Act, 28 U.S.C. § 2680 (1994)[hereinafter FTCA].

55. FSIA 28 U.S.C. § 1605(a)(2).

56. § 1605(a)(2).

about whether an activity was commercial. "The commercial character of an activity is determined by reference to the nature of the course of conduct or particular transaction or act, rather that by reference to its purpose."[57] The activity must also have "substantial contact" with the United States in order to be deemed commercial by the court.[58] Thus, the exception calls for the courts to narrowly apply the commercial activity provision as opposed to using this exception as the basis for stripping a State's immunity from tenuous and incidental links to a commercial activity.

The most notable case involving a rejected human rights claim under this exception is *Saudi Arabia v. Nelson*.[59] Nelson, a U.S. citizen alleged that he had suffered personal injuries as a result of his unlawful detention and torture by the Saudi government.[60] Nelson had been hired as a hospital safety administrator for a Saudi government hospital. He alleged that when he began to blow the whistle on unsafe practices, he was arrested by the Saudi police, imprisoned, and beaten.[61] He argued that Saudi Arabia was not entitled to immunity because: 1) his recruitment and hiring in the United States was a commercial activity carried on in the United States, and 2) it was an activity that had substantial contact with the United States.[62] The Court disagreed with the "commercial acts" analysis in *Nelson* because his recruitment and hiring were not the torts upon which the action was based and because the intentional torts at issue did not qualify as commercial activity.[63] The Court distinguished the arguably commercial nature of recruiting Nelson in the United States from the subject of the lawsuit, the Saudi government's tortious conduct. Therefore, the Court held that the arrest, imprisonment and torture of Nelson were abuses of Saudi Arabia's police power, which constituted a sovereign attribute rather than a commercial one.[64] Thus, Saudi Arabia was immune from suit in the United States.

In all of the preceding cases save one, victims of human

57. § 1603(d).
58. § 1603(e).
59. Saudi Arabia v. Nelson, 507 U.S. 349 (1993).
60. *Id.*
61. *Id.* at 352-53.
62. *Id.* at 355.
63. *Id.* at 356.
64. *Id.* at 358-62.

rights abuses have failed in overcoming the immunity created by the FSIA by trying to frame their claims within one of the statutory exceptions. As a result, the strategy to pursue these claims shifted by prompting Congress to amend the FSIA to include a human rights provision. While human rights advocates were partially successful in 1996 with the Antiterrorism and Effective Death Penalty Act (AEDPA) amendment[65], the problems under the new provisions demonstrate that the rush to amending the FSIA is not an effective solution to remedying human rights abuses. As shall be discussed below, one of the primary reasons for this ineffectiveness is the constant battle between the plaintiffs attempt to execute judgments and the executive's determination in blocking attachable foreign assets in order to preserve its foreign policy strategies.

C. *AEDPA: Another Avenue for Litigating Human Rights Violations*

The Antiterrorism and Effective Death Penalty Act of 1996 covers many issues, including habeas corpus reform, victim restitution, the exclusion of aliens, and prohibiting support for terrorist groups abroad.[66] However, the act is primarily concerned with stopping terrorism, both within the United States and abroad.[67] The provision amends the FSIA by adding an exception to immunity to include cases in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act.[68] Thus, the amendment was not the comprehensive human rights provision that many people hoped for because it does not include some human rights considered *jus cogens* norms of international law.

The amendment has other limitations. The action must be commenced not later than ten years after the date on which the cause of action arose; however, all principles of equitable tolling, including the period during which the foreign sovereign was

65. AEDPA § 221(codified as amended at 28 U.S.C. § 1605(a)(7)(1996)).

66. § 221.

67. § 221; *See, e.g.,* Title III of the Act (prohibiting assistance to terrorist states and terrorist organizations).

68. § 221.

immune from suit, apply in calculating the limitation period.[69] Most importantly, the amendment makes the abrogation of immunity turn on whether the U.S. Department of State has designated the state as a "state sponsor of terrorism."[70] That list currently includes Cuba, Iraq, Iran, Libya, North Korea, Sudan, and Syria.[71] Moreover, even after a state is designated by the State Department as a sponsor of terrorism, two additional limitations apply. First, if the act occurred in the foreign state against which the claim was brought, the claimant must afford the foreign state a reasonable opportunity to arbitrate the claim.[72] Second, the claimant or the victim must have been a national of the United States when the act occurred.[73]

While Congress was motivated in part by its desire to provide a remedy to some victims of human rights abuses that had lost their claims in court, the restricted nature of the amendments indicate Congress's concern that a more comprehensive human rights amendment might lead to undesired judicial interference in foreign policy matters. The U.S. Department of State argued strongly against the new amendment[74] and has decided to intercede in terrorism exception cases to protect diplomatic properties and blocked properties from attachment. The reason the State Department has taken this position is that it believes that the terrorism exception is incompatible with international treaty obligations and that it will adversely impact the ability of the United States to use frozen assets as a bargaining chip with unfriendly foreign governments.[75] The fact that the executive has had to intervene and block attachable assets from judgments is the strongest evidence that the terrorism exception is a significant intrusion

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69. § 221(f).

70. § 221(c)(7)(A).

71. Terrorism List Governments Sanctions Regulations; Implementation of Section 321 of the AEDPA of 1996, 61 Fed. Reg. 43,462 (1996).

72. AEDPA § 221(a)(7)(B)(i).

73. § 221(a)(7)(B)(ii).

74. Molora Vadnais, *The Terrorism Exception to the Foreign Sovereign Immunities Act: Forward Leaning Legislation or Just Bad Law?*, 5 UCLA J. INT'L L. & FOREIGN AFF. 199, 200 (2000)(citing Hearings on S. 825 Before the Subcomm. on Courts and Admin. Practice of the Senate Judiciary Comm., 103d Cong. (1994) (statement of Jamison S. Borek, State Department official) (arguing that, since the terrorism exception was inconsistent with established international practice, it would erode both the credibility of the FSIA in the opinion of foreign states and the U.S. ability to fine tune sanctions, thereby causing other states to expand their jurisdiction in ways that affect U.S. actions)).

75. Vadnais, *supra* note 73, at 201.

into the area of foreign relations. Thus, Congress has attempted to limit these intrusions somewhat by restricting the 1996 amendment in the ways described above. In fact, the amendment's reliance on the State Department's determination that the state at issue is "terrorist" is likely designed to avoid inadvertent (or explicit) judicial interference with the conduct of foreign relations, and to provide a screen which avoids judicial inquiries into the political context surrounding an act of violence.[76] Moreover, the provisions requiring State Department designation before immunity is abrogated seems calculated merely to assure that friendly governments are not subject to suit, irrespective of their treatment of U.S. citizens.[77] Human rights advocates argue that the result reached by the new amendment is regrettable since two equally egregious human rights violations may result in disparate treatment depending on the country's designation as a terrorist state.[78] Therefore, it is suggested, Congress should amend the FSIA with a comprehensive human rights exception, or codify an implied waiver for violations of *jus cogens* norms.[79]

However, if the purpose of the limitations in the 1996 amendment was to restrict human rights actions in a way that would not interfere with foreign relations, the plain implication is that proposals to enact a more comprehensive human rights amendment not limiting the defendant to State Department designations would expressly contradict section 1605(a)(7). Similarly, a codification of an implied waiver for violations of *jus cogens* norms would nullify the purposes and structure of the new amendment since it would presumably allow human rights suits against states that were not designated by the State Department as terrorist states. Therefore, any further enactment of human rights provisions in the form suggested by advocates above would in effect be a pro tanto repeal of section 1605(a)(7).

76. Roht-Arriaza, *supra* note 29, at 81.
77. *Id.*
78. *Id.* at 82.
79. *Id.* at 84.

D. Alternative Remedies That Do Not Interfere With The Conduct Of Foreign Policy

The United States does not need to choose between abdicating its commitment to protecting human rights, and adopting provisions in its domestic laws that provoke states conducting foreign relations with the United States to respond with similar legislation that places U.S. interests at risk. Through the ATCA,[80] human rights are vindicated more appropriately because the individual directly responsible for the violation is put on trial and held to answer for the consequences. This point is illustrated in *Siderman.*[81] This case is one of the few instances where the court held that the state had implicitly waived its immunity by availing itself of U.S. courts and remanded the case for trial. While the case ultimately settled, General Domingo Bussi, the military junta's chief administrator in Tucuman, who was directly responsible for the torture against the plaintiff in 1976, was elected governor of Tucuman in 1995.[82]

If the issue is that judgments against individuals go unsatisfied, then perhaps the focus should be on redressing that problem[83] and not on creating exceptions to the FSIA at the expense of upsetting a system that is based on international comity. However, notwithstanding the exceptions to the FSIA, the problem of collecting judgments has not been effectively remedied.[84] Yet the loss of credibility to the FSIA and the judicial system resulting from the negative reactions of other states to the 1996 amendment could have implications in other contexts, such as fugitive extradition agreements and the willingness of foreign states to submit to U.S. court jurisdiction in other matters.[85]

To the extent that immunity for acts of governments persists

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80. ATCA 28 U.S.C. § 1350

81. *Siderman*, 965 F.2d at 718.

82. Jacobson, *supra* note 14, at 791.

83. *See* Edward A. Amley, Jr., *Sue and Be Recognized: Collecting § 1350 Judgments Abroad*, 107 YALE L. J. 2177 (1998)(suggesting different ways of collecting judgments under the ATCA in the forum state).

84. *See* Alejandre v. Telefonica Larga Distancia de Puerto Rico, Inc., 183 F.3d 1277 (11th Cir. 1999).

85. Vadnais, *supra* note 73, at 223.

and reflects fundamental concerns about interference of one sovereign with the affairs of another, the best solution may be to extend the jurisdiction of international tribunals. That, of course, not only implicates the Inter-American system, but the International Criminal Court provided for in the Rome Statute, now being considered for ratification in many countries, and the jurisdiction of the International Court of Justice as well. From the Inter-American perspective however, one alternative that has been the product of state collaboration and has demonstrated some effectiveness in protecting human rights has been the Inter-American Commission on Human Rights[86] (Commission) and the Inter-American Court of Human Rights (Court).[87] The two organs supervise compliance with human rights norms in the Inter-American region.

The Commission is comprised of seven independent members elected by the General Assembly of the OAS to represent the OAS member states for terms of four years. The OAS represents all thirty-five states of the Americas except Cuba. The Commission has very broad powers compared with other regional and universal supervisory agencies. These include visits in loco, adjudicating cases, referring cases to the Court for adjudication, appointing rapporteurs on human rights issues, and drafting declarations and treaties.[88]

The Court is also comprised of seven individuals elected for six-year terms and has adjudicatory, as well as advisory functions. For the Court to exercise its compulsory jurisdiction, the parties have to accept the compulsory jurisdiction of the Court for contentious cases.

Many, but not all, of the OAS states have signed a pact agreeing to accept the jurisdiction of the Inter-American Court of Human rights. While the United States has not, Peru had agreed to accept the court's rulings until the government unilaterally withdrew from the Court's contentious jurisdiction.[89] It did so when the Court ruled against it in the case of four Chileans who were convicted of treason by a military tribunal

86. Commission, *supra* note 1.

87. Court of Human Rights, *supra* note 2.

88. Claudio Grossman, *Moving Toward Improved Human Rights Enforcement in the Americas*, Human Rights, A.B.A.(2000).

89. 1999 U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, *supra* note 7.

and sentenced to life in prison.[90] The Court found that the military had denied the defendants' due process provided for under the American Convention on Human Rights.[91] Peru rejected the Court's directive to grant a new civilian trial and subsequently withdrew from the Court's obligatory jurisdiction.[92]

While this event undoubtedly highlights a setback in the effectiveness of regional institutions, the Inter-American system can be improved to achieve its stated goals of promoting the observance of human rights. In the past, these organizations have been capable of remedying human rights abuses through the use of effective sanctions, and they have done so through a collaborative effort that does not impede their domestic political processes. In the Loayza Tamayo case,[93] the Court declared that the Peruvian decrees that typified the delicts of terrorism were incompatible with Article 8(4) of the Convention. Quite significantly, some days after the Court's judgment, the Peruvian government duly complied with the Court's order to release the prisoner, Maria Elena Loayza Tamayo.

In November, the government of Venezuela accepted responsibility for 44 cases of extrajudicial killings by security forces. The killings occurred during the civil unrest of February-March 1989, in which an estimated 300 alleged extrajudicial killings were committed.[94] The government also agreed to compensate the families of the victims and to identify and punish those responsible.[95] In September 1996, the Court awarded $722,332 in damages to two survivors and the surviving families of 14 fishermen killed in 1988 by Venezuelan military and police officers.[96] The government acknowledged responsibility for these actions and began to make payments in September 1997.[97]

The Court has broad power to execute its judgments. If the State party fails to comply with the Court's judgment, the victims or their relatives can execute the judgment in the country

90. *Id.*
91. *Id.*
92. *Id.*
93. *See* Loayza Tamayo v. Peru, Judgment Sept. 19, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 33 (1997).
94. 1999 U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, *supra* note 6.
95. *Id.*
96. *Id.*
97. *Id.*

concerned in accordance with domestic procedure governing the execution of judgment against the State. Further, victims or their relatives may inform the Court, who in turn, will inform the General Assembly. The General Assembly shall specify the cases in which a State has not complied with its judgments, making any pertinent recommendations.[98] While this regional system for the enforcement of human rights can be modified to make it more effective, it has proved to be a better way of enforcing human rights violations than judgments from U.S. courts that are rarely satisfied without resorting to the political branches.

III. CONCLUSION

The limits of judicial power are no doubt frustrating when injustice persists and the political branches remain inactive. It becomes an attractive notion to replace the cumbersome political process with the swift justice a court can provide with a judgment, assessing culpability and imposing damages. However, while seeking to redress global human rights abuses is an important goal, the manner in which those wrongs are remedied must not violate those great values which are incorporated in the wisdom of experience and fairness.

The international system is essentially one that is founded on historical notions of comity. To the extent that immunity for acts of state persists and reflects concerns of interference by one sovereign in the affairs of another, perhaps the best solution is extending the jurisdiction of international and regional tribunals. A nation that unilaterally seeks to undertake the enforcement of human rights by subjecting foreign sovereigns to suits in its courts is inviting diplomatic warfare. The result will ultimately be the victimization of human rights.

98. Victor Rodriguez Rescia & Marc David Seitles, *The Development of the Inter-American Human Rights System: A Historical Perspective and a Modern-Day Critique*, 16 N.Y.L. SCH. J. HUM. RTS. 593, 615 (2000).

Nor does it appear that Congress intended the federal courts to replace the International Court of Human Rights. Instead, Congress meant to provide a statutory scheme whereby a reliable forum would be in place to resolve disputes arising from an increasingly interconnected global economy. Any other approach to the FSIA would not only be imprudent, but would undermine the prerogative of the executive branch in forming and executing effective foreign policy strategies.

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