CALIFORNIA WESTERN
INTERNATIONAL LAW JOURNAL

VOLUME 33 SPRING 2003 NUMBER 2

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: EFFECTIVE REMEDIES AND THE DOMESTIC COURTS©

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I. INTRODUCTION

As we observed the Fiftieth Anniversary of the adoption of the Universal Declaration of Human Rights by the General Assembly of the United Nations, it was fitting to commemorate this historic event and to assess the progress that had been made in achieving the fundamental principles of human rights and freedoms. Upon its adoption on December 10, 1948, it was hailed "as a common standard of achievement for all peoples of all nations."[1]

High hopes were expressed that this Declaration would soon become a new Magna Carta of human rights and fundamental freedoms for all people throughout the world.[2] Notwithstanding some unfulfilled expectations, one must view, with great satisfaction, the emergence of human rights awareness and *an international law of human rights*. This body of human rights law, which deals with the promotion and protection of human rights, owes much to the Declaration and the United Nations Human Rights system that developed.[3] Indeed, at the United Nations Conference on Human Rights in 1993, more than one hundred nations reaffirmed "their commitment to the purposes and principles contained in the Charter of the United Nations and the Universal Declaration of Human Rights."[4]

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1. General Assembly Adopts Declaration of Human Rights: Statement by Mrs. Franklin D. Roosevelt, U.S. Representative to the General Assembly, Dec. 9, 1948, DEP'T ST. BULL., Dec. 19, 1948, at 751 [hereinafter Roosevelt Address (Dec.)]; Human Rights, 5 WHITEMAN DIGEST § 13, at 243. *See also Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., Supp. No. 16, U.N. Doc A/8 10 (1948), *reprinted in* JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS 165 (1993) [hereinafter *Universal Declaration*]; The Third Regular Session of the General Assembly, Paris: No Compromise on Essential Freedoms, Address by Secretary Marshall, Sep. 23, 1948, DEP'T ST. BULL., Oct. 3, 1948, at 432 (urging General Assembly to approve Declaration of Human Rights as standard of conduct for all).

2. Roosevelt Address (Dec), *supra* note 1, at 751.

3. *See* Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 290-91 (1996) (citing *Vienna Declaration and Programme of Action, World Conference on Human Rights*, 22d plen. mtg., pmbl. ¶¶ 3, 8 at 20-46, U.N. Doc. A/CONF. 157/24 (1993), *reprinted in* 32 I.L.M. 1661). For other valuable sources regarding the international law of human rights, see generally NEWMAN & WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS (2d ed. 1996); HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS (1996).

4. Hannum, *supra* note 3, at 290 (quoting *Vienna Declaration and Programme of Action, World Conference on Human Rights*, 22d plen. mtg., pmbl. ¶¶ 3, 8 at 20-46, U.N. Doc. A/CONF. 157/24 (1993), *reprinted in* 32 I.L.M. 1661).

II. MORAL NORMS AND LEGAL RIGHTS

Although this article deals with the United Nations' Universal Declaration of Human Rights and international law, one primary concern is the role of domestic courts in the enforcement of those human rights and fundamental freedoms as legal rights. The literature of human history is replete with discussions of idealistic moral norms and utopian societies. Are the ideals collectively described as "human rights" merely moral norms, or are they enforceable legal rights?[5] This article, therefore, does not deal merely with human rights as moral or ethical norms; rather, it addresses legally enforceable rights to be enjoyed by the human family. Hence, the author is not limited to the existence of substantive rights set forth in a declaration of human rights, but also extend to effective *remedies* to vindicate violations of those rights.

Predicated on theological, philosophical and sociological foundations, various theories have been expounded for the existence of human rights.[6] Without minimizing prior efforts to affirm and set forth the human rights of the individual,[7] the turning point for effective promotion and observance of human rights was the Charter of the United Nations.[8] The Charter of the United Nations not only paved the way for the adoption of the Universal Declaration of Human Rights, the Covenant on Political and Civil Rights, and the Covenant on Social and Economic Rights, but it also succeeded in establishing a new international juridical order.[9] This new international order altered the sovereign status of nation-states and their responsibilities to the individual.[10]

As a result of the unprecedented concern for human rights, nations were obliged to acknowledge the inherent dignity of the individual and fundamental human rights. The unfettered sovereignty of states was irrevocably eroded, and the duty of states to promote and observe human rights was solemnly proclaimed[11]—no longer were sovereign states the sole *subjects* of international law and the individual merely an "object."[12] The unspeakable

5. *Id.*

6. *See* NEWMAN & WEISSBRODT, *supra* note 3, at 2.

7. See prior declarations and statements in Edward D. Re, *Freedom in the International Society*, *in* CONCEPT OF FREEDOM 217 (Rev. Carl W. Grindel, C.M., Ph.D. ed., 1955) [hereinafter Re, *Freedom*]. *See generally* EDWARD LAWSON, ENCYCLOPEDIA OF HUMAN RIGHTS (Mary Lou Bertucci ed., 2d ed. 1991); LOUIS HENKIN, THE AGE OF RIGHTS (1990); BRENDAN F. BROWN, THE NATURAL LAW READER (1960); NORMAN BENTWICH, THE RELIGIOUS FOUNDATIONS OF INTERNATIONALISM (1933).

8. NEWMAN & WEISSBRODT, *supra* note 3, at 7.

9. LAWSON, *supra* note 7, at 710-11.

10. *Id.*

11. *See* W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 869 (1990), *reprinted in* HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 157-60 (1996).

12. Re, *Freedom*, *supra* note 7, at 224.

atrocities and gross human rights violations of the World War II era highlighted a new responsibility of the world community to respect, promote and protect the fundamental human rights of the individual.[13] Addressing the Fiftieth General Assembly of the United Nations in 1995, Pope John Paul II noted the "outrages against human dignity" led the United Nations to formulate, "barely three years after its establishment, that Universal Declaration of Human Rights[,] which remains one of the highest expressions of the human conscience of our time."[14]

It must be stressed that the very notion of the *existence* of human rights of individuals necessarily implies a *restriction* or *limitation* upon the sovereign power of states and governments.[15] The American Declaration of Independence, after proclaiming as self-evident certain "unalienable rights," declared that governments must be instituted to "secure these Rights."[16] For the United States, therefore, to protect or guarantee fundamental human rights is to be faithful to its founding document and the Bill of Rights of the Constitution, which gives legal status to the moral rights proclaimed in the Declaration of Independence. Much of this American political philosophy undoubtedly influenced the Universal Declaration of Human Rights.[17]

Regardless of the underlying philosophical or theoretical basis, no nation today may claim a sovereign right to violate those fundamental and unalienable universal rights.[18] The founding of the United Nations resulted in the establishment of a new international legal environment where human rights assumed unprecedented importance. Our present efforts, therefore, are not merely to *proclaim* or *assert* the existence of fundamental rights and

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13. LAWSON, *supra* note 7, at 710.

14. Pope John Paul II, Address at the Fiftieth General Assembly of the United Nations Organization (Oct. 5, 1995) (emphasis added). *See also* Redemptor Hominis, *in* THE ENCYCLICALS OF JOHN PAUL II §§ 17.4 & 17.5, at 75-76 (J. Michael Muller, C.S.B. ed., 1996) (outlining the Declaration of Human Rights); Sollicitudo Rei Socialis, *in id.* § 26.2, at 447 (noting the increased awareness of respect for human rights).

15. *See* Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 136 (1812) (acknowledging the "jurisdiction of the nation within its own territory is necessarily exclusive and absolute"); Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980) (stating that a sovereign's treatment of its own citizens is a matter of international concern under the United Nations Charter). *See also* Joseph Diab, Note, *United States Ratification of the American Convention on Human Rights*, 2 DUKE J. COMP. & INT'L L. 323, 336 (1992) ("The principle of noninterference in domestic affairs does not shield states from scrutiny or censure should they torture, murder, or arbitrarily imprison their citizens.").

16. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). When a government is guilty of destroying "certain unalienable Rights . . . it is the Right of the People to alter or abolish it, and to institute [a] new Government." *Id.*

17. *See Universal Declaration, supra* note 1. *See also* Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 415 (1979) (noting similarities and differences between American and Human rights) [hereinafter *American and Human*]. "[M]ost of the Universal Declaration of Human Rights, and later the International Covenant on Civil and Political Rights, are in their essence American constitutional rights projected around the world." *Id.*

18. *See* Siderman de Blake v. Rep. of Arg., 965 F.2d 699, 717 (9th Cir. 1992); Filartiga, 630 F.2d at 884 (noting that no contemporary state asserts "a right to torture its own or another nation's citizens").

freedoms to which human beings are entitled; rather, efforts must be dedicated to strengthening the *legal enforcement* institutions and mechanisms that must exist to give these rights vitality as enforceable legal rights.

III. UNIVERSAL DECLARATION OF HUMAN RIGHTS

The Charter of the United Nations contains seven provisions that expressly refer to human rights.[19] Article 55 specifically provides for promotion of "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[20] The Charter, however, does not include an International Bill of Rights or Charter of Human Rights.[21] Nevertheless, it was clear that international human rights were a subject of major concern and that, henceforth, fundamental human rights were to be recognized as *legal* rights enforceable under international law.[22]

A. Approval of Declaration by General Assembly

The task of drafting an International Bill of Rights was assigned to the Economic and Social Council of the United Nations, which established the Commission on Human Rights on June 21, 1946.[23] The Commission decided that the Bill of Rights would contain two parts.[24] The first part would be a Declaration that could be approved through the action of the Member States of the United Nations in the General Assembly.[25] In the words of the Commission, this Declaration would have *great moral force* because, in effect, it would say to the peoples of the world "*this is what we hope human rights may mean to all peoples in the years to come.*"[26]

The second part of the Bill of Rights would be a covenant in the form of a treaty to be presented to the nations of the world for adoption and ratification.[27] This covenant, once ratified or adopted by a nation, would have the status of a legally binding treaty. Hence, the signatory nations would, if necessary, be obligated to alter or modify their national laws if they did not conform to the provisions or standards established in the covenant.[28]

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19. U.N. CHARTER pmbl., arts. 1, 13, 55, 62, 68, 76.
20. *Id.* art. 55, para. C.
21. *See generally id.*
22. *See* Re, *Freedom*, *supra* note 7, at 243.
23. The Struggle for Human Rights: Address by Mrs. Franklin D. Roosevelt, U.S. Representative to the Commission on Human Rights, Sept. 28, 1948, DEP'T ST. BULL., Oct. 10, 1948, at 457 [hereinafter Roosevelt Address (Oct.)].
24. *Id.*
25. *Id.*
26. *Id.* (emphasis added).
27. *Id.*
28. *Id.*

The United Nations Commission on Human Rights presented the Universal Declaration of Human Rights to the General Assembly in 1948 at a meeting in Paris.[29] The declaration was overwhelmingly approved on December 10, 1948,[30] a date worthy of celebration throughout the world as Human Rights Day.

B. Nature and Content of the Declaration

Although past declarations of rights were usually enacted to remedy specific abuses or grievances, the Universal Declaration of Human Rights was the first all-embracing official codification of human rights. It encompassed a broad range of human rights and was the first concrete step to fulfilling the Charter's pledge to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[31]

The Declaration, which contained a preamble and thirty articles, was not limited to the basic civil and political rights that characterize the American Bill of Rights.[32] For example, in addition to certain miscellaneous provisions, such as the right of asylum, the Declaration included economic and social rights, such as the right to work and the right to education.[33] The importance of the Declaration cannot be minimized because, for the first time in history, there was agreement in the international community on the basic human rights of the individual. The animating principle of the Declaration is articulated in the opening phrase of its preamble, which proclaims: "*the inherent dignity and . . . equal and inalienable rights of all members of the human family are the foundation of freedom, justice and peace in the world.*"[34]

The thirty articles of the Declaration proclaimed: the right to life, liberty and security of person; freedom from slavery, torture, cruel, inhuman or degrading treatment or punishment; freedom from arbitrary arrest, detention or exile; the right to equality before the law; the right to a fair and public hearing by an independent and impartial tribunal, and, a presumption of innocence; the right to protection against ex post facto laws; and the right of asylum from persecution.[35] The articles also provided for: freedom from arbitrary interference with one's privacy, family, home or correspondence; freedom to leave any country; freedom of movement and residence; freedom of religion, expression, assembly and association; the right of people to have their will serve as the basis of the authority of Government; the right to work

29. *Id.*
30. *Id.*
31. U.N. CHARTER art. 55(c) (emphasis added).
32. *See generally Universal Declaration, supra* note 1.
33. *Id.* arts. 14, 22, 23, 26.
34. *Id.* pmbl. (emphasis added).
35. *Id.* arts. 3, 4, 5, 9, 10, 11, 14.

and join trade unions; the right to own property; the right to rest and leisure; the right to social security; the right to education; the right to participate in the cultural life of the community; equal rights as to marriage; and freedom from discrimination.[36]

The following sections illustrate the moral moorings of the Declaration: Article I proclaimed:

> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.[37]

Article 2 proscribed discrimination by declaring:

> 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.[38]

Article 3 declared:

> Everyone has the right to life, liberty and security of person.[39]

Article 18 explained freedom of worship in the following terms:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.[40]

In light of the vastness of the "rights and freedoms" proclaimed in the Universal Declaration on Human Rights, its adoption was a phenomenal achievement—a *common standard of achievement* by nations representing the greater portion of the world's population. Indeed, not one country ventured to cast a negative vote.

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36. *Id.* arts. 12, 13, 16, 17, 18, 20, 21, 22, 23, 24, 26.

37. *Id.* art. 1.

38. *Id.* art. 2. Article 7, which also addresses equal protection, states: "All are equal before the law and are entitled without any discrimination to equal protection of the law." *Id.* art. 7.

39. *Id.* art. 3.

40. *Id.* art. 18.

IV. MORAL AND LEGAL EFFECT OF THE DECLARATION AND REGIONAL CHARTERS

The Declaration is not an international covenant or treaty. As stated by Mrs. Eleanor Roosevelt, the Chair of the Commission on Human Rights and the United States Representative to the General Assembly:

> It is not and does not purport to be a statement of law or a legal obligation. It is a declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by formal vote of its members, and to serve as a common standard of achievement for all Peoples of all nations.[41]

Although not a legally binding treaty, the Declaration is an "authoritative interpretation" of the human rights provisions of the Charter and serves to awaken the world to a human rights conscience.[42] It was no longer questionable whether international protection is granted to all individuals: the international community would no longer tolerate gross human rights abuses or discrimination on account of "race, colour, sex, language, [or] religion."[43]

It must be noted that efforts to draft broad charters of human liberties have not been limited to the United Nations. Various important Regional Charters supplemented the efforts of the United Nations to promote respect and observance of human rights. Regional systems, such as the European system for the protection of human rights beginning with the Statute of the Council of Europe in 1949;[44] the Inter-American system which began with the Organization of American States in 1948;[45] and the African system which started with the Organization of African Unity in 1963,[46] are beyond the scope of this article. More recent initiatives, which manifest the firm determination of the international community to punish persons guilty of gross human rights violations, are also beyond the scope of this article. Examples of those initiatives, however, include the International Criminal Court[47] and the establishment of International Criminal Tribunals for Rwanda[48] and the former Yugoslavia.[49]

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41. Roosevelt Address (Dec.), *supra* note 1, at 751.

42. L'Osservatore Ramano, *The Church and the Rights of Man* (Apr. 11, 1968), *at* http://www.ewtn.com/library/HUMANITY/rightsmn.htm (last visited May 16, 2003) (on file with California Western International Law Journal).

43. *Universal Declaration, supra* note 1, art. 2.

44. Statute of the Council of Europe, May 5, 1949, 87 U.N.T.S. 103.

45. Charter of the Organization of American States, *entered into force* Dec. 13, 1951, 119 U.N.T.S. 3.

46. Charter of the Organization for African Unity, *entered into force* May 25, 1963, 479 U.N.T.S. 39.

47. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9 (1998).

48. U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc S/RES/955 (1994) (establishing Rwanda War Crimes Tribunal).

49. U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993) (establishing

Any treatment of international human rights must also refer to the enormous contribution of non-government organizations in the field of human rights. These organizations focus attention on human rights abuses throughout the world and work to achieve remedial action. A few that deserve mention include Amnesty International,[50] the International League for Human Rights,[51] the International Commission of Jurists,[52] the Lawyers Committee for Human Rights[53] and Human Rights Watch.[54]

V. INTERNATIONAL LAW AND HUMAN RIGHTS

Many of the fundamental human rights enunciated in the Declaration are embraced in modern international law and form the basis of international human rights standards.[55] Indeed, virtually all international instruments and treaties dealing with human rights invoke provisions of the Declaration, a primary source of international human rights law.

For Americans and others interested in the legal system of the United States, it is important to know that international law is part of the law of the land. Almost a century ago, in the classic case of *The Paquette Habana*,[56] Justice Gray stated: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."[57] The question to be resolved by American courts today is the specific applicability of that famous statement.

Yugoslavia War Crimes Tribunal).

50. *See generally Amnesty International at* http://www.amnesty.org. (last visited May 16, 2003). Amnesty International envisions "a world in which every person enjoys all of the human rights enshrined in the *Universal Declaration of Human Rights* and other international human rights standards." *Id.*

51. *See generally* International Leauge for Human Rights, *at* http://www.ilhr.org (last visited May 16, 2003). The goal of the International Leauge for Human Rights is to "keep human rights at the forefront of international affairs and to give meaning and effect to the human rights values enshrined in international human rights treaties and conventions." *Id.*

52. *See generally International Commission of Jurists, available at* http://www.icj.org (last visited May 16, 2003).

53. *See generally Lawyers Committee for Human Rights, at* http://www.lchr.org (last visited May 16, 2003). The "Lawyers Committee for Human Rights has worked in the U.S. and abroad to create a secure and humane world by advancing justice, human dignity and respect for the rule of law." *Id.*

54. *See generally Human Rights Watch, at* http://www.hrw.org (last visited May 16, 2003). Human Rights Watch stands "with victims and activists to prevent discrimination, to uphold political freedom, to protect people from inhumane conduct in wartime, and to bring offenders to justice." *Id.*

55. *See generally American and Human, supra* note 17; BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS (1996).

56. 175 U.S. 677 (1900).

57. *Id.* at 700. *See* U.S. CONST. art. VI, cl. 2. Article VI states, in pertinent part: "[A]ll Treaties made. . .under the Authority of the United States, shall be the supreme Law of the Land. . . ." *Id.* Justice Gray's statement followed a tradition reflected in William Blackstone, who, relying on judicial precedent, wrote that the "law of nations . . . is here adopted in its full

Addressing the American Society of International Law, Justice Harry Blackmun spoke of "the Supreme Court, the law of nations and the place in American jurisprudence for what the Drafters of the Declaration of Independence termed, a 'decent respect to the opinions of mankind.'"[58] He observed that:

> The early architects of our nation were experienced diplomats who appreciated that the law of nations was binding on the United States. John Jay, the first Chief Justice of the United States, observed, in a case called *Chisolm v. Georgia* that the United States "had, by taking a place among the nations of the earth, become amenable to the laws of nations." Although the Constitution [through art. I, § 8, cl. 10] gives Congress the power to "define and punish . . . [*o*]*ffenses against the Law of Nations*," and [through art. VI, cl. 2] identifies treaties of *"the supreme Law of the Land,"* the task of further defining the role of international law in the nation's legal fabric has fallen to the courts.[59]

After indicating that "[s]everal first principles have been established," Justice Blackmun stated:

> As early as 1804, the Supreme Court recognized that *"an act of congress ought never to be construed to violate the law of nations if any other possible construction remains."* In a trilogy of cases in the 1880s, the Court established that treaties are on equal footing with federal statutes and that, where a treaty and statute cannot be reconciled, the later in time is controlling.[60]

In discussing the case of *The Paquette Habana*, Justice Blackmun noted that:

> [T]he Supreme Court addressed the power of courts to enforce customary international law. In invalidating the wartime seizure of fishing vessels as contrary to the law of nations, the Court observed: *"International law is part of our law, and must be ascertained and administered by the courts."*

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extent by the common law, and is held to be a part of the law of the land." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 67 (lst ed. 1765-69). *See generally* CHARLES PERGLER, JUDICIAL INTERPRETATION OF INTERNATIONAL LAW IN THE UNITED STATES § 1, at 1 (1928) (reaffirming "[i]nternational law as part of the common law"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111(l) (1987) ("International law and international agreements of the United States are law of the United States and supreme over the law of the several States."); Filartiga, 630 F.2d at 877-78 (pointing to U.S. adoption of laws of nations). *See generally* JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES (1996).

58. Harry Blackmun, *The Supreme Court and the Law of Nations: Owing a Decent Respect to the Opinions of Mankind*, AM. SOC'Y INT'L L. NEWSLETTER, Mar.-May 1994, at 383.

59. *Id.* (emphasis added and citations omitted).

60. *Id.* (emphasis added and citations omitted). The "law of nations" has been supplanted by the current usage "international law." RESTATEMENT, *supra* note 57, pt. I, ch. 1 (Introductory Note).

> Where no treaty or other legal authority is controlling, resort must be had to the customs of nations.[61]

Thus, Justice Blackmun asserted that "[t]hese early principles, established during the Supreme Court's first century, continue to define the relationship between the law of nations and domestic American law."[62] Having introduced his subject, Justice Blackmun stated that he wished to consider "the Supreme Court's application of these principles in four of the Court's recent cases."[63] Accordingly, a word about each of these cases[64] here will be useful.

In 1991, the Court held in *United States v. Alvarez-Machain*[65] that the forced abduction of a Mexican national by United States agents did not violate a United States-Mexico extradition treaty.[66] In *Alvarez-Machain*, Dr. Alvarez was kidnapped in Mexico and brought to the United States to stand trial for murder. As one of three dissenting judges, Justice Blackmun stated that "transborder kidnapping" violated the very "spirit and purpose" of the exradition treaty, which was to "preserve the territorial integrity of nations, protect individuals from arbitrary detention and arrest, and prevent international conflict."[67] In the 1993 decision of *Haitian Centers Council v. McNary*,[68] Justice Blackmun again dissented from the Court's opinion to uphold a United States policy of "intercepting Haiti refugees on the high seas and summarily returning them to Haiti."[69] According to Justice Blackmun, such a ruling failed to respect the United Nations Convention Relating to the Status of Refugees by allowing "vulnerable" refugees to be returned to a place of persecution.[70]

The two other cases, *Thompson v. Oklahoma*[71] and *Stanford v. Kentucky*,[72] challenged the execution of juvenile offenders. In *Thompson*, a plurality opinion, the Court held that, "'civilized standards of decency' embod-

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61. Blackmun, *supra* note 58, at 383-84. (emphasis added and citations omitted).

62. *Id.* at 384.

63. *Id.*

64. *See* United States v. Alvarez-Machain, 504 U.S. 655 (1992) (examining United States-Mexico extradition treaty); Haitian Ctrs. Council v. McNary, 969 F.2d 1350 (2d Cir. 1992), *rev'd sub nom.* Sale v. Haitian Ctrs. Council, 509 U.S. 155, 159 (1993) (discussing the validity of executive action in light of binding international treaties); Stanford v. Kentucky, 492 U.S. 361, 389 (1989) (considering the relevance of legislation of other countries to the Eight Amendment analysis); Thompson v. Oklahoma, 487 U.S. 815 (1988) (considering implications of international law on Eighth Amendment death penalty jurisprudence).

65. 504 U.S. 655 (1992).

66. *Id.* at 669-70.

67. Blackmun, *supra* note 58, at 384.

68. 969 F.2d 1350 (2d Cir. 1992), *rev'd sub nom.* Sale v. Haitian Ctrs. Council, 509 U.S. 155 (1993).

69. Blackmun, *supra* note 58, at 385.

70. Sale, 509 U.S. at 190.

71. 487 U.S. 815 (1988) (plurality opinion).

72. 492 U.S. 361 (1989).

ied in the Eighth Amendment prohibited" the use of the death penalty against the defendant.[73] By following the standards of other countries that had outlawed juvenile capital punishment, the majority arrived at a decision "consistent with international practice."[74] In *Stanford*, however, the majority held that, regardless of the United States' ratification of an international treaty explicitly prohibiting juvenile death penalties, the execution of the juvenile defendant was constitutionally valid.[75] Justice Scalia distinguished *Stanford* from *Thompson* by "emphasiz[ing] that it is American conceptions of decency that are dispositive, [and] reject[ing] the contention . . . that the sentencing practices of other countries are relevant."[76] Justice Brennan's dissent in *Stanford* noted: "Within the world community, the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disapproved."[77] Referring to the four cases above, Justice Blackmun observed that unfortunately, "the Supreme Court has shown something less than 'a decent respect to the opinions of mankind.'"[78]

VI. HUMAN RIGHTS AND SOVEREIGN IMMUNITY

The four cases mentioned above dealt with the role and applicability of international law in U.S. courts, specifically, the United States Supreme Court. In 1993, the Court decided, *Saudi Arabia v. Nelson*, [79] a case that tested the tension between human rights and sovereign immunity. *Nelson* dealt with the interpretation of the United States Foreign Sovereign Immunities Act of 1976 (FSIA)[80] as applied to an American plaintiff who was allegedly tortured by a sovereign. Beyond mere interpretation of a domestic statute dealing with the immunity of a foreign sovereign, *Nelson* revealed the extent to which courts are willing to give effect to international legal norms.

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73. Thompson, 487 U.S. at 830.

74. *Id.*

75. Stanford, 492 U.S. at 380.

76. *Id.* at 369 n.1 (emphasis in original). "While the practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, . . . they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people." *Id.* (citations and quotations omitted).

77. *Id.* at 390 (Brennan, J., dissenting). *See also* Blackmun, *supra* note 58, at 387. An Amnesty International report indicated that "the United States 'stands almost alone in the world in executing offenders who were under 18 at the time of the crime.'" *Id.*

78. Blackmun, *supra* note 58, at 384. *See also* Louis Henkin, *A Decent Respect to the Opinions of Mankind*, 25 J. MARSHALL L. REV. 215, 229 (1992); Jennie Hatfield-Lyon, Nelson v. Saudi Arabia: *An Opportunity for Judicial Enforcement of International Human Rights Standards*, 86 AM. SOC'Y INT'L L. PROC. 331 *passim* (1992).

79. 507 U.S. 349 (1993). *See generally* Edward D. Re, *Human Rights, International Law, and Domestic Courts*, 4 CARDOZO J. INT'L & COMP. L. 1, 6-12 (1996) (discussing the *Nelson* case).

80. 28 U.S.C. §§ 1330, 1602-11 (2000) [hereinafter FSIA].

The facts of *Nelson* are clear. One may speak of "the facts" because defendants moved to dismiss for lack of jurisdiction, and therefore, for purposes of the motion, the facts alleged by Nelson were deemed true.[81] While in the United States, plaintiff Scott Nelson saw a printed advertisement recruiting employees for the King Faisal Specialist Hospital in Riyadh, Saudi Arabia. The Hospital Corporation of America (HCA), under contract with the Kingdom of Saudi Arabia, conducted recruitment of American employees for the hospital in the United States.[82] Nelson was selected to interview with hospital officials in Saudi Arabia. After returning to the United States, and pursuant to a contract of employment with the hospital executed in Miami, Florida, Nelson was hired as a monitoring systems engineer.[83]

Under the hospital's job description, Nelson was responsible for "monitoring all 'facilities, equipment, utilities and maintenance systems to insure the safety of patients, hospital staff and others.'"[84] Nelson's difficulties began when, while performing his duties, he discovered various safety hazards at the hospital. After he reported the safety hazards to an investigative commission of the Saudi government, Nelson was summoned to the hospital's security office. Nelson alleged that he was subsequently taken to a jail cell where he was "shackled, tortured, and beaten" by Saudi government agents.[85]

After Nelson's release and return to the United States, he sued Saudi Arabia, the hospital, and the hospital's purchasing agent in the United States District Court for the Southern District of Florida, claiming that United States courts had subject matter jurisdiction under FSIA.[86] Aside from seven exceptions, FSIA provided foreign states with immunity from suit in United States courts.[87] One exception provided 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 action is based upon a commercial activity carried on in the United States by the foreign state. . . ."[88]

The district court concluded that "the link between recruitment activities and the Defendants was not sufficient to establish 'substantial contact' with the United States" within the meaning of the commercial activity exception of the FSIA.[89] It, therefore, granted Saudi Arabia's motion for dismissal for lack of subject matter jurisdiction.[90]

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81. Nelson v. Saudia Arabia, No. 88-1791-CIV-NESBITT, 1989 WL 435302, at *1 (S.D. Fla. Aug. 11, 1989).

82. *See* Nelson, 507 U.S. at 351-52 (describing the method of hiring by the HCA).

83. *See* Nelson v. Saudi Arabia, 923 F.2d 1528, 1530 (11th Cir. 1991) (explaining the hiring process in employing Nelson).

84. *See* Saudi Arabia v. Nelson, 507 U.S. at 352 (describing Nelson's duties).

85. *See id.* at 352-53 (detailing treatment Nelson received after reporting violations).

86. Nelson, 1989 WL 435302, at *2.

87. *See* FSIA, *supra* note 80.

88. 28 U.S.C. § 1605(a)(2) (2000).

89. *See* Nelson, 923 F.2d at 1530 (quoting Nelson, 1989 WL 435302, at *2).

90. *Id.*

The Court of Appeals for the Eleventh Circuit reversed, holding that "the recruitment and hiring of Nelson in the United States was a 'commercial activity' of the Saudi government"[91] having "substantial contact with the United States."[92] The recruitment was conducted in the United States by the HCA, who contracted with the Royal Cabinet of the Kingdom of Saudi Arabia to recruit employees for the hospital in 1973. The Court of Appeals agreed with Nelson that the recruitment and hiring in United States constituted a commercial activity, and that a "jurisdictional nexus" existed between the acts for which damages were sought and the foreign sovereign's commercial activity.[93] The court concluded: "the detention and torture of Nelson are so intertwined with his employment at the HCA that they are 'based upon' his recruitment and hiring, in the United States, for employment at the Hospital in Saudi Arabia."[94] The Court of Appeals held that Nelson's alleged torture was directly attributable to the performance of his duties under the contract for employment made in the United States, and that the court had jurisdiction.[95]

The Department of State joined the defendants in urging a reconsideration *en banc*. The Court of Appeals denied the request and the Executive Branch joined the defendants in their petition for writ of *certiorari* to the Supreme Court. Even before the Court granted of the petition, the case generated considerable media interest.[96] The Supreme Court reversed and dismissed *Nelson* in its entirety.[97] Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas joined Justice Souter's opinion and reversed on the ground that Nelson's suit was not based on a commercial activity.[98]

Justice White's concurring opinion indicated that Saudi Arabia was engaged in a commercial activity because it was "self-evident"[99] that the "state-owned hospital was engaged in ordinary commercial business."[100] In "getting even" with a whistle blower, it did not matter whether the sovereign resorted to "thugs or government officers to carry on its business."[101] Nevertheless, Justice White concurred in the majority's reversal because, in his

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91. *Id.* at 1536 (reversing district court's ruling).
92. *Id.* at 1533.
93. *Id.* at 1530.
94. *Id.* at 1535.
95. *Id.*
96. *See* Pete Yost, *U.S. Sides Against American in Lawsuit Over Saudi Actions*, CHARLOTTE OBSERVER, May 25, 1993, at 3A; Thomas W. Lippman, *Workers' Tales of Torture Strain U.S.-Saudi Ties*, WASH. POST, May 24, 1992, at A8; Norman Kempster, *Panel to Hear Charges of Saudi Torture*, L.A. TIMES, May 13, 1992, at A6; Neil A. Lewis, *After the War: U.S. Wants Saudi Torture Suit Settled*, N.Y. TIMES, Apr. 23, 1991, at 11.
97. *See* Nelson, 507 U.S. at 363.
98. *See id.* at 358 n.4.
99. *Id.* at 365 (White, J., concurring).
100. *Id.* at 369 (White, J., concurring).
101. *Id.* at 368.

view, the commercial activity in Saudi Arabia, "though constituting the basis of the Nelsons' suit, lack[ed] a sufficient nexus to the United States."[102]

Justices Blackmun and Kennedy dissented in part and voted to remand the case on the "failure to warn" claims set forth in the Nelson complaint.[103] Justice Kennedy, joined by Justices Blackmun and Stevens, stated that the counts of failure to warn of foreseeable dangers were "based upon commercial activity having substantial contact with the United States," because "they complain of a negligent omission made during the recruiting of a hospital employee in the United States."[104]

Justice Stevens' dissent stated that:

> [Saudi Arabia's] commercial activities . . . have sufficient contact with the United States to justify the exercise of federal jurisdiction. . . . The position for which [Nelson] was recruited and ultimately hired was that of a monitoring systems manager, a troubleshooter, and, taking [Nelson's] allegations as true, it was precisely [his] performance of those responsibilities that led to the hospital's retaliatory actions against him. . . . If the same activities had been performed by a private business, I have no doubt jurisdiction would be upheld. And that, of course, should be a touchstone of our inquiry.[105]

Following the 1991 decision of the Court of Appeals in *Nelson*, the Judiciary Committee of the United States House of Representatives sought to expand the circumstances under which an American may sue by proposing certain amendments to the FSIA. One amendment would grant United States courts jurisdiction over any case in which money damages are sought against a foreign state for personal injury or death of a United States citizen occurring in such foreign state, and caused by torture or extra-judicial killing of that citizen by such foreign state, or by an official or employee of such foreign state while acting within the scope of his or her office or employment.[106]

The Committee Report stated, "[i]n recent years, several U.S. citizens have been tortured abroad and have faced difficulties in obtaining a remedy."[107] It noted that in *Nelson*, the State Department intervened on behalf of

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102. *Id.* at 370.

103. *Id.* at 376.

104. *Id.* at 371 (Kennedy, J., concurring in part and dissenting in part).

105. *Id.* at 378-79 (Stevens, J., dissenting).

106. *See* H.R. REP. NO. 102-900, at 1-2 (1992). The proposed amendments contained in H.R. REP. NO. 102-900 were intended to supplement and supersede a bill that was introduced in the House of Representatives more than two years prior to the *Nelson* ruling to amend § 1605(a) of the FSIA. The essential difference between the original bill and the Committee Report is that the Committee Report specifically deals with "torture or extrajudicial killing." H.R. REP. NO. 102-900, at 1. *See also* Edward D. Re, *Human Rights, Domestic Courts and Effective Remedies*, 67 ST. JOHN'S L. REV. 581, 588-92 (1993) (reviewing subcommittee hearing on House Bill 2357).

107. H.R. REP. NO. 102-900, at 3. For human rights practices, including human rights abuses, see generally Lorne W. Craner, *Country Reports on Human Rights Practices for*

Saudi Arabia, and that the Torture Victim Protection Act of 1992 (TVPA)[108] might not be an effective remedy.[109] Indeed, the TVPA was inadequate because it only provided for suit against the individual torturer and not the foreign state.[110] Hence, the Committee Report addressed the expansion of the circumstances under which an American subjected to torture by a foreign state could sue in United States courts.[111]

Although the proposed amendment was ultimately rejected, Congress enacted the Antiterrorism and Effective Death Penalty Act in 1996 (AEDPA), which amended Section 1605(a) of FSIA.[112] The amendments provided that:

> A foreign state shall not be immune from the jurisdiction of courts of the United States . . . 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 if such act or provision of material support is engaged in by an official, employee, or agent of such

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2001, 24 DEF. INST. OF SEC. ASST. MGMT. J. 4655 (2002), *at* http://disam.osd.mil/pubs/INDEXES/journals/24-4/Journal24-4.htm (on file with California Western International Law Journal), prepared by the Department of State in accordance with §§ 116(d) and 502(b) of the Foreign Assistance Act of 1961, and § 504 of the Trade Assistance Act of 1974. The report was submitted to the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate. *Id.*

108. *See* Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992). "An individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture shall, in a civil action, be liable for damages to that individual. . . ." *Id. See also* Kadić v. Karadžić, 70 F.3d 232, 236-37 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996) (considering action against former Bosnian Serb leader indicted by International Criminal Tribunal for various international crimes). Defendant was served in New York and was sued in federal court under the Alien Tort Act, 28 U.S.C. § 1350 (2002) and the Torture Victim Protection Act of 1991. *See also* Jordan J. Paust, *Suing Karadžić*, 10 LEIDEN J. INT'L L. 91 (1997).

109. H.R. REP. No. 102-900, at 4 (stating that the Torture Victim Protection Act will not be available to all U.S. citizens tortured abroad if personal jurisdiction over torturer does not exist).

110. *See* Torture Victim Protection Act § 2.

111. *See* H.R. REP. NO. 102-900, at 4-5. The Committee expressed the view that the U.S. had abdicated its:

> moral responsibility to provide leadership in the area of human rights by undertaking efforts to extend the scope of international laws protecting those rights. . . . [A]n action constituting a violation of settled international law—in this case torture or extrajudicial killing—is no more acceptable when committed by a foreign government than by anyone else.

Id. at 4. *See also* Keith Highet et al., *Foreign Sovereign Immunities Act—Commercial Activity Exception—Nature and Purpose Tests—Police Power as Sovereign Power*, 87 AM. J. INT'L L. 442, 444 (1993) (noting their "disappoint[ment] that the Court failed to use [the *Nelson*] case as a vehicle for providing a remedy in the U.S. courts for intentional torts committed by foreign states in their own territory").

112. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §221(a), 110 Stat. 1214 (codified at 28 U.S.C. §1605(a)(7)).

> foreign state while acting within the scope of his or her office, employment, or agency. . . .[113]

This new "anti-terrorism" exception to FSIA, however, permitted American citizens to sue a foreign state only if the defendant state is on the State Department's "terrorism list."[114] Nevertheless, because the "anti-terrorism" exception gave rise to new litigation, it might bring deserved attention to the existing problem and accelerate the enactment of a "human rights exception" to FSIA, which would deprive a nation of sovereign immunity for gross human rights violations.[115]

VII. INTERNATIONAL LEGAL NORMS AND DOMESTIC COURTS

A. International Law and the Interpretation of Statutes

In view of the specific allegations of torture in *Nelson*, two important points should be noted. First, under international law, torture is included among a state's *erga omnes* duties; that is, torture is a matter of concern for all states. [116] Torture is expressly condemned by Article 5 of the Universal Declaration[117] and the 1984 Convention Against Torture and Other Cruel,

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113. 28 U.S.C. § 1605(a)(7) (reviewing general exceptions to the jurisdictional immunities of a foreign state).

114. *See* 18 U.S.C. § 3662 (2002), as amended by 28 U.S.C. § 1605(a) (listing when a foreign state is not immune from jurisdiction). Currently, the terrorism list consists of Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria. *See generally* David J. Bederman, *Problems of Proving International Human Rights Law in the U.S. Courts: Dead Man's Hand: Reshuffling Foreign Sovereign Immunities in U.S. Human Rights Litigation*, 25 GA. J. INT'L & COMP. L. 255 (1995) (discussing Alien Tort Claims Act's effect on FSIA).

115. *See* Mathias Reimann, *A Human Rights Exception to Sovereign Immunity: Some Thoughts on* Princz v. Federal Republic of Germany, 16 MICH. J. INT'L L. 403 (1995). Discussing the human rights exception, Reimann noted:

> It is time to deny immunity to foreign sovereigns for torture, genocide, or enslavement, at least when they are sued by Americans in American courts. Such a denial would be consonant with two developments that have marked international law since World War II: the restriction of sovereign immunity and the expansion of human rights protection.

Id. at 406. *See also* 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), 12 DICK. J. INT'L L. 387, 390-92 (1994) (discussing the American concept of sovereign immunity).

116. *See* Philip S. Wellman, *Human Rights, International Law, and the Federal Courts*, 7 CONN. J. INT'L L. 181, 216 n.129 (1991). In Wellman's review of KENNETH C. RANDALL, FEDERAL COURT AND THE INTERNATIONAL HUMAN RIGHTS PARADIGM (1990), he concludes with Randall's vision of "an international legal system working beyond the traditional Westphalian boundaries and protecting all individual victims of terrorist acts and human rights violations." *Id.* at 217.

117. *See Universal Declaration, supra* note 1, art. 5. Article 5 states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." *Id.*

Inhuman or Degrading Treatment or Punishment.[118] These duties are well-recognized peremptory norms under the doctrine of *jus cogens*,[119] which binds all nations under international law. Indeed, Article 53 of the Vienna Convention on the Law of Treaties defines *jus cogens* as a "peremptory norm of general international law" from which no derogation is permitted.[120] Furthermore, the *Restatement (Third) of Foreign Relations Law of the United States* section 702 refers to the "core group of fundamental norms" by stating that a state which "practices, encourages, or condones" the following is in violation of international law: (a) genocide, (b) slavery, (c) the murder or causing the disappearance of individuals, or (d) torture or other cruel, inhuman, or degrading treatment or punishment.[121]

The second point is the relevance of international legal norms and principles in *interpreting* domestic statutes. As stated in a Committee Report of the Section of International Law of the American Bar Association, "international legal norms may find their way into United States law . . . when incorporated by reference in statutes or by private parties in their dealings *inter se*, or *when used by courts to inform the content of otherwise ambiguous Constitutional or statutory provisions*."[122] Therefore, in a case where there are doubts as to the meaning of a particular statutory provision, it is appropriate to be informed of the applicable "international legal norm."[123]

Quite apart from the views of those who strongly assert that no nation can claim sovereign immunity when it commits gross human rights violations,[124] there were hopes that FSIA would be interpreted more in keeping

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118. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984). Part 1, Article 2 states:

> Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
>
> No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

Id.

119. Wellman, *supra* note 116, at 216 n.130 (defining *jus cogens* as "fundamental norms from which . . . states may not deviate"). *Jus cogens* has also been likened to "a world public order not exclusively controlled by nation-states, one that . . . guard[s] the most fundamental and highly-valued interests of international society." Gordon A. Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT'L L. 585, 587 (1988).

120. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (1969).

121. RESTATEMENT, *supra* note 57, § 702. *See also* Princz v. F.R.G., 26 F.3d 1166 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1121 (1995) (discussing how *jus cogens* may be violated).

122. *See Judicial Education on International Law Committee of the Section of International Law of the American Bar Association: Final Report*, 24 INT'L LAW. 903, 914 (1990) (emphasis added) [hereinafter *Final Report*].

123. *Id.*

124. *See* Jordan J. Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of*

with the clearly expressed Congressional intent.[125] Congress enacted FSIA for two broad purposes: to codify the restrictive theory of sovereign immunity, and to transfer the responsibility of determining the applicability of sovereign immunity in specific cases from the executive to the judicial branch.[126] The "Findings and Declaration of Purpose" expressly stated, "decisions on claims by foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime *which incorporates standards recognized under international law*."[127] It continued:

> Although the general concept of sovereign immunity appears to be recognized in international law, its specific content and application have generally been left to the courts of individual nations. There is, however, a wide acceptance of the so-called restrictive theory of sovereign immunity; that is, that the sovereign immunity of foreign states should be "restricted" to cases involving acts of a foreign state which are sovereign or governmental in nature as opposed to acts which are either commercial in nature or those which private persons normally perform.[128]

In signing the legislation, President Ford stated:

> This statute will also make it easier for our citizens and foreign governments to turn to the courts to resolve ordinary legal disputes. In this respect, the Foreign Sovereign Immunities Act carries forward a modern and enlightened trend in international law. And it makes this development in the law available to all American citizens.[129]

State Doctrine, 23 VA. J. INT'L L. 191, 220-25 (1983). Those acts which deprive foreign states and individuals of immunity include human rights violations, genocide, and international terrorism. *Id.* at 223-25. Paust states that even violations of international law that occur entirely within a state's territorial boundaries "are not immune to responsive action by or on behalf of the international community." *Id.* at 221-22. He further notes that the very notion of sovereignty is contingent upon obedience to, and respect for, international law. *See also* Jordan J. Paust, *Draft Brief Concerning Claims to Foreign Sovereign Immunity and Human Rights: Nonimmunity for Violators of International Law Under the FSIA*, 8 HOUS. J. INT'L L. 49, 59 (1985) (stating that the "cloak of sovereignty ends when international law begins").

125. *See* Joan Fitzpatrick, *Reducing the FSIA Barrier to Human Rights Litigation—Is Amendment Necessary and Possible?*, 86 AM. SOC'Y INT'L L. PROC. 338, 344 (1992) (stating that the impetus for the passage of FSIA was to transfer sovereign immunity issues from the Executive to the Judiciary and to prevent inconsistencies).

126. *See* H.R. REP. NO. 94-1487, at 6-7 (1976), *reprinted in* 1976 U.S.C.C.A.N. (90 Stat.) 6604, 6604-06.

127. *Id.* § 1602, at 6613 (emphasis added). In the case of Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796), Justice Wilson stated that "[w]hen the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement." *Id.* at 281. *See also* BLACKSTONE, *supra* note 57 (noting that the law of nations is adopted by common law); The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) (stating that the law of nations is law of the land).

128. H.R. REP. NO. 94-1487 § 1602, at 14.

129. Robert B. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 33 (1978) (quoting President Ford).

Under the "modern and enlightened trend" in commercial matters, referred to by the President as "ordinary legal disputes," a foreign sovereign no longer enjoyed sovereign immunity.[130] Although the meaning of "commercial activity" was to be resolved by the courts, the statutory intent was to include:

> a broad spectrum of endeavor, from an individual commercial transaction or act to a regular course of commercial conduct. . . . Certainly, if an activity is customarily carried on for profit, its commercial nature could readily be assumed. At the other end of the spectrum, a single contract, if of the same character as a contract which might be made by a private person, could constitute a 'particular transaction or act.'[131]

House Report 94-1487 clearly envisaged that the courts would have considerable "latitude" in determining what constituted commercial activity and thought it "unwise to attempt an excessively precise definition of this term, even if that were practicable."[132]

B. Princz v. Republic of Germany *and a "Human Rights Exception" to the FSIA*

Princz v. Federal Republic of Germany,[133] a case not decided by the Supreme Court, is nevertheless a case of egregious human rights violations with a thorough discussion of FSIA and the doctrine of *jus cogens*.[134] In *Princz*, the plaintiff, an American citizen holocaust survivor, sued in the United States District Court for the District of Columbia for being imprisoned and "enslaved" by the Nazi German government. The District Court, in a bold and comprehensive opinion, held that the defendant, a successor nation to Nazi Germany, could not invoke sovereign immunity by, in effect, applying a "human rights violation" exception to the FSIA.[135]

On appeal, the United States Court of Appeals for the District of Columbia Circuit rejected the arguments for a human rights exception to the FSIA and reversed the decision.[136] Although the Supreme Court denied *certiorari*,[137] the majority and minority opinions of the Court of Appeals deserve careful consideration for their valuable treatment of the doctrines of *erga omnes*, *jus cogens*, and the elusive "human rights exception" to the FSIA. Writing for the majority, Circuit Court Judge Ruth Bader Ginsburg[138]

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130. *Id.* at 33 (commenting on the "restrictive doctrine" of foreign immunity).
131. H.R. REP. NO. 94-1487 § 1063, at 16.
132. *Id.*
133. 26 F.3d 1166 (D.C. Cir. 1994).
134. *See id.* at 1173-74 (discussing the doctrine of *jus cogens*).
135. Princz v. F.R.G., 813 F. Supp. 22, 27 (D.D.C. 1992).
136. *Princz*, 26 F.3d at 1175.
137. Princz v. F.R.G., 513 U.S. 1121 (1995).
138. Justice Ginsburg took her seat on the U.S. Supreme Court on August 10, 1993.

held that FSIA granted the defendant sovereign immunity and, because no statutory exception applied, the District Court had no jurisdiction over the defendant. Judge Ginsburg noted that FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in federal court"[139] and that a foreign government is immune from the "courts of the United States and of the States" unless a statutory exception applies, or the United States is a signatory to a controlling international agreement.[140] As for the "commercial activity" exception, Judge Ginsburg noted that it was limited to "either a regular course of commercial conduct or a particular commercial transaction or act"[141] and that the activity in question did not have a "direct effect in the United States."[142]

The court defined *jus cogens* as a principle of international law that is "accepted by the international community of States as a whole as a norm from which no derogation is permitted,"[143] and that it "prevail[ed] over and invalidat[ed] international agreements and other rules of international law in conflict with them."[144] Nevertheless, the majority concluded that the "fact that there has been a violation of *jus cogens* does not confer jurisdiction under the FSIA"[145] because a nation has not waived its sovereign immunity "without strong evidence that this is what the foreign state intended."[146] The court stated that an "implied waiver depends upon the foreign government's having at some point indicated its amenability to suit."[147] Hence, the court concluded that it had "no warrant . . . for holding that the violation of *jus cogens* norms by the Third Reich constitut[ed] an implied waiver of sovereign immunity under the FSIA."[148]

Circuit Judge Patricia M. Wald dissented, finding that "Germany's treatment of Princz violated *jus cogens* norms of the law of nations,"[149] and that by engaging in such "barbaric conduct,"[150] Germany implicitly waived

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139. *Princz*, 26 F.3d at 1169 (citing Arg. Rep. v. Amerada Hess Shipping, 488 U.S. 428, 439 (1989)).

140. *Id.* at 1171. *See also* 28 U.S.C. § 1604 (2002) (stating that a "foreign state shall be immune from the jurisdiction of the courts of the United States" except in limited circumstances); Amerada Hess Shipping, 488 U.S. at 434 (recognizing FSIA as the sole basis for jurisdiction over foreign sovereign in United States courts).

141. *Princz*, 26 F.3d at 1171-72 (quoting 28 U.S.C. § 1603(d) (2002)).

142. *Id.* at 1173.

143. *Id.* (quoting Comm. of U.S. Citizens in Nicar. v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988) (internal citation omitted)).

144. *Id.* (citing RESTATEMENT, *supra* note 57, § 102 cmt. k).

145. *Id.* at 1174 (quoting Siderman de Blake v. Rep. of Arg., 965 F.2d 699, 719 (9th Cir. 1992)).

146. *Id.* (quoting Foremost-McKesson, Inc. v. Islamic Rep. of Iran, 905 F.2d 438, 444 (D.C. Cir. 1990) (internal citation and quotation omitted)).

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

148. *Id.*

149. *Id.* at 1178.

150. *Id.* at 1179.

its immunity from suit within the meaning of Section 1605(a)(1) of FSIA. Judge Wald concluded that:

> in the absence of any indication that Congress intended to exclude from the scope of Section 1605(a)(1) the concept that a foreign state waives its immunity by breaching a peremptory norm of international law, . . . the only way to interpret the FSIA in accordance with international law is to construe the Act to encompass an implied waiver exception for *jus cogens* violations.[151]

VIII. STATE SPONSORED TERRORISM EXCEPTION TO THE FSIA

A. Recent Judicial Decisions

Several provisions of the Antiterrorism and Effective Death Penalty Act currently establishes an anti-terrorism exception to the FSIA.[152] Specifically, the Flatow Amendment,[153] which provides a cause of action against officials, employees, and agents of nations designated as state sponsors of terrorism, has been the most successful means for victims of human rights violations to obtain judgments against foreign governments and their instrumentalities. In the few cases where a foreign government contested the action, constitutional challenges to the anti-terrorism exception have been unsuccessful. For example, *Rein v. Socialist People's Libyan Jamahiriya*,[154] *Price v. Socialist People's Libyan Arab Jamahiriya*,[155] and *Daliberti v. Republic of Iraq*[156] each withstood several constitutional challenges. These cases included the following holdings: Congress had the power to grant subject matter jurisdiction;[157] the exception did not violate the separation of powers doctrine;[158] the classification of countries as sponsors or terrorism did not violate equal protection[159] or due process rights;[160] and the anti-terrorism exception was not an impermissible ex post facto law.[161]

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151. *Id.* at 1184-85.

152. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a), 110 Stat. 1214 (current version at 28 U.S.C. §1605(a)(7)).

153. Flatow Amendment, Pub. L. No. 104-208, § 101(c), 110 Stat. 3009-172 (codified at 28 U.S.C. § 1605 (1996)). The Flatow Amendment was passed as a rider to an appropriations bill. *See* Civil Liability for Acts of State Sponsored Terrorism, Pub. L. No. 104-208, § 589, 110 Stat. 3009, 3172 (1996).

154. 995 F. Supp. 325 (E.D. N.Y.), *aff'd in part, dismissed in part*, 162 F.3d 748 (2d Cir. 1998), *cert. denied*, 527 U.S. 1003 (1998).

155. 110 F. Supp. 2d 10 (D.D.C. 2000), *rev'd in part*, 294 F.3d 82 (D.C. Cir. 2002).

156. 97 F. Supp. 2d 38 (D.D.C. 2000).

157. *Price*, 110 F. Supp. 2d at 13.

158. *Daliberti*, 97 F. Supp. 2d at 49; *Price*, 110 F. Supp. 2d at 13-14.

159. *Daliberti*, 97 F. Supp. 2d at 52.

160. *Rein*, 995 F. Supp. at 330-31; *Price*, 110 F. Supp. 2d at 14-15.

161. *Rein*, 995 F. Supp. at 331.

Alejandre v. Republic of Cuba[162] was the first case to rely on the new anti-terrorism exception of FSIA to secure a large damage judgment against a state other than Iran. This case arose from a well-publicized incident in which two civilian aircrafts searching for rafters in international waters of the Florida Straits were shot down by the Cuban Air Force, killing four occupants.[163] Representatives of three of the deceased (two pilots and one passenger), all American citizens, later filed suit against both the Republic of Cuba and the Cuban Air Force.[164] The court held that the deaths of the occupants constituted an extrajudicial killing within the meaning of the statute,[165] and awarded $187,627,911 in compensatory and punitive damages.[166]

A majority of the actions subsequently brought under the anti-terrorism exception have been against Iran. One such case involved a 1985 "hostage-taking" in Beirut, Lebanon, carried out by Iranian-supported terrorist groups. In *Cicippio v. Islamic Republic of Iran*,[167] the court held that the ten-year statute of limitations under the Act was tolled while Iran was immune from suit under the limitations of actions provision of FSIA, which provided that "[a]ll principles of equitable tolling, including the period during which the foreign state was immune from suit. . . ."[168] Having established Iranian liability, the court then awarded the hostages and their wives a total of $55,000,000 in compensatory damages.[169] The Iranian government and the Ministry of Information and Security (MOIS) were subsequently held liable in two other Beirut hostage-taking decisions, *Anderson v. Islamic Republic of Iran*[170] and *Jenco v. Islamic Republic of Iran*.[171] In both cases, the court awarded the plaintiffs multi-million dollar compensatory and punitive damage awards.[172] Similarly, Iran and the MOIS were also held liable under the FSIA exception for: their support of a terrorist group that murdered an American serviceman during an airline hijacking in 1985;[173] the politically motivated killing of an Iranian dissident (and naturalized American citizen) in Paris in 1990;[174] and, the murder of an American AID official during the hijacking of a Kuwait Airlines plane in 1984.[175] Finally, the Iranian

162. 996 F. Supp. 1239 (S.D. Fla. 1997).

163. *Alejandre*, 996 F. Supp. at 1243-46.

164. One occupant was not a U.S. citizen, and his family could not join the suit. *Id.* at 1242.

165. *Id.* at 1248.

166. *Id.* at 1253.

167. 18 F. Supp. 2d 62 (D.D.C 1998).

168. *Id.* at 69.

169. *Id.* at 70.

170. 90 F. Supp. 2d 107 (D.D.C. 2000).

171. 154 F. Supp. 2d 27 (D.D.C. 2001).

172. *See Anderson*, 90 F. Supp. 2d at 114; *Jenco*, 154 F. Supp. 2d at 35-36.

173. Stethem v. Islamic Rep. of Iran, 201 F. Supp. 2d 78, 92-93 (D.D.C. 2002).

174. Elahi v. Islamic Rep. of Iran, 124 F. Supp. 2d 97, 114-15 (D.D.C. 2000).

175. Hegna v. Islamic Rep. of Iran, No. 71600 (D.D.C. Jan. 22, 2002). *See also* Neely Tucker, *Iran Loses $42 Million Judgment in Hijack Suit*, WASH. POST, Jan. 23, 2002, at A03.

government and the MOIS also suffered large damage awards for sponsoring groups involved in terrorist bombings. Such cases included Americans that were killed in the suicide bombings of Israeli buses[176] and an incident where an American serviceman was killed by a car bomb at the Beirut Embassy.[177] More recently, however, the 1996 death of an American during a terrorist machine gun attack in Israel resulted in a denial of plaintiff's motion for a default judgment against Iran on the grounds that there was insufficient evidence to establish Iranian liability.[178]

Victims of the 1979 Tehran Embassy takeover, the most recent Iranian hostage situation, were unsuccessful in obtaining a favorable judgment. In *Roeder v. Islamic Republic of Iran*,[179] the court held that the anti-terrorism exception did not apply because Iran was not deemed a state sponsor of terrorism as a result of the incident.[180] Furthermore, the exceptions provided by AEDPA and the Flatow Amendment did not abrogate the Algiers Accords barring lawsuits arising from the Embassy takeover.[181]

In actions against other nations named as state sponsors of terrorism, plaintiffs have had mixed success. In *Daliberti*, individuals who were taken prisoner by Iraqi authorities near the Kuwaiti border were allowed to proceed with their action for kidnapping, false imprisonment and torture against the Iraqi government.[182] Similarly, in *Price*, a case arising from a 1980 incident where two Americans were charged with illegally taking photographs and imprisoned for 105 days, plaintiffs were allowed to proceed with an action against the Libyan government for hostage taking and torture. The *Price* plaintiffs, however, were ultimately unsuccessful: the court held that allegations that the American were "kicked, clubbed and beaten" [183] did not qualify as "torture" so as to provide jurisdiction under the FSIA exception,[184] and that their imprisonment did not qualify as "hostage taking" under the exception.[185]

Although numerous plaintiffs have successfully utilized the FSIA terrorism exception to win default judgments against Cuba and Iran, they were un-

176. *See* Flatow v. Islamic Rep. of Iran, 999 F. Supp. 1 (D.D.C. 1998); Eisenfeld v. Islamic Rep. of Iran, 172 F. Supp. 2d 1 (D.D.C. 2000); Weinstein v. Islamic Rep. of Iran, 184 F. Supp. 2d 13 (D.D.C. 2002).

177. Wagner v. Islamic Rep. of Iran, 172 F. Supp. 2d 128 (D.D.C. 2001).

178. Ungar v. Islamic Rep. of Iran, 211 F. Supp. 2d 91 (D.D.C. 2002). For Ungar's action against the Palestinian Authority, the Palestine Liberation Authority, and various individual defendants, see Ungar v. Palestinian Authority, 151 F. Supp. 2d 76, 100 (D. R.I. 2001) (finding jurisdiction over the Palestinian Authority and the Palestine Liberation Organization, but not the individual defendants).

179. 195 F. Supp. 2d 140 (D.D.C. 2002).

180. *Id.* at 160.

181. *Id.* at 166-69.

182. *See Daliberti*, 97 F. Supp. 2d 38.

183. *Id.* at 86.

184. *Id.* at 94.

185. *Id.* at 94-95.

able to enforce the judgments in court. For example, in *Alejandre*, the plaintiff's efforts to attach funds owed to the Cuban telecommunications company failed when the Eleventh Circuit ruled that the company was a separate juridical entity.[186]

Plaintiffs' difficulties in enforcing judgments obtained in these cases are best illustrated by the *Flatow* case. In *Flatow v. Islamic Republic of Iran*,[187] Alisa Flatow, a United States citizen on a foreign study program in Israel, was killed on April 9, 1995 when a suicide bomber attacked a tourist bus in the Gaza Strip.[188] In 1996, Congress enacted amendments to FSIA as part of the Anti-Terrorism and Effective Death Penalty Act, which granted subject matter jurisdiction over a claim brought against the foreign state.[189] Based on these amendments, the estate of Alisa Flatow filed for wrongful death and related causes of action against the Iranian government.[190] On March 3, 1998, the plaintiff obtained a default judgment against the defendants, and the United States District Court entered a judgment in favor of the plaintiff in an amount exceeding $247 million.[191] Thereafter, the plaintiff commenced enforcement proceedings throughout the country against assets allegedly owned by the Iranian government.[192] However, the plaintiff was unable to convince the courts to interpret FSIA in a manner that would permit them to enforce the judgments against Iran.[193] The estate of Alisa Flatow, which won $20 million in compensatory damages and $225 million in punitive damages, has been unable to successfully attach any Iranian assets.[194] The Iran-United States Claims Tribunal ordered the United States to transfer three Iranian diplomatic properties and Iran's Foreign Military Sales Account to Iran.[195] Each of these attempts were unsuccessful when, in successive decisions, the District Court for the District of Columbia held that: (1) the terrorism exception to the FSIA did not authorize the attachment of funds owed to Iran by the United States;[196] (2) Iranian embassy property was not subject to writs of attachment;[197] and (3) because Iranian Foreign Military

186. Alejandre v. Telefonica Larga Distancia de Puerto Rico, Inc., 183 F.3d 1277, 1287 (11th Cir. 1999).

187. 999 F. Supp. 1 (D.D.C. 1998).

188. *Id.* at 7.

189. *Id.* at 12.

190. *Id.* at 6.

191. *Id.* at 5 (detailing the factual background in the underlying the *Flatow* case).

192. Flatow v. Islamic Rep. of Iran, 76 F. Supp. 2d 16 (D.D.C. 1999).

193. *Id.* at 27-28. *See generally* Jonathan Fischbach, Note, *The Empty Pot at the End of the Rainbow: Confronting "Hollow-Rights Legislation" After Flatow*, 87 CORNELL L. REV. 1001 (2002). As of the writing of this article, no victims have been able to collect on the judgments. *Id.* at 1009 (citing letter from Senators Connie Mack and Frank Lautenberg to Members of the Senate (Oct. 15, 1999)).

194. Fischbach, *supra* note 193, at 1008-09.

195. *Id.*

196. Flatow v. Islamic Rep. of Iran, 74 F. Supp. 2d 18, 25-26 (D.D.C. 1999).

197. *Flatow*, 76 F. Supp. 2d at 27-28.

Sales Account funds were held by the United States Treasury, the writ of attachment was a suit against the United States government and thus barred by sovereign immunity absent an explicit waiver.[198] The plaintiff in *Flatow* also failed to attach the assets of a non-profit Iranian foundation,[199] and continued efforts to obtain United States government assistance in locating Iranian assets were ultimately unsuccessful.[200]

B. New Legislation

Given the fact that current legislation has failed to enable victims of human rights violations in foreign territories to obtain adequate redress, one solution is to enact new legislation designed to broaden the jurisdiction of American courts in the area of human rights violations. Since 1997, however, there has been little activity in expanding the sovereign immunity exception. Aside from several technical and minor amendments to § 1605(a)(7),[201] unsuccessful bills were introduced during the 105th Congress that would have extended the exception to cover instances, such as, when states have no extradition treaty with the United States at the time the act in question occurred, or when no adequate available remedies conformed with fundamental fairness and due process.[202]

Instead of broadening the scope of § 1605(a)(7), the most notable legislative amendment focused on a prevailing party's inability to actually collect damages following a favorable judgment. These enactments consisted of a series of laws aimed at enabling successful plaintiffs to attach the assets of nations sponsoring terrorism. The first such legislation was passed as a rider to the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, which added § 1610(f)(1)(A) to FSIA.[203] This section, however, included a provision allowing the President to waive this section in the interests of national security.[204] Thus, on the same day that President Clinton

198. Flatow v. Islamic Rep. of Iran, No. 97-396 (RCL), 2000 U.S. Dist. LEXIS 8910, at *8-9 (D.D.C. June 6, 2000).

199. *See* Flatow v. Islamic Rep. of Iran, 67 F. Supp. 2d 535 (D. Md. 1999), *aff'd*, Flatow v. Alavi Found., 225 F.3d 653 (4th Cir. 2000) (unpublished table decision).

200. *See* Flatow v. Islamic Rep. of Iran, 202 F.R.D. 35 (D.D.C. 2001).

201. *See* Pub. L. No. 105-11, 111 Stat. 22 (1997) (substituting "neither the claimant nor the victim was" for "the claimant or victim was not"); Pub. L. No. 107-77, § 626(c), 115 Stat. 748, 803 (2001) (inserting before the semi-colon at the end "or the act is related to Case Number 1:00CV03110 (ESG) in the United States Court for the District of Columbia"); Pub. L. No. 107-117, Div. B, § 208, 115 Stat. 2230, 2299 (2002) (striking out 1:00CV03110 (ESG) and substituting 1:00CV03110(EGS)).

202. Foreign Sovereign Immunity Technical Corrections Act of 1997, S. 1302, 105th Cong., 1st Sess. § 2(a)(7)(B)(ii) (1997); Foreign Sovereign Immunity Technical Corrections Act of 1998, H.R. 3848, 105th Cong., 2d Sess. § 2(a) (1998).

203. *See* Fischbach, *supra* note 193, at 1020-21 (citing Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, § 117(a), 112 Stat. 2681, 2681-491 (codified at 28 U.S.C. § 1610(f)(1)(A) (1999)).

204. 28 U.S.C. § 1610(f)(2)(B)(3) (2002).

signed the Act, he waived the plaintiffs' rights to attach blocked assets.[205] Following the Clinton waiver, there were rumors that the administration offered to pay part of the *Flatow* judgment from a victim's compensation fund.[206] The Treasury Department suggested that judgments could be satisfied from the Crime Victims Fund.[207]

The next attempt to assist plaintiffs in satisfying judgments was the Victims of Trafficking and Violence Protection Act of 2000, which provided for compensation to a narrowly defined group of victims of terrorism sponsored by Cuba and Iran.[208] For Iran, the awards for compensatory damages were to be paid from $400 million in frozen Iranian assets, including rental proceeds from Iranian diplomatic and consular property, and "funds not otherwise made available in an amount not to exceed the total of the amount in the Iran Foreign Military Sales Program. . . ."[209] Although this legislation has permitted five plaintiffs to collect over $300 million in awards, it has been criticized because the funds are being paid by the United States with little chance of recovery from Iran.[210] Furthermore, because the Act also excluded plaintiffs whose situations differed little, if at all, from those who have been included, it has also recently been criticized by United States District Court Judge Henry H. Kennedy as "'illogical and inconsistent' and the 'result of poor statutory drafting.'"[211]

The latest congressional effort aimed at allowing plaintiffs to satisfy judgments from the frozen assets of terrorists, terrorist organizations, and state sponsors of terrorism is contained in section 11 of the Terrorism Risk Insurance Act of 2002.[212] The Act exempts certain properties, subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on

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205. Determination to Waive Requirements Relating to Blocked Property of Terrorist-List States, Presidential Determination No. 99-1, 63 Fed. Reg. 59201 (Oct. 21, 1998), *reprinted in* 28 U.S.C. § 1610 note (2002).

206. Fischbach, *supra* note 193, at 1025.

207. *Id.* at 1026 (citing Terrorism: Victims' Access to Terrorist Assets: Hearing Before the Senate Comm. on the Judiciary, 106th Cong., at 16 (statement of Sen. Frank R. Lautenberg)).

208. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002(a)(2)(A), 114 Stat. 1464, 1541 (2000).

209. *Id.* § 2002(b)(2).

210. Richard M. Mosk, *Compensating Victims: Costly, Unfair, Perilous*, NEWSDAY, Aug. 23, 2002, at A36 (the author is an associate justice of the California Court of Appeal and a former judge of the Iran-United States Claims Tribunal).

211. Neely Tucker, *Judge Asks Hill to Overturn Law on Compensation*, WASH. POST, Aug. 9, 2002, at A21. In Hegna v. Islamic Rep. of Iran, No. 71600 (D.D.C. Jan. 22, 2000), Judge Kennedy awarded the plaintiff $42 million in damages only to later rule that there could be no recovery because she was not eligible under the Act.

212. Terrorism Risk Insurance Act of 2002, H.R. 3210, 107th Cong., 2d Sess. (2002). [hereinafter Terrorism Risk Insurance Act]. On June 10, 2002, this bill passed the Senate with an amendment. For the Senate version of the bill, see Terrorism Risk Insurance Act of 2002, S. 2600, 107th Cong. (2d Sess. 2002). For similar legislations, see Terrorism Victim's Access to Compensation Act of 2002, S. 2134, 107th Cong. (2d Sess. 2002); Justice for Victims of Terrorism Act of 2002, H.R. 4647, 107th Cong., 2d Sess. (2002).

Consular Relations, and provides that presidential waiver does not apply to property used by the United States for any non-diplomatic purposes.[213] The bill also includes a special rule for cases against Iran with respect to distribution of foreign military sales funds where properties were inadequate to satisfy the amount of compensatory awards against Iran.[214] The bill has now passed both the House and Senate, and has been sent to a conference committee.[215] With regard to Iran, it also expands the coverage of the Victims of Trafficking and Violence Protection Act by making the law applicable to suits filed on or before October 28, 2000.[216] Like past legislations, it is controversial—some opponents claim that it will "subject the United States to retaliation and financial exposure, impair the president's ability to enter into agreements and treaties, and leave important foreign policy matters in the hands of tort plaintiffs and their lawyers. . . ."[217]

C. Violations of Jus Cogens

Plaintiffs seeking redress for a nation's violation of *jus cogens* have been unsuccessful since *Princz v. Federal Republic of Germany*, when the District of Columbia Circuit rejected the argument that violation of these norms constituted an implied waiver of sovereign immunity.[218] No such waiver was found in several Holocaust-related actions, including one brought by a former concentration camp slave laborer;[219] another seeking reparations under the 1952 Luxembourg Agreement between Germany and Israel;[220] and a third on behalf of Jews transported to Nazi death camps by the French national railroad company.[221] Other cases that rejected an implied waiver include: an action against Libya arising from the Pan American Flight 103 bombing;[222] a suit against Japan by Koreans forced into sexual slavery as part of the Imperial Japanese Army's "comfort women" program;[223] and an action against Yugoslavia brought by victims of ethnic cleansing in Kosovo.[224]

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213. H.R. 3210, §§ 11(b)(1)-11(b)(2)(A) (2002).
214. *Id.* § 11(d)(1)(A).
215. Terrorism Risk Insurance Act, *supra* note 212.
216. *Id.* § 11(c)(1).
217. Mosk, *supra* note 210, at A36.
218. *See Princz*, 26 F.3d at 1166.
219. Sampson v. F.R.G., 250 F.3d 1145 (7th Cir. 2001).
220. Hirsh v. Israel, 962 F. Supp. 377 (S.D.N.Y. 1997).
221. Abrams v. Société Nationale des Chemins de Fer Français, 175 F. Supp. 2d 423 (E.D.N.Y. 2001).
222. Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239 (2d Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997).
223. Hwang Geum Joo v. Japan, 172 F. Supp. 2d 52 (D.D.C. 2001).
224. Boshnjaku v. Fed. Rep. of Yugo., No. 01 C 4608, 2002 WL 1575067 (N.D. Ill. July 18, 2002).

D. Commercial Activity Exception to the FSIA

Since the Supreme Court's narrow construction of the "commercial activity" exception to FSIA in *Nelson*, which held that plaintiff's arrest, imprisonment and torture was an abuse of the Saudi government's police power and unrelated to commercial activity,[225] other plaintiffs seeking to utilize the exception have also been unsuccessful. The *Nelson* rationale has since been followed in other cases where human rights abuses occurred in connection with a commercial activity. Such cases include *Doe v. Unocal Corp.*,[226] where abuses were committed by the Burmese government during a joint-venture pipeline construction project involving an American oil company,[227] and *Bao Ge v. Li Peng*,[228] where Chinese citizens were allegedly compelled to perform forced prison labor in manufacturing soccer balls.[229] In both instances, the court held that the abuses complained of involved an exercise of sovereign police powers and refused to apply the commercial activity exception.[230]

Similarly, in *Daliberti*, where the spouses of the kidnap victims brought an action against Iraq under the commercial activity exception, the court, citing *Nelson*, held that Iraqi actions were an exercise of its sovereign powers and "not the kind of powers exercised by private citizens."[231] The court also refused to take a broad view of commercial activity, holding that while Iraqi funding of terrorist activities might arguably be a commercial activity, the acts committed in Iraq that directly affected the plaintiffs' spouses had "no connection with a commercial activity."[232]

Attempts to apply a broader view of the commercial activity exception in World War II-related actions have also been unsuccessful. For example, courts have rejected the following attempts to characterize as commercial activity: Japan's "comfort women" program;[233] the French national railway's transportation of Jews to Nazi death camps;[234] and Germany's establishment of reparation fund programs for Holocaust survivors.[235] The most recent unsuccessful attempt to apply the commercial activity exception to human rights abuses was in *Boshnajaku v. Federal Republic of Yugoslavia*.[236] Here, the plaintiffs maintained that Yugoslavia had obtained a commercial benefit

225. *Nelson*, 507 U.S. at 363.

226. 963 F. Supp. 880 (C.D. Cal. 1997), *aff'd in part, rev'd in part*, 2002 WL 31063976 (9th Cir. Sept. 18, 2002), *reh'g en banc granted*, 2003 WL 359787 (9th Cir. Feb. 14, 2003).

227. *Doe*, 963 F. Supp. at 887-88.

228. 201 F. Supp. 2d 14 (D.D.C. 2000).

229. *Id.* at 23-24.

230. *Id.*; *Doe*, 2002 WL 31063976, at *17-19.

231. *Daliberti*, 97 F. Supp. 2d at 47.

232. *Id.*

233. *Hwang Geum Joo*, 172 F. Supp. 2d at 61-64.

234. *Abrams*, 175 F. Supp. 2d at 429-30.

235. Wolf v. F.R.G., 95 F.3d 536, 543-44 (7th Cir. 1996).

236. No. 01 C 4608, 2002 WL 1575067 (N.D. Ill. Jul. 18, 2002).

from expelling Albanians, who then sought refuge in the United States.[237] The court, however, looked at the inherent nature of the acts and determined that the killings, assaults and expulsions carried out by Yugoslavia in no way fit any definition of commercial activity.[238]

E. Torture Victim Protection Act

The potential scope of the TVPA was expanded in *Doe I v. Islamic Salvation Front*,[239] where a court held that state action requirements of the Act did not require the government involved be officially recognized, and that groups constituting a de facto state may be held liable under the Act.[240] However, the limitations of TPVA as a means of redress for human rights violations have been amply demonstrated in several subsequent cases. The only successful effort, *Estate of Cabello v. Fernandez-Larios*,[241] was directed against an individual Chilean soldier—not the Chilean government. An attempt to use the TVPA against a corporation in *Beanal v. Freeport-McMoRan*,[242] however, was unsuccessful. Here, a member of the Amunge tribe of Indonesian-ruled Irian Jaya (western New Guinea) brought an action for human rights abuses against American corporations whose subsidiary was operating open-pit gold, silver and copper mines.[243] Noting that the TVPA holds only "individuals" liable, which generally does not apply to corporations, the court determined that a corporation could not be held liable under the Act.[244] Finally, in *Tachiona v. Mugabe*,[245] opponents of President Robert Mugabe of Zimbabwe brought an action alleging "murder, torture, terrorism, rape, beatings and destruction of property."[246] In ruling for Mugabe, the court noted that the TPVA did not "negate head-of-state immunity."[247]

IX. THE ROLE OF DOMESTIC COURTS

What is the role of United States courts—particularly, the Supreme Court—in the interpretation of statutes that embody international law and international legal norms? On this question, an observation in an ABA Com-

237. *Id.* at *3.
238. *Id.*
239. 993 F. Supp. 3 (D.D.C. 1998).
240. *Id.* at 9 (citing *Kadić*, 70 F.3d at 244). The court did not determine whether the Islamic Salvation Front did, in fact, constitute a de facto state. *Id.*
241. 157 F. Supp. 2d 1345 (S.D. Fla. 2001).
242. 197 F.3d 161 (5th Cir. 1999).
243. *Id.* at 163.
244. *Id.* at 168-69.
245. 169 F. Supp. 259 (S.D.N.Y. 2001).
246. *Id.* at 265.
247. *Id.* at 297.

mittee Report on Judicial Education on International Law is particularly pertinent. The Report states:

> [T]he applicability of international legal norms in specific cases may be, and frequently is, limited by the considerations of jurisdiction, equity and due process that bear upon all proceedings before U.S. courts. A decent respect for the opinions of mankind, however, as well as for our own judicial traditions, demands that such considerations not be invoked merely to disguise an unwillingness to accord international legal norms their rightful place in our legal system.[248]

In *Nelson*, the question was whether the court was reasonable to interpret and apply FSIA in keeping with the restrictive theory of sovereign immunity and in accordance with principles of international law that condemn torture. Specifically, the court determined the issue of whether the alleged acts of torture were "peculiarly sovereign in nature," or whether plaintiff's cause of action was based upon the "commercial activity" of operating a hospital.[249]

Assuming doubts as to the meaning of a particular section of FSIA, could the court not "be informed" by the international law norm that condemns torture?[250] Was it possible to adhere to Chief Justice Marshall's guidance that an "act of Congress ought never to be construed to violate the law of nations if any other possible construction remains?"[251] It was clear that the specific purposes of FSIA were to adopt the *restrictive* theory of sovereign immunity—"a modern and enlightened trend in international law"[252]—and have decisions on claims of sovereign immunity made by the "judiciary on the basis of a statutory regime *which incorporates standards recognized under international law.*"[253] Surely, it would be disheartening to conclude that

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248. *Final Report, supra* note 122, at 914-15.

249. *Nelson*, 507 U.S. at 360-61. The Supreme Court stated that "a foreign state's exercise of the power of its police has long been understood" as being unique to sovereigns, regardless of how "monstrous such abuse undoubtedly may be." *Id.* at 361. *See generally* Scott J. Graves, Comment, *Jurisdiction—Foreign Sovereign Immunities Act—Using the "Nexus Test" to Find Jurisdiction Over Foreign Sovereigns*, Nelson v. Saudi Arabia, 923 F.2d 1528 (11th Cir. 1991), 16 SUFFOLK TRANSNAT'L L. REV. 333 (1992) (analyzing whether FSIA granted Saudi Arabia subject matter jurisdiction in *Neslon*); Robert H. Wood, Saudi Arabia v. Nelson: *Roll Over Weltover, Tell Scott Nelson the News*, 2 TUL. J. INT'L & COMP. L. 175, 186 (1994) (criticizing Justice Souter's disposition of Nelson's intentional tort claims).

250. *See Final Report, supra* note 122, at 907-08 (indicating that "[i]nternational legal norms may find their way into United States law . . . when used by courts to inform the content of otherwise ambiguous Constitutional or statutory provisions.").

251. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). Chief Justice Marshall reaffirmed this position in 1815, holding that until an act of Congress has passed "the Court is bound by the law of nations which is a part of the law of the land." The Nereide, 13 U.S. (9 Cranch) at 423. *See generally* RESTATEMENT, *supra* note 57, § 114 & Reporter's Note 2; PAUST, *supra* note 57, at 107-08.

252. von Mehren, *supra* note 129, at 33 (noting Immunities Act codifies "restrictive doctrine of foreign service immunity").

253. H.R. REP. NO. 94-1487 § 1602, at 14 (emphasis added).

a determination was made "merely to disguise an unwillingness to accord international legal norms their rightful place in our legal system."[254]

In discussing the judicial function of the courts of the United States in interpreting constitutional provisions and statutes, it is essential to remember the special role of judges as appointed under Article III of the Constitution. Article III, which confers life tenure and judicial immunity, grants judges a special status.[255] Because federal courts have historically applied international law in the adjudication of cases,[256] judges might arguably have an even greater responsibility to exercise their constitutionally granted independence in cases involving international human rights.[257]

X. "A DECENT RESPECT TO THE OPINIONS OF MANKIND"

The doctrine and practice of judicial review have given the American Constitution and its Bill of Rights the unique status of living documents in securing the rights of the people against governmental abuse. With rare exceptions, the Supreme Court has not only given effect and vitality to the ideals set forth in the Constitution and the Bill of Rights, but has expanded upon the meaning of life and liberty—words enshrined in those documents.[258]

Justice Blackmun, in his thoughtful address, borrowed the phrase "a decent respect to the opinions of mankind" from the first paragraph of the Declaration of Independence.[259] He quoted Professor Louis Henkin, who remarked that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[260] Justice Blackmun added: "[u]nfortunately, . . . the Supreme Court's own recent record in the area is somewhat more qualified. I would say that, at best, the

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254. *Final Report*, *supra* note 122, at 915.

255. *See* U.S. CONST. art III, § 1. *See generally* authorities cited in Edward D. Re, *Judicial Independence and Accountability: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 8 N. KY. L. REV. 221 (1981).

256. *See supra* note 44 and accompanying text (noting courts will not tolerate human rights violations), and *supra* note 58 and accompanying text (stressing that law of nations is a part of common law).

257. *See* Hatfield-Lyon, *supra* note 78, at 337. "A court that does not meaningfully consider the international human rights obligations of its government is giving a judicial override to these obligations, thereby violating international law and denying justice." *Id.* (citation omitted). Professor Hatfield-Lyon urges American courts to follow the Canadian approach to international human rights cases and adopt a human rights exception to immunity under the FSIA. *See id.* at 334.

258. *See* Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (entitling Chinese nationals admitted into the United States to judicial hearings to adjudicate citizenship claims). "[T]he Fifth Amendment affords protection in its guarantee of due process of law," to those faced with "loss of both property and life; or of all that makes life worth living." *Id.* at 284-85.

259. Blackmun, *supra* note 58, at 383 (quoting THE DECLARATION OF INDEPENDENCE para. 1).

260. *Id.* at 387 (quoting LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979)).

present Supreme Court enforces *some* principles of international law and *some* of its obligations *some* of the time."[261]

Justice Blackmun concluded by stating that during his thirty-four years of service on the federal bench:

> [T]he United States has become economically and politically intertwined with the rest of the world as never before. International human rights conventions—still a relatively new idea when I came to the bench in 1959—have created for nations mutual obligations that are accepted throughout the world. As we approach the 100th anniversary of *The Paquette Habana* . . . it perhaps is appropriate to remind ourselves that now, more than ever, "international law *is* part of our law" and is entitled to the respect of U.S. domestic courts. Although the recent decisions of the Supreme Court do not offer much hope for the immediate future, I look forward to the day when the Supreme Court, too, will inform its opinions almost all the time with a decent respect to the opinions of mankind.[262]

XI. CONCLUSION

From the dawn of civilization, idealists and humanists have dreamed of achieving fundamental human rights. For Americans, the monumental milestones have been the Magna Carta, the Declaration of Independence, and the Constitution. To this renowned roster must be added the Universal Declaration of Human Rights, and covenants, which embody fundamental principles that today comprise of an impressive body of international law on human rights.

On December 10, 1998, the international community celebrated the Golden Anniversary of the enactment of the Universal Declaration of Human Rights. The celebration provided an opportunity to express gratitude to those who made possible its adoption, and to those who continue to work to make its ideals and fundamental freedoms a reality. In 1993, at a symposium on "Human Rights Before the Domestic Courts," in Concluding Remarks entitled "Human Rights, Domestic Courts and Effective Remedies," it was stated that our topic

> has dealt with human rights, but not merely as ideals, or goals. We mean human rights to be realized, and to be vindicated by an effective remedies. Hence, the question should no longer be whether there is a right not to be tortured. The question today is: How can the victim obtain an effective remedy?[263]

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261. *Id.* at 387-88 (emphasis added).

262. *Id.* at 388 (emphasis added).

263. Edward D. Re, *The Judge Edward D. Re Distinguished Lecture Series Symposium on Human-Rights Before Domestic Courts, Concluding Remarks: Human Rights, Domestic Courts and Effective Remedies*, 67 ST. JOHN'S L. REV. 581, 592 (1993).

To the self-evident truths proclaimed in the American Declaration of Independence, today, one must add the words of the Universal Declaration that the "inalienable rights of all members of the human family are the foundation of freedom, justice and peace in the world."[264]

The celebration served as a reminder that the efforts to fully achieve the fundamental freedoms enshrined in the Universal Declaration are the responsibility of us all. The greatest responsibility is that of governments and public officials whose commitment to human rights must make human rights concerns relevant in all questions of domestic and foreign policy. That responsibility will not end until fundamental human rights and freedoms are a reality enjoyed by the entire human family.

264. *See Universal Declaration, supra* note 1, at pmbl.