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STATE IMMUNITY, HUMAN RIGHTS, AND *JUS COGENS*: A CRITIQUE OF THE NORMATIVE HIERARCHY THEORY

By Lee M. Caplan*

When Sulaiman Al-Adsani traveled from the United Kingdom to Kuwait to repel Saddam Hussein's invasion in 1991, he never dreamed he would depart with bruises and burns inflicted by the very government he had sought to defend. According to Al-Adsani,¹ his troubles began when he was accused of releasing sexual videotapes of Sheikh Jaber Al-Sabah Al-Saud Al-Sabah, a relative of the emir of Kuwait, into general circulation. After the first Gulf war, with the aid of government troops, the sheikh exacted his revenge by breaking into Al-Adsani's house, beating him, and transporting him to a Kuwaiti state prison, where his beatings continued for days. Al-Adsani was subsequently taken at gunpoint in a government car to the palace of the emir's brother, where his ordeal intensified. According to Al-Adsani, his head was repeatedly submerged in a swimming pool filled with corpses and his body was badly burned when he was forced into a small room where the sheikh set fire to gasoline-soaked mattresses.

Following his return to the United Kingdom, Al-Adsani brought suit against the government of Kuwait in England's High Court seeking damages for the physical and psychological injury that had resulted from his alleged ordeal in Kuwait.² The court dismissed the suit for lack of jurisdiction, holding that Kuwait was entitled to foreign state immunity under the UK State Immunity Act, 1978.³ Al-Adsani then appealed the decision to the English Court of Appeal but again lost on grounds of state immunity.⁴

After Al-Adsani was refused leave to appeal by the English House of Lords, he filed an application with the European Court of Human Rights (ECHR), arguing principally that the United Kingdom had failed to protect his right not to be tortured and had denied him access to legal process.⁵ Al-Adsani again lost, but he convinced many of the Court's judges to advocate an increasingly popular legal theory, the "normative hierarchy theory," aimed at challenging seemingly unjust outcomes such as these. Under the normative hierarchy theory, a state's jurisdictional immunity is abrogated when the state violates human rights protections that are considered peremptory international law norms, known as *jus cogens*.⁶ The theory postulates

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¹ The summary of ill-treatment that follows derives from Al-Adsani's allegations in his case before the European Court of Human Rights. *Al-Adsani v. United Kingdom*, App. No. 35763/97, paras. 9–13 (Nov. 21, 2001), available at <<http://www.echr.coe.int/eng/judgments.htm>> [hereinafter ECHR Judgment]. The accuracy of these allegations has not been proven in a court of law.

² *Al-Adsani v. Kuwait*, 103 ILR 420 (Q.B. 1995).

³ State Immunity Act, 1978, c. 33 (UK), reprinted in 17 ILM 1123 (1978).

⁴ *Al-Adsani v. Kuwait*, 107 ILR 536 (C.A. 1996).

⁵ The claimant alleged, inter alia, a violation of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 UNTS 222. ECHR Judgment, *supra* note 1, para. 3.

⁶ "*Jus cogens* is a norm thought to be so fundamental that it even invalidates rules drawn from treaty or custom. Usually, a *jus cogens* norm presupposes an international public order sufficiently potent to control states that might otherwise establish contrary rules on a consensual basis." MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 62–63 (4th ed. 2003); see also AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 57–58 (Peter Malanczuk

that because state immunity is not *jus cogens*, it ranks lower in the hierarchy of international law norms, and therefore can be overcome when a *jus cogens* norm is at stake. The normative hierarchy theory thus seeks to remove one of the most formidable obstacles in the path of human rights victims seeking legal redress.⁷

The recent emergence of the normative hierarchy theory on the international law scene has sparked significant controversy among jurists and publicists. The ECHR's treatment of the issue in *Al-Adsani v. United Kingdom* exemplifies the spirited debate.⁸ While recognizing that the prohibition of torture possesses a "special character" in international law, the ECHR rejected the view that violation of such a norm compels denial of state immunity in civil suits.⁹ However, the verdict evoked opposing commentary on the normative hierarchy theory from various ECHR judges.¹⁰ On the one side, Judges Matti Pellonpää and Nicolas Bratza concurred with the decision and renounced the theory on practical grounds. They reasoned that if the theory were accepted as to jurisdictional immunities, it would also, by logical extension, have to be accepted as to the execution of judgments against foreign state defendants, since the laws regarding execution, like state immunity law, are arguably not *jus cogens* either.¹¹ Consequently, acceptance of the normative hierarchy theory might lead to execution against a wide range of state property, from bank accounts used for public purposes to real estate and housing for cultural institutes, threatening "orderly international cooperation" between states.¹²

On the other side, Judges Christos Rozakis, Lucius Caflisch, Luzius Wildhaber, Jean-Paul Costa, Ireneu Cabral Barreto, and Nina Vajić dissented and advocated resolution of the case on the basis of the normative hierarchy theory. They wrote: "The acceptance . . . of the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions."¹³ Thus, the minority concluded that Kuwait could not "hide behind the rules on State immunity to avoid proceedings for a serious claim of torture made before a foreign jurisdiction."¹⁴

The difference of opinion in the *Al-Adsani* case foreshadows the coming theoretical clash regarding the most appropriate and effective means of enforcing human rights law against foreign states in national proceedings. Since its inception just over a decade ago, the normative hierarchy theory has amassed notable support among scholars and jurists alike. Despite its

ed., 7th rev. ed. 1997); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 514–17 (5th ed. 1998) [hereinafter BROWNLIE (5th)]; 1 OPPENHEIM'S *INTERNATIONAL LAW* 512–13 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

Jus cogens is a concept with a long lineage, whose most significant modern manifestation is Article 53 of the Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 UNTS 331. Article 53 establishes the rule that "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." A "peremptory norm," also known as *jus cogens*, is defined as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted." See CHRISTOS L. ROZAKIS, *THE CONCEPT OF JUS COGENS IN THE LAW OF TREATIES* (1976); IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 203 (2d ed. 1984); JERZY SZTUCKI, *JUS COGENS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES* (1974); 7 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 327 (Rudolf Bernhardt ed., 1984).

⁷ While examples of the stymying effect of foreign state immunity on human rights claims abound, a prototypical case is found in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), in which the plaintiff, who alleged that he had been tortured by Saudi government officers, was barred from suing Saudi Arabia in U.S. court on account of the government's foreign sovereign status. See also *Bouzari v. Islamic Republic of Iran*, No. 00–CV–201372 (Ont. Sup. Ct. J. May 1, 2002) (on file with author) (claims of torture barred by Canadian State Immunity Act).

⁸ For a detailed summary of the decision, see Marius Emberland, Case Report: *McElhinney v. Ireland, Al-Adsani v. United Kingdom, Fogarty v. United Kingdom*, in 96 *AJIL* 699 (2002).

⁹ ECHR Judgment, *supra* note 1, para. 61.

¹⁰ The Grand Chamber presiding over the proceedings was composed of seventeen judges.

¹¹ ECHR Judgment, *supra* note 1, Concurring Opinion of Judges Pellonpää and Bratza.

¹² *Id.*

¹³ *Id.*, Dissenting Opinion of Judges Rozakis, Caflisch, Wildhaber, Costa, Cabral Barreto, and Vajić.

¹⁴ *Id.*

growing popularity, however, the theory has never been comprehensively tested.¹⁵ To attempt to fill this void, this article offers a critical assessment of the normative hierarchy theory and concludes that the theory is unpersuasive because it rests on false assumptions regarding the doctrine of foreign state immunity.

The doctrine of foreign state immunity, like most legal doctrines, has evolved and changed over the last centuries, progressing through several distinct periods.¹⁶ The first period, covering the eighteenth and nineteenth centuries, has been called the period of absolute immunity, because foreign states are said to have enjoyed complete immunity from domestic legal proceedings.¹⁷ The second period emerged during the early twentieth century, when Western nations adopted a restrictive approach to immunity in response to the increased participation of state governments in international trade.¹⁸ This period was marked by the development of the theoretical distinction between *acta jure imperii*, state conduct of a public or governmental nature for which immunity was granted, and *acta jure gestionis*, state conduct of a commercial or private nature for which it was not.¹⁹ This distinction rested on the growing notion that the exercise of jurisdiction over *acta jure gestionis* did not affront a state's sovereignty or dignity. Since applying the public/private distinction proved difficult for many courts,²⁰ some states, particularly the common-law countries, developed a functional variation on the restrictive approach in the 1970s and 1980s, replacing that hazy distinction with national immunity legislation.²¹

One of the more vexing topics in international law, state immunity is fraught with complexity and uncertainty, which the normative hierarchy theory does not adequately address. The theory operates conceptually on the international law level, as one norm of international law, *jus cogens*, trumps another, state immunity, because of its superior status. The theory thus

¹⁵ There is limited criticism of the theory. In *Al-Adsani*, Judges Pellonpää and Bratza focused primarily on its potentially damaging impact on international relations, see text at note 12 *supra*. In *Prefecture of Voïotia v. Federal Republic of Germany*, a minority on the Hellenic Supreme Court criticized the theory because of its unproven status in international law. *Prefecture of Voïotia v. Fed. Republic of Germany*, No. 11/2000 (Areios Pagos [Hellenic Sup. Ct.] May 4, 2000) [hereinafter Greek Judgment II]; see text at notes 216–23 *infra*. In addition, one commentator pointed out that the theory is inherently contradictory in that it presupposes an implied waiver of immunity in cases in which a foreign state would never be likely to consent explicitly to waive immunity. JÜRGEN BRÖHMER, *STATE IMMUNITY AND THE VIOLATION OF HUMAN RIGHTS* 191 (1997); see also HAZEL FOX, *THE LAW OF STATE IMMUNITY* 523–25 (2002) (raising interesting general questions about the relationship between *jus cogens* and state immunity). Unfortunately, the International Law Commission's work on codifying the law of foreign state immunity has not addressed the theory in detail. See Report of the Working Group on Jurisdictional Immunities of States and Their Property, UN Doc. A/CN.4/L.576, annex, at 58 (1999) (noting that the draft articles on jurisdictional immunities of states and their property do not address the effect of a *jus cogens* violation).

¹⁶ For a general overview of the development of the doctrine, see GAMAL MOURSİ BADR, *STATE IMMUNITY: AN ANALYTICAL AND PROGNOSTIC VIEW* 9–62 (1984); THEODORE R. GIUTTARI, *THE AMERICAN LAW OF SOVEREIGN IMMUNITY: AN ANALYSIS OF LEGAL INTERPRETATION* 26–102 (1970); JOSEPH M. SWEENEY, *THE INTERNATIONAL LAW OF SOVEREIGN IMMUNITY* (Policy Research Study, U.S. Dep't of State, 1963).

¹⁷ Indeed, in the nineteenth century national courts applied the rule of immunity rather broadly. See *The Parlement Belge*, [1880] 5 P.D. 197, 217 (finding that “each and every one [state] declines to exercise by means of any of its courts, any of its territorial jurisdiction over the person of any sovereign”); *Spanish Gov't v. Lambège et Pujol*, Cass., D. 1849, I, 5, 9 (finding that “a government cannot be subjected to the jurisdiction of another against its will, and that the right of jurisdiction of one government over litigation arising from its own acts is a right inherent to its sovereignty that another government cannot seize without impairing their mutual relations”); see also BARRY E. CARTER, PHILLIP R. TRIMBLE, & CURTIS A. BRADLEY, *INTERNATIONAL LAW* 547 (4th ed. 2003); Lakshman Marasinghe, *The Modern Law of Sovereign Immunity*, 54 MOD. L. REV. 664, 668–78 (1991).

¹⁸ See RICHARD A. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* 140–41 (1964); Peter D. Trooboff, *Foreign State Immunity: Emerging Consensus on Principles*, 200 RECUEIL DES COURS 235, 266–67 (1986 V).

¹⁹ Establishing the line between immune and nonimmune state conduct has proven to be a vexing task. See Rosalyn Higgins, *Certain Unresolved Aspects of the Law of State Immunity*, 29 NETH. INT'L L. REV. 265, 267–70 (1982). See generally James Crawford, *International Law and Foreign Sovereigns: Distinguishing Immune Transactions*, 1983 BRIT. Y.B. INT'L L. 75.

²⁰ See, e.g., *Ibrandtsen Tankers v. President of India*, 446 F.2d 1198, 1200 (2d Cir. 1971) (“The proposed distinction between acts which are *jure imperii* (which are to be afforded immunity) and those which are *jure gestionis* (which are not), has never been adequately defined, and in fact has been viewed as unworkable by many commentators.”).

²¹ For example, the U.S. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§1330, 1602–1611 (2000), and the UK State Immunity Act, 1978, *supra* note 3, were products of this movement.

assumes that state immunity in cases of human rights violations is an entitlement rooted in international law, by virtue of either a fundamental state right or customary international law. However, both assumptions are false. State immunity is not an absolute state right under the international legal order. Rather, as a fundamental matter, state immunity operates as an exception to the principle of adjudicatory jurisdiction.²² Moreover, while the practice of granting immunity to foreign states has given rise to a customary international law of state immunity, this body of law does not protect state conduct that amounts to a human rights violation. These realities yield the important conclusion—one that the normative hierarchy theory ignores—that, with respect to human rights violations, the forum state, not the foreign state defendant, enjoys ultimate authority, by operation of its domestic legal system, to modify a foreign state's privileges of immunity.²³

This article, while critiquing the normative hierarchy theory, establishes a solid theoretical foundation on which human rights litigation can proceed. The theory of restrictive immunity, adopted by most states, draws the line between immune and nonimmune state conduct roughly in accordance with the public (*imperii*)/private (*gestionis*) distinction. However, the original aim of state immunity law was to enhance, not jeopardize, relations between states. This article contends that international law requires state immunity only as to state activity that collectively benefits the community of nations. Thus, where state conduct is clearly detrimental to interstate relations but still protected by domestic state immunity laws, the restrictive approach is inconsistent with the strictures of international law and should be amended. The most obvious example of this kind is where state immunity bars claims against a foreign state brought in a forum state for the murder, torture, or victimization of citizens of the forum state. In such circumstances, foreign states are afforded immunity protections solely as a matter of domestic law and their entitlement to immunity is revocable on the basis of the forum state's right to exercise adjudicatory jurisdiction over the dispute.

Some have observed that the doctrine of foreign state immunity is poised on the cusp of another period of doctrinal development—one in which a further restriction of immunity will accrue in favor of human rights norms.²⁴ Such an advancement is welcome. However, it should proceed not on the basis of the normative hierarchy theory, which fails to reflect the true nature and operation of the doctrine of foreign state immunity, but, rather, on the basis of a theory of collective benefit in state relations.

²² Courts have made this assertion before, but with insufficient explanation. See, e.g., *Verlinden v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).

²³ It must be emphasized that this conclusion is possible to reach because the field of foreign state immunity has not been occupied completely by international law. See "The Status of State Immunity in Relation to International Law" *infra*. In other areas of immunity law, however, this may not be the case. For example, the field of diplomatic and consular immunities is clearly occupied primarily by the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, confirming its international law character. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 UST 3227, 500 UNTS 95; Vienna Convention on Consular Relations, Apr. 24, 1963, 21 UST 77, 596 UNTS 261. In the recent decision in *Arrest Warrant of 11 April 2000*, the International Court of Justice (ICJ) held, after assessing various international agreements, that incumbent heads of state also enjoy immunity as a matter of customary international law. *Arrest Warrant of 11 April 2000* (Dem. Rep. Congo v. Belg.) (Int'l Ct. Justice, Feb. 14, 2002), 41 ILM 536 (2002) [hereinafter *Arrest Warrant*], available at <<http://www.icj-cij.org/icjwww/idecisions.htm>>. But see Dissenting Opinion of Judge Van den Wyngaert, *id.* at 622 (disagreeing with the Court's conclusion because there is neither treaty law nor customary international law directly on point).

²⁴ See Richard Garnett, *The Defence of State Immunity for Acts of Torture*, 1997 AUSTRAL. Y.B. INT'L L. 97, 123–24; Hari M. Osafsky, 11 N.Y. INT'L L. REV. 35 (1998); Georg Ress, *The Changing Relationship Between State Immunity and Human Rights*, in *THE BIRTH OF EUROPEAN HUMAN RIGHTS LAW: STUDIES IN HONOUR OF CARL AAGE NØRGAARD* 175 (Michele de Salvia & Mark E. Villiger eds., 1998). But see ECHR Judgment, *supra* note 1, para. 66 ("[W]hile noting the growing recognition of the overriding importance of the prohibition of torture, it [is not] established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State.").

I. FALSE PRESUMPTIONS REGARDING THE DOCTRINE OF FOREIGN STATE IMMUNITY

The normative hierarchy theory proceeds on the assumption that state immunity in cases of human rights violations is an entitlement of states that derives from international law.²⁵ Indeed, the centerpiece of the theory is a proposed hierarchy of international legal norms, which resolves the conflict between *jus cogens* and state immunity in favor of the former. This hierarchy, quite clearly, operates on a purely international level under the theory that the core interests of the community of states, enshrined in *jus cogens*, outweigh the individual interests of any one state, i.e., immunity from foreign domestic proceedings. As at present there is no universally accepted multilateral treaty to govern state immunity law,²⁶ the normative hierarchy theory must rest on the assumption that state immunity is either the product of a fundamental principle of international law—a principle that arises from the very structure of the international legal order—or a rule of customary international law.²⁷

State Immunity and Fundamental Principles of International Law

The original conflict of principles. The doctrine of foreign state immunity was born out of tension between two important international law norms—sovereign equality²⁸ and exclusive territorial jurisdiction.²⁹ The United States Supreme Court's decision in *The Schooner Exchange v. McFaddon*,³⁰ widely regarded as the first definitive statement of the doctrine of foreign state immunity, presents the classic example of this theoretical conflict.³¹ In 1812, while sailing

²⁵ This aspect of the normative hierarchy theory is described in more detail in the text at notes 176–224 *infra*.

²⁶ The only such treaty is the European Convention on State Immunity, May 16, 1972, Europ. TS No. 74, 11 ILM 470 (1972) (entered into force June 11, 1976) [hereinafter European Convention], which, as of October 7, 2003, had only eight signatories.

²⁷ As the law of state immunity is largely uncodified on the international level, this article dwells primarily in the area of the second established source of international law listed in Article 38(1) of the ICJ Statute, international custom. Within that area, this article draws the same distinction that Professor Lauterpacht has drawn between the law of state immunity as it relates to fundamental principles of international law and to international custom. See generally Hersch Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 1951 BRIT. Y.B. INT'L L. 220. The first concept relates to a principle of international law that arises from the very structure of the international legal order, in this case the principle of sovereign equality. The second concept concerns a rule of international law whose creation is the product of prevailing international custom among states.

²⁸ Applying the test proposed by Professor Schwarzenberger, the principle of sovereign equality is undoubtedly a fundamental principle of international law. He suggests that principles of international law may be considered fundamental if they meet the following criteria:

(1) They must be exceptionally significant for international law; (2) they must stand out from others by covering a relatively wide range of issues and fall without artificiality under one and the same heading; (3) they must either form an essential part of any known system of international law or be so characteristic of existing international law that if they were ignored there would be a danger of losing sight of a characteristic feature of contemporary international law.

GEORG SCHWARZENBERGER & E. D. BROWN, A MANUAL OF INTERNATIONAL LAW 35 (6th ed. 1976). Article 2(1) of the United Nations Charter enshrines the principle of sovereign equality, reflecting its fundamental character. Many believe that the principle prevents one sovereign from exercising jurisdiction over another. Thus, the sovereign equality of states is often cited as the boilerplate explanation for the doctrine of foreign state immunity. See, e.g., RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, ch. 5 Introductory Note, at 390–91 (1987) [hereinafter RESTATEMENT].

²⁹ For a general discussion of the principle of territorial jurisdiction, see JANIS, *supra* note 6, at 318–20. The principle of exclusive territorial jurisdiction is commonly included under the rubric of “adjudicatory jurisdiction.” See RESTATEMENT, *supra* note 28, §421(2)(a) (jurisdiction to adjudicate exists in cases in which “the person or thing is present in the territory of the state, other than transitively”).

³⁰ 11 U.S. (7 Cranch) 116 (1812).

³¹ However, the doctrine pre-dates *The Schooner Exchange*, having originated in the period of monarchical rule in Europe. As Professor Giuttari explains:

Historically, the roots of sovereign immunity have been traced to the time-honored personal inviolability of sovereigns and their ambassadors when present or traveling in foreign countries. Considerations of concern and respect for the inviolable character and dignity of sovereigns had their initial and major impact during the transition from the feudal era to the modern age when most states were ruled by kings and princes who “in

off the American coast, a commercial schooner, the *Exchange*, owned by two citizens of Maryland, was seized by the French navy. By general order of the emperor Napoleon Bonaparte, the French navy converted the schooner into a ship of war.³² When bad weather forced the *Exchange* into the port of Philadelphia, the original owners brought an *in rem* libel action against the ship for recovery of their property. The French government resisted the action, arguing that, as a ship of war, the *Exchange* was an arm of the emperor and was thus entitled to the same immunity privileges as the emperor himself.³³

On appeal to the Supreme Court, Chief Justice John Marshall identified the theoretical dilemma at issue. On the one hand, he observed, international law dictated that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute."³⁴ According to this long-established principle, the moment the *Exchange* entered U.S. territorial waters off the eastern seaboard, it became subject exclusively to the national authority of the U.S. government, an authority that encompassed the U.S. district court's initiation of adverse legal proceedings against it.³⁵ On the other hand, Justice Marshall took notice of another fundamental principle of international law: that the world is composed of distinct nations, each endowed with "equal rights and equal independence."³⁶ This principle of sovereign equality, he believed, discouraged one sovereign from standing in judgment of another, coequal sovereign's conduct.³⁷ If the *Exchange* had been converted, as the French government argued, into an arm of the French emperor (and was thus a direct extension of his sovereignty), then the United States, as France's equal under international law, would be remiss in adjudging the ship's ownership through its courts. International law thus appeared simultaneously to grant the United States authority to adjudicate a dispute over property present within its territory and to prohibit the exercise of this jurisdiction because that property now purportedly belonged to a foreign government.³⁸

The conflict of principles in *The Schooner Exchange* resulted directly from what Sompong Sucharitkul has described as "a concurrence of jurisdictions . . . over the same location or dimension."³⁹ Normally, the principles of territorial jurisdiction and sovereign equality work individually—and often collectively—to promote order and fairness in the international legal system. The former serves to delineate each state's authority to govern a distinct geographical area of the world,⁴⁰ while the latter guarantees to all states, regardless of size, power, or wealth,

a very real sense, personified the State." In [such] a setting . . . , it was not difficult to understand the tendency to interpret the exercise of authority or jurisdiction on the part of one sovereign over another as indicative of hostility or a condition of inferiority that was incompatible with their dignity and independence.

GIUTTARI, *supra* note 16, at 7; *see also* CHARLES LEWIS, STATE AND DIPLOMATIC IMMUNITY 11 (1980).

³² *The Schooner Exchange*, 11 U.S. at 122.

³³ *Id.* at 126–27.

³⁴ *Id.* at 136.

³⁵ Justice Marshall made perfectly clear that "[t]he jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power." *Id.* This concept exists today in international law and is commonly referred to as "adjudicatory jurisdiction." *See* RESTATEMENT, *supra* note 28, §421. The concept also exists as a subset of "prescriptive jurisdiction."

³⁶ *The Schooner Exchange*, 11 U.S. at 136.

³⁷ *Id.* at 136–37.

³⁸ In the end, Justice Marshall found that U.S. courts were barred from inquiring into the validity of title to the *Exchange* because the schooner was "a national armed vessel, commissioned by, and in the service of the emperor of France." *Id.* at 146.

³⁹ Sompong Sucharitkul, *Immunities of Foreign States Before National Authorities*, 149 RECUEIL DES COURS 87, 117 (1976 I). Sucharitkul further describes such a concurrence as follows: "Contact between two States may result in a clash between two fundamental principles of international law, namely the principle of territoriality or territorial sovereignty, and the principle of the State or national sovereignty." *Id.*; *see also* THOMAS BUERGENTHAL & SEAN D. MURPHY, PUBLIC INTERNATIONAL LAW 216–17, 233–34 (3d ed. 2003).

⁴⁰ "International law is based on the concept of the state. The state in its turn lies upon the foundation of sovereignty" MALCOLM N. SHAW, INTERNATIONAL LAW 331 (4th ed. 1997). *See generally* Andrew L. Strauss, *Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts*, 36 HARV. INT'L L.J. 373 (1995).

equal capacity for rights under international law.⁴¹ In *The Schooner Exchange*, however, these principles were at odds because two nations, the United States and France, asserted their sovereign “jurisdiction,” or authority, to settle the dispute over the ship’s ownership. The United States claimed the right to exercise jurisdiction because of the physical presence of the schooner in U.S. territory.⁴² France, in stark contrast, argued that the conversion of the schooner fell within the ambit of the emperor’s power and thus, by virtue of its sovereign character, could not be reviewed in U.S. courts.⁴³

This clash of authority—and, in turn, that of the associated international law principles—is not confined to facts, such as those in *The Schooner Exchange*, that involve the straightforward transfer of sovereign property, such as a ship of war, to the territorial jurisdiction of another state.⁴⁴ Rather, the conflict arises any time a forum state seeks legitimately to exercise its right of jurisdiction under international law over a foreign state defendant, regardless of the physical location of the foreign state’s representatives.⁴⁵ Thus, the most relevant example for this study arises when a plaintiff sues a foreign state in domestic proceedings for alleged human rights abuses that occurred outside the forum state.⁴⁶ Here, too, the authority of the forum state to adjudicate the dispute, hereinafter referred to as “adjudicatory jurisdiction,” is at loggerheads with the principle of sovereign equality.⁴⁷ This disparity is usefully borne in mind because it means that the original clash of principles, as identified in *The Schooner Exchange*, and, more important, its resolution, as proposed by Justice Marshall and discussed

⁴¹ See generally EDWIN DEWITT DICKINSON, *THE EQUALITY OF STATES IN INTERNATIONAL LAW* (1920).

⁴² The significance of the territorial connection between the defendant and U.S. territory was later crystallized in the well-known case *Pennoy v. Neff*, 95 U.S. 714 (1877).

⁴³ “[T]he rights of a foreign sovereign cannot be submitted to a judicial tribunal. He is supposed to be out of the country, although he may happen to be within it.” *The Schooner Exchange*, 11 U.S. at 132 (arguments of U.S. Attorney General Pinkney in favor of dismissing the case on the basis of France’s sovereign immunity).

⁴⁴ The concept that Justice Marshall cited as “territorial jurisdiction” refers to “authority over a geographically defined portion of the surface of the earth and the space above and below the ground which a sovereign claims as his territory, together with all persons and things therein.” SCHWARZENBERGER & BROWN, *supra* note 28, at 74 (footnote omitted). This type of authority reflects only one aspect of the concept of jurisdiction, which in other manifestations may include the power to project state authority extraterritorially.

⁴⁵ Under modern principles of international law, a state’s right of jurisdiction includes “particular aspects of the general legal competence of states . . . [such as] judicial, legislative, and administrative competence.” BROWNLEE (5th), *supra* note 6, at 301.

⁴⁶ See, e.g., *Nelson v. Saudi Arabia*, 507 U.S. 349 (1993); *Smith v. Socialist People’s Libyan Arab Jamahiriya*, 101 F.3d 239 (2d Cir. 1996); *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164 (D.C. Cir. 1994); *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994).

⁴⁷ In cases of human rights abuses by foreign states, “adjudicatory jurisdiction” may rest on other principles of jurisdiction under public international law besides territoriality, including nationality, passive personality, the protective principle, and universality. For a discussion of the traditional bases of jurisdiction under public international law, see *S.S. Lotus* (Fr./Turk.), 1927 PCIJ (ser. A) No. 10 [hereinafter *Lotus* case]; RESTATEMENT, *supra* note 28, §454; Harvard Draft Convention on Jurisdiction with Respect to Crime, 29 AJIL Supp. 439 (1935). While domestic state immunity laws are typically predicated on civil jurisdiction, traditional bases of criminal jurisdiction under public international law are most suitable where human rights violations are concerned. As Professor Bowett has argued, “where the civil jurisdiction of the State is an instrument of State policy, used as a means of exercising control over activities or resources in the interests of the State, then in principle such jurisdiction ought to be subject to the same governing rules of [public] international law.” D.W. Bowett, *Jurisdiction: Changing Patterns of Authority over Activities and Resources*, 1982 BRIT. Y.B. INT’L L. 1, 4.

Within the legal systems of certain countries, domestic law limitations may limit the reach of a court’s jurisdiction under international law. In U.S. jurisprudence, it is debatable whether the Constitution’s Fifth Amendment requires that there be “minimum contacts” between the foreign state defendant and the United States, a precondition that would greatly limit U.S. courts’ ability to adjudicate human rights disputes. See *Tex. Trading & Milling Corp. v. Fed. Republic of Nig.*, 647 F.2d 300, 313–15 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982) (applying a separate constitutional due process analysis in the case of a suit against a foreign state); see also David J. Bederman, *Dead Man’s Hand: Reshuffling Foreign Sovereign Immunities in U.S. Human Rights Litigation*, 25 GA. J. INT’L & COMP. L. 255, 273–76 (1995). However, some have argued that the Fifth Amendment’s due process protections should not benefit foreign states. Lee M. Caplan, *The Constitution and Jurisdiction over Foreign States: The 1996 Amendment to the Foreign Sovereign Immunities Act in Perspective*, 41 VA. J. INT’L L. 369 (2001); Joseph W. Glannon & Jeffery Atik, *Politics and Personal Jurisdiction: Suing State Sponsors of Terrorism Under the 1996 Amendments to the Foreign Sovereign Immunities Act*, 87 GEO. L.J. 675 (1999).

below, provide a workable theoretical framework for resolving a wide range of current problems of state immunity.

Competing rationales and their implications for state immunity. The doctrine of foreign state immunity emerged from the theoretical conflict described above. Two leading rationales explain the legal source of the doctrine.⁴⁸ One asserts that state immunity is a fundamental state right by virtue of the principle of sovereign equality. The other views state immunity as evolving from an exception to the principle of state jurisdiction, i.e., when the forum state suspends its right of adjudicatory jurisdiction as a practical courtesy to facilitate interstate relations. Not surprisingly, these two rationales—like the principles of international law that they emphasize—find themselves in deep conflict. Moreover, each gives rise to vastly different implications for the nature and operation of the doctrine of foreign state immunity.⁴⁹

The traditional starting point for the view that foreign state immunity is a fundamental state right is the maxim *par in parem non habet imperium*, meaning literally “An equal has no power over an equal.”⁵⁰ Theodore Giuttari aptly explains the maxim’s historical origins in the classic period of international law:

In this period, the state was generally conceived of as a juristic entity having a distinctive personality and entitled to specific fundamental rights, such as the rights of absolute sovereignty, complete and exclusive territorial jurisdiction, absolute independence and legal equality within the family of nations. Consequently, it appeared as a logical deduction from such attributes to conclude that as all sovereign states were equal in law, no single state should be subjected to the jurisdiction of another state.⁵¹

Thus, according to the “fundamental right” rationale, *par in parem non habet imperium* is simply a specific application of the general principle of sovereign equality.

Despite the fact that modern international law has largely discarded the classic notion of inherent state rights, the “fundamental right” rationale has exhibited surprising resiliency. The Italian Corte di cassazione has opined, for example, that state immunity is “based on the customary principle *par in parem non habet jurisdictionem*, that has received universal acceptance.”⁵² The Polish Supreme Court found that “the basis of the immunity of foreign States is the democratic principle of their equality, whatever their size and power, which results in excluding the jurisdiction of one State over another (*par in parem non habet iudicium*).”⁵³ Scholars, too, have embraced this rationale. An early edition of Oppenheim’s *International Law*, for example, described the foundations of state immunity as a “consequence of State equality,” with reference to the maxim *par in parem non habet imperium*.⁵⁴

⁴⁸ For a general discussion of the various rationales, see BRÖHMER, *supra* note 15, at 9; HELMUT DAMIAN, STAATENIMMUNITÄT UND GERICHTSZWANG 12 (1985); GIUTTARI, *supra* note 16, at 5–7; Sucharitkul, *supra* note 39, at 117–20.

⁴⁹ While it is not terribly difficult to find a discussion of the competing rationales for the doctrine of foreign state immunity in the literature, an analysis of the significance of these rationales for the application of the doctrine is virtually absent.

⁵⁰ BLACK’S LAW DICTIONARY 1673 (7th ed. 1999). Professor Badr has traced the origins of the maxim back to the fourteenth-century Italian jurist, Bartolus, who wrote “*Non enim una civitas potest facere legem super alteram, quia par in parem non habet imperium*.” BADR, *supra* note 16, at 89 (quoting BARTOLUS, TRACTATUS REPRESSALIUM, Questio 1/3, para. 10 (1354)).

⁵¹ GIUTTARI, *supra* note 16, at 5.

⁵² Special Representative of the Vatican v. Pieciukiewicz, Cass., jt. sess., 5 July 1982, n.4005, 1983 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 379, translated in 78 ILR 120, 121, 1985 ITAL. Y.B. INT’L L. 179.

⁵³ S. v. Brit. Treasury, PAŃSTWO I PRAWO, NO. 4, 1949, at 119 (Pol. Sup. Ct. Dec. 14, 1948), translated in 24 ILR 223, 224–25.

⁵⁴ LASSA OPPENHEIM, INTERNATIONAL LAW 239–41 (6th ed. 1947). More recently, Professor Sucharitkul, in his Hague Academy lectures, taught that the rationale for state immunity “may be expressed in terms of Sovereignty, Independence, Equality and Dignity of States,” which collectively form “a firm international legal basis for sovereign immunity.” Sucharitkul, *supra* note 39, at 117; see also Sompong Sucharitkul, *Immunity of States*, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 327, 327 (Mohammed Bedjaoui ed., 1991) (“As a consequence of sovereignty and equality of States, each State is presumed, in certain circumstances, to have consented to waive or to refrain from exercising its exclusive territorial jurisdiction in a legal proceeding in which another State is a party without its consent.”). Professor Riesenfeld, too, appears to have placed significant weight on the principle of state equality.

In recent history, Communist publicists have been among the strongest supporters of the “fundamental right” rationale, which they found an attractive response to the emergent theory of restrictive state immunity, a theory that affords no immunity for acts of a commercial or private nature.⁵⁵ The restrictive view was antithetical to the prevailing socialist philosophy, which held that politics and trade were inseparable aspects of the socialist state; in essence, a socialist state acted qua state in all its dealings.⁵⁶ M. M. Boguslavskij, the Russian scholar, thus rejected the notion that a state could surrender its sovereignty, and with it its right of state immunity, simply by engaging in commercial or private activity.⁵⁷ He, like many of the socialist scholars, adhered to the “fundamental right” view.⁵⁸

Of particular interest to this study are the implications of the “fundamental right” view regarding the nature and operation of state immunity. Here, Professor Sucharitkul’s comments are illustrative. In resolving the clash of norms inherent in problems of state immunity, he concludes: “It has become an established rule that between two equals, one cannot exercise sovereign will or power over the other, ‘*Par in parem non habet imperium*.’”⁵⁹ While Sucharitkul acknowledges that the principle of territorial jurisdiction is a basic principle of international law, he emphasizes a state’s right to sovereign equality. Thus, according to Sucharitkul, the principle of state jurisdiction must give way to the principle of sovereign equality to effectuate a state’s right of immunity.⁶⁰ This view, if correct, presents substantial obstacles to human rights litigation, as plaintiffs must contend with and overcome a state right to immunity, perhaps even of a fundamental nature.⁶¹

According to another view, state immunity arises not out of a fundamental state right but, rather, as an exception to the principle of state jurisdiction. On this theory, state immunity is ascribed to “practical necessity or convenience and particularly the desire to promote good will and reciprocal courtesies among nations.”⁶² Clearly, this aim largely influenced Justice Marshall’s opinion in *The Schooner Exchange*, where he recognized that “intercourse” between nations and “an interchange of those good offices which humanity dictates and its wants require” foster “mutual benefit.”⁶³ States obtain such benefits, according to Justice Marshall, by means

Stefan A. Riesenfeld, *Sovereign Immunity in Perspective*, 19 VAND. J. TRANSNAT’L L. 1, 1 (1986) (citing DICKINSON, *supra* note 41); see also RESTATEMENT, *supra* note 28, ch. 5 Introductory Note, at 390–91; Harvard Research in International Law, Competence of Courts in Regard to Foreign States, 26 AJIL Supp. 455, 527 (1932) [hereinafter Harvard Research]; COUNCIL OF EUROPE, EXPLANATORY REPORTS ON THE EUROPEAN CONVENTION ON STATE IMMUNITY AND THE ADDITIONAL PROTOCOL 5 (1985).

⁵⁵ See sources cited *supra* note 18.

⁵⁶ For a general discussion of the development of the Soviet theory of international law, see Grigory I. Tunkin, *Soviet Theory of Sources of International Law*, in VÖLKERRECHT UND RECHTSPHILOSOPHIE: INTERNATIONALE FESTSCHRIFT FÜR STEPHAN VEROSTA 66, 66 (Peter Fischer, Heribert Franz Köck, & Albert Verdross eds., 1980); see also BRANIMIR M. JANKOVIĆ, PUBLIC INTERNATIONAL LAW 60–65 (1984).

⁵⁷ M. M. BOGUSLAVSKIJ, STAATLICHE IMMUNITÄT 168 (1965).

⁵⁸ The Soviet view modernized the classic justification for *par in parem non habet imperium*, relying not on the concept of international personality but, rather, on Article 2(1) of the United Nations Charter, which enshrines the principle of the sovereign equality of all United Nations members. See, e.g., L. A. LUNC, MEZHDUNARODNOE CHASTNOE PRAVO, OSOBNENNAIA CHAST (Private International Law) 77–91 (1975); I. S. PERETERSKII & S. B. KRYLOV, MEZHDUNARODNOE CHASTNOE PRAVO (Private International Law) 197–206 (2d. ed. 1959).

⁵⁹ Sucharitkul, *supra* note 39, at 117.

⁶⁰ Professor Sucharitkul’s preference for state equality over state jurisdiction as the source of state immunity is clear from his subsequent comments: “Reciprocity of treatment, comity of nations and courtoisie internationale are very closely allied notions, which may be said to have afforded a *subsidiary or additional basis* for the doctrine of sovereign immunity.” *Id.* at 119 (emphasis added).

⁶¹ See “Resolving the conflict of principles” *infra*, which demonstrates that the “fundamental right” rationale provides a less persuasive explanation for the creation of the doctrine of foreign state immunity.

⁶² GIUTTARI, *supra* note 16, at 6.

⁶³ *The Schooner Exchange*, 11 U.S. (7 Cranch) 116, 136 (1812). In *The Parlement Belge*, the court referred to state immunity as a “consequence of the absolute independence of every sovereign authority and of the *international comity* which induces every sovereign state to respect the independence of every other sovereign state.” [1880] 5 P.D. 197, 217 (emphasis added).

of their exclusive territorial jurisdiction.⁶⁴ In particular, he noted that "all sovereigns have consented to a relaxation in practice . . . of that absolute and complete jurisdiction within their respective territories which sovereignty confers."⁶⁵ Justice Marshall went on to observe that the forum state could advance international affairs by granting a foreign sovereign "license" to conduct its affairs in the forum state.⁶⁶ Such license was often conferred as part of a bilateral arrangement by which the foreign sovereign would afford reciprocal treatment to the representatives of the forum state when present in the foreign sovereign's territory. The effect of this "relaxation" of jurisdictional authority, as Justice Marshall described it, was to permit a foreign sovereign, together with his representatives and property, to enter and operate within the forum state without fear of arrest, detention, or adverse legal proceedings.⁶⁷

Support for Justice Marshall's "practical courtesy" approach is evident in international law scholarship. In his 1980 lectures at the Hague Academy, Ian Sinclair, commenting on *The Schooner Exchange*, described the "true foundation" of foreign state immunity as its "operation by way of exception to the dominating principle of territorial jurisdiction."⁶⁸ He continued:

[O]ne does not start from an assumption that immunity is the norm, and that exceptions to the rule of immunity have to be justified. One starts from the assumption of non-immunity, qualified by reference to the functional need (operating by way of express or implied licence) to protect the sovereign rights of foreign States operating or present in the territory.⁶⁹

Sir Robert Jennings echoed this sentiment when positing that in regard to state immunity, "territorial jurisdiction is the dominating principle."⁷⁰

⁶⁴ Indeed, the first statement of law in Justice Marshall's opinion affirms the exclusivity of the state's territorial jurisdiction. See text at note 34 *supra*.

⁶⁵ 11 U.S. at 136. Justice Marshall observed that this "relaxation" of state jurisdiction had become established in three cases: (1) the exemption of the sovereign's person from arrest or detention, (2) the immunity of foreign ministers, and (3) the free passage of friendly foreign troops. *Id.* at 137-40.

⁶⁶ *Id.* at 137. Thus, according to Justice Marshall, a state is said "to waive the exercise of a part of that complete exclusive territorial jurisdiction." *Id.* By way of clarification, the "waiver" of jurisdiction, described by Justice Marshall as creating the doctrine of state immunity, and the implied "waiver" of state immunity, which some argue occurs when a state violates *jus cogens*, are potentially confusing, yet distinct concepts. Here, in describing Justice Marshall's theoretical construct, the term "license" is used. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 321 (3d ed. 1979) ("By licence the agents of one state may enter the territory of another and there act in their official capacity." (footnote omitted)) [hereinafter BROWNLIE (3d)]; Lauterpacht, *supra* note 28, at 229 (the language of *The Schooner Exchange* clearly indicates that "the governing, the basic, principle is not the immunity of the foreign state but the full jurisdiction of the territorial state and that any immunity of the foreign state must be traced to a waiver—express or implied—of its jurisdiction on the part of the territorial state").

⁶⁷ An exemption to the forum state's jurisdictional authority was not necessary with respect to aliens. As Justice Marshall explained:

When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter can never be construed to grant such exemption.

The Schooner Exchange, 11 U.S. at 144.

⁶⁸ Ian Sinclair, *The Law of Sovereign Immunity: Recent Developments*, 167 RECUEIL DES COURS 113, 215 (1980 II).

⁶⁹ *Id.*

⁷⁰ ROBERT JENNINGS, THE PLACE OF THE JURISDICTIONAL IMMUNITY OF STATES IN INTERNATIONAL AND MUNICIPAL LAW 19 (Vortrag vor dem Europa-Institut der Universität des Saarlandes No. 108, 1987); see also Higgins, *supra* note 19, at 271.

Unlike the “fundamental right” rationale, the “practical courtesy” view resolves the theoretical clash between sovereign equality and state jurisdiction in favor of the latter.⁷¹ As a consequence, the scope of the entitlement to state immunity is defined by the extent to which the forum state chooses to suspend its right of jurisdiction. As Justice Marshall insightfully pronounced: “All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.”⁷² Accordingly, on this theory, no norm of international law, not even the principle of sovereign equality, is capable of derogating a state’s jurisdictional authority as exercised legitimately by its own courts, except in cases where the forum state has agreed to waive this right.⁷³

Resolving the conflict of principles: The primacy of adjudicatory jurisdiction. Determining which of the above rationales more persuasively explains the theoretical foundation of state immunity has profound implications for human rights litigation.⁷⁴ If state immunity is deemed a fundamental right of statehood, then human rights litigants face nearly insurmountable obstacles. The state defendant is entitled to presumptive immunity and even the normative hierarchy theory cannot be effective because it is by no means clear that *jus cogens* norms trump a fundamental state right to immunity. Such negative consequences, however, need not be explored in detail here, as a critical examination of the two rationales reveals that the “practical courtesy” rationale is more persuasive than the “fundamental right” rationale. From this conclusion one may infer that the regulation of state immunity falls, as a threshold matter, within the authoritative domain not of the foreign state defendant but, rather, of the forum state. As described below, three reasons support this conclusion.

The problem with the “fundamental right” rationale is that it assumes that the principle of sovereign equality is the root of the maxim *par in parem non habet imperium*, and thus that the maxim prohibits one state’s exercise of jurisdiction over another. The true meaning of sovereign equality, however, disproves this assumption.⁷⁵ Sovereign equality does not mean that all states are equal in any given circumstances but that, as Edwin Dickinson observed, every

⁷¹ Professor Hyde explains:

Because the exercise of exclusive jurisdiction throughout the national domain is essential to the maintenance of the supremacy of the territorial sovereign, the most solid grounds of international necessity must be shown in order to justify a demand that a State consent to an exemption It becomes important, therefore, to examine the reasons urged in behalf of exemptions habitually demanded . . . [and] also to observe the nature and purpose of particular exemptions.

1 CHARLES CHENEY HYDE, *INTERNATIONAL LAW* 815–16 (2d rev. ed. 1945); see also General Principle of Exemption, 2 HACKWORTH, *DIGEST* §169, at 393 (ascribing the origins of state immunity to the consent of the territorial sovereign and the principle of equality, but also taking note of the “necessity of yielding the local jurisdiction . . . as an indispensable factor in the conduct of friendly intercourse between members of the family of nations”); 2 D. P. O’CONNELL, *INTERNATIONAL LAW* 915 (1965) (“Originally the waiver may have been *ex gratia*, but probably the universal practice of granting immunity has produced a rule of positive law.”).

⁷² *The Schooner Exchange*, 11 U.S. at 136.

⁷³ As explained in part II, the practice of waiving adjudicatory jurisdiction in favor of state immunity has crystallized into a rule of customary international law with respect to a limited core body of state conduct that serves the collective interests of the community of nations.

⁷⁴ In the last fifteen years, there has been little, if any, serious treatment of the significance of the competing rationales for foreign state immunity. See, e.g., Report of the International Law Commission on the Work of Its Forty-third Session, [1991] 2 Y.B. Int’l L. Comm’n 32, UN Doc. A/CN.4/SER.A/1991 (Part 2) (choosing not to address the issue). One reason may be that with the general acceptance of the theory of restrictive immunity among the Western states, the drive to ponder such abstractions waned considerably. The loss of intellectual steam might have been further augmented by the decline of the Soviet Union and its dogmatic promotion of the “fundamental right” rationale. However, at the inception of another broad movement to restrict state immunity, now predicated on human rights protection, it is useful to revisit the topic and to attempt to determine which rationale should control.

⁷⁵ Interestingly, Professor Brierly was quite skeptical about the principle of sovereign equality in general. J. L. BRIERLY, *THE LAW OF NATIONS* 130–32 (Humphrey Waldock ed., 6th ed. 1963).

state enjoys an “equality of *capacity* for rights.”⁷⁶ Dickinson based his views on those of Heffter, who wrote that sovereign equality “means nothing more nor less than that each state may exercise equally with others all rights that are based upon its existence as a state in the international society.”⁷⁷ Thus, a state’s “capacity for rights,” according to Dickinson, relates to the freedom and ability of states to engage in official conduct typically associated with statehood, such as the formulation and promotion of domestic and foreign policies, the execution of treaties, and membership in international organizations.

This meaning of sovereign equality is further defined by the basic strictures of the system of international law. It is axiomatic that international law allocates sovereign authority to govern in accordance with national borders;⁷⁸ the United States governs within U.S. territory on behalf of Americans, France governs within French territory on behalf of the French, and so on. Each state exercises territorial jurisdiction within its political unit as a function of its sovereignty. Thus, a state’s capacity for rights, like statehood itself, is linked to a defined geographical area, i.e., the territory within the national borders of the state.⁷⁹ It follows that this capacity for rights, albeit equal in potential to that of every other state, may have greater or lesser force, in relation to that of other states, in proportion to its connection to national territory. For example, a state’s capacity for rights stands at its apogee when applied in relation to its own territory and citizens.⁸⁰ Accordingly, “[a] sovereign state is one that is free to independently govern its own population in its own territory and set its own foreign policy”—to the exclusion of all other states.⁸¹

Conversely, by simple operation of the principle of sovereign equality, a state’s capacity for rights will diminish when in direct conflict with another state’s sphere of authority, i.e., the jurisdiction of that state over persons, property, and events in its national territory.⁸² For example, a foreign sovereign present in an alien forum state quite obviously may not govern on behalf of the local citizenry; again, this is a right that the forum state generally enjoys to the exclusion of all other states.⁸³ Hence, the same principle of sovereign equality that entitles the foreign sovereign to govern with respect to its own national territory now excludes it from exercising authority in another state’s territory. In such cases, the foreign state’s capacity for rights with respect to the forum state reaches its lowest ebb.⁸⁴

Seen in this light, the literal meaning of *par in parem non habet imperium*, “an equal has no authority over an equal,” fails to reflect the realities of the international legal order. The principle of sovereign equality means that every state enjoys an “equal capacity for rights” in relation to every other state, but it does not alter the fact that a state may exercise the rights of statehood only with respect to its own territory and population. If, according to international law, a state is the sole master of its domain, persons and property located within the forum state necessarily come within the forum state government’s control and authority—even if

⁷⁶ DICKINSON, *supra* note 41, at 5 (emphasis added). “The meaning of equality as a legal principle is explained by a few modern writers in a way that approaches scientific precision. Some define it in terms that suggest equality of rights, and then proceed to explain it as equality of legal capacity.” *Id.* at 106.

⁷⁷ *Id.* (quoting AUGUST WILHELM HEFFTER, *VÖLKERRECHT* §§26–27).

⁷⁸ Western Sahara, Advisory Opinion, 1975 ICJ REP. 12, 63–65 (Oct. 16); OPPENHEIM, *supra* note 6, at 121; SHAW, *supra* note 40, at 331.

⁷⁹ In the *Lotus* case, the Permanent Court of International Justice found that “the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State.” *Lotus* case, *supra* note 47, at 18. Indeed, territory is one of the fundamental conditions for statehood.

⁸⁰ *Id.* at 18. Sovereignty is thus in the main a mutually exclusive concept; as with the laws of physics governing matter, no two sovereigns can occupy the same space at the same time.

⁸¹ JANIS, *supra* note 6, at 186; see also *Island of Palmas Case* (Neth. v. U.S.), 2 R.I.A.A. 829, 838 (Perm. Ct. Arb. 1928).

⁸² As Professor Janis explains, the elements of statehood “impart a certain mutual exclusivity among states that we know as sovereignty, one of international law’s most important principles.” JANIS, *supra* note 6, at 185–86.

⁸³ *Lotus* case, *supra* note 47, at 18.

⁸⁴ “Restrictions upon the independence of States cannot therefore be presumed.” *Id.*

endowed with foreign sovereign status.⁸⁵ Were international law to dictate otherwise, the present state-centric paradigm would crumble.

This is not to say that foreign states should be refused immunity privileges in all circumstances but that an entitlement to immunity is not intrinsic to statehood.⁸⁶ Thus, foreign state immunity is a privilege, not a right, and, accordingly, the maxim *par in parem non habet imperium* is a distortion of the principle of sovereign equality. Neither the maxim nor its purported progenitor, the principle of sovereign equality, persuasively supports the conclusion that one state *cannot* exercise jurisdiction over another, and the “fundamental right” rationale is fatally flawed for assuming so.⁸⁷

The view that state immunity is a fundamental state right has often been used to support the absolute approach to immunity, which held that states enjoy complete immunity from foreign domestic proceedings.⁸⁸ Indeed, absolutists would argue that, as a product of the principle of sovereign equality, immunity extends to the limits of a state’s sovereignty and, moreover, that a state acts qua state in all of its affairs regardless of the nature of its conduct. Absolute immunity is a myth, however—a fact that undermines the “fundamental right” approach on which absolute immunity is understood to rest. A brief assessment of the historical growth of the doctrine of state immunity proves this point.

First, it is a myth that states ever enjoyed absolute immunity from foreign jurisdiction.⁸⁹ While scholars often refer to an early period of “absolute immunity,” typically citing *The Schooner Exchange* as the leading case of the day, this title has more historical than legal significance and should not be interpreted as meaning that states were exempt at that time from foreign jurisdiction in all circumstances.⁹⁰ Indeed, after a rigorous examination of *The Schooner Exchange*, Gamal Badr persuasively argued:

⁸⁵ Lauterpacht supports this conclusion on historical grounds. According to him, the relationship between the principle of sovereign equality and state immunity “finds no support in classical international law. Grotius does not refer to it. Bynkershoek occasionally deprecates it: ‘Principes dum contrahunt haberi privatorum loco.’ Vattel, after admitting it with regard to the person of the foreign sovereign, is silent with regard to the position of foreign states as such.” Lauterpacht, *supra* note 27, at 228 (citation omitted).

⁸⁶ According to Professor Janis, the “rights” of statehood are not so broad as to include the right to be free from foreign domestic proceedings. JANIS, *supra* note 6, at 188.

⁸⁷ In the ninth edition of Oppenheim’s *International Law*, Jennings and Watts agree, but for a different reason:

It is often said that a third consequence of state equality is that—according to the rule *par in parem non habet imperium*—no state can claim jurisdiction over another. The jurisdictional immunity of foreign states has often also been variously—and often simultaneously—deduced not only from the principle of equality but also from the principles of independence and of dignity of states. It is doubtful whether any of these considerations supplies a satisfactory basis for the doctrine of immunity. There is no obvious impairment of the rights of equality, or independence, or dignity of a state if it is subjected to ordinary judicial processes within the territory of a foreign state—in particular if that state, as appears to be the tendency in countries under the rule of law, submits to the jurisdiction of its own courts in respect of claims brought against it. The grant of immunity from suit amounts in effect to a denial of a legal remedy in respect of what may be a valid legal claim; as such, immunity is open to objection.

OPPENHEIM, *supra* note 6, at 341–42 (footnotes omitted).

⁸⁸ This point formed the linchpin of the Communist position on foreign state immunity. See text at notes 55–58 *supra*.

⁸⁹ As Michael Byers explains:

[A]n examination of the history of state immunity, which is primarily a history of national court judgments and national legislation, suggests that absolute immunity was not an established rule. Rather, history suggests that there was no rule regulating state immunity from jurisdiction prior to restrictive immunity becoming a rule of customary international law, and that a mistaken belief in such a preexisting rule served to retard that later development.

Michael Byers, *Custom, Power, and the Power of Rules: Customary International Law from an Interdisciplinary Perspective*, 17 MICH. J. INT’L L. 109, 170 (1995); see also BRÖHMER, *supra* note 15, at 14–15.

⁹⁰ The organizational bifurcation of international law textbooks into sections on “absolute immunity” and “restrictive immunity” tends to add to the confusion. See, e.g., BUERGENTHAL & MURPHY, *supra* note 39, at 234–36; CARTER, TRIMBLE, & BRADLEY, *supra* note 17, at 547–52; LORI F. DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 1200–42 (4th ed. 2001).

For [Chief Justice] Marshall, . . . the starting point [of the case] was the local state's exclusive territorial jurisdiction to which immunity was an exception emanating from the will of the local state itself. He did not envisage a blanket immunity for the foreign state as a general rule, to which exceptions would be made to permit the exercise of the local state's territorial jurisdiction.⁹¹

Indeed, this crucial observation led Professor Badr to conclude that *The Schooner Exchange* "does not uphold the proposition that there exists a peremptory rule of international law requiring that an absolute immunity from the territorial jurisdiction be recognized in favour of foreign states."⁹²

The more realistic explanation of the absolute approach is that at one time foreign states, as a practical matter, were immune from foreign jurisdiction.⁹³ In the eighteenth and nineteenth centuries, sovereigns interacted with one another in peacetime in a very limited way, predominantly through diplomatic intercourse or military cooperation.⁹⁴ Consequently, interstate disputes almost inevitably touched upon sensitive foreign policy matters. The law of state immunity reflected these sensitivities and the prevailing preference for resolving these disputes by diplomacy, rather than adjudication. Most likely, claims against states in respect of private conduct—though technically not barred from foreign adjudication—were also handled diplomatically in accordance with the prevailing state-centric paradigm.⁹⁵ Thus, one cannot equate the fact that courts did not exercise jurisdiction over foreign states in this early period with a general prohibition against doing so on account of the principle of sovereign equality.

Second, the emergence and increasing acceptance of a restrictive approach to immunity is itself antithetical to the "fundamental right" approach.⁹⁶ The classic justification for the distinction between public and private acts in the restrictive immunity theory was that the sovereign, in effect, descends from his throne when operating as a merchant and thereby subjects himself to the local laws of the forum state.⁹⁷ Though this distinction in state activity is admittedly somewhat arbitrary, it nevertheless undermines the "fundamental right" position. If state immunity were really based on a fundamental principle of international law, then the movement toward restricting immunity would not have encountered so few legal and political obstacles. In other words, if state immunity were a fundamental state right, it would never be susceptible to theoretical division along public/private lines.

The "practical courtesy" rationale furnishes the more persuasive and realistic explanation for the doctrine of state immunity because it appropriately emphasizes the vital role of the principle of adjudicatory jurisdiction.⁹⁸ As a logical matter, a foreign state cannot be entitled to immunity without the prior existence of a jurisdictional anchor to establish the court's competence.⁹⁹ This observation results from the plain fact that a court lacking jurisdictional

⁹¹ BADR, *supra* note 16, at 11.

⁹² *Id.* at 13.

⁹³ According to the American Law Institute, "Until the twentieth century, sovereign immunity from the jurisdiction of foreign courts *seemed* to have no exceptions." RESTATEMENT, *supra* note 28, ch. 5 Introductory Note, at 391 (emphasis added).

⁹⁴ SHAW, *supra* note 40, at 494 (noting that the "relatively uncomplicated role of the sovereign and of government in the eighteenth and nineteenth centuries logically gave rise to the concept of absolute immunity").

⁹⁵ Such claims would most likely have been handled on the state level according to the law of diplomatic protection. See generally EDWIN M. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* (1927).

⁹⁶ For a description of this position, see text at notes 50–61 *supra*.

⁹⁷ See *The Schooner Exchange*, 11 U.S. at 145; BADR, *supra* note 16, at 11.

⁹⁸ The "fundamental right" view provides no meaningful treatment of this topic.

⁹⁹ See BADR, *supra* note 16, at 80–84; BRÖHMER, *supra* note 15, at 37–41; James Crawford, *A New Foreign State Immunities Act for Australia?* 1983 AUSTL. Y.B. INT'L L. 71, 92; Christian Dominicé, *The Relationship Between State Immunity and the Jurisdiction of Courts*, in International Law Association, Documentation for the Members of the Committee on State Immunity (prepared for the ILA Cairo Conference, 1992).

competence is completely devoid of authority to adjudicate a legal dispute.¹⁰⁰ Thus, as the International Court of Justice explained in the *Case Concerning the Arrest Warrant of 11 April 2000*, “[I]t is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction.”¹⁰¹ Addressing the role of jurisdiction is thus crucial to any understanding of the true nature and operation of the doctrine of state immunity. *The Schooner Exchange* highlights this point, because there Justice Marshall realized, quite rightly, that jurisdiction must be established before state immunity could be considered. Jurisdiction was not contested in that case because the presence of the *Exchange* in U.S. territorial waters constituted the necessary connection with the forum to establish the district court’s *in rem* jurisdiction.¹⁰² With this matter established—one that the “fundamental right” view neglects—state immunity could only obtain as an exception to the adjudicatory jurisdiction of the forum state.

Nevertheless, the principle of sovereign equality cannot be said to have no function in the state immunity equation. On the contrary, respect for the coequal status of a foreign sovereign state serves typically as the primary motivation for granting immunity privileges.¹⁰³ On this theory, however, a state’s entitlement to immunity is not compelled by the principle of sovereign equality but, rather, derives from the forum state’s waiver of adjudicatory jurisdiction with the aim of promoting mutually beneficial interstate relations.¹⁰⁴

Finally, the “practical courtesy” rationale promotes a more sensible international policy than the “fundamental right” rationale. States understood to possess a fundamental right to immunity would be permitted to act with impunity. Carried to the logical extreme, this notion would mean that foreign states acting in their foreign capacity could never be held accountable by the forum state. On the other hand, if state immunity is considered a practical courtesy, capable of being modified (or even withdrawn, if need be), then a more balanced relationship is maintained between the foreign state and the forum state. A foreign state will be more cautious about treading on the interests of other states, fearing that unacceptable conduct will result in the withdrawal of immunity and, in turn, the review of such conduct by domestic courts.

Correcting false presumptions. The foregoing discussion has revolved primarily around the broad principles animating the doctrine of foreign state immunity, and has shown, in particular, the theoretical persuasiveness of the “practical courtesy” rationale. Indeed, this persuasiveness is significant because it suggests that a forum state remains unrestricted, at least by a fundamental principle of international law, from exercising jurisdiction over a foreign-state human rights offender, so long as an appropriate connection exists between the alleged offense and the forum state.¹⁰⁵

Yet when one surveys the actual law of foreign state immunity, as formulated and applied, an entirely different picture emerges. In practice, the *rules* that regulate state immunity law assume that a foreign state *is* immune from suit, unless demonstrated otherwise. Taking an example from national practice, section 1604 of the U.S. Foreign Sovereign Immunities Act of 1976 (FSIA) contains the general rule that “a foreign state shall be immune from the jurisdiction of the courts of the United States,” which may be abrogated only by application of

¹⁰⁰ In general, there must be a reasonable link between the dispute and the forum state. See BROWNIE (5th), *supra* note 6, at 301.

¹⁰¹ Arrest Warrant, *supra* note 23, para. 46; see also *id.*, Joint Separate Opinion of Judges Higgins, Kooijmans, & Buergenthal, para. 5, 41 ILM at 574.

¹⁰² See JENNINGS, *supra* note 72, at 22 (“For competence, both juridically and physically in respect of persons and property within the territory of the forum is the normal basis of curial power and ultimately therefore of curial authority.”).

¹⁰³ Even states that have adopted the theory of restrictive immunity still cite these factors as a reason. RESTATEMENT, *supra* note 28, ch. 5 Introductory Note, at 390.

¹⁰⁴ See *Verlinden v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).

¹⁰⁵ The applicable bases of jurisdiction under international law are outlined *supra* note 47.

one of the exceptions to immunity enumerated in section 1605.¹⁰⁶ According to the FSIA's legislative history, the statute "starts from a premise of immunity and then creates exceptions to the general principle."¹⁰⁷ Similarly, the Swiss Federal Tribunal wrote:

According to a generally recognized rule of public international law, the sovereignty of each State is limited by the immunity of other States, in particular with regard to the jurisdiction of municipal courts and proceedings for enforcement. One State cannot be brought before the courts of another State except in exceptional circumstances.¹⁰⁸

These approaches, a function of codification in the American case and of constitutional orientation in the Swiss (as described further in the next section), unnecessarily build theoretical hurdles to human rights litigation.¹⁰⁹

International instruments paint largely the same picture. Article 15 of the European Convention provides: "A Contracting State shall be entitled to immunity from the jurisdiction of courts of another Contracting State if the proceedings do not fall within Articles 1 to 14," which enumerate various exceptions to immunity.¹¹⁰ Article 5 of the draft articles on jurisdictional immunities of states and their property of the International Law Commission (ILC) provides that "[a] State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present articles."¹¹¹ Articles 10 through 17 subsequently carve out various exceptions to the general rule. In the case of the draft articles, the Drafting Committee's rapporteur, Professor Sucharitkul, stated the following about the draft articles' theoretical approach:

[T]he draft articles should begin to attempt the formulation of a basic rule of State immunity. Based upon a series of the available source materials on State practice . . . , the draft has to face two interesting sets of options. In the first place, a rule of international law on State immunity could start from the very beginning as a rule of State immunity, or it could go back beyond and before the beginning of State immunity. It could . . . regard immunity not as a rule, nor less as a general rule of law, but more appropriately . . . as an exception to a more basic rule of territorial sovereignty. . . . [T]he International Law Commission is more inclined towards cutting the Gordian knot at the beginning, and beginning with a general rule of State immunity¹¹²

Several practical reasons can help to explain why state immunity is treated as the general rule, but unfortunately they have resulted in a misleading legal framework.¹¹³ Indeed, viewing state immunity as the general rule obfuscates the reality that state immunity derives from a forum state's concession of jurisdiction and is not presumptively a right under international

¹⁰⁶ 28 U.S.C. §§1604–1605 (2000).

¹⁰⁷ H.R. REP. NO. 94-1487, at 17 [hereinafter HOUSE REPORT]. The drafters did not intend that the plaintiff should bear the burden of proving that a state was not immune, but the construction of the rule has had this effect in practice. *Cf. McDonnell Douglas Corp. v. Iran*, 758 F.2d 341, 348 (8th Cir. 1985) (noting that the "FSIA recognizes that sovereign immunity is the exception, rather than the rule . . .").

¹⁰⁸ *Libyan Arab Socialist People's Jamahiriya v. Actimon SA*, translated in 82 ILR 30, 32 (Switz. Fed. Trib. Apr. 24, 1985).

¹⁰⁹ Some scholars have approached the doctrine of foreign state immunity similarly. *See, e.g.,* BENEDETTO CONFORTI, *DIRITTO INTERNAZIONALE* 220 (5th ed. 1997) (explaining that state immunity is the rule rather than the exception).

¹¹⁰ European Convention, *supra* note 26, Art. 15.

¹¹¹ For the most recent version of the draft articles, see Report of the *Ad Hoc* Committee on Jurisdictional Immunities and Their Property, UN GAOR, 57th Sess., Supp. No. 22, annex, at 3–13, UN Doc. A/57/22 (2002), available at <<http://www.un.org/law/jurisdictionalimmunities/index.html>>. For the 1991 draft articles with commentary, see THE INTERNATIONAL LAW COMMISSION (1949–1998), at 2006–103 (Arthur Watts ed., 1999).

¹¹² Sompong Sucharitkul, *Developments and Prospects of the Doctrine of State Immunity: Some Aspects of Codification and Progressive Development*, 29 NETH. INT'L L. REV. 252, 261 (1982).

¹¹³ Other codification projects have established a similar legal framework based on a blanket rule of immunity. *See* International Law Association, Revised Draft Articles for a Convention on State Immunity, Art. II (66th Conf., 1994); Harvard Research, *supra* note 54, Art. 7. The work of the Institut de Droit International is the notable exception, enumerating criteria indicative of the competence and incompetence of the forum state in actions against foreign states. *See* Contemporary Problems Concerning the Jurisdictional Immunity of States, [1991] 2 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 214.

law, as explained above.¹¹⁴ Reversing these false presumptions about foreign state immunity is no small task. As Rosalyn Higgins has counseled, "It is very easy to elevate sovereign immunity into a superior principle of international law and to lose sight of the essential reality that it is an exception to the normal doctrine of jurisdiction."¹¹⁵ However, by understanding that "[i]t is sovereign immunity which is the exception to jurisdiction and not jurisdiction which is the exception to a basic rule of immunity,"¹¹⁶ the possibilities for meaningful and effective human rights litigation emerge. With jurisdiction as the rule and immunity as the exception, it is incumbent upon the foreign state defendant, not the individual plaintiff, to point to the rule, domestic or international, that requires immunity.

The Status of State Immunity in Relation to International Law

If, as argued above, the doctrine of foreign state immunity does not derive from a fundamental principle of international law, namely sovereign equality, then what is the status of the doctrine in relation to international law? As previously noted, there is only one comprehensive multilateral agreement that governs state immunity, the European Convention on State Immunity, which has been ratified by only a handful of countries.¹¹⁷ Thus, for the vast majority of states, state immunity is unregulated by treaty as a general matter.¹¹⁸ The next question, then, involves determining the extent to which foreign state immunity is binding on states as customary international law. The following discussion demonstrates that, although customary international law compels immunity protections as to a limited core body of state conduct, a broader range of state behavior not included in the core, such as state-sponsored human rights violations, is entitled to immunity solely as a matter of domestic law.¹¹⁹

The scope of state immunity under customary international law. What is the scope of immunity protection afforded foreign states under customary international law? From Justice Marshall's perspective in *The Schooner Exchange*, determining the extent of immune conduct under international law was a rather straightforward exercise. Viewing a state's entitlement to immunity as the exception, not the rule, he deduced readily from state practice those "peculiar circumstances" in which states had waived jurisdiction in favor of immunity. The prevailing international custom led Justice Marshall to conclude that states had waived jurisdiction in favor of the following categories of immunity: (1) the freedom of the foreign sovereign from arrest or detention, (2) the diplomatic protection of foreign ministers, (3) the free passage of friendly foreign troops, and (4) the passage of friendly warships present in the host state.¹²⁰ Immunity

¹¹⁴ As Professor Schreuer points out, both approaches may result in confusion.

If immunity is the starting point, a requirement of a positive universal practice for any restriction is bound to lead to an assertion of absolute immunity. On the other hand, if we proceed from a general rule of jurisdiction, we will find it difficult, if not impossible, to find proof of a uniform practice supporting immunity.

CHRISTOPH H. SCHREUER, *STATE IMMUNITY: SOME RECENT DEVELOPMENTS* 5 (1988). Still, weighing the options, the latter course of logic is more beneficial to the development of the doctrine of foreign state immunity because it adds more flexibility to its scope and nature.

¹¹⁵ Higgins, *supra* note 19, at 271.

¹¹⁶ *Id.*

¹¹⁷ The European Convention has been adopted by eight countries: Austria, Belgium, Cyprus, Germany, Great Britain, Luxembourg, the Netherlands, and Switzerland. The Additional Protocol to the Convention, May 16, 1972, Europ. TS No. 74A, has been ratified by six countries. For a discussion of other treaties of peripheral relation, see BRÖHMER, *supra* note 15, at 121–25.

¹¹⁸ Indeed, the Convention for the Settlement of Investment Disputes Between States and Nationals of Other States expressly provides that none of its provisions dealing with the recognition and enforcement of an ICSID arbitral award "shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution." Convention for the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, Art. 55, 17 UST 1270, 575 UNTS 159.

¹¹⁹ An exhaustive inductive study of the consistency and uniformity of state practice and the existence of *opinio juris* in this area is unfortunately not possible in an article of this length.

¹²⁰ *The Schooner Exchange*, 11 U.S. at 137–41.

for conduct falling into one of these categories was warranted because of the “mutual benefit” that such protection provides to the community of nations.¹²¹ Any state conduct that fell outside the core of immune activity did not require immunity protection.¹²²

Twentieth-century developments, however, have obscured Justice Marshall’s direct observations. As the globalization of trade and commerce increasingly brought states and private merchants into contact, many states sought to expand their entitlement to immunity beyond the strictures of customary international law so as to evade any commercial liability in a transaction gone sour.¹²³ This self-serving policy laid the foundation for the myth that states were immune from suits of all kinds.¹²⁴ In time, principles of fairness in commercial dealing prevailed and compelled the movement to restrict immunity as to a state’s commercial or private conduct, *acta jure gestionis*. The primary justification for the restrictive theory of immunity was said to be that judicial review of foreign state conduct of a commercial or private nature did not affront the dignity of the state.

Approaching the question of immunity on the basis of the *imperii/gestionis* distinction produced a metaphysical quandary: where should the line between public and private state conduct be drawn?¹²⁵ For example, is a contract between a foreign state entity and a private manufacturer for the purchase of army boots a public or private act? To simplify matters, the restrictive approach came to focus more on establishing undisputed categories of nonimmune conduct and neglected to develop firm criteria for determining immune conduct.¹²⁶ The codification movement on both the national and international levels proceeded on a similar basis. National state immunity legislation, the European Convention, and the leading codification projects enumerated detailed categories of nonimmune conduct, i.e., the “exceptions” to immunity, while leaving all other state conduct to fall under a catchall rule of immunity. As explained above, this approach inappropriately reversed the presumption of immunity in the doctrine of foreign state immunity.¹²⁷

As a result of its awkward development, the restrictive approach to immunity, as adopted by most states, draws the line between immune and nonimmune conduct at a point beyond that required by customary international law. In fact, most states afford a range of immunity protections to foreign states that exceed the demands of customary international law. Accordingly, the doctrine of foreign state immunity is currently stratified into three types of state conduct: (1) conduct that is immune by virtue of customary international law, (2) conduct that is immune solely by virtue of domestic law, and (3) conduct that is not entitled to immunity under either customary international law or domestic law.

The ICJ’s recent decision in *Arrest Warrant of April 11, 2000* provides strong evidence as to the existence and nature of the rule of state immunity under customary international law. In that case, the Democratic Republic of the Congo protested the issuance by a Belgian investigating

¹²¹ *Id.* at 136.

¹²² As obiter dictum, Marshall stated:

[I]t may safely be affirmed, that there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force, which upholds his crown, and the nation he is entrusted to govern.

Id. at 145.

¹²³ As explained, a state’s right to absolute immunity is based on a myth. See text at notes 88–95 *supra*.

¹²⁴ See text at notes 88–95 *supra*.

¹²⁵ William W. Bishop, *New United States Policy Limiting Sovereign Immunity*, 47 AJIL 93, 105 (1953).

¹²⁶ BRÖHMER, *supra* note 15, at 22 (“The question why a state should enjoy immunity for governmental acts was largely avoided.”).

¹²⁷ See text at notes 105–16 *supra*.

magistrate of “an international arrest warrant *in absentia*” against the incumbent minister for foreign affairs of the Congo, alleging violations of human rights and humanitarian law. The ICJ found that “in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.”¹²⁸ Notably, the ICJ’s conclusion squares precisely with Justice Marshall’s findings in *The Schooner Exchange* regarding the immunities of foreign ministers and thus reaffirms the status of customary international law in that area.

What is perhaps most interesting about the *Arrest Warrant* case is its rationale for an international rule of state immunity. The ICJ concluded that customary international law compels state immunity regarding foreign ministers “to ensure the effective performance of their functions on behalf of their respective States” and to “protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.”¹²⁹ The *Arrest Warrant* decision is again entirely consistent with the findings in *The Schooner Exchange*, in which Justice Marshall concluded that states waive their right to adjudicatory jurisdiction over a foreign state as to certain conduct that promotes the “mutual benefit” of the community of nations, such as the exchange of foreign ministers.¹³⁰ From these cases, a persuasive rationale for granting immunity with respect to certain state conduct emerges—a rationale that arguably is a prerequisite to establishing the *opinio juris* necessary for a rule of customary international law.¹³¹

Conversely, when state conduct fails to promote “mutual benefit” among nations, the international law status of a rule that immunizes such conduct is dubious at best. Two examples from U.S. case law underscore this point. In *Letelier v. Republic of Chile* and *Liu v. Republic of China*, U.S. courts found that assassinations by foreign government agents committed in the United States were not “discretionary” state conduct within the meaning of the FSIA and thus fit into the FSIA’s exception to immunity for torts committed in U.S. territory.¹³² Under a strict application of the *imperii/gestionis* distinction, such conduct, i.e., state-sanctioned assassination, would be immune by virtue of its official mandate.¹³³ However, in *Letelier* and *Liu* the courts did not identify a rule of international law that required immunity where the state conduct in question was “clearly contrary to the precepts of humanity as recognized in both national and international law.”¹³⁴

¹²⁸ *Arrest Warrant*, *supra* note 23, para. 51; *see also id.*, para. 54 (concluding, on the basis of customary international law, that “the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability”).

¹²⁹ *Id.*, paras. 53, 54.

¹³⁰ *The Schooner Exchange*, 11 U.S. at 136.

¹³¹ Courts and commentators typically ascertain customary international law on the basis of two traditional elements, the general practice of states and *opinio juris*. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14 (June 27); *Continental Shelf (Libya/Malta)*, 1985 ICJ REP. 13, 29 (June 3). According to the ninth edition of Oppenheim, “A custom is a clear and continuous habit of doing certain actions which has grown up under the aegis of the conviction that these actions are, according to international law, obligatory or right.” OPPENHEIM, *supra* note 6, at 27. Professor Hudson explains: “The elements necessary are the concordant and recurring action of numerous States in the domain of international relations, the conception in each case that such action was enjoined by law, and the failure of other States to challenge that conception at the time.” MANLEY O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, 1920–1942, at 609 (1943); *see also* Luigi Condorelli, *Custom*, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS, *supra* note 54, at 179, 187.

The first element, state practice, represents the objective element of the test: a rule of international law exists only if reflected in the general practice of states. AKEHURST, *supra* note 6, at 39. The latter element, *opinio juris*, represents the test’s subjective element: in addition to conforming to state practice, a state must feel compelled to do so by an international law obligation. *Id.* at 44 (describing *opinio juris* as the “psychological element” of the test).

¹³² *Letelier v. Republic of Chile*, 488 F.Supp. 665, 673 (D.D.C. 1980); *Liu v. Republic of China*, 642 F.Supp. 297, 305 (N.D. Cal. 1986).

¹³³ *See* SCHREUER, *supra* note 114, at 47.

¹³⁴ *Letelier*, 488 F.Supp. at 673; *Liu*, 642 F.Supp. at 305 (quoting *Letelier*). *Prefecture of Voiotia*, discussed in detail in text at notes 279–86 *infra*, reaches the same conclusion.

The 1996 amendment to the FSIA¹³⁵ further evidences that customary international law does not immunize detrimental state conduct. The 1996 amendment creates an additional category of nonimmune conduct as to a limited range of acts committed by states designated by the U.S. government as "state sponsors of terrorism."¹³⁶ The amendment applies to actions by or on behalf of U.S. citizens that allege "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 acts.¹³⁷ The provision flatly rejects the traditional *imperii/gestionis* distinction in its application to conduct that "is engaged in by an official, employee, or agent of such foreign state *while acting within the scope of his or her office, employment, or agency*."¹³⁸ Notably, although the U.S. government expressed opposition to the 1996 amendment in a previous form, it never asserted that curtailing immunity for state conduct that violates human rights would constitute a breach of international law.¹³⁹

To summarize: It is established that customary international law mandates immunity as to a core body of state conduct. However, because of the awkward development of the theory of restrictive immunity, insufficient attention has been paid to defining the exact content of this core as it has developed since Justice Marshall's assessment in 1812. In fact, the prevailing approach to state immunity obscures the reach of the international rule of state immunity by establishing a false presumption of immunity and creating a catchall category for immune conduct. As a consequence, the current formulation of the doctrine of foreign state immunity, as adopted by most states, the European Convention, and the leading codification projects,¹⁴⁰ grants foreign states more immunity privileges than customary international law dictates.

Emerging consensus regarding restrictive immunity. For much of the last century, state immunity practice has been starkly divided between two groups of nations: countries that have favored the theory of restrictive immunity, mainly the Western capitalist countries; and countries that have clung to the theory of absolute immunity, mainly the Communist and socialist countries. Recent developments indicate that the gap between absolutist and restrictivist states is narrowing. The collapse of the Soviet empire has brought about great social and political changes in Eastern Europe, which have slowly influenced state immunity practice in the formerly Communist countries. The development of market economies and the participation in global commerce by the former Soviet countries, especially Russia, have strained the utility of the doctrine of absolute immunity and undoubtedly will cause a policy shift toward restrictive immunity.¹⁴¹ Evidence suggests that even the People's Republic of China, a staunch supporter

¹³⁵ 28 U.S.C. §1605(a) (7) (2000). The amendment was promulgated as §221 of the Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, §221, 110 Stat. 1214, 1241 (1996).

¹³⁶ 28 U.S.C. §1605(a) (7). At the time of this writing, Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria were so designated. U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM: 2002, at 76 (2003), available at <<http://www.state.gov/s/ct>>.

¹³⁷ 28 U.S.C. §1605(a) (7).

¹³⁸ *Id.* (emphasis added).

¹³⁹ *The Foreign Sovereign Immunities Act: Hearing on S.825 Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary*, 103d Cong. 8, 10 (1994) (testimony of Stuart Schiffer, deputy assistant attorney general, Civil Division, U.S. Dep't of Justice, and Jamison S. Borek, deputy legal adviser, U.S. Dep't of State).

¹⁴⁰ *But see supra* note 113 (describing the work of the Institut de Droit International).

¹⁴¹ Daniel J. Michalchuk, *Filling a Legal Vacuum: The Form and Content of Russia's Future State Immunity Law: Suggestions for Legislative Reform*, 32 LAW & POL'Y INT'L BUS. 487, 497 (2001) ("With Russia's emergence as a market economy, the theoretical and ideological foundations for an absolute approach to state immunity no longer exist in the Russian Federation."). New constitutional regimes in the former Soviet republics will also permit a greater role for international law in domestic systems by including constitutional provisions similar to those of the civil law systems of Western Europe. See Gennady M. Danilenko, *Implementation of International Law in CIS States: Theory and Practice*, 10 EUR. J. INT'L L. 51 (1999); Gennady M. Danilenko, *The New Russian Constitution and International Law*, 88 AJIL 451 (1994); Oleg Tiunov, *The Constitution Court of the Russian Federation and International Law*, in LIBER AMICORUM BENGT BROMS 627 (Mattu Tupamäki ed., 1999). See generally CONSTITUTIONAL REFORM AND INTERNATIONAL LAW IN CENTRAL AND EASTERN EUROPE (Rein Müllerson, Malgosia Fitzmaurice, & Mads Andenæs eds., 1998).

of absolute immunity, may be moderating its position.¹⁴² Such tendencies, while not yet etched in stone, show that the gap between absolutist and restrictivist practice may be as narrow today as it has ever been.¹⁴³

Still, setting aside the narrowing of the absolute/restrictive immunity split, one finds a myriad of substantive variations in national approaches to state immunity law. While each and every variation cannot possibly be addressed here, one significant example is revealing. The FSIA, for instance, instructs U.S. courts to look at the “nature” and not the “purpose” of a foreign state defendant’s conduct in order to determine whether such conduct is commercial or public in nature and, thus, whether it is immune or nonimmune from suit.¹⁴⁴ French courts, by contrast, appear to place more emphasis on the purpose of the operative state act, instead of its nature. The Cour de cassation, France’s highest court, held that foreign states may be entitled to immunity not only for *acta jure imperii*, but also for acts performed in the interest of public service.¹⁴⁵ Thus, the real possibility exists that U.S. and French courts may draw the line between immune and nonimmune foreign state conduct in very different places.¹⁴⁶

Accordingly, James Crawford’s earlier observation that the distinction between immune and nonimmune state conduct is drawn less by international law and more by national laws is equally relevant today.¹⁴⁷ Hazel Fox similarly posits that while there is a clear trend “away from an absolute doctrine to a restrictive doctrine, . . . the absence of a universal convention and the diversity of State practice . . . produce[] extraordinary complexity and variety in the emerging rules.”¹⁴⁸ Such significant variations in national practice have led another state immunity scholar, Joseph Dellapenna, to conclude his comparative study of immunity practice in the United Kingdom, France, and Germany with the following words:

All these countries, in grappling with the need to constrain the actions of sovereigns by the rule of law, have developed roughly similar responses that are collectively described by the rubric of the “restrictive theory of foreign state immunity.” *A closer examination of the details of the several approaches to foreign state immunity . . . demonstrates, however, that consensus exists only at a rather high level of abstraction.*¹⁴⁹

Because the doctrine of foreign state immunity is a mix of international law and domestic law, the reach of restrictive immunity, i.e., the extent to which states are not immune, may or may not be an international law question. Indeed, the nature of the inquiry depends on whether the core of immune conduct is implicated. In the *Arrest Warrant* case, for example, the ICJ addressed the scope of a sitting foreign minister’s immunities, a category of state conduct that

¹⁴² Compare Zhengyu Ni, *supra* note 68, and Jill A. Sgro, Comment, *China’s Stance on Sovereign Immunity: A Critical Perspective on Jackson v. People’s Republic of China*, 22 COLUM. J. TRANSNAT’L L. 101 (1983), with Guiguo Wang, *China’s Attitude Towards State Immunity—An Eastern Approach*, in JAPAN AND INTERNATIONAL LAW: PAST, PRESENT AND FUTURE 153, 171–72 (Nisuke Ando ed., 1999) (speculating that the People’s Republic of China would abide by the International Law Commission’s draft articles on state immunity since its chairman, Shi Jiuyong, is a representative of the PRC government).

¹⁴³ Opinion is still in great flux. See Hazel Fox, A “Commercial Transaction” Under the State Immunity Act 1978, 43 INT’L & COMP. L.Q. 193, 193 (1994) (“[U]nlike the Soviet Union, members of the CIS and Central European States have indicated support for a restrictive rule, although the People’s Republic of China and some Latin American States remain in favour of absolute immunity.”).

¹⁴⁴ 28 U.S.C. §1603(d) (2000). For a summary of the long struggle to distinguish public from private acts, see JOSEPH W. DELLAPENNA, *SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS* 148–52 (1988).

¹⁴⁵ Cass. 1e civ., May 2, 1990, Bull. civ. I, No. 9. For a discussion of the implications of this case, see BRÖHMER, *supra* note 15, at 110; Klaus Gahrnski, *Staatenimmunität im Erkenntnisverfahren—die französische Rechtsprechung im internationalen, insbesondere deutschen Vergleich*, 12 IPRAX 55 (1992).

¹⁴⁶ Recognizing the varying practices of states in this regard, the International Law Commission proposed draft Article 3(2), see *supra* note 111, which incorporates both aspects into the test for a commercial transaction. D.W. Greig, *Forum State Jurisdiction and Sovereign Immunity Under the International Law Commission’s Draft Articles*, 38 INT’L & COMP. L.Q. 243, 256–57 (1989).

¹⁴⁷ Crawford, *supra* note 19, at 77–78.

¹⁴⁸ FOX, *supra* note 15, at 127; see also Fox, *supra* note 143, at 194.

¹⁴⁹ Joseph W. Dellapenna, *Foreign State Immunity in Europe*, 5 N.Y. INT’L L. REV. 51, 61 (1992) (emphasis added).

clearly touches upon established customary international law matters. In contrast, in the *Letelier* and *Liu* cases, U.S. courts examined state conduct, namely assassination, that clearly falls outside the core body of immune conduct. Thus, the issue of immunity was decided solely as a matter of domestic law, and customary international law played no role in the analysis.

The conceptual divide between the civil law and common law countries. The mixed character of the doctrine of foreign state immunity has produced varying emphasis on its component parts in the civil law and common law systems, respectively. A review of the literature from the civil law and common law countries reveals starkly divergent views on the roles that international law and domestic law play in formulating state immunity policy. On the one side, the civil law countries deem state immunity generally to be a principle of customary international law that must be applied domestically by national courts. On the other side, the common law countries place more emphasis on regulating state immunity through domestic legislation, not customary international law.¹⁵⁰

Even a brief look at the civil law literature shows that these countries are firmly committed to the notion that state immunity originates in customary international law. Regarding state immunity, Antonio Cassese writes that "limitations are imposed upon State sovereignty by customary rules."¹⁵¹ Jürgen Bröhmer also writes: "The law of state immunity as it now stands as a customary rule of international law is commonly based and justified on various general principles of international law."¹⁵² Professors Cassese and Bröhmer, like other civil law scholars, appear to accept state immunity's status as international custom as a given.¹⁵³

The rationale for the civil law position largely derives from two factors: (1) the civil law constitutional design; and (2) the lack of national immunity legislation in many civil law countries.¹⁵⁴ The Italian experience is illustrative. The Italian Constitution, like many civil law constitutions, includes a broad and binding mandate regarding national compliance with international law. Article 10 of the Italian Constitution states: "The Italian legal system shall conform with the generally recognized rules of international law."¹⁵⁵ This provision not only endows Italian judges with the power to ensure national compliance with international law, but also imposes a constitutional obligation to do so. Thus, Italian courts, like most civil law courts, are generally inclined to view themselves as the chief interpreters and enforcers of international law.¹⁵⁶

¹⁵⁰ There are a few exceptions. Argentina, a civil law country, recently enacted national state immunity legislation. Law No. 24488 (Inmunidad jurisdiccional de los Estados extranjeros ante los Tribunales argentinos), June 22, 1995, BOLETIN OFICIAL, June 28, 1995, at 1. In Ireland, a common law country, the Supreme Court, in *McElhinney v. Secretary of State*, felt compelled to draw on customary international law since Ireland had not enacted national immunity legislation. [1996] 1 I.L.R.M. 276.

¹⁵¹ ANTONIO CASSESE, INTERNATIONAL LAW 91 (2001).

¹⁵² BRÖHMER, *supra* note 15, at 9.

¹⁵³ See *id.*; DAMIAN, *supra* note 48, at 10; see also CASSESE, *supra* note 151, at 91; CONFORTI, *supra* note 109, at 226–27; RESS, *supra* note 24, at 177; Anna Wyrozumska, *The State Immunity in the Practice of Polish Courts*, 1999–2000 POLISH Y.B. INT'L L. 77, 92, 94. But see JENÖ C. A. STAEHELIN, DIE GEWOHNHEITSRECHTLICHE REGELUNG DER GERICHTSBARKEIT ÜBER FREMDE STAATEN IM VÖLKERRECHT 99–128 (1969) (arguing that foreign state immunity is regulated by the municipal law of the forum state only).

¹⁵⁴ See, however, the Argentine law, *supra* note 150.

¹⁵⁵ COST. Art. 10, first sentence ("L'ordinamento giuridico italiano si conforma alle norme del diritto internazionale generalmente riconosciute"). For similar provisions, see Article 25 of the German Constitution, Article 20(1) of the Danish Constitution, Article 93 of the Spanish Constitution, Article 28 of the Greek Constitution, and Article 8(1) of the Portuguese Constitution. For a general discussion, see Vladlen S. Vereshchetin, *New Constitutions and the Old Problem of the Relationship Between International Law and National Law*, 7 EUR. J. INT'L L. 29 (1996).

¹⁵⁶ This point has been made effectively by one of Italy's eminent scholars, Professor Conforti:

[T]he truly legal function of international law essentially is found in the internal legal systems of States. Only through what we could term "domestic legal operators" can we describe the binding character of international law or, better still, its ability to be implemented in a concrete and stable fashion. . . . [C]ompliance with international law relies not so much on enforcement mechanisms available at the international level, but rather on the resolve of domestic legal operators such as public servants and judges to use to their limits the mechanisms provided by municipal law to ensure compliance with international norms. In other words, the sprawling body of international rules, pervasive in all sectors of the political, economic and social life of each State and between States, but lacking in judicial and coercive enforcement procedures at the international

Combined with the lack of immunity legislation in many civil law countries, this constitutional obligation has given rise to the belief that state immunity law derives from customary international law.¹⁵⁷ According to one civil law scholar, there can be no other possible origin.¹⁵⁸ Indeed, the Italian Corte di cassazione in the *Pieciukiewicz* case declared that the doctrine of state immunity is rooted in a “customary principle” that “comes under the purview of Article 10(1)” of the Italian Constitution.¹⁵⁹

In contrast, the common law countries tend to perceive state immunity as more a product of domestic law, although originally this was not the case. In *The Schooner Exchange*, as seen, Justice Marshall looked to international custom to determine the scope of entitlement to foreign state immunity.¹⁶⁰ However, since that early time, the common law approach has changed dramatically owing in large part to an influential article published in 1951 by Hersch Lauterpacht entitled *The Problem of Jurisdictional Immunities of Foreign States*.¹⁶¹ In that publication, the English scholar made the then-provocative declaration that there was “no rule of international law which obliges states to grant jurisdictional immunity to other states.”¹⁶² In support, Professor Lauterpacht relied on two points of evidence. First, he noted that during the twentieth century when the prevailing rule of absolute immunity began to lose its force, “international practice show[ed] no frequent instances of protests against assumption of jurisdiction, including execution, over foreign states.”¹⁶³ Second, Lauterpacht cited the fact that many states granted immunity privileges on the basis of reciprocity and added that “[s]tates do not make the observance of established rules of international law dependent upon reciprocity.”¹⁶⁴ Free from the constraints of international law, Lauterpacht went on to establish the “assimilative approach” to state immunity, according to which a state is immune from suit only to the extent that the host state enjoys immunity before its own courts.¹⁶⁵

Upon assessing the development of state immunity law more than twenty-five years later, Professor Brownlie, in the third edition of his treatise, observed: “it is difficult as yet to see a new principle which would satisfy the criteria of uniformity and consistency required for the formation of a rule of customary international law.”¹⁶⁶ Brownlie suggested a “fresh approach” to state immunity:

level, can be implemented only insofar as the basic values shared by all people irrespective of nationalities are reflected by the domestic operators of all countries.

BENEDETTO CONFORTI, INTERNATIONAL LAW AND THE ROLE OF DOMESTIC LEGAL SYSTEMS 8–9 (1993).

¹⁵⁷ The presence or absence of national immunity legislation is also significant. See the example of *McElhinney v. Secretary of State*, *supra* note 150.

¹⁵⁸ In the context of the immunities of international organizations, one scholar has written: “The absence of a specific statute on the immunity of international organizations compels Italian courts to decide such issues on the basis of international law.” Andrea Bianchi, Book Review, 88 AJIL 212, 212 (1994) (reviewing SAVERIO DE BELLIS, *L’IMMUNITÀ DELLE ORGANIZZAZIONI INTERNAZIONALI DALLA GIURISDIZIONE* (1992)).

¹⁵⁹ *Pieciukiewicz*, *supra* note 52, 78 ILR at 121. Similarly, the Greek Supreme Court stated: “We ascertain the general practice of the nations of the international community, which is accepted as custom, that is, [we ascertain] the formation of international custom, which is, according to article 28, paragraph 1 of the Constitution, an integral part of the [Greek] domestic legal order, superseding any statutory provision to the contrary.” Greek Judgment II, *supra* note 15, at 7. Scholars have echoed this proposition. See sources cited *supra* note 153.

¹⁶⁰ In noting states’ consent to a relaxation of absolute jurisdiction, see text at note 65 *supra*, Justice Marshall added that “[t]his consent may, in some instances, be tested by *common usage*, and by *common opinion*, growing out of *that usage*.” 11 U.S. at 136 (emphasis added).

¹⁶¹ Lauterpacht, *supra* note 27. According to one leading commentator on state immunity, Lauterpacht’s essay “had a strong stimulative effect in the United States.” Address by Monroe Leigh, in INTERNATIONAL LAW ASSOCIATION, STATE IMMUNITY: LAW AND PRACTICE IN THE UNITED STATES AND EUROPE 3, 3 (Proceedings of a conference held on Nov. 17, 1978).

¹⁶² Lauterpacht, *supra* note 27, at 228.

¹⁶³ *Id.* at 227.

¹⁶⁴ *Id.* at 228.

¹⁶⁵ *Id.* at 236–41.

¹⁶⁶ See BROWNIE (3d), *supra* note 66, at 333; see also Higgins, *supra* note 19, at 271.

The concepts of sovereign immunity . . . , the exclusive jurisdiction of the state within its own territory, and the need for an express licence for a foreign state to operate within that national jurisdiction . . . , can be taken as starting points. Each state has an existing power, subject to treaty obligations, to exclude foreign public agencies, including even diplomatic representation. If a state chooses, it would enact a law governing immunities of foreign states which would enumerate those acts which would involve acceptance of the local jurisdiction.¹⁶⁷

After citing as examples of such acts the conclusion of contracts subject to private law and consent to arbitration, Brownlie proposed that foreign trade partners of the host state be notified about the new legislation, which would take effect after sufficient time to allow them to withdraw, and that rights under such agreements could be reserved. He continued:

States would thus be given a licence to operate within the jurisdiction with express conditions and the basis of sovereign immunity, as explained in the *Schooner Exchange*, would be observed. Such a legal regime would be subject to the inevitable immunity *ratione materiae* . . . , and the principles of international law as to jurisdiction. The approach suggested would avoid the difficulties of the distinction between acts *jure gestionis* and acts *jure imperii*.¹⁶⁸

Thus, Brownlie, like Lauterpacht, suggested that the doctrine of immunity was not a rule of customary international law.

Lauterpacht and other commentators who agreed with him influenced the contemporary common law view of state immunity.¹⁶⁹ Indeed, Monroe Leigh, the FSIA's chief architect, stated that in the years leading up to the U.S. change in policy from the absolute to the restrictive approach to immunity, "there was no agreement among the students of international law as to whether Sovereign Immunity was a principle of customary international law or merely a matter of comity between nations."¹⁷⁰ Consequently, when reforming U.S. state immunity policy in the 1970s, the drafters of the FSIA undoubtedly felt free to operate on the basis that, save for a limited area of immunity law governed primarily by treaty, "the entire field is open to definition by domestic law."¹⁷¹ That several common law countries followed the U.S. lead and enacted their own domestic immunity legislation reflects broad consensus on this matter.¹⁷²

The distinct perspectives of the civil law and common law countries regarding the source of state immunity law have yielded divergent approaches to solving the human rights litigation problem. The civil law countries, with their emphasis on international law, are arguably

¹⁶⁷ BROWNLIE (3d), *supra* note 66, at 334 (internal references omitted).

¹⁶⁸ *Id.* (footnotes and internal reference omitted). Professor Brownlie reaffirmed his doubts as to the existence of a customary rule of foreign state immunity more recently. *Id.* (5th), *supra* note 6, at 332–33.

¹⁶⁹ Another scholar well versed in the common law concluded a significant study on state immunity practice by stating: "[I]t has become difficult to say whether State immunity is a question of customary international law, of treaty law or of domestic law." SCHREUER, *supra* note 114, at 4. Some common law scholars, however, have disagreed with Lauterpacht and Brownlie. The American Law Institute, for example, maintains that "[t]he immunity of a state from the jurisdiction of the courts of another state is an undisputed principle of customary international law." RESTATEMENT, *supra* note 28, ch. 5 Introductory Note, at 390. Professor Jennings has posited:

[I]t is difficult to see how immunity can be denied the status of a rule of international law when certain constituents of the same general principle—e.g. the immunity enjoyed by visiting heads of State, or foreign warships in port, as well as on the seas—have all the marks of firm and general public international law. Diplomatic immunities,—of those who represent the sovereign, and which immunities can be waived by him—have recently been confirmed as rules of international law by the International Court of Justice.

JENNINGS, *supra* note 70, at 4–5; see also FOX, *supra* note 15, at 68–70.

¹⁷⁰ Leigh, *supra* note 161, at 4.

¹⁷¹ Mark B. Feldman, *The United States Foreign Sovereign Immunities Act of 1976: A Founder's View*, 35 INT'L & COMP. L.Q. 302, 302 (1986).

¹⁷² Professor Badr compiled a collection of many of these statutes. BADR, *supra* note 16, appendices, at 169. But see Andrea Bianchi, *Denying State Immunity to Violators of Human Rights*, 46 AUS. J. PUB. & INT'L L. 195, 197 (1994) ("The fact that the rulings of domestic courts have shaped the developments of state immunity and that, recently, some states have passed legislation on the subject, does not infringe upon the international nature of the rule.").

more inclined to address human rights issues on the international law level and thus more receptive to approaches like the normative hierarchy theory.¹⁷³ The common law countries, with their skepticism about state immunity's broad reach under international law, generally prefer to regulate state immunities through the application of domestic legislation.¹⁷⁴ While the merits of each approach are debatable, the civil law perspective has created, as explained below, a propensity for adopting the normative hierarchy theory and thus unnecessarily complicates resolution of the human rights litigation problem.

II. THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND STATE IMMUNITY

In light of the discussion in part I, one must measure the normative hierarchy theory against two fundamental legal realities: (1) state immunity arises not out of a fundamental right of statehood but, rather, out of the concession of a forum state's right of adjudicatory jurisdiction; and (2) foreign states are not entitled to immunity under customary international law as to most, if not all, activity that constitutes human rights offenses.¹⁷⁵ The common thread running through both observations (and the crucial point that the normative hierarchy theory overlooks) is that the forum state, not the foreign state defendant, holds the authority to regulate the scope and content of the state immunity privilege. Part II presents a summary of the normative hierarchy theory, as developed in the American and European contexts, and then turns to a substantive critique of the theory.

The Anatomy of the Normative Hierarchy Theory

The American approach. The normative hierarchy argument had its genesis in the United States. The notion that foreign sovereign immunity might be trumped by superior international law norms first emerged as a reaction to the U.S. Supreme Court's decision in *Argentine Republic v. Amerasia Shipping Corp.*¹⁷⁶ In that case, the plaintiffs sued in tort to reclaim losses arising out of the unprovoked bombing of an oil tanker on the high seas by the government of Argentina, allegedly a violation of international law.¹⁷⁷ The Court ruled that the FSIA was "the sole basis for obtaining jurisdiction over a foreign state" in U.S. courts.¹⁷⁸ Moreover, the Court held that American courts may hear suits against foreign states only where Congress has explicitly provided a statutory exception to the FSIA's general rule of immunity.¹⁷⁹ A suit involving an armed attack against a ship on the high seas was not one over which Congress had intended the courts to exercise jurisdiction, the Court found, and thus it rejected the plaintiffs' claim.¹⁸⁰

¹⁷³ *Prefecture of Voiotia v. Federal Republic of Germany*, the only case to adopt the normative hierarchy theory, originated in a civil law country, Greece.

¹⁷⁴ Accordingly, the statement by the Swiss Federal Tribunal that a "state cannot be brought before the courts of another state except in exceptional circumstances" is inaccurate. See text at note 108 *supra*.

¹⁷⁵ Such claims would also have to fall within the forum state's right to exercise adjudicatory jurisdiction with respect to them.

¹⁷⁶ 488 U.S. 428 (1989).

¹⁷⁷ *Id.* at 431.

¹⁷⁸ *Id.* at 434. Accordingly, the Court rejected each of the plaintiffs' proposed bases of jurisdiction: the U.S. Alien Tort Statute, 28 U.S.C. §1350, general admiralty and maritime jurisdiction, 28 U.S.C. §1333, and the principle of universal jurisdiction under customary international law.

¹⁷⁹ *Id.* at 434–35. The Court noted that Congress had clearly addressed international law violations in 28 U.S.C. §1605(a)(3), which denies foreign states immunity in cases "in which rights in property taken in violation of international law are in issue." *Id.* at 435–36.

¹⁸⁰ The plaintiffs argued to no avail that the facts of the case triggered the FSIA's noncommercial torts exception, §1605(a)(5), and that the Argentine government's ratification of certain treaties regulating state conduct on the high seas triggered §1604, the "international agreements" exception. *Id.* at 439–43. Some have argued that, while not a formal exception to immunity under the FSIA, the international agreements exception is a mechanism for denying a state immunity for violations of international law. See, e.g., *Von Dardel v. Union of Soviet Socialist Republics*, 623 F.Supp. 246, 255–56 (D.D.C. 1985); Jordan J. Paust, *Draft Brief Concerning Claims to Foreign Sovereign Immunity and Human Rights: Nonimmunity for Violations of International Law Under the FSIA*, 8 HOUS. J. INT'L L. 49, 61–65 (1985).

The Court's restrictive interpretation of the FSIA's exceptions to immunity prompted a group of three law students to publish an inventive Comment in 1991 entitled *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*.¹⁸¹ The authors propose that states lose all entitlement to state immunity under international law when they injure individuals in violation of *jus cogens* norms. Their theory starts from the premise that, following the Nuremberg trials, the structure of international law changed; in particular, the "rise of *jus cogens*" placed substantial limitations on state conduct in the name of peaceful international relations.¹⁸² Indeed, "[b]ecause *jus cogens* norms are hierarchically superior to the positivist or voluntary laws of consent, they absolutely restrict the freedom of the state in the exercise of its sovereign powers."¹⁸³

This conclusion has ramifications for the doctrine of state immunity, the authors argue. Their theory turns on the assumption that state immunity is a product of state sovereignty, resting "on the foundation that sovereign states are equal and independent and thus cannot be bound by foreign law without their consent."¹⁸⁴ Since state immunity is not a peremptory norm, when invoked in defense of a violation of *jus cogens*, it must yield to "the 'general will' of the international community of states."¹⁸⁵ Accordingly,

[b]ecause *jus cogens*, by definition, is a set of rules from which states may not derogate, a state act in violation of such a rule will not be recognized as a sovereign act by the community of states, and the violating state therefore may not claim the right of sovereign immunity for its actions.¹⁸⁶

In causing harm to an individual in violation of *jus cogens*, a state may no longer raise an immunity defense because the state may be regarded as having implicitly waived any entitlement to immunity.¹⁸⁷ To give domestic effect to this waiver in U.S. courts, the authors point to section 1605(a)(1) of the FSIA, which empowers the exercise of district court jurisdiction in cases in which a state "has waived its immunity either explicitly or *by implication*."¹⁸⁸

While the implied waiver argument has never formed the basis of a legal decision in U.S. courts, it has not lacked influence on U.S. judges.¹⁸⁹ In *Siderman de Blake v. Republic of Argentina*,¹⁹⁰ the U.S. Court of Appeals for the Ninth Circuit accepted the argument's basic premise. The case involved the alleged torture of an Argentine citizen and expropriation of property by Argentine military officials.¹⁹¹ Following the logic of the implied waiver theory, the plaintiffs argued that *jus cogens* trumps foreign state immunity, resulting in the defendant's loss of immunity for torturing the victim, José Siderman.¹⁹² The court determined that Argentina was not immune from suit because Argentina had waived its entitlement to immunity under section 1605(a)(1) of the FSIA by involving itself in U.S. legal proceedings,¹⁹³ but in dicta it echoed the

¹⁸¹ Adam C. Belsky, Mark Merva, & Naomi Roht-Arriaza, Comment, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CAL. L. REV. 365 (1989).

¹⁸² *Id.* at 381, 385–89.

¹⁸³ *Id.* at 386.

¹⁸⁴ *Id.* at 390.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 377.

¹⁸⁷ *Id.* at 394.

¹⁸⁸ 28 U.S.C. §1605(a)(1) (emphasis added).

¹⁸⁹ The closest that a U.S. court has come was in *Von Dardel v. Union of Soviet Socialist Republics*, in which the court concluded, on the basis of the FSIA's "international agreements" exception, that the Soviet Union could not claim immunity for certain acts that constituted breaches of treaties to which the Soviet Union was a party. 623 F.Supp. 246, 256 (D.D.C. 1985).

¹⁹⁰ 965 F.2d 699 (9th Cir. 1992) (citing Belsky et al., *supra* note 181).

¹⁹¹ *Id.* at 702–04.

¹⁹² *Id.* at 714–19.

¹⁹³ *Id.* at 719–23.

plaintiff's arguments, stating that "[a] state's violation of the *jus cogens* norm prohibiting official torture therefore would not be entitled to the immunity afforded by international law."¹⁹⁴

The normative hierarchy argument again received substantial consideration in *Princz v. Federal Republic of Germany*,¹⁹⁵ a case involving claims of personal injury and forced labor arising from the plaintiff's imprisonment in Nazi concentration camps. In *Princz*, the U.S. Court of Appeals for the District of Columbia denied the plaintiff's claims, specifically rejecting the normative hierarchy argument.¹⁹⁶ Judge Patricia Wald, however, advocated its application in an impassioned dissent. "Germany waived its sovereign immunity by violating the *jus cogens* norms of international law condemning enslavement and genocide," she wrote.¹⁹⁷ To support this conclusion, Judge Wald contended: "*Jus cogens* norms are by definition nonderogable, and thus when a state thumbs its nose at such a norm, in effect overriding the collective will of the entire international community, the state cannot be performing a sovereign act entitled to immunity."¹⁹⁸ Judge Wald considered the waiver of immunity to be a fact of international law and thus urged that the FSIA's waiver provision be construed consistently, so as to allow plaintiffs to sue states for violations of *jus cogens*.¹⁹⁹

Though never formally accepted as the basis for judicial decision in U.S. courts, the normative hierarchy theory continues to spark interest among jurists and scholars alike. Plaintiffs suing under the FSIA for alleged human rights violations continually press for its application.²⁰⁰ Numerous scholars and international law commentators have also become engaged in the debate over the validity of the normative hierarchy theory.²⁰¹ However, the current position of U.S. courts to interpret the FSIA's implied waiver provision strictly is likely to incapacitate the normative hierarchy theory from amending U.S. state immunity policy.

*The contribution of continental Europe.*²⁰² Though it originated in the United States, the normative hierarchy theory has had a substantial impact in the countries of continental

¹⁹⁴ *Id.* at 718.

¹⁹⁵ 26 F.3d 1166 (D.C. Cir. 1994).

¹⁹⁶ The majority's decision against the plaintiff turned on the determination that the "*jus cogens* theory of implied waiver is incompatible with the intentionality requirement implicit in §1605(a)(1)," the waiver exception. *Id.* at 1174.

¹⁹⁷ *Id.* at 1179 (Wald, J., dissenting).

¹⁹⁸ *Id.* at 1182.

¹⁹⁹ *Id.* at 1183–84.

²⁰⁰ In *Smith v. Socialist People's Libyan Arab Jamahiriya*, the court intimated acceptance of the normative hierarchy theory, stating:

[W]e conclude that Congress's concept of an implied waiver, as used in the FSIA, cannot be extended so far as to include a state's existence in the community of nations—a status that arguably should carry with it an expectation of amenability to suit in a foreign court for violations of fundamental norms of international law.

101 F.3d 239, 244 (2d Cir. 1996). Plaintiffs continue to raise the normative hierarchy theory in U.S. courts. *See, e.g.,* Boshnjaku v. Federal Republic of Yugoslavia, 2002 WL 1575067 (N.D. Ill. July 18, 2002); Garb v. Republic of Poland, 207 F.Supp.2d 16 (E.D.N.Y. 2002); Abrams v. Societe Nationale des Chemins de Fer Francais, 175 F.Supp.2d 423 (E.D.N.Y. 2001); Joo v. Japan, 172 F.Supp.2d 52 (D.D.C. 2001); *In re World War II Era Japanese Forced Labor Litigation*, 164 F.Supp.2d 1160 (N.D. Cal. 2001); Hirsh v. State of Israel, 962 F.Supp. 377 (S.D.N.Y. 1997).

²⁰¹ The theory has received considerable support among American scholars. *See* Bederman, *supra* note 47, at 282; William Pepper, *Iraq's Crimes of State Against Individuals, and Sovereign Immunity*, 18 BROOK. J. INT'L L. 313 (1992); 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); *see also* KENNETH RANDALL, *FEDERAL COURTS AND THE INTERNATIONAL HUMAN RIGHTS PARADIGM* (1990); 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 State Doctrine*, 23 VA. J. INT'L L. 191 (1983). A number of student-written notes have also supported the theory. *See, e.g.,* Joseph G. Bergen, Note, *Princz v. The Federal Republic of Germany: Why the Courts Should Find That Violating Jus Cogens Norms Constitutes an Implied Waiver of Sovereign Immunity*, 14 CONN. J. INT'L L. 169 (1999); Thora A. Johnson, Note, *A Violation of Jus Cogens Norms as an Implicit Waiver of Immunity Under the Federal Sovereign Immunities Act*, 19 MD. J. INT'L L. & TRADE 259 (1995); Scott A. Richman, Comment, *Siderman de Blake v. Republic of Argentina: Can the FSIA Grant Immunity for Violations of Jus Cogens Norms?* 19 BROOK. J. INT'L L. 967 (1993).

²⁰² This heading is not meant to imply that no consideration of the relationship between human rights and foreign state immunity has occurred outside the United States and Europe. *See, e.g.,* Garnett, *supra* note 24, at 121 (stating that it is "unlikely that an Australian court would be prepared to recognise an implied exception to immunity for *jus cogens* violations in the Australian [State Immunity] Act"); Niranjini Vivekananthan, *The Doctrine of State Immunity & Human Rights Violations of Foreign States*, 8 SRI LANKA J. INT'L L. 125 (1996) (supporting the normative hierarchy theory).

Europe.²⁰³ For instance, in his treatise on public international law, Professor Cassese writes that “peremptory norms [or *jus cogens*] may impact on *State immunity from the jurisdiction of foreign States*, in that they may remove such immunity.”²⁰⁴ In support, he cites, among other sources, Judge Wald’s dissent in *Prinz v. Federal Republic of Germany*.²⁰⁵ Professor Bianchi states that “[r]eliance on the hierarchy of norms in the international legal system is a viable argument to assert non-immunity for major violations of international human rights.”²⁰⁶ The European brand of the theory is nearly identical in concept to its American predecessor: because *jus cogens*, a primary norm, is hierarchically superior to state immunity, a secondary norm, a foreign state is not immune for violations of human rights norms of a peremptory nature.

Where the European approach distinguishes itself is in its potential to affect national state immunity policy. Since the civil law countries of continental Europe have not enacted national immunity legislation and many of their constitutional systems oblige national courts to look to international law for guidance on foreign state immunity,²⁰⁷ it comes as no surprise that the civil law Europeans approach the normative hierarchy theory from the perspective of progressive jurisprudential development. Professor Bianchi, for example, calls for “a coherent interpretation” of the norms of the international legal order to resolve “the inconsistency between the rule of state immunity and the principle of protection of fundamental human rights.”²⁰⁸ According to Bianchi, ensuring that the application of international law produces just results requires judges to undertake a “value-oriented” interpretation of international law norms, giving preference to peremptory norms, such as the protection of human rights, over norms of lesser importance, such as state immunity.²⁰⁹

Largely free from the constraints of national immunity legislation and treaty obligations, a civil law court not surprisingly would feel inclined to make the type of “value-oriented” decision that Bianchi encourages. The adjudication of *Prefecture of Voiotia v. Federal Republic of Germany* in the Greek courts provides an apt example. The facts of the case arose out of the Nazi occupation of southern Greece during World War II. During that period Nazi military troops committed war atrocities against the local inhabitants of the Prefecture of Voiotia in 1944, particularly in the village of Distomo, including willful murder and destruction of personal property. Over fifty years later, the plaintiffs, mostly descendants of the victims, sued the Federal Republic of Germany in the Greek Court of First Instance of Leivadia for compensation for the material damage and mental suffering endured at the hands of the Nazis.²¹⁰

²⁰³ The United Kingdom is excluded from this category merely because its experience with the normative hierarchy theory is similar to that of the United States. Indeed, in the area of foreign state immunity law, the United Kingdom and the United States have traveled along a similar path. See generally Clark C. Siewert, Note, *Reciprocal Influence of British and United States Law: Foreign Sovereign Immunity Law from The Schooner Exchange to the State Immunity Act of 1978*, 13 VAND. J. TRANSNAT’L L. 761 (1980). As with the U.S. approach to the theory, UK courts have restrictively interpreted the exceptions to immunity in the State Immunity Act so as to stymie its application to human rights cases. See *Al-Adsani v. Kuwait*, 103 ILR 420 (Q.B. 1995), *aff’d*, 107 ILR 536 (C.A. 1996). However, the normative hierarchy theory has found some support. *Id.* at 547 (Ward, J., concurring) (interpreting the Act narrowly but recognizing that the theory “is a powerful one”). The dissent in *Al-Adsani* before the European Court of Human Rights also supported the theory. ECHR Judgment, *supra* note 1, at 29 (Rozakis, Caflisch, Wildhaber, Costa, Cabral Barreto, & Vajić, JJ., dissenting).

²⁰⁴ CASSESE, *supra* note 151, at 145.

²⁰⁵ *Id.*

²⁰⁶ Bianchi, *supra* note 172, at 219. The European literature is replete with additional support for the normative hierarchy theory. See, e.g., Magdalini Karagiannakis, *State Immunity and Fundamental Human Rights*, 11 LEIDEN J. INT’L L. 9 (1998); Juliane Kokott, *Mißbrauch und Verwirkung von Souveränitätsrechten bei gravierenden Völkerrechtsverstößen, in RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG: VÖLKERRECHT—EUROPARECHT—STAATSRECHT, FESTSCHRIFT FÜR RUDOLF BERNHARDT* 135 (1995); Norman Paech, *Wehrmachtsverbrechen in Griechenland*, 32 KRITISCHE JUSTIZ 380 (1999).

²⁰⁷ See text at notes 151–59 *supra*.

²⁰⁸ Bianchi, *supra* note 172, at 220; see also Andrea Bianchi, *Overcoming the Hurdle of State Immunity in the Domestic Enforcement of International Human Rights*, in ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS 405 (Benedetto Conforti & Francesco Francioni eds., 1997).

²⁰⁹ Bianchi, *supra* note 172, at 222.

²¹⁰ *Prefecture of Voiotia v. Federal Republic of Germany*, No. 137/1997 (Ct. 1st Inst. Leivadia, Oct. 30, 1997), *translated in* Maria Gavouneli, *War Reparation Claims and State Immunity*, 50 REVUE HELLÉNIQUE DE DROIT INTERNATIONAL

On the preliminary matter of jurisdiction, the court of first instance invoked the normative hierarchy theory to rule that Germany was not immune from suit. The court found that, "according to the prevailing contemporary theory and practice of international law opinion, . . . the state cannot invoke immunity when the act attributed to it has been perpetrated in breach of a *ius cogens* rule."²¹¹ The rule of *jus cogens* that the court identified was contained in Articles 43 and 46 of the regulations annexed to the 1907 Hague Convention Respecting the Laws and Customs of War on Land (Hague Regulations).²¹² Article 43 obligates an occupying power to respect the laws in force in the occupied territory and to ensure public order and safety, while Article 46 obliges occupying powers to protect certain rights of the occupied, especially the rights to family honor, life, private property, and religious convictions.²¹³ The court concluded that the demonstrated breach of this rule deprives a state of an immunity defense in domestic proceedings.

The reasons that the court provided in support of its decision are revealing and worth reiterating in their entirety:

a) When a state is in breach of peremptory rules of international law, it cannot lawfully expect to be granted the right of immunity. Consequently, it is deemed to have tacitly waived such right (constructive waiver through the operation of international law); b) Acts of the state in breach of peremptory international law cannot qualify as sovereign acts of state. In such cases the defendant state is not considered as acting within its capacity as sovereign; c) Acts contrary to peremptory international law are null and void and cannot give rise to lawful rights, such as immunity (in application of the general principle of law *ex iniuria ius non oritur*); d) the recognition of immunity for an act contrary to peremptory international law would amount to complicity of the national court to the promotion of an act strongly condemned by the international public order; e) The invocation of immunity for acts committed in breach of a peremptory norm of international law would constitute abuse of right; and finally f) Given that the principle of territorial sovereignty, as a fundamental rule of the international legal order, supersedes the principle of immunity, a state in breach of the former when in illegal occupation of foreign territory, cannot possibl[y] invoke the principle of immunity for acts committed during such illegal military occupation.²¹⁴

The reasoning in subsections a) through e) bears the traditional marks of the normative hierarchy theory. The court's pronouncement in subsection d) would appear to take the theory one step further, indicating that its nonapplication would implicate the forum state in the foreign state defendant's alleged breach of international law. Subsection f) is somewhat incongruous, seemingly advocating an entirely separate ground for denying immunity based on the forum state's authority to define its own state immunity law. Relying on this reasoning, the court awarded the plaintiffs 9.5 billion drachmas (approximately \$30 million) in the form of a default judgment.²¹⁵

The Hellenic Supreme Court, Areios Pagos, affirmed the holding of the lower court and arguably supported its reasoning relating to the normative hierarchy theory.²¹⁶ The Court

595 (1997) [hereinafter Greek Judgment I]. For an English summary of the decision, see Ilias Bantekas, Case Report: Prefecture of Voiotia v. Federal Republic of Germany, 92 AJIL 765 (1998).

²¹¹ Greek Judgment I, *supra* note 210, at 599.

²¹² *Id.*

²¹³ Regulations Respecting the Laws and Customs of War on Land, Art. 43, annexed to Hague Convention [No. IV] Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Regulations].

²¹⁴ Greek Judgment I, *supra* note 210, at 599–600.

²¹⁵ Ralph Atkins & Gerrit Wiesmann, *Greek Reparations Move Angers Berlin*, FIN. TIMES (London), July 12, 2000, World News—Europe, at 10.

²¹⁶ Greek Judgment II, *supra* note 15. For an English summary and commentary on the case, see Maria Gavouneli & Ilias Bantekas, Case Report: Prefecture of Voiotia v. Federal Republic of Germany, 95 AJIL 198 (2001). For an analytical discussion of the case, see Bernhard Kempen, *Der Fall Distomo: Griechische Reparationsforderungen gegen die*

began its analysis with the so-called torts exception to immunity. After reviewing the international law landscape,²¹⁷ the Court concluded that an exception to immunity for torts committed by a foreign state in the forum state's territory was established in customary international law, "even if the acts were *acta jure imperii*."²¹⁸ Second, the Court identified what it perceived as an obstacle to application of the torts exception in this case: the atrocities at issue were probably committed in the course of armed conflict, a situation in which the foreign state, even as occupier, would generally retain immunity.²¹⁹ However, the Court found that this rule of immunity was inapplicable, because

in the case of military occupation that is directly derived from an armed conflict and that, according to the now customary rule of Article 43 of the [Hague Regulations], does not bring about a change in sovereignty or preclude the application of the laws of the occupied State, crimes carried out by organs of the occupying power in abuse of their sovereign power do not attract immunity.²²⁰

Accordingly, the Court determined that the Nazi atrocities were an "abuse of sovereign power," on which Germany could not base an immunity defense.²²¹

The Court's decision to apply the torts exception to deny immunity for acts ostensibly of a public nature itself represents an interesting departure from the traditional public/private distinction in state immunity law. What is more attention grabbing about the decision, though, is that the Court, in reaching it, drew upon the normative hierarchy theory. Specifically, the Court found that the Nazi acts in question were "in breach of rules of peremptory international law (Article 46 of the [Hague Regulations])," and thus that "they were not acts *jure imperii*."²²² Consequently, the Court concluded that Germany had impliedly waived its immunity.²²³ As a result, one may view the Court's decision as the first endorsement of the normative hierarchy theory by a significant national tribunal.

The Greek Supreme Court's decision is a substantial contribution to state immunity practice in itself. Yet it is perhaps more significant as a potential harbinger of developments in state immunity policy in other similarly oriented countries, which neither have enacted national immunity legislation nor are parties to the European Convention on State Immunity. For this group of states, the national courts possess the primary authority to define foreign state immunity law and many, like Greece, may be bound to look to international law for applicable guidance.²²⁴

Bundesrepublik Deutschland, in TRADITION UND WELTOFFENHEIT DES RECHTS: FESTSCHRIFT FÜR HELMUT STEINBERGER 179 (Hans Joachim-Cremer et al. eds., 2002).

²¹⁷ The Court cited the European Convention on State Immunity, *supra* note 26, the ILC's draft articles on state immunity, *supra* note 111, and the work of the Institut de Droit International, *supra* note 113, as well as U.S. case law.

²¹⁸ Greek Judgment II, *supra* note 15, at 7.

²¹⁹ *Id.* The Court cited paragraph 4 of the commentary on Article 12 in the ILC's draft articles on the jurisdictional immunities of states, *supra* note 111, which limits the scope of that provision to "intentional physical harm such as assault and battery, malicious damage to property, arson or even homicide, including political assassination"; Article 31 of the European Convention, *supra* note 26, which provides: "Nothing in this Convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State"; and Article 16(2) of the UK State Immunity Act, 1978, *supra* note 3, which states: "This Part of this Act does not apply to proceedings relating to anything done by or in relation to the armed forces of a State while present in the United Kingdom and, in particular, has effect subject to the Visiting Forces Act 1952."

²²⁰ Greek Judgment II, *supra* note 15, at 10.

²²¹ *Id.* at 14–15.

²²² *Id.* at 15.

²²³ *Id.*

²²⁴ Pursuant to Article 28(1) of the Greek Constitution, a generally accepted rule of international law constitutes an integral part of the Greek legal order, which may even supersede a contrary statutory provision. For a discussion of the status of international law under Greek law, see A. A. Fatouros, *International Law in the New Greek Constitution*, 70 AJIL 492, 501 (1976); Emmanuel Roucouas, *Grèce, in* L'INTÉGRATION DU DROIT INTERNATIONAL ET COMMUNAUTAIRE DANS L'ORDRE JURIDIQUE NATIONAL 287 (Pierre Michel Eisemann ed., 1996).

A Critique of the Normative Hierarchy Theory

The misalignment of norms. Supporters of the normative hierarchy theory perceive the human rights litigation problem as a conflict between two international law norms, state immunity and *jus cogens*. In short, the superior norm of *jus cogens* is capable of striking down the inferior norm of state immunity, allowing the human rights victim to advance his or her claim.²²⁵ However, this approach is flawed conceptually because the norms that are purportedly at odds with one another under the normative hierarchy theory in reality never clash.

As part I demonstrated, state immunity is not a norm that arises from a fundamental principle of international law, such as state equality, or from the latter's purported theoretical derivative, the maxim *par in parem non habet imperium*.²²⁶ To reiterate briefly: The principle of state equality guarantees that states will enjoy equal *capacity* for rights. This capacity diminishes when a state intrudes on another state's sphere of authority, and becomes virtually dormant within another state's territorial borders. There is thus no inherent right of state immunity, as, ironically, is often suggested in the writings in support of the normative hierarchy approach.²²⁷

Moreover, the practice by states of waiving adjudicatory jurisdiction to create immunity privileges has created binding norms through the development of international custom as to only a core body of state conduct. Such norms do not apply to state conduct, e.g., the violation of the human rights of another state's citizens, that undermines the aim and purpose of the international legal order. If a foreign state receives immunity protection for such conduct, it is because that protection is afforded by the domestic policies of the forum state or, in the case of a few select states, pursuant to the European Convention. Accordingly, the norms of state immunity and *jus cogens* do not clash at all insofar as human rights violations are concerned. To accept otherwise, as the normative hierarchy theory does, endows foreign states with more of a claim to state immunity than reality dictates.

If there is any clash of international law norms that underpins the human rights litigation problem, it is between human rights protections and the right of the forum state to regulate the authority of its judicial organs, otherwise known as the right of adjudicatory jurisdiction. As demonstrated in part I, as a threshold matter state immunity operates as an exception to the overriding principle of adjudicatory jurisdiction and as customary international law does not cover human rights offenses.²²⁸ Any protections for human rights abuses on the domestic level thus result purely from the exercise of the forum state's right of adjudicatory jurisdiction. That is, the forum state with ultimate authority to establish the entitlement of state immunity has chosen to close its courts to meaningful human rights litigation. Therefore, rather than being between *jus cogens* and state immunity, the real conflict is between *jus cogens* and the principle of adjudicatory jurisdiction.

Finally, even if state immunity were an international law norm that shields states from liability for human rights claims, the normative hierarchy theory would fail to explain persuasively how a clash of norms would arise. Lady Fox criticizes the theory, asserting that, as "a procedural rule going to the jurisdiction of a national court," state immunity "does not contradict

²²⁵ As Judge Wald stated:

[A] state is never entitled to immunity for any act that contravenes a *jus cogens* norm The rise of *jus cogens* norms limits state sovereignty "in the sense that the 'general will' of the international community of states, and other actors, will take precedence over the individual wills of states to order their relations."

Princz v. Federal Republic of Germany, 26 F.3d 1166, 1182 (D.C. Cir. 1994) (Wald, J., dissenting) (quoting Mary Ellen Turpel & Philippe Sands, *Peremptory International Law and Sovereignty: Some Questions*, 3 CONN. J. INT'L L. 364, 365 (1988)).

²²⁶ See text at notes 28–116 *supra*.

²²⁷ See, for example, the statement of the authors of *Implied Waiver Under the FSIA* in the text at note 184 *supra*; Judge Wald's dissent in *Princz*, 26 F.3d at 1181, maintaining that state immunity "hinges on the notion that a state's consent to suit is a necessary prerequisite to another state's exercise of jurisdiction." See also Greek Judgment II, *supra* note 15, at 3 (stating that state immunity is "a consequence of the sovereignty, independence, and equality of states and purports to avoid any interference with international affairs").

²²⁸ See text at notes 74–104, 121–40 *supra*.

a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement.”²²⁹ Essentially, the norms of human rights and state immunity, while mutually reinforcing, govern distinct and exclusive aspects of the international legal order.²³⁰ On the one hand, human rights norms protect the individual’s “inalienable and legally enforceable rights . . . against state interference and the abuse of power by governments.”²³¹ On the other hand, state immunity norms enable state officials “to carry out their public functions effectively and . . . to secure the orderly conduct of international relations.”²³² To demonstrate a clash of international law norms, the normative hierarchy theory must prove the existence of a *jus cogens* norm that prohibits the granting of immunity for violations of human rights by foreign states. However, the normative hierarchy theory provides no evidence of such a peremptory norm.

Questions surrounding the application of jus cogens. Unresolved issues surrounding the application of *jus cogens* further undermine the appeal of the normative hierarchy theory.²³³ While the existence of *jus cogens* in international law is an increasingly accepted proposition, its exact scope and content remains an open question.²³⁴ Proponents of the normative hierarchy theory, in particular, have failed to generate a precise list of human rights norms with a peremptory character.²³⁵ To be sure, consensus is emerging as to the status of certain norms, such as the prohibitions against piracy, genocide, slavery, aggression, and torture.²³⁶ Yet these norms, despite their importance to the community of nations, represent only a small fraction of the norms that potentially may belong to the body of peremptory norms.²³⁷ In *Prefecture of Voiotia*, for example, the Greek courts identified the rights of family honor, life, private property, and religious convictions, enshrined in Article 46 of the Hague Regulations, as the operative *jus cogens*.²³⁸ Further, the concept of *jus cogens* is not confined solely to the realm of human rights. Commentators have suggested that crucial fundamental international law norms, such as *pacta sunt servanda*, may also constitute *jus cogens*.²³⁹

²²⁹ FOX, *supra* note 15, at 525.

²³⁰ Those who find a conflict between these norms have overlooked the fact that state immunity protection for human rights violations is not a product of international law.

²³¹ AKEHURST, *supra* note 6, at 209.

²³² FOX, *supra* note 15, at 1.

²³³ The existence of *jus cogens* in international law is a highly contentious matter. See the presentation of opposing views on the topic in *Colloquy*, 6 CONN. J. INT’L L. 359, 359–69 (1988). To simplify matters, this article assumes the existence of *jus cogens*. It also assumes that *jus cogens* is effective outside the field of international treaty making, where the modern manifestation of the concept emerged. This, too, is a controversial assumption. Compare CHRISTOS L. ROSENSTEIN-ROZAKIS, THE PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW (*JUS COGENS*) UNDER THE VIENNA CONVENTION ON THE LAW OF TREATIES 15 (1973), with OPPENHEIM, *supra* note 6, at 8, and Andreas Zimmermann, *Sovereign Immunity and Violations of International Jus Cogens—Some Critical Remarks*, 16 MICH. J. INT’L L. 433, 437–40 (1995). Note that the legitimacy of such assumptions has no bearing on the central thesis of this article, which does not hinge on the existence or nonexistence of *jus cogens*, but on the fact that state immunity protections for human rights violations are rooted in neither fundamental principles of international law nor international custom.

²³⁴ See BROWNLIE (5th), *supra* note 6, at 516–17; OPPENHEIM, *supra* note 6, at 7.

²³⁵ See Anthony D’Amato, *It’s a Bird, It’s a Plane, It’s Jus Cogens!* 6 CONN. J. INT’L L. 1, 1 (1990) (noting facetiously that “the sheer ephemerality of *jus cogens* is an asset, enabling any writer to christen any ordinary norm of his or her choice as a new *jus cogens* norm, thereby in one stroke investing it with magical power”); Karagiannakis, *supra* note 206, at 15–16 (ascribing immunity-piercing characteristics to the general category of “fundamental human rights”).

²³⁶ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), held that state-sanctioned torture violates *jus cogens*.

²³⁷ The body of literature considering the subject is rich. See, e.g., Antonio Gómez Robledo, *Le Jus cogens international: Sa genèse, sa nature, ses fonctions*, 172 RECUEIL DES COURS 9–217 (1981 III); Levan A. Alexidze, *Legal Nature of Jus Cogens in Contemporary International Law*, *id.* at 219–70; Giorgio Gaja, *Jus Cogens Beyond the Vienna Convention*, *id.* at 279–89; Gordon Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT’L L. 585 (1988).

²³⁸ Greek Judgment I, *supra* note 210, at 599; Greek Judgment II, *supra* note 15, at 15.

²³⁹ See, e.g., William J. Aceves, *The Vienna Convention on Consular Relations*, 31 VAND. J. TRANSNAT’L L. 257, 293 (1998). The American Law Institute maintains that “[i]t is generally accepted that the principles of the United Nations Charter prohibiting the use of force . . . have the character of *jus cogens*.” RESTATEMENT, *supra* note 28, §102 cmt. k. Professor Tunkin has even suggested that the Brezhnev doctrine, or “proletarian internationalism,” as he describes it, is a *jus cogens* norm. GRIGORY TUNKIN, *THEORY OF INTERNATIONAL LAW* 444 (1974).

The undefined character of *jus cogens*,²⁴⁰ coupled with the general applicability of the normative hierarchy theory, which invests *all* peremptory norms with immunity-stripping potential, may present problems for the courts. Requiring application of the theory beyond cases of genocide, slavery, and torture would place national courts in an awkward position. The theory not only would deprive the forum state of its right to regulate access to its own courts,²⁴¹ but also would force them to determine whether a particular norm of international law had attained the status of *jus cogens*, a task that international legal scholars have grappled with for decades with only limited success.²⁴² Further, the normative hierarchy theory logically requires courts to treat all violations of peremptory norms uniformly, even violations of norms that do not implicate human rights but are arguably *jus cogens*, such as *pacta sunt servanda*. In addition, allowing the courts to determine the parameters of *jus cogens* through application of the normative hierarchy theory may undermine the principle of separation of powers, in some cases inappropriately transferring foreign-policy-making power from the political branches of government to the judiciary.²⁴³ Finally, as Judges Pellonpää and Bratza warned in the *Al-Adsani* case, adoption of the normative hierarchy theory could be the first step on a slippery slope that begins with state immunity from jurisdiction but could quickly extend to state immunity from execution against sovereign property and ultimately threaten the “orderly international co-operation” between states.²⁴⁴

Second, if, as mentioned above, the true clash of norms underpinning the human rights litigation problem is between the protection of human rights and the principle of adjudicatory jurisdiction, what, then, is the relationship between these two norms? A thorough answer to this question cannot be offered in an article of this length, but a brief exploration of the issue may be enlightening.

If *jus cogens* is defined as a body of norms representing the core, nonderogable values of the community of states, then included in this body, arguably, is the principle of state jurisdiction, i.e., a state’s freedom to exercise jurisdiction, especially on the basis of territoriality, through its own governmental institutions, including its national courts.²⁴⁵ Support for this proposition is reflected in the core principles of international law, which consider the state the

²⁴⁰ One may wish to criticize the normative hierarchy theory by capitalizing on this uncertainty, arguing that many human rights norms are not *jus cogens* and thus that the theory is unfounded. Such criticism is fruitless, however, as it simply provokes the equally sound and unprovable response that human rights norms *are* indeed peremptory in nature. For that reason, this article avoids challenging the normative hierarchy theory on these grounds.

²⁴¹ Reimann, *supra* note 201, at 421.

²⁴² For example, within the span of one case of interest, *Prefecture of Voiotia*, the Greek courts determined (without significant support) that Articles 43 and 46 of the 1907 Hague Regulations, *supra* note 213, were *jus cogens*. Greek Judgment I, *supra* note 210, at 599; Greek Judgment II, *supra* note 15, at 15.

²⁴³ This risk is perhaps most problematic in countries whose national legislatures have enacted immunity legislation. In this situation, application of the normative hierarchy theory by the courts may thwart the intent of the legislature.

²⁴⁴ ECHR Judgment, *supra* note 1, at 27. Immunity from execution is a topic distinct from immunity from judicial proceedings. For instance, even if a court denies a foreign state immunity and holds it liable to the plaintiff in a quantified amount of damages, the law may still bar the forced execution of the court’s judgment against the foreign state’s property. For a more in-depth explanation of immunity from execution, see BADR, *supra* note 16, at 107–12; Sinclair, *supra* note 68, at 218–42.

²⁴⁵ Professor Scheuner has proposed three categories of *jus cogens* norms: (1) “the maxims of international law which protect the foundations of law, peace and humanity in the international order and which at present are considered by nations as the minimum standard for their mutual relations”; (2) “the rules of peaceful cooperation in the sphere of international law which protect fundamental common interests”; and (3) “norms regard[ing] the protection of humanity, especially of the most essential human rights.” Ulrich Scheuner, *Conflict of Treaty Provisions with a Peremptory Norm of General International Law, and Its Consequences*, 27 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 520, 526–27 (1967). Thus, it appears conceptually feasible that the principle of state jurisdiction, which arguably falls under one of the first two categories, could be *jus cogens* just like certain human rights norms, which fall under category three. See also Alexidze, *supra* note 237, at 260 (identifying “non-interference with domestic affairs” as *jus cogens*).

basic building block of the international legal order.²⁴⁶ In fact, most of the foundational rules of international law hold as the highest value the protection of the territorial integrity, independence, and equality of states.²⁴⁷ Even taking account of recent developments in international law that limit state sovereignty, such as in the areas of human rights and environmental law,²⁴⁸ it cannot be said at this point in time that any rule has emerged that would limit a state's authority to determine its own jurisdiction over foreign states.²⁴⁹

If the principle of state jurisdiction is so paramount to the community of states as to place it within the body of *jus cogens*, the human rights litigation problem may involve a clash of two peremptory norms, the protection of human rights and the principle of exclusive state jurisdiction. This scenario raises perplexing questions of international law. Can there be a hierarchy of norms within the body of peremptory norms and, if so, which ranks higher, human rights or territorial jurisdiction? The answers to these questions, if any, lie deep in uncharted territory of international legal scholarship and cannot be ascertained here.²⁵⁰ The very fact that the normative hierarchy theory would appear to lead courts into such a theoretical abyss casts doubt on its practical viability and utility.

Denying immunity through fictions. Explaining how a state loses its immunity is a critical element of the normative hierarchy theory. Two different, but interrelated, explanations are offered in the literature. On one rationale, a state is said to waive or forfeit its entitlement to immunity by implication when it commits a *jus cogens* violation.²⁵¹ On the other rationale, state conduct that violates a *jus cogens* norm is said to fall outside the category of protected state conduct known as *acta jure imperii*, for which immunity is traditionally granted, such conduct being devoid of legitimacy because it contravenes the will of the community of nations.²⁵²

²⁴⁶ SHAW, *quoted in* note 40 *supra*, at 331 (further noting that "the principle whereby a state is deemed to exercise exclusive power over its territory can be regarded as a fundamental axiom of classical international law").

²⁴⁷ *Id.* at 332.

²⁴⁸ See, e.g., HERSCH LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* (1950); Richard A. Falk, *A New Paradigm for International Legal Studies: Prospects and Proposals*, 84 YALE L.J. 969 (1975).

²⁴⁹ In this regard, Justice Marshall's age-old words in *The Schooner Exchange* still ring true: Jurisdiction is exclusive and absolute; any exceptions to the jurisdiction of a state must be based on its consent. See text at note 72 *supra*. Also, as editors Jennings and Watts admonish, limitations on state jurisdiction may not be presumed. OPPENHEIM, *supra* note 6, at 391.

²⁵⁰ When *jus cogens* norms clash, it "raises questions—to which no firm answer can be given—of the relationship between rules of *jus cogens*, and of the legitimacy of an act done in reliance on one rule of *jus cogens* but resulting in a violation of another such rule." OPPENHEIM, *supra* note 6, at 8. "If a state uses force to implement the principle of self-determination, is it possible to assume that one aspect of *jus cogens* is more significant than another?" BROWNIE (5th), *supra* note 6, at 517.

²⁵¹ The concept of "waiver" emerged from American experience. Some have argued that a state's violation of *jus cogens* implicates §1605(a) (1) of the FSIA, the so-called waiver exception, under which a foreign state implicitly waives its entitlement to immunity. See, e.g., Belsky et al., *supra* note 181, at 394–401. U.S. courts have consistently rejected this argument, refusing to interpret the waiver exception so broadly. In *Prinz v. Federal Republic of Germany*, for example, the court held that the "*jus cogens* theory of implied waiver is incompatible with the intentionality requirement implicit in §1605(a) (1)." The court went on to say that this requirement is "reflected in the examples of implied waiver set forth in the legislative history of §1605(a) (1), all of which arise either from the foreign state's agreement (to arbitration or to a particular choice of law) or from its filing a responsive pleading without raising the defense of sovereign immunity." 26 F.3d 1166, 1174 (D.C. Cir. 1994); see also *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1150–51 (7th Cir. 2001); *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 244 (2d Cir. 1996). Indeed, the legislative history of the FSIA contemplates only a few types of implicit waivers: "where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract. . . . [or] where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity." HOUSE REPORT, *supra* note 107, at 18. The American Bar Association has recently recommended amending the FSIA "to limit circumstances under which waivers may be implied." Working Group of the American Bar Association, *Report, Reforming the Foreign Sovereign Immunities Act*, 40 COLUM. J. TRANSNAT'L L. 489, 546 (2002). The idea of "forfeiture" of immunity by a foreign state is a European creation, developed outside the statutory context, which some have argued operates as part of the general principles of international law. See, e.g., Kokott, *supra* note 206.

²⁵² For example, in *Prefecture of Voitiia*, the court of first instance held that state acts in breach of *jus cogens* could not qualify as sovereign acts because the state would not be considered as acting within its capacity as sovereign. See b) in text at note 214 *supra*; see also Paech, *supra* note 206, at 394; Belsky et al., *supra* note 181, at 377.

Neither of these explanations is persuasive because both are based on fictions resulting from a misunderstanding of the true nature and operation of the doctrine of foreign state immunity.

The notion that a foreign state implicitly waives or forfeits any entitlement to immunity by acting against *jus cogens* is untenable for the reasons developed in part I: a foreign state's entitlement to immunity for human rights violations is not derived from international law, so a foreign state cannot lose its right to immunity by violating international law. Indeed, the entitlement in this respect—and therefore also the waiver or forfeiture of immunity—is strictly a matter of domestic regulation. This plain reality is illustrated in *Smith v. Socialist People's Libyan Arab Jamahiriya*, in which Libya conceded, for the limited purpose of its appeal, that its alleged participation in the bombing of Pan Am Flight 103 would consist of a *jus cogens* violation, but disputed that “such a violation demonstrates an implied waiver of sovereign immunity within the meaning of the FSIA.”²⁵³ The court ultimately held that Libya had not waived its immunity because the FSIA anticipated implied waiver only under a few select circumstances.²⁵⁴ *Smith*, while adjudicated under national immunity legislation, is of general appeal, if only to raise the paradoxical question of how a foreign state can be said to have implicitly waived its entitlement to immunity when it would be likely, if asked, expressly to state the contrary.²⁵⁵

The purported exclusion of state-sponsored human rights violations from the category of *acta jure imperii* is equally unpersuasive. Indeed, the distinction between *acta jure imperii* and *acta jure gestionis* is “superficially attractive as a means of keeping state immunity within reasonable limits” but “does not rest on any sound logical basis.”²⁵⁶ As Judge Gerald Fitzmaurice wrote, “[A] sovereign state does not cease to be a sovereign state because it performs acts which a private citizen might perform.”²⁵⁷ Along similar lines of logic, a foreign state does not cease to be a sovereign state simply because it commits acts of a criminal nature, including violations of human rights norms. Moreover, if state conduct that violates *jus cogens* is assertedly not *jure imperii* and obviously not *jure gestionis* (private or commercial), then what is it? This question is not addressed by supporters of the normative hierarchy theory. The real answer lies in the fact that foreign states are entitled to immunity for human rights violations only to the extent that a forum state grants them that privilege. Hence, the exclusion of *jus cogens*-violating state conduct from the category of *acta jure imperii* can be effectuated only through the expression of the forum state's immunity policies to that effect, not by international law.

Misplaced concerns regarding forum state complicity. Supporters of the normative hierarchy theory sometimes argue that the failure to deny state immunity for human rights violations amounts to complicity of the forum state with the *jus cogens* transgression.²⁵⁸ A brief review of the ILC's draft articles on state responsibility reveals the shortcomings of this claim. Of the provisions in the draft articles, only chapter IV on the responsibility of a state in connection with the act of another state is even remotely relevant. Articles 16, 17, and 18 of chapter IV address, respectively, situations in which one state aids or assists, directs and controls, or coerces another state in the commission of an internationally wrongful act.²⁵⁹ In all these provisions,

²⁵³ *Smith*, 101 F.3d at 242.

²⁵⁴ *Id.* at 244.

²⁵⁵ See 15 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶104.12[1][a] (3d ed. 2003) (“Courts will rarely find that a nation has waived its sovereign immunity without strong evidence that waiver was what the state intended.”).

²⁵⁶ BRIERLY, *supra* note 75, at 250; see also Lauterpacht, *supra* note 27, at 224.

²⁵⁷ G. G. Fitzmaurice, *State Immunity from Proceedings in Foreign Courts*, 1933 BRIT. Y.B. INT'L L. 101, 121; see also Lauterpacht, *supra* note 27, at 224.

²⁵⁸ See, for example, point d) in the court of first instance's opinion in *Prefecture of Voiotia*, in text at note 214 *supra*. See also Paust, *supra* note 201, at 227; Vivekananthan, *supra* note 202, at 147.

²⁵⁹ A state is internationally responsible under Article 16 when it aids or assists another state in committing, or under Article 17, when it directs and controls another state in committing, an internationally wrongful act if “(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.”

the ILC included a knowledge requirement for complicity of the third-party state, thus limiting the draft articles' contemplated application to cases of deliberate involvement in the internationally wrongful act before or during its commission.²⁶⁰ Hence, a forum state cannot be considered complicit for granting jurisdictional immunity to other states long before any lawsuit has been filed.²⁶¹

This does not mean, however, that the forum state cannot hold the foreign-state offender accountable under principles of state responsibility, only that it cannot be penalized for failing to do so.²⁶² Moreover, immunity in the forum state does not amount to global impunity for state conduct that violates human rights. Indeed, the forum state may pursue a human rights claim in numerous alternative political and judicial arenas. Nevertheless, repealing immunity protections that exist solely by virtue of the forum state's domestic policies and are not compelled by international law ranks high among all options.

III. NEW PROSPECTS FOR THE PROGRESSIVE DEVELOPMENT OF FOREIGN STATE IMMUNITY LAW

As demonstrated above, the normative hierarchy theory offers an unpersuasive solution to the human rights litigation problem. Foreign states are not immune from human rights litigation by virtue of a fundamental sovereign right or a rule of customary international law.²⁶³ With ultimate authority both to grant and to rescind the entitlement to immunity in these circumstances, the forum state may establish a state immunity policy in this area unrestricted by international law. This reality places the burden of providing meaningful human rights litigation not on the foreign state defendant, as the normative hierarchy theory contends, but on the government entities in each forum state with responsibility for establishing the state immunity laws.

While the forum state has authority to repeal many state immunity privileges, especially in the area of human rights protections, by exercising its right of adjudicatory jurisdiction, a more comprehensive justification for curtailing immunity is in order. Although an international rule of immunity exists, the modern doctrine of foreign state immunity fails to delineate the scope of its coverage. Accordingly, the line between international law and domestic law protections is not always readily apparent. Neither the traditional *gestionis/imperii* distinction of the theory of restrictive immunity nor the piecemeal approach of national and international codification efforts of national state immunity legislation accurately distinguishes between immune and nonimmune state conduct. These approaches, as explained, focus primarily on establishing categories of nonimmune conduct and in so doing promote excessive state immunity protections.

Part III proposes an alternative approach to allocating state immunity entitlements. The approach justifies granting immunity only in circumstances in which such protection promotes orderly relations in the community of states, not least between the forum state and the foreign state. As explained in more detail below, state conduct that does not enhance

Under Article 18, "A State which coerces another State to commit an act is internationally responsible for that act if: (a) the act would, but for the coercion, be an internationally wrongful act of the coerced State; and (b) the coercing State does so with knowledge of the circumstances of the act." Draft Articles on Responsibility of States for Internationally Wrongful Acts, Arts. 16–18, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), available at <<http://www.un.org/law/ilc>>, reprinted in CRAWFORD, *infra* note 261.

²⁶⁰ See *supra* note 258.

²⁶¹ For examples of the application of Articles 16, 17, and 18, see JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 148–58 (2002).

²⁶² Draft Articles 42 and 48 permit a state to invoke another state's responsibility for injury either to one of the forum state's citizens or, arguably, to a foreign state's citizens.

²⁶³ However, the European Convention, *supra* note 26, requires a small group of states to provide immunity protections as a matter of international obligation.

interstate relations, such as the abuse of citizens of the forum state, should not be entitled to immunity protection.

Developing a Theory of Collective Benefit

One way to identify the scope of the international rule of state immunity is to conceptualize state immunity as arising out of an agreement forged between the forum state and any foreign state with which it seeks to develop transnational intercourse. This approach is consistent with the more persuasive rationale for state immunity, i.e., that immunity protections result from the forum state's waiver of its right of adjudicatory jurisdiction. As Justice Marshall observed in *The Schooner Exchange*, state immunity protections were originally created when the forum state granted a foreign sovereign a "license" to operate within the forum state's jurisdiction free from arrest, seizure, or adverse legal proceedings.²⁶⁴ To the extent that this practice has crystallized into international custom, the forum state has consented to concede a right of adjudicatory jurisdiction on an enduring basis. Thus, defining the scope of the international rule of state immunity depends upon determining the circumstances in which forum states have conceded their important right of adjudicatory jurisdiction permanently in favor of immunity protections.

A look at the "agreement" that states have struck with one another regarding state immunity protections is revealing. Traditionally, a forum state's promise of foreign state immunity has provided foreign states with guarantees against arrest, seizure, and adverse legal proceedings sufficient to entice foreign sovereigns and their representatives into entering and operating within the forum state's jurisdiction. This promise of immunity, however, is not limitless in scope. As Justice Marshall observed, state immunity exists only for the "mutual benefit" of "intercourse" between states and for "an interchange of those good offices which humanity dictates and its wants require."²⁶⁵ Recently, the decision in the *Arrest Warrant* case confirmed this justification for state immunity in the context of immunities of foreign ministers. The ICJ found that such immunities are designed to enable the ministers to fulfill their functions effectively and to protect them from acts of authority of another state that would thwart them in fulfilling those functions.²⁶⁶ Accordingly, the sole *raison d'être* for state immunity under customary international law is so that states can perform their public functions effectively and ensure that international relations are conducted in an orderly fashion.²⁶⁷

If one accepts this basic premise, then conduct of a foreign state that does not conform with the development of beneficial interstate relations falls outside the state immunity "agreement" and thus is not immune by virtue of international custom. The most obvious example excludes foreign state conduct that does significant harm to the vital interests of the forum state, such as the commission of human rights abuses against the forum state's nationals. Accordingly, the basic test for distinguishing between immune and nonimmune transactions should not be whether the state conduct is public or private, as the theory of restrictive immunity requires, but whether such conduct would substantially harm the vital interests of the forum state.²⁶⁸ Within these parameters, the forum state can more accurately

²⁶⁴ *The Schooner Exchange*, 11 U.S. at 137.

²⁶⁵ *Id.* at 136.

²⁶⁶ *Arrest Warrant*, *supra* note 23, paras. 52, 54.

²⁶⁷ FOX, *supra* note 15, at 1.

²⁶⁸ The exact parameters of beneficial interstate conduct are variable and likely to depend on the immunity policies of each individual state. One can safely argue, however, that the protection of the forum state's "vital interests" is a universal common denominator in application of the state immunity agreement. Professor Lauterpacht, while similarly believing that the immunity of foreign states may be greatly curtailed, followed a different approach. He contended that immunity should be maintained in respect of four areas: (1) the legislative acts of foreign states; (2) the executive and administrative acts of the foreign state within its territory; (3) certain contracts forged with foreign states; and (4) diplomatic immunities. Lauterpacht, *supra* note 27, at 237-39.

define its domestic state immunity laws in accordance with customary international law requirements.

Although the forum state has wide discretion to modify its state immunity laws so as to provide better judicial access to human rights victims, certain important limitations still condition the forum state's approach. First, any changes in domestic state immunity policy must be consistent with the international rules of adjudicatory jurisdiction. Since state immunity, as a threshold matter, is an exception to adjudicatory jurisdiction, the absence of jurisdiction over state conduct would eliminate the state immunity question altogether.²⁶⁹ Thus, when opening up domestic courts to human rights litigation, it is necessary to ensure maintenance of an appropriate connection between the dispute and the forum state under international law.²⁷⁰

Second, the forum state, like the foreign state, belongs to a community of states and must abide by community rules, the rules of international law. For example, several principles restraining state behavior are enshrined in the United Nations Charter; they include, among others, the obligation to uphold the principles of sovereign independence, the peaceful settlement of disputes, and the protection of human rights.²⁷¹ Thus, any alteration in state immunity law that unjustifiably endangers peaceful relations may be unlawful. This consideration would preclude, for example, collusion between the forum state and the defendant state to commit a crime that is mutually beneficial to them but outlawed by international law.²⁷² Additional obligations will likely arise out of international agreements to which the forum state is a party or out of customary international law.²⁷³

Applying the Theory of Collective State Benefit

Two recent developments in state immunity law, in the United States and Greece, exemplify the legitimate restrictions on immunity that states seeking to advance human rights litigation may impose in accordance with the theory of collective state benefit. As mentioned above, in 1996 the U.S. Congress amended the FSIA by creating an additional exception to the immunity of certain foreign states for a limited range of human rights violations.²⁷⁴ Notably, the newest FSIA exception requires no territorial connection to the United States.²⁷⁵ Instead, jurisdiction is predicated on the American nationality of the victim or the claimant.²⁷⁶ The new exception is consistent with the theory of collective state benefit in that it stands to protect one of the most vital interests of the democratic state, the well-being of its

²⁶⁹ See Arrest Warrant, *supra* note 23, para. 46.

²⁷⁰ See discussion *supra* note 47.

²⁷¹ UN CHARTER pmb., Arts. 1, 2.

²⁷² See text at notes 258–62 *supra*.

²⁷³ A recent example appears in *Roeder v. Iran*, 195 F.Supp.2d 140 (D.D.C. 2002). There, the court held that executive agreements entered into by the United States and Iran, known as the "Algiers Accords," barred the FSIA claims of former hostages detained at the U.S. Embassy in Tehran. Indeed, some scholars maintain that conflicts between human rights and state immunity may be best resolved "through the ratification of human rights conventions and the submission to international procedures of supervision such as those provided by the UN Covenants." SCHREUER, *supra* note 114, at 60.

²⁷⁴ 28 U.S.C. §1605(a) (7) (2000).

²⁷⁵ As noted, the amendment covers even "the provision of material support or resources" for the proscribed conduct, which could occur in the foreign state defendant's own territory. *Id.*

²⁷⁶ Brief for the United States as Amicus Curiae at 27–28, *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239 (2d Cir. 1996) (Nos. 95-7931, 95-7942). The brief states:

[B]y specifying that the victim and claimant must be a national of the United States . . . , the legislation ensures that, where United States courts assume jurisdiction over a foreign sovereign, there is a nexus to the United States. This limitation balances the United States' interest in providing a forum for American victims of specified outrageous conduct against the interest of foreign governments in not being forced to defend actions with no connections to the U.S.

Id. (citation omitted).

citizenry.²⁷⁷ Indeed, the scope of the exception could arguably be broader, consistent with the theory, and could extend to a broader class of potential foreign state defendants, not only those designated as sponsors of terrorism.²⁷⁸

The second development is the Greek Supreme Court's decision in *Prefecture of Voiotia*, discussed earlier,²⁷⁹ which held the Federal Republic of Germany liable for Nazi acts of aggression against the civilian population of southern Greece. In addition to its misguided acceptance of the normative hierarchy theory, the case is notable for its advancement of the so-called torts exception to immunity. As indicated above, the Court ruled that "national courts have jurisdiction to adjudicate damages, including compensation for offenses against people or property that took place in the territory of the forum by organs of a foreign country that was present in the territory when the offense took place, even if it was *acta jure imperii*."²⁸⁰ In this regard, *Prefecture of Voiotia* not only adds to the corpus of law defining the torts exception to immunity, but also contributes to the growing consensus that such an exception has application even in cases of abuse of sovereign power.²⁸¹

The second contribution of *Prefecture of Voiotia*, really an extension of the first, is its recognition that even in the field of armed conflict a state is not immune when it abuses its official power to the detriment of citizens of the forum state. The Court noted that the commentary to Article 12 of the ILC draft articles, Article 31 of the European Convention, and section 16(2) of the UK State Immunity Act all indicate a rule of customary international law that entitles states to immunity in regard to military activity.²⁸² The Court determined, however, that this rule contained a significant exception "for damages arising from crimes, such as crimes against humanity, that affect, not necessarily as a consequence of war, particular civilians, not civilians at large and which civilians have no connection with that armed conflict during military occupation."²⁸³ In the context of that case, the Court concluded: "[T]here is no state immunity from criminal acts of the organs of the occupying power that take place by abusing their sovereign power as reprisals for acts of resistance movements against innocent and non-participant persons."²⁸⁴ The Court continued:

[T]he torts in question (murders that also constitute crimes against humanity) were directed against specific persons limited in number who resided in a specific place, who had nothing to do with the resistance activity resulting in the death of German soldiers taking part in a terror operation against the local population [They were] hideous murders that objectively were not necessary in order to maintain the military occupation

²⁷⁷ However, the law may raise some concerns in cases in which the claimant was a U.S. national but the victim was not, e.g., a married couple of mixed nationality. In these cases, the competence of U.S. courts is predicated on an arguably weaker basis of jurisdiction.

²⁷⁸ For a criticism of the limited scope of the exception, see Naomi Roht-Arriaza, *The Foreign Sovereign Immunities Act and Human Rights Violations: One Step Forward, Two Steps Back?* 16 BERKELEY J. INT'L L. 71, 81-82 (1998).

²⁷⁹ See text at notes 216-24 *supra*.

²⁸⁰ Greek Judgment II, *supra* note 15, at 7.

²⁸¹ This aspect of the torts exception has developed primarily in the context of §1605(a)(5) of the U.S. FSIA. That provision denies immunity to a foreign state "for personal injury or death . . . occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." The torts exception does not apply, however, to claims based upon the exercise of or failure to exercise a discretionary function. 28 U.S.C. §1605(a)(5)(A). In two cases already discussed, U.S. courts found that violations committed by foreign government agents in U.S. territory were outside the application of the discretionary function exception and thus denied the defense of immunity. See *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989) (the commission of murder by foreign government agents in violation of foreign law did not trigger the discretionary function exemption); *Letelier v. Republic of Chile*, 488 F.Supp. 665, 673 (D.D.C. 1980) (the assassination committed in the United States by Chilean government agents was not covered by the discretionary function exemption). For further discussion, see SCHREUER, *supra* note 114, at 57-61; Trooboff, *supra* note 18, at 357-62.

²⁸² Greek Judgment II, *supra* note 15, at 10.

²⁸³ *Id.*

²⁸⁴ *Id.*

of the area or subdue the underground action, carried out in the territory of the forum by organs of the German Third Reich in an abuse of sovereign power.²⁸⁵

Prefecture of Voiotia conforms with the theory of collective state benefit for many of the same reasons as the 1996 FSIA amendment. The infliction of wanton terror on Greek civilians by the Nazis during World War II was a direct affront to the vital interest of Greece, the forum state. Regardless of the label it bears, sovereign, military, *jure imperii*, or otherwise, a foreign state's unlawful killing of the forum state's civilians destroys bilateral relations between forum and foreign state and may even jeopardize the security and stability of the community of states. Thus, putting aside its endorsement of the normative hierarchy theory, *Prefecture of Voiotia* represents a legitimate solution to the human rights litigation problem.²⁸⁶

Taken together, the 1996 FSIA amendment and *Prefecture of Voiotia* demonstrate that progress can be made in resolving the human rights litigation problem in a manner consistent with the true nature of the doctrine of foreign state immunity. That is to say that the forum state, through the agent it designates to create and interpret foreign state immunity law (the U.S. Congress in the case of the 1996 amendment and the Hellenic Supreme Court in the case of *Prefecture of Voiotia*), is empowered to modify foreign state immunity law to an extent consistent with the theory of collective state benefit. These developments further show that such modifications are possible in two very different legal settings: the 1996 amendment arose in a common law country with national immunity legislation, while *Prefecture of Voiotia* resulted from the jurisprudential application of international law in a civil law country without national immunity legislation.

IV. CONCLUSION

State immunity is the product of a conflict between two international law principles, sovereign equality and adjudicatory jurisdiction, which conflict is resolved more persuasively in favor of adjudicatory jurisdiction. Thus, state immunity exists as an exception to the overriding principle of adjudicatory jurisdiction.

The awkward development of the doctrine of foreign state immunity in the twentieth century, which derived from the myth that states once enjoyed absolute immunity from suit, has, however, distorted the perception of how state immunity operates. Today, the prevailing formulation of state immunity laws improperly reverses the presumption of adjudicatory jurisdiction by establishing a catchall rule of immunity. Consequently, in many national jurisdictions state immunity laws grant foreign state defendants more protection than customary international law requires.

With respect to certain core state conduct, the practice of waiving adjudicatory jurisdiction has crystallized into a rule of customary international law binding on states. While the existence of a rule of customary international law concerning state immunity is firmly established, the exact scope of this rule is difficult to discern. Nevertheless, despite uncertainty at the edges,

²⁸⁵ *Id.* at 14–15.

²⁸⁶ Still, *Prefecture of Voiotia* is susceptible to some criticism. First, the Greek government arguably failed to provide adequate notice to the Federal Republic of Germany of the change in Greek state immunity policy. This fault is in large measure a function of Greece's lack of national immunity legislation. Absent an effective means of communication, i.e., through the promulgation of public laws, the affected state or states learns of modifications in state policy only at the moment the policy-changing judicial decision is rendered. Without fair warning, *Prefecture of Voiotia* came as a shock to the German government, evoking strong diplomatic protestation. See Atkins & Wiesmann, *supra* note 215. Recent efforts to enforce the Greek judgment in Germany were denied. The Distomo Massacre Case (Greek Citizens v. FRG) (Fed. Sup. Ct. June 26, 2003), translated in 42 ILM 1030 (2003). Second, *Voiotia* failed to place limits on the retroactivity of the new immunity rule. Indeed, the claims at issue arose out of wartime events occurring in 1944, more than fifty years before the suit was filed. The adjudication of claims of this nature, especially those possibly addressed previously by postwar reparations treaties, is likely to cause instability in bilateral relations. Indeed, following World War II, the German government paid the Greek government DM 115 million in compensation for victims of Nazi persecution.

sufficient evidence testifies that customary international law does not compel immunity protections for state conduct that violates human rights. Any immunity that a foreign state receives for such conduct is solely conferred by domestic laws.

The normative hierarchy theory offers an unpersuasive solution to the human rights litigation problem. The theory assumes a clash of international law norms of human rights and state immunity that, in fact, does not occur. There is no international norm of state immunity that shields foreign states from human rights litigation and, even if there were, the normative hierarchy theory fails to explain persuasively how human rights norms can trump state immunity norms when the two types of norms govern mutually exclusive types of state conduct. The real source of the human rights litigation problem is the forum state's failure to exercise its right of adjudicatory jurisdiction with respect to human rights cases. However, this problem is rather difficult to resolve on a theory of normative hierarchy, as the real conflict may involve a clash of two peremptory norms of international law, human rights and adjudicatory jurisdiction.

Finally, because state immunity is at its root an exception to the overriding principle of adjudicatory jurisdiction, the forum state may exercise its right of adjudicatory jurisdiction to curtail any excess state immunity privileges that do not emanate from international law, including protections for human rights violations. A theory of collective state benefit guides the process of repealing extraneous immunity protections and draws the line between immune and nonimmune conduct more appropriately than the normative hierarchy theory. On the collective state benefit theory, state conduct that fails to enhance interstate relations, particularly between the forum state and the foreign state, does not warrant immunity protection. The clearest example of this kind of conduct is activity by the foreign state defendant that harms the vital interests of the forum state, such as abuse of the citizens of the forum state.