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INTRODUCTION

In *Belhas v. Ya'alon*, the Circuit Court for the District of Columbia dismissed the complaint brought against General Moshe Ya'alon, a retired Israeli general, on the grounds that any potential international law violations committed by General Ya'alon occurred while he was acting in his official capacity with the Israeli military. The alleged violations included war crime, extrajudicial killings, crimes against humanity, and torture. Taking for granted the details alleged in the complaint, General Ya'alon's actions constituted serious *jus cogens* violations. Despite the severity of these violations, the court held that General Ya'alon's position in the Israeli military made him immune from suit under the Foreign Sovereign Immunities Act. This note will argue that, due to the nature of *jus cogens* norms and the standing they hold in the international community, the court should have found and applied a *jus cogens* exception to the immunity provided by the Foreign Sovereign Immunities Act.

I. BELHAS V. YA'ALON: FACTUAL BACKGROUND

Saadallah Belhas and other plaintiffs brought an appeal before the District of Columbia Circuit Court after their claims were dismissed in the district court for lack of subject matter jurisdiction because of sovereign immunity claimed by the defendant Moshe Ya'alon, an Israeli General, under the Foreign Sovereign Immunities Act ("FSIA").[1] The plaintiffs brought their

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[1] Belhas v. Ya'alon, 515 F.3d 1279, 1282 (D.C. Cir. 2008).

claims pursuant to the Alien Tort Claims Act ("ATCA") and the Torture Victims Protection Act ("TVPA"), alleging that General Ya'alon was guilty of "war crimes, extrajudicial killing, crimes against humanity, and cruel, inhumane or degrading treatment or punishment".[2]

From 1995 through 1998, General Ya'alon was the Head of Army Intelligence for the Israeli Defense Forces ("IDF").[3] He has since retired.[4] In 1996, IDF's Northern Command launched "Operation Grapes of Wrath", a campaign designed to encourage the Lebanese government to confront and disarm factions of the terrorist group Hezbollah, which was operating in southern Lebanon.[5] At the outset of the operation, the IDF issued radio warnings to civilians unaffiliated with Hezbollah to leave in order to prevent them from being falsely identified as members of the organization and targeted during the conflict.[6] Rather than leave southern Lebanon, many civilians instead decided to take refuge in a United Nations compound in the city of Qana.[7] The plaintiffs allege that, while under the command of General Ya'alon, IDF helicopters attacked the town, including the U.N. compound, leading to the injury or death of more than one hundred civilians.[8] The plaintiffs further allege that General Ya'alon took no action to prevent the injuries and deaths that occurred.[9] The plaintiffs, who are relatives of the injured and the deceased, brought this claim in U.S. District Court as a result, arguing that the conduct of General Ya'alon was inhuman and constituted an act of torture.[10]

II. LEGAL BACKGROUND

A. District of Columbia District Court

The plaintiffs brought their claim in the District Court for the District of Columbia under the ATCA.[11] In response, General Ya'alon moved for

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[2] *Id.*
[3] *Id.* at 1281.
[4] *Id.*
[5] *Id.*
[6] *Id.* at 1282.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.* at 1282.
[11] *Id.*

dismissal for lack of subject matter jurisdiction.[12] He argued that because his actions, regardless of whether they constituted torture or any other human rights offense, occurred during the course of his official duties as head of the IDF, he was immune from suit under the Foreign Sovereign Immunities Act ("FSIA").[13] In support of his motion, the Israeli ambassador wrote a letter to the United States Department of State confirming that General Ya'alon acted within his official capacities.[14] The District Court agreed and dismissed the case, holding that Ya'alon was immune from suit because none of the exceptions to sovereign immunity under the FSIA had been met.[15] Belhas and the other plaintiffs appealed the decision to the D.C. Circuit Court.

B. Court of Appeals

The court of appeals began by discussing whether or not Ya'alon's conduct indeed fell within his official capacity as the Head of Army Intelligence. The court found that none of his actions were outside the scope of his official duties, in part by relying on the letter from the Israeli ambassador.[16] Without looking at the FSIA's exceptions, the court held that Ya'alon qualified for immunity under the statute.[17] The thrust of the plaintiffs' appeal, however, claimed that the nature of General Ya'alon's conduct created an exception to the FSIA, and as a result, the district court did have subject matter jurisdiction over the torture claim.[18]

C. *Jus Cogens* Violations as Possible Exceptions to Sovereign Immunity Under the FSIA

The plaintiffs contended that if General Ya'alon's actions constituted *jus cogens* violations, the court should create an exception to the immunity provided by the FSIA.[19] The court rejected the contention that a violation of a *jus cogens* norm is enough to create an exception to the FSIA, regardless of whether General Ya'alon was responsible for committing human rights

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[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.* at 1283.
[17] *Id.* at 1282.
[18] *Id.* at 1286.
[19] *Id.*

violations in attacking the Lebanese compound.[20] Instead, the court found that the FSIA provided the only way for the U.S. district courts to obtain subject matter jurisdiction over a foreign sovereign.[21] Moreover, the court held that unless the FSIA explicitly provided an exception to immunity, no exception exists.[22] Because there is no enumerated *jus cogens* exception in the FSIA, the court rejected the plaintiffs' argument.

D. The Torture Victims Protection Act as a Possible Exception to the FSIA

The plaintiffs also argued that the TVPA establishes personal liability for acts of torture committed under the actual or apparent authority of foreign law despite the provisions of the FSIA.[23] The court disagreed and found that, while the TVPA may appear to grant subject matter jurisdiction over any defendant when torture claims are involved, it does not constitute an exception to sovereign immunity independent from those listed in the Act.[24] The court held that because the TVPA can still be applied to foreign officials when their conduct falls under one of the FSIA's exceptions, because of precedent to the contrary, and because the legislative history explicitly rejects a TVPA exception to the FSIA, that no independent exception is created by the Act.[25]

E. Miscellaneous Arguments Asserted by the Plaintiffs

The plaintiffs make two additional arguments in favor of the idea that General Ya'alon should not receive immunity under the FSIA. Neither of these arguments will be discussed any further in this note, and are mentioned here only to accurately represent the claims made by the plaintiffs. The plaintiffs argue that because General Ya'alon had retired from the IDF before the suit began, that he should no longer receive FSIA immunity.[26] Plaintiffs also argued that because they are seeking relief from General Ya'alon and not from the sovereign, that he should not be protected by the FSIA.[27] The court dismissed both of these arguments rather quickly and instead focused on the arguments for *jus cogens* and TVPA exceptions.

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[20] *Id.* at 1287.
[21] *Id.*
[22] *Id.*
[23] *Id.* at 1288.
[24] *Id.*
[25] *Id.* at 1288-89.
[26] *Id.* at 1284.
[27] *Id.*

III. THE ALIEN TORT CLAIMS ACT AND THE FOREIGN SOVEREIGN

A. The Development of the Foreign Sovereign Immunities Act from the Alien Tort Claims Act

The plaintiffs in *Belhas v. Ya'alon* brought suit in the United States District Court for the District of Columbia under the ATCA, which allows subjects of foreign states to bring claims in U.S. district courts for violations of international law.[28] Specifically, the plaintiffs brought suit under the TVPA, which makes anyone who commits an act of torture or an extrajudicial killing liable to the victim or to the legal representative of the victim.[29] The TVPA, which was added to the ATCA in 1991, modifies the ATCA, making individuals who commit acts of torture under the color of foreign law liable in U.S. district court.[30] The FSIA, on the other hand, provides that foreign sovereign states or "an agency or instrumentality" of a foreign state is immune from suit in U.S. district court unless certain enumerated exceptions are met.[31] It may appear that the TVPA abrogates the FSIA, first, because it makes individuals who act under the color of foreign law liable for their actions, and secondly, because the ATCA appears to permit suit against foreign states and their agents. Despite these interpretations, courts have consistently held that neither the ACTA nor the TVPA provide the basis for U.S. courts to exercise their jurisdiction over foreign sovereigns where there is no explicit FSIA exception.[32]

B. *Amerada Hess* and Exceptions to the Foreign Sovereign Immunities Act

In 1989 the Supreme Court held in *Argentine Republic v. Amerada Hess Shipping Corp.*, that the FSIA's exceptions to sovereign immunity

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[28] Alien Tort Claims Act, 28 U.S.C.A. § 1350 (2008) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States").

[29] Torture Victims Protection Act, 28 U.S.C.A. § 1350 (note) sec. 2(a) (2008) (" (a) Liability.--An individual who, under actual or apparent authority, or color of law, of any foreign nation--(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death").

[30] Alien Tort Claims Act § 1350.

[31] Foreign Sovereign Immunities Act §§ 1603; 1605.

[32] Foreign Sovereign Immunities Act § 1605; Torture Victims Protection Act § 1350.

provided the only basis for subject matter jurisdiction in U.S. courts over sovereign states.[33] This case, which did not involve *jus cogens* violations, has become a principle case in subsequent judicial decisions holding that such violations fail to provide an exception to the FSIA.[34]

United Carriers entered into a charter party contract with Amerada Hess Shipping to transport crude oil from Alaska to Amerada's refineries in the U.S. Virgin Islands.[35] At the time, Great Britain and Argentina were fighting over the Falkland Islands at the tip of South America.[36] While in international waters, about five hundred miles from the Falkland Islands, an Argentinean bomber began to circle the ship and eventually attacked, causing extensive damage.[37] As a result of the damage, United Carriers and Amerada Hess brought suit against Argentina under the ATCA in the Southern District of New York.[38] The case was dismissed in district court because of the FSIA.[39] The court found no exception in the Act to allow for the court to exercise jurisdiction over the claims. This decision was overturned by the court of appeals, and that decision was appealed by Argentina to the Supreme Court.[40]

The Second Circuit reversed the decision of the district court and refused to dismiss the plaintiffs' claims because it found that the FSIA was not meant to "eliminate 'existing remedies in United States courts for violations of international law' by foreign states under the Alien Tort Statute".[41] The court of appeals felt that because Congress did not repeal the ATCA when the FSIA was passed, and because much of the FSIA is focused on commercial concerns, that the remedies available under the ATCA were still available after the passage of the FSIA.[42]

The Supreme Court rejected these arguments on multiple grounds. First of all, the Court found that "the text and structure of the FSIA demonstrate[d] Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts".[43] Because the act set out when a

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[33] Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1988).

[34] *See* Belhas v. Ya'alon, 515 F.3d 1279 (D.C. Cir. 2008); Princz v. Federal Republic of Germany, 26 F.3d 1166 (D.C. Cir. 1994); Siderman de Blake v. Republic of Argentina, 965 F.3d 699 (9th Cir. 1992).

[35] *Argentine Republic*, 488 U.S. at 431.

[36] *Id.*

[37] *Id.* at 432.

[38] *Id.*

[39] *Id.* at 433.

[40] *Id.*

[41] *Id.* (citing Argentine Republic v. Amerada Hess Shipping Corp., 830 F.2d 421 (2d Cir. 1987)).

[42] *Id.* at 435.

[43] *Id.* at 434.

foreign state is immune from suit, as well as the specific instances when it could not obtain immunity, the court found the statute contained the only grounds for finding exceptions to sovereign immunity.[44] Additionally, the court was unconvinced by the argument that because the ATCA was not repealed, that the causes of action it previously permitted remained intact.[45] The ATCA could be interpreted so as to grant jurisdiction over foreign, non-sovereign defendants, while the FSIA conferred jurisdiction over foreign states.[46] The court found no reason then, especially when taking the language of the FSIA into account, to agree with the circuit court.[47] Ultimately, the Supreme Court held that the FSIA provided the sole basis for exercising subject matter jurisdiction over a foreign sovereign in a U.S. district court.

IV. *JUS COGENS* VIOLATIONS AND THE FOREIGN SOVEREIGN IMMUNITIES ACT

A. The Prohibition Against Official Torture has Reached the Level of a *Jus Cogens* Norm

The plaintiffs in *Belhas v. Ya'alon* argued that the attack on the U.N. compound, which caused the deaths and injuries of hundreds of Lebanese civilians, amounted to torture, and therefore, the violation of a peremptory norm.[48] The plaintiffs further contend that such a violation of a peremptory norm creates an exception to the sovereign immunity provided by the FSIA.[49]

According to the Vienna Convention on the Law of Treaties ("Vienna Convention"), "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".[50] *Jus cogens* norms are similar to customary international law, which operates

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[44] *Id.* at 434-35.

[45] *Id.* at 436.

[46] *Id.* at 437.

[47] The court in *Belhas v. Ya'alon* uses a similar analysis to come to the conclusion that the causes of action available under the TVPA are limited by the FSIA. This will be discussed in more detail in a later section of this note.

[48] Belhas v. Ya'alon, 515 F.3d 1279, 1287 (D.C. Cir. 2008).

[49] *Id.*

[50] Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 332 [hereinafter Vienna Convention].

based on the consent of states.[51] As a result, states that object to an international customary norm will not be bound as a matter of international law.[52] *Jus cogens* norms, to the contrary, do not depend on the consent of states.[53] They are considered universal, fundamental norms of the international community that "transcend . . . consent".[54] All states must accept and follow *jus cogens* norms regardless of objection. Because of the universal nature of *jus cogens* norms, they occupy the "highest status in international law" and can be preempted only by other *jus cogens* norms.[55]

In *Belhas v. Ya'alon,* the plaintiffs argued that the prohibition against torture has reached the level of a *jus cogens* norm, and as such, universally prohibited by international law.[56] The Nuremberg trials following World War II outlined many crimes that have traditionally been held to be violations of *jus cogens* norms; genocide, enslavement, and other inhuman acts were found to be so offensive to the human condition, they subjected the Nuremberg defendants to the jurisdiction of the court regardless of Germany's assent to the authority of the tribunal.[57] U.S. courts, as well as international treaties, have long recognized the prohibition against torture as part of customary international law, and have since come to consider it a peremptory norm.[58] The court in *Committee of U.S. Citizens of Nicaragua v. Reagan* announced that the prohibition against torture had reached the level of a *jus cogens* norm.[59] In *Siderman v. Argentina,* the court found that "[g]iven this extraordinary consensus, we conclude that the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*".[60] In light of these holdings, if the actions of General Ya'alon did indeed rise to the level of torture, he violated a

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[51] Siderman de Blake v. Republic of Argentina, 965 F.3d 699, 715 (9th Cir. 1992).

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988); *Siderman*, 965 F.3d at 715.

[56] *Belhas*, 515 F.3d at 1287.

[57] *Siderman*, 965 F.3d at 715 (*citing* Steven Fogelman, *The Nuremberg Legacy: An Unfulfilled Promise,* 63 S. CAL. L. REV. 833, 847 (1990); Belsky, Merva & Roht-Arriaza, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law,* 77 CAL. L. REV. 365, 385-86 (1989)).

[58] Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), Forti v. Suarez-Mason, 672 F.Supp. 1531 (N.D. Cal. 1987); The Treaty Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 23 I.L.M. 1027 (1984).

[59] *Reagan*, 859 F.2d at 941-42.

[60] *Siderman* 965 F.3d at 717.

jus cogens norm.

B. *Jus Cogens* Violations are Never Part of an Individual's Official State Duties, and so They are not Entitled to Sovereign Immunity

The FSIA's definition of a foreign state includes any "agency or instrumentality of [that] foreign state", and the Act extends immunity to such agents as if they were the state themselves.[61] Thus, in order for General Ya'alon to be immune from suit, he must have acted as an agent or instrumentality of Israel, which would require that his actions be of an official nature. This is precisely what Ya'alon claimed, and in support of this position, the Israeli ambassador asserted that Ya'alon's actions fell within his official duties as a general of the IDF.[62] Because the court agreed that Ya'alon had acted in his official capacity, it declined to consider whether his actions constituted war crimes, extrajudicial killings, or various other human rights abuses.[63] By refusing to examine whether General Ya'alon's actions constituted *jus cogens* violations because of his status as a state official, the court begged the question, as growing jurisprudence has held that serious human right abuses can never be official acts of a state.

International courts and tribunals have increasingly asserted that human rights violations committed by state officials are not legitimate acts of state. In 1993, the United Nations established the International Criminal Tribunal for the former Yugoslavia in order to prosecute individuals for war crimes committed in the Balkan nation.[64] In *Prosecutor v. Furundzija*, the court stated that international prohibitions of certain crimes against humanity, in this case torture, "first and foremost address themselves to individuals, in particular State officials" and that "those who engage in torture are personably accountable at the criminal level for such acts".[65] Acts of torture and other human rights violations, according to the court's reasoning, can never be part of an individual's official duties as an agent of the state. This idea of individual liability was subsequently echoed in the charter of the International Criminal

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[61] Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1603(a) (2008).

[62] Belhas v. Ya'alon, 515 F.3d 1279, 1282 (D.C. Cir. 2008).

[63] *Id.* at 1283 ("Indeed, the Court noted in the complaint indicates that General Ya'alon took part in any events related to the shelling of Qana that were outside his official authority and role as the head of intelligence for the IDF.").

[64] About the ICTY, http://www.icty.org/sections/AbouttheICTY (last visited Apr. 2, 2009).

[65] Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 140 (Dec. 10, 1998). While the case and selected quote deal with criminal, rather than civil, liability, this may simply be a function of the nature of the tribunal. It nevertheless stands for the proposition that officials who engage in torture are individually liable for their actions.

Tribunal for Rwanda, and has been a part of international law as early as the Nuremberg trials.[66]

Courts in the United States have also expressed the idea that conduct by state officials in violation of international human rights norms is not part of an official's duties as an agent of the state. In *Filartiga v. Pena-Irala,* the defendant Pena, the Inspector General of Police in Asuncion, Paraguay, was accused of kidnapping and torture.[67] On appeal, Pena argued that he was immune from suit because his actions were undertaken as an official of the Paraguayan government.[68] The court declined to rule on the issue because Pena had not made the argument in the lower court, however, it did state that they "doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could properly be characterized as an act of state".[69] Earlier in the decision, the court recognized that when Paraguay enacted its constitution it "[was] bound both to observe and construe the accepted norms of international law", thereby incorporating the law of nations into its own laws.[70] By violating the international prohibition against torture, Pena had acted contrary to the laws of the republic of Paraguay. As a result, his actions could not properly have been called acts of the state, and therefore he was liable as an individual and not entitled to the immunity granted to agents of a sovereign. In *Hilao v. Estate of Marcos,* the Ninth Circuit declined to extend immunity under the FSIA to the Venezuelan head of state because his actions "were not acts of Venezuelan sovereignty. . . . They constituted common crimes committed by the Chief of State done in violation of his position and not in pursuance of it".[71] Even more succinctly, in *Siderman v. Argentina,* the court stated: "International law does not recognize an act that violates *jus cogens* as a sovereign act".[72]

If a *jus cogens* violation can never be a sovereign act, then prior to any

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[66] Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994); Furundzija, ¶ 140 (quoting Trials of the Major War Criminals Before the International Military Tribunal, Vol. I, p. 223) ("Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced").

[67] Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

[68] *Id.* at 889.

[69] *Id.*

[70] *Id.* at 877.

[71] Hilao v. Estate of Marcos, 25 F.3d 1467, 1471 (9th Cir. 1994) (citing Jimenez v. Aristeguita, 311 F.2d 547, 557-58 (5th Cir. 1962)).

[72] Siderman de Blake v. Republic of Argentina, 965 F.3d 699, 719 (9th Cir. 1992).

decision on whether an individual was acting in an official capacity, courts must ask whether a violation has occurred. Otherwise a court would take an individual's official status for granted without any real inquiry. If an official violates a *jus cogens* norm, they cannot be acting as an agent of the state. As such, they are no longer immune from liability as agents of the sovereign under the FSIA, but rather, they become liable as individuals for the alleged conduct.

In *Belhas v. Ya'alon*, the court found that General Ya'alon was acting in his official capacity in part because the conduct alleged in the complaint was not personal or private in nature because of his position as the Head of Army Intelligence of the IDF.[73] But as the above examples point out, state courts cannot assume that officials are acting in their official capacity simply because they acted from their official position within the state. Because the court declined to examine whether or not Ya'alon's conduct constituted the crimes alleged in the complaint, it did not adequately determine if he acted in his official capacity. If he had acted in violation of internationally recognized human rights norms his actions could not have been considered acts of the sovereign. By refusing to determine whether Ya'alon had violated *jus cogens* norms, the court took for granted that he was acting in his official capacity rather than examining the issue. The *Belhas* court also gives weight to the Israeli ambassador's averment that Ya'alon acted in his official capacity.[74] While the statements of the foreign state may be useful, such statements do not alter the nature of the conduct. Statements from a foreign state cannot make a *jus cogens* violation into anything less than it is. Assuming Ya'alon's conduct, even though undertaken as an officer of the IDF, did constitute *jus cogens* violations, it could not have been part of his official duties. As such, he was not acting as an agent of Israel and therefore was not entitled to immunity under the FSIA.

C. There Should Be a *Jus Cogens* Exception to the FSIA

Even if such violations are considered official acts of a sovereign state, *jus cogens* violations should create an exception to the FSIA. *Jus cogens* norms can only be preempted by other international norms of comparable weight.[75] While sovereign immunity is internationally recognized, it does, by the very nature of *jus cogens* norms, constitute one. As such, immunity cannot preempt a *jus cogens* norm. Even if the *Belhas* court was correct in holding that General Ya'alon acted in his official capacity, he should not be immune from suit under

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[73] Belhas v. Ya'alon, 515 F.3d 1279, 1283 (D.C. Cir. 2008).

[74] *Id.*

[75] *Siderman*, 965 F.3d at 715.

the FSIA because of the particularly heinous nature of his alleged conduct.

Underthe Vienna Convention, *jus cogens* norms can be modified or preempted "only by a subsequent norm of general international law having the same character".[76] While sovereign immunity may be domestically codified, courts have held that sovereignty and sovereign immunity are principles of international law.[77] As principles of international law, sovereignty and sovereign immunity can only modify *jus cogens* norms if they are, as a matter of international law, of the same character as other peremptory norms; that is, they must be peremptory norms themselves.

Sovereign immunity is not a *jus cogens* norm. While the Vienna Convention declined to elaborate on just what were considered to be *jus cogens* norms, "there is wide agreement on past and current *jus cogens* norms".[78] The Third Restatement of Foreign Relations Law includes genocide, slavery and the slave trade, the murder or causing the disappearance of individuals, torture or other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, and systematic racial discrimination as prohibited *jus cogens* violations.[79] *Jus cogens* norms prohibit "acts that the laws of all civilized nations define as criminal".[80] While the Restatement's list is not exhaustive, it illustrates the types of crimes prohibited as violations of *jus cogens* norms. *Jus cogens* norms protect universally observed, fundamental human rights. In particular, they prohibit the type of conduct viewed as the most abusive of human rights and dignity. Sovereign immunity is simply not an international legal principle of this character. A violation of sovereign immunity cannot be equated with slavery or genocide. Sovereign immunity is not a human rights issue. For this reason, the principles of sovereignty and sovereign immunity are not *jus cogens* norms.

Additionally, *jus cogens* norms differ from other rules of international law in that there can be no derogation from adhering to them.[81] United States courts have recognized the mandatory nature of *jus cogens* norms. In *Siderman v. Argentina*, the court stated that "[whereas] customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent, as exemplified by the theories underlying the judgments of the Nuremberg tribunals following World War

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[76] Vienna Convention, *supra* note 50, art. 53.

[77] Int'l Ass'n of Machinists & Aerospace Workers v. OPEC, 649 F.2d 1354, 1359 (9th Cir. 1981).

[78] Lyn Beth Neylon & Karen Parker, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 429 (1989).

[79] Restatement (Third) of Foreign Relations Law § 702 (1987).

[80] Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1992).

[81] Vienna Convention, *supra* note 42, art. 53.

II".[82] In contrast to the mandatory nature of peremptory norms, sovereign immunity is far from universally practiced as a mandatory feature of international law. In fact, states frequently consent to waive immunity.

For example, the United States has consented to being sued by U.S. citizens.[83] Without the consent of the United States to be named as a defendant, it would enjoy sovereign immunity even against its own citizens.[84] States have also waived sovereign immunity and submitted to the jurisdiction of various international courts. Article 27 of the Rome Statute of the International Criminal Court, for example, states:

> 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute. . .
>
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.[85]

Because the FSIA defines a foreign state to include agents and instrumentalities of the state, by consenting to the jurisdiction of the International Criminal Court ("ICC") over officials, including heads of state, any state that ratifies the convention would be, in effect, waiving its sovereign immunity, at least with respect to the offenses covered by the Convention.[86] If sovereign immunity were a peremptory norm of international law, this article of the Rome Statute would violate the Vienna convention, since any treaty in derogation of a preemptory norm is unenforceable.[87] A treaty allowing for the waiver of sovereign immunity would result in a derogation of such a norm.[88] Because states are allowed to freely waive their sovereign immunity, it cannot be a *jus*

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[82] *Siderman*, 965 F.3d at 715.

[83] 28 U.S.C.A. § 1346 (2008).

[84] *Id.*

[85] Rome Statute of the International Criminal Court art. 27, July 17, 1998 2187 U.N.T.S. 90 [hereinafter Rome Statute].

[86] Foreign Sovereign Immunities Act, 28 U.S.C.A. §§ 1603(a) & (b)(1) (2008).

[87] Vienna Convention, *supra* note 50, art. 53.

[88] *Id.*

cogens norm.

States also deny sovereign immunity to other states without their consent. The FSIA, while recognizing a foreign state's immunity from suit in United States courts generally, also contains exceptions to that immunity.[89] These exceptions outline the circumstances in which the United States has decided to unilaterally deny sovereign immunity to a foreign state. Because *jus cogens* norms are based on "values taken to be fundamental by the international community", rather than the consent of nations, a state would not be permitted to ignore *jus cogens* norms.[90] A state cannot create exceptions to *jus cogens* norms as the FSIA does with sovereign immunity. This represents a fundamental difference between sovereign immunity and *jus cogens* norms.

Because sovereign immunity is an international law principle that is not comparable in character to *jus cogens* norms, international prohibitions against grave human rights abuses should not be preempted by concerns over state sovereignty. United States federal courts, however, have not recognized a *jus cogens* exception to the FSIA.[91] In *Princz v. Federal Republic of Germany*, the court refused to hear a case brought by Hugo Princz, a United States citizen, against Germany for his treatment in Nazi concentration camps during World War II.[92] Princz had been captured while visiting Slovakia and subsequently turned over to the SS.[93] After he was liberated by American soldiers following the war, Princz sought reparations from Germany with the support of the United States government.[94] His requests were routinely denied, largely because he was not a German citizen.[95] As a last resort, Princz brought suit against Germany in federal district court.[96] The lower court found that it did have subject matter jurisdiction over the case, stating that the FSIA "has no role to play where the claims alleged involve undisputed acts of barbarism committed by a one-time outlaw nation which demonstrated callous disrespect for the humanity of an American citizen, simply because he was Jewish".[97] The circuit court overruled the lower court's finding of subject matter jurisdiction, finding no *jus cogens* exception to sovereign immunity within the FSIA.[98] The court

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[89] Foreign Sovereign Immunities Act § 1605.

[90] *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 YALE J. INT'L L. 332, 351 (1988).

[91] *See* Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992).

[92] Princz v. Federal Republic of Germany, 26 F.3d 1166, 1168 (D.C. Cir. 1994).

[93] *Id.* at 1168.

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] Princz v. Federal Republic of Germany, 813 F.Supp. 22, 26 (D.D.C. 1992).

[98] Princz v. Federal Republic of Germany, 26 F.3d 1166, 1174 (D.C. Cir. 1994).

relied on *Argentine Republic v. Amerada Hess*, finding the FSIA to be the "sole basis for obtaining jurisdiction over a foreign state in federal court".[99] The court also relied on the holding in *Siderman v. Argentina* which had previously addressed the question of whether or not *jus cogens* violations created a FSIA exception and found that they did not.[100]

In *Siderman v. Argentina*, the plaintiffs sued Argentina for the torture of Jose Siderman by members of the country's ruling military junta.[101] The Sidermans claimed that Jose was taken one night by the Argentine military and subsequently beaten and tortured for a week because he was Jewish.[102] After a week of torture, Jose Siderman was driven to an isolated location and thrown from the car.[103] He was then ordered to leave Argentina.[104] The Sidermans argued that "when a state violates *jus cogens*, the cloak of immunity provided by international law falls away, leaving the state amenable to suit".[105] The court responded that "[as] a matter of international law, the Sidermans' argument carries much force".[106] Nevertheless the court relied on *Argentine Republic v. Amerada Hess* to hold that unless the FSIA provides an exception to sovereign immunity, federal district courts have no subject matter jurisdiction over claims brought against a foreign state.[107]

The court arrived at this decision reluctantly. It acknowledged that sovereign immunity "derives from international law" and that "*jus cogens* norms 'enjoy the highest status within international law'."[108] The court implied that it agreed with the Sidermans that *jus cogens* violations should create an exception to the sovereign immunity provided by the FSIA, and seemed to find to the contrary only out of deference to the ruling in *Argentine Republic v. Amerada Hess*.[109] But for the decision in *Argentine Republic v. Amerada Hess,*

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[99] *Id.* at 1169 (citing Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 439 (1988)).

[100] *Id.* at 1174 (citing Siderman de Blake v. Republic of Argentina, 965 F.3d 699, 719 (9th Cir. 1992)).

[101] Siderman de Blake v. Republic of Argentina, 965 F.3d 699, 703 (9th Cir. 1992) (The Sidermans were also suing for the expropriation by the junta of large amounts property, but these claims are separate from the torture claims and will not be discussed.).

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.* at 717.

[106] *Id.*

[107] *Id.* at 718-19.

[108] *Id.* at 718 (citing Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988)).

[109] *Id.* ("Unfortunately, we do not write on a clean slate. We deal not only with customary international law, but with an affirmative Act of Congress, the FSIA. We must interpret the FSIA

the court would presumably have allowed the Sidermans to sue Argentina in federal court. The court then pointed out that while the Amerada court dealt with the issue of whether or not international law can create an exception to the FSIA, the type of international law violation present in *Argentine Republic v. Amerada Hess* was not the type of violation alleged by the Sidermans.[110] In the *Amerada* case, two Liberian plaintiffs attempted to sue Argentina for the sinking of a crude oil tanker.[111] The Siderman court explained that:

> In *Amerada Hess*, the Court had no occasion to consider acts of torture or other violations of the peremptory norms of international law, and such violations admittedly differ in kind from transgressions of jus dispositivum, the norms derived from international agreements or customary international law with which the Amerada Hess Court dealt.[112]

When the Amerada court held that there are no exceptions to sovereign immunity outside of those in the FSIA, it was not presented with the challenges of balancing sovereign immunity against the severity of *jus cogens* violations. While the *Amerada* court may indeed have decided the same way had it been presented with a *jus cogens* violation, the *Siderman* court seems to suggest that the serious human rights concerns inherent in *jus cogens* norms may have led the *Amerada* court to decide differently. However, because the language of the *Amerada* decision left no room for a *jus cogens* exception to the FSIA, the *Siderman* court was forced to dismiss the Siderman's claims.[113] So while United States courts have routinely held that *jus cogens* violations do not create an exception to the FSIA, those decisions are based on a case, *Argentine Republic v. Amerada Hess*, which does not involve *jus cogens* violations.[114] Despite its holding, *Siderman v. Argentina* recognizes the validity of the argument in favor of a *jus cogens* exception to the FSIA, but was "foreclosed by the Supreme Court's opinion" in *Argentine Republic v. Amerada Hess* from recognizing such an exception.[115]

Additionally, *jus cogens* violations should create an exception to the FSIA because, as the principle of peremptory norms has become more important in the international community following the Nuremberg trials, the

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through the prism of *Amerada Hess.*").

[110] *Id.* at 718-19.

[111] Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 431-32 (1988).

[112] Siderman de Blake v. Republic of Argentina, 965 F.3d 699, 718-19 (9th Cir. 1992).

[113] *Id.* at 719.

[114] *Argentine Republic*, 488 U.S. at 428; *Siderman*, 965 F.2d at 699.

[115] *Siderman*, 965 F.2d at 713.

importance of the principles of sovereignty and sovereign immunity has waned.[116]

> The primitive legal order of classical international law with its 'loose, unorganized society of sovereign states' has been replaced by an increasingly organized and interdependent international community. International society is now characterized by an increasing volume of state cooperation in matters of common concern. The result has been a decreased emphasis on the classical notions of sovereignty in an effort to foster cooperation among the community of nations.[117]

Even the passage of the FSIA in 1976 itself represented a shift in the notion of sovereignty. Before the mid-twentieth century, the United States had granted foreign states almost complete sovereign immunity.[118] By the early twentieth century, however, the restrictive theory of immunity began to take hold.[119] Under the restrictive theory, states enjoy immunity only for their public acts, but not when states act privately; that is, when it engages in commerce.[120] The United States began to rely upon this theory of sovereign immunity in 1952, and in 1976 it was codified in the FSIA.[121] The development of *jus cogens* norms has further restricted sovereignty by limiting the ability of states to act unilaterally.[122] The twentieth century has seen an erosion of traditional notions of sovereignty in favor of "cooperation among the community of nations".[123] In the face of the increasing international concern about the types of human rights issues embodied by *jus cogens* norms, the notion of sovereign immunity in the case of *jus cogens* violations has become "outmoded".[124] This shift in the balance between sovereign immunity and *jus cogens* violations can be seen throughout the international community.

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[116] Belsky, *supra* note 57, at 391-92 (citations omitted).

[117] *Id.*

[118] Princz v. Federal Republic of Germany, 26 F.3d 1166, 1169 (D.C. Cir. 1994).

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] Belsky, *supra* note 57, at 390 ("The very existence of jus cogens limits 'state sovereignty in the sense that the 'general will' of the international community of states takes precedence over the individual wills of states to order their relation.' Thus, the concept that a sovereign is subject to no restraints except those imposed by its own will is inconsistent with the definition of jus cogens as peremptory law.") (citation omitted).

[123] *Id.* at 392.

[124] *Id.* at 391.

Article Six of the statute establishing the International Criminal Tribunal for Rwanda ("ICTR"), and Article Seven of the statute establishing the International Criminal Tribunal for the former Yugoslavia ("ICTY"), both state that an individual's status as an official of the state, including the position of Head of State, does not make that individual immune from liability.[125] Both tribunals were established to prosecute individuals for human rights violations such as genocide and torture.[126] Both tribunals refuse to grant sovereign immunity to individuals who commit the exact types of crimes prohibited by *jus cogens* norms.[127] Furthermore, in the case of the ICTY, it would have been impossible for the state to waive its sovereign immunity because Yugoslavia was no longer a state when the ICTY was established.[128] Not only do the ratifying states recognize that state officials who commit *jus cogens* violations are not entitled to sovereign immunity, but they granted the tribunal the jurisdiction to prosecute states without their consent as well. Article 27 of the Rome Statute establishing the ICC also declines to extend sovereign immunity to state officials and Heads of State.[129] While the Rome Statute only recently came into force, as of July 2008, one hundred and eight nations have ratified the convention.[130] This represents wide agreement in the international community that serious human rights violators must be brought to justice, even if those violators are state officials who, under traditional notions of sovereignty, would be immune from prosecution. While the United States has not ratified the Rome Statute, both the ICTR and ICTY were established by Security Council resolutions and, as a permanent member of the Security Council, had the United States objected to either resolution, they would not have passed.[131] On the international level, even the United States, at least some degree, has recognized the idea that *jus cogens* norms preempt concerns over state sovereignty.

While the ICTR, ICTY and other international tribunals charged with prosecuting human rights violations have criminal, rather than civil jurisdiction,

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[125] S.C. Res. 955, *supra* note 65, art. 6; Statue of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 7, U.N. Doc. S/RES/827 (1993).

[126] *Id.*

[127] *Id.*

[128] Timeline of the breakup of Yugoslavia, http://news.bbc.co.uk/2/hi/europe/4997380.stm (last visited Apr. 8, 2009) ("By 1992 the Yugoslav Federation was falling apart". Yugoslavia began breaking up before the establishment of the ICTY in 1993).

[129] Rome Statute, *supra* note 85, art. 27.

[130] About the establishment of the ICC, http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Establishment+of+the+Court.htm (last visited Apr. 4, 2009) (While the Rome Statute was passed in 1998 it did not come into effect until 2002, when it was ratified by sixty countries.).

[131] U.N. Charter art. 23, para. 1; art. 27 para. 3.

the reasoning underlying that jurisdiction applies likewise to civil matters like the *Belhas* case.[132]

> The goals of criminal and tort law overlap[.] . . . Although by tort claims private parties may seek vindication of private interests, judgments in these cases affirm much wider interests manifested in the norms that the community is prepared to enforce. Punishment and compensation represent two distinct, but complementary, ways of condemning past, and deterring future, wrongdoing.[133]

Allowing plaintiffs to sue in tort for *jus cogens* violations, then, promotes the same goals as prosecuting human rights violators in international courts and tribunals. If state officials can be held individually liable in criminal courts, it does not make sense to deny their victims the right to recover from the individuals who inflicted on them the worst types of human rights crimes.

In sum, the D.C. Circuit court in *Belhas v. Ya'alon* should have recognized a *jus cogens* exception to the FSIA. Courts have consistently recognized the definition of *jus cogens* found in the Vienna Convention, and that sovereign immunity is a principle of international law.[134] Sovereign immunity, then, can only preempt *jus cogens* norms if it is itself a *jus cogens* norm, which it is not. Despite the Ninth Circuit's recognition that this argument "carries much force", courts in the United States have consistently held that no FSIA exception exists.[135] These decisions are based on the Supreme Court's decision in *Argentine Republic v. Amerada Hess*, a case that did not itself deal with *jus cogens* violations. The court's decision in *Belhas v. Ya'alon*, as a result, contradicts the very idea of *jus cogens* norms. Furthermore, the court's emphasis on the immunity provided by the FSIA is out of step with the diminished importance of sovereign immunity in the international community in the face of increasing human rights concerns. The *Belhas* court's decision was then incorrect according to the recognized definition of *jus cogens* and

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[132] Donald Francis Donavan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L. L. 142, 154 (2006).

[133] *Id.*

[134] Vienna Convention, *supra* note 50, art. 53; Princz v. Federal Republic of Germany, 26 F.3d 1166, 1173 (D.C. Cir. 1994) (The Court recognized the Vienna Convention's definition.); Siderman de Blake v. Republic of Argentina, 965 F.3d 699, 714 (9th Cir. 1992) (The Court here also recognized that definition.); Int'l Ass'n of Int'l Ass'n of Machinists & Aerospace Workers v. OPEC, 649 F.2d 1354, 1359 (9th Cir. 1981) (The Court found the sovereign immunity is a principal of international law.).

[135] Siderman de Blake v. Republic of Argentina, 965 F.3d 699, 718 (9th Cir. 1992).

anachronistic according to international trends holding sovereigns liable for human rights violations rather than granting them immunity.

D. States that Violate *Jus Cogens* Norms Waive Sovereign Immunity, Creating an Exception within the Structure of the FSIA

Even if *jus cogens* violations do not create an exception to the immunity provided by the FSIA, the act alone provides a mechanism for finding federal court jurisdiction for the types of claims brought by the plaintiffs in *Belhas v. Ya'alon*. According to *Argentine Republic v. Amerada Hess,* the FSIA provides the sole basis for finding jurisdiction.[136] If a claim falls under one of the Act's enumerated exceptions, a sovereign can no longer claim immunity.[137] Section 1605(a)(1) provides that "a foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case in which the foreign state has waived its immunity explicitly or by implication . . .".[138] Foreign sovereigns who commit serious human rights abuses have impliedly waived their immunity because of the severity of their conduct, as well as universal abhorrence of such violations, thereby making them amenable to suit within the framework of the FSIA. If General Ya'alon did indeed commit the acts alleged in the complaint, those acts should have been interpreted as a waiver of sovereign immunity, and the case should not have been dismissed.

In *Siderman v. Argentina*, the court held that Argentina had waived its right to immunity by availing itself of courts.[139] Argentina sought to prosecute the Sidermans for the sale of land that it alleged did not belong to them, and used the American courts to try to serve them with process.[140] The sale of the land was linked to expropriation claims made by the Sidermans that, in turn, were linked to their torture claims.[141] The court held that because "Argentina has engaged our courts in the very course of activity for which the Sidermans

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[136] Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1988).

[137] The Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1605 (2008).

[138] *Id.* at § 1605(a)(1).

[139] *Siderman*, 965 F.3d at 722.

[140] *Id.*

[141] *Id.* (The Sidermans alleged that they owned a certain acreage of land and that the Argentine government claimed they in fact owned less than they did by a significant amount. This is part of the basis for their expropriation claims. When the Sidermans sold their land Argentine claimed the fraudulently sold the land that Argentina took when it undervalued the amount of land they owned. This was the basis of Argentina's claim against the Sidermans and the reason they availed themselves of the American courts.).

seek redress, it has waived its immunity as to that redress".[142] Despite the court's earlier holding that the alleged *jus cogens* violations did not provide a basis for jurisdiction, the court allowed the Sidermans to pursue their torture claims on this basis.[143] In its analysis, the court described some of the ways a foreign sovereign can waive immunity. For example, where a state submits to arbitration, agreed to the law of a foreign state, or where the state has filed a response to a pleading, a foreign sovereign has waived its immunity.[144] Where the litigation revolves around a written agreement, as the facts in Siderman do because of the sale of land, the central issue according to the court was whether the sovereign envisioned the involvement of a foreign court.[145] Despite the court's description of the types of activities that constitute an implied waiver of immunity, the full extent of what constitutes such a waiver is far from clear.[146] There are strong indications that what constitutes an implied waiver of immunity extends beyond the situations described in *Siderman v. Argentina.*

The legislative history of the FSIA indicates that it intended for decisions made on implied waivers to be based on international law.[147]

> The House Report states that, "the central premise of the bill is that decisions on claims by foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime which incorporates standards recognized under international law" . . . The incorporation of international law . . . suggests that the implied waiver provision should be read to include waivers implied by operation of international law.[148]

The FSIA's waiver exception does not, by its language, refer to an implied waiver based on international legal norms, and it does not make clear what actions carried out by a foreign state constitute an implied waiver either. But because Congress intended the FSIA to be informed by international law, the implied waiver exception should be interpreted in a way that brings the statute into accord with international norms. Holding that a state waives its immunity

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[142] *Id.*

[143] *Id.*

[144] *Id.* at 721.

[145] *Id.*

[146] Belsky, *supra* note 57, at 395 (citing Jeffery A. Blair & Karen E. M. Parker,Comment, *The Foreign Sovereign Immunities Act and International Human Rights Agreements: How They Co-Exist*, 17 U.S.F. L. REV. 71, 81 (1982)).

[147] *Id.*

[148] *Id.* at 397-98 (citing H.R. REP. No. 1487-94, at 14 (1976)).

when it commits *jus cogens* violations would bring the FSIA into harmony with those norms. This position, while in a dissenting opinion, has been expressed in at least one federal court.

In *Princz v. Germany,* Judge Wald argued in his dissent that Germany impliedly waived its sovereign immunity when it subjected Princz to the horrors of the Holocaust.[149] As he points out, the forms of waiver mentioned by the *Siderman* court are not exhaustive, and the legislative history of the FSIA does not foreclose the possibility that *jus cogens* violations may create a waiver of immunity.[150] Wald also points out that Congress intended the FSIA to "create 'a statutory regime which incorporates standards recognized under international law'".[151] For this reason, Wald felt that the FSIA should be interpreted in a way that reconciles the Act with international legal principles.[152] He concluded, therefore, that the only way to bring the FSIA into harmony with international standards is to hold that when a foreign sovereign commits *jus cogens* violations, it waives its right to sovereign immunity under the FSIA.[153]

In this way, *jus cogens* violations can create an exception to sovereign immunity within the statutory scheme of the FSIA. The court's holding in *Argentine Republic v. Amerada Hess* that the FSIA provides the sole basis for jurisdiction over a sovereign, then, can be reconciled with international norms condemning *jus cogens* violations. For this reason, *jus cogens* violations should be construed as implied waivers of sovereign immunity and the plaintiffs in *Belhas v. Ya'alon* should have been permitted to move forward with their case against General Ya'alon.

E. Courts Should Recognize a *Jus Cogens* Exception Despite any Potential Burdens Such an Exception would Impose on the Courts

There is also concern that allowing foreign sovereigns to be sued for *jus cogens* violations would flood U.S. courts with foreign litigation. Both the *Belhas* and *Princz* courts expressed this concern, noting that it may lead to a "strain . . . upon our courts".[154] Despite the worries of these courts, concerns about increased litigation in the United States are likely overblown and, perhaps more importantly, cannot be reconciled with the gravity of *jus cogens*

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[149] Princz v. Federal Republic of Germany, 26 F.3d 1166, 1179 (D.C. Cir. 1994) (Wald, dissenting).
[150] *Id.* at 1183-84.
[151] *Id.* at 1183 (citing H.R. REP. No.. 1487-94, at 14 (1976)).
[152] *Id.*
[153] *Id.*
[154] Belhas v. Ya'alon, 515 F.3d 1279, 1287 (D.C. Cir. 2008) (quoting Princz v. Federal Republic of Germany, 26 F.3d 1166, 1174 (D.C. Cir. 1994)).

violations.

Creating a *jus cogens* exception to the FSIA is unlikely to lead to an overly burdensome increase in the workload of the courts. First, only a small class of acts are considered *jus cogens* norms. As set out in the Third Restatement of Foreign Relations Law, genocide, slavery and the slave trade, the murder or causing the disappearance of individuals, torture or other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, and systematic racial discrimination as prohibited as *jus cogens* violations.[155] The FSIA would still provide immunity to foreign sovereigns for other torts and suits, including violations of international norms that do not rise to the level of *jus cogens* violations. Only the worst types of human rights abuses would create an exception to immunity.

Second, the FSIA already permits United States courts to exercise jurisdiction over foreign sovereigns in a large number of cases. For example, in addition to the exceptions for express and implied waiver of immunity, the FSIA subjects foreign states to the jurisdiction of United States courts when they engage in commercial activity.[156] By essentially codifying the restrictive theory of sovereignty, allowing foreign states to be sued when they act commercially as private entities, the FSIA allows United States courts to exercise jurisdiction over what is undoubtedly a much larger class of cases than is embodied in *jus cogens* norms. Congress nevertheless expressed in their declaration of purpose that, allowing for such jurisdiction "would protect the rights of foreign states and litigants in United States courts".[157] Permitting foreign plaintiffs to sue in U.S. courts at all, then, indicates a willingness to accept such litigation in order to protect some rights. The argument that creating a *jus cogens* exception to the FSIA would be a burden on the courts, then, is not by itself a forceful argument. All forms of litigation create work for the courts. The harm of increased litigation must be weighed against the rights that litigation would protect. *Jus cogens* norms by definition prohibit only the worst kinds of human rights abuses, and therefore the most fundamental human rights would be protected. When compared to the rights protected, then, the potential for increased litigation is simply not a weighty enough concern.

The potential harm of increased litigation would also be mitigated by the availability of alternate means of redress for the victims of *jus cogens* violations. In *Princz v. Germany*, for example, before initiating litigation against Germany, Princz repeatedly made requests, often with the support of the

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[155] Restatement (Third) of Foreign Relations Law § 702 (1987).

[156] The Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1605 (2008).

[157] *Id.* § 1602.

United States government, for reparations.[158] While his requests were unsuccessful, they illustrate that other forms of restitution besides resorting to the courts are available in some circumstances. Additionally, simply because the victims of *jus cogens* violations would be allowed to sue in United States courts does not mean that all victims would sue here. Plaintiffs may choose to sue in the courts of another nation, and United States courts would even be able to send cases to those courts under the principle of forum non conveniens.[159] Allowing United States courts to exercise jurisdiction over foreign states in the case of *jus cogens* violations does not mean that United States courts will always be the proper forum for *jus cogens* cases. This would greatly reduce the number of cases American courts would have to adjudicate if a *jus cogens* exception to the FSIA were recognized. For this and the foregoing reasons, the potential harm that would be caused by such an exception would be minor.

Finally, concerns over the increased strain on the courts that would potentially result from a *jus cogens* FSIA exception are contrary to the very notion of *jus cogens*. They are "nonderogable and enjoy the highest status within international law".[160] They only prohibit activities that are universally recognized as the worst type of human rights abuses. For this reason, they can only be preempted by other *jus cogens* norms. Like sovereign immunity, practical concerns over burdening the courts can only be superseded by *jus cogens* norms, then, if they are of the same character. Mere practicality issues, for this reason, cannot preempt *jus cogens* concerns. *Jus cogens* concerns must therefore take precedence over the potential for increased litigation.

V. THE TORTURE VICTIMS PROTECTION ACT AND THE FOREIGN SOVEREIGN IMMUNITIES ACT

The plaintiffs in *Belhas v. Ya'alon* also brought suit under the TVPA, arguing that where the TVPA applies, it supersedes the FSIA.[161] The TVPA provides that "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation subjects an individual to torture shall, in a civil action, be liable for damages to that individual".[162] They argued that, because in order to be subject to the act, an individual must be acting under actual or apparent authority of a foreign state, that foreign officials who commit acts of

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[158] Princz v. Federal Republic of Germany, 26 F.3d 1166, 1168 (D.C. Cir. 1994).

[159] Belsky, *supra* note 57, at 406.

[160] Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988).

[161] Belhas v. Ya'alon, 515 F.3d 1279, 1288 (D.C. Cir. 2008).

[162] The Torture Victim Protection Act, 28 U.S.C.A. § 1350 (note) sec.2 (2008).

torture are liable under the act and are not entitled to FSIA immunity.[163] To hold otherwise, they argued, would render the TVPA useless.[164] The court rejects this argument, and, for the following reasons, was correct in doing so.

The court first pointed out that the TVPA would not be nullified by extending immunity to foreign officials under the FSIA.[165] The FSIA would still permit foreign officials to be sued under the FSIA where their actions are not official acts, or where one of the FSIA's exceptions applies.[166] The court next looked to the legislative history of the TVPA and found that Congress did not intend for the act to create an exception to FSIA immunity.[167] In fact, as the court pointed out, "[b]oth the House and Senate reports on the passage of the TVPA state explicitly that the TVPA is not meant to override the FSIA".[168] Because granting immunity to foreign officials under the FSIA does not nullify the TVPA, there is no reason to find that the TVPA creates an exception to the FSIA. As this interpretation of the TVPA is additionally supported by the legislative history, the court was correct in its ruling that no TVPA exception to the FSIA exists.

VI. THE CURRENT STATE OF THE LAW, BRIEF POLICY CONCERNS AND POSSIBLE FUTURE DEVELOPMENTS

The decision in *Belhas v. Ya'alon* represents a recent example of jurisprudence; standing for the fact that unless the FSIA provides for an explicit exception to sovereign immunity, United States courts cannot exercise their jurisdiction over foreign states and their agents. Earlier cases addressing the issue, such as *Siderman v. Argentina* and *Princz v. Germany*, have held, like *Belhas v. Ya'alon*, that there is no *jus cogens* exception to the FSIA. At the Circuit court level, judges have routinely followed the decision in *Amerada*, and the Supreme Court has denied certiori to cases where the argument for a *jus cogens* exception is advanced.[169] For this reason, absent a shift in American policy towards issues of sovereignty and international legal standards, the circuit courts appear unlikely to change their position on the matter. Nevertheless, as the United States transitions from eight years of the Bush

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[163] *Belhas*, 515 F.3d at 1288.

[164] *Id.*

[165] *Id.*

[166] *Id.* at 1288-89.

[167] *Id.*

[168] *Id.* (citing H.R. REP. No. 102-367, at 5 (1991)).

[169] Siderman de Blake v. Republic of Argentina, 695 F.2d 699 (9th Cir. 1992) (certiorari denied); Princz v. Federal Republic of Germany, 26 F.3d 1166 (D.C. Cir. 1994) (certeriori denied).

presidency to the Obama administration, the *Belhas* decision represents an opportunity to revisit the issues raised by earlier cases in the faces of possible changes in American international policy and in attitudes toward human rights abuses.

In order to illustrate the likely policy differences between the Bush and Obama administrations, it is useful to examine their positions regarding the ICC. The Bush administration has been openly hostile toward the court. The administration's central objection to the court was that it is a threat to the sovereignty of the United States, and can be summed up by statements made by John Bolton, who under the Bush administration served as interim Representative to the United Nations, who stated that "[t]he ICC is an organization that runs contrary to fundamental American precepts and basic constitutional principles of popular sovereignty, checks and balances, and national independence".[170] American objections to the ICC, then, are founded on the same policy driving circuit court decisions which held that there is no *jus cogens* exception to the FSIA. The Bush administration's policy toward the court reflected the value placed on national sovereignty, even at the expense of holding violators of the worst type of human rights abuses accountable for their actions. There are indications, however, that this stance towards the court may change under President Obama. While still a senator, Barack Obama was asked whether he felt that the United States should ratify the Rome Statute. He responded "Yes[.] The United States should cooperate with ICC investigations in a way that reflects American sovereignty and promotes national security interests".[171] Even though he expressed reservations about the role of national sovereignty should the United States ratify the Rome Statute, his general support of the ICC is a marked departure from the Bush administration's opposition to the court. Hilary Clinton, who will play a pivotal role in shaping United States foreign policy as Secretary of State, has also expressed a more positive view of the ICC and concerns over the types of issues dealt with by the court than the Bush administration.

> There is broad support in this country across political and ideological divides that perpetrators of genocide, mass atrocities, and war crimes must be held accountable. . . . Consistent with my overall policy of reintroducing the United

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[170] John Bolton, Under Sec'y for Arms Control and Int'l Sec., Address before the Federalist Society at the National Lawyers Convention (Nov. 13, 2003), *available at* http://www.fed-soc.org/publications/PubID.58/pub_detail.asp.

[171] Presidential Candidate Questionnaire of Barack Obama, Sen. Ill., (2004), *available at* http://globalsolutions.org/politics/elections_and_candidates/questionnaire/2004?id=20.

> States to the world, I will . . . evaluate the record of [ICC], and reassess how we can best engage with this institution and hold the worst abusers of human rights to account.[172]

The willingness of American officials to reexamine the role the ICC has to play in bringing human rights violators to justice represents a possible willingness to reexamine the types of issues raised by the *Belhas* case. Ratification of the ICC would signal an acknowledgement that in the face of *jus cogens* violations, at least some degree of national sovereignty should be sacrificed. Such a change in policy could alter the views of politicians and judges on the importance of immunity provided to foreign sovereigns under the FSIA. While the ratification of the Rome Statute by the United States is not definite, and anticipating the adoption of a *jus cogens* FSIA exception even less certain, possible changes in American policy toward respecting international norms at the very least make the issues raised by *Belhas v. Ya'alon* worth reexamining. The shifts in United States policy which are necessary for the creation of a *jus cogens* exception to the FSIA are increasingly possible as the country transitions into the Obama administration.

CONCLUSION

The conclusion reached by the *Belhas* court that General Ya'alon should not have received sovereign immunity for his actions, while in line with prior decisions finding there to be no *jus cogens* exception to the FSIA, ignores the non-derogable nature of those norms. Acknowledging a *jus cogens* exception to sovereign immunity would bring the FSIA into accord with the universal understanding of *jus cogens* norms, as well as international trends limiting sovereignty in order to hold human rights violators liable for their actions. While General Ya'alon's actions may not have in fact constituted *jus cogens* violations, failing to even address the issue, and instead dismissing the case because of the FSIA, this and previous courts have turned their backs on the developing importance of human rights issues internationally, in favor of an antiquated notion of foreign sovereignty. In order to remedy this, future courts should recognize a *jus cogens* exception to the FSIA.

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[172] Presidential Candidate Questionnaire of Hilary Clinton, Sen. N.Y, (Nov. 12, 2007), *available at* http://globalsolutions.org/08orbust/quotes/2007/11/27/quote615.