Retroactivity, Implied Waiver, and the FSIA: Is it Time to Reform the Law on Sovereign Immunity?

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COMMENT

RETROACTIVITY, IMPLIED WAIVER, AND THE FSIA: IS IT TIME TO REFORM THE LAW ON SOVEREIGN IMMUNITY?

[I]f it appears that [agents of a sovereign breached international law] by order of the sovereign, such a proceeding in a foreign sovereign is justly considered as an injury, and as a sufficient cause for declaring war against him, unless he condescends to make suitable reparation.

—United States Supreme Court Chief Justice John Jay.¹

I. INTRODUCTION

In 1942, some three months after the United States formally declared war against Nazi Germany, Hugo Princz, an American Jew, was living with his parents, sister, and two younger brothers in what is now Slovakia.² Presumably because they were Jewish, the Princz family was arrested by the Slovak Fascist police and subsequently turned over to the German SS, whereupon they were sent to Camp Maidanek in Poland.³ Although most American citizens captured by the Nazis were released to the International Red Cross in a prisoner exchange program, again, because they were Jews, the Princz family was not.⁴ Instead, the Princz family was torn asunder. Mr. Princz’s parents and sister were sent to Treblinka, where they were subsequently murdered, while Mr. Princz and his brothers were sent to Auschwitz, and later Birkenau, where they were

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¹ Henfield’s Case, 11 F. Cas. 1099, 1104 (C.C.D. Pa. 1793).
³ Id.
forced into slave labor at an I.G. Farben chemical plant. After incurring work-related injuries at the plant, Mr. Princz's brothers were committed to a Birkenau "hospital," where Mr. Princz endured the horror of witnessing their deaths by starvation.

Sometime after his brothers' deaths, Mr. Princz was sent to the Warsaw Ghetto where, in his own words, he had an eight month "relative respite" from the atrocities witnessed by and inflicted upon him. That respite ended in October of 1944, when Mr. Princz was forced on a death march to Dachau and "enslaved as a laborer" in an underground Messerschmidt factory. Six months later, as he was being prepared to be transferred yet again, Mr. Princz was liberated by U.S. troops from a packed cattle train destined for the Alps, where he and his fellow prisoners were to be subjected to a mass execution as part of the Nazis' attempt to destroy all evidence of the Holocaust. While the other liberated prisoners were sent to displaced persons camps, because he was an American citizen Mr. Princz was instead sent to an American military hospital.

Seven years after World War II came to an end, the government of what is now the Federal Republic of Germany established a reparations program which was to provide pensions for Holocaust survivors. In 1955, Mr. Princz filed a claim with the United Restitution Office ("URO"), which handled pension fund disbursements, only to be told that he was ineligible for a pension because he was an American citizen at the time of his enslavement. In 1965, when the URO amended the pension law, he failed to file a second claim. According to Mr. Princz, the amended law did not enlarge the pool of claimants, but, rather, only extended through 1969 the period of time in which already eligible Holocaust survivors could file a claim.

5. Id.
6. Id. at 1176 (Wald, J., dissenting).
7. Id. at 1177.
8. Id.
9. Id.
10. Id. at 1168.
12. Id. That after the war Mr. Princz was not a "refugee" within the meaning of the Geneva Convention served as an additional reason for the URO to deny his claim. See Princz, 26 F.3d at 1168.
14. Id. It should be noted that Mr. Princz apparently did not raise this argument at the time the pension law was amended. Instead, the argument appears to have been raised only after Mr.
After all subsequent attempts by Mr. Princz to obtain reparations proved fruitless, in 1992 he resorted to filing an action against Germany in the United States District Court for the District of Columbia. In response to Mr. Princz's action, Germany filed a motion to dismiss, claiming that it was entitled to immunity under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), and was thus not subject to the district court's jurisdiction. The district court denied Germany's motion, however, asserting that the FSIA had no role to play under the facts of the case.

Two years later, a divided United States Court of Appeals for the D.C. Circuit reversed the district court and dismissed Mr. Princz's claim. The court found that, in light of the Supreme Court's recent decision in *Argentine Republic v. Amerada Hess Shipping Corp.*, if the FSIA did govern the case, then none of its exceptions were applicable. As such, the FSIA would bar Mr. Princz's action, as the district court would lack jurisdiction over the matter. Alternatively, if the FSIA did not govern, the district court would nonetheless be barred from hearing

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Princz filed his claim against Germany in the United States District Court for the District of Columbia. *Id.* In response, Germany claimed that the amended law did in fact enlarge the pool of eligible applicants. *Id.* at 24 n.1. However, as there is no record of any real deliberation by either the district court or the court of appeals on this issue (indeed, the court of appeals fails to mention it entirely), it shall not be the subject of further discussion in this Comment.

15. After 1969, The Federal Republic of Germany set up a $1.2 billion hardship fund for Holocaust survivors who, for excusable reasons, had failed to file a timely application for a pension under previous laws. The German government controls neither eligibility determinations nor disbursement of the fund, which is instead administered by the Jewish Claims Commission in New York. Mr. Princz applied for payment from this fund, but was advised that the fund was being reserved for genuine hardship cases and that he therefore did not qualify because he was able to work as a grocery clerk and his wife worked as a bookkeeper. *Id.* at 24.

In 1984, Mr. Princz enlisted the aid of Senator Bill Bradley and the U.S. Department of State to obtain ex gratia reparation payments from the German government. These requests were denied, as were requests made through diplomatic channels by both the Bush and Clinton administrations.

Finally, Mr. Princz's situation was presented to the German Supreme Court, which held that the 1969 statute of limitations for filing a pension claim was final. *Id.*

16. *Id.* at 22. Mr. Princz's specific claims against Germany were for false imprisonment, assault and battery, negligent and intentional infliction of emotional distress, and recovery in quantum meruit for the value of the labor he performed in the I.G. Farben and Messerschmidt factories. *Princz*, 26 F.3d at 1168.


18. *Id.* at 26.


20. 488 U.S. 428 (1989) (holding that the FSIA provided the sole basis for obtaining jurisdiction over a foreign state).

21. *Princz*, 26 F.3d at 1175.

22. *Id.* at 1176.
the case, as no alternative means of obtaining jurisdiction would be available to it.\textsuperscript{23} However, in a persuasive dissenting opinion, Judge Patricia Wald found that: (1) the FSIA applied; (2) it should be given retroactive effect to cover Mr. Princz's claims; and, (3) Germany impliedly waived its right to a claim of sovereign immunity by violating a variety of norms of international law during World War II.\textsuperscript{24}

This Comment criticizes a portion of the underlying reasoning of the D.C. Circuit's opinion in \textit{Princz v. Federal Republic of Germany},\textsuperscript{25} and seeks to preserve, in a slightly modified form, the rule enunciated by Judge Patricia Wald in her dissenting opinion. Specifically, this Comment argues that, at least where facts as extraordinary as those in Mr. Princz's case exist, a foreign state that violates certain fundamental norms of international law impliedly waives its claim of immunity from the jurisdiction of U.S. courts.\textsuperscript{26} It also argues that despite considerable precedent to the contrary,\textsuperscript{27} in light of the Supreme Court's recent decision in \textit{Landgraf v. USI Film Products},\textsuperscript{28} the FSIA should henceforth be given retroactive application.\textsuperscript{29}

Part II of this Comment first explores the purpose of and historical background of the FSIA. It then turns to the FSIA's implied waiver exception, embodied in 28 U.S.C. § 1605(a)(1), and, finally, to the language of 28 U.S.C. § 1602 as it relates to applying the FSIA retroactively. Part III begins with a general discussion of international law and how it is applied in U.S. courts. It next seeks to provide the reader with a general overview of the different fundamental norms of international law and the effect given to them by the international community. Part IV discusses in greater detail the opinions of the district

\textsuperscript{23} Id. For a discussion of those alternative means and the court's underlying reasoning for rejecting them, see infra text accompanying notes 105-08.

\textsuperscript{24} Princz, 26 F.3d at 1176-85 (Wald, J., dissenting). Judge Wald argued that, contrary to the majority's opinion, there was an applicable exception to FSIA immunity, 28 U.S.C. § 1605(a)(1) (1994), the FSIA's implied waiver exception. Id. at 1179.

\textsuperscript{25} 26 F.3d 1166 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 923 (1995). I use the term "portion of" because this Comment is only concerned with the reasoning that led the majority of the court to reject Mr. Princz's argument that Germany impliedly waived its immunity from the jurisdiction of U.S. courts when it violated certain norms of international law during World War II. Mr. Princz also argued that his claim fell within both the commercial activity and existing treaty exceptions to the FSIA, but the reasoning behind the court's rejection of these arguments appears to be sound.

\textsuperscript{26} International law recognizes a group of fundamental norms, known as \textit{jus cogens} or peremptory norms, from which no derogation is permitted. See infra part III.C.

\textsuperscript{27} See infra notes 52-53, 55-57 and accompanying text.

\textsuperscript{28} 114 S. Ct. 1483 (1994).

\textsuperscript{29} See infra part V.A.
Finally, Part V presents the arguments for applying the FSIA retroactively, and, in cases which present facts similar to those of Mr. Prinz’s case, for denying a foreign state immunity under the FSIA when such a state violates certain norms of international law known as *jus cogens* norms.

II. THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

A. Historical Background and Purpose

For most of its short history, the United States has embraced the concept first enunciated by Chief Justice John Marshall in *The Schooner Exchange v. M’Faddon* that, absent consent, a foreign state is entitled to absolute sovereign immunity from the jurisdiction of U.S. courts.

Writing for the Court, Marshall declared the world to be “composed of distinct sovereignties, possessing equal rights and equal independence . . . .” As such, states enjoyed full and absolute jurisdiction within their own territories which, however, did “not seem to contemplate foreign sovereigns nor their sovereign rights . . . . A foreign sovereign [could not be] understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation . . . .”

Nonetheless, the concept of foreign sovereign immunity envisioned in *The Schooner Exchange* was, and continues to be, “a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution.” Accordingly, for well into the twentieth century it had been the practice of U.S. courts to defer to the discretion of the Executive Branch on whether to exercise jurisdiction over foreign states. The beginning of the end of this practice was signaled in 1952 by the famous letter from the State Department’s Acting Legal Adviser,

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30. 11 U.S. (7 Cranch) 116 (1812).
32. 11 U.S. at 136.
33. *Id.* at 137.
35. *Id.* at 486 (citing Republic of Mexico v. Hoffman, 324 U.S. 30, 33-36 (1945); *Ex parte Peru*, 318 U.S. 578, 586-90 (1943)).
When *The Schooner Exchange* was decided, the actions of states were almost exclusively political and governmental, with their most important functions "limited more or less . . . to problems of internal administration or to the pursuit of diplomatic and military objectives." However, the twentieth century brought changes in the roles of states as they increasingly entered into commercial relationships with private parties and, as a result, often became entangled in litigation.

The Tate Letter recognized this problem and, as a solution, adopted the restrictive theory of sovereign immunity under which a foreign sovereign would retain its immunity from the jurisdiction of U.S. courts with regard to traditional sovereign or public acts of state, but relinquish immunity with regard to its private acts. Still, the courts continued to defer to the Executive Branch on whether to exercise jurisdiction over foreign states until 1976, when Congress codified the restrictive theory in the FSIA.

While a complete analysis of the FSIA is beyond the scope of this Comment, the Act's chief purpose is to leave the determination of whether to exercise jurisdiction over foreign states exclusively to the courts. To achieve this goal, the FSIA provides "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." In general, the FSIA extends immunity to foreign states


37. See Belsky et al., supra note 31, at 379 (alteration in original) (quoting THEODORE R. GIUTTARI, THE AMERICAN LAW OF SOVEREIGN IMMUNITY 3 (1970)).

38. Belsky et al., supra note 31, at 379.

39. See Tate Letter, supra note 36, at 714 ("The widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts.").


43. Verlinden B.V., 461 U.S. at 488. The governing provisions of the FSIA are §§ 1604 and 1330(a), which work in tandem. See Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989). Section 1604 provides that

[subject to existing international agreements to which the United States is a party at the time of enactment of this Act,] a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to
from the jurisdiction of U.S. courts subject to certain enumerated exceptions. Stated broadly, these exceptions include: (1) cases in which a foreign state has waived its immunity either explicitly or implicitly; (2) actions against a foreign state based upon: (i) a commercial activity carried on in the United States by the foreign state; (ii) an act performed in the United States connected with a commercial activity of the foreign state occurring outside of the United States; or (iii) an act outside the United States connected with a commercial activity of the foreign state which also occurs outside the United States, but which has a direct effect in the United States; (3) cases in which rights in property taken in violation of international law are at issue; (4) cases in which rights in property in the United States acquired by succession or gift, or rights in immovable property situated in the United States are at issue; (5) actions against a foreign state seeking monetary damages in compensation for personal injury or death, or damage or loss of property, occurring in the United States and caused by the tortious act or omission of the foreign state or of its agents while acting within their official capacity; and, (6) actions against a foreign state brought to enforce an agreement made by the foreign state with or for the benefit of a private party. For the purpose of this Comment, the implied waiver exception is most relevant and is discussed more extensively below.

B. The FSIA’s Implied Waiver Exception

Unsurprisingly, the FSIA does not extend sovereign immunity to a foreign state which has waived such immunity. For obvious reasons, the question of whether a foreign state has explicitly waived its claim of sovereign immunity has never been the subject of judicial scrutiny. The

1607 of this chapter.
28 U.S.C. § 1604 (1994). Section 1330(a) provides for subject matter jurisdiction over a foreign state, stating that “[t]he district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity[,] either under sections 1605-1607 of this title . . . or under any applicable international agreement.” 28 U.S.C. § 1330(a) (1994). Finally, section 1330(b) provides that “[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) . . .” 28 U.S.C. § 1330(b) (1994).
44. See supra note 43.
46. 28 U.S.C. § 1605(a)(1) (1994). “A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the foreign state has waived its immunity either explicitly or by implication . . .” Id. (emphasis added).
question of whether a foreign state has impliedly waived its sovereign immunity, however, can be, and has been, the source of considerable debate.\textsuperscript{47} Most courts that have been presented with the argument that a foreign state has impliedly waived its claim of sovereign immunity have construed the FSIA's implied waiver exception narrowly, and have generally declined to stray beyond Congress's list of examples of implied waiver in the Act's legislative history.\textsuperscript{48} These examples include: (1) cases in which foreign states agree to arbitration in the United States; (2) cases in which foreign states agree that the law of the United States should govern; and, (3) cases in which a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity.\textsuperscript{49} Additionally, courts have usually required some evidence that the foreign state intended to waive its immunity under the FSIA before they will find that the foreign state has impliedly done so.\textsuperscript{50} As shall be seen, however, at least one court apparently did not feel bound by such precedential constraints.\textsuperscript{51}

C. Retroactive Application of the FSIA

Retroactive application of the FSIA has almost always been disfavored by courts that have been presented with the issue.\textsuperscript{52} These

\begin{itemize}
\item \textsuperscript{48} See, e.g., \textit{Frolova}, 761 F.2d at 377 (holding that the U.S.S.R. did not impliedly waive its sovereign immunity when it signed the United Nations Charter and the Helsinki Accords).
\item \textsuperscript{50} See \textit{Frolova}, 761 F.2d at 377; \textit{accord Drexel Burnham}, 12 F.3d at 326; Foremost-McKesson v. Islamic Republic of Iran, 905 F.2d 438, 444 (D.C. Cir. 1990); \textit{Maritime Int'l}, 693 F.2d at 1100 n.10.
\item \textsuperscript{51} See \textit{Siderman}, 965 F.2d at 720 (holding that Argentina impliedly waived its sovereign immunity when it availed itself of the use of U.S. courts in pursuit of the plaintiff). For a full discussion of this case, see \textit{infra} text accompanying notes 152-69.
\item \textsuperscript{52} See Carl Marks & Co. v. Union of Soviet Socialist Republics, 841 F.2d 26 (2d Cir.), \textit{cert. denied}, 487 U.S. 1219 (1988) (holding that the FSIA did not confer jurisdiction over action on claims arising before the State Department issued the Tate Letter in 1952); Jackson v. People's Republic of China, 794 F.2d 1490 (11th Cir. 1986) (holding that the FSIA does not apply retroactively to confer subject matter jurisdiction over events which occurred in 1911); Slade v. United States of Mexico, 617 F. Supp. 351 (D.D.C. 1985), \textit{aff'd}, 790 F.2d 163 (D.C. Cir. 1986), \textit{cert. denied}, 479 U.S. 1032 (1987) (holding that the FSIA does not apply retroactively to allow
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courts have followed the general rule of statutory construction that a statute which interferes with or regulates human action shall not be given retroactive application, unless such is ""the unequivocal and inflexible import of [the statute's] terms, and the manifest intention of the legislature"."53 As Judge Patricia Wald has noted, however, "'[t]he language and legislative history of the FSIA provide only ambiguous guidance on the retroactivity question.""54 Nonetheless, courts that have declined to apply the FSIA retroactively have seized upon both the ""henceforth"" language of section 1602,55 and Congress's decision to forestall the effective date of the FSIA until ninety days after it became law,56 as evidence that the Act's reach was intended to be solely prospective in nature.57 It should be noted, however, that all of the decisions denying retroactive application to the FSIA were reached without the aid of the Supreme Court's teaching in Landgraf v. USI Film Products,58 which may dictate a different interpretation of the issue.59

plaintiff to recover debt arising from agreements made in 1922).

There is at least one decision favoring retroactive application of the FSIA. See Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp. 849 (S.D.N.Y. 1978) (holding that the FSIA, which merely codified the restrictive theory of sovereign immunity adopted in 1952, applies retroactively to events occurring before its enactment). However, this case has been implicitly overruled by the Carl Marks decision. See Carl Marks & Co., 841 F.2d at 26.

53. Union Pacific R.R. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913) (quoting United States v. Heth, 7 U.S. (3 Cranch) 399, 413 (1806)). These courts theorize that applying the FSIA to events which occurred before the Tate Letter adopted the restrictive theory of sovereign immunity in 1952 would upset a foreign state's expectation that it was entitled to absolute immunity from the jurisdiction of U.S. courts under the law as it then stood. See Carl Marks & Co., 841 F.2d at 26.


59. See infra part V.A.
III.  INTERNATIONAL LAW AND ITS PLACE IN U.S. COURTS

A.  The U.S. Approach to International Law

While it is well established that international law constitutes a part of United States law, the problem of exactly what application is to be given to international law in U.S. courts is often a perplexing one, and largely depends on the type of international law a claimant wishes a court to apply. Generally, countries have adopted one of two different approaches to the application of international law in their courts. Those countries adopting the so-called “monist” approach, such as Austria, give international law a status equal to, or supreme over, domestic law. At the other extreme, countries which have adopted the so-called “dualist” approach, such as the United Kingdom, will not enforce international law in their courts absent some type of implementing legislation.

United States law is viewed by some commentators as incorporating characteristics of both approaches. For example, it is well settled that “where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.” However, it has also long been the law in the United States that the existence of an applicable treaty, statute, or constitutional provision trumps a recognized custom of international law. It would appear then that, at least insofar as the concern is

60.  See The Paquete Habana, 175 U.S. 677, 700 (1900) (stating that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction . . .”). Indeed, the United States Constitution recognizes this proposition by investing Congress with the power to define and punish offenses against the law of nations, U.S. CONST. art I, § 8, cl. 10, and declaring that any treaty entered into under the authority of the United States becomes part of the supreme law of the land. U.S. CONST. art. VI, cl. 2.


63.  Id.

64.  Id. at 555.

65.  Id. at 554 (citing Reagan, 859 F.2d at 937); cf. 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 40-42 (1987) [hereinafter RESTATEMENT].

66.  The Paquete Habana, 175 U.S. 677, 700 (1900).

whether or not to apply the customary law of nations, U.S. courts are somewhat constrained in their application of international law. Whether this would also be the case if a U.S. court were called upon to apply a jus cogens norm of international law is unclear.

B. Customary International Law

Customary norms of international law reflect practices which have been widely accepted by the international community out of a sense of legal obligation. Courts make the determination of what is and what is not customary international law by looking to international conventions and treaties, the customs and practices of nations, the works of jurists and commentators, and both domestic and international law decisions.

Norms of international law can generally be divided into two categories: jus dispositivum and jus cogens. A jus dispositivum norm is binding upon only those governments that have consented to be bound thereby. Thus, a government which has consistently objected to the development of a jus dispositivum norm will not be bound by it. Governments may also alter a jus dispositivum norm by either encouraging other states to violate it, or by enacting a conflicting statute subsequent to the norm's development.

68. For an explanation of the jus cogens concept, see infra part III.C.
69. See, e.g., Reagan, 859 F.2d at 940 (discussing but ultimately reaching no decision on whether or not jus cogens norms of international law operate domestically); see also part V.B.
70. See RESTATEMENT, supra note 65, § 102(2); see also David F. Klein, A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts, 13 YALE J. INT'L L. 332 (1988).
72. Klein, supra note 70, at 350-53.
73. Id. at 351. At least where the United States is concerned, however, this proposition must be qualified. See supra note 67 and accompanying text.
74. RESTATEMENT, supra note 65, § 102 cmt. d.
75. Klein, supra note 70, at 351.
76. See supra note 67 and accompanying text.
C. Jus Cogens Norms of International Law

Jus cogens norms of international law, also known as peremptory norms, "enjoy the highest status in international law and prevail over both customary international law and treaties." Courts use the same means of ascertaining whether a norm has attained the status of jus cogens as they use to determine customary international law. Unlike customary international law, however, for a norm to attain the status of jus cogens it must be recognized and accepted by the international community as a whole. Additionally, jus cogens norms are binding upon all nations, regardless of consent, and can only be modified or preempted "by a subsequent norm of general international law having the same character."

Although the concept of jus cogens is now widely accepted there are sometimes disagreements on its exact content. Still, with some norms of international law, there is little question as to their jus cogens status. For example, there is general agreement that the principles underlying the U.N. Charter's prohibition of the use of force are jus cogens. It is also agreed that certain human rights law, such as the prohibitions of slavery, murder, genocide, torture, racial discrimination, and prolonged arbitrary detention, has achieved jus cogens status. During World War II, Nazi Germany was guilty of all of the aforementioned human rights related jus cogens violations.

77. Reagan, 859 F.2d at 935; see also RESTATEMENT, supra note 65, § 102 cmt. k (international agreements violating jus cogens are void).
79. RESTATEMENT, supra note 65, § 102 cmt. k & reporter's note 6. As has been previously discussed, a norm need only be widely accepted in the international community to attain the status of customary international law. See supra text accompanying note 70.
81. See generally Princz, 26 F.3d at 1166; Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992), cert. denied, 113 S. Ct. 1812 (1993); Reagan, 859 F.2d at 929.
82. See, e.g., Reagan, 859 F.2d at 935-36, 940 (rejecting plaintiffs' argument that an ICJ judgment is a binding, jus cogens norm of international law).
83. RESTATEMENT, supra note 65, § 102 cmt. k.
84. Id. § 702 cmt. n.
85. See Princz, 26 F.3d at 1182 (Wald, J., dissenting).
IV. PRINZ v. FEDERAL REPUBLIC OF GERMANY

A. The District Court's Opinion

In 1992, Hugo Princz, an American citizen and Holocaust survivor, brought action in the United States District Court for the District of Columbia against the Federal Republic of Germany seeking long denied reparation payments. The only issue before the court at the time of its opinion was whether it had subject matter jurisdiction over Germany to hear Mr. Princz's case. Germany argued that it did not, and filed a motion to dismiss Mr. Princz's claim pursuant to 28 U.S.C. § 1330, the governing provision of the FSIA. Specifically, Germany argued that as Mr. Princz's claim fit within none of the FSIA's exceptions, it was entitled to the broad immunity which Congress otherwise extended to foreign states when it enacted the FSIA.

In denying Germany's motion to dismiss, the court considered, but ultimately declined to apply, the teaching of the Supreme Court's decision in Argentine Republic v. Amerada Hess Shipping Corp., which held that the FSIA provided "the sole basis for obtaining jurisdiction over a foreign state." It noted that the Supreme Court did not have such facts as those presented in Mr. Princz's case before it when it rendered its decision in Hess, and concluded that neither Hess nor the FSIA itself barred the court from hearing Mr. Princz's claim. Finally, the court found that the U.S. courts were the only available forum in which Mr. Princz could bring his claim, and held that, as an American citizen, Mr. Princz had "a constitutional right to proceed in a United States Court" against Germany.

87. Id. at 25.
88. Id.
89. Id.
90. Id.
92. Id. at 434.
93. Princz, 813 F. Supp. at 26 ("A government which stands in the shoes of a rogue nation the likes of Nazi Germany is estopped from asserting U.S. law in this fashion.").
94. An administrative determination by the German Supreme Court indicated that Mr. Princz's claim would have been denied had he presented it there, and Mr. Princz asserted that no foreign national had ever successfully brought a case such as his in Germany. Id.
95. Id. at 27.
B. The D.C. Circuit's Opinion

The United States Court of Appeals for the D.C. Circuit found the district court's denial of Germany's motion to dismiss to be immediately appealable. Shortly thereafter, it reversed the judgment of the district court and dismissed Mr. Princz's case. In reaching its decision, the court considered the arguments raised by Mr. Princz that: (1) Germany impliedly waived its immunity under the FSIA when it violated \textit{jus cogens} norms of international law during World War II; and (2) the FSIA should be given retroactive application to cover the events in question. It also considered two arguments raised by Germany in response: (1) the FSIA provides the sole basis for a U.S. court to obtain jurisdiction over a foreign state, and thus, as Mr. Princz's claim falls within none of the FSIA's exceptions, the district court lacked subject matter jurisdiction; and, alternatively, (2) the FSIA does not apply retroactively, therefore entitling Germany to absolute sovereign immunity under the law of the D.C. Circuit as it stood at the time Mr. Princz was enslaved by the Nazis.

As is evident by its decision to reverse, the court ultimately found Germany's arguments to be more persuasive. It noted that while no other decision addressed Mr. Princz's specific argument that "a violation of \textit{jus cogens} norms forfeits immunity under the implied waiver provision of the FSIA," the Ninth Circuit had stated broadly that "[t]he fact that there has been a violation of \textit{jus cogens} does not confer jurisdiction under the FSIA." The court then rejected Mr. Princz's \textit{jus cogens} argument as being "incompatible with the intentionality requirement implicit" in the FSIA's implied waiver exception—the application of which, according to the court, was dependent "upon [a] foreign government's

98. \textit{Id. at 1170-71, 1173}. In support of the first argument, Mr. Princz relied on the FSIA's waiver exception which denies sovereign immunity in a case "in which the foreign state has waived its immunity either explicitly or by implication." 28 U.S.C. § 1605(a)(1) (1994). Mr. Princz also argued that the district court was entitled to exercise subject matter jurisdiction over the case through either the FSIA's commercial activity exception, 28 U.S.C. § 1605(a)(2) (1994), or the FSIA's treaty provision. 28 U.S.C. § 1604. The reasoning behind the court's rejection of these arguments is sound. As such, neither exception will be the subject of analysis in this Comment. See \textit{supra} note 25.
100. \textit{Id. at 1174} (quoting \textit{Siderman de Blake v. Republic of Argentina}, 965 F.2d 699, 719 (9th Cir. 1992), \textit{cert. denied}, 114 S. Ct. 1812 (1993)).
having at some point indicated its amenability to suit." Still, the real reasoning behind the court’s rejection of the *jus cogens* argument—dishonestly buried in a footnote to the opinion—appears to have been its reluctance to set a precedent which would open U.S. courts to the proverbial flood of litigation.102

Finally, in regard to Mr. Princz’s retroactivity argument, the court noted that while there was a strong case to be made for applying the FSIA retroactively,103 it need not decide whether to do so, for it found that if the FSIA applied, the case fell within none of the Act’s exceptions.104 Conversely, if the FSIA did not apply, the district court would still lack subject matter jurisdiction over Mr. Princz’s case.105 Before the FSIA was enacted, 28 U.S.C. § 1332 would have allowed the district court to obtain jurisdiction over Germany.106 After the enactment of the FSIA, however, 28 U.S.C. § 1330 effectively replaced section 1332.107 Under section 1330, jurisdiction over a foreign state can only be obtained upon a finding that a claimant’s case presents facts sufficient to bring it within one of the FSIA’s enumerated exceptions to sovereign immunity which, according to the court, Mr. Princz’s case did not do.108

C. Judge Wald’s Dissenting Opinion

Unlike her D.C. Circuit colleagues, Judge Patricia Wald agreed with Mr. Princz’s arguments.109 After an extensive discussion of *jus cogens*

101. *Princz*, 26 F.3d at 1174. In this context, the court noted the general reluctance of courts to expand upon the examples of implied waiver in the FSIA’s legislative history. *Id.* For a listing of these examples, see *supra* text accompanying note 48.

102. *See Princz*, 26 F.3d at 1174-75 n.1. The court reasoned:

    We think that something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong. Such an expansive reading of § 1605(a)(1) would likely place an enormous strain not only upon our courts but, more to the immediate point, upon our country’s diplomatic relations with any number of foreign nations.

     *Id.*

103. *See Landgraf v. USI Film Prods.*, 114 S. Ct. 1483 (1994); *see also infra* part V.A.


105. *Id.* at 1176.

106. *Id.*

107. *Id.*

108. *Id.* The court further noted that the case would not fall “within the federal question jurisdiction conferred by 28 U.S.C. § 1331, because Mr. Princz’s claims against Germany sound in tort and quasi contract, not in federal law.” *Id.*

norms and their place in international law. Judge Wald concluded that "[n]othing in the legislative history of [the FSIA's waiver of immunity exception] forecloses a finding that a state implicitly waives immunity when it transgresses one of the few universally accepted norms known as *jus cogens.*" Whereas the majority opinion found Mr. Princz's *jus cogens* argument to be foreclosed by the intentionality requirement of the FSIA's waiver exception, Judge Wald argued that "[i]n inflicting theretofore unimaginable atrocities on innocent civilians during the Holocaust, Germany could not have helped but realize that it might one day be held accountable for its heinous actions by any other state, including the United States."

Judge Wald also endorsed the argument for applying the FSIA retroactively. Noting that the text and legislative history of the FSIA provided scant guidance on the retroactivity issue, Judge Wald applied the teaching of the Supreme Court's decision in *Landgraf v. USI Film Products* and found that as "the FSIA infringes upon no rights held by Germany at the time it enslaved and imprisoned Princz, it applies [retroactively] to [Mr. Princz's] case." Finally, Judge Wald noted that, in light of the strong support for Mr. Princz's cause expressed by both the executive and legislative branches of government, an exercise of jurisdiction over Germany by the district court for claims of

110. Id. at 1179-83. Judge Wald drew particular attention to the *jus cogens* norms condemning slavery and genocide. See *supra* text accompanying note 84.
111. *Princz, 26 F.3d at 1184.
112. *See supra* text accompanying note 101.
113. *Princz, 26 F.3d at 1184. According to Judge Wald, "[t]he magnitude of the acts put the perpetrators on notice that they were violating 'principles common to the major legal systems of the world.'" Id. (quoting Report to the President from Robert H. Jackson, Chief Counsel for the United States in the Prosecution of Axis War Criminals, reprinted in 39 AM. J. INT'L L. 178, 186 (1945)).
114. *Princz, 26 F.3d at 1178.
115. *Id.*
117. *Princz, 26 F.3d at 1179.
118. Both the Bush and Clinton administrations tried unsuccessfully to intercede on Mr. Princz's behalf through the usual diplomatic channels. Princz v. Federal Republic of Germany, 813 F. Supp. 22, 24 (D.D.C. 1992), rev'd, 26 F.3d 1166 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 923 (1995). Indeed, President Clinton raised the issue with Germany's Chancellor Helmut Kohl during a January 31, 1994 meeting, but Kohl reportedly declined to discuss Mr. Princz's case while it was still pending. *Princz, 26 F.3d at 1177.*

Finally, both the Senate and the House of Representatives overwhelmingly passed resolutions imposing the executive branch to take steps to ensure that Mr. Princz's claims are resolved and that he be provided with fair reparations. S. Res. 162, 103rd Cong., 1st Sess. (1993) (enacted); H.R. Res. 323, 103rd Cong., 2d Sess. (1994) (enacted).
genocide and slavery would not disturb the “traditional comity concerns” underlying the FSIA.\textsuperscript{119}

V. RETROACTIVITY AND IMPLIED WAIVER

A. The Argument for Applying the FSIA Retroactively

Neither the D.C. Circuit nor the Supreme Court has ever decided whether the FSIA applies retroactively to cover events which took place before the United States adopted the restrictive theory of sovereign immunity in 1952.\textsuperscript{120} As has been previously stated, however, courts which have considered the issue have steadfastly refused to give the FSIA retroactive application.\textsuperscript{121} Although they found various reasons for so doing,\textsuperscript{122} the crux of these courts’ decisions was that applying the FSIA to pre-1952 events would disturb a foreign state’s “right” to absolute immunity from the jurisdiction of U.S. courts, as the law then stood.\textsuperscript{123} The Supreme Court’s recent decision in \textit{Landgraf v. USI Film Products}\textsuperscript{124} suggests that these beliefs may have been mistaken.

In \textit{Landgraf}, the Supreme Court was called upon to decide whether provisions of the Civil Rights Act of 1991 creating a right to recover compensatory and punitive damages for certain violations of Title VII, and providing for trial by jury if such damages were claimed, applied to a Title VII case pending on appeal when the statute was enacted.\textsuperscript{125} In holding that they do not,\textsuperscript{126} the Court weighed two competing canons of statutory construction: (1) “‘a court must “apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary’”\textsuperscript{127}; and, (2) “‘[r]etroactivity is not favored in the law,’ [and thus] ‘congressional enactments and administrative rules will not be

\begin{itemize}
\item \textsuperscript{119} See \textit{Princz}, 26 F.3d at 1184.
\item \textsuperscript{120} \textit{Princz}, 26 F.3d at 1170. This remains true as the D.C. Circuit ultimately reached no decision on the issue and the Supreme Court denied certiorari.
\item \textsuperscript{121} See supra text accompanying note 52.
\item \textsuperscript{122} See supra text accompanying note 52-53, 55-57.
\item \textsuperscript{123} See supra note 53 and accompanying text.
\item \textsuperscript{124} 114 S. Ct. 1483 (1994).
\item \textsuperscript{125} Id. at 1488.
\item \textsuperscript{126} Id.
\item \textsuperscript{127} Id. at 1488 (quoting \textit{Landgraf v. USI Film Prods.}, 968 F.2d 427, 432 (5th Cir. 1992) (quoting \textit{Bradley v. School Bd. of Richmond}, 416 U.S. 696, 711 (1974)); see also \textit{Landgraf}, 114 S. Ct. at 1496.
\end{itemize}
construed to have retroactive effect unless their language requires this result."128

During an extensive discussion of these two canons, the Court made several findings pertinent to this Comment. First, "[a] statute does not operate ‘retrospectively’ merely because it is applied in a case arising from conduct antedating the statute’s enactment, . . . or upsets expectations based in prior law."129 Instead, the presumption against retroactivity arises from the manifest "unfairness of imposing new burdens on [the private rights of] persons after the fact."130 Second, "[a]pplication of a new jurisdictional rule usually ‘takes away no substantive right but simply changes the tribunal that is to hear the case.’"131 Thus, in cases where jurisdictional statutes are at issue, present law would normally control because "jurisdictional statutes ‘speak to the power of the court rather than the rights or obligations of the parties.’"132 Finally, because procedural rules "regulate secondary rather than primary conduct," the fact that the conduct giving rise to a suit antedates a new procedural rule will not make application of the rule truly retroactive.133

While it must be stressed that these findings constitute nothing more than persuasive dicta,134 they provide a viable framework for giving retroactive application to the FSIA. With the exceptions of the ambiguous "henceforth" language of section 1602 and Congress’s decision to postpone the effective date of the FSIA until ninety days after its enactment,135 neither the text of the FSIA itself nor its legislative


133. *Landgraf*, 114 S. Ct. at 1502. The Court noted that it has regularly applied new jurisdictional statutes “whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed.” *Id.* at 1501.

134. Retroactive application of the Civil Rights Act of 1991 would have affected the substantive rights of the defendant, who would not have been liable for either punitive or compensatory damages under the old law. See *id.* at 1493.

135. See supra text accompanying notes 55-56. As even the majority in Mr. Princez’s case conceded, the “henceforth” language of § 1602 could be read as suggesting that the FSIA applies to all cases decided after its enactment, regardless of when the events giving rise to the case occurred. Princez v. Federal Republic of Germany, 26 F.3d 1166, 1170 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 923 (1995) (“Unless one is to infer that the Congress intentionally but silently denied a federal forum for all suits against a foreign sovereign . . . based upon pre-FSIA facts, the implication is strong that all questions of foreign sovereign immunity . . . are to be decided under the FSIA.”).
history provide much guidance on the retroactivity issue. In such a case, *Landgraf* teaches that a court must determine whether the statute "would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed"—i.e., whether the statute’s application to events predating its enactment would be truly retroactive.

The immunity of a foreign state from the jurisdiction of U.S. courts was never considered to be a right per se, but rather, a matter of comity and grace. Any “right” to sovereign immunity that a foreign state possessed under pre-FSIA law was, in reality, nothing more than an expectation. As such, *Landgraf* dictates that application of the FSIA to events preceding its enactment would not be truly retroactive. That the FSIA is a jurisdictional statute only serves to reinforce this proposition.

One seemingly valid argument for denying retroactive application to the FSIA, however, is Congress’s pronouncement that the FSIA is not intended to affect “the substantive law of liability.” While this is certainly true, courts have often placed far more reliance on this statement than is deserved. For to deny retroactive application of the FSIA on this theory is, in a very real sense, putting the cart before the horse. As an example, consider the case of a United States citizen whose property is alleged to have been expropriated by a foreign state in violation of international law. Suppose that, in defense of an action against it brought by the citizen in a U.S. court, the foreign state claims the protection of the act of state doctrine, which prohibits U.S. courts

138. See supra text accompanying note 34.
139. See supra text accompanying notes 129-30. In the instant case, Judge Wald noted that Germany “would suffer no inequity” from applying the FSIA retroactively, while denying such application would be “manifestly unjust to [Mr.] Princz,” as it would deny him his last chance at reparation. *Princz*, 26 F.3d at 1179 (Wald, J., dissenting).
140. See supra note 43.
141. See supra text accompanying notes 131-33.
143. See, e.g., Jackson v. People’s Republic of China, 794 F.2d 1490, 1497-99 (11th Cir. 1986), cert. denied, 480 U.S. 917 (1987) (holding that the FSIA could not be applied retroactively to cover transactions predating its enactment where to do so would create a cause of action where none previously existed).
145. Id. at 707.
from "examining the validity of a taking by a foreign state of property within its own territory, or from sitting in judgment on other acts of a governmental character done by a foreign state within its own territory and applicable there." Before the court can decide the act of state issue—i.e., determine whether the state is to be held substantively liable for its conduct—it must first consider the threshold issue of whether it has subject matter jurisdiction. Returning to the matter at hand, it appears that courts which have denied retroactive application to the FSIA on affecting substantive liability grounds have really been passing on the merits of the case in lieu of what should have been their focus—making the jurisdictional determination. As such, this argument for denying retroactive application of the FSIA must fail.

Moreover, whatever force this argument may have in other cases, it has none under the facts of Princz v. Federal Republic of Germany. The Nuremberg Trials, in which the United States participated, destroyed for all time any notion Germany may have entertained that it could escape liability for the atrocities it committed during World War II. Additionally, in Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, it was noted that, following a State Department release expressly stating such, it had become the policy of the Executive branch to relieve U.S. courts from placing any restraint upon the exercise of their jurisdiction to question the validity of acts committed by Germany during the war.

Thus, if from the Supreme Court’s teaching in Landgraf, one is to infer that a jurisdictional statute such as the FSIA should be applied to events predating its enactment, the unique facts of the Princz case present a stronger argument for so doing.

146. Restatement, supra note 65, § 443. The act of state doctrine "reflects the prudential concern that the courts, if they question the validity of sovereign acts taken by foreign states, may be interfering with the conduct of American foreign policy by the Executive and Congress." Siderman, 965 F.2d at 707.
147. Siderman, 965 F.2d at 706. "The act of state doctrine is a principle or rule of decision that the courts apply in deciding cases within their jurisdiction." Id. at 707 (emphasis added).
150. 210 F.2d 375 (2d Cir. 1954).
151. Id.
B. Jus Cogens Violations as a Basis for Implied Waiver of FSIA Immunity

In Siderman de Blake v. Republic of Argentina, a court considered for the first time what, if any, impact a foreign state's violations of jus cogens norms of international law would have on its claim of sovereign immunity from the jurisdiction of U.S. courts under the FSIA. The Siderman family claimed that on March 24, 1976, following a coup d'état by the Argentine military, ten armed and masked men forcibly entered their home in Argentina's Tucuman Province and abducted Jose Siderman. Mr. Siderman was tortured for seven days at an unknown location with, among other things, an electric cattle prod. His only "crime" appeared to be that he was Jewish.

Following Mr. Siderman's release, the Siderman family fled Argentina for fear that they would be killed and joined their daughter, Susana, in the United States. The Argentine government, however, continued its persecution of the Sidermans, initiating a criminal action against Jose and seizing the Sidermans' family owned business. In 1982, after obtaining permanent United States resident status, the Sidermans finally looked to the federal courts for relief by filing suit against the Argentine government for the torture of Jose, and the expropriation of the Siderman's property by Argentine military officials. The district court initially dismissed the expropriation claim and awarded a default judgment on the torture claim for $2.6 million. After Argentina challenged the damages award, however, the district court vacated the default judgment and dismissed the Sidermans' claim entirely, holding that Argentina was entitled to sovereign immunity under the FSIA. The Sidermans promptly filed a notice of appeal.

On appeal, the Ninth Circuit determined that the Sidermans'}
expropriation claim alleged facts sufficient to bring it within both 28
U.S.C. § 1605(a)(2), the FSIA's commercial activity exception, and 28
U.S.C. § 1605(a)(3), the FSIA's international takings exception.\textsuperscript{163} With
regard to the torture claim, the court considered three arguments raised
by the Sidermans for denying Argentina the protection of sovereign
immunity: (1) that Argentina is precluded from asserting sovereign
immunity by its violation of \textit{jus cogens} norms of international law which
prohibit official torture; (2) that the claim falls within the FSIA's existing
treaty exception, 28 U.S.C. § 1604; and (3) that the claim falls within the
FSIA's implied waiver exception, 28 U.S.C. § 1605(a)(1).\textsuperscript{164}

Ultimately, the court rejected the first two of these arguments but
accepted the third. Citing the Supreme Court's decision in \textit{Argentine
Republic v. Amerada Hess Shipping Corp.},\textsuperscript{165} it found both that the
FSIA's treaty exception only applies where a claimant can "identify an
international agreement to which the United States is a party which
"expressly conflict[s] with the immunity provisions of the FSIA,"" and
that the Sidermans had failed to do so.\textsuperscript{166} As to the \textit{jus cogens} argu-
ment, the court concluded that while there are \textit{jus cogens} norms against
official torture,\textsuperscript{167} the FSIA contains no express exceptions to sovereign
immunity for a state which violates such norms, and if such exceptions
\textit{are} to be made, the task of doing so lies with Congress, not the
courts.\textsuperscript{168} Finally, however, as Argentina had availed itself of U.S.
courts in its continued persecution of the Sidermans, the court found that
by so doing it had implicitly waived its sovereign immunity within the
meaning of 28 U.S.C. § 1605(a)(1), thereby conferring the jurisdiction
necessary to hear the Sidermans' torture claim.\textsuperscript{169}

Because the Sidermans presented all of their arguments separately,
the Ninth Circuit had no opportunity to assess the validity of the more
specific argument considered by the D.C. Circuit in the \textit{Princz} case, i.e.,
that the FSIA \textit{does indeed} contain an exception for a foreign state's
violation of \textit{jus cogens} norms—the implied waiver exception.\textsuperscript{170} The

\begin{itemize}
\item \textsuperscript{163} \textit{Id.} at 712.
\item \textsuperscript{164} \textit{Id.} at 714-20.
\item \textsuperscript{165} 488 U.S. 428 (1989).
\item \textsuperscript{166} \textit{Siderman}, 965 F.2d at 720 (alteration in original) (quoting \textit{Hess}, 488 U.S. at 442).
\item \textsuperscript{167} \textit{Siderman}, 965 F.2d at 717.
\item \textsuperscript{168} \textit{Id.} at 719.
\item \textsuperscript{169} \textit{Id.} at 722.
implied waiver exception applies to a foreign state's violation of \textit{jus cogen} norms was first proposed
\end{itemize}
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D.C. Circuit, of course, rejected this contention and, in so doing, raised the traditional arguments against giving the implied waiver exception too broad a construction. The court first noted that to construe the implied waiver exception to include violations of jus cogens norms would be incompatible with the "intentionality" requirement which courts have found to be implicit in the exception. It then pointed to the fact that the courts have been reluctant to stray beyond the examples of implied waiver listed in the FSIA's legislative history, and declined to do so itself. These are certainly valid arguments, but had the court been as diligent in applying the arguments to the facts of the case as it was in citing authority in support of them, it could not have helped but realize that neither was applicable here.

The solitary piece of evidence which the court cites in support of its intentionality argument is that neither "the present government of Germany [nor] the predecessor government of the Third Reich actually indicated . . . a willingness to waive immunity for actions arising out of the Nazi atrocities." Yet nothing in the language of the FSIA itself would seem to indicate that a foreign state must first have "intended" to be held accountable for its actions in U.S. courts before an implied waiver of immunity will be found. Instead, the intentionality requirement is a judicially created limitation. Be that as it may, however, by systematically enslaving and murdering millions of Jews during World War II, Germany violated, among others, recognized jus cogens norms of international law against both genocide and slavery. Given the magnitude of the atrocities committed, one would be hard pressed to argue that Germany had no expectation that it would be called upon to answer for them in the event that it lost the war. Moreover, when

in a 1989 comment written by three students attending the Boalt Hall School of Law in Berkeley, California. See Belsky et al., supra note 31.

171. See supra text accompanying notes 100-02.

172. See supra text accompanying note 101.


174. Id.

175. Id. at 1184 (Wald, J., dissenting).

176. See supra text accompanying note 84.

177. Fogelson noted that Colonel Telford Taylor, who was involved in the prosecution of the Nazi war criminals at Nuremberg, argued that "[t]he possibility of punishment should have been so apparent to the criminals that no one, except a strict formalist, could seriously raise the issue of ex post facto punishment." Fogelson, supra note 149, at 844 (citing BRADLEY F. SMITH, THE AMERICAN ROAD TO NUREMBERG 211 (1982)); see also Princz, 26 F.3d at 1184 (Wald, J., dissenting) ("Germany could not have helped but realize that it might one day be held accountable
Germany was called upon to answer for its crimes, at the Nuremberg trials, the legitimacy of the prosecutions rested not on its consent, implied or otherwise, to be held accountable, but rather on the nature of the acts committed—acts "violat[ing] the criminal law of all civilized countries in the world." Stated differently, acts of a state which are "'contrary to international law are invalid and cannot become a source of legal rights for the wrongdoer.'" Such acts lose their character as sovereign acts—for which Congress expressly intended to retain immunity when it enacted the FSIA—and are therefore not entitled to a claim of immunity. Thus, both the historical background underlying the Princz case, and the consequences of a foreign state's derogation from jus cogens norms, seem to negate the intentionality requirement argument for declining to expand the scope of the FSIA's implied waiver exception to include an implied waiver for jus cogens violations.

In light of the Ninth Circuit's decision in Siderman, the D.C. Circuit's reliance on judicial reluctance to expand the examples of implied waiver in the FSIA's legislative history likewise proves to be a negligible basis for its holding. As Judge Wald noted, the "list is neither exclusive nor exhaustive, . . . and courts are by no means constrained to these . . . examples of implied waiver." Indeed, in Siderman, the Ninth Circuit apparently did not feel so constrained. Its finding that Argentina impliedly waived its claim of sovereign immunity by availing itself of U.S. courts in pursuit of the Siderman family was certainly not culled from among the examples listed in the FSIA's legislative history. In truth, the D.C. Circuit's "real" reasoning behind its rejection of the jus cogens argument provides the only sound basis for its decision.

Any finding that a foreign state impliedly waives its claim of sovereign immunity when it violates jus cogens norms of international
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law necessarily carries with it the possibility of: (1) courts interfering with the foreign policy determinations of the Executive and Legislative Branches of government; and (2) setting a precedent which has the potential to open U.S. courts to a flood of litigation. With both the Executive and Legislative Branches voicing their support for Mr. Princz’s cause, the first of these dangers was not present in Princz. However, the danger of opening U.S. courts to the proverbial flood of litigation was present, and, as such, must ultimately be regarded as the impetus for the D.C. Circuit’s decision. In the final analysis then, a rule which seeks to expand the FSIA’s implied waiver exception to include a *jus cogens* violation must be very narrowly construed if it is to avoid the flood of litigation danger—something which, for all of its other merits, Judge Wald’s dissenting opinion failed to take into account.

Relevant considerations for a court facing this issue in the future might include: (1) the citizenship of the claimant (e.g., a requirement that the claimant be an American citizen); (2) support for the claimant’s cause in the government’s political branches; (3) the availability (or lack thereof) of an alternative forum in which the claimant may present his claims; and (4) the severity of the *jus cogens* violations alleged (possibly allowing only the claimant that has alleged one of a core group of *jus cogens* violations—e.g., genocide, slavery, official torture—the opportunity to present his claim). Finally, to ensure that the court has a legitimate interest in adjudicating the claim, there must exist a requirement—similar to that contained in 28 U.S.C. § 1605(a)(2)—that the conduct alleged has a direct effect in the United States.

VI. CONCLUSION

Hugo Princz’s fifty year struggle at long last came to an end when, on September 19, 1995, he and ten other U.S. citizens settled with Germany for more than $2 million in reparations. In Mr. Princz’s own words, “[t]he settlement . . . can never bring [his] parents, [his] siblings back, nor relieve [his] nightmares of the death camps or the

185. See Princz, 26 F.3d at 1174 n.1; see also supra note 102 and accompanying text.
186. See supra note 118 and accompanying text.
187. Judge Wald instead opted for a broader rule under which a foreign state’s violation of *jus cogens* norms was a per se implied waiver of sovereign immunity. See Princz, 26 F.3d at 1184–85.
physical pain [he] suffer[s] ... [b]ut it will finally help correct a terrible injustice." While Mr. Princz's long overdue triumph is certainly a cause for celebration, supporters of human rights should temper their revelry with a degree of caution. For as laudable as the settlement is, it is likely to have little, if any, effect on the judiciary's draconian construction of the FSIA's implied waiver provision. There will be other Hugo Princzs in the future and it does not stretch reason to postulate that their persecutors will not be as agreeable to a settlement as was Germany. Where such is the case, victims of human rights abuses should be able to turn to the courts. Yet rigid decisions such as the D.C. Circuit's ordain that such avenues of redress remain closed, sacrificing justice for the sake of a less burdensome caseload. In the long run, if the United States wishes to continue to hold itself to the world as a champion of human rights, it should, indeed must, provide a forum to which victims of human rights abuses can present their claims. Such a forum will only be made available through a reform of the current law on sovereign immunity. Whether this is done through the courts themselves or through Congress, the time to act is now.

Michael W. Hoops

190. Id.