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A NATURAL PROGRESSION OF RESTRICTIVE IMMUNITY: WHY THE JASTA AMENDMENT DOES NOT VIOLATE INTERNATIONAL LAW

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Abstract: On September 11, 2001, terrorists from extremist group al-Qaeda hijacked four commercial flights and flew two into the World Trade Center towers in New York City and one into the Pentagon in Washington, D.C. Many sought justice for friends and loved ones harmed in the attacks by bringing lawsuits against Saudi Arabia. These lawsuits alleged that Saudi Arabian leaders knowingly donated to charities that funded al-Qaeda which helped the group to pay for the September 11th terror attacks. The Second Circuit, however, dismissed the lawsuit on sovereign immunity grounds in 2008. Frustrated with the ruling, Congress passed the Justice Against Sponsors of Terrorism Act (JASTA). JASTA amended the Foreign Sovereign Immunities Act to allow lawsuits against foreign states when the plaintiffs allege the foreign state intentionally funded, sponsored, or facilitated intentional acts of terrorism on United States soil. This amendment has received global criticism for both its practical and legal effect on the rest of the world. The harshest critics claim that the United States is now in violation of international law, bolstered by a recent decision from the International Court of Justice (ICJ), *Jurisdictional Immunities of the State*. This Comment argues that the JASTA amendment to sovereign immunity does not violate international law or the ICJ decision. Due to the development of state immunity and the particular protections provided to sovereign acts in the ICJ decision, the JASTA amendment only denies state immunity when the foreign state is acting as a private citizen. Therefore, the JASTA amendment does not violate international law.

INTRODUCTION

On September 11, 2001, nineteen members of the al-Qaeda terror group hijacked four commercial airplanes. They flew them into the World Trade Center's Twin Towers in New York City and the Pentagon in Washington, D.C.[1] The attack affected millions of lives, directly and indirectly.[2]

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1. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 32–33 (2004) [hereinafter THE 9/11 COMMISSION REPORT].

2. Brad Plumer, *Nine Facts About Terrorism in the United States Since 9/11*, WASH. POST (Sept. 11, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/09/11/nine-facts-about-terrorism-in-the-united-states-since-911/ [https://perma.cc/H7CL-PC9H]; Shan Carter & Amanda Cox, *One*

Following the attack, those more directly affected asked a familiar question: who is to blame? In response, many people attempted to blame Saudi Arabia—the country of origin for fifteen of the nineteen plane hijackers—and tried to hold the country accountable in America's courts.[3]

The victims soon learned they would not see their day in court. The plaintiffs alleged Saudi Arabia purposely funded charities that it knew would transfer the funds to Muslim extremists, including the terror group al-Qaeda, and therefore it knowingly funded intentional acts of terrorism.[4] However, the Second Circuit Court of Appeals dismissed the consolidated suit on the pleadings, holding that Saudi Arabia was entitled to foreign sovereign immunity.[5] The Supreme Court denied certiorari.[6]

Unsettled by the Second Circuit's ruling, Congress worked to amend the Foreign Sovereign Immunities Act (FSIA)[7] to ensure 9/11 victims could at least take their claims past pleadings. With the Justice Against Sponsors of Terrorism Act (JASTA),[8] Congress sought to allow plaintiffs to sue foreign states in United States courts for sponsoring intentional acts of terrorism, such as the terrorist attacks on 9/11.[9] In 2009,[10] 2011,[11] 2013,[12] and 2015,[13] members of Congress introduced different versions of JASTA, but none of the bills passed Congress.

In 2016, the bill finally found the congressional support it needed to become law. It passed the House in May 2016 and the Senate in September 2016.[14] President Obama, however, vetoed the law, citing concerns with taking foreign policy out of the hands of the executive

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9/11 Tally: $3.3 Trillion, N.Y. TIMES (Sept. 8, 2011), http://www.nytimes.com/interactive/2011/09/08/us/sept-11-reckoning/cost-graphic.html [https://perma.cc/Y5RN-4Q4P].

3. *In re* Terrorist Attacks on September 11, 2001 (*Terrorist Attacks III*), 538 F.3d 71, 75 (2d Cir. 2008), *abrogated on other grounds by* Samantar v. Yousuf, 560 U.S. 305 (2010); *see also* THE 9/11 COMMISSION REPORT, *supra* note 1, at 215–54.

4. *Terrorist Attacks III*, 538 F.3d at 77.

5. *Id.* at 97.

6. Fed. Ins. Co. v. Kingdom of Saudi Arabia, 557 U.S. 935 (2009) (denying certiorari).

7. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1611 (2012).

8. Pub. L. No. 114-222, 130 Stat. 852 (2016) (codified at 28 U.S.C. §§ 1605–1605B, 2333 (2016)).

9. *Id.*

10. S. 2930, 111th Cong. (2009).

11. S. 1894, 112th Cong. (2011).

12. S. 1535, 113th Cong. (2013).

13. S. 2040, 114th Cong. (2015).

14. *Actions Overview*, *S. 2040, 114th Congress*, CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/senate-bill/2040/actions?q=%7B%22search%22%3A%5B%22%5C%22justice+against+sponsors+of+terrorism%5C%22%22%5D%7D&r=1 [https://perma.cc/W63N-RGFH] [hereinafter *Actions Overview*].

branch and putting it in the hands of the people and the judiciary.[15] Soon after, and for the first time in President Obama's presidency, Congress overrode the President's veto.[16] On September 28, 2016, JASTA became law.[17] The JASTA amendment has retroactive effect, allowing victims of the 9/11 terrorist attacks to sue foreign states using the JASTA amendment.[18]

Leading up to and following its passage in Congress, JASTA received large amounts of criticism for both practical and legal reasons.[19] Focusing on the legal reasons, many scholars and state leaders believe that this amendment runs afoul of customary international law principles of state immunity.[20] JASTA specifically revokes state immunity for states alleged to have committed international acts of terrorism—an unprecedented prospect in international law.[21] The lack of support for this type of exception to state immunity shows that it may lack the state practice and *opinio juris*[22] required to give it the status of customary international law.[23] Many scholars have argued that acts such as terrorism, if attributable to a state, are not deserving of state immunity because such acts violate *jus cogens* norms: those norms from which no derogation by

15. Barack Obama, *Veto Message from the President—S. 2040*, THE WHITE HOUSE (Sept. 23, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/09/23/veto-message-president-s2040 [https://perma.cc/L8T6-DWFL].

16. *Actions Overview*, *supra* note 14.

17. *Id.*

18. JASTA, Pub. L. No. 114-222, 130 Stat. 852 (2016) (codified at 28 U.S.C. §§ 1605–1605B, 2333 (2016)).

19. *See, e.g.*, Fatah Al-Rahman Youssef, *Former French Justice Minister: JASTA Is a Violation to International Law*, ASHARQ AL-AWSAT (Oct. 5, 2016), http://english.aawsat.com/2016/10/article55359628/former-french-justice-minister-jasta-violation-international-law [https://perma.cc/VQ4Q-XYZY].

20. *Id.* ("I believe that JASTA represents a violation to international law, as it threatens the principle of national sovereign immunity.").

21. *Cf.* Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. 99, 140 (Feb. 3) (holding there is no *jus cogens* violations exception to state immunity).

22. *Opinio juris* refers to actual statements from state officials, such as heads of executives, diplomats, ambassadors, or other public officials. *See id.* at 123.

23. *Cf. id.* at 141–42 (examining state practice and *opinio juris* to determine whether a *jus cogens*-violations exception to state immunity exists).

a state is permitted.[24] Domestic, foreign, and international courts have consistently rejected this argument.[25]

The International Court of Justice (ICJ) recently reviewed the intersection of state immunity and *jus cogens* violations in *Jurisdictional Immunities of the State*.[26] The case concerned Italian courts denying state immunity to Germany for suits against it relating to certain inhumane actions it took during World War II.[27] The Italian courts reasoned that Germany did not deserve sovereign immunity protection because of the abysmal character of its actions in enslaving Italian citizens after the nation fell to the Allied powers towards the end of World War II.[28] In holding the Italian courts violated international law on sovereign immunity, the ICJ held that there is no reason to conflate sovereign immunity and potential *jus cogens* violations because sovereign immunity was procedural, whereas *jus cogens* was substantive, meaning the two concepts should never collide.[29] Essentially, the immunity of a state and its specific actions in question should never influence the treatment of one another in a court of law.[30] Additionally, the ICJ noted the important distinction in state immunity cases between official state acts and acts in which the state functions more as a private entity.[31] Official state acts, known as *acta de jure imperii*, are those that only a state may perform, such as military actions.[32] Private state acts, known as *acta de jure gestionis*, are acts performed by the state that any person or entity could perform.[33] For example, any state can choose to trade or bargain for goods and services with merchants like any private party can, so a state is not

24. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 (explaining the definition of peremptory norms, known as *jus cogens* norms); *see also, e.g.*, Thora A. Johnson, *A Violation of* Jus Cogens *Norms as an Implicit Waiver of Immunity Under the Federal Sovereign Immunities Act*, 19 MD. J. INT'L L. 259 (1995) (arguing for a *jus cogens* waiver of foreign sovereign immunity).

25. *See, e.g.*, Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992); *Jurisdictional Immunities of the State*, 2012 I.C.J. at 141–42.

26. Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. 99, 140 (Feb. 3).

27. *Id.* at 113.

28. *Id.* at 113–14.

29. *Id.* at 124.

30. *Id.*

31. *Id.* at 124–25.

32. *Id.*

33. *Id.*

generally afforded immunity in disputes arising from these state actions of private character.[34]

Contrary to the overwhelming majority, this Comment argues that the JASTA amendment to the Foreign Sovereign Immunities Act does not actually put the United States in conflict with international law.[35] The JASTA amendment is distinguishable from *Jurisdictional Immunities of the State* because, unlike Germany's actions during the Third Reich, the acts committed by potential JASTA defendants are not likely *acta de jure imperii*. This is because the hypothetical JASTA case is not one in which a state official orders a state military to act a certain way in a time of war. Even if state acts of intentional terrorism are *acta de jure imperii*, they should not be seen as sovereign acts due to their abhorrent character. Additionally, *jus cogens* violations should supersede state immunity. *Jurisdictional Immunities of the State* was incorrect to say *jus cogens* norms and state immunity exist in separate legal planes, unable to affect one another, due to the history of court decisions denying state immunity based on the substantive merits of the case. Lastly, if all else fails, United States courts will endeavor to interpret the JASTA amendment in a way that does not violate international law, as there is a presumption that Congress does not intend to violate international law.

This Comment proceeds in five parts. Part I examines how sovereign immunity developed by looking at the state's actions to determine whether or not it deserved state immunity. Part II examines the concept of *jus cogens* norms, and how they came to supersede over every other aspect of international law. Part III examines the intersection of *jus cogens* norms and state immunity, including an overview of the International Law Commission's (ILC) articles on states' immunity and attribution. Part III will also examine the ICJ's views on state immunity, including a discussion of its findings in *Jurisdictional Immunities of the State*, its most recent robust discussion of state immunity. Part IV traces the creation and passage of JASTA, including the terror attacks of September 11, the ensuing litigation, the override of President Obama's veto, and the criticisms JASTA has received. Lastly, Part V argues that the JASTA amendment to the FSIA does not violate international law.

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34. *Id.*

35. This Comment does not discuss the practical arguments against the JASTA amendment to the FSIA, including whether or not this amendment strains our relationships with other countries. There are many strong practical arguments against this law. Those arguments are best made to Senators and Representatives.

I. STATE IMMUNITY: DEVELOPMENT AND CURRENT PRACTICE

Under the doctrine of sovereign immunity, governments of foreign states are immune from suits in the domestic courts of another nation.[36] It generally applies not only to actions directly against states, but also any actions that affect the property, rights, interests, or activities of a foreign state.[37] State immunity grew from the concept of *par in parem no habet imperium*: between equals no power.[38] It evolved from an idea that all states are equal with each other.[39] Under the doctrine, one state cannot force another state to answer to the jurisdiction of the first nation's domestic courts.[40] Sovereign immunity is a part of customary international law, meaning it finds its roots in state practice (the actions of states and their courts), and *opinio juris* (the belief of states and its actors that they are bound by the concept).[41] A nation's failure to give state immunity where it is due is a violation of international law.[42] Beyond customary international law, state immunity can also exist by a treaty between two or more states.[43] Properly invoking state immunity means a state is completely immune from suit, and need not even enter the litigation process.[44]

This Part examines state immunity in several stages. First, it traces the roots of state immunity from classic philosophers and jurists, and the belief that the sovereign could literally do no wrong. Second, it discusses

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36. INT'L LAW COMM'N, REPORT ON THE WORK OF ITS FORTY-THIRD SESSION, U.N. Doc. A/46/10, at 22–23 (1991).

37. *Id.* at 24.

38. Thomas Weatherall, Jus Cogens *and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence*, 46 GEO J. INT'L L. 1151, 1152 (2015).

39. *Jurisdictional Immunities of the State*, 2012 I.C.J. at 123.

40. *Id.* at 123–24.

41. Statute of the International Court of Justice, art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 1060 ("The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: . . . international custom, as evidence of a general practice accepted as law."); *see also Jurisdictional Immunities of the State*, 2012 I.C.J. at 122 (holding, pursuant to ICJ Statute art. 38(1)(b), "the existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris*").

42. *See Jurisdictional Immunities of the State*, 2012 I.C.J. at 123–24.

43. *See, e.g.*, European Convention on State Immunity, *opened for signature* May 16, 1972, 1495 U.N.T.S. 181 (entered into force June 11, 1976); U.N. GAOR, 59th Sess., Convention on Jurisdictional Immunities of States and Their Property, U.N. Doc. A/Res/59/508 (Dec. 2, 2004) (opened for signature Jan. 17, 2005 and not yet entered into force).

44. HAZEL FOX, THE LAW OF STATE IMMUNITY 1 (2002); *see also* 28 U.S.C. § 1604 (2012) (stating foreign states are "immune from the jurisdiction of the courts of the United States" subject to exceptions).

various nations' acceptance of "absolute" state immunity, in which states were very likely to receive immunity in foreign domestic courts, no matter the circumstances. Third, it discusses the world's gradual shift to a more "restrictive" form of state immunity, with which a state was sometimes denied immunity from suit depending on the character of the state's actions.

A. In the Beginning—Absolute Immunity

"Absolute" state immunity refers to the era in which most states gave other states immunity a substantial portion of the time, even if litigants claimed that the state did something unlawful. State immunity grew from the intersection of two separate (but related) doctrines: domestic sovereign immunity and equality between states.[45] With that in mind, this section will first focus on the development of both concepts into the recognition of a "state immunity" doctrine. It will then focus on how the concept of state immunity developed from the common law before the United States and eventually became accepted within the United States.

1. Early Sovereign Immunity Reflected the Understanding that Sovereigns Could Do No Wrong

State immunity partially grew from the doctrine of sovereign immunity, which protects the government of a state from suit in its own domestic courts.[46] Sovereign immunity developed from the idea that "[t]he king can do no wrong" in the feudal system.[47] People did not view the king as "above the law," so to speak, but as simply protected from answering in the courts of his own area of governance.[48] Because nation-states did not exist in the era of the feudal system, immunity was personal to the king himself, rather than belonging to the nation-state.[49]

Even though the doctrine started as a practical matter,[50] it developed into a more extreme, "God-given" understanding around the rise of the

45. *See* P. H. KOOIJMANS, THE DOCTRINE OF THE LEGAL EQUALITY OF STATES (1964); George W. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476, 477–79 (1953).

46. *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 53 (1996).

47. Pugh, *supra* note 45, at 476.

48. *Id.* at 478.

49. *Id.*

50. In this context, "practical" means it simply would be impractical to ask the king to answer to himself in his own court of his own land over which he governed. *See id.*

nation-state.[51] In his writings, Blackstone noted the infallibility of the king:

> Besides the attribute of sovereignty, the law also ascribes to the king, in his political capacity, absolute perfection . . . . The king, moreover, is not only incapable of *doing* wrong, but even of *thinking* wrong: he can never mean to do an improper thing: in him is no folly or weakness . . . the law will not suppose the king to have meant either an unwise or an injurious action.[52]

So while sovereign immunity grew from the practicality of the situation, that being the king as the representative of the law and therefore unanswerable to it, it eventually evolved into a trait of the king's "personal perfection."[53] It extended so far in some states as to assume that the king could not even authorize an unlawful act.[54] In other words, the king's orders authorizing an unlawful act would be assumed non-existent, and the private citizen could not use the king's orders as a defense.[55] While developing in disparate cases throughout Europe, this marked the beginning of the era of "absolute immunity," in which states were afforded total immunity from all, or nearly all, claims or actions against the government.[56]

While the above explains how domestic sovereign immunity developed, equality in the law between states finds its roots as far back as Greek philosophers. Aristotle commented on the idea of a perfect community, in which several systems can coexist peacefully, with each part providing its purpose to the community and benefiting from the other parts of the community providing their own purposes.[57] Later philosophers, such as Thomas Hobbes, carried the torch lit by Aristotle. Hobbes reasoned that all people are absolutely equal in the state of nature.[58] He further noted that people transfer their rights to the state as a part of their agreement with the sovereign to protect the people from the dangers existing in nature, meaning that the sovereign is the

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51. *Id.*

52. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 238–39 (Neill H. Alford et al. eds., 1983) (1765).

53. *Id.*

54. Pugh, *supra* note 45, at 479–80.

55. *Id.*

56. Matthew McMenamin, *State Immunity Before the International Court of Justice:* Jurisdictional Immunities of the State (Germany v Italy), 44 VICTORIA UNIV. OF WELLINGTON L. REV. 189, 191 (2013).

57. 1 ARISTOTLE, POLITICS (J. L. Ackrill & Lindsay Judson, eds., Trevor J. Saunders, trans., Clarendon Press 1995) (n.d.).

58. THOMAS HOBBES, LEVIATHAN 94 (W. G. Pogson Smith, ed., Clarendon Press 1909) (1651).

personification of the whole.[59] Therefore, the right of equality between people transferred to the sovereigns of states via the social contract, and because all people were equal, all states, too, were equal.[60] It is from these ideas of human and state equality that state immunity grew.

Following the work done by Hobbes, Samuel Pufendorf, a seventeenth-century German jurist and philosopher, expanded the idea of equality of the laws directly to international law.[61] Pufendorf was not an advocate of international law as a binding concept, outside the idea of treaties.[62] He reasoned that no law between nations can be truly binding outside of the concept of *pacta sunt servanda*—agreements are to be kept.[63] This disbelief in the enforceability of international law naturally extended to state immunity and equality.[64] He reasoned that states could not enforce international law against each other because no one state is superior to the other, and without such superiority there can be no true law of nations.[65] Absent a higher authority to enforce these concepts of international norms—found through natural law—states were implicitly equal to each other in terms of the law.[66] Therefore, through the absence of a binding and applicable system of international law, Pufendorf was one of the first to explicitly recognize equality of states in application of the law, as any attempt of enforcement upon another state conflicts with the concepts of state equality found in the law of nature.[67]

2. The Acceptance of Absolute State Immunity in the United States

The first case to recognize absolute state immunity in the United States was *The Schooner Exchange v. McFaddon*.[68] In that case, the Supreme Court granted immunity to France in an action by United States citizens John McFaddon and William Greetham to recover their schooner,

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59. *See id.* at 128–42.

60. *See id.* at 94–99.

61. *See* 2 SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO 330 (James Brown Scott, ed., C.H. Oldfather & W.A. Oldfather, trans., Clarendon Press 1934) (photo. reprint 1964) (1688).

62. *Id.* at 380, 402.

63. *Id.* at 402–27 (explaining that agreements must only be kept if made with consent to keep them).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. 11 U.S. 116 (1812).

Exchange, after the French army allegedly stole the ship from them.[69] As alleged by the petitioners, the two left the city of Baltimore in October of 1809, bound for St. Sebastians in Spain.[70] As the petitioners were peacefully traveling, the two alleged that French forces, under the orders of Emperor Napoleon, forcibly took the schooner into their own possession and "disposed" of both McFaddon and Greetham.[71] After the two found their way back to the United States, they heard of a schooner, similar to the description of the one taken from them, in the port of Philadelphia in late 1811.[72] McFaddon and Greetham alleged that their schooner had been made a warship in the royal French army, and was renamed to the *Balaou*.[73] They filed for the vessel to be returned to their possession.[74] The District Court of Maryland dismissed the action, stating that the foreign armed vessel "is not subject to the ordinary judicial tribunals of the country."[75] On appeal, the decision was reversed.[76] On behalf of the French monarchy, a United States district attorney appealed to the Supreme Court.[77]

Writing for a unanimous court, Chief Justice Marshall framed the question presented as follows: "whether an American citizen can assert, in an American court, a title to an armed national vessel, found within the waters of the United States."[78] The Court ruled in favor of France and reinstated the district court's opinion.[79] The Court acknowledged the absolute nature of state immunity, reasoning that it flows from the idea of domestic sovereign immunity.[80] It noted that a sovereign's control over the jurisdictional bounds of the courts in its own country is "exclusive and absolute," meaning that the only limitation on this control could come from the sovereign itself.[81] However, because the world is "composed of distinct sovereignties, possessing equal rights and equal independence," all states have agreed to a "relaxation" in the practice of total sovereign

69. *Id.* at 147.
70. *Id.* at 117.
71. *Id.*
72. *Id.*
73. *Id.* at 118.
74. *Id.* at 117.
75. *Id.* at 119–20.
76. *Id.* at 120.
77. *Id.*
78. *Id.* at 135.
79. *Id.* at 147.
80. *Id.* at 136; *see also supra* section I.A.1.
81. *The Schooner Exchange*, 11 U.S. at 136.

judicial control, and offer immunity to foreign states in their respective jurisdictions.[82] Chief Justice Marshall expressed concern about what would happen if a state exercised its territorial powers "in a manner not consonant to the usages and received obligations of the civilized world," referring to the possible assertion of jurisdiction over foreign entities on a nation-state's own soil.[83]

The Court recognized that there might be some limitations to the application of state immunity, albeit in very limited circumstances.[84] By implication, state immunity only applied to the people and governments of states with whom the United States is friendly, and therefore not at war.[85] Along with that, states could usually assume that the touching down of an army on the shores of a friendly power, without permission, could be seen as an act of hostility, thus doing away with state immunity once again.[86] However, the Court held that it was common practice for states to allow foreign ships to seek refuge in ports in cases of severe weather or other emergencies.[87] While this practice was normally done via treaty, and no relevant treaty between the United States and France was applicable to this situation, the Court ruled that ports remain open for foreign ships regardless, and thus "the conclusion seems irresistible, that they enter by [the state's] assent."[88] The Court then held that "by the unanimous consent of nations . . . nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception."[89]

Applying these principles to the case at hand, the Court held that the schooner, as a warship of a friendly power and in an open port, was afforded immunity from any sort of action, including a claim to title by McFaddon.[90] McFaddon countered that sovereign status and the ship's place in the royal army of France did not bar an action for the title of the

82. *Id.*

83. *Id.* at 137.

84. *Id.* at 140.

85. *Id.* ("Without doubt, a military force can never gain immunities of any other description that those which war gives, by entering a foreign territory against the will of its sovereign.").

86. *Id.* at 140–41.

87. *Id.* ("But the rule which is applicable to armies, does not appear to be equally applicable to ships of war entering the ports of a friendly power.").

88. *Id.* at 141.

89. *Id.* at 144; *see also* The "ARA Libertad" Case (Arg. v. Ghana), Case No. 20, Order of Dec. 15, 2012, 2012 ITLOS Rep. 332, 341 ("[U]nder customary international law, as it is recognized and enshrined in the Convention, the immunity of warships is a special and autonomous type of immunity which provides for the complete immunity of these ships.").

90. *The Schooner Exchange*, 11 U.S. at 147.

ship, and that state immunity afforded no such protection from this type of action.[91] However, Chief Justice Marshall stated that the opinion relied on the "general rule" of state immunity, which could only be undone by some sort of national act.[92] Without such an act existing, the Court ruled in favor of the French ship and barred McFaddon and Greetham from asserting their claim to the schooner in question.[93]

While the Court granted immunity to the French warship in *The Schooner Exchange*, it was unclear how far state immunity extended. For instance, would the Court have decided the case differently had the ship been a foreign, government-owned merchant ship?[94] The Supreme Court answered that question over one hundred years later in *Berizzi Bros. Co. v. The Pesaro*.[95] A merchant ship, owned by the Italian government, allegedly failed to deliver silk cargo from Italy to New York.[96] Relying on the words of Chief Justice Marshall in *The Schooner Exchange*, the Court extended immunity to the Italian-owned merchant ships, figuring the omission of merchant ships from discussion in *The Schooner Exchange* "is not of special significance" because, in 1812, governments were not known to employ merchant ships.[97] So while the petitioners brought the libel in rem claim under section 24, cl. 3 of the Judicial Code, which gave district courts the power to hear "all civil causes of admiralty and maritime jurisdiction," the Court held that it implicitly excludes jurisdiction over in rem actions against the ships of a friendly foreign government.[98] With *The Pesaro*, the Court made clear that it was willing to extend foreign sovereign immunity to foreign governments in almost any type of state action.[99]

Soon after *The Pesaro*, however, the Court signaled that it might be moving towards a new era of state immunity, in which the State

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91. *Id.* at 146.

92. *Id.* at 147.

93. *Id.*

94. XIAODONG YANG, STATE IMMUNITY IN INTERNATIONAL LAW 8 (James Crawford & John S. Bell eds., 2012) ("In this sense, *The Schooner Exchange* has been rightly perceived as ambiguous, since one would wonder what Justice Marshall might have decided if the ship had been a merchant vessel.").

95. 271 U.S. 562 (1926).

96. *Id.* at 569–70.

97. *Id.* at 573. For more on the current treatment of warships and other non-commercial vessels, as was the subject of *The Schooner Exchange*, see the U.N. Convention on the Law of the Sea art. 32, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 396, 409 (entered into force Nov. 16, 1994).

98. *The Pesaro*, 271 U.S. at 576.

99. *Id.*

Department played a crucial role. In *The Navemar v. The Navemar*,[100] the Spanish government claimed title to a ship presently held in New York, in which several parties claimed ownership.[101] However, the ambassador of Spain could not show with sufficient proof that the ship belonged to the Spanish government.[102] After a full hearing to determine the rightful owner of the ship, the district court determined that the ship was never in Spanish possession, and thus the Spanish government was not entitled to a dismissal for sovereign immunity.[103] On appeal, the Second Circuit reversed, stating that the district court should have taken the claim to title by the Spanish government as conclusive and dismissed the action in accordance with state immunity jurisprudence.[104] The Supreme Court reversed.[105] Writing for the Court, Justice Stone found the fact that the State Department refused to act on the Spanish government's claim to title compelling.[106] The Court used this fact to resolve the question of law—whether or not the claim to *The Navemar* was barred by state immunity—in favor of petitioners.[107] *The Navemar* signaled a movement towards relying on the actions and opinions of the State Department in deciding questions of state immunity.[108]

B. From Absolute to Restrictive: Recognizing Exceptions to State Immunity

Restrictive state immunity symbolizes a pullback from absolute state immunity and refers to a form of jurisprudence recognizing multiple exceptions to the normal rule of state immunity. As was suggested in *The Pesaro*, the jurists near the origin of the state immunity doctrine in modern law could not have foreseen a situation in which state governments were trading with private parties via merchant vessels.[109] As the years went on, governments became more and more involved in commercial transactions, such as the transactions that preceded the legal actions in *The*

100. 303 U.S. 68 (1938).

101. *Id.* at 70.

102. *Id.* at 70–71.

103. *Id.* at 73.

104. *Id.* at 73–74.

105. *Id.* at 75.

106. *Id.*

107. *Id.*

108. *See* JAMES COOPER-HILL ET AL., THE LAW OF SOVEREIGN IMMUNITY AND TERRORISM 61 (2006).

109. Berizzi Bros. Co. v. The Pesaro, 271 U.S. 562, 573 (1926).

Pesaro.[110] Because commercial transactions could end in legal disagreements (once again, as one did in *The Pesaro*), some people became concerned that governments would abuse their jurisdictional immunities to avoid courtroom disputes.[111] But because of the immunity afforded to sovereign vessels and transactions, private persons were inclined not to do business with sovereigns, knowing that the sovereign could claim state immunity and be immune to any action against it.[112]

The chipping away at the absolute immunity doctrine took place over a long period of time.[113] However, most states began making these rapid changes in their usage of state immunity following the conclusion of the Second World War.[114] It was at this point that the states began to distinguish between *acta de jure imperii*, sovereign acts, and *acta de jure gestionis*, private or commercial acts.[115] The doctrine of restrictive immunity generally granted immunity for *acta de jure imperii*, but not for a state's *acta de jure gestionis*.[116]

Because the change from absolute to restrictive state immunity happened case-by-case within each nation, each state's advancement towards restriction developed differently, and with unique distinctions from one another.[117]

1. The Development of Restrictive Immunity in the United States

In the United States, absolute immunity was never truly "absolute" in the purest sense of the word because a state could not just do whatever it wanted and receive state immunity as a result.[118] In *The Schooner Exchange*, Chief Justice Marshall hinted at the concept of an implied

110. McMenamin, *supra* note 56, at 191.

111. *Id.*

112. *Id.*

113. Yang, *supra* note 94, at 11. By "chipping away," I am referring to the process over a long period of time in which legislatures and courts found several exceptions to state immunity. As Yang notes, "[t]o say that the history of State immunity is one of movement from absolute to restrictive immunity does not mean that there is a sharply defined point of time at which international practice as a whole made such a shift. For there is no such point . . . ." *Id.*

114. *Id.*

115. *Id.*; *see also* McMenamin, *supra* note 56, at 191–92.

116. McMenamin, *supra* note 56, at 191–92. Interestingly enough, the Supreme Court of the United States expressly rejected the argument that a state's immunity rests on whether or not it was engaging in private or public acts. *See* Berizzi Bros. Co. v. The Pesaro, 271 U.S. 562, 574 (1926).

117. SOMPONG SUCHARITKUL, STATE IMMUNITIES AND TRADING ACTIVITIES IN INTERNATIONAL LAW 162–256 (1960) (detailing the change from absolute to restrictive immunity by several different nations).

118. *See* The Schooner Exchange v. McFaddon, 11 U.S. 116, 140 (1812).

waiver of the protections granted by state immunity.[119] Additionally, as far as the cases in actions involving vessels owned by foreign governments (which provided the bulk of state immunity jurisprudence in the early days of the doctrine), states were only afforded immunity in actions disputing the ownership or liens on vessels or their cargo if those vessels were dedicated to public service.[120] In this regard, "public service" means that the vessel is used for official state acts, or acts that only a state could perform due to its capacity as a sovereign.[121] For example, a state could employ an official warship for commission in its armed forces, but a private party could do no such thing.[122] However, the "public service" test was generally conditioned on a state's ability to prove that it possessed the ship at the time in which the dispute arose.[123] This meant that a key question in several immunity cases involving public merchant vessels was whether or not the state had actual possession of the merchant vessel during the events in question or the commencement of any action involving the merchant vessel.[124] Actual possession by a sovereign then became a quintessential question in state immunity cases.[125] Even in the era of absolute immunity, United States courts were unwilling to take foreign governments for their word that ships or vessels actually belonged to the state; the foreign governments had to prove that in court.[126]

a. The Court Begins Deferring to the Executive Branch

As the United States shifted into a more restrictive era of state immunity, it started deferring to the executive branch instead of deciding the matter on its own right.[127] The beginning of this deference doctrine could be traced, at least in part, to the Court's recognition of the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."[128] Just two years

119. *Id.* ("Without doubt, a military force can never gain immunities of any other description than those which war gives, by entering a foreign territory against the will of its sovereign.").

120. SUCHARITKUL, *supra* note 117, at 183.

121. *Id.*

122. *Id.*

123. *Id.* at 184–85.

124. *Id.*; *see also* The Navemar v. The Navemar, 303 U.S. 68, 73 (1938) (holding that Spain was not entitled to state immunity on an in rem action over its purported vessel because it could not prove it possessed the ship).

125. *See, e.g.*, *The Navemar*, 303 U.S. at 73.

126. SUCHARITKUL, *supra* note 117, at 184–85.

127. *See, e.g.*, *Ex Parte* Republic of Peru, 318 U.S. 578 (1943).

128. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

following the well-known *United States v. Curtiss-Wright*[129] decision, which recognized the President's inherent authority over foreign affairs,[130] Justice Stone noted in *The Navemar* that the lack of State Department action on Spain's claim to title over the ship helped resolve the issue of actual possession, and thus state immunity.[131] Five years following *The Navemar*, the Court furthered its deference to opinions of the State Department in *Ex parte Republic of Peru*.[132] In a dispute over a steamship in Louisiana, Peru intervened to claim ownership of the ship.[133] Claiming immunity on behalf of the vessel, Peru sought to have the case dismissed.[134] In support of its claim to immunity, Peru "follow[ed] the accepted course of procedure" by receiving recognition of the immunity claim from the State Department.[135] Nonetheless, the district court denied the claim for immunity, and Peru petitioned for a writ of mandamus against the district court.[136] The Supreme Court granted the writ, holding "[u]pon recognition and allowance of the claim by the State Department and certification of its action presented to the court by the Attorney General, it is the court's duty to surrender the vessel."[137] These cases signaled the beginning of an era in which the State Department played a key role in questions of state immunity.

Within this era of State Department deference, situated approximately between the 1920s to the mid-1950s, there were three ways in which the executive might influence judicial decisions of state immunity.[138] First, the executive could recognize a claim of immunity by itself.[139] In *United States of Mexico v. Schmuck*,[140] the New York Court of Appeals ruled that, upon receiving a certification of immunity from the State Department, the question of immunity "ceased to be a judicial question," and was instead treated as an executive decision.[141] Whether or not an inquiry would have resolved the question of immunity differently is immaterial; what matters

129. 299 U.S. 304 (1936).

130. *Id.* at 329.

131. The Navemar v. The Navemar, 303 U.S. 68, 75 (1938).

132. 318 U.S. 578 (1943).

133. *Id.* at 580.

134. *Id.* at 581.

135. *Id.*

136. *Id.* at 579.

137. *Id.* at 588.

138. SUCHARITKUL, *supra* note 117, at 191–92.

139. *Id.*

140. 56 N.E.2d 577 (N.Y. 1944).

141. *Id.* at 580.

is that the State Department came to an official conclusion regarding the issuance of immunity, and the judiciary must honor that recognition.[142]

The second method of executive intervention was the courts accepting that a foreign government's statements were true, while passing on the final question of immunity because the executive answered that question.[143] In this method, a court accepted the executive's stipulated facts as binding and unquestionable.[144] In *United States v. Pink*,[145] the Court deferred to a presidential decree that the USSR existed as a sovereign nation, and thus USSR law applied to a dispute over the vesting of a piece of property.[146] While the executive did not afford any country state immunity, the President's decree that the USSR existed as a recognized nation changed the course of the entire case. The Court made no attempt to question this executive declaration, as it feared it would "usurp the executive function if we held that that decision was not final and conclusive in the courts."[147] Thus, even in cases where immunity was not at issue, the executive could still stipulate to certain facts on international matters that might affect the outcome of the case, and which the judiciary could not fight against.

Lastly, the executive may make suggestions to the courts regarding international matters, including state immunity.[148] While a suggestion may sound similar to the first level of State Department involvement, explained above, the differences lie in whether or not the State Department offered a certification of immunity, as opposed to a mere suggestion of state immunity.[149] Essentially, this means the court would have discretion to make the final decision on immunity, knowing where the executive stood and weighing the executive recommendation.[150] As happened in cases such as *The Navemar* and *Republic of Mexico v. Hoffman*,[151] the Court rejected the State Department's suggestion of

142. *Id.* at 580–81.

143. SUCHARITKUL, *supra* note 117, at 191.

144. *Id.*

145. 315 U.S. 203 (1942).

146. *Id.* at 234.

147. *Id.* at 230.

148. SUCHARITKUL, *supra* note 117, at 192.

149. *Compare* United States of Mexico v. Schmuck, 56 N.E.2d 577, 581 (N.Y. 1944) (holding Mexico immune in U.S. courts after the State Department issued a certification of immunity), *with* Republic of Mexico v. Hoffman, 324 U.S. 30, 37–38 (1945) (holding Mexico not immune in action, even though the State Department suggested offering state immunity).

150. SUCHARITKUL, *supra* note 117, at 192.

151. 324 U.S. 30 (1945).

immunity, both times because of a failure on behalf of the foreign nation to show actual possession of the vessel in question.[152]

b. The Tate Letter Era—The State Department's Control over Granting State Immunity

While the doctrine of restrictive state immunity first grew from disputes over ship ownership, the State Department clarified with the Tate Letter that the executive should apply such a restrictive doctrine to all commercial transactions.[153]

The executive's involvement with the judiciary in the area of state immunity became more solidified in 1952 after it directly endorsed the restrictive model of state immunity.[154] Jack Tate, then-acting legal adviser to the Department of State, issued a letter to the acting Attorney General, actively endorsing the restrictive theory of state immunity.[155] It addressed the two competing theories of state immunity—absolute and restrictive—with Mr. Tate eventually discussing and explaining the benefits of the restrictive immunity doctrine.[156] He concluded:

> Finally the Department feels that 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. For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.[157]

The Tate letter drastically changed the process through which foreign states would litigate state immunity claims in the United States. While the State Department was tangentially involved in the early development of the restrictive doctrine, it now became directly involved, because foreign sovereigns could petition for the State Department's permission for

152. *Id.* at 37–38; The Navemar v. The Navemar, 303 U.S. 68, 75 (1938).

153. FOX, *supra* note 44, at 221.

154. *Id.*

155. *Id.*

156. *Id.*

157. Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, U.S. Att'y Gen. (May 19, 1952), *reprinted in Changing Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*, 26 DEP'T ST. BULL. 984, 984–85 (1952).

immunity before ever litigating the matter in court.[158] The "suggestion" of immunity by the State Department became much more important.[159]

The Supreme Court officially endorsed a deferential attitude to the State Department's recommendations in the post-Tate Letter era in *National City Bank of New York v. Republic of China*,[160] holding "[t]he status of the Republic of China in our courts is a matter for determination by the executive and is outside the competence of this Court."[161] It noted the recent developments in the State Department's involvement in the granting or waiving of immunity, stating "the State Department is the normal means of suggesting to the courts that a sovereign be granted immunity from a particular suit."[162]

Following *National City Bank*, courts stopped interpreting State Department findings as mere "suggestions," but rather as findings with which the courts declined to take a different position.[163] In *Amkor Corp. v. The Bank of Korea*,[164] a New York district court held that the immunity recommendation from the Department of the State "is binding on this Court."[165] The *Amkor Corp.* court relied on *Victory Transport Inc. v. Comisaria General de Abastecimientos Transportes*,[166] in which the Second Circuit held "the courts have quite naturally deferred to the policy pronouncements of the State Department" when it comes to decisions on immunity.[167] A District of Columbia district court in *Renchard v. Humphreys & Harding, Inc.*[168] endorsed this process, holding that "a suggestion of immunity is conclusive and binding on the courts."[169] Some courts were critical of the deference to the executive without clearly set standards by which the executive might abide, but nonetheless concluded that the executive's conclusion should be given a large amount of deference.[170]

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158. GAMAL MOURSI BADR, STATE IMMUNITY 53 (1984).

159. *Id.*

160. 348 U.S. 356 (1955).

161. *Id.* at 358.

162. *Id.* at 360 (citing *Ex parte* Republic of Peru, 318 U.S. 578, 581 (1943)).

163. *See, e.g.*, Amkor Corp. v. Bank of Korea, 298 F. Supp. 143, 144 (S.D.N.Y. 1969).

164. 298 F. Supp. 143, 144 (S.D.N.Y. 1969).

165. *Id.* at 144.

166. 336 F.2d 354 (2d Cir. 1964).

167. *Id.* at 358.

168. 381 F. Supp. 382 (D.D.C. 1974).

169. *Id.* at 383.

170. *See, e.g.*, Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 359 (2d Cir. 1964); Ocean Transp. Co. v. Gov't of the Ivory Coast, 269 F. Supp. 703, 705 (E.D. La. 1967).

Soon, however, it became apparent that deference to the executive branch was simply not sustainable. In the late 1960s, the State Department started holding informal hearings on immunity claims, involving counsel for both parties in lawsuits and written memos and oral presentations to the Office of the Legal Adviser.[171] Essentially, the State Department was conducting quasi-judicial hearings to decide the question of immunity, which, outside the foreign or international relations area, was a task usually reserved for the judiciary.[172] Additionally, foreign states did not always petition for immunity from the State Department, meaning the courts had to rely on old State Department determinations to come to their conclusions.[173] This led to a situation in which two branches of government, sometimes cooperating, sometimes not, were making decisions on state immunity with unclear policy factors.[174] Seeing this, Congress decided that it was time to act.

c. Codification—The Foreign Sovereign Immunities Act of 1976

In 1976, Congress passed the FSIA to embrace the restrictive doctrine of state immunity and move immunity-granting powers from the executive to the judiciary.[175] Finding that "American citizens are increasingly coming into contact with foreign states and entities owned by foreign states," Congress wanted United States citizens to be able to resolve disputes with foreign governments in domestic courts.[176] It highlighted several situations in which a United States citizen might be denied appropriate relief due to state immunity, including international commercial relations, real estate, or even tort actions against foreign officials in the United States.[177]

Accordingly, Congress sought to accomplish four objectives with the FSIA.[178] First, it codified the restrictive theory of state immunity, which differentiated between public acts (*acta de jure imperii*) and private acts

171. BADR, *supra* note 158, at 54.

172. *Id.*

173. JAMES COOPER-HILL, *supra* note 108, at 70.

174. *Id.*

175. *Id.*; *see also* FOX, *supra* note 44, at 317.

176. H.R. REP. NO. 94-1487, at 6–7 (1976).

177. *Id.* at 6–7 (in the report, the House noted examples included when "U.S. businessmen sell goods to a foreign state trading company, and disputes may arise concerning the purchase price. Another is when an American property owner agrees to sell land to a real estate investor that turns out to be a foreign government entity and conditions in the contract of sale may become a subject of contention").

178. *Id.* at 7–8.

(*acta de jure gestionis*), offering immunity for the former, but not the latter.[179] Second, it transferred the power to grant immunity away from the executive branch.[180] Congress favored the judiciary for making immunity decisions, as it would not only base immunity decisions on "purely legal grounds," but also was free from diplomatic pressures the executive branch faced.[181] Moving the decision from the executive to the judiciary ensured immunity was properly granted, rather than out of fear of any "adverse consequences resulting from an unwillingness . . . to support that immunity."[182] Third, it provided a statutory procedure for obtaining personal jurisdiction over foreign states for the first time in United States law.[183] Fourth, the FSIA helped enforce judgments against foreign states.[184]

The FSIA is now codified in 28 U.S.C. §§ 1602–1611.[185] It generally provides immunity to foreign states in U.S. Courts, subject to certain exceptions.[186] It defines a foreign state as "a political subdivision of a foreign state or an agency or instrumentality of a foreign state."[187] An agency or instrumentality of a foreign state refers to any entity that is (1) a separate legal person, (2) "an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof," and (3) is neither a citizen of the United States nor a third country.[188] It has the effect of establishing both subject matter jurisdiction and personal jurisdiction over foreign states.[189]

Despite generally recognizing immunity,[190] the FSIA contains several exceptions. Section 1605 requires courts to deny a foreign state immunity in cases where (1) the foreign state has waived immunity; (2) the action is based upon a commercial activity within the United States; (3) certain

179. *Id.* at 7.

180. *Id.*

181. *Id.* at 7–8.

182. *Id* at 7.

183. *Id.* at 8.

184. *Id.*

185. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1611 (2012).

186. *Id.* § 1604.

187. *Id.* § 1603(a).

188. *Id.* § 1603(b).

189. *See id.* § 1608 (setting service of process standards to appropriately give notice to a foreign state). Service of process has the effect of giving proper notice, a quintessential facet of personal jurisdiction. Additionally, the act in its entirety has the effect of placing subject matter jurisdiction over all actions against foreign states. *Id.*

190. *Id.* § 1604.

foreign expropriations are at issue; (4) real property or estates are at issue; (5) the state has allegedly committed a non-commercial tort in the United States (known as the territorial-tort exception); (6) the court is being asked to enforce an arbitration agreement; or (7) the court is deciding a maritime in rem action.[191] In 1996, Congress added an additional exception, known as the "terrorism" exception, allowing suits against foreign states that have been designated as state sponsors of terrorism.[192] The State Department has the sole authority to designate states as sponsors of terrorism.[193]

Since the FSIA entered into force in 1977, the Supreme Court has ruled that it is the sole and exclusive jurisdictional basis for suits against foreign governments, agencies, and instrumentalities.[194] While the FSIA has a very broad definition of what constitutes a state,[195] the Supreme Court has since limited FSIA's application. For example, in *Samantar v. Yousuf*,[196] the Court ruled that individual foreign officials are not entitled to state immunity because the definition of foreign state in the act refers to a body politic, rather than individuals.[197] However, the old system of common law, used before the enactment of the FSIA, can protect individuals or entities that may be entitled to state immunity, but not under the FSIA.[198] The FSIA has officially shown a commitment to the restrictive doctrine of state immunity by the United States.

2. The Acceptance of Restrictive Immunity Outside the United States

Similar to the United States, the restrictive doctrine developed near the beginning to mid-1900s around the world due to a growing dissatisfaction with the absolute doctrine.[199] However, other nation-states started making the movement towards restrictive immunity as early as the turn of the twentieth century, or as late as the end of the twentieth century.[200] The restrictive approach is now enforced in many nations, including the U.K., Australia, Pakistan, Canada, South Africa, Japan, Singapore, Israel,

191. *Id.* § 1605(a)–(b).

192. *Id.* § 1605A.

193. *Id.*

194. COOPER-HILL, *supra* note 108, at 71 (citing Argentine Republic v. Amerada Hess Shipping Corp, 48 U.S. 428 (1989) and Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480 (1983)).

195. 28 U.S.C. § 1603(a)–(b).

196. 560 U.S. 305 (2010).

197. *Id.* at 314–15.

198. *Id.*

199. FOX, *supra* note 44, at 221.

200. *Id.* at 224–35.

Argentina, Malaysia, Ireland, Nigeria, Zimbabwe, New Zealand, Italy, Germany, France, and Spain.[201] The following are a few examples of restrictive doctrine in nation-states other than the United States.

a. Restrictive Immunity in the United Kingdom

The dissatisfaction with the absolute doctrine of state immunity in the United Kingdom started well before the country ever codified the restrictive form of immunity.[202] In 1952, the Privy Council of England, which is the body of advisers to the Kingdom of England, denied that the absolute rule even existed in England.[203] However, scholars recognized that England was moving towards a practice of restrictive immunity in the mid-1900s.[204] The "tipping point," if there was a single point, could be seen as *Kajina v. Tass Agency*.[205] In this case, Tass Agency, a department of the Soviet State, received state immunity in English courts despite the agency being registered as a business entity under English law.[206] Given the anti-Soviet sentiments following World War II, many people were displeased with the result, triggering a series of debates in the legislature and English courts about the applicability of the absolute doctrine of state immunity in a modern and interconnected world.[207]

Following judiciary-led veering towards the restrictive law of state immunity, as well as the European Convention on State Immunity of 1972, the English legislature passed the 1978 State Immunity Act (SIA).[208] Similar to the FSIA, the SIA affords general immunity to foreign states in U.K. courts, but subjects the general grant to several exceptions, enumerated in sections 2–17 of the Act.[209] It defines a foreign state as "(a) the sovereign or other head of that State in his public capacity; (b) the government of that State; and (c) any department of that government."[210]

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201. McMenamin, *supra* note 56, at 192.

202. FOX, *supra* note 44, at 211.

203. *Id.*

204. SUCHARITKUL, *supra* note 117, at 182.

205. [1949] 2 All ER 274 (Eng.).

206. FOX, *supra* note 44, at 212.

207. Baccus SRL v. Servicio National de Trigo [1957] 1 QB 438, 464 (Eng.) (Singleton, L.J.) (endorsing a policy where states, acting as trading entities, are not entitled to state immunity); *see also* Trendtex Trading Corp. v. Cent. Bank of Nigeria [1976] 3 All ER 437 (Eng.) (differentiating between a state's commercial and governmental actions, ruling that "government should be subject to all the rules of the market place" when states act as traders).

208. FOX, *supra* note 44, at 237; *see also* State Immunity Act 1978, c. 33 (Eng.).

209. State Immunity Act §§ 1–17.

210. *Id.* § 14(1).

A notable omission is the waiver exception to sovereign immunity, in which a state only waives its right to sovereign immunity if it expressly consents to suit in the U.K.[211] However, a state only consents if it either institutes the proceedings, or has taken a step to intervene in the proceedings.[212] Therefore, it would seem that a state cannot implicitly waive state immunity in the U.K., unless it somehow manages to accidentally initiate or intervene in proceedings.

b. Restrictive Immunity in France

France's practice of state immunity first developed through case law rather than legislation, but that has not stopped France's legislative bodies from implementing their own form of restrictive state immunity.[213] The restrictive doctrine in France finds its roots in a 1929 decision in which the courts allowed a lawsuit against the commercial representative of the USSR.[214] Following this case, two applications of state immunity emerged: "*immunité de juridiction*" and "*incompétence d'attribution*."[215] Despite being two separate theories, treated differently in some French courts, their application means essentially the same thing, and each theory usually resulted in similar rulings on state immunity.[216]

Immunité de juridiction, or "immunity from jurisdiction," refers to a situation in which a defendant is not acting within the capacity of his or her position in the State.[217] This would be applicable in a situation where a person holding a position of state authority acts outside of his or her capacity as a state official, but attempts to claim state immunity regardless.[218] Essentially, when there is a disconnect between the actor's official capacity and the act in question, the actor is not afforded immunity.[219]

Incompétence d'attribution, or "incompetence of attribution," refers to the nature of the case involved, and rests on what specific actions the state

211. *Id.* § 2.

212. *Id.* § 2(3).

213. *See* Hazel FOX, THE LAW OF STATE IMMUNITY 226 (2d ed. 2008). The development of state immunity in France through the court system is interesting, considering France operates as a civil law country rather than a common law country.

214. *Id.*

215. SUCHARITKUL, *supra* note 117, at 202.

216. *Id.* at 205.

217. *Id.* at 203.

218. *Id.*

219. *Id.*

took and whether or not those actions are entitled to state immunity.[220] For example, in a situation where a foreign bank was contended to have failed to exchange old banknotes, the *Cour de Cassation* determined that it had jurisdiction over the Bank of Spain because any bank in its own right would be subject to French jurisdiction for the same or similar acts.[221]

* * *

As these examples in and outside of the United States show, the international legal community has moved towards support of the restrictive theory of state immunity, recognizing that there are real and legitimate situations in which a state should not be afforded immunity in courts foreign to the state. Under the theory of restrictive immunity, courts look at the actions taken by the states to determine if immunity is appropriate. Now that exceptions to state immunity are commonly accepted, the question is, when is it appropriate to deny a foreign sovereign state immunity in domestic courts? This question becomes relevant when analyzing the intersection between *jus cogens* norms and state immunity.

II. *JUS COGENS*: RECOGNITION AND PRACTICE

Peremptory norms, also known as *jus cogens*, are norms "accepted and recognized by the international community of [s]tates as a whole . . . from which no derogation is permitted."[222] *Jus cogens* are universally applicable by any state against any other state because of the international concern of protecting humankind from *jus cogens* violations.[223] As stated in the Vienna Convention on the Law of Treaties, states cannot "contract out" of *jus cogens* responsibilities via treaty or any other kind of international agreement; such a treaty is automatically void.[224] *Jus cogens* are the special exception to the normal practice of only enforcing international law if the state has consented to that international law.[225] Commonly cited and well-recognized *jus cogens* include the prohibition

220. *Id.* at 204.

221. *Id.*

222. Vienna Convention on the Law of Treaties, *supra* note 24, art. 53, at 344.

223. LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW 5–6 (1988).

224. Vienna Convention on the Law of Treaties, *supra* note 24, art. 53, at 344.

225. Dr. Markus Petsche, Jus Cogens *as a Vision of the International Legal Order*, 29 PENN. ST. INT'L L. REV. 233, 264 (2010).

on the use or threat of the use of aggressive armed forces, genocide, the taking of hostages, and torture.[226]

A. The Recognition of Jus Cogens *Norms: Evolution from Custom and Bilateral Treaties to Codification in the Vienna Convention*

Jus cogens is a recent development in international law.[227] Due to *jus cogens* norms' nature as superseding over all other forms of international law, they require an international structure to have effect.[228] It is impossible to rule out the existence of *jus cogens* in early European years (1600s–1900s), but if they did exist, they had little-to-no effect on international conduct.[229]

While there really were no identifiable *jus cogens* in the early developments of the modern world, some scholars argued for their existence. As early as the late 1500s, philosophers such as Hugo Grotius and Emer de Vattel wrote that there existed certain pieces of natural law that man-made law could not overcome.[230] Grotius went so far as to argue that not even God could change these core concepts of natural law, which, in his belief, included the keeping of promises and that "each should be given his due."[231] Vattel described his form of *jus cogens* as "necessary law," which was simply natural law that applied to the states.[232] In his opinion, states could not simply rid themselves of the moral responsibilities of necessary law via treaties or customs, and such practices were illegal in his eyes.[233] So while there was little official recognition of *jus cogens* in history, scholars were arguing for *jus cogens* norms' existence and recommending actions similar to those done between states today.[234]

Through the 1800s and early 1900s, most forms of *jus cogens* came in the form of treaties or agreements between two or more nation-states. For instance, in 1814, the Congress of Vienna attempted to create a system of

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226. HANNIKAINEN, *supra* note 223, at 356, 436.

227. *Id.* at 28.

228. *Id.*

229. *Id.*

230. *Id.* at 30.

231. *Id.*; *see also* HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 138, 155 (Richard Turk, ed., Liberty Fund 2005) (1625) (ebook).

232. ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 37 (2006).

233. EMER DE VATTEL, THE LAW OF NATIONS §§ 7–9 (Philadelphia, T. & J.W. Johnson 1863) (1797).

234. *Id.*

control by the Holy Alliance over Europe.[235] While the treaty did not last very long (there was an inability to enforce the treaty between nation-states), it shows the early attempts of nations to create a system of cognizable norms that all states intended to follow.[236] Many of these multilateral agreements dealt with the laws of war, showing that there indeed existed war crimes, a commonly cited *jus cogens* norm in the modern era.[237]

The official codification of *jus cogens* came about in the Vienna Convention on the Law of Treaties, known as the "treaty on treaties."[238] The treaty declared that any treaties attempting to violate or contract out of *jus cogens*, or peremptory norms, are void as to those clauses.[239] While many states have their own definitions of what does and does not constitute *jus cogens*, the drafters of the American Law Institute's Restatement of the Law on Foreign Relations, Third, believe that genocide, slavery, murder, torture, prolonged detention, racial discrimination, and consistent patterns of gross violations of internationally recognized human rights are all violations of *jus cogens* norms.[240]

B. Modern Jus Cogens *Norms*

In modern times, what do and do not qualify as *jus cogens* norms depends on which state is making a determination on the matter. This is somewhat paradoxical, as the justification behind *jus cogens* norms is that the acts are so horrible that no person would attempt to justify or defend those acts.[241] For example, a United States scholar might suggest that the following list qualifies as violations of *jus cogens* norms: piracy, slave trade, attacks on or hijacking of aircraft, genocide, certain war crimes, and certain acts of terrorism.[242] Others may argue that certain acts of terrorism

235. HANNIKAINEN, *supra* note 223, at 38.

236. *Id.* at 44.

237. *Id.* at 38.

238. Vienna Convention on the Law of Treaties, *supra* note 24, art. 53, at 344.

239. *Id.*

240. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k (AM. LAW INST. 1987).

241. COOPER-HILL, *supra* note 108, at 113 ("Some conduct is so egregious that all nations supposedly would support its condemnation.").

242. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (AM. LAW INST. 1987) (stating that the United States has "universal jurisdiction" over these acts, no matter where they were committed or who committed them, thereby implying that the United States recognizes these acts as violating *jus cogens* norms).

are not included in that list for lack of universal acceptance or recognition.[243]

Nonetheless, it appears that whether or not the terror attacks on September 11, 2001, were *jus cogens* violations is a settled question.[244] Given the amount of devastation the hijackers caused that day,[245] it seems appropriate to determine that the hijackers did violate some kind of *jus cogens* norms on September 11, 2001.[246]

III. THE INTERSECTION OF STATE IMMUNITY AND *JUS COGENS* IN DOMESTIC, FOREIGN, AND INTERNATIONAL LAW

Due to the importance of both state immunity and *jus cogens* norms, it is no wonder that these two concepts clash often in United States courts, foreign courts, and international courts.[247] Historically, in almost every situation, state immunity has triumphed over *jus cogens* violations due to the lack of a distinct "*jus cogens* violations" exception to the rule of state immunity.[248] Without such a clear-cut exception, states, international courts, and domestic courts may rely on the articles drafted by the International Law Commission (ILC) on jurisdictional immunities of states and their property and state responsibility.[249] These articles represent a codified set of recognized international concepts and doctrines relating to state jurisdictional immunity and responsibility.[250] They

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243. M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 DUKE L. AND CONTEMP. PROBS. 63, 68 (1996).

244. *See* COOPER-HILL, *supra* note 108, at 305–06 (noting that most peremptory norms are those which states rely on in order to create a sustainable system of coexisting states); JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY 246 (2002) (finding that peremptory norms, including the prohibition on aggression, are those which, if not followed, would threaten states, their people, and basic human values). If the actions of the September 11 terrorists can be attributed to a certain state (discussed more in section III.A, *infra*), then that state has likely violated some *jus cogens* norm, whether it is the prohibition on aggression, or other *jus cogens* norms concerning basic human rights and certain war crimes. *See* ROSANNE VAN ALEBEEK, THE IMMUNITY OF STATES AND THEIR OFFICIALS IN INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW 227 (2008).

245. *See* Carter & Cox, *supra* note 2.

246. *See supra* note 244 and accompanying text.

247. *See, e.g.*, Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. 99, 137–40 (Feb. 3).

248. *Id.*

249. INT'L LAW COMM'N, REPORT ON THE WORK OF ITS FORTY-THIRD SESSION, *supra* note 36, at 22–23; CRAWFORD, *supra* note 244.

250. INT'L LAW COMM'N, REPORT ON THE WORK OF ITS FORTY-THIRD SESSION, *supra* note 36, at 22–23.

function somewhat as the familiar Restatements of the Law created by the American Law Institute, but on an international level, as they are used for reference but are not binding on states or international courts.[251] Additionally, domestic courts may receive guidance from decisions of the ICJ, even if those decisions are not binding on them.[252] Recently, the ICJ held in *Jurisdictional Immunities of the State* that *jus cogens* violations do not allow domestic courts to proclaim jurisdiction over foreign states.[253]

Accordingly, this section will proceed in three parts. First, it will assess how domestic courts may interpret JASTA by examining the treatment that the United States has afforded the intersection of *jus cogens* violations and state immunity. Second, it will show the important provisions of two relevant ILC articles: jurisdictional immunities of states and their property, and state responsibility. Lastly, it will examine cases from international courts, including the one most relevant to the discussion: *Jurisdictional Immunities of the State*, from the ICJ.

A. State Immunity and Jus Cogens *Violations in Non-International Courts*

Prior to the JASTA amendment, United States courts had been fairly clear: a *jus cogens* violation, in its own right, does not supersede state immunity because no such exception to general foreign state immunity exists in the Foreign Sovereign Immunities Act (FSIA).[254] The path towards this conclusion began with *Argentine Republic v. Amerada Hess Shipping Corp.*,[255] a case in which a Liberian shipping corporation sued Argentina for destroying an oil tanker under the Alien Tort Statute instead of the FSIA.[256] On appeal by Argentina, the Supreme Court dismissed the action, holding that the exceptions in the FSIA are the only ways in which a United States court can have jurisdiction over a foreign state.[257] It found

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251. A key concept of international law is its non-binding nature, unless the state consents to be bound by the law or rule in question. *Cf.* Statute of the International Court of Justice, art. 59, June 26, 1945, 59 Stat. 1055, 1077 (stating that the decisions of the ICJ do not extend beyond the parties or dispute in question); Vienna Convention on the Law of Treaties, *supra* note 24, art. 26, at 339 (stating that treaties in force are binding on the parties to them, showing the requirement of consent).

252. Statute of the I.C.J., art. 59.

253. Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. 99, 137–40 (Feb. 3).

254. 28 U.S.C. § 1605–1605A (2012); *see also* Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992) (holding that there is no *jus cogens* violation exception to state immunity).

255. 488 U.S. 428 (1989).

256. *Id.* at 431–32.

257. *Id.* at 434–35.

that FSIA analysis must be applied in every action against a foreign state because the only way to have jurisdiction over a foreign state is through one of the exceptions in the FSIA.[258]

Following *Amerada Hess*, the Ninth Circuit held that *jus cogens* violations do not supersede state immunity because the FSIA does not contain such an exception.[259] In *Siderman de Blake v. Republic of Argentina*,[260] an Argentine family brought an action against Argentina for the alleged torture of an Argentine citizen and an unfounded taking of property by the Argentine military.[261] The district court dismissed the claims specifically related to the alleged torture because it found the claims did not fit into an exception under the FSIA.[262] On appeal, plaintiffs argued that Argentina could not claim sovereign immunity when it violates *jus cogens* norms, with the *jus cogens* norm in this case being the prohibition on torture.[263] While the court found that the prohibition of torture is certainly a *jus cogens* norm, a violation of a *jus cogens* norm is not an exception under the FSIA.[264] Citing *Amerada Hess*, the court held the FSIA limited its ability to create exceptions to foreign sovereign immunity, and *jus cogens* violations were not an exception within the Act.[265] Therefore, the Ninth Circuit held it could not retain jurisdiction over Argentina for alleged *jus cogens* violations on its own right.[266] The Supreme Court denied certiorari without explanation.[267]

Several other circuit courts have agreed with the Ninth Circuit's holding in *Siderman de Blake*. In *Princz v. Federal Republic of Germany*,[268] the District of Columbia Circuit held that Germany did not implicitly waive its sovereign immunity through *jus cogens* violations committed in the Nazi regime in the Third Reich.[269] While the FSIA does

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258. *Id.* ("[T]he FSIA must be applied by the district courts in every action against a sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity." (internal quotation marks and citation omitted)).

259. *Siderman de Blake*, 965 F.2d at 719.

260. *Id.*

261. *Id.* at 703–04.

262. *Id.* at 713.

263. *Id.* at 714.

264. *Id.* at 718–19.

265. *Id.*

266. *Id.* However, the court did find that the actions of Argentina were enough to show an implicit waiver of sovereign immunity, so the claims against Argentina were not entirely defeated. *Id.* at 721–22 (citing 28 U.S.C. § 1605(a)(1) (2012)).

267. Republic of Argentina v. Siderman de Blake, 507 U.S. 1017 (1993) (denying certiorari).

268. 26 F.3d 1166 (D.C. Cir. 1994).

269. *Id.* at 1174.

include an "implied waiver" exception to state immunity,[270] that exception is interpreted narrowly according to the Act's legislative history: the actions of the state must show a clear intent to waive whatever sovereign immunity it might claim in a given action.[271] In *Smith v. Socialist People's Libyan Arab Jamahiriya*,[272] the Second Circuit also held that *jus cogens* violations do not constitute a waiver of state immunity in an action against the Libyan government for its alleged involvement in the bombing of a Pan American Airways flight because Congress did not intend the waiver exception to extend that far, "however desirable such a result might be."[273] Lastly, in *Sampson v. Federal Republic of Germany*,[274] the Seventh Circuit dismissed yet another attempt to bypass state immunity with *jus cogens* violations because no such exception exists in the FSIA.[275]

Similar to the United States' courts treatment of *jus cogens* and state immunity, courts outside of the United States have found that *jus cogens* violations do not abrogate state immunity. In *Jones v. Saudi Arabia*,[276] the U.K. dismissed a case against Saudi Arabia over allegations of torture during the plaintiff's time there in 2001.[277] Throughout the opinion, the House of Lords searched for evidence relating to a rule of *jus cogens* violations overcoming state immunity, yet found none.[278] With no such exception ever arising from statutory or case law in the U.K., the court concluded that state immunity is not superseded when plaintiffs allege *jus cogens* or human rights violations.[279] Courts in Canada,[280] Poland,[281] Slovenia,[282] and New Zealand[283] have similarly held that no such *jus cogens* foreign sovereign immunity exception exists.[284] Essentially, there is wide agreement that *jus cogens* violations do not, in their own right,

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270. 28 U.S.C. § 1605(a)(1).

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

272. 101 F.3d 239 (2d Cir. 1996).

273. *Id.* at 245.

274. 250 F.3d 1145 (7th Cir. 2001).

275. *Id.* at 1156–57.

276. [2006] UKHL 26, [2007] 1 AC 270 (appeal taken from Eng.).

277. *Id.* at 46–47.

278. *Id.*

279. *Id.*

280. Bouzari v. Islamic Republic of Iran (2004), 71 O.R. 3d 675 (Can. Ont. C.A.).

281. IV CSK 465/09 of Oct. 29, 2010 of the Supreme Court.

282. Case No. Up-13/99, Constitutional Court of Slovenia.

283. *Fang v. Jiang* [2007] NZAR 420 (HC) (N.Z.).

284. Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. 99, 141–42 (Feb. 3).

give domestic courts the right to deny state immunity to foreign sovereigns.

While several nation-states agree that state immunity is not superseded by *jus cogens* violations, many domestic courts are forced into that conclusion due to their own states' laws on state immunity. For example, in *Siderman de Blake*, the Ninth Circuit, backed by the words of the Supreme Court in *Amerada Hess*, held that *jus cogens* violations do not bypass state immunity because states receive immunity via the FSIA, and the FSIA contains no such exception to state immunity.[285] Because domestic rules often slightly differ from international norms, it is difficult to conclude that the United States' courts' decisions would have any effect on the treatment of *jus cogens* violations on an international level. For a better understanding of international law, one must study two sources: articles on the state of international law from the ILC, and decisions interpreting international law from the ICJ.

B. Holding States Accountable—Immunity and Attribution

Two concepts make up state accountability for actions on the international level: immunity and attribution. As this Comment has discussed in length, state immunity allows sovereign states to invoke immunity from jurisdiction of domestic courts in other states.[286] The concept of state immunity on the international level is restated in length in the ILC's articles on the jurisdictional immunities of states and their property.[287] On the other hand, the concept of attribution determines whether or not an action can be attributed to the alleged state actor.[288] Attribution is restated in length in the articles on state responsibility.[289]

1. Jus Cogens *Violations and Articles on Jurisdictional Immunities of the State and Their Property*

According to the ILC, generally, a state enjoys immunity from foreign domestic courts.[290] However, like in the United States, the adoption of

285. Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 718–19 (9th Cir. 1992).

286. *See supra* Part I.

287. *See, e.g.*, INT'L LAW COMM'N, REPORT ON THE WORK OF ITS FORTY-THIRD SESSION, *supra* note 36.

288. *See generally* CRAWFORD, *supra* note 244.

289. *Id.*

290. INT'L LAW COMM'N, REPORT ON THE WORK OF ITS FORTY-THIRD SESSION, *supra* note 36, art. 5, at 22–23.

restrictive immunity around the world has led to numerous exceptions to the general rule of immunity.[291]

One exception to state immunity in the ILC is that a state cannot invoke immunity in a case "which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State."[292] This means that, when states injure people or damage property on foreign land, states cannot invoke state immunity in a domestic court of competent jurisdiction if the act is appropriately attributable to the state.[293] According to commentary, two conditions are needed for this exception. First, the act or omission causing the injuries to the third party must occur in whole or in part in the territory of the state that claims jurisdiction over the defendant-state.[294] Second, the "author" of the act or omission must be present in the state at the time of the act or omission to increase the connection between the two states.[295] Application of this exception does not turn on whether or not the acts or omissions in question are *de jure imperii* or *de jure gestionis*.[296]

The ILC explains that this so-called territorial-tort exception exists because of the concept of territoriality.[297] Given that the harm occurs in a state's territory, by the actor of a foreign state, causing harm to a citizen of the harmed state, it only makes sense to allow that state's domestic courts to resolve the dispute and seek justice within the confines of that states' laws.[298] Accordingly, if any act in a foreign state harms a person or property, the state actor is present in the foreign state at the time of the act, and the act is attributable to the defendant-state (as found using the guidelines in the subsequent section), then state immunity does not apply, pursuant to the ILC.[299]

State actions causing injury in foreign territories result in a denial of state immunity as long as the acts truly are attributable to the states.[300] To

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291. *See, e.g.*, *supra* Part I.

292. INT'L LAW COMM'N, REPORT ON THE WORK OF ITS FORTY-THIRD SESSION, *supra* note 36, art. 12, at 44–46.

293. *Id.*

294. *Id.* at 45.

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id*. It is important that the domestic laws would hold the defendant-state liable, and that international or foreign law, including the law of the defendant-state, cannot be used in the domestic action against the state.

299. *Id.*

300. *Id.*

determine which acts may be attributed to the state, one may turn to the articles on state responsibility for guidance.

2. Attribution of Actions to States—ILC Articles on State Responsibility

A state is responsible for internationally wrongful actions attributable to that state.[301] An internationally wrongful act occurs when an act is (1) attributable to the state under international law and (2) constitutes a breach of an international obligation.[302] An act is attributable to the state even if the actors are not official state actors if they are acting pursuant to instructions from the state, or under the directions and control of the state.[303] A breach of an international obligation occurs when a state breaches an obligation to which it is bound at the time of the act.[304] All states are bound by *jus cogens* norms at all times, even if a state does not agree to be bound.[305] When a state is found to have committed an internationally wrongful act, there are certain methods through which states may remedy the wrongful act, including restitution, compensation, and satisfaction.[306] Notably excluded from the forms of available relief are suits against the state in domestic courts foreign to the acting state.[307]

However, the rules of attribution and forms of remedy change if the state commits a serious breach of obligations under peremptory norms of international law. A serious breach occurs when the state fails to follow "an obligation arising under a peremptory norm of general international law."[308] Additionally, the ILC makes clear that the appropriate consequences for a state that fails to follow obligations from *jus cogens* norms may extend beyond those allowed in the articles.[309] Specifically, the ILC states that "further consequences" may be available to states attributed with a *jus cogens* violation, and that its articles should not be construed to "preclude the future development of a more elaborate regime of consequences entailed by such breaches."[310]

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301. CRAWFORD, *supra* note 244, art.1, at 61.

302. *Id.* art. 2, at 61.

303. *Id.* art. 8, at 61.

304. *Id.* art. 13, at 63.

305. Pestche, *supra* note 225, at 264.

306. CRAWFORD, *supra* note 244, arts. 35–37, at 68.

307. *Id.*

308. *Id.* art. 40, at 69.

309. *Id.* art. 41(3).

310. *Id.* art. 41, cmt. ¶ 14, at 253.

Additionally, the articles on state responsibility allow a state to take countermeasures against another state that refuses to comply with its obligations to remedy an international wrongful act.[311] Countermeasures are defined as "non-performance for the time being of international obligations of the State taking the measures towards the responsible State."[312] A state can only resort to countermeasures, though, if it first calls on a state to fulfill its obligations to cease the wrongful act, if ongoing, and provide the appropriate remedies, and first offer to negotiate with the wrongful state.[313] Additionally, if the wrongful act has ceased and the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties, then countermeasures are improper.[314] There are some actions states can never take as countermeasures, but denial of state immunity is not on that list.[315] Lastly, countermeasures are proportional to the harm caused or the seriousness of the breach of international obligations.[316]

The ILC's articles on jurisdictional immunities and state responsibility provide some context as to how the international community may interpret a state's choice to remedy a breach of *jus cogens* violations with the stripping of state immunity. The territorial-tort exception to state immunity shows that, regardless of whether or not the state is officially acting, or acting as a private party, it may be subject to liability for harm committed inside a foreign state.[317] The articles on attribution show that a state may take countermeasures for serious breaches of international, peremptory norms, possibly including the withholding of its obligation to afford state immunity.[318] While this may follow logically from looking at

311. *Id.* art. 49, at 71.

312. *Id.* art. 49(2), at 71. The commentary to Article 49(2) further explains that the injured state effectively has the ability to withhold performance of an international obligation as long as it is not prohibited in Article 50. This suggests that a state, via a countermeasure, may choose to withhold its obligation to issue state immunity to foreign states in its domestic courts.

313. *Id.* art. 52, at 72.

314. *Id.* art. 52(3), at 72. Interestingly enough, neither the article itself, nor its commentary, states that a domestic court cannot be a "court" within the meaning of this article. It simply states that the court in which the dispute is pending must have jurisdiction over the dispute and the power to order provisional measures. Both of these features are possible in domestic courts if there is not state immunity. *Id.* art. 52 cmt. ¶ 8, at 299. This perhaps suggests that suit in a domestic court may not qualify as a "countermeasure" at all. *Id.*

315. *Id.* art. 50, at 71–72.

316. *Id.* art. 51, at 72.

317. U.N. GAOR, 59th Sess., Convention on Jurisdictional Immunities of States and Their Property, art. 12, U.N. Doc. A/Res/59/508 (Dec. 2, 2004) (opened for signature Jan. 17, 2005 and not yet entered into force).

318. CRAWFORD, *supra* note 244.

the ILC's articles, in practice, the ICJ has shown that it is not willing to find a *jus cogens* exception to state immunity.[319]

C. State Immunity and Jus Cogens *Violations in International Courts*—Jurisdictional Immunities of the State *and Other Relevant International Cases*

Because international courts preside nearly exclusively over international law disputes, there is no shortage of international court cases interpreting the collision of state immunity and *jus cogens* violations.[320] The most recent case from the ICJ regarding state immunity, *Jurisdictional Immunities of the State*,[321] is most relevant to the intersection of *jus cogens* violations and state immunity because it directly addresses the issue.

The parties in *Jurisdictional Immunities of the State* asked the ICJ to determine whether criminal acts by state officials constitute a waiver of state immunity.[322] It was a dispute between Germany and Italy regarding *jus cogens* violations committed during the Third Reich, in which the plaintiff, an Italian national, was detained and forced to work in a factory until the end of the war by German soldiers.[323] While the trial-court equivalent in Italy dismissed the case against Germany for want of jurisdiction in light of state immunity, the high court equivalent reversed the ruling and remanded to the trial court, holding that state immunity is not afforded when the actions of the state constitute international crime.[324] This ruling opened up the floodgates of litigation, as litigants filed twelve more actions against Germany in Italy.[325] Additionally, several Greek nationals sought to enforce judgments against Germany in Italian courts following the Italy state immunity cases after having failed to enforce judgments in both Greek and German courts.[326] Germany submitted the action for review to the International Court of Justice, asking for the court to find that Italian courts were in violation of international law by allowing

319. *See, e.g.*, Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. 99, 140 (Feb. 3).

320. *See, e.g.*, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, 2005 I.C.J. 168 (Dec. 19); Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, 2002 I.C.J. 3 (Feb. 14).

321. *Jurisdictional Immunities of the State*, 2012 I.C.J. at 99.

322. *Id.* at 140

323. *Id.* at 113.

324. *Id.*

325. *Id.* at 114.

326. *Id.* at 115–16.

suits against Germany to proceed because the suits claim that German actions violated international law.[327]

The ICJ held in *Jurisdictional Immunities of the State* that *jus cogens* violations in Italy do not constitute an exception to Germany's state immunity, but its reasoning leaves questions regarding the intersection of *jus cogens* norms and state immunity. The ICJ found that the actions of the German armed forces were clearly *acta jure imperii*, which are generally afforded state immunity.[328] It then looked at the territorial-tort exception articulated in the ILC's articles on jurisdictional immunities and found that it does not apply because, generally, the exception does not apply to situations of armed conflict.[329] Considering the harmful acts occurred after Italy was defeated and declared war on Germany, its former ally, the territorial-tort exception was inapplicable.[330] Then, the ICJ held that the gravity of the offenses alleged—kidnapping and forced servitude—do not constitute an implied waiver of sovereign immunity or deny Germany the ability to plead sovereign immunity.[331] Additionally, even if the violations are *jus cogens* norms violations, from which "no derogation may be permitted,"[332] *jus cogens* violations and state immunity cannot conflict because state immunity sits on the procedural plane and *jus cogens* violations sit on the substantive plane.[333] Therefore, the ICJ found for Germany and ruled that Italy was in violation of international law as long as it allowed the lawsuits against Germany to proceed in its courts.[334]

The ICJ's discussion of the lack of collision between *jus cogens* violations and state immunity is interesting because it seems to ignore the process by which state immunity evolved from absolute to restrictive. When explaining the different planes on which the two concepts sit, the court concluded the rules of state immunity are procedural and simply limited to determining whether or not one state's courts can exercise jurisdiction over another state.[335] Whether the acts committed by the state are lawful or unlawful has no bearing on whether or not the state is

327. *Id.* at 117.

328. *Id.* at 125.

329. *Id.* at 130; *see also* INT'L LAW COMM'N, REPORT ON THE WORK OF ITS FORTY-THIRD SESSION, *supra* note 36, at 46 ("[N]or does it apply to situations involving armed conflicts.").

330. *Jurisdictional Immunities of the State*, 2012 I.C.J. at 130.

331. *Id.* at 137.

332. Vienna Convention on the Law of Treaties, *supra* note 24, art. 36, at 344.

333. *Jurisdictional Immunities of the State*, 2012 I.C.J. at 140.

334. *Id.* at 155.

335. *Id.* at 137.

immune from jurisdiction in a foreign court.[336] However, the court had just concluded earlier in the judgment that a large part of state immunity analysis comes from a determination of whether or not the acts allegedly committed by the state were sovereign or private (*acta de jure imperii* or *gestionis*).[337] Additionally, the court seemed to disregard the steps different courts took when moving from absolute to restrictive immunity. Other courts would look to the actions in question to determine if they were the types of acts protected by state immunity.[338] However, the ICJ held that the distinction between private and sovereign acts comes from the *character* of the acts rather than the *substance* of the acts.[339] Nevertheless, the ICJ concluded that Italy was in violation of international law as long as it allowed lawsuits against Germany to proceed without a viable path through the jurisdictional guard of state immunity.[340]

IV. THE JUSTICE AGAINST SPONSORS OF TERRORISM ACT

The Justice Against Sponsors of Terrorism Act (JASTA) was passed by Congress on September 9, 2016, by the House, after the Senate already passed the Act in May of that same year.[341] Following President Obama's veto of the bill on September 23, both houses of Congress passed it over the veto and enacted JASTA into law five days later.[342] It was the only time a bill overrode Barack Obama's veto throughout his eight years in office.[343]

JASTA adds another exception to the FSIA in U.S. courts.[344] The exception denies state immunity to the foreign state if the action pertains to an act of international terrorism in the United States or tortious acts committed by foreign states or their officials, regardless of where the acts occurred.[345]

This Part explains the background behind the JASTA amendment to the FSIA, detailing the events leading up to its creation and enactment into

336. *Id.*

337. *Id.* at 125 ("States are generally entitled to immunity in respect of *acta jure imperii*.").

338. *See supra* section I.B.

339. *Jurisdictional Immunities of the State*, 2012 I.C.J. at 125.

340. *Id.* at 156.

341. *Actions Overview*, *supra* note 14.

342. *Id.*

343. Russell Berman, *The Runaway 9/11 Bill that Congress Refused to Stop*, ATLANTIC (Sept. 30, 2016), https://www.theatlantic.com/politics/archive/2016/09/911-legislation-congress-obama-veto-override/502337/ [https://perma.cc/U5KN-Q9AH].

344. JASTA, Pub. L. No. 114-222, 130 Stat. 852 (2016) (codified at 28 U.S.C. §§ 1605B, 2333 (2016)).

345. *Id.* § 3 (codified at 28 U.S.C. § 1605B (2012)).

law. First, this Part will briefly discuss the terror attacks on September 11, 2001. Second, this Part will highlight the litigation that resulted from the terror attacks and how the FSIA defeated lawsuits against Saudi Arabia and Saudi Arabian princes. Third, this Part will discuss the creation and enactment of JASTA, including important commentary from domestic politicians. Fourth, this Part will touch on reactions to the JASTA amendment across the globe, including those that believe this amendment puts the United States in violation of international law.

A. The Terror Attacks of September 11, 2001 and Connections to Saudi Arabia

On September 11, 2001, four planes travelling inside of the United States were hijacked and used as weapons against United States buildings and civilians.[346] Two planes, both intending to travel from Boston to Los Angeles, crashed into the two World Trade Center towers in New York City.[347] A third plane, intended to travel from Washington, D.C. to Los Angeles, crashed into the Pentagon.[348] A fourth plane, intended to travel from Newark to San Francisco, crashed in a field in Shanksville, Pennsylvania, following the passengers' attempt to retake the plane from the hijackers.[349] Nearly 3,000 people died and more than 6,000 were injured.[350] In addition, estimates for the property damage caused by the attacks range between ten and twenty billion dollars.[351]

Troubling to many people was the overwhelming connection between the 9/11 hijackers and the country of Saudi Arabia. Nineteen members of terror group al-Qaeda carried out the attack.[352] Of the nineteen hijackers, fifteen were of Saudi Arabian nationality.[353] Additionally, an investigation into Saudi Arabia found that many extremist Islamic sects were exploiting the country's dedication to charitable donations to fund their acts of violence against non-Islamic peoples.[354] The Senate tasked

346. THE 9/11 COMMISSION REPORT, *supra* note 1, at 1–4.

347. *Id.* at 32.

348. *Id.* at 33.

349. *Id.*

350. Plumer, *supra* note 2.

351. Carter & Cox, *supra* note 2.

352. THE 9/11 COMMISSION REPORT, *supra* note 1, at 215–54.

353. *Id.*

354. *Id.* at 372. Charity is one of the five pillars of Islam, so as Saudi Arabia enriched itself through its natural resources, charitable donations vastly increased. Failure to regulate or track charitable spending led to the belief that Wahhabi extremists could be exploiting those donations for acts of terror.

the United States Senate Commission on 9/11 with authoring an investigative report on the details of the terrorist attacks and with suggesting responses to prevent an attack of this magnitude from happening again.[355] The Commission concluded cooperation with Saudi Arabia was the appropriate route for the United States to pursue.[356] The Commission noted that "political and economic reform" and a "shared interest in greater tolerance and cultural respect," could "translate into a commitment to fight the violent extremists who foment hatred."[357]

B. Ensuing Litigation From the 9/11 Terror Attacks and Dismissal of Saudi Arabia and Princes From Suit

As a result of the terror attacks on September 11, 2001, victims and their families filed lawsuits against many different foreign defendants, alleging the defendants negligently, recklessly, or intentionally aided and abetted the hijackers on 9/11.[358] In December of 2003, the Judicial Panel on Multidistrict Litigation consolidated six pending 9/11 lawsuits in the Southern District of New York.[359] In response to the lawsuits, some defendants claimed that immunity under the FSIA prevented the court from asserting subject matter jurisdiction over the case.[360] These defendants included several princes and the Kingdom of Saudi Arabia itself.[361] Plaintiffs claimed these defendants donated funds to charity, using both personal and state accounts, knowing that the charity would transfer the funds to al-Qaeda.[362]

The district court dismissed the princes and the Kingdom from the lawsuit because of foreign sovereign immunity.[363] First, it determined that

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355. *Id.* at xv–xviii.

356. *Id.* at 374.

357. *Id.*

358. *In re* Terrorist Attacks on Sept. 11, 2001 (*Terrorist Attacks II*), 392 F. Supp. 2d 539, 546 (S.D.N.Y. 2005); *In re* Terrorist Attacks on Sept. 11, 2001 (*Terrorist Attacks I*), 349 F. Supp. 2d 765, 779–80 (S.D.N.Y. 2005). It is important to note that the defendants were dismissed as to actions in their official capacities, but the court also lacked personal jurisdiction over the defendants in their individual capacities, so they were dismissed entirely.

359. *In re* Terrorist Attacks on Sept. 11, 2011, 295 F. Supp. 2d 1377, 1379 (J.P.M.L. 2003).

360. *Terrorist Attacks I*, 349 F. Supp. 2d at 780–82. The foreign sovereign immunities act is the only way by which a court can assert jurisdiction over a foreign state or its instrumentalities. *Id.* at 782; *see also* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 439 (1989).

361. *Terrorist Attacks I*, 349 F. Supp. 2d at 787.

362. *Terrorist Attacks III*, 538 F.3d 71, 77–78 (2d Cir. 2008), *abrogated by* Samantar v. Yousuf, 560 U.S. 305 (2010).

363. *Terrorist Attacks II*, 392 F. Supp. 2d at 555 (holding with respect to Prince Salman and Prince Naif); *Terrorist Attacks I*, 349 F. Supp. 2d at 802 (holding with respect to Prince Turki and Prince

the Kingdom and four princes were either foreign states or agents of foreign states.[364] Second, it found that several exceptions to the immunity provided by the FSIA did not apply to the princes or the Kingdom, including the commercial activities exception, the state-sponsored terrorism exception, and the torts exception.[365] Because no exception under the FSIA applied to the princes or the Kingdom, the district court dismissed all claims against them.[366] The Second Circuit affirmed the dismissal of the princes and the Kingdom from the consolidated suit for the same reasons.[367]

The Second Circuit's decision to affirm the district court shows that the United States' torts exception does not necessarily extend to the limit that international law may allow. As mentioned earlier, Article 12 of the ILC's articles on jurisdictional immunities allows for suits of any acts attributable to a state that injure or kill foreign nationals in foreign territories, paying no mind to whether the acts are *de jure imperii* or *de jure gestionis*.[368] While the FSIA's territorial-tort exception contains similar language, the legislative history contains information that puts its intended use into a narrower context:

> [A]lthough cast in general terms, the "tortious act" exception was designed primarily to remove immunity for cases arising from traffic accidents . . . . This is scarcely to say that the exception applies *only* to traffic accidents . . . rather, the point is that the legislative history counsels that the exception should be narrowly construed so as not to encompass the farthest reaches of common law.[369]

This narrow interpretation of the FSIA's territorial-tort exception by U.S. courts, when compared to the ILC's broad territorial-tort exception in

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Sultan).

364. *Terrorist Attacks II*, 392 F. Supp. 2d at 553; *Terrorist Attacks I*, 349 F. Supp. 2d at 789. The Supreme Court of the United States has since ruled that the FSIA does not extend to state officials and that officials must seek foreign sovereign immunity under the common law rather than the FSIA, but that does not bear major importance to the analysis in this Comment. *See Samantar*, 560 U.S. at 308.

365. *Terrorist Attacks II*, 392 F. Supp. 2d at 553–56; *Terrorist Attacks I*, 349 F. Supp. 2d at 792–803.

366. *Terrorist Attacks II*, 392 F. Supp. 2d at 575–76; *Terrorist Attacks I*, 349 F. Supp. 2d at 837–38.

367. *Terrorist Attacks III*, 538 F.3d at 71.

368. INT'L LAW COMM'N, REPORT ON THE WORK OF ITS FORTY-THIRD SESSION, *supra* note 36, at 44–46.

369. MacArthur Area Citizens Ass'n v. Republic of Peru, 809 F.2d 918, 921 (D.C. Cir. 1987) (emphasis in original) (internal citations omitted).

Article 12, shows the difference between the U.S.'s and the ILC's treatment of state immunity.

Furthermore, the Second Circuit refused to apply the territorial-tort exception because it believed that the plaintiffs were attempting to avoid going through the terrorism exception to the FSIA. The FSIA's terrorism exception applies to acts committed by states designated as state sponsors of terrorism by the executive branch that cause personal injury or death.[370] Given its similarity to the territorial-tort exception, the Second Circuit noted that it would be easy to allow the territorial-tort exception to swallow the terrorism exception, rendering the terrorism exception superfluous.[371] Without further direction from Congress regarding immunity exceptions for state-sponsored terrorist acts, the courts were unwilling to apply the territorial-tort exception to terrorist acts.[372] Therefore, neither the state-sponsored terrorism exception nor the territorial-tort exception applied to the claims made by the plaintiffs in the 9/11 litigation cases.

C. JASTA's Writing and Passing in Congress

In response to the Second Circuit's ruling in 2008, Senator Arlen Specter of Pennsylvania introduced the Justice Against Sponsors of Terrorism Act to the Senate in December of 2009.[373] The bill specifically stated that the Second Circuit's decision in *In re Terrorist Attacks* provided "undue protection from civil liability" to foreign groups that "provide material support or resources to foreign terrorist organizations."[374] The bill also stated that victims of international terrorism must have access to the courts to seek remedy from these groups that sponsor international terrorism for the injuries they or their loved ones suffered.[375] Quoting Judge Posner of the Seventh Circuit, the bill concluded, "suits against financiers of terrorism can cut the terrorists' lifeline."[376] The bill never made it out of the Judiciary Committee in the Senate following extensive hearings in July 2010.[377] The bill was then

370. 28 U.S.C. § 1605A(a)(1)–(2) (2012).

371. *Terrorist Attacks III*, 538 F.3d at 90.

372. *Id.*

373. S. 2930, 111th Cong. (2009).

374. *Id.* § 2(a)(7).

375. *Id.*

376. *Id.* § 2(a)(6) (quoting Boim v. Holy Land Found. for Relief & Dev., 549 F.3d 685, 691 (7th Cir. 2008)).

377. *Actions Overview: S. 2930—114th Congress (2009–2010)*, CONGRESS.GOV, https://www.congress.gov/bill/111th-congress/senate-bill/2930/actions?q=%7B%22search%22%3A%5B%22%

reintroduced to the Senate in 2011[378] and 2013.[379] The Senate passed the bill in 2014, but the bill died in the House that same year without action from the House.[380]

The version of JASTA that would eventually become law was introduced in the Senate in September 2015.[381] Its purpose was to provide citizens with the "broadest possible basis" to seek civil liability against persons, groups, and foreign countries that directly or indirectly provide material support to terrorist activities against the United States.[382] The pertinent text reads:

> A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which money damages are sought against a foreign state for physical injury to person or property or death occurring in the United States and caused by—(1) an act of international terrorism in the United States; and (2) a tortious act or acts of the foreign state; or of any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, regardless where the tortious act or acts of the foreign state occurred.[383]

Congress enacted the amendment allowing suits against foreign states accused of sponsoring acts of terror and committing torts abroad that cause damages within the United States—an amendment which explicitly allows a private cause of action.[384] The amendment has retroactive effect on any lawsuits relating to the September 11, 2001 terror attacks, but otherwise it has only prospective effect.[385] However, recognizing that international relationships might be affected by the amendment, JASTA includes a provision that allows the Attorney General to intervene in civil proceedings to seek a stay, as long as the United States is engaging in discussions with the foreign state to resolve the civil claims.[386]

5C%22justice+against+sponsors+of+terrorism%5C%22%22%5D%7D&r=7 [https://perma.cc/TEC8-5HJL].

378. S. 1894, 112th Cong. (2011).

379. S. 1535, 113th Cong. (2013).

380. *Actions Overview: S. 1535—113th Cong. (2013–2014)*, CONGRESS.GOV, https://www.congress.gov/bill/113th-congress/senate-bill/1535/actions?q=%7B%22search%22%3A%5B%22s.+1535%22%5D%7D&r=3 [https://perma.cc/9UTR-K2D5].

381. *Actions Overview*, *supra* note 14.

382. JASTA, Pub. L. No. 114-222, § 2(b), 130 Stat. 852 (2016).

383. *Id.* § 3(a).

384. *Id.*

385. *Id.* § 7.

386. *Id.* § 5(b)–(c).

D. Negative Domestic and International Reactions to the JASTA Amendment

The JASTA amendment to the FSIA has received large amounts of criticisms, both domestic and abroad, regarding its practicality and legality. From a legal standpoint, many state leaders and international law scholars believe the United States will be in violation of international law whenever it allows suit against a foreign state under the amendment.[387] Following JASTA's passage, Russia issued a statement saying the United States "once again demonstrated its complete disregard for international law" because "[a]ny American citizen can now sue any country and accuse it, without proof, of any possible wrongdoing" and then bypass the barrier of state immunity.[388] A former French Justice Minister called the act a violation of international law and territorial sovereignty.[389] The European Union released a statement prior to President Obama's veto of JASTA, urging the President to act against it because the law "would be in conflict with fundamental principles of international law and in particular the principle of State sovereign immunity."[390] When President Obama vetoed JASTA, the White House issued a statement saying that JASTA "would upset longstanding international principles regarding sovereign immunity."[391]

The JASTA amendment also drew practical criticisms beyond the criticisms it received in the context of international law. In the statement vetoing JASTA, President Obama also expressed concerns with reciprocity, which is the international law concept that a state consents to an action if it takes that action against other states.[392] Journalists and pundits have offered harsh criticisms of the law, calling it angering to

387. *See, e.g.*, The Ministry of Foreign Affairs of the Russ. Fed'n, *Comment by the Information and Press Department on the US Passing the Justice Against Sponsors of Terrorism Act with Extraterritorial Jurisdiction*, MID.RU (Sept. 30, 2016), http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2479122 [https://perma.cc/3U4Q-YMM8].

388. *Id.*

389. Al-Rahman Youssef, *supra* note 19.

390. European Union Delegation to the United States of America, *EU on JASTA*, WASH. POST (Sept. 14, 2016), https://www.washingtonpost.com/news/powerpost/wp-content/uploads/sites/47/2016/09/EU-on-JASTA.pdf [https://perma.cc/C9VL-4VPS].

391. Obama, *supra* note 15.

392. *Id.* The practical effects of the JASTA amendment are beyond the scope of this Comment, but for further reading on reciprocity, see Francesco Parisi & Nita Ghei, *The Role of Reciprocity in International Law*, 36 CORNELL INT'L L.J. 93 (2003).

Saudi Arabia,[393] "irresponsible and dangerous,"[394] and "the dumbest legislation ever."[395] Even Senate Majority Leader Mitch McConnell stated that the law could have "unintended ramifications" one day after overriding President Obama's veto.[396]

V. JASTA DOES NOT VIOLATE INTERNATIONAL LAW

While JASTA is certainly controversial on both a domestic and international level, a study of state immunity shows that the exception provided by JASTA does not violate customary international law. First, as shown in the articles of the ILC on jurisdictional immunities and responsibilities, international law already allows for a JASTA-type amendment. Second, *Jurisdictional Immunities of the State* is not applicable to the jurisdiction imposed over foreign states by JASTA because that case involved the acts of official state soldiers in the Third Reich, and would not involve a potential defendant affected by JASTA unless there is an assertion that the terrorist acts were committed by foreign officials. Third, if *Jurisdictional Immunities of the State* is applicable, the ICJ's conclusion was incorrect, as war crimes should not be considered protected as *acta de jure imperii* simply because the acts were committed by state agents. Additionally, as a practical matter, *jus cogens* violations should supersede state immunity in terms of international law, as shown through the development and creation of the restrictive doctrine of state immunity, and the ICJ in *Jurisdictional Immunities of the State* was wrong to separate the two concepts from each other. However, even if these arguments are inapplicable, the JASTA amendment can be interpreted in a way that does not violate customary international law.

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393. Ben Hubbard, *Angered by 9/11 Victims Law, Saudis Rethink U.S. Alliance*, N.Y. TIMES (Sept. 29, 2016), https://www.nytimes.com/2016/09/30/world/middleeast/chagrined-by-9-11-victims-law-saudis-rethink-us-alliance.html?_r=0 [https://perma.cc/UM6E-47RN].

394. James Zogby, *JASTA: Irresponsible and Dangerous*, HUFFPOST (Oct. 1, 2016), http://www.huffingtonpost.com/james-zogby/jasta-irresponsible-and-d_b_12269448.html [https://perma.cc/2KQ6-FUEV].

395. Rob Garver, *The Dumbest Legislation Ever Passed by Congress Will Bite the US Back*, CNBC (Oct. 3, 2016), http://www.cnbc.com/2016/10/03/911-lawsuits-the-dumbest-legislation-ever-passed-by-congress-will-bite-the-us-back.html [https://perma.cc/RK8R-KWPY].

396. Seung Min Kim & Burgess Everett, *McConnell: Saudi 9/11 Law Could Have 'Unintended Ramifications*, POLITICO (Sept. 29, 2016), http://www.politico.com/story/2016/09/mitch-mcconnell-saudi-9-11-bill-228903 [https://perma.cc/N2VB-E8MS].

A. The ILC's Articles on Jurisdictional Immunities and State Responsibility Already Allow a JASTA-Type Exception to State Sovereign Immunity

The ILC's articles on jurisdictional immunities and state responsibility allow for a JASTA-type exception to state immunity when combining the ILC's broad territorial-tort exception and permission to use countermeasures in certain situations. Starting with the articles on jurisdictional immunities, the JASTA amendment falls under the territorial-tort exception in Article 12. According to the ILC, only three factors must be met to apply the territorial-tort exception.[397] First, the act or omission causing the injuries to the third party must occur wholly or partially within the foreign state.[398] Second, the actor must be present in the state at the time of the tortious act.[399] Lastly, the act must be appropriately attributed to the state.[400] If these three factors are met, then no state immunity is issued to the defendant-state, even if the acts are *de jure imperii* instead of *de jure gestionis*.[401]

In a hypothetical JASTA case, such as the terror attacks of September 11, 2001, these three conditions are likely met. First, the JASTA amendment only applies to acts of "international terrorism in the United States," meaning that the act must occur in the territorial jurisdiction of the United States.[402] This satisfies the first condition of the territorial-tort exception. Second, in order for the tortious act to occur inside the United States, the actor must be present in the United States, here being the nineteen hijackers, meaning the second condition will likely be satisfied

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397. INT'L LAW COMM'N, REPORT ON THE WORK OF ITS FORTY-THIRD SESSION, *supra* note 36, at 44–45.

398. *See id.*

399. *Id.*

400. *Id*. at 44. This is generally a requirement for any action taken against a state.

401. *Id.* at 45.

402. 28 U.S.C. § 1605B(b)(1) (2012). This phrasing may seem odd when coupled with the definition of "international terrorism," which, according to JASTA, has the same meaning the term is given in 18 U.S.C. § 2331(1). Part of the definition of international terrorism is that the acts "occur primarily *outside the territorial jurisdiction of the United States,* or transcend national boundaries in terms of the means by which they are accomplished, the person they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum." 18 U.S.C. § 2331(1)(C) (2012) (emphasis added). It probably would have been clearer if Congress incorporated the definition of "domestic terrorism" instead of international terrorism, given the only difference is where the act occurs. *See id.* § 2331(5). However, this discrepancy likely lacks impact, as any acts of terrorism committed by foreign states inside U.S. territory is "international terrorism," in that it is committed by international person, and adding "in the United States" after "international terrorism" in the JASTA amendment shows Congress's intent of applying the exception only for acts committed inside U.S. borders. JASTA, Pub. L. No. 114-222, § 3(a), 130 Stat. 852 (2016).

as well by the requirement that the act occur "in the United States."[403] According to the ILC, this requirement simply prevents abrogation of state immunity in the odd situation in which a tortious act occurs near the border of two states and causes harm across state borders.[404] Given this limitation in the text of JASTA, the JASTA cases will likely satisfy the ILC's second element of the territorial-tort exception.

This just leaves the third condition, which will also likely be met in the hypothetical JASTA case: attribution. As seen in the Articles on State Responsibility, attribution is two-fold. First, attribution refers to holding the state in question actually responsible for the actions, whether done by an official state actor or an agent under the control of the state actor.[405] Second, once an international wrongful act is attributed to the state, the question becomes what the appropriate remedy is for that wrongful act, whether remedies or countermeasures.[406]

A JASTA case will likely satisfy these two factors of attribution in a way consistent with international law. When it comes to ensuring that the act in question is attributable to the state, this situation will be entirely fact-dependent. To analyze the issue, a court must consider the specific situation, including whether the wrongdoers committing the act of terrorism on United States land are official state actors or purported private actors.[407] However, to use the September 11 terrorist attacks as an example, the actions of the nineteen terrorists may be attributed to a certain state if they were acting "under the direction and control of" the state in question.[408] If the claims made by the plaintiffs were true, a strong argument could be made in favor of finding attribution. So while the first

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403. INT'L LAW COMM'N, REPORT ON THE WORK OF ITS FORTY-THIRD SESSION, *supra* note 36, at 45; *see also* JASTA § 3(a). It may be argued that this requirement precludes JASTA's use in cases similar to the September 11 terrorist attack claims, in which the plaintiffs plead that the state actors sponsored the attack from abroad, meaning that the state's act did not occur in the United States. However, this concern is covered by the third element of the territorial-tort exception: attribution. If attribution to the state is found, then the acts committed by the alleged non-state actors on United States land are attributable to the state, and the state is equally responsible as the individual actors. *See* INT'L LAW COMM'N, REPORT ON THE WORK OF ITS FORTY-THIRD SESSION, *supra* note 36, at 45.

404. INT'L LAW COMM'N, REPORT ON THE WORK OF ITS FORTY-THIRD SESSION, *supra* note 36, at 45.

405. *See* CRAWFORD, *supra* note 244, arts. 1–27, at 61–66.

406. *Id*. arts. 28–59, at 66–73.

407. Therefore, the distinction between *acta de jure imperii* (official state acts only possible because of the actor's connection to statehood) and *act de jure gestionis* (acts by state actors that are not in any way connected to its status as a state). *See* Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. 99, at 126 (Feb. 3).

408. CRAWFORD, *supra* note 244, art. 8, at 62.

element of attribution is entirely fact-dependent, it is likely to be met on most hypothetical JASTA cases, given the requirement of the act occurring on U.S. land and the ability to attribute private actors to states if the facts allow for it.

The second aspect of attribution—providing the appropriate remedy—is difficult to discuss in a hypothetical situation, but it would likely be met in a JASTA case as well. Using the September 11 attacks as an example, one can see how the features of remedy-seeking were met before the United States brought an official "international" countermeasure: suit in a domestic court. While many have accused the Saudi Arabian government and its officials of assisting the al Qaeda terrorists, the Kingdom has yet to admit responsibility for its actions.[409] The lack of willingness to take responsibility for internationally wrongful acts allows states to take appropriate countermeasures, which may include stripping the state of its state immunity in its domestic courts.[410] Additionally, the ILC states that the rules change when the state commits a serious breach of international obligations, and any state involved in an act of "international terrorism in the United States" has certainly committed a serious breach of international norms.[411] Therefore, the hypothetical JASTA case would allow U.S. courts to strip state immunity from foreign states within the confines and rules of international law as determined and restated by the ILC, meaning that the JASTA amendment is not in conflict with international law.

B. Jurisdictional Immunities of the State *Is Inapplicable to the Exception to State Immunity Created by JASTA*

The ICJ's decision in 2012 that *jus cogens* violations do not supersede grants of state immunity is inapplicable to the hypothetical JASTA case because of the factual differences between the two cases. Consider the facts of the Italian cases at issue in *Jurisdictional Immunities of the State*: an Italian national, imprisoned by the Nazi soldiers of the Third Reich and subjected to forced labor, sues the state and officials of Germany, asking for reparations for their wrongdoings.[412] These were acts committed by

409. Eric Lichtblau, *Documents Back Saudi Link to Extremists*, N.Y. TIMES (June 23, 2009), http://www.nytimes.com/2009/06/24/world/middleeast/24saudi.html [https://perma.cc/J79A-V92L].

410. CRAWFORD, *supra* note 244, arts. 49, 52, at 70–71.

411. *Id.* art. 41, at 69.

412. *See* Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. 99, 110, 125 (Feb. 3) (holding that the acts in question are *acta de jure imperii*, meaning they were official sovereign acts).

German soldiers under the orders of a German leader following a declaration of war between the two countries after their alliance broke down due to the installation of a new leader.[413] While the orders did happen to be war crimes, these orders were carried out by official German agents and were commanded by the official German leader.[414] As horrible as the acts might be, they were *acta de jure imperii* as the term is meant to be used—official actions of a sovereign under the authority granted to it as a sovereign.[415]

Juxtaposed with the case in *Jurisdictional Immunities of the State* is the hypothetical action brought under the exception to state immunity offered by JASTA. For example, in *In re Terrorist Attacks* the plaintiffs allege Saudi Arabia, as well as several princes, provided money to a charity organization, which was just a shell company used to fund terrorist activities.[416] This is quite different from an *actus de jure imperii* of a state or state official ordering its soldiers to do something while at war with a nation; this is a state knowingly choosing to fund terrorist activities.[417] The alleged actions here are a far cry from the actions Germany committed during World War II. While the acts in both cases are equally horrible in nature, one was technically an official act taken by soldiers in a time of war against an enemy state, and the other was (allegedly) a group of extremists funded by Saudi Arabia to attack a nation with whom Saudi Arabia was not at war. Therefore, the two cases should be treated differently, and courts should not find *Jurisdictional Immunities of the State* as dispositive on the question of JASTA's legality.

As a further point, while this Comment argues that the United States would not violate international law by allowing a JASTA case to proceed to the merits, U.S. courts are not bound by ICJ decisions.[418] Regardless of whether or not courts see JASTA as inconsistent with international law, U.S. courts will enforce the exception, likely without even considering the

413. *Id.*

414. *Id.*

415. *Id.* at 126.

416. *Terrorist Attacks III*, 538 F.3d 71, 76–77 (2d Cir. 2008), *abrogated by* Samantar v. Yousuf, 560 U.S. 305 (2010).

417. *Id.*

418. *See, e.g.*, Medellin v. Texas, 552 U.S. 491, 508 (2008) (holding that the ICJ's decision finding the United States in violation of international law for treatment of a Mexican national it wished to prosecute is not automatically enforceable in domestic law). However, courts are bound by international law concepts adopted by the Supreme Court. This point is simply to note that the Supreme Court has been willing to ignore directives from international courts before, so it would not be surprising to see the Court do the same with JASTA.

international implications.[419] Normally, U.S. courts operate under the assumption that a U.S. law will not violate international law unless Congress makes a clear indication that it intends to violate or deviate from international law.[420] Therefore, even if this exception does violate international law, it will likely have no effect on the way it is treated in U.S. courts.

Because *Jurisdictional Immunities of the State*'s facts differ from the facts of a hypothetical JASTA case, the United States is not violating international law when it bypasses state immunity upon a showing that the foreign state or official intentionally sponsored terrorism affecting U.S. nationals.

C. Even if Jurisdictional Immunities of the State *Is Applicable, the JASTA Exception to State Immunity Should Not Violate International Law Because Intentional Decisions to Commit War Crimes Should Not Be Classified as Acta de Jure Imperii*

International law does not support a finding of state immunity based on the history of state immunity. Over time, the doctrine of state immunity has grown from absolute immunity to restrictive immunity—a doctrine that recognizes the differences between private and sovereign acts.[421] While this distinction is not always clear, it remains apparent that sovereign immunity is only granted to a state or an official when that state or official is actually acting as a sovereign.[422] One can strongly and persuasively argue that a state does not act as a sovereign when it assists or sponsors intentional acts of terrorism,[423] so offering state immunity to officials allegedly intentionally sponsoring terrorism goes against, or should go against, principles of international law.

Consider the absolute doctrine of state immunity. If William Blackstone were asked if a state official could receive immunity for an act that intentionally sponsors terrorism, Blackstone would say that a state official could do no such act, given the official's status as the supreme law

419. *Id.*

420. Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804).

421. *See supra* Part I.

422. *See supra* Part I.

423. *Cf.* Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), 2012 I.C.J. 99, at 125 (defining *acta de jure imperii* as acts which fall within "the exercise of sovereign power"). The distinction between what are and are not *acta de jure imperii* seems to fall under whether or not a sovereign would be able to act this way absent its status as a sovereign. This distinction arose in the transition era from absolute to restrictive immunity. *See supra* section I.B.

of the land, and afford that state official, or the state itself, immunity.[424] According to Blackstone, it would be impossible for a state official to commit such an act.[425] For this reason, it would be impossible to name the state, the king, or an official in certain suits because they could literally do no wrong.

However, as noted in *The Schooner Exchange*, state immunity was never truly absolute.[426] Chief Justice Marshall placed special emphasis on the fact that France and the United States were allies, and not at war.[427] This and similar language implies that, even in the days of absolute immunity, there could be a denial of state immunity if the state did something that could amount to an act of war when two states were not at war, especially if that action was one of extreme atrocity.[428] A litigant, then, would have to argue that state-sponsored acts of terrorism would amount to acts of war.

Since the days of absolute sovereign immunity, however, courts have recognized the difference between when a state is acting as a sovereign and when a state is acting as a private citizen.[429] This distinction arises when the state or state official does something that does not match with its sovereign status.[430] It is best understood with the action that led to the restrictive doctrine: commercial transactions.[431] Situations would arise in which there was a disagreement with a sales contract, or some goods might not make it from the seller to the buyer, and a dispute would occur.[432] Courts and lawmakers saw how state immunity frustrated the practicalities of the growing global trading environment: if states and their officials received protections just because they were states, people were not going to trade with them.[433] Simply put, it would be unfair to grant these states immunity in these situations where the state clearly is not acting in its official capacity, beyond its actual status as a sovereign state.

The same reasoning can be applied to the JASTA amendment. Litigants can argue that state-sponsored acts of terrorisms are war crimes. Such acts

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424. BLACKSTONE, *supra* note 52, at 239.

425. *Id.*

426. The Schooner Exchange v. McFaddon, 11 U.S. 116, 141–42 (1812).

427. *Id.*

428. *See id.*

429. *See supra* Part I.

430. *See, e.g.*, 28 U.S.C. § 1605 (2012).

431. *See generally* SUCHARITKUL, *supra* note 117, at 23–152 (detailing the application of sovereign immunity to trading activities).

432. *Id.*

433. *Id.*

are far removed from a situation in which soldiers, acting under the orders of a commander-in-chief, defend their nation against invaders or take other official acts during an official, ongoing war.[434] This is a situation in which the state or state official purposely gives vigilantes the means to conduct acts of terrorism on foreign soil.[435] By affording states and their officials immunity in these situations, courts and states are giving the benefits of sovereign status to a sovereign that does not act as a sovereign.

These arguments demonstrate that the intentional sponsoring of terrorism by a state should not be seen as *actus de jure imperii* but as *acta de jure gestionis*. Furthermore, because *acta de jure gestionis* are not afforded state immunity, intentional acts sponsoring terrorism should not be afforded state immunity in courts, and such a denial of immunity should not be seen as a violation of international law.

D. Jurisdictional Immunities of the State *Was Wrong to Place State Immunity and Jus Cogens in Two Different Planes Given the Substantive Questions Surrounding Whether or Not State Immunity Is Given*

In *Jurisdictional Immunities of the State*, the ICJ was incorrect in determining that state immunity and *jus cogens* violations exist on two separate planes because the granting or denying of state immunity is often dependent on the types of acts in which the state is engaged.[436] This, too, reflects back to the growth and development of the restrictive doctrine of state immunity in that states began to focus on the actions of states in determining whether or not state immunity was appropriate.[437] The ICJ failed to recognize or consider the growth of state immunity, which created its exceptions through the conduct of the states themselves.

In *Jurisdictional Immunities of the State*, the ICJ found that *jus cogens* violations, even those that are admitted or obvious, do not supersede state immunity because the two concepts sit at two separate planes of the law.[438] State immunity, it ruled, is a procedural doctrine, and exists separate from the merits of the case.[439] It went on to describe *jus cogens* as substantive portions of a case, meaning they do not affect and do not change the

434. Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. 99, at 113–14 (Feb. 3).

435. *See, e.g.*, *Terrorist Attacks I*, 349 F. Supp. 2d 765, 769 (S.D.N.Y. 2005).

436. *Jurisdictional Immunities of the State*, 2012 I.C.J. at 140.

437. *See supra* Part I.

438. *Jurisdictional Immunities of the State*, 2012 I.C.J. at 140.

439. *Id.*

procedural questions posed in a given case.[440] So while derogation from *jus cogens* norms is impermissible, the ICJ found that, even if there are clear derogations from *jus cogens*, it cannot affect whether or not a state has jurisdiction over another state.[441] Therefore, it concluded that *jus cogens* violations do not affect whether or not sovereign immunity is granted in a given case.

The distinction between sovereign and private acts in granting state immunity is particularly important to explaining why international law supports a "*jus cogens* exception" to state immunity. The international law trend moved from the absolute to the restrictive theory of state immunity by looking at the act in question and determining whether or not the state was acting in its sovereign capacity (*acta de jure imperii*) or more as a private actor (*acta de jure gestionis*).[442] Despite that history, the ICJ in *Jurisdictional Immunities of the State* held that state immunity sits on the "procedural" plane of the law, separate and distinct from the substantive acts of the state, regardless of whether or not those acts constitute *jus cogens* violations.[443] It would be impossible to make this determination without first looking at the type of conduct in which the state is engaged.

The exceptions to state immunity all reflect an interest in denying state immunity when the state does not act as a sovereign, but instead as a private party. It purposely distinguishes between *acta de jure imperii* and *acta de jure gestionis* because a state should only be immune when it is acting as a state, not when it is acting as a private entity.[444] The only way in which a court can determine whether or not a state is acting as a state or as a private entity is by looking at the actions that occurred. For example, in *Jurisdictional Immunities of the State*, the ICJ determined that the acts in question were sovereign acts because they were orders from a nation's leader to a nation's army and were directed at a nation with whom war was ongoing.[445] Without looking at the specific substantive actions involved in the case, it is impossible to determine whether or not a state is actually acting as a state, meaning it is impossible to decide whether or not state immunity is appropriate.

State immunity and alleged *jus cogens* violations, then, should not exist as separate international conflicts with no relation to one another, given the connection state immunity has to the merits of a given case. Without

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440. *Id.*

441. *Id.*

442. *See supra* Part I.

443. *Jurisdictional Immunities of the State*, 2012 I.C.J. at 140.

444. For example, the Foreign Sovereign Immunities Act differentiates implicitly between private and sovereign acts through the codified exceptions in § 1605. 28 U.S.C. § 1605 (2012).

445. *Jurisdictional Immunities of the State*, 2012 I.C.J. at 99.

examining the allegations and the substantive parts of a claim against a state, it would be impossible to determine whether that state was actually acting as a state or as a private party. Customary international law supports a denial of state immunity when a state violates *jus cogens*.

E. The JASTA Amendment May Be Narrowly Construed so that It Does Not Violate International Law

Despite emphatically arguing that the JASTA exception is within the limits of state immunity accepted by international law, if it is not, the exception may be narrowly tailored so that it does not violate existing precedent, including *Jurisdictional Immunities of the State*. In fact, it is highly likely that U.S. courts will choose to do this, given the Supreme Court's assumption that Congress does not intend to violate international law unless it explicitly states an intention to do so.[446]

Given the fact that there is no such exception to state immunity for *jus cogens* violations in international law, a United States court can hold that the JASTA amendment purely applies to private acts, or *acta de jure gestionis*, and not sovereign acts, or *acta de jure imperii*. This means that the JASTA amendment would not apply to any harms committed by foreign sovereigns in a proper exercise of sovereign power, harmonizing with the holding in *Jurisdictional Immunity of the State*.

This construction would also coincide with the ICJ's interpretation of *jus cogens* violations and state immunity in *Jurisdictional Immunities of the State*. In that case, the ICJ ruled that *jus cogens* violations cannot waive state immunity implicitly, and therefore cannot turn *acta de jure imperii* into *acta de jure gestionis*.[447] Traditionally, the word "terrorism" has not been used to describe actions by soldiers, under the orders of a government official, against another state during a time of war.[448] Terrorism, instead, usually refers to acts of rogue vigilantes intended on making a radical or violent political statement through intimidation and fear.[449] Taken in this light, the JASTA amendment does not turn sovereign acts into private acts simply through substantive violations from the derogation of a *jus cogens* norm; instead, it recognizes that intentional sponsorship of terrorism is a private act in its own right. Therefore, US courts may interpret the JASTA amendment in a way that coincides with *Jurisdictional Immunities of the State* and the rest of international law.

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446. Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804).

447. *Jurisdictional Immunities of the State*, 2012 I.C.J. at 125.

448. *See* 28 U.S.C. § 2331 (2012).

449. *Id.*

CONCLUSION

Thanks to the JASTA amendment to the FSIA, victims of the 9/11 terrorist attacks and their families can see their day in court in an attempt to hold someone responsible for the devastation resulting from that day.[450] While many people have argued that the JASTA exception puts the United States in violation of international law, this Comment shows that the United States would not, or at least should not, be in conflict with international custom. Given the novelty of the law, it is uncertain how United States courts will interpret its effect until the law makes its way up to a circuit court or the Supreme Court. However, given the development of state immunity, the treatment of *jus cogens* norms in international law, the ILC's restatement of international law on immunity and responsibility, and the distinctions between a hypothetical JASTA case and *Jurisdictional Immunities of the State*, United States courts should find the JASTA exception not in violation of international law.

450. *See* JASTA, Pub. L. No. 114-222, 130 Stat. 852 (2016) (codified at 28 U.S.C. §§ 1605–1605B, 2333 (2016)).