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Comments

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INTRODUCTION

During the Falkland Islands war between Argentina and Great Britain, Argentine aircraft attacked an oil tanker in international waters in the South Atlantic. The vessel sustained extensive damage and had to be scuttled at a loss of nearly $12 million. After unsuccessfully trying to pursue their damages claim in Argentina, the Liberian corporations that owned and chartered the tanker sued the Argentine government in the United States District Court for the Southern District of New York.

1. The dispute over claims to the Falkland, or Malvinas, Islands arose in April 1982 when Argentina invaded the islands. See Rubin, Historical and Legal Background of the Falklands/Malvinas Dispute, in THE FALKLANDS WAR: LESSONS FOR STRATEGY, DIPLOMACY, AND INTERNATIONAL LAW 9 (A. Coll & A. Arend eds. 1985).

2. Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421, 423 (2d Cir. 1987), cert. granted, 108 S. Ct. 1466 (1988). Because the width of the tanker prevented passage through the locks of the Panama Canal, the tanker sailed around the southern tip of South America en route from Alaska to the Virgin Islands. On June 8, 1982, while the empty tanker was returning to Alaska, Argentine military aircraft attacked without provocation or warning. See Joint Brief for Appellants at 5-6, Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421 (2d Cir. 1987) (No. 86-7602), cert. granted, 108 S. Ct. 1466 (1988). Because an unexploded bomb remained lodged in the hull of the ship when it arrived in port at Rio de Janeiro, the owner of the tanker had to scuttle it 250 miles off the Brazilian coast. Amerada Hess Shipping Corp. v. Argentine Republic, 638 F. Supp. 73, 74 (S.D.N.Y. 1986), rev'd, 830 F.2d 421 (2d Cir. 1987), cert. granted, 108 S. Ct. 1466 (1988). The United States Department of State delivered a formal demarche to the Argentine Embassy protesting the bombing. Joint Brief for Appellants at 7.

3. Amerada Hess, 830 F.2d at 423. United Carriers, a Liberian corporation, owned the tanker. Amerada Hess, 638 F. Supp. at 73. Plaintiff Amerada Hess Shipping Corp., also a Liberian corporation, had time-chartered the vessel to carry Alaskan North Slope crude oil to a refinery in the Virgin Islands. Id. United Carriers estimated its loss at $10 million. Amerada Hess sought damages of $1.9 million for the loss of the tanker's fuel supply. See Joint Brief for Appellants at 8.
York. The district court dismissed the complaint for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act (FSIA). In *Amerada Hess Shipping Corp. v. Argentine Republic*, the United States Court of Appeals for the Second Circuit reversed and remanded, holding that although the FSIA did not provide the district court with jurisdiction, the Alien Tort Statute did.

Under the FSIA, foreign states generally are immune from the jurisdiction of United States courts. The Act provides limited exceptions to this general immunity. *Amerada Hess* raises the issue of whether Congress intended the FSIA to provide the exclusive framework for resolving claims of foreign sovereign immunity. The decision adds another exception to sovereign immunity to those allowed under the FSIA and gives the 199-year-old Alien Tort Statute a complementary role in determining when courts may exercise jurisdiction over foreign states. As a result, plaintiffs barred by the FSIA from suing foreign states may be able to invoke the Alien Tort Statute to establish federal subject matter jurisdiction.

This Comment analyzes the intended scope of the FSIA and the role, if any, that the Alien Tort Statute should play in resolving issues of foreign sovereign immunity. Part I examines the history of foreign sovereign immunity in the United States before and after the passage of the FSIA and reviews previous interpretations of the Alien Tort Statute. Part II analyzes the court's opinion in *Amerada Hess* and argues that the Alien Tort Statute is inapplicable to determinations of foreign sovereign immunity claims. Part III proposes that Congress amend the Alien Tort Statute to conform to the policies underlying the FSIA. The Comment concludes that the *Amerada Hess* court inappropriately circumvented the FSIA by resorting

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5. See *Amerada Hess*, 638 F. Supp. at 77; 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1982) (provisions regarding federal district court jurisdiction and sovereign immunity). Because the facts of the case did not bring it within one of the exceptions to sovereign immunity codified in the FSIA, the district court held that the Argentine government was immune from its jurisdiction. *Amerada Hess*, 638 F. Supp. at 75, 77.
8. *Amerada Hess*, 830 F.2d at 428-29. This is the holding of the two judge majority of the panel. Judge Kearse wrote a separate dissent favoring dismissal of the action under the FSIA. Id. at 429-31.
to the Alien Tort Statute to find jurisdiction over Argentina because Congress intended the FSIA to provide the exclusive means for determining when United States courts may exercise jurisdiction over foreign states.

I. THE STATUTORY FRAMEWORK

A. FOREIGN SOVEREIGN IMMUNITY AND THE FSIA

If a citizen of one nation sues the government of another for breach of contract, for a tort, or over a property dispute, the foreign government might raise the defense of sovereign immunity. The doctrine of sovereign immunity in international law provides that a sovereign state is immune from the jurisdiction of the courts of other states. The principle originated in an era when the state and its ruler were considered one, when kings theoretically could do no wrong, and when the exercise of authority by one sovereign over another denoted super-


10. International law defines a state as “an entity which has a defined territory and permanent population, under the control of its own government, and which engages in, or has the capacity to engage in, formal relations with other such entities.” 1 RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (Tent. Draft No. 6, 1985). States act only through actions or omissions by human beings or human collectivities, and acts attributed to a state at the international level are those of its organs or agents. L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW 521 (2d ed. 1987) [hereinafter cited as HENKIN]. A state, therefore, is responsible for any violation of its obligations under international law resulting from action or inaction by its government, government authorities, political subdivisions, or any organ, agency, official, employee, or other agent of its government acting within the scope of its authority or functions. 1 RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 207 (Tent. Draft No. 6, 1985). In this Comment the terms sovereign, state, nation, and government denote a state as defined and described above.


priority or antagonism. More recently, courts have used the doctrine to avoid embarrassing those responsible for the conduct of a nation's foreign relations. Proponents of one theory argue that immunity is a fundamental right of the sovereign state as an equal among nations. A second group of theorists views the extension of jurisdictional immunities to foreign sovereigns as motivated by practical necessity and the desire to promote reciprocal courtesies among nations.

Whether rooted in sovereign rights or considerations of comity, sovereign immunity has become an established principle of international law. In United States law, courts origi-


In United States law, the analogous, judicially created Act of State doctrine provides that United States courts will not determine the validity under international law of a foreign state's acts committed within its own territory. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416-17 (1964). The Act of State doctrine, unlike sovereign immunity, does not require a court to decline to exercise jurisdiction. See Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 789-90 (D.C. Cir. 1984) (Edwards, J., concurring), cert. denied, 470 U.S. 1003 (1985). The doctrine instead requires the court to refrain from passing on the merits of certain issues. See id. Although the Supreme Court developed the Act of State doctrine as a principle of judicial restraint, the doctrine is related in spirit to international law rules of sovereign immunity. See RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 469 comment a (Tent. Draft No. 7, 1986).

15. See L. OPPENHEIM, INTERNATIONAL LAW 266-67 (7th ed. 1955) (stating that countries of most countries treat principle of sovereign immunity as rule of international law); The Schooner Exchange v. M’Faddon, 11 U.S. (7 Cranch) 116, 137 (1812) (stating that jurisdictional immunity is rooted in “perfect equality and absolute independence of sovereigns”).

16. T. GIURARI, supra note 11, at 6. Those who believe that jurisdictional immunities are rooted in the desire for comity among nations view such immunity as a privilege granted politically, rather than as a right of sovereignty observed out of a sense of legal obligation. See Reeves, The Foreign Sovereign Before United States Courts, 38 FORDHAM L. REV. 455, 455 (1970); compare I. BROWNRIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 326 (3d ed. 1979) (stating that rationale for jurisdictional immunities rests equally on dignity of foreign nation, its organs and representatives, and on functional need to leave them unencumbered in pursuit of their functions) with T. GIURARI, supra note 11, at 6 (stating that those who believe sovereign immunity to have originated out of comity acknowledge that it had become accepted rule of international law by end of nineteenth century).

nally applied the *absolute* doctrine of sovereign immunity.\(^1\) This doctrine provides that a state may not be sued over any matter in the courts of other nations without its consent.\(^2\) Since 1952 the United States has favored the *restrictive* approach to sovereign immunity.\(^3\) The restrictive doctrine of existence in customary international law of rule requiring grant of immunity to foreign states).

18. **International law is a part of the law of the United States.** *See* The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."). For a discussion of how international law became a part of United States law, see [Henkin, supra note 10, at 144-46. *See also Note, Enforcing the Customary International Law of Human Rights in Federal Court, 74 Calif. L. Rev. 127, 181 n.202 (1986)*](https://www.law.harvard.edu/journals/cal/1986/74/127/). Discussing various theories of jurisprudential basis for incorporation of international law into United States law).

Under the Constitution United States treaties are the supreme law of the land, subject to the constitutional limitations that apply to all exercises of federal power. U.S. Const. art. VI, cl. 2; [Henkin, supra note 10, at 183-84. In the case of a conflict between a federal statute and a self-executing treaty, the one last in date controls. Whitney v. Robertson, 124 U.S. 190, 194 (1888). It has not been authoritatively determined, however, whether a rule of customary international law that developed after the enactment of a conflicting federal statute should be given effect as the law of the United States. *1 Restatement (Revised) of the Foreign Relations Law of the United States* § 135 comment d (Tent. Draft No. 2, 1981).]


20. *See* T. Giuttari, supra note 11, at 8-9; *see also* Henkin, supra note 10, at 891 (stating that under absolute theory, state may invoke immunity irrespective of nature of its sovereign activities).


Plaintiffs whose claims are barred even under the restrictive theory of immunity usually will receive compensation only if the state of their nationality seeks and obtains an international legal remedy. *See* Henkin, supra note 10, at 1040 (stating that if private claimant fails to obtain redress for his or her injury under laws of state alleged to have violated his or her rights, state of claimant's nationality may press claim on state-to-state level); *see generally* Lillich, *The Current Status of the Law of State Responsibility for Injuries to Aliens*, in *International Law of State Responsibility for Injuries to Aliens* 1 (R. Lillich ed. 1983) (describing historical development of, contemporary challenges to, and future prospects for, international law of state responsibility). A state may pursue such remedies through diplomatic negotiation or
sovereign immunity permits suits against a foreign state engaged in private or commercial activity or business ventures.\textsuperscript{22}

Before Congress passed the FSIA in 1976, foreign states sued in United States courts often requested the State Department to suggest immunity to the court.\textsuperscript{23} United States courts considering the immunity claims of foreign states routinely deferred to the State Department's advice,\textsuperscript{24} reasoning that foreign relations are chiefly the province of the executive branch.\textsuperscript{25} A series of Supreme Court cases in the first half of the twentieth century dictated that courts should follow such suggestions without independent judicial inquiry.\textsuperscript{26} Recognizing that courts deferred to State Department recommendations, foreign nations seeking immunity often placed diplomatic pressure on the executive branch.\textsuperscript{27} Foreign state defendants did through any procedure for dispute settlement to which the two states have agreed. Henkin, \textit{supra} note 10, at 555. Dispute settlement procedures include bilateral commissions, conciliation and mediation procedures, arbitration, and judicial settlement. \textit{Id.} at 555. International law also permits the injured state to use unilateral measures such as suspension of diplomatic relations or bilateral aid, to pressure the offending state to make compensation. \textit{See id.} at 541-42.

Although individuals, since at least the nineteenth century, were not seen as subjects of international law, an injury by one state to a national of another constituted an offense to the state of the injured individual's nationality. 1 \textsc{Restatement (Revised) of the Foreign Relations Law of the United States} 445 (Tent. Draft No. 6, 1985). Because the liability in international law for the offense runs from the responsible state to the state of the injured individual's nationality, only that state may assert the claim on the international level. \textit{See Henkin, supra} note 10, at 1042.

\textit{22.} See T. Giuttari, \textit{supra} note 11, at 9. The rationale for restricting sovereign immunity in such cases is to avoid denying legal remedies to private parties injured in the course of their trade. \textit{See id.} at 67. When a state engages in competition with private entities, such competition is unfair if the state is not answerable in the courts of the state in which the business is transacted. \textit{Id.} at 77.

\textit{23.} See, \textit{e.g.}, \textit{Ex parte} Peru, 318 U.S. 578, 581 (1943).


\textit{25.} See J. Nowak, R. Rotunda & J. Young, \textsc{Constitutional Law} § 6.2, at 189-90 (3d ed. 1985); \textit{see also} U.S. Const. art. II, §§ 2, 3 (enumerating president's foreign affairs powers).


\textit{27.} Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 487 (1983). Commentators criticized the pattern of State Department determinations of immunity claims as being governed by political expediency without regard for consistency. \textit{See, e.g.}, Timberg, \textit{Sovereign Immunity and Act of State Defenses: Transnational Boycotts and Economic Coercion}, 55 \textit{Tex. L. Rev.} 1, 11 (1976); \textit{see also} Note, \textit{supra} note 12, at 183 (maintaining that State Department lacks adjudicative machinery necessary for consistent determinations and is suscep-
not always seek State Department intervention, however, and were free to assert the defense of sovereign immunity directly before the court.\textsuperscript{28} In such cases courts regularly decided immunity issues without asking the State Department for advice.\textsuperscript{29} Thus, sovereign immunity determinations were not only sometimes the result of diplomatic pressure, but also were made in two branches of the government.\textsuperscript{30} Due to such influences, the mechanisms for deciding immunity claims did not always achieve results comporting with the restrictive theory of immunity.\textsuperscript{31}

To eliminate the unpredictability and inconsistency inherent in these methods of decision, Congress passed the FSIA in 1976,\textsuperscript{32} codifying the restrictive theory of sovereign immunity.\textsuperscript{33} The FSIA transfers determinations of sovereign immunity from the executive to the judicial branch.\textsuperscript{34} The Act also establishes uniform procedures for litigation against foreign states, their agencies, and instrumentalities.\textsuperscript{35} Congress intended the FSIA to create a comprehensive and exclusive federal framework for

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\textsuperscript{28} See Note, Act of State and Sovereign Immunities Doctrines: The Need to Establish Congruity, 17 U.S.F. L. Rev. 91, 95 (1982).

\textsuperscript{29} Courts determining issues of immunity without the State Department's advice usually did so with reference to previous State Department decisions. See Verlinden, 461 U.S. at 487. Because of the State Department's routine failure to give explicit reasons for recommending a grant or denial of immunity, courts had little guidance on which to base immunity decisions absent a State Department recommendation. See Note, Jurisdiction Over Foreign Governments: A Comprehensive Review of the Foreign Sovereign Immunities Act, 19 Vand. J. Transnat'l L. 119, 123-24 (1986) (observing that State Department's unpredictable process of determining sovereign immunity hindered development of uniformity in case law).

\textsuperscript{30} See Verlinden, 461 U.S. at 488.

\textsuperscript{31} See id. at 487.

\textsuperscript{32} Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1982)).


\textsuperscript{34} See Feldman, The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View, 35 INT'L & COMP. L.Q. 302, 304-05 (1986). The drafters of the FSIA intended this transfer to depoliticize sovereign immunity cases. Id.

\textsuperscript{35} See Annotation, supra note 33, at 103-04; HOUSE REPORT, supra note 33, at 8, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6606.
litigation against foreign states, extending from service of process to execution of judgment.

The general rule of the FSIA provides that a foreign state is immune from the jurisdiction of United States courts. The Act lists limited exceptions, however, primarily related to commercial or private activity. Specifically, these exceptions apply to commercial activity of the foreign state, noncommercial torts occurring in the United States, maritime claims in rem

36. Section 1603 of the FSIA defines foreign state:
For purposes of this chapter—
(a) A "foreign state" . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
(b) An "agency or instrumentality of a foreign state" means any entity—
(1) which is a separate legal person, corporate or otherwise, and
(2) which is 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) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title, nor created under the laws of any third country.


37. HOUSE REPORT, supra note 33, at 8, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6606; Feldman, supra note 34, at 305. Section 1602 declares the FSIA's exclusive role: "Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. § 1602.

The FSIA's comprehensive and exclusive intent also is apparent in its legislative history:

[T]he "Foreign Sovereign Immunities Act of 1976" sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States. It is intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities.


38. See 28 U.S.C. § 1604. This section states:
Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

Id.

41. Id. § 1605(a)(5).
arising out of commercial activity, actions involving real property and inheritances in the United States, actions in which the foreign state waives its immunity, and actions involving a foreign state's unlawful expropriation of property. Using these exceptions private plaintiffs have sued foreign states in federal courts without provoking serious diplomatic repercussions.

B. THE ALIEN TORT STATUTE

In contrast to the relative recency of the FSIA's enactment, the Alien Tort Statute has existed for almost two hundred years. The statute provides in full that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a

42. Id. § 1605(b).
43. Id. § 1605(a)(4).
44. Id. § 1605(a)(1).
45. Id. § 1605(a)(3); Feldman, supra note 34, at 305-06.
49. The statute originally formed part of the Judiciary Act of 1789, which established the federal court system of the United States. See Randall, Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute, 18 N.Y.U. J. Int'l L. & Pol'y 1, 3 (1985); Judiciary Act of 1789, ch. 29, § 9, 1 Stat. 73, 77 (1789). The Constitution empowered Congress to establish
treaty of the United States.”

Even though the statute has rarely been invoked, its broad and vague language has generated a variety of judicial interpretations. Courts attempting to construe its cryptic language have been further hindered because no specific legislative history of the Alien Tort Statute exists. As a result, the requirements for a cause of action or defense under the statute remain areas of considerable uncertainty and disagreement.

federal courts and to determine the scope of their jurisdiction. See U.S. CONST. art. 1, § 8, cl. 9; id. art. III, §§ 1, 2.

Judge Friendly described the Alien Tort Statute as “a kind of legal Lohengrin; although it has been with us since the first Judiciary Act ... no one seems to know whence it came.” IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).


51. See Randall, supra note 49, at 4 n.15, 5 n.17. According to research done by Professor Kenneth C. Randall of the University of Alabama Law School, plaintiffs invoked the Alien Tort Statute in only 21 cases in the first 191 years of the statute’s existence. See id. at 4 n.15.


53. The House debates over the Judiciary Act of 1789 do not mention the Alien Tort Statute, while the Senate debates were not recorded. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 812 (D.C. Cir. 1984) (Bork, J., concurring) (citing 1 ANNALS OF CONG. 782-833 (J. Gales ed. 1789)), cert denied, 470 U.S. 1003 (1985).

Professor Randall has attempted to reconstruct a legislative history of the statute, relying on the Federalist Papers and contemporary events. See Randall, supra note 49, at 11-31. He theorizes that the statute covers alien suits for a “tort only” because of fears that British creditors would flood United States courts with actions brought under the law of merchants to recover on debts. See id. at 28-31. The statute might cover only torts in violation of the law of nations because of an incident that occurred in Pennsylvania in 1784 involving an assault and battery of the French Consul General. Although attacks on diplomats violated the law of nations, the Continental Congress had no power to force the State of Pennsylvania to extradite the assailant, a French national, to France. See id. at 24-28. For a similar analysis, see Casto, The Federal Courts’ Protective Jurisdiction over Torts Committed in Violation of the Law of Nations, 18 CONN. L. REV. 467, 488-98 (1986). Commentators agree that the Alien Tort Statute formed part of an effort by the Judiciary Act’s drafters to keep control of foreign relations in the hands of the federal government. Compare Randall, supra note 49, at 21 (drafters of Judiciary Act considered state tribunals to be parochial in nature and more likely to deny justice to alien) with Note, supra note 7, at 115 (congressional provision of federal forum for alien claimants was based on Confederation experience illustrating danger of permitting one state to draw the others into foreign entanglement or war).
The statute’s broad language seems to permit any alien to bring an action.\(^5\) The statute is silent with respect to the class of defendants, however, and plaintiffs have attempted to invoke the statute’s jurisdiction over individuals,\(^5\) corporations,\(^5\) and sovereign states.\(^5\) Other phrases in the statutory language have proven equally perplexing. Courts have had difficulty deciding what constitutes a “violation of the law of nations,”\(^6\) and courts have not agreed on the meaning of “tort only.”\(^7\) Moreover, decisions conflict as to whether the Alien Tort Statute merely provides aliens with a forum or whether it also creates a cause of action.\(^8\) Due in part to the statute’s ambiguity, courts generally have denied jurisdiction. Before 1980 courts sustained jurisdiction under the Alien Tort Statute in only two of the few cases

\(^{54}\) Historical evidence suggests that the legislation was specifically intended to protect foreign ambassador plaintiffs. See Casto, supra note 53, at 499; Randall, supra note 49, at 24-28. 


\(^{56}\) See IIT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975). 


Under the traditional positivist view of international law, only states could violate international law. See Randall, Further Inquiries into the Alien Tort Statute and a Recommendation, 18 N.Y.U. J. INT’L L. & POL. 473, 497 (1986). Individuals, however, were capable of violating the law of nations in 1789. See Note, supra note 18, at 129-30. The state-oriented concept of international law did not become predominant until the nineteenth century. See id. at 130-31. 


in which the statute was invoked.\textsuperscript{61} Jurisdiction was found proper in a 1961 child custody dispute\textsuperscript{62} and in a 1795 restitution action involving property seized from a Spanish warship.\textsuperscript{63}

The Second Circuit raised the statute from obscurity in 1980, applying it to find jurisdiction over an alien’s human rights claim. In \textit{Filartiga v. Pena-Irala},\textsuperscript{64} two Paraguayans sued a former Paraguayan police chief living in the United States for the wrongful death by torture of a member of their family.\textsuperscript{65} The court reasoned that torture by a government official violates the law of nations, giving rise to a grant of jurisdiction under the Alien Tort Statute.\textsuperscript{66} The case raised no sovereign immunity issues, because the Filartigas did not name Paraguay as a defendant and Pena-Irala did not claim immunity.\textsuperscript{67}

In contrast to the Second Circuit, the District of Columbia Circuit has refused to apply the Alien Tort Statute to an inter-

\begin{itemize}
\item \textsuperscript{61} See Randall, supra note 49, at 5.
\item \textsuperscript{62} Abdul-Rahman Omar Adra v. Clift, 195 F. Supp. 857, 862-65 (D. Md. 1961) (court sustained jurisdiction over child custody action by Lebanese national against former wife, finding that wife’s unlawful removal of child from father’s custody was a tort, while falsification of wife’s passport to conceal child’s nationality violated law of nations).
\item \textsuperscript{63} Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607) (court sustained jurisdiction over action for restitution of neutral property seized from Spanish warship).
\item \textsuperscript{65} \textit{Filartiga}, 630 F.2d 876 (2d Cir. 1980). Plaintiff Dr. Joel Filartiga had opposed Paraguayan President Alfredo Stroessner. \textit{Id.} at 878. Filartiga and his daughter alleged that defendant Pena-Irala, as Inspector General of Police in Asuncion, had kidnapped, tortured, and killed Filartiga’s 17-year-old son in retaliation for Filartiga’s political activities. \textit{Id.} Filartiga’s daughter, in the United States on a visitor’s visa, sued Pena-Irala in the Eastern District of New York upon learning of his presence in Brooklyn, where he was personally served with process. \textit{Id.} at 878-79.
\item \textsuperscript{66} \textit{Filartiga}, 630 F.2d at 887.
\item \textsuperscript{67} \textit{See} Note, supra note 18, at 144 n.101.
\end{itemize}
national human rights claim.\(^68\) In other types of claims brought under the statute, most courts since *Filartiga* have denied jurisdiction.\(^69\)

Jurisdiction under the Alien Tort Statute over a foreign


Although the circuit court panel unanimously denied jurisdiction, the judges differed markedly in their reasoning in three separate opinions. The most controversial of the three concurrences in *Tel-Oren* was the opinion of Judge Bork. He voted to affirm dismissal because of concern over the courts' interfering with the conduct of foreign relations by the political branches. 726 F.2d at 799 (Bork, J., concurring). Judge Bork stated that the Alien Tort Statute should be construed as providing jurisdiction only when a modern statute, treaty, or executive agreement grants a cause of action, or when an alien's claim arises out of one of the three international crimes recognized at the time the Alien Tort Statute was enacted. *Id.* at 813-16. Judge Bork cited Blackstone to demonstrate that only piracy, violation of safe conduct, and infringements of the rights of ambassadors violated the law of nations in 1789. *See id.* at 813. Judge Bork also seemed concerned that a more expansive reading of the Alien Tort Statute would flood United States courts with suits by and against aliens. *See id.* at 812, 821. For a succinct summary and analysis of the three concurrences in *Tel-Oren*, see Weissbrodt, *Ethical Problems of an International Human Rights Law Practice*, 1985 MICH. Y.B. INT'L LEGAL STUDIES 217, 245-47 & nn. 117-18.

\(^{69}\) *See* Randall, *supra* note 49, at 5-7 & n.19 and authorities cited therein. The decisions continue to evidence inconsistent and confused approaches to jurisdiction under the statute. *Id.* at 7. *Compare* Zapata v. Quinn, 707 F.2d 691, 692 (2d Cir. 1983) (holding that jurisdiction under Alien Tort Statute applies only to "shockingly egregious violations of universally recognized principles of international law") and Jafari v. Islamic Republic of Iran, 539 F. Supp. 209, 215 (N.D. Ill. 1982) (holding that to violate law of nations defendant's conduct must be "so universally abhorred" that its prohibition commands the "'general assent of civilized nations,'" (quoting Filartiga v. Pena-Irala, 630 F.2d 876, 881 (1980))) with Trans-Continental Inv. Corp., S.A. v. Bank of the Commonwealth, 500 F. Supp. 565, 570 (C.D. Cal. 1980) (stating that "controversy must implicate a treaty or that body of rules and custom governing relations between states *inter se* or between a state and foreign citizens or subjects" for Alien Tort Statute jurisdiction to apply).
sovereign was first exercised in 1985 in *Von Dardel v. USSR.*\(^7\) In *Von Dardel* the plaintiffs sued the Soviet Union for the arrest and subsequent disappearance of Swedish diplomat Raoul Wallenberg in Hungary in early 1945.\(^7\) The court held that the FSIA did not preclude jurisdiction over the Soviet Union.\(^7\) The court first found that to allow immunity under the FSIA for an offense against a diplomat would interfere with United States obligations under the Vienna Convention on Diplomatic Relations\(^7\) and the 1973 Convention on Internationally Protected Persons.\(^7\) As the court noted, the FSIA grants immunity subject to international agreements to which the United States was a party at the time of its enactment.\(^7\) The court then determined that the Soviet Union had impliedly waived its FSIA immunity by ratifying certain human rights treaties.\(^7\) After concluding that the FSIA granted no immunity, the court considered whether jurisdiction under the Alien Tort Statute was proper.\(^7\) According to the court the Alien Tort Statute applied because interfering with a diplomat violated both contemporary international law and the law of nations at the time the statute was enacted.\(^7\)

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70. 623 F. Supp. 246, 254 (D.D.C. 1985). In addition to the district court in *Amerada Hess,* two other courts have rejected the argument that the Alien Tort Statute creates an implied exception to the FSIA. See *In re Korean Air Lines Disaster of Sept. 1, 1983,* Misc. No. 83-0345, slip op. at 11 (D.D.C. Aug. 1, 1985) (stating that to find that Alien Tort Statute gives cause of action when FSIA forbids it would make FSIA a nullity); *Siderman v. Argentina,* No. CV 82-1772-RMT (MCx), slip op. at 2-3 (C.D. Cal. Sept. 28, 1984) (order for reconsideration) (concluding that Alien Tort Statute's silence on issue of sovereign immunity could not be read as implying exemption from sovereign immunity for claims arising under the statute), dismissed, No. CV 82-1772-RMT (CMCx) (C.D. Cal. Mar. 7, 1985).

71. 623 F. Supp. at 249.

72. Id. at 254-56.


78. See id. at 256-59. The court found jurisdiction under the reasoning of all three concurrences in *Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774 (D.C. Cir. 1984) (per curiam), cert. denied, 470 U.S. 1003 (1985). For a discussion of *Tel-Oren,* see supra note 68.
II. THE PREEMPTIVE NATURE OF THE FSIA

A. THE DECISION OF THE SECOND CIRCUIT IN AMERADA HESS

The Amerada Hess court was the first appellate panel to construe the Alien Tort Statute as providing a basis for jurisdiction over foreign states. The majority reasoned that the Alien Tort Statute would apply only if Argentina's attack on a neutral commercial vessel violated international law.\(^7\)\(^9\) Citing treaties, case law, and academic literature, the court concluded that an attack on a neutral ship in international waters, without cause for suspicion or investigation, violates international law.\(^8\)\(^0\) Thus, the attack was within the ambit of the statute.\(^8\)\(^1\)

The court then analyzed the jurisdictional requirements of the Alien Tort Statute.\(^8\)\(^2\) Because Amerada Hess, a foreign corporation, alleged a tort committed in violation of international law, the court found that the Alien Tort Statute granted jurisdiction to hear the claim.\(^8\)\(^3\) According to the court, international law did not prevent courts from exercising jurisdiction under the Alien Tort Statute.\(^8\)\(^4\) Furthermore, the court concluded that states are not immune from suit for their violations of international law.\(^8\)\(^5\) Consequently, Argentina enjoyed no immunity from jurisdiction.\(^8\)\(^6\)

Recognizing that none of the FSIA exceptions to immunity applied, the court next considered whether the FSIA is the exclusive means by which United States courts may exercise jurisdiction over a foreign sovereign.\(^8\)\(^7\) The court acknowledged

\(^8\) Id. at 424.
\(^9\) Id.
\(^10\) Id. at 424-26.
\(^11\) Id. at 426.
\(^12\) See id. at 425-26.
\(^14\) Amerada Hess, 830 F.2d at 426.
\(^15\) Argentina contended that the FSIA precluded resort to the Alien Tort Statute as a basis for jurisdiction. Id. at 426. The United States Department of State also argued this position as amicus curiae. See Brief for the United States as Amicus Curiae at 13-18, Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421 (2d Cir. 1987) (No. 86-7602), cert. granted, 108 S. Ct. 1466 (1988). The district court adopted this rationale in dismissing Amerada Hess's
that the FSIA's legislative history stated that the statute set forth the sole and exclusive standards for resolving sovereign immunity questions. The majority noted, however, that Congress had focused solely on commercial concerns in enacting the FSIA. The statute's legislative history did not address actions arising out of violations of international law. Because Congress expressed no clear intent to contradict the immunity rules of international law and had not repealed the Alien Tort Statute, the court reasoned that the FSIA did not preempt the Alien Tort Statute's jurisdictional grant. The Second Circuit therefore held that an alien may sue a foreign sovereign under the Alien Tort Statute when that sovereign's violation of international law gives rise to a tort claim, even though the FSIA would bar the suit.

88. *Amerada Hess*, 830 F.2d at 426; see also supra note 37 (discussing exclusive, comprehensive, and preemptive intent of FSIA).

89. *See Amerada Hess*, 830 F.2d at 426-27. The court reviewed the policies underlying the FSIA as indicated in the statute's legislative history. *See id.* The court found that Congress's goal of codifying the restrictive doctrine of sovereign immunity limited the FSIA's scope to commercial situations. *See id.* at 427.

90. *Id.* Additionally, the court found that Argentina's contacts with the United States satisfied the due process requirements for personal jurisdiction. *Id.* at 428. A United States court's exercise of personal jurisdiction over a defendant complies with the fifth amendment requirement of due process if the defendant's contacts with the forum state are such that maintenance of the action does not offend traditional notions of fair play and substantial justice. *See International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). In the case of a foreign defendant, the court must examine the extent to which defendants availed themselves of the privileges of American law, the extent to which litigation in the United States would be foreseeable to them, the inconvenience to defendants of litigating in the United States, and the countervailing interest of the United States in hearing the suit. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 297 (1980).

The court based its finding of sufficient contacts with the United States on Argentina's having been specifically notified by the United States that the tanker would be passing through the South Atlantic on neutral business on the date it was attacked. *Amerada Hess*, 830 F.2d at 428. The court reasoned that Argentina thus was on notice that it might be sued in the United States. *Id.*

91. *See Amerada Hess*, 830 F.2d at 428-29. Consequently, the majority remanded the case to the district court for trial on the merits. Acknowledging that other courts have decided the question differently, the court noted the difficulty of construing the effect of the two statutes. *Id.* at 429 & n.2. In a dissenting opinion, Judge Kearse agreed with those courts that have concluded that the FSIA provides the sole and exclusive basis on which a United States court may exercise jurisdiction over a foreign sovereign. *See id.* at 429-31.
FOREIGN SOVEREIGN IMMUNITY

B. THE SECOND CIRCUIT'S CONTRIBUTION TO THE CONFUSION OVER THE ALIEN TORT STATUTE

The majority decision in *Amerada Hess* added a new factor—the international law of sovereign immunity—to the existing judicial confusion over the meaning and application of the Alien Tort Statute. The court's use of the statute as a jurisdictional basis is inappropriate. The court misinterpreted the FSIA and erroneously relied on international law.

1. The Court's Misinterpretation of the FSIA

The *Amerada Hess* majority asserted that Congress in the FSIA adopted a theory of immunity the focus of which is limited to commercial situations. As a result the court concluded that the FSIA did not deny jurisdiction over a foreign government's violation of international law. The court's analysis dismisses clear statements of congressional intent in both the statute and its legislative history as inapplicable because of the commercial focus of the FSIA. In fact, the plain language of the FSIA reveals that Congress intended the statute to provide the sole means by which United States courts are to decide foreign sovereign immunity claims. The Act states that "a foreign state shall be immune from the jurisdiction of the courts of the United States except as provided in this chapter." The FSIA's legislative history also underscores the mandatory and exclusive nature of the statute's provisions. According to the House Report, the Act provides the

Judge Kearse would have affirmed the district court's reasoning. *Id.* at 431. The majority opinion expressed relief in the knowledge that, if its decision were erroneous, Congress could correct it through statutory amendment. *Id.* at 429. The court also emphasized that the class of actions that are recognized as international law violations, as distinguished from mere torts, is quite small. *Id.*

92. See generally Randall, *supra* note 49, at 7-10 (discussing recently increased judicial confusion and disagreement over Alien Tort Statute).

93. 830 F.2d at 426-27.

94. *Id.*

95. *See id.* at 427; 28 U.S.C. § 1602 (1982) (findings and declaration of purpose); HOUSE REPORT, *supra* note 33, at 14, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6613 ("The sovereign immunity of foreign states should be 'restricted' to cases involving acts of a foreign state which are sovereign or governmental in nature, as opposed to acts which are either commercial in nature or those which private persons normally perform.").


“sole and exclusive standards” to be used in resolving sovereign immunity questions and preempts all other laws except international agreements.\(^9\) Furthermore, the legislative history of the Act indicates that only international agreements which expressly conflict with the FSIA on the issue of sovereign immunity are given priority.\(^10\)

The general rule intended by the drafters of the FSIA is that foreign states retain immunity for their official acts.\(^1\) The exceptions listed in the FSIA relate to commercial or private activities,\(^2\) but this does not support the court’s conclusion that the Act has a commercial focus. The exceptions simply grew out of Congress’s desire to codify the restrictive doctrine of immunity.\(^3\) Under this doctrine jurisdiction is appropriate only over a state’s commercial or private acts. It was unnecessary for the FSIA’s drafters to explicitly state that foreign nations retain immunity for their official acts. Such acts are implicitly within the statute’s blanket grant of immunity.\(^4\) Much of the FSIA’s language is devoted to foreign states’ commercial activities, but merely because the drafters needed more words to enumerate the exceptions to immunity than to enunciate the general rule.\(^5\) The emphasis on commercial activity in the FSIA’s exceptions does not render the statute any less comprehensive than its legislative history indicates. The FSIA is not limited to commercial situations but applies as well to official acts.

In justifying its departure from the FSIA exceptions to sov-

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\(^10\) Under the FSIA a foreign sovereign may expressly or impliedly waive its immunity. 28 U.S.C. § 1605(a)(1). As the legislative history makes plain, an implied waiver should be found in cases “where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract.” House Report, supra note 33, at 18, reprinted in 1976 U.S. Code Cong. & Admin. News at 6617. Thus, a foreign state should not be found to have waived its immunity by signing other types of international agreements, such as the agreements relied on in Von Dardel. See supra notes 71-77 and accompanying text. The FSIA controls international agreements that are silent as to the question of immunity. See 28 U.S.C. § 1604.


\(^2\) See supra notes 39-45 and accompanying text.

\(^3\) For a discussion of the restrictive theory of immunity, see supra notes 21-22 and accompanying text.


ereign immunity, the Amerada Hess court also emphasized the FSIA's failure to focus on violations of international law.\textsuperscript{106} The majority found nothing in the FSIA's legislative history to indicate that the statute bars suits against a foreign state for violations of international law.\textsuperscript{107} The majority erred, however, in concluding that Congress did not consider violations of international law when it enacted the FSIA. The FSIA's drafters considered and included one violation of international law in the statute's exceptions to foreign sovereign immunity. Section 1605(a)(3) of the FSIA denies immunity in cases in which property rights are taken in violation of international law.\textsuperscript{108} As the FSIA's legislative history indicates, the nationalization of property without prompt, adequate, and effective compensation is such a taking.\textsuperscript{109} Thus, the FSIA denies immunity to a foreign state for violations of international law involving arbitrary or uncompensated expropriations of property.

Surprisingly, the FSIA's "silence" on violations of international law disturbed the Amerada Hess court more than the Alien Tort Statute's silence regarding foreign sovereigns. The court reasoned that if Congress had intended the FSIA to bar jurisdiction over a foreign sovereign for a violation of international law, Congress either would have stated this intent or would have repealed the Alien Tort Statute.\textsuperscript{110} This view, however, ignores the extremely infrequent use of the Alien Tort Statute before Filartiga.\textsuperscript{111} At the time Congress enacted the FSIA, no plaintiff in a United States court had invoked the Alien Tort Statute to assert jurisdiction over a foreign sovereign.\textsuperscript{112} As a result the FSIA's drafters had no reason to anticipate, much less to address, a potential conflict between the FSIA and the Alien Tort Statute. Moreover, the statute's legislative history plainly indicates the preemptive intent of the

\textsuperscript{106} See 830 F.2d at 427.
\textsuperscript{107} Id.
\textsuperscript{109} See HOUSE REPORT, supra note 33, at 19-20, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6618.
\textsuperscript{110} See Amerada Hess, 830 F.2d at 427.
\textsuperscript{111} For a discussion of the scarcity of cases construing the Alien Tort Statute before Filartiga, see supra note 51 and accompanying text. For a description of the decision in Filartiga, see supra notes 64-67 and accompanying text.
\textsuperscript{112} See Randall, supra note 49, at 4 n.15. Randall's research shows only 21 cases in which the Alien Tort Statute was invoked before Filartiga. See id. The first of these to name a sovereign state as defendant is Canadian Transp. Co. v. United States, 430 F. Supp. 1168 (D.D.C. 1977), aff'd in part and rev'd in part, 663 F.2d 1081 (D.C. Cir. 1980) (affirming dismissal of Alien Tort Statute claim).
FSIA's drafters.\textsuperscript{113}

Similarly, the failure of Congress to repeal the Alien Tort Statute does not suggest that Congress intended that statute to provide an alternative means by which United States courts may exercise jurisdiction over foreign sovereigns. Because the Alien Tort Statute mentions neither foreign sovereigns nor defendants of any kind, the statute can be construed not to conflict with the FSIA's preemptive intent.\textsuperscript{114} Rules of statutory construction, which provide that statutes should be construed harmoniously whenever possible, support such an interpretation.\textsuperscript{115} The FSIA by its terms creates a class of defendants: foreign states acting in commercial or private undertakings or allegedly committing torts within the United States. Conversely, the Alien Tort Statute creates a class of plaintiffs: aliens suing for torts that violate the law of nations.\textsuperscript{116}

In addition to codifying restrictive sovereign immunity in the FSIA, Congress sought to transfer determinations of immunity claims from the State Department to the courts and to establish uniform procedures for litigation against foreign states.\textsuperscript{117} Congress intended foreign sovereign immunity determinations to be made according to uniform standards of deci-

\textsuperscript{113} The FSIA "is intended to \textit{preempt} any other State or Federal law . . . for according immunity to foreign sovereigns." \textsc{House Report, supra} note 33, at 12, \textit{reprinted in} 1976 U.S. \& ADMIN. NEWS at 6610 (emphasis added).

\textsuperscript{114} Plaintiffs in \textit{Amerada Hess} argued that a cause of action against a foreign sovereign which the Alien Tort Statute provided must survive the FSIA, because repeal by implication is disfavored. 638 F. Supp. 73, 76 (S.D.N.Y. 1986), \textsc{rev'd}, 830 F.2d. 421 (2d Cir. 1987), \textsc{cert. granted}, 108 S. Ct. 1466 (1988). The district court responded: "[T]he FSIA does not repeal the Alien Tort Act because it narrows the class of defendants. It does the same to many of the jurisdictional statutes in the United States Code. . . . Thus, it is irrelevant that repeal by implication is disfavored. The FSIA effects no repeal." \textsc{Id}.

\textsuperscript{115} \textit{See} Nichols v. Rysavy, 809 F.2d 1317, 1331 (8th Cir. 1987) (stating proposition that "'when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective'" (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974))), \textsc{cert. denied}, 108 S. Ct. 147 (1987); Pennsylvania v. Department of Health and Human Servs., 723 F.2d 1114, 1119 (3d Cir. 1983) ("[S]tatutory provisions enacted at different times should be read as harmoniously as possible, so that each is given effect and the provisions do not conflict."); District of Columbia Fed'n of Civic Ass'ns v. Airis, 275 F. Supp. 553, 558 (D.D.C. 1967) (whenever possible, apparent conflict between two statutes should be resolved so as to give effect to each).

\textsuperscript{116} Under the conventional positivist view, however, only states could violate international law. Randall, \textit{supra} note 57, at 497. For a discussion of who may be a defendant under the Alien Tort Statute, see \textit{supra} notes 55-57 and accompanying text.

\textsuperscript{117} \textit{See} \textsc{supra} notes 32-35 and accompanying text.
sion, because disparate treatment of cases involving foreign
governments may produce adverse foreign policy conse-
quences. The Amerada Hess court's exercise of jurisdiction
over Argentina under the Alien Tort Statute frustrates the
achievement of uniformity in sovereign immunity determina-
tions. After Amerada Hess a court may exercise jurisdiction
over a foreign state to hear a suit that the FSIA bars. In deter-
miming the state's immunity claim, that court necessarily will
have considered factors different from those considered in the
FSIA provisions. Furthermore, it may be easier for alien plain-
tiffs to assert jurisdiction under the Alien Tort Statute than
under the FSIA. The FSIA has clear exceptions to immunity
and well-developed case law, while much confusion surrounds
jurisdiction under the Alien Tort Statute. Uncertainty about
which law to apply could lead to conflicting determinations of
immunity questions. Such a result would exacerbate the lack
of decisional uniformity and could perpetuate the precise
problems Congress intended to eliminate when it enacted the
FSIA.

The Amerada Hess court not only ignores congressional in-
tent, but also deviates from the predominant interpretation ap-

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Cong. & Admin. News at 6611.

119. One way in which courts may arrive at conflicting results under the
Alien Tort Statute is in determining whether they have personal jurisdiction
over a foreign state. The Amerada Hess court's analysis of the personal jurisdic-
tion question was less than coherent. The court found that the plaintiffs'
allegations were sufficiently related to the United States to put Argentina on
notice that it might be sued in this country. Amerada Hess, 830 F.2d at 428.
The court's reasoning, however, overlooks the effect of the FSIA. Argentina
had no reason to anticipate being sued in the United States over an act com-
mitted by its armed forces, because the FSIA provides jurisdiction only over
foreign governments' commercial or private acts. See supra notes 39-45 and ac-
companying text. Similarly, that the tanker had been engaged in United
States trade under a contract to be paid in the United States establishes only
that contacts existed between the plaintiffs and the forum. Amerada Hess,
830 F.2d at 428. The court gave only cursory analysis to the remaining ele-
ments of the test for sufficient minimum contacts for the exercise of personal
jurisdiction over a foreign sovereign. See id.; supra note 90 (quoting elements
of test for sufficient contacts required for constitutional exercise of personal
jurisdiction).

120. Indeed, this result already has occurred at the federal district court
level. See supra note 70 and authorities cited therein. Compare In re Korean
(holding that FSIA precluded court's exercise of jurisdiction over USSR under
(alternatively holding that Alien Tort Statute provided basis for jurisdiction to
enter default judgment against USSR).
plied by other courts to the FSIA. The *Amerada Hess* majority is the first appellate panel to hold that courts may exercise jurisdiction over foreign sovereigns under a statute other than the FSIA. The only other court to exercise jurisdiction over a foreign state under the Alien Tort Statute did so by finding that the state had impliedly waived its immunity by ratifying certain human rights treaties.\footnote{121} Even if this were a valid theory,\footnote{122} no such argument was raised in *Amerada Hess*. Virtually all other United States courts interpreting the FSIA have assumed that it is the exclusive source of jurisdiction over foreign sovereigns,\footnote{123} even if other jurisdictional statutes also appear to apply.\footnote{124} In a unanimous decision, the Supreme Court has recognized that the FSIA provides the exclusive means for determining claims of sovereign immunity.\footnote{125} In light of these

\footnote{121. See *Von Dardel*, 623 F. Supp. at 256, 259 (holding jurisdiction existed under FSIA waiver exception and Alien Tort Statute and entering default judgment against USSR for imprisonment and possible death of Swedish diplomat Raoul Wallenberg in action brought by Wallenberg's relatives). Until *Amerada Hess*, *Von Dardel* stood alone in finding that the FSIA exceptions to immunity are not the sole means by which courts of the United States can obtain jurisdiction over foreign sovereigns. For a discussion of *Von Dardel*, see supra notes 70-78 and accompanying text.}

\footnote{122. The theory that a state's ratification of human rights agreements constitutes a waiver of immunity within the meaning of the FSIA's waiver exception was explicitly rejected in *Frolova v. USSR*, 761 F.2d 370, 378 (7th Cir. 1985) (per curiam). Stating that the FSIA's implicit waiver clause should be narrowly construed, the *Frolova* court saw no basis in the vague, general language of the United Nations Charter for finding a waiver. *Id.* at 377-78. Additionally, the court found no reason to conclude that nations that ratified the Charter anticipated when signing it that American courts would be the means by which the Charter's provisions would be enforced. *Id.* at 378.}


\footnote{124. See *O'Connell Machinery Co. v. M.V. Americana*, 734 F.2d 115, 117 (2d Cir.) (holding liner owned by Italian government immune from prejudgment attachment in admiralty under 28 U.S.C. § 1610(d)), *cert. denied*, 469 U.S. 1086 (1984); *Ruggiero v. Compania Peruana de Vapores* "Inca Capac Yupanqui," 639 F.2d 872, 875 (2d Cir. 1981) (rejecting plaintiffs' argument that they could resort to diversity jurisdiction when suing entity owned by foreign government to obtain jury trial).}

\footnote{125. See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 489 (1982)}
judicial interpretations, Amerada Hess inappropriately adds another exception to sovereign immunity to those in the FSIA.126

2. Misplaced Reliance on International Law

Although sovereign immunity exists in international law,127 no theory of immunity permits a United States court to exercise jurisdiction under the facts of Amerada Hess.128 The court relied on secondary evidence, the writing of two law

("If one of the specified exceptions to sovereign immunity applies, a federal district court may exercise subject-matter jurisdiction under § 1330(a); but if the claim does not fall within one of the exceptions, federal courts lack subject-matter jurisdiction.").

126. Human rights proponents and others who advocate a liberal interpretation of the Alien Tort Statute have not questioned that the FSIA limits jurisdiction under the Alien Tort Statute. See Blum & Steinhardt, supra note 64, at 106 & n.232 (under FSIA, state defendants absolutely immune from civil suit under Alien Tort Statute; FSIA constitutes definitive pronouncement on United States sovereign immunity law); Casto, supra note 53, at 472 & n.33 (sovereign immunity is potential limitation on Alien Tort Statute litigation); Randall, supra note 57, at 509 (FSIA basically controls extent to which jurisdiction may be asserted over states; Alien Tort Statute is probably of greater utility against nonstate actors); Note, supra note 18, at 169 (doctrine of sovereign immunity will, as a general rule, prevent sovereign states themselves from being sued in United States courts). But see Paust, supra note 85, at 226 (domestic notions of sovereign immunity should not be applied in domestic courts to thwart universal sanctions effort directed at international criminal activity). Some human rights advocates have suggested that the FSIA be amended to include a further exception to foreign sovereign immunity explicitly allowing United States courts to exercise jurisdiction over gross violations of human rights by other states. See Gerstel & Segall, Conference Report: Human Rights in American Courts, 1 Am. U.J. Int'l L. & Pol'y 137, 161 (1986).

127. See L. Oppenheim, supra note 15, at 266-67 (stating that courts of most countries regard sovereign immunity as rule of international law).

128. Under the theory of universal jurisdiction, any nation may punish the perpetrators of certain egregious violations of international law, regardless of where the violations occur. See 1 Restatement (Revised) of the Foreign Relations Law of the United States § 404 (Tent. Draft No. 6, 1985) (listing piracy, slave trade, aircraft hijacking, genocide, war crimes, and possibly terrorism as international crimes of universal concern that any state may define and punish); Henkin, supra note 10, at 856-59 (discussing principle of universal jurisdiction). A United States court's exercise of jurisdiction over the perpetrator of such a crime, however, is subject to constitutional limitations. See 1 Restatement (Revised) of the Foreign Relations Law of the United States § 423 comment c (Tent. Draft No. 6, 1985). United States courts may hold criminal trials only when the accused is present. See id. at § 442 comment c (iii). In a civil action, the court must have constitutionally sufficient personal jurisdiction over the defendant. See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292, 297 (1980). For a critique of the Amerada Hess court's finding that it had personal jurisdiction over Argentina, see supra note 118.
professors, to support its finding that international law denies foreign states immunity for certain crimes.\textsuperscript{129} Only one of these writers, however, suggested bringing actions directly against foreign states.\textsuperscript{130} Even that writer seemed to limit jurisdiction over foreign sovereigns to suits for gross violations of human rights and also stated objectives other than prevailing in court.\textsuperscript{131} Furthermore, the court in \textit{Amerada Hess} did not consider primary evidence of international law, such as actual state practice, which may negate secondary evidence.\textsuperscript{132}

The content of sovereign immunity doctrine derives predominantly from such primary evidence.\textsuperscript{133} Some states adhere to the absolute doctrine of sovereign immunity,\textsuperscript{134} which prevents national courts from exercising jurisdiction over any act of a foreign sovereign, regardless of the act's nature.\textsuperscript{135} Other countries, including the United States, apply the restrictive theory of immunity,\textsuperscript{136} which allows courts to exercise jurisdiction only over a foreign state's commercial or private acts.\textsuperscript{137} Primary evidence therefore indicates that the court's conclusion inaccurately assessed international law. Courts may exercise jurisdiction only over the commercial or private acts of another state. Argentina's attack on the tanker was neither a commercial nor a private act, but an official act of the Argentine government. Under both theories of sovereign immunity,
international law precludes a United States court from exercising jurisdiction in such circumstances.

Even if international law permitted suits against foreign sovereigns under these circumstances, a United States court would not necessarily apply such a rule. The Amerada Hess court's interpretation of international sovereign immunity law conflicts with a federal statute, the FSIA. When a rule of international law conflicts with a United States statute, United States courts do not automatically apply international law. Under the Constitution a federal statute may control a contrary rule of customary international law. When such a conflict exists, the Supremacy Clause makes the Constitution, United States laws made in pursuance thereof, and treaties "the Supreme Law of the Land." Thus, Congress was free to pass the FSIA even if the statute might conflict with the international law of sovereign immunity. Having misinterpreted the FSIA as applying only to commercial situations, the Amerada Hess court failed to address the question of whether the statute supersedes customary international law. The court did not regard the FSIA as a comprehensive statement of United States sovereign immunity law and thus failed to consider any conflict between the statute and the court's interpretation of the international law of sovereign immunity.

Even if the rule of international law stood on an equal footing with the FSIA, it is unclear which would prevail in a United States court. In an analogous situation, when a treaty conflicts with a federal statute, the more recent law generally is applied. This later-in-time principle may also apply to a

138. For a discussion of the role of international law in the law of the United States, see supra note 18 and authorities cited therein.


140. See HENKIN, supra note 10, at 160.

141. See U.S. CONST. art. VI, cl. 2.

142. Some authorities suggest that an act of Congress always controls a contrary rule of customary international law before United States courts. See The Paquete Habana, 175 U.S. 677, 700 (1900) ("For the purpose of ascertaining international law, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . ") (emphasis added).

143. See supra notes 93-113 and accompanying text for an analysis of the court's misinterpretation of the FSIA.

144. The Supreme Court has stated:

When the [statute and treaty] relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if
conflict between a rule of customary international law and a federal statute. Under this analysis the FSIA would prevail over the rule of international law that according to the court permitted jurisdiction under the Alien Tort Statute, unless the international rule had developed since the FSIA's enactment.

The Amerada Hess court assumed that the absence of FSIA jurisdiction over Argentina's official act of bombing a Liberian tanker mandated consideration of international law to find a basis for exercising jurisdiction over Argentina. In doing so, the court usurped a congressional function. Congress, not international law, determines the scope of federal subject matter jurisdiction in United States courts. Because Congress established the FSIA as the exclusive means of resolving sovereign immunity questions, the court's determination that Amerada Hess's claim did not fall within one of the FSIA's exceptions should have ended the inquiry. The court should have denied jurisdiction.

A United States court's exercise of jurisdiction over a foreign government for an official act infringes upon the no-

that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing.


For a discussion of the difference between treaty law and customary law, see supra note 9.

See 1 RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 135 comment d (Tent. Draft No. 6, 1985) ("Whether a rule of customary international law that developed after, and is inconsistent with, an earlier statute . . . should be given effect as the law of the United States, has . . . not been authoritatively determined.").

See U.S. CONST. art. III, § 1; see also Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421, 429 (2d Cir. 1987) (Kearse, J., dissenting) (federal court subject matter jurisdiction exists only as far as Congress has bestowed it), cert. granted, 108 S. Ct. 1466 (1988).

See HOUSE REPORT, supra note 33, at 12, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6610.

See Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 489 (1983) ("If one of the specified exceptions to sovereign immunity applies, a federal district court may exercise subject-matter jurisdiction . . . but if the claim does not fall within one of the exceptions, federal courts lack subject-matter jurisdiction.").

Acts concerning a nation's armed forces are strictly political public acts. See Victory Transp., Inc. v. Comision General de Abastacimientos y Transportes, 336 F.2d 354, 360 (2d Cir.), cert. denied, 381 U.S. 934 (1964); see also In re Korean Air Lines Disaster of Sept. 1, 1983, Misc. No. 83-0345, slip op. at 14 (D.D.C. Aug. 1, 1985) ("The Court can conceive of no action which is
tions of sovereign equality and independence that underlie the doctrine of sovereign immunity. A lower court of a single branch of the United States government should not pass judgment on the legality of an act by the Argentine government. Considerations of comity also counsel against such an exercise of jurisdiction by United States courts. The courts of other nations at most exercise jurisdiction over foreign governments' commercial acts. The Second Circuit's determination that the international law of sovereign immunity allows a United States court to exercise jurisdiction over an Argentine military act could damage United States interests in the international arena, interests that sovereign immunity evolved to protect.

III. A PROPOSED AMENDMENT TO THE ALIEN TORT STATUTE

Under Amerada Hess an alien may invoke the Alien Tort Statute to sue a foreign state in a United States court. The decision denied Argentina's claim of foreign sovereign immunity in circumstances clearly not within the exceptions to immunity codified in the FSIA. Amerada Hess thus circumvented Congress's intent that courts make immunity determinations exclusively according to FSIA guidelines.

The Alien Tort Statute's availability may lead plaintiffs with claims against foreign governments to forego more appropriate avenues of remedy, such as diplomatic negotiation or res-

151. See supra notes 15-16 and accompanying text (discussing theories advanced to justify doctrine of sovereign immunity).
152. The United States presumably would resist judicial scrutiny of its own official acts in the courts of another state. Indeed, the United States has exhibited resistance to such scrutiny by an international tribunal. Following the International Court of Justice's determination that it had jurisdiction over a claim brought by Nicaragua against the United States, the United States terminated its acceptance of the court's jurisdiction. See Henkin, supra note 10, at 646; Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) 1984 I.C.J. 392 (Jurisdiction and Admissibility Judgment of Nov. 26).
153. See supra note 19-22 and accompanying text (discussing absolute and restrictive theories of sovereign immunity and alternative means of international dispute settlement).
154. See supra notes 15-16 and accompanying text (discussing origins of sovereign immunity).
155. See supra notes 40-45 and accompanying text (listing FSIA exceptions to immunity).
156. See supra note 37 for a discussion of congressional intent in enacting the FSIA.
olution by an international tribunal. Additionally, aliens seeking redress under that statute for grievances against their own governments could flood United States courts with suits otherwise barred by the FSIA. To preclude further recourse to the Alien Tort Statute as a means of evading the FSIA and to avoid uncertainty in the application of these statutes, Congress should amend the Alien Tort Statute explicitly to exclude actions against foreign sovereigns from its jurisdictional grant.

157. See supra note 21 (discussing remedies available under doctrine of state responsibility for injury to aliens). The claim of the plaintiffs in Amerada Hess probably would have been more appropriately resolved through the United States Department of State. In fact, the State Department established some precedent for handling the claim diplomatically when it issued a formal demarche to the Argentine embassy protesting the attack on the Hercules. See supra note 2.

158. The Filartiga decision created no similar possibility because that decision, limited to the facts of that case, required that personal jurisdiction be established over the defendant torturer through service of process in the United States. See Filartiga v. Pena-Irala, 630 F.2d 876, 885 (1980).

159. The Amerada Hess majority opinion actually anticipated such action. See supra note 91.

160. This Comment proposes to amend the Alien Tort Statute, rather than the FSIA, because of the ambiguity of the former statute's current language. The FSIA's language, in contrast, plainly sets forth that statute's purpose. See 28 U.S.C. § 1602 (1982).

161. Professor Randall has proposed a comprehensive amendment to the Alien Tort Statute that would clarify the proper application of the Alien Tort
the amended statute should read as follows:

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States. No action shall be brought under this section, however, against a foreign state as defined in §1603 of this title.

The proposed addition to the Alien Tort Statute narrows the class of defendants within the statute’s grant of jurisdiction, but only to the extent necessary to prevent any overlap in jurisdiction between the Alien Tort Statute and the FSIA. The limiting language precludes actions against only those defendants who are entitled to immunity under the FSIA. The proposal clarifies and reinforces Congress’s intent that the FSIA provide the exclusive standards for resolving questions of foreign sovereign immunity. At the same time, the proposed language does not unnecessarily limit alien access to United States courts. Under the proposed version of the Statute, aliens still can bring human rights claims such as that in Filartiga against former foreign officials found in the United States.

Precluding alternative bases of jurisdiction over foreign sovereigns will further Congress’s goal that immunity determinations be made according to uniform standards. Additionally, private parties who transact business with foreign governments will continue to have redress in United States courts in accord-

Statute and define the international law violations the statute covers. See Randall, supra note 57, at 511-32. Such a comprehensive proposal is beyond the scope and focus of this Comment. Professor Randall’s proposal aims at facilitating human rights litigation under the Alien Tort Statute. This Comment’s proposal, on the other hand, aims to effectuate congressional intent in codifying standards for determining sovereign immunity issues by excluding suits against foreign states from jurisdiction under the Alien Tort Statute.

162. This is the current text of the Alien Tort Statute. 28 U.S.C. § 1350 (1982).

163. Language in italics represents the proposed amendment. For the FSIA’s definition of “foreign state” see 28 U.S.C. § 1603(a)-(b), quoted supra note 36.


165. See supra notes 32-37 and accompanying text for a discussion of congressional intent in enacting the FSIA.

166. The FSIA does not include individuals acting on behalf of a state within its definition of “foreign state.” See 28 U.S.C. § 1603 (1982).

167. See discussion of Filartiga, supra notes 64-67 and accompanying text. For a recent holding consistent with Filartiga, see Forti v. Suarez Mason, 672 F. Supp. 1531 (N.D. Cal. 1987). Excluding foreign states from Alien Tort Statute jurisdiction does not conflict with Filartiga’s interpretation of the statute. Judge Kearse, a member of the three-judge panel that decided Filartiga, cited that case with approval in her dissent in Amerada Hess. See Amerada Hess, 830 F.2d 421, 429 (2d Cir. 1987), cert. granted, 108 S. Ct. 1466 (1988).
ance with the restrictive theory of sovereign immunity. Finally, supplemental recourse to the Alien Tort Statute will no longer undermine the FSIA. Foreign governments will have clear guidelines by which they can assess their liability to suit in United States courts, thus enhancing foreign relations and encouraging international trade.

CONCLUSION

In denying Argentina's claim of sovereign immunity, the majority opinion in *Amerada Hess* erroneously departed from standards established in the Foreign Sovereign Immunities Act. Although a violation of international law, the Argentine military attack on the tanker was not an appropriate subject for judicial inquiry in United States courts. The FSIA grants complete immunity to foreign sovereigns, excepting only certain commercial or private activity. Official state acts such as military actions do not fall within the FSIA's exceptions to foreign sovereign immunity.

Congress intended the FSIA to be the sole and exclusive standard by which United States courts should decide claims of foreign sovereign immunity. Resort to other jurisdictional statutes, such as the Alien Tort Statute, undermines that standard and could inundate the federal courts with claims by aliens against foreign governments. This Comment's proposed amendment to the Alien Tort Statute would prevent resort to the statute in spurious attempts to establish jurisdiction over claims barred by the FSIA.

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