Must the Foreign Sovereign Immunities Act Bar International Human Rights Claims

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MUST THE FOREIGN SOVEREIGN IMMUNITIES ACT BAR INTERNATIONAL HUMAN RIGHTS CLAIMS?

Twice since 1980 United States courts have awarded judgments (totalling $13,085,364) to alien victims of torture. The defendants were also aliens. The torture occurred outside United States territory. While these cases imply that victims of international human rights violations will find satisfaction in United States courts, this Comment concludes that the internationally endorsed doctrine of sovereign immunity, as codified by Congress in 1976, will bar future judgments in favor of alien victims of torture. The Comment proposes an amendment to the Foreign Sovereign Immunities Act that would provide one of the few available means of redress for these victims of international human rights violations.

INTRODUCTION

In 1984 the Central District Court of California, in Siderman de Blake v. Argentina,1 awarded a $2.7 million judgment against the government of Argentina for the torture of an Argentine citizen in Argentina. The court based jurisdiction on the Alien Tort Claims Act (ATCA),2 a seldom-used statute which establishes federal jurisdiction for torts committed by an alien in violation of international law.3 The Siderman court, following the Second Circuit Court of Appeals decision in Filartiga v. Pena-Irala,4 found that torture indeed violates the ATCA's "law of nations" (international law) and

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3. For the purposes of this Comment, “international law” is used synonymously with the more antiquated phrase, “law of nations.” For a definition of “law of nations”, see infra note 136.
that the ATCA provides for suits between foreign plaintiffs and foreign defendants in United States courts. However, these two cases are distinguishable in that the defendant in Siderman, Argentina, was a sovereign nation, while the Filartiga defendant was a private citizen. The court failed to address the possible sovereign immunity defense for Argentina. Consequently, the result in Siderman is questionable.

Traditionally, the defense of sovereign immunity is available to a foreign government when acting as a public entity rather than in a private capacity. This distinction is usually (and superficially) interpreted to mean that the state is held liable for its commercial acts, but is immune from suit in all other situations. In 1976 the United States codified a restrictive theory in the Foreign Sovereign Immunities Act (Immunities Act). The Immunities Act purports to be the exclusive means of obtaining jurisdiction over foreign states in United States courts. Yet, the Siderman holding implies that the ATCA functions concurrently with the Immunities Act as a means of obtaining jurisdiction to bring suit against a sovereign in a United States court. Thus, although Siderman appears to provide a mechanism for foreign victims of torture to seek redress in American courts, such a presumption is premature. The “ exclusivity” of the Immunities Act must first be determined.

If the Immunities Act supercedes the ATCA, the Immunities Act must be analyzed to determine whether it is amenable to the torture cause of action. This Comment explores this judicial inquiry concluding that the Immunities Act, as written, will bar future international human rights claims. Further, this Comment analyzes policy which would allow litigation of torture claims in United States courts and proposes an amendment to the Immunities Act which would provide a practical avenue of redress for the victims of international human rights violations.
EXISTING AVENUES OF REDRESS FOR INTERNATIONAL HUMAN RIGHTS VIOLATIONS

The Alien Tort Claims Act

The ATCA, enacted nearly 200 years ago as part of the Judiciary Act of 1789, states: “The district court 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.”

The ATCA has been used successfully as the basis for jurisdiction only four times since its enactment. Of those cases, the two most recent, Filartiga and Siderman, concerned the torture of alien citizens.

The plaintiffs in Filartiga were the father and sister of Joelito Filartiga, a teenage Paraguayan boy, who was kidnapped and tortured to death in Paraguay by the defendant, the Inspector General of Police in Asuncion, Paraguay. Plaintiffs alleged the boy was tortured in retaliation for his father’s criticism of the Paraguayan regime.

In a provocative opinion, the Second Circuit Court of Appeals held that “deliberate torture perpetrated under color of official authority violates . . . the international law of human rights.” The court further held that jurisdiction is available for a suit by a foreign plaintiff against a foreign defendant under the ATCA. While the court required that the claim be characterized as official torture, that is, under color of state law, the opinion did not discuss sovereign immunity because Paraguay did not ratify the acts of Pena-Irala, and because Pena-Irala himself was available in the United States for service of process.

11. Siderman de Blake v. Argentina, No. CV 82-1772-RMT (MCx) (C.D. Cal. 1984); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (Jurisdiction over allegation of official torture not ratified by official's state); Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961) (child custody dispute between two aliens; wrongful withholding of custody is a tort and defendant's falsification of child's passport to procure custody violated international law); Bolchos v. Darrel, 3 F. Cas. 810 (D.S. 1795) (No. 1607) (suit for restitution of three slaves who were on board a Spanish ship seized as a prize of war; treaty with France superseded international law; the ATCA could have been an alternative basis of jurisdiction).
14. Filartiga, 630 F.2d at 876.
15. Id.
16. Id. at 878.
17. Id. at 889.
18. Id. See generally Blum & Steinhardt, Federal Jurisdiction Over Interna-
The most recent case, *Siderman de Blake v. Argentina*[^19], was brought by a sixty-five year old resident of Argentina who was kidnapped, held for a week, and tortured to persuade him to leave Argentina. The perpetrator was an official of the Argentine government.[^20] The case resulted in a $2.7 million default judgment against Argentina.[^21] Traditionally, Argentina would have an affirmative defense under the doctrine of sovereign immunity. However, the *Siderman* opinion failed to address this defense or offer an explanation for basing jurisdiction outside the Immunities Act. There are three possible explanations of the court's actions: first, Argentina waived immunity by failure to respond to service of process; second, Argentina waived immunity by signing various international human rights agreements; or third, Argentina waived immunity by signing several treaties prohibiting torture and agreeing to provide a national forum for torture victims.[^22]

Whatever the district court's reasoning, the court presently is reconsidering the issue of foreign sovereign immunity sua sponte. The United States Department of State has submitted a brief requesting a rehearing of the *Siderman* case on the issue of the sovereign immunity of Argentina.[^23] The unique circumstances of *Filartiga*, making suit against an individual torturer possible, are unlikely to occur again.[^24] Invariably, sovereign states will be the defendant in future suits for "official" torture (the cause of action as defined in *Filartiga*),[^25] raising the defense of sovereign immunity in each case. Thus, sovereign immunity will be the key issue in future international human rights cases.

### The Foreign Sovereign Immunities Act

Historically, independent nations and their governments were free from the threat of suit by the doctrine of absolute immunity. Chief Justice Marshall described this doctrine in *The Schooner Exchange*

[^20]: Id.
[^21]: Id.
v. M'Fadden:28

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction on it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source.27

In the last decade, the United States joined most sovereign nations (with the exception of the socialist countries) in adopting a more restrictive theory of sovereign immunity.28

The Immunities Act is a codification of the restrictive principle of sovereign immunity. Under this theory, immunity is restricted to the public acts (acta jure imperii) of foreign states; immunity is not granted when a foreign state engages in private, usually commercial, activities (acta jure questionis).29 This theory conforms to the practice of most sovereign states and now is considered the accepted rule of international law.30

The Immunities Act provides procedures for bringing suit against a foreign government in United States courts. It also provides a list of situations in which sovereigns cannot claim immunity.31 The Immunities Act denies immunity on claims which are based upon a sovereign’s commercial activity when conducted in the United States or which have direct effects in the United States.32 If a foreign government waives immunity, explicitly or implicitly, immunity is denied.33 If a sovereign takes property in violation of international law, and either that property, or the commercial activity of the sovereign owning the property, is connected to the United States, immunity is denied.34 Immunity is also unavailable for a sovereign’s tortious acts committed within the United States.35 The Immunities Act further provides that immunity is considered waived when a sovereign fails

26. 11 U.S. (7 Cranch) 116 (1812).
27. Id. at 135.
28. HOUSE REPORT, supra note 6, at 6-12.
29. Id. at 7.
30. Id. See also J. Sweeney, C. Oliver & N. Leech, CASE MATERIALS ON INTERNATIONAL LEGAL SYSTEMS, 288-89, 301-02 (2d ed. 1981).
32. Id. § 1605(a)(2).
33. Id. § 1605(a)(1).
34. Id. § 1605(a)(3).
35. Id. § 1605(a)(5).
Immunity under the Immunities Act is also subordinated to previous international agreements. The Immunities Act makes no explicit provision for human rights causes of action; the legislative history does not propose liability for public acts in any form. Nevertheless, in 1980 the D.C. District Court attempted to hold the government of Chile liable for its public act of ordering the assassination of the former Chilean Ambassador to the United States while he was in the United States. The Immunities Act also fails to provide explicitly for suits between a foreign plaintiff and a foreign sovereign. However, in 1983 the Supreme Court, in *Verlinden B.V. v. Central Bank of Nigeria*, accepted jurisdiction over a commercial cause of action between a foreign plaintiff and a foreign sovereign, requiring only that the substantive cause of action fall within one of the Immunities Act's enumerated exceptions. Thus, it is possible the Immunities Act is open to further expansion, allowing human rights causes of action to proceed under one of three provisions in the Act: 1) waiver by failure to respond to service; 2) waiver by ratification of a treaty prohibiting torture; or 3) waiver by ratification of other international agreements which provide for international tribunals. Before addressing possible avenues of redress for torture victims under the Immunities Act, the exclusivity of the Immunities Act first must be considered.

**Does the Immunities Act Supercede the ATCA?**

The Immunities Act purports to set 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." Furthermore, United States case law predominantly sup-

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36. Id. § 1608.
37. Id. § 1330(a).
38. HOUSE REPORT, supra note 6, at 39. The “purpose” section of the House Report refers only to commercial disputes and ordinary private torts, such as automobile accidents.
39. Id. at 7.
44. Id. § 1605(a)(1).
45. Id. § 1330(a).
46. HOUSE REPORT, supra note 6, at 12. In support of this language is an established canon of statutory construction which provides that a more recent statute should prevail when two statutes overlap or conflict. Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907); see also A.J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 2313 (C. Sands 4th ed. 1972). The Immunities Act is more recent than
ports the exclusive use of the Immunities Act in establishing jurisdiction over a sovereign state.\textsuperscript{47}

While no case prior to \textit{Siderman} has found jurisdiction under the ATCA as an alternative to the Immunities Act, longshoremen previously have brought suits against sovereign defendants under 28 U.S.C. § 1331 in an attempt to retain their right to jury trial in federal civil cases, since the Immunities Act provides for nonjury trials only.\textsuperscript{48} In only two of these cases did the courts allow jurisdiction to be based outside of the Immunities Act.\textsuperscript{49} The Second, Third, and Fourth Circuits have held that the right to jury trial, in itself, does not permit suit to be brought under section 1331, since the Immunities Act "constitutes the sole basis of federal subject matter jurisdiction over foreign sovereigns and its entities."\textsuperscript{50}

The United States Department of State agreed with this conclusion, submitting an amicus curiae brief to the \textit{Siderman} court sug-
gesting that "the court must apply and is limited to the provisions under the FSIA [Immunities Act]." The State Department expressed concern that the government of Argentina might be politically offended by a contrary result. Argentina established friendly relations with the United States after the time of Siderman's torture and is now a recipient of United States financial assistance. However, the drafters of the Immunities Act intended to "leave immunity decisions exclusively to the courts and to discontinue judicial deference to 'suggestions of immunity' from the executive branch." The Immunities Act's legislative history explains that immunity decisions should no longer be swayed by foreign policy considerations as they were prior to the Act, when the State Department, instead of the courts, chose to grant or withhold immunity.

In enacting the Immunities Act, Congress intended to take the measure of justiciable substantive law out of the political realm. However, did Congress also intend to simultaneously eliminate the substantive law established by the drafters of the Constitution in 1789? It is presumed that the drafters of the ATCA intended to avoid or mitigate international conflict by providing for the adjudication of international law violations. Where international law norms have universal assent, their application cannot be barred by national barriers or political motivations. The Immunities Act, however, does not provide for the adjudication of these violations. The legislative history of the Immunities Act indicates that the drafters never considered the remedies already existing under the ATCA for international law violations; nor did they indicate an intent to eliminate those remedies.

The Supreme Court has held that universally recognized norms of international law should be the bases of suits in United States courts. In Filartiga, the court held that "[t]he constitutional basis for the Alien Tort Statute is the law of nations, which has always been part of the federal common law." The court further held that

52. Id.
53. HOUSE REPORT, supra note 6, at 12.
54. Id. at 12.
55. Id.
57. Id.
58. HOUSE REPORT, supra note 6, at 10.
59. The Nereide, 13 U.S. (9 Cranch) 388, 422 (1815). (Chief Justice Marshall wrote that "the Court is bound by the law of nations which is part of the law of the land."); 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").
official torture is a violation of international law because it is a universally recognized crime; the countries of the world have demonstrated that the wrong is of mutual, and not merely several, concern.61 If the Immunities Act is exclusive in establishing jurisdiction over sovereigns, this effectively eliminates the adjudication claims of official torture in United States courts.62

Two fundamental principles of statutory construction argue that the source of this substantive law, the ATCA, should be preserved. First, a statute dealing with a narrow and specific subject is not superseded by a later-enacted statute covering a more generalized spectrum.63 Second, a statute should not be construed so as to render any part of it "inoperative or superfluous, void or insignificant."64 The specific subjects of international law violations, including human rights violations, are not covered by the broad jurisdictional provisions of the Immunities Act. Further, suits against sovereigns in the United States are crucial to the viability of the ATCA. Many jurists and scholars have argued that only sovereigns may and should be sued as defendants under the ATCA.65 If this widely-held view was adopted, the ATCA would be rendered completely impotent by the Immunities Act. Half of the successful suits brought under the ATCA were based on claims of official torture.66 exclusion of these suits due to preemption by the Immunities Act would significantly weaken the usefulness of the ATCA and render an important part of the ATCA inoperative, superfluous, and void. In spite of the weighty

61. Id. at 888. (The court cites various multilateral human rights documents, the constitutions of nations, and works of commentators and jurists to establish official torture as a violation of "customary" international law by the "general assent of civilized nations." Id. at 881-85.)


64. King v. Alaska State Hous. Author., 633 P.2d 256 (Ala. 1981); Indianapolis Power & Light Co. v. Interstate Commerce Comm'n, 687 F.2d 1098 (7th Cir. 1982). See also A.J. Sutherland, supra note 46, § 46.06.


66. See cases cited supra note 11.
authority arguing for the exclusive use of the Immunities Act, these two statutes could coexist as alternative bases of jurisdiction over sovereign states.67

Traditionally, the substantive and procedural aspects of a legislative act are treated separately.68 Because the Immunities Act purports to provide a comprehensive scheme for actions against foreign nations, it establishes exclusive procedures by which these suits may be brought but enumerates only a limited number of controversies to which the statute applies. Consequently, the Act is incomplete. Legislation recently has been proposed to clarify certain substantive elements of the Immunities Act.69 Because the procedural and substantive elements must be addressed separately, the Immunities Act may provide an exclusive procedural guide for suits against foreign states, while at the same time recognizing other substantive causes of action which already exist under United States law.70 Consequently, jurisdiction could be based on any appropriate statute which addresses the substantive violation at issue.71 This interpretation would allow the ATCA to survive intact, protecting specified substantive rights while providing a uniform mechanism for bringing suit under the Immunities Act.72 In the absence of a more explicit command from Congress, courts should continue to allow suits outside the Immunities Act when the ATCA’s requirements are met.73


70. Kane, *supra* note 67, at 393 (“Thus, a plaintiff suing a foreign government may attempt to claim federal jurisdiction under any statutory base for which the requirements are met.”)

71. See *supra* notes 67-70 and accompanying text.


73. Kane, *supra* note 67, at 392 n.45 (Those courts allowing suit against sovereigns outside the Immunities Act did so because Congress was not explicit regarding exclusivity).
Is Immunity Waived by Silence?

If immunity from suit is waived when the sovereign fails to respond to service, torture victims may prevail even though the supposedly “exclusive” provisions of the Act do not include a human rights cause of action, as occurred in Siderman. Section 1608 of the Immunities Act provides for default judgment against foreign sovereigns when claimants establish a claim or right to relief by evidence satisfactory to the court. Congress intended that sovereign immunity would act as an affirmative defense, and courts repeatedly have placed the burden of pleading and proving immunity on the defendant state.

Nevertheless, the Supreme Court has declared that, even if a foreign state does not make an appearance, the court must determine sua sponte if immunity is available under the Immunities Act. This holding renders the default judgment provision of the Immunities Act meaningless. Additionally, courts have set aside default judgments made under the Immunities Act at the request of the United States or the sovereign defendant, for determining post facto whether the suit falls within one of the Immunity Act exceptions.

As previously noted, the Siderman court is reconsidering the default judgment against Argentina, and the Department of State is requesting that it be set aside. Thus, recent precedent has all but disposed of the “automatic immunity waiver by default” provisions of the Im-

74. Siderman de Blake v. Argentina, No. CV 82-1772-RMT (MCx) (C.D. Cal. 1984). (Although the court failed to refer to the Immunities Act, the finding was a default judgment as provided for under section 1608 of the Immunities Act).
76. HOUSE REPORT, supra note 6, at 14. (“Sovereign immunity is an affirmative defense which must be specially pleaded, and the burden will remain on the foreign state to produce evidence in support of its claim of immunity.”)
78. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 493-94 (1983) (“The statute [Immunities Act] must be applied by the district courts in every action in a district court against a foreign sovereign. . . . At the threshold of every action in a district court against a foreign state, therefore, the court must satisfy itself that one of the exceptions applies.”)
81. See supra notes 31-37 and accompanying text.
82. See supra note 23 and accompanying text.
Victims of international human rights violations have two other possible bases of redress under the Immunities Act. Section 1604 makes the Immunities Act “subject to existing international agreements to which the United States is a party. . . .”, and section 1605(a)(1), grants an exception to immunity where the foreign state has waived its immunity either explicitly or implicitly. The plaintiffs in Siderman argued that both of these exceptions applied to Argentina. The availability of these exceptions is important not only to the Siderman plaintiffs, but also to any torture victim attempting suit in United States courts.

The first Immunities Act basis for human rights plaintiffs, section 1604, allows a previous international agreement to control, but only when it is in “manifest” conflict with the Immunities Act. The legislative history specifically states, “where the international agreement is silent on a question of immunity, the bill would control.” This language would seem to preclude waiver by such documents as the United Nations Charter or the Universal Declaration of Human Rights because they fail to discuss immunity. Nevertheless, the commitment to provide domestic enforcement of human rights which is central to these documents should relieve the parties of the right to claim immunity when they not only fail to provide a forum for the

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85. Id. § 1605(a)(1).
87. HOUSE REPORT, supra note 6, at 18.
88. UNITED NATIONS CHARTER.
90. The International Court of Justice, interpreting article 56 of the United Nations Charter, held that the failure of a member state to promote fundamental human rights is a “flagrant violation of the purposes and principles of the Charter.” Legal Consequences for the Status of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Counsel Resolution 1970 I.C.J 28, 57 (Advisory Opinion). Similarly, article 8 of the Universal Declaration of Human Rights, supra note 89, states that “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law.” As President Carter stated in his address to the United Nations on March 17, 1977: All the signatories of the United Nations Charter have pledged themselves to observe and to respect basic human rights. Thus, no member of the United Nations can claim that mistreatment of their citizens is solely its own business. Equally no member can avoid its responsibilities to review and to speak when torture or unwarranted deprivation occurs in any part of the world. Reprinted in 78 DEP’T ST. BULL. 322 (1977).
victim of torture, but are the actual perpetrators of the torture.\textsuperscript{91} Such waiver is needed to provide at least a minimal level of deterrence to state-sponsored torture.

The primary objection to incorporating international human rights agreements is that such agreements are not self-executing. Thus, "implementing legislation" is required to create a private right of action based upon international agreements.\textsuperscript{92}

Human rights advocates do not propose this application of international agreements. Whether the international agreements evidence the customs and usages of civilized nations for purposes of ascertaining international law\textsuperscript{93} or are used as an implicit waiver of sovereign immunity, the advocates argue that such applications do not trigger the enforcement of a nonself-executing treaty. However, there is no need to base a new private right of action upon international law when torture is considered a violation of the offending sovereign country's own constitutional law as well as international law, which is recognized by the law of the United States.\textsuperscript{94} Nevertheless, the

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\item \textsuperscript{92} Further legislation is usually required to create a private right of action based on the treaty or convention when, and if, the individual state deems appropriate. Unfortunately, however, there is no clearly defined rule to this effect, as evidenced in Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 373 (7th Cir. 1985); ("Whether a treaty is self-executing is an issue for judicial interpretation, Restatement (Second) of Foreign Relations Law of the United States § 154(1) (1965), and courts consider several factors in discerning the intent of the parties to the agreement. . . "). While this issue is too broad for a thorough discussion in this Comment, several extensive treatments of the self-executing treaty issue are available. See D'Amato, The Concept of Custom in International Law ch. 5 (1971); Burke, Application of International Human Rights Law in State and Federal Courts, 18 Tex. Int'l L.J. 291 (1983); Rusk, A Comment on Filartiga v. Peña-Irala, 11 Ga. J. Int'l & Comp. L. 311 (1981); Comment, The Domestic Application of International Human Rights Law: Evolving the Species, 5 Hastings Int'l & Comp. L. Rev. 161 (1981).
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specific language of the Immunities Act's legislative history implicitly precludes such incorporation of international agreements under section 1604.

The second basis upon which to find redress for human rights violations under the Immunities Act, as an explicit or implied waiver of immunity under section 1605(a)(1), has been interpreted narrowly by the courts. Congress expressed two methods of explicit waiver in the Immunities Act's legislative history: 1) agreement to arbitrate or to be subject to the laws of another country; and 2) filing a responsive pleading without raising the defense of sovereign immunity.96

The case history follows this language closely, finding implicit waiver when a nation has agreed to arbitrate or has specifically waived immunity in a treaty.96 However, the courts have upheld immunity where the treaty waiver applies only to certain limited acts,97 or when the only contact with the United States is a contract under which the sovereign has not knowingly relinquished a legal right.98

An example of the courts' hesitancy toward waiving sovereign immunity on the basis of a treaty is found in Jafari v. Islamic Republic of Iran.98 Iran had signed an economic treaty with the United States waiving immunity for commercial enterprises between the two countries. The court held that the waiver reasonably could not be extended to the nations themselves under section 1605(a)(1) of the Immunities Act.99 Yet, this case should not be construed to bar human rights claims of waiver which are based upon international law.

Jafari was a commercial claim attempting to base jurisdiction on a
narrowly drawn commercial treaty of limited application. However, many treaties and international agreements prohibit established violations of international law and could act together to create a valid basis for jurisdiction. "The newer mode [of international law-making] sees international instruments not as necessarily binding by themselves, but as incremental building blocks of an order which can be seen with increasing clarity as the number and authoritativeness of supporting instruments mount." Such use of human rights documents has precedent. In Filartiga, the court characterized official torture as a violation of international law on just such an accumulation of international law based upon proscriptions against torture.

The Present Status of Human Rights Claims

In summary, most United States courts regard the Immunities Act as the exclusive means of obtaining jurisdiction over foreign sovereigns. The few exceptions to immunity under the Immunities Act may be construed liberally to permit human rights causes of action against foreign sovereigns. The ATCA provides for adjudication of international law claims; sovereign states, however, as common human rights defendants, are often protected by sovereign immunity. Courts may be willing to construe the Immunities Act more liberally in the future with decisional precedent such as De Letelier, Verlinden, and Siderman. Yet, the adoption of a specific, unambigu-


102. Blum & Steinhardt, supra note 18 at 73 (citing Sohn, The Shaping of International Law, 8 GA. J. INT'L & COMP. L. 1 (1978)).

103. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).


106. Siderman de Blake v. Argentina, No. CV 82-1772-RMT (MCx) (C.D. Cal.
nous amendment to the Immunities Act would resolve the confusion created by the coexisting ATCA and Immunities Act legislation.

PROVIDING REDRESS FOR TORTURE VICTIMS

The Proscription Against Torture

The United States Department of State declared that transgressions of human rights are not matters within a state's exclusive domestic jurisdiction. Rather, human rights violations are proper claims for suit in United States courts, when, as with torture, there is a consensus in the international community that the right is protected. Torture is prohibited by every major multilateral human rights treaty and is prohibited by the constitutions of 112


108. It is important to distinguish torture from terrorism. While there is a universal abhorrence of torture (see infra notes 109-111), terrorism is considered a viable means of aggression by many nations. Blum & Steinhardt, supra note 18, at 77 n.99. See also Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J., concurring), cert. denied 105 S.Ct. 1354-55 (1985) ("While this nation unequivocally condemns all terrorist attacks, that sentiment is not universal. Indeed, the nations of the world are so divisively split on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or consensus."). This lack of consensus precludes a suit for terrorist acts under the ATCA. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (tradition requires a high standard of mutual assent between civilized nations before a rule may be said to be part of the law of nations). See also Tel-Oren, 726 F.2d at 806-07 (Bork, J., concurring). Furthermore, most acts of terrorism are perpetrated by political organizations or religious sects rather than recognized nations, again precluding suit under the ATCA. See e.g., Tel-Oren, 726 F.2d at 774. See also Whitaker & Anderson, An Odyssey of Terror, NEWSWEEK, June 24, 1985, at 20 (President Amin Gemayel of Lebanon disavowed any official association with the Shiite Moslem hostage situation of June 1985).

109. Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980), citing Brief of Amicus Curiae, Filartiga v. Pena-Irala, reprinted in 19 I.L.M. 585, 604 (1980). It should be noted that this brief by the State Department was filed during the Carter Administration. "In the political sphere, the human rights policies of Jimmy Carter have given way to the realpolitik of the Reagan Administration." D'Amato, The Concept of Human Rights in International Law, 82 COLUM. L. REV. 1110, 1110 (1982).


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nations. There is not a single nation which officially asserts a right to torture its nationals. In *Filartiga*, the court concluded that state-sponsored torture is prohibited by international law, with no distinctions between treatment of aliens and citizens. Because of this consensus, it is argued that sovereigns have implicitly given up the right to claim immunity when they commit any acts of torture.

Torture becomes “institutionalized” when the perpetrators are protected from prosecution. Neither the World Court, the United Nations Security Council, nor national tribunals presently provide a viable forum for torture victims. If the United States intends to live up to its human rights commitments, it must act to guarantee a forum for these victims.

**Amending the Immunities Act**

Sovereign immunity is not guaranteed by the Constitution; rather, it is a matter of legislative grace and comity allowed at the discretion of Congress. In its *Filartiga* brief, the United States Department of State declared that enforcement of human rights would not impair United States foreign policy efforts, but rather would preserve the credibility of the United States commitment to protect human rights.

The United States, once a leader in the protection of human rights, has been accused of turning its back on the tradition of

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113. *Filartiga*, 630 F.2d at 876.
116. D’Amato, *supra* note 94, at 119 (the World Court has no viable means of enforcement of its judgments).
117. *Id.* at 122 (the Security Council is rendered impotent by the discretionary veto, which allows any member-state to bar the majority’s judgment).
118. In those cases thus far brought in United States courts (*Filartiga* and *Siderman*), the plaintiff’s national tribunal failed to provide a hearing, thereby violating voluntary treaty guarantees.
121. For example, the Universal Declaration of Human Rights was created, fought
protectionism it helped to establish.\textsuperscript{122} There is concern that human rights suits against foreign sovereigns will make the United States vulnerable to retaliatory suits by foreign countries.\textsuperscript{123} One scholar suggests that nations will attempt to avoid United States courts by reducing their commercial activity with this country.\textsuperscript{124}

These concerns, though not unfounded, are neither new nor unique. Many have previously appeared as attacks on the restrictive theory of sovereign immunity; however, sovereign immunity waiver is now recognized world-wide.\textsuperscript{125} Concerns over United States vulnerability are valid only in the unlikely event that the United States practices official torture. Further, because it is the sovereign state which is held liable for official torture, individual American citizens would not be legitimate defendants in foreign-based torture claims.

The United States does not want to expose itself to liability for its support of unpopular governments. The concerns regarding this vulnerability are valid, as evidenced by the International Court of Justice case brought by Nicaragua against the United States for illegal activities in violation of international law.\textsuperscript{126} However, nations have yet to agree on the right to sue under international law.\textsuperscript{127} At this time, nothing protects the United States from suit in a foreign court.\textsuperscript{128} Although United States courts may dismiss a politically sensitive case as a nonjusticiable political question,\textsuperscript{129} international comity has not been effective in preventing such cases from proceed-

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\item \textsuperscript{122} For a discussion of United States policy towards Nicaragua, see Comment, \textit{The Legal Implications of United States Policy Towards Nicaragua: A Machiavellian Dilemma} 22 \textit{San Diego L. Rev.} 899 (1985).
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ing in foreign tribunals. For these reasons, vulnerability to judicial retribution is no new threat. Foreign nations will not find it more politically expedient to sue the United States in the future because we have amended the Immunities Act to allow for torture claims.

Additionally, there is a concern that United States courts and Congress are not equipped to involve themselves in an assessment of a foreign government’s political activities. This argument is not persuasive. For years Congress has risked aggravating United States vulnerability, and has undertaken repeatedly to assess the political activities of foreign sovereigns through the enforcement of financial aid and trade sanctions against states which violate human rights. This legislation “indicates that the President and Congress [place] a high priority on human rights, even at the expense of potentially harmful diplomatic consequences.”

A Proposed Amendment

This Comment proposes an amendment to the Immunities Act which would provide for a narrow, unambiguous human rights cause of action. Such an exception to section 1605(a)(6) of the Immuni-

130. For example, the United States helped to establish a court in Nicaragua, but twice refused to recognize decisions from that court that went against United States interests (in 1912 and 1916). W. LAFEBER, INEVITABLE REVOLUTIONS 41 (rev. ed. 1984). See also supra note 126.


132. See, e.g., Foreign Assistance Act of 1974, 22 U.S.C. § 2304(a)(2) (Supp. II 1979) (“Except under circumstances specified in this section, no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights.”).


134. The proposed amendment would, if enacted, fall under 28 U.S.C. § 1605. General Exceptions to the Jurisdiction Immunity of a Foreign State:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(6) in which money damages are sought against a foreign state for official acts of torture, genocide, or slavery. The victim must first have sought and been refused a hearing on this violation in the national tribunals of the country of his or her citizenship.

Proposed § 1603 Definitions:

For purposes of this chapter:
ties Act would establish jurisdiction and a private right of action in cases of torture, genocide, or slavery, where plaintiffs first had sought and been refused a hearing in the victim's native country, or in the forum where the crime occurred. Definitions of torture, genocide, and slavery should be included under section 1603 of the Immunities Act.

Jurists on both sides of the ATCA debate have manipulated judicial doctrines to support their particular viewpoint. An amendment would eliminate such speculation by specifically prohibiting enumerated acts, that is, torture, genocide, and slavery, rather than...
broadly defined torts as international law violations. Because the prohibited acts must be official, no American citizen would be made vulnerable to suit merely by visiting a foreign country.\footnote{137} Suit by a foreign state or citizen against the United States would arise under this amendment only if the United States government "officially" committed the alleged crimes; mere association with an offending sovereign would not create United States liability. Another limitation to United States liability is the threshold requirement that redress be unavailable to victims in their native country. Although Argentina\footnote{138} and Paraguay\footnote{139} have previously failed to provide a national tribunal in torture cases, it is hoped that this would not occur in the United States.

Such an amendment would provide the United States with an opportunity to continue as a leader in the cause of international human rights. Congressional debate regarding adoption of the amendment would provide a much needed forum for expressions of interest by both the legislative and executive branches. The judiciary, having struggled in a vain attempt to gauge the appropriate measure of United States involvement in international human rights protection, should welcome commentary and analysis from the political branches on this sensitive issue. The courts cannot effectuate fair and consistent adjudication of human rights claims because of existing legislative ambiguity. Clarification from Congress will promote the United States role in defining and protecting international human rights.

**CONCLUSION**

Victims of torture refused protection by their native judiciary deserve redress. International tribunals presently offer no effective recourse for victims of international human rights violations. In the United States, the Immunities Act controls as the exclusive means to establish jurisdiction over defendant sovereigns, yet it was not designed to accommodate human rights causes of action. The United States can, nevertheless, continue its vigilant tradition as a protector of human rights by amending the Immunities Act. Rather than abandon our history as a friend to oppressed citizens of the world,
the United States courts should continue to provide a forum for the victims of egregious violations of international law.

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