Implied Waiver of Sovereign Immunity: The Avenue Not Taken in Jurisdictional Immunities of the State

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Kyle G. Potvin

There will be no end to the troubles of states, or of humanity itself, till philosophers become kings in this world, or till those we now call kings and rulers really and truly become philosophers, and political power and philosophy thus come into the same hands.\(^2\)

**Absolute immunity of the sovereign state is a relic of the past.** The current trend in international law is that exceptions to absolute immunity exist and are increasing in number and scope as evidenced by domestic and international legislation and judicial decisions. Recently, Italy argued that yet another exception to absolute immunity had evolved. They contend that sovereign immunity of a foreign state, in domestic courts, may be abrogated when that state commits violations of jus cogens in the territory of forum state. The International Court of Justice declared in their contentious opinion on the merits that treaty law, customary law, and the international community had not yet recognized this exception. While this decision illustrates one accurate representation of the current status of sovereign immunity, alternative outcomes could and should have been taken in the case to solidify a human rights exception abrogating sovereign immunity in domestic courts. One such alternate outcome that could have been analyzed and explored by the Court is the highlighted proposition of this paper, namely, that an implicit waiver of sovereign immunity has developed through States practice of entering into human rights treaties giving individuals remedies for the international wrongful acts of States.

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\(^2\) Plato, *The Republic*. 
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I. HUMAN RIGHTS vs. ANTIQUATED NOTIONS OF SOVEREIGNTY

Sovereign immunity has been evolving for the past two centuries. It was once considered to be absolute with no exceptions. This view no longer exists. Domestic legislation, judicial decisions, and policy considerations have altered the parameters of this immunity on the international stage. Furthermore, an international move towards a restrictive immunity doctrine has been considered with the formation of the U.N. Convention on Jurisdictional Immunities of States and Their Property (UN Convention). Exceptions to the absolute theory have been voluntarily formed by states, not only domestically, but also in the international arena.

However, the recent decision in the Jurisdictional Immunities of the State (Jurisdictional Immunities) has arguably solidified immunity from domestic jurisdiction for states and sovereigns in civil actions unless they explicitly waive it. The case can be simplified as being a clash between individual human rights and a states’ sovereignty; state sovereignty prevailed. States can now use the case as ammunition to protect themselves from civil liability even if they

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4 See infra note 26.


commit egregious violations of human rights. The implications of the decision leave individual victims of international wrongful acts without a civil remedy against their state aggressors.

The procedural grant of immunity stems from the notion of sovereignty. Comity\(^8\) is granted to states by other states based on this notion of sovereignty and that each state is equal as set forth in the United Nations Charter (UN Charter).\(^9\) In the preamble of the UN Charter, however, there is another important principle. One of the purposes of the charter is to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.”\(^10\) While States are the members of the United

Justice provides that judicial decisions are to “be utilized as a subsidiary means for the determination of rules of law…[but] can be of immense importance.) (emphasis added).

\(^8\) Hilton v. Guyot, 159 U.S. 113, 163-164 (1895) (“The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call ‘the comity of nations.’ Although the phrase has often been [criticized], no satisfactory substitute has been suggested. ‘Comity,’ in the legal sense, is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.”)

\(^9\) United Nations, Charter of the United Nations, art. 2(1), 24 Oct. 1945, 1 UNTS XVI (hereinafter UN Charter) (Art 2(1) specifically states “The Organization is based on the principle of the sovereign equality of all its Members.”).

\(^10\) Id. at preamble.
Nations, the charter very clearly indicates that its purpose is to protect the rights of individuals. In certain situations, these two principles are in direct conflict and cannot coexist.\textsuperscript{11}

Individual human rights are essential to the “foundation of freedom, justice and peace.”\textsuperscript{12}

In a speech before the Commission on Human Rights, Kofi Annan proclaimed that “[n]o government has the right to hide behind national sovereignty in order to violate the human rights or fundamental freedoms its people.”\textsuperscript{13}

The punishment for the human rights violations committed by Germany during World War II was an essential step for the security and peace of mankind.\textsuperscript{14} The solution to these crimes is not something that can be handled internally but by the international community as a whole.\textsuperscript{15} The German entities that committed those crimes were said at the time by the U.S., U.K., and former U.S.S.R. as those that must be “pursue[d]…without fail to the farthest corners

\begin{flushleft}
\textsuperscript{11} One situation in simplest form, for example, would be where individual human rights were violated by a state seeking to utilize immunity as a way to avoid being held accountable.

\textsuperscript{12} United Nations, Universal Declaration of Human Rights, Preamble, 10 Dec. 1948, General Assembly Resolution 217 A (III), (hereinafter \textit{HR Declaration}).


\textsuperscript{14} J.E.S. Fawcett, \textit{A Time Limit for Punishment of War Crimes?}, The International and Comparative Law Quarterly, Vol. 14, No.2 627-632, at 630 (1965).

\textsuperscript{15} \textit{Id.}
\end{flushleft}
of the earth and surrender[ed] to their accusers, [so] that justice might take its course.”\textsuperscript{16} The outcome of \textit{Jurisdictional Immunities} sends an entirely contradictory message.

This paper posits that there is evidence to suggest that a foreign state has implicitly waived its sovereign immunity in domestic courts when they or their agents take actions that violate international human rights norms. Part II gives a concise and accurate recitation of the history regarding sovereign immunity. The \textit{Jurisdictional Immunities} case will be highlighted in Part III with an in depth analysis of the facts, arguments, and final judgment binding Italy, Germany, and Greece. The conversation continues into Part IV with arguments for an exception to sovereign immunity for human rights violations jointly and severally based on an assortment of theories. Decisions seldom are derived without policy considerations and therefore in Part V, the reasons for a different outcome of the case will be explored. Lastly, Part VI will conclude with some final thoughts and remarks regarding the future of sovereign immunity in human rights litigation.

\textsuperscript{16} \textit{Id.} at 631. (A statement made in October 1943 by the governments of the U.S., U.K. and U.S.S.R. The three allied Powers bound themselves in the eyes of the world “to pursue the offenders without fail to the furthest corners of the earth and surrender them to their accusers, that justice might take its course.”) (Emphasis added.)
II. EVOLUTION AND DIMENSIONS OF SOVEREIGN IMMUNITY BEFORE THE ICJ DECISION IN JURISDICTIONAL IMMUNITIES

Sovereign immunity\(^{17}\) has evolved from being absolute to a much more restrictive view filled with exceptions. The dimensions of the doctrine have been altered in ways unforeseen in the days of *The Schooner Exchange* decision.\(^{18}\) Understanding the doctrine’s past is crucial to realize the potential and probable future path of sovereign immunity. Therefore, this section will begin with the notions of sovereignty and its origin. It will then quickly move onto the 20\(^{th}\) century derivation of the unconditional immunity theory. Lastly, the section will conclude with the widely accepted view of the doctrine just prior to the ICJ decision in *Jurisdictional Immunities*.

An early form of absolute sovereign immunity existed in England as early as the 13\(^{th}\) century.\(^{19}\) The rule rested on the notion that the state can do no wrong.\(^{20}\) The acts of the “King or the Crown” can never be wrong, can never be assumed to be done in an improper way, and will

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\(^{17}\) Sovereign immunity has many names including but not limited to state immunity, government immunity, and jurisdictional immunity. These names are mostly interchangeable in international law with minor and subtle distinctions that include not only the immunity of the state itself but also its internal entities such as consuls, diplomats, kings, and presidents. Throughout the remainder of the paper, the author refers to the notion of respecting the autonomy of the state and not holding it liable in the jurisdiction of another state as sovereign immunity.

\(^{18}\) *Supra* note 3. (describing the notions of absolute sovereign immunity).


\(^{20}\) *Id.* at 29.
not be allowed to be judged in the courts.\textsuperscript{21} The logical conclusion from these principles was the common law that barred individuals from being able to sue the sovereign and hold him accountable.\textsuperscript{22}

\textit{The Schooner Exchange} is considered the landmark case in the United States on respecting the immunity of a foreign state from domestic courts. In the 1812 decision\textsuperscript{23}, Chief Justice Marshall declared that each state in the world is an independent sovereign, equal to the other. A State should be “confident that the immunities belonging to his independent sovereign station…are reserved by implication, and will be extended to him.”\textsuperscript{24} Marshall continued with stating that his logic stemmed from the well accepted notion that a foreign state presumably does not intend to subject itself to the jurisdiction of another.\textsuperscript{25}

\begin{itemize}
\item \textsuperscript{21} \textit{Id.}
\item \textsuperscript{22} \textit{Id.} at 30.
\item \textsuperscript{23} The opinion was written on February 24, 1812 and delivered on March 3, 1812.
\item \textsuperscript{24} \textit{Supra} note 3, at 137. (“One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.”).
\item \textsuperscript{25} \textit{Id.} at 137-8. (“Why has the whole civilized world concurred in this construction? The answer cannot be mistaken. A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation, and it is to avoid this subjection that the license has been obtained.”).
\end{itemize}
In 1952, the United States official policy regarding sovereign immunity transformed from an absolute to a restrictive approach.\textsuperscript{26} The State Department announced, through what is commonly referred to as the Tate Letter,\textsuperscript{27} that they would no longer extend immunity to foreign states for its commercial activities. The rule stemming from the Tate Letter makes a distinction between sovereign acts which are public in nature and commercial acts which are characteristically private in nature.\textsuperscript{28} The sovereign acts, or \textit{acta jure imperii}\textsuperscript{29}, committed by a State were to be afforded blanket immunity because of their nature.\textsuperscript{30} The private acts, or \textit{acta jure gestionis}\textsuperscript{31}, were subject to a denial of immunity.\textsuperscript{32} While this distinction is now widely accepted, the application of the rule presents problems in determining what acts are considered \textit{jure imperii} and which ones are considered \textit{jure gestionis}.\textsuperscript{33} Some acts that have been the subject of much debate in regards to whether they constitute \textit{acta jure imperii} include murder, state


\textsuperscript{27} \textit{Id.}

\textsuperscript{28} \textit{The Jurisdictional Immunity of Foreign Sovereigns}, 63 YALE L.J. 1148, 1160 (1954) (discussing the legal and political ramifications of the absolute and restrictive approaches to sovereign immunity).


\textsuperscript{30} \textit{Supra} note 28, at 1160.

\textsuperscript{31} \textit{Supra} note 29, at 637.

\textsuperscript{32} \textit{Supra} note 28, at 1160.

\textsuperscript{33} \textit{Supra} note 29, at 637.
sanctioned assassinations, torture, etc. Acts of torture and other human rights violations have arguably been held to never be acts *jure imperii*.  

Another exception started to gain much traction in the international community. The reemergence of the Normative Hierarchy Theory in the *Al-Adsani v. United Kingdom* case has led to much controversy. The theory declares that the sovereign immunity of a State is abrogated if the State violates *jus cogens* norms. The theory was given credence in the dissenting opinions of *Al-Adsani*. In the case, Al-Adsani claims to have been tortured in Kuwait. He was falsely imprisoned, severely beaten, severely burned, and even had his head held under water in a pool of dead corpses. He brought a civil suit in the United Kingdom against the state of Kuwait which was subsequently dismissed. Al-Adsani brought the case to the European Court of Human Rights (ECtHR) and named the United Kingdom as a defendant.

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34 *Infra* note 95, at 745.

35 *Infra* note 191, at 177.

36 *See also* Princz v. Federal Republic of Germany, 26 F.3d. 1166 (D.C. Cir. 1994) and *Al-Adsani v. United Kingdom*, App. No. 35763/97, European Court of Human Rights (2001) (hereinafter *Al-Adsani*).

37 *Infra* note 95, at 742.

38 *Id.* at 741.

39 *Id.* at note 203.


41 *Id.*

42 *Id.* at para 14-17.
for its failure to abrogate Kuwait’s immunity.\textsuperscript{43} In the majority opinion, the ECtHR stated that the United Kingdom was correct for granting immunity to Kuwait for the acts committed against Al-Adsani because international law had not developed to recognize a jus cogens exception for granting immunity in domestic civil cases.\textsuperscript{44} The dissenting judges in the case, however, make a strong case that the nature of the proceedings are immaterial and that the case for an exception to immunity based on the jus cogens nature of States actions should be sustained.\textsuperscript{45}

Recently, the United Nations adopted the UN Convention in an attempt to make the law of sovereign immunity more clear and certain.\textsuperscript{46} While it is still not in force due to lack of the required ratifications, it is considered the “first modern multilateral instrument to articulate a comprehensive approach to issues of state or sovereign immunity from suits in foreign courts.”\textsuperscript{47}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{43} (hereinafter \textit{ECtHR})
\item \textsuperscript{44} \textit{Id.} at para 66.
\item \textsuperscript{45} Al-Adsani, Dissenting Opinion of Judges Rozakis, Caflish, Wildhaber, Costa, Cabral Barreto, and Vajič. (…”[i]t is not the nature of the proceedings which determines the effects that a jus cogens rule has upon another rule of international law, but the character of the rule as a peremptory norm and its interaction with a hierarchically lower rule. The prohibition of torture, being a rule of jus cogens, acts in the international sphere and deprives the rule of sovereign immunity of all its legal effects in that sphere. The criminal or civil nature of the domestic proceedings is immaterial. The jurisdictional bar is lifted by the very interaction of the international rules involved, and the national judge cannot admit a plea of immunity raised by the defendant State as an element preventing him from entering into the merits of the case and from dealing with the claim of the applicant for the alleged damages inflicted upon him.”)
\item \textsuperscript{46} \textit{Supra} note 5, at preamble.
\item \textsuperscript{47} David P. Stewart, The UN Convention on Jurisdictional Immunities of States and Their Property, 99 Am. J. Int’l L. 194 (2005) (analyzing the provisions of the newly adopted convention.).
\end{itemize}
\end{footnotesize}
The convention reiterates the tort exception to granting immunity.\textsuperscript{48} By its terms, the tort exception provision includes those acts which are intentional and deliberate.\textsuperscript{49} Also, injury suffered by the negligence or inaction of a State is covered by the provision.\textsuperscript{50} It is also worth noting that the UN Convention is silent on whether a State implicitly waives their immunity because they acted against norms of international law.\textsuperscript{51} In leaving this question unanswered, a possible interpretation may lead scholars to interpret the silence as acquiescence.\textsuperscript{52}

In addition to the development of sovereign immunity on the global level, the doctrine has been affected by regional and domestic legislation. Domestically, many States have enacted legislation that limited the scope and depth of immunity to be granted to foreign sovereigns. For example, in the United States, the Federal Sovereign Immunities Act (FSIA) was enacted in 1976 as an attempt to codify international law in the field of sovereign immunity.\textsuperscript{53} The FSIA declares that immunity will be not be granted to foreign States in selected situations.\textsuperscript{54}

\textsuperscript{48} Id. at 201.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id. at 205.
\textsuperscript{53} Infra note 79.
\textsuperscript{54} Id.
Additionally, the United Kingdom has also enacted similar legislation.\textsuperscript{55} Regionally, the Council of Europe drafted the European Convention on State Immunity in 1972.\textsuperscript{56} It contains similar codifications as the legislations from the United Kingdom and United States.

III. THE CURRENT STATUS OF SOVEREIGN IMMUNITY AS DECIDED BY THE ICJ IN JURISDICTIONAL IMMUNITIES

The ICJ recently decided in \textit{Jurisdictional Immunities} that the sovereign immunity of Germany should have been respected by Italian and Greek domestic courts.\textsuperscript{57} This is true even though Germany admits internationally wrongful acts were committed against Italian nationals between 1943 and 1945.\textsuperscript{58} While this decision is not binding\textsuperscript{59} on any State other than Germany, Italy, and Greece, the judgment will most likely be viewed as setting precedent because it claims to affirm the current status of sovereign immunity in customary law. This section will first reaffirm the specific facts that led to the controversy brought before the court. Second, the Italian arguments for abrogating German sovereign immunity will be explored and analyzed. Lastly, the

\textsuperscript{55} United Kingdom, State Immunity Act, 1978 c. 33 (1978).

\textsuperscript{56} \textit{Infra} note 88.

\textsuperscript{57} \textit{Jurisdictional Immunities, supra} note 6, at para. 107.

\textsuperscript{58} \textit{Id.} at para 52.

\textsuperscript{59} \textit{Statute of the International Court of Justice}, at art. 59. (The Statute of the ICJ, laid out in Article 59, states that the decision of the Court is binding only on those partied to the case at hand. “The decision of the Court has no binding force except between the parties and in respect of that particular case.”) (hereinafter \textit{ICJ Statute}).
ICJ decision will be laid out and expounded upon in an effort to set the stage for the discussion of alternative endings in the next part of the paper.

a. Human Rights Violations Committed by Germany Against Italian Nationals During World War II

To truly understand the impact of this case, and arguably the intent of this paper, the inconceivable horrors the Italian nationals were subjected to between 1943 and 1945 must be acknowledged and those violations of their human rights affirmed. The Second World War pulled states, usually those unwilling or unable to participate, into the fight. Early in the war Italy and Germany were allies. After the fall of Benito Mussolini, a noteworthy change occurred in the Italian government which led Italy to switch sides, join the Allied Powers, and declare war on Germany.

At this time, German forces were stationed on Italian soil. After Italy switched sides, German soldiers took control of large territories as part of their occupation of Italy. It was during this occupation where some of the most historic violations of human rights occurred and they occurred to Italians. Specifically, the human rights atrocities inflicted upon Italian nationals include the following: extermination, willful killings, rape, torture, enslavement, forced labor,

60 Counter-Memorial of Italy, Case Concerning Jurisdictional Immunities of the State (Germany v. Italy), para. 2.2, (22 December 2009) (hereinafter Italian Memorial in Jurisdictional Immunities).

61 Id.

62 Id. at 2.5.

63 Id.
imprisonment and deportation. At this junction, a distinction must be made between the victims because their classifications indicate and trigger different facets of international law and require a different analysis. The most basic difference in victims was that between Italian soldiers and Italian civilians.

The soldiers of the Italian military were disarmed and captured by the German armed forces shortly after Italy’s declaration. After being given a choice to join the German military, those who declined were deposited into labor camps and forced to perform uncompensated labor. Nearly 700,000 Italian soldiers, often referred to as “Hitler’s slaves,” were estimated to have been forced to labor, denied prisoner of war status, and forced to live in appalling situations without adequate nutrition. Those who were fortunate not to have perished from the living conditions were subjected continuously to other forms of inhuman treatment and punishment for being enemies of the state. While it was a time of war, the Italian soldiers undoubtedly were subjected to cruelties beyond the spectrum of what civilized nations would expect at the time.

64 Id. at para. 2.6-2.7. (Italy’s counter-memorial goes into an exhaustive list of atrocities which include the list provided above and also extensive destruction of property, violence to life and person, cruel treatment, outrages upon personal dignity, humiliation, etc.)

65 Id. at para. 2.6

66 Id.

67 Id.

68 Id. at para. 2.5-2.6 (In addition to being called enemies, Italian soldiers were sometimes considered traitors for refusing to fight alongside German armed forces when Italy switched sides during the war.)
Shockedly, German armed forces persecuted the innocent civilian population even more than the soldiers.\textsuperscript{69} In addition to detention, the estimated 10,000 civilian victims were killed, raped, and tortured.\textsuperscript{70} Entire villages and towns faced mass exterminations.\textsuperscript{71} The civilians, who included not only men but also women, children, and the elderly, were subjected to numerous human rights violations which were tantamount to war crimes.\textsuperscript{72} After the war, the Federal Republic of Germany, by treaty, gave reparations to some but many have never received appropriate compensation or compensation at all.\textsuperscript{73}

\textbf{b. Italian Arguments for not Honoring Germany’s Sovereign Immunity}

Italian victims were without any effective mechanism for recovering the reparations that would make them whole again, or at least, attempt to.\textsuperscript{74} Leaving those victims empty handed, Italian courts had no choice but to abrogate the immunity that Germany relied upon.\textsuperscript{75} When the Jurisdictional Immunities reached the ICJ, the Italian representatives relied on three theories to

\begin{itemize}
  \item \textsuperscript{69} Id. at para. 2.7 (Deducing from the list of horrible acts committed against the soldiers vs. the civilian population.)
  \item \textsuperscript{70} Id.
  \item \textsuperscript{71} Id. (Specific towns and villages listed in Italy’s counter-memorial include Civitella, Marzabotto, Sant’Anna di Stazzema, and Onna.)
  \item \textsuperscript{72} Id. at para. 2.7-2.8.
  \item \textsuperscript{73} Id. at para. 2.18.
  \item \textsuperscript{74} Id. at para. 7.11.
  \item \textsuperscript{75} Id.
\end{itemize}
support the Italian and Greece courts decisions: (1) territorial tort principle, (2) gravity of the violation exception, and (3) the last resort argument.76

The territorial tort principle is the concept that when a State or its organs, by its acts, cause death, personal injury or property damage on the territory of the forum State, it gives up its immunity by implication.77 The implied waiver stems from a number of States enacting domestic legislation that formalizes when the State will and will not respect the sovereign immunity of the other State.78 One example is the FSIA in the United States.79 The FSIA is the United States attempt to reiterate international law in the area of sovereign immunity.80 It recognizes that States enjoy immunity from jurisdiction of a foreign States courts.81 However, the FSIA codifies some existing exceptions recognized by other States.82 One such exception declares that a State

76 Jurisdictional Immunities, supra note 6, at para. 26-40. (The ICJ highlights Italy’s arguments throughout those pages.)

77 Id. at para. 62. (The ICJ continues with stating that the outcome of this principle, implicit waiver of immunity, still occurs even if the act is considered acta jure imperii. Acta jure imperii equates to an act that is carried out by the State in its sovereign duty. The conversation that follows this footnote will not analyze the difference between acta jure imperii and acta jure gestionis for the mere fact that the distinction is irrelevant to the central argument of this paper.).

78 The States that have enacted this type of legislation include the United States, United Kingdom, Argentina, Australia, Canada, Israel, Japan, and South Africa.


80 Id. at § 1604. (The provision states that “[s]ubject 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…”)

81 Id.

82 Id. at § 1605.
is not entitled to immunity if it is waived explicitly or implicitly.\(^83\) Another exception within the
FSIA is that a State is not entitled to immunity if it, or its actors, commit a tort within the United
States that incurs a loss for an individual.\(^84\) Specifically, if a State injures an individual or their
property within the United States and the individual is attempting to sue the foreign State, the
foreign State is unable to utilize its immunity.\(^85\) Using the FSIA, domestic courts in some cases
have stated that giving immunity to foreign States for acts committed on United States territory
is not required but done out of comity.\(^86\)

Italy also argues that this territorial tort principle is stated within the UN Convention\(^87\)
and the European Convention on State Immunity.\(^88\) While the UN Convention still falls short of

\(^83\) Id. at § 1605(a)(1) (A foreign state shall not be immune from the jurisdiction of courts of the
United States or of the States in any case--in which the foreign state has waived its immunity
either explicitly or by implication…)

\(^84\) Id. at § 1605(a)(5) (“A foreign state shall not be immune from the jurisdiction of courts of the
United States or of the States in any case-- in which money damages are sought against a foreign
state for personal injury or death, or damage to or loss of property, occurring in the United States
and caused by the tortious act or omission of that foreign state or of any official or employee of
that foreign state while acting within the scope of his office or employment…”)

\(^85\) Id.

\(^86\) New England Merchants Nat. Bank v. Iran Power Generation and Transmission Co.,
S.D.N.Y.1980, 502 F.Supp. 120, 129 (discussing that “[s]overeign immunity is granted to
foreign governments as matter of comity and it is a privilege granted by one sovereign to another
in the family of nations, but it is not a right enjoyed by one sovereign within territorial
jurisdiction of another and fact that the doctrine has been codified in the Foreign Sovereign
Immunities Act does not alter that fundamental premise.”) (emphasis added).

\(^87\) UN Convention, at art. 12.

\(^88\) Council of Europe, European Convention on State Immunity, art 11.,16 May 1972 (entered
into force 11 Jun 1976) (hereinafter European Convention)
legal force lack of ratification by the requisite 30 States, it is an attempt to codify customary international law and make the law regarding States immunity clear. Some provisions of the UN Convention do carry the force of law because they are considered principles of customary international law. The territorial tort provision contained within in the UN Convention succinctly states that if a State commits an act in the territory of the forum state that creates a pecuniary recovery interest for injury, death, or property loss, then they are unable to invoke immunity in the forum state. No other provision in the UN Convention limits the territorial tort article or dictates that it does not apply to actions committed by armed forces.

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89 UN Convention, at art. 30(1) (30 States are required to ratify in order for the treaty to enter into force. As of this date, it has only been signed by 28 States and ratified by 13 States.)

90 UN Convention, at preamble. (“[b]elieving that an international convention on the jurisdictional immunities of States and their property would enhance the rule of law and legal certainty, particularly in dealings of States with natural or juridical persons, and would contribute to the codification and development of international law and the harmonization of practice in this area.”)

91 Jurisdictional Immunities, supra note 6, at para 66.

92 UN Convention, at art 12. (“Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.”)

93 Jurisdictional Immunities, supra note 6, at para 69.
After dismissing the territorial tort principle, the ICJ goes into the *jus cogens* exception analysis.\(^9^4\) This is also commonly referred to as the normative hierarchy theory.\(^9^5\) This theory postulates that because state immunity does not rise to the high level of *jus cogens*\(^9^6\), it must logically be considered a lower level of norm in international law, and therefore when a *jus cogens* violation occurs, States are unable to derogate from their duties and invoke immunity for those acts.\(^9^7\)

The final contention on Italy’s behalf was appropriately entitled the last resort argument.\(^9^8\) Italy claims that its courts were allowed to deprive Germany of its sovereign immunity because no other options for victims to receive reparations were available.\(^9^9\) Germany did make some reparations but failed to compensate many victims, if not the majority of the victims.\(^1^0^0\)

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\(^9^4\) *Id.* at para. 80 (The *jus cogens* exception is referred to as the “subject matter and circumstances of the claims.” The Italian representatives and ICJ clearly indicate that the acts committed by Germany were *jus cogens* throughout the judgment.)


\(^9^6\) *Shaw* at 125. (*Jus cogens* are peremptory norms “accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”)

\(^9^7\) *Caplan* at 741-741.

\(^9^8\) *Jurisdictional Immunities* at para 98.

\(^9^9\) *Id.* at 98.

\(^1^0^0\) *Id.* at 99.
c. The Final Decision in Jurisdictional Immunities Leaves Italian Human Rights Victims Without Recourse

The ICJ came to the conclusion, simply, that despite all the human rights violations, Germany was entitled to immunity in Italian courts.\textsuperscript{101} First, the territorial tort principle was found to not apply to the acts of armed forces.\textsuperscript{102} Customary law, it was said, had not risen to the level in which a State loses its right to immunity for the acts of its armed forces in the territory of another State.\textsuperscript{103} In coming to this decision, the ICJ looked at domestic legislation and decisions that said that the acts of the armed forces on the territory of another State cannot undo the right to immunity.\textsuperscript{104}

The next argument, the normative hierarchy theory, was also discounted. Violations of \textit{jus cogens} do not absolve a State of its sovereign immunity from the jurisdiction of another State.\textsuperscript{105} In concluding that States can still use their immunity for violations of peremptory norms, those from which no derogation are permitted, the ICJ surveyed past international and

\textsuperscript{101} \textit{Id.} at 107. (The ICJ expounded on that simple statement with saying that not only was Germany entitled to immunity but that Italy breach an international obligation to respect that immunity. By claiming that, the ICJ essentially said that Italy had committed a wrongful act by denying Germany’s immunity but Germany could use their immunity for mass deportations, killings, tortures, and etc.).

\textsuperscript{102} \textit{Id.} at 78.

\textsuperscript{103} \textit{Id.}

\textsuperscript{104} \textit{Id.} at 72-76.

\textsuperscript{105} \textit{Id.} at 97.
domestic judicial decisions to see if customary law had evolved to create such an exception.\textsuperscript{106} They found that customary law had not evolved to such a level and that when a conflict exists between a rule of customary law and \textit{jus cogens}, the enforcement of one does not necessarily hinder the enforcement of the other.\textsuperscript{107}

The “last resort” argument also failed.\textsuperscript{108} The fact that Italian victims are without recourse for receiving reparations does not entitle Italian courts to abrogate Germany’s immunity because there is no evidence in treaty or customary law.\textsuperscript{109} However, the ICJ did conclude that the mere fact that the procedural granting of immunity still does not alter the substantive law and acts.\textsuperscript{110} When a State is afforded immunity, there is no way to attach punishment, however, the international responsibility and obligation to make reparations is still engaged and does not merely disappear.\textsuperscript{111}

\begin{flushright}
\textsuperscript{106} \textit{Id.} at 95-96.
\textsuperscript{107} \textit{Id.} at 95.
\textsuperscript{108} \textit{Id.} at 103.
\textsuperscript{109} \textit{Id.} at 101. (“The Court can find no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress.”).
\textsuperscript{110} \textit{Id.} at 100.
\textsuperscript{111} \textit{Id.}
\end{flushright}
IV. ALTERNATE ENDING: IMPLICITLY WAIVING SOVEREIGN IMMUNITY THROUGH HUMAN RIGHTS TREATIES

As previously stated,\textsuperscript{112} sovereign immunity is usually honored as long as the State doesn’t explicitly waive it. Some international treaties\textsuperscript{113} have stated situations in which a State has agreed to waive the procedural obstacle in another State. Notwithstanding those situations, a State has immunity from the jurisdiction of another State’s court unless they say otherwise. Implicit waivers of sovereign immunity are unheard of because of the importance of equality between States. This section suggests, however, that implicit waivers of sovereign immunity are evident in human rights treaties and subsequently in customary law. First, some background on how international law is formed and altered through treaty making will set the stage for the forthcoming arguments. Next a discussion of human rights treaties, in general, will evidence the fact that those agreements are formed for the purpose of protecting individuals. If the individual is injured by a State or its actors, some type of relief is available for the individual. Third, the right to a remedy in those treaties, specifically for violations of human rights by States, will show that customary law has developed to include an implicit waiver of immunity for those violations. It will also be shown that this implicit waiver can also be found for human rights violations committed by a States’ military. Finally, an implicit waiver of Germany’s sovereign

\textsuperscript{112} Supra note 6.

\textsuperscript{113} These treaties include the European Convention on State Immunity and the UN Convention on Jurisdictional Immunities of States and Their Properties.
immunity could have been found in *Jurisdictional Immunities* and would have allowed the Italian and Greek victims to receive the damages previously awarded at the domestic level.

a. **Forming and Altering International Law**

    The process by which international law is formed and continually changes is not straightforward as one might suppose. In many states, as in the United States, laws are created by legislatures and interpreted by the courts. These laws can be found by reading the passed legislation and judicial decisions. Once the legislation or decision is formed, that is the law until altered by subsequent acts. There is a definitive way of finding the law. Finding what the law is in international law is far from being as simple as finding it domestically.

    The simplest and quickest way of changing international law is by entering into treaties.\(^{114}\) Treaty making is by no means easy or simple, but is the most analogous process to the domestic law making in the international arena.\(^{115}\) It is also the process by which the states can clearly determine what their international obligations are with minor challenges to other

\(^{114}\) *ICJ Statute*, at art. 38(1)(a) (“The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states…””) The term treaty in international relations is synonymous with agreements, conventions, and covenants.

agreements or the interpretations of the treaty.\textsuperscript{116} States bind themselves in the treaty process either by promising to act or omit actions and these obligations are expected to be honored via the concept of \textit{pacta sunt servanda}.\textsuperscript{117}

A more confusing and uncertain source of international law is customary law.\textsuperscript{118} It plays an important role in the international community and arguably is more important than treaties as a source of law because of its universal applicability.\textsuperscript{119} It wasn’t until the adoption of the ICJ Statute in 1945 that customary law achieved “formal elevation to the status as a source of international law.”\textsuperscript{120}

The traditional view towards customary law is that it meets two requirements before custom is accepted as law.\textsuperscript{121} Two interdependent elements must exist for customary law to be

\begin{footnotesize}
\begin{enumerate}
\item Id. at 954. (“The strange birth and schizophrenic life of treaties has caused them to be seen as something fundamentally \textit{other} than public law. Nowhere is this treatment more obvious than in the efforts of American courts to give meaning and content to treaty provisions.”)
\item United Nations, \textit{Vienna Convention on the Law of Treaties}, art. 26, 23 May 1969 (hereinafter \textit{Vienna Convention}) (Art. 26 states that the concept of \textit{pacta sunt servanda} means in treaty law that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”) (emphasis added).
\item \textit{Shaw} at 73.
\item Id.
\item Id. at 607.
\end{enumerate}
\end{footnotesize}
accepted and they include: (1) usage or practice, which is a detectable element, and (2) opinio juris sive necessitates, which is the psychological element.\(^\text{122}\)

The first element of practice is usually referred to as general practice or state practice. There is no requirement that the practice be universal.\(^\text{123}\) The practice should however be followed or accepted by a majority of the “states whose interests are specially affected.”\(^\text{124}\) Additionally, the practice of states must be reasonably consistent and uniform.\(^\text{125}\)

The second element, opinio juris, is the subjective or psychological element. It is should be noted that opinio juris is difficult to assess.\(^\text{126}\) The traditional theory of opinio juris requires that there is a “conviction on the part of states that their acts are required by, or consistent with, existing international law.”\(^\text{127}\) The practice is not enough to suggest the state believes it is acting because of a legal obligation. The States’ actions may be provoked by a sense of courtesy or tradition and those reasons are not sufficient to prove opinio juris.

\(^\text{122}\) *Id.* at 612.

\(^\text{123}\) North Sea Continental Shelf Cases, 1969 I.C.J. 3 (stating that in order for a rule to become binding international law, it need not pass a universal acceptance test.) (hereinafter *North Sea Continental*).

\(^\text{124}\) *Id.* at para. 73-74.

\(^\text{125}\) *Asylum Case*, 1950 I.C.J. 266.

\(^\text{126}\) John King Gamble, *Reconceptualizing International Law in the Information Age: Lexus; Olive Trees; Globalization; Henkin; Jessup; Lachs; Opinio Juris*, 96 AM. SOC’Y INT’L. PROC. 238, 245 (2002) (discussing the application and exploration of international law in the information age).

\(^\text{127}\) *Supra* note 120, at 620.
Customary international law and treaties are interrelated and help form and alter each other. First, in order to have customary law, there must be state practice and *opinio juris* as stated previously.\(^\text{128}\) Examples of state practice include enacting legislature, passing judicial decisions, and entering into treaties with other States.\(^\text{129}\) Additionally, in many instances, States have signed international agreements because they believe it was already law as evidenced by custom thus forming customary international law.\(^\text{130}\) Alternatively, States and international organizations attempt to codify customary law by forming treaties with those rules of law in it.\(^\text{131}\)

Unless a State persistently objects from the beginning to the formation of customary law, they are bound.\(^\text{132}\) If a State signs a treaty, they are bound to not go against its object and purpose.\(^\text{133}\) If a State ratifies a treaty, even with reservations, understandings, and declarations, they are bound not to go against the object and purpose.\(^\text{134}\)

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\(^{128}\) *Supra* note 122.

\(^{129}\) *Shaw* at 82.

\(^{130}\) *Id.* at 96.

\(^{131}\) *Id.* (For other examples of treaties attempting to codify rules of customary law, please see the preambles of some of the most common international treaties: Vienna Convention on the Law of Treaties, Vienna Convention on the Consular Relations, Vienna Convention on Diplomatic Relations, United Nations Convention on Jurisdictional Immunities of States and Their Properties, etc.)

\(^{132}\) *Id.* at 90.

\(^{133}\) *Vienna Convention*, at art. 19.

\(^{134}\) Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, at 10. (Advisory Opinion) (“It is also a generally recognized principle that a multilateral convention is the result of an agreement freely concluded upon its clauses and that
b. The Object, Purpose, and Remedial Provisions of Human Right’s Treaties

From its inception, the United Nations has perpetuated the need for universal human rights.\(^{135}\) The UN Charter, which is a treaty that needed to be ratified by the now UN member States, illustrates very clearly that its purpose is to promote and encourage human rights and fundamental freedoms for all.\(^{136}\)

The next human rights milestone came with the passing of the HR Declaration. While it is not a binding document, it formed the basis of what has come to be known as the International Bill of Rights\(^{137}\) and carries “strong moral force.”\(^{138}\) The HR Declaration contains a list of rights that are applicable to every individual without any reservations.\(^{139}\) This object and purpose of this document is to also promote fundamental freedoms at the national and international

\(^{135}\) As evidenced by the UN General Assembly’s adoption of the UN Charter in 1945 and subsequently, the Universal Declaration of Human Rights on 10 December 1948.

\(^{136}\) *UN Charter*, at art. 1(3).

\(^{137}\) (hereinafter *IBR*).


\(^{139}\) *HR Declaration*, at art 1-30.
levels.\textsuperscript{140} One provision in the HR Declaration specifically states that every individual has a right to an effective remedy “by competent national tribunals.”\textsuperscript{141}

Shortly after the resolution, containing the HR Declaration, was passed, the UN drafted two additional covenants. Together with the HR Declaration, the International Covenant on Civil and Political Rights\textsuperscript{142} and the International Covenant on Economic, Social, and Cultural Rights\textsuperscript{143} formed what has come to be known as the IBR.\textsuperscript{144} With the understanding that the HR Declaration was not binding on member States, the drafters of the ICCPR incorporated Articles one through twenty-one of the HR Declaration in the final version thereby giving legal force to those provisions. Those who ratified the ICCPR essentially bound themselves to giving a remedy to individuals whose rights listed in the treaty were violated. While some States still violate the ICCPR on a regular basis\textsuperscript{145}, national and international courts continually apply the rights enshrined in the HR Declaration, ICCPR, and ICESCR because they are legally and morally binding on member States.\textsuperscript{146} Other multilateral treaties that include similar purposes of

\begin{itemize}
\item \textsuperscript{140} \textit{Id.} at preamble.
\item \textsuperscript{141} \textit{Id.} at art 7.
\item \textsuperscript{142} United Nations, International Covenant on Civil and Political Rights, 16 Dec. 1966, (entered into force 23 Mar. 1976) (hereinafter \textit{ICCPR}).
\item \textsuperscript{144} \textit{Supra} note 138, at 44.
\item \textsuperscript{145} \textit{Id.} at 49.
\item \textsuperscript{146} \textit{Id.}
\end{itemize}
protected human rights, bind States from violating those rights, and contain remedial provisions. The United Nations Convention against Torture\textsuperscript{147} and International Convention for the Protection of All Persons from Enforced Disappearance.\textsuperscript{148}

Multilateral global treaties are not the only measure States have used to bind themselves to protecting human rights and providing remedial means. Regional unions, notably Europe and the American States, have drafted and passed human rights agreements. The primary instrument in Europe protecting human rights is the European Convention on the Protection of Human Rights and Fundamental Freedoms.\textsuperscript{149}

The ECHR\textsuperscript{150} reiterates and expands on the rights listed in the HR Declaration.\textsuperscript{151} By doing this, the ECHR helps reinforce not only moral effect to the HR Declaration, but also the force of being legally binding.\textsuperscript{152} The preamble states that the ECHR was created to aid in promotion of the human rights the HR Declaration proposes and also proffers that its purpose is

\textsuperscript{147}United Nations, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, (entered into force 26 Jun. 1987) (hereinafter CAT).


\textsuperscript{149}Supra note 138, at 97.


\textsuperscript{151}Supra note 138, at 98.

\textsuperscript{152}As noted previously, the ICCPR came subsequently to the HR Declaration and reiterated Articles 1-22. Due to the legally binding nature of the ICCPR, it gave the provisions taken from the HR Declaration the force of law when it was ratified. With the ratification of the ECHR by European States, these provisions gain more traction in international treaty and customary law.
to reaffirm States “…profound belief in those fundamental freedoms which are the foundation of
justice and peace in the world and are best maintained on the one hand by an effective political
democracy and on the other by a common understanding and observance of the human rights
upon which they depend…”153 While very similar to the HR Declaration’s provision on giving
effective remedies, the entire provision in the ECHR expounds with stating that in addition to
giving an effective remedy to individuals whose rights have been violated, those remedies will
be given “notwithstanding that the violation has been committed by persons acting in an official
capacity.”154

The Organization of American States added considerable force to promoting human
rights. With the adoption of the American Declaration on the Rights and Duties of Man, the
American States indicated that human rights are paramount and that “international protection of
rights of man should be the principle guide of an evolving American law.”155 Almost twenty
years passed before the signing and subsequent ratification of the American Convention of
Human Rights.156 The ACHR contains a similar purpose of protecting human rights and affords
individuals a remedy.157

153 ECHR, at preamble (emphasis added).
154 ECHR, Art. 13
155 Organization of American States, American Declaration on the Rights and Duties of Man,
preamble. O.A.S. Res. XXX (1948).
156 Organization of American States, American Convention on Human Rights, 22 Nov. 1969,
157 See generally ACHR, at art. 25.
International humanitarian treaties also bind its member States from violating human rights during times of war. The Geneva Conventions were written with the intent to prevent a repeat of the human rights devastation that occurred during the First and Second World Wars.\textsuperscript{158} The Third Geneva Convention deals exclusively with the protection of civilians and non-combatants during times of war.\textsuperscript{159} While the convention does not speak directly to reparations for injured parties, it does state that when grave human rights breaches\textsuperscript{160} have been committed, no State will be allowed to absolve itself or another from liability.\textsuperscript{161} The issue of reparations in humanitarian law was addressed later in 1984 with the \textit{Case Concerning Military and Paramilitary Activities In and Against Nicaragua}.\textsuperscript{162} The ICJ declared with a majority vote that

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\textsuperscript{158} Supra note 138, at 12-13.


\textsuperscript{160} \textit{Third Geneva Convention}, at art.147 (Grave breaches “involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property.”).

\textsuperscript{161} \textit{Third Geneva Convention}, at art. 148.

\textsuperscript{162} Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America) I.C.J. Reports 1984 (hereinafter \textit{Military Activities in Nicaragua}).
\end{flushright}
the United States was liable for reparations for breaching humanitarian law\textsuperscript{163}, albeit customary law, for the injuries and damages incurred by Nicaragua and its’ citizens.\textsuperscript{164}

c. Reparations for International Wrongful Acts are an Obligation

Early on, it was widely accepted in the international community that a State that commits an international wrongful act is responsible to make the injured State or person whole again.\textsuperscript{165} Despite the fact that a n available remedy might not be linked with the wrongful act, the mandate to give reparations still exists.\textsuperscript{166}

Before the issue of reparations is addressed, an international wrongful act must first have taken place. An international wrong occurs when a State takes an action that is attributable to the state and “constitutes a breach of an international obligation of the State.”\textsuperscript{167} The act is still a wrongful act internationally even if considered lawful under domestic law.\textsuperscript{168} Whether or not the act is sanctioned, if the State by way of its organs or representatives commits the wrongful act, it

\textsuperscript{163} Id. at para. 13-14.

\textsuperscript{164} Id.

\textsuperscript{165} Factory at Chorzow (Germany v. Poland), 1927 P.C.I.J. (ser. A) No. 9 (July 26).

\textsuperscript{166} Id. at 21. (“It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.”).

\textsuperscript{167} International Law Commission, Draft Articles on Responsibility of States for International Wrongful Acts, art. 2. (2001) (hereinafter \textit{ILC Articles}).

\textsuperscript{168} Id. at art. 3.
is attributable to the State. Wrongful acts can be attributable to the State if they are conducted by a State’s military.

d. Implicit Waivers of Sovereign Immunity Can Be Substantiated

Customary law is derived from States practice including entering into treaties. Treaties are entered into sometimes on the notion of obligation and sometimes on the theory of freedom to contract. Either way, when States enter into treaties, the formation of treaty law occurs and the formation of customary law begins or is codified. As discussed, many States have signed human rights treaties that (1) have put those treaties and its’ provisions into force, (2) confirmed the purpose of human rights, and (3) reaffirmed the fact that violations of those treaties by its consenting parties, the States, demands a right to relief to the victims, the individuals. These actions constitute sufficient evidence to imply a waiver of sovereign immunity because in order for such an implication to be found, a State must engage in a pattern of conduct that indicates its willingness to be held liable for its acts.

169 Id. at art 4(1).
170 Protocol 1, Geneva Convention, at art. 91 (“A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”)
171 Joseph G. Bergen, Princz v. The Federal republic of Germany: Why the Courts Should Find That Violating Jus Cogens Norms Constitutes an Implied Waiver of Sovereign Immunity, 14 CONN. J. INT’L L. 169, 190 (1999) (hereinafter Bergen) (discussing the idea that Germany should be held liable for violating jus cogens norms because they signed the Torture Convention which directly prohibits one of the jus cogens norms. The article closely resembles the idea behind the Normative Hierarchy Theory but differs from this paper because this paper seeks an implied
Conducts by States do include the practice of entering into treaties, whether bilaterally, regionally, or multilaterally. By entering into these treaties, they consent to be bound by its terms and to not go against its object and purpose. In essence, they are make their intention known to other parties and outside spectators that they have acquired new international obligations and like any party to a treaty; the State agrees that those obligations will be adhered to. Deviation from a treaty, its provisions, or the object and purpose will constitute an international wrongful act that will trigger an obligation to give reparations. Even if such an international obligation did not exist in customary law, most of the human rights treaties already listed above give express rights to an individual for relief.

Willingness to be held liable can be shown additionally through the signing of human rights treaties that afford an individual a right to relief for the violations of treaty provisions. If a State becomes a party to a treaty that stipulates that a State must give individuals a right to relief for any violation of the treaty, it is a clear manifestation that the State is willing to consent to those conditions. If the State then violates the treaty, the State by its consent, has already expressly consenting, if not implicitly, to give reparations for such violations.

Another matter to address is whether there is a timing conflict between when the acts occurred, the treaties that prohibit the act and give relief, and the effectuation of sovereign immunity. For example, what happens if a violation of a treaty occurred in 1945 and an

waiver based on many human rights treaties that grant reparations; it does not go on the notion of a *jus cogens* exception.)
individual is seeking redress in 2012? The law of immunity is procedural in nature.\textsuperscript{172} The timing of the acts are irrelevant in conjunction with the application of sovereign immunity in judicial proceedings.\textsuperscript{173} Applying the new formulated implied sovereign immunity rule that this paper posits would be appropriate in judicial proceedings today for acts committed in 1945.

e. An Implied Waiver of Germany’s Sovereign Immunity Could Have Been Substantiated in Jurisdictional Immunities

The broad question that now needs to be answered is whether Germany has implicitly waived its sovereign immunity by entering into human rights treaties. Put another way, has Germany engaged in a pattern of conduct that indicates its willingness to be held liable for its violations of the human rights of Italian victims between the years 1943 and 1945? The answer must be answered in the affirmative.

Following World War II, Germany entered into a number of bilateral, regional, and multilateral human rights treaties. Those treaties include: ICCPR\textsuperscript{174}, CAT\textsuperscript{175}, ICCEPD\textsuperscript{176}, and

\textsuperscript{172} Jurisdictional Immunities, supra note 6, at para 58; citing Arrest Warrant (Democratic Republic of Congo v. Belgium), I.C.J. Reports 2002, para.60.

\textsuperscript{173} Jurisdictional Immunities, supra note 6, at para 93.

\textsuperscript{174} Germany signed the ICCPR on 9 Oct 1968 and ratified it on 17 Dec 1973, codifying most of the HR Declaration, and making it binding international law on Germany.

\textsuperscript{175} Germany signed the CAT on 13 Oct 1986 and ratified it on 1 Oct 1990 making it binding international law on Germany.

\textsuperscript{176} Germany signed the ICCEPD on 26 Sep 2007 and ratified it on 24 Sep 2008 making it binding international law on Germany.
the ECHR\textsuperscript{177}. By ratifying these treaties, they committed themselves to honor the object and purpose of them and not violate any of the provisions contained within them. Such provisions include a prohibition on torture, inhuman treatment, slavery, forced labor, arbitrary detention, and the right to life.\textsuperscript{178} Germany was bound not to break those provisions. As to the current argument though, the main provisions we are interested in are those regarding the right to a remedy or reparations for the wrongful acts of a State.\textsuperscript{179} Germany has shown their willingness, by entering to these treaties, to be sued for reparations for the violations of the treaties. It has implicitly warranted the right to abrogate their immunity for those acts.

The fact that those acts were committed during an armed conflict by the armed forces of Germany is immaterial. The acts committed by the armed forces of Germany were in direct violation of the Geneva Convention. While the acts occurred before the signing of the Geneva Convention, they still constituted international wrongful acts under customary international law.

As stated previously\textsuperscript{180}, the ICJ declared in the \textit{Military Activities in Nicaragua} case that when these acts are committed, it is a violation of customary international law, and the obligation to give reparations is engaged and must be fulfilled. While sovereign immunity may not be waived

\begin{footnotes}
\footnote{177} Germany signed the ECHR on 4 Nov 1950 and ratified it on 5 Dec 1952, again codifying most of the HR Declaration, and making it binding international law on Germany.

\footnote{178} \textit{ICCPR}, at art 6-10 (Identical provisions are listed in the other treaties listed previously.)

\footnote{179} \textit{See HR Declaration}, at art.7; \textit{ICCPR}, at art. 2; \textit{CAT}, at art. 22; \textit{ICCEPD}, at art. 8(2) & art. 20(2); \textit{ECHR}, at art. 13.

\footnote{180} \textit{Supra} note 162.
\end{footnotes}
by acts committed by the armed forces of a State, they are implicitly waived when a State enters into general human rights treaties that give reparatory benefits to victims regardless of the nature of the actual act. Even though the acts were committed by Germany’s armed forces, and the acts were of such a heinous nature, the perpetrators of the act or the act itself is not absolving Germany of its sovereign immunity. In fact, it is the nature of Germany signing human rights treaties, and building the foundational blocks of customary international law, to generally give reparations for wrongful international acts committed by the State.

V. POLICY RATIONALE FOR IMPLICITLY WAIVING SOVEREIGN IMMUNITY

The judgment in *Jurisdictional Immunities* indicates an attempt, albeit a latent attempt, by the ICJ to reassure the States and the international community that sovereignty will not be infringed by another sovereign. While the concept of sovereignty is still vital to the independence of nations, its value is slowly diminishing over time as the States of the world quickly become interconnected and globalization continues to evolve. With the combined effects of States giving up some power to the international community and making promises to remedy individuals for violations of basic human rights, it is reasonable to assume that the time for finding an implicit waiver of immunity has arrived. This section will first discuss the common arguments for upholding immunity of foreign States in domestic courts. Next, the diminishing nature of sovereignty in a more intertwined global community will be discussed. Finally, the policy reasons for finding an implicit waiver of sovereign immunity will be analyzed.
Objectors to the idea of implicit waivers have many arguments. The debate over upholding immunity usually begins with respecting the UN Charter, which declares that every State will be independent and equal.181 States also agree not to interfere by force against the territory or political independence of another State.182 To do so, some argue, would be to invite retaliation from abroad.183 Such retaliation could take the form of holding the other State accountable in the foreign State’s domestic courts.184 Another popular objection to holding an implicit waiver of immunity is the potential flood of litigation.185 Opening the proverbial doors will most likely bring about more claims against States in domestic courts. While these may be prudent arguments, the diminishing nature of sovereignty and the increasing push for human rights for individuals appear to abrogate its validity.

Sovereignty is essential and inherent in every political community.186 The supreme and independent sovereign contains inherent power that signifies his “rightful or legitimate basis of

181 Supra note 9.

182 UN Charter, art. 2(4).

183 Adam C. Belsky, Mark Merva, Naomi Roht-Arriaza, Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law, 77 CAL. L. REV. 365, 404. (1989) (discussing the perplexing nature and scope of a sovereign state’s immunity from the jurisdiction of another state’s domestic courts and arguing that violations of peremptory norms constitute an implied waiver of immunity under the FSIA).

184 Id. at 404.

185 Id. at 405.

186 Kal Raustiala, Rethinking the Sovereignty Debate in International Economic Law, 6 J. INT’L ECON. L. 841, 842 (2003) (discussing the idea that sovereignty is threatened by the ongoing expansion of international economic institutions).
authority” over the State and its population.\textsuperscript{187} Sovereignty, itself, is a formal attribute.\textsuperscript{188} Many commentators have argued that the concept of sovereignty is threatened by the ongoing expansion of global governance.\textsuperscript{189} Indeed, when a State delegates any power allocation to the international level, via treaty, admission of a new rule of customary law, or by other State practice, that in turn alters that States’ sovereignty in some way.\textsuperscript{190}

The developing nature of human rights and peremptory norms have furthered diminished the power of States.\textsuperscript{191} The next inevitable step is to recognize that the States have implicitly waived its immunity for violations of human rights treaties. If allowed, this recognition would primarily allow redress of the wrongs committed and punishment of the wrongdoers.\textsuperscript{192} It would give victims of egregious violations of human rights a forum to argue the merits of their case.\textsuperscript{193} Violations of human rights are an international concern that does not deserve respect for diminished sovereign rights.\textsuperscript{194} The punishment and compensation for these acts serve a dual

\textsuperscript{187} Id. at 842.

\textsuperscript{188} Id. at 852.

\textsuperscript{189} Id. at 842.

\textsuperscript{190} Id. at 852.


\textsuperscript{192} Id. at 186-187.


\textsuperscript{194} Id. at 429.
purpose of condemning past violations and deterring future wrongful acts.\textsuperscript{195} Allowing immunity to continue for violations of treaty obligations, especially human right conventions, would send a message that those agreements do not need to be followed and basic human rights do not need to be protected or respected. It is no longer appropriate to allow a State to violate human rights with impunity in a time of universal agreement that those rights are paramount.\textsuperscript{196}

\section*{VI. CONCLUSION}

The push for promoting and extending human rights to individuals all over the world has been, for the most part, universally accepted and practiced. The right of the individual to life has been and continues to be paramount. Following that right, individuals should not be subjected to torture, slavery, forced labor, genocide, mass deportation, etc. These rights belong to the individuals, who after all, are the entities that international human rights law attempts to protect.

States use to enjoy absolute sovereign immunity. Through treaties, developing customary international law, international and domestic judicial decisions, and domestic legislation, this absolute immunity has slowly been eroded to allow for exceptions. The idea behind this is that there are circumstances when the sovereign should not be able to hide behind a cloak of immunity and deprive victims of a right to reparations. As evidenced in the preceding sections, another exception appears to have emerged, whether noticed or not. The Italian representative in

\textsuperscript{195} \textit{Supra} note 191, at 187.

\textsuperscript{196} \textit{Supra} note 193, at 431-432.
Jurisdictional Immunities did not argue this paper’s contention and it is therefore conceivable this is because the argument has not been seen in litigation previously.

Many more treaties exist in all levels of the international arena that give individuals rights for the wrongful acts of States. The ones listed within this paper are the most pertinent because they range from 1950-2009 in Germany’s ratification. This symbolizes that not only does Germany have a willing intent to give individuals a right to a remedy, but they have done this consistently for six decades.

The policy argument against an implied waiver of immunity will continue to exist despite this paper’s attempt to state that there is evidence to the contrary. States, as the main subjects of the international community and of international law, will continue to persist that no such waiver exists. After all, what entity would want to surrender such an invaluable defense? The idea that this implicit waiver would open the floodgates for other forms of litigation is plausible. However, if steps are taken by States to codify some sort of exception for these acts so that individuals can receive reparations then that argument is made void.

Additionally, while the territorial tort principle and *jus cogens* exceptions were defeated in Jurisdictional Immunities, it is the argument of this author that these exceptions be codified in an additional protocol to the UN Convention once the document is ratified. While some limitations may have to be attached to such exceptions, the aim should be to protect the rights of individual in times of peace or war.

In concluding, an implied waiver of sovereign immunity could and should have been found to exist in Jurisdictional Immunities. Germany had already consented to giving some sort
of reparations to Italian victims but purposely neglected a majority of them. Germany acted
against the spirit of international human rights when they killed, forcefully labored, and deported
individuals against their will during World War II. After the war, a less than acceptable effort
was made to make whole those victims despite the fact that Germany acknowledged the horrible
acts committed by its military. Not only did they break an international obligation to abstain
from committing violations of peremptory norms, but they broke their international obligation to
give reparations for those acts, and have continued to do so. Germany has entered into numerous
human rights treaties that specifically state that they should give reparations for the individuals
they injure through violations of those treaties; its time they should be forced to be held liable for
those obligations.