World War I was a watershed conflict. Apart from inaugurating total war, the end of the war saw an unsuccessful attempt to prise open the iron curtain of Westphalian sovereignty by individualizing criminal responsibility for violations of the emerging law of war. The punishment provisions of the peace treaties of Versailles and Sevres sought to limit the scope of the principle of sovereign immunity by punishing military and civilian officials, while at the same time extending universal jurisdiction to cover war crimes and crimes against humanity.

In a dramatic break with the past, and in a bid to build a normative foundation of human dignity, the chaos and destruction of World War I gave rise to a yearning for peace and a popular backlash against impunity for atrocity.

The war provoked criticism by many of both the outrageous behaviour by a government towards its own citizens (Turkey) and aggression against other nations (Germany). Both types of atrocity evoked demands for increased respect for humanity and the maintenance of peace.  

The devastation of the war provided a catalyst for the first serious attempt to crack the Westphalian notion of sovereignty. This dramatic new attitude was encapsulated in the enthusiasm for extending criminal jurisdiction over sovereign states, such as Germany and Turkey, with the aim of apprehension, trial and

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Westphalian sovereignty enshrined the internal and external autonomy of the State. The accompanying sovereign tenets of political independence and territorial supremacy enshrined the State's freedom of action and unlimited use of power internally, forbidding and exercise of jurisdiction by any State over issues and individuals within another State's territorial boundaries thus precluding external interference and unsolicited intervention. See Jackson Maogoto, *International Criminal Law and State Sovereignty: Versailles to Rome I* (New York: Transnational Publishers Inc. 2003)  

punishment of individuals guilty of committing atrocities through supranational trials. 1277

However the emerging commitment to human dignity was to be first derailed and then swept aside by resurgent nationalistic ambitions brewed in the cauldron of sovereignty and distilled by politics. The "iron curtain" of Westphalian sovereignty was the primary objection advanced by both Germany and Turkey, against Allied calls for the establishment of supranational tribunals to try the officials and personnel of these countries implicated in wartime atrocities. Both nations, in the light of these international efforts, strongly advocated against such a move, arguing that sovereignty over territory and authority over nationals, a sacrosanct principle of international law, was threatened if the proposed supranational tribunals proceeded.

The anticipated international penal process yielded to the demands of national sovereignty, which lead to sham national trials in Germany and Turkey after a major revision and scaling down of the defendant list in both countries. Subsequently, the German and Turkish regimes that gained power in the post-war era successfully relied on principles of national sovereignty to reject the authority of the European Powers to intervene in the domestic trials held in lieu of anticipated supranational trials.

While the envisaged international efforts to secure international criminal liability failed to materialize, important principles were established. Firstly, the 1919 Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties articulated crimes against humanity, and attempted to limit the previously solid conception of sovereign immunity that shielded Heads of State as well as officials from the reach of international law. Secondly, for the first time, the idea that the state did not hold exclusive criminal jurisdiction was challenged. Finally, the recognition of the need of international penal institutions to repress violations of international criminal law in the face of state recalcitrance

1277 The peace treaties of Versailles and Sevres envisaged liability for individuals even if their crimes were committed in the name of their states.
questioned the state’s exclusive right to legal competence over management of its affairs.

It took the Second World War, about two decades later, to spur states into giving international criminal law life and vitality. The surge of moral unrest over the unlimited right of states to go to war whenever they wanted to, coupled with political and economic chaos, provided the basis for focusing on international accountability through penal process. It was at the post-World War II trials at Nuremberg (and later at Tokyo) that the iron curtain of sovereignty was dramatically drawn back. The post-World War II trials were designed to change the anarchic context in which nations and peoples of the world related to one another. The rejection of "obedience to superior orders", “acts of state" and "sovereign immunity" for the first time exposed the state to inquiry into its freedom of action and law-making competence.

The Nuremberg and Tokyo trials are the visible symbol of the transition from the classical Westphalian system of state sovereignty to an international system based on the credo of "common interest" that surfaced in the middle of the last century. In a sense these trials represent the foundation of modern thinking about international law, with an emphasis on the maintenance of peace and the responsibility of the state and its officials to international standards. The Nuremberg and Tokyo trials of major war criminals were a landmark event in the development of international law. Besides infusing international law with fundamental moral principles in a manner not seen for centuries and giving birth to the modern international law of human rights, the trials also gave clear notice to the nations of the world that claims of absolute sovereignty must hereafter yield to the international community’s claim on peace and justice.

Nuremberg and Tokyo marked a paradigmatic shift from the externalisation of domestic norms under the statist Westphalian system of sovereignty to an international system determined to internalize international norms within the national sphere. It was at these post-World War II trials that unabashed claims of national sovereignty, stimulated by the nation-state system recognized at
Westphalia, were subjected to the test of international standards and universalist claims for peace and the sanctity of human rights. For the first time in history, at Nuremberg and later Tokyo, individuals who had abused power in violation of international law were held to answer in international courts of law for crimes committed during war in the name of their state. The Nuremberg judgment (echoed subsequently by the Tokyo judgment) clearly brought crimes against humanity from the realm of vague exhortation into the domain of positive international law. This generated the idea that grave and massive violations of human rights can become the concern of the international community, not just that of the individual state.

The decision by the Allies at the end of World War II to try major war criminals for violations of international law was a turning point in modern history concerning the relationship between individuals and international law. The lesson of Nuremberg, echoed at Tokyo, was that never again would atrocities in war or peace be carried out with impunity and that the world was determined to bring to account, individuals who carried out massive and heinous atrocities against other warring parties and civilians. The Nuremberg tribunal was not merely to establish that the rules of public international law should and do apply to individuals; it was also intended to demonstrate that the protection of human rights was too important a matter to be left entirely to states. This proposition was earlier enshrined in the Preamble and Article 55 of the United Nations ("U.N.") Charter.

The post-World War II trials were a pivotal event in international law. In some ways they marked a return to venerable doctrines of natural justice that had fallen into disuse and disfavour with the rise of legal positivism starting in the eighteenth century. Naturalistic doctrines were resurrected and infused into the


1279 The UN. Charter was signed on June 26, 1945 (and entered into force on October 24, 1945). Shortly after the San Francisco Conference which gave birth to the U.N., representatives of the four Major Allied Powers (Great Britain, France, the U.S.S.R. and the U.S.) met in London on 26 June 1945 to negotiate on the law and procedures according to which the Nazi leaders ought to be prosecuted, tried and punished resulting in the adoption of the Nuremberg Charter on August 8, 1945.
new thought and philosophy that was behind the decision to hold the trials. The belief in natural law helped to ensure that the tribunals would apply international law in the interests of fundamental moral values. This reversed the nineteenth century trend (the heyday of legal positivism), during which natural law lost much ground as positivism gained sway and infused international law with the agenda of maximising state sovereignty and cutting back concerns with following any fundamental precepts of morality.

The significance of the post-World War II trials is captured by Justice Robert H Jackson, Chief Prosecutor at Nuremberg. Writing in 1949, he described the Nuremberg international trials as the twentieth century's most "definite challenge" to the "anarchic concepts of the law of nations." He argued that Nuremberg was the first step towards limiting the unfettered discretion of sovereign states to resort to armed force. Government officials could no longer credibly claim legal immunity based upon the act of state and superior orders defenses. Jackson noted that international institutions were so undeveloped and in decline that, absent the Nuremberg trial, it is unlikely that these "catastrophic doctrines" would have been challenged and modified.

11.1 THE COLD WAR: A NOBLE CRUSADE IN STORMY WATERS?

The "internationalization" of the legal status of the human being became one of the most prominent features of the post-World War II period after the Nazi and fascist violations of elementary human rights. The post-World War II era was a period in which the freedom and independence of the state in law-making was subjected to limitations by international law in respect of certain international interests. What had been unthinkable before World War II became

1281 Id.
1282 Id.
1283 Id at 813-814.
commonplace. The dozens of human rights and humanitarian instruments adopted after the post-World War II trials are based on the premise that sovereign states are not free to abuse their own citizens with impunity. The instruments are designed to secure adherence to the international human rights, recognized at the post World War II international trials. Besides demonstrating that legal values arising from international law impose obligations directly on the state, these instruments are a sign that the citizen is not subject only to the dictates of the national sovereign but a subject of the dictates of international law as well. Even as international human rights and humanitarian law instruments marked the important steps by the international law to limit sovereignty, the Cold War was to tie the issue of sovereignty to ideological and revolutionary agendas. The world experienced the third struggle for hegemonic domination of the twentieth century hot on the heels of the conclusion of the second. The U.S.S.R. increasingly saw the notion of "restriction of sovereignty" and the conceptions of "common interest" and "common good" as nothing more than a diplomatic screen hiding the predatory aims of western imperialist powers.1285 Coupled with this stance by one of the world's only two superpowers was the outcome of the decolonisation and self-determination process which saw a radical increase in internationally recognized claims to national state sovereignty. Vast numbers of newly independent sovereign states were weak in terms of national integration and foreign relations. This led to widespread reification of sovereignty in the vast numbers of newly independent states, justified under the internal affairs domestic jurisdiction clause of the U.N. Charter.1286 These states sought to claim widespread immunity from international duties and obligations (especially in the human rights sphere) and expanded sovereign rights as a form of compensation for the wrongs of colonial-imperialist exploitation and hegemony. The net effect of these factors was to strengthen sovereignty considerations, as the U.N. became a ground for cultivating the agenda of nationalism brought to the fore with the appearance of the "Third World" as a force in the years after World War II.

1286 UN. Charter, supra note 13, art. 2(7).
With sovereignty viewed as a vital element of global international society, the power politics of the Cold War era served to curtail the expected benefits from the limitation of sovereignty articulated at the post-World War II trials. Consequently, an increasingly evident contradiction in the Cold War appeared. International law continued to pursue its original, and still topical, ambition which is to regulate the relations between states in their international dimensions while at the same time tending more and more to defer to the municipal dimension of states and their domestic affairs. The interpenetration between international dimensions and national aspects in inter-state relations, against a background of rivalries in a divided world, was a feature of the Cold War that threatened to expand and strengthen state sovereignty, which had undergone a major battering at the Nuremberg and Tokyo trials.

The Cold War largely put an end to the spurt of international judicial activity inaugurated at Nuremberg and Tokyo and contributed to the preservation of a statist international order. Many states were reluctant to enthusiastically embrace any form of international penal process and displayed a great deal of ambivalence in the normal conduct of their foreign affairs. Though a series of conflicts in the Cold War era set the arena for violations of international criminal law, the lack of a systematic international enforcement regime contributed to the lack of respect for the legitimacy of the international justice and even to a degree of cynicism about it. With lack of state cooperation, the blood-soaked Cold War era was characterized by impunity. The ad hoc international criminal tribunals in the 1990s represented an international effort to put in place an international enforcement regime, the lack of which had helped ensure impunity during the Cold War era. The War Crimes and Crimes against Humanity Courts at Nuremberg were the forerunners at the heart of the United Nations Security resolutions of the 1990s, which created the two ad hoc international criminal tribunals.
11.2 POST-COLD WAR: OLD SOVEREIGNTY, NEW SOVEREIGNTY

The creation of the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda raised questions concerning the appropriate relationship between these international ad hoc penal institutions and national courts. This is in view of the fact that traditionally sovereignty over territory and authority over nationals are two of the most basic aspects of statehood, and therefore the territorial and nationality principles are more fundamental than other competing principles of jurisdiction. While the statutes of the ad hoc international criminal tribunals recognize that national courts have concurrent jurisdiction, they clearly assert the primacy of the international tribunals, an extraordinary jurisdictional development. Though states, by definition, have international independence, "combined with the right and power of regulating [their] internal affairs without foreign dictation," the weakening of its denotation of full and unchallengeable power over territory and all the persons therein, is illustrated by the establishment of the two ad hoc international criminal tribunals. It was not lost on the 'international community that concessions to the ideals of international justice were a necessity. This was in order to create effective international mechanisms necessitating trumping the wishes of many states insisting upon preserving the totality of their sovereign prerogatives.

The new balance achieved between the jurisdiction of national courts and that of the ad hoc international criminal tribunals marks the end of an era when the exercise of criminal jurisdiction fell within the unfettered prerogatives of the sovereign state. The Security Council created each of the two existing international criminal tribunals ad hoc as an extraordinary response to a specific and narrowly defined threat to international peace and security. To enable them to address these threats, it granted them unprecedented primacy over the jurisdiction of all national courts. The practice and application of primacy, in both the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"), foreshadowed the political and legal disputes over the creation of a permanent International Criminal Court.

("ICC") and the possible contours of its jurisdiction during the Rome Diplomatic Conference.

The dilemma of building agreement among state parties without diluting core principles essential to an effective international penal regime coloured the Rome conference. The process of making the Rome Statute was a battleground for supranational and international regimes. The challenge was the need for a trade-off between achieving consistency and building a consensus. This was arguably more pronounced because the state was being called upon to reconfigure certain key aspects of its domestic jurisdiction as well as state crafted international regimes in favour of a functioning international regime. Consultations, consensus and compromise were at the heart of the Statute making process.

The Rome Statute embodies a carefully created compromise between a state centred idea of jurisdiction, and a more inclusive international vision. In its extreme manifestation, the state centred idea would uphold a state's exclusive jurisdiction to prosecute and try its own citizens for war crimes, genocide, crimes against humanity, and to prosecute citizens of other states who commit such acts on the territory of the forum state. An inclusive vision would promote the idea of universal jurisdiction, whereby individuals of any nationality could be tried for certain crimes by any state acting on behalf of humanity as a whole. The ICC follows a middle path. The Rome Statute assigns primary jurisdiction to the ICC's Member states. However, in ratifying the Rome Statute and becoming members of the ICC, states agree that, if they are unwilling or unable to carry out their

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1289 Id., at 215.
1290 In the articulate encapsulation of this triad, Professor M Plachta states: Triple "C" was a dominant tone at the Conference. Consultations-Consensus-Compromise describes both the organisational framework and the tools that were adopted at the Conference. While the first element is procedure-oriented, the last two are result-oriented, with one important distinction between them. The second component sets the threshold, whereas the third determines the contents of the final result. The first two elements out of this triad facilitate and encourage achieving the last one. That compromise will be a matter of "life and death" became apparent at the very beginning of the Conference, when the delegates started presenting their positions specified in instructions from their capitals. Michael Plachta, Contribution of the Rome Diplomatic Conference for the Establishment of the ICC to the Development of International Criminal Law 5 U.C. Davis J. Int'l L. & Pol'y 181, 186-187 (1999).
obligation to investigate and prosecute these crimes, the ICC has "complementary" jurisdiction to do so in their stead.

The ICC will provide an indispensable backup to national jurisdictions in deterring, investigating, and prosecuting serious international crimes. The momentum behind the ICC testifies to the increasing realisation by countries that international norms may require international enforcement mechanisms, especially where individual perpetrators beyond the reach of their own domestic courts are concerned. The frequent observation that an individual who commits one murder may face life imprisonment, but another who murders thousands may enjoy impunity, has driven efforts to rectify this incongruity, especially insofar as it constitutes a by-product of an international system of sovereign states. The ICC will eliminate the need to create additional ad hoc international tribunals when domestic legal systems lack the will or ability to investigate and prosecute these crimes themselves.

A An Ageing Ideology Facing a New Reality

Sovereignty has several basic difficulties - some conceptual, and some of an empirical nature. From a conceptual point of view, the term has contradictory characteristics of being both reified and porous. All too often though, the sovereignty doctrine is an "impenetrably rigid juridical artefact as states incant the ritual of brooking no interference with their internal affairs." The constitutional position of the existing ad hoc international criminal tribunals, as well as the international criminal court, is instructive. The common interest of sovereign entities is better protected when exclusive parochial interests of reified sovereignty are bypassed in the interests of mankind. The basis for this is through mapping and locating sovereignty more precisely within the context of

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1291 Signing, ratifying, and implementing the ICC provides states with an opportunity to review their existing criminal procedures, and to ensure that these comport with international standards such as those relating to due process, the protection of victims and witnesses, and jurisdiction over internationally recognised crimes.

1292 Operational constitutions often exhibit the characteristics of being reified and porous at the same time.

global power and constitutive processes. Professor Winston Nagan postulates that:

To strengthen the conceptual and doctrinal basis of humanitarian law we must purge the sovereignty precept of the conceptual and normative confusion it generates. We need more precision about the nature of the specific problems in which sovereignty is invoked as a sword or a shield, a clearer perception of the common and special interest it sometimes seeks to promote, protect or compromise, and a clearer delineation of its precise role in the constitutional order and promise of the UN Charter. We must map and locate sovereignty more precisely within the context of global power and constitutive processes. ¹²⁹⁴

Since the end of the Cold War, international law has come to recognize the permissibility of intervention in circumstances other than in response to a nation's external acts of aggression. This growth has focused primarily on the violation of basic human rights norms as a basis for intervention. Current consensus indicates that a state's violation of its citizens' most basic rights may permit intervention into its affairs. Indeed, "international law today recognizes, as a matter of practice, the legitimacy of collective forcible humanitarian intervention, that is, of military measures authorized by the Security Council for the purpose of remedying serious human rights violations."¹²⁹⁵

State sovereignty, which for centuries was conceptualized as “the absolute power of the state to rule,"¹²⁹⁶ has opened up by recognition that the state may be responsible for a breach of certain international obligations. Among these obligations, a state must provide for the general safety of the human person and may not permit widespread human rights violations against its citizens, such as

¹²⁹⁴ Id., at 146.
the commission of genocide, crimes against humanity, slavery, and apartheid.\textsuperscript{1297} Though state responsibility and individual criminal responsibility are separate concepts under international law,\textsuperscript{1298} a state that undertakes the prosecution of a foreign citizen for crimes committed in a foreign state assumes that state's domestic jurisdiction. In this regard, the author concurs with Anthony Sammons conclusion that:

\begin{quote}
...the valid assertion of universal jurisdiction as the sole basis for the prosecution of international crimes requires a conclusion that the State of the perpetrator's nationality, or of the crime's commission, either has breached or failed to enforce its international obligations to such a degree that partial assumption of its domestic jurisdiction is permissible.\textsuperscript{1299}
\end{quote}

Sammons postulation is especially relevant in view of the fact that classical Westphalian sovereignty hinders the development of a more rational approach to the international, constitutional allocation of competence in controlling and regulating criminal behaviour that requires effective international community intervention. Further elaboration of Sammons's view is encapsulated in Professor Nagan's concise observation that:

\begin{quote}
From an operational perspective, the practical question generally has been how far a State may go in establishing the external reach of its criminal jurisdiction under international law. The phrase "under international law" suggests some accommodating prudential limit of the reach of a state's competence from the perspective of other States whose interest may be compromised when a State allocates for itself the right to try the nationals of other States under its own criminal justice standards.\textsuperscript{1300}
\end{quote}

\textsuperscript{1297} Id., at 7 (citing art 19, §3(c) of the Draft Articles on State Responsibility).
\textsuperscript{1298} Id., at 9.
\textsuperscript{1300} Nagan, supra note 27, at 137.
The destructive impact of massive and systematic human rights violations impinges directly on important world order values which no state has dared suggest are not common and shared. If human rights are considered serious values and matters of international concern, effective policing is required from local to global levels in the name of the world community as a whole. A complete denial of the principles of human rights and humanitarian law, especially when grave breaches of that law are involved, represents a rejection of fundamental human rights precepts. This may point to an alternative normative order that essentially disparages the basic principle of human dignity.

Though sovereignty in the external or international context continues to be strong, it is not as absolute as its definition suggests. No state, however powerful, has been able to shield its affairs completely from external influence. “Although sovereignty continues to be a controlling force affecting international relations, the powers, immunities and privileges it carries have been subject to increased limitations.” These limitations often result from the need to balance the recognized rights of sovereign nations against the greater need for international justice.

Since one of the main roles of a sovereign state is to provide security and protection for its own people. The author concurs with McKeon’s view that a state forfeits its sovereignty when its actions are universally condemned. From a legal perspective, each instance of enforcement serves to legitimize

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1301 See generally Michael Ross Fowler & Julie Marie Bunck, Law, Power and the Sovereign State: The Evolution and Application of the Concept of Sovereignty 41-45 (University Park, PA.: Pennsylvania State University Press 1995) (explaining that sovereign state's failure to protect its inhabitants is tantamount to transferring its sovereign power to one who will).
norms of international criminal law. These norms reflect a collective judgment by all countries that certain acts are by their very nature criminal. The enforcement of criminal law is innately tied to a nation's sovereignty and it can be argued that by enforcing international criminal law governments are not ceding sovereignty but instead are exercising sovereignty.

... if the role of the sovereign is to provide security for its subjects, and effective means present themselves for increasing security through international law, then the role of the sovereign must be to participate in the development of that law. It is not an abdication of sovereign authority to delegate functions and authority to a global system of law; it is in many cases an abdication of that authority not to do so.\(^\text{1308}\)

If international law is to be relevant in the twenty-first century, it must acknowledge the principal social contract focus on the relationship between the citizen and the state for purposes of defining sovereignty in both national (internal) and international (external) relations. In place of a social contract of states, this redefinition of sovereignty recognizes that international law has developed direct links between the individual and international law. Consequently, an active role on the part of the international community in promoting human rights and humanitarian norms is consistent with a sovereign's responsibility to protect its people, and enhances rather than detracts from this notion of sovereignty.\(^\text{1309}\) Patricia McKeon notes that:

Although a nation cedes some sovereignty when it becomes a party to an international agreement, it also receives certain protections which broaden its sovereignty. If sovereignty is viewed as the power of a nation to protect its citizens, as it should, fortifying itself

\(^{1308}\) Brand, supra note 38, at 1696.

with the aid of the international community only enhances this objective.\textsuperscript{1310}

McKeon's observation is echoed and amplified by the Report of the Secretary General's High-level Panel on Threats, Challenges and Change.

The Report firstly endorses the emerging norm of a \textit{responsibility to protect} civilians from large-scale violence, a responsibility that is held, first and foremost, by national authorities.\textsuperscript{1311} It however, goes on to note that:

\begin{quote}
When a State fails to protect its civilians, the international community then has a further responsibility to act, through humanitarian operations, monitoring missions and diplomatic pressure-and with force if necessary, though only as a last resort. And in the case of conflict or the use of force, this also implies a clear international commitment to rebuilding shattered societies.\textsuperscript{1312}
\end{quote}

Support for the Report is found in the reality that the U.N. Charter is part of a world constitutional instrument and hence the formal basis of an international rule of law. One of the Charter's primary purposes is to constrain sovereign behaviours inconsistent with its key precepts. Professor Nagan notes that: "The term 'sovereignty' in the UN Charter is most visible in the context of sovereign equality."\textsuperscript{1313} However he goes on to observe that: "Outside this context, the term is rarely used in the text of the Charter. Indeed, Charter Article 2(7) uses the term 'domestic jurisdiction' as a precept that seems intentionally less inclusive than the term 'sovereign' suggests."\textsuperscript{1314} This particular interpretation provides the basis for the author to contend that it seeks to demonstrate de-linkage of the external nature of sovereignty from its internal contours and thus shed the all-encompassing conception that is frequently and regularly attributed to

\begin{footnotes}
\textsuperscript{1310} McKeon, supra note 39, 542-43.
\textsuperscript{1311} Report of the Secretary General's High-level Panel on Threats, Challenges and Change, supra note 2, at 4.
\textsuperscript{1312} Id., at 4.
\textsuperscript{1313} Nagan, supra note 27, at 146.
\textsuperscript{1314} Id., at 146.
\end{footnotes}
Wesphalian sovereignty. "Commentaries that disregard state sovereignty as an eradicable hindrance to denationalization fail to recognize the possible benefits to be gained by simply redrawing the balance between sovereignty's empowering and limiting aspects."1315

Recent international legal theory supports the view of sovereignty as an "allocation of decision-making authority between national and international legal regimes."1316 A state's total "bundle" of sovereign rights remains extensive, as sovereignty remains the pre-emptive international norm. However, the international legal regime obligates all states to maintain a minimum standard of observation of human rights. By the existence of this minimum standard, international law imposes obligations which a state must meet continuously in order to maintain legitimacy under the international system. Elaborating on this new sovereignty reconceptualisation, Kurt Mills asserts that:

[A state's] rights and obligations come into play when a State, or at least certain actions of a State, has been found to be illegitimate within the framework of the New Sovereignty. That is, when a State violates human rights or cannot meet its obligations vis-à-vis its citizens, those citizens have a right to ask for and receive assistance and the international community has a right and obligation to respond in a manner most befitting the particular situation, which may involve ignoring the sovereignty of the State in favour of the sovereignty of individuals and groups.1317

The significance of the assertion above is captured in Sammons observation that: "when a state instigates or acquiesces in the commission of serious violations of international human rights and humanitarian norms, it exceeds its

allocation of authority as a matter of law.” Sammons goes on to note that this position recognizes that a state's sovereign rights with "regard to the internal treatment of its population are not absolute and, by implication, states are subject to international oversight.” It would appear, that the evolution of sovereignty and the increasing need for international justice have now converged. This in turn means that the future development of international criminal law hinges upon the continuing evolution of this paradigm.

When Sulaiman Al-Adsani traveled from the United Kingdom to Kuwait to repel Saddam Hussein's invasion in 1991, he never dreamed he would depart with bruises and burns inflicted by the very government he had sought to defend. According to Al-Adsani, his troubles began when he was accused of releasing sexual videotapes of Sheikh Jaber Al-Sabah Al-Saud Al-Sabah, a relative of the emir of Kuwait, into general circulation. After the first Gulf war, with the aid of government troops, the sheikh exacted his revenge by breaking into Al-Adsani’s house, beating him, and transporting him to a Kuwaiti state prison, where his beatings continued for days. Al-Adsani was subsequently taken at gunpoint in a government car to the palace of the emir’s brother, where his ordeal intensified. According to Al-Adsani, his head was repeatedly submerged in a swimming pool filled with corpses and his body was badly burned when he was forced into a small room where the sheikh set fire to gasoline-soaked mattresses.

Following his return to the United Kingdom, Al-Adsani brought suit against the government of Kuwait in England’s High Court seeking damages for the physical and psychological injury that had resulted from his alleged ordeal in Kuwait. The court dismissed the suit for lack of jurisdiction, holding that Kuwait was entitled to foreign state immunity under the UK State Immunity Act, 1978. Al-Adsani then appealed the decision to the English Court of Appeal but again lost on grounds of state immunity.

1318 Sammons, supra note 33, at 121.
1319 Id., at 122.
After Al-Adsani was refused leave to appeal by the English House of Lords, he filed an application with the European Court of Human Rights (ECHR), arguing principally that the United Kingdom had failed to protect his right not to be tortured and had denied him access to legal process. Al-Adsani again lost, but he convinced many of the Court’s judges to advocate an increasingly popular legal theory, the “normative hierarchy theory,” aimed at challenging seemingly unjust outcomes such as these. Under the normative hierarchy theory, a state’s jurisdictional immunity is abrogated when the state violates human rights protections that are considered peremptory international law norms, known as jus cogens. The theory postulates that because state immunity is not jus cogens, it ranks lower in the hierarchy of international law norms, and therefore can be overcome when a jus cogens norm is at stake. The normative hierarchy theory thus seeks to remove one of the most formidable obstacles in the path of human rights victims seeking legal redress.

The recent emergence of the normative hierarchy theory on the international law scene has sparked significant controversy among jurists and publicists. The ECHR’s treatment of the issue in Al-Adsani v. United Kingdom exemplifies the spirited debate. While recognizing that the prohibition of torture possesses a “special character” in international law, the ECHR rejected the view that violation of such a norm compels denial of state immunity in civil suits. However, the verdict evoked opposing commentary on the normative hierarchy theory from various ECHR judges. On the one side, Judges Matti Pellonpää and Nicolas Bratza concurred with the decision and renounced the theory on practical grounds. They reasoned that if the theory were accepted as to jurisdictional immunities, it would also, by logical extension, have to be accepted as to the execution of judgments against foreign state defendants, since the laws regarding execution, like state immunity law, are arguably not jus cogens either. Consequently, acceptance of the normative hierarchy theory might lead to execution against a wide range of state property, from bank accounts used for
public purposes to real estate and housing for cultural institutes, threatening “orderly international cooperation” between states.

On the other side, Judges Christos Rozakis, Lucius Caflisch, Luzius Wildhaber, Jean-Paul Costa, Ireneu Cabral Barreto, and Nina Vajie dissented and advocated resolution of the case on the basis of the normative hierarchy theory. They wrote: “The acceptance... of the jus cogens nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions.” Thus, the minority concluded that Kuwait could not “hide behind the rules on State immunity to avoid proceedings for a serious claim of torture made before a foreign jurisdiction.”

The difference of opinion in the Al-Adsani case foreshadows the coming theoretical clash regarding the most appropriate and effective means of enforcing human rights law against foreign states in national proceedings. Since its inception just over a decade ago, the normative hierarchy theory has amassed notable support among scholars and jurists alike. Despite its growing popularity, however, the theory has never been comprehensively tested. To attempt to fill this void, this article offers a critical assessment of the normative hierarchy theory and concludes that the theory is unpersuasive because it rests on false assumptions regarding the doctrine of foreign state immunity.

The doctrine of foreign state immunity, like most legal doctrines, has evolved and changed over the last centuries, progressing through several distinct periods. The first period, covering the eighteenth and nineteenth centuries, has been called the period of absolute immunity, because foreign states are said to have enjoyed complete immunity from domestic legal proceedings. The second period emerged during the early twentieth century, when Western nations adopted a restrictive approach to immunity in response to the increased participation of state governments in international trade. This period was marked by the
development of the theoretical distinction between acta jure imperii, state conduct of a public or governmental nature for which immunity was granted, and acta jure gestionis, state conduct of a commercial or private nature for which it was not. This distinction rested on the growing notion that the exercise of jurisdiction over acta jure gestionis did not affront a state’s sovereignty or dignity. Since applying the public/private distinction proved difficult for many courts, some states, particularly the common-law countries, developed a functional variation on the restrictive approach in the 1970s and 1980s, replacing that hazy distinction with national immunity legislation.

One of the more vexing topics in international law, state immunity is fraught with complexity and uncertainty, which the normative hierarchy theory does not adequately address. The theory operates conceptually on the international law level, as one norm of international law, jus cogens, trumps another, state immunity, because of its superior status. The theory thus assumes that state immunity in cases of human rights violations is an entitlement rooted in international law, by virtue of either a fundamental state right or customary international law. However, both assumptions are false. State immunity is not an absolute state right under the international legal order. Rather, as a fundamental matter, state immunity operates as an exception to the principle of adjudicatory jurisdiction. Moreover, while the practice of granting immunity to foreign states has given rise to a customary international law of state immunity, this body of law does not protect state conduct that amounts to a human rights violation. These realities yield the important conclusion—one that the normative hierarchy theory ignores—that, with respect to human rights violations, the forum state, not the foreign state defendant, enjoys ultimate authority, by operation of its domestic legal system, to modify a foreign state’s privileges of immunity.

This article, while critiquing the normative hierarchy theory, establishes a solid theoretical foundation on which human rights litigation can proceed. The theory of restrictive immunity, adopted by most states, draws the line between immune
and nonimmune state conduct roughly in accordance with the public (imperii)/private (gestionis) distinction. However, the original aim of state immunity law was to enhance, not jeopardize, relations between states. This article contends that international law requires state immunity only as to state activity that collectively benefits the community of nations. Thus, where state conduct is clearly detrimental to interstate relations but still protected by domestic state immunity laws, the restrictive approach is inconsistent with the strictures of international law and should be amended. The most obvious example of this kind is where state immunity bars claims against a foreign state brought in a forum state for the murder, torture, or victimization of citizens of the forum state. In such circumstances, foreign states are afforded immunity protections solely as a matter of domestic law and their entitlement to immunity is revocable on the basis of the forum state’s right to exercise adjudicatory jurisdiction over the dispute.

Some have observed that the doctrine of foreign state immunity is poised on the cusp of another period of doctrinal development—one in which a further restriction of immunity will accrue in favor of human rights norms. Such an advancement is welcome. However, it should proceed not on the basis of the normative hierarchy theory, which fails to reflect the true nature and operation of the doctrine of foreign state immunity, but, rather, on the basis of a theory of collective benefit in state relations.

The normative hierarchy theory proceeds on the assumption that state immunity in cases of human rights violations is an entitlement of states that derives from international law. Indeed, the centerpiece of the theory is a proposed hierarchy of international legal norms, which resolves the conflict between jus cogens and state immunity in favor of the former. This hierarchy, quite clearly, operates on a purely international level under the theory that the core interests of the community of states, enshrined in jus cogens, outweigh the individual interests of any one state, i.e., immunity from foreign domestic proceedings. As at present
there is no universally accepted multilateral treaty to govern state immunity law, the normative hierarchy theory must rest on the assumption that state immunity is either the product of a fundamental principle of international law—a principle that arises from the very structure of the international legal order—or a rule of customary international law.

11.3 STATE IMMUNITY AND FUNDAMENTAL PRINCIPLES OF INTERNATIONAL LAW

The original conflict of principles. The doctrine of foreign state immunity was born out of tension between two important international law norms—sovereign equality and exclusive territorial jurisdiction. The United States Supreme Court's decision in The Schooner Exchange v. McFaddon, widely regarded as the first definitive statement of the doctrine of foreign state immunity, presents the classic example of this theoretical conflict. In 1812, while sailing off the American coast, a commercial schooner, the Exchange, owned by two citizens of Maryland, was seized by the French navy. By general order of the emperor Napoleon Bonaparte, the French navy converted the schooner into a ship of war. When bad weather forced the Exchange into the port of Philadelphia, the original owners brought an in rem libel action against the ship for recovery of their property. The French government resisted the action, arguing that, as a ship of war, the Exchange was an arm of the emperor and was thus entitled to the same immunity privileges as the emperor himself.

On appeal to the Supreme Court, Chief Justice John Marshall identified the theoretical dilemma at issue. On the one hand, he observed, international law dictated that “[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute.” According to this long-established principle, the moment the Exchange entered U.S. territorial waters off the eastern seaboard, it became subject exclusively to the national authority of the U.S. government, an authority that encompassed the U.S. district court's initiation of adverse legal
proceedings against it. On the other hand, Justice Marshall took notice of another fundamental principle of international law: that the world is composed of distinct nations, each endowed with "equal rights and equal independence." This principle of sovereign equality, he believed, discouraged one sovereign from standing in judgment of another, coequal sovereign’s conduct. If the Exchange had been converted, as the French government argued, into an arm of the French emperor (and was thus a direct extension of his sovereignty), then the United States, as France’s equal under international law, would be remiss in adjudging the ship’s ownership through its courts. International law thus appeared simultaneously to grant the United States authority to adjudicate a dispute over property present within its territory and to prohibit the exercise of this jurisdiction because that property now purportedly belonged to a foreign government.

The conflict of principles in The Schooner Exchange resulted directly from what Sompong Sucharitkul has described as “a concurrence of jurisdictions… over the same location or dimension.” Normally, the principles of territorial jurisdiction and sovereign equality work individually-and often collectively-to promote order and fairness in the international legal system. The former serves to delineate each state’s authority to govern a distinct geographical area of the world, while the latter guarantees to all states, regardless of size, power, or wealth, equal capacity for rights under international law. In The Schooner Exchange, however, these principles were at odds because two nations, the United States and France, asserted their sovereign “jurisdiction,” or authority, to settle the dispute over the ship’s ownership. The United States claimed the right to exercise jurisdiction because of the physical presence of the schooner in U.S. territory. France, in stark contrast, argued that the conversion of the schooner fell within the ambit of the emperor’s power and thus, by virtue of its sovereign character, could not be reviewed in U.S. courts.
This clash of authority-and, in turn, that of the associated international law principles-is not confined to facts, such as those in The Schooner Exchange, that involve the straightforward transfer of sovereign property, such as a ship of war, to the territorial jurisdiction of another state. Rather, the conflict arises any time a forum state seeks legitimately to exercise its right of jurisdiction under international law over a foreign state defendant, regardless of the physical location of the foreign state’s representatives. Thus, the most relevant example for this study arises when a plaintiff sues a foreign state in domestic proceedings for alleged human rights abuses that occurred outside the forum state. Here, too, the authority of the forum state to adjudicate the dispute, hereinafter referred to as “adjudicatory jurisdiction,” is at loggerheads with the principle of sovereign equality. This disparity is usefully borne in mind because it means that the original clash of principles, as identified in The Schooner Exchange, and, more important, its resolution, as proposed by Justice Marshall and discussed below, provide a workable theoretical framework for resolving a wide range of current problems of state immunity. Competing rationales and their implications for state immunity. The doctrine of foreign state immunity emerged from the theoretical conflict described above. Two leading rationales explain the legal source of the doctrine. One asserts that state immunity is a fundamental state right by virtue of the principle of sovereign equality. The other views state immunity as evolving from an exception to the principle of state jurisdiction, i.e., when the forum state suspends its right of adjudicatory jurisdiction as a practical courtesy to facilitate interstate relations. Not surprisingly, these two rationales-like the principles of international law that they emphasize-find themselves in deep conflict. Moreover, each gives rise to vastly different implications for the nature and operation of the doctrine of foreign state immunity. The traditional starting point for the view that foreign state immunity is a fundamental state right is the maxim par in parem non habet imperium, meaning literally “An equal has no power over an equal.” Theodore Giuttari aptly explains the maxim’s historical origins in the classic period of international law:
In this period, the state was generally conceived of as a juristic entity having a distinctive personality and entitled to specific fundamental rights, such as the rights of absolute sovereignty, complete and exclusive territorial jurisdiction, absolute independence and legal equality within the family of nations. Consequently, it appeared as a logical deduction from such attributes to conclude that as all sovereign states were equal in law, no single state should be subjected to the jurisdiction of another state.

Thus, according to the “fundamental right” rationale, par in parem non habet imperium is simply a specific application of the general principle of sovereign equality. Despite the fact that modern international law has largely discarded the classic notion of inherent state rights, the “fundamental right” rationale has exhibited surprising resiliency. The Italian Corte di cassazione has opined, for example, that state immunity is “based on the customary principle par in parem non habet jurisdictionem, that has received universal acceptance.” The Polish Supreme Court found that “the basis of the immunity of foreign States is the democratic principle of their equality, whatever their size and power, which results in excluding the jurisdiction of one State over another (par in parem non habet judicium).” Scholars, too, have embraced this rationale. An early edition of Oppenheim’s International Law, for example, described the foundations of state immunity as a “consequence of State equality,” with reference to the maxim par in parem non habet imperium.

In recent history, Communist publicists have been among the strongest supporters of the “fundamental right” rationale, which they found an attractive response to the emergent theory of restrictive state immunity, a theory that affords no immunity for acts of a commercial or private nature. The restrictive view was antithetical to the prevailing socialist philosophy, which held that politics and trade were inseparable aspects of the socialist state; in essence, a socialist state acted qua state in all its dealings. M. M. Boguslavskij, the Russian scholar, thus rejected the notion that a state could surrender its sovereignty, and with it its
right of state immunity, simply by engaging in commercial or private activity. He, like many of the socialist scholars, adhered to the “fundamental right” view.

Of particular interest to this study are the implications of the “fundamental right” view regarding the nature and operation of state immunity. Here, Professor Sucharitkul’s comments are illustrative. In resolving the clash of norms inherent in problems of state immunity, he concludes: “It has become an established rule that between two equals, one cannot exercise sovereign will or power over the other, ‘Par in parem non habet imperium.’ ” While Sucharitkul acknowledges that the principle of territorial jurisdiction is a basic principle of international law, he emphasizes a state’s right to sovereign equality. Thus, according to Sucharitkul, the principle of state jurisdiction must give way to the principle of sovereign equality to effectuate a state’s right of immunity. This view, if correct, presents substantial obstacles to human rights litigation, as plaintiffs must contend with and overcome a state right to immunity, perhaps even of a fundamental nature.

According to another view, state immunity arises not out of a fundamental state right but, rather, as an exception to the principle of state jurisdiction. On this theory, state immunity is ascribed to “practical necessity or convenience and particularly the desire to promote good will and reciprocal courtesies among nations.” Clearly, this aim largely influenced Justice Marshall’s opinion in The Schooner Exchange, where he recognized that “intercourse” between nations and “an interchange of those good offices which humanity dictates and its wants require” foster “mutual benefit.” States obtain such benefits, according to Justice Marshall, by means of their exclusive territorial jurisdiction. In particular, he noted that “all sovereigns have consented to a relaxation in practice… of that absolute and complete jurisdiction within their respective territories which sovereignty confers.” Justice Marshall went on to observe that the forum state could advance international affairs by granting a foreign sovereign “license” to conduct its affairs in the forum state. Such license was often conferred as part of a bilateral arrangement by which the foreign sovereign would afford reciprocal
treatment to the representatives of the forum state when present in the foreign sovereign’s territory. The effect of this “relaxation” of jurisdictional authority, as Justice Marshall described it, was to permit a foreign sovereign, together with his representatives and property, to enter and operate within the forum state without fear of arrest, detention, or adverse legal proceedings.

Support for Justice Marshall’s “practical courtesy” approach is evident in international law scholarship. In his 1980 lectures at the Hague Academy, Ian Sinclair, commenting on The Schooner Exchange, described the “true foundation” of foreign state immunity as its “operation by way of exception to the dominating principle of territorial jurisdiction.” He continued:

[O]ne does not start from an assumption that immunity is the norm, and that exceptions to the rule of immunity have to be justified. One starts from the assumption of nonimmunity, qualified by reference to the functional need (operating by way of express or implied licence) to protect the sovereign rights of foreign States operating or present in the territory.

Sir Robert Jennings echoed this sentiment when positing that in regard to state immunity, “territorial jurisdiction is the dominating principle.”

Unlike the “fundamental right” rationale, the “practical courtesy” view resolves the theoretical clash between sovereign equality and state jurisdiction in favor of the latter. As a consequence, the scope of the entitlement to state immunity is defined by the extent to which the forum state chooses to suspend its right of jurisdiction. As Justice Marshall insightfully pronounced: “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.” Accordingly, on this theory, no norm of international law, not even the principle of sovereign equality, is capable of derogating a state’s
jurisdictional authority as exercised legitimately by its own courts, except in cases where the forum state has agreed to waive this right.

Resolving the conflict of principles: The primacy of adjudicatory jurisdiction. Determining which of the above rationales more persuasively explains the theoretical foundation of state immunity has profound implications for human rights litigation. If state immunity is deemed a fundamental right of statehood, then human rights litigants face nearly insurmountable obstacles. The state defendant is entitled to presumptive immunity and even the normative hierarchy theory cannot be effective because it is by no means clear that jus cogens norms trump a fundamental state right to immunity. Such negative consequences, however, need not be explored in detail here, as a critical examination of the two rationales reveals that the “practical courtesy” rationale is more persuasive than the “fundamental right” rationale. From this conclusion one may infer that the regulation of state immunity falls, as a threshold matter, within the authoritative domain not of the foreign state defendant but, rather, of the forum state. As described below, three reasons support this conclusion.

The problem with the “fundamental right” rationale is that it assumes that the principle of sovereign equality is the root of the maxim par in parem non habet imperium, and thus that the maxim prohibits one state’s exercise of jurisdiction over another. The true meaning of sovereign equality, however, disproves this assumption. Sovereign equality does not mean that all states are equal in any given circumstances but that, as Edwin Dickinson observed, every state enjoys an “equality of capacity for rights.” Dickinson based his views on those of Heffter, who wrote that sovereign equality “means nothing more nor less than that each state may exercise equally with others all rights that are based upon its existence as a state in the international society.” Thus, a state’s “capacity for rights,” according to Dickinson, relates to the freedom and ability of states to engage in official conduct typically associated with statehood, such as the
formulation and promotion of domestic and foreign policies, the execution of treaties, and membership in international organizations.

This meaning of sovereign equality is further defined by the basic strictures of the system of international law. It is axiomatic that international law allocates sovereign authority to govern in accordance with national borders; the United States governs within U.S. territory on behalf of Americans, France governs within French territory on behalf of the French, and so on. Each state exercises territorial jurisdiction within its political unit as a function of its sovereignty. Thus, a state’s capacity for rights, like statehood itself, is linked to a defined geographical area, i.e., the territory within the national borders of the state. It follows that this capacity for rights, albeit equal in potential to that of every other state, may have greater or lesser force, in relation to that of other states, in proportion to its connection to national territory. For example, a state’s capacity for rights stands at its apogee when applied in relation to its own territory and citizens. Accordingly, “[a] sovereign state is one that is free to independently govern its own population in its own territory and set its own foreign policy”—to the exclusion of all other states.

Conversely, by simple operation of the principle of sovereign equality, a state’s capacity for rights will diminish when in direct conflict with another state’s sphere of authority, i.e., the jurisdiction of that state over persons, property, and events in its national territory. For example, a foreign sovereign present in an alien forum state quite obviously may not govern on behalf of the local citizenry; again, this is a right that the forum state generally enjoys to the exclusion of all other states. Hence, the same principle of sovereign equality that entitles the foreign sovereign to govern with respect to its own national territory now excludes it from exercising authority in another state’s territory. In such cases, the foreign state’s capacity for rights with respect to the forum state reaches its lowest ebb.
Seen in this light, the literal meaning of par in parem non habet imperium, “an equal has no authority over an equal,” fails to reflect the realities of the international legal order. The principle of sovereign equality means that every state enjoys an “equal capacity for rights” in relation to every other state, but it does not alter the fact that a state may exercise the rights of statehood only with respect to its own territory and population. If, according to international law, a state is the sole master of its domain, persons and property located within the forum state necessarily come within the forum state government’s control and authority—even if endowed with foreign sovereign status. Were international law to dictate otherwise, the present state-centric paradigm would crumble.

This is not to say that foreign states should be refused immunity privileges in all circumstances but that an entitlement to immunity is not intrinsic to statehood. Thus, foreign state immunity is a privilege, not a right, and, accordingly, the maxim par in parem non habet imperium is a distortion of the principle of sovereign equality. Neither the maxim nor its purported progenitor, the principle of sovereign equality, persuasively supports the conclusion that one state cannot exercise jurisdiction over another, and the “fundamental right” rationale is fatally flawed for assuming so.

The view that state immunity is a fundamental state right has often been used to support the absolute approach to immunity, which held that states enjoy complete immunity from foreign domestic proceedings. Indeed, absolutists would argue that, as a product of the principle of sovereign equality, immunity extends to the limits of a state’s sovereignty and, moreover, that a state acts qua state in all of its affairs regardless of the nature of its conduct. Absolute immunity is a myth, however—a fact that undermines the “fundamental right” approach on which absolute immunity is understood to rest. A brief assessment of the historical growth of the doctrine of state immunity proves this point.
First, it is a myth that states ever enjoyed absolute immunity from foreign jurisdiction. While scholars often refer to an early period of “absolute immunity,” typically citing The Schooner Exchange as the leading case of the day, this title has more historical than legal significance and should not be interpreted as meaning that states were exempt at that time from foreign jurisdiction in all circumstances. Indeed, after a rigorous examination of The Schooner Exchange, Gamal Badr persuasively argued:

For [Chief Justice] Marshall… the starting point [of the case] was the local state’s exclusive territorial jurisdiction to which immunity was an exception emanating from the will of the local state itself. He did not envisage a blanket immunity for the foreign state as a general rule, to which exceptions would be made to permit the exercise of the local state’s territorial jurisdiction.

Indeed, this crucial observation led Professor Badr to conclude that The Schooner Exchange “does not uphold the proposition that there exists a peremptory rule of international law requiring that an absolute immunity from the territorial jurisdiction be recognized in favour of foreign states.”

The more realistic explanation of the absolute approach is that at one time foreign states, as a practical matter, were immune from foreign jurisdiction. In the eighteenth and nineteenth centuries, sovereigns interacted with one another in peacetime in a very limited way, predominantly through diplomatic intercourse or military cooperation. Consequently, interstate disputes almost inevitably touched upon sensitive foreign policy matters. The law of state immunity reflected these sensitivities and the prevailing preference for resolving these disputes by diplomacy, rather than adjudication. Most likely, claims against states in respect of private conduct—though technically not barred from foreign adjudication—were also handled diplomatically in accordance with the prevailing state-centric paradigm. Thus, one cannot equate the fact that courts did not exercise jurisdiction over foreign states in this early period with a general
prohibition against doing so on account of the principle of sovereign equality.

Second, the emergence and increasing acceptance of a restrictive approach to immunity is itself antithetical to the “fundamental right” approach. The classic justification for the distinction between public and private acts in the restrictive immunity theory was that the sovereign, in effect, descends from his throne when operating as a merchant and thereby subjects himself to the local laws of the forum state. Though this distinction in state activity is admittedly somewhat arbitrary, it nevertheless undermines the “fundamental right” position. If state immunity were really based on a fundamental principle of international law, then the movement toward restricting immunity would not have encountered so few legal and political obstacles. In other words, if state immunity were a fundamental state right, it would never be susceptible to theoretical division along public/private lines.

The “practical courtesy” rationale furnishes the more persuasive and realistic explanation for the doctrine of state immunity because it appropriately emphasizes the vital role of the principle of adjudicatory jurisdiction. As a logical matter, a foreign state cannot be entitled to immunity without the prior existence of a jurisdictional anchor to establish the court’s competence. This observation results from the plain fact that a court lacking jurisdictional competence is completely devoid of authority to adjudicate a legal dispute. Thus, as the International Court of Justice explained in the Case Concerning the Arrest Warrant of 11 April 2000, “[I]t is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction.” Addressing the role of jurisdiction is thus crucial to any understanding of the true nature and operation of the doctrine of state immunity. The Schooner Exchange highlights this point, because there Justice Marshall realized, quite rightly, that jurisdiction must be established before state immunity could be considered. Jurisdiction was not contested in that case because the presence of the Exchange in U.S. territorial
waters constituted the necessary connection with the forum to establish the district court’s in rem jurisdiction. With this matter established—one that the “fundamental right” view neglects—state immunity could only obtain as an exception to the adjudicatory jurisdiction of the forum state.

Nevertheless, the principle of sovereign equality cannot be said to have no function in the state immunity equation. On the contrary, respect for the coequal status of a foreign sovereign state serves typically as the primary motivation for granting immunity privileges. On this theory, however, a state’s entitlement to immunity is not compelled by the principle of sovereign equality but, rather, derives from the forum state’s waiver of adjudicatory jurisdiction with the aim of promoting mutually beneficial interstate relations.

Finally, the “practical courtesy” rationale promotes a more sensible international policy than the “fundamental right” rationale. States understood to possess a fundamental right to immunity would be permitted to act with impunity. Carried to the logical extreme, this notion would mean that foreign states acting in their foreign capacity could never be held accountable by the forum state. On the other hand, if state immunity is considered a practical courtesy, capable of being modified (or even withdrawn, if need be), then a more balanced relationship is maintained between the foreign state and the forum state. A foreign state will be more cautious about treading on the interests of other states, fearing that unacceptable conduct will result in the withdrawal of immunity and, in turn, the review of such conduct by domestic courts.

Correcting false presumptions. The foregoing discussion has revolved primarily around the broad principles animating the doctrine of foreign state immunity, and has shown, in particular, the theoretical persuasiveness of the “practical courtesy” rationale. Indeed, this persuasiveness is significant because it suggests that a forum state remains unrestricted, at least by a fundamental principle of international law, from exercising jurisdiction over a foreign-state
human rights offender, so long as an appropriate connection exists between the alleged offense and the forum state.

Yet when one surveys the actual law of foreign state immunity, as formulated and applied, an entirely different picture emerges. In practice, the rules that regulate state immunity law assume that a foreign state is immune from suit, unless demonstrated otherwise. Taking an example from national practice, section 1604 of the U.S. Foreign Sovereign Immunities Act of 1976 (FSIA) contains the general rule that “a foreign state shall be immune from the jurisdiction of the courts of the United States,” which may be abrogated only by application of one of the exceptions to immunity enumerated in section 1605. According to the FSIA’s legislative history, the statute “starts from a premise of immunity and then creates exceptions to the general principle.” Similarly, the Swiss Federal Tribunal wrote:

According to a generally recognized rule of public international law, the sovereignty of each State is limited by the immunity of other States, in particular with regard to the jurisdiction of municipal courts and proceedings for enforcement. One State cannot be brought before the courts of another State except in exceptional circumstances.

These approaches, a function of codification in the American case and of constitutional orientation in the Swiss (as described further in the next section), unnecessarily build theoretical hurdles to human rights litigation.

International instruments paint largely the same picture. Article 15 of the European Convention provides: “A Contracting State shall be entitled to immunity from the jurisdiction of courts of another Contracting State if the proceedings do not fall within Articles 1 to 14,” which enumerate various exceptions to immunity. Article 5 of the draft articles on jurisdictional immunities of states and their property of the International Law Commission (ILC) provides that “[a] State
enjoys immunity, in respect of itself and its property, from the jurisdiction of the
courts of another State subject to the provisions of the present articles.” Articles
10 through 17 subsequently carve out various exceptions to the general rule. In
the case of the draft articles, the Drafting Committee’s rapporteur, Professor
Sucharitkul, stated the following about the draft articles’ theoretical approach:

[T]he draft articles should begin to attempt the formulation of a basic rule of State
immunity. Based upon a series of the available source materials on State
practice…, the draft has to face two interesting sets of options. In the first place,
a rule of international law on State immunity could start from the very beginning
as a rule of State immunity, or it could go back beyond and before the beginning
of State immunity. It could… regard immunity not as a rule, nor less as a general
rule of law, but more appropriately…. as an exception to a more basic rule of
territorial sovereignty…. [T]he International Law Commission is more inclined
towards cutting the Gordian knot at the beginning, and beginning with a general
rule of State immunity….

Several practical reasons can help to explain why state immunity is treated as
the general rule, but unfortunately they have resulted in a misleading legal
framework. Indeed, viewing state immunity as the general rule obfuscates the
reality that state immunity derives from a forum state’s concession of jurisdiction
and is not presumptively a right under international law, as explained above.
Reversing these false presumptions about foreign state immunity is no small
task. As Rosalyn Higgins has counseled, “It is very easy to elevate sovereign
immunity into a superior principle of international law and to lose sight of the
essential reality that it is an exception to the normal doctrine of jurisdiction.”
However, by understanding that “[i]t is sovereign immunity which is the exception
to jurisdiction and not jurisdiction which is the exception to a basic rule of
immunity,” the possibilities for meaningful and effective human rights litigation
emerge. With jurisdiction as the rule and immunity as the exception, it is
incumbent upon the foreign state defendant, not the individual plaintiff, to point to the rule, domestic or international, that requires immunity.

The Status of State Immunity in Relation to International Law

If, as argued above, the doctrine of foreign state immunity does not derive from a fundamental principle of international law, namely sovereign equality, then what is the status of the doctrine in relation to international law? As previously noted, there is only one comprehensive multilateral agreement that governs state immunity, the European Convention on State Immunity, which has been ratified by only a handful of countries. Thus, for the vast majority of states, state immunity is unregulated by treaty as a general matter. The next question, then, involves determining the extent to which foreign state immunity is binding on states as customary international law. The following discussion demonstrates that, although customary international law compels immunity protections as to a limited core body of state conduct, a broader range of state behavior not included in the core, such as state-sponsored human rights violations, is entitled to immunity solely as a matter of domestic law.

The scope of state immunity under customary international law. What is the scope of immunity protection afforded foreign states under customary international law? From Justice Marshall's perspective in The Schooner Exchange, determining the extent of immune conduct under international law was a rather straightforward exercise. Viewing a state’s entitlement to immunity as the exception, not the rule, he deduced readily from state practice those "peculiar circumstances" in which states had waived jurisdiction in favor of immunity. The prevailing international custom led Justice Marshall to conclude that states had waived jurisdiction in favor of the following categories of immunity: (1) the freedom of the foreign sovereign from arrest or detention, (2) the diplomatic protection of foreign ministers, (3) the free passage of friendly foreign troops, and (4) the passage of friendly warships present in the host state.
Immunity for conduct falling into one of these categories was warranted because of the “mutual benefit” that such protection provides to the community of nations. Any state conduct that fell outside the core of immune activity did not require immunity protection.

Twentieth-century developments, however, have obscured Justice Marshall’s direct observations. As the globalization of trade and commerce increasingly brought states and private merchants into contact, many states sought to expand their entitlement to immunity beyond the strictures of customary international law so as to evade any commercial liability in a transaction gone sour. This self-serving policy laid the foundation for the myth that states were immune from suits of all kinds. In time, principles of fairness in commercial dealing prevailed and compelled the movement to restrict immunity as to a state’s commercial or private conduct, acta jure gestionis. The primary justification for the restrictive theory of immunity was said to be that judicial review of foreign state conduct of a commercial or private nature did not affront the dignity of the state.

Approaching the question of immunity on the basis of the imperii / gestionis distinction produced a metaphysical quandary: where should the line between public and private state conduct be drawn? For example, is a contract between a foreign state entity and a private manufacturer for the purchase of army boots a public or private act? To simplify matters, the restrictive approach came to focus more on establishing undisputed categories of nonimmune conduct and neglected to develop firm criteria for determining immune conduct. The codification movement on both the national and international levels proceeded on a similar basis. National state immunity legislation, the European Convention, and the leading codification projects enumerated detailed categories of nonimmune conduct, i.e., the “exceptions” to immunity, while leaving all other state conduct to fall under a catchall rule of immunity. As explained above, this approach inappropriately reversed the presumption of immunity in the doctrine of foreign state immunity.
As a result of its awkward development, the restrictive approach to immunity, as adopted by most states, draws the line between immune and nonimmune conduct at a point beyond that required by customary international law. In fact, most states afford a range of immunity protections to foreign states that exceed the demands of customary international law. Accordingly, the doctrine of foreign state immunity is currently stratified into three types of state conduct: (1) conduct that is immune by virtue of customary international law, (2) conduct that is immune solely by virtue of domestic law, and (3) conduct that is not entitled to immunity under either customary international law or domestic law.

The ICJ’s recent decision in Arrest Warrant of April 11, 2000 provides strong evidence as to the existence and nature of the rule of state immunity under customary international law. In that case, the Democratic Republic of the Congo protested the issuance by a Belgian investigating magistrate of “an international arrest warrant in absentia” against the incumbent minister for foreign affairs of the Congo, alleging violations of human rights and humanitarian law. The ICJ found that “in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.” Notably, the ICJ’s conclusion squares precisely with Justice Marshall’s findings in The Schooner Exchange regarding the immunities of foreign ministers and thus reaffirms the status of customary international law in that area.

What is perhaps most interesting about the Arrest Warrant case is its rationale for an international rule of state immunity. The ICJ concluded that customary international law compels state immunity regarding foreign ministers “to ensure the effective performance of their functions on behalf of their respective States” and to “protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.” The
Arrest Warrant decision is again entirely consistent with the findings in The Schooner Exchange, in which Justice Marshall concluded that states waive their right to adjudicatory jurisdiction over a foreign state as to certain conduct that promotes the “mutual benefit” of the community of nations, such as the exchange of foreign ministers. From these cases, a persuasive rationale for granting immunity with respect to certain state conduct emerges—a rationale that arguably is a prerequisite to establishing the opinio juris necessary for a rule of customary international law.

Conversely, when state conduct fails to promote “mutual benefit” among nations, the international law status of a rule that immunizes such conduct is dubious at best. Two examples from U.S. case law underscore this point. In Letelier v. Republic of Chile and Liu v. Republic of China, U.S. courts found that assassinations by foreign government agents committed in the United States were not “discretionary” state conduct within the meaning of the FSIA and thus fit into the FSIA’s exception to immunity for torts committed in U.S. territory. Under a strict application of the imperii / gestionis distinction, such conduct, i.e., state-sanctioned assassination, would be immune by virtue of its official mandate. However, in Letelier and Liu the courts did not identify a rule of international law that required immunity where the state conduct in question was “clearly contrary to the precepts of humanity as recognized in both national and international law.”

The 1996 amendment to the FSIA further evidences that customary international law does not immunize detrimental state conduct. The 1996 amendment creates an additional category of nonimmune conduct as to a limited range of acts committed by states designated by the U.S. government as “state sponsors of terrorism.” The amendment applies to actions by or on behalf of U.S. citizens that allege “personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources” for such acts. The provision flatly rejects the traditional imperii / gestionis distinction in its application to conduct that “is engaged in by an
official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency." Notably, although the U.S. government expressed opposition to the 1996 amendment in a previous form, it never asserted that curtailing immunity for state conduct that violates human rights would constitute a breach of international law.

To summarize: It is established that customary international law mandates immunity as to a core body of state conduct. However, because of the awkward development of the theory of restrictive immunity, insufficient attention has been paid to defining the exact content of this core as it has developed since Justice Marshall’s assessment in 1812. In fact, the prevailing approach to state immunity obscures the reach of the international rule of state immunity by establishing a false presumption of immunity and creating a catchall category for immune conduct. As a consequence, the current formulation of the doctrine of foreign state immunity, as adopted by most states, the European Convention, and the leading codification projects, grants foreign states more immunity privileges than customary international law dictates.

Emerging consensus regarding restrictive immunity. For much of the last century, state immunity practice has been starkly divided between two groups of nations: countries that have favored the theory of restrictive immunity, mainly the Western capitalist countries; and countries that have clung to the theory of absolute immunity, mainly the Communist and socialist countries. Recent developments indicate that the gap between absolutist and restrictivist states is narrowing. The collapse of the Soviet empire has brought about great social and political changes in Eastern Europe, which have slowly influenced state immunity practice in the formerly Communist countries. The development of market economies and the participation in global commerce by the former Soviet countries, especially Russia, have strained the utility of the doctrine of absolute immunity and undoubtedly will cause a policy shift toward restrictive immunity. Evidence suggests that even the People’s Republic of China, a staunch supporter of
absolute immunity, may be moderating its position. Such tendencies, while not yet etched in stone, show that the gap between absolutist and restrictivist practice may be as narrow today as it has ever been.

Still, setting aside the narrowing of the absolute/restrictive immunity split, one finds a myriad of substantive variations in national approaches to state immunity law. While each and every variation cannot possibly be addressed here, one significant example is revealing. The FSIA, for instance, instructs U.S. courts to look at the "nature" and not the "purpose" of a foreign state defendant’s conduct in order to determine whether such conduct is commercial or public in nature and, thus, whether it is immune or nonimmune from suit. French courts, by contrast, appear to place more emphasis on the purpose of the operative state act, instead of its nature. The Cour de cassation, France’s highest court, held that foreign states may be entitled to immunity not only for acta jure imperii, but also for acts performed in the interest of public service. Thus, the real possibility exists that U.S. and French courts may draw the line between immune and nonimmune foreign state conduct in very different places.

Accordingly, James Crawford’s earlier observation that the distinction between immune and nonimmune state conduct is drawn less by international law and more by national laws is equally relevant today. Hazel Fox similarly posits that while there is a clear trend “away from an absolute doctrine to a restrictive doctrine... the absence of a universal convention and the diversity of State practice... produce[ ] extraordinary complexity and variety in the emerging rules.” Such significant variations in national practice have led another state immunity scholar, Joseph Dellapenna, to conclude his comparative study of immunity practice in the United Kingdom, France, and Germany with the following words:

All these countries, in grappling with the need to constrain the actions of sovereigns by the rule of law, have developed roughly similar responses that are collectively described by the rubric of the “restrictive theory of foreign state
immunity.” A closer examination of the details of the several approaches to foreign state immunity… demonstrates, however, that consensus exists only at a rather high level of abstraction.

Because the doctrine of foreign state immunity is a mix of international law and domestic law, the reach of restrictive immunity, i.e., the extent to which states are not immune, may or may not be an international law question. Indeed, the nature of the inquiry depends on whether the core of immune conduct is implicated. In the Arrest Warrant case, for example, the ICJ addressed the scope of a sitting foreign minister’s immunities, a category of state conduct that clearly touches upon established customary international law matters. In contrast, in the Letelier and Liu cases, U.S. courts examined state conduct, namely assassination, that clearly falls outside the core body of immune conduct. Thus, the issue of immunity was decided solely as a matter of domestic law, and customary international law played no role in the analysis.

The conceptual divide between the civil law and common law countries. The mixed character of the doctrine of foreign state immunity has produced varying emphasis on its component parts in the civil law and common law systems, respectively. A review of the literature from the civil law and common law countries reveals starkly divergent views on the roles that international law and domestic law play in formulating state immunity policy. On the one side, the civil law countries deem state immunity generally to be a principle of customary international law that must be applied domestically by national courts. On the other side, the common law countries place more emphasis on regulating state immunity through domestic legislation, not customary international law.

Even a brief look at the civil law literature shows that these countries are firmly committed to the notion that state immunity originates in customary international law. Regarding state immunity, Antonio Cassese writes that “limitations are imposed upon State sovereignty by customary rules.” Jurgen Bröhmer also
writes: “The law of state immunity as it now stands as a customary rule of international law is commonly based and justified on various general principles of international law.” Professors Cassese and Brohmer, like other civil law scholars, appear to accept state immunity’s status as international custom as a given.

The rationale for the civil law position largely derives from two factors: (1) the civil law constitutional design; and (2) the lack of national immunity legislation in many civil law countries. The Italian experience is illustrative. The Italian Constitution, like many civil law constitutions, includes a broad and binding mandate regarding national compliance with international law. Article 10 of the Italian Constitution states: “The Italian legal system shall conform with the generally recognized rules of international law.” This provision not only endows Italian judges with the power to ensure national compliance with international law, but also imposes a constitutional obligation to do so. Thus, Italian courts, like most civil law courts, are generally inclined to view themselves as the chief interpreters and enforcers of international law.

Combined with the lack of immunity legislation in many civil law countries, this constitutional obligation has given rise to the belief that state immunity law derives from customary international law. According to one civil law scholar, there can be no other possible origin. Indeed, the Italian Corte di cassazione in the Pieciukiewicz case declared that the doctrine of state immunity is rooted in a “customary principle” that “comes under the purview of Article 10(1)” of the Italian Constitution.

In contrast, the common law countries tend to perceive state immunity as more a product of domestic law, although originally this was not the case. In The Schooner Exchange, as seen, Justice Marshall looked to international custom to determine the scope of entitlement to foreign state immunity. However, since that early time, the common law approach has changed dramatically owing in
large part to an influential article published in 1951 by Hersch Lauterpacht entitled The Problem of Jurisdictional Immunities of Foreign States. In that publication, the English scholar made the then-provocative declaration that there was “no rule of international law which obliges states to grant jurisdictional immunity to other states.” In support, Professor Lauterpacht relied on two points of evidence. First, he noted that during the twentieth century when the prevailing rule of absolute immunity began to lose its force, “international practice show[ed] no frequent instances of protests against assumption of jurisdiction, including execution, over foreign states.” Second, Lauterpacht cited the fact that many states granted immunity privileges on the basis of reciprocity and added that “[s]tates do not make the observance of established rules of international law dependent upon reciprocity.” Free from the constraints of international law, Lauterpacht went on to establish the “assimilative approach” to state immunity, according to which a state is immune from suit only to the extent that the host state enjoys immunity before its own courts.

Upon assessing the development of state immunity law more than twenty-five years later, Professor Brownlie, in the third edition of his treatise, observed: “it is difficult as yet to see a new principle which would satisfy the criteria of uniformity and consistency required for the formation of a rule of customary international law.” Brownlie suggested a “fresh approach” to state immunity:

The concepts of sovereign immunity..., the exclusive jurisdiction of the state within its own territory, and the need for an express licence for a foreign state to operate within that national jurisdiction..., can be taken as starting points. Each state has an existing power, subject to treaty obligations, to exclude foreign public agencies, including even diplomatic representation. If a state chooses, it would enact a law governing immunities of foreign states which would enumerate those acts which would involve acceptance of the local jurisdiction.
After citing as examples of such acts the conclusion of contracts subject to private law and consent to arbitration, Brownlie proposed that foreign trade partners of the host state be notified about the new legislation, which would take effect after sufficient time to allow them to withdraw, and that rights under such agreements could be reserved. He continued:

States would thus be given a licence to operate within the jurisdiction with express conditions and the basis of sovereign immunity, as explained in the Schooner Exchange, would be observed. Such a legal regime would be subject to the inevitable immunity ratione materiae..., and the principles of international law as to jurisdiction. The approach suggested would avoid the difficulties of the distinction between acts jure gestionis and acts jure imperii.

Thus, Brownlie, like Lauterpacht, suggested that the doctrine of immunity was not a rule of customary international law.

Lauterpacht and other commentators who agreed with him influenced the contemporary common law view of state immunity. Indeed, Monroe Leigh, the FSIA’s chief architect, stated that in the years leading up to the U.S. change in policy from the absolute to the restrictive approach to immunity, “there was no agreement among the students of international law as to whether Sovereign Immunity was a principle of customary international law or merely a matter of comity between nations.” Consequently, when reforming U.S. state immunity policy in the 1970s, the drafters of the FSIA undoubtedly felt free to operate on the basis that, save for a limited area of immunity law governed primarily by treaty, “the entire field is open to definition by domestic law.” That several common law countries followed the U.S. lead and enacted their own domestic immunity legislation reflects broad consensus on this matter.

The distinct perspectives of the civil law and common law countries regarding the source of state immunity law have yielded divergent approaches to solving the
human rights litigation problem. The civil law countries, with their emphasis on international law, are arguably more inclined to address human rights issues on the international law level and thus more receptive to approaches like the normative hierarchy theory. The common law countries, with their skepticism about state immunity’s broad reach under international law, generally prefer to regulate state immunities through the application of domestic legislation. While the merits of each approach are debatable, the civil law perspective has created, as explained below, a propensity for adopting the normative hierarchy theory and thus unnecessarily complicates resolution of the human rights litigation problem.

11.4 THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND STATE IMMUNITY

In light of the discussion in part I, one must measure the normative hierarchy theory against two fundamental legal realities: (1) state immunity arises not out of a fundamental right of statehood but, rather, out of the concession of a forum state’s right of adjudicatory jurisdiction; and (2) foreign states are not entitled to immunity under customary international law as to most, if not all, activity that constitutes human rights offenses. The common thread running through both observations (and the crucial point that the normative hierarchy theory overlooks) is that the forum state, not the foreign state defendant, holds the authority to regulate the scope and content of the state immunity privilege. Part II presents a summary of the normative hierarchy theory, as developed in the American and European contexts, and then turns to a substantive critique of the theory.

The Anatomy of the Normative Hierarchy Theory

The American approach. The normative hierarchy argument had its genesis in the United States. The notion that foreign sovereign immunity might be trumped by superior international law norms first emerged as a reaction to the U.S. Supreme Court’s decision in Argentine Republic v. Amerada Hess Shipping Corp. In that case, the plaintiffs sued in tort to reclaim losses arising out of the
unprovoked bombing of an oil tanker on the high seas by the government of Argentina, allegedly a violation of international law. The Court ruled that the FSIA was “the sole basis for obtaining jurisdiction over a foreign state” in U.S. courts. Moreover, the Court held that American courts may hear suits against foreign states only where Congress has explicitly provided a statutory exception to the FSIA’s general rule of immunity. A suit involving an armed attack against a ship on the high seas was not one over which Congress had intended the courts to exercise jurisdiction, the Court found, and thus it rejected the plaintiffs’ claim.

The Court’s restrictive interpretation of the FSIA’s exceptions to immunity prompted a group of three law students to publish an inventive Comment in 1991 entitled Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law. The authors propose that states lose all entitlement to state immunity under international law when they injure individuals in violation of jus cogens norms. Their theory starts from the premise that, following the Nuremberg trials, the structure of international law changed; in particular, the “rise of jus cogens” placed substantial limitations on state conduct in the name of peaceful international relations. Indeed, “[b]ecause jus cogens norms are hierarchically superior to the positivist or voluntary laws of consent, they absolutely restrict the freedom of the state in the exercise of its sovereign powers.”

This conclusion has ramifications for the doctrine of state immunity, the authors argue. Their theory turns on the assumption that state immunity is a product of state sovereignty, resting “on the foundation that sovereign states are equal and independent and thus cannot be bound by foreign law without their consent.” Since state immunity is not a peremptory norm, when invoked in defense of a violation of jus cogens, it must yield to “the ‘general will’ of the international community of states.” Accordingly, “[b]ecause jus cogens, by definition, is a set of rules from which states may not derogate, a state act in violation of such a rule will not be recognized as a sovereign act by the community of states, and the
violating state therefore may not claim the right of sovereign immunity for its actions.

In causing harm to an individual in violation of jus cogens, a state may no longer raise an immunity defense because the state may be regarded as having implicitly waived any entitlement to immunity. To give domestic effect to this waiver in U.S. courts, the authors point to section 1605(a)(1) of the FSIA, which empowers the exercise of district court jurisdiction in cases in which a state “has waived its immunity either explicitly or by implication.”

While the implied waiver argument has never formed the basis of a legal decision in U.S. courts, it has not lacked influence on U.S. judges. In Siderman de Blake v. Republic of Argentina, the U.S. Court of Appeals for the Ninth Circuit accepted the argument’s basic premise. The case involved the alleged torture of an Argentine citizen and expropriation of property by Argentine military officials. Following the logic of the implied waiver theory, the plaintiffs argued that jus cogens trumps foreign state immunity, resulting in the defendant’s loss of immunity for torturing the victim, José Siderman. The court determined that Argentina was not immune from suit because Argentina had waived its entitlement to immunity under section 1605(a)(1) of the FSIA by involving itself in U.S. legal proceedings, but in dicta it echoed the plaintiff’s arguments, stating that “[a] state’s violation of the jus cogens norm prohibiting official torture therefore would not be entitled to the immunity afforded by international law.”

The normative hierarchy argument again received substantial consideration in Princz v. Federal Republic of Germany, a case involving claims of personal injury and forced labor arising from the plaintiff’s imprisonment in Nazi concentration camps. In Princz, the U.S. Court of Appeals for the District of Columbia denied the plaintiff’s claims, specifically rejecting the normative hierarchy argument. Judge Patricia Wald, however, advocated its application in an impassioned dissent. “Germany waived its sovereign immunity by violating the
“Jus cogens norms of international law condemning enslavement and genocide,” she wrote. To support this conclusion, Judge Wald contended: “Jus cogens norms are by definition nonderogable, and thus when a state thumbs its nose at such a norm, in effect overriding the collective will of the entire international community, the state cannot be performing a sovereign act entitled to immunity.” Judge Wald considered the waiver of immunity to be a fact of international law and thus urged that the FSIA’s waiver provision be construed consistently, so as to allow plaintiffs to sue states for violations of jus cogens.

Though never formally accepted as the basis for judicial decision in U.S. courts, the normative hierarchy theory continues to spark interest among jurists and scholars alike. Plaintiffs suing under the FSIA for alleged human rights violations continually press for its application. Numerous scholars and international law commentators have also become engaged in the debate over the validity of the normative hierarchy theory. However, the current position of U.S. courts to interpret the FSIA’s implied waiver provision strictly is likely to incapacitate the normative hierarchy theory from amending U.S. state immunity policy.

The contribution of continental Europe. Though it originated in the United States, the normative hierarchy theory has had a substantial impact in the countries of continental Europe. For instance, in his treatise on public international law, Professor Cassese writes that “peremptory norms [or jus cogens] may impact on State immunity from the jurisdiction of foreign States, in that they may remove such immunity.” In support, he cites, among other sources, Judge Wald’s dissent in Princz v. Federal Republic of Germany. Professor Bianchi states that “[r]eliance on the hierarchy of norms in the international legal system is a viable argument to assert non-immunity for major violations of international human rights.” The European brand of the theory is nearly identical in concept to its American predecessor: because jus cogens, a primary norm, is hierarchically superior to state immunity, a secondary norm, a foreign state is not immune for violations of human rights norms of a peremptory nature.
Where the European approach distinguishes itself is in its potential to affect national state immunity policy. Since the civil law countries of continental Europe have not enacted national immunity legislation and many of their constitutional systems oblige national courts to look to international law for guidance on foreign state immunity, it comes as no surprise that the civil law Europeans approach the normative hierarchy theory from the perspective of progressive jurisprudential development. Professor Bianchi, for example, calls for “a coherent interpretation” of the norms of the international legal order to resolve “the inconsistency between the rule of state immunity and the principle of protection of fundamental human rights.” According to Bianchi, ensuring that the application of international law produces just results requires judges to undertake a “value-oriented” interpretation of international law norms, giving preference to peremptory norms, such as the protection of human rights, over norms of lesser importance, such as state immunity.

Largely free from the constraints of national immunity legislation and treaty obligations, a civil law court not surprisingly would feel inclined to make the type of “value-oriented” decision that Bianchi encourages. The adjudication of Prefecture of Voiotia v. Federal Republic of Germany in the Greek courts provides an apt example. The facts of the case arose out of the Nazi occupation of southern Greece during World War II. During that period Nazi military troops committed war atrocities against the local inhabitants of the Prefecture of Voiotia in 1944, particularly in the village of Distomo, including willful murder and destruction of personal property. Over fifty years later, the plaintiffs, mostly descendants of the victims, sued the Federal Republic of Germany in the Greek Court of First Instance of Leivadia for compensation for the material damage and mental suffering endured at the hands of the Nazis.

On the preliminary matter of jurisdiction, the court of first instance invoked the normative hierarchy theory to rule that Germany was not immune from suit. The
court found that, “according to the prevailing contemporary theory and practice of international law opinion,… the state cannot invoke immunity when the act attributed to it has been perpetrated in breach of a jus cogens rule.” The rule of jus cogens that the court identified was contained in Articles 43 and 46 of the regulations annexed to the 1907 Hague Convention Respecting the Laws and Customs of War on Land (Hague Regulations). Article 43 obligates an occupying power to respect the laws in force in the occupied territory and to ensure public order and safety, while Article 46 obliges occupying powers to protect certain rights of the occupied, especially the rights to family honor, life, private property, and religious convictions. The court concluded that the demonstrated breach of this rule deprives a state of an immunity defense in domestic proceedings.

The reasons that the court provided in support of its decision are revealing and worth reiterating in their entirety:

a) When a state is in breach of peremptory rules of international law, it cannot lawfully expect to be granted the right of immunity. Consequently, it is deemed to have tacitly waived such right (constructive waiver through the operation of international law); b) Acts of the state in breach of peremptory international law cannot qualify as sovereign acts of state. In such cases the defendant state is not considered as acting within its capacity as sovereign; c) Acts contrary to peremptory international law are null and void and cannot give rise to lawful rights, such as immunity (in application of the general principle of law ex injuria jus non oritur); d) the recognition of immunity for an act contrary to peremptory international law would amount to complicity of the national court to the promotion of an act strongly condemned by the international public order; e) The invocation of immunity for acts committed in breach of a peremptory norm of international law would constitute abuse of right; and finally f) Given that the principle of territorial sovereignty, as a fundamental rule of the international legal order, supersedes the principle of immunity, a state in breach of the former when in illegal occupation of foreign territory, cannot possibl[y] invoke
the principle of immunity for acts committed during such illegal military occupation.

The reasoning in subsections a) through e) bears the traditional marks of the normative hierarchy theory. The court’s pronouncement in subsection d) would appear to take the theory one step further, indicating that its nonapplication would implicate the forum state in the foreign state defendant’s alleged breach of international law. Subsection f) is somewhat incongruous, seemingly advocating an entirely separate ground for denying immunity based on the forum state's authority to define its own state immunity law. Relying on this reasoning, the court awarded the plaintiffs 9.5 billion drachmas (approximately $30 million) in the form of a default judgment.

The Hellenic Supreme Court, Areios Pagos, affirmed the holding of the lower court and arguably supported its reasoning relating to the normative hierarchy theory. The Court began its analysis with the so-called torts exception to immunity. After reviewing the international law landscape, the Court concluded that an exception to immunity for torts committed by a foreign state in the forum state’s territory was established in customary international law, “even if the acts were acta jure imperii.” Second, the Court identified what it perceived as an obstacle to application of the torts exception in this case: the atrocities at issue were probably committed in the course of armed conflict, a situation in which the foreign state, even as occupier, would generally retain immunity. However, the Court found that this rule of immunity was inapplicable, because in the case of military occupation that is directly derived from an armed conflict and that, according to the now customary rule of Article 43 of the [Hague Regulations], does not bring about a change in sovereignty or preclude the application of the laws of the occupied State, crimes carried out by organs of the occupying power in abuse of their sovereign power do not attract immunity.
Accordingly, the Court determined that the Nazi atrocities were an “abuse of sovereign power,” on which Germany could not base an immunity defense. The Court’s decision to apply the torts exception to deny immunity for acts ostensibly of a public nature itself represents an interesting departure from the traditional public/private distinction in state immunity law. What is more attention grabbing about the decision, though, is that the Court, in reaching it, drew upon the normative hierarchy theory. Specifically, the Court found that the Nazi acts in question were “in breach of rules of peremptory international law (Article 46 of the [Hague Regulations]),” and thus that “they were not acts jure imperii.” Consequently, the Court concluded that Germany had impliedly waived its immunity. As a result, one may view the Court’s decision as the first endorsement of the normative hierarchy theory by a significant national tribunal. The Greek Supreme Court’s decision is a substantial contribution to state immunity practice in itself. Yet it is perhaps more significant as a potential harbinger of developments in state immunity policy in other similarly oriented countries, which neither have enacted national immunity legislation nor are parties to the European Convention on State Immunity. For this group of states, the national courts possess the primary authority to define foreign state immunity law and many, like Greece, may be bound to look to international law for applicable guidance.

A Critique of the Normative Hierarchy Theory

The misalignment of norms. Supporters of the normative hierarchy theory perceive the human rights litigation problem as a conflict between two international law norms, state immunity and jus cogens. In short, the superior norm of jus cogens is capable of striking down the inferior norm of state immunity, allowing the human rights victim to advance his or her claim. However, this approach is flawed conceptually because the norms that are purportedly at odds with one another under the normative hierarchy theory in reality never clash.
As part I demonstrated, state immunity is not a norm that arises from a fundamental principle of international law, such as state equality, or from the latter’s purported theoretical derivative, the maxim par in parem non habet imperium. To reiterate briefly: The principle of state equality guarantees that states will enjoy equal capacity for rights. This capacity diminishes when a state intrudes on another state’s sphere of authority, and becomes virtually dormant within another state’s territorial borders. There is thus no inherent right of state immunity, as, ironically, is often suggested in the writings in support of the normative hierarchy approach.

Moreover, the practice by states of waiving adjudicatory jurisdiction to create immunity privileges has created binding norms through the development of international custom as to only a core body of state conduct. Such norms do not apply to state conduct, e.g., the violation of the human rights of another state’s citizens, that undermines the aim and purpose of the international legal order. If a foreign state receives immunity protection for such conduct, it is because that protection is afforded by the domestic policies of the forum state or, in the case of a few select states, pursuant to the European Convention. Accordingly, the norms of state immunity and jus cogens do not clash at all insofar as human rights violations are concerned. To accept otherwise, as the normative hierarchy theory does, endows foreign states with more of a claim to state immunity than reality dictates.

If there is any clash of international law norms that underpins the human rights litigation problem, it is between human rights protections and the right of the forum state to regulate the authority of its judicial organs, otherwise known as the right of adjudicatory jurisdiction. As demonstrated in part I, as a threshold matter state immunity operates as an exception to the overriding principle of adjudicatory jurisdiction and as customary international law does not cover human rights offenses. Any protections for human rights abuses on the domestic
level thus result purely from the exercise of the forum state’s right of adjudicatory jurisdiction. That is, the forum state with ultimate authority to establish the entitlement of state immunity has chosen to close its courts to meaningful human rights litigation. Therefore, rather than being between jus cogens and state immunity, the real conflict is between jus cogens and the principle of adjudicatory jurisdiction.

Finally, even if state immunity were an international law norm that shields states from liability for human rights claims, the normative hierarchy theory would fail to explain persuasively how a clash of norms would arise. Lady Fox criticizes the theory, asserting that, as “a procedural rule going to the jurisdiction of a national court,” state immunity “does not contradict a prohibition contained in a jus cogens norm but merely diverts any breach of it to a different method of settlement.” Essentially, the norms of human rights and state immunity, while mutually reinforcing, govern distinct and exclusive aspects of the international legal order. On the one hand, human rights norms protect the individual’s “inalienable and legally enforceable rights…. against state interference and the abuse of power by governments.” On the other hand, state immunity norms enable state officials “to carry out their public functions effectively and… to secure the orderly conduct of international relations.” To demonstrate a clash of international law norms, the normative hierarchy theory must prove the existence of a jus cogens norm that prohibits the granting of immunity for violations of human rights by foreign states. However, the normative hierarchy theory provides no evidence of such a peremptory norm.

Questions surrounding the application of jus cogens. Unresolved issues surrounding the application of jus cogens further undermine the appeal of the normative hierarchy theory. While the existence of jus cogens in international law is an increasingly accepted proposition, its exact scope and content remains an open question. Proponents of the normative hierarchy theory, in particular, have failed to generate a precise list of human rights norms with a peremptory
character. To be sure, consensus is emerging as to the status of certain norms, such as the prohibitions against piracy, genocide, slavery, aggression, and torture. Yet these norms, despite their importance to the community of nations, represent only a small fraction of the norms that potentially may belong to the body of peremptory norms. In Prefecture of Voiotia, for example, the Greek courts identified the rights of family honor, life, private property, and religious convictions, enshrined in Article 46 of the Hague Regulations, as the operative jus cogens. Further, the concept of jus cogens is not confined solely to the realm of human rights. Commentators have suggested that crucial fundamental international law norms, such as pacta sunt servanda, may also constitute jus cogens.

The undefined character of jus cogens, coupled with the general applicability of the normative hierarchy theory, which invests all peremptory norms with immunity-stripping potential, may present problems for the courts. Requiring application of the theory beyond cases of genocide, slavery, and torture would place national courts in an awkward position. The theory not only would deprive the forum state of its right to regulate access to its own courts, but also would force them to determine whether a particular norm of international law had attained the status of jus cogens, a task that international legal scholars have grappled with for decades with only limited success. Further, the normative hierarchy theory logically requires courts to treat all violations of peremptory norms uniformly, even violations of norms that do not implicate human rights but are arguably jus cogens, such as pacta sunt servanda. In addition, allowing the courts to determine the parameters of jus cogens through application of the normative hierarchy theory may undermine the principle of separation of powers, in some cases inappropriately transferring foreign-policymaking power from the political branches of government to the judiciary. Finally, as Judges Pellonpaa and Bratza warned in the Al-Adsani case, adoption of the normative hierarchy theory could be the first step on a slippery slope that begins with state immunity from jurisdiction but could quickly extend to state immunity from execution
against sovereign property and ultimately threaten the “orderly international co-operation” between states.

Second, if, as mentioned above, the true clash of norms underpinning the human rights litigation problem is between the protection of human rights and the principle of adjudicatory jurisdiction, what, then, is the relationship between these two norms? A thorough answer to this question cannot be offered in an article of this length, but a brief exploration of the issue may be enlightening.

If jus cogens is defined as a body of norms representing the core, nonderogable values of the community of states, then included in this body, arguably, is the principle of state jurisdiction, i.e., a state’s freedom to exercise jurisdiction, especially on the basis of territoriality, through its own governmental institutions, including its national courts. Support for this proposition is reflected in the core principles of international law, which consider the state the basic building block of the international legal order. In fact, most of the foundational rules of international law hold as the highest value the protection of the territorial integrity, independence, and equality of states. Even taking account of recent developments in international law that limit state sovereignty, such as in the areas of human rights and environmental law, it cannot be said at this point in time that any rule has emerged that would limit a state’s authority to determine its own jurisdiction over foreign states.

If the principle of state jurisdiction is so paramount to the community of states as to place it within the body of jus cogens, the human rights litigation problem may involve a clash of two peremptory norms, the protection of human rights and the principle of exclusive state jurisdiction. This scenario raises perplexing questions of international law. Can there be a hierarchy of norms within the body of peremptory norms and, if so, which ranks higher, human rights or territorial jurisdiction? The answers to these questions, if any, lie deep in uncharted territory of international legal scholarship and cannot be ascertained here. The
very fact that the normative hierarchy theory would appear to lead courts into such a theoretical abyss casts doubt on its practical viability and utility.

Denying immunity through fictions. Explaining how a state loses its immunity is a critical element of the normative hierarchy theory. Two different, but interrelated, explanations are offered in the literature. On one rationale, a state is said to waive or forfeit its entitlement to immunity by implication when it commits a jus cogens violation. On the other rationale, state conduct that violates a jus cogens norm is said to fall outside the category of protected state conduct known as acta jure imperii, for which immunity is traditionally granted, such conduct being devoid of legitimacy because it contravenes the will of the community of nations.

Neither of these explanations is persuasive because both are based on fictions resulting from a misunderstanding of the true nature and operation of the doctrine of foreign state immunity.

The notion that a foreign state implicitly waives or forfeits any entitlement to immunity by acting against jus cogens is untenable for the reasons developed in part I: a foreign state’s entitlement to immunity for human rights violations is not derived from international law, so a foreign state cannot lose its right to immunity by violating international law. Indeed, the entitlement in this respect—and therefore also the waiver or forfeiture of immunity—is strictly a matter of domestic regulation. This plain reality is illustrated in Smith v. Socialist People’s Libyan Arab Jamahiriya, in which Libya conceded, for the limited purpose of its appeal, that its alleged participation in the bombing of Pan Am Flight 103 would consist of a jus cogens violation, but disputed that “such a violation demonstrates an implied waiver of sovereign immunity within the meaning of the FSIA.” The court ultimately held that Libya had not waived its immunity because the FSIA anticipated implied waiver only under a few select circumstances. Smith, while adjudicated under national immunity legislation, is of general appeal, if only to raise the paradoxical question of how a foreign state can be said to have
implicitly waived its entitlement to immunity when it would be likely, if asked, expressly to state the contrary.

The purported exclusion of state-sponsored human rights violations from the category of acta jure imperii is equally unpersuasive. Indeed, the distinction between acta jure imperii and acta jure gestionis is "superficially attractive as a means of keeping state immunity within reasonable limits" but "does not rest on any sound logical basis." As Judge Gerald Fitzmaurice wrote, “[A] sovereign state does not cease to be a sovereign state because it performs acts which a private citizen might perform.” Along similar lines of logic, a foreign state does not cease to be a sovereign state simply because it commits acts of a criminal nature, including violations of human rights norms. Moreover, if state conduct that violates jus cogens is assertedly not jure imperii and obviously not jure gestionis (private or commercial), then what is it? This question is not addressed by supporters of the normative hierarchy theory. The real answer lies in the fact that foreign states are entitled to immunity for human rights violations only to the extent that a forum state grants them that privilege. Hence, the exclusion of jus cogens–violating state conduct from the category of acta jure imperii can be effectuated only through the expression of the forum state’s immunity policies to that effect, not by international law.

Misplaced concerns regarding forum state complicity. Supporters of the normative hierarchy theory sometimes argue that the failure to deny state immunity for human rights violations amounts to complicity of the forum state with the jus cogens transgression. A brief review of the ILC’s draft articles on state responsibility reveals the shortcomings of this claim. Of the provisions in the draft articles, only chapter IV on the responsibility of a state in connection with the act of another state is even remotely relevant. Articles 16, 17, and 18 of chapter IV address, respectively, situations in which one state aids or assists, directs and controls, or coerces another state in the commission of an internationally wrongful act. In all these provisions, the ILC included a knowledge requirement
for complicity of the third-party state, thus limiting the draft articles’ contemplated application to cases of deliberate involvement in the internationally wrongful act before or during its commission. Hence, a forum state cannot be considered complicit for granting jurisdictional immunity to other states long before any lawsuit has been filed.

This does not mean, however, that the forum state cannot hold the foreign-state offender accountable under principles of state responsibility, only that it cannot be penalized for failing to do so. Moreover, immunity in the forum state does not amount to global impunity for state conduct that violates human rights. Indeed, the forum state may pursue a human rights claim in numerous alternative political and judicial arenas. Nevertheless, repealing immunity protections that exist solely by virtue of the forum state’s domestic policies and are not compelled by international law ranks high among all options.

11.5 NEW PROSPECTS FOR THE PROGRESSIVE DEVELOPMENT OF FOREIGN STATE IMMUNITY LAW

As demonstrated above, the normative hierarchy theory offers an unpersuasive solution to the human rights litigation problem. Foreign states are not immune from human rights litigation by virtue of a fundamental sovereign right or a rule of customary international law. With ultimate authority both to grant and to rescind the entitlement to immunity in these circumstances, the forum state may establish a state immunity policy in this area unrestricted by international law. This reality places the burden of providing meaningful human rights litigation not on the foreign state defendant, as the normative hierarchy theory contends, but on the government entities in each forum state with responsibility for establishing the state immunity laws.

While the forum state has authority to repeal many state immunity privileges, especially in the area of human rights protections, by exercising its right of
adjudicatory jurisdiction, a more comprehensive justification for curtailing immunity is in order. Although an international rule of immunity exists, the modern doctrine of foreign state immunity fails to delineate the scope of its coverage. Accordingly, the line between international law and domestic law protections is not always readily apparent. Neither the traditional gestionis/imperii distinction of the theory of restrictive immunity nor the piecemeal approach of national and international codification efforts of national state immunity legislation accurately distinguishes between immune and nonimmune state conduct. These approaches, as explained, focus primarily on establishing categories of nonimmune conduct and in so doing promote excessive state immunity protections.

Part III proposes an alternative approach to allocating state immunity entitlements. The approach justifies granting immunity only in circumstances in which such protection promotes orderly relations in the community of states, not least between the forum state and the foreign state. As explained in more detail below, state conduct that does not enhance interstate relations, such as the abuse of citizens of the forum state, should not be entitled to immunity protection.

Developing a Theory of Collective Benefit
One way to identify the scope of the international rule of state immunity is to conceptualize state immunity as arising out of an agreement forged between the forum state and any foreign state with which it seeks to develop transnational intercourse. This approach is consistent with the more persuasive rationale for state immunity, i.e., that immunity protections result from the forum state’s waiver of its right of adjudicatory jurisdiction. As Justice Marshall observed in The Schooner Exchange, state immunity protections were originally created when the forum state granted a foreign sovereign a “license” to operate within the forum state’s jurisdiction free from arrest, seizure, or adverse legal proceedings. To the extent that this practice has crystallized into international custom, the forum state has consented to concede a right of adjudicatory jurisdiction on an enduring
basis. Thus, defining the scope of the international rule of state immunity depends upon determining the circumstances in which forum states have conceded their important right of adjudicatory jurisdiction permanently in favor of immunity protections.

A look at the “agreement” that states have struck with one another regarding state immunity protections is revealing. Traditionally, a forum state’s promise of foreign state immunity has provided foreign states with guarantees against arrest, seizure, and adverse legal proceedings sufficient to entice foreign sovereigns and their representatives into entering and operating within the forum state’s jurisdiction. This promise of immunity, however, is not limitless in scope. As Justice Marshall observed, state immunity exists only for the “mutual benefit” of “intercourse” between states and for “an interchange of those good offices which humanity dictates and its wants require.” Recently, the decision in the Arrest Warrant case confirmed this justification for state immunity in the context of immunities of foreign ministers. The ICJ found that such immunities are designed to enable the ministers to fulfill their functions effectively and to protect them from acts of authority of another state that would thwart them in fulfilling those functions. Accordingly, the sole raison d’etre for state immunity under customary international law is so that states can perform their public functions effectively and ensure that international relations are conducted in an orderly fashion.

If one accepts this basic premise, then conduct of a foreign state that does not conform with the development of beneficial interstate relations falls outside the state immunity “agreement” and thus is not immune by virtue of international custom. The most obvious example excludes foreign state conduct that does significant harm to the vital interests of the forum state, such as the commission of human rights abuses against the forum state’s nationals. Accordingly, the basic test for distinguishing between immune and nonimmune transactions should not be whether the state conduct is public or private, as the theory of
restrictive immunity requires, but whether such conduct would substantially harm the vital interests of the forum state. Within these parameters, the forum state can more accurately define its domestic state immunity laws in accordance with customary international law requirements.

Although the forum state has wide discretion to modify its state immunity laws so as to provide better judicial access to human rights victims, certain important limitations still condition the forum state’s approach. First, any changes in domestic state immunity policy must be consistent with the international rules of adjudicatory jurisdiction. Since state immunity, as a threshold matter, is an exception to adjudicatory jurisdiction, the absence of jurisdiction over state conduct would eliminate the state immunity question altogether. Thus, when opening up domestic courts to human rights litigation, it is necessary to ensure maintenance of an appropriate connection between the dispute and the forum state under international law.

Second, the forum state, like the foreign state, belongs to a community of states and must abide by community rules, the rules of international law. For example, several principles restraining state behavior are enshrined in the United Nations Charter; they include, among others, the obligation to uphold the principles of sovereign independence, the peaceful settlement of disputes, and the protection of human rights. Thus, any alteration in state immunity law that unjustifiably endangers peaceful relations may be unlawful. This consideration would preclude, for example, collusion between the forum state and the defendant state to commit a crime that is mutually beneficial to them but outlawed by international law. Additional obligations will likely arise out of international agreements to which the forum state is a party or out of customary international law.

Applying the Theory of Collective State Benefit

Two recent developments in state immunity law, in the United States and Greece, exemplify the legitimate restrictions on immunity that states seeking to
advance human rights litigation may impose in accordance with the theory of collective state benefit. As mentioned above, in 1996 the U.S. Congress amended the FSIA by creating an additional exception to the immunity of certain foreign states for a limited range of human rights violations. Notably, the newest FSIA exception requires no territorial connection to the United States. Instead, jurisdiction is predicated on the American nationality of the victim or the claimant. The new exception is consistent with the theory of collective state benefit in that it stands to protect one of the most vital interests of the democratic state, the well-being of its citizenry. Indeed, the scope of the exception could arguably be broader, consistent with the theory, and could extend to a broader class of potential foreign state defendants, not only those designated as sponsors of terrorism.

The second development is the Greek Supreme Court’s decision in Prefecture of Voiotia, discussed earlier, which held the Federal Republic of Germany liable for Nazi acts of aggression against the civilian population of southern Greece. In addition to its misguided acceptance of the normative hierarchy theory, the case is notable for its advancement of the so-called torts exception to immunity. As indicated above, the Court ruled that “national courts have jurisdiction to adjudicate damages, including compensation for offenses against people or property that took place in the territory of the forum by organs of a foreign country that was present in the territory when the offense took place, even if it was acta jure imperii.” In this regard, Prefecture of Voiotia not only adds to the corpus of law defining the torts exception to immunity, but also contributes to the growing consensus that such an exception has application even in cases of abuse of sovereign power.

The second contribution of Prefecture of Voiotia, really an extension of the first, is its recognition that even in the field of armed conflict a state is not immune when it abuses its official power to the detriment of citizens of the forum state. The Court noted that the commentary to Article 12 of the ILC draft articles, Article 31
of the European Convention, and section 16(2) of the UK State Immunity Act all indicate a rule of customary international law that entitles states to immunity in regard to military activity. The Court determined, however, that this rule contained a significant exception “for damages arising from crimes, such as crimes against humanity, that affect, not necessarily as a consequence of war, particular civilians, not civilians at large and which civilians have no connection with that armed conflict during military occupation.” In the context of that case, the Court concluded: “[T]here is no state immunity from criminal acts of the organs of the occupying power that take place by abusing their sovereign power as reprisals for acts of resistance movements against innocent and nonparticipant persons.” The Court continued:

[T]he torts in question (murders that also constitute crimes against humanity) were directed against specific persons limited in number who resided in a specific place, who had nothing to do with the resistance activity resulting in the death of German soldiers taking part in a terror operation against the local population…. [They were] hideous murders that objectively were not necessary in order to maintain the military occupation of the area or subdue the underground action, carried out in the territory of the forum by organs of the German Third Reich in an abuse of sovereign power.

Prefecture of Voiotia conforms with the theory of collective state benefit for many of the same reasons as the 1996 FSIA amendment. The infliction of wanton terror on Greek civilians by the Nazis during World War II was a direct affront to the vital interest of Greece, the forum state. Regardless of the label it bears, sovereign, military, jure imperii, or otherwise, a foreign state’s unlawful killing of the forum state’s civilians destroys bilateral relations between forum and foreign state and may even jeopardize the security and stability of the community of states. Thus, putting aside its endorsement of the normative hierarchy theory, Prefecture of Voiotia represents a legitimate solution to the human rights litigation problem.
Taken together, the 1996 FSIA amendment and Prefecture of Voiotia demonstrate that progress can be made in resolving the human rights litigation problem in a manner consistent with the true nature of the doctrine of foreign state immunity. That is to say that the forum state, through the agent it designates to create and interpret foreign state immunity law (the U.S. Congress in the case of the 1996 amendment and the Hellenic Supreme Court in the case of Prefecture of Voiotia), is empowered to modify foreign state immunity law to an extent consistent with the theory of collective state benefit. These developments further show that such modifications are possible in two very different legal settings: the 1996 amendment arose in a common law country with national immunity legislation, while Prefecture of Voiotia resulted from the jurisprudential application of international law in a civil law country without national immunity legislation.

11.6 CONCLUSION

State immunity is the product of a conflict between two international law principles, sovereign equality and adjudicatory jurisdiction, which conflict is resolved more persuasively in favor of adjudicatory jurisdiction. Thus, state immunity exists as an exception to the overriding principle of adjudicatory jurisdiction.

The awkward development of the doctrine of foreign state immunity in the twentieth century, which derived from the myth that states once enjoyed absolute immunity from suit, has, however, distorted the perception of how state immunity operates. Today, the prevailing formulation of state immunity laws improperly reverses the presumption of adjudicatory jurisdiction by establishing a catchall rule of immunity. Consequently, in many national jurisdictions state immunity laws grant foreign state defendants more protection than customary international law requires.
With respect to certain core state conduct, the practice of waiving adjudicatory jurisdiction has crystallized into a rule of customary international law binding on states. While the existence of a rule of customary international law concerning state immunity is firmly established, the exact scope of this rule is difficult to discern. Nevertheless, despite uncertainty at the edges, sufficient evidence testifies that customary international law does not compel immunity protections for state conduct that violates human rights. Any immunity that a foreign state receives for such conduct is solely conferred by domestic laws.

The normative hierarchy theory offers an unpersuasive solution to the human rights litigation problem. The theory assumes a clash of international law norms of human rights and state immunity that, in fact, does not occur. There is no international norm of state immunity that shields foreign states from human rights litigation and, even if there were, the normative hierarchy theory fails to explain persuasively how human rights norms can trump state immunity norms when the two types of norms govern mutually exclusive types of state conduct. The real source of the human rights litigation problem is the forum state’s failure to exercise its right of adjudicatory jurisdiction with respect to human rights cases. However, this problem is rather difficult to resolve on a theory of normative hierarchy, as the real conflict may involve a clash of two peremptory norms of international law, human rights and adjudicatory jurisdiction.

Finally, because state immunity is at its root an exception to the overriding principle of adjudicatory jurisdiction, the forum state may exercise its right of adjudicatory jurisdiction to curtail any excess state immunity privileges that do not emanate from international law, including protections for human rights violations. A theory of collective state benefit guides the process of repealing extraneous immunity protections and draws the line between immune and nonimmune conduct more appropriately than the normative hierarchy theory. On the collective state benefit theory, state conduct that fails to enhance interstate
relations, particularly between the forum state and the foreign state, does not warrant immunity protection. The clearest example of this kind of conduct is activity by the foreign state defendant that harms the vital interests of the forum state, such as abuse of the citizens of the forum state.