

# *Nova Law Review*

---

*Volume 25, Issue 2*

2001

*Article 8*

---

## Breaking the Shackles of the Past: The Role and Future of State Sovereignty in Today's International Human Rights Arena

Temple Fett Kearns\*

\*

Copyright ©2001 by the authors. *Nova Law Review* is produced by The Berkeley Electronic Press (bepress). <https://nsuworks.nova.edu/nlr>

# Breaking the Shackles of the Past: \* The Role and Future of State Sovereignty in Today's International Human Rights Arena

Temple Fett Kearns\*\*

---

## TABLE OF CONTENTS

I. INTRODUCTION .....	502
II. STATE SOVEREIGNTY.....	503
A. <i>Historically</i> .....	503
B. <i>Defenses Created out of State Sovereignty</i> .....	503
1. Sovereign Immunity.....	504
2. The Act of State Doctrine .....	507
III. UNIVERSAL JURISDICTION .....	511
A. <i>Historical Development of Universal Jurisdiction</i> .....	512
B. <i>Current Evolution</i> .....	516
C. <i>Universal Jurisdiction Today</i> .....	517
IV. LIMITATIONS ON UNIVERSAL JURISDICTION .....	521
V. CONCLUSION.....	522

---

\* This phrase was taken from an address given by Professor Henry T. King, Jr., of Case Western Reserve University School of Law, at the McLean Lecture, University of Pittsburgh Law School. In that speech, he stated:

Nuremberg was right, and it was just. It was a revolutionary break with the shackles of the past, and it grew out of the conviction that there was a better way. We saw the stars at Nuremberg and the vision of a secure world under a rule of law. Let that vision always remain with us, and let us always keep our eyes on the stars.

Henry T. King, Jr., *The Meaning of Nuremberg*, in 30 CASE W. RES. J. INT'L L. 143, 148 (1998).

\*\* Nova Southeastern University, Shepard Broad Law Center, 2000, J.D., cum laude, Florida International University 1996, BA. Ms. Kearns is an associate with Shutts & Bowen, LLP, practicing in government relations and commercial litigation. The author would like to thank Professors James Wilets and Douglas Donoho for their incites and debates throughout the formation of this article.

## I. INTRODUCTION

The use of the word “sovereignty” historically referred to the relationship between the rulers of a country and the persons over whom they ruled.<sup>1</sup> Yet, over time, this idea grew to its modern understanding as a description of the relationship between states.<sup>2</sup> Commentators have criticized the creation of this new meaning as “an illegitimate offspring”<sup>3</sup> but regardless, it is used and perceived as both a sword and a shield to protect a state from the evils it perceives from other states. The legitimacy of a state’s ability to hide behind its sovereignty has been to be challenged over the past half century as we witness an evolution to a new idea of what role a state’s sovereignty should play.<sup>4</sup>

This article will explore the role state sovereignty plays in the evolving international human rights arena. Specifically, it will address the concept of universal jurisdiction and how its growing acceptance cuts into a state’s ability to cry sovereign. Part II will begin with a brief discussion of the evolution of state sovereignty into this modern day wall separating states. This section will also describe the methods by which states use their sovereignty as a defense from scrutiny or review through the development and use of such concepts as the act of state doctrine and sovereign immunity. Part III will address the concept of universal jurisdiction through a discussion of its history and development over time. Included in this section will be a discussion of the recent revival of the controversies which surround the use of universal jurisdiction with Spain’s attempt to prosecute General Augusto Pinochet Ugarte for his part in the systematic widespread human rights violations against the people of Chile while under his control. Part IV will analyze the state’s effect on sovereignty when it invokes universal jurisdiction to review and judge actions that occur in other states. Although it is the view of the author that the expansion of universal jurisdiction is eroding the idea of sovereignty, this article will conclude by explaining why this doctrine of jurisdiction alone can not, and will not, be its demise.

---

1. Louis Henkin, *That “S” Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 *FORDHAM L. REV.* 1, 2 (1999).

2. The use of the word “states” throughout this article will be used in its international context, which refers to other countries, and not to any individual American state.

3. Henkin, *supra* note 1, at 2.

4. *See generally id.* at 1–14.

## II. STATE SOVEREIGNTY

### A. *Historically*

The historical use of the word sovereignty referred to the persons having independent and supreme authority over those they ruled.<sup>5</sup> This meant that the Queen of England, for example, was the sovereign, but only with respect to her subjects, not to other states.<sup>6</sup> Sovereignty was a domestic term used in a domestic context; it had no international meaning.<sup>7</sup>

Through the centuries, however, this concept of sovereignty was expanded to its modern understanding as a description of the relationship between states.<sup>8</sup> Under this view, we saw the creation of a new legal concern: that of a state and the protection of its very existence. This was an important shift because this new understanding of sovereignty was very powerful. It became a widely accepted principle which governments and courts used as a means of avoiding judgment or review by other states, through the development and use of related attributes of sovereignty, such as sovereign immunity and the act of state doctrine.<sup>9</sup> Because of the very existence of this new legal concern—that of the state and its territory—states had to develop the means by which to ensure their survival.

### B. *Defenses Created out of State Sovereignty*

With the development of this concept of absolute sovereignty by nations came the creation of two notable legal doctrines: the act of state doctrine and sovereign immunity. These two legal theories, although not founded solely on the principle of sovereignty, lose their necessity as the concept of sovereignty loses its power. Each has at its core the idea that the sovereign—the state—is not to be judged.

---

5. *See id.*

6. *Id.* at 2.

7. *See id.*

8. Henkin, *supra* note 1, at 2.

9. *See* text and accompanying notes *infra* Part II.B.

## 1. Sovereign Immunity

The doctrine of sovereign immunity provides that domestic courts should decline to hear a case against a foreign sovereign.<sup>10</sup> It evolved out of the idea that the “king can do no wrong.”<sup>11</sup> Historically this immunity was absolute in that a foreign court could not hear the case no matter what the acts complained of may have been, or what injuries were caused.<sup>12</sup> In recent history, however, this immunity has been somewhat restricted. The predominant understanding now is that a sovereign state is only immune from those cases that involve injuries resulting from the sovereign’s governmental actions.<sup>13</sup>

This trend of restricting the ability of a state to hide behind sovereign immunity developed out of need. Historically the state was only involved with such things as tax collection, national defense, and law enforcement.<sup>14</sup> However, as the modern state became more involved in the commercial arena, it became apparent that persons needed an avenue of redress when that state failed to perform its obligations on its commercial contracts.<sup>15</sup>

Additionally, as a result of the egregious acts committed during World War II, the international community agreed that states need to be accountable and responsible for the international crimes they commit.<sup>16</sup> It is

10. See 28 U.S.C. § 1603(a) (1994); see, e.g., Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330–32, 1391, 1602–11 (1994); United Kingdom State Immunity Act, 1978, reprinted in 17 I.L.M. 1123 (1978); Canadian State Immunity Act of 1982, reprinted in 21 I.L.M. 798 (1982); Australian Foreign States Immunities Act 1985, reprinted in 25 I.L.M. 715 (1986). Within this context, the use of the word “sovereign” encompasses the state, its officers, its agencies, or its instrumentalities. RAY AUGUST, INTERNATIONAL BUSINESS LAW 123 (2d ed. 1997).

11. William R. Dorsey, III, *Reflections on the Foreign Sovereign Immunities Act After Twenty Years*, 28 J. MAR. L. & COM. 257, 257 (1997). Additional bases for this legal principle are comity and mutuality between sovereigns. See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983) (noting that foreign sovereign immunity is viewed as a “matter of grace and comity on the part of the United States”).

12. AUGUST, *supra* note 10, at 123; see also *The Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812). The Foreign Sovereign Immunities Act is the sole basis for subject matter jurisdiction over a foreign state and its instrumentalities in a United States court. See *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 439 (1989).

13. AUGUST, *supra* note 10, at 124.

14. *Id.* at 123.

15. *Id.* at 123–24.

16. See Hari M. Osofsky, *Foreign Sovereign Immunity from Severe Human Rights Violations: New Directions for Common Law Based Approaches*, 11 N.Y. INT’L L. REV. 35, 50 (1998).

this idea that has helped foster the expansion of crimes subject to a state invoking universal jurisdiction, and as a result, has allowed for a slight erosion to the traditional notions of sovereignty.

The application of this belief, however, has proven to be much more difficult in practice since the issue of sovereign immunity was not addressed in the human rights treaties ratified after the war.<sup>17</sup> Many of the treaties provide for enforcement either through some international body, or through the use of the appropriate state's national courts when handling internal obligations, yet there were no discussions of a state's ability to take jurisdiction over another state.<sup>18</sup>

To complicate this further, none of the states that codified some form of the restricted sovereign immunity concept ever provided an explicit exception for human rights violations.<sup>19</sup> In practice, this proved to be a brick wall in that numerous cases were dismissed or subsequently reversed on the basis of sovereign immunity.<sup>20</sup> However, in 1996, the United States stepped up to correct this error by amending the Foreign Sovereign Immunities Act to provide an explicit exception for a civil suit to be brought against a sovereign for "personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, [or] hostage taking . . ." <sup>21</sup> Although this exception is a step in the right direction, it is important to note that it merely provides for a civil remedy to obtain money damages for the wrongful acts of a foreign sovereign.<sup>22</sup> It does not provide for an exception

17. *Id.*

18. *Id.*

19. *See id.* at 38.

20. *See, e.g., Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) (holding that states are presumptively immune from a court's jurisdiction and that the only method of obtaining jurisdiction in the United States courts is under the Foreign Sovereign Immunities Act); *Von Dardel v. Union of Soviet Socialist Republics*, 736 F. Supp. 1 (D.D.C. 1990) (dismissing the case on sovereign immunities grounds, citing six reasons why the Foreign Sovereign Immunities Act does not apply). In *Siderman de Blake v. Argentina*, the Ninth Circuit reversed the district court, which had dismissed the case on sovereign immunity grounds. 965 F.2d 699, 723 (9th Cir. 1992). The Ninth Circuit held that, in this limited fact situation, Argentina had impliedly waived its right to the sovereign immunity defense because it had previously sought the assistance of the United States courts. *Id.* at 720–23. For a detailed discussion of the treatment of human rights cases under the doctrine of sovereign immunity in other states, see generally Osofsky, *supra* note 16.

21. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, § 221, 110 Stat. 1214, 1241 (1996) (amended at 28 U.S.C. § 1605(a) (Supp. IV 1998)).

22. *See* 28 U.S.C. § 1605(a)(7) (Supp. IV 1998) (providing that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States . . . in which money damages are sought against a foreign state" for such acts as torture) (emphasis added).

from immunity for criminal prosecution when the foreign state, through its actors, commits these enumerated acts. Thus, this exception does not grant jurisdiction to a United States court to universally prosecute a foreign sovereign for its human rights violations, but merely prevents a foreign sovereign from using immunity as a defense when the case is rightfully before a United States court.<sup>23</sup> Thus, the United States court must obtain proper jurisdiction to hear the case by some other means. Only then will this exception come into play by disallowing a defendant from arguing sovereign immunity. Therefore, under current law, although a state may invoke universal jurisdiction to prosecute those individuals, the Foreign Sovereign Immunities Act still provides one more hurdle for that state to overcome.

Despite no explicit exception to sovereign immunity under the statute, it has been argued that a person should not be permitted to assert a sovereign immunity defense in a criminal prosecution for human rights violations.<sup>24</sup> This argument is premised on the underlying purpose of the sovereign

23. This statute explicitly provides that the human rights exception cannot be used if the actions alleged were committed solely in the territory of the foreign sovereign and neither the claimant nor the victim is a United States national. See § 1605(a)(7)(B)(i)–(ii). However, people in those situations are not closed off to civil remedies in the United States court system. Under the Alien Tort Claim Act, an alien may initiate a lawsuit in the United States seeking civil damages against another alien for actions that occurred in a foreign state. See 28 U.S.C. § 1350 (1994).

24. Willard B. Cowles, *Universality of Jurisdiction over War Crimes*, 33 CAL. L. REV. 177, 194 (1945) (noting that war criminals take advantage of the fact that often there is no well-organized police or judicial system where the act is committed, and therefore they hope to commit their crimes with impunity); see also Jodi Horowitz, Comment, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet: Universal Jurisdiction and Sovereign Immunity for Jus Cogens Violations*, 23 FORDHAM INT'L L.J. 489 (1999) (discussing Prefecture of Voiotia v. Fed. Republic of Germany, Case No. 137/1997 (Court of First Instance of Leivadia, Greece, 1997)). In *Prefecture of Voiotia*, the Greek court held that a state should deny immunity for certain violations of human rights because the sovereign could not have reasonably expected to receive immunity for such grave violations of international law, and therefore it constructively waived its privilege when it committed the egregious acts. *Id.* at 510. Additionally, the court noted that when such acts are committed, the sovereign is not acting within its authority and therefore should not be able to hide behind its sovereignty. *Id.* at 510–11. The United States Supreme Court, however, rejected an implied waiver argument by holding that the Argentine government did not implicitly waive its immunity by signing certain treaties. See *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442–43 (1989). In that decision, the Court stated “[n]or do we see how a foreign state can waive its immunity under § 1605(a)(1) by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States.” *Id.*

immunity doctrine and the rationale for its current limitations. Just as a sovereign is not immune from inquiries into its commercial contracts since those are distinguished from its *official acts*, so too should the sovereign be subject to prosecution for its human rights violations, as those actions are not within the ambit of any state's official acts. However, until such time as this becomes a recognized exception to sovereign immunity, there is always the chance that no justice will be served.

In addition to the overall sovereign immunity exception, there is also the subset of head of state immunity. Although this doctrine is legally distinct from state immunity,<sup>25</sup> its force as a viable defense against prosecutions for human rights violations is questionable. The Nuremberg Charter, enacted after World War II, provided that "[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."<sup>26</sup> This principle was recently reaffirmed by the creation of the international tribunals in both the former Yugoslavia and Rwanda.<sup>27</sup> Yet, even if a state successfully overcomes these two jurisdictional hurdles, it will then face another potential defense—the act of state doctrine.

## 2. The Act of State Doctrine

The act of state doctrine is a judicial doctrine which precludes American courts from inquiring into the validity of another foreign sovereign's acts when those acts are committed within that foreign

---

25. Jerrold L. Mallory, *Resolving the Confusion over Head of State Immunity: The Defined Rights of Kings*, 86 COLUM. L. REV. 169, 170–71 (1986) (noting that heads of state are no longer viewed as actual states); Horowitz, *supra* note 24, at 505 ("[t]he state, rather than its ruler, is the primary subject of international law, and is thus protected by immunity").

26. Charter of the Int'l Military Tribunal, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, art. 7, 59 Stat. 1544, 1556, 82 U.N.T.S. 279, 288 [hereinafter the Nuremberg Charter].

27. See *Statute for the International Criminal Tribunal for the Former Yugoslavia*, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/INF/49 (1993) [hereinafter *ICFY Statute*]; United Nations: Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, May 3, 1993, 32 I.L.M. 1159, 1175; *Statute for the International Criminal Tribunal for Rwanda*, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. SC/5974 (1994), reprinted in 33 I.L.M. 1598, 1604 [hereinafter *ICTR Statute*].



territory.<sup>28</sup> This doctrine differs from sovereign immunity in that sovereign immunity operates to deprive a court of jurisdiction to hear a case; whereas, in contrast, the act of state doctrine does not defeat a court's jurisdiction, but rather, merely precludes inquiry on certain issues.<sup>29</sup> Although this is a doctrine used in the American court system, many other states have similar concepts.<sup>30</sup>

There are several justifications for the act of state doctrine. Traditionally, it was seen as an offspring of sovereignty and a means to protect the importance of sovereign authority.<sup>31</sup> Other justifications for this doctrine include comity<sup>32</sup> and the separation of powers.<sup>33</sup> Comity is an international principle based on reciprocity. Simply stated, it is the idea that we, as a sovereign government, do not want to tell others how to rule their country because we do not want them to tell us how to rule ours.<sup>34</sup> Separation of powers also comes into play because the United States Constitution vests the executive branch with the exclusive right to conduct foreign affairs; therefore, the judiciary is not authorized to review those actions.<sup>35</sup> Originally, when the term sovereign spoke of the relationship between the

28. BLACK'S LAW DICTIONARY 34 (6th ed. 1990).

29. *Ricaud v. Am. Metal Co.*, 246 U.S. 304, 309 (1918). The Supreme Court noted in that decision that the act of state doctrine:

[D]oes not deprive the courts of jurisdiction once acquired over a case. It requires only that, when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision. To accept a ruling authority and to decide accordingly is not a surrender or abandonment of jurisdiction but is an exercise of it.

*Id.*

30. See, e.g., *Regina v. Bartle*, 37 I.L.M. 1302, 1331–32 (H.L. 1998) (reviewing several variations of the act of state doctrine and recognizing that certain questions of foreign affairs remain nonjusticiable).

31. See *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) (noting that “[e]very sovereign State is bound to respect the independence of every other sovereign State . . .”).

32. Comity is the “[r]ecognition that one sovereignty allows within its territory to the legislative, executive, or judicial act of another sovereignty, having due regard to rights of its own citizens.” BLACK'S LAW DICTIONARY 267 (6th ed. 1990).

33. See *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp. Int'l*, 493 U.S. 400, 404 (1990).

34. “In general, [the] principle of ‘comity’ is that courts of one state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect.” BLACK'S LAW DICTIONARY 267 (6th ed. 1990) (citing *Brown v. Babbitt Ford, Inc.*, 571 P.2d 689, 695 (Ariz. Ct. App. 1977)).

35. See *W.S. Kirkpatrick & Co.*, 493 U.S. at 404.

government and its people, the idea of this doctrine was that the sovereign made the law and therefore we could not challenge it. As the concept of sovereignty expanded, this doctrine came to be understood as the absence of a foreign government's right to enter another state and judge its actions.

Traditionally, the act of state doctrine required that United States federal courts accept, without question, the validity of a foreign sovereign's acts of state that were performed in that sovereign's territory.<sup>36</sup> The United States Supreme Court explained this doctrine by stating:

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.<sup>37</sup>

Years later, the Supreme Court reexamined the doctrine in a case that arose out of the Cuban expropriations of American assets.<sup>38</sup> In *Banco Nacional de Cuba v. Sabbatino*,<sup>39</sup> the Supreme Court noted that "constitutional underpinnings" compel adherence to the act of state doctrine, specifically, the constitutional mandate on separation of powers.<sup>40</sup> However, the Court put an end to the prior categorical approach to this doctrine and replaced it with a case-by-case analysis, in which a three-part test would be used to determine when the doctrine should be applied.<sup>41</sup>

This test, a form of "balanc[ing] of relevant considerations" looked to whether adjudication of any given issue would interfere with the nation's foreign affairs.<sup>42</sup> In deciding whether to apply the act of state doctrine, the court must balance: 1) the degree of codification regarding the international legal principle in question; 2) the impact of the matter on United States foreign relations; and 3) the status of the foreign government whose act is allegedly implicated.<sup>43</sup> The Court articulated this test by stating:

36. See *Oetjen v. Cent. Leather Co.*, 246 U.S. 297 (1918); *Ricaud v. Am. Metal Co.*, 246 U.S. 304 (1918); *Underhill v. Hernandez*, 168 U.S. 250 (1897).

37. *Underhill*, 168 U.S. at 252.

38. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

39. 376 U.S. 398 (1964).

40. *Id.* at 423.

41. *Id.* at 427.

42. *Id.*

43. *Id.*

It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.<sup>44</sup>

Since the Supreme Court's decision in *Sabbatino*, the act of state doctrine has been litigated in numerous decisions, although rarely making it to the United States Supreme Court.<sup>45</sup> In its latest decision, the Supreme Court has slightly deviated from its holding in *Sabbatino* by articulating a threshold question that must be satisfied prior to a court embarking on the *Sabbatino* balancing test.<sup>46</sup> The Court held that the proper question at the outset is whether adjudication requires inquiry into the *validity* of the public act of a foreign sovereign.<sup>47</sup> If the challenged acts are found to qualify as acts of state, then the *Sabbatino* balancing test can be applied to limit the doctrine's applicability.<sup>48</sup> The Court articulated this distinction by stating:

Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for

---

44. *Sabbatino*, 376 U.S. at 428.

45. The United States Supreme Court has only addressed the act of state doctrine in three cases since its decision in *Sabbatino*. See *W.S. Kirkpatrick & Co. v. Env'tl. Tectonics Corp. Int'l*, 493 U.S. 400 (1990); *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682 (1976); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972). The United States Legislature reversed the effect of the United States Supreme Court's decision in *Sabbatino* by enacting the Hickenlooper Amendment, also known as the *Sabbatino* Amendment. See 22 U.S.C. § 2370(e)(2) (1994). This amendment requires United States courts to adjudicate takings claims if the foreign government does not provide "speedy compensation" for the property taken despite a claim of defense under the act of state doctrine. *Id.* However, although this amendment reversed the outcome of the Supreme Court's decision in *Sabbatino*, it did nothing to affect how the act of state doctrine is to be applied in future decisions by United States courts for matters that do not involve a property taking.

46. See *W.S. Kirkpatrick & Co.*, 493 U.S. at 409.

47. *Id.*

48. See *id.*

cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.<sup>49</sup>

Under the above analysis, it appears that a foreign sovereign would not be able to successfully use this doctrine to defeat a United States court from hearing a human rights case against it. With the addition of the threshold question a court must answer to determine whether the further balancing of interests must be entered into, one can make a tighter argument that the act of state doctrine should not defeat the court's ability to hear a human rights case. Clearly, a state's actions of committing human rights violations could not and should not be deemed "acts of state." By a court holding that such actions are not acts of state, the court would not need to continue further into the balancing test, and thus it would not be precluded from hearing the case.

However, until such time as the arguments are made and precedent is set, both sovereign immunity and the act of state doctrine represent two types of hurdles persons seeking punishment for human rights abuses must overcome. With the expansion of universal jurisdiction, the threat of a case being dismissed on sovereign immunity grounds weakens. Additionally, with the United States' new articulation of the appropriate use of the act of state doctrine, this, too, is no longer impossible to overcome.

### III. UNIVERSAL JURISDICTION

It is a basic premise of every legal system that a court must have jurisdiction before it may decide a case. Jurisdiction is defined as "the authority of states to prescribe their law, to subject persons and things to adjudication in their courts and other tribunals, and to enforce their law, both judicially and nonjudicially."<sup>50</sup> The jurisdictional principle of universality provides that every state has the right to prosecute offenders under its domestic laws for certain crimes even though the defendant and the victim are not nationals of that state, or the alleged crime did not occur in that

---

49. *Id.*

50. Christopher C. Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 *LAW & CONTEMP. PROBS.* 153, 163 (1996) (quoting *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES JURISDICTION AND JUDGMENTS*, pt. IV, Introductory Note (1987)).

state.<sup>51</sup> These crimes are considered to be of such a universal concern and mutual threat to all states that every nation has an interest in punishing the perpetrators.<sup>52</sup>

### A. *Historical Development of Universal Jurisdiction*

The principal of universal jurisdiction was first developed as a means of punishing pirates and slave traders.<sup>53</sup> Pirates were considered *hostis humanis generis*, enemies of mankind, and any nation could assume jurisdiction over them.<sup>54</sup> The rationale behind the development of universal jurisdiction to this offense was based on the fact that the offenses were committed on the high seas and not within the territorial jurisdiction of any particular state.<sup>55</sup> Slave trading is also an offense that is subject to every state's jurisdiction.<sup>56</sup> Through the use of various treaties, the international community agreed that despite the fact that slave trading did not threaten commerce or navigation between nations in the same manner as piracy, this offense was of such a heinous nature that it was subject to prosecution in every state.<sup>57</sup>

---

51. Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX L. REV. 785, 788 (1988). Universal jurisdiction is only one of five principles of jurisdiction a state can use to have the authority to hear a case. These extraterritorial jurisdiction principles are:

- (1) [T]he territoriality principle, which applies when an offense occurs within the territory of the prosecuting state; (2) the nationality principle, which admits jurisdiction when the offender is a national or resident of the prosecuting state; (3) the protective principle, which permits jurisdiction where an extraterritorial act threatens interests that are vital to the integrity of the prosecuting state; (4) the passive personality principle, which recognizes jurisdiction where the victim is a national of the prosecuting state; and (5) the universality principle, which holds that some crimes are so universally abhorrent and thus condemned that their perpetrators are *hostis humani generis*—enemies of all people—and allows that jurisdiction may be based solely on securing custody of the perpetrator.

Joyner, *supra* note 50, at 164–65 (internal citations omitted).

52. Joyner, *supra* note 50, at 165.

53. See Randall, *supra* note 51, at 788.

54. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

55. Joyner, *supra* note 50, at 165 n.48.

56. Randall, *supra* note 51, at 798.

57. *Id.* at 800; see, e.g., Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, 60 U.N.T.S. 253; Protocol Amending the Slavery Convention, Dec. 7, 1953, 7 U.S.T. 479, 182 U.N.T.S. 51; Supplementary Convention of the Abolition of

It was not until the conclusion of the second World War, however, that the concept of universal jurisdiction began to truly develop. As World War II came to an end, and the international community became aware of the atrocities committed, the cries of “never again” became the theme.<sup>58</sup> The international community drafted the Nuremberg Charter of 1945 (“Nuremberg Charter”),<sup>59</sup> which permitted the piercing of a state’s sovereignty in order to hold a foreign individual accountable, regardless of his or her position as a head of state or a government official, for crimes against peace, crimes against the laws of war, and crimes against humanity.<sup>60</sup> The significance of the Nuremberg Charter not only paved the way for the establishment of ad hoc tribunals in Nuremberg and Tokyo to prosecute persons charged with these crimes, but it also sparked a growth in the desire to enact treaties aimed at the codification of international humanitarian law.<sup>61</sup>

The majority of the treaties passed, and the trials that took place never directly made reference to the use of universal jurisdiction,<sup>62</sup> although it is generally agreed that this was the appropriate justification for the establishment of the tribunals and the various proceedings.<sup>63</sup> It was not until

Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3.

58. In the days following the liberation of the Nazi concentration camps throughout Germany, Austria, and Poland, the world became aware of, and was astounded by, the revelation of the millions of Jewish people and Gypsies that had been exterminated by the Nazis as a direct result of the policies of the German State under Adolph Hitler’s “Final Solution.” See generally YVES BEIGBEDER, *JUDGING WAR CRIMINALS: THE POLITICS OF INTERNATIONAL JUSTICE* 29–31 (St. Martin’s Press, Inc. 1999); DANIEL R. BROWER, *THE WORLD IN THE TWENTIETH CENTURY: THE AGE OF GLOBAL WAR AND REVOLUTION* 148–49 (2d ed. Prentice-Hall 1992).

59. Nuremberg Charter, *supra* note 26.

60. *Id.*

61. Jamison G. White, *Nowhere to Run, Nowhere to Hide: Augusto Pinochet, Universal Jurisdiction, the ICC, and a Wake-Up Call for Former Heads of State*, 50 CASE W. RES. L. REV. 127, 135 (1999).

62. In fact, the ability of the international community to even hold the trials prosecuting various German officials in Nuremberg was ridiculed as being merely “victor’s justice.” BEIGBEDER, *supra* note 58, at 38–41.

63. See *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985). In *Demjanjuk*, the Sixth Circuit Court of Appeals held that the United States could extradite Demjanjuk to Israel for the crimes he committed when he was a guard at Treblinka, a Nazi concentration camp in Poland, pursuant to Israel’s exercise of universal jurisdiction. *Id.* at 584. The court held that the acts committed by Demjanjuk were of such a universally recognized nature that they were punishable by any member of the international community. *Id.* at 582.

several years later that such a clear use of universal jurisdiction would be seen.<sup>64</sup> Almost fifteen years after victory was declared, the world witnessed one of the most controversial trials in its history when the State of Israel kidnapped Adolph Eichmann from Argentina and invoked universal jurisdiction to prosecute him for crimes against humanity.<sup>65</sup> In its decision, the Supreme Court of Israel stated:

Not only do all the crimes attributed to [Eichmann] bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try [Eichmann].<sup>66</sup>

The creation of various international agreements following the conclusion of the war also helped to solidify the principle of universal jurisdiction by codifying various aspects of international humanitarian law. The European Convention on Human Rights,<sup>67</sup> the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”),<sup>68</sup> and the Universal Declaration of Human Rights<sup>69</sup> are three examples of such agreements. Of these agreements, the Genocide Convention was the most notable since it called for the international condemnation of not only those acts specified in the Nuremberg Charter, but

64. See Attorney Gen. of Israel v. Eichmann, 36 I.L.R. 5 (D.C. Jm. 1961), *aff’d* 36 I.L.R. 277 (Isr. S. Ct. 1962).

65. *Id.* The controversy over this case surrounded Israel’s actions of kidnapping Eichmann from Argentina without Argentina’s consent. See Randall, *supra* note 51, at 813. Although Israel had a right, pursuant to universal jurisdiction, to prosecute Eichmann for the crimes against humanity, universal jurisdiction did not give it the right to invade Argentina’s sovereignty in pursuit of that right. *Id.* Additionally, controversy arose over Israel’s ability to try Eichmann, since Israel was not in existence at the time the acts were committed. *Id.* at 813–14. Although this argument could have been used to negate other jurisdictional principles, it is irrelevant when using universal jurisdiction. *Id.* at 814.

66. *Eichmann*, 36 I.L.R. at 304.

67. Convention for the Protection of Human Rights & Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

68. Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

69. G.A. Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

added the crime of genocide to the list of punishable offenses.<sup>70</sup> Additionally, the international community, through its concern over the acts that were committed during the war, as well as the lack of any international court to address such crimes, ratified the four Geneva Conventions of 1949.<sup>71</sup> Each of these treaties provide that the signatories are under an obligation to either search for persons alleged to have committed grave breaches and bring them to trial, or to extradite the offenders to another state that is willing to try them.<sup>72</sup>

The treaties codified the various crimes that the international community believed to be of such importance as to demand worldwide assistance in punishing the perpetrators. Over the next several decades, numerous treaties were ratified to include additional acts which defined the modern day enemy and therefore expanded the types of acts that are considered universal.<sup>73</sup> The significance of these new additional crimes were that they differed from piracy and slave trading in that they were not international in nature. The new crimes were being committed within the territorial jurisdiction of one state against the nationals of that state. Without their inclusion into universal jurisdiction, any other foreign state lacked a jurisdictional tie to prosecute these crimes when committed.

---

70. White, *supra* note 61, at 135 (citing the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277, 281–83).

71. See Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

72. Geneva Convention I, *supra* note 71, art. 49, 6 U.S.T. at 3146, 75 U.N.T.S. at 62; Geneva Convention II, *supra* note 71, art. 50, 6 U.S.T. at 3250, 75 U.N.T.S. at 116; Geneva Convention III, *supra* note 71, art. 129, 6 U.S.T. at 3418, 75 U.N.T.S. at 236; Geneva Convention IV, *supra* note 71, art. 146, 6 U.S.T. at 3616, 75 U.N.T.S. at 386.

73. See *infra* Part III.B.



## B. *Current Evolution*

The momentum established after the war quickly dissipated, as the Cold War went into full force.<sup>74</sup> In fact, even the four Geneva Conventions were weakened by the failure on the part of the international community to establish an international criminal court. The trend, however, to create new international rules prevailed with the focus now on the new, contemporary war criminal. These new *hostis humanis generis* were committing outrageous acts within the territory of a state and were too often even empowered by that state.<sup>75</sup> The battle against this new type of war criminal provided the perfect basis for expansion of the doctrine of universality.

The international community first turned its aim at the growing crimes of hijacking and aircraft sabotage.<sup>76</sup> These treaties, although providing for both protective and territorial jurisdiction, also hinted at the ability to use universal jurisdiction.<sup>77</sup> Next came the International Convention on the Suppression and Punishment of the Crime of Apartheid in 1973.<sup>78</sup> This convention defined apartheid as certain “inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.”<sup>79</sup> It required the signatories to create domestic legislation criminalizing the use of apartheid.<sup>80</sup> However, similar to the hijacking and aircraft sabotage conventions, it does not explicitly mention universal jurisdiction as a basis for a state to punish violators.<sup>81</sup>

74. White, *supra* note 61, at 135.

75. See, e.g., *infra* Part III.C, which details the legal problems Spain faced when it attempted to prosecute Augusto Pinochet for his alleged role in the torturing and murdering of persons in Chile between September 1973 and March 1990.

76. See Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 25 U.S.T. 564, 974 U.N.T.S. 177; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; 1963 Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219.

77. White, *supra* note 61, at 136 (stating that the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft “mandat[ed] that no ‘criminal jurisdiction exercised in accordance with national law’ is excluded”).

78. Nov. 30, 1973, 1015 U.N.T.S. 244.

79. *Id.* at 245, art. II.

80. See *id.* at 244.

81. White, *supra* note 61, at 136.

In the 1970s and 1980s, this trend continued with a focus on terrorism and torture. The International Convention Against the Taking of Hostages,<sup>82</sup> the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents,<sup>83</sup> and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>84</sup> each contain a provision, with slight variations, that provides:

The State Party in the territory of which the alleged offender is found shall, *if it does not extradite him, be obliged, without exception whatsoever and whether or not the offense was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.*<sup>85</sup>

Such a provision signifies the international community's willingness to rely on the domestic courts of its nations to prosecute violators of these crimes. These were the first treaties ratified that explicitly called for persons to be tried in the national courts of various states around the world under that state's laws. To facilitate this process, the treaties also required their signatories to pass appropriate domestic legislation prohibiting the same conduct.<sup>86</sup>

### C. *Universal Jurisdiction Today*

The principle of universal jurisdiction for human rights violations has recently come full circle with the creation of the International Criminal Tribunals for the former Yugoslavia and Rwanda.<sup>87</sup> This is the first time since the Nuremberg Trials that an international body has been established to prosecute violators of human rights. Although the existence and use of these international tribunals to prosecute those individuals responsible for human rights abuses does not rely on universal jurisdiction, it does solidify the list of acts that the international community agrees should be punished. This can

82. Dec. 4, 1979, 18 I.L.M. 1456.

83. Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167.

84. G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984).

85. Randall, *supra* note 51, at 819.

86. *Id.*

87. Both tribunals were set up by the United Nations Security Council. See *ICFY Statute*, *supra* note 27; *ICTR Statute*, *supra* note 27.

then be used by a state to justify its use of universal jurisdiction in prosecuting other individuals that commit such egregious acts as genocide, torture, war crimes, and crimes against humanity.

The use and expansion of universal jurisdiction, however, took a step backward with the recent legal battle in the English courts surrounding the detention and attempted extradition of General Augusto Pinochet. On October 16, 1998, while on a medical visit to the United Kingdom, General Pinochet was arrested in London at the request of a Spanish court, which had issued a provisional arrest warrant.<sup>88</sup> The warrant alleged that Pinochet was responsible for systematic acts of murder, torture, disappearances, illegal detention, and summary executions while he was President and Director of the National Intelligence Directorate ("DINA").<sup>89</sup> This extradition request by Spain led to a legal battle that lasted approximately two years before General Pinochet was released by the English courts and allowed to return to his home in Chile.<sup>90</sup>

During his seventeen years as the President of Chile, it is estimated that more than 2000 people were killed and thousands more tortured by DINA operatives at the direction of Pinochet in an effort to retain power.<sup>91</sup> Prior to his resignation as President, the government of Chile enacted a new constitution.<sup>92</sup> This not only created a position of senator for life for all ex-presidents who serve for over six years, but, more importantly, it incorporated a general amnesty law which prohibited prosecution of any individuals for crimes committed during the coup in 1973 through the

---

88. For a detailed discussion of the history surrounding General Pinochet's rise to power and the human rights violations which formed the basis for Spain's attempt to prosecute him, see Nehal Bhuta, *Justice Without Borders? Prosecuting General Pinochet*, 23 MELB. U. L. REV. 499 (1999).

89. *Id.* at 513.

90. See, e.g., Ray Moseley, *Ailing Ex-Dictator Pinochet Heads Home to Chile: Extradition Effort is Dead, But Foes Still Want a Trial*, NEW ORLEANS TIMES-PICAYUNE, Mar. 3, 2000, at A8; Tim Vandenack, *Pinochet Faces Future in Santiago: Freed Ex-dictator Could Encounter Human Rights Charges as He Comes Home to Friends and Foes*, SUN-SENTINEL (Ft. Lauderdale), Mar. 3, 2000, at 1A; *Key Dates in Saga that Cost Pounds 15m*, SCOT. DAILY RECORD, Mar. 3, 2000, at 11, available at 2000 WL 13728918 (detailing the chronology of events from Pinochet's arrest to his release). The legal battle to prosecute Pinochet for his human rights violations continues as Chile has now sought to have him charged in its domestic courts. See Jonathan Franklin, *Pinochet Put Under House Arrest: Ex-dictator Indicted For His Role in Hit Squad Murders*, THE GUARDIAN, Jan. 30, 2001.

91. See Bhuta, *supra* note 88, at 508 (citing the Chilean National Commission on Truth and Reconciliation).

92. *Id.* at 509.

dissolution of DINA in 1978.<sup>93</sup> This law meant that Pinochet could not be prosecuted in Chile for his human rights violations.<sup>94</sup>

Upon hearing that Pinochet was in London for back surgery, action was taken by a human rights organization to notify the Spanish prosecutors that were investigating alleged human rights violations in Chile and Argentina against Spanish citizens.<sup>95</sup> On October 13, 1998, Spanish Judge Garzon issued a provisional international arrest warrant and requested that England detain General Pinochet pending a formal extradition request.<sup>96</sup> Pinochet was subsequently arrested and he immediately applied for judicial review and habeas corpus.<sup>97</sup> The legal issues raised in the courts in England involved: 1) whether Spain had jurisdiction to hear the case;<sup>98</sup> 2) whether Pinochet was immune from prosecution due to the fact that the alleged acts were committed while Pinochet was President, and thus a head of state;<sup>99</sup> and 3) whether the arrest warrants listed an offense for which England could rightfully extradite Pinochet to Spain.<sup>100</sup>

The English High Court granted immunity to Pinochet as a former sovereign and head of state, and thus it held that he could not be extradited to Spain.<sup>101</sup> In its decision, the High Court distinguished its grant of

93. *Id.* (citing Decree Law No. 2191, Apr. 19, 1978).

94. *Id.* at 510 (noting that the amnesty law was subsequently upheld by Chile's Supreme Court as constitutional and thus has been successful at barring any prosecutions for human rights violations that fell within the amnesty time period).

95. *Id.* at 513.

96. Bhuta, *supra* note 88, at 513.

97. *Id.*

98. *In re Pinochet*, 38 I.L.M. 68 (Q.B. Div'l Ct. 1998). This issue detailed whether Spain could legally prosecute General Pinochet for human rights violations that occurred within Chile. Although Spain prefaced its charges with the allegation that the acts were committed against Spanish citizens living in Chile, thus making the argument that the Spanish court has jurisdiction based on passive personality, universal jurisdiction was discussed and recognized by the English courts as a means of finding jurisdiction in the Spanish court. *See id.*; *see also* Joyner, *supra* note 50, at 163-65.

99. In addition, Pinochet also enjoyed the title of senator for life, and thus raised the additional legal question of whether a current head of state could be prosecuted. *See In re Pinochet*, 38 I.L.M. at 80.

100. As explained by the English High Court, for the crime to be extraditable under English law, the defendant must have committed a crime that is an extraditable offense under both Spanish law and English law. *See* Bhuta, *supra* note 88, at 513-14. Although this article does not address in detail this aspect of the English decision, the process the English courts used to analyze the issue raised questions of what crimes were considered international crimes and thus subject to extradition by England.

101. *In re Pinochet*, 38 I.L.M. at 85.

immunity for Pinochet as a head of state from the current international view that precludes head of state immunity for certain crimes.<sup>102</sup> The High Court held that although heads of state have been subject to criminal prosecutions, those prosecutions were the result of international agreements and thus one sovereign state was not being judged by another sovereign state.<sup>103</sup> In *Pinochet*, however, it was not an international body seeking to prosecute Pinochet, but rather the sovereign state of Spain.<sup>104</sup>

On appeal, however, the House of Lords reversed the High Court and held that Pinochet was not immune as a former head of state for internationally recognized crimes.<sup>105</sup> Within its decision, the court held that the actions alleged to have been committed could in no way be regarded as normal functions of a head of state, and thus no immunity could be had for such activities.<sup>106</sup> Yet this decision by the House of Lords was set aside as a result of a potential bias, and a new panel heard the case.<sup>107</sup> In this substituted decision, the new panel held that Pinochet could only be subject to prosecution for those crimes he committed after 1988.<sup>108</sup> This substituted decision by the House of Lords was a setback to the international human rights community because of its failure to recognize that Pinochet could be prosecuted pursuant to universal jurisdiction for his actions prior to 1988. It implies that torture was not an international crime prior to the adoption of the Torture Convention. By such implication, the case can now be used as

102. Under the Nuremberg Charter persons charged with crimes against humanity, crimes against the laws of war, and crimes against peace were subject to prosecution despite their position as heads of state or governmental officials. See Nuremberg Charter, *supra* note 26, art. 7, 59 Stat. at 1556, 82 U.N.T.S. at 288. This principle was recently reaffirmed by the creation of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, which allow former heads of state to be prosecuted for the human rights violations they commit. See *ICFY Statute*, *supra* note 27, art. 7, para. 2, 32 I.L.M. at 1175; *ICTR Statute*, *supra* note 27, art. 6, para. 2, 33 I.L.M. at 1604 (stating “the official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment”).

103. *In re Pinochet*, 38 I.L.M. at 84–85. Those cases cited in support of not recognizing head of state immunity are international tribunals and have been organized for the sole purpose of these criminal trials. In the case at hand, Spain was seeking to use its domestic courts to prosecute Pinochet.

104. *Id.*

105. *Regina v. Bartle*, 37 I.L.M. 1302, 1334 (H.L. 1998).

106. *Id.* at 1333.

107. *In re Pinochet*, 38 I.L.M. at 432.

108. See *Bartle*, 38 I.L.M. at 619 (holding that Pinochet could only be extradited and thus prosecuted for those acts of torture he committed after the Convention against Torture became binding on the United Kingdom, Spain, and Chile).

precedent to preclude a state from invoking universal jurisdiction to prosecute individuals for torture prior to the enactment of the Torture Convention.

#### IV. LIMITATIONS ON UNIVERSAL JURISDICTION

Although the expansion of universal jurisdiction limits a state's right to hide behind its sovereignty, several factors exist which restrict its ability to make a more dramatic impact. It is important to emphasize that universality is a limited jurisdictional means. Although it has expanded over the years, it still covers only those acts held by the international community to be egregious violations of world peace. The crimes that are subject to universal jurisdiction must be of such world-wide importance and threat to the human race as to warrant this extraterritorial reach.<sup>109</sup>

Additionally, universal jurisdiction does not grant a state the power to invade another state's sovereign borders to essentially kidnap the individual in order to bring them to justice in that state.<sup>110</sup> Therefore, if an individual remains in the safe borders of a chosen country, that for whatever reason, decides not to prosecute him, the individual will, in essence, escape prosecution. Yet, upon leaving that state, any country can then request that the person be extradited to stand trial in its national courts.<sup>111</sup> However, as is evident by the recent attempt by Spain to have General Pinochet extradited from England, this is not an easy step.

As previously noted, the evolution of the new "sovereign" brought with it legal doctrines to protect its existence. Each of these doctrines can be used by a state to avoid review of its actions by another sovereign. The Foreign Sovereign Immunities Act is an almost absolute bar on jurisdiction in United States courts for cases against a sovereign.<sup>112</sup> It is important to note, however, that this is for suits brought against a state, or an individual *for his or her official acts*.<sup>113</sup> When a state is seeking to prosecute an individual, such as a foreign president, for violations of human rights, a strong argument

---

109. See Joyner, *supra* note 50, at 165.

110. See generally Randall, *supra* note 51.

111. *Id.*

112. See Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330–32, 1391, 1602–11 (1994).

113. *Id.*

exists to prevent this president from crying sovereign.<sup>114</sup> The illegal acts of killing or torturing its citizens should not be considered *official acts*. Likewise, a president's claim of head of state immunity would also fail. It is clear in the international human rights context that a head of state is not free from responsibility for such egregious crimes by reason of his official position. This was clearly laid out in the Nuremberg Charter and recently reaffirmed by the international tribunals in the former Yugoslavia and Rwanda. Although some commentators have made the distinction that the Nuremberg Charter, as well as the tribunals in the former Yugoslavia and Rwanda, only stand for the proposition that a head of state is not immune from prosecution by an *international* tribunal, the recent decision by the House of Lords declined to draw this distinction.<sup>115</sup> Because of such arguments, however, a state wishing to invoke universal jurisdiction cannot dismiss immunity claims lightly.

## V. CONCLUSION

As this article discussed, the use of the word sovereignty has evolved over the years from a reference to the relationship between the sovereign and its subjects, to its modern understanding as a description of the relationship between states. This new understanding of sovereignty has been used by governments and courts as a means of avoiding judgment or review. More recently, with the birth of the human rights movement following the discovery of the atrocities committed during World War II, the role of state sovereignty is again changing form. As the human rights movement continues to gain momentum and the idea of some form of international human rights obligations become engrained, what will happen to this notion of sovereignty? Although there are additional factors contributing to this reformation of sovereignty,<sup>116</sup> the expansion of the acts subject to universal jurisdiction by another state indirectly chips away at this concept without the direct consent of the state itself.

With the creation of the ad hoc tribunals in the former Yugoslavia and Rwanda, the international community is sending a strong signal to the

---

114. In addition, as a result of the House of Lords decision denying immunity to General Pinochet, the human rights community now has support for its contention that sovereign immunity should not extend to human rights violations.

115. See *id.*; Horowitz, *supra* note 24, at 515.

116. Other factors include globalization, the creation of the first international criminal court, and the ever increasing use of treaties. For a detailed discussion on the effects of these factors, see generally Henkin, *supra* note 1.

individual nations of the world that the international community is not going to idly stand by while its citizens' basic human rights are being violated. It is no longer going to be acceptable to hide behind the wall of sovereignty. Just as the Nuremberg trials held that it was not a defense that the defendant was just following orders, sovereignty can not now be used to escape prosecution for acts committed in the state's name. The former Yugoslavia tribunal clearly addressed this idea in its first decision by stating:

It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity.<sup>117</sup>

This statement sends a clear warning to all future heads of state to respect the human rights of the nationals of its state just as if those individuals were not subject to their control. One commentator, while speaking on the lessons from Nuremberg, hinted at what this new role of sovereignty should be. He explained:

The fact is that unrestricted national sovereignty means, in real terms, international anarchy. Nuremberg showed us that there must be some limitations on national sovereignty if we are to have a more secure world. . . .

Nuremberg showed us that we must reach the behavior of individuals to create a better world. That we must penetrate the veil of national sovereignty and punish individuals for violations of international law if we are to give that law life and vitality.<sup>118</sup>

Thus, despite the fact that universal jurisdiction has rarely been invoked throughout history, the world-wide acceptance of its expansion has led to the reformation of our idea of sovereignty. And, although universal jurisdiction, with its various limitations, cannot alone crumble this brick wall, we are witnessing an evolution of a new concept of sovereignty—the creation of a world-nation to act as a true keeper of its citizens. This new world-nation is

---

117. Prosecutor v. Tadic, 35 I.L.M. 32, 52 (Int'l Crim. Trib. for the Former Yug. 1995).

118. Henry T. King, Jr., *The Meaning of Nuremberg*, 30 CASE W. RES. J. INT'L L. 143, 147 (1998).



**one with no boundaries to act as a barrier to protect its people against prosecution for crimes against humanity.**