The Scholar: St. Mary's Law Review on Race and Social Justice

Volume 17 | Number 1 Article 32

1-1-2015

Crisis at the Border: A Need to Reexamine the Doctrine of Sovereign Immunity.

Guinevere E. Moore

Robert T. Moore

CRISIS AT THE BORDER: A NEED TO REEXAMINE THE DOCTRINE OF SOVEREIGN IMMUNITY

GUINEVERE E. MOORE AND ROBERT T. MOORE*

I. INTRODUCTION

In June of 2010, a Border Patrol agent shot and killed a fifteen year-old Mexican national who was standing on the Mexican side of the border across from El Paso.[1] Though the agent was placed on administrative leave for three days, no criminal charges were filed and it is believed that the agent has resumed his duties.[2] In June of 2011, near San Diego California, Border Patrol agents were again involved in an incident that resulted in the death of a Mexican national.[3] While allegations of rock throwing by the victim have emerged, questions have also arisen as to whether an armed response is a disproportionate use of force against such

* Guinevere E. Moore and Robert T. Moore are adjunct professors of law at St. Mary's University School of Law, teaching courses in international and comparative law. They are amici curiae in support of the Hernandez family, seeking redress through the U.S. Court of Appeals for the Fifth Circuit. Brief of Amicus Curiae for Professors Guinevere E. Moore & Robert T. Moore in Support of Plaintiff-Appellants in Favor of Reversal, *Hernandez v. United States*, 757 F.3d 249 (5th Cir. 2014) (No. 12-50217), 2012 WL 11860817.

1. Hernandez v. United States, 757 F.3d 249, 255 (5th Cir. 2014).

2. *See* Alejandro Martinez-Cabrera, *U.S. Officials to Visit Parents of Mexican Teen Shot, Killed by Border Patrol Agent*, EL PASO TIMES (June 3, 2012, 12:00 AM), *http://www.elpasotimes.com/ci_20770760/us-officials-set-visit-parents-slain-teen* (reporting on the Department of Justice's refusal to prosecute the Border Patrol agent who shot a teenage Mexican national and explaining that "the case fell apart because the scope of federal law was limited to prosecuting civil-rights violations committed within U.S. territory").

3. Nick Valencia & Michael Martinez, *Police: Border Patrol Agent Fatally Shoots Rock-Throwing Migrant*, CNN (June 22, 2011, 9:34 PM), http://www.cnn.com/2011/US/06/22/california.border.shooting.

rock throwing.[4] Finally, in September of 2012, Border Patrol agents fired into a group of Mexican nationals standing on the Mexican side of the Rio Grande River, killing a national who was there with his family on a picnic.[5] Allegations of rock throwing once again surfaced, and the Mexican government once again raised concerns as to whether shooting into a crowd constitutes a disproportionate use of force on behalf of the American Border Patrol agents.[6]

These events reveal an emerging and alarming trend along the border of the United States and Mexico. While there is no doubt that an individual, be they a Border Patrol agent or otherwise, has a right to defend themselves from violence, doubt surrounding the warranted use of firearms in these three incidents suggests there should be more restraint on behalf of the Border Patrol agents or a clear policy on when the use of deadly force is appropriate.[7] On June 30, 2014, the Fifth Circuit Court of Appeals issued a ruling concerning this very issue.[8] The Fifth Circuit held that the Plaintiff could move forward with a cause of action against the Border Patrol agent for alleged violations of the deceased's Fifth Amendment protection against arbitrary deprivation of life.[9] The court stated that there should be Fifth Amendment protections from "conscience shocking conduct" when a non-citizen is injured outside of the United States through the "arbitrary official conduct" of a law enforcement agent who is present within the United States.[10] The court also denied the application of *Bivens*[11] and rejected qualified immunity on behalf of

---

4. *See id.* (reporting that "[r]ock throwing altercations have been a subject of controversy between Mexican and U.S. officials . . . . [Moreover,] Mexican officials have called the Border Patrol's use of gunfire in response to such rock throwing excessive").

5. Jason Buch, *Mexican Girl Clutched Her Dying Father,* SAN ANTONIO EXPRESS-NEWS (Sept. 8, 2012, 2:55 AM), http://www.mysanantonio.com/news/local_news/article/Father-shot-by-border-agent-while-holding-his-3848597.php.

6. *See id.* (discussing whether rock throwing presents sufficient physical threat to law enforcement to justify an armed and potentially lethal response).

7. *See e.g.* International Covenant on Civil and Political Rights art. 6(1), Mar. 23, 1976, 999 U.N.T.S. 171, 174 (affirming "[n]o one shall be arbitrarily deprived of his life" because "[e]very human being has the inherent right to life [and] [t]his right shall be protected by law").

8. *See generally* Hernandez v. United States, 757 F.3d 249 (5th Cir. 2014) (deciding the issue of whether the family of deceased could proceed against Border Patrol agents for deprivation of life).

9. *See id.* at 271–72 (recognizing that a noncitizen injured outside the United States may invoke constitutional protections).

10. *Id.*

11. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 456 F.2d 1339 (2d Cir. 1972).

the agent.[12] This ruling is most timely given the increased presence at the U.S.–Mexico border of minors and other vulnerable individuals who are arriving from Central America.

While this ruling is an important step forward in holding members of the executive branch accountable for their actions, the ruling only allows the family to pursue a remedy against the individual agent.[13] What it does not provide is a means for the family to vindicate the victim's fundamental right to life directly against the United States. The United States enjoys sovereign immunity, and has declined to waive immunity in this and other similar cases.[14] Thus, while the family will have some recourse, it is in some ways only a partial victory and may be an insufficient remedy given the gravity of the loss.

While the Fifth Circuit's ruling is an important step forward, and while it may have a potential impact on how agents behave at the border in the future, there remains little deterrence for this continued behavior when the entity establishing the policies that lead to these incidents, namely the United States government, is beyond the reach of the courts. Accordingly, this article takes the position that where there has been an allegation of a violation of a fundamental human right by domestic law enforcement, particularly where it rises to the level of a possible violation of a *jus cogens* norm, the United States should adopt a policy of waiving its sovereign immunity.[15] This would bring the United States in line with other Western democracies who appreciate the need for individuals to have the ability to vindicate their individual, fundamental, human rights

---

12. *Hernandez*, 757 F.3d at 272–80; *see also Bivens*, 456 F.2d at 1342 ("[C]ertain officers of the federal government, acting in their official capacities, are absolutely immune from lawsuits."). *Bivens* articulates that federal officials receive qualified immunity and protection from civil liability provided that the official in question has not violated a clearly established constitutional or statutory right. *Id.* at 1341. In *Hernandez* the potential arbitrary killing of an individual seemed to the Fifth Circuit to be a clear violation of Fifth Amendment protections that guarantee no one shall be deprived of life, liberty, or property without due process. *Hernandez*, 757 F.3d at 267–68.

13. *See Bivens*, 456 F.2d at 1341 (holding that federal agents have no immunity to protect them from suits charging violations of constitutional rights).

14. *See Hernandez*, 757 F.3d at 259 (holding that absent a waiver of sovereign immunity on behalf of the United States, the parties could not bring a claim against the government directly).

15. *Jus cogens* is defined by the Vienna Convention on the Law of Treaties as a "peremptory norm" which "is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention of the Law of Treaties art. 53, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 344 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention]; *see also* Siderman de Blake v. Republic of Arg., 965 F.2d 699, 714 (9th Cir. 1992) (quoting the same).

against the State directly without the fear that the State is beyond reach because of sovereign immunity.[16]

Allowing individuals to directly vindicate their rights against the State itself provides a meaningful check on government authority. If a court reviews such actions and finds them to violate individual, fundamental rights, then the State is held accountable and must cease those actions while changing the offending policies.[17] However, if a State can simply invoke sovereign immunity, then this may allow the State to continue to act with impunity, maintain the offending policies, and create a situation where the victims are denied justice.

Part I will examine the differences between issues of *foreign* sovereign immunity versus *domestic* sovereign immunity. Part II of this article will examine the issue of *jus cogens* vis-à-vis the issue of sovereign immunity and why valid arguments exist for the denial or waiver of sovereign immunity when violations of these peremptory norms take place. Part II will also examine comparatively the policies of other States concerning these issues as well as U.S. law limiting sovereign immunity in certain instances.

Finally, it should be noted that the premise of this article is not to say that sovereign immunity should be waived in all instances. The authors do not take the position that foreign courts should sit in judgment over the acts of another State, but rather that when the action is brought within its own domestic courts, States should be willing to waive sovereign immunity in certain circumstances. Issues concerning acts of warfare, which are often controversial, will not be addressed, as they are separate issues governed by separate law.[18] Rather, this article confines itself to the examination of acts committed by law enforcement and other federal agents that may violate fundamental rights of individuals.

---

16. *See generally* Convention for the Protection of Human Rights and Fundamental Freedoms, pmbl., Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR] (representing European governments' reaffirmation of "their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world . . . best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend").

17. *See Bivens*, 403 U.S. at 389 (upholding the right to a cause of action against federal agents who violate an individual's constitutional rights).

18. *See Hernandez*, 757 F.3d at 275 (noting the Fifth Circuit's express recognition that these types of claims would not apply to military personnel as it is a different context with different rules of law).

II. FOREIGN SOVEREIGN IMMUNITY VERSUS DOMESTIC SOVEREIGN IMMUNITY

The United States has long honored the principle of foreign sovereign immunity.[19] Essentially, this doctrine states that a foreign sovereign cannot be brought into a U.S. court without first waiving its sovereign immunity from suit, with some modern exceptions.[20] Even where the foreign sovereign may have violated *jus cogens* norms, the United States will not breach that principle of foreign sovereign immunity.[21]

The Act of State Doctrine, which partially forms the basis for the principle of foreign sovereign immunity, precludes the courts of the United States from examining the public acts of another nation within its own territory.[22] Additionally, because "every sovereign State is bound to respect the independence of every other sovereign state, the courts of one

---

19. *See* Schooner Exch. v. M'Faddon, 11 U.S. (7 Cranch) 116, 135 (1812) (deciding whether federal courts should be granted jurisdiction in a title dispute between an American citizen and friendly foreign military vessel visiting an American port). Chief Justice Marshall articulates the common practice of granting foreign sovereign immunity given the equality of all sovereigns. *Id.* at 136–47. By the definition of sovereignty put forth in this decision, a foreign state has absolute and exclusive jurisdiction within its own territory, but the jurisdiction of domestic courts may be waived in specific instances by implied or express consent. *Id.* at 136.

20. *See id.* at 125 (holding that an express waiver of sovereign immunity is necessary for a U.S. court to obtain jurisdiction over a foreign state).

21. *See* Princz v. Fed. Republic of Ger., 26 F.3d 1166, 1171–72, 1174 (D.C. Cir. 1994) (denying a U.S. federal district court jurisdiction despite the fact that the plaintiff was suing the Federal Republic of Germany to recover money damages for injuries suffered while imprisoned in Nazi concentration camps during the holocaust); *see also* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989) (holding—in an opinion written by Chief Justice Rehnquist—that the Foreign Sovereign Immunities Act (FSIA) is the sole means by which a court in the United States might obtain jurisdiction over a foreign sovereign, absent a waiver of immunity). Courts have been reluctant to read in an exception even where a *jus cogens* violation is alleged. *See* Siderman de Blake v. Republic of Arg., 965 F.2d 699, 718–20 (9th Cir. 1992) (resisting application of FSIA to *jus cogens* violation). Recently, the Court narrowed the application of the Alien Tort Statute arguing that it does not apply extraterritorially, with a possible exception for claims which may "touch and concern the United States" with sufficient force to displace the presumption against the extraterritorial application of the Alien Tort Statute. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013).

22. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 408–11 (1964) (applying the Act of State Doctrine even when the U.S. views the foreign sovereign as hostile). In *Sabbatino* a U.S. federal district court refused to hear a claim against Cuba regarding the expropriation of sugar after the Communist revolution and the subsequent nationalization of the sugar industry. *Id.* at 398. Justice Harlan's opinion acknowledges that even if the U.S. views the foreign sovereign as hostile, they are still entitled to sovereign immunity and to not have their public acts judged by a foreign court because "both the national interest and progress toward the goal of establishing the rule of law among nations are best served by maintaining intact the Act of State Doctrine." *Id.* at 437.

country will not sit in judgment of the acts of a government of another done within its own territory."[23] This corresponds to the notion that all sovereigns are equal within the international community and, as such, no sovereign should judge the actions of another sovereign.[24] If sovereigns could stand in judgment of each other, the floodgates of litigation would open as individuals—who feel their government has wronged them—flee to neighboring States in order to sue in that State's courts.

The international community views the issue in the same manner as the United States. In a recent International Court of Justice (I.C.J.) decision, the court upheld this doctrine of foreign sovereign immunity even where the allegations involved wrongful acts committed by the German military in Italy during World War II.[25] Italy had allowed its courts to hear the case against Germany even though Germany had not waived its immunity and the Italian courts had awarded damages.[26] The court initially stated that the actions clearly fell within the ambit of sovereign acts, rather than commercial or other acts which are not those of a sovereign, and accordingly upheld Germany's right to sovereign immunity.[27] The Court stated that State immunity has been "adopted as a general rule of customary international law rooted in the current practice of states."[28] Essentially, all States have this right to immunity under international law, and it is the duty of other States to respect that immunity.[29]

The European Court of Human Rights has also taken the same approach of upholding the validity of foreign sovereign immunity. In 2001, the Court ruled that Kuwait was entitled to invoke foreign sovereign immunity in respect to civil claims for damages.[30] This was the case even

---

23. *Id.* at 416 (quoting Underhill v. Hernandez, 168 U.S. 250, 252 (1897)).

24. *See* U.N. Charter art. 2, para. 1 (emphasizing the sovereign equality of all U.N. members).

25. Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), 2012 I.C.J. 99, 154–55 (Feb. 3). The ICJ does not actually refer to Federal Republic of Germany as "foreign" sovereign immunity but instead simply as "sovereign immunity." However, from the context of the case, it may be presumed the court is referring to foreign sovereign immunity.

26. *Id.* at 113–14.

27. *Id.* at 134–35.

28. *Id.* at 123.

29. *See id.* (concluding "[t]hat practice shows that, whether claiming immunity for themselves or according it to others, States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of the other States to respect and give effect to that immunity"). This conclusion was "based upon an extensive survey of State practice . . . the record of national legislation, judicial decisions, assertions of a right to immunity and the comments of States on what became the United Nations Convention." *Id.*

30. Al-Adsani v. The United Kingdom, 2001-XI Eur. Ct. H.R. 79, 103 (2001), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59885.

though the plaintiff in question alleged that he had been severely tortured by Kuwaiti government officials, including having received burns on approximately twenty-five percent of his body.[31] The Court reasoned that there was no acceptance under international law for a loss of sovereign immunity, even where state action rises to the level of a *jus cogens* violation, such as torture.[32] The Court noted, however, that the torturer could be subject to criminal jurisdiction should that individual appear in the United Kingdom.[33] Yet, the distinction remains: where it is the State itself who is being challenged in a foreign court, then that State shall have a right to invoke sovereign immunity, even against the most serious allegations.[34]

The reluctance of foreign courts to waive sovereign immunity and hear these types of cases is understandable. Waiver of sovereign immunity would first and foremost open up the legal system of the State to hundreds or possibly thousands of cases which have little to do directly with the State itself.[35] From a practical standpoint, it would place an enormous burden on limited judicial resources and finances.[36] Finally, it would serve to undermine the equality of each State that has become an accepted part of International Law.[37]

However, given the respect afforded States concerning sovereign immunity, there has been a growing trend towards limiting sovereign immunity in certain instances. For example, in the United States under the Foreign Sovereign Immunities Act, the United States recognizes several

---

31. *Id.* at 87.

32. *Id.* at 103 (determining torture constitutes a *jus cogens* violation).

33. *Id.* at 102–03.

34. *Id.*

35. *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013) (illustrating the reluctance to allow adjudication of claims in U.S. courts arising from violations within foreign jurisdictions; deferring such decision-making to the political branches because of potentially "serious foreign policy consequences . . ."). Chief Justice Roberts seems to imply, though does not directly say, that there is no desire for courts in the United States to be opened up to the international community at large so these individuals might have recourse where there are violations of fundamental human rights.

36. *See* Office of Personnel Management v. Richmond, 496 U.S. 414, 432 (1990) (holding that allowing claims for personal damages against the United States would open the door to a flood of litigation, burdening the court system, even if most of the claims were ultimately rejected).

37. *See* Winston P. Nagan & Joshua L. Root, *The Emerging Restrictions on Sovereign Immunity: Peremptory Norms of International Law, the U.N. Charter, and the Application of Modern Communications Theory*, 38 N.C.J. INT'L L. & COM. REG. 375, 452 (2013) (describing that—despite the existence of potentially valid personal claims against Germany for human rights violations—it was in the best interest for all nations for any World War II reparations to be handled at the state and international level).

instances where a sovereign may not invoke immunity.[38] For example, a State may not invoke immunity when it engages in commercial activities in the United States or participates in non-commercial torts occurring in the United States.[39]

This notion of limited sovereign immunity was first adopted in the 1952 Tate Letter,[40] which explained that States receive immunity for their sovereign acts but not private acts.[41] Similarly, the United Kingdom has also passed an act limiting sovereign immunity in much the same way as the Foreign Sovereign Immunities Act.[42] As with the Foreign Sovereign Immunities Act, the United Kingdom's law focuses on the distinction between private acts versus sovereign acts of the State.[43]

To apply these principles to the current situation along the U.S.–Mexico border, it would not be possible for the families of the individuals who have been shot to appear in a Mexican court and sue the United States. This is not permitted under international law, and the current trend is to respect the equality of all states and their right to sovereign immunity, no matter how egregious the allegations may be.[44] However, this in turn may leave the families without a meaningful remedy of any kind.[45]

Ultimately, their only recourse is to go to a court in the United States to seek redress. The question then is how much of a remedy is possible if

---

38. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602–1611 (2012).

39. *Id.* § 1605(a)(1, 5).

40. *See generally* John M. Niehuss, Comment, *International Law—Sovereign Immunity—The First Decade of the Tate Letter Policy*, 60 MICH. L. REV. 1142 (1962) (summarizing executive and judicial treatment of "Tate Letter Policy" from 1952 to 1962).

41. Siderman de Blake v. Republic of Arg., 965 F.2d 699, 718 (9th Cir. 1992).

42. *See* State Immunity Act, 1978, c.33, §§ 3–10 (U.K.) (outlining specific exceptions to sovereign immunity).

43. *See Id.* § 14 (defining a State entitled to immunities and privileges as a "separate entity" which includes "(a) the sovereign or other head of State in his public capacity; (b) the government of that State; and (c) any department of that government, but not any entity . . . which is distinct from the executive organs of the government of the State and capable of suing or being sued").

44. *See e.g.*, Hernandez v. United States, 757 F.3d 249, 259 (5th Cir. 2014) (illustrating that absent a waiver of sovereign immunity, the standard of equality set before each state will supersede even the most atrocious allegations); *see also* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971) (emphasizing that the State, when acting in their respected duties, is rarely susceptible to pay a direct remedy due to sovereign immunity).

45. *See Hernandez*, 757 F.3d at 273 (clarifying that without a waiver of sovereign immunity on behalf of the United States, the Mexican parties cannot bring a claim against the government directly because of the foreign-country exception). This could potentially provide the plaintiffs with a meaningful remedy, but instead they can only pursue a limited civil claim against the individual agent. *Id.* The parties suing the individual agent in a civil claim will have to prove the agent used an excessive amount of force. *Id.* at 272.

the United States can simply invoke sovereign immunity in its own courts, leaving the individual agent as the only possible defendant?[46] Further, are the same concerns in terms of not wishing to have public acts judged by foreign courts equally present in a State's domestic courts? This article would posit that the concerns are not the same, and that where a State invokes sovereign immunity in its own domestic courts, it is possible to create a denial of justice and the potential lack of an effective remedy for the aggrieved parties.

III. A LIMITATION ON DOMESTIC SOVEREIGN IMMUNITY

A. *International Law*

It is important to place some of these concepts into proper context and application. While the preceding section recognizes the importance of *foreign* sovereign immunity, domestic sovereign immunity is another matter altogether, and warrants a different analysis.[47] Respect for the equality of sovereigns is an important part of international law that allows for the various States to have a civil relationship with each other in the broader international community.[48] However, when a State's public actions are being questioned in its domestic court system, the ability to invoke sovereign immunity seems less clear, at least where the allegations suggest violations of *jus cogens* norms.[49]

---

46. *See id.* at 280 (recognizing a Fifth Amendment claim against an individual Border Patrol agent but denying all other claims against U.S. government entities because the United States did not waive sovereign immunity).

47. *See* ECHR, *supra* note 16, pmbl., 213 U.N.T.S. at 221 (representing the European governments' reaffirmation of "their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world . . . best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend"); *see also* U.N. Charter pmbl. ("reaffirm[ing] faith in fundamental human rights . . . establish[ing] conditions under which justice and respect for obligations arising from treaties and other sources of international law can be maintained, and . . . promot[ing] social progress and better standards of life in larger freedom"). *But see* Hon. Lord Wilberforce, Chairman, Exec. Council, Int'l Law Ass'n, The Role and Work of the International Law Association, *in* 58 INT'L L. ASS'N REP. CONF. 513–18 (1978) (explaining the dilemma that has occurred through sovereign immunity, the doctrine of domestic jurisdiction, and how this interferes with matters of human rights).

48. *See e.g.*, Vienna Convention art. 53, *supra* note 15, 1155 U.N.T.S. at 344 (establishing a norm that all sovereigns must abide by, and thus promoting a sense of trust by providing that no international treaty may circumvent the peremptory norms established in this treaty even during times of war).

49. *See Hernandez*, 757 F.3d at 280 (finding that the United States must waive its sovereign immunity for any claims asserted against it, but when there is a Fifth Amendment factually supported claim against an agent of the state, qualified immunity may not necessarily be extended to said agent).

After World War II, many nations came together with a desire to promote and enforce human rights.[50] The United Nations Charter specifically states that one of the purposes of establishing this organization is to establish conditions under which justice and respect for obligations arising under treaties and other sources can be maintained.[51] Further, the United Nations shall promote universal respect for and observance of human rights and fundamental freedoms.[52] In addition, States are required to take appropriate actions to achieve these goals.[53] It may be argued that a logical progression in achieving the goal of promoting fundamental human rights may necessarily include a path by which individuals may vindicate these rights directly against the State who may have violated these rights.

It is important to bear in mind that "international law confers fundamental rights upon [all people] vis-à-vis their [own] governments."[54] Essentially what this means, then, is that when there is a discussion of fundamental rights and a violation of those rights, one of the parties is necessarily the State.[55] Therefore, it seems disingenuous for the State to then invoke sovereign immunity in its own domestic courts to prevent a vindication of that right and prevent a redress for the harm caused by the violation of that right. This hardly seems to comport with the U.N. Charter's requirement to promote the observance of human rights and fundamental freedoms.[56] The United States is of course a party to the United Nations Charter, and was in fact one of the driving forces behind its creation.[57] Logically, the United States would want to be one of the States to set an example for the appropriate respect for and enforcement of fundamental human rights.

It is also important to consider what types of rights are at issue. While all fundamental rights are important, there are some that are of the utmost importance and form the basis for a *jus cogens* peremptory norm.

---

50. *See generally* U.N. Charter (establishing an international organization after World War II whose goal was to prevent "the scourge of war" from affecting future generations).

51. *Id.* pmbl.

52. *Id.* art. 55, para. c.

53. *Id.* art. 56.

54. Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1980).

55. *Id.* at 884–85.

56. *See generally* U.N. Charter pmbl. ("reaffirm[ing] faith in fundamental human rights . . . establish[ing] conditions under which justice and respect for obligations arising from treaties and other sources of international law can be maintained, and . . . promot[ing] social progress and better standards of life in larger freedom").

57. *See generally The United States and the Founding of the United Nations, August 1941–October 1945*, U.S. DEP'T OF STATE (last visited Oct. 19, 2014), http://2001-2009.state.gov/r/pa/ho/pubs/fs/55407.htm (describing the origins of the United Nations and President Roosevelt's important role in the creating the basic framework for the United Nations).

The Vienna Convention on the Law of Treaties defines a peremptory norm (*jus cogens*) as a norm accepted and recognized by the international community from which there can be no derogation by a State.[58] This in turn means that while some human rights may be derogated from in times of emergency, the rights protected by these peremptory norms many never be derogated from, thus requiring that they must always be observed.[59] The United States has signed this treaty, and though it has not ratified the treaty, many of the provisions of the treaty are considered as customary international law by the U.S. State Department, and therefore the United States is bound to uphold those provisions and practices.[60] This precept that *jus cogens* norms may not be derogated from is also codified in the Restatement (Third) of Foreign Relations.[61]

These norms also apply *erga omnes*, meaning that all States are bound by these norms without the need for consent.[62] "*Jus cogens* embraces customary laws that are considered binding on all nations . . . and are derived from values taken to be fundamental by the International Community rather than fortuitous or self-interest choices of nations[.]"[63] *Jus cogens*, which include "principles and rules concerning the basic rights of

58. Vienna Convention art. 53, *supra* note 15, 1155 U.N.T.S. at 344. Article 53 goes on to say that no international treaty may circumvent these norms as "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Id.*

59. *See e.g.* ECHR, *supra* note 16, art. 15, 213 U.N.T.S. at 232 (allowing for the derogation of certain rights protected by the treaty in a time of war or public emergency). However, a State party may not, for example, derogate from the right to life or the right of an individual to be free from torture. That is because these are examples of *jus cogens* norms from which no derogation is possible.

60. *Is the United States a Part to the Vienna Convention on the Law of Treaties?*, U.S. DEP'T OF STATE, http://www.state.gov/s/l/treaty/faqs/70139.htm# (last visited Oct. 19, 2014). Customary international law is one of the binding sources of international law outside of treaties and general principles of international law. *Id.*

61. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. K (1987).

62. *See id.* § 702, cmt. O (explaining that violations of *jus cogens* rules are violations of obligations to all other states).

63. Siderman de Blake v. Republic of Arg., 965 F.2d 699, 715 (9th Cir. 1992) (citing David F. Klein, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 YALE J. INT'L L. 332, 350–51 (1988)). Despite the Court's thorough discussion of the role of *jus cogens* in international law, the Court ultimately finds the Foreign Sovereign Immunities Act does not confer jurisdiction on a United States Court for a violation of *jus cogens* norms. *Id.* at 720. However, it is important to remember that this case involved a foreign sovereign, not the United States itself. In reading the Court's extensive treatment of the issue, it looks like the result they reach is with reluctance, and poses the question of whether the Court would have come to the same conclusion had the United States been the offending party.

the human person" are the concern of all States and thus apply to all States.[64] As such, these norms also enjoy the highest status at international law.[65] They "prevail over and invalidate international agreements and other rules of international law that conflict with them."[66] If these norms have the highest status at international law, then reasonably it would seem then that perhaps they should overcome domestic sovereign immunity concerns where there is an alleged violation of those norms.

Murder, in the form of extrajudicial killing, is defined as a violation of *jus cogens* peremptory norms.[67] This of course is also codified in the United States Constitution, where such a deprivation of life may not occur without due process.[68] Hence, the United States should not be able to derogate from the obligation to not engage in extrajudicial killing and, where there are allegations that such killings have occurred, it is the duty of the United States to provide redress to these violations.[69] In each of the instances mentioned in the introduction, an individual lost their life at the hands of a member of the executive branch of government.[70] In the first instance, a 15-year-old boy was shot in the face by a Border Patrol agent while standing in Mexico.[71] In the second instance, a man was shot by Border Patrol agents, albeit amid allegations that there had been rock throwing by the victim.[72] That shooting took place on the U.S. side of the border.[73] In the final instance in 2012, it appears that Border Patrol agents may have fired into a crowd standing on the Mexican side of the Rio Grande River, killing one man.[74] A video of the incident does not appear to show any rock throwing, meaning that the shooting may have

---

64. *Siderman*, 965 F.2d at 715 (quoting Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 27)).

65. *See Siderman*, 965 F.2d at 715 (explaining that *jus cogens* norms do not derive their binding force solely from the States' consent they are held at a higher status within international law).

66. *Id.* at 716 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. K (1987).

67. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702(c) (1987).

68. U.S. CONST. amend. V. Specifically, "no person shall be deprived of life, liberty or property, without due process of law[.]" *Id.*

69. *See id.* (providing due process to those who have been deprived of life).

70. *See generally* CHAD C. HADDAL, CONG. RESEARCH SERV., RL32562, BORDER SECURITY: THE ROLE OF THE U.S. BORDER PATROL (2010) *available at* http://www.fas.org/sgp/crs/homesec/RL32562.pdf (identifying the U.S. Border Patrol as an agency of the Executive Branch, discussing the Border Patrol's organization, and composition, and highlighting issues for congressional action).

71. Martinez-Cabrera, *supra* note 2.

72. Valencia & Martinez, *supra* note 3.

73. *Id.*

74. Buch, *supra* note 5.

been unprovoked.[75] This shows a possibly alarming trend, and in turn requires accountability on behalf of the United States for these actions whether the shootings may have occurred extraterritorially or not.

A meaningful remedy for the deprivation of life is also required under International Law.[76] Article 6 of the International Covenant on Civil and Political Rights (ICCPR) recognizes the fundamental right to life and the requirement that no one should be arbitrarily deprived of that life.[77] Furthermore, the treaty requires that each member provide an effective remedy where an individual's rights or freedoms have been violated even where an individual commits those actions in an official capacity.[78] Additionally, the treaty requires that States provide an "effective remedy" where an individual's rights or freedoms have been violated, again even where these violations were committed by an individual in an official capacity.[79] Finally, a person claiming such a remedy will have their right determined by a competent judicial, administrative or legislative authority.[80]

There is also a duty upon States to develop possibilities of a judicial remedy.[81] As the United States has signed and ratified the ICCPR, the provisions are now part of U.S. law, and as such the United States has a duty to uphold its treaty obligations.[82] As such, the United States has a duty to provide an effective remedy for the families of the individuals who have been killed if it is found that the killings were unwarranted.

In fact, the United States remains the only party in disputes like this able to grant such a remedy because Mexico lacked jurisdiction over both the individual agents[83] and the United States.[84] Furthermore, even if the Mexican courts permitted a suit, enforcement of any judgment rendered by that court would be implausible.[85] However, while the Fifth Circuit's

---

75. *Id.*

76. *See* ICCPR, *supra* note 7, art. 6, 999 U.N.T.S. at 174 (requiring that no person be arbitrarily deprived of life).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *See* U.S. CONST. art. VI, para. 2 (mandating, as part of the Supremacy Clause, that "all Treaties made, or which shall be made, Under the Authority of the United States, shall be the supreme Law of the Land").

83. *See* Hernandez v. United States, 757 F.3d 249, 273 (5th Cir. 2014) (emphasizing the Mexican government's own concession that while Agent Mesa remains in the United States, he is beyond the jurisdiction of the Mexican courts).

84. *See* ICCPR, *supra* note 7, art. 2(3), 999 U.N.T.S. at 174 (stating that remedies are available for violations committed by persons acting in official capacity from a competent authority provided for by the legal system of the State).

85. *See id.* at 2(3)(c).

ruling in *Hernandez* is heartening in that the border patrol agent can be held accountable in a court of law for civil damages, this is not going to change U.S. policy or provide meaningful redress in terms of the elimination of extrajudicial killings along the U.S.–Mexico border.[86] While the agent may be hailed into court, the United States, the party responsible for establishing the policies concerning the use of deadly force, is permitted to hide behind the shield of sovereign immunity.[87]

This does not suggest the United States must give up its sovereign immunity in all instances, as that would result in potentially endless litigation over matters which may unnecessarily restrict important government action or are trivial.[88] However, where an alleged violation of a *jus cogens* norm takes place, sovereign immunity, "a concept devised by lawyers in the 19th century," should not be used by a State as a means of avoiding and denying compliance with international obligations.[89] In order to force a change in policy, the correct party must be brought to court so that there is a proper incentive for that policy change to occur.[90] In this instance, it means holding the United States government accountable for its actions, including those conducted by federal law enforcement, so as to promote change if change is required.

The concept of providing an effective remedy is not limited to the ICCPR. The Convention for the Protection of Human Rights and Freedoms (ECHR) has a similar provision allowing that where an individual's rights or freedoms are violated, they shall have an "effective remedy" before a national authority even where the violation may have been committed by a party acting in an official capacity.[91] The American Convention on Human Rights similarly provides that *everyone* shall have "effective recourse" to a competent court or tribunal for acts that violate a person's fundamental rights that are recognized by the Constitution, the

86. *See Hernandez*, 757 F.3d at 280 (narrowly remanding the case to the district court because Plaintiff alleged sufficient facts to overcome qualified immunity, allowing them to assert a Fifth Amendment claim against the individual Border Patrol agent).

87. *See id.* (denying all claims against the federal government because the United States did not waive sovereign immunity).

88. *See* ICCPR, *supra* note 7, art. 4, 999 U.N.T.S. at 175 (stating that State parties may take actions that derogate from their obligations under the Covenant if they follow the given protocols).

89. Hon. Lord Wilberforce, supra note 47, at 513–18.

90. *See generally* HEATHER SMITH-CANNOY, INSINCERE COMMITMENTS: HUMAN RIGHTS TREATIES, ABUSIVE STATES, AND CITIZEN ACTIVISM (2012) (discussing how bringing a case before UN treaty bodies can lead to changes in human rights outcomes).

91. ECHR, *supra* note 16, art. 13, 213 U.N.T.S. at 232.

laws of the State, or the convention itself.[92] Again, this applies where the violation may have been committed by a State actor as part of their official duties.[93] Such provisions also appear in the African Charter on Human and People's Rights as well as the Arab Charter on Human Rights.[94]

This provision is so prevalent because it recognizes the nature of enforcement of fundamental rights. That is, these rights must be enforced against the State by an individual or group of individuals. Yet, if sovereign immunity is to be employed, then those provisions lose their power and become virtually meaningless.[95] That cannot have been the intent of the drafters of these treaties as they specifically recognized a State's duty to protect and promote those rights.[96] Necessarily, then, enforcement of those rights against a State violating those rights must be possible within the State's own domestic courts.[97]

It seems clear then, that at international law, enforcement of *jus cogens* norms is contemplated, regardless of a State's consent to be bound by such norms.[98] Various human rights treaties contemplate this enforce-

---

92. Organization of American States, American Convention on Human Rights art. 25(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, 151 [hereinafter American Convention].

93. *Id.*

94. *See* African Charter on Human and Peoples' Rights art. 7(1), 27 June 1981, 1520 U.N.T.S. 218, 247, *available at* http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf. (providing "[e]very individual shall have the right have his cause heard"); *see also* Dr. Mohammad Amin A-Midani et al., *Arab Charter on Human Rights 2004,* 24:147 B. U. INT'L L. 147, 153 (1996) (translating Article 13 of the 2004 Arab Charter on Human Rights which provides "[e]verybody has the right to a fair trial in which sufficient guarantees are ensured, conducted by competent, independent and impartial tribunal established by law").

95. *See generally* American Convention, supra note 92, art. 25(1), O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (acknowledging that the only way to ensure freedom is if the provisions are created in a way that all State parties undertake to respect the rights and ensure compliance).

96. *See id.* (indicating that the drafters intended to respect man's essential rights, which were derived from attributes of the human personality, not one's nationality; showing that, therefore, international protection and the creation of a system of personal liberty and social justice is justified).

97. *See id.* (stressing that the States Parties undertook to respect the rights and freedoms recognized in the Convention, and where the exercise of these rights are not already ensured by legislation, the States Parties assume to adopt, in accordance with their constitution, other measures required to give effect to these rights and freedoms).

98. *See id.* (emphasizing that the Convention has been reaffirmed in international instruments worldwide, in accordance with the Universal Declaration of Human rights, in order to consolidate a system of personal liberty and social justice).

ment before a judicial or administrative body.[99] This necessarily means the State will be a party in these situations.[100] Hence, it appears disingenuous of States to sign these treaties, and make declarations concerning their desire to enforce human rights, only to then hide behind sovereign immunity if an individual actually chooses to enforce those rights. Furthermore, the only way to force a State to change a policy is to hold the State, or rather its government, directly accountable for its acts. That process would be the only way to effect meaningful change in governmental policies. This is not to say that such enforcement should come through foreign courts; rather, in understanding international law, States should allow such enforcements in their own domestic courts.

B. *State Practice*

The practices of various States would also support the supposition that sovereign immunity should not be a shield wielded by States to evade their responsibility to observe the fundamental rights of individuals. Following World War II, the International Military Tribunal was established in Nuremberg to hold those responsible for the atrocities committed during the war accountable.[101] Nuremberg recognized that a State does not have the power to make laws that which depart from *jus cogens* norms.[102] Appropriately, acts that do depart from these norms can never be legal.[103] Part of the responsibility and recognition of a State is that State's willingness to automatically accept being bound by *jus cogens* norms.[104] Indeed a claim based upon a violation of a *jus cogens* norm should be actionable in court, regardless of whether there is a treaty present to protect those rights or the enforcement of these rights locally; such a claim

---

99. *See id.* (noting that several international instruments, including the Charter of the Organization of American States, the American Declaration of the Rights and Duties of Man, and the Universal Declaration of Human Rights have affirmed that the essential rights of man are derived from attributes of the human personality and justify international protection).

100. *See generally id.* (enumerating the inherent rights of all persons, leading to the conclusion that when these rights are violated by the State, the Sate will be held accountable).

101. *See* Steven Fogelson, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S. CAL. L. REV. 833, 834 (1990) (explaining that the trial was the first comprehensive attempt to punish those responsible for crimes committed by the German Nazi regime).

102. *See* Scott A. Richman, *Siderman de Blake v. Republic of Argentina: Can the FSIA Grant Immunity for Violations of Jus Cogens Norms?*, 19 BROOK. J. INT'L. L. 967, 974–75 (1993) (discussing the conviction of Nazi war criminals in Nuremberg and distinguishing *jus cogens* norms, which no state may attempt to violate or alter, from *just dispositivum* norms that may be changed by a particular state's violation of them).

103. Richman, *supra* note 102, at 974–75.

104. *Id.* at 975.

seeks to enforce observance of fundamental human rights that are already accepted by the global community.[105]

The Nuremberg Tribunals also made clear that sovereign immunity cannot be applied to acts which are condemned as criminal by international law.[106] Thus, the "conduct of individuals under the color of official State action would no longer be immune from the reach of international law."[107] Further, sovereignty is necessarily limited by the requirements of international law and the sovereign itself must be held accountable for violations of certain offenses.[108] While some may argue that the Nuremberg tribunals tried individuals criminally for acts committed during World War II, it was in many ways also a trial of the German government at large as many of these individuals had served in the Nazi government and the crimes were committed in furtherance of government policy.[109] Additionally, subsequent German governments passed legislation allowing for compensation of victims of Nazi persecution.[110]

When a suit is brought against the State, it is not the land or its people who are brought to court, but the government, for it is the government's actions that are being examined for wrongdoing.[111] Nor should it matter if the trial is criminal (against the state actors themselves) or civil (against the State seeking direct compensation) in nature. The main point is that sovereign immunity cannot be invoked as a means of avoiding being held

---

105. *Id.*

106. *See* Int'l Military Tribunal (Nuremburg), *Judicial Decisions: Judgments & Sentences*, 41 AM. J. INT'L. L. 172, 221 (1947) (stating that "[h]e who violates the laws of war cannot obtain immunity while acting in the pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law"). Years later, many claims by Italian parties under Germany's Federal Compensation Law of 1953 were unsuccessful because they were not able to meet required standards (*i.e.*, being a victim of national Socialist persecution, being a resident of Germany, or classified as a refugee as of October 1, 1953). That being said, it is important to note that Germany recognized a duty to compensate victims, albeit a limited class, as a result of violations of *jus cogens*. *See generally* Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), 2012 I.C.J. 99, 111 (Feb. 3) (recounting Germany's adoption of the Federal Compensation Law of 1953). They could just as easily have hidden behind the shield of sovereign immunity, yet chose to not do this because of an understanding that a State is responsible for its actions and needs to be held accountable.

107. Fogelson, *supra* note 101, at 869.

108. *Id.*

109. *See id.* at 841–46 (discussing the difficulty and necessity of prosecuting the crimes of the German government as a whole as well as the crimes of individuals acting for the government).

110. *See generally Jurisdictional Immunities of the State*, 2012 I.C.J. at 111 (discussing Germany's adoption of the Federal Compensation Law of 1953 in order to compensate certain categories of victims of Nazi persecution).

111. U.S. CONST. amend. XI. *See generally* Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (explaining the fundamentals of bringing a suit against a sovereign state).

accountable for the violation of *jus cogens* norms. The legitimacy of the Nuremberg Tribunal did not depend upon the consent of the axis powers but rather on the nature of the offenses committed.[112] The laws of civilized nations defined those rights as criminal.[113] Thus, where the offenses in question rise to the level of *jus cogens* violations, consent to be hailed into court should not be required on behalf of the State.[114] That is part of the duty and responsibility of the State to observe and promote fundamental human rights.[115]

Following World War II and the Nuremberg tribunals, the Council of Europe formulated the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[116] This provided an additional response by the European community to the atrocities that occurred during World War II.[117] Its purpose was in part to allow for collective enforcement of certain fundamental human rights.[118] It allows for anyone, be they a citizen of the member State or otherwise, to enforce their fundamental rights directly against the member State in the European Court of Human Rights provided they are within the jurisdiction of one of the member States.[119] Indeed the purpose of establishing the European Court of Human Rights is to ensure the "observance and engagements undertaken by the High Contracting Parties."[120] Hence, in becoming a member of the ECHR, a State necessarily surrenders its claim of sovereign immunity where an individual within its jurisdiction wishes to enforce the enumerated rights present within the treaty directly against the State.[121] An individual may even demand compensation where a financial loss has been incurred due to an infringement of a right.[122]

---

112. Siderman de Blake v. Republic of Arg., 965 F.2d 699, 715 (9th Cir. 1992).

113. *Id.*

114. *See generally* ICCPR, *supra* note 7, 999 U.N.T.S. at 174 (ensuring that if a persons rights are violated, which are considered a standard right among the nations, an effective remedy shall be enforced).

115. *See* U.N. Charter art. 55, para. c (stating that the United Nations shall promote a universal respect for the human rights).

116. Fogelson, *supra* note 101, at 873.

117. *Id.* at 835.

118. ECHR, *supra* note 16, pmbl., 213 U.N.T.S. at 222–24.

119. *Id.*, arts. 1–2, at 224.

120. *Id.*, art. 19, at 234.

121. *See id.*, art. 17, at 234 (providing that "[n]othing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention").

122. *See* Lawless v. Ireland, (No. 3), App. No. 332/57, Eur. Ct. H. R., at 13–28 (1961), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57518 (examining the admissibility of the applicant's claim). This case involved a suspected member of the IRA who had been detained without trial. *Id.* at 5. Upon his release, Lawless sued and

Of course, some may point to the fact that certain rights may be derogated from during a time of war or other public emergency.[123] This allows the State to infringe upon certain fundamental rights in a permissible fashion provided that the matter truly is a public emergency and those rights are infringed only as is strictly required by the exigencies of the situation.[124] Arguably, if the United States adopted a similar policy because the situation on the border between the United States and Mexico may be considered a public emergency, enforcement of all fundamental rights against the United States may not be required. However, the derogation provision within the ECHR makes clear that there can never be a derogation concerning the right to life.[125] This is of course because the arbitrary deprivation of life is considered a violation of *jus cogens* norms, a principle at international law from which a party may never derogate.[126] Hence, any person may vindicate their right to life against a member of the ECHR directly.[127] Similarly under the proposed policy, the United States could not derogate from its duty to enforce the right to life in a public emergency.[128] The right to life is perhaps the cornerstone of all human rights, and in the Twentieth Century, and certainly in the Twenty-First Century, the international community recognizes the dangers posed by "a flagrant disregard of basic human rights."[129]

Various member States to the ECHR have allowed enforcement of the fundamental rights articulated in the treaty within their own domestic

---

demanded compensatory damages for his detention. *Id.* at 10. Though the Court ultimately rules against Lawless, citing to Article 15 of the ECHR which allows a derogation of certain rights during a public emergency, never was it argued that Lawless could not sue both to enforce his fundamental rights and receive compensatory damages. *See id.* at 76–83.

123. *See* ECHR, *supra* note 16, art. 15, 213 U.N.T.S. at 232 (clarifying the rights nations may derogate from, providing exigencies so long as the measures do not interfere with international law).

124. *See id.* (allowing states to depart from the laws of the Convention so long as certain fundamental rights are infringed upon and the measures by the state do not interfere with international law).

125. *See id.* (stating that the only exception to the issue of the right to life as enshrined in Art. 2 is through lawful acts of warfare).

126. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702, cmt. O (1987) (indicating the responsibilities all states have for adopting *jus cogens* norms, and the violations that follow); *id.* § 102 cmt. K (indicating the *jus cogens* norms which states cannot derogate from in international law).

127. *See id.* § 702, cmt. O (stating that upon the violation of customary law, states may defer to available remedies).

128. *See generally* ECHR, *supra* note 16, 213 U.N.T.S. 221 (allowing derogation only in times of war and when public emergency requires action for the protection of life).

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

court system. The United Kingdom passed the Human Rights Act of 1998, which finally incorporated the rights present within the treaty directly into U.K. law and allowed for enforcement of those rights in a U.K. court.[130] For the first time, the supremacy of Parliament could be challenged where an act of Parliament is alleged to violate the ECHR.[131] Previously, acts of Parliament were considered unassailable and the only means of redress for an aggrieved party was to go directly to the European Court of Human Rights.[132] Thus, the Human Rights Act of 1998 recognizes that in certain instances, sovereignty can be breached.[133] As a result of the passage of the Human Rights Act, parties may now directly challenge government action without an invocation of sovereign immunity on behalf of the U.K government.[134] In light of the United States' close ties with the United Kingdom, as well as the shared common law tradition, it is worth taking note of actions across the pond and considering whether the United States should follow suit, at least when the rights concerned fall within *jus cogens* norms.

The Dutch have similarly taken a very progressive view on the enforcement of *jus cogens* norms. In *Netherlands v. Mustafic*, the Netherlands made itself amenable to suit concerning the enforcement of *jus cogens* norms extraterritorially.[135] Surviving family members of a victim of the Srebrenica massacre brought suit in Dutch courts arguing that the actions of the Dutch soldiers stationed in Srebrenica in 1995 violated *jus cogens* norms.[136] The family alleged that the Dutch soldiers forced Mustafic to leave the Dutch compound because of the approaching Bosnian-Serb

---

130. *See* Human Rights Act, 1998, c.42, § 7 (U.K.) (providing that individuals who claim "a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may . . . rely on the Convention right or rights concerned in any legal proceedings").

131. *See id.* (applying powers of remedial action if "a provision of legislation has been declared under section 4 to be incompatible with a Convention right").

132. *See generally id.* (extending enforcement of the European Convention of Human Rights provisions against public authority within the United Kingdom).

133. *See id.* (listing the requirements of an appeal against the act of a public authority and the means by which to proceed with the claim).

134. *See e.g.* A. and Others v. Secretary for the Home Dep't, [2004] UKHL 56 (appeal taken from Eng.), *available at* http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd051208/aand-1.htm. (involving the indefinite detention of non-U.K. citizens who were suspected of engaging in terrorist activities or were associated with known terrorists). The House of Lords ruled that this was an impermissible form of detention in part because it was discriminatory and violated the ECHR. *Id.* at 24–28. Despite the real threat of terrorism, this was not enough to allow discrimination based upon nationality. *Id.*

135. HR 6 september 2013, RvdW 2013, 1036 m.nt., at 31 (State/Mustafic-Mujic, Mustafic, Mustafic) (Neth.), *available at* http://www.rechtspraak.nl/Organisatie/Hoge-Raad/OverDeHogeRaad/publicaties/Documents/12%2003329.pdf.

136. *Id.* at 4.

army, and those actions directly led to his death at the hands of that army.[137]

What is most interesting about this case is the fact that the violation occurred outside of Dutch territory, yet the Court found that the duty to uphold the right to life traveled with the Dutch forces provided the murder could be tied to Dutch state action.[138] This highlights the principle of *jus cogens* in that a State may not derogate from or abandon these norms simply when derogation becomes convenient. In a recent subsequent decision, the Hague District Court has awarded compensation to the families of three hundred of the victims.[139]

The Srebrenica Massacre ruling is very progressive, and it throws into question whether military forces should be held liable for their actions.[140] Military action is governed by international law, and though more leeway is given for collateral damage, there can never be a justification for a military force violating *jus cogens* norms.[141] This article does not attempt to delve specifically into the issue of when military action can be the subject of litigation, and generally speaking a Status of Forces Agreement typically governs such litigation concerning the United States.[142] However, in the present series of cases concerning the actions of Border Pa-

137. *Id.* at 9.

138. *Id.* at 12–13.

139. *Dutch State Liable Over 300 Srebrenica Deaths*, BBC (July 16, 2014, 11:49 ET), http://www.bbc.com/news/world-europe-28313285.

140. *See generally* Hon. Richard J. Goldstone, Address at the University of Las Vegas Law School on Oct. 15, 2005, *in* 6 NEV. L.J. 421 (2006) (discussing how prosecuting political leaders for military actions might hamper peace negotiations and that "[t]he converse is also true").

141. *See generally* Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6.3 U.S.T. 3114, 75 U.N.T.S. 31 (addressing the vagueness as to when the armed forces would be deemed liable for their actions, what the penalties would be, and when they would be applied and outlining the international law in order to improve the conditions of the wounded and sick in armed forces in the field); Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6.3 U.S.T. 3217, 75 U.N.T.S. 85 (establishing the international law pertaining to wounded, sick, and shipwrecked members of armed forces at sea); Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6.3 U.S.T. 3316, 75 U.N.T.S. 135 (providing the international law concerning the treatment of prisoners of war, laying out the general provisions and protections provided to war victims); Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6.3 U.S.T. 3516, 75 U.N.T.S. 287 (illustrating the international law relative to the protection of civilian persons in time of war and construing general provisions for the international community).

142. *See* BRUCE ZAGARIS, INTERNATIONAL WHITE COLLAR CRIME, 243 (2010) (discussing, for example, limits on extradition where the accused is a member of the United States military and explaining that any prosecution of a military member is often circumscribed by a Status of Forces Agreement).

trol agents, they are members of law enforcement, and as such they do not receive some of the same protections as members of the military.[143] Furthermore, the issues arising at the U.S.–Mexico border are not classified as armed conflict, but police actions.[144] In those instances, where the alleged violations rise to possible *jus cogens* violations, the State should be held accountable. What is also interesting to note is that the ruling of the Dutch court means that even extraterritorially, the duty to not breach *jus cogens* norms exists, and the fact that several of the victims have died in Mexico should not be used as a means of avoiding accountability.[145]

There is also evidence in United States case law to support these ideas. It is understood that international law, which would necessarily include recognition of *jus cogens* norms, is part of the law of the United States.[146] Furthermore, custom and usage helps U.S. courts determine obligations and rights under international law.[147] Additionally, courts have a duty to interpret international law in its current state, not its state at the time of ratification of the Constitution.[148] Courts have even questioned whether an action that violates domestic law or a domestic Constitution may even be considered as a sovereign act, thereby entitled to sovereign immu-

143. *See e.g.* Hernandez v. United States, 757 F.3d 249, 275–77 (5th Cir. 2014) (recognizing that unlike in military contexts where injuries arise out of military service, injuries that arise from the actions of an immigration officer should not receive the same special solicitude and that the law can proceed against them).

144. *See generally id.* (analyzing the actions of Border Patrol Agents and disregarding any notion of armed conflict—despite an increased militaristic presence of the Border Patrol along the U.S./Mexico border and increasing security concerns).

145. *Compare* HR 6 september 2013, RvdW 2013, 1036 m.nt. (State/Mustafic-Mujic, Mustafic, Mustafic) (Neth.), *available at*: http://www.rechtspraak.nl/Organisatie/Hoge-Raad/OverDeHogeRaad/publicaties/Documents/12%2003329.pdf (acknowledging that the violation occurred outside of Dutch territory and finding a duty to uphold the right to life despite geographical location, so long as the violation of a *jus cogens* norm could be tied to Dutch state action) *with Hernandez*, 757 F.3d at 271 (taking a somewhat dim view of the argument that, because the victim had died in Mexico, no constitutional protections existed at least vis-à-vis the agent who had killed the victim). The Fifth Circuit reasoned that a functional approach for extraterritorial application of Constitutional protections was more appropriate in light of the Supreme Court's ruling in *Boumediene v. Bush*, 553 U.S. 723 (2008). *Hernandez*, 757 F.3d at 271.

146. *See* The Paquete Habana, 175 U.S. 677, 700 (1900) (stating that such law must be ascertained and administered by the courts of appropriate jurisdiction); *see also* U.S. CONST. art. I, § 8, para. 10 (defining offenses as against the "Law of Nations" necessarily means a recognition of international law).

147. *See id.* (indicating that when there is no controlling executive or legislative act, treaty or judicial decision, customs and usage helps U.S. courts determine international law).

148. Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980).

nity.[149] Such basic norms as *jus cogens* which include the prohibition of murder, slavery, and torture may well have domestic legal effect where they restrain governments in the same way that the Constitution acts as restraint on government action.[150]

For example, if Congress adopted a foreign policy that led to the enslavement of U.S. citizens or other individuals, domestic courts could challenge such an act under international law.[151] Likewise a government is prohibited from torture, summary execution, genocide, and slavery.[152] Note that the language used in these cases concerns the government at large, not the individual executive agent whose conduct may have violated *jus cogens* norms.[153] This harkens back to the notion that fundamental rights are conferred upon people vis-à-vis their government.[154] Thus, the only way to meaningfully enforce those rights, and challenge government policy and actions, is to sue the government as a whole and not permit the government to wield the shield of sovereign immunity to defeat such claims. Suing one Border Patrol agent civilly will not change government policy.[155] It simply means that one agent, if found guilty, will be required to pay money to the grieving family.[156] The only way to get the U.S. government to reconsider its policies along the border and institute constructive changes to limit these types of incidents, which may rise to the level of violating *jus cogens* norms, is to make them a party to the

149. *Id.* at 889. It should be noted that, once again, it is an individual, who was a government official, being brought to trial. *Id.* at 878. However, the Court rejects the notion that he would enjoy immunity based upon the Act of State Doctrine mentioned previously because the alleged actions violated Paraguayan law, the Paraguayan Constitution, and were in fact considered to be in violation of the Law of Nations. *Id.* at 889. The Filartiga family could not have sued Paraguay directly because of issues involving foreign sovereign immunity. *Id.*

150. Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 941 (D.C. Cir. 1988).

151. *Id.*

152. *Id.*

153. *See Filartiga*, 630 F.2d at 890 ("Paraguay's renunciation of torture as a legitimate instrument of state policy, however, does not strip the tort of its character as an international law violation, if in fact it occurred under the color of government authority.").

154. *See id.* at 885 (articulating the U.S. policy that international law confers fundamental rights—like the right to be free from torture—upon "all people vis-a-vis their own governments").

155. *See* Martinez-Cabrera, *supra* note 2 (reporting on the Department of Justice's case-by-case approach to the investigation of Border Patrol shootings with no indication of any substantive policy change arising out of Border Patrol shootings).

156. *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (holding that monetary damages are available from federal agents that violate a plaintiff's constitutional rights).

suit.[157] A sovereign is entitled to immunity in most instances, but not when it is accused of violating *jus cogens* norms.[158]

Additionally, the United States already takes a limited view on sovereign immunity, even when dealing with foreign sovereigns. Such limitations include explicit waiver of immunity when a State is engaged in commercial activities within the United States or, in the case of non-commercial torts occurring within the United States.[159] It is interesting to note that where a tort is committed by a foreign sovereign on U.S. soil, that sovereign may not then invoke sovereign immunity.[160] However, in the instance where an official commits a tort standing on U.S. soil, but the victim has the temerity to die in Mexico, then the United States may still invoke sovereign immunity.[161] This result seems to split the hair very finely and, while it may well comport with the letter of the law, it certainly cannot be said to comport with the spirit of the law.[162]

Finally, it is important to consider the role of the U.S. Constitution in these matters. The Constitution is meant to be a check on the various powers exercised by the three branches of government, ensuring that no

---

157. *See* HR 6 september 2013, RvdW 2013, 1036 m.nt. at 16, 17, 20, 21 (State/Mustafic-Mujic, Mustafic, Mustafic) (Neth.), *available at* http://www.rechtspraak.nl/Organisatie/Hoge-Raad/OverDeHogeRaad/publicaties/Documents/12%2003329.pdf (detailing the Netherland's Supreme Court action to limit sovereign immunity of the government or state and making them a party in situations where *jus cogens* norms may or may not have been met).

158. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. K (1987) (explaining that there is a limit to sovereign immunity when *jus cogens* norms are at issue).

159. Arg. Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 439 (1989) (citing to the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(a)).

160. Foreign Sovereign Immunities Act of 1976 § 1605(a)(5).

161. *See* Hernandez v. U.S., 757 F.3d 249, 256 (5th Cir. 2014) (granting a motion to dismiss, holding that the United States did not waive sovereign immunity under the U.S.C. § 2679(b)(1), which establishes that an FTCA claim against the United States is the exclusive remedy for any tort claims based on acts the performance of a government employee acting within the scope of his employment). In this case, the Mexican national who was shot and killed was standing on the Mexico side of the border. *Id.* at 255. However, the agent who fired the shots was standing on the U.S. side of the border. *Id.* Interestingly, the Court agreed that the Constitution should extend Fifth Amendment protections to the victim vis-à-vis the agent, but would not extend those same protections to allow the victim to sue the United States under the Federal Tort Claims Act, which would have allowed for a waiver of sovereign immunity on behalf of the United States government. *Id.* at 272. While this is supported by a reading of the statute in that it does not apply to torts committed by U.S. officials outside of U.S. territory, it is somewhat questionable to classify this shooting as "outside of U.S. territory" when the only part of the event that happened in Mexico was the death of the victim. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 145 (1969) (looking at a variety of elements to help determine locus).

162. *See generally* Foreign Sovereign Immunities Act of 1976 § 1605 (stating that sovereign immunity is not a substitute for the implementation of justice and accountability).

one branch begins to abuse its power.[163] Judicial review and access to the courts is an important and necessary check on executive authority.[164] In essence, executive action should be reviewable in an Article III court to ensure that there is no abuse of power.[165] This may require more than just a review of an individual agent's actions, but also the review of a governmental policy that possibly led to those actions.[166] For, the powers of the United States are not unlimited, and are subject to the limitations imposed upon it by the Constitution.[167] However, in order to enforce those limitations and restrictions that are imposed upon the government, that government must first be brought before a court. Otherwise, the ability to prohibit such actions becomes very limited, where only the individual agent is punished civilly for his or her acts, meanwhile the questionable conduct may continue through the actions of other agents. Therefore, the government at large must be held accountable, particularly where actions on behalf of executive agents may have violated *jus cogens* norms. This is the only way that a government's actions that are in violation of *jus cogens* norms may be stopped, and where an individual's right may be fully vindicated, thus guaranteeing an "effective remedy."[168]

IV. CONCLUSION

There is no question that respect for foreign sovereign immunity is required and is considered part of customary international law.[169] This helps to reaffirm the concept that all sovereigns are equal.[170] At the same time, however, the international community has come to understand that there are certain limitations on sovereign immunity, and that

163. *See* I.N.S. v. Chadha, 462 U.S. 919, 951 (1983) (explaining the Constitution delegated powers to the Executive, Legislative, and Judicial Branches to limit their powers which are aligned with their designated responsibilities). In this case, the Supreme Court rejected the idea of a legislative veto and reaffirmed the necessity of both bicameral passage of an act and presentment for signature of that act to the President. *Id.* at 957.

164. Stephen I. Vladeck, *Boumediene's Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2145 (2009).

165. *See id.* at 2128 (discussing the importance of review conducted by Article III courts due to the increasing number of statutes allotting adjudicative authority to administrative agencies).

166. *See generally*, Martin M. Shapiro, *Supreme Court and Gov't Planning: Judicial Review and Policy Formation*, 35 GEO. WASH. L. REV. 329 (1966) (discussing SCOTUS's role in constitutional judicial review of gov't agency policies).

167. Boumediene v. Bush, 553 U.S. 723, 765 (2008).

168. ICCPR, *supra* note 7, art. 2(3)(a), 999 U.N.T.S. at 174.

169. *See* Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), Judgment, 2012 I.C.J. 99, 123 (Feb. 3) (explaining that States consistently act in accordance with the rules of sovereign immunity).

170. *See* U.N. Charter art. 2, para. 1 (establishing sovereign equality as a principle governing the interaction of United Nations members).

the sovereign must be held to account when there are violations of *jus cogens* norms.[171]

Other Western States are now taking the position that when there has been a violation of a *jus cogens* norm, it is the State who will be held accountable and the State may not hide behind the shield of sovereign immunity to avoid its international obligations.[172] This interpretation allows for a full understanding that fundamental human rights exist between the State and the people, not just one government actor and the people.[173] Hence, the State responsible for the actions of its agents should be one of the parties to a proceeding where *jus cogens* violations are alleged.[174]

Additionally, an individual is entitled to an "effective remedy" when the State deprives an individual of a fundamental right.[175] Part of that effective remedy entails not just compensatory damages, but also an assurance by the State that any policy leading to these types of violations will cease. This is precisely why the European Court of Human Rights was created.[176] The United States also has this obligation pursuant to its treaty obligations.[177] The United States already recognizes instances where sovereign immunity may not be invoked.[178] It should hardly seem unreasonable or illogical, then, that the United States would allow for a

---

171. *See* Richman, *supra* note 102, at 978 (discussing how *jus cogens* norms are recognized by the world).

172. *See e.g.* HR 6 september 2013, RvdW 2013, 1036 m.nt. (The State of the Netherlands/Mustafic-Mujic, Mustafic, Mustafic), *available at* http://www.rechtspraak.nl/Organisatie/Hoge-Raad/OverDeHogeRaad/publicaties/Documents/12%2003329.pdf (holding a state responsible for the conduct of it's agents).

173. *See e.g.* Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) (stating that torture perpetrated by an individual does not alleviate the State of culpability if it is implemented under the pretense of government authority).

174. *See* HR 6, 1036 m.nt., at 11–12 (holding that a state retains certain powers over its organs or agents and is thus responsible for their actions); *see also Filartiga*, 630 F.2d at 890 (finding the State still liable for the acts of it's agents if government authorization conferred).

175. ICCPR, *supra* note 7, art. 2(3)(a), 999 U.N.T.S. at 174.

176. *See generally* ECHR, *supra* note 16, 213 U.N.T.S. 221 (explaining that recognition of human rights and basic freedoms will be enforced by the contracting parties while being overseen by the European Court of Human Rights).

177. *See generally* ICCPR, *supra* note 7 (holding that the States who signed the International Covenant on Civil and Political Rights agreed to be bound by the rules and regulations therein).

178. *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605 (2012) (listing "[g]eneral exceptions to the jurisdictional immunity of a foreign state"); *see also* Federal Tort Claims Act of 1948, 28 U.S.C. § 1346(b)(1) (2012) (establishing exclusive jurisdiction for various District Courts regarding claims in which the United States is a respondent in a civil suit).

waiver of sovereign immunity in the instance where a *jus cogens* violation is alleged at the hands of federal law enforcement.

Finally, allowing for enforcement of *jus cogens* norms in these instances comports with the idea that Executive power is limited, and the only successful check on that power is through Article III courts.[179] This also serves as the only recourse available to the families of the victims because they may not bring an action in the courts of Mexico based on the principles of foreign sovereign immunity and the lack of enforceability for any judgment rendered by those courts.[180] Their only recourse is to come to the United States and hope that the United States will be amenable to suit as a party.

Allowing for suit of the individual agent responsible for the deaths is an important step, but it neither changes the policy set by the government nor prevents these types of actions from continuing.[181] Essentially, a failure to allow suit against the government because of sovereign immunity amounts to a denial of justice and may turn the U.S.–Mexico border into a killing zone where there is no accountability.[182] This is of particular concern given the increased presence of minors along the border crossing into the United States from Central America. The United States should join other Western nations and allow for a waiver of sovereign immunity when *jus cogens* violations are alleged and those allegations are brought before the domestic courts. Otherwise, the United States may run the risk of becoming a nation with a "flagrant disregard of basic human rights."[183]

---

179. *See* Richman, *supra* note 102, at 978–79 (explaining that sovereign immunity is waived when State representatives commit *jus cogens* violations).

180. *See* Foreign Sovereign Immunities Act of 1976 § 1609 (enacting limitations on attachment, arrest, and execution of property owned by foreign states).

181. *See generally* Hernandez v. U.S., 757 F.3d 249 (5th Cir. 2014) (allowing the parents of a young child shot and killed by a border patrol agent to sue the agent individually, while granting immunity to the United States from suit utilizing the FTCA's foreign country exception).

182. *See generally* Valencia & Martinez, *supra* note 3 (discussing the growing pressure between US-Mexican international relations because of the growing border violence).

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