Sovereign Immunity and *Jus Cogens*: Is There A Terrorism Exception for Conduct-Based Immunity?

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This Note addresses the implications of jus cogens *for sovereign immunity, in particular regarding the act of supporting terrorism.* Jus cogens *norms are peremptory norms of international law — fundamental principles which cannot be abrogated by international agreement, judicial opinion or custom. Terrorism might be considered the type of violation of international law that falls outside existing immunity protections, under a fiduciary theory of* jus cogens *and a definition of terrorism that takes its central feature as violence that targets citizens in an attempt to dissuade them from exercising their lawful rights. However, because international actors have not reached a consensus on a workable definition of either* jus cogens *or terrorism, it is unlikely courts will adopt this approach. This Note considers alternative approaches to enable suits to go forward against individual officials who allegedly sponsored terrorism, including an addition to the statutory tort scheme.*

I. INTRODUCTION

On November 26, 2008, members of the terrorist group Lashkar-e-Taiba carried out a series of coordinated attacks throughout Mumbai, India's highly populated financial capital. Armed with guns and explosives, ten men targeted the Taj Mahal and Oberoi luxury hotels, the Chhatrapati Shivaji train station, Leopold's restaurant, the Nariman House Jewish center, and the Cama and

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Albless women and children's hospital.[1] By the time the attacks ended almost three days later, 166 people had been killed and hundreds more injured.[2] The hotel gunmen had asked victims to state their nationalities at gunpoint, specifically seeking American and British victims.[3] India later accused Pakistan's Inter-Services Intelligence agency (ISI) of masterminding the attacks, based on the ISI's historical ties to Lashkar-e-Taiba and evidence disclosed by a high-ranking suspect pointing towards substantial Pakistani involvement.[4]

Survivors and families of victims of the attacks filed suit under the Alien Tort Statute and Antiterrorism Act in the Eastern District of New York case *Rosenberg v. Lashkar e-Taiba*.[5] In addition to Lashkar-e-Taiba and its leaders, the defendants also included the ISI and two former ISI Directors General.[6] The ISI asserted immunity under the Foreign Sovereign Immunities Act (FSIA),[7] while the individual officials asserted immunity on common law grounds for acts undertaken in an official capacity.[8] The *Rosenberg* plaintiffs argued that the individual officials could not claim immunity for official acts, on the theory that their conduct violated a *jus cogens* peremptory norm[9] under international

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1. Somini Sengupta, *At Least 100 Dead in Indian Terror Attacks*, N.Y. TIMES (Nov. 26, 2008), http://www.nytimes.com/2008/11/27/world/asia/27mumbai.html?pagewanted=all [http://perma.cc/PGX5-N9A9]; Barney Henderson & Amrita Kadam, *Mumbai 26/11: five years on, city still feels scars of devastating terror attack*, TELEGRAPH (Nov. 26, 2013), http://www.telegraph.co.uk/news/worldnews/asia/india/10474304/Mumbai-2611-five-years-on-city-still-feels-scars-of-devastating-terrorist-attack.html [http://perma.cc/L696-EC9Y].

2. Henderson & Kadam, *supra* note 1.

3. Sengupta, *supra* note 1.

4. Dean Nelson, *India: Pakistan's ISI had direct control over Mumbai attacks*, TELEGRAPH (July 14, 2010), http://www.telegraph.co.uk/news/worldnews/asia/india/7890226/India-Pakistans-ISI-had-direct-control-over-Mumbai-attacks.html [http://perma.cc/X39C-2EH8].

5. Rosenberg v. Lashkar-e-Taiba, 980 F. Supp. 2d 336, 338 (E.D.N.Y. 2013), *aff'd sub nom*. Rosenberg v. Pasha, 577 F. App'x 22 (2d Cir. 2014). The plaintiffs comprised Israeli and American citizens. The Alien Tort Statute gives federal courts jurisdiction over "any civil action by an alien [i.e., non-U.S. citizen] for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2012). The Antiterrorism Act provides a basis for suit in U.S. district court for any U.S. national, or their estate, for an injury arising out of an act of international terrorism. 18 U.S.C. § 2333 (2012).

6. *Lashkar-e-Taiba*, 980 F. Supp. 2d at 338.

7. The FSIA governs civil actions against foreign states in U.S. courts. 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), and 1602–1611 (2012). Sections 1605–1607 set forth exceptions to the jurisdictional immunity of foreign states.

8. *Lashkar-e-Taiba*, 980 F. Supp. 2d at 339–40. For a discussion of the history of common law immunity, see Samantar v. Yousuf, 560 U.S. 305, 311 (2010) ("Samantar I").

9. Peremptory norms are internationally recognized norms "from which no derogation is permitted and which can be modified only by a subsequent norm of general interna-

law.[10] The district court dismissed the suit, deferring to a State Department Suggestion of Immunity (SOI) with regard to the ISI's immunity under the FSIA, and Second Circuit precedent finding there is no common law exception to immunity for foreign officials accused of violating *jus cogens*.[11] The Second Circuit summarily affirmed the dismissal on appeal.[12] Neither court addressed whether a prohibition on terrorism would qualify as a *jus cogens* norm.

The *Rosenberg* case arose soon after the Supreme Court had resolved a circuit split over the application of the FSIA to individual foreign officials.[13] In its 2010 decision in *Samantar v. Yousuf*, the Court held that an individual official is not covered under the act, but that immunity might be available to a defendant official under the federal common law of sovereign immunity.[14] On remand, the Fourth Circuit applied common law, holding that "under international and domestic law, officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity," because such conduct cannot constitute official sovereign acts.[15] The Fourth Circuit gave significant weight to the State Department's decision not to recommend immunity for Muhammad Ali Samatar,[16] a former Prime Minister of Somalia accused of torturing members of a politically threatening clan.[17] In addition to engendering controversy due to its ambiguous reasoning,[18] *Samantar II* created a split with the Second Circuit, which held in the 2009 case *Matar v. Dichter* that "[a] claim premised on the violation of *jus cogens* does not withstand foreign

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tional law having the same character." Yousuf v. Samantar, 699 F.3d 763, 775 (4th Cir. 2012) ("Samantar II") (quoting the Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331). The list of acts falling under *jus cogens* norms includes "torture, summary execution and prolonged arbitrary imprisonment" as well as "genocide and slavery," and acts which are committed under color of law but "are, by definition, acts that are not officially authorized by the sovereign." *Id.* at 775–76.

10. *Lashkar-e-Taiba*, 980 F. Supp. 2d at 343–44.
11. *Id.* at 342, 344.
12. Rosenberg v. Pasha, 577 Fed. App'x 22 (2d Cir. 2014).
13. *See Samantar I*, 560 U.S. 305 (2010).
14. *Id.* at 325–26.
15. *Samantar II*, 699 F.3d at 776–77.
16. The case is mistakenly titled "Samantar," as the official's name is actually spelled "Samatar."
17. *Samantar II*, 669 F.3d at 770, 772.
18. *See infra* note 91, 97.

sovereign immunity," under the FSIA or common law.[19] The Second Circuit's 2014 *Rosenberg* opinion reaffirmed *Matar v. Dichter* as binding circuit precedent, concluding that "nothing in the Supreme Court's [*Samantar*] opinion even suggests, let alone mandates, that we abandon our clear precedent in *Matar*."[20] While *Samantar* does not displace *Matar*, a second look at *Matar* shows that there is more flexibility for future plaintiffs to weaken its conclusions than the Second Circuit has indicated.[21]

Few cases in U.S. or international courts have directly addressed whether terrorism qualifies as a *jus cogens* violation, in part because both concepts are notoriously challenging to define via international consensus. While several theories of *jus cogens* may provide a basis for the inclusion of particular definitions of terrorism, courts are reluctant to expand the concept of *jus cogens*, as its parameters are already difficult to determine. The existence of the split between the Fourth and Second Circuits is itself an argument against labeling the prohibition on terrorism a peremptory norm, as one criteria for identifying such norms is their widespread historical acceptance by the international community as rules from which derogation is absolutely impermissible. At the same time, allowing plaintiffs to recover in civil suits against sponsors of terrorist attacks can serve a variety of public policy interests. Those interests include restitution for victims as well as a reconceptualization of counter-terror as a multi-branch pursuit, not limited to conventional warfare and intelligence work under the Executive.[22]

This Note considers the arguments for and against a *jus cogens* exception to individual official immunity, and addresses whether an individual official's support for terrorism would qualify as a *jus cogens* violation. Part II details the development of foreign sovereign immunity law in the United States. Part III discusses the *Samantar* cases and the major doctrinal debates post-*Samantar II*. Part IV applies theories of *jus cogens* to concepts of terrorism to determine whether terrorism qualifies as a violation of peremptory norms under international law. Finally, Part V discusses potential solutions to the questions raised in

19. Matar v. Dichter, 563 F.3d 9, 15 (2d Cir. 2009).
20. Rosenberg v. Pasha, 577 Fed. App'x 22, 23 (2d Cir. 2014).
21. *See infra* Part V.A.
22. Laura B. Rowe, *Ending Terrorism with Civil Remedies: Boim v. Holy Land Foundation and the Proper Framework of Liability*, 4 SEVENTH CIR. REV. 372, 379 (2009).

these contexts, including ongoing statutory reform efforts on behalf of victims of terror attacks.

II. THE HISTORY OF FOREIGN SOVEREIGN IMMUNITY LAW IN THE UNITED STATES

Foreign sovereign immunity law in the United States underwent three major periods of development from the early nineteenth to late twentieth centuries: the establishment of basic immunity jurisprudence in case law, the Executive's adoption of the restrictive theory of immunity, and the passage of the FSIA. This Part discusses each in turn, addressing how specific historical circumstances and legal doctrine interacted to produce particular judicial outcomes. The role of these historical circumstances supports skepticism towards the level of cohesiveness in the body of doctrine as it developed over time, a relevant consideration due to the attention afforded to the historical application of immunity law in modern arguments. At each stage, narrow factual circumstances of key cases produced uncertainty about the contours of the judiciary and the Executive's respective roles in immunity determinations. The influence of contemporaneous historical circumstances on the development of immunity doctrine cautions against the oversimplification of precedent in cases involving claims under recently passed legislation.

A. THE BASIS FOR FOREIGN SOVEREIGN IMMUNITY

The early sovereign immunity cases typically involved disputes over sea vessels owned by friendly sovereigns, docked in American ports.[23] These cases show that while the judiciary has always been cognizant that certain diplomatic functions are best reserved to the Executive when it comes to disputes over sovereign property, judicial deference has not been practiced with complete consistency. The historical circumstances surrounding the early cases, rather than strict doctrinal analysis, may have played a large role in producing their outcomes.

The 1812 case *The Schooner Exchange v. McFaddon* established the foundation for foreign sovereign immunity doctrine in

23. The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812) (discussing prior cases throughout).

the United States.[24] *The Schooner Exchange* concerned a dispute over ownership of a Napoleonic military vessel that had docked in the friendly port of Philadelphia due to unexpected weather conditions.[25] The Supreme Court held that the vessel fell under an implied exception to American jurisdiction, protecting "the power and dignity" of its sovereign owner. The public nature of the military vessel was critical to the outcome of *The Schooner Exchange*.[26] Chief Justice Marshall described a practice of unanimous relaxation of jurisdiction of one sovereign over another within its territory, which preserved the "mutual benefit[s]" of international cooperation between "distinct sovereignties, possessing equal rights and equal independence."[27] Although some courts have identified *The Schooner Exchange* as the starting point for judicial deference to executive suggestions regarding immunity,[28] the Court carried out an extensive analysis rather than simply deferring to the executive branch's position. The practice of deference to executive suggestions is more likely based on the decisions in *Ex parte Republic of Peru*[29] and *Republic of Mexico v. Hoffman*,[30] whose implications for executive control remain contested.[31]

In *Ex parte Republic of Peru,* a contract dispute involving the Peruvian government,[32] the Peruvian Ambassador formally filed for and received recognition of immunity by the State Department.[33] The Court "accept[ed] and follow[ed]" the State Department's determination of immunity in order to reduce the risk of insulting a friendly foreign state.[34] The Court emphasized the shared agreement on this approach by both the judiciary and the

24. *Schooner*, 11 U.S. (7 Cranch) at 137. *See also* ANDREAS F. LOWENFELD, THE DEVELOPMENT OF SOVEREIGN IMMUNITY LAW IN THE UNITED STATES 1, http://iilj.org/courses/documents/AHistoricalIntroduction.pdf [http://perma.cc/Q299-K2WC].

25. *Schooner*, 11 U.S. (7 Cranch) at 117–18.

26. *Id.* at 147.

27. *Id.* at 136.

28. Ye v. Zemin, 383 F.3d 620, 624 (2004) (citing Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983)).

29. 318 U.S. 578 (1943).

30. 324 U.S. 30 (1945).

31. Scott Gilmore, *Immunity Disorders: The Conflict of Foreign Official Immunity and Human Rights Litigation*, 80 GEO. WASH. L. REV. 918, 945 n.206 (Apr. 2012). *See also* Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT'L L. 915, 949 (2011).

32. 318 US. at 580.

33. *Id.* at 581.

34. *Id.* at 588.

Executive, agreeing that a diplomatic resolution better served the national interest than "the compulsions of judicial proceedings."[35]

The State Department has not always offered a firm opinion on the question of immunity. In *Republic of Mexico v. Hoffman*, the State Department took no formal position, merely citing two previous cases.[36] In the first case, the Court had recognized immunity over a vessel that was in the possession and service of the Mexican government at the time of its seizure.[37] In the second, a district court had denied immunity where the vessel in question was not in the possession and service of its government at the time of seizure.[38] The *Hoffman* Court denied immunity, concluding that the State Department had forgone "numerous opportunities like the present" to expand immunity to include cases in which the foreign state lacked possession at the time of seizure.[39]

Justice Frankfurter's concurrence in *Hoffman* characterized the decision as driven by historical factors, noting the "enormous growth" of "ordinary merchandizing activity" by governments.[40] A great increase in state ownership of ordinary trade ships (as opposed to war ships, long entitled to immunity from seizure) had rendered the question of expanding immunity quite pressing. If seizure in port could be regarded as an act of military aggression,[41] such behavior by the judiciary would be particularly dangerous.

Frankfurter's concurrence in *Hoffman* points to the limitations in drawing rigid principles from the early immunity cases. The early immunity analysis was shaped by major historical changes in the use of a limited category of ships over the course of a few decades; one must exercise caution in applying a general articulation of principles espoused during that era to modern civil suits against individual foreign officials. In her critique of the State Department's reliance on *Ex Parte Peru* and *Hoffman* to support an expansive interpretation of judicial deference, Ingrid Wuerth notes that both were admiralty cases superseded by the FSIA, in

35. *Id.* at 589.
36. 324 U.S. 30, 31–32 (1945).
37. *Id.* at 32.
38. *Id.*
39. *Id.* at 38.
40. *Id.* at 40–41 (internal quotations omitted).
41. This possibility was not directly broached by Frankfurter, but is relevant in terms of historical context. *See British Navy Impressment*, PBS, http://www.pbs.org/opb/historydetectives/feature/british-navy-impressment [http://perma.cc/JQ7D-U229].

which the Court said little about the basis for deference to the executive branch.[42] For this reason, Wuerth argues that these cases should be regarded in the context of "the Court's other broad statements of executive power in foreign affairs during the late 1930s [which] have been undermined by subsequent cases and events."[43]

B. INCONSISTENCIES IN STATE DEPARTMENT PRACTICE DURING THE TATE LETTER ERA

In 1952, State Department Legal Advisor Jack Tate wrote to acting Attorney General Philip Perlman, notifying him of the executive branch's decision to adopt the "restrictive" theory of immunity.[44] Under the restrictive theory, a foreign sovereign is immune for public acts (*jure imperii*) but not private acts (*jure gestionis*).[45] Tate referenced growing international adherence to the restrictive theory, such as the decision by ten nations to ratify the Brussels Convention of 1926, waiving immunity for government-owned merchant vessels.[46] While the U.S. did not ratify the Convention,[47] the increasing participation of governments in international commerce required a forum for adjudicating the rights of individuals.[48] Tate wrote, "a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so."[49] He further explained that several Supreme Court justices had indicated their support for deference to the Executive based on the potential ramifications for foreign relations.[50]

In the decade following the shift to the restrictive theory, implementation of the Tate letter was flawed. According to John

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42. Wuerth, *supra* note 31, at 928.

43. *Id.*

44. Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952), 26 DEP'T ST. BULL. 984–85 (1952), *reprinted in* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 714 App. 2 (1976) ("Tate Letter").

45. *Id.*

46. *Id.* at 985.

47. John Kriz, *Ship Mortgages, Maritime Liens, and Their Enforcement: The Brussels Conventions of 1926 and 1952*, 13 DUKE L.J. 70, 70 (1964).

48. Tate Letter, *supra* note 44, at 984–85.

49. *Id.*

50. *Id.* at 985.

Niehuss, the State Department's characterization of disputes as commercial or non-commercial in nature, and its ensuing decisions regarding the filing of suggestions of immunity, reflected the U.S.'s degree of latitude in its relations with the foreign power rather than the facts of the case.[51] Suits against the Republic of Korea[52] and the Philippines,[53] both of which had friendly relations with the U.S., were denied immunity suggestions, while suits that could have been characterized as equally "commercial" involving the Soviet Union[54] and Czechoslovakia[55] received such suggestions.[56] A suggestion of immunity on behalf of a nation with whom the U.S. had colder relations accrued benefits that "outweigh[ed] the benefit of uniformity of treatment," making the restrictive theory of immunity merely a "fair weather doctrine . . . applied by the State Department only when . . . politically expedient."[57]

Over the decade following the Tate Letter, courts strove to avoid adjudicating cases that could embarrass the Executive, but not those that were "truly judicial in character."[58] Writing in 1962, Niehuss proposed that courts evaluate the commercial nature of a dispute, as the State Department's procedures for immunity determinations did not include formal hearings and attendant procedural safeguards.[59] Under Niehuss's scheme, the State Department would retain a veto power to be exercised once the court had performed its analysis regarding the commercial nature of the activity and the contingent immunity determination, so that "overriding political factors" could be accounted for as necessary.[60] Though they were not adopted, Niehuss's suggestions highlight the long-standing tension between the judiciary and Executive in this area.

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51. John M. Niehuss, *International Law: Sovereign Immunity: The First Decade of the Tate Letter Policy*, 60 MICH. L. REV. 1142, 1142–53 (1962).

52. New York & Cuba Mail S.S. Co. v. Republic of Korea, 132 F. Supp. 684 (S.D.N.Y. 1955).

53. *In re* Grand Jury Investigation of the Shipping Indus., 186 F. Supp. 298 (D.D.C. 1960).

54. Weilamann v. Chase Manhattan Bank, 192 N.Y.S.2d 469 (N.Y. Sup. Ct. 1959).

55. Stephen v. Zivnostenska Banka, 155 N.Y.S.2d 340 (N.Y. Sup. Ct. 1956), *aff'd*, 157 N.Y.S.2d 903 (N.Y. App. Div. 1956), *aff'd*, 3 N.Y.2d 862 (N.Y.1957), *appeal dismissed*, 356 U.S. 22 (1958).

56. Niehuss, *supra* note 51, at 1143–44.

57. *Id.* at 1144–45.

58. *Id.* at 1146.

59. *Id.* at 1147.

60. *Id.* at 1151–52.

The early implementation of the Tate Letter demonstrates that the actual application of criteria for immunity determinations and the degree of control afforded to the executive remained inconsistent in the decade following *Ex parte Peru* and *Hoffman*. Since *The Schooner Exchange*, the judicial branch has referenced the Executive's unique role in foreign affairs while retaining a distinction between diplomatic and judicial priorities in immunity cases.

C. THE FOREIGN SOVEREIGN IMMUNITIES ACT

The next major development in the evolution of foreign sovereign immunity law was the passage of the FSIA in 1976. The express purposes of the FSIA were to address inconsistencies in the application of sovereign immunity law, codify the restrictive approach undertaken after the Tate Letter, and place greater emphasis on legal as opposed to political analysis in determining the fate of immunity claims.[61] FSIA § 1604 established "a premise of immunity,"[62] stipulating that "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 [later repealed in part] of this chapter."[63] Sovereign immunity is an affirmative defense, placing "the burden . . . on the foreign state to produce evidence in support of its claim of immunity."[64] This burden also extends to demonstrating "that the plaintiff's claim relates to a public act of the foreign state" and is not covered by the FSIA exceptions.[65]

Congress described the practice of State Department statements of interest as a problematic involvement of "diplomatic influences," calling for the Act to "transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations."[66] The House Report explicitly announced Congress's intent that the FSIA "discontinu[e] the prac-

61. H.R. Rep. 94-1487, at **6605 (1976).
62. *Id.* at **6616.
63. 28 U.S.C. § 1604 (2014).
64. H.R. Rep, *supra* note 61, at **6616.
65. *Id.*
66. *Id.* at **6606.

tice of judicial deference to 'suggestions of immunity' from the executive branch."[67] This shift would benefit both litigants and the State Department itself, by reducing pressure on the Executive to contain potentially negative diplomatic consequences by formally limiting executive influence.[68]

Deputy Secretary of State Robert S. Ingersoll and Deputy Attorney General Harold R. Tyler, Jr. wrote to the Speaker of the House on October 31, 1975, expressing support for the bill's aim "to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation," with the effect of "entrust[ing] the resolution of questions of sovereign immunity to the judicial branch of Government."[69] While they did not directly express an opinion on the specific role that executive suggestions of immunity should retain in the future, their letter recognized the shifting of focus from executive determinations to judicial control.

III. THE *SAMANTAR* CASES

The *Samantar* cases ushered in the next area of debate within sovereign immunity law, concerning its application to individual officials. In 2010, the *Samantar* Court held that the FSIA does not apply to individual foreign officials, as their immunity is governed by the common law.[70] In *Samantar II* on remand to the Fourth Circuit, another issue emerged: whether under the common law, a former individual official is entitled to immunity for actions taken while in office that are potential *jus cogens* violations.[71] The Fourth Circuit's holding that such violations cannot constitute official acts for immunity purposes created a split with the Second Circuit. Currently, a suit against an individual foreign official for authorizing *jus cogens* violations in their home country would reach a different outcome if pursued in New York than in Washington, D.C., both of which are major centers of diplomatic traffic.

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67. *Id.* at **6610.
68. *Id.*
69. *Id.* at **6634.
70. Samantar v. Yousuf, 560 U.S. 305, 320 (2010) ("Even reading the Act in light of Congress' purpose of codifying *state* sovereign immunity, however, we do not think that the Act codified the common law with respect to the immunity of individual officials.") (emphasis in original).
71. Yousuf v. Samantar, 699 F.3d 763, 775 (4th Cir. 2012).

A. *SAMANTAR I*

Samantar arose out of events occurring in Somalia, where petitioner Mohamed Ali Samatar served as a high-ranking official from 1980 to 1990.[72] Respondents, members of a prominent rival clan, alleged that Samatar authorized the torture and extrajudicial killings of them and their families during his tenure. They sought damages under the Torture Victim Protection Act of 1991.[73] The key question before the Court was whether the FSIA governs individual officials.[74]

Samatar argued that an individual official's acts are acts of the state, thus receiving immunity. The Court distinguished between state and individual official immunity, noting "the act of state doctrine is distinct from immunity," though "in some circumstances the immunity of the foreign state extends to an individual for acts taken in his official capacity."[75] The Court cited the Second Restatement of Foreign Relations Law,[76] which states that the immunity of foreign states covers "any other public minister, official, or agent of the state with respect to acts performed in his official capacity *if the effect of exercising jurisdiction would be to enforce a rule of law against the state*."[77] The existence of cases in which a government suggested individual official immunity where the state itself would not receive such a suggestion further supported this distinction between the state and individual official.[78] The Court concluded that the FSIA does not govern individual official immunity, adding that the legislative history of the FSIA pointed to "an intent to leave official immunity outside the scope of the Act."[79]

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72. *Yousuf*, 560 U.S. at 308.
73. *Id.*
74. 560 U.S. at 326 (Alito, J., concurring); 560 U.S. at 326 (Thomas, J., concurring); 560 U.S. at 326–27 (Scalia, J., concurring) (criticizing the use of legislative history rather than exclusive reliance on statutory interpretation, noting their views that the textual analysis on its own was sufficient to decide the case).
75. *Id.* at 322.
76. *Id.* at 321 (quoting RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 66 (1965)).
77. *Id.*
78. *Id.* at 324–25.
79. *Id.* at 323.

B. *SAMANTAR II*

On remand to the Fourth Circuit, the State Department submitted a statement of interest.[80] The SOI rejected immunity for Samatar, on two grounds: (1) there was no recognized Somali government to request immunity on his behalf, and (2) his current status as a U.S. resident obliged him to submit to U.S. law.[81]

The Fourth Circuit's interlocutory opinion rejected the additional assertion by the State Department that the court owed absolute deference to the SOI, based on the President's constitutional recognition power.[82] The court emphasized the relatively recent onset of judicial deference to executive determinations, as well as the context of pre-FSIA cases wherein "claims of *individual* foreign sovereign immunity were scarce" and "provided inconsistent results."[83] The court concluded that absolute deference to the Executive based on the President's recognition power only extends to head-of-state immunity.[84] Since the State Department offered no additional constitutional basis for deference on other foreign official immunity questions, the court determined that SOIs for conduct-based immunity would "carr[y] substantial weight" without controlling the outcome.[85]

Performing its own analysis of Samatar's immunity claim, the Fourth Circuit focused on the distinction between official acts for which an individual has historically been afforded immunity vis-à-vis the state, and private acts of a nature that "a suit directed against that action is not a suit against the sovereign."[86] Private acts include "drug possession or fraud," i.e., criminal acts that "are not arguably attributable to the state."[87] The court referenced the developing international practice of denying immunity for officials accused of violating *jus cogens* norms.[88] The court

80. SOI may refer to "suggestion of immunity" or "statement of interest."

81. Statement of Interest of the United States of America 7, 699 F.3d 763 (4th Cir. 2012) (No. 1:04 CV 1360 (LMB)).

82. Yousuf v. Samantar, 699 F.3d 763, 771–72 (4th Cir. 2012).

83. *Id.* (emphasis in original).

84. *Id.* at 772.

85. *Id.*

86. *Id.* at 775 (quoting Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1106 (9th Cir. 1990)).

87. *Id.*

88. *Id.* at 776 ("There has been an increasing trend in international law to abrogate foreign official immunity for individuals who commit acts, otherwise attributable to the State, that violate jus cogens norms. . . .").

acknowledged that the increasing acceptance of this approach to immunity occurred in the criminal rather than civil context,[89] but concluded that Congress's enactment of the Torture Victim Protection Act "essentially created an express private right of action for individuals victimized by . . . violations of *jus cogens* norms."[90]

The Fourth Circuit held that Samatar was not entitled to conduct-based official immunity because the claims against him "involve[d] acts that violated *jus cogens* norms."[91] The State Department SOI provided "additional reasons"[92] to support this conclusion, reasons that "add[ed] substantial weight"[93] to the court's independent determination that Samatar should not receive immunity.[94] The court's language presents the SOI as a secondary source for its reasoning, leaving ambiguity as to how a future case involving a similar fact pattern and an SOI in favor of immunity would fare under the Fourth Circuit.

Samatar filed a petition for certiorari on March 4, 2013, seeking review of the Fourth Circuit's determination.[95] Over the course of 2013, domestic political changes in Somalia created an unstable diplomatic landscape affecting key factors in the foreign relations analysis. In 2013, the Obama administration recognized the Somali government for the first time since 1991,[96] a change relevant to the State Department's argument against immunity. In his amicus brief, the Solicitor General discussed the December 2, 2013 Somali Parliament no-confidence vote against then-Prime Minister Abdi Farah Shirdon, a development that foreshadowed his replacement with Abdiweli Sheikh Ahmed later that month.[97] Not only was the turnover in the Somali government a sign of unpredictability, but also of a lack of transpar-

89. *Id.* (citing Regina v. Bartle, *ex parte* Pinochet, 38 I.L.M. 581, 593–95 (H.L. 1999)).
90. *Id.* at 777.
91. *Id.* at 778.
92. *Id.* at 777–78.
93. *Id.* at 777.
94. *Id.* at 778.
95. *See Samantar v. Yousuf*, 699 F.3d 763 (4th Cir. 2012), *petition for cert. filed* 81 U.S.L.W. 3503 (U.S. Mar. 24, 2013) (No. 12-1078).
96. Ashish K. Sen, *U.S. Recognizes First Somali Government Since 1991*, WASH. TIMES (Jan. 17, 2013), http://www.washingtontimes.com/news/2013/jan/17/us-recognizes-first-somali-government-since-1991 [http://perma.cc/XS7W-TA2Q].
97. Hamza Mohamed, *Somali President Appoints New Prime Minister*, ALJAZEERA (Dec. 12, 2013), http://www.aljazeera.com/news/africa/2013/12/somalia-appoints-new-prime-minister-201312121511372l674.html [http://perma.cc/AM4L-KYQ4] (commenting that "Ahmed is the sixth prime minister the war-torn east African country has had in six years").

ency that affected the U.S. government's ability to verify who was authorized to speak on its behalf. On December 30, 2013, "an individual identifying himself as the legal adviser to the President of Somalia sent a letter to the State Department, purporting to waive any residual immunity Samantar might enjoy."[98] Soon after, the Somali President's Chief of Staff emailed the State Department to disavow the alleged advisor and his letter.[99] The Supreme Court denied Samantar's certiorari petitions on January 13, 2014, and March 9, 2015.[100]

C. IMPLICATIONS OF *SAMANTAR II*

A much-debated point from the 2012 *Samatar II* opinion concerns whether *jus cogens* violations provide an exception to immunity,[101] or whether this is a threshold question, preventing the initial attachment of immunity.[102] While some may consider this a semantic distinction, the status of *jus cogens* as either a threshold or exception-based analysis implicates the Fourth Circuit's reliance on cases characterizing customary international law as supporting an alleged trend against immunity for individual officials accused of *jus cogens* violation. John Bellinger has argued that the Fourth Circuit's opinion "was simply wrong on the law," relying on a recent International Court of Justice opinion rejecting such an exception based on multiple national and international cases that point against international acceptance of a *jus cogens* immunity exception.[103]

William Dodge argues that the Fourth Circuit's opinion deals with the issue as a threshold question, and that the difference between a post-attachment exception and a pre-attachment deni-

98. John Bellinger, *Supreme Court Denies Samantar Cert Petition (but this may not be the end of the story)*, LAWFAREBLOG.COM (Jan. 13, 2014, 7:34 PM), http://www.lawfareblog.com/2014/01/supreme-court-denies-samantar-cert-petition-but-this-may-not-be-the-end-of-the-story/#.Uu6u__1ATwI [http://perma.cc/T7YP-NXU8].

99. *Id.*

100. *See Samantar v. Yousuf*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/samantar-v-yousuf-3 [http://perma.cc/RT8Y-7U2Q].

101. The U.S. Government has interpreted the Fourth Circuit's opinion as creating "a new categorical judicial exception to immunity." Brief for the United States 19, *Samantar v. Yousef*, 560 U.S. 305 (2010) (No. 08-1555).

102. John Bellinger, *Why the Solicitor General Should Ask the Supreme Court to Reverse the Fourth Circuit's Decision in Samantar*, LAWFAREBLOG.COM (July 16, 2013, 7:20 AM), https://www.lawfareblog.com/why-solicitor-general-should-ask-supreme-court-reverse-fourth-circuits-decision-samantar [http://perma.cc/TF8Z-8NUK].

103. *Id.*

al is significant.[104] According to Dodge, because the Fourth Circuit held that conduct violating *jus cogens* norms precludes the attachment of immunity, its reasoning is consistent with international norms, contrary to both Samantar's petition for certiorari and the arguments of academic critics.[105] However, while Dodge defends the court's ultimate outcome, he critiques the court's argument for reaching it, contending that the court's conclusion misrepresents the kind of analysis it actually performed.[106] Certain phrases used by the court, such as "officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity," obscure the nature of the threshold question by presenting the denial of immunity for *jus cogens* violations as an exception to conduct immunity.[107]

The confusing language used by the court is significant because Dodge agrees that "[t]here is a long line of authority holding that once immunity has been established, no exception for *jus cogens* violations exists."[108] However, this line of cases does not address "the logically prior question addressed by the Fourth Circuit of whether conduct-based immunity attaches to *jus cogens* violations in the first place."[109] Three key international criminal cases support the concept of *jus cogens* violations as a threshold question precluding designation as official acts eligible for immunity: the Nuremberg Tribunal, the 1962 Eichmann case decided by the Israeli Supreme Court, and the UK House of Lords' decision in Pinochet.[110] While these cases are criminal, because of "the diversity of forms in which jurisdiction is exercised around the globe," the distinction between civil and criminal cases is less

104. William S. Dodge, *Samantar Asks for Supreme Court Review Again*, OPINIOJURIS.ORG (Mar. 8, 2013, 9:00 AM), http://opiniojuris.org/2013/03/08/samantar-asks-for-supreme-court-review-again [http://perma.cc/DBY2-LWWX].

105. *Id.*

106. William S. Dodge, *Making Sense of the Fourth Circuit's Decision in Samantar*, OPINIOJURIS.ORG (Nov. 3, 2012, 6:41 PM) http://opiniojuris.org/2012/11/03/making-sense-of-the-fourth-circuits-decision-in-samantar [http://perma.cc/DKU7-F6RB].

107. *Id.*

108. *Id.*

109. Dodge, *supra* note 104 ("[T]he ICJ's *Jurisdictional Immunities* decision and the European Court of Human Rights decision in *Al-Adsani v. United Kingdom* both involved *state* immunity, which extends to all public acts. *Jones v. Saudi Arabia* (UK), *Zhang v. Zemin* (Australia), and *Bouzari v. Iran* (Canada) each involved a legislative act extending state immunity to foreign officials (something the FSIA does not do).") (emphasis in original).

110. *Id.*

significant for immunity doctrines.[111] As further support for the Fourth Circuit's opinion, Dodge notes that the State Department's arguments for absolute judicial deference to their SOIs relies on an abridged historical account which "skips from 1812 to 1938, omitting a period during which the executive's determinations of immunity were not treated as conclusive."[112] Furthermore, many cases deferring to the Executive are distinguishable from *Samantar* as they involved head of state immunity rather than conduct-based immunity.[113]

Bellinger raises concerns about the pragmatic challenges that the Fourth Circuit's opinion could impose on the executive branch. Under his interpretation of the case, which does not regard the Fourth Circuit's reasoning as threshold-based, the 2012 decision has created a new circuit split that "will create a patchwork of immunity protections, with foreign government officials enjoying immunity in some circuits (like the Second Circuit) but not in the Fourth Circuit (where many foreign government officials land at Dulles International Airport)."[114] This inconsistency promotes ambiguity concerning the role of executive SOIs, which could limit the State Department's ability to engage with foreign countries that have requested an immunity suggestion.[115] Not only would the State Department's arguments for deference to its SOIs based on historical practice be diminished by a continuing circuit split linked to different categorizations of an overlapping group of cases, but the possibility of a foreign state requesting immunity for multiple officials named as parties in suits under different circuits would undermine diplomacy efforts.[116] As the

111. *Id.*

112. William S. Dodge, *Samantar Insta-Symposium: What Samantar Doesn't Address*, OPINIOJURIS.ORG (June 2, 2010, 8:42 PM), http://opiniojuris.org/2010/06/02/samantar-insta-symposium-what-samantar-doesn't-decide [http://perma.cc/68QY-KBTS].

113. *Id.*

114. Bellinger, *Why the Solicitor General Should Ask the Supreme Court to Reverse the Fourth Circuit's Decision in Samantar*, *supra* note 102.

115. Critics of Bellinger's reasoning could point out that the State Department's SOI practice is itself riddled with inconsistencies that could promote some of the same pragmatic concerns he articulates here. For example, "the State Department's historical practice has been not to file suggestions of immunity for lower-level foreign government officials at the district court level, unless requested by the court." *See* John Bellinger, *The Dog that Caught the Car: Observations on the Past, Present, and Future Approaches of the Office of the Legal Advisor to Official Acts Immunities*, 44 VAND. J. TR. L. 819, 823 n.17 (2011).

116. While concurrent suits against officials from the same state in different circuits might seem unlikely, the changing facts of the Samantar case (due to the recent U.S.

early American cases on foreign immunity demonstrate, reciprocity for U.S. officials abroad has been a long-standing concern.[117] Bellinger observes that reciprocity is particularly fraught for the U.S. due to its extensive global military presence, including practices such as drone strikes that have been widely condemned as human rights abuses.[118]

Bellinger points out that the State Department can pursue a range of potential options to strike the delicate balance required when the official seeking immunity has been accused of human rights violations but is from a state that is a key U.S. ally.[119] In *Matar v. Dichter*, in which plaintiffs filed suit against a former Israeli intelligence chief for authorizing a Gaza Strip bombing that killed 14 civilians and wounded over 150, the Second Circuit relied on the SOI in holding Dichter immune from suit.[120] However, the State Department's public criticism of the attack reflected the reality that "the interests of the State Department with respect to the question of official acts immunity are independent from the underlying subject matter of the dispute."[121] The State Department is free to file an SOI in order to promote broad policy concerns stemming from foreign sovereign immunity while also engaging in other forms of diplomatic action to pressure valuable allies to improve their protection of human rights.

D. CONDUCT-BASED IMMUNITY AND *JUS COGENS*

Scholars continue to debate whether there is a *jus cogens* exception to individual official immunity, and if so, when such an exception would apply. While sovereign immunity protects the state itself, individual official immunity may be either status-based or conduct-based.[122] Status-based immunity is "an absolute protection for certain high-ranking officials like heads of state . . . in other states' courts," for both public and private acts,

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recognition of a Somali government) point to the possibility of even highly unlikely political events complicating immunity questions.

117. See Justice Marshall's attention to comity in *Schooner*, 11 U.S. (7 Cranch) at 137.

118. Bellinger, *Why the Solicitor General Should Ask the Supreme Court to Reverse the Fourth Circuit's Decision in Samantar*, *supra* note 102.

119. Bellinger, *The Dog That Caught the Car*, *supra* note 115.

120. *Id. See also* Matar v. Dichter, 563 F.3d 9 (2d Cir. 2009).

121. Bellinger, *The Dog That Caught the Car*, *supra* note 115, at 824.

122. Anthony J. Colangelo, *Jurisdiction, Immunity, Legality and Jus Cogens*, 14 CHI. J. INT'L L. 53, 57 (2013).

so long as the official is in office.[123] Conduct-based immunity is more limited in terms of the scope of acts covered, applying only to acts carried out on behalf of the state but remaining in effect even after the official has left office.[124] Sovereign and status immunity bar adjudicative jurisdiction[125] by foreign courts but "do not remove liability under the governing substantive law."[126] While the contours of those two immunities are relatively well-settled, the law of conduct-based immunity reflects a state of uncertainty.[127]

Various arguments have been offered as to why conduct-based immunity should not be granted for alleged *jus cogens* violations. Anthony Colangelo notes that under the normative hierarchy view, *jus cogens* norms are defined by their power to "trump contrary norms of international law."[128] Under the implied waiver view expressed in *Samantar II*, *jus cogens* acts cannot be considered official under international law; therefore, states (and the officials through whom they act) waive immunity by committing those acts.[129] Colangelo argues that conceiving of conduct-based immunity as an affirmative and substantive, rather than jurisdictional, defense dispenses with the argument that *jus cogens* and immunity analyses address different issues.[130] If conduct-based immunity is a substantive defense, *jus cogens* violations can overcome immunity.

Colangelo argues that conduct-based immunity should be viewed as a substantive defense wherein "jurisdictional principles imply an override of immunity for the offenses for which they created jurisdiction" thus, "creat[ing] opportunities for *jus cogens* to trump immunity."[131] This "implied override view" relies on multiple steps of implication, and may be seen as weak for that reason.[132] This argument also depends on the context of the case, as state practice treats criminal and civil cases differently when

123. *Id.* at 58.
124. *Id.* at 59.
125. Adjudicative jurisdiction is "the power to subject persons or things to judicial process," while prescriptive jurisdiction is "the power to regulate the conduct of persons or things." *Id.* at 55.
126. *Id.* at 62.
127. *Id.* at 57.
128. *Id.* at 77.
129. *Id.* at 78.
130. *Id.* at 77.
131. *Id.* at 76.
132. *Id.* at 80.

it comes to conduct-based immunity and *jus cogens*.[133] While American cases seem not to enforce a strict line between civil and criminal applications of immunity doctrine, Ingrid Wuerth argues that many cases evidencing this practice were ones in which the foreign state did not invoke or waive immunity, and thus cannot be relied upon for a hard rule.[134] However, Wuerth also argues that "forum states are not required to afford [conduct-based immunity] unless it is invoked by the state."[135]

Scott Gilmore proposes that courts treat conduct-based immunity as a conflict of laws problem, framing the issue as whether the foreign state's authorization of the alleged *jus cogens* violation is compatible with U.S. and international law and recommending a rebuttable presumption against immunity.[136] This approach would take into account international jurisprudence, public policy as articulated by Congress, and the Executive's take on foreign policy concerns.[137] Though conflict of laws doctrine traditionally operates on a presumption "in favor of the law of the state where the occurrence took place,"[138] it also takes into account the public policy of the forum state. Under Gilmore's approach, a prima facie showing of a violation of an international human rights law would trigger the presumption against immunity . The presumption could be overcome by a State Department SOI in favor of immunity, which Gilmore argues is legitimate under the concurrent authority reasoning of *Youngstown* category two.[139]

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133. *Id.* at 86.

134. *Id.* at 87 (citing Ingrid Wuerth, *Pinochet's Legacy Reassessed*, 106 AM. J. INT'L L. 731, 738 (2012)).

135. Ingrid Wuerth, *Foreign Official Immunity: Invocation, Purpose, and Exceptions* 2 (Vanderbilt Univ. L. Sch. Pub. Law and Legal Theory, Working Paper No. 13–22, 2013).

136. Scott Gilmore, *Immunity Disorders: The Conflict of Foreign Official Immunity and Human Rights Litigation*, 80 GEO. WASH. L. REV. 918 (2012).

137. *Id.* at 949.

138. *Id.* at 940.

139. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), Justice Jackson's concurrence suggested a three-category analysis for determining whether the executive has authority over a certain action. The President has the greatest authority in the first category, in which Congress has given express or implicit authorization. The third category is the lowest, in which the President acts in contravention of congressional will. In the second category, the "zone of twilight," Congress has neither approved nor rejected Presidential action and thus shares concurrent authority with the President. Gilmore argues that SOIs should overcome his suggested rebuttable presumption because (1) the FSIA did not strip the President of authority to immunize officials, and (2) there is a long pattern of legislative and judicial acquiescence to executive SOIs. Gilmore, *supra* note 136, at 945. Ingrid Wuerth argues that executive official immunity determinations fall "clearly within [*Youngstown*] category III because the FSIA explicitly stripped the execu-

While Gilmore's proposal appears to be a middle ground between those who categorically favor the denial of immunity on *jus cogens* grounds and those who oppose it, certain weaknesses are worth mentioning. First, under Gilmore's model the same concerns about consistency and predictability remain in light of the emphasis on State Department SOIs. Second, an area in flux like conduct-based immunity may be poorly suited to a conflict of laws analysis. Finally, potential *jus cogens* violations whose status as such is contested, like terrorism, would pose a significant obstacle to the performance of this analysis in practice. The lack of consensus over criteria appropriate for defining *jus cogens* could lead to an underdeveloped doctrine whose few on-point cases may not be representative of the underlying theory.[140]

IV. DEFINING TERRORISM AND *JUS COGENS* VIOLATIONS

In addition to the issue of a *jus cogens* exception to conduct-based immunity, the question remains as to whether terrorism qualifies as a *jus cogens* violation. *Jus cogens* norms, widely acknowledged as enjoying a higher rank than international treaty or customary law, include the prohibitions of genocide, torture, crimes against humanity, slavery and the slave trade, piracy, racial discrimination and apartheid, and hostilities directed at civilian populations.[141] At first glance, terrorism overlaps with several of these categories, in particular piracy, whose modern manifestation is also referred to as "maritime terrorism."[142] However,

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tive of its power and comprehensively addressed many immunity issues." Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT'L L. 915, 951 (2011).

140. This last problem parallels the challenge in determining the significance of precedent on conduct-based immunity, as cases against individual officials were far less common than other types of claims in the period leading up to the passage of the FSIA.

141. *See* DAMROSCH, ET AL. INTERNATIONAL LAW, CASES AND MATERIALS 104 (6th ed. 2014).

142. Eric Shea Nelson discusses the distinctions between and confusion over the terms "maritime terrorism" and "piracy," noting that "[w]e typically correlate the former with acts of war committed by rogue ideologues while the latter connotes criminal activities committed by brigands for profit." However, he argues that these definitions are "shortsighted and fail to demonstrate the true meaning of the terms." The debate over the relationship between these phenomena is further muddled by "recent suggestions that a nexus may be forming between pirates and terrorists." *See* ERIC SHEA NELSON, GLOBAL SEC. STUDIES, MARITIME TERRORISM AND PIRACY: EXISTING AND POTENTIAL THREATS 15 (2012). *See also*, GRAHAM GERARD ONG-WEBB EDS., PIRACY MARITIME TERRORISM AND SECURING THE MALACCA STRAITS (2006) (discussing piracy and maritime terrorism as subsets of piracy).

the prohibition of terrorism is not historically established under international consensus as having peremptory norm status.

One obstacle to the analysis of terrorism as *jus cogens* is its contested definition. Statutory definitions of terrorism are limited in terms of identifying what differentiates terrorism from other forms of political violence, a significant impediment considering the critique that "terrorist" is a label used to stigmatize opposition movements.[143] Academic definitions may be useful for exploring the intersections of these concepts, but have not been adopted by relevant legal bodies. The historical characterizations of the sources of *jus cogens* norms as well as current theoretical accounts provide a basis for the inclusion of terrorism under *jus cogens*, though the abstract nature of these discussions may prevent recognition by relevant international bodies.

A. DEFINITIONS OF TERRORISM

Terrorism is notoriously difficult to define. Discussions of terrorism in American political speech have often avoided an explicit definition, instead characterizing terrorists as non-state actors who use violence to achieve the specific objective of undermining national stability.[144] Several federal statutes provide general definitions which rely on the enumeration of acts that may be considered terrorism, rather than a central animating concept explaining when those particular forms of political violence become terroristic.

The Department of State describes terrorism as "premeditated, politically motivated violence perpetrated against noncombat-

143. For example, the U.S. government considered the late anti-apartheid activist and President of South Africa Nelson Mandela a terrorist until 2008. Mandela's political party, the African National Congress, was labeled a terrorist organization in 1986, when the Reagan administration adopted the stance of the South African apartheid government, which considered the ANC a terrorist group. *See* Robert Windren, *US Government Considered Nelson Mandela a Terrorist Until 2008*, NBC NEWS (Dec. 7, 2013, 4:55 AM), http://www.nbcnews.com/news/other/us-government-considered-nelson-mandela-terrorist-until-2008-f2D11708787 [http://perma.cc/SRV2-DX8K].

144. In perhaps the most memorable American speech on terrorism, President Bush's response to 9/11 focused on terrorists' lack of identification with a state agenda and their reliance on the element of surprise to disrupt peace in target nations: "The terrorists who declared war on America represent no nation. They defend no territory. And they wear no uniform. They do not mass armies on borders or flotillas of warships on the high seas. They operate in the shadows of society." President George W. Bush, Speech on Terrorism from the White House (Sept. 6, 2006) (transcript available at http://www.nytimes.com/2006/09/06/washington/06bush_transcript.html?pagewanted=all&_r=0 [http://perma.cc/LV98-3ZSY]).

ant targets by subnational groups or clandestine agents."[145] The FBI employs the definition found in 18 U.S.C. § 2331, under which terrorist activities include "acts dangerous to human life that violate federal or state law" and that "appear intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping."[146] The Antiterrorism and Effective Death Penalty Act of 1996, passed "to deter terrorism" and "provide justice for victims," also relies on 18 U.S.C. § 2331's definition of terrorism.[147] The Torture Victim Protection Act and the Alien Tort Statute have both been used to bring claims related to terrorist acts,[148] though neither defines terrorism itself. The FSIA's exception for terrorism, codified in 28 U.S.C. § 1605A, denies immunity for:

> personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.[149]

This exception applies only to a foreign state designated as a state sponsor of terrorism by the State Department.[150] The State Department's State Sponsors of Terror list is brief, currently consisting of Iran, Sudan and Syria.[151] The original date of designation to the list for each of these countries occurred over two decades ago, a telling indication of its rigidity. Furthermore, the primary function of the State Department list relates not to coun-

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145. 22 U.S.C. § 2656f(d)(2) (2014).

146. 18 U.S.C. § 2331 (2001). Section 2331 distinguishes between international and domestic terrorism based on the territorial jurisdiction in which the acts occur, but uses the same language in referring to terrorist acts.

147. Foreign Terrorism and Death Penalty Act of 1996, Pub. L. No. 104-132.

148. Part of the Judiciary Act of 1789, the Alien Tort Statute experienced a resurgence in use during the 1980s.

149. 28 U.S.C. § 1605A (2008).

150. *Id.*

151. *See State Sponsors of Terrorism*, U.S DEP'T OF STATE, http://www.state.gov/j/ct/list/c14151.htm [http://perma.cc/8BR6-D9FW] (last visited Oct. 15, 2015). Dates of designation: Syria (Dec. 29, 1979), Iran (Jan.19, 1984), Sudan (Aug.12, 1993). *Id.*

ter-terror prosecutions, but to various economic sanctions regimes.

In contrast to statutory approaches, Professor Philip Bobbitt defines terrorism as "the pursuit of political goals through the use of violence against noncombatants *in order to dissuade them from doing what they have a lawful right to do*."[152] Bobbitt notes that acts of terrorism throughout different eras of history are nevertheless similar, as terrorism "derives its ideology in reaction to the raison d'etre of the dominant constitutional order, at the same time negating and rejecting that form's unique ideology but mimicking the form's structural characteristics."[153] With its conceptual flexibility and emphasis on principles of legality, this definition is useful for an application under various *jus cogens* frameworks.

B. HISTORICAL ACCOUNTS OF *JUS COGENS*

Jus cogens peremptory norms have evaded easy definition ever since the post-World War II response to German war crimes initiated a period of intense debate over the relationship between human rights and national sovereignty.[154] Article 53 of the 1969 Vienna Convention on the Law of Treaties defines a peremptory norm as one "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."[155] The ALI's Third Restatement of Foreign Relations Law explicitly adopts this definition, adding "the principles of the United Nations Charter prohibiting the use of force . . . have the character of *jus cogens*."[156] The Restatement notes that while the ac-

152. PHILIP BOBBITT, TERROR AND CONSENT: THE WARS FOR THE TWENTY FIRST CENTURY 352 (2009).

153. *Id.* at 26.

154. *See, e.g.*, Louis Henkin, Sibley Lecture at the Univ. of Ga. L. Sch., Human Rights and State "Sovereignty" (Mar. 1994); W. Michael Reisman, *Sovereignty and Human Rights in International Law*, 84 AM. J. INT'L L. 866, 867 (1990). For a contextual discussion of this tension, applied to the Dominican Republic's recent actions towards people of Haitian descent, *see* Robin Guittard, *National Sovereignty v. Human Rights?*, AMNESTY INT'L (Nov. 6, 2014, 17:24 UTC), https://www.amnesty.org/en/latest/campaigns/2014/11/national-sovereignty-vs-human-rights [http://perma.cc/8XYV-HFWP].

155. Vienna Convention on the Law of Treaties art. 53, May 22, 1969, 1155 U.N.T.S. 331.

156. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S., § 102(k) (1987).

ceptance of the existence of *jus cogens* norms is widespread, the content of those norms is contested.[157]

In 1977, Marjorie Whiteman evaluated a collection of comments on the nature of *jus cogens* norms from expert sources, including judges of the International Court of Justice, legal scholars, and representatives of nations present at the Vienna Convention drafting conferences. Whiteman used these comments on the sources of *jus cogens* to compile a list of twenty activities that were already or should in the future be categorized as *jus cogens* violations, including among others, slavery, genocide, piracy,[158] armed aggression, war crimes, and hostile modification of weather.[159] Whiteman's list also included "political terrorism abroad, including terroristic activities," "hijacking of air traffic," and "all methods of mass destruction (including nuclear weapons) used for other than peaceful purposes."[160] Whiteman did not specify a working definition of terrorism in her list, so it is helpful to examine the underlying theories she compiled as a basis for this conclusion, in part to delineate the scope of which potentially terrorist actions could be considered *jus cogens* violations.

Sir Gerald Fitzmaurice[161] based *jus cogens* on the concept of acts that are *malum in se*, evil in themselves rather than as a result of a statutory prohibition.[162] In contrast, Professor Verdross of the International Law Commission viewed *jus cogens* rules as those implicating "the higher needs of the international community" rather than the isolated individual.[163] Though international needs may be observed through the formation of treaties, the negotiable character of the treaty instrument renders it an insufficient source for a *jus cogens* norm, as treaties can be terminated and withdrawn.[164] Other sources for *jus cogens* rules

157. *Id.* at Reporters Notes ¶ 6.

158. Evan J. Criddle and Evan Fox-Decent would exclude piracy from the *jus cogens* list under their fiduciary theory, discussed later in this Part. *See* Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of* Jus Cogens, 34 YALE J. INT'L. L. 331, 376 (2009).

159. Marjorie M. Whiteman, *Jus Cogens in International Law, with a Projected List*, 7 GA. J. INT'L & COMP. L. 609, 625–26 (1977).

160. *Id.* While the first two of these activities would be considered terrorism under any of the proffered definitions examined in this Part, the third might only receive that label under the Bobbitt definition, depending on whether the WMD is wielded by a state or non-state actor.

161. British jurist Sir Fitzmaurice was a Senior Judge on the International Court of Justice and a judge on the European Court of Human Rights.

162. Whiteman, *supra* note 159, at 610.

163. *Id.* at 612.

164. *Id.* at 614 (discussing Professor Lissitzyn's critique).

include public morality,[165] international public policy,[166] and a general "legal conscience."[167] One professor opted to consider *jus cogens* rules "not as law but as the social infrastructure providing the basis of a real international public order."[168] The final crucial issue in defining *jus cogens* norms is the characteristic that distinguishes them from other international laws. While all international laws "have a certain peremptory character in the sense that they are obligatory" until set aside by other legally valid norms, *jus cogens* rules are those from which no derogation is permitted, even by mutual assent between nations.[169]

These characteristics support considering terrorism, as defined by Bobbitt, a *jus cogens* violation for several reasons. While the concept of *malum in se* does not apply in a blanket sense to international acts of violence — or else there could be no laws of war because war itself would always be prohibited — the purposes of a violent political act could render it *malum in se*. Political violence that seeks to undermine the ability of the citizen to exercise their lawful rights has a transnational effect, as the existence of such lawful rights is common across nations despite potentially significant substantive variations. Terrorism that mimics and opposes the constitutional order, rather than merely violating criminal statutes, aims to destroy the state's ability to deliver on what Bobbitt calls its "core promise" to the citizen. One could argue this reflects the state's inability to derogate from a *jus cogens* norm; permitting a state to sacrifice its capacity to constitutionally mandate its internal order would be analogous to permitting the individual to sell himself into slavery. However, the variety of conceptualizations offered by Whiteman as potential sources for *jus cogens* may undermine this approach. The lack of a cohesive identifying principle could lead to a slippery slope in which the *jus cogens* framework is expanded to include virtually any violent offense of a certain scale.

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165. *Id.* at 610.
166. *Id.* at 615, 617.
167. *Id.* at 622.
168. *Id.* at 615.
169. *Id.* at 619.

C. INTERNATIONAL CONVENTIONS AND THE RESTATEMENT OF FOREIGN RELATIONS

Several conventions adopted by the United Nations General Assembly have addressed the threat of terrorism, in particular hostage taking, terrorist bombings, financing of terrorist groups, and nuclear terrorism.[170] However, the mere existence of documents evidencing international condemnation of an activity does not automatically imply *jus cogens* status. Quite tellingly, the 1994 UN Declaration on Measures to Eliminate Terrorism references a need to push for the "progressive development of international law and its codification," suggesting a state of flux indicative of terrorism's exclusion from *jus cogens* status.[171]

The ALI's Third Restatement of Foreign Relations Law § 404 discusses universal criminal jurisdiction for offenses "such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and *perhaps certain acts of terrorism*."[172] Though terrorism is included in this list of well-established *jus cogens* violations (which itself does not use the phrase "*jus cogens*") such as slavery and genocide, the phrase "perhaps certain acts" implies that terrorism as a general category is definitely not included, and could possibly be *excluded* as a whole. The text of the section does not indicate which acts could "perhaps" be categorized with slavery and genocide, but the comments mention "assaults on the life or physical integrity of diplomatic personnel, kidnapping, and indiscriminate violent assaults on people at large."[173] The Restatement also notes that despite global condemnation of terrorism, "international agreements to punish it have not, as of 1987, been widely adhered to, principally because of inability to agree on a definition of the offense."[174] Comment (b) explains that § 404's reach could apply to civil as well as criminal law;[175] thus, if terrorism were accepted as a *jus cogens* violation, universal ju-

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170. *See* U.N. Treaty Collection, Text and Status of the United Nations Conventions on Terrorism, https://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml [http://perma.cc/WVL9-D6R3].

171. U.N. G.A. Res. 49/60 (IV) ¶ 12, U.N. Doc. A/ RES/ 49/60 (Dec. 9, 1994).

172. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 404 (1987) (emphasis added).

173. *Id.* at cmt. (a).

174. *Id.*

175. *Id.* at cmt. (b).

risdiction under the Restatement would apply in tort suits such as *Rosenberg*.

The significance of the Third Restatement's provisions is limited, as "such treatises are not primary sources of international law."[176] In *United States v. Yousef*, the Second Circuit overturned a district court decision relying on the D.C. Circuit's use of § 404 of the Third Restatement. The court noted that according to Article 38 of the Statute of the International Court of Justice, "acts and decisions of States are sources of law, while scholarly works are not," and that § 404 "advocates the expansion of universal jurisdiction beyond the scope presently recognized by the community of States."[177] The appellate court explicitly rejected the district court's analogical expansion of the "few, near-unique offenses uniformly recognized by the 'civilized nations' as an offense against the 'Law of Nations'" to include a "new crime such as placing a bomb on board an airplane."[178] Universal jurisdiction, originally exercised only over piracy, expanded after World War II to include war crimes and "crimes against humanity."[179] Piracy and crimes against humanity have a similar nature not only because they are universally condemned, but also because they take place outside of a zone in which "any adequate judicial system operat[es]," thus necessitating universal jurisdiction.[180] While the debate over the acts included under *jus cogens* is not coterminous with the enumeration of offenses warranting universal jurisdiction, there is a shared emphasis on a distinguishing characteristic removing the act from the category of criminal offenses that are less grave and more amenable to effective prosecution within a single interested state.[181]

176. United States v. Yousef, 327 F.3d 56, 99 (2d Cir. 2003).
177. *Id.* at 99.
178. *Id.* at 104.
179. *Id.* at 105.
180. *Id.* at 105.
181. Though the sovereign immunity exception for officials accused of *jus cogens* violations might seem to implicate other elements of the court's discussion in *Yousef*, the case has limited instructive value due to its posture as an exercise of jurisdiction over a civilian foreign national in a criminal prosecution. Thus the case is most useful for the specific question of whether § 404 indicates terrorism is of the same fundamental nature as the enumerated offenses that are traditional *jus cogens* violations.

D. CURRENT THEORIES OF *JUS COGENS*

Academic commenters have proffered several theories to define *jus cogens* norms. Positivists suggest that international consensus demonstrated by state custom generates peremptory norms "by codifying the norms in treaties, accepting them as customary international law, or employing them domestically as general principles of law."[182] Natural law theory ascribes moral authority to peremptory norms, while the public order theory focuses on mutual coexistence between nations. The most illuminating approach to *jus cogens* in relation to terrorism may be the fiduciary theory, based on the state's relation to its subjects.

Under the positivist approach, states elevate norms to peremptory status by signaling approval through traditional international lawmaking processes.[183] Evan J. Criddle and Evan Fox-Decent point out that "[s]tates rarely (if ever) express an affirmative intent to transform ordinary customary norms into peremptory law," and there is considerable ambiguity as to how such an intent could be implied.[184] This critique is particularly relevant for the question of whether the prohibition against terrorism has been identified as a peremptory norm. While there are numerous international agreements attesting to global condemnation of terrorist violence, the international community's failure to establish an accepted definition of terrorism undermines the argument for *jus cogens* status based on express or implied intent manifested by state practice. Though unanimity is not a necessary condition for the emergence of a peremptory norm, even the criterion of acceptance by a representative supermajority[185] could be almost impossible in this context. Great powers and their allies have an incentive to avoid clarifying the meaning of terrorism, as doing so could circumscribe their options for limited intervention in other states' domestic affairs during periods of political turmoil.

Natural law theories of *jus cogens* face similar challenges in offering a basis for the inclusion of terrorism. According to Louis Henkin and Louis Sohn, certain *jus cogens* norms are elevated to peremptory status based on their moral authority.[186] The well-

182. Criddle & Decent, *supra* note 158, at 339.
183. *Id.*
184. *Id.* at 340.
185. *Id.* at 341.
186. *Id.* at 343.

known positivist critique that natural law theorists conflate law and morality is particularly resonant here, given the subjectivity inherent in the quest to define which groups are terrorists rather than political factions with popular support[187] or branches of a state military apparatus, such as the Iranian Revolutionary Guard.[188] Furthermore, it is by no means clear how natural law theory "would resolve disputes over the scope or content of less well-defined norms," even where the issue is not as politically fraught as the concept of terrorism.[189]

The public order theory argues that a violation reflects *jus cogens* status if it offends the peaceful coexistence of the international community or undermines its fundamental normative commitments.[190] While global acceptance of the UN Charter is evidence of the international public policy concerns relating to the concept of *jus cogens*, this theory does not provide a prescriptive basis for identifying peremptory norms.[191] Criddle and Fox-

187. For example, in 2011, Muammar Gaddafi's regime characterized the Libyan opposition movement, part of the broader Arab Spring, as a plot to turn the country into "a base for terrorism." *See Libya on verge of Civil War, says Seif al-Islam Gaddafi*, THEAUSTRALIAN.COM.AU, (Feb. 21, 2011, 5:18 PM), http://www.theaustralian.com.au/news/world/libyan-pm-baghdadi-mahmudi-defends-violence-to-crush-plot/story-e6frg6so-1226009226234 [http://perma.cc/N27V-ME93]. While observers believe that elements of the opposition were sympathetic to Al-Qaeda, painting Arab Spring protesters as terrorists was a common response by now-defunct regimes, as well as labeling the protestors Western (in particular Israeli) spies. *See* Frank Gardner, *Is the Arab Spring Good or Bad for Terrorism?*, BBCNEWS.COM, (June 22, 2011, 1:00 PM), http://www.bbc.com/news/world-middle-east-13878774 [http://perma.cc/EF7J-8ESH].

188. According to the Council on Foreign Relations, Iran's Revolutionary Guard Corps (IRGC) is "the country's premier security institution," fielding "an army, navy, and air force, while managing Iran's ballistic missile arsenal and irregular warfare operations through its elite Quds Forces and proxies such as Hezbollah." *See* Greg Bruno, Jayshree Bajoria, & Jonathan Masters, *Iran's Revolutionary Guards*, CFR.ORG, (June 14, 2013), http://www.cfr.org/iran/irans-revolutionary-guards/p14324 [http://perma.cc/ZCU9-EDBC]. IRGC appears to exercise influence over both traditionally accepted state military units as well as alleged terrorist activity, and was the subject of a 2013 House bill requiring the Secretary of State to determine whether the IRGC is a terrorist group. In the past, efforts to designate the IRGC as a terrorist organization have "been opposed by President Obama and key members of his administration." *See* Patrick Goodenough, *House Bill would designate Iran's Revolutionary Guard as Terrorist Group*, CNSNEWS.COM, (Feb. 28, 2013, 4:34 AM), http://www.cnsnews.com/news/article/house-bill-would-designate-iran-s-revolutionary-guard-terrorist-group [http://perma.cc/5TGA-UTTU]. On September 29, 2015, Senator Ted Cruz introduced the IRGC Terrorist Designation Act, expressing "the sense of Congress that . . . the Secretary of State should designate [the IRGC] as a foreign terrorist organization under [section 219 of the Immigration and Nationality Act]." S. 2094, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/senate-bill/2094/text [http://perma.cc/582F-Z9M9].

189. Criddle & Fox-Decent, *supra* note 158, at 343.

190. *Id.* at 344.

191. *Id.* at 345.

Decent offer their own prescriptive theory, borrowing Kant's concept of fiduciary obligations and applying it to the relationship between the state and the individual citizen-subject.[192]

According to the fiduciary theory of *jus cogens*, the state exercises public powers to which private subjects are not entitled, justified on the basis of popular sovereignty or the will of the citizenry.[193] The state's substantive fiduciary obligation is, at a minimum, to comply with *jus cogens* norms, regardless of whether the state is party to a treaty explicitly requiring such a commitment.[194] Criddle and Fox-Decent illuminate their theory by contrasting traditional *jus cogens* norms such as prohibitions on slavery and piracy, the former of which retains such status under the fiduciary theory, but the latter of which does not. The fiduciary theory finds that slavery violates the state's basic obligation to "ensure that each agent subject to its powers is regarded equally as a person capable of possessing legal rights[,]" emphasizing that each individual is "an equal co-beneficiary of legal order[.]"[195] While piracy is illegal under international conventions, it is a purely private act that does not "address the limits of sovereign authority in the state-subject fiduciary relation[,]" and is thus classified as a crime in this framework.[196] The distinction drawn between purely private piracy (not a *jus cogens* violation) and state-sponsored piracy (which could be a *jus cogens* violation) is instructive for the terrorism question, possibly implying that terrorism becomes a *jus cogens* violation when it is supported by a state official.

Criddle and Fox-Decent enumerate formal and substantive criteria for identifying *jus cogens* norms under the fiduciary theory. Peremptory norms must be: (1) general and universalizable rather than ad hoc, (2) public rather than secret, (3) feasible in terms of compliance, (4) unequivocal and unambiguous, (5) internally and externally consistent, (6) prospective, and (7) stable

192. Criddle and Fox-Decent define the basic concept of the fiduciary relationship as "aris[ing] from circumstances in which one party (the fiduciary) holds discretionary power of an administrative nature over the legal or practical interests of another party (the beneficiary), and the beneficiary is peculiarly vulnerable to the fiduciary's power in the sense that she is unable, either as a matter of fact or law, to exercise the entrusted power." *Id.* at 349.

193. *Id.* at 350–52.

194. *Id.* at 352.

195. *Id.* at 356.

196. *Id.* at 376–77.

over time.[197] These criteria provide legitimacy because they make adherence to the norm possible and preserve order. The fiduciary theory also has a specific set of substantive criteria, comprising the following principles: (1) integrity, having "the good of the people" as the object, (2) formal moral equality, (3) solicitude, requiring the state to preserve the legitimate interests of subjects, (4) fundamental equal security, and (5) the rule of law.[198] Underlying this set of criteria is an interest in the dignity of the legal subject, which must be treated as an end in itself rather than a means, "reflect[ing] the intrinsic value of agency[.]"[199] Actions that treat individuals as "mere means" include those that "literally annihilate the agency[,]" such as genocide, or those that "subject the agent to systemic domination," such as slavery.[200]

This formulation of the underlying dignitary interest of the agent corresponds to the elements of Bobbitt's definition of terrorism that are distinguishable from those found in the U.S. Code. Bobbitt's definition incorporates legality, so that violence is terroristic when it is explicitly aimed at preventing individuals from exercising their legal rights. In this sense, terrorist violence annihilates the legal subjecthood of its intended targets. Terrorism, distinguishable from other forms of political violence, aims to prevent the state from carrying out its core promise (which varies in substance from one period to the next) to the subject.[201] Thus, the targets are not just those who experience the violence in a physical sense, but all members of the polity in which the violence occurs, whose fiduciary state guarantees legal rights to the populace.

While the content of the obligations under Bobbitt's state models goes beyond the basic fiduciary function of preserving the agency of the legal subject, defining terrorism in this way could provide an argument for its inclusion as a *jus cogens* violation under Criddle and Fox-Decent's theory. Terrorism generally vio-

197. *Id.* at 361–62.
198. *Id.* at 363, 366–67.
199. *Id.* at 365.
200. *Id.*
201. Bobbitt identifies 6 constitutional orders with corresponding substantive promises between the state and the citizen: (1) the princely state, (2) the kingly state, (3) the territorial state of the 18th century, (4) the imperial state nation, (5) the industrial nation state, (6) and the current emerging market state. *See* BOBBITT, *supra* note 152, at 27, 30, 34, 38, 43, 44–45. The industrial nation state, for example, offered the core promise of "improv[ing] the material well-being of its people to confirm its legitimacy," which terrorist groups sought to attack. *Id.* at 43.

lates substantive principles of solicitude, equal security and the rule of law by attacking the individual's ability to benefit from the state's fulfillment of the fiduciary relationship. Terrorism undermines the rule of law, both symbolically, through non state-sanctioned use of force, and directly, by blocking victims from exercising the legal rights the state must secure for all. The terrorist usurps the role of the state by disrupting its supervision of the individual's legal agency, violating the criterion of formal moral equality. This places the terrorist in a position to exercise the public power that the fiduciary theory ascribes only to the state, while the individual legal subject remains restricted to their private role.

Criddle and Fox-Decent do not analyze terrorism under their framework, but note that the fiduciary theory could accommodate the inclusion of state-sponsored terror as a *jus cogens* violation, as they conceptualized peremptory norms based not on "their relative importance in some abstract sense but rather their constitutive role as fiduciary constraints on a state's sovereign power."[202] Furthermore, the international community itself has a fiduciary relationship to the individual, with international bodies acting as "surrogate guarantor[s] of *jus cogens*" in the event of a state's violation.[203] International obligations to provide disaster relief in the fiduciary capacity[204] also implicate Bobbitt's theory of terrorism, which identifies natural disasters and catastrophes[205] as one of the three major theaters[206] in which states must focus their counter-terror efforts. Bobbitt argues that management of natural disasters is a key objective in combating terror not because such disasters produce a large-scale fear response,[207] but because natural and terrorist-induced disasters alike threaten the "pluralism grounded in human rights" whose protection is "a

202. Criddle & Fox-Decent, *supra* note 158, at 378.
203. *Id.* at 382–83.
204. *Id.* at 383.
205. BOBBITT, *supra* note 152, at 215.
206. The other two theaters are "global, networked terrorism" and the proliferation of weapons of mass destruction. Bobbit posits that effective action in one of these theaters often "operates negatively with respect to the others," necessitating the development of "a new kind of decision making." *Id.* at 511.
207. Bobbitt offers a hypothetical critical response to his inclusion of natural disaster relief on the counter-terror agenda: "These catastrophes may indeed spread terror but they are hardly the traditional subjects of warfare. It is fanciful enough to declare war on terrorism; are we now to declare war on tsunamis and hurricanes?" *Id.* at 215.

proper defense aim" of states.[208] Thus, both terrorist attacks and natural disasters reflect threats to the individual state and international community's respective abilities to fulfill fiduciary obligations.

E. THE SECOND CIRCUIT'S ANALYSES OF TERRORISM AS *JUS COGENS*

While the specific combination of the fiduciary theory of *jus cogens* and Bobbitt's definition of terrorism can provide a model for conceptualizing terrorism as a *jus cogens* violation, courts would not[209] adopt these frameworks with no statutory authority. However, Naomi Roht-Arriaza argues that the Second Circuit has already accepted terrorism as a *jus cogens* violation.[210] In *Smith v. Socialist People's Libyan Arab Jamahiriya*, the court's language points to the assumption that terrorism is included in the *jus cogens* list, for example by referring to "such outrageous violations of *jus cogens* as the bombing of a passenger aircraft."[211]

In light of the arguments before the court, *Smith* should not be taken to represent the conclusion that acts of terrorism are established *jus cogens* violations. The Libyan government conceded for purposes of appeal that "its alleged participation in the bombing of Pan Am Flight 103 would be a violation of *jus cogens,*" and contested plaintiff's claims on other grounds.[212] Thus, the court had no reason to reach the question of whether terrorist attacks are *jus cogens* violations under U.S. or international law. This question has not been explored in the case law, because it typically arises in the procedural posture of an order for dismissal on sovereign immunity grounds, such as in *Rosenberg v. Lashkar-e-*

208. *Id.*

209. In *United States v. Yousef*, the court describes the notion "that professors of international law enjoy a special competence to prescribe the nature of customary international law wholly unmoored from legitimating territorial or national responsibilities, the interests and practices of States, or (in countries such as ours) the processes of democratic consent" as one that is not "unique, but . . . certainly without merit[,]" because "scholars do not *make* law." 327 F.3d 56, 106 (2d Cir. 2003) (emphasis in original).

210. Naomi Roht-Arriaza, *The Foreign Sovereign Immunities Act and Human Rights Violations: One Step Forward, Two Steps Back*, 16 BERKELEY J. INT'L L. 71, 76 (1998).

211. Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 244 (2d Cir. 1996). The court also stated to similar effect, "Congress can legislate to open United States courts to some victims of international terrorism in their suits against foreign states without inevitably withdrawing entirely the defense of sovereign immunity for all *jus cogens* violations." *Id.*

212. *Id.* at 242.

Taiba.[213] While courts can treat terrorism as a *jus cogens* violation where the individual constituent acts are recognized violations, such as torture or violation of the laws of war, this would not amount to a categorical recognition of terrorism under *jus cogens*.[214]

A more recent Second Circuit opinion catalogued the varying obstacles to defining terrorism in the judicial context, contrasting terrorism with offenses such as piracy and war crimes.[215] *United States v. Yousef* treated terrorism as fundamentally distinct from these recognized *jus cogens* norms based on the arguable impossibility of defining terrorism. The court relied on a string of concurrences from the D.C. Circuit case *Tel-Oren v. Libyan Arab Republic*, noting the persistence of the "cliché that 'one man's terrorist is another man's freedom fighter[,]'" the vehement international disagreement over which acts constitute terrorism, and the necessary invocation of the political question doctrine.[216] Finding the *Tel-Oren* court's critique still relevant, the Second Circuit concluded that because courts "regrettably are no closer now than eighteen years ago to an international consensus on the definition of terrorism[,]"[217] terrorism could not serve as a basis for universal criminal jurisdiction.

While courts have demonstrated a reluctance to define terrorism of their own accord, statutory activity in this sphere, due to pressure on members of Congress and increases in the filing of cases against alleged individual official sponsors of terror, might provide a stable framework to address the concept in the future. Just as inconsistency in executive SOIs coupled with more fre-

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213. Plaintiffs in *Rosenberg* asserted that the ISI officials were liable "for acts of murder, torture and terrorism, classic violations of *jus cogens* norms." Rosenberg v. Lashkar-e-Taiba, 980 F. Supp. 2d 336, 340 (E.D.N.Y. 2013). The court did not address whether this characterization of terrorism was accurate under U.S and/or international law, focusing its discussion on the circuit split between the Fourth and Second Circuits on the issue of individual official immunity for alleged *jus cogens* violations generally, and dismissing under *Matar v. Dichter*. *Id.* at 343–44. The argument that "murder" is a classic *jus cogens* norm seems unsustainable due to the overly broad use of the term, but it is unclear from the text of the decision whether plaintiffs were making an argument that individual officials' private acts are not covered by immunity doctrine, in which case "murder" could refer to a killing carried out by the official in a civilian capacity (but such a private act would not necessarily equate to a *jus cogens* violation).

214. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984) (opinion of Edwards, J.) (focusing on the acts of torture carried out as part of a terrorist attack on Israeli civilians taken hostage from an Israeli highway).

215. United States v. Yousef, 327 F.3d 56, 106 (2d Cir. 2003).

216. *Id.* at 106–08.

217. *Id*. at 106.

quent commercial interactions with foreign officials spurred the passage of the FSIA, these factors may have a similar effect on the question of how to define terrorism in relation to *jus cogens* and immunity.

V. A *JUS COGENS* TERRORISM EXCEPTION TO CONDUCT-BASED IMMUNITY

Given the proliferation of cases against alleged financial sponsors of terrorism, future cases importing the *jus cogens* debate on conduct-based immunity to the terrorism context may push at the boundaries of what constitutes "material support." Since the FSIA terrorism exception is limited by the requirement of State Department designation as a state sponsor of terror, there may be an increasing number of cases resembling *Rosenberg v. Lashkar-e-Taiba*, with plaintiffs seeking to bring suit against the sponsor state collaterally through its officials. A broad reading of Second Circuit precedent might enable plaintiffs to sustain a claim against an individual official on *jus cogens* grounds. Alternatively, a reconsideration of the terrorism exception to the FSIA might be helpful to plaintiffs.

A. A SECOND LOOK AT *MATAR*

The *Rosenberg* court rejected plaintiffs' arguments for a *jus cogens*-based denial of immunity on the grounds that that Second Circuit had already precluded this reasoning in *Matar v. Dichter*.[218] However, the actual text of the *Matar* decision does not necessarily dispose of the question in *Rosenberg* as easily as the district court suggested. Although *Matar* was pre-*Samantar I*, the Second Circuit analyzed former official immunity under the common law; therefore, its approach would be consistent with Supreme Court precedent as it stands now. The Second Circuit first commented that there is no general *jus cogens* exception to FSIA immunity, a proposition that would not be contested to-

218. *Rosenberg*, 980 F. Supp. 2d. at 344. ("[T]he exception to foreign official immunity that the Fourth Circuit announced in Yousuf is not recognized in this Circuit. Indeed, in *Matar*, the Second Circuit reached the opposite conclusion, holding that '[a] claim premised on the violation of jus cogens does not withstand foreign sovereign immunity.'") (internal citations omitted).

day.[219] But in the common law context, the Second Circuit did not explicitly reject withholding conduct-based immunity on *jus cogens* grounds, instead stating "we defer to the Executive's determination of the scope of immunity," and offering the following quote from the Seventh Circuit:

> Just as the FSIA is the Legislative Branch's determination that a nation should be immune from suit in the courts of this country, the immunity of foreign leaders remains the province of the Executive Branch. The Executive Branch's determination that a foreign leader should be immune from suit even where the leader is accused of acts that violate *jus cogens* norms is established by a suggestion of immunity.[220]

In both *Matar* and *Ye v. Zemin*,[221] the court relied on a questionably expansive view of the degree of deference historically afforded to the executive on immunity determinations, rather than a doctrinal analysis of the interplay between *jus cogens* norms and conduct-based immunity. This presentation of individual official immunity analyses as the exclusive historical purview of the Executive is problematic in light of the relative rarity of individual official cases leading up to the FSIA, noted by the Supreme Court in 2010 as part of its conclusion that the FSIA was not intended to apply to individual officials.[222] Future plaintiffs could seek to weaken *Matar* by emphasizing the lack of historical support for its propositions and the paucity of suits filed against individual officials during the period from which its conclusions were extrapolated. A hypothetical case in which the State Department has not issued an SOI could be the vehicle to address these underlying questions.

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219. Matar v. Dichter, 563 F.3d 9, 15 (2d. Cir. 2009) ("We have previously held that there is no general jus cogens exception to FSIA immunity.") (citing Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 242–45 (2d Cir.1996)).

220. *Matar*, 563 F.3d at 15 (quoting Ye v. Zemin, 383 F.3d 620, 627 (7th Cir. 2004)).

221. *See Zemin*, 383 F.3d at 625 (referring to the pre-FSIA approach exercised by the courts as "reflexively deferring to the Executive Branch's immunity determinations" and finding that post-FSIA such reflexive deference to the executive is proper on individual official immunity determinations).

222. Samantar v. Yousuf, 560 U.S. 305, 312 (2010).

B. EXISTING STATUTORY ANTI-TERRORISM SCHEME

In enacting the Antiterrorism Act of 1990 (ATA),[223] Congress provided survivors and families of victims of terrorist attacks with a civil remedy for their injuries. Congress "intended to enable private parties to attack terrorist funding through these civil suits . . . creat[ing] yet another tool for eliminating terrorism in general."[224] This intent complicates the assumption that the Executive has a monopoly on counter-terror expertise, regardless of whether counter-terror is defined as a "war."[225] The ATA criminalizes harboring terrorists[226] and providing material support for terrorists, defined to include the provision of property, training, expert advice, and equipment.[227] The statutory scheme's focus on cutting off financial support for terrorism would have significant support amongst those who view counter-terror efforts as best guided by preclusive aims.[228] Indeed, the legislative history suggests that the ATA's purpose was not only to compensate victims for injuries in keeping with other areas of tort law, but also to "significantly impair[ ] vital sources of terrorist funding,"[229] creating a somewhat novel role for the judiciary. There has been an increase in cases filed under the ATA against banking institutions in the past decade, often decided against plaintiffs due to the challenges of adequately alleging proximate cause.[230] Cases filed under the ATA against government sponsors of terror will be

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223. 18 U.S.C. § 2333.

224. Laura B. Rowe, *Ending Terrorism with Civil Remedies: Boim v. Holy Land Foundation and the Proper Framework of Liability*, 4 SEVENTH CIRCUIT REV. 372, 373 (2009), http://www.kentlaw.edu/7cr/v4-2/rowe.pdf [http://perma.cc/BFT4-MZAQ].

225. For arguments as to why the label "War on Terror" is not just hyperbolic political rhetoric, see BOBBITT, *supra* note 152.

226. 18 U.S.C. § 2339.

227. 18 U.S.C. § 2339A.

228. Bobbitt argues that victory over terrorism as "sought by twenty-first market states will be *preclusive*." BOBBITT, *supra* note 152, at 189 (emphasis in original). This type of victory requires that "terror itself . . . be precluded, chiefly by the protection of innocent civilians." Preclusive victory is necessary because the legitimacy of modern parliamentary states is derived from consensual governance, and such states "cannot thrive . . . in conditions of terror." *Id.* at 200.

229. Rowe, *supra* note 224, at 379.

230. SULLIVAN & CROMWELL LLP, ANTI-TERRORISM ACT LIABILITY FOR FINANCIAL INSTITUTIONS 2, 3 (2013) (discussing the implications of the Second Circuit case Rothstein v. UBS AG, 708 F.3d 82 (2d Cir. 2013)). *See also* Strauss v. Credit Lyonnais, S.A., 249 F.R.D. 429 (E.D.N.Y. 2008); Linde v. Arab Bank, PLC, 384 F. Supp. 2d 571 (E.D.N.Y. 2005). This trend may continue, as in 2013 Congress expanded the period of time for plaintiffs to file under the ATA to 18 years. KEVIN WALSH & DOUGLAS WALTER MATEYASCHUK, DLA PIPER, LITIGATION ALERT (US) 1 (2013).

hindered in the FSIA context by the narrow breadth of the 1605A exception, and in the common law context by the tenuousness of the *jus cogens* debate.

The FSIA's 1605A exception only allows for suits to be filed against countries that are, or were at the time of the attack, on the State Department's state sponsors of terror list,[231] which currently comprises three countries and essentially functions as a bargaining chip for diplomatic negotiations.[232] Placement on the list serves a similar aim to that of the ATA: to cut off financial support to the offending party.[233] Sanctions under the state sponsors of terror list include "restrictions on U.S. foreign assistance; a ban on defense exports and sales; certain controls over exports of dual use items; and miscellaneous financial and other restrictions."[234] Iraq, Libya, North Korea and Yemen have all been placed on and removed from the list in the past.[235] In 2009, then-Secretary of State Hillary Clinton's statement regarding the possible re-designation of North Korea exemplified the use of the list as a particularly limited tool of counter-terror policy, most effective in placing pressure on a country to prevent the proliferation of weapons of mass destruction.[236]

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231. 28 U.S.C. § 1605A empowers federal courts to hear FSIA claims against a state that "was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section. . . ." *See* 28 U.S.C. § 1605A (a)(2)(A)(i)(I).

232. U.S. DEP'T ST., STATE SPONSORS OF TERRORISM 1 (2015). For a brief explanation of the list's diplomatic history, *see* Dennis Jett, *Why the State Sponsors of Terrorism List Has So Little to Do With Terrorism*, HUFFINGTON POST (June 29, 2015), http://www.huffingtonpost.com/dennis-jett/state-sponsors-of-terrorism-list_b_7658880.html [http://perma.cc/NQ8K-J3Q2].

233. Jeewon Kim, *Making State Sponsors of Terror Pay: A Separation of Powers Discourse Under the Foreign Sovereign Immunities Act*, 22 BERKELEY J. INT'L L. 513 (2004). Kim notes, "By passing the 'State Sponsors of Terrorism' exception to sovereign immunity, Congress sought to achieve two primary purposes: ending terrorism and compensating American victims." *Id.* at 514. The exception's anti-terror aim is premised on the rationale that it will "make foreign states more reluctant to sponsor acts of terror against U.S. citizens by forcing them to pay huge sums of money to those who won judgments." *Id.* at 516–17.

234. U.S. DEP'T. ST., *supra* note 232.

235. Krishnadev Calamur, *Who's On The List Of State Sponsors Of Terrorism, And Why*, NPR (Apr. 15, 2015), http://www.npr.org/sections/thetwo-way/2015/04/15/399809412/whos-on-the-list-of-state-sponsors-of-terrorism-and-why [http://perma.cc/J8T3-2DNY].

236. *US considering putting North Korea back on terror list*, WASH. POST (June 8, 2009), http://www.boston.com/news/world/asia/articles/2009/06/08/us_considering_putting_north_korea_back_on_terror_list/ [http://perma.cc/GP5L-NRMX].

The objective pursued through such a list is important for its effects on other counter-terror aims. Bobbitt's framework for conceptualizing the phenomenon of terrorism identifies three "theatres" in which counter-terror measures may operate: mass atrocities, arms proliferation and humanitarian crises.[237] This disaggregation of the amorphous concept of terrorism into particular strategic contexts is missing from the current statutory framework, in which the interaction between the ATA and the FSIA links the state sponsor list to legislative remedies for civilians seeking compensation after a mass atrocity. If *jus cogens* reasoning such as that employed by the Fourth Circuit is eventually struck down by the Supreme Court, or continues to be rejected by other circuits, the interplay of the ATA and the common law of individual official immunity may limit efforts to combat terror in the specific strategic context of tort compensation. This would represent a missed opportunity for the judiciary to contribute its unique capabilities to the federal government's comprehensive counter-terror efforts.

The limits of the 1605A exception are also apparent as applied to the relationship between the United States and Pakistan, which has never been on the state sponsor list.[238] In 2009, then-President of Pakistan Asif Ali Zardari confirmed in an interview that "many of the Islamic militants now waging war against [the Pakistani] government were once 'strategic assets.'"[239] Zardari further stated that Pakistan's military was targeting "those it had previously used as proxies in attacks on India," including Lashkar-e-Taiba, a group that Pakistan had previously denied supporting in the face of widespread international suspicion.[240] Put simply, Pakistan's head of state acknowledged state sponsorship of a terror group against whom civil litigation has been filed

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237. BOBBITT, *supra* note 152.

238. As of February 2016, the State Sponsors of Terror list included Iran, Sudan, and Syria. U.S. DEP'T ST., *supra* note 232. Cuba was removed from the list in May 2015 as part of the thawing in US-Cuban relations. Nahal Toosi, *Cuba removed from U.S. list of state sponsors of terrorism*, POLITICO (May 29, 2015, 11:32 AM), http://www.politico.com/story/2015/05/us-removes-cuba-state-sponsor-terrorism-118411 [http://perma.cc/PGC6-PX5V]. Iraq, Libya, North Korea and the former South Yemen have previously been added to and removed from the list. Calamur, *supra* note 235.

239. Dean Nelson, *Pakistani president Asif Zardari adits creating terrorist groups*, TELEGRAPH (July 8, 2009), http://www.telegraph.co.uk/news/worldnews/asia/pakistan/5779916/Pakistani-president-Asif-Zardari-admits-creating-terrorist-groups.html [http://perma.cc/8JPR-87KK].

240. *Id.*

in the U.S., but because the State Department has not designated his country a sponsor of terror, there are no options for plaintiffs under the FSIA or the Second Circuit case law on individual foreign official immunity. While there may be other reasons for the State Department not to designate Pakistan a state sponsor of terror, including shared foreign policy interests, perhaps one reason is that it is simply too late in the Pakistani context to use the list for the purpose Secretary Clinton identified in 2009: to stop a burgeoning arms race. Pakistan and India both have nuclear weapons, motivated by their decades-long conflict over Kashmir and other tensions, but have recently indicated a desire to initiate a "new beginning" in their relationship.[241]

These limits, combined with the current uncertainty over the implications of *jus cogens* violations, may undermine the purposes underlying legislation such as the ATA. If William Dodge's interpretation of *Samantar II* as a threshold analysis were to be adopted by the Supreme Court in the future, plaintiffs blocked from bringing suit against foreign states that are not encompassed by 1605A could pursue cases against individual officials on the grounds that supporting terrorism violates peremptory norms and therefore cannot constitute an official act. It may also be possible to enable civil litigation to serve the dual aims of compensating victims and undermining financial support for terrorist groups by amending the current statutory framework.

C. PROPOSED LEGISLATION

Since the state of uncertainty regarding *jus cogens* and the concept of terrorism is widely acknowledged, the legal questions posed by their intersection may be best suited for resolution by one of the political branches. Congress faces an opportunity to intervene through the proposed Justice Against Sponsors of Terrorism Act (JASTA) sponsored by Senator Charles Schumer.[242]

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241. In September 2013, Pakistani Prime Minister Nawaz Sharif told the UN General Assembly that Pakistan and India had "wasted massive resources" in their three-decades-long arms race, in an overture made to prime his historic meeting with Indian Prime Minister Manmohan Singh. *India-Pakistan arms race 'massive waste' says Nawaz*, DAWN.COM (Sept. 27, 2013), http://www.dawn.com/news/1045829/india-pakistan-arms-race-massive-waste-says-nawaz [http://perma.cc/LXB8-ULEA].

242. Originally introduced in the House on September 9, 2014, H.R. 3143 was referred to the House Judiciary Subcommittee on the Constitution and Social Justice on January 9, 2014. H.R. 3143, 113th Cong. (2013), https://www.govtrack.us/congress/bills/113/hr3143 [http://perma.cc/5WFK-MA6T]. An identical bill was introduced in the Senate on the same

JASTA seeks to provide a foreign sovereign immunity exception in both the statutory and common law contexts for "tort claims arising out of an act of extrajudicial killing, aircraft sabotage, hostage taking, terrorism, or the provision of material support or resources for such an act, or any claim for contribution or indemnity relating to a claim arising out of such an act."[243] JASTA would add this list of actions to section 1605(a)(5), which deals with exceptions not covered under the 1605(a)(2) commercial activity exception.[244] Those terms would be given the same meaning as in 1605A, but no changes to 1605A and its State Department designation requirement are proposed. It is unclear how JASTA would affect 1605A's inclusion of the State Department. JASTA would amend the Anti-Terrorism Act by adding a provision for civil liability for persons and entities that aided and abetted a terrorist group. However, JASTA also includes a provision stating "[n]othing in the amendments made by this section affects immunity of a foreign state . . . from jurisdiction under other law."[245]

VI. CONCLUSION

The debates over *jus cogens* and terrorism have evolved through a back-and-forth exchange between all three branches of the federal government, as well as international actors. Both Congress and the executive branch have participated in defining

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date and referred to the Committee on the Judiciary. In December 2014, JASTA passed in the Senate. Press Release, Senator Charles E. Schumer, Schumer Announces Senate Passage Of 'Justice Against Sponsors Of Terrorism Act' — Long Sought After By 9/11 Families; Senator Calls On House To Pass Legislation (Dec. 12, 2014), https://www.schumer.senate.gov/newsroom/press-releases/schumer-announces-senate-passage-of-justice-against-sponsors-of-terrorism-actlong-sought-after-by-9/11-families-senator-calls-on-house-to-pass-legislation [http://perma.cc/R7N6-UGAJ]. Senator Schumer again pursued JASTA with Senator John Cornyn in September 2015. Press Release, Senator Charles E. Schumer, Schumer, Cornyn Announce 'Justice Against Sponsors Of Terrorism Act' — Legislation, Long Sought By 9/11 Families, Will Allow Victims Of 9/11 & Other Terrorist Acts To Sue Foreign Countries & Others That Funded Al Qaeda, Isis (Sept. 17, 2015), https://www.schumer.senate.gov/newsroom/press-releases/-schumer-cornyn-announce-justice-against-sponsors-of-terrorism-act_legislation-long-sought-by-9/11-families-will-allow-victims-of-9/11-and-other-terrorist-acts-to-sue-foreign-countries--others-that-funded-al-qaeda-isis [http://perma.cc/9J8U-VTRR]. *See also* Paul Katinas, Schumer Seeking financial Justice for 9/11 Families, BROOKLYN EAGLE (Sept. 18, 2015), http://www.brooklyneagle.com/articles/2015/9/18/schumer-seeking-financial-justice-911-families [http://perma.cc/L3VY-DFKB].

243. H.R. 3143, *supra* note 242.

244. *Id.*

245. *Id.*

terrorism, and each has a defensible claim to authority over this type of task. Congress has already enacted a statutory scheme to address the impact of terrorism on victims; in the interest of consistency, future changes should take into account both the framework itself and its historical significance. However, diplomatic concerns triggered by the designation state sponsors of terror correspond closely with executive action, such that the foreign relations grey area reflected in the facts of cases like *Rosenberg* might require adaptability that the slow-moving legislature is incapable of achieving. Relations with states like Pakistan and Iran are capable of changing suddenly due to regional geopolitical considerations and surprises like Zardari's open admission of former Lashkar-e-Taiba sponsorship. The aim of restitution for victims of terrorism is at odds with the foreign policy considerations underlying determinations of what constitutes terrorism, especially in the immunity context. JASTA seeks to provide a foreign sovereign immunity exception for "tort claims arising out of an act of extrajudicial killing, aircraft sabotage, hostage taking, terrorism, or the provision of material support or resources for such an act, or any claim for contribution or indemnity relating to a claim arising out of such an act." While commenters may have a long wait to see how these legal ambiguities are resolved, existing theories of *jus cogens* and terrorism can support a terrorism exception to official immunity based in international law.