The Commercial Activity Exception - Justice Demands Congress Define a Line in the Shifting Sands of Sovereign Immunity

Amelia L. McCarthy

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Available at: http://scholarship.law.marquette.edu/mulr/vol77/iss4/8

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.
THE COMMERCIAL ACTIVITY EXCEPTION—JUSTICE DEMANDS CONGRESS DEFINE A LINE IN THE SHIFTING SANDS OF SOVEREIGN IMMUNITY

I. INTRODUCTION

The foreign policy adopted by our government is to do justice to all, and to submit to wrong by none.

—Andrew Jackson

The United States Supreme Court is restricted to enforcing federal statutes passed by Congress, and as a result, justice is not always served. Enforcement of the commercial activity exception to the Foreign Sovereign Immunities Act of 1976 (FSIA), in certain circumstances, exemplifies such injustice. Under the FSIA, a foreign state is generally immune from United States jurisdiction. The commercial activity exception to the FSIA is intended to deny foreign states immunity when they engage in conduct that is based on a commercial activity carried on in the United States. The exception, however, contains a significant loophole that allows foreign states to circumvent the jurisdiction of a United States court by masking their commercial activity behind the otherwise sovereign activities of a state agency. The United States Supreme Court decision Saudi Arabia v. Nelson illustrates this loophole.

In Nelson, an American citizen, Scott Nelson, alleged that he was abused by his foreign government-entity employer. Nelson was a monitoring systems engineer for the Saudi Arabian-owned King Faisal Specialist Hospital. He obtained employment with the hospital through advertisement and recruitment efforts in the United States. While em-

4. Id. §§ 1330, 1332, 1391, 1441, 1602-11.
5. Id. § 1605(a)(2).
8. 113 S. Ct. 1471 (1993).
9. Id. at 1474.
10. Id.
ployed in Saudi Arabia, Nelson alleged that Saudi law enforcement agents detained and tortured him in retaliation for his job-related duty of reporting safety violations. After returning to the United States, Nelson sued the Kingdom of Saudi Arabia for his permanent injuries.

The Federal District Court for the Southern District of Florida dismissed Nelson’s complaint for lack of subject matter jurisdiction under the FSIA, and Nelson appealed. The Court of Appeals for the Eleventh Circuit reversed and remanded the lower court decision, granting jurisdiction based on the commercial activity exception to the FSIA. On appeal, however, the Supreme Court denied Nelson any legal redress in United States courts, declaring that his claim was not “‘based upon a commercial activity’ within the meaning” of the commercial activity exception.

Part II of this Comment outlines the history of the FSIA. Part III discusses the commercial activity exception to the FSIA and its treatment in the United States courts. Part IV, focusing on the Nelson decision, identifies and analyzes the current loophole in the Act. Finally, Part V addresses the need for congressional action and proposes a solution. Absent congressional action, American citizens working on foreign soil for foreign corporations may share Scott Nelson’s plight and be denied any judicial recourse.

II. HISTORICAL DEVELOPMENT OF SOVEREIGN IMMUNITY

Under the principle of sovereign immunity, recognized in both international law and the law of various states, a foreign state generally cannot be sued without its consent. Sovereign immunity developed in an attempt to define domestic jurisdiction while “respect[ing] the territorial integrity and political independence of other states.”

11. Id.
13. Id.
18. SHAW, supra note 17, at 430.
The United States Supreme Court first addressed the concept of sovereign immunity in *The Schooner Exchange v. M'Faddon.* There, Chief Justice John Marshall, influenced by an executive branch suggestion, granted a French warship docked in a United States port immunity from suit in United States courts. Marshall described a nation's jurisdiction within its own territory as "necessarily exclusive and absolute" and "susceptible of no limitation not imposed by itself." He maintained that foreign states were entitled, with limited exception, to "perfect equality and absolute independence."

This theory developed at a time when the foreign states were ruled by personal sovereigns who generally personified the state. Absolute immunity persisted into the twentieth century, gaining the appropriate title, "the absolute theory of sovereign immunity." Under the absolute theory, private citizens dealing with foreign sovereigns in a commercial capacity had no legal remedy. However, as trading and other commercial activities increased, the Supreme Court was criticized for ignoring State Department suggestions to restrict the privilege of sovereign immunity.

---

19. 11 U.S. (7 Cranch) 116 (1812). The Court codified the common-law doctrine of foreign sovereign immunity and noted that it rests on the principle of mutual respect between nations. *Id.* at 135-36; see Verlinden B.V. v. Central Bank of Nig., 461 U.S. 480, 486 (1983).


21. *Id.* at 136.

22. Chief Justice Marshall acknowledged that a sovereign would be understood to waive its exercise of "complete exclusive territorial jurisdiction" where the foreign sovereigns, ambassadors, or troops were traveling abroad. *Id.* at 137-39.

23. *Id.* at 137.


25. See *Compania Espanola de Navegacion Maritima,* S.A. v. The Navemar, 303 U.S. 68 (1938); Berizzi Bros. v. S.S. Pesaro, 271 U.S. 562 (1926) (relying on *The Schooner Exchange* in formally adopting the rule of absolute immunity). *The Berizzi Bros.* decision drew no distinction between the public and private acts of foreign states and disregarded the fact that *The Schooner Exchange* did not extend to commercial activities of foreign states. *Id.* at 573. The Court adopted the theory of absolute sovereign immunity primarily because of "the absence of a treaty or statute of the United States evincing a different purpose." *Id.* at 574.


eign immunity to a foreign state's noncommercial activities. After World War I, international commerce and trade boomed. European monarchs and other states left their traditional roles and entered areas formerly left to the private industry by obtaining ownership of various commercial and trade enterprises. This increased commercial involvement resulted in a variety of decisions that upset the stability of international commercial expectations.

The Supreme Court, influenced by executive branch suggestions, increasingly considered a "restrictive approach" to sovereign immunity. The restrictive approach advocated extending immunity only to purely governmental activities, requiring courts to distinguish between public governmental acts (jure imperii) and private governmental acts (jure gestiones). The distinction attempted to stabilize international commercial expectations and thus promote the free flow of goods and services across national boundaries.

The United States State Department formalized its restrictive approach in the famous Tate Letter of 1952 by announcing that it would "follow the restrictive theory of sovereign immunity," with the hope that

28. See, e.g., The Pesaro, 277 F. at 479-80 n.3.
29. Draft Convention, supra note 24, at 473-74 (declaring that "state operation of railways, telegraphs, radio . . . [and] state monopolies such as those of tobacco, salt, matches, and other common articles of commerce" brought the states out of the sovereign realm and into the commercial context, requiring various countries to adopt exceptions to absolute immunity); see Harvey Schweitzer, Note, Sovereign Immunity and the Foreign State Enterprise in Alaska, 4 UCLA-ALASKA L. REV. 343, 351 (1975).
31. See Republic of Mex. v. Hoffman, 324 U.S. 30, 34-35 (1945) (holding that the Court would not enlarge state immunity unless it was recommended by the executive branch because of its intimate association with foreign policy); Ex Parte Republic of Peru, 318 U.S. 578, 588 (1943) (The Court noted that where the State Department recognized a foreign state's immunity claim, it was the Court's duty to dismiss the action. Relief, then, would be granted only through diplomatic negotiations.); Victory Transport Inc. v. Comisaría Gen., 336 F.2d 354, 358 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965).
32. CHEN, supra note 17, at 243.
33. BORN & WESTIN, supra note 16, at 337-38; CHEN, supra note 17, at 243; SHAW, supra note 17, at 433.
34. CHEN, supra note 17, at 243.
35. Letter from Jack B. Tate, Acting Legal Advisor of the U.S. Dept. of State, to Acting Attorney General Phillip B. Perlman (May 19, 1952), reprinted in 26 DEP'T ST. BULL. 984-85.
the courts would do the same. The Tate Letter recognized immunity for public or sovereign acts, but denied immunity for private acts. However, the Tate Letter failed to provide any criteria to distinguish between public and private acts, which resulted in inconsistent executive determinations and case law regarding sovereign immunity. These inconsistencies appeared in everyday political dealings.

When the State Department did not recommend the classification of a foreign state’s act or its immunity, the courts were left to decide whether to grant immunity. For example, in Victory Transport, Inc. v. Comisaría General de Abastecimientos y Transportes, the State Department failed to suggest immunity. The Second Circuit refused to grant immunity because it was not “plain that the activity in question [fell]
within one of the categories of strictly political or public acts." The Second Circuit declared that the restrictive theory accommodated the "interest of individuals doing business with foreign governments in having their legal rights determined by the courts, with the interest of foreign governments in being free to perform certain political acts without undergoing the embarrassment or hindrance of defending the propriety of such acts before foreign courts." 45

While the courts and the State Department shifted responsibility, and international political pressure increased over the restrictive theory, questions arose about the executive branch's decision-making in what is more properly the judicial arena. 46 The once seemingly "prudent attempt to minimize potential friction and foster good relations with other states gradually became an onerous burden that ill served the best interests of the United States and those of private parties dealing with foreign governments." 47 This disorder gave rise to two identical bills being submitted to Congress, one in each house, on October 31, 1975. 48

From these bills came the FSIA. 49 The FSIA completely lifted the burden of determining immunity from the State Department and placed it solely on the judicial branch. 50 The FSIA was intended to codify the

44. Id. at 360. The court went on to limit the acts to: "(1) internal administrative acts, such as expulsion of an alien; (2) legislative acts, such as nationalization; (3) acts concerning the armed forces; (4) acts concerning diplomatic activity; [and] (5) public loans." Id.

45. Id.


47. CHEN, supra note 17, at 244.

48. von Mehren, supra note 27, at 44. The Senate report stated, "at present, the law of foreign state immunity in the United States is in a state of uncertainty." Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 29 (1976) [hereinafter Hearings on H.R. 11315] (statement of Bruno Ristau, Chief, Foreign Litigation Section, Civil Division, Department of Justice).


restrictive approach, and was consistent with immunity provisions of other countries. Currently, the FSIA is the sole basis for obtaining jurisdiction over a foreign state in United States courts. The FSIA, however, is not without limits. A foreign state is immune from the jurisdiction of a United States court unless it falls outside one of the eight FSIA exceptions.

III. THE COMMERCIAL ACTIVITY EXCEPTION TO THE FSIA

The commercial activity exception denies immunity for states "insofar as their commercial activities are concerned." The exception provides in pertinent part:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state . . . .


54. 28 U.S.C. § 1605 (1988). There are eight exceptions to the FSIA. The exceptions consist of actions based on: (1) a waiver by a foreign state; (2) "commercial activity" having a certain nexus to the United States; (3) property rights that were taken in violation of international law; (4) immoveable property rights located in the United States or property located in the United States acquired by gift or succession; (5) particular noncommercial torts; (6) enforcement or confirmation of certain arbitral awards; (7) certain admiralty acts by the foreign state; and (8) foreign state foreclosure of a preferred mortgage. Id. The list of exceptions is so extensive that Judge Heaney, writing for a unanimous panel of the Eighth Circuit, characterized immunity as the exception rather than the rule. McDonnel Douglas Corp. v. Islamic Republic of Iran, 758 F.2d 341, 348 (8th Cir.), cert. denied, 474 U.S. 948 (1985). For a discussion of the nexus requirement and relevant case law, see George Kahale III & Matias A. Vega, Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States, 18 COLUM. J. TRANSNAT'L L. 211, 244-52 (1979).

55. 28 U.S.C. § 1602 (1988); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 451 (1993) ("Under international law, a state or state instrumentality is immune from the jurisdiction of the courts of another state, except with respect to claims arising out of activities of the kind that may be carried on by private persons.") [hereinafter RESTATEMENT].

56. The full text of the exception provides:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case
The FSIA defines commercial activity as "either a regular course of commercial conduct or a particular commercial transaction or act."57 To determine the character of the activity, courts must look to the nature of the course of conduct rather than its purpose.58 The primary test in determining whether the state engaged in "commercial activity" is "whether the activity in question is one which private parties ordinarily perform or whether it is peculiarly within the realm of governments."59 In addition, courts are instructed to look at whether the foreign state made its appearance in the marketplace as a merchant, or as a sovereign.60 If the foreign state makes an appearance as a merchant it may then be held accountable in United States courts.61

Courts acknowledge that Congress's circular definition of "commercial" leaves the term largely undefined.62 Congress provided such modest guidance, however, to allow the courts "to work out progressively, on a case-by-case basis...the distinction between commercial and governmental."63 The courts, using the FSIA's legislative history and strict language requirements, declared that a foreign state acts commercially under the FSIA only when it acts as "a private player" engaging in the market by performing "the type of actions by which a private party engages in 'trade and traffic or commerce.'"64 To determine whether an act is commercial, the courts must identify the specific conduct on which

\[\text{(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.}\]

57. Id. § 1603(d).
58. Id. (emphasis added). This "test" or "requirement" has caused varied court interpretations. See infra notes 70-84 and accompanying text.
59. Hearings on H.R. 11315, supra note 48, at 53 (testimony of Monroe Leigh, Legal Advisor, State Dep't.).
60. Id. at 30 (testimony of Bruno A. Ristau).
61. Id. (testimony of Bruno A. Ristau).
the action is based.65 This requires the courts to look at the nature, rather than the purpose, of the activity.66 A strict interpretation of this requirement implies that without further inquiry, certain activities would always be commercial and denied immunity, while others would be forever governmental and granted immunity.67 For example, a state entering into a contract, regardless of its substance, would be engaging in commercial activity,68 while a state utilizing its police power, irrespective of the context, would always be engaging in governmental activity.69 As such, courts have differed in their interpretation of exactly when the nature of an activity ends and the purpose begins.70

Courts have developed,71 and commentators have suggested,72 numerous tests regarding the interpretation of actions involving contract


67. See generally Donoghue, supra note 65.

68. Contracts by their very nature are commercial obligations and entering into such obligations typically require the government to lose its sovereign identity and take on the identity of a private citizen. See Bank of United States v. Planters' Bank, 22 U.S. (9 Wheat.) 904, 907 (1824); see also Alfred Dunhill of London, Inc., 425 U.S. at 695-96 (plurality opinion); Callejo v. Bancomer, S.A., 764 F.2d 1101, 1108-09 (5th Cir. 1985).

69. The exercise of police power is generally characterized as governmental and therefore sovereign. See, e.g., Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1379 (5th Cir. 1980); Herbage v. Meese, 747 F. Supp. 60, 67 (D.C.C. 1990), aff'd, 946 F.2d 1564 (D.C. Cir.), cert. denied, 112 S. Ct. 605 (1991) (denying jurisdiction because the case was based on arrest and extradition); Tucker v. Whitaker Travel Ltd., 620 F. Supp. 578, 584 (E.D. Pa. 1985), aff'd, 800 F.2d 1140 (3d Cir.), cert. denied, 479 U.S. 986 (1986) (denying jurisdiction over the government defendant and declaring that a government's decision "whether and how to regulate an industry, police the activities of its citizens, and investigate or assist in the investigation of accidents" is peculiar to government and should not be scrutinized by United States courts); Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056, 1064 (E.D.N.Y. 1979); see also Hersch Lauterpacht, The Problem of Jurisdictional Immunities of Foreign States, 28 BRIT. Y.B. INT'L L. 220, 237 (1951) (declaring that a state must receive immunity for "the executive and administrative acts of the foreign state within its territory").

70. E.g., Segni v. Commercial Office of Spain, 835 F.2d 160, 163-64 (7th Cir. 1987); De Sanchez v. Banco Cent. de Nicar., 770 F.2d 1385, 1392 (5th Cir. 1985); see also Margot C. Wuebbels, Note, Commercial Terrorism: A Commercial Activity Exception Under § 1605(a)(2) of the Foreign Sovereign Immunities Act, 35 ARIZ. L. REV. 1123, 1130 (1993) (declaring that the "courts have experienced difficulty in determining where the nature of an activity ends and where the purpose begins. Often, the essence of an act is defined by its purpose, and unless there is an inquiry into the purpose of such acts, their nature cannot be determined.").

71. See infra notes 73-84 and accompanying text.

72. E.g., Donoghue, supra note 65, at 522 (espousing a four-step functional approach to analyze sovereign immunity). Donoghue's analysis, though intended as an approach for all
disputes. Some earlier courts avoided the per se denial of immunity to states entering into contracts by looking beyond the act of entering into a contract to the purpose or subject matter of the contract in deciding whether the activity was sovereign or commercial. For example, in MOL, Inc. v. People's Republic of Bangladesh, Bangladesh cancelled MOL's license to capture and export monkeys. The court disregarded the granting or canceling of licenses in general and classified the "nature" of the suit as the regulation of wildlife. The court then characterized such acts as sovereign and granted immunity under the FSIA.

In Republic of Argentina v. Weltover, Inc., the Supreme Court acknowledged the difficulty in distinguishing between an act's nature and purpose. Attempting to comply with the FSIA, the Court defined an act's "purpose" as "the reason why the foreign state engages in the activity." In contrast, an act's "nature" was defined as "the outward form of the conduct that the foreign state performs or agrees to perform." Including the phrase "agrees to perform" allowed the Court to eliminate the per se denial of immunity for contract cases, by allowing the courts to inquire into the substance of the contract. This interpretation, however, actions commencing under § 1605(a)(2), would still leave no redress for American citizens injured as a result of their employment activities abroad. Thus, the approach should not be adopted in employment related claims. See generally infra notes 145-51 and accompanying text.

73. E.g., MOL, Inc. v. People's Republic of Bangl., 572 F. Supp. 79, 84 (D. Or. 1983), aff'd, 736 F.2d 1326 (9th Cir.), cert. denied, 469 U.S. 1037 (1984). See generally Donoghue, supra note 65, at 501 (discussing courts' problems of "infus[ing] their definition of the relevant activity with the purpose of the activity, with the activities of other components of the foreign state, or with the overall operations the foreign state performed").

75. Id. at 81.
76. Id. at 84 ("The granting of such a license as part of a comprehensive regulation of wildlife under the police power is an action in which the sovereign power is essential.") (emphasis added).
77. Id. at 85 ("The power to regulate the taking of game upon land owned by the landowner is an aspect of sovereignty," and, therefore, one in which private persons would not engage.).
78. Id. at 84. The action was also barred under the Act of State Doctrine. Id. at 85.
80. Id. at 2167.
81. Id.
82. Id.
83. Id. (emphasis added).
does not eliminate the per se grant of immunity for acts that routinely have been classified as governmental.84

Finally, the inquiry does not end with a characterization of the type of activity. The lawsuit against the foreign state must also be "based upon" that commercial activity.85 Congress found an act to be based upon a commercial activity if the foreign state's act has substantial contact with the United States.86 The Supreme Court has not addressed what constitutes substantial contact under the statute,87 allowing lower courts to create numerous variations.88 The majority view supports the nexus test.89 This test requires a connection between the specific activity that forms the basis of the suit and the sovereign's commercial activity; that sovereign's commercial activity must then have substantial contact with both the commercial activity alleged in the action and the United States. For example, in Gould, Inc. v. Pechiney Ugine Kuhlmann,90 the Sixth Circuit concluded that the continuing course of conduct by an agent of the Pechiney Corporation, as a representative in the United States, was sufficient to meet the nexus test.91 Similarly, in America West Airlines, Inc. v. GPA Group, Ltd.,92 the Ninth Circuit noted that although there was a commercial connection with the United States, the

86. Id. § 1603(e).
87. The cases have typically been decided prior to reaching a "based upon" analysis or they were classified under one of the other two allowable bases in the statute (that is, the act had a direct effect in the United States or the act was performed in the United States in connection with a commercial activity of the foreign state elsewhere). E.g., Nelson, 113 S. Ct. at 1477; Republic of Argentina v. Weltover, Inc., 112 S. Ct. 2160 (1992).
88. See Wuebbels, supra note 70, at 1131-35 (offering an analysis of the lower courts' constructions of tests such as the literal, nexus, causation connection, doing business, and jurisdictional nexus tests).
90. 853 F.2d 445 (1988), enforced sub nom Gould, Inc. v. Mitsui Mining & Smelting Co., 947 F.2d 218 (6th Cir. 1991) cert. dismissed, 112 S. Ct. 1657 (1992). In a later proceeding before the district court, the evidence presented clearly established substantial contact, and on a second appeal was not disputed. Gould, 947 F.2d at 220.
91. 853 F.2d at 453.
92. 877 F.2d 793 (9th Cir. 1989).
connection was not related to the cause of action, and thus it failed to meet the nexus test.\textsuperscript{93}

In the case of an employee being abused by a government-entity employer, no court has addressed whether the act meets the nexus test.\textsuperscript{94} The Court determined that the acts do not constitute commercial activity; thus, the inquiry ends prior to undertaking the nexus analysis.\textsuperscript{95}

IV. \textit{Nelson v. Saudi Arabia} and the Loophole of the Commercial Activity Exception

A. Nelson v. Saudi Arabia

1. The Facts\textsuperscript{96}

In September 1983, while in the United States, Scott Nelson read a printed advertisement for a position as a monitoring systems engineer for the King Faisal Specialist Hospital (the Hospital) in Ridyah, Saudi Arabia.\textsuperscript{97} Hospital Corporation of America (HCA), a privately owned corporation,\textsuperscript{98} had placed the advertisement. Since 1973, HCA contracted with Saudi Arabia to assist in employment recruitment for the Hospital.\textsuperscript{99}

Nelson interviewed for the position in Saudi Arabia.\textsuperscript{100} After his interview, Nelson returned to the United States and signed an employ-
ment contract in Miami, Florida in November 1983. A month later, he attended an orientation session conducted by HCA in Tennessee. Nelson then flew to Saudi Arabia to begin his employment.

At the Hospital, Nelson was responsible "for the development and expansion of electronic monitoring and control system capabilities" and for recommending "modifications of existing equipment and the purchase and installation of new equipment." He also monitored all hospital "facilities, equipment, utilities, and maintenance systems to insure the safety of patients, hospital staff, and others."

In March 1984, during the course of his duties, Nelson discovered a safety hazard that he reported to an investigative commission of the Saudi government. Over the next several months, Nelson repeatedly reported the safety hazards to Hospital officials, but was allegedly told to ignore the problem.

Nelson stated that agents or employees of the Saudi government summoned him on September 27, 1984 to the Hospital's security office, where he was subsequently arrested. Upon his arrest, Nelson alleged that he was taken to the Saudi Arabia Criminal Investigation Division, where he was detained in a jail cell and was shackled, tortured and beaten by Saudi officials acting in their official capacity. He alleged that he was imprisoned for thirty-nine days and never charged with any crime nor informed of the charges against him. Furthermore, he al-

102. Respondents' Brief at 6, Nelson (No. 91-522). At the program, Royspec in Maryland was identified as the point of contact for family members who, in cases of emergency, wished to contact Nelson in Saudi Arabia. Id.
103. Nelson, 923 F.2d at 1530.
104. Id.
106. Nelson, 923 F.2d at 1530. The safety hazard was a defective grease valve in the oxygen and nitrous oxide lines. Respondents' Brief at 8, Nelson (No. 91-522).
108. Id.
109. Id.
110. Nelson, 923 F.2d at 1530.
111. Petitioners' Brief at 8, Nelson (No. 91-522).
112. Id. Nelson alleged that the abuse occurred for approximately one hour on the day he was arrested. After he was transferred to await trial, he was jailed in a prison cell where he "'slept on the floor,' with 'rats crawling all over' [him] and was denied adequate food." Id.
113. Nelson, 923 F.2d at 1530. While imprisoned, Nelson met at least twice with officials of the United States Embassy in Saudi Arabia. In these meetings, the United States official found that Nelson's claims were "not credible" because he had "no bruises or marks" and found "no indication of undue stress." The State Department also determined that Nelson
ledged that his family was initially unaware of his whereabouts.\textsuperscript{114} Eventually, Mrs. Nelson was advised of her husband's detention and was allegedly told he could be released in exchange for sexual favors.\textsuperscript{115}

Nelson was finally released from prison on November 5, 1984.\textsuperscript{116} One week later, Nelson and his family left Saudi Arabia.\textsuperscript{117} In America, Nelson sought medical treatment and was declared permanently and totally disabled.\textsuperscript{118}

Four years later, Nelson and his wife initiated a civil lawsuit naming Saudi Arabia and the Hospital as defendants.\textsuperscript{119} Royspec, a corporation owned and controlled by Saudi Arabia that was responsible for purchasing the Hospital's supplies, was also named as a defendant.\textsuperscript{120} Nelson claimed the federal district court had subject matter jurisdiction based on the commercial activity exception to the FSIA.\textsuperscript{121} Saudi Arabia promptly moved to dismiss for lack of subject matter jurisdiction.\textsuperscript{122}

2. The Lower Court Opinions

The district court concluded there was not a sufficient link between the recruitment process in the United States and the defendants to con-
stitute a substantial contact. Thus, the actions against all the defendants were dismissed for want of subject matter jurisdiction.

On appeal, the Eleventh Circuit reversed the district court’s judgment and remanded the case. In a two-part analysis, the court of appeals first determined that the activity was commercial. The court announced that Nelson’s recruitment and hiring in the United States was clearly “part of a process having ‘substantial contact with the United States.’” Therefore, his recruitment and hiring “constituted a ‘commercial activity’ of Saudi Arabia within the meaning of the FSIA.”

The Eleventh Circuit then adopted the “jurisdictional nexus” test outlined in Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation. This test required there to be a “‘nexus’ between the acts giving rise to liability, and the commercial activity carried on by the foreign state in the United States.” The court concluded that Nelson’s detention and torture were “so intertwined with his employment” that the nexus requirement was satisfied. Saudi Arabia appealed, and the Supreme Court granted certiorari on June 8, 1992.

---

124. Id. The district court further concluded that even if it could find a substantial contact through the “indirect recruitment activities,” there was not a sufficient “nexus” between the activities and the complaint to support jurisdiction. Id. at 8.
125. Nelson, 923 F.2d at 1536.
126. Id. at 1533.
127. Id.
128. Id.
129. Id. at 1534 (citing 730 F.2d 195 (5th Cir. 1984)).
130. Id.
131. Id. at 1535.
3. The Supreme Court Decision

Justice Souter delivered the Court's opinion, reversing the court of appeals decision and granting Saudi Arabia immunity. The Court's five-four decision was based solely on its determination that the activities at issue were not commercial under the exception.

The Court began its analysis by identifying the particular conduct forming the basis of the Nelsons' claim. After examining what "based

---

133. Saudi Arabia, King Faisal Hospital, and Royspec filed two briefs as petitioners: an original on July 31, 1992, and a reply brief on October 8, 1992. The United States as amicus curiae submitted a brief on July 31, 1992 supporting the petitioners.


The questions presented in request for certiorari were:

(1) Do U.S. courts have jurisdiction under commercial activity exception in Foreign Sovereign Immunities Act to review inherently sovereign law enforcement activities of foreign state carried out in that country?

(2) Does FSIA confer jurisdiction over suit challenging conduct of foreign state when commercial activity of that foreign state in United States is unrelated to non-commercial conduct forming basis of suit?

Saudi Arabia v. Nelson, 60 U.S.L.W. 3823 (U.S. June 9, 1992) (No. 91-522). It has been suggested that the more appropriate issue before the Court was "whether the sovereign may use means that might otherwise be treated as an exercise of sovereign governmental power to address commercially created problems and thereby avoid what would otherwise be under the jurisdiction of the United States courts." Michael P. Waxman, Can Governmental Action Shield Otherwise Commercial Activity Under the Foreign Sovereign Immunities Act?, 1992-93 PREVIEW U.S. SUP. CT. CASES 137, 139 (Nov. 30, 1992). As Professor Waxman predicted, however, the Court left the question for another day. Id. at 139-40.

134. Saudi Arabia v. Nelson, 113 S. Ct. 1471, 1474 (1993). Justice Souter was joined by Justices Rehnquist, O'Connor, Scalia, and Thomas. Id. Justice Kennedy, with the exception of the last paragraph, also joined the majority. Id. Justice White, joined by Justice Blackmun, wrote a concurring opinion. Id. at 1481 (White & Blackmun, JJ., concurring). Justice Blackmun wrote a opinion concurring in part and dissenting in part. Id. at 1484 (Blackmun, J., concurring in part and dissenting in part). Justice Kennedy, joined by Justices Blackmun and Stevens, wrote an opinion concurring in part and dissenting in part. Id. (Kennedy, Blackmun, & Stevens, JJ., concurring in part and dissenting in part). Finally, Justice Stevens submitted a dissenting opinion. Id. at 1487 (Stevens, J., dissenting).

135. Id. at 1477. In reaching this decision, the Court did not decide the issue of whether the commercial activity had substantial contact with the United States. Id.

136. Id. (citations omitted). Souter's characterization of the relevant conduct has been criticized. Wolf, supra note 6, at 18 (arguing Souter's focus solely on the Saudi Arabian law enforcement conduct was improper). Wolf asserts that if the majority would have focused on each of the named defendants individually, specifically the Hospital, as required under the FSIA, it would not have "characterize[d] what was clearly private or commercial conduct as sovereign in nature." Id. Even if the Court had focused on each individual defendant, however, this would not alter the fact that the acts in question were those of the Saudi Arabian government, and thus outside the exception's parameters.
upon" meant for determining whether the activity was commercial, the Court identified the personal injuries and intentional torts alleged in the Nelsons' complaint as the activities forming the suit. The Court concluded that such activities did not qualify as commercial under the exception.

The Court supported its conclusion by distinguishing between an activity's nature and purpose. It relied on the definitions provided in Republic of Argentina v. Weltover, Inc., which specifically prohibit a court from looking at the motivation behind the activity in question. The Court declared: "The conduct boils down to abuse of power of its police by the Saudi Government, and however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature." The Court concluded that since the exercise of police power was not an act in which a private person could engage, the Nelsons' lawsuit was based on a sovereign act and thus did not fall within the exception. This conclusion exemplifies the current loophole in the commercial activity exception.

B. The Loophole and Analysis

The legislative history of the FSIA declares that a foreign government's employment of laborers is an example of a state engaging in commercial activity. The Nelson decision, however, holds that an act by a sovereign body, although during the course of or as a direct result of this commercial activity, can eliminate the "commercialness" of the claim.

137. Nelson, 113 S. Ct. at 1477-78.
138. Id. at 1478.
139. Id.
140. Id. at 1478-79.
142. Nelson, 113 S. Ct. at 1478-79; see also id. at 1480 (declaring that any analysis of the Saudi government's motivation would be addressing the "purpose" of the activity, and therefore would be irrelevant).
143. Id. at 1479 (citations omitted).
144. Id. at 1480. The Court also denied the Nelsons' failure to warn claim for separate reasons. Id.
146. The FSIA's language requires the court to analyze only the nature of the activity on which the action is based. 28 U.S.C. §§ 1605(a)(2), 1603(d) (1988); see also Waxman, supra note 133 (identifying the actual issue before the Court but accurately predicting that the question would be left for another day).
In other words, so long as a foreign state utilizes a government entity, it can opt-in or opt-out of United States courts’ jurisdiction at will.\footnote{147} This result undermines the intent of the FSIA. Immunity was intended for foreign states \textit{unless} they engage in commercial activity that has substantial contact with the United States.\footnote{148} Case law clearly establishes that employment-related activity is commercial. For example, Chief Justice Marshall, in a somewhat similar context, acknowledged:

When a government becomes a partner in any trading company, it \textit{devests} itself . . . of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges . . ., it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.\footnote{149} Likewise, in \textit{Alfred Dunhill of London, Inc. v. Republic of Cuba},\footnote{150} the Court acknowledged that foreign governments acting in their commercial capacities “do not exercise powers peculiar to sovereigns. Instead, they exercise only those powers that can also be exercised by private citizens.”\footnote{151}

Saudi Arabia clearly divested itself of its sovereign character and acted in its commercial capacity when it recruited, hired, and employed Scott Nelson. Saudi Arabia’s commercial involvement is apparent in three instances. First, Saudi Arabia entered the commercial marketplace by using an American corporation to recruit and advertise for the position in the American marketplace. Second, Saudi Arabia hired Nelson in the typical commercial manner of having him sign an employment contract. Finally, Saudi Arabia’s commercial actions continued into Nelson’s working environment. In effect, the government of Saudi Arabia was everything a commercial employer would be. No distinction can be

\begin{itemize}
  \item \footnote{147} Justice White acknowledged this in his concurrence stating that “had the hospital retaliated against Nelson by hiring thugs to do the job” the act would not have obtained sovereign status. \textit{Nelson}, 113 S. Ct. at 1482 (White, J., concurring). Further, Justice White argued that the purpose of the restrictive theory is to prevent “foreign states from taking refuge behind their sovereignty when they act as market participants.” \textit{Id.} at 1483 (White, J., concurring).
  \item \footnote{150} 425 U.S. 682, 695-96 (1976) (plurality opinion).
  \item \footnote{151} \textit{Id.} at 704; \textit{see also} Republic of Arg. v. Weltover, Inc., 112 S. Ct. 2160, 2166 (1992) (declaring that “[w]hen a foreign government acts, not as regulator of a market but in the manner of a private player within that market, its actions are ‘commercial’ within the meaning of the FSIA”).
\end{itemize}
drawn between a regular nonstate merchant employer's role and that played by the Saudi government. Saudi Arabia's choice of enforcing its commercial policies, the policies of the Hospital in reporting safety violations, through the use of a governmental agency, is not the typical sovereign governmental police power activity. Rather, the typical police power activity occurs when a criminal act or policy has been violated. However, although merely an arm of the merchant-acting government employer, the actions of Saudi governmental agents cannot be questioned because they, under the present FSIA, are considered sovereign. Thus, the Nelsons are denied justice.

V. THE NEED FOR CONGRESSIONAL ACTION

"Foreign policy must be clear, consistent and confident."
—Dwight D. Eisenhower

Foreign states should not be able to evade American jurisdiction and American law through questionable claims of sovereign immunity. The United States must firmly decide whether a foreign state should be subject to suit in our country. The FSIA sends a conflicting message. On one hand, foreign states are told they will be held accountable in United States courts if they engage in commercial activity. On the other hand, foreign states are also told that so long as they take care of their commercial problems through the use of a sovereign entity, their conduct will not be questioned by American courts. Because of this conflicting message, this section outlines additional reasons for legislative action and offers a proposed solution.

A. Reasons for Legislative Action

The changing world market, the increased role of the United States in the global economy, and the interests of justice—all demand that Congress amend the commercial activity exception. A clear, consistent, and confident message must be sent to the international community.

The restrictive approach, adopted first in the Tate Letter and then codified in the FSIA, emerged in response to the expanding world market, and more specifically, in response to foreign states leaving their

152. Consider this far-fetched example. If there had been some sort of contract for the Saudi police's abuse, the Court could then look into the Saudi police's reasons for the physical abuse. See supra notes 79-84 and accompanying text. Then, the commercial character would appear.

traditional roles and entering the marketplace.\textsuperscript{154} Since then, the international commercial marketplace has grown immensely.\textsuperscript{155} Foreign states are uniting to meet these changes through treaties or communities, such as the North America Free Trade Agreement (NAFTA)\textsuperscript{156} and the 1992 European Economic Community.\textsuperscript{157} In addition, while unemployment currently plagues the industrialized nations,\textsuperscript{158} the demand for highly educated and technically skilled individuals in developing nations has increased,\textsuperscript{159} particularly in the fields of medicine, agriculture, and business fields.\textsuperscript{160} America’s increased trade between the United States and Mexico as a result of NAFTA will only exacerbate this movement of skilled individuals.\textsuperscript{161} Thus, skilled Americans like Scott Nelson are likely to be increasingly enticed to work in foreign states for foreign nations.\textsuperscript{162}  

\begin{itemize}
\item \textsuperscript{154} See supra notes 28-34 and accompanying text.
\item \textsuperscript{155} See supra notes 28-30 and accompanying text.
\item \textsuperscript{158} According to Michael Hansenne, Director General of the United Nations’ International Labour Organization in Geneva, “For the first time since the Great Depression, the industrialized nations, as well as developing nations, are facing long-term, persistent unemployment . . . . The employment situation [is] a global crisis.” Michael Arndt, Fewer Workers, Fewer World Shoppers; Fading Jobs Overseas Cut U.S. Exports, CHI. TRIB., Mar. 13, 1994, § 7, at 1.
\item \textsuperscript{159} For example, in 1992, the United States, Russia, and Germany announced plans to employ nuclear scientists from the former Soviet Union to keep them from accepting offers in developing nations. David Hoffman, Ex-Soviet Scientists to Get Aid; Center to Employ Nuclear Experts; Yeltsin, Baker Meet, WASH. POST, Feb. 18, 1992, at A1. CIA Director Robert M. Gates asked Congress to adopt the plan because he feared a “brain drain” of these scientists to countries such as Cuba, Syria, Algeria, and India. \textit{Id}.
\item \textsuperscript{160} John Zarocostas, Firms Urged to Offer Farm Insurance in Little-Tapped Developing World, J. COM., Feb. 24, 1993, at A10 (identifying that one of the most inhibiting factors for developing countries is the “lack of technical know-how of operational processes, inadequate infrastructure and support services, and difficulties in product development and improvement”).
\item \textsuperscript{161} A great concern over the United States workforce losing blue-collar jobs to cheaper Mexican workers has developed. See Christopher J. Martin, The NAFTA Debate: Are Concerns About U.S. Job Migration to Mexico Legitimate?, EMPLOYEE REL. L.J., Winter 1993-94, at 239. Likewise, however, someone will be needed to organize the labor, manufacturing, and industrial growth. Most likely, many highly trained Americans will be sought out as advisors.
The United States has a duty to protect its citizens who are recruited by and employed in foreign states. While the United States may intervene when an American citizen is being harmed or detained abroad, the only redress the injured citizen has upon return to the United States is the FSIA.

Sources of international redress, like the International Court of Justice, are also unavailable to injured American citizens for two reasons. First, actions before the International Court can be brought only by individual states, not citizens. Second, the foreign state involved must consent to the International Court hearing the case or else the International Court lacks jurisdiction.

Thus, given the current loophole in the FSIA, American citizens are ultimately left uncompensated. Foreign states can shed their sovereign nature, enter the marketplace and freely violate an American's internationally protected human rights, knowing their actions will not be questioned in a United States court. America prides itself on the justice, or the protection, of human rights in this country. As such, justice demands that these citizens have redress and protection through the United States courts. To provide such redress, the commercial activity exception must be modified to cover those foreign states choosing to enter the marketplace, availing themselves of the privileges of the United States, ultimately employing American citizens, and then denying them their internationally protected human rights.

---


The Supreme Court, in dicta in Dames & Moore v. Regan, 453 U.S. 654, 676-77 (1981), declared that the Hostage Act was “passed in response” to some countries’ refusal to acknowledge American citizenship of naturalized citizens travelling abroad in the 19th century and was thus quite different than contemporary hostage situations; but the Court has since declined to review lower court decisions applying the Act's duty to, at a minimum, perform an investigation into the justifiability of the imprisonment of American citizens by foreign governments. E.g., Flynn v. Schultz, 748 F.2d 1186 (7th Cir. 1984), cert. denied, 474 U.S. 830 (1985).

166. A foreign state's consent is the basis of the Court's compulsory jurisdiction. I.C.J. Stat. art. 36(2), reprinted in ROSENNE, supra note 165, at 205-06.
This proposal promotes Chief Justice Marshall's statement that when a sovereign makes a choice to enter the marketplace, it cannot later choose to claim immunity for its actions within that marketplace.\(^{167}\) This proposal requires Congress to enumerate a five-step analysis. The proposal is intended to apply only to employment-related claims.

The five-step proposal is first summarized and then detailed.\(^{168}\) As a first step, the courts should identify the specific activity in question. Second, the courts should consider the personal jurisdiction of the foreign state. Third, the courts should apply the proper judicial test for determining whether the activity involved was "commercial." If the activity is deemed commercial, the inquiry would cease, and the court would have jurisdiction. However, if the activity is not commercial, the inquiry would continue. As a fourth step, the courts should consider whether the cause of action alleged an abuse of an internationally protected human right. Finally, if the cause of action alleged such an abuse, the courts would then look at the reasons alleged in the complaint for the violation. If the reasons alleged in the complaint are deemed commercial, the courts would have jurisdiction. If the cause of action did not allege an abuse of internationally protected human rights, the case would be dismissed.

A more detailed description of each element of the proposal follows, supplemented by an application of the elements to the facts of *Saudi Arabia v. Nelson*.\(^{169}\) The elements are the central issue. With the exception of the personal jurisdiction element, whether Congress specifically outlines a test for each item or leaves it up to the courts is immaterial.

1. Identify the Activity in Question

To identify the activity in question, the Supreme Court's analysis in *Saudi Arabia v. Nelson*\(^ {170}\) would be appropriate. Congress should instruct the courts to determine what conduct forms the "basis" or "foundation" of the cause of action.\(^{171}\) The determination would be made by

\(^{167}\) Bank of United States v. Planters' Bank, 22 U.S. (9 Wheat.) 904, 907 (1824); see supra note 149 and accompanying text.

\(^{168}\) The first three steps could be adopted for all causes of action. However, a clearer definition of "commercial activity" would then be warranted. See Donoghue, supra note 65, at 526.

\(^{169}\) 113 S. Ct. 1471 (1993).

\(^{170}\) Id.

\(^{171}\) Id. at 1477.
looking at "those elements of a claim that, if proven, would entitle a plaintiff to relief." In doing so, the Nelson Court concluded that the conduct forming the basis of the cause of action was the detention and torture inflicted on Scott Nelson by the Saudi Arabian police authorities.

2. Determine the Personal Jurisdiction of the Foreign State

To determine the personal jurisdiction of the foreign state, Congress should adopt the "minimum contacts test" for jurisdiction as outlined in *International Shoe Company v. Washington.* Furthermore, Congress should require the courts to apply this analysis prior to determining whether the activity is commercial. The minimum contacts standard in this context focuses on whether the foreign state had sufficient contacts with the United States when it engaged in employment activities with the American citizen. Sufficient contacts would exist if the foreign state had "substantial contact" or purposefully availed itself of the privileges of the United States, such that it could reasonably anticipate being subject to the United States' jurisdiction. The acts in question should be required to be continual and not random, fortuitous, or attenuated.

The minimum contacts standard would shape consistent case law by allowing the lower courts to apply a universal test. Furthermore, the minimum contacts test does not conflict with the current requirement that the foreign state have substantial contact with the United States. In addition, by having the courts apply the minimum contacts test prior to making a determination of the characterization of the activity, courts would avoid unnecessarily reaching complex immunity cases.

---

172. *Id.* (citing Santos v. Compagnie Nationale Air France, 934 F.2d 890, 893 (7th Cir. 1991); Millen Indus., Inc. v. Coordination Council for N. Am. Affairs, 855 F.2d 879, 885 (D.C. Cir. 1988); Callejo v. Bancomer, S.A., 764 F.2d 1101, 1109 (5th Cir. 1985)).


178. Currently, the courts are applying numerous tests. *See supra* note 87 and accompanying text.

179. In utilizing the minimum contacts test, the United States Supreme Court has frequently noted that it requires a finding that the entity had "substantial" contacts with that particular state. *E.g.*, McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957) (declaring it would be sufficient for jurisdiction if a "substantial connection" exists).

In applying the minimum contacts standard to the facts of Nelson, it is clear the United States' courts would have personal jurisdiction over Saudi Arabia. Although Saudi Arabia contracted with an American corporation to advertise for the position in the United States, the contract designated full control of all employment decisions to Saudi Arabia. Moreover, Saudi Arabia had Nelson sign the employment contract in the United States, and Saudi Arabia, through the American corporation, held the orientation session for the position in the United States. Thus, Saudi Arabia has sufficient contacts and the analysis continues.

3. Determine Whether the Activity in Question Was Commercial

The "commercial" determination under this proposal takes on less significance than the current approach, since an additional step has been added. As a result, it is not necessary to formulate a new test. In fact, analyzing other foreign states' models identifies that a more specific "commercial" determination does not alleviate the current problem under the FSIA. For example, the British, Australian, and European Convention immunity acts all have special provisions for employment contracts that deny a foreign state immunity unless the contract specifically provides otherwise. The Australian immunity act is generally consistent with the existing FSIA: It identifies and includes additional specific commercial exceptions, such as a foreign state contracting "for the supply of goods or services" or for a foreign state granting a "guarantee or indemnity in respect of a financial obligation." However, none of these tests, including the current test requiring the identification of the "nature" of the activity as compared to the "purpose" of the activity, closes the current loophole in the FSIA, as none qualify the abuse of police power as commercial.

183. Id.; see supra note 104.
184. See infra Step 4.
187. Id. § 11(3). The Australian model, however, explicitly declares that a contract of employment does not constitute commercial activity. Id.
188. The British, Australian, and European Convention immunity acts grant immunity only if the cause of action is based on a breach of the employment contract. Here, the cause of action was based on the abuses inflicted by the Saudi law enforcement agents. Likewise,
The additional steps of this proposal make the commercial activity test less significant in the context of an employment-related claim, and as a result, the current test would be sufficient. However, to end lower court confusion, Congress could define the terms "nature" and "purpose" of the current test, or adopt those definitions laid out in Republic of Argentina v. Weltover, Inc.\textsuperscript{189}

Irrespective of whether Congress adopts a new test or retains the current test, any determination that the activity in question was commercial would end the jurisdiction inquiry. However, if the activity is determined to be noncommercial, because of the general nature of employment-related activities,\textsuperscript{190} the inquiry would continue.

Because the isolated "nature" or "outward form of the conduct"\textsuperscript{191} that Saudi Arabia performed was the activity of law enforcement agents, the activities in Nelson would not be commercial under the nature or purpose distinction. However, because the law enforcement activities were allegedly implemented as a result of employment-related activities, the inquiry would continue.

4. Determine Whether the Cause of Action Alleges a Violation of an Internationally Protected Human Right

In step four, Congress would instruct the courts to determine whether the complaint alleged an abuse of an internationally protected human right. If such an abuse were alleged, Congress would then instruct the courts to proceed to step five. If no such violation were alleged, the foreign state would be granted immunity and the inquiry would cease.

Numerous scholars have suggested that the violation of international law should be a separate exception to the FSIA, and thus constitute a waiver of immunity.\textsuperscript{192} Professor Paust contends that to continue granting immunity to those states engaging specifically in human rights violations or terrorism "would be to further illegality, [and] give it legal

\begin{flushleft}
189. 112 S. Ct. 2160 (1992); see supra notes 79-84 and accompanying text.
190. See supra notes 145-51 and accompanying text.
191. Weltover, 112 S. Ct. at 2167.
\end{flushleft}
effect.... This a court of law cannot do. Thus, a violation of law poses the one necessary exception to immunity, one implicitly necessary in any truly legal system.193 However, since the violation of an international law is not enumerated in any of the eight FSIA exceptions, the courts cannot claim jurisdiction based solely on such a violation.194 In Argentinian Republic v. Amerada Hess Shipping Corp.,195 the Supreme Court declared no jurisdiction existed based on a violation of international law under the FSIA because such a violation was not contained in the FSIA.196

This Comment does not attempt to analyze whether a full exception to immunity based on an international law violation should be enumerated. Rather, the Comment analyzes the foreign state's conduct in light of international human rights customary norms to merely assist in determining whether the United States has jurisdiction over a foreign state. The result would make foreign states' sovereign authority give ultimate deference and respect to an American citizen's fundamental human rights and liberties.197

In determining whether a human right has become "customary" for jurisdictional purposes, the courts should follow the Restatement (Third) of the Foreign Relations Law of the United States, which lists certain abuses considered to be violations of customary international law.198 Specifically, the Restatement declares that a foreign state is violating international law if, as a matter of policy, "it practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights."199

Adopting the Restatement is appropriate for three reasons. First, although the burden would remain with the parties to ultimately establish whether a certain right has reached the level of "customary international law," the Restatement already enumerates certain abuses which

193. Paust, supra note 192, at 59 (emphasis added).
196. Id. at 689-91.
197. RANDALL, supra note 26, at 99.
198. RESTATEMENT, supra note 55, § 702.
199. Id.
have reached the "customary" level. Second, the enumeration gives foreign states notice of those abuses that will not be tolerated. Finally, the Restatement allows flexibility in the event that additional rights attain a customary status or certain rights enumerated fall below a customary status.

As noted earlier, the analysis of international customary norms would only assist the courts in determining jurisdiction. Two additional elements would be prerequisites to undertaking the international law analysis. Specifically, the cause of action must first involve the employment of an American citizen, and second, a determination must already be made that the foreign state has sufficient contacts with the United States. In addition, the analysis would not end with a determination that a customary international human right law was violated. The Court would still be required to proceed to step five and look at the purpose of the activity in question.

Applying Nelson's allegations of detention and torture to this step, his allegations would be considered violations of customary internationally protected human rights. Prolonged arbitrary detention and torture are recognized in the Restatement. In addition, both abuses would survive any challenge Saudi Arabia could make that they were not principles of customary international law. For example, being subject to prolonged arbitrary detention or being held without a judicial determination is prohibited by most comprehensive international human rights instruments. The right to be free from arbitrary detention is also pro-

---

200. A legal principle attains "customary" international status when foreign states generally recognize that a certain practice is obligatory. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4 (4th ed. 1990). Four elements of custom exist including, the requiring of certain duration, the uniformity and consistency of practice, the generality of practice, and a general practice that is accepted as law. Id. at 5-7.

201. RESTATEMENT, supra note 55, § 702(g) (offering the final option of "a consistent pattern of gross violations of internationally recognized human rights").

202. See supra note 17 and accompanying text.

203. See supra Step 2.

204. See infra Step 5.

205. RESTATEMENT, supra note 55, § 702(d), (e).

tected in the constitutions of 118 nations. The International Court of Justice, whose decisions are generally regarded as principles of customary international law, has also acknowledged the right to be free from arbitrary detention. In addition, the right to be free from torture and other degrading treatment is a universally recognized principle in a number of international instruments and at least eighty-one national constitutions.

Nelson alleged that he was detained after his arrest for over thirty-nine days without being told the reason for his detention or being brought before a judicial tribunal. Additionally, Nelson alleged that Saudi law enforcement officials tortured him and confined him to an overcrowded, rat-infested cell area where he often had to fight other prisoners for food. These allegations clearly suggest international violations of prolonged arbitrary arrest and detainment, and torture or cruel and inhuman treatment. Thus, the courts would continue their inquiry to the final step.


210. Bassiouni, supra note 207, at 263 n.128 (listing the 81 state constitutions adopting the right to be free from torture).


5. Analyze the Reasons Alleged in the Complaint for the Activity Producing the Human Rights Violation

If the activity in question was alleged to have violated an internationally protected human right, Congress should instruct the courts to look behind the activity and analyze the alleged reasons or purpose for the activity. If the reasons for the activity were commercial, then the courts would have jurisdiction. If the activity were not for a commercial purpose, the state would receive immunity.

Admittedly, this would depart from the current FSIA requirement and recent case law. This test, however, would ensure that the intent of the FSIA is carried out. In addition, the test is applied in the midst of several safeguards. Specifically, prior to analyzing the purpose of the sovereign's activity, the court would already have determined that the cause of action involved the employment of an American citizen, that the sovereign had sufficient contacts with the United States, and that the sovereign allegedly violated an individual's internationally protected human rights.

Returning again to the facts of Nelson, the courts could then look behind the outward nature of the police activity and analyze whether the law enforcement activity was alleged to have been commercially motivated. Scott Nelson explicitly declared that his detention and torture resulted from his employment related activities. Specifically, Scott Nelson alleged he had repeatedly reported safety violations to the Saudi Arabian owned hospital but was told to ignore them. Refusing to ignore the violations, Nelson alleged he again reported the violations. As a direct result from this final report, Nelson alleged he was detained and tortured which left him permanently disabled. Thus, the Saudi law enforcement activity addressing commercially related problems would provide Scott Nelson and the American courts with jurisdiction.

216. Nelson, 113 S. Ct. at 1476. Because the case appeared before the Court on a motion to dismiss, the Court must assume the allegations in the complaint are true. United States v. Gaubert, 499 U.S. 315, 327 (1991).
218. Id.
219. Id.
C. Analysis of the Proposal

The enumeration of the five-part analysis would serve two purposes. First, it would ease the United States government's foreign policy concerns over the question of a foreign state's police activities. The government fears that "if police activities of foreign states are deemed commercial and questioned and punished in United States courts, it is likely the law enforcement conduct of the United States will also be called into account in foreign courts." By adopting this proposal, however, United States courts would only be judging those acts that were violations of international law, not law peculiar only to the United States. Thus, while United States law enforcement may be called into courts of other nations, it would only be for the violation of an internationally protected human right.

Second, enumeration of this proposal would send a clear, confident message to the international community that the United States will not tolerate abuses of internationally protected human rights. The United States acknowledges the importance of the protection of individual human rights within its boundaries. The contradiction of outlawing an act and then granting immunity when the outlaw is brought to court should not continue. Moreover, the United States, as a signatory to the United Nations Charter, is required to take joint and separate action to protect human rights. Thus, granting immunity to human rights violators breaches the United States' obligation to other members of the international community. Finally, this proposal would not deter states from seeking American citizens as employees because the states would be called into American courts only if they had violated an internationally protected human right. Rather, once adopted, this proposal would serve as notice that if a foreign state chooses to enter the marketplace, abuse American citizens, and deny them their internationally protected human rights, it will be held responsible in United States courts.

The weakness of the proposal lies with the uncertainty of what constitutes "international law" and the United States courts' competency to

220. Petitioners' Brief at 25, Nelson (No. 91-522). The government continues, stating "if the prevailing law in this country is that foreign police activity can be judged by our standards, it will be difficult or impossible for the United States successfully to claim immunity elsewhere." Id.

221. See Restatement, supra note 55, § 702.

222. Randall, supra note 26, at 100.

223. The Charter requires all members to "take joint and separate action" to bring about the "universal respect for, and observance of human rights and fundamental freedoms for all." U.N. Charter arts. 55(c), 56, reprinted in Rosenne, supra note 165, at 190.
make those ongoing determinations. By adopting the Restatement, this problem may be somewhat eliminated. Granted, it is doubtful there will ever be one single instrument defining the substance of what specifically constitutes international law. However, for now, in the interest of justice, this approach adequately balances the interests of a foreign state, the foreign policy of the United States, and the well-being of American citizens.

V. Conclusion

The United States must convey a clear and confident foreign policy message to the international community. Justice requires that American citizens have some judicial recourse when they are denied their internationally protected human rights. As foreign states increasingly recruit and hire American citizens, America needs to take proactive measures to protect its citizens. Thus, foreign policy and justice require that Congress amend the commercial activity exception to the FSIA. Justice demands it.

AMELIA L. McCARTHY

224. See supra notes 198-200 and accompanying text.