THE QUEST FOR JUSTICE FOR VICTIMS OF TERRORISM: INTERNATIONAL LAW AND THE IMMUNITY OF STATES IN CANADA AND THE UNITED STATES

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Introduction

On September 4, 1997, three suicide bombers killed five people and injured almost two hundred others at the Ben Yahuda Street pedestrian mall in Jerusalem. Among the injured were a Canadian, Sherri Wise, and three Americans, Diana Campuzano, Avi Elishis, and Greg Salzman. The attack occurred on the last day of a volunteer internship that Dr. Wise, a dentist, was completing at a dental clinic serving underprivileged children.[1] Hamas, which has since been recognized as a terrorist organization by Canada[2] and the United States,[3] claimed responsibility for the attacks. Six years later, on September 10, 2003, the U.S. District Court for the District of Columbia awarded Campuzano, Elishis, and Salzman tens of millions of dollars in damages against Iran due to its material support for Hamas.[4] Despite being successful in their claim against Iran, the plaintiffs in *Campuzano* faced the prospect of not receiving compensation because Iran had insufficient assets in the United States against which the judgment could be enforced. Fourteen years after the *Campuzano* plaintiffs "won" by securing a judgment against Iran, they moved a step closer to obtaining damages from Iran when the Court of Appeal for Ontario unanimously upheld in *Tracy (Litigation Guardian of) v Iranian Ministry of Information and*

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[1] See "Hamas suicide bombing victim files first Canadian lawsuit against Iran under new anti-terrorism laws" *The National Post* (29 September 2013), online: <nationalpost.com/news/canada/hamas-suicide-bombing-victim-files-first-canadian-lawsuit-against-iran-under-new-anti-terrorism-laws>; Notice of Civil Claim between Sherri Wise and the Islamic Republic of Iran and Iranian Ministry of Information and Security dated September 27, 2013, Supreme Court of British Columbia, Vancouver Registry [*Wise Civil Claim*].

[2] See Public Safety Canada, "Currently Listed Entities" (15 February 2018), online: <www.publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/lstd-ntts/crrnt-lstd-ntts-en.aspx> (accessed 20 March 2018).

[3] See U.S. Department of State, Bureau of Counterterrorism, "Foreign Terrorist Organizations", online: <www.state.gov/j/ct/rls/other/des/123085.htm> (Hamas has been recognized as a "Foreign Terrorist Organization" by the United States since 8 October 1997).

[4] *Campuzano v Islamic Republic of Iran*, 281 F Supp (2d) 258 (DC 2003) [*Campuzano*] (The Court awarded compensatory damages of over $18 million to Campuzano, $12 million to Elishis, and $10 million to Salzman. Punitive damages of $300,000,000 were also awarded to the eight plaintiffs based on the principle of awarding punitive damages of three times Iran's annual expenditure on terrorism, which was recognized as $100 million. Due to U.S. legislation prohibiting awarding punitive damages against states directly [but permitting them against state agencies], the punitive damages were awarded against Iranian agencies named as defendants).

Security[5] the finding of the Ontario Superior Court of Justice[6] that the U.S. *Campuzano* judgment (plus nine others[7] in favour of over 100 U.S. plaintiffs) could be enforced against Iranian assets in Canada. In March 2018, the Supreme Court of Canada dismissed Iran's application for leave to appeal, rendering the Court of Appeal's decision final.[8]

Tracy (Appeal) is noteworthy because it was the first case decided under Canada's *Justice for Victims of Terrorism Act*.[9] With the *JVTA*, Canada joined the United States as the only states in the world that have implemented legislation permitting domestic civil claims by victims of terrorism abroad against foreign states that have been designated as sponsors of terrorism. While denying states immunity from such claims has a firm moral foundation, it raises a number of issues that will be explored in this paper. Among these issues is whether *Tracy (Appeal)* has resulted in Canada violating Iran's right to jurisdictional immunity under international law. As the 2012 decision of the International Court of Justice (ICJ) in *Jurisdictional Immunities of the State (Greece Intervening)* suggests, there is a strong argument that denying jurisdictional immunity to states in these circumstances violates current customary international law.[10] For the law to evolve to permit such claims, states will need to recognize more consistently that they do not enjoy jurisdictional immunity in these circumstances. Whether international law will evolve is questionable, as there may be compelling reasons for states to resist this evolution, including their concern that it may erode state sovereignty and risk negative consequences for international relations. The experience of victims in the United States (and, potentially, Canada) may also lead states to conclude that civil claims are not an effective means of achieving justice for victims of terrorism.

The paper begins with an overview of international law and the principle of state immunity, which is included to provide a necessary introduction for readers who are unfamiliar with these topics. Part two assesses the practice of Canada and the United States by examining the legislated exceptions to state immunity that allows claims against foreign states that sponsor terrorism, as well as the decision in *Tracy (Appeal)*. Part three returns to international law and explores the decision of the ICJ in *Jurisdictional Immunities*.[11] This examination calls into question whether, through

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[5] *Tracy (Litigation Guardian of) v Iranian Ministry of Information and Security*, 2017 ONCA 549, 415 DLR (4th) 314 [*Tracy (Appeal)*].

[6] *Tracy (Litigation Guardian of) v Iranian Ministry of Information and Security*, 2016 ONSC 3759, [2016] OJ No 3042 [*Tracy (Sup Ct)*].

[7] See *ibid* at paras 6–35 (there were five separate motions brought in Ontario by Iran to set aside or stay judgments in Canada that recognized and permitted the enforcement of twelve judgments of U.S. courts against Iran, the Iranian Ministry of Information and Security, and the Islamic Revolutionary Guard Corps as a result of eight terrorist attacks occurring between 1983 to 2002).

[8] *Tracy (Appeal)*, *supra* note 5 (leave to appeal to SCC refused 15 March 2018, without reasons).

[9] *Justice for Victims of Terrorism Act*, SC 2012, c 1 at s 2 [*JVTA*].

[10] *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, [2012] ICJ Rep 99 [*Jurisdictional Immunities*].

[11] *Ibid*.

Tracy (Appeal), Canada has violated Iran's right to immunity under current customary international law. Part four considers the potential for Canada to be a "custom breaker" leading the way towards the recognition of a new exception to state immunity under international law. Since an evolution in international law would require additional states to embrace the legality of such claims, part five addresses the risks that may result from allowing civil claims against states and part six canvasses alternative means for achieving justice for victims of state-sponsored terrorism and other international crimes.

The quest for justice for victims is unarguably laudable. Deterring heinous violations of individual rights and achieving justice for victims ought to be goals toward which the international community strives. As such, there is a strong moral argument that it is appropriate and legitimate to hold states accountable for their wrongs through civil claims in domestic courts and that it is incumbent upon all states to support lifting immunity to allow for such claims. However, as this paper demonstrates, since international law is created by states, it may not always result in just outcomes; despite Canada's laudable intentions, its legislation allowing for claims against foreign states designated as sponsors of terrorism is likely inconsistent with the current international law. *Jurisdictional Immunities* and the recent reaction of states to U.S. practice suggest that international law does not presently support an exception to state immunity for claims alleging violations of fundamental individual rights committed outside of the forum state – including violations arising from state-sponsored terrorism.

Since the scope of state immunity remains defined by customary international law in accordance with state practice, whether the law will evolve to permit such claims depends on states accepting a new exception to state immunity. Canadian legislators should determine if Canada wants to help spur an evolution in international law to allow for such claims. If Canada wants to be an effective leader on this issue, it should encourage other states to accept that state sovereignty must yield to efforts to ensure respect for individual rights and that international law should evolve so that states are not entitled to jurisdictional immunity when they violate fundamental human rights. An assessment of the potential risks that arise from allowing claims against states suggests, however, that it is overly optimistic to conclude that an evolution in the law will be forthcoming in the near future. Rather than align with what is considered just and fair from a moral perspective, international law may reflect the assessment by states of what rules best serve their interests. Although states may be sympathetic to the plight of victims of state-sponsored terrorism (and other serious violations of human rights), states may hesitate to recognize a new exception for a number of reasons, including the risk that permitting such claims may erode state sovereignty and pose undesirable consequences for international relations. Further arguments may be raised against recognizing a new exception if the benefit of such claims for victims is largely symbolic when lengthy, costly, and uncertain litigation results in judgments that are unenforceable. This paper concludes that, while an evolution in international law admitting a new exception may not occur in the near future and civil claims against foreign states may be unlikely to achieve accountability, the international community of states should still strive towards more fully respecting and securing individual rights. It is incumbent on states to work towards achieving

justice by pursuing alternatives to civil claims, including criminal prosecutions and meaningful sanctions against individuals who violate the fundamental rights of individuals and the states on behalf of which such individuals act or by which they are supported.

I. State Immunity from Enforcement Jurisdiction Under International Law

State immunity is a complex issue on which manuscripts have been written.[12] Since a fulsome examination of state immunity is beyond the scope of this paper, only a brief overview of state immunity will be provided here. This part provides an introduction to international law before turning to state immunity in order to assist with establishing why Canada's denial of state immunity pursuant to the *JVTA*[13] may challenge current international legal principles. Although there has been increasing recognition of the rights of individuals at an international level, the limited potential for individual rights to be secured through legal means is evident when efforts to achieve justice run counter to long-standing principles of a state-centric international legal system.

(a) International Law and Its Binding Obligations for States

Modern public international law has, historically, been state-centric, with states being its predominant subjects and authors. States are the subjects of international law because the law primarily gives rise to binding obligations for states and thereby restricts what actions one state may take vis-à-vis another state and, in some cases, individuals or groups of individuals. States are the authors of public international law because they create international law. This "positivist"[14] view of international law as created by states is reflected in the primary sources of international law: conventions (also commonly known as treaties) and customary international law.[15] Treaties are

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[12] See e.g. Hazel Fox and Philippa Webb, *The Law of State Immunity*, 3rd ed (New York: Oxford University Press, 2013) [Fox & Webb, *The Law of State Immunity*]; James Cooper-Hill, *The Law of Sovereign Immunity and Terrorism* (New York: Oxford University Press, 2006); Ernest K. Bankas, *The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts* (Berlin: Springer, 2005).

[13] *JVTA*, *supra* note 9.

[14] Modern conceptions of international law reflect a largely "positivist" theory of the formation of international law as created by states for states, rather than a "naturalist" view according to which it is understood that rules of international law exist and are waiting to be identified. For a more detailed discussion, see e.g. Stephen C. Neff, "A Short History of International Law" in Malcolm D. Evans, ed, *International Law*, 2nd ed (New York: Oxford University Press, 2006) at ch 1; John H. Currie, *Public International Law*, 2d ed (Toronto: Irwin Law, 2008) at ch 1 [Currie, *Public International Law*].

[15] See *Statute of the International Court of Justice*, being part of *Charter of the United Nations and the Statute of the International Court of Justice*, 26 June 1945, Can TS 1945 No 7 [*Statute of the ICJ*] (generally recognized as laying out the sources of international law: "[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; subject to the provisions of Article 59 [that decisions of the Court are only

international agreements negotiated by states. The necessity of state consent to international law is illustrated through how treaties operate: treaties are only binding on states that have formally agreed to the treaty-based rules by signing and ratifying the specific treaty and, even then, these rules are only binding with respect to the mutual relations among states that are party to the treaty in question (and, even then, only to the extent that the state has not made a reservation to certain aspects of the treaty).[16]

At present, there is no treaty in effect that provides a binding source of rules regarding the jurisdictional immunity of states.[17] As a result, these rules are found in customary international law.[18] Customary international law is formed when there is sufficient uniformity of practice among states coupled with their *opinio juris*, which is evidence that the state believes that the law obliges (or, perhaps, does not prohibit) the act or omission of the state in question.[19] Once formed, these rules may have sweeping effect, as customary international law is generally[20] binding on all states regardless of whether a specific state has engaged in the practice underlying the rule.

Some rules of international law fall into the category of *jus cogens*.[21] These rules may be considered the pinnacle of international law, as they are so-called

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binding "between the parties and in respect of that particular case"], (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law", art 38(1)).

[16] For a discussion of treaties as sources of law, see generally Currie, *Public International Law*, *supra* note 14 at chs 4, 6.

[17] *United Nations Convention on Jurisdictional Immunities of States and Their Property*, GA Res A/59/38, Annex, UNGAOR, 59th Sess, Supp No 49, UN Doc A/59/49 (adopted by the U.N. General Assembly on 2 December 2004, not yet in force) [*U.N. Convention on Jurisdictional Immunities of States*] (as discussed more fully at note 61 and surrounding text, this treaty is not yet in force).

[18] *Statue of the ICJ*, *supra* note 15 at art 38(1)(b).

[19] See e.g. *North Sea Continental Shelf (Germany v Denmark and the Netherlands)*, [1969] ICJ Rep 3 at paras 74, 77 (where the Court suggested that state practice should be "virtually uniform" and explained that, when determining the content of customary international law, "two conditions must be fulfilled. Not only must the acts [of states] concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitua1 character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty").

[20] Exceptions to customary international law being universally binding may exist for so-called "persistent objectors" to the specific rule or if the rule has formed on a regional or local basis; see e.g., Currie, *Public International Law*, *supra* note 14 at 199–201 (on persistent objectors), 201–205 (on "regional, special, or local" rules of customary international law).

[21] See Currie, *Public International Law*, *supra* note 14 at 98, n 52, 174–176 ("A *jus cogens* norm is a 'peremptory' or 'non-derogable' rule of international law that is so fundamental to the international legal order that it cannot be set aside or suspended, even by the express consent of states"); John H. Currie, Craig Forcese, Joanna Harrington and Valerie Oosterveld, *International Law: Doctrine, Practice and Theory*, 2d

peremptory norms that are binding on all states and are rules from which states may not derogate lawfully. Unlike general rules of customary international law that may be displaced by a contrary treaty-based rule or through sufficiently consistent and widespread contrary state practice, *jus cogens* may only be displaced by another peremptory norm of international law.[22] *Jus cogens* rules of international law are important for present purposes because state support of terrorism may lead to violations of the state's obligation to respect human rights, including the right to life. The right to life, which prohibits states from arbitrary killing, is embodied in every major human rights treaty[23] and may be considered a peremptory norm upon which the enjoyment of all other human rights depends.[24] The concept of *jus cogens* is also relevant because advocates of permitting civil claims against states often argue that states should not enjoy immunity when they are responsible for violating peremptory norms of international law.

When identifying rules of international law, recourse may be had to secondary sources, including decisions of international courts and the work of leading international law scholars.[25] Although the ICJ is often referred to informally as the "World Court," its decisions are only binding upon the states that are directly involved

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ed (Toronto: Irwin Law, 2014) at ch 2(E) [Currie et al, *International Law*]; but see Anthony D'Amato, "It's a bird, it's a plane, it's *jus cogens*" (1990) 6:1 Conn J of Intl L 1.

[22] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, art 31(1) (entered into force 27 January 1980) at art 53 ("A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character").

[23] See *Universal Declaration of Human Rights*, GA Res 217(III), UN GAOR, 3d Sess, UN Doc A/810 (1948) 71 at art 3; *International Covenant on Civil and Political Rights*, 23 March 1976, 999 UNTS 171 at art 6(1), *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 UNTS 217 at art 4; *American Convention on Human Rights*, 22 November 1969, 1144 UNTS 143 at art 4; *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 at art 2.

[24] See e.g. Kurt Herndl, "Forward" in B.G. Ramcharan, ed, *The Right to Life in International Law* (Boston: Martinus Nijhoff, 1985) at xi ("Of all the norms of international law, the right to life must surely rank as the most basic and fundamental, a primordial right which inspires and informs all other rights, from which the latter obtain their raison d'etre and must take their lead. Protection against arbitrary deprivation of life must be considered as an imperative norm of international law, which means not only that it is binding irrespective of whether or not States have subscribed to international conventions containing guarantees of the right, but also that the non-derogability of the right to life has a peremptory character at all times, circumstances and situations"); U.N. Commission on Human Rights, *General Comment No. 29: States of Emergency (Article 4)*, UN HRCOR, 72nd Sess, 1950th Mtg, UN Doc CCPR/C/21/Rev.1/Add. 11 (2001) at para 11 ("The proclamation of certain provisions of the International Covenant on Civil and Political Rights as being of a non-derogable nature, in article 4, paragraph 2, is to be seen partly as a recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant (e.g. articles 6 [the right to life] and 7 [the right to be free of torture or cruel, inhuman or degrading treatment or punishment)"); cited in Karinne Coombes, "Balancing Necessity and Individual Rights in the Fight Against Transnational Terrorism: 'Targeted Killings' and International Law" (2009) 27:2 Windsor YB Access Just 285 at 298–299.

[25] See *Statute of the International Court of Justice*, *supra* note 15 at art 38(1)(d) (the ICJ shall apply, "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law"); it should be noted that "the general principles of law recognized by civilized nations" may also be considered by the ICJ per art 38(1)(c).

in the case.[26] While court decisions and academic commentary may be useful for identifying the rules of international law that could apply to a future legal dispute, it should be noted that a court or scholar's interpretation of international law remains a secondary source; underscoring the positivist view of international law, state practice (with *opinio juris*) remains the means through which customary international law develops.

(b) International Law before Canadian Courts

Whether and to what extent international law will be considered and applied by domestic courts depends upon the legal structure of the jurisdiction in question.[27] In Canada, treaties are implemented through domestic legislation, which results in treaty-based rules becoming incorporated into Canadian law. While it may be somewhat unclear whether customary international law is directly applicable without formal legislative steps to "transform" or incorporate customary international law into domestic law, it is "probable" that customary international law is incorporated or received directly into domestic law.[28] The principle of legislative supremacy in Canada requires Canadian courts to give priority to domestic law when there is a conflict between domestic and international law;[29] as the Supreme Court of Canada has noted, "Canada's domestic legal order, as Parliament has framed it, prevails."[30]

With respect to state immunity from claims before Canadian courts, the Supreme Court has recognized that customary international law may be an interpretive aid when there is a question of whether and how international law applies to a matter before a Canadian court. In such instances, although there is a presumption that Canadian law will be consistent with international law, "[i]nternational law cannot be used to support an interpretation that is not permitted by the words of the [domestic]

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[26] *Ibid*, art 59.

[27] For a more detailed discussion for how international law may be received domestically see e.g. Eileen Denza, "The Relationship between International and National Law" in Malcom Evans, ed, *International Law* (2nd ed) (Oxford: Oxford University Press, 2014) at 422–428; Currie et al, *Interntaional Law*, *supra* note 21 at 539–541, 158-79; Currie, *Public International Law*, *supra* note 14 at ch 6.

[28] Currie, *Public International Law*, *ibid* at 226–235 (after a review of case law stating that "[t]o summarize, it can—still only cautiously—be concluded that, unless a statute or binding rule of precedent is expressly and irreconcilably to the contrary effect, a rule of customary international law will probably be deemed, *ipso jure*, to form part of the common law of Canada and to have direct domestic legal effect as such. As a logical corollary, existing statute and common law that does not expressly override inconsistent rules of customary international law will generally be interpreted by the courts in such a way as to conform to the latter. In this way, it is probable that while preserving the domestic legal system's ability, primarily through the legislative branch, to control the content of domestic law through express override of a customary rule" at 234, citations omitted).

[29] *Ibid* at 234–235 ("the legislative branch may, if it so chooses, violate or override customary international law. This flows from the basic constitutional principle of legislative supremacy which, although subject to constitutional imperatives, is not subject to any requirement of compliance with international law, whether of a customary or conventional nature").

[30] *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 SCR 176 [*Kazemi Estate*] at para 60, citations omitted; see also *R v Hape*, 2007 SCC 26, [2007] 2 SCR 292 at paras 53-54.

statute."[31] In addition, "the presumption of conformity [of Canadian legislation with international law] does not overthrow clear legislative intent… the presumption can be rebutted by the clear words of the statute under consideration."[32] Lacking evidence that legislators intended to legislate contrary to international law, the Supreme Court has noted that Canadian courts should take a cautious approach when assessing the possible legal effect of state practice that runs counter to a previously established rule of customary international law: "[p]articularly in cases of international law, it is appropriate for Canadian courts only to follow the 'bulk of the authority' and not change the law drastically based on an emerging idea that is in its conceptual infancy."[33]

(c) Evolving Rules of Customary International Law

Identifying rules of customary international law may be difficult when state practice runs counter to a rule that was previously considered well-settled. Since customary international law is created through consistent state practice and *opinio juris*, when state practice is in flux and states take different positions on the legality of a practice,[34] uncertainty may arise with respect to the significance of the practice and its effect on customary international law. Over time, customary international law may evolve in response to changing state practice. While a detailed analysis of how customary international law may evolve has been considered elsewhere,[35] the development and evolution of customary international law is important for present purposes because Canada, through Bill C-10,[36] which introduced the *JVTA*[37] and amended the *State Immunity Act*,[38] joined the United States and embarked upon state practice that may

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[31] *Kazemi Estate*, *supra* note 30 at para 60.

[32] *Ibid.*

[33] *Ibid* at para 108, citing *Jones v United Kingdom*, Nos 34356/06 and 40528/06, ECHR 2014 at para 213.

[34] It should be noted that contrary state practice, by itself, is not sufficient to undermine the rules of customary international law; see e.g. *Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)*, [1986] ICJ Rep 14 at para 186 ("The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of a new rule. If a State acts in a way that is prima facie incompatible with a recognized rule, but defends it conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule").

[35] See e.g. Suzanne Katzenstein, "International Adjudication and Custom Breaking by Domestic Courts" (2012) 62 Duke LJ 671.

[36] Canada, Bill C-10, *Safe Streets and Communities Act*, 1st Sess, 41st Parl, 2012, part 1 (as assented to 13 March 2012) ["Bill C-10"].

[37] *Ibid* at s 2.

[38] *Ibid* at ss 3-9.

depart from the traditional understanding of the scope of jurisdictional immunity that states enjoy under international law.

(d) An Overview of State Jurisdictional Immunity

Under international law, states enjoy immunity from being subjected to the jurisdiction of other states in many instances. While there are various aspects to jurisdiction (e.g., legislative or prescriptive jurisdiction[39] and enforcement jurisdiction) and who enjoys immunity (e.g., the immunity of the state as a legal person and the immunity of certain state officials while in office[40]), the focus of this paper is on state (or sovereign) immunity from enforcement jurisdiction. When a state is entitled to immunity from enforcement jurisdiction under international law, this jurisdictional immunity presents a legal bar to proceedings against the state.[41] Although jurisdictional immunity does not excuse or render lawful the state's violation of the law underpinning the claim against it, it will deprive courts in the forum state jurisdiction under international law to hear claims against the foreign state, including actions seeking to enforce judgments.[42]

State Immunity and the Sovereign Equality of States

The principle of state immunity under customary international law has been long-recognized; however, its scope and effect has been subject to modification over time as a result of changing state practice. State immunity is founded upon the principle of state sovereignty and the limited exceptions that have been accepted over time may be explained by the desire of states to preserve their sovereignty.[43]

State sovereignty is a foundational principle of modern international law from which the equality of each state flows. Its importance to the international community of states is reflected in the fact that the "sovereign equality" of states is one of the

[39] See e.g. Cedric Ryngaert, *Jurisdiction in International Law*, 2nd ed (New York: Oxford University Press, 2015).

[40] See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, [2002] ICJ Rep 3; Chanaka Wickremasinghe, "Immunities Enjoyed by Officials of States and International Organizations" in *International Law*, *supra* note 27 at 395–421.

[41] See Currie, *Public International Law*, *supra* note 14 at 364 ("State immunity is a narrowly focused but potent immunity in that it protects states from one another's enforcement jurisdiction…. [S]tate immunity, a long-established and universally recognized doctrine of customary international law, essentially blocks a state's courts from exercising jurisdiction over foreign states").

[42] *Ibid* ("This immunity extends to all phases of the judicial process, including interlocutory or interim preservation orders as well as post-trial execution measures and appeals").

[43] Reflecting the importance of sovereignty in this area, the discussion of jurisdiction and immunities in *International Law*, *supra* note 27 at Part IV: "The Scope of Sovereignty".

principles upon which the United Nations is based.[44] Sovereignty has historically helped to shield domestic affairs of states from outside interference and has been described by the unanimous U.N. General Assembly as meaning that "[all states] have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature."[45]

Affording states jurisdictional immunity helps to preserve their sovereignty because when one state subjects another state to its jurisdiction, this risks undermining the principle that they are sovereign equals; as John Currie explains, "[i]f all state are equal in international law, so the theory goes, no state should be able to subject another state to the process of its courts."[46] A further, "more informal and functional," rationale for state immunity is to assist with fostering friendly relations among states,[47] (which, by extension, may ultimately ease the way for peaceful settlement of disputes). The *U.N. Charter* may, again, underscore the importance of these aims: maintaining international peace and security is the first purpose of the United Nations, while the second is "to develop friendly relations among nations based on respect for the principle of equal rights."[48] There are, of course, limits to state sovereignty that are reflected through exceptions to state immunity. As the following section explores, states have, over time, shown a willingness to redefine when they are entitled to immunity under international law.

The Evolution of State Immunity from Absolute to Restrictive

Historically, there were no recognized exceptions to state immunity under international law. Pursuant to this absolute approach, regardless of the nature of the wrong being asserted, one state could never be subject to the jurisdiction of another state's courts unless the foreign state waived its entitlement to immunity because "[a]ny subjection of a foreign state to domestic courts was seen as incompatible with sovereign equality."[49] Over time, however, a "restrictive" approach to state immunity

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[44] See *Charter of the United Nations and the Statute of the International Court of Justice*, *supra* note 15 at art 2(1) ("The Organization is based on the principle of the sovereign equality of all its Members").

[45] *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation in accordance with the Charter of the United Nations*, GA Res 2625 (XXV), UNGAOR, 25 Sess, UN Doc A/Res/2625/XXV (1970) (the resolution goes on to provide for the elements of sovereign equality as: "(a) States are judicially equal; (b) Each State enjoys the rights inherent in full sovereignty; (c) Each State has the duty to respect the personality of other States; (d) The territorial integrity and political independence of the State are inviolable; (e) Each State has the right freely to choose and develop its political, social, economic and cultural systems; (f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States").

[46] Currie, *Public International Law*, *supra* note 14 at 365–366.

[47] *Ibid* at 366.

[48] *Charter of the United Nations and the Statute of the International Court of Justice*, *supra* note 15 at arts 1(1)–(2).

[49] Currie et al, *International Law*, *supra* note 21 at 539–541; *Kazemi Estate*, *supra* note 30 at para 39.

emerged as exceptions developed under customary international law as a result of state practice (and corresponding *opinio juris*).[50]

One of the primary exceptions to state immunity that arose was based on the nature or context of the alleged wrongdoing, according to which a state is entitled to immunity with respect to its official acts (often referred to as "*acta jure imperii*"), but not when its actions are akin to those of a private individual (known as "*acta jure gestionis*").[51] Hazel Fox explains the rationale for this exception: with the "increased participation of States in trading activities following the First World War, there was much dissatisfaction with the denial of legal redress against States for their commercial activities."[52] As a result, courts in Italy, Belgium, and Egypt "led the way in adopting a restrictive doctrine construing international law as requiring immunity for proceedings relating to acts committed in exercise of sovereign authority… and not for trading activities or acts which a private person may perform."[53]

In l976, the United States became the first state to legislate a restrictive approach to state immunity.[54] Since then, a number of states,[55] including Canada,[56] have adopted a restrictive approach by enacting legislation laying out a general principle of state immunity, subject to specific, enumerated exceptions. In other states, a restrictive approach has developed through domestic court decisions, while a minority of states have retained an absolute approach to state immunity.[57] Although state practice is not uniform, in many instances, the restrictive approach recognizes exceptions reflecting a lack of immunity for private acts when a foreign state is involved in a commercial relationship or for "territorial torts" when a foreign state is responsible for a private wrong committed within the territory of the state in which the claim is brought.[58] Examples of claims relying on the territorial tort exception include allegations that foreign states have violated employment agreements with embassy staff or when a claimant seeks to hold a foreign state vicariously liabile for driving or other offences committed by the state's employees.

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[50] For a discussion of this evolution, see Hazel Fox, "International Law and the Restraints on the Exercise of Jurisdiction by National Courts of States" in *International Law*, *supra* note 27 at 365–368 [Fox, "Restraints"].

[51] See e.g. Fox and Webb, *The Law of State Immunity*, *supra* note 12 at 33–35.

[52] Fox, "Restraints", *supra* note 50 at 366-67; see also Fox and Webb, *The Law of State Immunity*, *supra* note 12 at 131–164.

[53] Fox, "Restraints", *supra* note 50.

[54] See *ibid* at 367 (the approach had been signalled in 1952 with the U.S. State Department's so-called "Tate Letter").

[55] See *Jurisdictional Immunities*, *supra* note 10 at para 70 (the Court identified ten states that have legislation regarding state immunity: Canada, the United States, the United Kingdom, South Africa, Australia, Singapore, Argentina, Israel, Japan, and Pakistan).

[56] *State Immunity Act*, RSC 1985, c S-18 at s 3(1) (providing in s 3(1) that "[e]xcept as provided in this Act [see ss 4-6.1], a foreign state is immune from the jurisdiction of any court in Canada").

[57] See e.g. Fox and Webb, *The Law of State Immunity*, *supra* note 12 at 321.

[58] See *ibid*.

State Immunity Under Conventional International Law

Currently, there is no international treaty that codifies the rules of state immunity. While the International Law Commission ("ILC") worked on this issue between 1977 and 2004,[59] the treaty arising from these efforts, the *United Nations Convention on Jurisdictional Immunities of States and Their Properties*,[60] has not yet come into force. Having achieved only 21 of 30 ratifications necessary for the Convention to enter into force,[61] it is questionable whether the treaty will enter into force. While the Convention is not (yet) binding, it is worthwhile to explore its provisions briefly; it may be telling that the Convention, which is the result of lengthy consideration of state immunity, does not provide an exception that would clearly allow for claims against states that have supported terrorist activities that harm individuals outside of the state in which the claim is being brought.

The Convention, which only applies to civil claims, lays out a restrictive approach to state immunity.[62] Part III of the Convention enumerates the "proceedings in which state immunity cannot be invoked," which are consistent with the exceptions outlined above: commercial transactions;[63] contracts of employment;[64] territorial torts;[65] proceedings related to the ownership, possession, and use of property;[66] intellectual and industrial property claims;[67] proceedings related to the state's participation in companies or other "collective bodies;"[68] and proceedings related to ships owned or operated by the state.[69]

While it would be imprudent to read too much into the existence of the Convention that has only been ratified by a limited number of states, the Convention may be considered evidence that state immunity is still generally interpreted

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[59] See International Law Commission, "Analytical Guide to the Work of the International Law Commission: Jurisdictional immunities of States and their property", online: <legal.un.org/ilc/guide/4_1.shtml> (detailing the work of the ILC on the Convention).

[60] *U.N. Convention on Jurisdictional Immunities of States*, *supra* note 17.

[61] See United Nations Treaty Collection, "13. United Nations Convention on Jurisdictional Immunities of States and Their Property", online: <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-13&chapter=3&clang=_en>.

[62] *UN Convention on Jurisdictional Immunities of States*, *supra* note 17 at art 5 ("[a] State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention").

[63] *Ibid* at art 10.

[64] *Ibid* at art 11.

[65] *Ibid* at art 12 (the Convention does not use the term "territorial tort" but applies to personal injuries and damage to property that occurred "in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission,").

[66] *Ibid* at art 13.

[67] *Ibid* at art 14.

[68] *Ibid* at art 15.

[69] *Ibid* at art 16.

restrictively under current customary international law.[70] Whether its exceptions exhaustively reflect customary international law may be subject to debate;[71] as Lori Fisler Damrosch has maintained, a number of the exceptions contained within the Convention could reflect customary international law,

> but probably only… those that represented the lowest common denominator of state practice at the time the Convention was negotiated, such as acceptance that a state is not entitled to immunity for commercial transactions as regards disputes falling within the forum's jurisdiction under applicable rules of private international law.[72]

Reflecting on the *U.N. Convention on Jurisdictional Immunities of States*, Fox and Philippa Webb conclude that "a number of areas relating to the application of State immunity… remain controversial or unsupported by general State practice."[73] In their view, these areas of controversy include when state immunity is denied for "contravention of international law, particularly a violation of *jus cogens*" because there is a "lack of acceptance among States" that violations of international law provide "a basis for an exception to State immunity."[74]

What is clear, however, is that state immunity has evolved in response to state practice. The next section will explore the practice of Canada and the United States, as the only states that have legislated an exception to state immunity for states that have sponsored terrorism. As will be discussed more fully below, arguments have been made in favour of these exceptions on the basis that state immunity is outdated and should not be available where states have violated the fundamental rights of individuals.[75] Despite the moral appeal of such arguments, as the majority of the ICJ in *Jurisdictional Immunities* makes clear, it is unlikely that such an exception exists

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[70] See e.g. Christian Tomuschat, "The International Law of State Immunity and Its Development by National Institutions" (2011) 44 Vand J Transnation'l L 1105 at 1118-19 ("The Convention has yet to enter into force, but there is general agreement that as a reflection on the restrictive theory of state immunity its provisions reflect current customary international law"); Fox and Webb, *The Law of State Immunity*, *supra* note 12 at 321 ("independently of the [*U.N. Convention on Jurisdictional Immunities of States*], the overwhelming majority of States supports a restrictive doctrine. In the last decade it is increasingly rare to find a case where a national court confronted with a claim related to a commercial transaction involving a State trading entity has rejected jurisdiction on the basis of an absolute rule of State immunity").

[71] See e.g. Lori Fisler Damrosch, "Changing the International Law of Sovereign Immunity Through National Decisions", (2011) 44 Vand J Transnat'l L 1185 at 1190 (arguing that the "number[] [of states ratifying the Convention] fall[s] far short of what is typically considered reliable evidence that a treaty reflects customary international law binding on nonparties to the treaty").

[72] *Ibid* ("it is implausible that a treaty negotiated in full awareness that it was not congruent with existing immunity law and practice of leading states [e.g., the United States] could be understood as establishing new rules of customary international law at odds with the [U.S.] FSIA and judicial decisions in the United States and other countries").

[73] Fox and Webb, *The Law of State Immunity*, *supra* note 12 at 321.

[74] *Ibid*.

[75] See e.g. Francois Larocque, "Spleen at Ideal: les Immunites Jurisdictionnelles en Droit Canadien" (2016) 57 C de D 311; *Jurisdictional Immunities*, *supra* note 10, Cançado Trindade J, dissenting; Yusuf J, dissenting; and Gaja J (ad hoc), dissenting.

under customary international law at present. At best, customary international law may be in a state of flux; while a new exception to state immunity may be emerging, it is not yet clear that it will garner sufficient support among states to form a new rule of customary international law.

II. Terrorism Exceptions to State Immunity in Canada and the United States

As noted above, Canada and the United States are the only states that have legislation expressly denying jurisdictional immunity for civil claims against foreign states that have supported terrorism outside of their respective territories. Because the United States was the first state to introduce such an exception and lessons may be drawn from its experience, this section will examine the U.S. legislation before turning to Canadian legislation.

(a) The Terrorism Exception in the U.S. *Foreign State Immunities Act*

The United States adopted a restrictive approach to foreign state immunity in 1976 through the *Foreign State Immunity Act*,[76] which took out of the hands of its executive branch the responsibility for determining when foreign states were entitled to immunity before U.S. courts.[77] The *FSIA* was designed to provide immunity for claims related to official acts of foreign states while denying immunity with respect to private or commercial acts.[78]

The *FSIA* has been amended on a number of occasions relevant for present purposes, including in 1996, through the *Antiterrorism and Effective Death Penalty Act.*[79] The *AEDPA* introduced a new exception (then section 1605(a)(7), but renumbered in 2008 to section 1605(A)[80]) to allow for civil claims against foreign states[81] with respect to injuries or death arising from specified acts that are often linked to terrorism (namely, "torture, extrajudicial killing, aircraft sabotage, [and] hostage

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[76] *Foreign Sovereign Immunities Act*, USC tit 28 s 1330, 1391(f), 1441(d) and 1602-1611 (1976) [*FSIA*].

[77] See e.g. Fox and Webb, *The Law of State Immunity*, *supra* note 12 at 238 ("A principal purpose of the legislation was to transfer the determination of sovereign immunity from the executive to the judicial branch, thereby minimizing the foreign policy implications and providing clearer legal standards and due process procedures"); Naomi Roht-Arriaza, "The Foreign Sovereign Immunities Act and Human Rights Violations: One Step Forward, Two Steps Back" (1998) 16 BJIL 71 at 72–73.

[78] Fox and Webb at 238-39, citing Legislative History of the Foreign Sovereign Immunities Act 1976, House Report No 94-1487, 94th Cong, 2d Sess.

[79] *Antiterrorism and Effective Death Penalty Act of 1996*, Pub L No 104-132, 110 Stat 1214 (1996) [*AEDPA*].

[80] Fox and Webb, *The Law of State Immunity*, *supra* note 12 at 278.

[81] Since 2008, the U.S. *FSIA* also specifically provides that claims may be brought against a foreign state's "agencies and instrumentalities"; see *Rubin v Iran*, No 16–5342 (1 February 2018) (slip opinion) at 6 [*Rubin*].

taking").[82] An exception to state immunity also exists for injuries or death arising from "the provision of material support or resources" for the foregoing acts, so long as the "act or provision of material support is engaged in by an official, employee, or agent of [a] foreign state while acting within the scope of his or her office, employment or agency."[83] As Naomi Roht-Arriaza explains, "[p]rovision of material support or resources is defined broadly to include provision of currency or other financial securities, financial services, lodging, training, safehouses, weapons, personnel and the like."[84]

The effect of section 1605(A) is significantly limited because it only permits claims against states that have been formally designated by the U.S. Department of State as a "state sponsor of terrorism."[85] Additional limitations exist because "either the claimant or the victim must have been a national of the U.S. when the act occurred" and "the claimant must afford the foreign state a reasonable opportunity to arbitrate the claim."[86] As will be discussed more fully below,[87] these restrictions suggest that, when drafting the *AEDPA*, the United States was mindful of, and was attempting to limit, the potential for section 1605(A) claims to have negative consequences for its international relations.

(b) State Immunity from Enforcement of Judgments under the U.S. *FSIA*

As previously noted, jurisdictional immunity applies to all court processes, including actions seeking to enforce judgments against a state's assets. The U.S. *FSIA* reflects this fact, as it specifically adopts a restrictive approach to the jurisdictional immunity of foreign state property by recognizing immunity to attachment and enforcement,[88] subject to specific exceptions laid out in section 1610.

The primary exception for attachment and enforcement in the *FSIA* prior to the *AEDPA* amendments was for commercial property held in the United States that "is or was used for the commercial activity upon which the claim [being enforced] is based."[89] The *AEDPA* expanded the amendments to allow specifically for the execution of section 1605(A) judgments against "property in the United States… used for a commercial activity in the United States."[90] While this amendment provided for

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[82] *FSIA*, *supra* note 76 at s 1605(A)(1)(a).

[83] *Ibid*.

[84] Roht-Arriaza, *supra* note 77 at 78.

[85] See *FSIA*, *supra* note 76 at s 1605A.

[86] *Ibid* at s 1605(a)(7)(B)(ii); Roht-Arriaza, *supra* note 77 at 79, n 58.

[87] See Part V(b).

[88] See *FSIA*, *supra* note 76 at s 1602.

[89] *Ibid* at s 1610.

[90] *Ibid* at s 1610(a)(7) (foreign state property that is used for a commercial activity in the United States is not immune from attachment and execution of s 1605A judgments against the foreign state).

an expanded opportunity for the enforcement of section 1605(A) judgments because it does not require the property to related to the underlying claim,[91] in September 2017, the U.S. Supreme Court resolved in *Rubin v Iran* conflicting decisions of lower U.S. courts and rejected the argument that the nature of the property at issue is not relevant when determining whether section 1605(A) could be enforced.[92] As a result, section 1605(A) claims may only be enforced against a foreign state's U.S.-based commercial property.[93] The limited ability for claimants to enforce section 1605(A) judgments is relevant because it, again, may reflect the desire of U.S. legislators to ensure that the negative effects of the terrorism exception to state immunity are limited and the exception conforms to international law as much as possible even though, as discussed below,[94] it raises a substantial barrier to obtaining compensation for victims of state-sponsored terrorism.

(c) The *Justice Against Sponsors of Terrorism Act* Amendments to the U.S. *FSIA*

The U.S. *FSIA* was further amended in 2016 through the *Justice Against Sponsors of Terrorism Act* to introduce broader exceptions to the immunity of states. The impetus for the *JASTA* amendments were failed attempts by victims of alleged state-sponsored terrorism to bring claims against foreign states that were not listed as sponsors of terrorism. Such claims are exemplified by civil claims against Saudi Arabia for its alleged support of the September 11, 2001 terrorist attacks in the United States that were dismissed due to Saudi Arabia's immunity.

The *JASTA* introduced a new provision to the *FSIA*, section 1605(B), providing an additional exception to state immunity for civil claims seeking monetary damages for "physical injury to person or property or death occurring in the United

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[91] Fox and Webb, *The Law of State Immunity*, *supra* note 12 at 278.

[92] *Rubin*, *supra* note 81 (the claimants in *Rubin* attempted to use s 1610(g) to enforce judgments against non-commercial assets of Iran located in the United States. Introduced in 2008, this provision was intended to codifying the ability for plaintiffs to attach and enforce section 1605(A) judgments to property owned by an "agency" or "instrumentality" of a state that has been designated as a sponsor of terrorism.)

[93] See *FSIA*, *supra* note 76 at s 1610(b)(3) ("any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5) or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based, or

(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based").

[94] See discussion at Part V(b) of this article.

States and caused by (1) an act of international terrorism… in the United States."[95] Subsection 1605(B)(2) also purports to extend the territorial tort principle beyond the United States, as it provides an exception to state immunity with respect to "a tortious act or acts of the foreign state, or of any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, regardless where the tortious act or acts of the foreign state occurred."[96]

Notably, section 1605(B) does not limit claims to states that have been designated as sponsors of terrorism, which significantly increases the potential for victims of state-sponsored terrorism to bring claims against foreign states before U.S. courts. Reflecting the controversial nature of the *JASTA* amendments due to concerns regarding the effects on U.S. foreign relations, the U.S. Department of State and President Obama, among others, opposed the new exceptions to state immunity.[97] Ultimately, the exceptions only came into effect after Congress overrode President Obama's veto of the *JASTA*.[98]

The *JASTA* amendments may widen the ability for victims to bring claims against foreign states; however, unless further amendments to the *FSIA* are made, they may offer only symbolic justice because the *JASTA* did not broaden the scope of the exception for immunity to attachment and enforcement of foreign state property to section 1605(B) claims.[99] As the U.S. Supreme Court recently confirmed in *Rubin*,

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[95] *Justice Against Sponsors of Terrorism Act,* 114th Cong s 2040 (2016) at s 3 [*JASTA*].

[96] *Ibid* at s 1605B(2); "international terrorism" for the purposes of this exception is defined in Title 18, United States Code ("(1) the term "international terrorism" means activities that—

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be 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; and

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum").

[97] Jennifer Steinhauer, Mark Mazzetti, and Julie Hirschfeld Davis, "Congress Votes to Override Obama Veto on 9/11 Victims Bill" *New York Times* (28 September 2016), online: <www.nytimes.com/2016/09/29/us/politics/senate-votes-to-override-obama-veto-on-9-11-victims-bill.html> ("Mr. Obama angrily denounced [Congress overriding his veto to make the *JASTA* effective], saying lawmakers had been swayed to cast a political vote for legislation that set a 'dangerous precedent' with implications they did not understand and never debated" and "[t]here were swift complications. Within hours of their vote, nearly 30 senators signed a letter expressing some reservations about the potential consequences of the law, including the prospect that the United States could face lawsuits in foreign courts 'as a result of important military or intelligence activities'").

[98] *Ibid*.

[99] See e.g. Ingrid Wuerth, "Justice Against Sponsors of Terrorism Act: Initial Analysis" *Lawfare* (29 September 2016), online: <www.lawfareblog.com/justice-against-sponsors-terrorism-act-initial-analysis>.

there must be an express exception under U.S. law for the attachment and execution of judgments against assets of foreign states held in the United States. However, at present, there is no legislated exception for section 1605(B) judgments. As a result, while section 1605(B) enables victims to bring civil claims against states that have not been designated as sponsors of terrorism, the property of such states is likely to be immune from attachment and enforcement.[100] Significant impediments to U.S. victims receiving redress for their injuries resulting from state-sponsored terrorism will therefore persist unless further amendments are made to the U.S. *FSIA*.

(d) Canada's Bill C-10 and the *Justice for Victims of Terrorism Act*

In 1982, Canada adopted a restrictive approach to state immunity through the *State Immunity Act*,[101] which recognizes the immunity of states from the jurisdiction of Canadian courts, subject to express exceptions.[102] As the Supreme Court of Canada has concluded, for Canadian courts, "the *SIA* lists the exceptions to state immunity exhaustively" and, where there are arguments that customary international law may support lifting immunity in other instances, "Canada's domestic legal order, as Parliament has framed it, prevails."[103]

Prior to 2012, the *SIA* provided for exceptions consistent with those generally recognized under customary international law identified above, as the Act stated that "a foreign state is immune from the jurisdiction of any court in Canada"[104] except where: (i) a foreign state waives its immunity or submits to the Canadian court's jurisdiction;[105] (ii) the claim relates to a foreign state's commercial activities;[106] or (iii) the proceedings relate to personal injuries or property damage within Canada (i.e., a territorial tort).[107]

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[100] See *ibid*.

[101] *State Immunity Act*, RSC 1985, c S-18 [*SIA*].

[102] *Ibid* at ss 3(1)–(2) ("Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada", s 3(1); In any proceedings before a court, the court shall give effect to the immunity conferred on a foreign state by subsection (1) notwithstanding that the state has failed to take any step in the proceedings", s 3(2)).

[103] *Kazemi Estate*, *supra* note 30 at para 60.

[104] *SIA*, *supra* note 101 at ss 3(1)–(2).

[105] *Ibid* at s 4.

[106] *Ibid* at s 5.

[107] *Ibid* at s 6.

On March 13, 2012, Bill C-10[108] came into force, which introduced the *Justice for Victims of Terrorism Act*[109] and amended the *SIA*.[110] Designed to "deter terrorism by establishing a cause of action that allows victims of terrorism to sue perpetrators of terrorism and their supporters,"[111] Bill C-10 allows civil claims to be brought against designated foreign states on account of their support of terrorism. Parliament's intention to provide for a new, limited exception to state immunity is apparent through the *JVTA*'s preamble, which provides that "certain states that support terrorism should not benefit from state immunity."[112]

Bill C-10 also introduced amended the *SIA*, introducing a new provision, section 6.1, which allows for civil claims against states that have been listed as sponsors of terrorism "on the recommendation of the Minister of Foreign Affairs" when the Minister "is satisfied that there are reasonable grounds to believe that the foreign state supported or supports terrorism."[113] Claims may be brought by "any person that has suffered loss or damage in or outside of Canada on or after January 1, 1985"[114] for acts within or outside of Canada that amount to "terrorism activity" under Part II.1 of the *Criminal Code*.[115] To bring a claim under section 6.1, the plaintiff must

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[108] Bill C-10 (Part I), *Justice for Victims of Terrorism Act*, 1st Sess., 41th Parl., 2011. For a fulsome discussion of a substantially similar bill that had previously been before Parliament, see Prasanna Ranganathan, "Survivors of Torture, Victims of Law: Reforming State Immunity in Canada by Developing Exceptions for Terrorism and Torture" (2008) 71 Saskatchewan Law Review 343.

[109] *Ibid.*

[110] *SIA*, *supra* note 101.

[111] *JVTA*, *supra* note 9 at s 3.

[112] *Ibid* at preamble.

[113] See *SIA*, *supra* note 101 at s 6.1.

[114] This date is largely seen as being selected in order to allow for claims by victims of the Air India bombings, which occurred in June 1985.

[115] *Criminal* Code, RSC 1985, c C-46 (The *Criminal Code* adopts a two-pronged approach to defining offences related to "terrorism activity" by enumerating offenses based on international statues in s 83.01(1)(a) and providing a general definition in s 83.01(1)(b) (the latter of which includes "an act or omission, in or outside Canada, (i) that is committed (A) in whole or in part for a political, religious or ideological purpose, objective or cause, and (B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and (ii) that intentionally (A) causes death or serious bodily harm to a person by the use of violence, (B) endangers a person's life, (C) causes a serious risk to the health or safety of the public or any segment of the public, (D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or (E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C), and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law).

be a Canadian citizen or permanent resident, or the action must otherwise have a real and substantial connection to Canada.[116]

Bill C-10 followed significant lobbying by victims of terrorism and torture after Canadian courts repeatedly upheld Iran's entitlement to immunity under the *SIA*.[117] The amendments also followed multiple attempts by Canadian parliamentarians to amend the *SIA* to allow for these types of claims against foreign states.[118] Despite the desire of victims' rights advocates that there would be a "full and complete list,"[119] to date, only Iran and Syria have been listed as sponsors of terrorism.[120] Potentially reflecting the difficulties that such a designation may have on bilateral relations, on the same day that Canada designated Iran as a sponsor of terrorism, Canada closed its embassy in, and severed diplomatic ties with, Iran.[121]

Bill C-10's amendments to the *SIA* also address the immunity of foreign state property from enforcement action, allowing for attachment and execution of judgments against the property of a foreign state listed as a sponsor of terrorism where (i) the property "is used or is intended to be used by it to support terrorism or engage

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[116] *JVTA*, *supra* note 9 at s 4(2).

[117] See e.g., *Bouzari v Iran* (2004), 71 O R (3d) 675, 2004 CanLII 871 (CA) [*Bouzari Estate*]; *Kazemi Estate*, *supra* note 30.

[118] See e.g., Bill C-483 "An Act to amend the State Immunity Act (genocide, crimes against humanity, war crimes or torture)" 29 November 2009; 40th Parl, 2d Sess, and reintroduced 3 March 2010, 40th Parl, 3d Sess; Bill C-10 Legislative Summary, Publication Number Publication No. 41-1-C10-E 5 October 2011 [The Legislative Summary]; Revised 17 February 2012, ("From the 1st Session of the 38th Parliament, see bills C-367, C-394 and S-35, all entitled An Act to amend the State Immunity Act and the Criminal Code (terrorist activity); from the 1st Session of the 39th Parliament, see bills C-272 and C-346, both entitled An Act to amend the State Immunity Act and the Criminal Code (terrorist activity), and Bill S-218, An Act to amend the State Immunity Act and the Criminal Code (civil remedies for victims of terrorism); from the 2nd Session of the 39th Parliament, see bills C-272 and C-346, both entitled An Act to amend the State Immunity Act and the Criminal Code (terrorist activity), and Bill S-225, An Act to amend the State Immunity Act and the Criminal Code (deterring terrorism by providing a civil right of action against the perpetrators and sponsors of terrorism); and from the 2nd Session of the 40th Parliament, see bills C-408 and S-233, both entitled An Act to amend the State Immunity Act and the Criminal Code (deterring terrorism by providing a civil right of action against perpetrators and sponsors of terrorism); and from the 3rd Session of the 40th Parliament: see Bill C-408, entitled An Act to amend the State Immunity Act and the Criminal Code (deterring terrorism by providing a civil right of action against perpetrators and sponsors of terrorism)" at n 7).

[119] Senate, Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue No 12, 8th Meeting on Bill C-10, (21 February 2012) (Richard Marceau, General Counsel, Centre for Israel and Jewish Affairs) at 12:86 [8th Meeting on Bill C-10] ("We are also eager to see the government's proposed list of states that may be prosecuted. Obviously, we are expecting that it will be a full and complete list").

[120] *Order Establishing a List of Foreign State Supporters of Terrorism*, SOR/2012-170 at Schedule I; Order Accepting the Recommendation of the Minister of Foreign Affairs Concerning the Two-year Review of the List of State Supporters of Terrorism, Canada Gazette Part I, Vol. 151, No. 26 (the listing was reviewed and renewed for a further two years as of June 20, 2017).

[121] See Laura Payton, "Canada closes embassy in Iran, expels Iranian diplomats", *CBC News* (21 September 2012), online: <www.cbc.ca/news/politics/canada-closes-embassy-in-iran-expels-iranian-diplomats-1.1166509>.

in terrorist activity;"[122] or (ii) the enforcement action "relates to a judgment rendered… against [a foreign state listed as a sponsor of terrorism] for its support of terrorism or its terrorist activity and to property other than property that has cultural or historical value."[123]

The *JVTA* is ostensibly aimed at "impairing the functioning of terrorist groups in order to deter and prevent acts of terrorism *against Canada and Canadians*."[124] However, subsection 4(5) of the *JVTA* provides for the enforcement in Canada of foreign judgments against states that have been listed by Canada as sponsors of terrorism,[125] without expressly limiting such enforcement to actions brought by Canadian citizens or permanent residents, or to actions with a substantial connection to Canada.[126] Without such limitations, the *JVTA* opened the door for the execution in Canada of foreign judgments in favour of foreign plaintiffs and provided the mechanism for the U.S. plaintiffs in *Tracy* to enforce their U.S. judgments against Iranian assets in Canada.

(e) *Tracy v Iran*: A (Partial) Victory for U.S. Victims of Terrorism

The Superior Court of Justice's Decision

Several claims have been filed under the *JVTA*;[127] however, to date, only one, *Tracy v Iran*,[128] has been decided. In *Tracy (Sup Ct)*, Justice Hainey of the Superior Court of Justice for Ontario dismissed five motions brought by Iran to stay or set aside prior decisions of the court that, relying on the Bill C-10's legislative changes, had provided

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[122] *SIA*, *supra* note 101 at s 12(1)(b).

[123] *Ibid* at s 12(1)(d).

[124] *JVTA*, *supra* note 9 at preamble (emphasis added).

[125] *Ibid* at s 4(5) ("A court of competent jurisdiction must recognize a judgment of a foreign court that, in addition to meeting the criteria under Canadian law for being recognized in Canada, is in favour of a person that has suffered loss or damage referred to in subsection (1). However, if the judgment is against a foreign state, that state must be set out on the list referred to in subsection 6.1(2) of the State Immunity Act for the judgment to be recognized").

[126] Although s 4(5) of the *JVTA* is subject to s 4(1), it does not refer to s 4(2) which requires plaintiffs to be Canadian residents or citizens or for the claim to have a real and substantial connection to Canada. As the Court noted in *Tracy (Sup Ct*), *supra* note 6 at para 71 ("to have a foreign judgment recognized, a plaintiff must establish the following three requirements pursuant to s. 4(5) of the *JVTA*: 1. The foreign judgment must meet the criteria under Canadian law for being recognized in Canada; 2. The foreign judgment must be in favour of the plaintiff for loss or damage referred to in s. 4(1) of the *JVTA*; and 3. The state sponsor of terrorism must be on the list referred to in s. 6.1(2) of the SIA").

[127] See Lincoln Caylor and Nathan Shaheen, "Speaker's Corner: Terror ruling may impact Khadr case" *Law Times* (14 August 2017), online: <http://www.lawtimesnews.com/article/speakers-corner-terror-ruling-may-impact-khadr-case-13530/>.

[128] *Tracy (Appeal)*, *supra* note 5 (leave to appeal to SCC refused 15 March 2018, without reasons).

for the enforcement of twelve U.S. judgments awarding damages to over 100 U.S. plaintiffs against Iran under the U.S. *FSIA*.[129]

Like many foreign states sued in domestic courts, Iran did not defend the actions in Canada seeking enforcement of the U.S. judgments.[130] However, once the U.S. judgments were ordered enforceable against Iran's non-diplomatic assets in Canada, Iran brought its motions to dismiss the Canadian judgments and advanced a number of arguments challenging the jurisdiction of Canadian courts. These arguments included that "the *SIA* is contrary to international law, including the customary and treaty rules on state, diplomatic and consular immunity from process;" "[t]he *JVTA* is contrary to international law, including the customary and treaty rules on state, diplomatic and consular immunity from process, including enforcement;" and "Iran is entitled to full immunity from civil and criminal process, including enforcement, in accordance with international law and relevant Canadian legislation."[131]

Justice Hainey noted that the main issue before the court with respect to Iran's motions was "whether Iran is entitled to immunity from the jurisdiction of Canadian courts for its support of terrorism"[132] and ultimately dismissed all of Iran's motions. Without needing to explore in any detail the issue of what exceptions to state immunity exist under customary international law, he concluded, among other things, that: (i) Iran was not entitled to immunity under the *SIA* because it had been duly listed pursuant to section 6.1 of the *SIA* as a sponsor of terrorism; and (ii) the plaintiffs were entitled to have the U.S. judgments enforced because, among other things, the assets against which the judgments were being enforced were eligible for enforcement because they had not been designated as diplomatic by the Minister of Foreign Affairs.[133]

Iran had further challenged the legality of the U.S. judgments under international law on the basis that "the [U.S.] *FSIA* contravened international law and the U.S. courts did not exercise a properly restrained jurisdiction."[134] Justice Hainey did not find it necessary to explore whether the U.S. *FSIA* was consistent with international law. Relying on the *JVTA* and the amended *SIA*, he found that the U.S. plaintiffs were entitled to enforce the U.S. judgments in Canada because the U.S. courts had "assumed jurisdiction over the plaintiffs' claims on the same basis a Canadian court would pursuant to a similar statutory scheme in Canada."[135] Although the *JVTA* only provides the ability to bring claims for persons who "suffered loss or

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[129] *Tracy (Sup Ct) supra* note 6.

[130] *Ibid* at para 3.

[131] *Ibid* at appendix.

[132] *Ibid* at para 5.

[133] *Ibid* at paras 120–58.

[134] *Ibid* at para 101.

[135] *Ibid* at paras 101–104.

damage in or outside of Canada on or after January 1, 1985," Justice Hainey held that U.S. judgments relating to terrorist attacks prior to January 1, 1985 could be enforced because the plaintiffs' losses had continued past January 1, 1985.[136]

The Court of Appeal for Ontario's Decision

Iran appealed Justice Hainey's decision on a number of grounds. Among other things, it argued that "[t]he [U.S.] *FSIA*… contravenes public international law because it creates an exception in U.S. domestic law to state immunity for a state supporter of terrorism."[137] Canada intervened at the Court of Appeal; however, it did not take an express position on whether its legislation or the U.S. *FISA* were consistent with international law.[138] The unanimous Court of Appeal for Ontario dismissed the majority of the appeal, only allowing Iran's appeal with respect to the U.S. judgments relating to terrorist attacks that occurred before January 1, 1985.[139]

While Iran's argument that lifting its immunity violated international law was not persuasive due to the principle of legislative supremacy, international legal issues were addressed somewhat more directly by the Court of Appeal.[140] In his consideration of whether the *JVTA* violated the principle against retroactivity, Justice Hourigan briefly reviewed the law of state immunity in Canada, noting that "[s]ubsection 3(1) of the *SIA* demonstrates Canada's acceptance of the well-recognized principle of customary international law that states are immune from the jurisdiction of other states."[141] He also found that "[t]he rule in customary international law that sovereign states enjoy absolute immunity from the jurisdiction of other states has evolved over time resulting in some exceptions to this general rule recognized at common law" in Canada and that the "statutory exceptions [in the *SIA*] are exhaustive… there are no further exceptions at [Canadian] common law."[142] In the Court's view, Bill C-10 "simply added a new exception [to state immunity] for state support of terrorism."[143]

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[136] *Ibid* at para 76.

[137] See *Tracy (Appeal)*, *supra* note 5 at para 111 (Factum of the Appellant).

[138] See *Tracy (Appeal)*, *supra* note 5 (Factum of the Intervenor Canada) (Canada's submissions were limited to arguing that certificates issued by the Minister of Foreign Affairs not designating Iran's assets as diplomatic conclusively determined their status Since the Iranian assets in question had not been designated diplomatic, Canada maintained that they were properly considered non-diplomatic and, therefore, could be subject to attachment and enforcement).

[139] *Tracy (Appeal)*, *supra* note 5 at paras 6, 38(i), 46-58 (on the issue of whether judgments related to events prior to January 1, 1985 could be enforced under the *JVTA*, the Court of Appeal concluded that "[a]lthough the *JVTA* is expressly retroactive, it does not apply prior to that date").

[140] *Ibid* at paras 51-58.

[141] *Ibid* at para 51.

[142] *Ibid* at para 52 (citations omitted).

[143] *Ibid*.

Turning to the retroactivity of Bill C-10, Justice Hourigan found that Parliament was "[aware] of its obligation under international law to respect state sovereignty" and that its intent to introduce the new exception was "clear."[144] Since it was clear that Parliament intended to allow claims against states that are listed as sponsors of terrorism, but it was unclear whether it intended to allow for recovery of claims where the damage arose prior to, but continued past, January 1, 1985, the Court of Appeal adopted the interpretation that would support "the presumption of compliance with international law and the presumption against retroactivity" and held that only claims relating to terrorist attacks occurring as of January 1, 1985 could be subject to enforcement under the *JVTA*.[145] In so doing, the Court of Appeal affirmed the principle of legislative supremacy such that Canadian domestic law that intentionally runs counter to customary international law will be enforced by Canadian courts.

Justice Denied for Canadian Victims of Terrorism?

On March 15, 2018, the Supreme Court of Canada dismissed Iran's request for leave to appeal,[146] rendering *Tracy (Appeal)* final. This decision may be hailed as achieving long-awaited justice for some U.S. victims of terrorism sponsored by Iran. However, it may also result in justice being denied for Canadian victims, including Dr. Wise, the Canadian dentist injured in the terrorist attack described at the outset of this paper, because Iran's diplomatic assets are immune from enforcement and *Tracy (Appeal)* will deplete Iran's non-diplomatic assets in Canada. As a result, even if Canadian victims like Dr. Wise succeed in claims against Iran, it is almost certain that they will ultimately be unable to hold Iran financially liable.

In September 2013, Dr. Wise was the first Canadian to commence proceedings under the *JVTA*, seeking an unspecified amount of damages from Iran.[147] She did not attempt to bring a claim against Iran prior to the passage of Bill C-10 because the U.S. *FSIA* did not allow non-residents to claim against foreign states in the United States, and Canadian courts had repeatedly reaffirmed that an express exception in the *SIA* would be necessary to lift state immunity.[148] Concerned that the actions to enforce U.S. judgments against Iran would deplete Iranian assets from which she could be compensated if she were successful in her action, Dr. Wise obtained intervenor status in one of the enforcement proceedings decided in *Tracy (Appeal)*.[149] She was concerned that allowing the U.S. judgments to be enforced in Canada would

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[144] *Ibid* at para 53.

[145] *Ibid* at para 58.

[146] *Tracy (Appeal)*, *supra* note 5 (leave to appeal to SCC refused 15 March 2018, without reasons).

[147] *Wise, Notice of Civil Claim*, *supra* note 1.

[148] See Paul Burd, "Dr. Sherri Wise Makes the First Canadian Claim under the Justice for Victims of Terrorism Act", *The Court.ca* (17 October 2013), online: <www.thecourt.ca/dr-sherri-wise-makes-the-first-canadian-claim-under-the-justice-for-victims-of-terrorism-act/>.

[149] See *Bennett Estate v Iran (Islamic Republic)*, 2013 ONCA 623.

result in the *JVTA* not providing a "meaningful remedy for Canadian victims of terrorism sponsored by Iran".[150]

Tracy (Appeal) provided for the enforcement of judgments in favour of U.S. plaintiffs with respect to approximately $1.6 billion against Iran; however, Iran was estimated in 2013 to hold only an estimated $2.6 million of assets in Canada.[151] The recovery of damages by the U.S. plaintiffs in *Tracy (Appeal)* and the corresponding inability for Dr. Wise or other victims of terrorism sponsored by Iran to enforce a future judgment against Iran means that Dr. Wise's concerns have likely come to fruition. It also highlights how legislation like Canada's Bill C-10 may offer primarily symbolic justice for victims of terrorism: even when victims are successful in bringing a claim against a foreign state, they are often unable to enforce their judgments. The potential for such legislation to offer only symbolic justice may call into question its value in the eyes of states. At the same time, such legislation may lead to violations of current customary international law, which will be explored in the following section before turning to an assessment of the risks of recognizing new exceptions to state immunity.

III. *Jurisdictional Immunities of the State* and Conflicting Norms of International Law

The potential for state immunity to result in injustice for victims of wrongs committed by states is clear. While arguments in favour of denying immunity are often rooted in the nature of the wrong at issue and are compelling from a moral perspective, attempts to limit further the scope of state immunity have met with limited success.[152]

The concern that state immunity leads to injustice is reflected in criticism of the *U.N. Convention on Jurisdictional Immunities of States* for not including an exception for serious violations of human rights. It should be recalled, however, that the Convention was the product of lengthy negotiations and, in order to increase the potential for states to become party to the Convention, it had to reflect the general view of states regarding the law on state immunity. Fox and Webb have explained the arguable "omission" from the Convention of an exception for human rights abuses by stating that,

> [t]his [omission] is not surprising when one remembers that the ILC finalized its Draft Articles on the subject in 1991 and it is only in the last two decades that the rights of victims and their families to recover reparations for crimes under international law… have received recognition in international law, and then mainly in 'soft' [i.e., non-binding] law.[153]

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[150] *Ibid* at para 6.

[151] Burd, *supra* note 148.

[152] Fox and Webb, *The Law of State Immunity*, *supra* note 12 at 44.

[153] *Ibid* at 317.

Gerhard Hafner, who headed the Working Group on the Convention in 1999, addressed this matter by explaining that there was insufficient agreement among states to support including such an exception.[154] He also noted that such an exception would be problematic:

> Some criticism has been levelled at the Convention on the ground that it does not remove immunity in cases involving claims for civil damages against States for serious violations of human rights. This issue was raised in the ILC and it was dropped. It was raised again in the UN General Assembly and it was dropped because… it was concluded that there was no clearly established pattern by States in this regard. It was recognised, therefore, that any attempt to include such a provision would, almost certainly jeopardise the conclusion of the Convention. In my view, there are other arguments which militate against including such an exception. It is said that we must limit impunity but suing a State for civil damages does not address the issue of impunity. To remove immunity, we must prosecute the individual person or persons responsible for the serious violations and this can be undertaken in other fields but not in the context of this Convention. Anyway, what is meant by 'serious violations of human rights'? What would be the scope of any such exception? .... There would be significant problems of interpretation and this was also a reason why we did not take up this issue.[155]

As Hafner makes clear, there may be difficulties with admitting a new exception to state immunity, including problems with defining the scope of the exception. Although Hafner was speaking in 1999, his remarks hold true today, as the tension between individual rights and sovereignty has persisted.

Although customary international law is capable of evolving, it remains questionable whether exceptions to state immunity for civil claims tied to the state's support of terrorism is consistent with current customary international law. While there may be evidence that some states may be open to a future development in international law according to which immunity is not enjoyed for serious violations of human rights abroad,[156] as the decision of the ICJ in *Jurisdictional Immunities* makes clear, there is likely insufficient state practice to this effect at present. While this paper is primarily focused on exceptions to state immunity for claims related to terrorist attacks, the discussion of exceptions for human rights abuses is relevant because, as noted above,

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[154] *Ibid* at 317–18, citing Chatham House, "State Immunity and the New UN Convention: Transcripts and Summaries" (5 October 2005).

[155] *Ibid*.

[156] See *ibid* at 318 (When Switzerland ratified the Convention in 2010, it stated in an interpretive declaration: "Switzerland considers that article 12 does not govern the question of pecuniary compensation for human rights violations which are alleged to be attributable to a State and are committed outside the State of that forum." Norway and Sweden attached similar declarations, which Fox and Webb conclude "add[] to the understanding… that [the *U.N. Convention on Jurisdictional Immunities of States*] is without prejudice to any future international legal development concerning the protection of human rights").

terrorism strikes at the heart of many human rights including the right to life, which may be considered a peremptory norm of international law.[157]

This section examines *Jurisdictional Immunities*, which supports the conclusion that there are only limited exceptions to state immunity and that these exceptions do not currently extend to allowing claims against states that sponsor acts of terrorism outside of the forum state. Despite arguments that international law has been moving towards additional exceptions to immunity,[158] and the fact that the scope of state immunity has evolved over time, the majority's decision may support the conclusion that international law is currently settled. As Fox and Webb maintain,

> the ICJ… found conclusively that the plea of State immunity bars civil proceedings brought against one State in the national courts of another State for acts committed by State officials without any exception to such immunity by reason of the gravity of violations of international humanitarian law; or by reason of their *jus cogens* nature; or by reason of the absence of any effective means of redress.[159]

Unless state practice evidences consistent state acceptance of a more restrictive approach to state immunity that admits an exception for terrorism or other serious violations of human rights, the reasoning of the majority in *Jurisdictional Immunities* suggests that decisions like *Tracy (Appeal)* are likely inconsistent with current international law.

(a) Background to *Jurisdictional Immunities*

In 2008, Germany commenced proceedings at the ICJ alleging that Italy had violated its right to immunity under international law. The dispute arose after a number of decisions by Italian courts allowing civil claims to proceed and, in some instances, ordering enforceable judgments against Germany on account of war crimes that the German Reich had committed in Italy and Greece during the Second World War. In one case, the Italian Court of Cassation ordered Germany to pay damages to an Italian citizen, Luigi Ferrini, who had been deported to Germany where he was forced to work in circumstances that amounted to slave labour.[160] Following that decision, multiple claims were brought against Germany before Italian courts.[161] In one case, the Court of Appeal of Florence found enforceable in Italy a judgment from a domestic court in

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[157] See *supra* note 24.

[158] Damrosch, *supra* note 71 at 1200 (arguing in anticipation of the ICJ's decision in *Jurisdictional Immunities* that the ICJ should proceed with caution due to inconsistent state practice regarding state immunity: "[i]n light of this history [of the evolution towards an increasingly restrictive understanding of state immunity], one can hope that the ICJ will not block national institutions from moving the international law of sovereign immunity in a direction that is responsive to contemporary demands for remedies due to wrongs committed by states").

[159] Fox and Webb, *The Law of State Immunity*, *supra* note 12 at 321–322 (citations omitted).

[160] See *Jurisdictional Immunities of the State*, *supra* note 10 at para 27.

[161] See *ibid* at para 28.

Greece that had found Germany liable to the survivors of a massacre of civilians in the Greek village of Distomo during the Second World War.[162]

Before the ICJ, Germany did not dispute that it had committed the crimes underlying the proceedings before the Italian courts[163] and noted that it "is fully aware of [its] responsibility in this regard;"[164] however, it nonetheless maintained that Italy had "failed to respect the jurisdictional immunity which [Germany] enjoys under international law by allowing the civil claims to be brought against it in Italian courts".[165] Italy had not passed legislation providing an exception to state immunity applicable in these circumstances, but it embraced the decisions of its courts and advanced before the ICJ a number of arguments in favour of its position that Germany was not entitled to immunity before its courts. Among other things, Italy argued that international law did not accord jurisdictional immunity to states for serious violations of the law of armed conflict. More relevant for present purposes, it also asserted that Germany was not entitled to immunity due to the gravity of the German Reich's crimes, which it characterized as violations of peremptory norms of international law.

(b) *Jurisdictional Immunities* and State Immunity under Customary International Law

In a 12-to-3 decision,[166] the majority of the ICJ held firm in *Jurisdictional Immunities* to the view that states enjoy a wide scope of jurisdictional immunity under customary international law. The majority did not find Italy's arguments persuasive, including that the nature of Germany's crimes resulted in it not being entitled to jurisdictional immunity.

While Germany and Italy both agreed that state immunity is derived from customary international law, the Court took the opportunity to confirm this fact, stating that:

> the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order…. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it.[167]

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[162] See *ibid* at paras 30–36.

[163] *Ibid* at paras 52–53.

[164] *Ibid* at para 53.

[165] *Ibid* at para 37.

[166] Three judges wrote individual dissenting opinions (Judges Trindade, Yusuf, and Gaja [ad hoc]), while three other judges wrote individual separate opinions (Judges Koroma, Keith, and Bennouna).

[167] *Jurisdictional Immunities of the State*, *supra* note 10 at para 57.

The Court noted that some states distinguish between official and private acts of the state and only recognize immunity for the former; however, the Court found that it did not need to "address the question of how international law treats the issue of State immunity in respect of *acta jure gestionis* [i.e., private acts]" because "[t]he acts of the German armed forces and other State organs which were the subject of the proceedings in the Italian courts clearly constituted *acta jure imperii* [i.e., sovereign acts of state]."[168] This finding could leave room for arguments in future cases that states are not entitled to immunity with respect to violations of individual rights, including violations that result from their supporting of terrorism, so long as one could characterize these violations as a private act rather than an official act of the state. However, this line of argument may be of limited utility in any future cases, as the Court went on to conclude that illegality does "not alter the characterization… as *acta jure imperii*."[169]

Despite Italy agreeing that states are generally entitled to immunity in respect of their official acts, it argued that Germany did not enjoy immunity in the circumstances due to the territorial tort exception,[170] which it argued applied because the claims in Italy arose as a result of wrongs that occurred in Italy (or related to the enforcement in Italy of claims brought in Greece for wrongs occurring in Greece). Italy also went beyond the territorial tort exception, arguing that "irrespective of where the relevant acts took place, Germany was not entitled to immunity because those acts involved the most serious violations of rules of international law of a peremptory character for which no alternative means of redress was available."[171]

The majority did not find Italy's arguments persuasive. With respect to the territorial tort exception, it noted that "the notion that State immunity does not extend to civil proceedings in respect of acts committed on the territory of the forum State causing death, personal injury or damage to property originated in cases concerning road traffic accidents and other 'insurable risks'."[172] It examined state practice, which it found to be unsettled regarding whether the territorial tort exception applies to official acts of a state, but found that it was not required to determine "whether there is in customary international law a 'tort exception' to state immunity applicable to *acta jure imperii* in general" because the situation before it concerned that activities of a state's armed forces "in the course of conducting an armed conflict."[173] After assessing the *U.N. Convention on Jurisdictional Immunities of States* and state practice through national legislation and domestic court decisions, the Court concluded that "customary international law continues to require that a State be accorded immunity in national

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[168] *Ibid* at para 60.

[169] *Ibid*.

[170] *Ibid* at para 61 (Italy maintained that immunity "does not extend to torts or delicts occasioning death, personal injury or damage to property committed on the territory of the forum State").

[171] *Ibid*.

[172] *Ibid* at para 64.

[173] *Ibid* at para 65.

proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of the State in the course of conducting an armed conflict."[174]

Notably for present purposes, the Court also did not accept Italy's broader argument that Germany was not entitled to immunity due to the heinous nature of its wrongs. On this point, Italy advanced three specific arguments: (i) the acts "amount[ed] to war crimes and crimes against humanity;" (ii) the acts violated peremptory norms of international law; and (iii) "the exercise of jurisdiction by the Italian courts was necessary as a matter of last resort" because "the claimants [had] been denied all other forms of redress."[175] With respect to the first argument, the majority noted that there was a "logical problem" if a state is not entitled to immunity due to the gravity of the alleged crimes because "it would become necessary for the national court to hold an enquiry into the merits in order to determine whether it had jurisdiction," which would thereby subject the state to the forum state's jurisdiction.[176] It also considered that "mere allegation[s]" of serious wrongs would "be sufficient to deprive the State of its entitlement to immunity" which would thus render state immunity capable of "be[ing] negated simply by skillful construction of the claim."[177] More importantly, the Court also examined state practice[178] and "conclude[d] that, under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the law of armed conflict."[179]

The Court assessed separately Italy's contention that Germany did not enjoy immunity due to its violation of *jus cogens* and found that there is no true conflict between state immunity and *jus cogens*. It reasoned that state immunity and *jus cogens* are

> two sets of rules [that] address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear on the question whether or not the conduct in respect of the proceedings are brought was lawful or unlawful.[180]

In the majority's view, state immunity is a procedural matter and, although it may result in a denial of redress for victims of wrongs committed by states, state immunity does not permit or excuse derogations from *jus cogens* norms. As a result, since state immunity does not permit the derogation from a *jus cogens* norm nor does it affect the fact that the state has violated a *jus cogens* norm, there is no conflict between state

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[174] *Ibid* at paras 65–79.

[175] *Ibid* at para 80.

[176] *Ibid*.

[177] *Ibid*.

[178] *Ibid* at paras 80–91.

[179] *Ibid* at para 91.

[180] *Ibid* at para 93.

immunity and the *jus cogens* norm. Similarly, the majority also concluded that a victim's right to redress does not rank as *jus cogens*; therefore, even when state immunity denies a victim redress, this does not violate a *jus cogens* norm. In support of its conclusions, the Court, again, assessed state practice and found that it did not support Italy's position, holding that "even on the assumption that the proceedings in the Italian courts involved violations of *jus cogens* rules, the applicability of the customary international law on State immunity was not affected."[181]

Finally, based on its review of state practice, the majority rejected Italy's argument that state immunity must yield to enable victims to have a remedy for violations of *jus cogens* norms. While the majority was "not unaware" that upholding Germany's immunity "may preclude judicial redress for the Italian nationals concerned,"[182] it concluded that there was "no basis in the State practice… that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress."[183]

(c) *Jurisdictional Immunities* and the Divided Court

Although the majority in *Jurisdictional Immunities* took a firm view on the limited nature of exceptions to the principle of state immunity, arguments could be made that the reasoning did not foreclose additional exceptions, particularly where violations of individual rights at issue were not committed by the state's armed forces during an armed conflict. In particular, the territorial tort and the private acts exceptions to state immunity may provide an opening for finding that exceptions to state immunity in accordance with Bill C-10 (and/or the U.S. *FSIA*) are consistent with current international law because there is no compelling reason (except, potentially, state practice) to limit a tort-based principle to the territory of the forum state or to find that supporting terrorism is properly considered official act.

If a state may be subject to a foreign court's jurisdiction with respect to claims arising from the state's wrongs in the territory of the forum state or in a commercial context, is there truly a principled basis against extending exceptions to wrongs that occur abroad or outside of a commercial context? Additionally, when a state violates the fundamental rights of individuals, why should this be considered an "official" act that attracts immunity? These types of questions found traction with a number of the judges in *Jurisdictional Immunities*, including Judge Cançado Trindade. In a comprehensive and resounding dissent, he characterized as a "juridical absurdity" that the majority of the Court would

> admit the removal of State immunity in the realm of trade relations, or in respect of local personal tort (e.g., in traffic accidents), and at the same time… insist on shielding States with immunity, in cases of international

[181] *Ibid* at para 97.

[182] *Ibid* at para 104.

[183] *Ibid* at para 101.

> crimes—marked by grave violations of human rights and of international humanitarian law—in pursuance of State (criminal) policies.[184]

As Judge Yusuf, who also dissented in *Jurisdictional Immunities*, maintained, "State immunity is… as full of holes as Swiss cheese."[185] He argued, therefore, that state practice is sufficiently unsettled to admit new exceptions:

> even the traditional distinction between *jure gestionis* and *jure imperii*, which is often used for practical purposes to group together certain exceptions, depending on the nature of the acts involved, is far from being universally applied in a uniform manner, since the categorization of certain acts under one class of acts or the other still remains a matter of controversy among States and national courts. Moreover, the definition of the basic concept underlying the distinction, namely commercial transactions, remains elusive. In the meantime, the exceptions and derogations to which State immunity is subject keep growing all the time.[186]

As Judge Yusuf reasoned, a "balance…. must be struck between two sets of functions which are both valued by the international community."[187] He concluded that Germany should not enjoy immunity under customary international law for its crimes at issue: "In today's world, the use of State immunity to obstruct the right of access to justice and the right to an effective remedy may be seen as a misuse of such immunity."[188]

Considering justice and fairness, it is difficult to avoid concluding that the majority opinion in *Jurisdictional Immunities* is, to borrow the characterization of Judge Cançado Trindade, absurd. Taking into account, however, the sources of international law and how the majority of states have approached state immunity to date, rather than considering this a "judicial absurdity," it may be appropriate to characterize as an absurdity of *state practice* that customary international law affords states jurisdictional immunity with when they violate important human rights when they do not enjoy such immunity in a commercial context or with respect to territorial torts.

While the majority in *Jurisdictional Immunities* may leave a narrow opening for finding that serious violations of human rights (including support for terrorism) is a private act for which states do not enjoy immunity, when the decision is read as a whole, it may be difficult to use the case to support this conclusion. Although the majority avoided laying out its view on how a private act should be distinguished from an official act of a state under customary international law, with the majority's review of state practice supporting its rejection of Italy's argument that Germany did not enjoy immunity due to the nature of the wrong at issue and its finding that illegality does not

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[184] *Jurisdictional Immunities*, *supra* note 10, Cançado Trindade J, dissenting at para 239.

[185] *Ibid*, Yusuf J, dissenting at para 26.

[186] *Ibid* at para 25.

[187] *Ibid* at para 26.

[188] *Ibid*.

change an official act into a private act, it may be difficult to avoid the conclusion that, unless and until state practice changes, the territorial tort and private act exceptions ought to be narrowly interpreted.

(d) Italy's Response to *Jurisdictional Immunities*

States that are party to a case before the ICJ are obliged under the *U.N. Charter* to comply with the decision of the Court.[189] It is therefore not surprising that, following the decision in *Jurisdictional Immunities*, Italy "pledged to implement the judgment… and ensure that its domestic courts would not hinder the implementation of the ICJ judgment."[190] More notably, Italy also stated that it would ratify the *U.N. Convention on Jurisdictional Immunities of States*.[191] Making good on this pledge, Italy enacted Law No. 5/2013, through which it "ratif[ied] the [Convention] and provid[ed] for [domestic] compliance with the ICJ *Jurisdictional Immunities* Judgment" by, among other things, requiring judges in Italian courts then presiding over unresolved civil claims against Germany with respect to violations of individual rights "to declare Italy's lack of jurisdiction."[192]

Prior to the Law becoming effective, the Italian Supreme Court upheld Germany's immunity, which Filippo Fontanelli concluded "put an end to [the Court's] decade-long effort to find an exception to the well-known rule of customary international law providing for State immunity from foreign civil jurisdiction for acts *iure imperii*."[193] This conclusion, however, was premature. In October 2015, the Italian Court of Cassation found that Iran could be subject to civil claims for its support of terrorism on the basis that "the immunity of the foreign state is not a right but a prerogative which cannot be assured when it concerns [state crimes]… perpetrated in violation of international *jus cogens* norms, as such infringing universal values that transcend the interests of the particular state communities."[194] While this effort to

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[189] *Charter of the United Nations and the Statute of the International Court of Justice*, *supra* note 15 at art 94 ("(1) Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party. (2) If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment").

[190] Fox and Webb, *The Law of State Immunity*, *supra* note 12 at 324.

[191] *Ibid*.

[192] *Ibid* at 322.

[193] *Ibid* at 324, citing Filippo Fontanelli, "Criminal Proceedings Against Albers" (2013) 107:3 AJIL 632.

[194] Carmen-Cristina Cîrlig and Patryk Pawlak, European Parliament Briefing, "Justice against sponsors of terrorism JASTA and its international impact" *European Parliamentary Research Service* (October 2016), online: <www.europarl.europa.eu/RegData/etudes/BRIE/2016/593499/EPRS_BRI(2016)593499_EN.pdf> at 4, n 7 [European Parliamentary Research Service]. The Court ultimately found that the U.S. judgment at issue could not be executed against Iranian property in Italy, citing *Flatow v Iran and Iranian Ministry of Information and Security and Ministry of Foreign Affairs of Italy (intervening)*, Final appeal judgment, No 21946, ILDC 2459 (IT 2015), 28th October 2015, Italy; see also Thomas Weatherall, "*Flatow v Iran*" (2016) 110:3 AJIL 540 at 544–445.

enforce a U.S. judgment against Iran in Italy ultimately failed on other grounds, Weatherall has argued that the reasoning of the Court of Cassation "is both conceptually problematic and legally unsupported."[195] With this decision, the Court of Cassation has flouted both Italy's domestic law and, arguably, international law: "the highest courts of Italy have now taken on both the ICJ… and the UN Charter."[196] In Weatherall's assessment,

> [t]his is not a desirable state of affairs for international law however laudable the motivations…. Although the Court of Cassation considered the Italian judiciary to be contributing to the formation of a new principle of customary international law that limits the jurisdictional immunity of the state, the 2012 ICJ judgment makes crystallization of such a contrary norm unlikely in the foreseeable future.[197]

A similar conclusion may be drawn when assessing Canada's exception to state immunity for states that sponsor terrorism. While Parliament's intention for passing Bill C-10 may be laudable, in light of *Jurisdictional Immunities* and state practice underpinning the decision, it is likely that decisions such as *Tracy (Appeal)* result in Canada violating its obligations under current customary international law.

(e) The Potential for Future Guidance from the International Court of Justice

Iran has asserted that Canada has violated its rights under international law through decisions against it under the *JVTA*.[198] Although it could use the reasoning in *Jurisdictional Immunities* to support its position, it is likely that Iran will be unable to challenge at the ICJ Canada's denial of its immunity. This is because Iran, unlike Canada, has not accepted the compulsory jurisdiction of the ICJ.[199] As a result, the ICJ will not have the jurisdiction to hear the case unless Canada consents to such

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[195] Weatherall, *supra* note 194 at 544.

[196] *Ibid*.

[197] *Ibid*.

[198] See e.g. "Iran calls Canada's court ruling 'unacceptable'" *Tehran Times* (19 February 2017), online: <www.tehrantimes.com/news/411257/Iran-calls-Canada-s-court-ruling-unacceptable> (Iran's Foreign Ministry spokesperson, Bahram Qassemi, maintained regarding an order for Iran to pay costs that, "'[t]his ruling runs contrary to the basic principles of international law about legal immunity of the governments and their properties, and is unacceptable….' Qassemi said the Canadian court has ruled regardless of considering 'international law' and the 'principle of the governments' equality'"); "Iran: Canada court ruling against international norms" *Tehran Times* (5 July 2017), online: <www.tehrantimes.com/news/414850/Iran-Canada-court-ruling-against-international-norms> ("Issuing verdict against a foreign government is contrary to the principle of equality of states and violates their immunity within the international law, ministry spokesman Bahram Qassemi said").

[199] International Court of Justice, *Declarations recognizing the jurisdiction of the Court as compulsory*, online: <www.icj-cij.org/en/declarations> (Canada accepted compulsory jurisdiction on 10 May 1994, but Iran has not).

proceedings.[200] The ICJ may, nonetheless, consider the legality of the U.S. *FISA* exceptions to state immunity in the coming years because, in June 2016, Iran filed an application to institute proceedings against the United States at the ICJ. Iran is, among other things, challenging billions of dollars that U.S. courts have awarded against it under the U.S. *FSIA* on the basis that:

> Iran and Iranian State-owned companies are entitled to immunity from the jurisdiction of the US courts and in respect of enforcement proceedings in the USA, and that such immunity must be respected by the USA (including US courts), to the extent established as a matter of customary international law and required by the [U.S.-Iran] Treaty of Amity.[201]

While it remains to be seen whether the ICJ will find that it has the jurisdiction to hear the dispute,[202] these proceedings may open the door to the Court's future consideration of the U.S. *FSIA*. If the case goes forward, the ICJ may confront more directly whether state support for terrorism is an official or private act and whether the territorial limitation to the territorial tort exception still reflects customary international law.

If it does hear Iran's claim, the majority opinion in *Jurisdictional Immunities* suggests that the Court will likely require additional evidence of state practice and *opinio juris* to conclude that Iran is not entitled to immunity; if the seriousness of the crimes to which Germany admitted were insufficient for Italian courts to be able to subject Germany to the jurisdiction of its courts and remain in compliance with international law, why would the position be different with respect to supporting acts of terrorism?

It should be recalled, however, that the Court was appropriately careful in *Jurisdictional Immunities* to frame its conclusions on the law as it stood in 2012, when the case was decided.[203] As the evolution of state immunity from absolute to restrictive makes clear, customary international law is capable of evolving further through changes to state practice. The question remains whether such an evolution has occurred, if it is in the midst of occurring, or if state practice is closing the door on this

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[200] *Statute of the ICJ*, *supra* note 15 at art 36(2) (States ratifying the Statute "at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court").

[201] *Certain Iranian Assets (Islamic Republic of Iran v United States of America)* "Application Instituting Proceedings Submitted by Iran" (14 June 2016) ICJ Pleadings 1 at para 33(d) [*Certain Iranian Assets (Application Instituting Proceedings)*], citing the *Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States of America*, 15 August 1955.

[202] Iran is attempting to bring the claim before the ICJ notwithstanding the fact that it has not accepted the compulsory jurisdiction of the Court by framing its claim as being tied to alleged U.S. violations of the *Treaty of Amity, Economic Relations, and Consular Rights*, *ibid*, which is a bilateral treaty between Iran and the United States providing the ICJ with jurisdiction to hear disputes regarding the "interpretation or application of the… Treaty", so long as these disputes are "not satisfactorily adjusted by diplomacy" or otherwise settled, see art XXI(2)).

[203] See e.g. *Jurisdictional Immunities*, *supra* note 10 at para 91 ("The Court concludes that, under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict").

evolution. The recent negative reaction from some states to the *JASTA* amendments to the U.S. *FISA*, discussed below,[204] may support the conclusion that such an evolution has not yet occurred. Should Iran's claim against the United States at the ICJ proceed, this state practice will no doubt be assessed by the Court. The United States, however, would be able to point to Canada's legislation to support an argument that the U.S. *FISA*'s terrorism exceptions to state immunity are consistent with current customary international law. The following section explores Canada's role as a "custom breaker" and how Canada's practices could support an evolution in the law of state immunity.

IV. Denying State Immunity for Sponsors of Terrorism: Canada as a "Custom-Breaker"?[205]

Although Canada is unlikely to face a claim by Iran before the ICJ, the fact that Canada may violate current customary international law when its courts deny state immunity pursuant to the *JVTA* and the amended *SIA* ought to be considered by the Canadian government. As this section examines, it is not clear whether Canada was mindful of customary international law when it enacted Bill C-10. By taking a clearer position on whether, in its view, states are entitled to immunity under international law from civil claims tied to their support of terrorism, Canada may more clearly act as a "custom breaker"[206] on this issue and thereby encourage the international community of states to admit a new exception to state immunity under customary international law.

(a) *Tracy v Iran* and Customary International Law

That the Court of Appeal in *Tracy (Appeal)* dismissed the majority of Iran's appeal should not be surprising in light of prior decisions of the Supreme Court of Canada[207] holding firm to the principle of legislative supremacy. According to this principle, customary international law may be "displaced by [an] irreconcilably contrary Canadian statute law or binding precedent."[208] When Parliament expressly legislates counter to international law, Canada may end up acting "illegally from an *international* legal perspective, but would be doing nothing wrong from a *domestic* [legal] perspective."[209] Following the reasoning of the majority in *Jurisdictional Immunities*, this is precisely what has occurred in *Tracy (Appeal)*: although *Tracy*

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[204] See discussion at Part IV(b) of this article.

[205] For a discussion of the role of international adjudication and states acting as so-called "custom breakers" when they depart from the previously settled customary international law in the context of state immunity, see Katzenstein, *supra* note 35.

[206] *Ibid*.

[207] See e.g. *Kazemi Estate supra* note 30; *Bouzari Estate, supra* note 117.

[208] Currie, *Public International Law*, *supra* note 14 at 174.

[209] *Ibid* at 160 (while the authors made this comment in the context of Canada's reception of treaty-based rules of international law, the same conclusion holds true for customary international law).

(Appeal) was consistent with the *JVTA* and the *SIA*, it is likely that the decision resulted in Canada violating Iran's right to jurisdictional immunity under international law.

As noted above, in *Tracy (Appeal)*, the Court of Appeal stated that Bill C-10 "simply" added a new exception to the principle of sovereign immunity.[210] While Parliament clearly intended to deny listed states immunity from civil claims, introducing a legal exception to state immunity is not simple under international law because it requires sufficiently consistent state practice and *opinio juris* to this effect. One may read between the lines of the majority opinion in *Jurisdictional Immunities* to find that the majority may consider Canada, like the United States, to be out-of-step with current state practice on this issue. In *Jurisdictional Immunities*, the majority touched upon the U.S. *FSIA* amendments, noting, at the time the decision was rendered (approximately five weeks before Canada's Bill C-10 entered into force) that, "this amendment has no counterpart in the legislation of other States" and that no state that "has enacted legislation on the subject of State immunity has made provision for the limitation of immunity on the grounds of the gravity of the acts alleged."[211] Since the United States was not a party to the case before it, the Court, appropriately, did not assess the international legality of the terrorism exceptions in the U.S. *FSIA*. However, in light of its ultimate conclusions on the broad scope of state immunity and its identification of the United States an outlier on this matter, if the U.S. exceptions had been before the Court, the majority may likely have considered the exceptions to be inconsistent with current customary international law. This conclusion is supported by the finding by Fox and Webb that "[c]ontravention of international law, particularly a violation of *jus cogens*, has not yet been accepted [under customary international law], as recently confirmed by the ICJ [in *Jurisdictional Immunities*], as a ground for an exception to State immunity."[212]

(b) "Custom Breaking" Towards an Evolution in Customary International Law

Without additional state practice supporting new exceptions, it is likely that customary international law will reflect the status quo and afford only limited exceptions to state immunity. While one could assume that Canada considered Bill C-10 to accord with current customary international law when it was passed, a review of the legislative history raises questions regarding whether Parliament was aware that Bill C-10 could run counter to customary international law. If Canada wants to support an exception to state support of terrorism (and, by extension, other serious violations of human rights), it should adopt the role of custom breaker[213] to assist with moving this exception forward.

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[210] *Tracy (Appeal)*, *supra* note 5 at para 52.

[211] *Jurisdictional Immunities*, *supra* note 10 at para 88.

[212] Fox and Webb, *The Law of State Immunity*, *supra* note 12 at 332.

[213] Katzenstein, *supra* note 35.

In *Tracy (Appeal)*, the Court relied on the Parliamentary Information and Research Service's Legislative Summary of Bill C-10 to support its finding that Parliament intended to legislate a new exception to state immunity.[214] While there is no question that Parliament intended to introduce a new exception to state immunity, the Legislative Summary does not address whether Parliament was aware that denying state immunity pursuant to this new exception may be inconsistent with established principles of customary international law. In particular, the Legislative Summary did not consider how the majority's reasoning in *Jurisdictional Immunities* could undermine an argument that a terrorism exception to state immunity exists under current international law. Although the Legislative Summary was revised after the decision in *Jurisdictional Immunities* was released,[215] it only notes that the ICJ was "now preparing the judgment" after hearing Germany's claim that Italy had "fail[ed] to respect its immunity."[216] The Legislative Summary may, however, acknowledge implicitly that denying jurisdictional immunity for states that sponsor terrorism could violate international law, as it notes that: (i) "exceptions to the general rule of complete immunity have evolved over time"; (ii) "Parliament has acknowledged this evolution by codifying the most common exceptions to the general rule of state immunity in the *State Immunity Act* as it currently stands" and (iii) "Part 1 of Bill C-10 seeks to add a new exception for state support of terrorism."[217]

The legislative debates regarding Bill C-10 also leave unclear whether Parliament considered the terrorism exception to state immunity to be consistent with international law. Shortly after *Jurisdictional Immunities* was decided, witnesses before the Standing Senate Committee on Legal and Constitutional Affairs expressed concerns regarding, among other things, the potential for Bill C-10's amendments to lead to violations of customary international law in light of *Jurisdictional Immunities*.[218] To consider this matter further, the Committee subsequently heard from the Legal Bureau of Foreign Affairs and International Trade Canada's Director of Criminal Security and Diplomatic Law. The Director presented a narrow reading of *Jurisdictional Immunities*, asserting that the Department had determined that Bill C-10 was not "a match for that kind of situation" since ICJ decisions are only binding upon the parties to the specific case and because "the current drafted Canadian legislation" was not "similar in any way to the issue which was being discussed" in *Jurisdictional Immunities*.[219] There appears to have been no further substantive

[214] *Tracy (Appeal)*, *supra* note 5 at para 53.

[215] The Legislative Summary, *supra* note 118 (originally published in October 2011 and revised on February 17, 2012).

[216] *Ibid* at 4.

[217] *Ibid*.

[218] See Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue No 12, 7th and 8th meetings on Bill C-10, An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts, 1st Sess, 41st Parl, 2011-12, February 20, 2012 and February 21, 2012.

[219] Senate, Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, "Eleventh and twelfth (final) meetings on: Bill C-10, An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Ciminal Code, the Controlled Drugs and Substances Act, the Corrections

discussion on the legislative record regarding Bill C-10's possible inconsistency with international law and the matter did not appear in the Senate Committee's report on Bill C-10.[220] In addition, although concerns were subsequently expressed by two senators and one member of Parliament regarding the possibility that the legislation could lead to Canada violating international law,[221] no further public discussion of Bill C-10's potential inconsistency with international law appears to have occurred within the Senate or the House of Commons.

If Parliament intended for Bill C-10 to provide a foundation for recognizing a new exception to state immunity under customary international law, it may be worthwhile for Canada to adopt a clearer position on whether, in its view, Bill C-10's amendments reflect customary international law. In so doing, Canada could assist with providing clearer evidence of *opinio juris* to support a future evolution of customary international law. By breaking from prior state practice on the scope of state immunity, Canada could provide an opening for "forg[ing] new law by breaking existing law, thereby leading the way for other nations to follow."[222] As a witness urged before the Standing Senate Committee on Legal and Constitutional Affairs during its consideration of Bill C-10: "What is wrong with Canadian leadership? What is wrong with Canada saying that is an important case? We are dealing with an important issue here…. The victims are looking for their day in court. They are looking for tools to

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and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts", Issue No 14, 1st Sess (24 February 2012) (testimony from Wendell Sanford, Director, Criminal, Security and Diplomatic Law Division, Foreign Affairs and International Trade Canada), online: <https://sencanada.ca/Content/SEN/Committee/411/lcjc/pdf/14issue.pdf>.

[220] Standing Committee on Legal and Constitutional Affairs, 1st Sess, 41st Parl, Ninth Report, February 2012, online: <https://sencanada.ca/Content/SEN/Committee/411/lcjc/rep/rep09feb12-e.htm>.

[221] Senate, *Debates of the Senate*, 41st Parliament, 1st Session, vol 148 (1 March 2012) at 1420 debate at report stage and at third reading (Senator Joan Fraser) ("We gave practically no consideration to the quite important implications under our constitutional regime and under international law of Bill C-10. These elements were mentioned. We were told several times that we are probably in contravention of both the Constitution and international law with Bill C-10, but we did not have time to examine those issues properly. Since the committee was obliged to conclude its work in something approaching record time, the only last recourse, the last line of defence, is this debate… at report stage and at third reading. This is where the Senate should be doing its job as the chamber of sober second thought"); Senate, *Debates of the Senate*, 41st Parliament, 1st Session, vol 150 (1 March 2012) 1st Sess, 41st Parl, Volume 150, Issue 56 at 2020 (Senator Joyal) ("The second argument is that it would run contrary to international law. I want to cite a decision of the International Court of Justice, from February 3, 2012, less than a month ago. The court refused to allow Italy to bring Germany to court for reparation for damages inflicted to Italy in the last world war because the court came to the conclusion that you cannot change state immunity to seek damages or compensation, even if those acts are as abhorrent as the ones the Nazi government inflicted on Italy and other countries. This very recent decision, in my opinion, questions the scope of this bill and the way it is drafted."); *House of Commons Debates*, 41st Parliament, 1st Session, vol 146 (6 March 2012), MP Jack Harris (NDP) "the executive branch of the U.S. has been very reluctant to allow frozen assets to be used for this purpose and made available.... It was concerned about retaliatory measures and losing leverage over the country concerned, as well as potentially violating international law on state immunity. There was a whole quagmire of problems."

[222] Jonathan I. Charney, "The Persistent Objector Rule and the Development of Customary International Law" (1985) 56 British Yearbook of International Law 21, cited in Katzenstein, *supra* note 35 at 681.

fight this because now they are alone. They feel helpless, and this bill gives them something."[223]

With Canada potentially breaking from current state practice on state immunity, the reaction of states to this break may determine whether a future rule will develop or whether Canada and the United States will remain outliers on this issue. While a full examination of how customary international law evolves is beyond the scope of this paper, it should be noted that customary international law on this issue may be within a period of flux marked by inconsistent state practice; as Suzanne Katzenstein explains, "[customary international law] cannot evolve without… ambiguity and inconsistency in state practice."[224] For the law to change, states must determine whether they will endorse state practice that diverges from formerly settled rules of customary international law.[225]

If states respond favourably to the practice of Canada and the United States, they may help to avoid what Roger O'Keefe has termed a "customary international legal feedback loop" resulting from international adjudication.[226] While, as noted above, decisions of the ICJ are only binding upon the parties to the specific cases, such a "feedback loop" may arise because, as secondary sources of international law, the decisions often play a role in clarifying – and potentially solidifying – rules of international law when the Court's reasoning proves persuasive and is relied upon in future cases before the ICJ, other international tribunals, and domestic courts.[227] In light of this influence, Katzenstein argues that "early international adjudication" adhering to a pre-existing rule of customary international law before states have had time to react in support or against state practice running counter to the rule is "problematic" because "it may discourage others from following the custom breaker and prevent better [customary international law] from emerging… and, regardless of whether states decide to follow the custom breaker, it cuts short the opportunity for states to debate and respond to deviations from the status quo."[228] With respect to *Jurisdictional Immunities*, Katzenstein concludes that, "[r]egardless of whether the ICJ's ruling is consistent with what states would have ultimately decided for themselves, it is procedurally problematic for the ICJ to pre-empt the traditional process by which [customary international law] evolves."[229] It remains to be seen whether the majority in *Jurisdictional Immunities* has pre-empted additional restrictions on the scope of state immunity. Canada could, however, assist with

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[223] 8th Meeting on Bill C-10, *supra* note 119, Marceau at 12:86.

[224] Katzenstein, *supra* note 35 at 681.

[225] *Ibid*.

[226] *Ibid* at 686.

[227] *Ibid* ("In this [feedback] loop an international court, which sees itself as following state practice, upholds traditional [customary international law] on the basis that domestic decisions continue to adhere to it. Domestic courts in turn view the international court's ruling as evidence that traditional [customary international law] persists, and then continue to follow such customs", citations omitted).

[228] *Ibid*.

[229] *Ibid* at 696.

avoiding a pre-emption by taking a clearer position on whether international law supports an exception to state immunity when states sponsor acts of terrorism.

The ability for Canada's legislation to spur an evolution in the law of state immunity may, however, be limited. The recent reaction of states to the 2016 *JASTA* amendments to the U.S. *FISA* may be telling and provide evidence that customary international law is not evolving to recognize an exception to state immunity that would allow domestic claims against states that sponsor terrorism or other serious violations of human rights. Although states may have been willing to remain ambivalent about the potential for the *AEDPA* amendments to the U.S. *FSIA* to violate international law because it was unlikely that they would be subjected to claims due to the listing requirement for section 1605(A) claims, a number of states have reacted negatively to the broader 2016 *JASTA* amendments.

Arguably illustrating the unwillingness of states to tolerate an expansive lifting of immunity for acts of terrorism, as a briefing paper for the European Parliament has noted, "State or sovereign immunity is a recognised principle of customary international law and, for that reason, JASTA has been denounced as potentially violating international law and foreign states' sovereignty."[230] Officials and legislators from a variety of states and international organizations have warned that *JASTA*'s new exceptions are contrary to international law, including Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates (through the Gulf Cooperation Council),[231] Morocco,[232] France,[233] the Netherlands,[234] the United Kingdom,[235] and the European Union.[236] The Briefing Paper highlights the potential

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[230] European Parliamentary Research Service, *supra* note 194 at 1.

[231] *Ibid* at 9 (the Secretary General of the Gulf Cooperation Council has "expressed GCC members' concern with regard to JASTA, which in their view contradicts the foundations and principles of relations between states, notably the sovereign immunity principle").

[232] *Ibid*.

[233] *Ibid* ("Pierre Lellouche, a Member of the Foreign Affairs Committee in [France's] National Assembly stated that JASTA would cause a 'legal revolution in international law with major political consequences' and declared that he would pursue legislation that would permit French citizens to sue the United States with cause should the bill enter in force").

[234] *Ibid* ("In July 2016, the Dutch Parliament submitted a formal letter in advance to the Judiciary Committee hearing on the JASTA proposal. In a binding motion on the JASTA bill, members of the Parliament considered JASTA to be 'a gross and unwanted breach of Dutch sovereignty' and declared that 'the entry into force of JASTA in its current form' was 'unacceptable for the Netherlands'").

[235] *Ibid* ("The risk of legal suits against the government has also been raised by British politicians. In an op-ed for The Telegraph, British MP, Tom Tugendhat, signalled that, under JASTA, US citizens might sue the British government claiming a negligent lack of efforts to tackle Islamic radicalism in earlier decades").

[236] *Ibid* ("At EU level, the Transatlantic Relations Working Party (COTRA) in the Council has agreed on the EU démarche to the US Department of State that signalled the conflict of the proposed legislation with the fundamental rights of international law and in particular the principle of state immunity. The European Union considers that the adoption of the bill and its subsequent implementation might also cause repercussions for other states that may seek to adopt similar legislation, which then could lead to a further weakening of the principles of state sovereignty and immunity. The EU also expressed the intention to seek assurance and clarification from the United States concerning the bill's implementation, in particular

for the *JASTA* amendments to lead to violations of international law and recommends that the European Union react:

> even though JASTA's provisions and the current debate surrounding them do not suggest the [JASTA] authors' intention to target European countries, the EU will need to react to the limitation on the principle of state immunity proposed in JASTA…. [S]tate immunity is a well-recognised principle of customary international law based on the sovereign equality of states in the international legal order. Subjecting the EU Member States to civil law suits in the US courts would therefore represent a significant violation of their sovereignty.[237]

As customary international law arises as a result of state practice, this negative reaction to the U.S. *JASTA* may confirm that state immunity remains a fundamental principle of customary international law and that *Jurisdictional Immunities* did not pre-empt an evolution in customary international law. Rather, the reaction could be evidence that, with the *JASTA*, the United States broke too far from generally accepted custom and many states may be unwilling to recognize new exceptions to state immunity.

As the following section will explore, when considering whether to follow the lead of the U.S. and Canada on this issue, states may be mindful of the risks that accompany additional exceptions to state immunity. Although adhering to the traditional exceptions to state immunity may result in injustice to victims of state sponsored terrorism and other violations of individual rights, states may find compelling reasons to not accept new exceptions – including the fact that allowing such claims may, in many instances, promise only symbolic justice.

V. Can Civil Claims Against States Achieve Justice?

This part explores the prospect of states accepting a more restrictive understanding of the principle of state immunity based on the nature of the claims at issue and examines critically the ability of civil claims to achieve justice for victims of terrorism. Advocates of additional exceptions to state immunity have advanced a variety of arguments to support their position, including implied waivers of immunity by states whose policies or officials violate fundamental human rights or commit serious international crimes.[238] Another approach has been to argue that state immunity must yield to allow claims for violations of *jus cogens* norms (through, for example, torture, extrajudicial killing, or genocide) because of the nature of the wrong. Another rationale focuses on the increasing recognition of individuals as actors and subjects of international law, who are entitled to a remedy just as individuals who suffer harm within the forum state are already entitled to remedies under the territorial tort exception. While these arguments may, to varying degrees, provide morally

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reassurance that the US administration would seek to request a stay of proceedings as required in order to mitigate possible breaches of the principle of state immunity").

[237] *Ibid* at 10.

[238] Roht-Arriaza, *supra* note 77 at 74–77.

compelling reasons to not recognize state immunity, as *Jurisdictional Immunities* makes clear, there may be insufficient state practice at present to support such exceptions. Although one may find laudable the rationale underpinning the dissenting opinions in *Jurisdictional Immunities* and it may be difficult to disagree with the conclusion that international law ought to permit claims against states when they violate fundamental individual rights, an evolution in the law may be unlikely so long as states consider the risks of allowing claims to outweigh the possible benefits.

States may hesitate to embrace new exceptions to state immunity for a number of reasons, including because it could lead to an erosion of state sovereignty that they consider unacceptable. States may also be mindful that a new exception could be abused and could lead to friction in international relations. Finally, states may look at the outcome in the United States (and, with *Tracy (Appeal)*, Canada) and be mindful that allowing civil claims against foreign states may not lead to justice or accountability for violations. While an evolution in customary international law may be unlikely to occur in the near future, this does not mean that it is inappropriate for states to attempt to achieve justice for victims of terrorism and other violations of fundamental individual rights; however, rather than allowing for civil claims against foreign states, there may be more appropriate alternative action for states to take, including criminal prosecutions and sanctions.

(a) The Possible Misuse of a "Terrorism" Exception

Although the majority in *Jurisdictional Immunities* may have left room for a future finding that support for terrorism is a private act for which states are not entitled to immunity, states may hesitate to accept interpreting such acts as private. States may be motivated to not accept support for terrorism as private because "terrorism" is notoriously difficult to define and states may disagree on whether a group is "terrorist". With this potential disagreement among states and no clear agreement on what is objectively "terrorism", if a terrorism exception existed, there is a risk that states could be subjected to the jurisdiction of foreign courts in cases with dubious merit. This may, in turn, result in an erosion to state sovereignty and potential friction in international relations that states would hesitate to accept. While negative effects on international relations could be limited if states legislate a listing process like that in Canada (and in the United States for section 1605(A) claims), if the exception were recognized under customary international law, there would be no legal requirement for a listing process. Additionally, even if a listing process were adopted by states, the exception could still be subject to misuse or result in claims being brought where states have divergent views on what groups are "terrorist" and what activities amount to support for "terrorism".

An example of such a difference of opinion may be drawn from the current armed conflict in Syria. The Syrian government labels as "terrorist" groups fighting against it, including some groups that are being supported by foreign states, including

Canada and the United States.[239] Similarly, Turkey considers the Kurdish People's Protection Units (or Y.P.G.), which is supported by the United States, to be a terrorist group.[240] Leaving aside questions such as the legality of foreign intervention in the Syrian conflict and whether foreign states would be entitled to jurisdictional immunity from claims because their support is occurring in the context of an armed conflict, if Syria or Turkey were to adopt a terrorism exception to state immunity, would Canada or the United States enjoy immunity with respect to their support of groups that Syria or Turkey considers terrorist? With domestic courts around the world operating with varying degrees of independence from the government of the state in question, there may be no guarantee that foreign states brought before domestic courts for these types of claims would be afforded due process and an impartial assessment of their entitlement to state immunity. And, as *Tracy (Appeal)* makes clear, since domestic law is likely to prevail over international law before the domestic courts, such claims may ultimately succeed even when the legislation allowing for the claims runs counter to the generally accepted rules of international law.

(b) The Erosion of Sovereignty and Detrimental Effects on International Relations

States may also hesitate to follow the lead of Canada and the United States and admit a new exception to state immunity for terrorism due to concern for creating a slippery slope to new exceptions and opening floodgates of claims that could negatively affect international relations.[241] The possibility of a terrorism exception leading to additional exceptions is clear because, if states accept that they are not immune to civil claims for their wrongs against individuals, a necessary question arises: why stop at terrorism?[242] If states do not enjoy immunity from civil claims for support of terrorism because these acts violate fundamental human rights, a compelling argument can be made that claims are also permissible for other international crimes, such as torture, genocide, and crimes against humanity, which are international crimes that are legally defined and may be less susceptible to conflicting interpretations than "terrorism". While it may be morally persuasive to recognize exceptions to state immunity for all

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[239] See e.g. Connor Finnegan, "A look at the factions battling in Syria's civil war" *ABC News* (11 April 2017), online: <abcnews.go.com/International/inside-syrias-multiple-fighting-factions/story?id=46731830> ("The [Syrian] Assad regime has been quick to label anyone in the opposition against it a "terrorist," accusing those groups' Western and Arab allies of supporting terrorism").

[240] See e.g. *ibid*; Anne Barnard and Ben Hubbard, "Allies or Terrorists: Who are the Kurdish Fighters in Syria" *New York Times* (25 January 2018), online: <www.nytimes.com/2018/01/25/world/middleeast/turkey-kurds-syria.html>.

[241] See e.g. S. Jason Baletsa, "The Cost of Closure: A Reexamination of the Theory and Practice of the 1996 Amendments to the Foreign Sovereign Immunities Act" (2000) 148 U Pa L Rev 1247; Daveed Gartenstein-Ross, "A Critique of the Terrorism Exception to the Foreign Sovereign Immunities Act" (2002) 34 NYU J Int'l L & Pol 887.

[242] Ranganathan, *supra* note 108 at 389 (Striking a similar note to the question of why states should not go further with their restrictions on state immunity, arguing in favour of adding a torture exception to a prior legislative incarnation of Bill C-10, Ranganthan has noted that "Canada has a longstanding history in the field of human rights, positioning itself as an international leader in this field. Providing victims of torture with avenues for redress against foreign states in Canadian courts is consistent with this history").

of these crimes, states may hesitate to admit these exceptions due to concern that it may erode state sovereignty.

In addition, states may not accept new exceptions due to concern that this could have negative effects on their international relations. Canada and the Unites States were clearly mindful of this issue when they introduced exceptions for terrorism. With respect to Canada, a previous bill, Bill C-483, tabled by a member of Parliament from an opposition party, would have allowed for civil claims to be brought before Canadian courts against foreign states for genocide, crimes against humanity, war crimes, and torture.[243] However, Parliament ultimately enacted the much narrower terrorism exception through Bill C-10. While it would be imprudent to say with certainty why the narrower approach was adopted, it could be that the government preferred Bill C-10's listing process and more limited scope because it posed substantially less risk to Canada's international relations. This conclusion is supported by the fact that, when Bill C-10 was before Parliament, it was favoured over another private member's bill also under consideration, Bill C-408.[244] Like Bill C-10, Bill C-408 only provided for a civil cause of action against states that sponsor terrorism; however, Bill C-408 was significantly more expansive than Bill C-10 because it did not include a listing requirement.[245] During debates regarding Bill C-10, an opposition member of Parliament who co-sponsored Bill C-408 (and had previously sponsored Bill C-438) argued strongly against a listing requirement:

> We have an opportunity to provide redress for Canadian victims anchored in principles of domestic and international law. Regrettably, the government's bill handcuffs the victims of terrorism by subjecting them to a political list of countries that the government chooses to target. In this the government bill fails victims of terrorism and places politics above justice. Simply put, the government's bill takes as its basic premise that state immunity should still operate, which undermines its own purpose in the legislation even when a state is charged with supporting terrorism. Only those states that the government chooses to single out will be held accountable. The government's legislation politicizes the legislation as victims of terrorism have themselves noticed.[246]

The U.S. experience also suggests that the U.S. government has been mindful that new exceptions to state immunity could have detrimental effects on international relations. As discussed above, the executive branch strongly resisted the 2016 *JASTA* amendments to the U.S. *FISA* and they only passed when Congress overrode a presidential veto.[247] In addition, Roht-Arriaza has noted that the listing process for section 1605(A) claims was, in part, "designed to avoid inadvertent interference with

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[243] Bill C-483, *supra* note 118.

[244] Bill C-408, *supra* note 118.

[245] *Ibid*.

[246] *House of Commons Debates*, 40th Parliament, 2nd Session, No 104 (30 October 2009) at 6388 (Hon. Irwin Cotler (Mount Royal)).

[247] See discussion at Part II(c) of this article.

the conduct of foreign relations"[248] and "to assure that 'friendly' governments are not subject to suit notwithstanding their treatment of U.S. citizens."[249] Roht-Arriaza also noted that the 1996 *AEDPA* amendments reflect concerns expressed during the legislative process that they could "lead to other countries… modify[ing] their own laws relating to foreign sovereign immunity in ways that go beyond liability for torture and the like, potentially exposing the U.S. to suit in foreign court for acts which the U.S. might take against foreign nationals."[250]

While a more stringent and fulsome listing process in Canada and the United States may be desirable from a victims' rights perspective, it may be unlikely that concerns for achieving justice will prevail over concerns regarding international relations. It has been noted, for example, that the listing process in the United States may pose problems to international relations when the U.S. executive attempts to normalize relations with states that have been listed as state sponsors of terrorism: "Although a state sponsor of terror can easily be delisted as such by the State Department, the judgments against the… defendants are not as easy to eliminate. This reality seriously limits the range of methods by which the executive branch can incentivize belligerent regimes to cooperate."[251] As a result, it has be concluded that, "although the exception was created to make it easier to fight terrorism, the exception might actually hamper efforts to do so because the judgments create a cloud of apprehension over normalization discussions."[252] Similarly, as Daveed Gartenstein-Ross has explored in the U.S. context, there is a risk that judgments could pose a barrier to normalizing relations with foreign states, like Iran, that are listed as sponsors of terrorism.[253]

Ultimately, states considering whether to follow the lead of Canada and the United States will assess whether the erosion of state sovereignty and the resulting friction with respect to international relations that may result from admitting new exceptions to state immunity is desirable. The negative reaction that the *JASTA* amendments to the U.S. *FSIA* have provoked among states may signal that states, being mindful of this issue, may not be eager to recognize a similar exception.

(c) The Questionable Benefits of Unenforceable Claims and the Continued Denial of Justice

Although allowing civil claims against states that sponsor terrorism may promise justice for victims of terrorism, the unfortunate reality is that, even if when such claims

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[248] Roht-Arriaza, *supra* note 77 at 81.

[249] *Ibid*.

[250] *Ibid*.

[251] Troy C. Homesley III, "'Towards a Strategy of Peace': Protecting the Iran Nuclear Accord Despite $46 Billion in State-Sponsored Terror Judgments" (2017) 95 NC L Rev 795 at 827.

[252] *Ibid*.

[253] Gartenstein-Ross, *supra* note 241.

are permitted, victims are likely to face significant difficulties with holding states financially liable. The experience of victims in the United States (and, to a more limited extent, Canada), show that there are practical limitations that may call into question the value of legislation like Bill C-10. Ultimately, justice may remain elusive when successful plaintiffs are unable to enforce their judgments and cannot collect the damages they have been awarded. This continued denial of justice calls into question whether such legislation is ultimately beneficial.

As the Canadian and U.S. experiences show, exceptions to state immunity within domestic legislation are likely to be narrowly crafted and applied due to concerns about adverse effects on its international relations. With only Syria and Iran listed under Canada's *JVTA*, one may conclude that the legislation has fallen short of the desire expressed during the legislation process that there would be "a full and complete list" of states designated as sponsors of terrorism.[254] Without a more complete list, the *JVTA* is unlikely to achieve its stated aim of "impairing the functioning of terrorist groups in order to deter and prevent acts of terrorism against Canada and Canadians."[255] Similarly, in the United States, the fact that there is currently no legislated exception for the enforcement of section 1605(B) judgments (unlike section 1605(A) judgments), reinforces the importance of a state being listed as a sponsor of terrorism. At the time of writing, North Korea, Iran, Sudan and Syria have been designated in the United States as state sponsors of terrorism, which severely curtails the prospects of victims holding foreign states financially liable for the suffering that their sponsorship of terrorism has caused.[256]

Even when legislated exceptions permit the enforcement of judgments against foreign states, victims may be unlikely to hold foreign states finically liable for their support of terrorism or other violations of their rights. Victims may be deterred from bringing claims because they are costly, difficult, and time consuming. In addition, allowing for such claims may raise false hopes that satisfaction or restitution would be forthcoming; even if a victim is successful with a claim, the judgment that is obtained may be unenforceable if the foreign state does not have sufficient assets within the domestic state against which the judgment may be enforced.

The U.S. experience may provide a cautionary example for plaintiffs considering bringing claims under Canada's legislation. Writing shortly after the passage of the 1996 *AEDPA*, Roht-Arriaza foresaw that the states listed as sponsors of terrorism would be "those least likely to have significant assets within reach that might

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[254] 8th Meeting on Bill C-10, *supra* note 119, Marceau.

[255] *JVTA*, *supra* note 9 at preamble.

[256] See U.S. Department of State, "State Sponsors of Terrorism", online: <www.state.gov/j/ct/list/c14151.htm>; Roht-Arriaza, *supra* note 77 at 82 (Reflecting on the limited ability to bring claims under section 1605(A), it has been suggested that, "[i]f the purpose of the [U.S.] legislation is to provide relief to U.S. citizens now left without a remedy for grievous violations of their rights, the door has only been opened slightly, and without any assurance that it will stay open").

be used to satisfy a judgment."[257] States are only likely to be listed as sponsors of terrorism when the U.S. executive is satisfied that this will not unduly interfere with its foreign or commercial relationships with that state and, once they are listed, such states may avoid locating significant assets within the United States in an effort to prevent future judgments being enforced against these assets.

U.S. victims of terrorism who have successfully brought claims against foreign states have, in many instances, been unable to collect the damages they are awarded. As of 2008, it was estimated that there were $11.4 billion in damages awarded against Iran alone that remained outstanding and, with Iran only having approximately $400 million in assets in the United States, of which only $91 million were not immune from attachment and enforcement, few plaintiffs would be able to collect on their judgments.[258] Since 2008, the gap between damages awarded against Iran and assets against which these decisions could be enforced has only widened with Iran being ordered to pay over $50 billion in damages as of June 2016.[259] In the face of continued injustice for victims of terrorism, the U.S. government has tried to assist successful plaintiffs by, among other things, creating a fund providing up to $35 million to victims and their families who have received judgments against state sponsors of terrorism.[260] While there are good intentions behind this fund, the amount clearly falls far short of providing complete compensation for plaintiffs that have been awarded damages from Iran.

If victims are unable to enforce judgments against foreign states, legislation allowing claims against foreign states may ultimately lead to dashed expectations for victims. This unfortunate effect is illustrated through the experience of Stephen Flatow, the father of Alisa Flatow, a U.S. citizen who was killed in a terrorist attack by Hamas. The estate of Ms. Flatow obtained a judgment against Iran due to its support of Hamas, which claimed responsibility for the terrorist attack that killed Ms. Flatow and Mr. Flatow once spoke in favour of the *AEDPA* amendments to the U.S. *FSIA*:

> [The law g]ave me a weapon…. [A] sovereign country has the right to launch… missiles at another country to protect its rights…. I don't have that kind of power. I don't have $60 million to launch those kinds of missiles.

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[257] Roht-Arriaza, *ibid*.

[258] Jennifer K. Elsea, Congressional Research Service, "Suits Against Terrorist States by Victims of Terrorism" *Congressional Research Service Report for* Congress (8 August 2008) at appendix B.

[259] *Certain Iranian Assets (Application Instituting Proceedings)*, *supra* note 201 at appendix; see also Orde Kittrie, "Iran Still Owes $53 Billion in Unpaid U.S. Court Judgments to American Victims of Iranian Terrorism: Foundation for Defense of Democracy Research Memo" *Foundation for Defense of Democracy*, online: <www.defenddemocracy.org/media-hit/orde-kittrie-after-supreme-court-decision-iran-still-owes-53-billion-in-unpaid-us-cour/>.

[260] See e.g. John Bellinger, "Omnibus Bill Creates One Billion Dollar Fund for Victims of Terrorism (and allows up to $250 million to go to their attorneys)" *Lawfare* (28 December 2015), online: <www.lawfareblog.com/omnibus-bill-creates-one-billion-dollar-fund-victims-terrorism-and-allows-250-million-go-their>; Brendan Green, David Quayat and Hilary Young, "Bill C-35: Real Justice for Victims of Terrorism?" (2010) 36:3 Adv Q 329.

> But now I have something that's purely American. I have… American jurisdiction over the people who sponsored the attack that killed Alisa.[261]

However, "three years later, Mr. Flatow was devastated yet again after he 'won' the case but could not force Iran to pay," stating that, "[i]f I knew then what I know [now], after spending tens of thousands of dollars trying to get some measure of justice for Alisa, I don't think I would have ever started this lawsuit."[262] One may only surmise that Mr. Flatow's frustrations have, sadly, continued in light of the attempt to enforce the Estate's judgment against Iranian assets in Italy that was ultimately unsuccessful in 2015.[263] Reflecting on the *AEDPA* amendments to the U.S. *FISA*, in 1999, the editorial board of *The Washington Post* went so far as to characterize the amendments as a "lie", maintaining that "Congress never should have passed, nor President Clinton signed, a law that could only offer Mr. Flatow justice by depriving the administration of control over important instruments of foreign policy. The law should be repealed."[264]

The experience of Dr. Wise illustrates that similar difficulties with enforcing judgments are likely to occur in Canada, which raises the prospects that Canadian victims of terrorism abroad may one day share Mr. Flatow's sentiments if they are offered only symbolic justice by prevailing in claims against foreign states, but are ultimately unable to collect the damages awarded. Commenting on a prior incarnation of Bill C-10, others have cautioned that,

> [t]he experience of the United States… demonstrates that depriving a state of its jurisdictional immunities is unlikely to result in plaintiffs actually recovering damages. Thus, the legislation could lead to violations of Canada's international legal commitments and diplomatic confrontations with other states, but would not provide any real benefit to victims of terrorism or deter states who sponsor terrorism.[265]

As Senator Boisvenu noted during the legislative process, however, symbolic justice could be worthwhile because "victims do not necessarily want to be compensated; they want support from the country sheltering such a group of criminals responsible for the death of their husband, their sister, or their father. Canada needs tools to ensure that victims are supported."[266] While symbolic justice may provide some solace to victims,

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[261] Jennifer Anglim Kreder and Kimberly Degraaf, "Museums in the Crosshairs: Unintended Consequences of the War on Terror" (2011) 10 Wash. U. Global Stud. L. Rev. 239 at 249 (citations omitted).

[262] *Ibid*.

[263] See European Parliamentary Research Service, *supra* note 194 at part III.d; see Weatherall, *supra* note 194 (although the Court found that international law permitted the enforcement of the judgment, it ultimately concluded that it could not be enforced in Italy because Italy did not have similar legislation to the US *FISA*).

[264] Editorial, "Lawsuits and Terrorism" *The Washington Post* (26 December 1999), cited in Baletsa, *supra* note 241 at 1299, n 323.

[265] Green, Quayat and Young, *supra* note 260 at 352.

[266] 8th Meeting on Bill C-10, *supra* 119.

in light of Mr. Flatow's statement above, one may question whether legislation like Bill C-10 can assist with achieving justice. Indeed, although a stated goal of an anti-terrorism and victims' rights group has been "bankrupting terrorism – one lawsuit at a time,"[267] it is questionable whether civil claims can be an effective means of combating terrorism or achieving justice for victims of terrorism when foreign states are not held financially liable despite judgments being rendered against them. Given the possible detrimental effects that eroding the principle of state immunity under international law may have, states considering adopting legislation like Bill C-10 may hesitate to enact such legislation due to fundamental doubts regarding whether its promise of elusive justice and accountability outweighs its negative effects.

VI. The Ongoing Quest for Ending Impunity: Criminal Accountability and State Responsibility

Rather than raising false hopes that victims of international terrorism will obtain justice by bringing civil claims against foreign states, an argument may be made that states should forego legislating new exceptions to state immunity in favour of taking concerted efforts to hold states and state officials directly responsible for their violations of individual rights. As Chrisitan Tomuschat has asserted,

> Pleas for discarding state immunity in cases of grave violations of human rights are mostly based on fully understandable emotional reasons, but generally fail to take into account the full scope of the regime of state responsibility. Before inventing a new wheel, one should carefully examine the functionality of the old wheel. The traditional mechanisms for the settlement of damages in cases of massive injustices… are certainly not without any flaw or defect. However, to replace this system with an uncoordinated clutter of individual suits is the worst of all possible solutions. A viable mechanism requires the guiding hand of an international organization able to balance the interests at stake in a thorough manner. This should become a project of progressive development of the law.[268]

While it may be optimistic to hope that states will vest an international organization with the competence to balance competing interests in a manner that respects state sovereignty but achieves justice for victims of terrorism and other violations of fundamental human rights, Tomuschat provides a strong rationale for encouraging states to continue striving to hold other states accountable for their violations of individual rights.

In light of the negative effects that admitting a new exception to state immunity may have and the questionable benefits this approach offers for victims, states should make ending impunity a goal, prioritize victims' rights, and use and build

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[267] See Shurat HaDin, *Shurat HaDin*, online: <israellawcenter.org>; Shurat HaDin, *2017 Shurat HaDin Annual Report: Bankrupting Terrorism – One Lawsuit at a Time*, online: <israellawcenter.org/wp-content/uploads/2018/03/SH211_Annual-Report-2017.7.pdf>.

[268] Tomuschat, *supra* note 70 at 1140 (Tomuschat represented Germany as co-agent in *Jurisdictional Immunities*, *supra* note 10).

upon existing means to hold states responsible when they violate fundamental human rights. States could, for example, bring criminal claims against state officials (when such officials are no longer immune from prosecution[269]), assist individuals with bringing civil claims against state officials (rather than the state itself), and use countermeasures against states and individuals to achieve accountability.

With respect to countermeasures, it should be recalled that state immunity acts as a procedural barrier preventing one state from being subject to another state's jurisdiction. It does *not* excuse the state's violations of international law. As a result, even if civil claims against the state are barred, a state that sponsors terrorism or otherwise violates fundamental human rights has still committed an internationally wrongful act.[270] Having committed an internationally wrongful act, the state incurs responsibility and is obliged under international law to make restitution,[271] provide compensation,[272] and give non-monetary satisfaction to victims.[273] In such instances, other states may be legally entitled to impose sanctions[274] against the state that has violated international law in order to encourage the violating state to cease its violations and to comply with its obligations to the victims of its violations.

Although there are difficulties with using existing means to hold states and state officials accountable for their internationally wrongful acts and states may hesitate to employ these means for a variety of reasons (including concern for negative effects on their international relations), using existing mechanisms would avoid needing customary international law to evolve for the measures to be internationally lawful. The above approaches may also prove more palatable to states because states retain control over claims or the countermeasures employed and can thereby determine what action is warranted. In doing so, one would hope that states would take into consideration the interests of victims and the international community as a whole when determining if legal proceedings and/or countermeasures are warranted. As Gartenstein-Ross has argued, "[b]ecause terrorism is a foreign policy problem, it is best dealt with by the political branches of government rather than by a wide array of courts and judges engaging in their own foreign policy experiments."[275]

For these approaches to be effective, states will need to become more strident advocates for victims. There may be some cause for optimism that states will take

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[269] See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, [2002] ICJ Rep 3 (recognizing the immunity of certain state officials while they hold office).

[270] *State Responsibility for Internationally Wrongful Acts*, UN GAOR, 56th Sess, Annex, Agenda Item 162, UN Doc A/RES/56/83 (2001) at art 2 ("There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State").

[271] *Ibid* at art 35.

[272] *Ibid* at art 36.

[273] *Ibid* at art 37.

[274] See *ibid*.

[275] Gartenstein-Ross, *supra* note 241 at 888 (citation omitted).

individual rights more seriously; in recent years, some states have shown a willingness to adopt targeted sanctions against state officials and other individuals who are suspected of committing serious human rights abuses. One example is the U.S. *Magnitsky Act*,[276] which spurred similar legislation in additional states. The namesake of the Act, Sergei Magnitsky was a lawyer who "uncovered a $230 million corruption scheme implicating numerous Russian interior ministry officials" and was arrested after providing testimony about this corruption.[277] After being denied adequate medical treatment for health ailments including gallstones and pancreatitis, Mr. Magnitsky was fatally assaulted by prison guards in 2009 and, after his death, was tried and convicted for fraud.[278] Passed in 2012 in response to Magnitsky's death, the Act authorized the imposition of targeted sanctions against Russian officials who were considered responsible for Mr. Magnitsky's death. As Canadian Senator A. Raynell Andreychuk has asserted, "Mr. Magnitsky's case reflects the plight of countless brave individuals working to expose the illegal activities carried out by their governments in the pursuit of freedom, justice and democracy."[279] In 2016, the U.S. Congress passed the *Global Magnitsky Human Rights Accountability Act*.[280] The *Global Magnitsky Act* was implemented on December 2017 through an executive order of the U.S. president that "authorized the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, to impose financial sanctions on persons determined to be directly or indirectly responsible for serious human rights abuse or acts of significant corruption" and also "authorized the Secretary of State to impose visa restrictions on persons designated pursuant to the executive order."[281] In 2017, financial sanctions were imposed under the *Global Magnitsky Act* against 14 persons suspected of human rights abuses and/or corruption in multiple countries, including Burma/Myanmar, the Democratic Republic of the Congo, the Dominican Republic, Gambia, Guatemala, Liberia, Nicaragua, Pakistan, Russia, South Sudan, Ukraine, and Uzbekistan.[282] Demonstrating the sweeping reach of such laws, the targeted individuals include a former head of state, military officers, an arms dealer, a surgeon, and officials from security agencies on account of allegations of serious human rights abuses, corruption, enrichment as a result of violations of arms bans, extrajudicial

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[276] *Russia and Moldova Jackson–Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012* HR 6156 (2012).

[277] *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)*, SC 2017 c 21 at preamble [*Sergei Magnitsky Law (Canada)*].

[278] *Ibid*.

[279] Senator A. Raynell Andreychuk, Bill S-226, "An Act to provide for the taking of restrictive measures in respect of foreign nationals responsible for gross violations of internationally recognized human rights and to make related amendments to the Special Economic Measures Act and the Immigration and Refugee Protection Act", second reading, 1st Sess, 42nd Parl, Vol 150, Issue 65 (October 25, 2016) at 1650.

[280] *National Defense Authorization Act for Fiscal Year 2017*, Pub L 114-328 [2016].

[281] United States Department of State, "Global Magntisky Human Rights Accountability Act Annual Report" Federal Register, Vol. 83, No. 23 (February 2, 2018), Notices at 4950.

[282] *Ibid* at 4950-53.

killings, sexual violence, assault of activists, ethnic cleansing, death of an individual in custody, and torture.[283]

A number of states have adopted similar measures, including Canada, which passed the *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)* in 2017.[284] Relying on the Act, Canada has authorized financial sanctions against 52 individuals suspected of "gross violations of internationally recognized human rights" and/or "significant acts of corruption" in Russia, South Sudan, and Venezuela.[285] Speaking in favour of Canada's *Sergei Magnitsky Law*, Senator Andreychuk noted that it was designed "to strengthen the Canadian government's capacity in the protection and promotion of internationally recognized human rights."[286] Similarly, Canada's Foreign Affairs Minister has asserted that the Act is "a valuable complement to [Canada's] existing human rights and anti-corruption tools" that "enable[s] Canada to sanction, impose travel bans on and hold accountable those responsible for gross human rights violations and significant corruption" which thereby "ensure[s] that Canada's foreign policy tool box is effective and fit for purpose in today's international environment."[287] It may be that implementing tailored sanctions pursuant to legislation like the *Global Magnitsky Act* and the *Sergei Magnitsky Law* may provide more effective tools for states to fight impunity and achieve justice for victims than allowing civil claims against foreign states that may result in largely symbolic outcomes.

Conclusion

While state immunity has evolved over time, it does not yet admit clearly an exception to state immunity to allow for civil claims against states that violate fundamental human rights abroad. *Tracy (Appeal)* may, therefore, be hailed as a step towards achieving long-awaited justice for victims of state-sponsored terrorism but, in light of the majority's decision in *Jurisdictional Immunities*, it is likely that the decision has led to Canada violating Iran's right to jurisdictional immunity under current customary international law.

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[283] *Ibid*.

[284] *Sergei Magnitsky Law (Canada)*, *supra* note 277; see Senator Andreychuck, *supra* note 279 at 1700 ("In adopting this legislation, Canada would join other parliamentarians in calling for justice. I note in particular the adoption of the Sergei Magnitsky Rule of Law Accountability Act in the United States, passed by both houses and signed into law by President Barack Obama on December 4, 2012; a resolution passed in the European Parliament calling on the European Council to introduce 'Magnitsky list' sanctions against Russia; a resolution passed by the Parliamentary Assembly of the Organization for Security and Co-operation in Europe; the unanimous adoption of a motion by the Justice and Human Rights Committee in Poland; a parliamentary petition launched in Sweden; and the unanimous adoption of a resolution by the Dutch Parliament").

[285] *Justice for Victims of Corrupt Foreign Officials Regulations,* SOR/2017-233.

[286] Senator Andreychuck, *supra* note 284 at 1650.

[287] Chrystia Freeland, Minister of Foreign Affairs, "Statement by Minister of Foreign Affairs on Justice for Victims of Corrupt Foreign Officials Act" *Global Affairs Canada* (4 October 2017), online: <https://www.canada.ca/en/global-affairs/news/2017/10/statement_by_ministerofforeignaffairsonjusticeforvictimsofcorrup>.

Even though there are compelling moral reasons to conclude that it is absurd to permit claims against states in a commercial context but to protect them from civil claims when they support acts of terrorism, it is likely that this absurdity persists. One must recall, however, that this absurdity arises as a result of state practice. Even when it impedes efforts to achieve justice for victims of terrorism (and other abuses of human rights), international law remains premised on the consent of states. While current customary international law may be dissatisfactory and unpalatable when it protects states from civil claims despite the fact that they have violated fundamental rights of individuals, as the decision in *Jurisdictional Immunities* (and the reaction of states to the *JASTA* amendments to the U.S. *FISA*) suggests, the shield sovereignty provides through state immunity likely remains in place at present. Unless and until states recognize more consistently additional exceptions to state immunity, customary international law will not evolve to admit such claims. By extension, unless and until such an evolution occurs, it is likely that decisions such as *Tracy (Appeal)* will result in Canada violating customary international law despite the fact that the proceedings are not problematic from a domestic legal perspective.

While Canada and the United States could be considered "custom breakers" that may be leading the way toward the recognition of a more restrictive approach to state immunity, it remains to be seen whether arguments in favour of opening the door wider to civil claims against states that violate fundamental rights of individuals will persuade states to follow their lead. To accept a new exception, states will likely need to determine that the benefits of a new exception outweigh the risks posed. Ultimately, optimism about a future evolution in the law may not be warranted because states may conclude that it is undesirable to admit a new exception that erodes state sovereignty and may interfere with international relations in order to achieve a potentially ineffective means of achieving justice for victims. As a result, it may be that the majority decision in *Jurisdictional Immunities* was not arresting the development of customary international law, but was, instead, consistent with the view of the majority of states that jurisdictional immunity extends to acts of states that violate fundamental rights of individuals.

In light of the potential for state immunity to lead to morally unjust outcomes, it is incumbent on states to explore other means of achieving accountability, such as bringing criminal charges against state officials; assisting individuals with bringing civil claims against state officials; and using sanctions to deter violations of serious human rights and encourage states to abide by their obligation to make restitution, provide compensation, and give satisfaction to victims. Ultimately, whether and to what extent customary international law will one day permit civil claims against states will likely remain to be determined by how states resolve a "key question [which] is not 'whether sovereignty?' but instead 'how much sovereignty'?"[288]

[288] Currie et al, *Interntaional Law*, *supra* note 21 at 37.