

THE DISCRETIONARY FUNCTION EXCEPTION UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT: WHEN IN AMERICA, DO THE ROMANS DO AS THE ROMANS WISH?*

INTRODUCTION

In a significant departure from the traditional principle of absolute foreign sovereign immunity, the Foreign Sovereign Immunities Act of 1976 (the FSIA)¹ codified the doctrine of restrictive foreign sovereign immunity.² The FSIA confers broad immunity on foreign sovereigns, but also carves out several exceptions to this immunity. One of the exceptions, the non-commercial tort exception, exposes a foreign sovereign to liability for tortious acts committed by its agents within the scope of their employment.³ The FSIA also provides, in a complicated fashion, for exceptions to this non-commercial tort exception: the discretionary function exception⁴ shields a foreign sovereign from the jurisdiction of U.S. courts, and thus from liability for its agents' acts, when these acts are deemed "discretionary."

This discretionary function exception under the FSIA replicates the discretionary function exception in the Federal Tort Claims Act (FTCA),⁵ a statute enacted thirty years before the FSIA. The purpose of the FSIA discretionary function exception is to accord foreign sovereigns the same treatment that the U.S. government would receive before the U.S. federal and state courts. Without defining the term

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1. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1602-1611 (1988).

2. See H.R. Rep. No. 1487, 94th Cong., 2d Sess. 1 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6605 [hereinafter House Report]. Only the House Report was set out because "[t]he House bill was passed in lieu of the Senate bill." *Id.* at 6604. This Note focuses on the discretionary function exception and does not address the general issues of foreign sovereign immunity, on which literature abounds, see, e.g., H. Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 1951 *Brit. Y.B. Int'l L.* 220; Sompong Sucharitkul, *Immunities of Foreign States before National Authorities*, 149 *Recueil des Cours d'Academie de Droit International [R.C.A.D.I.]* 87 (1976); see also Thomas H. Hill, *A Policy Analysis of the American Law of Foreign State Immunity*, 50 *Fordham L. Rev.* 155 (1981) (evaluating FSIA's handling of foreign sovereign immunity issues).

3. See 28 U.S.C. § 1605(a)(5).

4. See *id.* § 1605(a)(5)(A). The discretionary function exception technically is an exception to the non-commercial tort exception to foreign sovereign immunity, provided for in § 1605(a)(5). To avoid the awkwardness of repeating the phrase "the exception to the exception," this Note will generally refer simply to "the discretionary function exception under the FSIA."

5. 28 U.S.C. §§ 1346(b), 2671-2680 (1988). The FTCA discretionary function exception can be found in 28 U.S.C. § 2680(a).

"discretionary function" in either statute, Congress stated that the discretionary function exception under the FSIA "correspond[s] to" the identical exception under the FTCA.⁶ Attempting to give effect to this scant congressional direction, and in the absence of Supreme Court decisions authoritatively defining the scope of the discretionary function exception under the FSIA, lower courts construing that exception have followed the principles developed by courts interpreting the parallel exception under the FTCA.

In so doing, U.S. courts have read the discretionary function exception under the FSIA expansively in cases involving violations of statutes and regulations ranging from criminal laws to zoning codes. Consequently, foreign officials and agents presently enjoy tremendous latitude in violating federal and state laws. In cases other than those involving the simple negligence of foreign agents—such as slip and fall accidents⁷ or pilot errors⁸—courts have largely refused jurisdiction over cases involving so-called discretionary conduct.⁹ The courts' willingness to clothe foreign sovereigns with immunity from liability for the consequences of their agents' conduct stops only when agents perpetrate conduct that is either "clearly contrary to the precepts of humanity"¹⁰ or prohibited by the foreign sovereign's internal law.¹¹ Under the expansive interpretation, the FSIA's discretionary function exception engulfs the general rule denying immunity for noncommercial torts, and thus deprives too broad a class of victims of the opportunity to vindicate their rights. Hence, the existing breadth of the discretionary function exception defeats a critical purpose of the FSIA: to provide mechanisms for aggrieved parties to obtain relief in U.S. courts for wrongs that foreign sovereigns commit in the United States.¹²

Notwithstanding their professed adherence to the principles that courts developed in cases construing the FTCA, the courts' interpretation of the discretionary function exception under the FSIA in fact is not faithful to those principles. Specifically, courts simply look to the open-ended principles announced in the FTCA cases and proceed to ignore the approaches these cases have employed to find limits on the

6. House Report, *supra* note 2, at 6620.

7. See *Olson v. Singapore*, 636 F. Supp. 885, 886 (D.D.C. 1986) (mem.).

8. See *Olsen v. Mexico*, 729 F.2d 641, 645 (9th Cir.), cert. denied sub nom. *United Mexican States v. Olsen*, 469 U.S. 917 (1984).

9. See *Risk v. Halvorsen*, 936 F.2d 393, 395–97 (9th Cir. 1991), cert. denied sub nom. *Risk v. Norway*, 112 S. Ct. 880 (1992) (violation of criminal law fell within the discretionary function exception); *MacArthur Area Citizens Ass'n v. Peru*, 809 F.2d 918, 921–23 (D.C. Cir. 1987) (violation of zoning code fell within the discretionary function exception).

10. *De Letelier v. Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980) (mem.) (assassination does not fall within the discretionary function exception).

11. See *Liu v. Republic of China*, 892 F.2d 1419, 1431 (9th Cir. 1989), cert. dismissed, 497 U.S. 1058 (1990).

12. See House Report, *supra* note 2, at 6605–06, 6620.

discretionary function of federal officials. That is, although purporting to follow FTCA case law, lower courts have adopted a portion of the FTCA jurisprudence and rejected the rest haphazardly.

After analyzing the current approaches to interpreting the discretionary function exception under the FSIA, this Note argues that judicial application of that exception has been misguided and that other applicable federal and state laws should assist the courts in defining the scope of foreign sovereign immunity. When a federal or state law prohibits or requires the act at issue, the discretionary function exception under the FSIA should not apply. Such an interpretation finds support in the case law construing the parallel FTCA exception, and is consistent with the concern for sovereign equality that underlies the discretionary function exception under the FSIA.

In addition to recommending the adoption of several limitations to the discretionary function exception, this Note shifts gears in the final section and argues that the FSIA exception itself is incongruous and should be repealed. Repeal of the discretionary function exception is necessary to compensate victims more effectively and to follow the trend in international law of providing a blanket tort exception to foreign sovereign immunity. More importantly, the underlying logic of the FSIA exception—to ensure parity between the immunity of the United States and that of foreign sovereigns—is fundamentally unsound in this context. The purpose of the discretionary function exception under the FTCA—to protect public policy making—has no corresponding application to foreign officials acting in the United States, because these foreign officials act as representatives of their own governments and do not make public policy within the United States.

Part I of this Note explores the discretionary function exception and the difficulties courts have faced in its construction. Part II examines the case law spawned by this exception and outlines the myriad and conflicting interpretations given by the federal courts. Part III argues that the discretion of foreign officials should be limited by federal and state prohibitory and mandatory laws. Part IV recommends that the discretionary function exception under the FSIA be repealed altogether.

I. THE DISCRETIONARY FUNCTION EXCEPTION UNDER THE FSIA AND THE DIFFICULT TASK OF INTERPRETATION

The discretionary function exception under the FSIA immunizes foreign sovereigns from suits in the courts of the United States for claims based on discretionary functions performed by their agents. In short, even if their agents' conduct violates federal or state laws, foreign sovereigns cannot be hauled into court if the conduct at issue is considered discretionary. Since almost every official act entails a modicum of discretion, a broad reading of the discretionary function exception vitiates the non-commercial tort exception to foreign sovereign

immunity. A proper interpretation of the discretionary function exception thus calls for an inquiry into what limitations on it are necessary and proper under the FSIA.

The principle of absolute foreign sovereign immunity, which bars any suit against a foreign sovereign without its consent, has deep historical roots at common law. The King of England enjoyed absolute immunity from suit in his own courts, and His Majesty extended like treatment to foreign sovereigns acting in his country.¹³ Justice John Marshall considered the doctrine of foreign sovereign immunity necessary to accommodate "th[e] perfect equality and absolute independence of sovereigns, and th[e] common interest impelling them to mutual intercourse, and an interchange of good offices with each other."¹⁴

Recognizing that a foreign sovereign often performs acts in another country that are both governmental (such as diplomatic or consular functions) and private (such as commercial activities), many countries gradually began, as early as the late nineteenth century, to adopt a restrictive theory of foreign sovereign immunity, affording immunity only for governmental acts.¹⁵ The United States adopted this view of restrictive sovereign immunity in 1952.¹⁶ Foreign sovereigns facing suit could obtain the "suggestion" of immunity from the State Department, to which courts would defer.¹⁷ In requesting immunity, foreign sovereigns often brought diplomatic influences to bear on the executive branch;¹⁸ this injection of politics into law led to inconsistent awards of immunity. In 1976 Congress, recognizing these problems, enacted the FSIA to serve two purposes: to "bring U.S. practice into conformity with that of most other nations"¹⁹ by codifying the narrow view of foreign sovereign immunity, and to transfer the authority to grant sovereign immunity from the executive branch to the judicial branch.²⁰ Under the FSIA, an aggrieved party can sue a foreign sovereign in U.S. courts for acts performed by foreign agencies or officials only when the FSIA provides a specific cause of action.²¹

Structurally, the FSIA first confers broad immunity on foreign sovereigns²² and then provides for specific exceptions. One of these ex-

13. See Sucharitkul, *supra* note 2, at 115-16.

14. See *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812).

15. See Lauterpacht, *supra* note 2, app. at 250-72; Sucharitkul, *supra* note 2, at 127-70.

16. See The Tate Letter, 26 Dep't St. Bull. 984 (1952).

17. See House Report, *supra* note 2, at 6605-06.

18. See *id.* at 6606.

19. *Id.* at 6610.

20. See *id.* at 6605-06; see also 28 U.S.C. § 1602 (1988).

21. See 28 U.S.C. § 1330(c); see also House Report, *supra* note 2, at 6610 ("[t]his bill . . . sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity").

22. 28 U.S.C. § 1604.

ceptions is the non-commercial tort exception in section 1605(a)(5). The purpose of this exception is to permit a tort victim to "maintain an action against the foreign state to the extent otherwise provided by law."²³ This exception provides that a foreign sovereign shall not be immune from the jurisdiction of U.S. federal and state courts in any case

in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.²⁴

The breadth of this statutory language, along with relevant legislative history, suggests that the tort jurisdiction of American courts is intended to reach both the public and private acts of a foreign sovereign.²⁵ To sue a foreign sovereign for the acts of its officials,²⁶ a plaintiff must show that a foreign official has committed a tortious act,²⁷ that both the act and injury occurred in the United States, and that the official acted within the scope of his employment.²⁸

23. House Report, *supra* note 2, at 6620.

24. 28 U.S.C. § 1605(a)(5); see also House Report, *supra* note 2, at 6619. The Act also provides for causes of action that arise out of the commercial activities conducted by the foreign sovereign in the United States. See 28 U.S.C. § 1605(a)(2).

25. The distinction between public (or governmental) and private acts is immaterial under the tort exception. "Section 1605(a)(5) is directed primarily at the problem of traffic accidents but is cast in general terms as applying to *all* tort actions for money damages." House Report, *supra* note 2, at 6619 (emphasis added). At least one court has explicitly taken the view that the exception applies to "all tort actions." *De Letelier v. Chile*, 488 F. Supp. 665, 672 (1980) (quoting House Report, *supra* note 2, at 6619). The International Law Commission of the United Nations (ILC) took the same view, see ILC, Draft Articles on Jurisdictional Immunities of States and Their Property art. 12 cmt. 8, in Report of the International Law Commission on the Work of Its Forty-third Session, U.N. GAOR, 46th Sess., Supp. No. 10, at 105, U.N. Doc. A/46/10 (1991) [hereinafter ILC Draft Articles].

26. Often, suing a foreign sovereign for its officials' acts in the United States is the only way to obtain relief, because many foreign officials enjoy immunity from legal process in the United States. For example, foreign diplomatic agents are completely immune from legal process, see Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes of 1961, Apr. 18, 1961, art. 31, 23 U.S.T. 3227, 3240-41, 500 U.N.T.S. 95,112 [hereinafter Vienna Diplomatic Convention]; and foreign consular officials enjoy partial immunity from legal process, see Vienna Convention on Consular Relations and Optional Protocol on Disputes of 1963, Apr. 24, 1963, art. 43, 21 U.S.T. 77, 104-05, 596 U.N.T.S. 261, 298 [hereinafter Vienna Consular Convention].

27. Whether the conduct at issue constitutes a tortious act under the FSIA is generally determined according to the law of the place where the conduct or injury took place, see *Liu v. Republic of China*, 892 F.2d 1419, 1425-26 (9th Cir. 1989), cert. dismissed, 497 U.S. 1058 (1990).

28. Generally, courts gauge whether the agent has acted within the scope of employment by turning to the local law of the place where the injury or the act occurred. Whether the official acted in violation of the law of his or her own country is immaterial in determining whether the act was committed within the scope of employment. See *id.*

Even if the court concludes that the aggrieved party's case has satisfied all other requirements for jurisdiction, the FSIA "discretionary function" exception immunizes the foreign sovereign against "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion [is] abused."²⁹ Under this exception, any act that is legally recognized as "discretionary" will shield the foreign sovereign from the jurisdiction of a federal or state court over a claim that is based on that act.

Because the FSIA's discretionary function exception was intended to ensure that U.S. courts afford foreign sovereigns the same treatment the U.S. government would receive,³⁰ the exception's language duplicates that of its parallel in the FTCA.³¹ This parity accords with the notions of sovereign equality. Through the FTCA, the United States waives its immunity from the jurisdiction of federal courts, with many exceptions,³² in order to establish a uniform system of compensating injured parties.³³ The discretionary function exception under the FTCA preserves the government's immunity from claims based upon its performance or failure to perform a discretionary function.³⁴ Congress intended the scope of the discretionary function exception under the FSIA to parallel that of the identical exception under the FTCA: the legislative history of the FSIA states that the exceptions to non-commercial tort liability under FSIA were designed to correspond to "many of the claims" against which the U.S. Government retains im-

at 1430. This Note does not address the issues relating to "tortious act" or "scope of employment."

29. 28 U.S.C. § 1605(a)(5)(2)(A) (1988). This exception is also found in the Restatement (Third) of the Foreign Relations Law of the United States § 454(2) (1986) [hereinafter *Restatement Third*].

30. See Restatement Third, § 454 cmt. d ("as in regard to responsibility for actions of officials and employees, the . . . [FSIA] follows the corresponding provisions of the [FTCA]"); *id.* reporters' note 3 ("[The discretionary function exception] is designed to place foreign states in the same position before United States courts as is the United States itself when sued under the Federal Tort Claims Act.").

31. The discretionary function exception under the FTCA provides:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680 (1988).

32. See *supra* note 5.

33. See H.R. Rep. No. 1287, 79th Cong., 1st Sess. 1-4 (1945). The FTCA was designed to replace the old system of relying on Congress to pass private bills. See Harold Krent, *Preserving Discretion without Sacrificing Deterrence: Federal Government Liability in Tort*, 38 UCLA L. Rev. 871, 875-76 (1991).

34. See *supra* note 31.

munity under the FTCA.³⁵

The scope of the discretionary function exception under the FTCA, however, is far from clear: neither the FTCA nor its legislative history is definitive. In *United States v. Varig Airlines*,³⁶ the Supreme Court interpreted the discretionary function exception under the FTCA by examining the relevant legislative history, which it found "suggest[ed]" Congress' wish to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."³⁷ Though the Court couched the rationale for the exception in terms of separation of powers concerns,³⁸ the most direct purpose of the discretionary function exception under the FTCA is to protect and facilitate public policy decisionmaking.³⁹ By its terms, the exception protects only *some* rather than all executive branch decisionmaking—decisionmaking that is "discretionary" and is thus necessarily based on considerations of public policy.⁴⁰ The legislative history evinces Congress's intent to draw a line between decisions grounded in "social, economic, and political policy" and other decisions, yet Congress failed to define the breadth of the immunity preserved under the exception. The ambiguous legislative history of the FTCA offers little assistance to the courts in defining the scope of the discretionary function exception under the FSIA.

Guided by the link between the FSIA and the FTCA, every court that has considered the question has taken the position that the principles developed under the FTCA by the federal courts control the interpretation of the discretionary function exception under the FSIA.⁴¹ This position is necessary to give effect to the congressional desire to

35. House Report, *supra* note 2, at 6620.

36. *United States v. Varig Airlines*, 467 U.S. 797 (1984).

37. *Id.* at 814.

38. *See id.*

39. "[The discretionary function exception] presumably seeks to encourage vigorous decisionmaking by agencies and to limit judicial second-guessing of policy judgments entrusted to those with programmatic and administrative responsibility for the outcomes." Peter H. Schuck, *Suing Government* 113-14 (1983).

40. *See Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988).

41. *See, e.g., Risk v. Halvorsen*, 936 F.2d 393, 395 (9th Cir. 1991), cert. denied, 112 S. Ct. 880 (1992); *Liu v. Republic of China*, 892 F.2d 1419, 1431 (9th Cir. 1989), cert. dismissed, 497 U.S. 1058 (1990); *Joseph v. Office of Consulate Gen. of Nigeria*, 830 F.2d 1018, 1026 (9th Cir. 1987), cert. denied, 485 U.S. 905 (1988); *MacArthur Area Citizens Ass'n v. Peru*, 809 F.2d 918, 921-22 (D.C. Cir. 1987); *Olsen v. Mexico*, 729 F.2d 641, 646-47 (9th Cir.), cert. denied, 469 U.S. 917 (1984); *English v. Thorne*, 676 F. Supp. 761, 763-64 (S.D. Miss. 1987); *Olson v. Singapore*, 636 F. Supp. 885 (D.D.C. 1986); *Estate of Domingo v. Philippines*, No. C82-1055V, 1984 WL 3140, at *1 (W.D. Wash. July 18, 1984) (unpublished order denying motion to dismiss); *de Letelier v. Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980). But see John M. Rogers, *A Fresh Look at Agency "Discretion"*, 57 Tul. L. Rev. 776, 824-34 (1983), in which Professor Rogers, in advocating a broad application of the discretionary function exception under FSIA, argues that it is "preferable to view the FSIA as not incorporating the law of the FTCA

accord foreign sovereigns the same treatment before U.S. courts as the U.S. government receives.

While the Supreme Court has yet to offer an interpretation of the discretionary function exception under the FSIA, it has made an effort to clarify the scope of the exception under the FTCA. In *Berkovitz v. United States*,⁴² an FTCA case, the Supreme Court stated that “‘the nature of the conduct,’” rather than “‘the status of the actor,’” must govern “‘whether the discretionary function exception applies in a given case.’”⁴³ In examining the “nature of the conduct,” Courts must

exception,” *id.* at 833–34, even though he acknowledges the weight of legislative history indicating such an incorporation, see *id.* at 830.

Notwithstanding Rogers’ argument, courts are not at liberty to disregard legislative intent. As support for his position, Professor Rogers notes that the purpose of the exception under the FTCA was to respect separation of powers between the legislative and judicial branches, while the purpose of the exception under the FSIA was to preserve orderly and friendly relations between different countries, see *id.* at 830–31. This characterization is not precise. The discretionary function exception under the FTCA was drafted to protect public policy decisionmaking—be it legislative or administrative—though separation of powers concerns are in the background. This purpose applies equally to foreign sovereigns if they have the same decisions to make in the United States. For an argument that foreign sovereigns do not make this kind of decision in the United States, see *infra* part IV.C. More importantly, the purpose of the discretionary function exception under the FSIA was to treat foreign sovereigns and the United States government equally, see *supra* notes 30–35 and accompanying text. This requires an incorporation of the jurisprudence under the FTCA.

Professor Rogers suggests that the victims rely on diplomatic intervention remedies for torts committed by foreign sovereigns. See Rogers, *supra* at 830. Relying on the State Department for a remedy is contrary to the declared purpose of the FSIA that immunity cases be decided by the independent judiciary, see 28 U.S.C. § 1602 (1988). In practice, the State Department has not been a zealous advocate for injured parties. As the House Judiciary Committee observed:

[Enlisting the help of the State Department] is not always a viable alternative. The State Department may have no more success than the citizen in obtaining a remedy. Moreover, the State Department’s familiar role of being a conciliator and maintaining foreign relations may conflict with its role of defending the rights of U.S. citizens. In fact, in one recent case, the State Department actually filed a brief before the Supreme Court on behalf of Saudi Arabia, asking the Court to overturn an 11th Circuit Court of Appeals decision which had allowed a U.S. citizen to sue Saudi Arabia under the FSIA. *Nelson v. Saudi Arabia*, 923 F.2d 1528 (11th Cir. 1991), cert. granted, [112 S. Ct. 2937] (1992).

H.R. Rep. No. 900, 102d Cong., 2d Sess. 3 (1992) [hereinafter H.R. Rep. 900].

Furthermore, to support his argument for a broad application of the discretionary function exception, Professor Rogers posits that the courts should look to international law for guidance on its construction. International law, however, supports eliminating the discretionary function exception completely, see *infra* part IV.B.

42. 486 U.S. 531 (1988).

43. *Id.* at 536 (quoting *United States v. Varig Airlines*, 467 U.S. 797, 813 (1984)). This principle has invalidated the widely-held doctrine distinguishing between decisions made at the planning level and those made at the operational level. For cases applying this doctrine, see, e.g., *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511 (9th Cir. 1987); *Olsen v. Mexico*, 729 F.2d 641 (9th Cir.), cert. denied, 469 U.S. 917 (1984); and *Olson v. Singapore*, 636 F. Supp. 885 (D.D.C. 1986).

first ascertain "whether the action is a matter of choice for the acting employee."⁴⁴ Furthermore, the Court found that the element of judgment must be of the kind that the discretionary function exception was designed to shield; that is, the decision of the employee must be "based on considerations of public policy."⁴⁵

Under these broad principles, almost every act could be deemed discretionary, because courts are free to regard many debatable acts judgment calls. The *Berkovitz* interpretation of the discretionary function exception, then, appears to provide few effective limits to the reach of the immunity that a court can afford. However, although the Court in *Berkovitz* did not clearly explain the relationship between the discretionary function exception and other bodies of applicable law,⁴⁶ it did reach outside the FTCA to define the boundaries of the discretion of federal agents. Specifically, the Court declared that the discretionary function exception does not apply "when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow."⁴⁷ That is, when there is a federal law specifically prohibiting or mandating the act at issue, that act cannot be within the discretion of the federal agent. The Court's rationale for this conclusion was that "[i]n this event, the employee has no rightful option but to adhere to the directive."⁴⁸ Therefore, a faithful reading of the *Berkovitz* case supports the proposition that a federal official only has discretion within the limits of the existing relevant law when the act at issue was performed.⁴⁹ If to say that an official has "discretion" implies that she makes choices, then the range of her possible choices is defined by relevant laws. A limit of this sort on the discretion of federal officials is not, however, a check on the "abuse of discretion" as in the language of the exception, because the limit applies to discretion *ex ante* and defines its

44. *Berkovitz*, 486 U.S. at 536. In the words of the Second Circuit, "[a] discretionary function can derive only from properly delegated authority. Authority generally stems from a statute or regulation, or at least, from a jurisdictional grant that brings the discretionary function within the competence of the agency." *Birnbaum v. United States*, 588 F.2d 319, 329 (2d Cir. 1978).

45. *Berkovitz*, 486 U.S. at 536-37 (citation omitted).

46. See Part II of *Berkovitz*, 486 U.S. at 535-39.

47. *Id.* at 536.

48. *Id.*

49. The term "discretion" is a misnomer in that it can be easily misunderstood as meaning "unlimited authority." In fact, one may consider the term as having the qualifier "principled." Discretion thus means discretion within legal limits. See *Work v. United States ex rel. Rives*, 267 U.S. 175, 177 (1925). In *Work*, Chief Justice Taft discussed official discretion in these terms:

Mandamus issues to compel an officer to perform a purely ministerial duty. It can not be used to compel or control a duty in the discharge of which by law he is given discretion. The duty may be discretionary within limits. He can not transgress those limits, and if he does so, he may be controlled by injunction or mandamus to keep within them.

Id.

scope, whereas "abuse of discretion" denotes the state of affairs after the discretion is assured. Such limits on discretion therefore do not offend the statutory language of the discretionary function exception, which states that if the actor has discretion, no cause of action lies "regardless of whether the discretion be abused."⁵⁰

The *Berkovitz* Court's expansive articulation of the discretionary function exception under the FTCA, if divorced from that decision's approach to finding limits on such discretion, affords courts wide latitude in granting immunity to foreign sovereigns under the FSIA. Illustrating this hazard are *MacArthur Area Citizens Ass'n v. Peru*⁵¹ and *Risk v. Halvorsen*,⁵² which ruled that foreign officials have discretion to violate zoning codes and criminal law, respectively. Oddly enough, while purporting to apply the *Berkovitz* principles in the FSIA context, these courts divorced the broad principles from the rest of the case and ignored the *Berkovitz* approach to finding limitations on the discretion of federal agents.

II. MAJOR DECISIONS CONSTRUING THE DISCRETIONARY FUNCTION EXCEPTION UNDER THE FSIA

In light of these interpretive difficulties, courts have struggled to conceptualize the FSIA's discretionary function exception, offering a variety of disjointed rationales for allowing or denying immunity. The courts have not coherently interpreted that exception, nor have they articulated any rational limitation on its scope.⁵³ The courts' widely disparate interpretations fall into two categories: the semi-restrictive approach, which holds that there is no discretion for foreign agents to commit murder in the United States, and the broad approach, which confers immunity upon foreign officials who violate zoning codes and criminal statutes so long as their acts are arguably discretionary.

A. A Semi-Restrictive Reading of the Exception

Applying a semi-restrictive reading of the discretionary function exception under the FSIA, some courts have denied foreign sovereigns immunity from liability for murders that their agents had committed in the United States; in justification, these courts have asserted either that

50. 28 U.S.C. § 2680(a) (1988); see also 28 U.S.C. § 1605(a)(5)(B) (1988).

51. 809 F.2d 918 (D.C. Cir. 1987).

52. 936 F.2d 393 (9th Cir. 1991), cert. denied, 112 S. Ct. 880 (1992).

53. This Note does not comprehensively analyze all FSIA cases in which the discretionary function exception was invoked, even though there have not been many. Cases in which the courts ruled that no discretion was involved are not discussed. See, e.g., *Joseph v. Office of Consulate Gen. of Nigeria*, 830 F.2d 1018 (9th Cir. 1987) (destruction of leased property), cert. denied, 485 U.S. 905 (1988); *Olson v. Singapore*, 636 F. Supp. 885 (D.D.C. 1986) (slip and fall accident at crowded ambassadorial reception).

murder is "clearly contrary to the precepts of humanity"⁵⁴ or that it violates the internal law of the foreign sovereign.⁵⁵ Other courts have often distinguished or rejected these decisions, opting for a broader interpretation of the exception.⁵⁶

1. *The "Clearly Contrary to the Precepts of Humanity" Approach.* — In *de Letelier v. Chile*,⁵⁷ the district court held that a foreign agent has no discretion to assassinate a person in the United States. The decision turned on whether the act at issue was "clearly contrary to precepts of humanity."⁵⁸ Agents for the Republic of Chile had murdered a Chilean diplomat and his assistant in Washington, D.C. The survivors of the victims brought an action for monetary damages against Chile. Without appearing in court, Chile sent a diplomatic note asserting that the successful assassination of the two individuals fell within the discretionary function exception and that Chile was therefore immune from the court's jurisdiction. The court denied this defense on the ground that conduct such as assassination was "clearly contrary to the precepts of humanity."

Although the court reached an undoubtedly correct result,⁵⁹ its opinion is weakened in force by its inadequate analysis of the law; it merely relied on the gravity of the conduct at issue to support its holding. More concerned with getting the right result than with delving into analysis, the court erred in distinguishing the act by degree rather than by kind. There is nothing in the statutory language or legislative history that allows a balancing of degree. Rather, the exception requires a distinction of kind: whether or not the decision was based on public policy considerations.

In denying immunity under the discretionary function exception for a crime "clearly contrary to the precepts of humanity as recognized in both national and international law,"⁶⁰ the court in *de Letelier* purported to apply national and international law as limitations on the discretion of foreign officials. It is no doubt an apt proposition that

54. *De Letelier v. Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980).

55. See *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989), cert. dismissed, 497 U.S. 1058 (1990).

56. See *infra* notes 74-96 and accompanying text.

57. 488 F. Supp. 665 (D.D.C. 1980).

58. *Id.* at 673.

59. *De Letelier* was cited approvingly for the position that the tort exception to jurisdictional immunity applies to political assassination, see ILC Draft Articles, *supra* note 25, art. 12 cmt. 4, at 103 n.163. For further discussion and approval of the case, see Haley D. Collums, Note, *The Letelier Case: Foreign Sovereign Liability for Acts of Political Assassination*, 21 Va. J. Int'l L. 251, 266 (1981) (calling the decision "an important further step in construing the scope of the sovereign immunity defense under the FSIA"). For a contrary view, see Rogers, *supra* note 41, at 828 (criticizing *de Letelier* as an unsound "case exemplifying the maxim that hard cases make bad law"). Professor Rogers seems to think that diplomatic intervention would be better in such cases. See *id.* at 830. For a brief critique of Professor Rogers' article, see *supra* note 41.

60. *De Letelier*, 488 F. Supp. at 673.

national law limits the discretion of foreign officials, but the court's failure to elaborate on the manner in which this limitation operates, except to state that foreign sovereigns lack the discretion to commit illegal acts,⁶¹ severely undermines the precedential value of the opinion.

International law, as understood by the *de Letelier* court, may be problematic as a source of limitations on the discretion of foreign officials. The court used the term "international law" in its substantive sense, thus implying that there is a body of "precepts" that is supposed to apply universally to everyone, including, of course, foreign officials.⁶² The court did not cite to any authority for such a body of precepts. Rather than prescribing a uniform code of conduct for foreign agents acting in a host country, international law operates as a choice-of-law rule, directing foreign officials to obey the laws and regulations of the host country. Both the widely accepted Vienna Convention on Diplomatic Relations⁶³ and the Vienna Convention on Consular Relations⁶⁴ impose a duty on the diplomatic and consular agents of a sending state to obey the laws and regulations of the receiving state. Thus, the ultimate source of limitations on the "discretion" of foreign officials acting in another country should be the domestic laws and regulations of the host state.⁶⁵

The *de Letelier* court thus offers little guidance to other courts. Classifying an act as discretionary or nondiscretionary on the basis of its degree rather than its kind is a jurisprudential approach inconsistent with the discretionary function exception in either the FSIA or FTCA. Furthermore, the suggestion that the substantive component of international law serve as a limitation on discretion is sure to be problematic. To find limitations on the discretion of foreign agents, courts must turn to U.S. law; this proposition was asserted but not analyzed by the court in *de Letelier*.

2. *The Violation of Foreign Sovereign Internal Law Approach.* — In *Liu v. Republic of China*,⁶⁶ the Ninth Circuit ruled that an act in violation of a

61. See *id.*

62. This is true only to the extent that the rule of *jus cogens* prohibits a nation from engaging in "genocide, piracy, slave-trade, racial discrimination, terrorism or the taking of hostages." See Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 R.C.A.D.I. 9, 64 (1978) (Judge Jiménez de Aréchaga is a former President of the International Court of Justice). It is not clear how such a rule could apply to an individual acting with discretion but not specific state authorization to commit an isolated murder.

63. See Vienna Diplomatic Convention, *supra* note 26, art. 41(1).

64. See Vienna Consular Convention, *supra* note 26, art. 55.

65. The Special Rapporteur for the United Nations International Law Commission project on sovereign immunity states that "[a] State conducting activities in the territory of another State is obliged to respect local laws and regulations and to abide by all ground rules." Sompong Sucharitkul, *Fifth Report on Jurisdictional Immunities of States and Their Property*, [1983] 2 Y.B. Int'l L. Comm'n 25, 40, U.N. Doc. A/CN.4/SER.A/1983/Add.1 (Part I).

66. 892 F.2d 1419 (9th Cir. 1989).

foreign sovereign's own internal law cannot be discretionary. Under this interpretation, then, the applicability of the discretionary function exception turns on whether there was a violation of the internal law of the foreign sovereign. In *Liu*, a writer was murdered in California by order of the former director of the Defense Intelligence Bureau of the Republic of China ("ROC"). The widow of the victim sued Taiwan in California under the FSIA for monetary damages. Taiwan invoked the discretionary function exception, claiming that it was entitled to immunity on the ground that the issuance of the assassination order was a discretionary act. To undermine this defense, the plaintiff pointed to the Criminal Code of Taiwan, which prohibits murder, and also to recent rulings by Taiwanese courts that the act at issue was forbidden.⁶⁷ The Ninth Circuit relied on both the Taiwanese statute and the court decision in concluding that the discretionary function exception under the FSIA was not applicable: the former director "had no discretion, according to the ROC courts, to violate the ROC law that prohibits murder."⁶⁸

The court's limitation on the discretion of the Taiwanese official under the FSIA thus derived from the criminal laws of Taiwan. However, by applying the foreign sovereign's own criminal law as a limitation on the discretion of foreign officials acting in the United States, the court enforced the criminal law of another country, albeit in the context of a civil case. This approach violates the established conflict-of-law rule that no country may enforce the penal laws of another country.⁶⁹ The principle underlying this rule is that "[t]he proper place for punishment is where the crime is committed, and no society takes concern in any crime but what is hurtful to itself."⁷⁰ An exception to this rule, however, permits giving effect to a foreign criminal law in a civil case, if that foreign law also authorizes such a civil cause of action.⁷¹ Since *Liu*'s civil cause of action was not authorized by the Taiwanese law that the director of the Taiwan intelligence bureau had violated, but was brought instead under the FSIA, the Ninth Circuit violated a cardinal rule of conflict-of-law jurisprudence.⁷²

67. See *id.* at 1423 (describing Taiwanese proceedings); *id.* at 1431 (referring to Taiwanese court orders and Taiwan Criminal Code, art. 21, para. 2).

68. *Id.* at 1431.

69. See, e.g., *The Antelope*, 23 U.S. (10 Wheat.) 66, 122-23 (1825) (concerning the capture of a foreign-owned cargo ship carrying African slaves); *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 289-90 (1888) ("the penal laws of a country . . . must be administered in its own courts only, and cannot be enforced by the courts of another country"); see also Joseph Story, *Commentaries on the Conflict of Laws* §§ 619-628, at 840-49 (Melville M. Bigelow ed., 8th ed. 1883) (citing numerous authorities to support the proposition that a country's punitive laws cannot be enforced in other countries).

70. *Pelican Ins. Co.*, 127 U.S. at 291 (citations omitted).

71. See *Huntington v. Attrill*, 146 U.S. 657, 674-75 (1892) ("A statute of a State [allowing a civil suit for causing a person's death] might be enforced . . . in another State . . .").

72. If Taiwanese had authorized persons injured by the violation to bring a civil

The principle that no country may enforce the criminal law of another country should also apply to other public laws that do not authorize a private cause of action. Like criminal laws, a country's public laws are enacted for application within its own territory; accordingly, courts should not enforce another country's public laws in adjudicating claims arising out of events that occurred outside that country.

Moreover, reliance on the internal law of a foreign sovereign as a limitation on the discretionary function of the foreign sovereign's agents breaks down when the laws of the foreign sovereign conflict with U.S. federal or state laws. That is, *Liu* was an easy case in that no conflict between Taiwan and U.S. or California laws existed. The court's opinion does not address instances in which the foreign sovereign's internal law has not been violated or in which the foreign law actually authorizes the conduct at issue. *Liu* can be read as suggesting that, if the internal laws of the foreign sovereign were not violated, then the conduct at issue is within the discretionary function exception. The Ninth Circuit itself has distinguished *Liu* on this ground.⁷³ If courts regard the foreign sovereign's internal law as the only applicable limitation, acts prohibited by United States federal and state laws but permitted by the foreign sovereign's law will be condoned, and the victim will be left without a claim. Thus, the criminal law or regulations of the nation where the act occurs could have no effect.

The *Liu* approach of applying the internal law of the foreign sovereign not only violates cardinal conflict-of-law rules, but it also, potentially, allows foreign criminal or public law, when not violated by the conduct at issue, to trump U.S. federal and state laws. Foreign criminal and public law are thus given extra-territorial effect.

B. *An Expansive Reading of the Exception*

The expansive interpretation of the discretionary function exception, like the semi-restrictive interpretation adopted by other courts, fails to articulate a coherent rationale for its reading. The *modus operandi* of this approach is to borrow broad principles from the FTCA cases and then manipulate the facts of the case to fit them, without considering the methods that these FTCA cases have employed to find limitations on discretionary functions.

1. *Violation of Regulations as a Discretionary Act.* — In *MacArthur Area Citizens Ass'n v. Peru*,⁷⁴ the D.C. Circuit held that violations of zoning codes can fall within the discretionary function exception under the

action for damages abroad, *Liu* could have brought an action in the U.S. courts on the basis of that law. See *id.*

73. See *Risk v. Halvorsen*, 936 F.2d 393, 396 (9th Cir. 1991) (The *Liu* case "has no application to the facts here. There is no assertion that the Norwegian officials violated any Norwegian law."), cert. denied sub nom. *Risk v. Norway*, 112 S. Ct. 880 (1992); *infra* notes 84-96 and accompanying text.

74. 809 F.2d 918 (D.C. Cir. 1987).

FSIA. At issue in *MacArthur* was the conduct of Peru in purchasing a building in Washington, D.C., for use as a chancery for its naval attaché. Seeking to deny Peru use of the structure, plaintiff MacArthur Area Citizens Association sued Peru for monetary damages and injunctive relief. The complaint alleged that certain "transmogrifications" of the building—including the installation of bright fluorescent lights and metal bars on the windows—and its use violated the zoning code and decreased the value of the neighboring properties.⁷⁵

The court ruled that the discretionary function exception insulated Peru from its jurisdiction. Citing *United States v. Varig Airlines*,⁷⁶ the court stated that the discretionary function exception protects decisions resting on either "social, economic, . . . [or] political policy." The D.C. Circuit then fit the facts of the case into all three categories:

[The decision to use the property in such a manner], it seems to us, (1) is grounded in an economic judgment regarding which property represents the best value; or (2) embodies a political decision regarding the image that the Peruvian Government seeks to project through the offices it occupies; or (3) reflects security considerations that one might presume to be of interest in the present day; or (4) represents some combination of the foregoing considerations.⁷⁷

Given so broad a definition of the categories of actions to which the discretionary function exception applies, any governmental action could probably be defended as discretionary. The court did not consider authorities such as the Vienna Convention on Consular Relations,⁷⁸ the Vienna Convention on Diplomatic Relations,⁷⁹ and Restatement (Third) of the Foreign Relations Law of the United States ("Restatement Third"),⁸⁰ which strongly support the view that the real property of a foreign sovereign, even if used for governmental purposes, should be subject to regulation, if at all, by the host state. According to these authoritative sources, the D.C. zoning code should have been deemed to constrain any discretion the Peruvian officials might have had.

The court ignored the force of the zoning regulations, seemingly drawing a distinction between acts violating criminal statutes and acts violating mere regulations. The court explained this distinction in a

75. See *id.* at 919. The court noted that "Peru voluntarily vacated the premises in June 1985, thereby mooting the claim for injunctive relief." *Id.*

76. 467 U.S. 797, 814 (1984).

77. *MacArthur*, 809 F.2d at 923.

78. Vienna Consular Convention, *supra* note 26, art. 30, § 1 ("The receiving State shall either facilitate the acquisition on its territory, in accordance with its laws and regulations, by the sending State of premises necessary for its consular post or assist the latter in obtaining accommodation in some other way." (emphasis added)).

79. Vienna Diplomatic Convention, *supra* note 26, art. 21, § 1. For virtually identical language, see Vienna Consular Convention, *supra* note 26, art. 30, § 1.

80. Restatement Third, *supra* note 29, § 461 cmt. d.

footnote, stating that although cases such as *de Letelier*⁸¹ arguably support the theory that a criminal act *malum in se* cannot be discretionary—a position not clearly established—it was “not unduly bold to conclude that violations, if any, of a zoning ordinance do not rise to the level of actions *malum in se*.”⁸² Thus, for the *MacArthur* court, whether or not an act is discretionary appeared to depend initially on whether it constitutes a violation of a regulation or of a criminal law, though the court might not automatically consider all criminal acts nondiscretionary.⁸³

The *MacArthur* decision exemplified a broad reading of the discretionary function exception under the FSIA. Practically speaking, *MacArthur* gives foreign officials license to violate regulations in the United States so long as their conduct is arguably based on considerations of social, economic, or political policy.

2. *Violation of Criminal Codes as a Discretionary Act.* — Spurning the D.C. Circuit’s dictum in *MacArthur* that violations of criminal statutes might not be dictumized under the FSIA, the Ninth Circuit has offered the most expansive and permissive interpretation of the discretionary function exception. In *Risk v. Halvorsen*,⁸⁴ the Ninth Circuit held that immunity may even bar claims arising from a foreign agent’s violation of a state criminal law. In *Risk*, plaintiff Larry Risk and his former wife, a native of Norway, obtained a state court order that awarded them joint custody of their two children and prohibited either of them from removing the children from the San Francisco Bay Area. Apparently with the assistance of various Norwegian consular officials, which the court did not specify, the ex-wife returned to Norway with her children.⁸⁵ In California, such an intentional violation of a custody order, or of a parent’s rights under such an order, is a felony.⁸⁶ Larry Risk sued Norway for intentional infliction of emotional distress, interference with parent-child relations, and conspiracy to remove his children from California.⁸⁷

The Ninth Circuit held that the Norwegian officials’ acts were “discretionary” and that Norway was therefore immune from suit in a U.S. court. Drawing upon the FTCA jurisprudence, the court correctly considered two questions of paramount importance: whether the government employee had any discretion to act⁸⁸ and “‘whether the decisions were grounded in social, economic, and political policy.’”⁸⁹ The

81. 488 F. Supp. 665 (D.D.C. 1980).

82. *MacArthur*, 809 F.2d at 922 n.4. The Court regards the *De Letelier* case as one of a special “character and order,” making only serious criminal acts nondiscretionary.

83. See *id.*

84. 936 F.2d 393 (9th Cir. 1991), cert. denied sub nom. *Risk v. Norway*, 112 S. Ct. 880 (1992).

85. See *id.* at 394.

86. See *id.* at 396 n.3 (citing Cal. Penal Code § 278.5 (West 1988)).

87. See *Risk*, 936 F.2d at 394.

88. See *id.* at 395.

89. *Id.* (citations omitted).

Vienna Convention on Consular Relations (the "Convention"),⁹⁰ figured importantly in the court's reasoning. First, the court found that the conduct at issue fell within the consular functions defined by the Convention, to which both the United States and Norway were signatory parties.⁹¹ The court then asserted that acts covered by the Convention are "'grounded in social, economic, and political policy.'" ⁹² Presumably, therefore, the court considered all consular functions to be discretionary.

Next, the court characterized the acts of the Norwegian government officials as no more than issuing travel documents to a Norwegian citizen and her children, providing funds for her travel, and protecting her from her former husband.⁹³ Such conduct, according to the court, is permitted under the terms of the Convention and thus fell within the discretionary function exception under the FSIA.⁹⁴ Taking an approach similar to that of *MacArthur*—purporting to follow the broad principles that there must be choice for the agent and that the choice must be grounded on "social, economic, [or] political policy"—the court found the conduct at issue consistent with these principles.

In *Risk*, California criminal law fared no better in limiting the discretionary function exception than the zoning regulations had in *MacArthur*. The court ruled that "[a]lthough [the acts of the Norwegian officials] may constitute a crime under California law, it cannot be said that every conceivably illegal act is outside the scope of the discretionary function exception."⁹⁵ The court presumably thought that a viola-

90. Vienna Consular Convention, *supra* note 26, art. 5.

91. See *Risk*, 936 F.2d at 395-96.

92. *Id.* at 396.

93. See *Risk*, 936 F.2d at 396-97. While the court quoted part of Article 5 in support of its conclusion, it did not take a holistic view of the Vienna Convention on Consular Relations. Under the general principle of that Convention, as embodied in Article 55, § 1, foreign consulate officials have no discretion to conduct their consular functions as they please: they are to abide by the laws and regulations of the receiving state. See Vienna Consular Convention, *supra* note 26, art. 55, § 1. The language of Article 55, and of other parts of Article 5 that the court did not quote, should serve to limit the discretion of the Norwegian officials, or should at least warrant the court's attention. Many sections in Article 5 require the consulate officials to act within the limits either of international law, see *id.* art. 5(a), or of laws and regulations of the receiving State, see *id.* art. 5(g), (h). Although Article 5(e) only states that consulate functions include "helping and assisting nationals" of the sending state, without adding the qualifying phrase "within limits imposed by the laws and regulations of the receiving State," *id.* art. 5(e), the absence of this phrase does not help the court. No one has claimed that the Convention authorizes a criminal act. It is unreasonable to take the phrase "helping and assisting" as a license to do anything; much less could one reasonably envisage that helping and assisting would justify intentionally violating a criminal code.

94. See *id.*

95. *Id.* at 397. As support for its decision, the court cited the *MacArthur* footnote, *MacArthur*, see 809 F.2d at 922 n.4, that distinguished between regulatory violations and criminal acts *malum in se*. This appears to be a misuse of authority. As analyzed above,

tion of a child custody order—though a felony under California law—was not sufficiently serious. In so ruling, the court committed the same mistake as did the *de Letelier* court: it distinguished an act by gravity or degree instead of by kind.⁹⁶

Read together, *MacArthur* and *Risk* afford foreign officials broad discretion under the FSIA. Conduct that falls short of murder in gravity, but that violates other criminal laws or regulatory codes, will not expose a foreign sovereign to the jurisdiction of U.S. courts. In effect these courts regard the discretionary function exception as preempting a large body of generally applicable law *sub silentio*, but they venture no discussion of the relationship between the discretionary function exception and the particular law at issue. By eviscerating the non-commercial tort exception to foreign sovereign immunity, this broad approach defeats the central purpose of the FSIA—namely, to provide a mechanism for injured plaintiffs to seek remedies against a foreign sovereign in a U.S. court.

III. A PROPOSAL: RECOGNIZE AND APPLY FEDERAL AND STATE PROHIBITORY AND MANDATORY LAWS AS LIMITATIONS ON FOREIGN OFFICIALS' DISCRETIONARY FUNCTION UNDER THE FSIA

As the case law construing the discretionary function exception under the FSIA demonstrates, U.S. courts have usually failed to define limitations on the discretion of foreign sovereign agents; when they have placed some constraint on that discretion, they have failed to articulate a coherent rationale for doing so. Although ritualistically professing to follow the principles announced in the cases interpreting the discretionary function exception under the FTCA,⁹⁷ courts have not properly followed the guidance supplied by these cases. For their initial analytical premises, courts faced with FSIA questions properly borrow the principles announced in *Berkovitz* or in other FTCA cases, but they then do no more than characterize the acts of the foreign officials so that they fit these principles. Mysteriously, courts ignore the second portion of the *Berkovitz*⁹⁸ opinion and other FTCA cases holding that no discretion exists under the FTCA when a specific statute prohibits or prescribes a course of conduct.⁹⁹ In short, while *Berkovitz* confirms that the FTCA shield of immunity under the discretionary function excep-

that footnote supported the proposition that criminal acts are not discretionary. See *supra* notes 82–83 and accompanying text.

96. See *supra* notes 57–65 and accompanying text. The *Risk* court distinguished *De Letelier* on the ground that “the nature of the act in that case obviously influenced the court.” *Risk*, 936 F.2d at 396.

97. See *supra* note 41 and accompanying text.

98. *Berkovitz v. United States*, 486 U.S. 531 (1988).

99. See *infra* notes 100–140 and accompanying text.

tion is punctured by a federal statute or policy that constrains discretion, lower courts have found no such limit in the FSIA context.

To be faithful to the congressional direction that the interpretation of the discretionary function exception under the FSIA be modelled upon the interpretation of the same exception under the FTCA, courts should adopt the restrictive attitude of that context and follow the approaches used there in recognizing limits on the discretion of federal agents. For purposes of the FTCA, courts, while announcing broad principles, have adopted a relatively restrictive interpretation of the discretionary function exception and have reached outside the FTCA for various types of limitations on federal agents' discretion. In line with this methodology, courts adjudicating the FSIA cases should adopt a restrictive, rather than an expansive, reading of the discretionary function exception under the FSIA. Specifically, courts should treat federal and state prohibitory and mandatory laws as limits on the discretionary functions of foreign officials, because each of these laws prescribes a specific course of conduct that admits of no deviation.

A. *Limitations on Discretion Under the FTCA*

Federal law has been regarded as limiting the discretion of federal agents under the FTCA. Some limitations derive from federal laws prohibiting a particular course of action, while others stem from federal laws mandating another course of action. State court orders and property laws have effectively been left as limits on federal agents' discretion. Other state prohibitions and mandatory requirements are also arguably proper limits. Accordingly, federal officials have discretion to act only within the limits of applicable law.¹⁰⁰

1. *Federal Law as a Limitation.* — In upholding federal law as a limitation on the discretion of federal officials, courts have relied on statutes, regulations, and rules of federal agencies, such as the internal policies of the FBI. These statutes, rules, and regulations serve as the source of federal agents' discretion. They also serve as the source of requirements for or prohibitions against certain courses of conduct from which the agent has no discretion to deviate.¹⁰¹

The Supreme Court applied specific governing statutes as limits on

100. Although commentators have generally discussed some of the cases analyzed in this section, see, e.g., Krent, *supra* note 33; Donald L. Zillman, Congress, Courts and Government Tort Liability: Reflections on the Discretionary Function Exception to the Federal Tort Claims Act, 1989 Utah L. Rev. 687; Barry R. Goldman, Note, Can the King Do No Wrong? A New Look at the Discretionary Function Exception to the Federal Tort Claims Act, 26 Ga. L. Rev. 837 (1992), they have not discussed these cases, as this Note attempts to do, with a view to sorting out what types of laws can limit the discretion of federal agents. Having such a goal, this Note does not attempt a comprehensive analysis of all FTCA cases.

101. For further discussion of the relationship between discretion and mandatory regulations in the context of FTCA cases, see Walter H. Boone, Recent Decisions, 59 Miss. L.J. 607 (1989).

the discretion of federal agents in *Berkovitz v. United States*.¹⁰² The plaintiff in *Berkovitz*, who had contracted polio after taking an oral polio vaccine, claimed that the government licensing agency had violated federal statutes and regulations that specifically governed such licensing by not collecting the required data before issuing the license for the drug.¹⁰³ The Court ruled that the agency had no discretion to issue a license without first receiving the required test data because "to do so would violate a specific statutory and regulatory directive."¹⁰⁴ The "directive" in this case was embodied both in the statute and in the regulations that governed the issuance of such a license.¹⁰⁵ According to the *Berkovitz* Court, when a federal statute, regulation, or policy specifically prescribes a course of action for a federal agent, she has "no rightful option but to adhere to the directive."¹⁰⁶

In addition to specific governing statutes and regulations, the agency's own internal rules and policies also operate to limit the discretion of its agents. For example, courts have held that FBI agents have no discretion to violate the agency's own internal policy on handling a hijacking¹⁰⁷ and that the Department of Defense has no discretion to fail to enforce its own safety regulations.¹⁰⁸ Internal rules and regulations promulgated by the federal agencies serve in these cases to limit federal agents' discretion in carrying out their tasks.

Courts have also identified federal law of general applicability, including the Constitution, as a source of limitations on the discretion of government officials. In *Butz v. Economou*,¹⁰⁹ an official immunity case,¹¹⁰ the Supreme Court held that a federal official has no discretion to violate willfully or knowingly constitutional rights without facing liability.¹¹¹ A problem may arise if another federal statute conflicts with the statute from which the discretion of the federal agent emanates, because one of the statutes may supersede the other. Such a situation would call for an evaluation of the relationship between the statute that

102. 486 U.S. 531 (1988); see also *Hatahley v. United States*, 351 U.S. 173, 180-81 (1956) (when statutes provide procedure for managing federal land, federal agents have no discretion to deviate therefrom).

103. See *Berkovitz*, 486 U.S. at 533-34.

104. *Id.* at 542-43.

105. See *id.* at 541-42 (citing 42 U.S.C. § 262(d) [date omitted from opinion]; 42 C.F.R. § 73.3 (Supp. 1964); 21 C.F.R. § 601.2 (1987)).

106. *Berkovitz*, 486 U.S. at 536.

107. See *Downs v. United States*, 522 F.2d 990, 997-98 (6th Cir. 1975).

108. See *McMichael v. United States*, 751 F.2d 303, 305-07 (8th Cir. 1985).

109. 438 U.S. 478 (1978).

110. An official immunity case is one in which the plaintiff sues the official personally instead of the United States or a state. Usually, the official enjoys an immunity for the performance of discretionary functions that is identical to the government's immunity under the FTCA discretionary function exception. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (holding that federal officials have no discretion to violate clearly established constitutional or statutory rights).

111. See *Butz*, 438 U.S. at 485.

ordains discretion and the conflicting statute. Even though no court has explicitly engaged in such an analysis in this context, courts ruling on this point in FTCA¹¹² and official immunity cases¹¹³ have held that other federal statutes trump discretion,¹¹⁴ thus reinforcing the position that discretion may only exist within the limits of relevant existing law.

*Cruikshank v. United States*¹¹⁵ squarely confronted the conflict between a statute that conferred discretion upon federal agents and a statute that barred conduct apparently authorized under the first. In *Cruikshank*, the plaintiff sued the United States under the FTCA when CIA agents violated a federal statute by opening his mail without a warrant.¹¹⁶ The *Cruikshank* court held that the government did not have discretion to break the law,¹¹⁷ implicitly using the federal statute as a limitation on the CIA agents' discretion in performing their intelligence tasks. The court fashioned a policy argument: "no man, nor any man acting on behalf of our government, is above the law."¹¹⁸ In holding that the federal government lacks the "'discretion' to commit illegal acts whenever it pleases,"¹¹⁹ the court drew a distinct and unmistakable line in the sand: the government forfeits its discretionary function immunity under the FTCA when it allows its agent to violate a federal statute.

An underpinning of the *Berkovitz*¹²⁰ decision is that laws and regulations that serve to limit the discretion of a federal agent must specifically prescribe a course of action for the agent.¹²¹ Thus, only those

112. See, e.g., *Johnson v. Sawyer*, 980 F.2d 1490, 1503 (5th Cir. 1992). According to the *Johnson* court,

the discretionary function exception to the FTCA does not shield the government from liability for acts of its agents taken in furtherance of a general discretionary policy—such as the IRS policy to deter tax evasion through the publication of the names and other personal information about tax evaders—when such acts are taken in a manner that violates a federal statute.

113. See *Harlow*, 457 U.S. at 815–19.

114. It is impracticable in this Note to examine comprehensively the relationship between each statute that arguably confers discretion and each statute that might conflict with it. The Supreme Court's holding in *Harlow* is clear on this relationship: whatever its source, a federal agent's discretion cannot extend to violating a clearly established constitutional or statutory right. See *id.* at 818.

115. 431 F. Supp. 1355 (D. Haw. 1977).

116. See *id.* at 1356 & n.3 (citing 18 U.S.C. § 1702 (1970)).

117. See *Cruikshank*, 431 F. Supp. at 1356.

118. *Id.* at 1359.

119. *Id.* The term "illegal acts" in the opinion seems to be broad enough to include violations of state law as well, but, here, the Court addressed only violations of federal statutes.

120. *Berkovitz v. United States*, 486 U.S. 531 (1988).

121. See also *Industria Panificadora, S.A. v. United States*, 957 F.2d 886, 887 (D.C. Cir.) (discretionary function exception applies if federal statute does not prescribe specific course of conduct to avert tort liability), cert. denied, 113 S. Ct. 304 (1992). This case could have been better decided under the foreign country exception, which bars "[a]ny claim arising in a foreign country," 28 U.S.C. § 2680(k) (1988).

general federal laws—as opposed to those that apply specifically to a particular agent or agency, as in *Berkovitz*—that give specific guidance to a federal agent can serve to limit his discretion. This has been emphasized in the official immunity cases, in which the Supreme Court has refused to grant immunity only where the rights alleged to have been violated were “clearly established statutory or constitutional rights of which a reasonable person would have known.”¹²² A law imposing a general duty of care could be too ambiguous to limit the discretion of a federal agent.

2. *State Law as a Limitation.* — Though courts have not explicitly invoked state law as a limitation on the discretion of federal agents, they have indirectly allowed state law to control by denying the federal government immunity by finding that no discretion was involved.¹²³ *Ellison v. United States*¹²⁴ held that the government had no discretion to violate an order of a Nevada state court decreeing water for various users because the government was not engaged in any authorized public project, but was acting as the successor in interest to land governed by that decree.¹²⁵ In *Preston v. United States*,¹²⁶ the Seventh Circuit held that when the U.S. government became cotenants with the plaintiffs by storing grains with them, the government “intended to be bound by the duties imposed by state law on such property holders.”¹²⁷ Although leaving state law as an effective limit on the discretion of federal agents, cases like *Ellison* and *Preston* did not explicitly hold that state law implicates the discretionary function of federal agents. Thus, these cases have not squarely addressed the relationship between state law and the discretion of federal agents.

The hard question is whether state law should be regarded as a limit on the discretionary function of federal agents when state law bears directly upon that function, thus making the discretionary function exception inapplicable. For example, when the federal government has to incur extra costs in conducting its affairs in order to meet a specific state regulatory standard or to abide by a state criminal law, should state law be preempted or should courts adopt state law as a

122. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In imposing the “clearly established” limitation, the Court reasoned that government agents should not be burdened with the responsibility of defining the limits on their own discretion by predicting the development of the law. See *id.* at 818–19.

123. See, e.g., *McCall v. United States Dep’t of Energy*, 914 F.2d 191, 196 (9th Cir. 1990) (government’s failure to ensure safe place for employees of independent contractor who were engaged in inherently dangerous work did not involve policy choice); *Dube v. Pittsburgh Corning*, 870 F.2d 790, 796–800 (1st Cir. 1989) (holding that Navy did not make any discretionary decision, but simply failed to warn of asbestos hazards).

124. 98 F. Supp. 18 (D. Nev. 1951).

125. See *id.* at 21.

126. 696 F.2d 528 (7th Cir. 1982).

127. *Id.* at 541.

limit on the scope of federal officials' discretion? State regulatory standards and criminal laws usually take the form of prohibitions and mandatory requirements that prescribe a specific course of conduct for anyone who finds himself in a particular state, with specificity equal to that of the federal statutes and regulations in *Berkovitz*. Federal counterparts to these state laws, if there were any, would clearly limit the discretion of federal agents under the holdings of FTCA cases.¹²⁸ If not preempted, such state laws are appropriate limitations on the discretion of federal agents.

A federal law can preempt any state law if Congress clearly manifests the intent that it do so. When state laws are based on the police power, the presumption is that "the historic police powers of the States were not to be superseded by . . . [a] Federal Act unless that was the clear and manifest purpose of Congress."¹²⁹ The language and legislative history of the FTCA do not clearly indicate that Congress intended the discretionary function exception *itself* to preempt any state law that would otherwise bear upon the conduct of federal agents. If other relevant statutes from which the federal agent's discretion can be said to emanate are also silent, the question should be whether the judiciary should conclude that Congress intended to displace applicable state law. In the absence of clear congressional guidance, courts should so conclude when the subject matter of the statute that defines discretion involves a unique federal interest where state participation is not allowed or the actual content of the state rule significantly impairs a federal interest.¹³⁰ Otherwise, courts should not define the scope of the discretionary function, a concept bereft of any statutory content, so broadly as to override all applicable state law.

Even though courts have not explicitly taken the preemption approach in the FTCA cases, they have, in effect, allowed federal statutes or decisional principles that arguably confer discretion on federal officials to preempt or displace state negligence law, *sub silentio*, by holding that the conduct at issue fell within the discretionary function exception and thus was not actionable.¹³¹ The Supreme Court has taken the pre-

128. See *supra* notes 101-122 and accompanying text.

129. *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 500 (1988) (citations omitted).

130. For a general discussion of preemption standards, see *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 203-04 (1983); see also *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 (1988) (state law can be displaced only when "'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law,' or when the application of state law would 'frustrate specific objectives' of federal legislation" (citations omitted)).

131. See, e.g., *United States v. Gaubert*, 111 S. Ct. 1267, 1274-75 (1991) (federal agents' management of failing bank not subject to state negligence law); *Boyle*, 487 U.S. at 504-13 (U.S. contractor not subject to state law for design defect when U.S. approved design); *Dalehite v. United States*, 346 U.S. 15, 37-38 (1953) (U.S. not liable for causing fertilizer explosion).

emption approach in a case involving federal contractors who, although unable to claim the benefit of the statutory discretionary function exception, are accorded identical immunity from state negligence claims because the costs would be passed on to the federal government if immunity were not granted.¹³² Disregarding state negligence law in the FTCA or federal contractor cases might be defended on two grounds. First, with a reasonable person standard, negligence law is not sufficiently specific to restrict the conduct of federal agents: it does not prescribe a course of action, but rather creates a set of amorphous duties that do not effectively guide federal agents' conduct. Second, the federal interest in promoting efficiency trumps the state interest in maintaining its negligence standard. Imposing amorphous negligence standards on federal agents may reduce their efficiency by unduly burdening them with the difficult task of calculating reasonableness.¹³³

At the very least, state prohibitory and mandatory laws that have general applicability should not be preempted, but should serve as limits on the discretion of federal agents.¹³⁴ First, general state prohibitory and mandatory laws that can be involved in an FTCA case rarely conflict with a federal law or interest. Rather, they constitute part of the legal framework of our federal system. Such state laws—essentially zoning regulations, rent control regulations, traffic regulations, and criminal laws—are within the traditional scope of state police power, an area in which there is little parallel federal applicable law. As scholars have observed, Congress has not constructed a complete body of federal law that regulates every aspect of the federal enterprise or federal agents' conduct; it has only built upon the legal relationships established by the states.¹³⁵ The absence of a complete body of federal pro-

132. See *Boyle*, 487 U.S. at 511–12.

133. This is analogous to the concerns expressed in *Harlow v. Fitzgerald*, 457 U.S. 800, 818–19 (1982), that government agents should not be held responsible for defining the limits of their discretion by predicting the development of the law.

134. It is beyond the scope of this Note to analyze comprehensively what types of state laws can be preempted by the discretionary function exceptions under the FTCA and the FSIA.

135. Professors Hart and Wechsler have stated:

Federal law is generally interstitial in its nature. It rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states. This was plainly true in the beginning when the federal legislative product (including the Constitution) was extremely small. It is significantly true today, despite the volume of Congressional enactments, and even within areas where Congress has been very active. Federal legislation, on the whole, has been conceived and drafted on an *ad hoc* basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose. Congress acts, in short, against the background of the total *corpus juris* of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation.

Paul M. Bator et al., *Hart and Wechsler's The Federal Courts and the Federal System* 533 (3d ed. 1988).

hibitory and mandatory laws makes it necessary to borrow state laws to govern the conduct of federal agents, unless these agents can be trusted with unbridled discretion.

Second, balancing the federal and state interests in the conflict between the discretion of federal agents and state mandatory or prohibitory laws suggests that the discretion of federal agents should yield to state prohibitions and mandatory requirements. State prohibitory and mandatory laws reflect important interests of states. Although the Supreme Court has not addressed the conflict between the discretionary function exception and state prohibitory and mandatory laws,¹³⁶ in cases such as *United States v. Yazell*, it has underscored the importance of state laws based on traditional state police power.¹³⁷ In *Yazell*, the Supreme Court held that state laws based on traditional police power "should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied."¹³⁸ Taking this approach, the Supreme Court in that case declined the government's invitation to fashion a federal common law rule preempting state law regarding the capacity of a married woman to make contracts, even though the United States was the plaintiff seeking to enforce a contract signed by the woman.¹³⁹

The absence of a complete body of federal prohibitory and mandatory laws and the importance of the state's interest in preserving its prohibitory and mandatory laws thus militate in favor of non-preemption of these state laws. Rarely have the courts found a situation in which national interests could not be served when they gave effect to state prohibitory or mandatory laws, because these laws usually govern those areas necessary for maintaining an orderly society. If a federal agent's discretion could easily override a state prohibition, police control not only in the states, but in the nation as a whole, would be gravely threatened: our federal system depends upon the ability of the states to exercise police power, the federal government having no

136. Some official immunity cases have touched upon this problem, if only marginally. For example, in *Barr v. Matteo*, 360 U.S. 564, 574 (1959), the plurality held that an agency director was immune from suit for malicious defamation by a press release. This decision was criticized in *Butz v. Economou*, 438 U.S. 478 (1978), for choosing not "to discuss whether the director's privilege would be defeated by showing that he was without reasonable grounds for believing his release was true or that he knew that it was false," *id.* at 488, and for "appear[ing]—without any discussion of the matter—to have extended absolute immunity to an officer who was authorized to issue press releases, who was assumed to know that the press release he issued was false and who therefore was deliberately misusing his authority." *Id.* at 495. Furthermore, *Barr* is distinguishable because state defamation law does not prescribe specific conduct as do state prohibitory and mandatory laws such as zoning codes or criminal laws.

137. 382 U.S. 341 (1966).

138. *Id.* at 352.

139. See *id.* at 352–53.

general police power.¹⁴⁰

In summary, state prohibitory and mandatory laws should be regarded as limits on the discretion of federal agents. Because these prohibitory and mandatory laws enable states to perform important police control functions, such laws should not be preempted by a broad interpretation of the discretionary function exception under the FTCA in the absence of express congressional intent to displace state law.

B. *Limitations on Discretion Under the FSIA*

The approach that courts have employed to find limits on the discretionary function of federal officials under the FTCA should be followed to find limitations on the discretionary function of foreign officials under the FSIA. Accordingly, courts should adopt a restrictive rather than an expansive interpretation of the exception and should go beyond the language of the FSIA to apply other bodies of law, when appropriate, as limitations on the discretionary functions of foreign officials. Federal and state prohibitory and mandatory laws represent appropriate limitations and should be applied as such in cases arising under the FSIA.

1. *Potential Limitations on the Discretion of Foreign Officials Under the FSIA.* — Several bodies of law could conceivably limit the discretion of foreign officials and thus the immunity of foreign sovereigns that is based on the discretionary function exception under the FSIA. These include the foreign sovereign's own internal law, international law, and U.S. federal and state laws. The domestic law of the foreign sovereign should not be deemed a proper source of limitation on the discretion of its agents: although a foreign sovereign's own internal law has a direct effect on the conduct of its agents, this law should not be given extra-territorial effect in violation of established conflict-of-law rules.¹⁴¹ In this context, international law, rather than providing appropriate substantive rules, merely directs foreign officials to obey the laws and regulations of the United States.¹⁴² To find any limitation on the discretion of foreign agents, courts should turn to U.S. federal and state laws.

2. *U.S. Federal and State Prohibitory and Mandatory Laws as Limitations on the Discretion of Foreign Officials.* — Recognizing and applying federal and state prohibitory and mandatory laws as limits on foreign officials' discretion under the FSIA parallels the analysis of courts interpreting

140. In *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. Rev. 685 (1991), Professor S. Candice Hoke discusses the general problems of the current preemption pathologies. She argues forcefully that "rampant federal preemption forms an ominous threat to the constricted space that remains to local and state politics," *id.* at 765-66. In her opinion, such preemption produces regulatory vacuums when state laws are overridden by the courts before Congress has had a chance to fill the gap. See *id.* at 718-22.

141. See *supra* notes 66-73 and accompanying text.

142. See *supra* notes 60-65 and accompanying text.

the discretionary function exception under the FTCA. This parity fulfills the congressional desire to accord foreign sovereigns the same treatment that the U.S. government receives in U.S. courts. This approach, which is also supported by the principle of international law that only a sovereign has the prerogative to prescribe appropriate conduct within its borders,¹⁴³ is more favorable to foreign sovereigns than is current international law, which does not recognize any discretion to commit torts.¹⁴⁴ Recognizing and applying federal and state prohibitory and mandatory laws as limitations on the discretion of foreign officials offends neither the sovereign equality nor dignity—concededly concerns for the FSIA—to which a foreign sovereign is entitled under current international law.

By definition, prohibitory or mandatory law “specifically prescribes a course of action”¹⁴⁵ and admits of no deviation, thus affording the specificity that *Berkovitz* requires. State prohibitory and mandatory laws should have the same limiting effect on the discretion of foreign agents as federal law does: under international law, federal and state laws apply with equal force to foreign officials, unless the latter are preempted.¹⁴⁶

A foreign official's discretion covered by the discretionary function exception under the FSIA should not preempt, but should instead be limited by, state prohibitory and mandatory laws of general applicability. First, the argument made under the FTCA¹⁴⁷ applies to cases arising under the FSIA, because the FSIA, like the FTCA, does not manifest any congressional intent to override laws enacted under state police power. But the argument for reading the discretionary function exemption restrictively is even stronger in the context of the FSIA: applying state prohibitory and mandatory laws to foreign officials furthers the interests of the United States, given that the skeletal body of federal prohibitory and mandatory laws is less effective against foreign officials because constitutional constraints do not apply. Second, the doctrine of territoriality suggests that any conflict should be resolved in favor of federal and state authority.¹⁴⁸ Under the federal system, state prohibitory and mandatory laws constitute part of the exercise of the U.S. sovereign prerogative both to dictate conduct within its borders and to require that its laws be strictly enforced. Third, existing prohibitory and mandatory laws should be presumed to be the will of the sovereign unless the sovereign clearly manifests contrary intent. Unless state law

143. See *infra* notes 149–172 and accompanying text.

144. See *infra* notes 196–213 and accompanying text.

145. *Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

146. “International law normally is not concerned with how authority to exercise jurisdiction is allocated within a state's domestic constitutional order.” Restatement Third, *supra* note 29, § 402 cmt. k.

147. See *supra* notes 123–140 and accompanying text.

148. See *infra* notes 149–172 and accompanying text.

clearly conflicts with an identifiable federal interest, the judiciary should be slow to override state prohibitory and mandatory laws, which would effectively abrogate, without authorization, not only the sovereignty of the several states but also that of the United States.

Federal and state prohibitory and mandatory laws should be applied to the conduct of foreign officials through the time-honored principle of territoriality under international law. The traditional understanding of this principle was expressed with elegant simplicity by Justice Story in his treatise on the conflict of laws: "every nation possesses an exclusive sovereignty and jurisdiction within its own territory"¹⁴⁹ and "has an exclusive right to regulate persons and things within its territory, according to its own sovereign will and public policy."¹⁵⁰ Despite the passage of time, the principle of territoriality remains alive and well. Indeed, the non-commercial tort exception to immunity under the FSIA acknowledges the force of this principle by requiring that an injury occur within the United States in order to give rise to a valid claim in American courts.¹⁵¹ In its draft of an international convention on the immunity of foreign states, the International Law Commission of the United Nations (ILC)¹⁵² explicitly adopted territoriality as the basis for a tort exception to foreign sovereign immunity.¹⁵³ The ILC's position is significant because its work is generally considered to constitute authoritative evidence of international law.¹⁵⁴ Territoriality has also been invoked by other countries to assert tort jurisdiction over foreign sovereigns.¹⁵⁵

Recent commentary in the United States has viewed the sovereign's prerogative to regulate conduct within its territory as part of the broader theory of the jurisdiction to prescribe.¹⁵⁶ This theory states that international law recognizes territoriality and nationality as "dis-

149. Story, *supra* note 69, § 18, at 21.

150. *Id.* § 22, at 25.

151. See 28 U.S.C. § 1605(a)(5) (1988). The same principle also appears in the FTCA. See 28 U.S.C. § 2680(k) (1988), which provides that the United States' waiver of immunity shall not apply to "[a]ny claim arising in a foreign country."

152. The International Law Commission (ILC) was created in 1947, by the United Nations General Assembly, to "initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification." U.N. Charter art. 13, ¶ 1. For more information on the ILC, see United Nations, *The Work of the International Law Commission*, U.N. Sales No. E. 88. V.1 (4th ed. 1988).

153. "The basis for the assumption and exercise of jurisdiction in cases covered by [the tort exception] is territoriality." ILC Draft Articles, *supra* note 25, art. 12 cmt. 8, at 105. The Draft Articles resulted from thirteen years' effort by the ILC to codify the law of sovereign immunity. See *id.* at 8-10.

154. See Stephen C. McCaffrey, *The Work of the International Law Commission Relating to the Environment*, 11 *Ecology L.Q.* 189, 190-91 (1983).

155. See *infra* notes 202-213 and accompanying text.

156. See Restatement Third, *supra* note 29, §§ 401-416. This approach seems to add only new phraseology to the theory of the sovereign's prerogative to regulate conduct within its borders.

crete and independent bases"¹⁵⁷ for jurisdiction. The host country can regulate the conduct of foreign officials within its territory, and at the same time, a foreign sovereign can also regulate the conduct of its own officials. Conflicts may naturally arise. However, territoriality is the most common basis for jurisdiction and has been "generally . . . free from controversy."¹⁵⁸ Hence, when there is a conflict, territoriality should trump nationality unless unusual circumstances exist.¹⁵⁹

The sovereign's jurisdiction to prescribe conduct applies to all activities performed within the sovereign's territory by a foreign sovereign, including diplomatic and consular activities.¹⁶⁰ Absent immunity, a state acting in the territory of another is obliged to comply with local law of general applicability.¹⁶¹ Immunity from this prerogative can only be obtained either by consent of the host state with respect to the particular act at issue or by an exemption given within the generally applicable law.¹⁶² Furthermore, a host country can often enforce its jurisdiction to prescribe, even if there is immunity from jurisdiction to adjudicate, through such extra-judicial means as declaring the actor *persona non grata* and ordering her to leave the country.¹⁶³ Since a host country is allowed to enact appropriate federal and state prohibitory and mandatory laws to define what every person can do, the proper limitations on her discretion are these prohibitory and mandatory laws.

This position is sanctioned by state practice in every country, with the exception of the United States, that has codified a tort exception to foreign sovereign immunity.¹⁶⁴ These countries do not recognize any "discretion," but take complete jurisdiction to adjudicate cases involving personal injuries and property damages.¹⁶⁵ Furthermore, international treaties presume the validity of sovereign prerogative to prescribe by imposing a duty on the diplomatic and consular agents of

157. *Id.* § 402 cmt. b.

158. *Id.* cmt. c.

159. See *id.* § 441 and cmts. a-g; *id.* § 441 reporters' notes. But it is interesting to note that Restatement Third appears to endorse the position that only serious crimes fall outside the discretionary function exception. See *id.* § 454 reporters' note 3. Neither the conflict between these two positions nor the relationship between the discretionary function exception and the jurisdiction to prescribe is acknowledged or discussed.

160. See *id.* § 461 cmt. b.

161. See *id.* § 461; see also *supra* note 65.

162. See Restatement Third, *supra* note 29, § 461 and cmts. a and d; *id.* § 461 reporters' notes. The discretionary function exception under the FSIA cannot be considered consent as such, see *infra* notes 167-168 and accompanying text.

163. See Restatement Third, *supra* note 29, § 461 cmt. a, § 463. A *persona non grata* is one not acceptable to a court or government that has to accredit him or her as an ambassador or minister. A country has the unfettered right to declare any foreign person *persona non grata*, see Vienna Diplomatic Convention, *supra* note 26, art. 9.

164. See *infra* notes 202-213 and accompanying text.

165. See *id.*

the sending state to respect all laws and regulations of the receiving state.¹⁶⁶

If a prohibitory or mandatory law exists, the question becomes whether the sovereign defendant has obtained consent to the act at issue or an exemption from the generally applicable law; such consent or exemption would supersede the host country's prohibitory or mandatory law. First, a court should examine the law under which the case is brought—in this instance, the FSIA. This Act appears to consent to specific types of conduct, but it does not itself consent to violations of federal and state prohibitory and mandatory laws.¹⁶⁷ Although purporting to immunize discretionary acts, the discretionary function exception cannot be read to constitute a general exemption from prohibitory and mandatory laws, because the FSIA dictates that, before the exception can apply, the act at issue must be defined as "discretionary" by other bodies of law or by judicially developed principles. Second, consent or exemptions may be granted by the agreements and treaties that the United States has made with foreign sovereigns.¹⁶⁸ Third, consent or exemptions may be found in laws of general applicability. For example, an act requiring military service may exempt all foreigners. Finally, consent may be obtained specifically for a particular project or matter. This form of consent depends upon the particular facts of each case rather than upon a general rule. The United States does not appear to have granted any consent or exemption to foreign officials acting in the U.S.—at least no foreign sovereign defendant has so claimed—with respect to an act that has resulted in personal injuries or property damages.

Even though no court has explicitly taken the position that U.S. federal and state laws limit the discretion of foreign officials, such an approach yields a better explanation than that offered by the courts for their decisions in *de Letelier*¹⁶⁹ and *Liu*.¹⁷⁰ Murder and assassination are prohibited by the laws of the United States, and the United States has not given consent for foreign agents to perform such acts within its

166. See Vienna Diplomatic Convention, *supra* note 26, art. 41, ¶ 1; Vienna Consular Convention, *supra* note 26, art. 55, ¶ 1. Foreign diplomatic and consular officials are also immune from the receiving state's jurisdiction with respect to some matters not relating to personal injury or property damage; for instance, such officials are exempt from social security, taxation, and customs duties. See *id.* arts. 48–50.

167. Though not couched in terms of "consent," the FSIA effectively grants consent for "malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." See 28 U.S.C. § 1605(a)(5)(B) (1988).

168. For treaty provisions establishing exemptions from taxation, alien registrations, military service, and customs duties, see Vienna Diplomatic Convention, *supra* note 26, arts. 33–37; Vienna Consular Convention, *supra* note 26, arts. 46–52, 60–62.

169. *De Letelier v. Chile*, 488 F. Supp. 665 (D.D.C. 1980); see *supra* notes 57–65 and accompanying text.

170. *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989), cert. dismissed, 497 U.S. 1058 (1990); see *supra* notes 66–73 and accompanying text.

territory. Therefore, foreign agents acting in the United States have no discretion to murder or assassinate. Of course, this approach would dictate different outcomes in *MacArthur*¹⁷¹ and *Risk*.¹⁷² foreign officials acting in the United States should abide by state zoning codes and criminal codes in the absence of an express exemption, which was not given in either case.

IV. A FURTHER PROPOSAL: REPEAL THE DISCRETIONARY FUNCTION EXCEPTION FROM THE FSIA

Recognizing and applying federal and state prohibitory and mandatory laws as limitations on the discretionary function under the FSIA will eliminate the availability of the defense to foreign sovereigns whenever there is a prohibition against or a requirement mandating the act at issue. There will obviously be situations, however, when no prohibitory or mandatory law applies to conduct that is unquestionably discretionary under the broad principles announced in *Berkovitz*.¹⁷³ In such cases, as long as the discretionary function exception stays on the statute books, judges will have no alternative but to allow immunity. Such a situation arises, for example, when the sovereign's agents breach ordinary standards of care, causing personal injury or property damage to hapless plaintiffs. Notwithstanding palpable injury, plaintiffs will receive no compensation.

To avert this evil, it is time to eliminate the exception completely and make a foreign sovereign liable for the tortious acts that its agents commit while performing discretionary functions. The increased dismantling of the citadel of sovereign immunity,¹⁷⁴ the emerging consensus on state responsibility,¹⁷⁵ state practice in other parts of the world,¹⁷⁶ and the differences between the decisionmaking functions performed by agents of the home sovereign and those performed by agents of a foreign sovereign in the United States all militate in favor of an outright repeal of the discretionary function exception under the FSIA.

A. *An Anachronism*

The discretionary function exceptions under both the FTCA and the FSIA are anachronistic in their preservation of sovereign immunity from tort actions: the immunity of domestic and foreign sovereigns has

171. *MacArthur Area Citizens Ass'n v. Peru*, 809 F.2d 918 (D.C. Cir. 1987). For discussion of this case, see *supra* notes 74-82 and accompanying text.

172. *Risk v. Halvorsen*, 936 F.2d 393 (9th Cir. 1991), cert. denied sub nom. *Risk v. Norway*, 112 S. Ct. 880 (1992); see *supra* notes 84-96 and accompanying text.

173. *Berkovitz v. United States*, 486 U.S. 531, 535-39 (1988).

174. See *infra* notes 177-182 and accompanying text.

175. See *infra* notes 181, 196-201 and accompanying text.

176. See *infra* notes 202-213 and accompanying text.

long been shrinking.¹⁷⁷ Many countries have begun to take seriously their responsibility to compensate the victims of their actions; one means of providing compensation is to waive immunity, before their own courts¹⁷⁸ and the courts of other countries,¹⁷⁹ from claims arising out of personal injuries and property damage. Many countries are also increasingly eliminating foreign sovereign immunity as a bar to tort proceedings.¹⁸⁰ The need to compensate victims has been recognized so broadly that the ILC has begun a project to codify the international law on state responsibility for extraterritorial personal injuries and property damages arising out of "acts not prohibited by international law."¹⁸¹ With its broad scope, this effort may even go so far as to adopt some features of a strict liability regime.¹⁸²

The discretionary function exception under the FTCA has made that act "largely a false promise,"¹⁸³ even though courts have tried to limit the scope of the exception. Under the FTCA, the discretionary function exception has immunized decisions regarding government projects, such as the production and storage of fertilizer¹⁸⁴ and the

177. See Lauterpacht, *supra* note 2, at 233-35.

178. See, e.g., Crown Proceedings Act, 1947, 10 & 11 Geo. 6, ch. 44, § 2 (Eng.), Law Concerning State Liability for Compensation, Law No. 125, Oct. 27, 1947, art. 1, 1 Roppō Zensho [Selected Statutes] 537 (1992) (Japan), translated in 1 E.H.S. L. Bull. Ser. AL1 (1986); Administrative Litigation Law, Apr. 4, 1989, art. 11, Renmin Ribao [People's Daily], Apr. 10, 1989, at 2 (China), reprinted with trans. in China Law and Practice, June 5, 1989, at 38-39. France has occasionally made itself accountable for the acts of its legislative organs, see Lauterpacht, *supra* note 2, at 220. The European Economic Community is liable for any damage caused by the ordinary torts that its agents committed during the performance of their official duties or by their wrongful legislative acts. See Treaty Establishing the European Economic Community [EEC Treaty] art. 215(2); Case C-152/88, Sofrimport S.A.R.L. v. Commission, 1990 E.C.R. I-2477, [1990] 3 C.M.L.R. 80 (partially voiding Commission regulations and awarding compensation for damages caused by the regulations).

179. See European Convention on State Immunity, May 16, 1972, art. 11, Eur. T.S. No. 74, reprinted in 11 I.L.M. 470, 473 (1972).

180. See *infra* notes 202-206 and accompanying text; see also the surveys of states restricting foreign sovereign immunity, Lauterpacht, *supra* note 2, at 250-72; Sucharitkul, *supra* note 2, at 126-70.

181. Robert Q. Quentin-Baxter, Special Rapporteur, Third Report on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law, [1982] Y.B. Int'l L. Comm'n 51, U.N. Doc. 4/CN.4/SER.A/1982.

182. See *id.* at 55-56 (possibility of strict liability in some areas); *id.* at 62-64 (schematic outline).

183. *Allen v. United States*, 816 F.2d 1417, 1425 (10th Cir. 1987) (McKay, J., concurring), cert. denied, 484 U.S. 1004 (1988).

184. See *Dalehite v. United States*, 346 U.S. 15 (1953), in which the Supreme Court held that the United States was not liable for the deaths, personal injuries, and property damage that occurred when a large quantity of fertilizer stored by the government exploded and blew up much of Texas City, Texas. Over five hundred and seventy persons died and 3,500 were injured in the accident, while property damages amounted to millions of dollars. See H.R. Rep. No. 1305, 84th Cong., 1st Sess. 3 (1955), reprinted in 1955 U.S.C.C.A.N. 3065, 3066.

testing of atomic weapons,¹⁸⁵ that caused catastrophes of great magnitude, thus leaving a large number of innocent victims claimless. This result has profoundly frustrated judges who have had to grapple with the discretionary function exception under the FTCA.¹⁸⁶ Under the FSIA, the discretionary function exception has likewise been largely construed to insulate foreign sovereigns from liability for intentional torts¹⁸⁷ and criminal conduct.¹⁸⁸ It is odd to make foreign sovereigns pay for traffic accidents caused by their officials but to allow their agents to engage in criminal conduct with impunity.¹⁸⁹

It is unfair to afford any immunity at all to a sovereign in the field of torts. As a matter of tort law, there is little reason to differentiate between private persons and the government when both have caused a harm. The usual justification for treating them differently is based on differences in their status: the government performs public functions for the good of the people, while a private injurer acts only for her own benefit. The argument runs that "[g]overnment hardly could go on"¹⁹⁰ if, every time the government injured a private person, it had to expend funds from the public treasury in order to compensate the victim. While this argument has general appeal, it falters upon more detailed consideration. Above all, it is a slight burden for a sovereign to compensate a victim; the government will rarely risk insolvency by doing so. The nub of the question is whether the cost should be borne by the victim alone, or whether it should be shouldered by all taxpayers within the borders of the state. It is unfair to place the burden on the victim alone when she is injured through no fault of her own by some act that

185. See *Allen*, 816 F.2d at 1421-24.

186. See, e.g., *Dalehite*, 346 U.S. at 60 (Jackson, J., dissenting) ("[T]he ancient and discredited doctrine that 'The King can do no wrong' has not been uprooted; it has merely been amended to read, 'The King can do only little wrongs.'"); *Allen*, 816 F.2d at 1424-25 (McKay, J., concurring). In Judge McKay's words:

Many endorsed what appeared to be the FTCA's policy that if the citizens at large benefited from a government program, that collective citizenry, not the isolated individual injured by the negligent conduct of the program, would bear the economic burden of that injury. This case dramatically illustrates that . . . the FTCA (and for that matter Congress' injunction that a program be carried out safely) is largely a false promise in all but 'fender benders' and perhaps some cases involving medical malpractice by government doctors.

Id. (citations omitted).

187. See, e.g., *MacArthur Area Citizens Ass'n v. Peru*, 809 F.2d 918, 921-23 (D.C. Cir. 1987).

188. See, e.g., *Risk v. Halvorsen*, 936 F.2d 393, 396-97 (9th Cir. 1991), cert. denied sub nom. *Risk v. Norway*, 112 S. Ct. 880 (1992).

189. Under the Vienna Diplomatic Convention and the Vienna Consular Convention, foreign diplomatic and consular enjoy personal immunity from legal process at least in cases arising out of their duties, see *supra* note 26, but these treaties do not purport to immunize the sending states of these officials for their conduct.

190. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (Holmes, J.).

is supposed to benefit, however abstractly, all citizens.¹⁹¹ If the government were to compensate the victim, it would act as an insurer to spread costs among all taxpayers who might derive benefits from the injuring act. Having under its control not only a vast amount of wealth but also the taxing power, the government would have an easy task in carrying out such an "insurance" function.¹⁹² Furthermore, in compensating its victims the government must internalize the costs of any particular government project; this accounting will force the sovereign to be more careful and more responsible in planning and managing its activities, and thus will lead to greater efficiency. If the benefits derived from a governmental project cannot cover the losses it causes in injuries and property damage, then efficiency concerns dictate that such a project should not be undertaken at all.¹⁹³

Even Congress has recognized the unfairness of withholding compensation from victims of official torts. To mitigate this unfairness, Congress has occasionally created legislative compensation programs.¹⁹⁴ As to victims injured by foreign officials, however, such legislative remedies are not available, because foreign legislatures are unlikely to pass legislation for the benefit of injured aliens. Repealing the discretionary function exception under the FSIA is thus the only way to assure compensation for U.S. citizens.¹⁹⁵

191. Indeed, this was perceived by Judge McKay to be the policy of the FTCA. See *supra* note 186.

192. The loss-spreading analysis is more powerful in a tort context than in the regulatory takings setting, where it won only three votes in *Penn Central Transp. Co. v. New York*, 438 U.S. 104, 148-49 (Rehnquist, J., dissenting, joined by Burger, C.J., and Stevens, J.), because a tort that results in personal injuries and property damage physically invades the victim's person or property. Personal injuries and property damages are thus analogous to physical takings situations in which the Court has steadfastly insisted on compensation. See, e.g., *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

193. For a more comprehensive discussion of the distribution of the costs of the injury and the benefits of imposing on the government a standard higher than the present one, see Schuck, *supra* note 39, at 100-21; see also Goldman, *supra* note 100, at 856-58 (summarizing policy arguments against the discretionary function exception under the FTCA).

194. In *Dalehite v. United States*, 346 U.S. 15 (1953), the Supreme Court held the government immune from liability for an explosion that destroyed part of a city. Subsequently, Congress passed the Act of Aug. 12, 1955, Pub. L. No. 84-378, 69 Stat. 707 (1955), to provide some compensation for the victims, eight years after the disaster. See H.R. Rep. No. 1305, 84th Cong., 1st Sess. (1955), reprinted in 1955 U.S.C.C.A.N. 3065, 3069-74. In 1990, Congress passed the Radiation Exposure Compensation Act, Pub. L. No. 101-426, 104 Stat. 920 (1991), to compensate victims similar to the plaintiffs in *Allen v. United States*, 816 F.2d 1417 (10th Cir. 1987). See H.R. Rep. No. 463, 101st Cong., 2d Sess. (1990), reprinted in 1990 U.S.C.C.A.N. 1368, 1368.

195. For a criticism of reliance on diplomatic intervention by the State Department for compensation, see H.R. Rep. No. 900, *supra* note 41, at 3.

B. *An American Lone Star*

Repeal of the discretionary function exception under the FSIA is supported not only by the foregoing policy considerations, but also by the state of international law as reflected in international treaties and state practice. As a statute with international implications, the FSIA affords an immunity that can claim neither roots in the theory of international law nor support in state practice in other parts of the world. The United States is a lone star in the world in that it affords other states a discretionary function exception to its jurisdiction over tort actions.

The very concept of a discretionary function exception to the tort liability of a foreign sovereign is not recognized by international law theorists. Neither Lauterpacht¹⁹⁶ nor Sucharitkul,¹⁹⁷ who have extensively researched the area of foreign sovereign immunity, discusses this concept. Likewise, the ILC does not discuss the concept of a discretionary function exception to tort liability in its effort to codify the international law of foreign sovereign immunity.¹⁹⁸ Lauterpacht, it is true, advocates an exception to jurisdiction for legislative, executive, and administrative acts of a foreign sovereign in its own territory.¹⁹⁹ Yet even though legislative, executive, and administrative acts may be categorized as discretionary acts under the principles announced in *Berkovitz*,²⁰⁰ Lauterpacht's vision is radically different from the discretionary function exception under the FSIA: according to Lauterpacht, acts to be exempted from jurisdiction must take place *in the territory of the foreign sovereign*, while under the FSIA, immunity applies to acts of the foreign sovereign that take place *in the United States*.²⁰¹

State practice reflected in foreign statutes also militates against a discretionary function exception to the tort liability of a foreign sovereign. Except for the United States, no country that has enacted a tort exception to immunity provides a discretionary function exception to that exception. The tort exception in other countries is a blanket one. A typical and widely followed statute is that of the United Kingdom:

A State is not immune as respects proceedings in respect of—

(a) death or personal injury; or

(b) damage to or loss of tangible property, caused by an

196. See Lauterpacht, *supra* note 2.

197. See Sucharitkul, *supra* note 2.

198. See ILC Draft Articles, *supra* note 25, at 8–151.

199. See Lauterpacht, *supra* note 2, at 237–38. Lauterpacht's proposition is in essence the act of state doctrine as applied by the United States courts. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

200. *Berkovitz v. United States*, 486 U.S. 531 (1988); see *supra* notes 41–45 and accompanying text.

201. See Lauterpacht, *supra* note 2, at 237–38; *supra* notes 24–25 and accompanying text.

act or omission in the United Kingdom.²⁰²

As is obvious from this language, if the act or omission occurs in the United Kingdom, no immunity is available. Singapore,²⁰³ South Africa,²⁰⁴ Canada,²⁰⁵ and Australia²⁰⁶ have adopted the English model by enacting virtually identical statutory provisions. The European Convention on State Immunity,²⁰⁷ which the English Statute implemented, first provided such a blanket tort exception to foreign sovereign immunity in 1972. As of January 1, 1991, Austria, Belgium, Cyprus, Germany, Luxembourg, the Netherlands, Switzerland, and the United Kingdom had become parties to the Convention.²⁰⁸

The *Draft Articles on Jurisdictional Immunities of States and Their Property*, recently adopted by the ILC, also provide a blanket tort exception to a foreign state's jurisdictional immunity;²⁰⁹ the discretionary function exception is neither included nor discussed at all. The ILC has recommended that the General Assembly of the United Nations call a convention to adopt a treaty enacting these articles.²¹⁰ The commentary to the exception states that this blanket tort exception applies to both private and public acts.²¹¹ Accordingly, this exception would apply to "discretionary functions" under the U.S. law. The private International Law Association²¹² has taken the same position on foreign

202. State Immunity Act, 1978, 26 Eliz. 2, ch. 33, § 5 (U.K.), reprinted in 17 I.L.M. 1123, 1125 (1978).

203. State Immunity Act, 1979, § 7 (Sing.), reprinted in United Nations Legislative Series, Materials on Jurisdictional Immunities of States and their Property 30, U.N. Doc. ST/LEG/SER.B/20, U.N. Sales No. E/F.81.V.10 (1982) [hereinafter United Nations, Materials].

204. Foreign Sovereign Immunity Act (1981), § 6 (S. Afr.), reprinted in United Nations, Materials, supra note 203, at 36-37.

205. State Immunity Act, 29-30-31 Eliz. 2, ch. 95, § 6 (1982) (Can.), reprinted in 21 I.L.M. 798, 799 (1982).

206. Foreign States Immunities Act 1985, No. 196, § 13 (1985) (Austl.), reprinted in 25 I.L.M. 715, 719 (1986).

207. European Convention on State Immunity, supra note 179, art. 11.

208. See M.J. Bowman & D.J. Harris, *Multilateral Treaties Index and Current Status* 362 (1984 & Supp. 1991).

209. See ILC Draft Articles, supra note 25, art. 12, at 102:

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission 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.

210. See ILC Draft Articles, supra note 25, at 10.

211. See ILC Draft Articles, supra note 25, art. 12 cmt. 8, at 105.

212. The International Law Association (ILA) is a widely respected non-governmental body of international law experts, established in 1873 for the reform and codification of the law of nations. See Rolf Stödter, *International Law Association*, in 9 *Encycl. Pub. Int'l L.* 182, 182-83 (1986).

sovereign immunity.²¹³

Current trends in international law, as reflected in state practice, thus support the repeal of the discretionary function exception under the FSIA, a statute designed to bring U.S. law into conformity with international state practice.²¹⁴ Repealing the exception would not offend international law or international comity, but rather would actually *follow* the trend of state practice. Many states impose liability on foreign sovereigns for injuries caused by acts that may be discretionary under U.S. standards. The age-old teaching is that "[w]e must take the current when it serves, or lose our ventures."²¹⁵ Moreover, if the United States is sued in any of the countries whose statutes are discussed above, no immunity will be granted for acts that may be discretionary under United States law. Under these circumstances, if the doctrine of reciprocity is to have any force,²¹⁶ it commands the abolition of the discretionary function exception under the FSIA.

C. *A Mis-Transplant*

That it was a mistake for Congress to graft the exception from the FTCA to the FSIA in the first place also counsels in favor of repealing the discretionary function exception under the FSIA. Congress apparently aimed to place foreign states in the same position before U.S. courts as the United States itself would be in if it were sued under the FTCA.²¹⁷ This logic is deeply flawed. Copying the discretionary function exception is a mis-transplant, despite noble congressional motives, because the purpose of the discretionary function exception under the FTCA has no application in the context of foreign sovereign immunity.

The legislative history, though ambiguous, seems to indicate that the discretionary function exception under the FTCA was intended primarily to facilitate high-level governmental decisionmaking and regulatory rule-making by federal agencies.²¹⁸ Congress cited several

213. See ILA, Draft Articles for a Convention on State Immunity, art. III, § F, reprinted in 22 I.L.M. 287, 290 (1983).

214. See *supra* text accompanying note 19.

215. William Shakespeare, *Julius Caesar* act 4, sc. 3, quoted in *Trendtex Trading Corp. v. Central Bank of Nigeria*, 1977 Q.B. 529, 556 (Eng. C.A.).

216. Reciprocity as a basis for sovereign immunity has been criticized, see *Lauterpacht*, *supra* note 2, at 245-46. But the principle of reciprocity is important in United States jurisprudence, see *Hilton v. Guyot*, 159 U.S. 113, 228 (1895). Furthermore, reciprocity was also one of the important factors that motivated the enactment of FSIA, see House Report, *supra* note 2, at 6607-08.

217. See *supra* notes 30-35 and accompanying text.

218. The discretionary function exception is

a highly important exception, intended to preclude any possibility that the bill [the FTCA] might be construed to authorize suit for damages against the Government growing out of an authorized activity, such as a flood-control or irrigation project, *where no negligence on the part of any Government agent is shown*, and the only ground for suit is the contention that the same conduct by a private individual would be tortious, or that the statute or regulation

examples of the kinds of decisionmaking it wished to protect: statutes or regulations authorizing flood-control projects, rulemaking of the Federal Trade Commission and the Securities and Exchange Commission, and fiscal operations of the Treasury Department. At the same time, Congress stated that the common law torts of the regulatory agencies were not immunized.²¹⁹ Courts now consider the exception to protect any decision grounded on political, social, or economic judgments of federal agencies, regardless of which agency or employee makes the decision.²²⁰ Thus, immunity has been granted for non-rule-making regulatory acts such as airplane inspections,²²¹ and for administrative acts such as the day-to-day management of failing banks.²²² Such an interpretation appears to have enlarged the scope of protection beyond that intended by Congress. Notwithstanding this apparent departure from original understanding, however, the requirement that the act must be based on considerations of public policy has not been relaxed at all.²²³ An act that satisfies this requirement constitutes part of the process of public policy-making.

The purpose of the discretionary function exception under the FTCA, even expansively construed, does not apply to the actions of a foreign sovereign in the United States, because a foreign sovereign does not perform the same functions of public policy-making in the United States. Mechanisms that facilitate the domestic governmental functions of the home sovereign do not apply to a foreign sovereign, which does not perform those functions in the United States. The foreign sovereign and its agents cannot perform legislative or regulatory

authorizing the project was invalid. It is also designed to preclude application of the bill to a claim against a regulatory agency, such as the Federal Trade Commission or the Securities and Exchange Commission, based upon an alleged abuse of discretionary authority by an officer or employee, whether or not negligence is alleged to have been involved. To take another example, claims based upon an allegedly negligent exercise by the Treasury Department of the blacklisting or freezing powers are also intended to be excepted. The bill is not intended to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion. Nor is it desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort. However, *the common-law torts of employees of regulatory agencies would be included within the scope of the bill to the same extent as torts of nonregulatory agencies.*

H.R. Rep. No. 1287, 79th Cong., 1st Sess. 5-6 (1945) (emphasis added).

219. See *id.*

220. See *United States v. Varig Airlines*, 467 U.S. 797, 813 (1984) ("[I]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case.").

221. See *id.* at 814-21.

222. See *United States v. Gaubert*, 111 S. Ct. 1267, 1275-76 (1991).

223. See *Berkovitz v. United States*, 486 U.S. 531, 537 (1988) ("The exception, properly construed, . . . protects only governmental actions and decisions based on considerations of public policy.").

acts in the United States, nor can the foreign sovereign's agents perform any executive or administrative acts that make public policy. Foreign officials conduct their affairs in the United States in a representative capacity.²²⁴ Since foreign sovereigns do not perform in the United States the functions that the discretionary function exception under the FTCA was designed to protect, there is no need to engraft the discretionary function exception onto the FSIA.

In short, however effective it may be in protecting governmental decisionmaking under the FTCA, the discretionary function exception is not appropriate for the purposes of foreign sovereign immunity. It should never have been blindly transplanted onto the FSIA; having been, it should now be repealed.

CONCLUSION

The broad interpretation of the discretionary function exception under the FSIA destroys the efficacy of the non-commercial tort exception as a mechanism for affording remedies to injured victims, thus defeating the critical purpose of the FSIA. Under the present statutory framework, courts should apply federal and state prohibitory and mandatory laws as limitations on the discretion of foreign officials, and allow the discretionary function exception only when no prohibitory or mandatory law applies to the conduct in question. All of these arguments, however, assume the maintenance of the existing FSIA. As this Note urges, compelling arguments can be made against the continued existence of the FSIA discretionary function exception altogether. The time is ripe for Congress to repeal the discretionary function exception under the FSIA in order to compensate victims more effectively, to bring U.S. law into accord with state practice internationally, and to rectify the misapplication of the FTCA exception in an inapposite context. The United States cannot, consistent with its aspiration to be a leader in promoting respect for human rights, continue to provide *carte blanche* to foreign agents within its borders.

Sienho Yee

224. See Vienna Consular Convention, *supra* note 26, art. 5 (listing consular functions); Vienna Diplomatic Convention, *supra* note 26, art. 3 (listing diplomatic functions).