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Holocaust-Era Claims in the 21st Century: Hearing Before the S. Comm. on the Judiciary, 112th Cong., June 20, 2012 (Statement of Edward T. Swaine, Professor of Law, GW Law School)

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Testimony of Edward T. Swaine
Professor of Law, George Washington University Law School

United States Senate Judiciary Committee
June 20, 2012

Mr. Chairman, Ranking Member Grassley, thank you for inviting me to appear before the Committee today to testify on the subject of Holocaust-Era Claims in the 21st Century.

I have been asked to focus on the relationship between the proposed Holocaust Rail Justice Act (S. 634) and international law. I am happy to do so. I teach and write at in the fields of international law, human rights law, and foreign relations law, each of which involves the human rights and immunity issues at the bill's core. I also gained experience with the subject during government service, both at the Justice Department and as a former Counselor on International Law at the State Department. Although my remarks are in my personal capacity only, I am also engaged in international law as a member of the Executive Council of the American Society of International Law, a leading organization in the study of international law and international relations.

It is important to stress the limits to my remarks. I will not attempt to describe in detail the tragic events addressed in S. 634's findings, which no one should ever forget, nor the range of efforts to secure reparations. I will avoid policy questions of the kind addressed to Congress and the executive branch, such as the relative merits of alternative remedies. And I will not be addressing many claims and defenses that would presumably arise in any ensuing litigation, which would be addressed to our courts. Instead, I will focus on how international law considerations might inform Congress' judgment. Unfortunately, although it is a carefully tailored solution to a compelling problem, S. 634 confronts substantial challenges under existing law, because of the functional and geographic breadth of liability it proposes for state-owned entities.

Background

European governments and businesses – spurred by U.S. leadership, particularly that provided by Ambassador Stuart Eizenstat – have made great strides in establishing administrative mechanisms that provide a form of “imperfect justice” for Holocaust victims. However, not every kind of claim has been addressed to date, and some cases have been litigated in U.S. courts – including, as relevant here, claims against the French national railroad, SNCF, for the role it played in forced deportations to Nazi concentration camps.¹ A central question in these cases has been whether SNCF enjoys

¹ See *Freund v. SNCF*, 391 Fed. Appx. 939 (2nd Cir. 2010) (affirming dismissal on immunity grounds of class action brought by Holocaust survivors and their heirs and beneficiaries against France, SNCF, and the French national depository, based on seizure and retention of personal property during forced deportations to Nazi concentration camps); *Abrams v. SNCF*, 389 F.3d 61 (2nd Cir. 2004) (affirming dismissal on immunity grounds of class action brought by Holocaust survivors and their heirs and beneficiaries against SNCF based on war crimes and crimes against humanity committed during forced deportation to Nazi concentration camps); see also *Victims of the Hungarian Holocaust v. Hungarian State Railways*, 798 F.

sovereign immunity from suit, which has been resolved under the general principles established in the Foreign Sovereign Immunities Act (FSIA). For example, during the *Abrams v. SNCF* litigation, it was held that SNCF was an “agency or instrumentality of a foreign state” under the FSIA, and thus considered part of a “foreign state” presumptively entitled to immunity.² Further, no exception to immunity applied. As to the FSIA’s exception for commercial activities, the district court explained, “there is clearly no commercial activity by a foreign state carried on in the United States, and there is no act performed in the United States in connection with a commercial activity by a foreign state,” and finally no sufficient “act outside the territory of the United States in connection with a commercial activity of a foreign state that causes a direct effect in the United States.” As to the non-commercial tort exception, “no part of the tort . . . occurred in the United States,” and neither the waiver exception nor the exception for state sponsors of terrorism was deemed applicable.³

S. 634 would dictate a different result in this and potentially additional cases. Essentially, the bill would remove immunity for railroads that owned and operated trains involved in the transportation and deportation of persons in France to concentration camps between 1940 and 1944, so long as the railroad was at that time a separate legal entity, regardless of whether it was then or is now owned by a foreign state. There would, accordingly, be no inquiry by U.S. courts into the scope of sovereign immunity or its exceptions.

In *Abrams* and other cases, the parties debated whether SNCF and other railroads would have enjoyed immunity under international law, either based on the law relating to sovereign immunity as it stood at that time or based on contemporary law. Because the courts found that immunity is dictated by the terms of the FSIA, they did not need to resolve international law questions. If Congress were to amend the FSIA, this would pose squarely the question whether doing so is consistent with international law.

The Salience of International Law

When it enacted the FSIA in 1976, thereby codifying for the United States a restrictive theory of sovereign immunity, Congress was attentive to customary international law – rules derived from the general practice of states accepted as law.

The statute occasionally references international law in addressing the types of claims for which foreign states lack immunity. Most exceptions to foreign state immunity are mundane; the premise of the restrictive theory is that states lack immunity when they engage in conduct like that of private parties, such as when they enter contracts. Nevertheless, the FSIA maintains a few exceptions for distinctively sovereign

Supp. 2d 934 (N.D. Ill. 2011) (denying motion to dismiss under the FSIA of class action against Hungarian state railroad for seizure of Jewish possessions and expropriation of Jewish funds during the Holocaust).

² *Abrams v. SNCF*, 389 F.3d 61 (2nd Cir. 2004); see also *Freund v. Republic of France*, 592 F. Supp. 2d 540, 554-55 (S.D.N.Y. 2008) (noting, additionally, plaintiffs’ concession that SNCF was an “agency or instrumentality” for purposes of the FSIA), *aff’d*, 391 Fed. Appx. 939 (2nd Cir. 2010).

³ *Abrams v. SNCF*, 175 F. Supp. 2d 423, 429-33 (E.D.N.Y. 2001).

conduct that violates international law – for example, the longstanding exception for certain cases in which “rights in property taken in violation of international law are in issue” (28 U.S.C. 1605(a)(3)). There are no exceptions, however, for conduct by the sovereign that violates human rights norms generally or other international obligations.

The fact that more attention is paid in the FSIA to establishing accountability when governments engage in commercial or other private conduct, but relatively little when governments violate their international obligations, is purposeful – and communicates no lack of respect for international law norms. When a sovereign state violates international law, it is understood that it may discharge its international legal responsibility, including a responsibility to make reparations, without necessarily subjecting itself involuntarily to litigation in foreign domestic courts. And a sovereign state does not generally assume an obligation under international law to open its national courts to allow civil suits against other states based on their violations of international law.

To the contrary, international law provides that governments must respect the immunity of other sovereigns – and Congress was mindful of this when it enacted the FSIA. The House Judiciary Committee recognized sovereign immunity as “a doctrine of international law under which domestic courts relinquish jurisdiction over a foreign state,” and sought to revert to a practice based on the “law and practice of nations,” noting that “[i]n virtually every country, the United States has found that sovereign immunity is a question of international law to be determined by the courts.”⁴ Thus, as the Supreme Court has recognized, Congress sought both “adoption of the restrictive view of sovereign immunity and codification of international law at the time of the FSIA’s enactment.”⁵ It is unsurprising, then, that the FSIA’s findings and declaration of purpose explain that subjecting foreign states to the jurisdiction of U.S. courts for their commercial activities was consistent with international law (28 U.S.C. § 1602).

The international law of sovereign immunity has not changed markedly since the FSIA was enacted. While the General Assembly adopted the UN Convention on Jurisdictional Immunities of States and their Property in 2004, it largely agrees with the restrictive approach adopted by the United States, and the Convention is not yet in force (nor has the United States ratified it).

The same reasons for heeding international law, too, remain. Generally, of course, the United States has an abiding interest in signaling its respect for international law whenever it can, because that will reinforce our own reputation for compliance and sustain our ability to insist that other states adhere to their obligations. More particularly, the U.S. government has a clear interest in ensuring respect by foreign states and their courts for our sovereign immunity. No other state is as active beyond its borders – militarily, commercially, diplomatically – as we are, and U.S. policies and prosperity make it an inviting target for lawsuits, including sometimes on the basis of alleged violations of international law. If sovereign immunity were disregarded, the United

⁴ H.R. Rep. 94-1487, 94th Cong., 2nd Sess. (1976), 1976 USSCAN 6604, 6606, 6608.

⁵ Permanent Mission of India to United Nations v. City of New York, 551 U.S. 193, 199 (2007).

States and its agencies and instrumentalities could be sued based on allegations involving civilians injured in drone strikes, torture, or extraordinary renditions – or, using more novel international law theories, based on allegations of cyber-attacks or damage to the global climate. Exposure would be particularly broad if proceedings could be brought concerning contentious historical events, like past U.S. policy in Central and South America or Southeast Asia, and if proceedings could be initiated in any foreign court, regardless of its connection to the events.

To be clear, ensuring U.S. accountability for its wrongdoing is desirable, including through appropriate judicial proceedings. Even so, steps that might subject the United States to greater risk of litigation before foreign (and sometimes hostile) courts requires careful evaluation, and there is no more direct way to compromise our ability to insist that foreign states honor U.S. sovereign immunity than for us to disregard the immunity of other governments. The structure of S. 634 may inadvertently accentuate that possibility. The bill is meticulously drafted to address the facts at hand – that is, claims arising from specific conduct, occurring during a circumscribed period, and against a designated class of defendants – in marked contrast to the FSIA, which generally articulates principles that can be universally applied. Piecemeal legislation may make it harder to establish a deliberate, consistent, and nondiscriminatory approach that can be defended in light of international objections. And U.S. interests abroad may be better protected if our government is subject to generalized principles respecting both human rights and sovereign immunity, not having encouraged the propagation of event-focused approaches – which may single out particularly controversial U.S. activities without the impediment of standards applicable other states or to the foreign state itself.

The Recent Decision on Jurisdictional Immunities of the State (Germany v. Italy)

The international law of sovereign immunity is addressed by an important recent judgment by the International Court of Justice (ICJ), the most prominent tribunal in the international legal system. As explained below, the decision echoes principles already established under the FSIA as a matter of domestic law, but makes clear that they also bind the United States internationally.

The case, *Jurisdictional Immunities of the State (Germany v. Italy)*,⁶ involved admitted wrongdoing by German armed forces in German-occupied Italy during World War II – including arrests and deportation of Italian nationals to perform forced labor in Germany, forced labor by members of the Italian armed forces who had been denied prisoner of war status, and massacres of civilians. Although Germany reached agreement with Italy on the compensation of Italian nationals for certain wrongs, and subsequently adopted national law entitling others to compensation, these did not make whole victims of forced labor and successors in interest to civilians killed in massacres. Beginning in the late 1990s, these victims commenced multiple proceedings against Germany in Italian courts, and the Italian Court of Cassation – the court of last resort – held that Germany lacked immunity for the acts in question. Germany subsequently applied to the ICJ, and

⁶ *Jurisdictional Immunities of the State (Ger. v. Italy: Greece Intervening)*, Judgment (Feb. 3, 2012), available at <http://www.icj-cij.org/docket/files/143/16883.pdf>.

in a judgment issued this February, it held in Germany's favor, finding – by a vote of twelve to three – that Italy had violated customary international law by failing to respect Germany's immunity from civil claims.

Germany v. Italy, like the claims being addressed by S. 634, arose from terrible wrongs committed during the Holocaust. Nonetheless, there are limits to that judgment's authority for this matter. To begin with, the judgment binds Italy and Germany in respect of that particular dispute, but does not in itself formally bind the United States or other states in connection with different disputes. Rather, it construes customary international law, which does bind the United States, and sets the benchmark for how other states will evaluate the legality of our conduct, whether through formal litigation or otherwise.

More important, the claims differ in a potentially critical way. The dispute before the ICJ involved wrongs committed by Germany armed forces, and more generally, sovereign acts (*jure imperii*) rather than commercial or other private acts (*jure gestionis*) – while the railroad claims addressed by the bill involve acts depicted in the findings as more commercial in character. The Court properly stressed that it was not addressing state acts of a non-sovereign nature (para. 60), and further stated that “[t]he issue before the Court is confined to acts committed on the territory of the forum State by the armed forces of a foreign State, and other organs of State working in co-operation with those armed forces, in the course of conducting an armed conflict” (para. 65).

Despite these important limitations, the judgment remains instructive, and will certainly inform the judgment of foreign states appraising any U.S. legislation. The ICJ stated four propositions of potential relevance to S. 634.

First, the Court recalled that “in claiming immunity for themselves or according it to others, States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity” (para. 56). The Court's understanding that immunity is a binding obligation under customary international law – which was common ground between Italy and Germany – is consistent with views expressed by Congress in adopting the FSIA.

Second, the Court addressed the relevant time frame for reckoning the international law to be applied. The Court acknowledged the general principle that “the compatibility of an act with international law can be determined only by reference to the law in force at the time when the act occurred” (para. 58). It distinguished, however, between applying this principle to Germany's conduct – which, having occurred in 1943-1945, would be governed by the international law applicable during that period – and applying it to Italy's acts. As the Court explained, Italy's alleged violations of international law stemmed from the recent judicial proceedings against Germany, to which contemporary international law is applicable; this is consistent with the “procedural” nature of sovereign immunity, which regulates the exercise of jurisdiction, and which is distinct from the substantive law regulating whether the underlying conduct motivating the judicial proceedings is lawful (para. 58).

This approach, too, is consistent with the FSIA as it has been construed by our courts. In *Republic of Austria v. Altmann*,⁷ the Supreme Court determined that the FSIA applied to conduct occurring prior to its enactment, even before the U.S. moved to adopt the restrictive theory of sovereign immunity, in part because this was consistent with Congress' objective of establishing a comprehensive framework for resolving immunity issues. The effect, in the context of that case, was reduce the scope of sovereign immunity, and to permit plaintiffs seeking the recovery of Nazi-confiscated art the opportunity to invoke the expropriations exception, but the Court's reasoning did not turn on that. In another case, *Dole Food Co. v. Patrickson*,⁸ the Court held that whether an entity is part of a foreign state under the FSIA depends on the facts at the time suit is brought rather than when the conduct occurred. As both the ICJ and the Supreme Court have emphasized, the question is not whether a foreign state has legitimate expectations that its conduct, when rendered, will be immune, but rather the circumstances under which that state will be subject to judicial proceedings.

Third, the ICJ rejected the proposition that the illegality of the underlying conduct – as opposed to its characterization as sovereign or non-sovereign, or similar inquiries related to recognized exceptions – affected the immunity inquiry. Thus, the evident illegality of conduct by German armed forces had no bearing on their sovereign character (para. 60). The Court further stated that under existing customary international law, even serious violations of human rights or the laws of war would not deprive a state of immunity for the relevant acts (para. 91), and similarly concluded that a violation of *jus cogens*, or nonderogable, rules would not affect the immunity inquiry (para. 97).

This is not self-evident as a matter of first principles. There is surely a case to be made for a norm according to which the egregious wrongs committed during the Holocaust – not just by the railroads – are unprotected by immunity. Other behavior causing massive human suffering (inhumane bombing campaigns, apartheid and racial segregation, crimes against humanity, genocide, and torture) might likewise be interrogated in lawsuits against sovereigns, presumably in another state's courts, rather than through international diplomacy, international criminal courts, and other alternative means.

Nevertheless, the ICJ rejected such an approach as inconsistent with the sovereign rights secured by customary international law as it now stands. The Court cited its own precedent and decisions by bodies like the European Court of Human Rights. The Court also recalled the distinction between the substantive illegality of a foreign state's acts – and its duty to make reparations – and the issue of whether immunity permits national courts to maintain jurisdiction, which in effect implicates only one possible means of providing reparations (para. 94). Finally, it noted the difficulty of reconciling any judicial inquiry into the gravity of the underlying violations with the jurisdictional character of immunity, warning that immunity would be effectively negated if skillful construction of a claim would subject foreign states to lengthy trials (para. 82).

⁷ 541 U.S. 677 (2004).

⁸ 538 U.S. 468 (2003).

The Court’s reasoning was strikingly similar to that of U.S. courts, which have also resisted arguments to the effect that *jus cogens* claims fall within a nonstatutory exception to the FSIA, including in cases involving the use of slave labor in Nazi concentration camps.⁹ The Supreme Court has not reached this precise question, but has more broadly suggested that “immunity is granted in those cases involving alleged violations of international law that do not come within one of the FSIA’s exceptions.”¹⁰

Fourth, and finally, the ICJ rejected Italy’s “last resort” argument – the suggestion that the failure to secure other means by which Germany would compensate victims warranted denying Germany immunity to which it was otherwise entitled. The Court criticized Germany’s failure to provide a remedy, particularly its decision to exclude from its compensation program Italian military detainees (para. 99). Nonetheless, the Court explained that customary international law revealed no principle according to which immunity depended on the availability of adequate alternatives; it further noted practical difficulties with making immunity contingent on some indefinite prospect of alternative redress or, alternatively, inquiring into the purposes to which a foreign state had put reparations or other remedies it had received (paras. 101-102).

Application to S. 634

How does the proposed legislation comport with these and related principles of international law? In effect, S. 634 tries to produce a different result on the *Abrams* facts by two means: first, by focusing on how railroads were organized during 1940-1944 rather than now; second, by removing immunity without regard to where the conduct giving rise to the claims occurred.

Historical status of railroads. S. 634 changes the focus from the present-day status of the defendant railroads – when some, like SNCF, are wholly state-owned and entitled under U.S. law to be treated as part of a foreign state – to their legal and factual status when the underlying events occurred, when they may have lacked immunity. Thus, S. 634 would withdraw immunity from any railroad that owned and operated trains between approximately 1940 and 1944 and “was, at the time of the transportations or deportations, a separate legal entity, whether or not any or all of the equity interest in the railroad was or is owned by a foreign state.” The premise is likely the opinion that during that period, prior to U.S. adoption of the restrictive theory, a “separate legal entity” like SNCF was not entitled to immunity.¹¹ Congress presumably has the authority to make

⁹ See *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1173-74 (D.C. Cir.1994); *Sampson v. Federal Republic of Germany* 250 F.3d 1145, 1151-56 (7th Cir. 2001); see also *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 242-45 (2nd Cir.1996); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 706, 718-19 (9th Cir.1992).

¹⁰ *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).

¹¹ *Abrams*, 175 F. Supp. 2d at 447 (noting reliance by plaintiffs on William C. Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?*, 65 Tul. L. Rev. 535 (1991)). The district court noted, however, that it was entirely possible that immunity would have been conferred even under that approach. See *Abrams*, 175 F. Supp. 2d at 447-48.

such a change as a matter of domestic law, since the Supreme Court's contrary holdings in *Republic of Austria v. Altmann* and *Dole Food Co. v. Patrickson* simply construed the FSIA as Congress had then written it.¹²

International law permits other approaches to defining what constitutes a “foreign state,” entitled to a foreign state’s immunity, beyond the one Congress has hitherto used under the FSIA. Title 28, section 1603(a) effectively includes within the definition of a foreign state all agencies or instrumentalities in which a foreign state has a majority holding. What matters, ultimately, is the scope of immunity conferred, and the FSIA accords these agencies and instrumentalities somewhat reduced protection against service, attachment, and punitive damages. Generally, though, it regulates them according to the same immunity and exception provisions applicable to other forms of a foreign state.

Other approaches to defining the notion of a foreign state have been adopted and seem to be legally available under international law, so long as adequate safeguards are in place. For example, the 1972 European Convention on State Immunity excludes immunity for “any legal entity of a Contracting State which is distinct therefrom and is capable of suing or being sued, even if that entity has been entrusted with public functions” – an approach, notably, that was intended to limit immunity for entities like “railway administrations”¹³ – unless the proceedings concern “acts performed by the entity in the exercise of sovereign authority (*acta jure imperii*)” (art. 27). The UN Convention includes within the definition of a sovereign state “agencies or instrumentalities . . . or other entities,” if “they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State” (art. 2(1)(b)(iii)). Conversely, it removes the immunity of state enterprises and similar entities that have “independent legal personality,” can sue and be sued, and can engage in property transactions, so long as the proceeding relates to their commercial transactions, which (as under the FSIA) are indirectly contrasted with sovereign functions (arts. 10(3), 2(2)).¹⁴ Each convention was relied upon by the ICJ as part of reckoning customary international law (e.g., *Germany v. Italy*, para. 66). Regardless of which approach is preferable, it appears that there is sufficient room for both the FSIA’s present approach and one that – like S. 634 – pays heed at the threshold to whether an entity has a separate legal identity.

The reason this is permissible is important, because it affects how much latitude Congress ultimately has. The premise should not be that the United States is capable of dictating application of the law of sovereign immunity as it existed in 1940-1944, such that a railroad’s status “at the time of the transportations or deportations” is used to tap

¹² If S. 634 is intended to enable the re-opening of a final judgment, however, there may be constitutional objections. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

¹³ Explanatory Report, European Convention on State Immunity (ETS No. 074), para. 109, available at <http://conventions.coe.int/Treaty/EN/Reports/HTML/074.htm>.

¹⁴ See also Draft Articles on Jurisdictional Immunities of States and Their Property, with Commentaries, in Report of the International Law Commission on the Work of Its Forty-third Session, [1991] 2 Y.B. Int'l L. Comm'n, pt. 2, at 13, 17 para. 15 (noting theoretical inclusion of state enterprises among “other entities”), 20 para. 25 (distinguishing “commercial transactions” from those “non-commercial or governmental in nature”), UN GAOR, 46th Sess., Supp. No. 10, UN Doc. A/46/10 (1991).

into a prior era's law. While law in effect from 1940-1944 bears on whether railroads violated international law, it is the contemporary law of sovereign immunity, applied to the facts of the railroad's complained-of conduct during that period, that determines whether it is presently entitled to sovereign immunity or is governed by one of its exceptions. As the ICJ indicated in *Germany v. Italy*: "it is the international law in force at the time of [judicial proceedings against a foreign state]" which must be applied, because it is the proceedings that give rise to potential offense against immunity (para. 58). This means that the invocation of immunity by SNCF and other railroads can be ignored only if doing so is consistent with contemporary international law, regardless of the result that would have obtained were this suit to have been adjudicated in the 1940s.

To simplify somewhat, it seems plausible that if contemporary international law permits distinct treatment of certain legally separate entities as they are presently composed, per the European and UN Conventions, it might permit similar treatment of state entities on the basis that they were once so composed – perhaps even if they no longer possess that separate identity, if they did so during the underlying conduct. Critically, however, nothing in this distinct treatment under contemporary law would warrant disregarding all immunity for such entities. As previously noted, both the European Convention and UN Convention inquire whether the separate entity was nonetheless engaged in the exercise of sovereign authority, in which case it is entitled to sovereign immunity just as if it were any other part of the state. Similarly, while English law excludes from the definition of a foreign state "any entity [a "separate entity"] which is distinct from the executive organs of the government of the State and capable of suing or being sued," it separately provides that such a separate entity is entitled to immunity if "the proceedings relate to anything done by it in the exercise of sovereign authority" and the circumstances are such that a state would be immune.¹⁵ In contrast, S. 634 seems to withdraw all immunity on the predicate that a state agency or instrumentality was, at a prior interval, a separate legal entity, mooted any inquiry into whether a claim is based on sovereign or non-sovereign (for example, commercial) conduct.

Whether or not this approach would be acceptable if applied to the U.S. government is an important question of policy. Beyond that, rendering S. 634 more compatible with contemporary international law seems to require two additional steps. Given the precise geographic focus of S. 634 – and the likelihood that the states concerned regard the European Convention (to which Germany, but not France, is a party) and the UN Convention (which France, but not Germany, has approved, but which is not yet in force) as compatible with customary international law – it would be appealing to add provisos that accorded with the approach of those treaties.

First, it would be preferable to determine whether an otherwise-qualified railroad was during 1940-1944 a separate entity of the kind distinguished by international conventions (and not fully regarded as a foreign state), and whether present international law genuinely permits ascertaining status at the time the entity engaged in relevant conduct. (Of course, if a railroad was entirely private at the relevant time, no immunity would be warranted; if, on the other hand, it was state owned and not legally separate, no

¹⁵ State Immunity Act (1978), § 14(1), (2).

distinct approach to its immunity would be warranted under S. 634 or otherwise.) Whether S. 634 complies turns in part on what the bill means by the term “separate legal entity.” Both the European Convention and UN Convention have what appear to be more demanding tests that must be satisfied before (partly) separating a state-owned entity from immunity. For example, for the European Convention, which requires both a distinct existence and capability of suing or being sued, the Explanatory Report stated that “the criterion of legal personality alone is not adequate, for even a State authority may have legal personality without constituting an entity distinct from the State,” such that a dual test was thought necessary to “identify[] those legal entities in Contracting States which should not be treated as the State.”¹⁶

Second, and more critically, it still remains essential to establish that the claims are based on non-sovereign conduct of some kind, though the burden of establishing sovereignty might be placed on the railroad.¹⁷ For example, one might provide that immunity could be afforded to any railroad that was a separate legal entity during the relevant period in 1940-1944, but which would be deemed an agency or instrumentality of a foreign state based on its present status, provided that it could demonstrate that it was exercising sovereign authority at the relevant time. This would likely reduce the breadth of international law objections by affording state entities the opportunity to present immunity defenses for U.S. courts to evaluate – according to standards that the relevant countries should accept.

To be clear, the result might be to sustain the immunity of railroads, depending on the facts and pleading. U.S. case law illustrates the contentious and difficult questions that arise in distinguishing between commercial and sovereign activities; in one case, for example, the Supreme Court held that intentional torts allegedly committed by Saudi Arabia against an American employee in a Saudi hospital – including torture – were, notwithstanding their relation to commercial employment activities, better described as being “based upon a sovereign activity immune from the subject-matter jurisdiction of United States courts under the Act.”¹⁸ While that decision has been sharply criticized, international law does not take an altogether different approach in distinguishing between sovereign and non-sovereign activities, and it plainly reserves to governments the capacity to breach international law while still claiming that they are exercising sovereignty. Per *Germany v. Italy* and the decisions it cites, even *jus cogens* offenses do not diminish an activity’s characterization as an act of sovereignty (*jure imperii*). Thus, even if proof of *jus cogens* offenses is mustered in a particular action (though that is not required by S. 634), it remains possible that courts would order dismissal or, if they did not, that foreign states would object on the ground that their immunity was not respected.

¹⁶ Explanatory Report, European Convention on State Immunity (ETS No. 074), para. 108, available at <http://conventions.coe.int/Treaty/EN/Reports/HTML/074.htm>

¹⁷ This is consistent with the authority cited to the district court in *Abrams*. Hoffman, *supra*, at 564 (stating, in reference to current national laws, that “[i]n all these jurisdictions, the law clearly provides that the separate entity’s presumption of nonimmunity may be rebutted by evidence showing that the entity has acted in a sovereign capacity”).

¹⁸ *Saudi Arabia v. Nelson*, 507 U.S. 349, 363 (1993).

Geographic scope of exceptions. In addition to pretermitted inquiry into whether a railroad is engaged in sovereign or non-sovereign (or commercial) activities, S. 634 simultaneously changes the geographic scope of exceptions to sovereign immunity. In the *Abrams* proceedings, the fatal difficulty was not whether, in principle, SNCF had engaged in commercial activities or committed a non-commercial tort, but rather where any such activity had occurred. Assuming SNCF is deemed now or during 1940-1944 to be part of a foreign state, or at a minimum to constitute a separate or distinct legal entity entitled to some measure of immunity, S. 634 would curtail nexus restrictions that limit the liability of sovereign entities.

The scope of U.S. capacity to adopt civil liability on the basis of universal jurisdiction – jurisdiction based on the nature of the offense, rather than on territorial nexus or the nationality of the plaintiff or defendant – is hotly disputed among governments. It is also the subject of expert briefing in *Kiobel v. Royal Dutch Petroleum Co.*, which is pending before the U.S. Supreme Court. Without reproducing the extensive discussions of this question, universal jurisdiction over foreign states is a further bridge to cross. Territoriality is integrally related to immunity. At its core, international law seeks to reconcile the sovereign equality of states, which supports state immunity, with the sovereignty that each state possesses over its own territory, including the right to exercise jurisdiction that flows from that sovereignty – with which state immunity interferes (*Germany v. Italy*, para. 57).

It is unsurprising, then, that territorial elements are a near constant in exceptions to immunity. For example, the UN Convention makes states accountable for commercial transactions that “fall within the jurisdiction of a court of another State” (art. 10) and for torts involving personal injuries or damage to property if, among other things, “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” (art. 12) – the latter being known, revealingly, as the “territorial tort” exception. The European Convention is suffused with required links to “the territory of the State of the forum.”

This approach is generally followed in the United States. As previously mentioned, the commercial activities exception under the FSIA requires a nexus to the United States (28 U.S.C. § 1605(a)(2)), and the exception for other matters involving personal injury or death requires (inter alia) requires that the injury or death “occur[] in the United States” (28 U.S.C. § 1605(a)(5)). One notable departure, however, is the FSIA exception for state sponsors of terrorism (28 U.S.C. § 1605A). However, that exception is itself controversial as a matter of international law, and the ICJ noted in *Germany v. Italy* that the exception “ha[d] no counterpart in the legislation of other states (para. 88).¹⁹ In articulating the terrorism exception, in any event, Congress adopted several important safeguards: for example, foreign states must be designated by the United States as state sponsors of terrorism, and as a substitute for territoriality, claimants

¹⁹ A comparable statute was subsequently enacted in Canada. Justice for Victims of Terrorism Act, S.C. 2012, c. 1, s.2 (assented to March 13, 2012).

must be U.S. nationals, members of U.S. armed forces, or government employees or contract personnel.

S. 634 would not, as introduced, include any similar restriction. To my knowledge, the bill would be among the first national statutes to establish universal civil jurisdiction – irrespective, that is of any obvious claim to territorial jurisdiction, or nationality or passive personality jurisdiction – while simultaneously denying foreign states the benefit of sovereign immunity.²⁰ The most material limitation, which bears emphasis, is the requirement that the railroads concerned have separate legal identities at the time of their conduct, together with a legislative finding that they were engaged in commercial activities. At least in the absence of reconciling that inquiry with known international law standards, the bill would be quite exceptional.

I do not mean to overstate this objection. It is difficult to define precise territorial limits to exercising jurisdiction over foreign sovereigns, or even whether these limits derive from sovereign immunity or other jurisdictional principles. While territorial thresholds are kept frequently set higher for foreign state defendants, probably because of states' frequent extraterritorial contacts and the political sensitivity of suits against them, there is no internationally agreed standard. At the end of the day, however, it is doubtful these points of uncertainty redeem a statute with no nexus requirements whatsoever.

Were S. 634 adopted, the United States might try to defend it as a progressive measure that pushes the boundaries of universal civil jurisdiction, which many have advocated for certain international offenses. While the United States has often defended extraterritorial legislation against foreign complaints, this would be an uphill battle, given the holding in *Germany v. Italy* that that a foreign state is entitled to sovereign immunity under international law notwithstanding allegations of grave offenses that may give rise to universal jurisdiction. Some of the leading advocacy for universal jurisdiction, moreover, has conceded that such jurisdiction if recognized would still be tempered by appropriate accommodation of immunity.²¹ Defending this broader proposition – assuming, that is, that S. 634 extends to entities that colorably enjoy all or some of the status of foreign states – may risk the argument for universal jurisdiction even over parties that lack immunity. If accepted, moreover, it would expose the United States itself to proceedings in any foreign court based on alleged present or past offenses. This feature requires careful reconsideration in light of international law concerns.

Additional Concerns Relating to International Agreements

As a separate matter, I understand that S. 634, as originally submitted, may be augmented by text that would retain the immunity of “any railroad that is an agency or

²⁰ Neither the Alien Tort Statute nor the Torture Victim Protection Act, which provide for civil liability, purport to override state immunity, and various criminal statutes reaching extraterritorial offenses like piracy or torture are not understood to concern states either.

²¹ See, e.g., Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 86-87 para. 79 (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal). Indeed, the distinction of cases involving immunity is a recurring features of the briefs recently filed to defend the Alien Tort Statute as an exercise of universal jurisdiction.

instrumentality of a foreign state . . . that has contributed, as of January 1, 2010, to any fund established under an agreement of the United States of America to resolve Holocaust-related claims in United States courts.” This is a well-conceived and welcome attempt to respect existing agreements. Although Congress generally enjoys the right under U.S. law to limit the domestic legal effect of international agreements entered into by the United States, this has no effect on the international legal responsibility of the United States. For this reason, exempting international agreements is highly desirable.

Nonetheless, the exemption may narrower than is intended, in that the relevant U.S. agreements may not invariably be characterized as being to “resolve Holocaust-related claims in United States courts.” For example, under the German Foundation Agreement, which involved substantial contributions by both the German government and by German companies, claims in U.S. courts were not conclusively resolved. Rather, the United States agreed to represent in U.S. judicial proceedings that our foreign policy interests favored using the Foundation as an exclusive forum for resolving World War II-era claims against German companies, and that these interests favored “dismissal on any valid legal ground,” but stopped short of guaranteeing that these interests would “in themselves provide an independent legal basis for dismissal.”²² It is unclear whether contributions by a German railroad to the fund established by this agreement would allow it to retain immunity under the bill.

Finally, if and to the extent there is interest in fostering alternatives to U.S. litigation, provision might be made for the legislation’s suspension upon some form of executive branch certification – for example, that negotiation concerning reparations for the implicated claims was ongoing. I am not in a position to evaluate whether that kind of provision is warranted in light of diplomatic realities, or whether the executive branch would welcome it. However, it would not resolve other international law issues posed.

* * *

Because Congress has paid heed to international law in enacting and amending the FSIA, the United States has generally managed to avoid international controversy, thereby contributing to the legal integrity of our domestic judicial processes. This proves important when, as is inevitable, politically sensitive matters against foreign sovereigns are litigated in our courts – and helps to ensure that foreign states obey international law when contemplating litigation against the U.S. government in their courts.

Claims like those addressed by S. 634 deserve to be addressed in some forum. The bill presents difficult questions with which the political branches should be engaged, requiring attention both toward respecting human rights, on one hand, and toward respecting the legal rights of foreign sovereigns, on the other. Each contributes to respect for the rule of law. I appreciate the continued attention of Congress to these matters, and the opportunity to testify about them.

²² Agreement Concerning the Foundation “Remembrance, Responsibility and the Future,” 39 Int’l Legal Materials 1298, 1303-04 (2000); see *American Ins. Ass’n v. Garamendi*, 539 U.S. 396, 405-06 (2003).