

FOREIGN SOVEREIGN IMMUNITY, INDIVIDUAL OFFICIALS, AND HUMAN RIGHTS LITIGATION

Curtis A. Bradley & Jack L. Goldsmith

FOR THIRTY YEARS, international human rights litigation in U.S. courts has developed with little attention to a lurking doctrinal objection to the entire enterprise. The paradigm international human rights case involves a suit against a foreign government official for alleged abuses committed abroad under color of state law. A potentially dispositive objection to this litigation is foreign sovereign immunity. The Foreign Sovereign Immunities Act (FSIA) creates presumptive immunity for foreign states and has no exception that would cover human rights cases. Many courts have assumed that the FSIA has no relevance to human rights suits as long as they are directed against state officials rather than the state itself. Recently, however, courts have begun to reject this assumption, and the issue is now before the Supreme Court in *Yousuf v. Samantar*.¹

This essay makes two contributions to the debate over whether the FSIA applies to suits against individual foreign officials. First, it

Curtis Bradley is the Richard A. Horvitz Professor at Duke Law School. Jack Goldsmith is the Henry L. Shattuck Professor at Harvard Law School.

¹ 552 F.3d 371 (4th Cir. 2009), *cert. granted*, No. 08-1555 (Sept. 30, 2009).

shows that, contrary to what some courts have assumed, suits against individual officials fall naturally within the plain language of the FSIA's immunity provisions. Second, it shows that the international law of state immunity, which is relevant to the proper interpretation of the FSIA in several ways, supports this construction. Combining these and other points, the essay concludes that the FSIA confers presumptive immunity in suits against state officials, including former state officials, for their official acts committed while in office, and that this immunity applies even in human rights cases.

BACKGROUND

International human rights litigation in U.S. courts can be traced to the Second Circuit's 1980 decision in *Filartiga v. Pena-Irala*.² The court in *Filartiga* held that Paraguayan citizens could sue a former Paraguayan police inspector for allegedly torturing and killing a member of their family in Paraguay, in violation of international law. In support of this holding, the court relied on the Alien Tort Statute (ATS), a then-obscure provision that had originally been part of the First Judiciary Act of 1789. The ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."³

Since *Filartiga*, plaintiffs from around the globe have relied on the ATS to sue in U.S. courts for human rights abuses. In many of these suits, as in *Filartiga*, a foreign plaintiff sues a foreign official for an alleged violation of international law committed on foreign soil. The allegation of governmental conduct is often a necessary component of the plaintiff's case, since most violations of international law require state action.⁴ Because governments act through individuals, these suits in effect challenge the conduct of foreign gov-

² 630 F.2d 876 (2d Cir. 1980).

³ 28 U.S.C. § 1350.

⁴ See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 & cmt. b (1987).

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ernments. As a result, the sovereign immunity of these governments is a potentially serious obstacle to this litigation.

Courts in the United States have long accorded foreign nations immunity from suit. Before 1976, they did so as a matter of common law, taking into account considerations of international law and comity. In addition, starting in the late 1930s, courts began to give essentially absolute deference to Executive Branch views on whether immunity should be granted. Courts also accepted and applied the Executive Branch's determination in 1952, in the Tate Letter, that the United States would henceforth apply the "restrictive" theory of immunity, whereby foreign sovereigns could be sued for their private, commercial acts, but not their public, sovereign acts.⁵

In 1976, Congress enacted the FSIA, a statute that purported to codify the international law of sovereign immunity, including the restrictive theory, and to move immunity determinations from the Executive Branch to the courts. The FSIA provides that a "foreign state," including a state's "agency or instrumentality," is immune from suit in U.S. courts unless the suit falls within one of the FSIA's specified exceptions to immunity.⁶ Importantly, the FSIA's general tort exception is limited to situations in which the damage or injury occurs in the United States.⁷ In 1996, Congress added an exception for certain egregious acts committed abroad, but the exception applies only to a few "state sponsor[s] of terrorism."⁸ As a result, the FSIA appears to contain no exception for international human rights cases.

It is unclear from the text of the FSIA whether it covers suits, like the suit against the police inspector in *Filartiga*, against individual officials. The court in *Filartiga* did not address the issue, even

⁵ See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486-87 (1983) (describing history recounted in this paragraph).

⁶ 28 U.S.C. §§ 1603-04.

⁷ See 28 U.S.C. § 1605(a)(5).

⁸ The "state sponsor of terrorism" exception currently applies to suits against four states: Cuba, Iran, Sudan, and Syria. For the latest iteration of this exception, see 28 U.S.C. § 1605A.

though the international law violation in that case – torture – required government action. Many of the post-*Filartiga* human rights decisions have similarly failed to consider the issue of immunity.

Outside the human rights context, the Ninth Circuit held in an influential 1990 decision, *Chuidian v. Philippine National Bank*, that suits against individual officers for actions taken in an official capacity are covered by the FSIA.⁹ That case involved a suit by a Philippine citizen against a member of a Philippine governmental commission charged with recovering wealth allegedly absconded by the Marcos regime. Noting that foreign officials received common law immunity before enactment of the FSIA, the court reasoned that it would be “illogical” to think that Congress in the FSIA eliminated the application of sovereign immunity to individuals “implicitly and without comment.” The court added that “to allow unrestricted suits against individual foreign officials acting in their official capacities . . . [would allow] litigants to accomplish indirectly what the Act barred them from doing directly,” and “would defeat the purposes of the Act.” It concluded that individual officials who act on behalf of the state can reasonably be considered “agencies or instrumentalities” of the state for purposes of the FSIA.

Most circuit courts to have addressed this issue have agreed with *Chuidian*.¹⁰ In recent years, however, two circuit courts have staked out a contrary view. The Seventh Circuit has noted that the FSIA defines “agency or instrumentality” as a “separate legal person,” a phrase that “refers to a legal fiction – a business entity which is a legal person.”¹¹ It added that “[i]f Congress meant to include individuals acting in the official capacity in the scope of the FSIA, it would have done so in clear and unmistakable terms.” The Fourth Circuit in *Yousuf* agreed with these points, and also noted that indi-

⁹ 912 F.2d 1095 (9th Cir. 1990).

¹⁰ See, e.g., *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 83 (2d Cir. 2008); *Keller v. Central Bank of Nigeria*, 277 F.3d 811, 815-16 (6th Cir. 2002); *Byrd v. Corporacion Forestal y Industrial de Olancho*, 182 F.3d 380, 388-89 (5th Cir. 1999); *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996).

¹¹ *Enahoro v. Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005).

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viduals do not easily fit within the FSIA's jurisdictional and service of process provisions for an "agency or instrumentality."¹²

MOVING BEYOND "AGENCY OR INSTRUMENTALITY"

We agree with those courts that have concluded that suits against individual foreign officials are not easily accommodated within the "agency or instrumentality" language of the FSIA. There is, however, a better textual basis for applying the FSIA: these suits can be considered to be directed against the foreign state itself for purposes of the FSIA.¹³ Since a state acts through individuals, a suit against an individual official for actions carried out on behalf of the state is in reality a suit against the foreign state, even if that is not how the plaintiff captions his or her complaint. This approach is consistent with the FSIA's definition of "foreign state," which does not purport to be comprehensive, but rather simply "includes" various entities, including agencies and instrumentalities.¹⁴

A number of courts have gestured towards this approach even though they have ultimately rested their decisions on the FSIA's "agency or instrumentality" language. In *Chuidian*, for example, the Ninth Circuit noted that "a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly."¹⁵ More recently, the Second Circuit observed that "a claim against an agency of state power, including a state officer act-

¹² 552 F.3d at 380-82.

¹³ See Curtis A. Bradley, *Foreign Officials and Sovereign Immunity in U.S. Courts*, ASIL INSIGHT (Mar. 17, 2009), www.asil.org/insights090317.cfm.

¹⁴ See 28 U.S.C. § 1603(a) ("[a] foreign state . . . includes" listed entities) (emphasis added). This approach is also consistent with the FSIA's exception to immunity for tort claims, which, in allowing a foreign state to be sued when an employee of the state commits a tort within the United States "while acting within the scope of his office or employment," 28 U.S.C. § 1605(a)(5), recognizes that a tort committed by a state official can be an act of the state.

¹⁵ *Chuidian v. Philippine National Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990).

ing in his official capacity, can be in effect a claim against the state.”¹⁶

Treating a suit against a state officer for his official acts as a suit against the state itself is also consistent with the pre-FSIA common law of immunity. Over a century ago, the Second Circuit explained: “[B]ecause the acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers, courts and publicists have recognized the immunity of public agents from suits brought in foreign tribunals for acts done within their own states in the exercise of the sovereignty thereof.”¹⁷ The *Restatement (Second) of the Foreign Relations Law of the United States*, published in 1965, similarly concluded that, under the common law, a foreign state’s sovereign immunity extended to a “minister, official, or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state.”¹⁸

This common law backdrop is significant. As a statute that regulates in the area of the common law, the FSIA should “be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.”¹⁹ Nothing in the FSIA, however, suggests an intent to withdraw the immunity that the common law would have granted in suits against foreign officials. Taking account of the proper common law backdrop is particularly significant in cases brought under the ATS – the principal statutory vehicle for international human rights cases – since the ATS does not even create a statutory cause

¹⁶ *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 84 (2d Cir. 2008).

¹⁷ *Underhill v. Hernandez*, 65 F. 577 (2d Cir. 1895), *aff’d on other grounds*, 168 U.S. 250 (1897); *see also* 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW § 179 (1906) (collecting authorities from the late 1700s through *Underhill*).

¹⁸ RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 66(f) (1965); *see also* *Heaney v. Government of Spain*, 445 F.2d 501, 504 (2d Cir. 1971) (endorsing this provision of the *Restatement*).

¹⁹ *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952); *see also* *Matar v. Dichter*, 563 F.3d 9, 13-14 (2d Cir. 2009) (making this point).

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of action but rather has been construed as delegating limited common law authority to the courts.²⁰

Treating official capacity suits brought against individual officials as suits against the state is also consistent with, and indeed required by, the international law of sovereign immunity. As Hazel Fox, a leading expert on foreign sovereign immunity, explains, “any act performed by the individual as an act of the State enjoys the immunity which the State enjoys.”²¹ Many courts around the world have concluded that the international law of foreign sovereign immunity applies to suits against officials acting in an official capacity.²² This conclusion is also reflected in the UN Convention on Jurisdictional Immunities of States and Their Property, which includes within its definition of the “state” that is entitled to immunity “representatives of the State acting in that capacity.”²³

Courts outside the United States have interpreted their domestic foreign sovereign immunity laws in light of this international law principle even when those laws were unclear on the point. For example, the United Kingdom State Immunity Act of 1978, like the FSIA, makes the “State” presumptively immune from the jurisdiction of domestic courts subject to discrete exceptions, but also like

²⁰ See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713, 721 (2004) (construing the ATS as “strictly jurisdictional” but as nevertheless “underwrit[ing] litigation of a narrow set of common law actions derived from the law of nations”).

²¹ HAZEL FOX, *THE LAW OF STATE IMMUNITY* 455 (2d ed. 2008); see also, e.g., 1 OPPENHEIM’S *INTERNATIONAL LAW* 348 (Robert Jennings & Arthur Watts eds., 9th ed. 1996).

²² See, e.g., *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, [2007] 1 A.C. 270, at para. 10 (United Kingdom); *Schmidt v. Home Secretary of the Government of the United Kingdom* [1995] 1 I.L.R.M. 301, (1994) 103 I.L.R. 322, 323-325 (Ireland); *Jaffe v. Miller* [1993] 13 O.R.3d 745, 758-59 (Canada); *Church of Scientology Case* (1978) 65 I.L.R. 193, 198 (Germany); see also Mizushima Tomonori, *The Individual as Beneficiary of State Immunity: Problems of the Attribution of Ultra Vires Conduct*, 29 DENV. J. INT’L L. & POL’Y 261, 274 (2001) (“The vast majority of cases in various jurisdictions have recognized the individual as a beneficiary of state immunity.”).

²³ See UN Convention, art. 2(1)(b)(iv), G.A. Res. 59/38, U.N. Doc. A/RES/59/38/Annex (Dec. 16, 2004).

the FSIA does not expressly include within its definition of the term “State” government officials acting in an official capacity. Nonetheless, the British House of Lords, relying on settled international law, interpreted “State” to include “servants or agents, officials or functionaries of a foreign state” acting in an official capacity.²⁴

International law, like the common law, is a significant consideration when construing the FSIA. Under the *Charming Betsy* canon, courts have long construed federal statutes, where possible, not to violate international law.²⁵ In the absence of any relevant exception, the United States would violate international law if it failed to confer immunity on state officials for their official acts committed while in office. Moreover, a well-recognized purpose of the FSIA was “codification of international law [of immunity] at the time of the FSIA’s enactment.”²⁶ Both in 1976 and today, international law confers immunity in suits brought against individual officers for their official acts.

FORMER OFFICIALS

Once it is established that the FSIA applies to suits against individual state officers who act in an official capacity, the next question is whether the FSIA applies to suits brought against these officers after they leave office with respect to the official acts they carried out while in office.

In *Yousuf*, the Fourth Circuit, relying on the Supreme Court’s decision in *Dole Food Co. v. Patrickson*,²⁷ concluded that the FSIA does not apply to suits against former officials. The question in *Dole Food* was whether a corporation’s status as state-owned for purposes of the “agency or instrumentality” portion of the FSIA’s definition of “foreign state” should be determined at the time of the underlying

²⁴ See *Jones v. Ministry of the Interior*, *supra* note 22, at para 10; see also, e.g., *Jaffe v. Miller*, *supra* note 22, at 759 (interpreting Canada’s immunity statute).

²⁵ See, e.g., *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

²⁶ *Permanent Mission of India to the UN v. City of New York*, 551 U.S. 193, 199 (2007).

²⁷ 538 U.S. 468 (2003).

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activity or at the time of the lawsuit. The FSIA defines an agency or instrumentality to include an entity “a majority of whose shares or other ownership interest *is* owned by a foreign state or political subdivision thereof.” The Supreme Court concluded from this present-tense phrasing that “instrumentality status [must] be determined at the time suit is filed.” The Fourth Circuit in *Yousuf* reasoned that the status of an individual defendant under the FSIA should similarly be determined at the time of the lawsuit.²⁸

There are reasons to question the Fourth Circuit’s reliance on *Dole Food*. As the D.C. Circuit explained in *Belhas v. Ya’alon*, which involved a suit brought against a retired Israeli general, *Dole Food* focused on state corporations rather than state officials, and these two classes of defendants implicate different issues.²⁹ “While the state may own corporations that conduct some of [its official] acts, it need not do so,” explained the D.C. Circuit, whereas “individual officials or agents must act as instrumentalities for anything actually to be done.” As a result, “[t]o suppose that the sovereign’s immunity protecting the individual official in the performance of his sovereign’s business vanishes the moment he resigns, retires, or loses an election is to establish that he had no immunity at all.” The D.C. Circuit added that the comity aims of the FSIA are fully implicated in a suit against a former official, because “[t]o allow the resignation of an official involved in the adoption of policies underlying a decision or in the implementation of such decision to repeal his immunity would destroy, not enhance that comity.”

While we find the D.C. Circuit’s policy arguments persuasive, at bottom the debate between the Fourth and D.C. Circuits about the meaning of *Dole Food* assumes that the question of immunity for former officials turns on how individuals are assimilated into the “agency or instrumentality” language in the FSIA. If immunity in suits against officials flows from the immunity of the state itself, however, then *Dole Food* does not come in to play, and there should be no distinction between current and former officials, because the

²⁸ 552 F.3d at 381-83.

²⁹ See 515 F.3d 1279, 1284-86 (D.C. Cir. 2008).

state's immunity would encompass all official acts, regardless of whether the individuals who carried out the acts happen to be in office at the time of the litigation.

This reading of the FSIA is consistent with the international law of state immunity, which provides former officials with immunity for official acts taken while in office.³⁰ International law distinguishes between state immunity based on status (*ratione personae*) and state immunity based on acts (*ratione materiae*). Status immunity attaches to select important offices, such as heads of state and diplomats. This immunity extends even to acts carried out before the official took office or committed in a personal capacity while in office, but such immunity terminates with the office. Act immunity, by contrast, is broader in applying to every government official, both during and after their time in office, but also narrower in applying only to the individual's *official acts*. It is this act immunity that applies in a suit against a former official, something that the Fourth Circuit failed to recognize.

In *Matar v. Dichter*, which involved a suit against the former head of the Israeli security agency for alleged war crimes, the Second Circuit correctly noted that “an immunity based on acts – rather than status – does not depend on tenure in office.”³¹ But the court elided the debate between the D.C. and Fourth Circuits about whether former officials are covered by the “agency or instrumentality” language of the FSIA, reasoning that “whether the FSIA applies to former officials or not, they continue to enjoy immunity under common law.” The court noted that the pre-FSIA common law recognized individual official immunity for acts performed in an official capacity. It added that during that period courts deferred to suggestions of immunity from the Executive Branch, and that the

³⁰ See, e.g., DRAFT ARTICLES ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY, WITH COMMENTARIES 18 (1991), at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/4_1_1991.pdf; *R v. Bow St. Magistrate, Ex parte Pinochet*, [1999] 2 W.L.R. 827 (H.L.) (U.K.) (Millet, L.J.), reprinted in 38 INT'L LEGAL MATERIALS 581, 644-45 (1999).

³¹ 563 F.3d at 14.

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Executive Branch in that case had urged the district court to apply immunity.

In our view, *Matar* marks an unfortunate return to the pre-FSIA common law regime of executive discretion in determining foreign sovereign immunity – a regime characterized by unprincipled conferrals of immunity based on the political preferences of the presidential administration and case-by-case diplomatic pressures.³² Courts have continued to apply this pre-FSIA regime in a few cases involving heads of state,³³ but *Matar*'s extension of the practice to all former officials expands the trend significantly and threatens to unravel the FSIA. The FSIA was designed to “free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to ‘[assure] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process.’”³⁴ *Matar*'s approach to immunity for former state officials flies in the face of these goals, and it does so unnecessarily. As we have shown, courts can reach the legally correct conclusion that former officials receive immunity for their official state acts through a natural application of the term “foreign state” in the FSIA, without mangling the “agency or instrumentality” definition and without returning to the regime of executive discretion that the FSIA was designed to eliminate.

HUMAN RIGHTS VIOLATIONS AND IMMUNITY

The final issue is whether there is anything special about human rights litigation that would exempt it from the considerations discussed above. As an initial matter, nothing in the statutes that serve as the basis for human rights litigation overrides immunity. The Supreme Court in *Argentine Republic v. Amerada Hess Shipping Corp.* held that the primary fount of U.S. human rights litigation, the ATS, is subject to the FSIA's immunity restrictions.³⁵ The Tor-

³² See *Republic of Austria v. Altmann*, 541 U.S. 677, 690 (2004).

³³ See, e.g., *Ye v. Zemin*, 383 F.3d 620, 625-27 (7th Cir. 2004).

³⁴ *Verlinden*, 461 U.S. at 487 (quoting H. R. Rep. No. 94-1487, p. 7 (1976)).

³⁵ 488 U.S. 428 (1989).

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ture Victim Protection Act (TVPA) is another basis for human rights litigation in U.S. courts. This statute, enacted in 1992, provides a cause of action for acts of torture and extrajudicial killing committed under color of foreign law.³⁶ Like the ATS, the TVPA does not mention immunity. This omission is significant, since the TVPA was enacted against the backdrop of both the FSIA and the *Amerada Hess* decision. Statements in the legislative history of the TVPA confirm that the statute is subject to the immunity restrictions in the FSIA.³⁷

Plaintiffs in human rights cases have sometimes argued for an exception to the FSIA for violations of “jus cogens” norms of international law. A jus cogens norm is the highest norm in international law from which no derogation is permitted.³⁸ Frequently cited examples are the prohibitions on genocide, slavery, and torture. In suits brought directly against foreign states, every circuit to have considered the issue has concluded that immunity is available even for alleged jus cogens violations.³⁹

These jus cogens decisions implicitly or expressly assume that human rights violations can be official acts for purposes of the FSIA.

³⁶ 28 U.S.C. § 1350 note.

³⁷ See H.R. Rep. No. 102-367, at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 88 (“The TVPA is subject to restrictions in the Foreign Sovereign Immunities Act of 1976.”); S. Rep. No. 102-249, at 7 (1991) (“[T]he TVPA is not meant to override the Foreign Sovereign Immunities Act of 1976.”). There is a statement in the legislative history suggesting an expectation that, because the TVPA authorizes suits only against individuals rather than states, “sovereign immunity would not generally be an available defense.” H.R. Rep. No. 102-367, at 5. There is also a statement, however, suggesting that even former officials might be able to invoke the immunity protections of the FSIA in a suit brought under the TVPA if they “could prove an agency relationship to a state.” S. Rep. No. 102-249, at 8.

³⁸ See Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331.

³⁹ See *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1150-53 (7th Cir. 2001); *Smith v. Socialist People’s Libyan Arab Jamahiriya*, 101 F.3d 239, 242-45 (2d Cir. 1996); *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1174 (D.C. Cir. 1994); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 719 (9th Cir. 1992).

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This assumption is further supported by the Supreme Court's decision in *Saudi Arabia v. Nelson*, which stated in the context of examining the FSIA's commercial activities exception that police abuse and torture were "peculiarly sovereign in nature."⁴⁰ It is also supported by the international law of state immunity. As a general matter, the international law of state immunity applies even when a state official acts illegally or in excess of authority.⁴¹ Moreover, most national courts to address the issue have concluded that, under international law, sovereign immunity is appropriate in civil cases even for alleged violations of jus cogens norms.⁴²

U.S. courts have not resolved a related issue, which is the extent to which the acts of state officers that violate foreign *domestic* law can constitute official state action for purposes of the FSIA. Some courts view the foreign state's position on whether the officer acted in an official capacity to be an important factor in answering this question,⁴³ a sensible approach in light of the difficulties courts would otherwise have in discerning the contours of foreign public law. It is also worth keeping in mind that the ultimate issue for pur-

⁴⁰ *Saudi Arabia v. Nelson*, 507 U.S. 349, 361 (1993)

⁴¹ See *Jones v. Ministry of the Interior*, *supra* note 22, at 6 (collecting citations).

⁴² See *Bouzari v. Iran*, [2004] 71 O.R.3d 675 (Canada); Anotato Eidiko Dikasterio, 6/2002, *excerpted and translated in* Maria Panezi, *Sovereign Immunity and Violation of Jus Cogens Norms*, 56 REVUE HELLENIQUE DE DROIT INTERNATIONAL 199 (2003) (Greece); *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, [2007] 1 A.C. 270 (United Kingdom); *Al-Adsani v. United Kingdom*, (2001) 34 Eur. H.R. Rep. 273 (European Court of Human Rights). Some Italian decisions contain contrary reasoning, see, e.g., *Ferrini v. Germany*, Cass. sez. un., 6 Nov. 2003, n.5044, ILDC 19 (IT 2004), but they involve abuses committed within Italy and thus are distinguishable from most U.S. international human rights cases. In any event, Italy is an outlier, and its approach is under challenge by Germany in the International Court of Justice. See *Jurisdictional Immunities of the State (F.R.G. v. Italy)* (I.C.J. filed Dec. 23, 2008).

⁴³ Compare *Hilao v. Estate of Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation)*, 25 F.3d 1467, 1472 (9th Cir. 1994) (no immunity when Philippine government said defendant's action was not official), with *Belhas*, 515 F.3d at 1283 (immunity after Israel said defendant's action was official). But see *Yousuf*, 552 F.3d at 377 (foreign government said action was official but no immunity granted).

poses of immunity in this context is whether the action in question is the conduct of the state, a question of attribution. Under international law, the state is internationally responsible for the official's actions, even if the official exceeded his authority or contravened his instructions, as long as he acted "with apparent authority."⁴⁴ As a result, international law "does not require, as a condition of a state's entitlement to claim immunity for the conduct of its servant or agent, that the latter should have been acting in accordance with his instructions or authority."⁴⁵

CONCLUSION

We have argued that the FSIA should be construed to confer presumptive immunity in lawsuits brought against foreign officials for their official acts. This conclusion, if accepted, would narrow the scope of human rights litigation in U.S. courts. It would not, however, affect the many other legitimate mechanisms of human rights accountability. For example, a nation can hold its officials accountable in its own courts. It can waive an official's immunity in foreign courts.⁴⁶ It can ratify a treaty that criminalizes acts in such a way that it may eliminate state immunities in foreign courts.⁴⁷ It can agree by treaty (or through the UN Security Council) to an international tribunal, such as the International Criminal Court, that abrogates state immunities.

These widely accepted mechanisms of human rights accountability are consistent with the international law of state immunity because they are all grounded in state consent. By contrast, human

⁴⁴ See *Jones v. Ministry of the Interior*, *supra* note 22, at para. 12 (quoting International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Article 7, commentary, and other sources).

⁴⁵ See *id.*

⁴⁶ See, e.g., *In re Grand Jury Proceedings, Doe #700 (Under Seal)*, 817 F.2d 1108, 1110-11 (9th Cir. 1987).

⁴⁷ See *Jones v. Ministry of the Interior*, *supra* note 22, at paras. 19, 71 (explaining the central holding in *Pinochet*). *But cf.* *Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, 2002 I.C.J. 121, at para. 58 (Feb. 14) (implicitly questioning the reasoning in *Pinochet*).

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rights accountability via civil lawsuits directed at foreign officials for their conduct abroad has no basis in any treaty or any other act of state consent. Such an approach to accountability, though adopted by some lower courts in the United States, has “not attracted the approbation of states generally.”⁴⁸ It is also, according to the British House of Lords, “contrary to customary international law.”⁴⁹ Congress could nevertheless decide to endorse such an approach, but it has not yet done so.



⁴⁸ Case Concerning the Arrest Warrant, *supra* note 47, Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, at para. 48.

⁴⁹ See *Jones v. Ministry of the Interior*, *supra* note 22, at para. 99.