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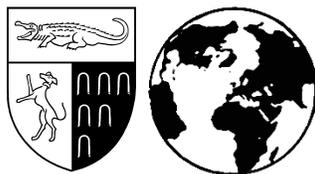
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Officially Immune? A Response to Bradley and Goldsmith

Chimène I. Keitner[†]

It is often tempting to read statutes the way one thinks they ought to have been written. This impulse, though understandable, can create more problems than it solves. Such is the case with applying the Foreign Sovereign Immunities Act of 1976 (FSIA)¹ to suits against current and former foreign officials, as Curt Bradley and Jack Goldsmith have recently proposed.²

Bradley and Goldsmith argue that the FSIA's grant of immunity to "a foreign state"³ should be read to include current and former foreign officials for actions taken in their official capacity.⁴ Under their interpretation, "official capacity" actions would include "human rights abuses" and other violations of international law that "require state action,"⁵ such as the alleged torture and extrajudicial killing of a seventeen-year-old "in retaliation for his father's political

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1. Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1602-1611 (2006)).
2. Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity, Individual Officials, and Human Rights Litigation*, 13 GREEN BAG 2D 9 (2009) [hereinafter Bradley & Goldsmith, *Foreign Sovereign Immunity*].
3. 28 U.S.C. § 1604 (2006).
4. Bradley & Goldsmith, *Foreign Sovereign Immunity*, *supra* note 2, at 13.
5. *Id.* at 10. Bradley and Goldsmith use a number of terms to refer to suits they believe should come within the scope of the FSIA, including suits for "abuses committed . . . under color of state law," *id.* at 9, suits for "official acts," *id.* at 12, suits for "actions carried out on behalf of the state," *id.* at 13, "official capacity suits," *id.* at 15, and "suits against individual state officers who act in an official capacity," *id.* at 16. However, even if certain "official acts" are deemed to fall within the scope of the FSIA, it is not self-evident that acts that violate international law, or the foreign state's own law, can constitute "official acts" for immunity purposes. *See, e.g.*, Brief of Dolly Filártiga et al. as Amici Curiae Supporting Respondents at 18, *Samantar v. Yousuf*, No. 08-1555 (U.S. argued Mar. 3, 2010) (positing that "a court must determine, first, what authority a state has actually granted to an official and, second, what authority domestic and international law permit a state to grant lawfully to an official").

activities and beliefs” at issue in *Filártiga v. Peña-Irala*.⁶ They reject the familiar distinction in U.S. law between the capacity in which an individual official has *acted*, and the capacity in which that official is *sued*, as applied to foreign officials.⁷ Unless a foreign state chooses to waive its immunity, Bradley and Goldsmith’s interpretation would deprive U.S. courts of personal and subject matter jurisdiction in suits against current and former officials where the conduct at issue does not fall within an existing exception to the FSIA.⁸ This result would create a categorical barrier to most human rights suits beyond those contemplated by existing immunities and other applicable restrictions.

Bradley and Goldsmith appeal to three basic sources of support for their proposal: (1) logic, (2) policy, and (3) international law. In this brief essay, I examine each of these sources in turn. I conclude that these sources do not support reading the FSIA to encompass suits against natural persons, even when such persons have acted under color of foreign law. Unless the Supreme Court decides to write its own statute when it decides *Samantar v. Yousuf*,⁹ or Congress enacts a comprehensive statute regulating foreign officials’ immunities, current and former foreign officials should continue to invoke the well-established sources of immunity that they already have under relevant treaties, customary international law, and the common law,¹⁰ without creating the myriad problems associated with forcing individuals into the ill-fitting text of the FSIA.

Stated briefly, the observation that “a state acts through individuals”¹¹ does not support Bradley and Goldsmith’s proposal as a matter of logic, because both U.S. and international law attribute personal responsibility to individuals for certain types of illegal conduct *precisely because* they engage in such conduct under color of law. When a certain criterion defines conduct as illegal, it does not make sense for that same criterion to place individuals who have engaged in that conduct categorically beyond the reach of U.S. courts. Nor do policy considerations support Bradley and Goldsmith’s proposal. There are at least three reasons for this: the FSIA was not designed to include individuals, reading it to do so would conflict with the Torture Victim Protection Act, and various specialized immunities and other non-statutory doctrines already afford substantial

6. *Filártiga v. Peña-Irala*, 630 F.2d 876, 878 (2d Cir. 1980).

7. *See, e.g., Hafer v. Melo*, 502 U.S. 21, 26 (1991) (indicating that, in a § 1983 action, “the phrase ‘acting in their official capacities’ is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury.”). *But see* Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity and Domestic Officer Suits*, 13 GREEN BAG 2D 137 (2009) [hereinafter Bradley & Goldsmith, *Domestic Officer Suits*] (rejecting this approach in suits against foreign officials).

8. Bradley & Goldsmith, *Foreign Sovereign Immunity*, *supra* note 2, at 22; *see also* 28 U.S.C. § 1605 (2006) (listing exceptions).

9. No. 08-1555 (U.S. argued Mar. 3, 2010).

10. *See infra* notes 43–46 and accompanying text.

11. Bradley & Goldsmith, *Foreign Sovereign Immunity*, *supra* note 2, at 13.

protections to foreign officials and to the interests of foreign states in U.S. courts. Finally, neither international treaties nor customary international law require treating all “official capacity suits” as suits against the state itself, without regard to the conduct at issue. It would be anomalous to find that international law categorically prevents states from holding individuals accountable for universally condemned violations of international law.

LOGIC

Logic does not support Bradley and Goldsmith’s reading of the FSIA because both U.S. and international law make individuals liable for engaging in certain types of conduct *precisely because* they act under color of law. It would be self-defeating for the same criterion to both create and preclude liability.

Before *Samantar* reached the Supreme Court this term, courts and litigants had assumed that, if the FSIA could include suits against individual officials, this was because a given official qualified as an “agency or instrumentality” of the foreign state under § 1603(b). However, as Chief Justice Roberts noted during oral argument in *Samantar*, the FSIA “says that an agency or instrumentality is an entity [and] we usually don’t think of individuals as being entities.”¹²

The decision most often cited for the “agency or instrumentality” approach is that of the Ninth Circuit in *Chuidian v. Philippine National Bank*.¹³ The *Chuidian* court observed that “[o]fficial-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent.”¹⁴ The *Chuidian* court mistakenly believed that the only alternatives to reading the FSIA to include individuals were either to find no immunity for individuals, or to give the State Department complete discretion over determinations of individual immunity.¹⁵ The court held that individuals acting in their official capacity are agencies or instrumentalities of foreign states in order to avoid these results.

Bradley and Goldsmith share some of the *Chuidian* court’s concerns, but they propose an alternative solution. Instead of viewing individuals as agencies or instrumentalities of foreign states, they argue that “[s]ince a state acts through individuals, a suit against an individual official for actions carried out on behalf of

12. Transcript of Oral Argument at 63, *Samantar v. Yousuf*, No. 08-1555 (U.S. argued Mar. 3, 2010).

13. *Chuidian v. Philippine Nat’l Bank*, 912 F.2d 1095 (9th Cir. 1990).

14. *Id.* at 1101–02 (citing *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978)).

15. Although the role of the Executive Branch is beyond the scope of this response, it bears noting that the Executive Branch is responsible for determining an individual’s entitlement to status-based immunity, because the Executive is charged with accrediting diplomats and recognizing foreign heads of state. By contrast, the views of the Executive Branch are important—but not dispositive—in determining the scope of conduct-based immunity.

the state is in reality a suit against the foreign state [itself]”¹⁶ Accordingly, they contend that suits against current or former foreign officials for actions taken in their official capacity (which they define broadly to include all actions “carried out on behalf of the state”) are suits against the state “even if that is not how the plaintiff captions his or her complaint.”¹⁷

Their appeal to logic proceeds as follows: (A) states can only act through individuals, so (B) a suit against an individual for actions taken in his or her official capacity must be a suit against the state, not against the individual. Although (A) is uncontroversial, (B) does not follow as a logical result. Notably, a similar observation about the relationship between state action and individual action led to a strikingly different result at Nuremberg, where the tribunal concluded that because “[c]rimes against international law are committed by men, not by abstract entities,” it was both appropriate and necessary to impose individual responsibility on individuals who had acted on behalf of the Nazi regime.¹⁸ Imposing individual responsibility for acts that might also entail state responsibility is not illogical because, as the Draft Articles on State Responsibility recognize, state responsibility and individual responsibility are *not mutually exclusive*.¹⁹ Were it otherwise, any would-be international law violator could receive a “free pass” by using state authority to commit the violation. This would turn the very premise of much international human rights law on its head—namely, that certain actions rise to the level of international law violations *precisely because* they involve the abuse of state authority.²⁰

When an individual is a named defendant, the question is how to determine when the state, and not the individual, is the real party in interest. The FSIA provides no guidance on this question. If the state is the real party in interest, the individual defendant can properly invoke common law immunity. There is no need to treat the action as if it had been brought under the FSIA.

Courts in other countries have approached the problem of determining the real party in interest by focusing on the nature of the relief sought. For example, the Irish Supreme Court denied immunity to a Spanish colonel in an action for damages arising from a contract to carry horses from Dublin to Lisbon for use by

16. Bradley & Goldsmith, *Foreign Sovereign Immunity*, *supra* note 2, at 13.

17. *Id.* at 5.

18. 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945-1 OCTOBER 1946, at 223 (1947).

19. See Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, art. 58, in *Report of the International Law Commission on the Work of its Fifty-Third Session*, ¶ 76, U.N. Doc. A/56/10 (2001).

20. The paradigmatic example of this is torture, which by definition must be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1(1), Dec. 10, 1984, 102 Stat. 382, 1465 U.N.T.S. 85.

the Spanish Army because “in the proceedings, as framed, no relief is sought against any person save the appellant. He is sued in his personal capacity and . . . any judgment . . . against him, will bind merely the appellant personally, and . . . cannot be enforced against any property save that of the appellant.”²¹ The Court in this case thus recognized a meaningful distinction between a suit against an individual official and a suit against the state, even where the state might ultimately indemnify the individual.²²

This focus on the nature of the requested relief is reflected in other foreign cases from various periods, including those cited by Bradley and Goldsmith. For example, a German court dismissed a suit against a current U.K. official for injunctive relief that would have compelled the United Kingdom to act contrary to a treaty obligation.²³ A U.K. court dismissed a suit against companies acting as the agents of a foreign government in London for money damages from the state treasury based on common law immunity and because the foreign state was a necessary party.²⁴ A U.K. court also dismissed a suit against a current official who had no plausible connection to the alleged misconduct because he was not in office when the conduct occurred.²⁵ These cases do not support Bradley and Goldsmith’s claim that suits seeking to impose liability directly on individuals for torture and extrajudicial killing come within the scope of the FSIA, or that the defendants in such suits are entitled to immunity under the FSIA by virtue of the “official” nature of their conduct.

It may be true, in some metaphysical sense, that a state can only act through individuals. But it does not follow that individuals who act on behalf of the state should be treated as the state itself for all purposes. As Sir Hersch Lauterpacht observed in 1951, “the state always acts as a public person. It cannot act otherwise. In a real sense all acts *jure gestionis* [commercial activities] are acts

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21. *Saorstat & Cont’l Steamship Co. v. De las Morenas*, [1945] I.R. 291, 300, *reprinted in* 12 I.L.R. 97, 98 (Ir.).
 22. *Id.* at 301 (finding that the possibility of indemnification by the Spanish Government did not turn the suit into one against the Government). *But see* *Jaffe v. Miller*, [1993] 13 O.R. (3d) 745, 759 (C.A.) (Can.) (giving greater weight to indemnification); Bradley & Goldsmith, *Domestic Officer Suits*, *supra* note 7, at 148 (same).
 23. *Church of Scientology Case*, 65 I.L.R. 193 (BGH 1978) (F.R.G.) (dismissing suit for injunction against current head of New Scotland Yard to prevent compliance with a document request from Germany under a 1961 Agreement), *cited in* Bradley & Goldsmith, *Foreign Sovereign Immunity*, *supra* note 2, at 15 n.22.
 24. *Twycross v. Dreyfus*, (1877) 5 Ch.D. 605 (C.A.) (Eng.) (finding lack of jurisdiction over claim to proceeds of the sale of guano owned by the Republic of Peru because the Republic was a necessary party as the owner of the guano), *cited in* Bradley & Goldsmith, *Domestic Officer Suits*, *supra* note 7, at 142 n.20.
 25. *Propend Finance Pty. Ltd. v. Sing*, 111 I.L.R. 611, 662 (C.A. 1997) (Eng.) (finding no basis for suing current Commissioner of the Australian Federal Police Force for an improper fax sent by Australian diplomat, where the Commissioner in office at the time the fax was sent had died by the time of suit).

jure imperii [sovereign activities].”²⁶ However, as Lauterpacht emphasized and the FSIA reflects, “the logical consequence” of that observation is not necessarily the grant of absolute immunity for commercial activities.²⁷ Moreover, as the Supreme Court held in *Hafer v. Melo*, it makes no sense for the very criteria that define a violation (such as a requirement that the defendant acted under color of law) to shield the defendant from legal consequences.²⁸ Bradley and Goldsmith’s proposal compels this illogical result.

POLICY

Considerations of policy do not support Bradley and Goldsmith’s proposal. The reading they propose of the FSIA does not fit into the design of the statute and would substantially negate the Torture Victim Protection Act. Furthermore, various specialized immunities and other common law doctrines already provide protection for foreign officials, and for the interests of foreign states, when such protection is warranted.

The omission of foreign officials from the FSIA was not an oversight. Rather, Congress was concerned primarily with regulating suits against foreign states and state-owned enterprises, not suits against individuals. Immunity for state entities had been governed since 1952 by the standards set out in the so-called Tate Letter, which differentiates between sovereign activities, for which state entities are deemed immune, and commercial activities, for which they are not.²⁹ Congress enacted the FSIA to codify the Tate Letter and give the courts authority over its application.³⁰

Given the reasons for which Congress enacted the FSIA, it is not difficult to see why suits brought against individuals fall outside its scope, even when those suits involve actions taken in an “official capacity.” An authoritative compilation of pre-FSIA immunity decisions, published at the time of the FSIA’s enactment, makes clear that “the Foreign Sovereign Immunities Act does not deal with the immunity of individual officials, but only that of foreign states”³¹ Former State Department Acting Legal Adviser Mark Feldman, who participated in drafting the FSIA, later stated that “[i]t was never the intention of the drafters

26. H. Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT’L L. 220, 224 (1951).

27. *Id.*

28. *Hafer v. Melo*, 502 U.S. 21, 27–28 (1991).

29. Letter from Jack B. Tate, Acting Legal Adviser, Dep’t of State, to Philip B. Perlman, Acting Att’y Gen. (May 19, 1952), reprinted in 26 DEP’T OF STATE BULL. 984–85 (1952).

30. See *Verlinden B.V. v. Cen. Bank of Nigeria*, 461 U.S. 480, 486–89 (1983).

31. See *Sovereign Immunity Decisions of the Dep’t of State, May 1952 to January 1977*, 1977 DIG. U.S. PRAC. INT’L L. 1017, 1020 (appendix).

of the Foreign Sovereign Immunities Act to encompass [foreign officials].”³² This has also been the consistent position of the U.S. government.³³

Rewriting history to include suits against individuals within the text of the FSIA, as Bradley and Goldsmith propose, would create numerous problems. Although these problems are not the main focus of this response, three bear mentioning. First, the FSIA states that “a foreign state *shall be immune* from the jurisdiction of the courts of the United States” except as provided in the FSIA itself.³⁴ The FSIA does not distinguish between civil and criminal jurisdiction, and it does not contain an exception for criminal proceedings. Therefore, reading suits against individuals into the FSIA would inadvertently confer both civil *and criminal* immunity on individuals for their non-commercial activities. This could interfere with the United States’s ability to prosecute individuals involved in offenses carried out with the tacit or explicit approval of a foreign state.³⁵

Second, reading suits against individuals into the text of the FSIA would make the commercial activities exception to immunity applicable to all suits involving actions taken in an “official capacity,” including suits against sitting heads of state. This would prevent U.S. courts from recognizing the absolute immunity of sitting heads of state, since such immunity was not codified in an international agreement to which the United States was a party at the time the FSIA was enacted (which is the only recognized basis for derogations from the textual provisions of the FSIA).³⁶

Third, 28 U.S.C. § 1608, which establishes the method of service of process for suits brought under the FSIA, contains no provision for service of process on individuals sued in their official capacity, or individuals sued in their individual capacity for acts performed on the state’s behalf.³⁷ It is therefore unclear what steps a plaintiff would need to take to secure personal jurisdiction over an individual defendant if the suit is governed by the FSIA. Moreover, Bradley and Goldsmith’s reading of the FSIA would pose problems for defendants as well, since the FSIA broadly equates service of process with personal jurisdiction without reference to a minimum contacts requirement.³⁸ It is therefore possible that treating claims against individuals as coming within the

32. *Foreign Governments in United States Courts: Discussion*, 85 AM. SOC’Y INT’L L. PROC. 276 (1991) (statement by Mark Feldman).

33. See Brief of the United States as Amicus Curiae Supporting Affirmance, *Samantar v. Yousuf*, No. 81–1555 (U.S. argued Mar. 3, 2010); Statement of Interest of the United States, *Chuidian v. Philippine Nat’l Bank*, No. 86–2255 (C.D. Cal., Mar. 21, 1988).

34. 28 U.S.C. § 1604 (2006) (emphasis added).

35. See *United States v. Emmanuel*, 2007 WL 2002452 at *12–13 (S.D. Fla., July 5, 2007) (order denying defendant’s motion to dismiss the indictment) (rejecting sovereign immunity defense to prosecution under 18 U.S.C. § 2340 for torture in Liberia).

36. See 28 U.S.C. § 1604 (2006).

37. Compare FED. R. CIV. P. 4(i)(2)–(3) with 28 U.S.C. § 1608 (2006).

38. See 28 U.S.C. § 1330(b) (2006).

FSIA's definition of a "foreign state" could raise due process concerns. These problems arise because those who drafted and enacted the FSIA did not intend it to apply to suits against individuals.

Reading the FSIA as it was actually written, to apply to states and not to individuals, reflects Congress's own understanding, as a contrary reading not only does not fit into the design of the FSIA but also substantially negates the subsequently enacted Torture Victim Protection Act of 1991 (TVPA).³⁹ The TVPA provides a cause of action to U.S. citizens and aliens for torture or extrajudicial killing against an individual defendant who acted "under actual or apparent authority, or color of law, of any foreign nation."⁴⁰ In order for Bradley and Goldsmith's interpretation of the FSIA to be plausible, one must assume that Congress engaged in a futile exercise of creating a specific cause of action for a class of activity that is, by definition, immune from suit by virtue of having been performed under color of foreign law. In interpreting potentially conflicting statutes, the Supreme Court has cautioned that a court "must read the statutes to give effect to each if [it] can do so while preserving their sense and purpose."⁴¹ Reading the FSIA to bar suits against current or former officials for torture and extrajudicial killing would violate this basic principle of statutory interpretation.

In addition to these tensions with surrounding statutory law, Bradley and Goldsmith's reading of the FSIA is also largely superfluous, because it neglects well established immunities for individuals outside the FSIA. Foreign officials already benefit from a host of specialized immunities under relevant treaties, customary international law, and the common law. As Bradley and Goldsmith indicate, international law differentiates between status-based (*ratione personae*) and conduct-based (*ratione materiae*) immunity from the jurisdiction of national courts.⁴² Status-based immunities, such as the immunity afforded sitting heads of state as a matter of customary international law,⁴³ and the immunity afforded diplomats under the Vienna Convention on Diplomatic Relations,⁴⁴ are absolute during an official's tenure in office. Courts will, accordingly, dismiss suits brought against current heads of state or current diplomats. They will also dismiss suits against defendants who are served while they are present in the United States to conduct official government business as part of a "special diplomatic mission,"

39. Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2006)).

40. *Id.* § 2(a).

41. *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (citing *Morton v. Mancari*, 417 U.S. 535, 551(1974)).

42. Bradley & Goldsmith, *Foreign Sovereign Immunity*, *supra* note 2, at 18.

43. *See, e.g., Ye v. Zemin*, 383 F.3d 620, 625 (7th Cir. 2004), *cited in* Bradley & Goldsmith, *Foreign Sovereign Immunity*, *supra* note 2, at 19 n.33; *see also* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 22 (Feb. 14) (holding that an incumbent foreign minister is entitled to status-based immunity).

44. Vienna Convention on Diplomatic Relations art. 31(1), Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 96.

as determined by the State Department.⁴⁵ Conduct-based immunity is both narrower and broader than status-based immunity: it is narrower, because it only provides immunity for specific acts (such as those performed in the exercise of diplomatic or consular functions), but it is also broader, because it endures even after an individual has left office.⁴⁶ If Congress had sought to consolidate all these types and sources of immunity into one overarching statute, the 1976 FSIA is not what it would have enacted.

The United States can keep human rights suits within appropriate limits without shoehorning individuals into the ill-fitting text of the FSIA. Under the TVPA and the Alien Tort Statute (ATS), U.S. courts can only assert subject matter jurisdiction over a small number of universally recognized international law violations.⁴⁷ These constraints mean that there is a limited class of potential defendants worldwide, few of whom are present in the United States at any given time and thus subject to the personal jurisdiction of U.S. courts. The political question doctrine, the act of state doctrine, and procedural determinations such as whether the state is a necessary party also provide mechanisms for dismissing TVPA and ATS suits when warranted to protect diplomatic relations and minimize interference with the conduct of foreign affairs.

INTERNATIONAL LAW

Bradley and Goldsmith claim that “the United States would violate international law if it failed to confer immunity on state officials for their official acts committed while in office.”⁴⁸ However, neither international treaties nor customary international law require treating all “official capacity suits” as suits against the state, without regard to the conduct at issue. It would be passing strange to find that international law categorically prevents states from holding individuals accountable for universally recognized violations of international law.

Bradley and Goldsmith invoke the U.N. Convention on Jurisdictional Immunities of States and Their Property because it defines “state” to include “representatives of the State acting in that capacity.”⁴⁹ However, the United States

45. *See, e.g.*, Suggestion of Immunity and Statement of Interest of the United States at 11 n.9, Li Weixum v. Bo Xilai, Civ. No. 04-0649 (D.D.C. filed July 24, 2006), available at <http://www.state.gov/documents/organization/98832.pdf> (suggesting immunity from service of process for invitee of the Executive branch but emphasizing that “[s]pecial mission immunity would not . . . encompass all foreign official travel”).

46. Vienna Convention on Diplomatic Relations, *supra* note 44, art. 39(2); Vienna Convention on Consular Relations art. 53(4), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

47. 28 U.S.C. § 1350 (2006); *see Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (construing the ATS).

48. Bradley & Goldsmith, *Foreign Sovereign Immunity*, *supra* note 2, at 16.

49. *Id.* at 15 (citing United Nations Convention on Jurisdictional Immunities of States and Their Property art. 2(1)(b)(iv), *opened for signature* Dec. 16, 2004, 44 I.L.M. 803).

has not signed the Convention and is unlikely to do so because it differs substantially from the terms of the FSIA.⁵⁰ Moreover, this Convention, which deals largely with state liability for commercial transactions, has not yet obtained the thirty ratifications required to enter into force. Absent a basis in treaty law, Bradley and Goldsmith's claim must rely on their interpretation of customary international law, which "results from a general and consistent practice of states followed by them from a sense of legal obligation."⁵¹ However, although various national courts have found individual foreign officials immune for various types of conduct in various circumstances, there is no "general and consistent" practice of states granting conduct-based immunity to foreign officials—let alone *former* foreign officials—for conduct such as torture and extrajudicial killing. In fact, there is significant practice to the contrary.

Particularly since World War II, states have created and supported international courts that explicitly reject official capacity defenses to international law violations within their jurisdiction.⁵² As the International Criminal Tribunal for the Former Yugoslavia has emphasized, "those responsible for [conduct within the tribunal's jurisdiction] cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity," just as spies "although acting as State organs, may be held personally accountable for their wrongdoing."⁵³ This principle of individual responsibility is not confined to international proceedings. Numerous domestic statutes reject official capacity defenses to international crimes such as torture, genocide, and crimes against humanity, and allow injured parties to seek civil

50. See David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 AM. J. INT'L L. 194, 205 (2005) (noting that the Convention does not contain exceptions for expropriation or terrorism); see also *id.* at 210–11 (noting other U.S. objections).

51. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987). Customary international law is binding on the United States, although academic debates persist about the status of customary international law as federal common law in the wake of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Compare Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) with Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

52. *E.g.*, Rome Statute of the International Criminal Court art. 27, July 17, 1998, 2187 U.N.T.S. 90; Statute of the Special Court for Sierra Leone art. 6(2), Jan. 16, 2002, 2178 U.N.T.S. 145; Statute of the International Criminal Tribunal for Rwanda art. 6(2), S.C. Res. 955, Annex, U.N. Doc. S/RES/955 (Nov. 8, 1994); Statute of the International Criminal Tribunal for the Former Yugoslavia art. 7(1), U.N. Doc. S/25704 (May 3, 1993); Charter of the International Military Tribunal art. 7, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

53. *Prosecutor v. Blaskic*, Case IT-95-14-PT, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ¶ 41 (29 Oct., 1997), reprinted in [1997] 110 I.L.R. 607.

damages as part of criminal proceedings.⁵⁴ Ignoring the established lack of immunity for these crimes in international courts and in certain domestic proceedings neglects an important aspect of state practice in this area.

Early cases cited by Bradley and Goldsmith to illustrate the “rule” of immunity that “prevailed” in the United States⁵⁵ actually show the absence of blanket immunity. As early as 1794, Attorney General William Bradford was asked to opine on a suit brought in Pennsylvania state court against General George Henri Victor Collot for his conduct while Governor and Commander in Chief of the French colony of Guadeloupe. Bradford declined to intervene on France’s behalf, stating that “[w]ith respect to his suability, [the former Governor] is on a footing with any other foreigner (not a public minister) who comes within the jurisdiction of our courts.”⁵⁶ The Supreme Court of Pennsylvania found that the defendant could be held to bail, whether or not he would ultimately be found liable for his conduct.⁵⁷ Three years later, Attorney General Charles Lee stated that, even though “a person acting under a commission from the sovereign of a foreign nation is not amenable” in U.S. court “for what he does in pursuance of his commission,” the claims brought in Virginia against British privateer Henry Sinclair were “entitled to a trial according to law”⁵⁸ In 1841, the New York Supreme Court (the highest court of general jurisdiction sitting in New York at that time) rejected the claim to immunity of Alexander McLeod, a British subject and former deputy sheriff of the Niagara District in Upper Canada who was implicated in the 1837 attack on the steamboat *Caroline*. McLeod had been arrested and charged with the crimes of arson and murder, and civil claims were also brought against him. The court, which included future U.S. Supreme Court Justice Samuel Nelson, held that Britain had not “placed the offenders above the law, and beyond our jurisdiction, by adopting and approving [the defendant’s] crime.”⁵⁹

Bradley and Goldsmith attempt to distinguish these early opinions on the grounds that they involved state court proceedings, and were thus beyond the reach of the federal government.⁶⁰ However, had a principle of immunity for

54. See, e.g., Harold Hongju Koh, *Filártiga v. Pena-Irala*, in INTERNATIONAL LAW STORIES 45, 71 n. 110 (2007) (enumerating domestic statutes).

55. Bradley & Goldsmith, *Domestic Officer Suits*, *supra* note 7, at 142–43.

56. 1 Op. Att’y Gen. 45, 46 (1794).

57. *Waters v. Collot*, 2 U.S. (2 Dall.) 247, 248 (1796).

58. 1 Op. Att’y Gen. 81 (1797). A correction was made to the Article on September 29, 2010. The word “privateer” was substituted for “Navy Captain” in the text accompanying this footnote.

59. *People v. McLeod*, 1 Hill 377, 25 Wend. 483 (N.Y. Sup. Ct. 1841). Two other nineteenth-century cases sometimes cited for immunity principles in fact involved what we now know as the act of state doctrine. Both cases were tried on the merits, which a finding of jurisdictional immunity would have precluded. See *Underhill v. Hernandez*, 168 U.S. 250 (1897); *Hatch v. Baez*, 14 N.Y. Sup. Ct. 596 (1876).

60. Bradley & Goldsmith, *Domestic Officer Suits*, *supra* note 7, at 142–43 nn.21–22 & 25.

“official acts” been well established in international law or common law at the time, presumably at least one of these courts would have applied it.

Bradley and Goldsmith also overstate the case when they assert that “[m]any courts around the world have concluded that the international law of foreign sovereign immunity applies to suits against officials acting in an official capacity.”⁶¹ Although courts have certainly found immunity in a variety of contexts, some of these cases involved suits for injunctive relief, suits for monetary relief from the state itself, or suits against individuals who had no plausible personal connection to the alleged misconduct.⁶² Others involved the application of domestic immunity statutes whose text, unlike that of the FSIA, could plausibly be read to encompass individuals.⁶³ None involved the direct application of customary international law principles of immunity to allegations of torture and extrajudicial killing. For example, in *Zoernsch v. Waldock*, a U.K. appeals court found that the *current* Secretary of the European Commission of Human Rights was entitled to immunity under an Order of the Council of Europe in a suit alleging that he had presented an edited version of the plaintiff’s claim, rather than the entire claim in plaintiff’s own words, to the Commission.⁶⁴ In *Zoernsch*, Lord Diplock, the “eminent British judge”⁶⁵ whose speech Bradley and Goldsmith rely on, cited *Rahimtoola v. Nizam of Hyderabad* on the question of conduct-based immunity.⁶⁶ In *Rahimtoola*, the House of Lords found that a suit against the former High Commissioner of Pakistan was barred by sovereign immunity because it involved determining Pakistan’s entitlement to funds held in a London bank account. The House of Lords’s decision in *Rahimtoola* thus typifies those cases that name individual defendants but are appropriately barred by principles of immunity because “the effect of exercising jurisdiction [over the individual defendant] would be to enforce a rule of law against the state”.⁶⁷

Unlike the conduct at issue in *Zoernsch* and *Rahimtoola*, the alleged conduct at issue in ATS cases such as *Filártiga* and TVPA cases such as *Samantar* entails personal responsibility as a matter of international law. National courts can, in appropriate circumstances, impose legal consequences for such conduct. This is true even though the state might also bear responsibility, and even though the state itself might be immune from suit in a foreign court.

61. Bradley & Goldsmith, *Foreign Sovereign Immunity*, *supra* note 2, at 15.

62. *See supra* notes 21–25 and accompanying text.

63. *E.g.*, *Jones v. Saudi Arabia*, [2006] UKHL 26, [2007] 1 A.C. 270 (appeal taken from Eng.) (U.K.); *Jaffe v. Miller*, [1993] 13 O.R. (3d) 745, 790 (C.A.) (Can.).

64. *Zoernsch v. Waldock*, (1964) 2 All E.R. 256 (C.A.) (Eng.); *see* Bradley & Goldsmith, *Domestic Officer Suits*, *supra* note 7, at 141.

65. Bradley & Goldsmith, *Domestic Officer Suits*, *supra* note 7, at 141.

66. *Rahimtoola v. Nizam of Hyderabad*, [1958] A.C. 379 (H.L.) (appeal taken from Eng.) (U.K.).

67. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 66(f) (1965).

The U.K. House of Lords's analysis in *Jones v. Saudi Arabia* does not alter this conclusion, because that case asked whether Article 6 of the European Convention on Human Rights (which provides for access to courts) requires finding an implied *exception* to immunity under the U.K. State Immunity Act.⁶⁸ The House of Lords concluded that it does not, and the petitioners in that case have sought a hearing before the European Court of Human Rights. But even if the European Court of Human Rights agrees with the House of Lords, it would not mean that customary international law requires granting conduct-based immunity for torture under the FSIA, as Bradley and Goldsmith argue.⁶⁹ Reading the House of Lords's decision to require *granting* immunity for torture under the FSIA ignores that, in the U.K., the burden is on the plaintiff to show that international law requires an *exception* to the immunity created by a domestic statute. In the United States, by contrast, the burden is on the defendant to show that immunity exists in the first place.

CONCLUSION

Bradley and Goldsmith take issue with human rights suits because they have “no basis in any . . . act of state consent.”⁷⁰ What this neglects, however, is the exclusive and absolute jurisdiction of the United States over its own territory.⁷¹ Peña-Irala overstayed his visa and was living in Brooklyn, New York. Samantar has lived in Fairfax, Virginia since the 1990s. Applying the FSIA to grant immunity to current and former officials for *any* non-commercial conduct performed under color of foreign law would categorically preclude U.S. courts from exercising jurisdiction over certain claims against individuals present on U.S. territory, even in cases brought by U.S. citizens and, potentially, by the U.S. government.

Determining the scope of conduct-based immunity is not a new problem, and applying the FSIA is not the proper solution. The fact that, in the thirty years since *Filártiga*,⁷² few courts have explicitly considered or granted conduct-based (as opposed to status-based) immunity to individual defendants for international law violations should not be taken to mean that lawyers and judges have been

68. *Jones v. Saudi Arabia*, *supra* note 63; Bradley & Goldsmith, *Foreign Sovereign Immunity*, *supra* note 2, at 15 n.22.

69. Bradley & Goldsmith, *Foreign Sovereign Immunity*, *supra* note 2, at 16.

70. *Id.* at 23.

71. *Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812).

72. The *Filártiga* court appears to have considered, at least in passing, the possibility of immunity outside the FSIA. This can be inferred from the court's observation that Peña-Irala did not claim diplomatic immunity, *Filártiga v. Peña-Irala*, 630 F.2d 876, 879 (2d Cir. 1980), and its affirmation of the principle that a U.S. state official can be held personally liable for constitutional violations despite the immunity of the state, *id.* at 890 (citing *Ex Parte Young*, 209 U.S. 123 (1908)).

missing the obvious. Rather, this relative silence is better interpreted as demonstrating a widespread understanding that individuals will not ordinarily be deemed immune from suit for certain types of conduct, and that any individual immunity that might exist does not come from the FSIA. Arguments based on logic, policy, and international law do not support a contrary result.