

# DEAD MAN'S HAND: RESHUFFLING FOREIGN SOVEREIGN IMMUNITIES IN U.S. HUMAN RIGHTS LITIGATION

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## I. OPENING DEAL

Those litigating human rights claims in the federal courts of the United States have had a run of especially good luck of late. The adoption of the Torture Victim Protection Act (TVPA) in 1991,<sup>1</sup> along with notable victories in the *Marcos* cases,<sup>2</sup> *Paul v. Avril*,<sup>3</sup> and *Taye v. Negewo*,<sup>4</sup> have galvanized

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This essay was revised to reflect developments up to January 1995.

<sup>1</sup> Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350(2) (1994)). See also Yoav Gery, Note, *The Torture Victim Protection Act: Raising Issues of Legitimacy*, 26 GEO. WASH. J. INT'L L. & ECON. 597 (1993); Jennifer Correale, Comment, *The Torture Victim Protection Act: A Vital Contribution to International Human Rights Enforcement or Just a Nice Gesture?*, 6 PACE INT'L L. REV. 197 (1994).

<sup>2</sup> The two most relevant decisions in this multi-faceted, multi-district litigation, are *In re Estate of Ferdinand E. Marcos Litigation* (Trajano v. Marcos), 978 F.2d 493 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2960 (1993) and *In re Estate of Ferdinand E. Marcos Litigation* (Hilao v. Marcos), 25 F.3d 1467 (9th Cir. 1994), *cert. denied*, 63 U.S.L.W. 3562 (U.S. Jan. 23, 1995). Other cases, typically involving the Philippine government's attempt to repatriate the stolen assets of the late ex-President Marcos, include *Republic of Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986), *cert. denied*, 481 U.S. 1048 (1987) [hereinafter "*Marcos* (2d Cir.)"]; *Republic of Phil. v. Marcos*, 862 F.2d 1355 (9th Cir. 1988) (en banc panel), *cert. denied*, 490 U.S. 1035 (1989) [hereinafter "*Marcos* (9th Cir.)"].

See also Ellen L. Lutz, *The Marcos Human Rights Litigation: Can Justice Be Achieved in U.S. Courts for Abuses that Occurred Abroad?*, 14 BOST. COL. THIRD WORLD L.J. 43 (1994); Joan Fitzpatrick, *The Future of the Alien Tort Claims Act: Lessons from In re Marcos Human Rights Litigation*, 64 ST. JOHN'S L. REV. 491 (1993).

<sup>3</sup> 812 F. Supp. 207 (S.D. Fla. 1993).

<sup>4</sup> No. 1:90-cv-2010-GET (N.D. Ga. Aug. 2, 1993) (Memorandum and Order; Entry of Judgment), on appeal, Docket No. 91-9133 (11th Cir.).

the human rights advocacy community here. There have been some setbacks, for sure. The outcomes in *Siderman de Blake v. Argentina*,<sup>5</sup> *Princz v. Federal Republic of Germany*,<sup>6</sup> and *Lafontant v. Aristide*<sup>7</sup> can probably be considered mixed. The results in such cases as *Doe I v. Karadzic*,<sup>8</sup> and, even more especially, the U.S. Supreme Court's decision in *Saudi Arabia v. Nelson*<sup>9</sup> are unambiguously bad.

Nevertheless, it seems we have finally entered a period of authentic success. Many shared such optimism when the Second Circuit's decision in *Filartiga v. Pena-Irala*<sup>10</sup> was handed down in 1980. That case may well be regarded as opening the epic period of human rights litigation in this country. The successful revivification of the Alien Tort Claims Act (ATCA),<sup>11</sup> and its enlistment in the service of those who would use it to vindicate international standards of humanity and decency, was surely remarkable. In a sense, all current human rights litigation owes its fortune to *Filartiga*. The rediscovery of the Alien Tort Statute was much like finding the Holy Grail.

But events moved quickly to rob human rights litigators of the sweet taste of success. There were notable cases in which the ambit of the ATCA was

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<sup>5</sup> 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 112 S. Ct. 1812 (1993).

<sup>6</sup> 813 F. Supp. 22 (D.D.C. 1992), *rev'd*, 26 F.3d 1166 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 923 (1995). For an update on developments, see Eva M. Rodriguez, *Germans Still Cool to Princz Claim*, 16 LEGAL TIMES OF WASH. (No. 39) 16 (Feb. 14, 1994); *Federal Court Watch: Survivor Can't Sue Germany*, *id.* at 6 (July 11, 1994). See also Comment, *D.C. Circuit Holds that Violation of Peremptory Norms of International Law Does Not Constitute an Implied Waiver of Sovereign Immunity Under the Foreign Sovereign Immunities Act—Princz v. Federal Republic of Germany*, 108 HARV. L. REV. 513 (1994).

<sup>7</sup> 844 F. Supp. 128 (E.D.N.Y. 1994).

<sup>8</sup> 866 F. Supp. 734 (S.D.N.Y. 1994), on appeal, Docket No. 94-9035 (2d Cir.). For more on this litigation, see Fitzpatrick, *supra* note 2, at 517-20. See also Denegri v. Republic of Chile, 1992 WL 91914 (D.D.C. 1992).

<sup>9</sup> 113 S. Ct. 1471 (1993).

<sup>10</sup> 630 F.2d 876 (2d Cir. 1980).

<sup>11</sup> 28 U.S.C. § 1350 (1994) ("The 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."). For more on the historical background of the statute, see Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989); Jean-Marie Simon, *The Alien Tort Claims Act: Justice or Show Trials?*, 11 BOST. U. INT'L L.J. 1 (1993).

thoughtlessly and needlessly narrowed.<sup>12</sup> Even more devastating was the United States Supreme Court's opinion in *Argentine Republic v. Amerada Hess*,<sup>13</sup> where the Court clearly ruled that the ATCA did not vest federal courts with subject-matter jurisdiction over foreign sovereigns.<sup>14</sup> Only the Foreign Sovereign Immunities Act (FSIA)<sup>15</sup> could, and the narrowly drawn exceptions to the presumptive immunity of the foreign sovereign were not satisfied in that case.<sup>16</sup> Nor were they to be fulfilled in any other case where the cause of action sounded in a tort violating the customary international law of human rights. In short, *Amerada Hess* foreclosed suits against foreign sovereigns for their human rights abuses. Until the recent string of strong hands, litigators were forced to be content to proceed against the minions and lackeys of foreign governments: free-lance torturers, war criminals, and exploiters. So, as we all know, our enthusiasm in 1980 was unwarranted. It may be now, too, and this article suggests that we could soon again become victims of our own prosperity.

I believe that the essence of the problem of litigating international human rights claims in U.S. courts is foreign sovereign immunity. The doctrine—as largely codified in the Foreign Sovereign Immunities Act—is implicated in two fundamental ways in all such litigation. The first is whenever an individual defendant attempts to seek immunity under the FSIA by arguing that his or her actions were really those of a foreign sovereign. The result of such a tactic, if successful, would be to require human rights plaintiffs to show that their cause of action arises under one of the enumerated exceptions within the statutory scheme of the FSIA.<sup>17</sup> We know from the *Amerada Hess* decision that this may well be an impossible task.

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<sup>12</sup> See e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985) (particularly Judge Bork's opinion in that case). See 726 F.2d at 798, 810-19.

<sup>13</sup> 488 U.S. 428 (1989).

<sup>14</sup> See *id.* at 435-39.

<sup>15</sup> Foreign Sovereign Immunities Act of 1976, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1332, 1391, 1441 1602-11 (1988)).

<sup>16</sup> *Amerada Hess*, 488 U.S. at 439-43.

<sup>17</sup> There are five enumerated exceptions to the presumptive immunity of a foreign sovereign. They are detailed at 28 U.S.C. § 1605(a). The commercial activity (§ 1605(a)(2)) and property expropriation (§ 1605(a)(3)) exceptions are unlikely to be applicable in most human rights litigation. *But see Sideman*, 965 F.2d at 708-11. The tort exception of the FSIA (§ 1605(a)(5)) is inapplicable by its very terms: the tort must occur in the United States. The waiver exception (§ 1605(a)(1)) is promising, and will be considered below. See *infra* notes 74-98 and accompanying text.

This leads to the second implication of foreign sovereign immunity. Assuming that a suit *is* brought directly against a foreign sovereign, or derivatively by virtue of a court's finding that the private actor was engaged in a public act, one can wonder if there are any novel avenues for getting around the FSIA's immunity roadblock. Just as significantly, one must speculate whether the development of an implied waiver exception to the FSIA, premised on a defendant actor's violation of a *jus cogens* norm of customary international law, may not, in fact, cause substantial mischief. I am afraid it could be a joker in the deck.

I hope here to reshuffle our understanding of the relationship between statutory grants of subject-matter jurisdiction, foreign sovereign immunities, and the prudential doctrines of Act of State and *forum non conveniens*. There has been a lawyerly tendency to classify these concerns into separate doctrinal compartments. After all, if we do not oblige with such an approach, the judges surely will. Disaggregating, for example, foreign sovereign immunities from the Act of State doctrine has been a useful maneuver for human rights litigators. Likewise, drafting complaints invoking distinct jurisdictional bases has been successful. These approaches may continue to be workable, but a warning is sounded here of the potential dangers of failing to see beyond the next hand to be dealt. I truly believe that we are embarking on a new era in human rights litigation in this country. We need, therefore, to look ahead and see the potential pitfalls and trapdoors that await us. There are plenty of them, and for those serious about the progressive development of the law in this area we had best be prepared to make some tough bets. Litigation strategies that seem easy and expedient today could, I suggest, prove disastrous tomorrow.

## II. ANTE-UP: PRIVATE ACTORS, PUBLIC ACTS

One kind of bad hand that could be dealt to a human rights litigant is to sue a defendant who then claims that their actions were really those of a foreign government. The Foreign Sovereign Immunities Act takes great pains to define those entities that are "foreign state[s]" and thus worthy of presumptive immunity in the courts of the United States. For starters, "A 'foreign state' . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state."<sup>18</sup> So far, so good, but there is no mention here whether an individual could be deemed to be a foreign

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<sup>18</sup> 28 U.S.C. § 1603(a) (1994).

state for purposes of invoking sovereign immunity. The Act does thoughtfully provide an exquisitely sophisticated definition of an "agency or instrumentality of a foreign state." To qualify as such, an entity must satisfy all three stated criterion: (1) it must be a separate "legal person, corporate or otherwise;" (2) it must be an organ of a foreign state or political subdivision thereof, or have a majority of its shares owned by a foreign state or subdivision; and (3) it must not be a citizen of the United States, "nor created under the laws of any third country."<sup>19</sup> Quite obviously, this definition was intended to cover business associations, not individuals.<sup>20</sup> Indeed, one commentator has suggested that "agency or instrumentality" "does not include natural persons acting as agents of a foreign state."<sup>21</sup>

The case law has, however, held differently. One court did grasp the significance of section 1603(b)(1)'s referral only to "legal person[s]," and thus ruled that individuals could not claim immunity under the FSIA.<sup>22</sup> Another opinion focused on corollary language (found in the FSIA's tortious act exception) referring to "any official or employee of that foreign state while acting within the scope of his office or employment,"<sup>23</sup> in order to hold that the drafters of the Act clearly intended that individual defendants could be cloaked by foreign sovereign immunity.<sup>24</sup> The remainder of the decisions, though, credit the wider intent of Congress in extending immunities to foreign sovereigns, and ruled that such an intent for the FSIA would be frustrated if the protections of the Act were not granted to individuals in appropriate circumstances.<sup>25</sup>

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<sup>19</sup> *Id.* § 1603(b).

<sup>20</sup> See Foreign Sovereign Immunities Act, H.R. Rep. No. 94-1487, 94th Cong., 2d Sess., reprinted in 1976 U.S. Code Cong. & Admin. News 6604, 6614 [hereinafter "FSIA HOUSE REPORT"].

<sup>21</sup> JOSEPH W. DELLAPENNA, *SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS* 25 (1988).

<sup>22</sup> See *Republic of Phil. v. Marcos*, 665 F. Supp. 793, 797 (N.D. Cal. 1987) [hereinafter "*Marcos (N.D. Cal.)*"]. The District Court in *Marcos* said that "the statute is not intended to apply to natural persons, except perhaps to the extent that they may personify a sovereign. Even then, it appears that the FSIA was not intended to apply to individual sovereigns, but rather that they would be covered by the separate head-of-state doctrine." *Id.* (citing FSIA HOUSE REPORT, *supra* note 20, at 6613-14, 6619).

<sup>23</sup> 28 U.S.C. § 1605(a)(5) (1994).

<sup>24</sup> *Liu v. Republic of China*, 892 F.2d 1419, 1425 (9th Cir. 1989).

<sup>25</sup> See, e.g., *Kline v. Kaneko*, 685 F. Supp. 386, 389 (S.D.N.Y. 1988) ("The FSIA does apply to individual defendants when they are sued in their official capacity."); *American Bonded Warehouse Corp. v. Compagnie Nationale Air France*, 653 F. Supp. 861, 863 (N.D.

Any real doubts as to whether individuals are notionally covered by the FSIA were resolved by the Ninth Circuit's decision in *Chuidian v. Philippine National Bank*.<sup>26</sup> In this case, the gravamen of which was the wrongful dishonor of a letter of credit, a duly appointed member of President Corazon Aquino's Good Government Commission ordered the action taken against the plaintiff.<sup>27</sup> The Commissioner was sued personally; he answered that he was immune under the FSIA. The plaintiff vigorously contested this point, and, somewhat surprisingly, the United States government weighed in with a "Statement of Interest" indicating that while the defendant was *not* covered by the FSIA, he was immune under common law principles of foreign sovereign immunity.<sup>28</sup> The Ninth Circuit, in any event, found the language of FSIA section 1603(b) ambiguous, noting that "[w]hile [it] may not explicitly include individuals within its definition of foreign instrumentalities, neither does it expressly exclude them."<sup>29</sup> Drawing solace from state qualified immunity jurisprudence, the *Chuidian* court<sup>30</sup> said that

we cannot infer that Congress . . . intended to allow unrestricted suits against individual foreign officials acting in their official capacities. Such a result would amount to a blanket abrogation of foreign sovereign immunity by allowing litigants to accomplish indirectly what the Act barred them from doing directly. It would be illogical to conclude that Congress would have enacted such a sweeping alteration of existing law implicitly and without comment.<sup>31</sup>

The Ninth Circuit likewise made short work of the government's contention that individual immunities were subject to the common law residuum of

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Ill. 1987); *Rios v. Marshall*, 530 F. Supp. 351, 371 (S.D.N.Y. 1981) (an individual "sued in his official capacity as [an] agent of the instrumentality, . . . is equally protected by principles of foreign sovereign immunity."); *Mueller v. Diggelman*, No. 82 CIV 5513 (S.D.N.Y. 1983) (LEXIS, Genfed Library, District Court file).

<sup>26</sup> 912 F.2d 1095 (9th Cir. 1990).

<sup>27</sup> *Id.* at 1097-98.

<sup>28</sup> *Id.* at 1099, 1101.

<sup>29</sup> *Id.* at 1101.

<sup>30</sup> *Id.* at 1101-02 (citing *Monell v. Dep't of Social Serv.*, 436 U.S. 658, 690 n.55 (1978); *Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376, 1382 n.5 (9th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989)).

<sup>31</sup> *Chuidian*, 912 F.2d at 1102.

foreign sovereign immunity. The court clearly saw this as an attempt to revive the practice of individual State Department determinations for such cases. The Ninth Circuit was not inclined to do so, preferring at least to embrace the idea that the FSIA codified in 1976 nearly the entire field of foreign sovereign immunity law.<sup>32</sup> Courts following *Chuidian* have simply assumed that the FSIA can apply to individual actors.<sup>33</sup> This question appears closed.<sup>34</sup>

All this begs the question of when precisely will an individual's actions be attributed to a foreign sovereign in order to grant immunity. The only court to articulate an intelligible test of attribution has been the Ninth Circuit Court of Appeals.<sup>35</sup> In its 1992 *Trajano* opinion, that court affirmed and summarized its earlier holding in *Chuidian*, pronouncing this standard:

[T]he FSIA covers a foreign official acting in an official capacity, but that official is not entitled to immunity for acts which are not committed in an official capacity (such as selling personal property), and for acts beyond the scope of her authority (for example, doing something the sovereign has not empowered the official to do).<sup>36</sup>

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<sup>32</sup> See *id.* at 1102-03.

<sup>33</sup> See, e.g., *Drexel Burnham Lambert Group, Inc. v. Comm. of Receivers for A.W. Galadari*, 810 F. Supp. 1375, 1381 (S.D.N.Y.), *rev'd on other grounds*, 12 F.3d 317 (2d Cir. 1993); *Refco, Inc. v. Galadari*, 755 F. Supp. 79, 82 (S.D.N.Y. 1991).

<sup>34</sup> Amicus parties in *Trajano*, including Human Rights Watch, the Lowenstein Human Rights Clinic, and the Center for Constitutional Rights, attempted to reargue the point that the FSIA was inapplicable to individuals. The Court brushed aside the submission as "foreclosed by *Chuidian*." See 978 F.2d at 495, 497 n.8.

<sup>35</sup> Other courts have as much as said that the issue is largely a factual one. See *Gilson v. Republic of Ir.*, 682 F.2d 1022, 1029 (D.C. Cir. 1982); *Skeen v. Federative Republic of Braz.*, 566 F. Supp. 1414, 1418 (D.D.C. 1983). See also FSIA HOUSE REPORT, *supra* note 20, at 6619.

Alternatively, "in determining whether an entity is entitled to claim the protection of the FSIA, courts have accorded great weight to the statements of foreign officials." *Kline*, 685 F. Supp. at 390 & n.2.

Lastly, *Skeen* did suggest that when the suit was against an officer or employee of a foreign state the test of attribution would be broadened to include both acts or omissions ordered at higher levels of state authority, or those actions designed to further the state's interests. 566 F. Supp. at 1418-19. See also DELLAPENNA, *supra* note 21, at 185-87.

<sup>36</sup> *Trajano*, 978 F.2d at 497 (citing *Chuidian*, 912 F.2d at 1106).

But how did the *Chuidian* panel formulate this two prong test, emphasizing both official capacity and scope of authority? What few have noticed is that the Ninth Circuit has, in essence, imported domestic notions of *respondereat superior* in sovereign immunity claims, and applied them to the FSIA. One might suggest those notions were derived from the parallel provision of the FSIA covering tortious acts, since that clause does refer to an "official or employee of [a] foreign state while acting within the scope of his office or employment."<sup>37</sup> That provision of the FSIA is substantially identical to language in the Federal Tort Claims Act (FTCA),<sup>38</sup> the sole avenue by which individuals may sue the U.S. government in tort. Indeed, the *Chuidian* decision is explicit in its reliance on cases construing the FTCA in circumstances where individual government employees have been sued.<sup>39</sup>

But the FSIA also provides a "discretionary function" limitation to this tortious acts exception. Even if a foreign sovereign is responsible for a tort occurring in the United States under this exception, immunity will still attach to "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused."<sup>40</sup> Cases like *De Letelier v. Chile*<sup>41</sup> and *Liu v. Republic of China*<sup>42</sup> clearly say that a foreign sovereign has no discretion to carry out certain acts (like political assassination) within the United States that are illegal under U.S. or international law.<sup>43</sup> Other cases are more

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<sup>37</sup> 28 U.S.C. § 1605(a)(5) (1994).

<sup>38</sup> The Federal Tort Claims Act, June 25, 1948, ch. 646, 62 Stat. 933 (1948) (codified as amended at 28 U.S.C. § 2680(a) (1994)).

<sup>39</sup> See *Chuidian*, 912 F.2d at 1106 (citing and quoting *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949); *United States v. Yakima Tribal Court*, 806 F.2d 853, 859 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987)). For other such cases, see *Quern v. Jordan*, 440 U.S. 332 (1979); *Dugan v. Rank*, 372 U.S. 609 (1963). See also *The Westfall Act*, 28 U.S.C. § 2679(d) (1994).

<sup>40</sup> 28 U.S.C. § 1605(a)(5)(A) (1994).

<sup>41</sup> 488 F. Supp. 665 (D.D.C. 1980).

<sup>42</sup> 642 F. Supp. 297 (N.D. Cal. 1986), *rev'd on other grounds*, 892 F.2d 1419 (9th Cir. 1989).

<sup>43</sup> *De Letelier*, 488 F. Supp. at 673; *Liu*, 642 F. Supp. at 304-05. Interestingly, Judge Green in *De Letelier* relied on precedents construing the FTCA's corollary "discretionary function" exception. See 488 F. Supp. at 673 (citing *Hatahley v. United States*, 351 U.S. 173, 181 (1956); *Cruikshank v. United States*, 431 F. Supp. 1355, 1359 (D. Haw. 1977)). See also Comment, *Illegal Acts and the Discretionary Function Exception of the Federal Tort Claims Act*, 1978 B.Y.U. L. REV. 355.



equivocal for conduct falling far short in consequence.<sup>44</sup> These discretionary function cases seem to be saying that while certain individual conduct may be attributed as public acts of a state, they do not qualify as a sovereign act for purposes of granting immunity.<sup>45</sup> Courts seem, therefore, willing to develop an exception to foreign sovereign immunity for manifestly illegal acts carried out in this country. But it might be wondered whether the FSIA's discretionary function jurisprudence is useful in establishing limits on an individual's ability to attribute his conduct to a foreign sovereign, when those acts are carried out in the foreign sovereign's territory.

This jurisprudential sleight-of-hand would not be troubling but for the fact that it appears to have been utterly unintended. How can a court apply a consistent standard of imputing private acts to foreign sovereigns, when the standard developed seems to be conditioned on peculiarly domestic expectations as to the relationship between government and its officials? As has already been suggested, much turns on this point. If the standard of attribution is construed liberally, more individual conduct will be covered by the FSIA, and thus fewer cases will likely clear the Act's presumptive grant of immunity.

Consider now the handful of cases where a determination was made whether, in fact, an individual defendant's act was sovereign in character. *Chuidian*, the well-spring of this stream of cases, is quite straightforward. The Ninth Circuit simply concluded, with virtually no discussion, that the defendant committed acts "in his official capacity as a member of the [Philippine's Good Government] Commission."<sup>46</sup> In *Trajano*, the Ninth Circuit resolved the problem of Imee Marcos-Manotoc's claim that she was immune from charges that she caused the wrongful death of plaintiff's decedent by simply saying that in failing to make an appearance before the

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<sup>44</sup> See, e.g., *Joseph v. Office of Consulate Gen. of Nig.*, 830 F.2d 1018, 1025 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988) (gratuitous damage to consular residence was within scope of consular officials' duties; no immunity); *Risk v. Halvorsen*, 936 F.2d 393, 395 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 880 (1992) (consular officials' aid to Norwegian national in evading a state court child custody order was within discretion of foreign government; immunity granted).

<sup>45</sup> See Adam C. Belsky et al., Comment, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CAL. L. REV. 365, 399-401 (1989) [hereinafter "*California Comment*"]. For the difficult choice-of-law problems inherent in these cases, read *Liu*, 892 F.2d at 1425-26 (applying California's rules of *respondeat superior* in attributing assassin's conduct to foreign sovereign).

<sup>46</sup> *Chuidian*, 912 F.2d at 1103.

district court, and thus defaulting, she "admitted acting on her own authority, not on the authority of the Republic of the Philippines."<sup>47</sup> The Court did add that "her acts cannot have been taken within any official mandate and therefore cannot have been acts of an agent or instrumentality of a foreign state within the meaning of the FSIA."<sup>48</sup>

But what really tipped the scales against Marcos-Manotoc's argument (that her acts were covered by the FSIA) was the Ninth Circuit's reliance on its 1989 decision<sup>49</sup> that the Act of State doctrine was unavailable to protect ex-President Ferdinand Marcos from the same charges of planning Trajano's murder. The later panel of the Ninth Circuit noted that "[i]n so holding, we implicitly rejected the possibility that the acts set out in Trajano's complaint were public acts of the sovereign."<sup>50</sup> Although the Act of State doctrine is analytically distinct from any determination of jurisdiction under the FSIA, as the Ninth Circuit has made clear in other cases,<sup>51</sup> it seems to play a role in the process of attributing private acts to foreign sovereigns. The *Trajano* opinion certainly suggests that if an act is characterized as "official" and "public" the Act of State doctrine might be available on the merits to block consideration of the case.<sup>52</sup> If the Act of State doctrine's definition of public acts is wider than that suggested above for the FSIA, this might result in more cases being dismissed. To date, this has not been a real concern; in every instance where a defendant in a human rights case has raised an Act of State defense, it has been rejected.<sup>53</sup>

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<sup>47</sup> *Trajano*, 978 F.2d at 498.

<sup>48</sup> *Id.* See also *Hilao*, 25 F.3d at 1470-71 (for same analysis).

<sup>49</sup> *Trajano v. Marcos*, 878 F.2d 1439 (9th Cir. 1989).

<sup>50</sup> *Trajano*, 978 F.2d at 498 & n.10.

<sup>51</sup> See *Marcos* (9th Cir.), 862 F.2d at 1360-61, 1368-71 (Schroeder, J., dissenting) (en banc panel).

<sup>52</sup> For more on the policy rationale of applying the Act of State doctrine in human rights litigation, see the different opinions in *Marcos*, 818 F.2d 1473, 1482-85 (Kozinski, J.), 1492-95 (Nelson, J., dissenting) (9th Cir. 1987), *vacated by en banc panel*, 862 F.2d 1355 (9th Cir. 1988). See also *Marcos* (2d Cir. 1986), 806 F.2d at 357-59. For the modern contours of the doctrine, see *W.S. Kirkpatrick & Co. v. Evtl. Tectonics Corp.*, 493 U.S. 400 (1990); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

<sup>53</sup> See, e.g., *Filariga*, 630 F.2d at 889 (Act of State defense rejected in dicta: "[W]e doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could properly be characterized as an act of state."); *Jimenez v. Aristeguieta*, 311 F.2d 547, 557 (5th Cir. 1962) ("It is only when officials having sovereign authority act in an official capacity that the Act of State Doctrine applies."), *cert. denied*, 373 U.S. 914 (1963); *Paul v. Avril*, 812 F. Supp.

But there is a danger lurking here, and its origins can be traced back to unfortunate language in *Filartiga*. In what he acknowledged to be dicta, Judge Kaufman said

[W]e doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could properly be characterized as an act of state. Paraguay's renunciation of torture as a legitimate instrument of state policy, however, does not strip the tort of its character as an international law violation, if in fact it occurred under color of government authority.<sup>54</sup>

There is some cognitive dissonance in this statement, for Judge Kaufman was valiantly attempting to reconcile two contradictory assertions. On the one hand, he had to defeat a putative Act of State defense by disclaiming that the torture carried out by the defendant was, indeed, a public act. But he also had to maintain the cause of action as arising under the Alien Tort Statute, and to do that he had to vindicate its "international" character, and thus preserve some fiction of attribution to a sovereign power. *Filartiga* resolves this conflict in a similar manner as the discretionary function cases. While Judge Kaufman sees "public acts" as distinct from those "occurring under color of governmental authority," the jurisprudence under FSIA section 1605(a)(5)(A) distinguishes "public acts" from "sovereign acts."

*Filartiga's* different treatment of public acts and those occurring under color of governmental authority was perpetuated in *Trajano*, when the Ninth Circuit noted that "only individuals who have acted under official authority or under color of such authority may violate international law."<sup>55</sup> It seems obvious that Judge Rymer in *Trajano* came upon the same problem as Judge Kaufman in *Filartiga*. The *Trajano* opinion recognizes precisely the same dilemma, and embraces the exact same solution:

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at 212 ("The acts as alleged in the complaint [torture and extrajudicial killing], if true would hardly qualify as official public acts."). *But cf. Marcos*, 818 F.2d 1473 (9th Cir. 1987) (Kozinski, J.), *vacated by en banc panel*, 862 F.2d 1355 (9th Cir. 1988).

<sup>54</sup> 630 F.2d at 889 (citations omitted).

<sup>55</sup> 978 F.2d at 501-02 (citing *Tel-Oren*, 726 F.2d at 791-95 (Edwards, J., concurring)). *See also Hilao*, 25 F.3d at 1470-71.

Although Marcos-Manotoc's default concedes that she controlled the military intelligence personnel who tortured and murdered Trajano, and in turn that she was acting under color of the martial law declared by then-President Marcos, we have concluded that her actions were not those of the Republic of the Philippines for purposes of sovereign immunity under *Chuidian*.<sup>56</sup>

While I believe there is not much to the differentiation articulated in the discretionary function cases, I see terrific trouble in the "under color of governmental authority" test applied in *Trajano*. For starters, the formulation itself arises from a peculiarly domestic preoccupation with Fourteenth Amendment jurisprudence and the problem of qualified immunity for state actors.<sup>57</sup> If it has any international origins, they can be traced through *Filartiga* to *Jimenez v. Aristeguieta*<sup>58</sup> and thence to an antique and obscure provision of the federal Habeas statute which extends the Writ to citizens and residents of a foreign state "in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, *or under color thereof*, the validity and effect of which depend upon the law of nations."<sup>59</sup> This is a thin reed to support a novel theory of attribution.

This facile technique for evading the FSIA while, at the same time, maintaining jurisdiction under the Alien Tort Claims Act, may backfire—and badly. The U.S. Supreme Court recently cautioned in the *Nelson* case that broad ambits were to be given to "sovereign" conduct and foreign sovereign immunity was not to be lightly excepted for such actions. Justice Souter, writing for the Court, said:

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<sup>56</sup> *Trajano*, 978 F.2d at 502. See also Fitzpatrick, *supra* note 2, at 503-11.

<sup>57</sup> See *supra* note 30 and accompanying text. For further details on the qualified immunity doctrine, see *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), which enunciates this standard: "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.

<sup>58</sup> 311 F.2d 547, 557 (5th Cir. 1962).

<sup>59</sup> Act of Aug. 29, 1842, ch. 257, 5 Stat. 539 (1842), (codified at 28 U.S.C. § 2241(c)(4)) (emphasis added). For more on the legislative history of this act, see David J. Bederman, *The Cautionary Tale of Alexander McLeod: Superior Orders and the American Writ of Habeas Corpus*, 41 EMORY L. J. 515, 526-30 (1992).

[T]he intentional conduct alleged here (the Saudi government's wrongful arrest, imprisonment, and torture of Nelson) could not qualify as commercial under the restrictive theory. The conduct boils down to abuse of the power of its police by the Saudi Government, and however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory [of foreign sovereign immunity] as peculiarly sovereign in nature.<sup>60</sup>

An advocate may be tempted to distinguish *Nelson* since it was brought under the commercial activity exception in the FSIA. But I think that would be foolish, and, absent some reversal on the part of the Supreme Court of the principle enunciated in *Nelson*, human rights advocates had best think of arguments to defeat renewed claims by individual defendants that their conduct is covered by the presumptive immunity of the FSIA. The distinction offered by *Filartiga* and *Trajano*—that while the individual's conduct was not attributable to the sovereign, it still violates international law—may simply be untenable.

And if this were not enough, the provisions of the new Torture Victim Protection Act will also bear on the problem of imputability of individual conduct. The TVPA extends to defendants acting "under actual or apparent authority, or color of law, of any foreign nation."<sup>61</sup> This was obviously drafted expansively to apply to as broad a class of defendants as possible. But if the TVPA's formulation is used for other individuals, performing conduct not covered by the TVPA, it will mean that those defendants would, by analogy, be covered by § 1603 of the FSIA. Although Congress probably did not intend that the quoted provision of the TVPA be regarded as the proper standard for this question,<sup>62</sup> this may well become judicial practice.

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<sup>60</sup> 113 S. Ct. at 1479 (1993) (citations omitted). See also *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 726 (1995).

<sup>61</sup> Torture Victim Protection Act, § 2(a), 28 U.S.C. § 1350(2)(a) (1994). The TVPA does, however, limit this formulation in cases involving "extrajudicial killings." Such conduct, even if it satisfies section 2(a), is not covered under the Act if "the killing, under international law, is lawfully carried out under the authority of a foreign nation." *Id.* § 3(a).

<sup>62</sup> See SENATE COMM. ON THE JUDICIARY, TORTURE VICTIM PROTECTION ACT OF 1991, S. REP. NO. 249, 102d Cong., 1st Sess. (1991) [hereinafter "TVPA SENATE REPORT"]; HOUSE COMM. ON THE JUDICIARY, TORTURE VICTIM PROTECTION ACT OF 1991, H.R. REP. NO. 367, 102d Cong., 1st Sess., pt. 1 (1991) [hereinafter "TVPA HOUSE REPORT"].

Consider the discussion in *Lafontant v. Aristide*,<sup>63</sup> in which Judge Weinstein considered whether *Trajano*, when read with the TVPA, would widen the scope of an individual's FSIA immunity. "[T]he [*Trajano*] court," he wrote, "indicated that the TVPA applies to individuals while the FSIA applies to states and state actors, [so] the TVPA will only apply to state actors when they act in their individual capacity . . . ."<sup>64</sup> This does not address the problem of human rights actions, other than torture and extrajudicial killings, brought under the ATCA. Will such claims be subject to a broader test for attribution? If so, defendants in such cases will claim the benefits of the Foreign Sovereign Immunities Act.

The District Court's discussion of these questions in *Doe I v. Karadzic*<sup>65</sup> was particularly devastating. The defendant in that case was the president of the self-proclaimed Bosnian-Serb state, an entity unrecognized by the United States although possessing probable *de facto* status. Judge Leisure ruled that the plaintiff's claims for torture, murder, and mass rape could not be sustained under the ATCA because there was no essential showing that the defendant was a recognized State actor, making his conduct an offense under the law of nations.<sup>66</sup> Likewise, the TVPA "requires a plaintiff's claim for relief to be based on actions *taken under color of law* of any foreign nation."<sup>67</sup>

Individual defendants will certainly find solace in these recent developments. Since it seems undoubted that individuals may seek the protection of the FSIA, the only bar to this litigation tactic is to somehow formulate a standard that excludes human rights abuses from the ambit of a foreign sovereign's public acts, without, at the same time, divesting the court of its

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<sup>63</sup> 844 F. Supp. 128 (E.D.N.Y. 1994).

<sup>64</sup> *Id.* at 131 (citing *Trajano*, 978 F.2d at 497). Judge Weinstein seemed also to be relying on the legislative history of the TVPA SENATE REPORT, *supra* note 62, which contemplated this issue: "To avoid liability by invoking the FSIA, a former official would have to prove an agency relationship to a state, which would require that the state 'admit some knowledge or authorization of the relevant acts.' 28 U.S.C. § 1603(b). Because all states are officially opposed to torture and extrajudicial killing, however, the FSIA should normally provide no defense to an action against the TVPA against a former official." *Id.* at 8.

What is curious in this passage, however is that the Senate Committee cites to language in the FSIA (§ 1603(b)) that does not exist. If the standard were "knowledge or authorization" it would be easier to rebut defendants' claims that they were covered under the FSIA.

<sup>65</sup> See 866 F. Supp. at 738-42.

<sup>66</sup> See *id.* at 739-40 (relying chiefly on *Tel-Oren*, 726 F.2d at 776 (Edwards, J.), and *Carmichael v. United Technologies Corp.*, 835 F.2d 109, 113-14 (5th Cir. 1988)).

<sup>67</sup> *Id.* at 742 (emphasis added).

jurisdiction under the Alien Tort Statute. This will particularly effect more novel human rights claims, including arbitrary and prolonged detention. If a court were, for example, to find that such incarceration violated the law of nations for the purposes of the ATCA, it would, as Judge Kaufman said in *Filartiga*, have to be carried out under color of governmental authority. The defendant would then surely contend that she was carrying out an official function within the scope of her employment, the very standard of *Chuidian* and *Trajano*. One solution would be to duck back into domestic law, using the choice of law cue in *Liu v. Republic of China*,<sup>68</sup> and apply home-grown rules of attribution. But what works for torts occurring in the United States may not really persuade for human rights abuses elsewhere.

Another solution to this conundrum—how to impute conduct to a foreign sovereign (the jurisdictional predicate of the ATCA) without invoking the presumptive immunity of the FSIA—lies, I believe, in international standards of attribution. To date, no human rights litigation has resorted to the standard rules of attribution developed in the law of State responsibility.<sup>69</sup> There is, of course, lawyerly and judicial reluctance to rely upon such authority. But the adoption of the TVPA provides some encouragement, with its limiting provision that extrajudicial killings, otherwise covered, will be non-actionable if “the killing, *under international law*, is lawfully carried out under the authority of a foreign nation.”<sup>70</sup> Since the TVPA and ATCA explicitly make international law the rule of decision, why not have that law adopted in satisfying a court that the individual actor’s conduct is imputable to the foreign sovereign?<sup>71</sup> This will avoid reliance on the terms of the

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<sup>68</sup> 892 F.2d at 1425-26 (applying California’s rules of *respondeat superior* in attributing assassin’s conduct to foreign sovereign). See also *Skeen*, 566 F. Supp. at 1417-18 (District of Columbia’s rules of *respondeat superior* applied). This issue was obliquely addressed in *Aguinda v. Texaco, Inc.*, 1994 U.S. Dist. Lexis 4718 (S.D.N.Y. Apr. 11, 1994).

<sup>69</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 207 (1987); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 446-52 (4th ed. 1990).

<sup>70</sup> Torture Victim Protection Act, § 3(a), 28 U.S.C. § 1350(3)(a) (1994) (emphasis added).

<sup>71</sup> This approach seems to be validated in the TVPA SENATE REPORT, *supra* note 62, at 8-9. For more on it, see C.A. Whomersley, *Some Reflections on the Immunity of Individuals for Official Acts*, 41 INT’L & COMP. L. Q. 848 (1992).

On a related point, it might be possible for a foreign sovereign to waive the immunity of an individual defendant seeking to claim the benefits of the FSIA in a human rights action. This has happened once in *Paul v. Avril*, 812 F. Supp. at 210-11. This will be considered below in the discussion of head-of-state immunity. See *infra* notes 140-50 and accompanying text.

FSIA to provide such a connection, while also eluding the artificial, judicially-created distinctions of "public act"/"sovereign act" and "public act"/"under color of governmental authority." But it may be too late to deal a new hand in this regard. Attribution jurisprudence under the FSIA has already been too heavily influenced by what may be inappropriate domestic analogues.

### III. BLUFF AND RAISE: A *JUS COGENS* EXCEPTION TO THE FSIA

If a suit is brought directly against a foreign sovereign, or derivatively by virtue of a court's finding that the private actor was engaged in a public act, then it will become necessary to bring the case within one of the statutorily-defined exceptions within the FSIA, as the Supreme Court ruled in *Amerada Hess*.<sup>72</sup> This is no easy task. Indeed, in a typical human rights case, alleging tortious acts occurring within a foreign country, no exception is readily available.<sup>73</sup> But litigants have recently suggested a number of novel avenues for getting around the FSIA's immunity roadblock.

The first of these strategies to be employed was arguing that a foreign sovereign's violation of human rights norms, as contained in international conventions to which the United States was a party in 1976, creates an exception under the FSIA's section 1604 or acts as an express waiver under section 1605(a)(1).<sup>74</sup> This contention figured prominently in *Amerada Hess* and the Supreme Court took pains there to indicate that a foreign nation does not "waive its immunity under [the Act] by signing an international agreement that contains no mention of a waiver of immunity to suit in the United States courts or even the availability of a cause of action in the United States."<sup>75</sup> The Supreme Court cited to the FSIA's legislative history for the proposition that § 1604 applies only to those international agreements

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<sup>72</sup> See 488 U.S. at 435-39.

<sup>73</sup> See *supra* note 17 and accompanying text.

<sup>74</sup> 28 U.S.C. § 1604 ("Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States . . ."); § 1605(a)(1) (where "the foreign state has waived its immunity either explicitly or by implication . . .").

<sup>75</sup> 488 U.S. at 442-43. The Court proceeded to reject the applicability of the Geneva Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200; the Pan-American Maritime Neutrality Convention, Feb. 20, 1928, 47 Stat. 1989, T.S. No. 845; and the Treaty of Friendship, Commerce and Navigation, Aug. 8, 1938, United States-Liberia, 54 Stat. 1739, T.S. No. 956.



which “expressly conflic[t]” with the immunity provisions of the FSIA,<sup>76</sup> and specially mentioning Status of Forces Agreements (SOFAs) and Friendship, Commerce and Navigation (FCN) Treaties.<sup>77</sup> Other courts have narrowly construed the applicable treaties referenced in § 1604 to include just a handful of instruments.<sup>78</sup>

Variations on this argument were renewed in *Denegri*<sup>79</sup> and *Siderman de Blake*,<sup>80</sup> and rejected in both cases. The District Court in *Denegri* summarily noted that the plaintiffs were relying on such instruments as the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Torture Convention, none of which “set[s] forth a cause of action against foreign nations in United States courts, nor do they provide for a waiver of immunity to suit in the United States.”<sup>81</sup> The Ninth Circuit’s discussion in *Siderman* was fuller, and just as conclusive, on this point. The Ninth Circuit pointed out that for an “international agreement” to be relevant, for purposes of section 1604, it must have been (1) in force before 1976 (the adoption of the FSIA) for the United States,<sup>82</sup> (2) be an international agreement “enforceable . . . between the United States and other foreign states or international organizations,”<sup>83</sup> (3) the relevant provisions of which must be self-executing,<sup>84</sup> and (4)

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<sup>76</sup> 488 U.S. at 442-43 (citing FSIA HOUSE REPORT, *supra* note 20, at 6616).

<sup>77</sup> FSIA HOUSE REPORT, *supra* note 20, at 6616.

<sup>78</sup> See DELLAPENNA, *supra* note 21, at 202-07 (collecting cases). See, e.g., *Harris Corp. v. Nat’l Iranian Radio & Television*, 691 F.2d 1344, 1350 (11th Cir. 1982) (FCN Treaty with Iran).

<sup>79</sup> 1992 WL 91914, at \*3.

<sup>80</sup> 965 F.2d at 719-20.

<sup>81</sup> 1992 WL 91914 at \*3.

<sup>82</sup> See 965 F.2d at 719 (quoting relevant language of the FSIA, § 1604).

<sup>83</sup> This was noted in response to plaintiff’s argument that the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948), was such an “agreement.” Although the Ninth Circuit said that although an international agreement did not have to be a “constitutional” treaty, ratified pursuant to article II, section 2 of the Constitution, it still had to be recognized as binding under international law. Since the Universal Declaration was a General Assembly Resolution, aspirational in character (despite its status as expressing customary international law), it did not qualify. See 965 F.2d at 719.

<sup>84</sup> This is inferred from the Circuit’s discussion of the status of the human rights provisions in the United Nations Charter. See 965 F.2d at 720. Although the doctrine of self-execution is not mentioned specifically by the court, it seems an obvious corollary to the remaining points. Intriguingly, the caption of the TVPA indicates that it was legislated “[t]o carry out the obligations of the United States under the United Nations Charter and other

“ ‘expressly conflict with the immunity provisions of the FSIA.’ ”<sup>85</sup> No generic human rights instrument will satisfy all four elements of this test. It is possible that provisions in certain FCN Treaties may, although to date they have yet to be litigated in an individual liberties context. Likewise, one can imagine human rights instruments—adopted after 1976 and actually containing self-executing waivers of sovereign immunity for domestic court actions—employed under section 1605(a)(1). Again, however, there is no such agreement which is as explicit in its waiver as the Supreme Court’s decision in *Amerada Hess* demands.

A second tactic has been the contention that a foreign sovereign’s violation of human rights norms is an *implied* waiver under § 1605(a)(1). It was raised in *Siderman de Blake*,<sup>86</sup> where the Ninth Circuit agreed with plaintiffs’ suggestion that there exists a set of peremptory norms of customary international law to which no derogation is permitted. These are *jus cogens* principles.<sup>87</sup> The court then agreed that the prohibition against torture is one of these norms.<sup>88</sup> But the Ninth Circuit disagreed with Sidermans’ last proposition that the FSIA impliedly waives sovereign immunity for violations of *jus cogens* norms, although noting that “as a matter of international law [it] carries much force.”<sup>89</sup> The court fairly characterized their argument as meaning that “[i]nternational law does not recognize an act that violates *jus cogens* as a sovereign act. A state’s violation of the *jus cogens* norm prohibiting official torture therefore would not be entitled to the immunity afforded by international law.”<sup>90</sup> Despite all of this, the Ninth Circuit concluded that the issue was foreclosed by the Supreme Court’s decision in *Amerada Hess*.<sup>91</sup> The *jus cogens* claim likewise failed in *Denegri*.<sup>92</sup>

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international agreements pertaining to the protection of human rights . . . .” 106 Stat. 73 (1992).

<sup>85</sup> 965 F.2d at 720 (quoting *Amerada Hess*, 488 U.S. at 442).

<sup>86</sup> See the extraordinarily full discussion at 965 F.2d at 714-19.

<sup>87</sup> *Id.* at 714-16. See also *Comm. of U.S. Citizens in Nic. v. Reagan*, 859 F.2d 929, 941 (D.C. Cir. 1988).

<sup>88</sup> *Siderman*, 965 F.2d at 716-17.

<sup>89</sup> *Id.* at 718.

<sup>90</sup> *Id.* at 718.

<sup>91</sup> *Id.* at 718-19.

<sup>92</sup> See *Denegri*, 1992 WL 91914 at \*3, where the district court noted that “Plaintiffs are essentially asking the Court to grant FSIA jurisdiction under a novel theory of implied waiver that has never been before used to deprive a foreign sovereign of immunity. . . . [While] the

And, despite an initial success in the district court deciding *Princz*,<sup>93</sup> the *jus cogens* theory was given an ignominious burial on appeal before the D.C. Circuit.<sup>94</sup> The Circuit focused on the narrow scope that Congress intended for the implied waiver exception under the FSIA's section 1605(a)(1). "In sum," the Circuit concluded, "an implied waiver depends upon the foreign government having at some point indicated its amenability to suit."<sup>95</sup> This conclusion drew a sharp and scholarly dissent<sup>96</sup> from Judge Wald, who traced the history and nature of *jus cogens* norms while noting that the majority's emphasis on the intentionality of a waiver was unsupportable.<sup>97</sup>

This is not the place to rehearse the arguments for or against adopting a *jus cogens* exception.<sup>98</sup> Instead, I would like to indicate something that has gone unnoticed in the law review literature. Even if courts *were* to adopt some form of a *jus cogens* exception to the FSIA, other doctrines of jurisdictional concern or judicial abstinence might be played to defeat such claims.

First, one must consider the minimum due process standards under the U.S. Constitution's Fifth Amendment when either a foreign sovereign or private individual is a defendant in a case arising under the FSIA. Some courts have reasoned that since Congress has the power, pursuant to article

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Supreme Court in [*Amerada Hess*] did not discuss the violation of basic human rights as a waiver of sovereign immunity per se, . . . the opinion explicitly mandates a strict interpretation of the FSIA's provisions." *Id.*

<sup>93</sup> The District Court's decision in *Princz*, 813 F. Supp. 22, is not clear as to its basis for finding an exception to immunity. Judge Sporkin seems to have indicated that while the Supreme Court in *Amerada Hess* rejected a generic FSIA exception for international law violations, it did not pass on the problem of *jus cogens* violations. *See id.* at 25-27.

<sup>94</sup> 26 F.3d at 1173-74. *Accord*, *Smith v. Libya*, 886 F. Supp. 306, 315 (E.D.N.Y. 1995) (adopting the reasoning in *Princz*).

<sup>95</sup> *Id.* at 1174.

<sup>96</sup> *See id.* at 1179-85 (Wald, J., dissenting).

<sup>97</sup> *See id.* at 1184.

<sup>98</sup> *See generally*, *California Comment, supra* note 45; Jordan J. Paust, Document, *Draft Brief Concerning Claims to Foreign Sovereign Immunity and Human Rights: Nonimmunity for Violations of International Law under the FSIA*, 8 HOUS. J. INT'L L. 49, 57-67 (1985); Danny Abir, Comment, *Suing a Foreign Government: A Note on Siderman v. Republic of Argentina*, 15 WHITTIER L. REV. 575 (1994); Philippe Lieberman, Comment, *Expropriation, Torture and Jus Cogens under the Foreign Sovereign Immunities Act: Siderman de Blake v. Republic of Argentina*, 24 INTER-AM. L. REV. 503 (1993).

In view of the Supreme Court's decision in *Nelson* (*see supra* note 60 and accompanying text for the relevant passage of that opinion), the Court will not likely be well-disposed to a judicially-created *jus cogens* exception to the FSIA.

III of the Constitution, to adopt legislation like the FSIA, ATCA and TVPA (which all require courts to hear cases involving alien parties),<sup>99</sup> due process standards are satisfied as long as any legitimate personal jurisdiction has been exerted over the defendant.<sup>100</sup> But the better view seems to be that the FSIA's "long-arm" provisions for service of process<sup>101</sup> cannot preempt the Constitution's due process requirements. Courts must, therefore, perform a separate constitutional due process inquiry.<sup>102</sup> To date, courts have been ambivalent about due process challenges by defendants claiming an insufficient constitutional nexus between their conduct and the United States.<sup>103</sup> Most of the jurisprudence in this area concerns the commercial activity exception to the FSIA<sup>104</sup> and its finely articulated bases of contacts with the United States.<sup>105</sup> This case law would not be relevant for human rights litigation for an implied *jus cogens* exception under FSIA section 1605(a)(1).<sup>106</sup>

Any victory in winning recognition of a *jus cogens* exception to the FSIA may, therefore, be pyrrhic if courts then give more searching review to the

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<sup>99</sup> See *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480 (1983).

<sup>100</sup> See Paust, *supra* note 98, at 69. But see *Harris Corp. v. Nat'l Iranian Radio & Television*, 691 F.2d 1344, 1352-53 (11th Cir. 1982).

<sup>101</sup> 28 U.S.C. § 1608 (1994).

<sup>102</sup> See *Texas Trading & Milling Corp. v. Fed. Republic of Nig.*, 647 F.2d 300, 313-15 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982). See also Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 STAN. L. REV. 385, 405 & n.104 (1982); *California Comment*, *supra* note 45, at 407.

<sup>103</sup> No court has refused to hear a case in which there was an explicitly available waiver (usually an arbitration clause) without other contacts to the United States, but several have raised the possibility. See *Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela*, 760 F.2d 390, 394 (2d Cir. 1985); *Wyle v. Bank Melli*, 577 F. Supp. 1148, 1157 (N.D. Cal. 1983); *Chicago Bridge & Iron Co. v. Iran*, 506 F. Supp. 981, 985-87 (N.D. Ill. 1980).

<sup>104</sup> See 28 U.S.C. § 1605(a)(2) (1994). See also *Int'l Hous. Ltd. v. Rafidain Bank Iraq*, 893 F.2d 8, 11-14 (2d Cir. 1989).

<sup>105</sup> See DELLAPENNA, *supra* note 21, at 80-95.

<sup>106</sup> See *id.* at 102-03. One recent case suggests, moreover, that a human rights plaintiff may have difficulty in establishing a constitutional nexus in these cases. The court in *Djordjevich v. Bundesminister Der Finanzen*, 827 F. Supp. 814, 818 (D.D.C. 1993), noted in dicta that proper service of process may not be enough and that a defendant may proffer a due process challenge. The case did arise under the commercial activity exception, but shared some features common to human rights litigation.

defendant's contacts with the United States.<sup>107</sup> If this more demanding test was based on a finding of specific jurisdiction—a specific link between the alleged *jus cogens* offense and the United States—very few human rights cases could be heard here.<sup>108</sup> Although there does not appear to be a constitutional bar to applying a theory of general jurisdiction to individual foreign defendants,<sup>109</sup> the issue remains open as to foreign sovereigns.<sup>110</sup> General jurisdiction would require only some link between the defendant foreign sovereign and the United States, which could be satisfied with a showing of substantial, continuous and systematic contacts with the forum unrelated to the cause of action.<sup>111</sup> Still, courts must be satisfied that a foreign sovereign “reasonably anticipate[d] being haled into [a United States] court,”<sup>112</sup> and, at a very minimum, the exercise of jurisdiction accords with “traditional notions of fair play and substantial justice.”<sup>113</sup> Even a strong hand for general jurisdiction could get bested under this analysis.<sup>114</sup>

A trumping riposte that *jus cogens* violations trigger universal jurisdiction may not prevail.<sup>115</sup> Even if Congress does have the power to “define and punish . . . Offenses against the Law of Nations,”<sup>116</sup> it is not at all clear whether the courts of the United States may exercise such jurisdiction in

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<sup>107</sup> It is possible that courts would decide that such an inquiry was not needed since the jurisdictional basis of the FSIA (implied consent) was premised on the defendant nation's consent. See *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964).

<sup>108</sup> See *California Comment, supra* note 45, at 407-08 & n.233.

<sup>109</sup> See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984).

<sup>110</sup> The U.S. Supreme Court specifically refused to decide this issue in *Verlinden*, 461 U.S. at 490 n.15 (“We need not decide whether, by waiving its immunity, a foreign state could consent to suit based on activities wholly unrelated to the United States.”).

<sup>111</sup> See *Olsen by Sheldon v. Gov't of Mex.*, 729 F.2d 641, 648-49 (9th Cir.), *cert. denied*, 469 U.S. 917 (1984). See also *Meadows v. Dom. Rep.*, 628 F. Supp. 599 (N.D. Cal. 1986), *aff'd*, 817 F.2d 517 (9th Cir.), *cert. denied*, 484 U.S. 976 (1987); *Rush-Presbyterian-St. Luke's v. Hellenic Republic*, 690 F. Supp. 682 (N.D. Ill. 1988), *aff'd*, 877 F.2d 574 (7th Cir.), *cert. denied*, 493 U.S. 937 (1989), which both held that such contacts as maintenance of embassies or tourist offices in the United States were sufficient to satisfy rule of general jurisdiction.

<sup>112</sup> *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980).

<sup>113</sup> *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

<sup>114</sup> See *Gilson v. Republic of Ir.*, 682 F.2d 1022, 1028-29 (D.C. Cir. 1982) (finding for jurisdiction, but relying heavily on domestic due process jurisprudence of personal jurisdiction).

<sup>115</sup> See *California Comment, supra* note 45, at 409-11; *Simon, supra* note 11, at 44-48.

<sup>116</sup> U.S. CONST. art. I, § 8, cl. 10.

violation of the due process clause of the Fifth Amendment.<sup>117</sup> And just because conduct violates a *jus cogens* norm does not necessarily mean that it is an offense within the universal jurisdiction of all nations.<sup>118</sup> Lastly, when Congress adopted the TVPA, it appeared to contemplate that a due process analysis would still have to be performed under the terms of that Act.<sup>119</sup> Even if an implied *jus cogens* exception were adopted, it would remain to develop a proper approach to satisfy due process concerns in its application.

A theory of general jurisdiction for foreign sovereigns would certainly be preferable, but human rights litigators would need to exercise restraint in not bringing cases where the connections were so tenuous with the United States that a court, relying on the *International Shoe* and *World-Wide Volkswagen* principles, would dismiss it. As for individuals charged with human rights abuses, either special or general jurisdiction could be difficult to show. In any event, such a defendant could not claim the benefit of the FSIA and then argue that in addition to the proper service of process, a special jurisdictional nexus had to be formed between the individual, her conduct, and the United States. Once an individual claims to be acting as an instrumentality of a foreign sovereign, and that contention is accepted for purposes of triggering the FSIA, all that should matter is whether there is a link between the foreign sovereignty and the United States. The only question is whether that nexus must satisfy general or specific grounds.

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<sup>117</sup> For an analogous line of cases, see *United States v. Davis*, 905 F.2d 245, 248-49 (9th Cir. 1990), as confirmed and followed in *United States v. Aikins*, 946 F.2d 608, 613-14 (9th Cir. 1991); *United States v. Rasheed*, 802 F. Supp. 312, 316-20 (D. Haw. 1992); *United States v. Juda*, 797 F. Supp. 774, 780 (N.D. Cal. 1992), all of which hold that jurisdiction under the Maritime Drug Law Enforcement Act ("MDLEA"), 46 U.S.C. app. § 1903, is subject to the nexus requirements of the Fifth Amendment.

<sup>118</sup> See RESTATEMENT (THIRD), *supra* note 69, §§ 423, 702 cmt. n & n.11. *But see* *Comm. of U.S. Citizens in Nic. v. Reagan*, 859 F.2d 929, 941 (D.C. Cir. 1988) (peremptory [*jus cogens*] "norms of international law may well have . . . domestic legal effect . . . [and] may well restrain our government in the same way that the Constitution restrains it.").

<sup>119</sup> *Torture Victim Protection Act of 1991, Hearings before the Subcomm. on Immigration & Refugee Affairs of Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 24-28 (1989) (prepared statement by David P. Stewart, Assistant Legal Advisor, Department of State), 53 (prepared statement by Michael H. Posner, Executive Director, Lawyers Committee for Human Rights) [hereinafter "*TVPA Hearings*"]; 138 Cong. Rec. S2667, S2686 (Mar. 3, 1992) (statement by Sen. Specter in colloquy with Sen. Grassley) ("[T]he defendant [in a TVPA action] must have sufficient minimum contacts with the United States.").

Then there are the related questions of exhaustion of local remedies and the *forum non conveniens* doctrine. A human rights action might survive heightened due process scrutiny, but still run into trouble with these concerns. The TVPA, for example, establishes its own exhaustion requirement. This has been reason enough for some plaintiffs to avoid its invocation and rely, instead, on the ATCA.<sup>120</sup> If cases are brought within the ambit of the TVPA, plaintiffs will have to show that they have "exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred."<sup>121</sup> Such an exhaustion requirement has been considered an implicit element in some FSIA<sup>122</sup> and ATCA<sup>123</sup> claims. By making it express in the TVPA, cases brought under that Act may end up being bifurcated, with the first phase of the litigation being devoted to the defendant convincing the court that local remedies realistically exist in the subject country.<sup>124</sup>

Whether the action is brought under the ATCA, TVPA or FSIA, *forum non conveniens* will raise its ugly head.<sup>125</sup> To date, human rights litigators have been fortunate; no court has dismissed a case on *f.n.c.* grounds.<sup>126</sup> But as the *Filartiga* decision suggested, it remains a potent prudential de-

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<sup>120</sup> This was arguably the posture in *Taye v. Negewo*, No. 1:90-cv-2010-GET (Aug. 2, 1993). Whether the TVPA's exhaustion requirement preempts the ATCA (which contains no such provision) may be decided on appeal in this case.

<sup>121</sup> TVPA, § 2(b) (codified at 28 U.S.C. § 1350(2)(b)). See also Paula Rivka Schochet, Comment, *A New Role for an Old Rule: Local Remedies and Expanding Human Rights Jurisdiction Under the Torture Victim Protection Act*, 19 COLUM. HUM. RTS. L. REV. 223, 251-57 (1987).

<sup>122</sup> See *Denegri*, 1992 WL 91914 at \*3 n.9 (considering, in dicta, whether availability of remedies in Chile would make the case non-justiciable).

<sup>123</sup> See *Filartiga*, 577 F. Supp. 860 (E.D.N.Y. 1984) (on remand), where the district court noted that if an alien claimant does not seek redress within the violating nation because the damages remedy would be less, the claim might be denied. See *id.* at 865.

<sup>124</sup> See TVPA SENATE REPORT, *supra* note 62, at 9-10; TVPA Hearings, *supra* note 119, at 14 (statement John O. McGinnis, Deputy Assistant Attorney General), 28 (statement of David P. Stewart, Assistant Legal Advisor, Department of State).

<sup>125</sup> For recent jurisprudential reviews of this doctrine, see *American Dredging Co. v. Miller*, 114 S. Ct. 981 (1994) (application of the doctrine in admiralty cases); *Piper Aircraft v. Reyno*, 454 U.S. 235 (1981). For specific application of *forum non conveniens* to the Foreign Sovereign Immunities Act, see DELLAPENNA, *supra* note 21, at 134-43.

<sup>126</sup> See *Marcos (9th Cir.)*, 862 F.2d at 1361 (upholding district court's ruling that *forum non conveniens* should not be invoked in the case); *Marcos (2d Cir.)*, 806 F.2d at 361 (same holding); *Paul*, 812 F. Supp. at 212 (rejecting defendant's arguments of justiciability which closely paralleled *forum non conveniens* doctrine).

fense.<sup>127</sup> Factors relevant to the dismissal of an action for this reason include location of the evidence, costs of producing witnesses, the source of governing law, and injustice to the parties.<sup>128</sup> In human rights litigation, a significant question will be whether an alternative forum even exists which can provide justice to the plaintiff. Serious doubts about a foreign court's impartiality will defeat a motion to dismiss on the grounds of *forum non conveniens*.<sup>129</sup> Despite these reservations about the doctrine, courts will remain concerned to give it a fair application. Congress clearly intended this for the TVPA,<sup>130</sup> and it is certainly possible to imagine that in some instances a court may invoke it to dismiss the litigation, particularly when the underlying facts of the case have little connection with the United States.<sup>131</sup>

Human rights advocates have been dealt a lousy hand by *Amerada Hess* and the Foreign Sovereign Immunities Act. If the action is brought against a foreign sovereign, the Act is triggered immediately; if brought against an individual there is the substantial risk that the defendant could persuade the court that the FSIA applies to her "official" conduct. At this juncture, the litigator can throw in his hand or raise the stakes by offering the implied *jus cogens* exception to the FSIA. But even if that gambit works, due process standards, exhaustion, and *forum non conveniens* could conspire to cheat the human rights plaintiff of victory. I want to suggest here that, in developing a *jus cogens* exception, litigators may expect a backlash of judicial resistance. Moreover, to the extent that the TVPA codifies or countenances these prudential grounds for avoiding jurisdiction, it may prove to be a most unpopular vehicle for redress. The problem, of course, is that courts will

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<sup>127</sup> See 630 F.2d at 890 (calling the question "critical").

<sup>128</sup> See *Piper Aircraft*, 454 U.S. at 257-61; *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

<sup>129</sup> See *Phoenix Canada Oil Co. v. Texaco, Inc.*, 78 F.R.D. 445 (D. Del. 1978), *rev'd in part on other grounds*, 842 F.2d 1466 (3d Cir.), *cert. denied*, 488 U.S. 908 & 916 (1988). See also *California Comment*, *supra* note 45, at 406; William F. Webster, Comment, *Amerada Hess Shipping Corp. v. Argentine Republic: Denying Sovereign Immunity to Violators of International Law*, 39 HASTINGS L. J. 1109, 1139-40 (1988).

<sup>130</sup> See 138 Cong. Rec. S2667, S2668 (Mar. 3, 1992) (remark of Sen. Specter in colloquy with Sen. Grassley) ("Nothing in this legislation is intended to or does affect the doctrine of *forum non conveniens*, which remains applicable to any lawsuit brought under this act."). See also *TVPA Hearings*, *supra* note 119, at 9 (statement of John O. McGinnis, Deputy Assistant Attorney General) (arguing that *forum non conveniens* doctrine should be retained in TVPA suits).

<sup>131</sup> See *Kane*, *supra* note 102, at 411 n.135.



likely rule that the TVPA provides the sole means of remedy when the gravamen of the case is torture or extrajudicial killing. We may all come to wish that the TVPA had never been enacted.<sup>132</sup>

As if this were not enough, even if the FSIA is circumvented under these conditions, a common law residual of foreign sovereign immunity may remain to bar jurisdiction. This normally should not be an issue, most courts being in agreement that the FSIA fully codified foreign sovereign immunity law.<sup>133</sup> Despite some mutterings of the government in *Chuidian* that such common law may remain,<sup>134</sup> this has not been widely credited, except for two distinct circumstances.

The first is for older claims. These raise problems because the FSIA's "restrictive" theory of foreign sovereign immunity<sup>135</sup> has not been deemed retroactive. Claims arising before the 1950s may be decided on absolute foreign sovereign immunity theories, and thus be rejected.<sup>136</sup> Although most human rights claims would be cut off in any event by some statute of limitations defense,<sup>137</sup> this line of cases would have to be reconciled by those arguing for a *jus cogens* exception. The cause of action in *Princz*, for example, arose from the Nazi atrocities of World War II.<sup>138</sup> Although Judge Sporkin on the district court did not consider the retroactivity issue, he implicitly ruled that conduct constituting a *jus cogens* violation would not be insulated even under an absolute theory of sovereign immunity. This

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<sup>132</sup> It has to be acknowledged, of course, that the primary benefit of the TVPA is that it gives U.S. citizens and residents the right to sue. See TVPA § 2(a), 28 U.S.C. § 1350(2)(a) (1994).

<sup>133</sup> See generally DELLAPENNA, *supra* note 21, at 8-13. See also FSIA HOUSE REPORT, *supra* note 20, at 6606.

<sup>134</sup> See *supra* notes 32-34 and accompanying text (discussing *Chuidian*, 912 F.2d at 1102-03).

<sup>135</sup> Prior to the Tate Letter of 1952, a foreign sovereign was absolutely immune from suit in the courts of the United States. See DELLAPENNA, *supra* note 21, at 1-8, 347.

<sup>136</sup> See *Carl Marks & Co. v. U.S.S.R.*, 841 F.2d 26, 27 (2d Cir.), *cert. denied*, 487 U.S. 1219 (1988); *Jackson v. P.R.C.*, 596 F. Supp. 386, 387-89 (N.D. Ala. 1984), *aff'd*, 794 F.2d 1490, 1497-99 (11th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987); *Slade v. Mex.*, 617 F. Supp. 351, 356-58 (D.D.C. 1985), *aff'd mem.*, 790 F.2d 163 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1032 (1987); *Djordjevich*, 827 F. Supp. at 816-17. For a criticism of these cases, see Paust, *supra* note 98, at 50-57.

<sup>137</sup> See DELLAPENNA, *supra* note 21, at 340-41.

<sup>138</sup> See 813 F. Supp. at 23-25.

proved to be an untenable holding on appeal.<sup>139</sup> Even if it were clear that genocide was a *ius cogens* violation in 1945, it was certainly not apparent that such conduct would be an exception to a rule of otherwise absolute sovereign immunity.

A second common law concern is head-of-state immunity, much-litigated of late. This doctrine has, apparently, withstood codification by the FSIA,<sup>140</sup> but has been judicially limited. *Paul v. Avril* recognized that a foreign government can waive head-of-state immunity;<sup>141</sup> these same cases (as well as others) hold that head-of-state immunity is not available for deposed rulers.<sup>142</sup> There are also other cases which may be read as giving substantial deference to Executive branch determinations on this point.<sup>143</sup> In *Lafontant v. Aristide*, one question raised was whether the defendant, the exiled President of Haiti, was entitled to head-of-state immunity to claims brought under the TVPA. The district court concluded that he was. Judge Weinstein looked to the legislative history of the TVPA indicating a Congressional intent for the Act not to displace common law principles of

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<sup>139</sup> *Princz*, 26 F.3d at 1175-76. The D.C. Circuit was guilty of some circumlocution on this issue as well. It did not rule that the pre-Tate letter jurisprudence of sovereign immunity was such as to have cloaked Germany. Instead, the majority ruled that there would have been no jurisdiction for a district court to have entertained Princz's suit under 28 U.S.C. §§ 1331 & 1332. *See id.* at 1176.

<sup>140</sup> *See Lafontant*, 844 F. Supp. at 129-31. *See generally*, Jerrold L. Mallory, Comment, *Resolving the Confusion over Head of State Immunity: The Defined Right of Kings*, 86 COLUM. L. REV. 169 (1986).

<sup>141</sup> 812 F. Supp. at 211. *See also In re Grand Jury Proceedings*, Doc. No. 700, 817 F.2d 1108, 1111 (4th Cir.), *cert. denied sub nom. Marcos v. United States*, 484 U.S. 890 (1987); *Lafontant*, 844 F. Supp. 128, 129 (saying that waiver of head-of-state immunity is possible, but that military junta in Haiti cannot waive immunity of President Aristide, still recognized by the United States as head-of-state).

<sup>142</sup> *See Paul*, 812 F. Supp. at 211 n.5; *In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) (noting in dicta that there is "respectable authority for denying head-of-state immunity to a former head-of-state for private or criminal acts in violation of American law."). *See also Ex-King Farouk of Egypt v. Christian Dior, S.A.R.L.*, 84 Clunet 717 (Cour d'Appel Paris 1957), *reprinted in* 24 I.L.R. 228 (1957) (after abdication, monarch is not entitled to head-of-state immunity).

<sup>143</sup> *See Lafontant*, 844 F. Supp. at 129; *United States v. Noriega*, 746 F. Supp. 1506, 1520-21 (S.D. Fla. 1990); *Saltany v. Reagan*, 702 F. Supp. 319, 320 (D.D.C. 1988), *aff'd in part, rev'd in part*, 886 F.2d 438 (D.C. Cir. 1989), *cert. denied*, 495 U.S. 932 (1990); *Estate of Domingo v. Republic of Phil.*, 694 F. Supp. 782 (W.D. Wash. 1988).

head-of-state immunity.<sup>144</sup>

The court in *Lafontant* said, moreover, that head-of-state immunity was absolute; it made no difference that the basis of the claim was an extrajudicial killing allegedly ordered by the defendant in his private capacity.<sup>145</sup> This may run counter to dicta in an earlier Second Circuit decision,<sup>146</sup> relying on a passage in *Schooner Exchange v. McFaddon*,<sup>147</sup> that there is "respectable authority for denying head-of-state immunity to a former head-of-state for private or criminal acts in violation of American law."<sup>148</sup> The Marcos cases obviously present the problem of a former head-of-state, whose immunity has been disclaimed and waived, and who has been sued for conduct that was arguably private—and criminal. Of course the Ninth Circuit did not reach this issue in *Trajano*;<sup>149</sup> it reached a happy conclusion in its denial of individual immunity under the FSIA.<sup>150</sup> Whether head-of-state immunity is really absolute thus remains to be settled. Distinguishing private from official acts may be one approach, as suggested by Judge Weinstein in *Lafontant*. Or, as the Second Circuit noted in *In re Doe*, something more may be needed: an illegal character to the conduct alleged as the basis of the suit. Even if a *jus cogens* exception is developed to the Foreign Sovereign Immunities Act, it will remain important to fashion arguments debunking human rights defendants' claims to some *sui generis*, common law species of absolute immunity.

#### IV. CUT AND RUN: BEATING THE HOUSE IN HUMAN RIGHTS CASES

With this new deck of cards seemingly stacked against us, how can we win? The joker in the deck is, obviously, the Supreme Court's 1989 decision in *Amerada Hess*. If that were overruled, suits could proceed against foreign sovereigns directly under the ATCA or TVPA without fear of an immunity bar. With that same stroke, individual defendants would be

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<sup>144</sup> See *Lafontant*, 844 F. Supp. at 131-32 (citing TVPA SENATE REPORT, *supra* note 62, at 7-8 and TVPA HOUSE REPORT, *supra* note 62, at 5).

<sup>145</sup> Judge Weinstein concluded his order by noting that "[w]e need not consider whether an act of President Aristide in ordering the killing would be official or private because he now enjoys head-of-state immunity." *Id.* at 132.

<sup>146</sup> *In re Doe*, 860 F.2d 40 (2d Cir. 1988).

<sup>147</sup> 11 U.S. (7 Cranch) 116, 142-47 (1812).

<sup>148</sup> 860 F.2d at 45.

<sup>149</sup> This was noted in *Lafontant*, 844 F. Supp. at 132.

<sup>150</sup> See *supra* notes 47-53 and accompanying text.

denied the potential cover that the FSIA currently provides. Congress could have impliedly overruled the *Amerada Hess* opinion when it crafted the terms of the TVPA. But by only extending liability to individuals, Congress showed its disinclination to do so.<sup>151</sup> So, absent some extraordinary shift in sentiment on the High Court, we will just have to live with the legacy of *Amerada Hess*. Another option would be to do an end-run around the FSIA by securing judicial recognition of the application of an exception applicable in human rights litigation. A *jus cogens* exception, based on the implied waiver provision of section 1605(a)(1), is surely the best candidate. But I have stressed here there could be some unintended consequences of such a strategy.

The next option would be to amend the FSIA itself in order that it could entertain human rights suits against foreign sovereigns. After the Supreme Court's decision in *Nelson v. Saudi Arabia*,<sup>152</sup> a number of such amendments have been proposed in Congress. One bill introduced in the 102d Congress by Congressman Lawrence J. Smith of Florida,<sup>153</sup> although intended specifically to overrule the result in *Nelson*,<sup>154</sup> actually had much broader consequences. That bill would have inserted the terms of the TVPA into the FSIA as a new exception to foreign sovereign immunity.<sup>155</sup> In other words, if a claim fell into the ambit of the TVPA, it could be brought against a foreign sovereign as long as the torturer or extrajudicial killer was "acting within the scope of his or her office or employment."<sup>156</sup> The Smith legislation was favorably reported by the House Judiciary Committee,<sup>157</sup> but killed on the House floor after substantial objection was raised that it would "not be consistent with the general terms of international law

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<sup>151</sup> See TVPA § 2(a), 28 U.S.C. § 1350(2)(a) (1994). See also TVPA HOUSE REPORT, *supra* note 62, at 4-5; TVPA SENATE REPORT, *supra* note 62, at 7.

<sup>152</sup> See *supra* notes 9 & 60 and accompanying text.

<sup>153</sup> H.R. 2357, 102d Cong., 2d Sess. (1992) [hereinafter "FSIA AMEND. I"].

<sup>154</sup> See H.R. Rep. No. 102-900, 102d Cong., 2d Sess. 3 (1992) [hereinafter "FSIA AMEND. I REPORT"].

<sup>155</sup> See FSIA AMEND. I, § 1(3), which would have added this language as an extra exception to FSIA section 1605(a)(7): "Not otherwise encompassed in paragraph (2), in which monetary damages are sought against a foreign state for personal injury or death of a United States citizen occurring in such foreign state and caused by the torture or extrajudicial killing of that citizen by such foreign state or by any official or employee of such foreign state acting within the scope of his or her office or employment . . ." *Id.* (emphasis added).

<sup>156</sup> *Id.*

<sup>157</sup> See FSIA AMEND. I REPORT, *supra* note 154, at 1.

nor with the basic tenets of legal jurisdiction.”<sup>158</sup>

Similar legislation was introduced in the 103d Congress. In attempting to answer the criticisms of the first bill’s detractors, Congressman Smith offered to introduce in 1991 a much more circumspect piece of legislation which would have provided an exception to foreign sovereign immunity only

(a) for tortious acts committed against an American outside the United States; (b) and caused by employees or agents of a foreign country or an operation substantially controlled by a foreign country; and (c) because of employment contracts made in the United States by the foreign country or its agents.<sup>159</sup>

This was much more narrowly-tailored to overturn the result in *Nelson*, involving as it (arguably) did torture and detention arising from an American’s employment in a foreign country after recruitment here in the United States.<sup>160</sup> However, this change would not go so far as to provide relief for the vast class of human rights litigants.

In other bills introduced in the 103d Congress (and likely to be proposed in the 104th), one bill was simply a resubmission of Congressman Smith’s first exercise.<sup>161</sup> Another piece of legislation,<sup>162</sup> introduced by Congressmen Schumer and Pallone in response to both the *Nelson* and *Princz* cases,<sup>163</sup> went one dramatic step further. Although modelled on Representative Smith’s earlier bill, incorporating the terms of the TVPA as an exception into the FSIA, this legislation’s operative terms provided that the exception would apply to those actions

in which monetary damages are sought against a foreign state for personal injury or death of a United States citizen occurring in such foreign state and caused by the torture or

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<sup>158</sup> *Id.* at 11 (dissenting views of Judiciary Committee minority).

<sup>159</sup> See 137 CONG. REC. H3124 (May 15, 1991) (remarks by Rep. Smith).

<sup>160</sup> See 113 S. Ct. at 1474-76.

<sup>161</sup> H.R. 934, 103d Cong., 1st Sess. (1993) (introduced by Rep. Mazzoli). Another bill, S. 825, 103d Cong., 1st Sess. (1993) (introduced by Sen. Specter), would create an FSIA exception for U.S. citizens or residents injured abroad by acts of international terrorism. See *id.* § 1(b)(3). See also 139 CONG. REC. S4924 (remarks by Sen. Specter).

<sup>162</sup> H.R. 2363, 103d Cong., 1st Sess. § 1(3) (1993) [hereinafter “FSIA AMEND. II”].

<sup>163</sup> See 139 CONG. REC. E1444 (June 9, 1993) (extension of remarks by Rep. Schumer).

extrajudicial killing of that citizen by such foreign state *or by a war crime committed by the military of such foreign state* or by any official or employee of such foreign state acting within the scope of his or her office or employment  
 . . . .<sup>164</sup>

The addition of the provision for war crimes, intended to cover Hugo Princz's situation, moved this amendment beyond the scope of the TVPA. It also vastly complicated construction of the clause since it is not at all clear whether the essential, qualifying language regarding "scope of . . . office or employment" modifies either or both the causes of action of torture/extrajudicial killing and war crimes.

Insinuating the TVPA into the FSIA as an exception to immunity will require us to again fashion a coherent attribution jurisprudence for human rights cases. If the FSIA is amended in the ways proposed, foreign sovereigns will obviously take steps to disclaim the acts of torturers, killers, and war criminals in their employ. They will maintain that torture and killing can never be within the "scope of . . . office or employment." Since our recent FSIA attribution cases make clear that none of these acts can be considered "sovereign" for purposes of triggering immunity,<sup>165</sup> it will remain for the human rights litigant to make some intelligent distinction here. Having the independent cause of action under the joint FSIA-TVPA will relieve advocates of resolving the riddle confronted by Judge Kaufman in *Filartiga* and Judge Rymer in *Trajano*: how to satisfy the jurisdictional predicate of the Alien Tort Statute (an international law violation attributed to a foreign sovereign) without conceding immunity. Proposals to amend the FSIA thus offer one real solution to these problems.

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This essay has tried not only to explore the nuances of current human rights practice in our courts, but also to chart the interconnection of the legal rules bearing on foreign sovereign immunity. Despite the small number of these principles, their doctrinal combinations and outcomes in practice, as with a newly-shuffled deck of cards, seems to be endless. Moreover, the obstacles to a successful result for a human rights plaintiff are formidable.

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<sup>164</sup> FSIA AMEND. II, *supra* note 162, § 1(3) (emphasis added).

<sup>165</sup> See *supra* notes 46-68 and accompanying text.

We need not only good cards, but winning hands. In my extended metaphor of lawless villains and devoted enforcers of human rights, we need, most of all, to avoid the fate of becoming complacent and making the mistake of drawing aces and eights.<sup>166</sup> Our clients have suffered enough without enduring the legal ignominy of holding the dead man's hand.

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<sup>166</sup> See *How the West was Won—and Lost (Old West chronology)*, 16 LIFE 8 (Apr. 5, 1993) (“1876: . . . James Butler ‘Wild Bill’ Hickok, a frontier scout and marshal of Abilene, Kans., shot to death while holding what came to be called the dead man’s poker hand—aces and eights—in a saloon in Deadwood, S. Dak.”).

