

FOREIGN OFFICIAL IMMUNITY AND THE “BASELINE” PROBLEM

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INTRODUCTION

The parable is sometimes told of a person who, having asked for directions, receives the response: “I wouldn’t start from here.” Although there can be more than one path to the same destination, starting points do matter. At times, starting points can even determine outcomes. This is true of foreign official immunity, as recent judicial opinions and academic commentary illustrate.

By “foreign official immunity,” I mean the immunity of current or former officials of one state from the adjudicatory jurisdiction of another state. Such immunity could exist under the forum state’s domestic law, under international law, or both. In thinking about jurisdictional immunity, it is helpful to distinguish between status-based immunity, which attaches to an individual while he or she occupies a particular position, and conduct-based immunity, which attaches to certain acts performed by individuals on behalf of states.¹

Conduct-based immunity has emerged as a more contested category than status-based immunity, particularly in cases that are not explicitly governed by statute or treaty. In several recent cases, domestic courts have grappled with the scope of conduct-based immunity as a matter of common law, statutory law, and customary international law. In so doing, some courts have failed to distinguish between precedents involving defendants who are physically present in the forum state’s territory, and precedents involving defendants who have not been served within the jurisdiction. Insisting on this distinction might at first seem counterintuitive, because conduct-based immunity attaches to the act, not the individual. However, all cases of

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1. I have elaborated on this point elsewhere. See Chimène I. Keitner, *Annotated Brief of Professors of Public International Law and Comparative Law as Amici Curiae in Support of Respondents*, 15 LEWIS & CLARK L. REV. 609, 621–22 (2011) [hereinafter Keitner, *Annotated Brief*] (amicus brief for *Samantar*); Chimène I. Keitner, *The Common Law of Foreign Official Immunity*, 14 GREEN BAG 2D 61, 63–67 (2010) [hereinafter Keitner, *The Common Law*]; Chimène I. Keitner, *Foreign Official Immunity After Samantar*, 44 VAND. J. TRANSNAT’L L. (forthcoming 2011) [hereinafter Keitner, *Foreign Official Immunity*]; Chimène I. Keitner, *Officially Immune? A Response to Bradley and Goldsmith*, 36 YALE J. INT’L L. ONLINE 1, 8–9 (2010), <http://www.yjil.org/docs/pub/o-36-keitner-officially-immune.pdf>.

immunity involve competing jurisdictional principles. When a defendant is not physically present within the forum state, there is no competing principle of territorial jurisdiction (unless the conduct occurred in the forum state, in which case most states recognize an exception to state immunity for tortious conduct that results in personal injury, death, or property damage or loss). When a defendant is physically present within the forum state, a competing principle of plenary jurisdiction over territory must be taken into account. In these cases, conduct-based immunity might not preclude the exercise of adjudicatory jurisdiction, leaving it to other doctrines (such as the political question doctrine or the act of state doctrine) to curb the exercise of adjudicatory jurisdiction where appropriate.

This overlooked distinction might be called the “baseline” problem. Some judges and scholars begin with the assumption that all conduct performed on behalf of a foreign state is entitled to conduct-based immunity. This could be called the attribution theory of immunity, since it insists on symmetry between actions that are attributable to the state and those that benefit from the state’s immunity. Starting from a baseline of immunity, those who subscribe to an attribution theory then search for an exception to immunity, either based on the consent of the official’s home state (waiver), or in an international treaty or custom.² Although I have argued elsewhere that the precedents invoked to support the attribution theory actually do not stand for the proposition that all acts performed on behalf of a state are entitled to immunity,³ that is not my focus here.

A second approach, which might be called the territorial theory, begins with a presumption in favor of the territorial jurisdiction of the forum state.⁴ This is the accepted approach where the conduct occurs on the forum state’s territory. It also makes sense when a current or former foreign official who is not entitled to status-based immunity (including immunity for participation in a special diplomatic mission) enters the forum state’s

2. See, e.g., Special Rapporteur on the Immunity of State Officials from Foreign Criminal Jurisdiction, *Second Rep. on Immunity of State Officials from Foreign Criminal Jurisdiction*, Int’l Law Comm’n, ¶ 24, U.N. Doc. A/CN.4/631 (June 10, 2010) (by Roman Anatolevich Kolodkin) (“The Special Rapporteur considers it right to use the criterion of the attribution to the State of the conduct of an official in order to determine whether the official has immunity *ratione materiae* and the scope of such immunity.”); Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity, Individual Officials, and Human Rights Litigation*, 13 GREEN BAG 2D 9, 13 (2009) (“Since a state acts through individuals, a suit against an individual official for actions carried out on behalf of the state is in reality a suit against the foreign state, even if that is not how the plaintiff captions his or her complaint.”).

3. See Keitner, *Annotated Brief*, *supra* note 1, at 616–18, 623–27; see also Jane Wright, *Retribution but No Recompense: A Critique of the Torturer’s Immunity from Civil Suit*, 30 OXFORD J. LEGAL STUD. 143, 174–75 (2010).

4. See, e.g., Lee M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT’L L. 741, 744 (2003) (“[A]s a fundamental matter, state immunity operates as an exception to the principle of adjudicatory jurisdiction.”); R. Higgins, *Certain Unresolved Aspects of the Law of State Immunity*, 29 NETH. INT’L L. REV. 265, 271 (1982) (“It is sovereign immunity which is the exception to jurisdiction and not jurisdiction which is the exception to a basic rule of immunity.”); Lorna McGregor, *Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty*, 18 EUR. J. INT’L L. 903, 912 (2007) (characterizing immunity as “an exception to the jurisdiction of the forum state”).

territory, or when an official who was previously excluded from the forum state’s territory as a *persona non grata* subsequently re-enters the territory. In such cases, judges should weigh whether or not the exercise of adjudicatory jurisdiction would be reasonable in the circumstances, starting with a presumption in favor of plenary jurisdiction.

Courts and commentators generally agree that some actions performed by individuals on behalf of a state can entail both personal and state responsibility.⁵ There also appears to be an emerging consensus that national courts can exercise criminal jurisdiction over individuals for certain internationally unlawful conduct performed on behalf of a foreign state.⁶ However, agreement on the role of national courts in holding individuals *civilly* liable has proved more elusive, particularly in jurisdictions that differentiate sharply between civil and criminal proceedings.⁷

Adherents of the attribution theory regard a suit against an individual as a suit against the state. They would therefore import the principle of foreign *state* immunity wholesale into civil actions against *individuals*, with or without a domestic statutory basis for doing so. In their view, unless there is a treaty or established norm of customary international law *denying* immunity from civil suit to individual officials, such suits impermissibly violate foreign state immunity absent an explicit waiver by the foreign state. By contrast, adherents of the territorial theory and others take the view that international law does not require *granting* civil immunity where the requested relief would not run directly against the foreign state itself.

The question thus becomes whether a domestic court must search for an exception to immunity, or an exception to jurisdiction. An analysis of recent cases shows that courts are not always clear about which of these inquiries they are conducting. This brief symposium contribution suggests

5. See Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, art. 7, in Rep. of the Int’l Law Comm’n, 53d sess., at 43, U.N. Doc. A/56/10; U.N. GAOR, 56th Sess., Supp. No. 10 (2001) [hereinafter Draft Articles]. The attribution of an individual’s actions to the state for the purposes of state responsibility is “without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.” *Id.* art. 58; see, e.g., Prosecutor v. Blaskic, Case No. IT-95-14-PT, Judgment, ¶ 41 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 29, 1997), <http://www.icty.org/x/cases/blaskic/acdec/en/71029JT3.html> (“[T]hose 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.”).

6. See Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 SUP. CT. REV. 213, 238; Dapo Akande & Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EUR. J. INT’L L. 815, 839–40 (2010).

7. For a discussion of the relationship between civil and criminal immunity, see, for example, Keitner, *Foreign Official Immunity*, *supra* note 1; Beth Stephens, *The Modern Common Law of Foreign Official Immunity*, 79 FORDHAM L. REV. 2669, 2697 (2011); Wright, *supra* note 3, at 144–45. For a discussion of the relationship between universal criminal jurisdiction and universal civil jurisdiction, see generally Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT’L L. 142 (2006).

that searching for an exception to immunity might not, in fact, be the appropriate starting point, particularly when the defendant is present on the forum state's territory. The answer in such cases might well be "I wouldn't start from here."

I. THE UNITED KINGDOM

In 2006, the United Kingdom House of Lords confronted the question of whether the U.K. State Immunity Act⁸ (U.K. SIA) permits a civil action against foreign officials who were not physically present in the United Kingdom for torture that took place in Saudi Arabia.⁹ This question had not previously been addressed squarely by the lower courts in other cases, at least one of which had assumed that individual foreign officials were *not* immune from service of process outside the United Kingdom.¹⁰

In 2003, a trial court invoked the U.K. SIA to deny Ronald Jones permission to serve a Saudi Arabian official outside of the United Kingdom with proceedings by an alternative method in a suit for torture and other unlawful acts.¹¹ Mr. Jones appealed, arguing that Part 1 of the U.K. SIA was incompatible with his right of access to a court under Article 6(1) of the European Convention on Human Rights.¹² The issue on appeal was not whether the Saudi official enjoyed immunity under the U.K. SIA, but rather whether the United Kingdom's obligations under the European Convention foreclosed it from providing such immunity in a domestic statute. The Court of Appeal considered both the U.K. SIA and the effect of Article 6 of the European Convention to find that individual foreign officials are not entitled to conduct-based immunity for torture.¹³ The House of Lords reversed.¹⁴

The Court of Appeal grounded its reasoning in the seriousness of the alleged conduct. Lord Justice Mance wrote a lengthy opinion, in which both Lord Neuberger and Lord Phillips concurred. Lord Phillips also wrote separately to indicate his revised understanding of the relationship between civil and criminal immunity since his participation in the House of Lords's decision in *Ex parte Pinochet (No. 3)*.¹⁵

8. 1978, c. 33 (U.K.).

9. *See Jones v. Ministry of the Interior of Saudi Arabia*, [2006] UKHL 26, [2] (appeal taken from Eng.).

10. *See Al-Adsani v. Government of Kuwait*, 100 I.L.R. 465, 466 (Ct. App. 1994) (Eng.) (referencing but not reviewing the High Court's conclusion that the three individual defendants were not immune from service of process outside the jurisdiction).

11. *Jones*, [2006] UKHL [2] (Lord Bingham of Cornhill).

12. *Id.* The appeal was consolidated with a similar appeal by Alexander Mitchell, William Sampson, and Leslie Walker, who were also denied leave to serve Saudi Arabian officials outside the United Kingdom. *Id.*

13. *Jones v. Ministry of the Interior of Saudi Arabia*, [2004] EWCA (Civ) 1394, [96], [2005] Q.B. 699 (Eng.).

14. *Jones*, [2006] UKHL [35].

15. [2000] 1 A.C. 147 (H.L.) (appeal taken from Eng.); *see Jones*, [2004] EWCA (Civ) [128] (Lord Phillips of Worth Matravers) (citing *Pinochet No. 3*, [2000] 1 A.C. at 281). Lord Phillips is currently the President of the Supreme Court of the United Kingdom, *see Biographies of the Justices*, THE SUPREME COURT,

Lord Justice Mance began by observing that

[t]here are important distinctions between the considerations governing (a) a claim to immunity by a state in respect of itself and its serving head of state and diplomats and (b) a state’s claim for immunity in respect of its ordinary officials or agents generally (including former heads of state and former diplomats).¹⁶

Permission for the claimant to serve outside the jurisdiction would ordinarily be available because the alleged torts involved damage (psychological harm) suffered within the jurisdiction.¹⁷ The question, then, was whether Saudi Arabia’s state immunity posed a barrier to the jurisdiction of the English courts over the Saudi officials.

Lord Justice Mance recognized that the pre-1978 common law governing the immunity “in respect of state officials or agents” was embedded “in the context of the general prohibition against impleading a foreign sovereign state.”¹⁸ The claimants in *Jones* relied heavily on the argument that “systematic torture by a state official (or other person acting in a public capacity) cannot be regarded as a function of such an official or person,” even if such action would engage state responsibility.¹⁹ In response, Saudi Arabia claimed that, “since the state is clearly responsible for torture, committed by any of its officials in an official context, any suit against such an official indirectly impleads The Kingdom.”²⁰ Lord Justice Mance observed that, under Saudi Arabia’s reasoning, “criminal proceedings against an alleged torturer may [also] be said indirectly to implead the foreign state,”²¹ yet this result was permitted by the House of Lords in *Pinochet (No. 3)*.²² Moreover, a civil suit against an individual would not involve executing a judgment against state property. Lord Justice Mance continued:

There would be no incongruity in allowing execution against the individual assets of an individual torturer, if these could be located and made the subject of execution. And any claim to hold the *state* itself responsible would have to be brought in that state, or in an international forum, and proved quite separately from any claim against the individual officer.²³

<http://www.supremecourt.gov.uk/about/biographies.html> (last visited Oct. 20, 2011), which replaced the House of Lords in October 2009, see *The Supreme Court*, THE SUPREME COURT, <http://www.supremecourt.gov.uk/about/the-supreme-court.html> (last visited Oct. 20, 2011).

16. *Jones*, [2004] EWCA (Civ) [23] (Mance L.J.).

17. *Id.* [29].

18. *Id.* [36]. Lord Justice Mance’s opinion discusses many of these cases, as well as more recent U.S. cases, in great detail. See *id.* [31]–[43] (common law cases); *id.* [61]–[68] (more recent U.S. cases). On the earlier common law cases, see also Keitner, *Annotated Brief*, *supra* note 1, at 623–26.

19. *Jones*, [2004] EWCA (Civ) [69] (Mance L.J.).

20. *Id.* [72].

21. *Id.* [75].

22. *Ex parte Pinochet (No. 3)*, [2000] 1 A.C. 147 (H.L.), at 203–05.

23. *Jones*, [2004] EWCA (Civ) [77].

There would, however, be an incongruity in allowing criminal jurisdiction while precluding civil jurisdiction for the same claims.²⁴

In sum, Lord Justice Mance concluded, and his colleagues agreed, that an absolute jurisdictional bar was inappropriate and had no basis in governing law. Rather, he favored a flexible approach:

Quite apart from any separate principle of state immunity, the fact that a civil claim was being brought against an official or agent of a foreign state in respect of conduct in that state, and the sensitivity of any adjudication by the courts of another state upon such an issue, would rightly feature as important factors in any decision whether or not to exercise any such jurisdiction.²⁵

Lord Phillips wrote separately to underline his agreement that “[i]f civil proceedings are brought against individuals for acts of torture in circumstances where the state is immune from suit *ratione personae*, there can be no suggestion that the state is vicariously liable.”²⁶ In such a case, “[i]t is the personal responsibility of the individuals, not that of the state, which is in issue. The state is not indirectly impleaded by the proceedings.”²⁷ Although this would also be true of civil actions for conduct not amounting to torture, the Court of Appeal found that torture was distinguishable at least in part because “no state could be required to provide an indemnity”²⁸ for such a serious violation of international law. One might argue, alternatively, that the seriousness of the alleged conduct should go to the reasonableness of exercising jurisdiction, rather than the existence or lack of immunity.

The House of Lords disagreed with the Court of Appeal’s conclusion that it is “impossible to identify any settled international principle affording the state the right to claim immunity in respect of claims directed against such an official, rather than against the state itself or its head or diplomats.”²⁹ I have argued elsewhere that the House of Lords’s opinion rests on a misreading of precedent, in contrast to the more faithful reading by the Court of Appeal.³⁰ Nevertheless, it is worthwhile to trace the steps of the

24. *Id.* [79].

25. *Id.* [81].

26. *Id.* [128] (Lord Phillips of Worth Matravers).

27. *Id.*

28. *Id.* [35] (Mance L.J.); *see also id.* [76]. This distinction arose in the court’s discussion of the Ontario Court of Appeal’s decision in *Jaffe v. Miller* (1993) 64 O.A.C. 20 (Can. Ont. C.A.), a case that emphasized the role of indemnification in finding that the Florida Attorney General and other Florida officials, who had filed criminal charges that led to the plaintiff’s conviction in Florida, were immune from service of process outside the jurisdiction. *Id.* at 31, 33. By contrast, the Irish Supreme Court has held that the possibility that a foreign government might indemnify the official does not turn the suit into one against the foreign government: “Where the Sovereign is not named as a party and where there is no claim against him for damages or otherwise, and where no relief is sought against his person or his property, [the Sovereign cannot] be said to be impleaded either directly or indirectly.” *Saorstát & Cont’l S.S. Co. v. de las Morenas*, [1945] I.R. 291, *reprinted in* 12 I.L.R. 97, 101 (Ir.).

29. *Jones*, [2004] EWCA (Civ) [83] (Mance L.J.).

30. *See Keitner, Annotated Brief, supra* note 1, at 623–28.

House of Lords’s reasoning, which represents the most sustained (although flawed) engagement by a state’s highest court with the question of an individual’s conduct-based immunity from civil suit.

The House of Lords’s opinion begins with Section 1(1) of the U.K. SIA, which provides that “[a] State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.”³¹ The SIA then goes on to define a “State” to include at least some individuals, specifically heads of state.³² The SIA expressly excludes criminal proceedings,³³ also suggesting that individual officials are covered by the SIA.³⁴ With respect to the immunity of individuals under the SIA, Lord Bingham indicated that “[i]t is not suggested that the Act is in any relevant respect ambiguous or obscure.”³⁵

Lord Bingham began with the premise that “[t]he foreign state’s right to immunity cannot be circumvented by suing its servants or agents.”³⁶ In other words, he began with a baseline assumption that individual officials always share the state’s immunity. However, in finding that the instant suits would indeed “circumvent” Saudi Arabia’s immunity, he imported language from cases involving claims for damages or injunctive relief that would run directly against the state into the different context of actions seeking damages solely from the individual.³⁷ Contrary to Lord Bingham’s reading, cases prior to *Jones*, including the very cases *Jones* cites, support the proposition that absolute immunity is not the appropriate answer where relief would not run directly against the state.³⁸ Instead, where the state is not directly impleaded, other prudential doctrines such as the political question doctrine, exhaustion of local remedies, or forum non conveniens enable courts to decline to exercise their adjudicatory jurisdiction where doing so would have undesirable collateral effects.

In *Jones*, the House of Lords succumbed to the fallacy that adjudicating conduct that is *attributable* to a state necessarily *impleads* that state.³⁹ Having embraced this approach as his starting point, Lord Bingham focused the bulk of his analysis on whether or not the claimants could overcome the individual defendants’ statutory immunity under the U.K. SIA by invoking

31. State Immunity Act, 1978, c. 33, § 1(1) (U.K.); see *Jones v. Ministry of the Interior of Saudi Arabia*, [2006] UKHL 26, [9] (Lord Bingham of Cornhill) (appeal taken from Eng.).

32. State Immunity Act § 14(1)(a).

33. *Id.* § 16(4).

34. In these respects, as Lord Justice Mance observed, the U.S. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.), “is in very different wording to the United Kingdom’s State Immunity Act 1978.” *Jones*, [2004] EWCA (Civ) [63] (Mance L.J.).

35. *Jones*, [2006] UKHL [13] (Lord Bingham of Cornhill).

36. *Id.* [10].

37. See *id.*

38. For a discussion of these cases, see Keitner, *Annotated Brief*, *supra* note 1, at 623–29.

39. *Jones*, [2006] UKHL [13]. For a contrary argument, see Keitner, *The Common Law*, *supra* note 1, at 69–71.

Article 6 of the European Convention.⁴⁰ He therefore set out to determine whether the SIA's restriction on the claimants' access to an English court was proportionate and directed to a legitimate objective.⁴¹ On this point, Lord Bingham did not find the House of Lords's conclusion in *Pinochet* (No. 3) helpful to the claimants, because it "concerned criminal proceedings falling squarely within the universal criminal jurisdiction mandated by the Torture Convention and did not fall within Part 1 of the 1978 Act."⁴² (He might also have added that Pinochet was not entitled to immunity under the SIA, because the SIA excludes criminal proceedings.)⁴³ Because he began from a presumption of individual immunity, Lord Bingham examined *Pinochet* and other cases⁴⁴ from the perspective of the search for an exception to immunity.⁴⁵ However, the four arguments that persuaded him to start from this baseline are deeply problematic:

(1) Lord Bingham emphasized that the *Arrest Warrant*⁴⁶ decision of the International Court of Justice found that an allegation of a *jus cogens* violation does not override the status-based immunity of a sitting foreign minister.⁴⁷ However, he neglected to emphasize that this decision did *not* find that lower-level officials or former officials are immune from the jurisdiction of a foreign court;

(2) Lord Bingham noted that Article 14 of the Convention Against Torture does not mandate universal civil jurisdiction.⁴⁸ However, even if this is so, it says nothing about conduct-based immunity where domestic jurisdiction otherwise exists;

(3) Lord Bingham attached weight to the definition of "state" in the 2004 UN Convention on Jurisdictional Immunities, which includes "representatives of the State acting in that capacity."⁴⁹ However, the convention is not in force due to the low number of ratifications, and this definition of "state" is not uniformly reflected in domestic state immunity acts; and

(4) Lord Bingham observed that there is no overwhelming international consensus *requiring* states to exercise universal civil jurisdiction over serious international law violations.⁵⁰ However,

40. *Jones*, [2006] UKHL [14] (Lord Bingham of Cornhill).

41. *Id.*

42. *Id.* [19].

43. See State Immunity Act, 1978, c. 33, § 16(4) (U.K.).

44. *Jones*, [2006] UKHL [20].

45. *Id.* [27].

46. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 22 (Feb. 14).

47. *Jones*, [2006] UKHL [24].

48. *Id.* [25]. But see Christopher Keith Hall, *The Duty of States Parties to the Convention Against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad*, 18 EUR. J. INT'L L. 921, 923 (2007).

49. *Jones*, [2006] UKHL [10], [26] (Lord Bingham of Cornhill).

50. See *id.* [27].

even if this were true, it does not mean that states are prohibited from exercising civil jurisdiction within the limits defined by status-based immunities, other limits on personal and subject-matter jurisdiction, and applicable abstention doctrines.

Even if Lord Bingham’s conclusion were correct, it would mean only that “Part 1 of the 1978 Act [conferring immunity on foreign officials] is not shown to be disproportionate as inconsistent with a peremptory norm of international law.”⁵¹ Although the United Kingdom’s decision to grant individuals immunity under its SIA does count as state practice for the purpose of customary international law formation, that decision is not uniformly reflected in the legislative and judicial choices of other countries.⁵² In addition, at the time of writing, the claimants in *Jones and Mitchell v. United Kingdom* had petitioned the European Court of Human Rights (ECHR) to revisit the House of Lords’s conclusion, and briefing to the ECHR was in progress.⁵³ How the ECHR approaches the baseline question will likely determine the outcome of its deliberations, if it decides to issue an opinion on the merits. In addition, the questions posed by the court to the parties indicate that it will only address the question of whether *granting* immunity to individual officials, as the U.K. SIA does, is incompatible with Article 6 of the European Convention.⁵⁴ This is different from the question of whether *refusing* to grant immunity to individual officials violates international law.

The United Kingdom’s observations to the ECHR in *Jones and Mitchell*, which are accessible to the public on request at the court’s registry, take the position that “the assertion of jurisdiction by the courts [of one State] over a foreign State or the officials of a foreign State in civil proceedings in respect of which the State is entitled to immunity constitutes a violation of international law by the forum State.”⁵⁵ By conceptualizing state immunity as an international law limit on the adjudicative authority of each state,⁵⁶

51. *Id.* [28].

52. At the request of the European Court of Human Rights, the Government of the United Kingdom prepared an appendix on state practice with regard to state immunities, focusing on whether contracting states “allowed civil proceedings to be brought against officials of another State and/or compensation to be awarded to victims in criminal proceedings brought against those officials.” *Jones v. United Kingdom*, 2009 Eur. Ct. H.R. 1427, ¶ 1 app. Responses to a survey conducted by the Government revealed that as to the specific questions concerning the plea of immunity when there were allegations of torture, many States commented (not unsurprisingly) that such a case had not come before their courts, and that accordingly, they could only offer responses based on the general principles and practices applied by their courts, and that the responses were hypothetical.

Id. ¶ 11. The relative lack of state practice in this area makes the question of whether one begins with a baseline of jurisdiction or a baseline of immunity particularly important.

53. Statement of Facts ¶¶ 33–34, *Jones*, 2009 Eur. Ct. H.R. 1427 (App. Nos. 34356/06 & 40528/06).

54. *Id.* ¶¶ 1–19.

55. Observations of the Government of the United Kingdom on the Admissibility and Merits of the Applications ¶ I.3, *Jones*, 2009 Eur. Ct. H.R. 1427 (App. Nos. 34356/06 & 40528/06) [hereinafter Observations] (on file with the Fordham Law Review).

56. *Id.* ¶ II.1.

the question of immunity collapses into one of attribution.⁵⁷ Under this approach, rules attributing individual conduct to the state define the contours of conduct-based immunity.

This approach has the virtue of simplicity, but it is not grounded in either state practice or a faithful interpretation of the purposes behind the rules of state responsibility. The International Law Commission specifically emphasized, in elaborating principles of state responsibility, that individual officials cannot “hide behind the State in respect of their own responsibility for conduct of theirs which is contrary to rules of international law which are applicable to them.”⁵⁸ While the United Kingdom is no doubt correct that “the general rule is one of immunity”⁵⁹ with respect to states themselves, it is more problematic to assert that state immunity and the immunity of state officials is always congruent. For example, if this were the case, state agents would not be immune for commercial activities performed on behalf of the state—a proposition that is not supported by state practice, and to which few judges or scholars would likely subscribe. One could take the position that the scope of state immunity provides a floor but not a ceiling for claims of official immunity, but to do so would be to recognize that the two are not necessarily congruent, something that proponents of the attribution theory of conduct-based immunity resist.

The United Kingdom argues that, because states can only act through individuals, individuals do not bear civil liability for *any* acts taken on behalf of the state. This flows from its position that “[t]he doctrine of imputability of the acts of the individual to the State imputes the act solely to the State, who alone is responsible for its consequences.”⁶⁰ In the United Kingdom’s view, this is the only way to ensure that civil suits naming individuals will not be used to circumvent the immunity of the state.⁶¹ In this perspective, the state is indirectly impleaded in any civil action against an individual for official conduct because “not only are its acts called into question, but it would be expected to satisfy any award of damages and, in all probability, would be the only source from which such an award of damages could be satisfied.”⁶²

The United Kingdom’s position in its observations to the ECHR is a classic statement of the attribution theory. The attribution theory of conduct-based immunity starts with a baseline of absolute conduct-based immunity for individual officials, and recognizes exceptions for waiver by the state, criminal jurisdiction, and territorial torts. The territorial theory, by contrast, starts with a baseline of plenary jurisdiction by the forum state over its territory and individuals present in that territory, but recognizes conduct-based immunity for acts that do not entail personal responsibility.

57. *Id.* ¶ 1.9(i).

58. Draft Articles, *supra* note 5, at 143.

59. Observations, *supra* note 55, ¶ II.7.

60. *Id.* ¶ III.63.

61. See Response of the Government of the United Kingdom to the Applicants’ Reply Observations and to the Third Parties’ Submissions ¶ 45, *Jones v. United Kingdom*, 2009 Eur. Ct. H.R. 1427 (App. Nos. 34356/06 & 40528/06).

62. Observations, *supra* note 55, ¶ III.69; see *id.* ¶ III.71(iv).

Torture is not such an act. The more persuasive international law argument against the exercise of adjudicatory jurisdiction over a defendant who is not present on the forum state’s territory would be that it constitutes an unreasonable exercise of jurisdiction, not that such jurisdiction does not exist because of conduct-based immunity.

II. NEW ZEALAND

While the *Jones* case was on appeal to the House of Lords, a trial court in Auckland, New Zealand confronted the question in *Fang v Jiang*⁶³ of whether plaintiffs were entitled to serve proceedings out of the jurisdiction on Chinese officials allegedly responsible for the plaintiffs’ torture in China.⁶⁴ At the first rehearing, the plaintiffs relied on the English Court of Appeal’s decision in *Jones*.⁶⁵ The judge reserved his decision pending the appeal of that decision to the U.K. House of Lords.⁶⁶ When the House of Lords reversed the Court of Appeal, the plaintiffs attempted to distinguish *Jones* on the ground that New Zealand has no legislation comparable to the U.K. SIA.⁶⁷ The judge elected to follow *Jones*.⁶⁸

The New Zealand trial judge acknowledged that the plaintiffs in *Jones* began with a baseline of immunity, provided in the SIA, and that they therefore “needed to establish a means of overriding or displacing that immunity.”⁶⁹ Nevertheless, he relied on the House of Lords’s analysis of whether international law requires *overriding* statutory immunity to find that international law requires *providing* conduct-based immunity to individuals outside the jurisdiction.⁷⁰ To be sure, some of the language in *Jones* about state immunity discusses it in compulsory terms, but the procedural posture of that case only required the judges to determine whether they were compelled to override statutory immunity, not whether international law required granting immunity.⁷¹ By uncritically adopting the baseline in *Jones*, and by relying on Lord Bingham’s misreading of prior cases, the New Zealand trial judge in *Fang* embraced the attribution theory of foreign official immunity even though this was not required by either New Zealand domestic law or by international law.

The trial court’s opinion in *Fang* has not been reviewed by the New Zealand Court of Appeal or the New Zealand Supreme Court. That said, it reflects the position urged by the New Zealand Attorney-General in the case,⁷² and contributes to state practice regarding conduct-based immunity

63. [2007] NZAR 420 (N.Z.).

64. *Id.* ¶¶ 1, 4–6.

65. *Id.* ¶ 40.

66. *Id.* ¶ 7.

67. *Id.* ¶ 62.

68. *Id.* ¶ 63.

69. *Id.* ¶ 29.

70. *See id.* ¶ 68.

71. *See Jones v. Ministry of the Interior of Saudi Arabia*, [2006] UKHL 26, [9], [28] (Lord Bingham of Cornhill) (appeal taken from Eng.).

72. *See Submissions on Behalf of the Attorney-General in Relation to Rule 220 Application, Fang*, [2007] NZAR 420 (No. CIV 2004-404-5843) [hereinafter Submissions];

in those countries that permit service outside the jurisdiction. The Attorney-General started with the baseline that state immunity and individual civil immunity are indistinguishable, and therefore that “[o]nly if a recognised *exception* applies is immunity displaced.”⁷³ Even though the foreign state was “not directly impleaded”⁷⁴ because China was not a named defendant, the Attorney-General argued that “to sue an individual indirectly impleads the state,”⁷⁵ and that “[t]o sue an individual for an act where the state itself has immunity fundamentally undermines the state’s immunity.”⁷⁶ In a submission predating the House of Lords’s opinion in *Jones*, the New Zealand Attorney-General faulted the U.K. Court of Appeal’s finding that “officials had state immunity in relation to all acts falling short of torture, but not in relation to torture itself”⁷⁷ because, under the Court of Appeal’s reasoning, “it is difficult to see why torture should be treated differently from other illegal acts.”⁷⁸ The Attorney-General thus found the Court of Appeal’s reasoning unpersuasive and urged the New Zealand trial court to reject it.

The Attorney-General acknowledged that the “starting point” in civil cases is usually that “as a general proposition, the New Zealand Courts have jurisdiction over parties who may be served within New Zealand.”⁷⁹ The Attorney-General also observed that criminal proceedings for torture, which would not be barred by immunity, “usually depend on the physical presence of the alleged torturer in the jurisdiction.”⁸⁰ One might think that these observations support the territorial theory, rather than the attribution theory. To the contrary, however, the Attorney-General relied on the House of Lords’s opinion in *Jones* to argue that “[individual] immunity from civil liability parallels the responsibility of states at international law.”⁸¹ According to this view, criminal proceedings against individuals do not indirectly implead the state because states cannot bear criminal responsibility.⁸²

The Attorney-General regarded the House of Lords’s opinion in *Jones* as “an authoritative assessment of state immunity under current international law.”⁸³ However, as I have argued elsewhere,⁸⁴ insofar as *Jones* misreads prior cases on the scope of foreign official immunity, it should not be regarded as an authoritative statement of international law (as opposed to

Further Submissions on Behalf of the Attorney-General, *Fang*, [2007] NZAR 420 (No. CIV 2004-404-5843) [hereinafter Further Submissions].

73. Submissions, *supra* note 72, ¶ 20.

74. *Id.* ¶ 66.

75. *Id.* ¶ 79.

76. *Id.*

77. *Id.* ¶ 85.

78. *Id.* ¶ 86.

79. *Id.* ¶ 107.

80. *Id.* ¶ 91.

81. Further Submissions, *supra* note 72, ¶ 4.3.

82. *Id.* ¶ 5.1.

83. *Id.* ¶ 7.1.

84. See Keitner, *Annotated Brief*, *supra* note 1, at 623–29.

U.K. domestic law).⁸⁵ The state practice relied upon by *Jones* relates to the immunity of states themselves. It is only by making the further assumption that individual immunity must always be commensurate with state immunity, and then excepting both criminal immunity (which is less) and civil immunity for commercial transactions (which is greater) from this blanket rule, that the *Jones* opinion, and those that have followed it, can conclude that individual officials always share the civil immunity of the state.

III. AUSTRALIA

Foreign official immunity in Australia is governed by the Foreign States Immunities Act of 1985. This statute contains a number of provisions that indicate its applicability to individual officials, and that explicitly confer responsibility for certifying the official status of a particular individual or entity at the time of the alleged conduct on the Minister for Foreign Affairs.⁸⁶ An additional feature of this statutory scheme is that service of process must be effectuated on individual foreign defendants through diplomatic channels.⁸⁷ In finding individual Chinese officials immune from jurisdiction in *Zhang v Zemin*, the Court of Appeal of New South Wales relied on the finding of the commission that drafted the *Immunities Act* that “[w]ith respect to individuals, once it is shown that a person acted ‘for the purposes of the foreign State itself’ rather than [in] a personal capacity, immunity can be claimed.”⁸⁸

As suggested above, the proposition that certain conduct by officials on behalf of a state benefits from state immunity is unremarkable; the fallacy lies in assuming that all such conduct benefits from state immunity. This was also the problem in *Jones*, which takes language from cases in which the state was effectively the real party in interest and generalizes this to contexts in which the individual official bears concurrent responsibility for his or her conduct. Indeed, the New South Wales Court of Appeal cites familiar statements about the inability to circumvent state immunity by suing the state’s agents, and observes that “[n]umerous similar quotations could be gathered.”⁸⁹ While this is no doubt true, reading such quotations out of their context creates a false impression about the extent of individual

85. The Attorney-General indicated that the House of Lords “follow[ed] caselaw in the United Kingdom, Germany, the United States, Canada, Ireland and in the International Criminal Tribunal for the Former Yugoslavia and the recently concluded Convention on Jurisdictional Immunities of States and their Property.” Further Submissions, *supra* note 72, ¶ 4.3. My reading of the same cases indicates that *Jones* went well beyond the proposition that those cases represent on the question of foreign official immunity, as opposed to foreign state immunity. Of course, since *Jones* explicitly conflates the two types of immunity and insists that they must be congruent, this is not surprising.

86. See *Zhang v Zemin* [2010] NSWCA 255, ¶ 11 (Austl.) (special leave to appeal refused on May 11, 2011).

87. *Id.* ¶ 58.

88. *Id.* ¶ 68.

89. *Id.* ¶ 77.

official immunity that has in fact been recognized outside the provisions of a particular domestic statute.

In the Australian case, the domestic statute was determinative. The Court of Appeal found that the Act does “not allow for any exception based upon international law, even if that law is of the character for which the appellant contends.”⁹⁰ Judge Allsop emphasized in his concurring remarks:

To find that the perpetrators of such acts [such as torture] in an official or public capacity are able to be rendered liable under the civil law of a State for the consequences of their acts one must have recourse to the relevant law of that State governing foreign state immunity. In Australia, that is the [Immunities] Act.⁹¹

Consequently, “[i]f the Commonwealth Parliament wishes to remove the immunity of foreign States for civil liability for torture such as by legislating in accordance with Article 14 of the Torture Convention, it must amend the Act.”⁹² In sum, Australian jurisprudence on foreign official immunity involves the proper interpretation and application of its domestic statute, which contains a baseline of immunity and a series of exceptions that the courts have treated as exhaustive. Absent a domestic statute that requires immunity for individual foreign officials, such a baseline is not the appropriate starting point for an inquiry into conduct-based immunity.

IV. CANADA

As in the United Kingdom and Australia, foreign official immunity and any exceptions to immunity are governed in Canada by a State Immunity Act⁹³ (Canada SIA). An Ontario Court of Appeal opinion in 2004 found that there was no exception to the immunity of the state itself for allegations of torture, because no such exception was contained in the Canada SIA.⁹⁴ In *Kazemi v. Islamic Republic of Iran*,⁹⁵ a Québec trial court recently reached the same conclusion, in a decision that was under appeal at the time of writing. The Québec judge emphasized:

[T]he SIA contains all of the legal rules and principles which may be invoked to decide whether immunity should, or not, be granted to a foreign state. The SIA is a complete statute which suffers no intrusion from the common law, international law or Canada’s international treaty obligations.⁹⁶

The opinion then drew a sharp distinction between the two claimants in the case: the first, the estate of the deceased photojournalist who was allegedly tortured and killed in Iran, and the second, her son, who suffered the loss of

90. *Id.* ¶ 130.

91. *Id.* ¶ 170 (Allsop, J.).

92. *Id.* ¶ 172.

93. R.S.C. 1985, c. S-18 (Can.).

94. *Bouzari v. Islamic Republic of Iran* (2004), 71 O.R. 3d 675 (Can. Ont. C.A.).

95. *Kazemi v. Islamic Republic of Iran* (Jan. 25, 2011), No. 500-17-031760-062 (Can. Ont. Sup. Ct.).

96. *Id.* ¶ 51.

his relationship with his mother and continues to endure psychological and emotional harm in Canada as a result of this loss.⁹⁷

The court found this distinction significant because Section 6 of the Canada SIA indicates that a state is not immune from the jurisdiction of the court in any proceedings that relate to any personal or bodily injury or property damage that occurs in Canada.⁹⁸ Much of the opinion therefore focused on the scope of the definition of “personal or bodily injury” (*dommage corporel* or *préjudice corporel* in the equally authoritative French text) in light of relevant Canadian Supreme Court precedent and treatises to determine whether it would encompass the son’s suffering.⁹⁹ The court found that, particularly at this early stage of the proceedings, the son’s allegation of psychological trauma was sufficient to constitute *préjudice corporel* because it was more than merely distress: it was “an attack upon the physical integrity of the person enduring it.”¹⁰⁰ As a result, section 6 operated to remove the immunity both of the state and of the individual defendants, providing that the son could properly demonstrate the extent of his suffering at trial.¹⁰¹

The court also considered the argument that individual foreign officials (not including the head of state) should be deemed to fall outside the scope of the Canada SIA altogether. It rejected this contention, holding that “the codification of state immunity in Canada cannot have any other purpose than to immunize official individuals from the jurisdiction of Canadian courts, while acting in their official capacity.”¹⁰² Moreover, unlike the territorial tort exception, “in the exceptions enumerated in the SIA there is no exception concerning the illegality of the acts of the foreign state or its agents.”¹⁰³ Relying exclusively on the provisions of the Canada SIA, the court reached the conclusion that both individual and state immunity could be overcome by the breach of the son’s physical integrity on Canadian soil through a principle of effects jurisdiction, but that the mother’s estate could not surmount the immunity barrier.¹⁰⁴ At the time of writing, both parties had challenged the court’s conclusions.¹⁰⁵

V. THE UNITED STATES

Unlike the U.K., Australian, and Canadian state immunity acts, the U.S. Foreign Sovereign Immunities Act¹⁰⁶ does not govern the immunity of

97. *Id.* ¶¶ 52–53.

98. *Id.* ¶ 55.

99. *Id.* ¶ 63.

100. *Id.* ¶¶ 78–79.

101. *Id.* ¶ 92.

102. *Id.* ¶ 138.

103. *Id.* ¶ 152.

104. *Id.* ¶¶ 92–93, 153.

105. See *Public CCIJ Cases Zahra Kazemi*, CANADIAN CENTRE FOR INTERNATIONAL JUSTICE, http://www.ccij.ca/programs/cases/index.php?WEBYEP_DI=10 (last visited Oct. 20, 2011).

106. Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified in scattered sections of 28 U.S.C.).

individual foreign officials.¹⁰⁷ The decisions in *Jones, Zhang, and Kazemi* are thus less instructive on the scope of individual conduct-based immunity in the U.S. context, just as those courts have distinguished their approach from that of the United States.¹⁰⁸ Because personal jurisdiction in U.S. cases is generally established on the basis of the defendant's territorial presence (even if that presence is transitory),¹⁰⁹ the territorial theory of immunity might justifiably play a greater role in U.S. cases than it has in countries that more readily authorize service outside the jurisdiction. Moreover, because the countries examined above, with the exception of New Zealand, have found individual immunity under state immunity acts that explicitly exempt criminal proceedings, those countries have been able to uphold civil immunity while denying criminal immunity. Any theory of immunity from the civil jurisdiction of U.S. courts will have to explain why criminal cases are different as a doctrinal—as opposed to just a policy—matter.

If one begins from a baseline of plenary territorial jurisdiction rather than absolute state immunity, the burden shifts to the defendant to show why immunity is required by either domestic or international law. Under a faithful reading of the common law precedents cited in *Jones*, such immunity may be required when the state is the real party in interest or a necessary party. There might be other barriers to adjudication, such as a lack of subject matter jurisdiction, forum non conveniens, the prudential act of state doctrine, a prudential requirement of exhaustion of remedies, and so forth. But the work these various doctrines do should not all be lumped together under the rubric of immunity, thus unilaterally depriving U.S. courts of the ability to adjudicate conduct that otherwise falls within their jurisdiction.

The baseline issue is not unique to the question of foreign official immunity. As Dame Rosalyn Higgins wrote in 1982 with regard to the restrictive theory of foreign state immunity:

It is very easy to elevate sovereign immunity into a superior principle of international law and to lose sight of the essential reality that it is an exception to the normal doctrine of jurisdiction. It is a derogation from the normal rule of territorial sovereignty. It is sovereign immunity which is the exception to jurisdiction and not jurisdiction which is the exception to a basic rule of immunity. An exception to the normal rules of jurisdiction should only be granted when international law requires—that is to say, when it is consonant with justice and with the equitable protection of the parties. It is not to be granted “as of right.”¹¹⁰

107. *Samantar v. Yousuf*, 130 S. Ct. 2278, 2292 (2010).

108. See, e.g., *Zhang v Zemin* [2010] NSWCA 255, ¶ 78 (Austl.) (“[T]he constitutional and legislative position is so different in Australia [from the United States], that I do not find that decision [in *Samantar*] of significant assistance for the purposes of interpreting the Australian legislation.”).

109. See, e.g., *Pennoyer v. Neff*, 95 U.S. 714 (1878); see also *Burnham v. Superior Court*, 495 U.S. 604 (1990).

110. Higgins, *supra* note 4, at 271. My thanks to Beth Stephens for drawing my attention to this passage.

The baseline issue is significant because, as Dame Higgins indicated, “[I]n any marginal case issues about the burden of proof will arise.”¹¹¹ Given the arguably unsettled nature of the international law of foreign official immunity, the result of looking to international law in a given case will depend on whether one seeks to prove a settled exception to a baseline of plenary jurisdiction, or a settled exception to a baseline of absolute immunity.¹¹²

My central point in this Essay is not to lose sight of the role of territory, or what I have elsewhere referred to as “presence.”¹¹³ Because immunity is an exception to jurisdiction, a court’s first task is to determine whether personal and subject matter jurisdiction exist with regard to the defendant and the substance of the claim, respectively. In the U.S. context, the physical presence of the defendant on the forum state’s territory, and any other jurisdictional links, can and should affect the baseline from which a U.S. court reasons about that defendant’s entitlement to immunity from either civil or criminal jurisdiction. If the defendant is entitled to status-based immunity, this will preclude a U.S. court from exercising both civil and criminal jurisdiction. If the defendant is entitled to conduct-based immunity because the challenged act entails *only* state responsibility, then a court should find immunity. But there are an increasing number of acts that entail both state *and* individual responsibility. For these acts, the attribution theory of immunity provides an incomplete and potentially misleading answer unless it is dictated by a specific, authoritative domestic statute. The territorial theory better accommodates the competing principle of the forum state’s plenary jurisdiction over its own territory and should serve as the starting point for discussions of common law immunity—and potential revisions to other countries’ state immunity acts—going forward.

111. *Id.*

112. On the unsettled nature of international law, see Bradley & Helfer, *supra* note 6, at 248 (indicating that customary international law in the area of foreign official immunity “is unsettled and rapidly evolving”); Stephens, *supra* note 7, at 2687 (“[T]here are no binding, comprehensive international treaties or customary international law norms governing the immunity of foreign officials.”).

113. See Keitner, *Foreign Official Immunity*, *supra* note 1.