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Head-of-State and Foreign Official Immunity in the United States After Samantar: A Suggested Approach

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Christopher D. Totten

Abstract

A concept of immunity for foreign heads of state has existed since ancient times. Such immunity constitutes customary international law (“CIL”) and, when applicable, frees such individuals from the criminal jurisdiction of foreign nations while carrying out their duties. In the United States, executive branch guidance is considered determinative on the issue of foreign head-of-state immunity; however, the executive branch does not always provide suggestions of immunity, or it may provide suggestions that violate CIL. Drawing upon both US and against foreign sitting and former heads of state and government officials increasingly are becoming more established and may provide additional guidance in the absence of, or as a supplement to, US executive branch guidance. For example, while relevant international immunity law norms generally prohibit criminal prosecutions by domestic jurisdictions against foreign sitting heads of state and other senior governmental officials, they allow such suits against former leaders and officials in certain circumstances. Moreover, these same norms permit prosecutions against both sitting and former heads of state and officials if these prosecutions are commenced by international criminal tribunals (e.g., the ongoing International Criminal Court proceeding against President Omar Al-Bashir of Sudan). Significantly, the recent US Supreme Court case *United States v. Samantar* significantly changed the related doctrine of foreign official immunity in the United States. *Samantar* essentially removed statutory analysis of foreign official immunity through the Foreign Sovereign Immunity Act (“FSIA”) and ostensibly replaced it with traditional common law analysis. In light of this radical shift in the foreign official immunity inquiry, this Article suggests an analytical approach that US courts may draw upon in the aftermath of *Samantar*. Such an approach, reflecting a “totality of circumstances” analysis, combines certain aspects of the existing common law analysis from the head-of-state context with particular approaches used by courts in the official immunity context under the FSIA. Finally, in light of both the evolving principle of subsidiarity, which an increasing number of non-US jurisdictions follow, and the concept of complementarity adopted by the International Criminal Court (“ICC”), this Article attempts to shed light on how US courts should approach the issue of whether to defer to either the courts of other nations (i.e., subsidiarity) or to international tribunals (i.e., complementarity) in those specific cases in which these courts or tribunals are actively proceeding against a head of state or other foreign official who is also a defendant in a US court. For example, potentially strong policy reasons related to the maintenance of peaceful foreign relations among nations, and equally potent conceptual reasons related to the sovereignty of individual states, appear to support US courts’ deferring to ongoing or pending non-US, national trials of heads of state and certain foreign government officials, particularly

when these trials have a clear connection to the foreign country and are legitimate. Similarly, deference to an international criminal tribunal may be appropriate in certain circumstances. This Article consists of four parts. Part I addresses the US approach to immunity for current and former foreign heads of state as well as the related issue of foreign official immunity. Part I includes a discussion of the 2010 US Supreme Court case of *Samantar*, which addresses foreign official immunity. Part II explores head-of-state and official immunity under international law, including a discussion of *Democratic Republic of the Congo v. Belgium* decided by the International Court of Justice (“ICJ”), the Charles Taylor immunity decision of the Special Court for Sierra Leone, the ongoing case by the ICC against Sudanese President Al-Bashir, and relevant international codification on the issue. Part III examines third-party prosecutions of heads of state and other government officials by other national jurisdictions. This part discusses the jurisdictions of Germany, Great Britain, and Spain and how they approach immunity from prosecution for foreign heads of state and officials. Part IV includes an analysis of how US courts should continue to handle the evolving issues of foreign head-of-state and foreign official immunity, particularly in light of *Samantar* and recent international developments, including high-profile proceedings involving heads of state and other governmental officials by the ICC, ICJ, and other international tribunals, and increased activity by foreign national courts against these individuals.

HEAD-OF-STATE AND FOREIGN OFFICIAL IMMUNITY IN THE UNITED STATES AFTER SAMANTAR: A SUGGESTED APPROACH

Dr. Christopher D. Totten *

INTRODUCTION

A concept of immunity for foreign heads of state has existed since ancient times.¹ Such immunity constitutes customary international law (“CIL”) and, when applicable, frees such individuals from the criminal jurisdiction of foreign nations while carrying out their duties.² In the United States, executive branch guidance is considered determinative on the issue of foreign head-of-state immunity; however, the executive branch does not always provide suggestions of immunity, or it may provide suggestions that violate CIL.³ Drawing upon both US and

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1. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES ch. 6, intro. note (1987) [hereinafter RESTATEMENT].

2. See *id.* at chs. 5–6, intro. notes. Such protections exist in order to foster positive relations between nations. See *id.* at ch. 6, intro. note. The guarantee of freedom from prosecution allows for states to exchange representatives without fear of persecution. Daniel Singerman, Comment, *It’s Still Good to Be the King: An Argument for Maintaining the Status Quo in Foreign Head of State Immunity*, 21 EMORY INT’L L. REV. 413, 418 (2007). Furthermore, the prohibition on allowing states to prosecute certain officials and representatives from foreign nations promotes respect for national sovereignty by disallowing one state from passing judgment on the actions of another. See *id.* The system, or framework, of immunity works on a basis of reciprocity; one nation must treat another’s representative on equal footing. See *id.*

3. For the idea that executive branch guidance is determinative on the issue of sitting-head-of-state immunity analysis, see *infra* notes 43–48 and accompanying text (citing and discussing relevant case law). For the role of executive branch guidance for former head-of-state immunity, see *infra* note 67 and accompanying text (citing and discussing relevant case law). For a discussion of the independent court analysis in cases in which executive branch guidance is not forthcoming, see *infra* notes 49–56, 60 and accompanying text (citing and discussing relevant case law). For a thorough discussion of the nebulous nature of the head-of-state immunity inquiry in the United States, including the problems associated with executive branch (e.g., State Department) guidance on the head-of-state immunity issue (e.g., arbitrariness, inconsistency, unfairness, and undue political influence) and the overall dearth of judicial cases, see

international law, this Article endeavors to establish an analytical framework for US courts to use when such suggestions of immunity are not provided.⁴ In particular, certain contextual factors such as waiver by the foreign nation and the nature of the conduct of the foreign head of state may be considered.⁵ In addition, international law norms governing domestic suits

Jerrold Mallory, *Resolving the Confusion over Head of State Immunity: The Defined Rights of Kings*, 86 COLUM. L. REV. 169, 183–88, 197 (1986). In light of the uncertain nature of the head-of-state inquiry, Mallory proposes that legislation should be passed by the US Congress on the head-of-state immunity issue that is similar to existing legislation on immunity for foreign states (e.g., the Foreign Sovereign Immunities Act (“FSIA”). See *id.* at 187–92, 197. Since the time of the often-cited Mallory article, customary international law has become more developed in the area of head-of-state immunity (in particular, with respect to foreign national prosecutions), and international criminal tribunals have been created to prosecute leading government officials, including heads of state, for grave crimes. This Article will address the impact of these developments up to the present time on the issue of head-of-state immunity. There are only a few articles that have addressed the issue of head-of-state immunity in the US in light of the recent burst of international activity in this area, but few, if any, have seriously attempted to synthesize and harmonize US domestic law in this area with both international norms and the law of an increasing number of foreign jurisdictions. This Article seeks to do this while also addressing the related doctrine of official immunity in light of the landmark 2010 US Supreme Court case of *United States v. Samantar*. For articles that have examined the issue of head-of-state immunity in light of international law developments in this area, see Kaitlin R. O’Donnell, *Certain Criminal Proceedings in France (Republic of Congo v. France) and Head of State Immunity: How Impenetrable Should The Immunity Veil Remain?*, 26 B.U. INT’L L.J. 375, 379 (2008) (noting that a recent decision of the International Court of Justice (“ICJ”) declining to issue provisional measures to stop France from investigating alleged international crimes in the Congo by its senior leaders, including the Congolese head of state, signals a positive change from “upholding a head of state’s immunity because the executive is one and the same as the state, to promoting governmental transparency, remedies for human rights violations, and individual accountability”); Singerman, *supra* note 2 (arguing for maintaining the current US and international systems for head-of-state immunity); and Brent Wible, “*De-Jeopardizing Justice*”: *Domestic Prosecutions for International Crimes and the Need for Transnational Convergence*, 31 DENV. J. INT’L L. & POL’Y 265, 285–90, 293–95 (2002) (reviewing international developments in head-of-state immunity and arguing in general that certain steps must be taken to harmonize national prosecutions of international crimes). For a further discussion of *Republic of Congo v. France* in the ICJ case, see *infra* note 98.

4. Under the traditional Restatement approach, immunity conferred to sitting heads of state and certain high officials, such as a minister for foreign affairs, is considered absolute as it stems from the sovereignty of the state. See RESTATEMENT, *supra* note 1, at. ch. 5, intro. note (1987). Nonetheless, modern US courts have considered executive branch guidance determinative on the issue of immunity. See *infra* notes 43–48 and accompanying text.

5. For a further discussion of these contextual factors, see *infra* notes 179–183 and accompanying text (head-of-state analysis) and *infra* notes 192–195 (former-head-of-state analysis).

against foreign sitting and former heads of state and government officials increasingly are becoming more established and may provide additional guidance in the absence of, or as a supplement to, US executive branch guidance. For example, while relevant international immunity law norms generally prohibit criminal prosecutions by domestic jurisdictions against foreign sitting heads of state and other senior governmental officials, they allow such suits against former leaders and officials in certain circumstances.⁶ Moreover, these same norms permit prosecutions against both sitting and former heads of state and officials if these prosecutions are commenced by international criminal tribunals (e.g., the ongoing International Criminal Court proceeding against President Omar Al-Bashir of Sudan).⁷

Significantly, the recent US Supreme Court case *United States v. Samantar* significantly changed the related doctrine of foreign official immunity in the United States. *Samantar* essentially removed statutory analysis of foreign official immunity through the Foreign Sovereign Immunity Act (“FSIA”) and ostensibly replaced it with traditional common law analysis.⁸ In light of this radical shift in the foreign official immunity inquiry, this Article suggests an analytical approach that US courts may draw upon in the aftermath of *Samantar*. Such an approach, reflecting a “totality of circumstances” analysis, combines certain aspects of the existing common law analysis from the head-of-state context

6. *See generally* Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, ¶ 47 (May 31, 2003); Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belgium), 2002 I.C.J. 3 (Feb. 14). According to the ICJ in *Congo v. Belgium*,

a court of one State may try a former [senior official or head of state] of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

Id. ¶ 61.

7. For example, the statutes of the International Criminal Court (“ICC”), the International Criminal Tribunal for Rwanda (“ICTR”), the International Criminal Tribunal for Yugoslavia (“ICTY”), and the Special Court for Sierra Leone all decline to recognize immunity from prosecution for grave crimes committed by heads of state and other governmental officials. *See infra* note 184. For further discussion of the ICC proceeding against the President of Sudan, as well as proceedings by other international tribunals against heads of state, see *infra* note 117.

8. *See generally* *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010). For a further discussion of *Samantar*, see *infra* notes 69–74 and accompanying text.

with particular approaches used by courts in the official immunity context under the FSIA.⁹

Finally, in light of both the evolving principle of subsidiarity, which an increasing number of non-US jurisdictions follow, and the concept of complementarity adopted by the International Criminal Court (“ICC”), this Article attempts to shed light on how US courts should approach the issue of whether to defer to either the courts of other nations (i.e., subsidiarity) or to international tribunals (i.e., complementarity) in those specific cases in which these courts or tribunals are actively proceeding against a head of state or other foreign official who is also a defendant in a US court.¹⁰ For example, potentially strong policy reasons related to the maintenance of peaceful foreign relations among nations, and equally potent conceptual reasons related to the sovereignty of individual states, appear to support US courts’ deferring to ongoing or pending non-US, national trials of heads of state and certain foreign government officials, particularly when these trials have a clear connection to the foreign country and are legitimate. Similarly, deference to an international criminal tribunal may be appropriate in certain circumstances.

This Article consists of four parts. Part I addresses the US approach to immunity for current and former foreign heads of state as well as the related issue of foreign official immunity. Part I includes a discussion of the 2010 US Supreme Court case of *Samantar*, which addresses foreign official immunity. Part II explores head-of-state and official immunity under international law, including a discussion of *Democratic Republic of the Congo v. Belgium* decided by the International Court of Justice (“ICJ”), the Charles Taylor immunity decision of the Special Court for Sierra Leone, the ongoing case by the ICC against Sudanese President Al-Bashir, and relevant international codification on the issue. Part III examines third-party prosecutions of heads of state and other government officials by other national jurisdictions.¹¹ This

9. For a detailed description of this totality of circumstances approach to official immunity analysis, see *infra* pp. 146–47.

10. For further discussion of subsidiarity, see *infra* Part III.B (discussing the cases of Spain and Germany). For a further discussion of the issue of complementarity within the ICC, see *infra* notes 184–189 and accompanying text.

11. Third-party prosecution in this context is intended to mean a prosecution by a jurisdiction for a crime that occurred in another state, and neither the accused nor the

part discusses the jurisdictions of Germany, Great Britain, and Spain and how they approach immunity from prosecution for foreign heads of state and officials. Part IV includes an analysis of how US courts should continue to handle the evolving issues of foreign head-of-state and foreign official immunity, particularly in light of *Samantar* and recent international developments, including high-profile proceedings involving heads of state and other governmental officials by the ICC, ICJ, and other international tribunals, and increased activity by foreign national courts against these individuals.

I. *HEAD-OF-STATE AND FOREIGN OFFICIAL IMMUNITY: US APPROACH*

A. *Origins*

In the United States, the concept of head-of-state immunity and foreign sovereign immunity for states can be traced to the 1812 US Supreme Court case of *The Schooner Exchange*.¹² In fact, though the Court's direct holding in *The Schooner Exchange* dealt with the immunity of a foreign ship physically located in the US port of Philadelphia, the case's greater significance is its establishment of the doctrine of absolute immunity of foreign sovereigns.¹³ In *The Schooner Exchange*, Chief Justice Marshall stated that, while states generally enjoy exclusive jurisdiction over their territory (as an attribute of their sovereignty), states have conceded, or "waived," a part of this jurisdiction in order to conduct foreign relations. One "part" of this absolute jurisdiction that has been waived, according to Marshall, is "the exemption of the person of the sovereign from arrest or detention within a foreign territory."¹⁴

Though the head-of-state immunity concept first arose in US jurisprudence in *The Schooner Exchange*, very few cases implicating

victim is a citizen or national of the prosecuting jurisdiction. Such a prosecution generally proceeds under the theory of universal jurisdiction.

12. *The Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812).

13. See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983) ("Although the narrow holding of *The Schooner Exchange* was only that the courts of the United States lack jurisdiction over an armed ship of a foreign state found in [a US] port, that opinion came to be regarded as extending virtually absolute immunity to foreign sovereigns.").

14. *The Schooner Exchange*, 11 U.S. at 137.

the concept appeared in the United States prior to the late twentieth century.¹⁵ In fact, the concept became subsumed, for the most part, within the broader principle of “absolute foreign sovereign immunity for states.”¹⁶ Since the late twentieth century, however, head-of-state immunity has emerged in the United States as its own distinct concept.¹⁷ In *Tachiona v. Mugabe*, Judge Marrero articulated several reasons why the number of litigated cases against heads of state for issues related to their unofficial, private conduct may have increased in the US in the late twentieth century.¹⁸ These reasons include, according to Marrero, the undertaking by heads of state of more personal business opportunities in the expanded international trade market and the accompanying greater exposure to lawsuits such opportunities may bring.¹⁹ In addition, with the recent increase in the body of substantive international criminal law norms,

15. See *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 275 & n.37 (S.D.N.Y. 2001), *rev'd on other grounds*, *Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004) (“In this precedential void, . . . [US] courts, on the few occasions in which the principle of sovereign immunity was asserted [prior to 1976] in connection with an action filed against a head-of-state, regarded the conceptual issue as subsumed within the recognized principle of absolute sovereign immunity for states and governed by *The Schooner Exchange* doctrine. This treatment suggested the existence of a unified theory of sovereign immunity integrating the traditional notion that the sovereign and its ruler were one and the same, concepts that had not yet branched into distinct doctrines subject to their own separate policies, standards and applications.” (citing Joseph W. Dellapenna, *Head-of-State Immunity—Foreign Sovereign Immunities Act—Suggestion by the Department of State*, 88 AM. J. INT’L L. 528, 529 (1994); Shoba Varughese George, *Head of State Immunity in the United States Courts: Still Confused after All These Years*, 64 FORDHAM L. REV. 1051, 1055 (1995))).

16. *Id.* at 275–76 (“[A]ny reference to a head-of-state immunity ‘doctrine’ as a concept distinct from foreign state immunity is a construct that does not arise in the case law and commentary as a specifically identified and widely recognized legal principle until after 1976.” (citing Dellapenna, *supra* note 15, at 529–30)). Note, however, that if a plaintiff attempts to mask a suit against a state by suing its head, US courts still generally treat the suit as one against the state: “Ordinarily, a proceeding against a head of state or government that is in essence a suit against the state is treated like a claim against the state for purposes of immunity.” RESTATEMENT, *supra* note 1, § 464, Reporters’ Notes ¶ 14 (1987).

17. After 1976 and the passage of FSIA, US courts are increasingly treating head-of-state immunity and foreign sovereign immunity for the state itself as both different and unique concepts, each with its own separate issues. See *Tachiona*, 169 F. Supp. 2d. at 277–78 & n.68 (describing several cases recognizing head-of-state immunity as a distinct concept).

18. *Id.* at 278.

19. See *id.* (citing *First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1112–13 (D.D.C. 1996); *Lasidi, S.A. v. Financiera Avenida, S.A.*, No. 5864/52 (N.Y. Sup. Ct. May 24, 1988), *aff’d* 538 N.E.2d 332 (N.Y. 1989)).

plaintiffs have begun to use the courts to redress violations of these norms, including violations by heads of state.²⁰

Traditionally, under the theory of absolute foreign sovereign immunity, states that were sued in US courts made special appearances to assert immunity, resulting in dismissal of the suit.²¹ In particular, in the twentieth century, foreign states increasingly contacted the US State Department to request that the Department of Justice make a “suggestion of immunity” to the presiding court.²² As early as 1943, the US Supreme Court ruled that a suggestion of immunity from the executive branch must be accepted by the courts.²³ The suggestion was found to be a conclusive decision, and to proceed would interfere with the conduct of foreign relations.²⁴ In 1945, the Court reasserted that it is not the courts’ place to make decisions to deny or grant immunity, but rather this authority lies within the executive branch.²⁵ This deference to the executive branch has continued to this day in the particular context of head-of-state immunity²⁶ (but, notably, not foreign sovereign immunity).²⁷

20. *Id.* at 278–81 (citing Dellapenna, *supra* note 15, at 529–31; George, *supra* note 15 at 1051–52, 1054). Another reason identified by Judge Marrero in *Tachiona* dealt with the passage of FSIA in 1976, which is discussed *infra* notes 29–47 and accompanying text. Judge Marrero said:

[S]ome plaintiffs, aware that suits naming the state directly are explicitly barred by the FSIA, either for tactical effect or to test the substantive contours of the Act’s exceptions, have sought to assert theories of liability that extend to foreign officials not only as “agencies or instrumentalities” of the state, but in their personal capacities.

Id. at 278 (citing *Chuidian v. Philippine Nat’l Bank*, 912 F.2d 1095, 1106 (9th Cir. 1990); Dellapenna, *supra* note 15 at 530).

21. RESTATEMENT, *supra* note 1, at ch. 5, intro. note (1987).

22. *Id.*

23. *See Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943); *see also* RESTATEMENT, *supra* note 1, at ch. 5, intro. note (1987).

24. *See Ex parte Peru*, 318 U.S. at 589.

25. *See Republic of Mexico v. Hoffman*, 324 U.S. 30, 34–35 (1945); *see also Ye v. Zemin*, 383 F.3d 620, 625 (7th Cir. 2004); RESTATEMENT, *supra* note 1, at ch. 5 intro. note (1987).

26. *See Ye*, 383 F.3d at 625–26 (“The Supreme Court has held, however, that the Executive Branch’s suggestion of immunity is conclusive and not subject to judicial inquiry.” (citing *Ex parte Peru*, 318 U.S. at 589; *Compañía Española de Navegacion Marítima, S.A. v. Navemar*, 303 U.S. 68, 74 (1938); *Spacil v. Crowe*, 489 F.2d 614, 617 (5th Cir. 1974); *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1201 (2d Cir. 1971); *Rich v. Naviera Vacuba S.A.*, 295 F.2d 24, 26 (4th Cir. 1961))).

27. *See infra* Part I.B.

In 1952, the Acting Legal Adviser of the US Department of State, Jack B. Tate, wrote to the Acting Attorney General setting forth the department's position on foreign sovereign immunity.²⁸ The Tate Letter asserted that the department would henceforth follow the more limited form of immunity known as the restrictive theory.²⁹ This theory essentially recognizes the immunity of the sovereign for public acts but not for private, commercial acts.³⁰ The practice of immunity decisions by the State Department using the restrictive theory, however, soon came under criticism, particularly for its inconsistency.³¹

B. *Head-of-State Immunity, the Foreign Sovereign Immunity Act, and the Common Law*

By the 1970s, both the practicing bar and Department of State sought to relieve the department of its role of ruling on sovereign immunity claims; a more precise and codified set of standards were sought to correct this system.³² After more than a decade of debate, the US Congress passed the Foreign Sovereign Immunities Act of 1976 ("FSIA") to streamline the sovereign immunity decision system.³³ The FSIA is premised on the restrictive theory of immunity, and places US courts in charge of the immunity determination once a claim of immunity is raised

28. Letter from Jack B. Tate, Acting Legal Adviser, U.S. Department of State, to Philip B. Perlman, Acting Attorney General, May 19, 1952, 25 Dep't St. Bull. 984-85 (1952) [hereinafter Tate Letter]; see also BARRY E. CARTER ET AL., *INTERNATIONAL LAW* 562-63 (5th ed. 2007).

29. Tate Letter, *supra* note 28; see also CARTER ET AL., *supra* note 28, at 564-65 ("For a few years after the Tate Letter, the State Department usually made decisions on sovereign immunity claims by a foreign state on the basis of the foreign government's submission. Criticism of this procedure, however, led the Department's Office of Legal Adviser to conduct quasi-judicial hearings on whether a particular claim of immunity was within the Tate Letter's criteria.")

30. See *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 698, 711, 714 (1976) (citing Tate Letter, *supra* note 28).

31. See CARTER ET AL., *supra* note 28, at 566 ("This regime [created in the Tate Letter], under which the State Department made some immunity determinations and the courts made others, did not always produce consistent decisions.")

32. *Id.* ("Unhappiness with the process for deciding immunity under the Tate Letter and a desire for greater predictability led private lawyers, scholars, and the Department of State to push for legislation establishing more precise criteria.")

33. *Id.* at 568; see Foreign Sovereign Immunity Act, 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1441(d), 1602-11 (2006).

by the foreign state.³⁴ In general, FSIA presumes immunity on the part of the foreign state being sued; however, there are various exceptions to this immunity.³⁵ These exceptions include any explicit or implicit waiver of immunity by the foreign state;³⁶ a counterclaim to a suit commenced by a foreign state in the United States;³⁷ certain commercial activity engaged in by the foreign state;³⁸ certain noncommercial torts committed by the

34. See CARTER ET AL., *supra* note 28, at 568 (citing H.R. Rep. No. 94-1487, at 7, 12 (1976)).

35. See 28 U.S.C. § 1604 (2006) (“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 and of the States except as provided in sections 1605 to 1607 of this chapter.”); see also CARTER ET AL., *supra* note 28, at 568 (“Under this [FSIA] structure, a court must determine whether the foreign state defendant is immune from suit in order to determine whether the court has personal and subject matter jurisdiction. If the court finds that the defendant is immune, the court lacks personal and subject matter jurisdiction. Conversely, if the court finds that there is an exception to immunity, and that proper service has been made, the court automatically has personal and subject matter jurisdiction (assuming no violation of due process requirements).”) For the relevant provisions of the various exceptions to immunity, see 28 U.S.C. §§ 1605–07; see also *infra* notes 36–42 and accompanying text.

36. See 28 U.S.C. § 1605 (a)(1) (2006) (effective January 28, 2008) (“A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver . . .”). At least one judge has argued that a state’s violation of a customary international law norm constitutes a waiver. See *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1185–86 (D.C. Cir. 1984) (Wald, J., dissenting). The majority trend reflected in US case law, however, appears to go against this argument (e.g., that a violation of a *jus cogens* norm by a state should constitute a waiver). See CARTER ET AL., *supra* note 28, at 586.

37. See 28 U.S.C. § 1607 (“In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or (b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or (c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.”).

38. See *id.* § 1605 (a)(2) (“A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States . . .”).

foreign state;³⁹ particular types of expropriation actions by foreign states;⁴⁰ and actions attempting to enforce arbitral awards or agreements.⁴¹ Formerly, there was an additional immunity exception under FSIA for terrorist actions by certain foreign states; however, this exception has now been repealed.⁴²

39. *See id.* § 1605(a)(5) (“A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . not otherwise encompassed [by the commercial activity exception in § 1605(a)(2)], in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—(A) 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, or (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights . . .”).

40. *See id.* § 1605(a)(3) (“A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States . . .”).

41. *See id.* § 1605(a)(6) (“A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or [the waiver exception in § 1605(a)(1)] is otherwise applicable.”). For the text of § 1607, see *supra* note 37.

42. *See* 28 U.S.C. § 1605(a)(7), *repealed by* National Defense Authorization Act for Fiscal Year 2008, Pub.L. 110–181, 122 Stat. 341, Div. A, § 1083(b)(1)(A)(iii) (“A foreign state [that is a designated supporter of terrorism] shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . (7) not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.”). For additional explanation of the designated state supporter of terrorism requirement and for a list of states that have been so designated by the US government, see CARTER ET AL., *supra* note 28, at 603. The

According to most US courts, FSIA and its exceptions do not generally apply to suits against heads of state.⁴³ Rather, using the common law approach first introduced in *The Schooner Exchange*, US courts look directly to the executive branch for guidance on the issue of head-of-state immunity.⁴⁴ For example, in *Lafontant v.*

US Congress has allowed punitive damages to be sought against officials associated with states who sponsor terrorism or who engage in the relevant terrorist acts. *See id.* at 604; *see also* Civil Liability for Acts of State Sponsored Terrorism, Pub.L. 104–208, 110 Stat. 3009–172, Div. A, Title I, § 101(c) (“An official, employee, or agent of a foreign state designated as a state sponsor of terrorism . . . while acting within the scope of his or her office, employment, or agency shall be liable to a United States national . . . for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction [under 28 U.S.C. Section 1605 (a)(7)] for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages . . .”). Even prior to the Civil Liability Act, state agencies and instrumentalities (but *not* individuals) who were designated sponsors of terrorism could be sued for punitive damages. *See* CARTER ET AL., *supra* note 28, at 604 (referring to 28 U.S.C. § 1606).

43. For example, the US Court of Appeals for the Eleventh Circuit noted in *United States v. Noriega*:

[The] FSIA “contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.” It codified the State Department’s general criteria for making suggestions of immunity, and transferred the responsibility for case-by-case application of these principles from the Executive Branch to the Judicial Branch. *Because the FSIA addresses neither head-of-state immunity, nor foreign sovereign immunity in the criminal context, head-of-state immunity could attach in cases, such as this one, only pursuant to the principles and procedures outlined in The Schooner Exchange and its progeny.* As a result, this court must look to the Executive Branch for direction on the propriety of Noriega’s immunity claim.

United States v. Noriega, 117 F.3d 1206, 1212 (11th Cir. 1997) (emphasis added and omitted) (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983) (citing *Kadic v. Karadzic*, 70 F.3d 232, 248 (2d Cir. 1995)); *see also* *Enahoro v. Abubakar*, 408 F.3d 877, 882 (7th Cir. 2005) (“In our case, we conclude, based on the language of the statute, that the FSIA does not apply to General Abubakar [as an individual member of a ruling committee, or junta, in Nigeria that exerted considerable control over that country]; it is therefore also clear that the Act does not provide jurisdiction over the case.”). Specifically, the court in *Enahoro* said that “[i]f Congress meant to include individuals acting in the official capacity in the scope of the FSIA, it would have done so in clear and unmistakable terms.” *Id.* at 881–82.

44. *See Noriega*, 117 F.3d at 1211–12 (citing *Verlinden*, 461 U.S. at 486) (“The principles of international comity outlined by the Court in *The Schooner Exchange* led to the development of a general doctrine of foreign sovereign immunity which courts applied most often to protect foreign nations in their corporate form from civil process in the United States. . . . As this doctrine emerged, the ‘Court consistently . . . deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities.’”); *see also infra* notes 45–47 and accompanying text (explaining

Aristide, the District Court for the Eastern District of New York found that the US executive branch's suggestion of immunity for defendant Jean-Bertrand Aristide, whom it recognized as the official head of state of Haiti, was conclusive: "The [US] State Department [within the executive branch] has submitted a letter of immunity. It speaks for the President of the United States. Its suggestion of immunity is controlling with respect to President Aristide. The court must defer to the Executive on this matter."⁴⁵

Additionally, in *Ye v. Zemin*, the Court of Appeals for the Seventh Circuit considered the US executive branch's suggestion of immunity for Chinese head of state Jiang Zemin to be conclusive: "In the present case the Executive Branch has recognized the immunity of President Jiang from the [plaintiff's] suit. The district court was correct to accept this recognition as conclusive."⁴⁶ Moreover, in *Tachiona v. Mugabe*, the District Court for the Southern District of New York granted immunity to the Zimbabwean President Robert Mugabe and Foreign Minister Stan Mudenge for various crimes as a result of the US executive branch's suggestion of immunity.⁴⁷ The court commented that

that judicial deference to suggestions of immunity by the executive branch applies in the particular context of head-of-state immunity); *supra* notes 23–25.

45. 844 F. Supp. 128, 139–40 (E.D.N.Y. 1994). Plaintiff Lafontant sued President of Haiti Aristide for his alleged role in ordering the execution of plaintiff's husband. Aristide apparently had this execution carried out by other officers in his government because plaintiff's husband participated in a failed coup aimed at ousting Aristide from power. *See id.* at 130.

46. 383 F.3d 620, 627 (7th Cir. 2004) ("[T]he immunity of foreign leaders remains the province of the Executive Branch. The Executive Branch's determination that a foreign leader should be immune from suit even when the leader is accused of acts that violate *jus cogens* norms is established by a suggestion of immunity."). In *Ye*, plaintiffs, who were members of a Chinese spiritual movement known as the Falun Gong, sued Chinese President Zemin for acts of "torture, genocide, arbitrary arrest and imprisonment, as well as other claims related to the [plaintiffs'] freedom of conscience, movement, and religion." *Id.* at 622.

47. 169 F. Supp. 2d 259, 279 (S.D.N.Y. 2001). In that case, "[p]laintiffs charge[d] that defendants' lawless conduct included 'murder, torture, terrorism, rape, beatings, and destruction of property.'" *Id.* at 265. Plaintiffs were persecuted as a result of their status as members of the political opposition in Zimbabwe at the time. *See id.* at 265–66; *see also* *First American Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1121 (D.D.C. 1996) (finding that defendants were not entitled to head-of-state immunity, in part because the US executive branch did not issue a suggestion of immunity on their behalf); *Estate of Domingo v. Republic of the Philippines*, 694 F. Supp. 782, 786 (W.D. Wash. 1982) (denying head-of-state immunity to former President Ferdinand Marcos of the Philippines, in part because the US State Department failed to file a suggestion of immunity on his behalf at the time of the suit, after he had left office). For a list of other

“the FSIA does not serve to abrogate the State Department’s decisive role in the recognition of head-of-state immunity, nor to negate the head-of-state immunity invoked here by the State Department on behalf of [the Zimbabwean officials].”⁴⁸

When the Executive Branch does not put forth a suggestion of immunity, some courts undertake an independent analysis of the immunity issue. For example, in a case involving alleged embezzlement of funds by the former President of the Philippines, Ferdinand Marcos, the Second Circuit Court of Appeals suggested in dicta that: “[w]hen lacking guidance from the executive branch [on the head-of-state immunity issue], as here, a court is left to decide for itself whether a head-of-state is or is not entitled to immunity.”⁴⁹ Despite this suggestion by the court, it ultimately declined to reach the merits of the head-of-state immunity issue for former President Marcos.⁵⁰ Rather, the court held that the successor government in the Philippines waived Marcos’ head-of-state immunity.⁵¹

Furthermore, in *Spacil v. Crowe*, though the Court of Appeals for the Fifth Circuit believed it must follow the executive branch’s suggestion of immunity when it exists,⁵² the court also found that absent such a suggestion, the judicial branch may

cases in which US courts followed the executive branch’s suggestion of immunity, see *Tachiona*, 169 F. Supp. 2d at 287.

48. *Tachiona*, 169 F. Supp. 2d at 296–97.

49. *In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988). The suit arose because Marcos refused to respond to a subpoena requiring him to turn over certain bank records. *Id.* at 42.

50. *Id.* at 45. The court declined to reach the merits of the head-of-state immunity issue because it believed either Congress or the President were, under the US Constitution, the branches of government both authorized and best suited to address such an issue. *Id.*

51. *Id.* at 46.

52. 489 F.2d 614, 617 (5th Cir. 1974) (“The precedents are overwhelming. For more than 160 years American courts have consistently applied the doctrine of sovereign immunity when requested to do so by the executive branch. Moreover, they have done so with no further review of the executive’s determination.”) The court in *Spacil* found that the executive branch’s suggestion of immunity was controlling and held that “the executive’s decision to recognize and allow a claim of foreign sovereign immunity binds the judiciary, and that no further review of the executive’s action is dictated.” *Id.* at 620–21. The court based its holding primarily “on the role of secrecy in foreign relations.” *Id.* at 620. It believed that the executive branch was in the best position to make an immunity determination because the foreign relations power was assigned to that branch by the Constitution; in addition, the executive had both more expertise and resources in dealing with a foreign relations question such as an immunity determination. *Id.* at 619.

make its own determination of immunity: “We do not doubt the propriety of courts deciding questions of sovereign immunity, absent executive recognition and allowance of a claim. This has been the traditional and accepted practice of the courts.”⁵³

Finally, in *United States v. Noriega*, the Court of Appeals for the Eleventh Circuit applied the approach suggested in *Spacil* by independently evaluating whether defendant Panamanian General Noriega was entitled to head-of-state immunity.⁵⁴ The court found that, based on certain evaluation criteria such as Noriega’s status and the nature of his acts, he was not entitled to such immunity:

[G]iven that the record indicates that Noriega never served as the constitutional leader of Panama, that Panama has not sought immunity for Noriega and that the charged acts relate to Noriega’s private pursuit of personal enrichment [e.g., drug trafficking], Noriega likely would not prevail even if this court had to make an independent determination regarding the propriety of immunity in this case.⁵⁵

Before offering this independent evaluation of the head-of-state issue, however, the Court found that the US executive branch had indicated through its actions that defendant should not be entitled to immunity: “[B]y pursuing Noriega’s capture and this prosecution [on drug trafficking charges], the Executive Branch has manifested its clear sentiment that Noriega should be denied head-of-state immunity.”⁵⁶

53. *Id.* at 618.

54. 117 F.3d 1206 (11th Cir. 1997).

55. *Id.* at 1212 (citing *In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988)). For a summary of the charges related to drug trafficking for which the district court convicted Noriega, see *id.* at 1209 n.1. Noriega’s official title in Panama at the time of his indictment in the United States on the drug-related charges was “commander of the Panamanian Defense Forces in the Republic of Panama.” *Id.* Also, at this time, the United States recognized Eric Arturo Delvalle as the constitutional leader of Panama. *Id.* at 1209–10. The US government had seized Noriega in Panama and brought him back to US soil to face the drug charges. *See id.*

56. *Id.* at 1212. After noting that the executive branch’s input on the head-of-state issue can fall within one of three categories (i.e., expressly suggest immunity, expressly decline immunity, or offer no guidance), the court in *Noriega* interpreted the holding of a precedent case—*In re Doe*—to be “that absent a formal suggestion of immunity, a putative head of state should receive no immunity.” *Id.* (citing *Doe*, 860 F.2d at 45). Applying this standard, the *Noriega* court believed that the executive branch, through its actions, clearly manifested its intent that Noriega be denied immunity. *Id.* While this may be one interpretation of *Doe*, it should be emphasized that in that case the court

Notably, head-of-state status for purposes of the immunity determination attaches only to those individuals whom the US executive branch recognizes as legitimately holding that status.⁵⁷ For example, in *United States v. Noriega*, the district court commented:

In order to assert head of state immunity, a government official must be recognized as a head of state. Noriega has never been recognized as Panama's Head of State . . . by the United States. . . . [T]he United States government has never accorded Noriega head of state status, but rather continued to recognize President Eric Arturo Delvalle as the legitimate leader of Panama while Noriega was in power.⁵⁸

Moreover, in *Lafontant v. Aristide*, the district court found the fact that defendant Aristide was in exile from Haiti and did not actually control that country's government to be irrelevant to the determination of head-of-state status; rather, the controlling factor for the court was the designation of head-of-state status by the US executive branch:

[Head-of-state] immunity extends only to the person the United States government acknowledges as the official head-of-state. Recognition of a government and its officers is the exclusive function of the Executive Branch. Whether the recognized head-of-state [e.g., Aristide] has *de facto* control of the government is irrelevant; the courts must defer to the Executive determination.⁵⁹

denied immunity based on the formal waiver by the Philippine government of defendant Marcos's immunity. *See infra* note 63 and accompanying text.

57. *See* PETER HENNER, HUMAN RIGHTS AND THE ALIEN TORT STATUTE: LAW, HISTORY AND ANALYSIS 267–68 (2009).

58. 746 F. Supp. 1506, 1519 (S.D. Fl. 1990). The court also explained that defendant Noriega was also not recognized as head of state by the Panamanian Constitution. *See id.* The court found that “[t]he ruling in [*Republic of Panama v. Air Panama*, 745 F. Supp. 669 (S.D. Fla. 1988)]—which [it] [found] no reason to depart from here—was based on a line of case law holding that recognition of foreign governments and their leaders is a discretionary foreign policy decision committed to the Executive Branch and thus conclusive upon the courts.” *Id.* at 1519–20 (citing *Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943); *Guaranty Trust Co. v. United States*, 304 U.S. 126, 137 (1938); *United States v. Belmont*, 301 U.S. 324, 328 (1937); *Jones v. United States*, 137 U.S. 202, 212–14 (1890); *Banco De Espana v. Fed. Reserve Bank*, 114 F.2d 438, 442 (2d Cir. 1940); *Republic of Panama v. Citizens and Southern Int'l Bank*, 682 F. Supp. 1544, 1545 (S.D. Fl. 1988)).

59. 844 F. Supp. 128, 132–33 (E.D.N.Y. 1994) (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)). The court also noted that “[US p]residential decisions

Finally, in *Kadic v. Karadžić*, the court refused to recognize defendant Radovan Karadžić as a head of state because the US executive branch had yet to confer such status on defendant:

Even if such future recognition [of head-of-state status for Karadžić], determined by the Executive Branch, would create head-of-state immunity, it would be entirely inappropriate for a court to create the functional equivalent of such an immunity based on speculation about what the Executive Branch *might* do in the future.⁶⁰

Moreover, foreign governments may choose to waive the immunity ordinarily attaching to their heads of state.⁶¹ For example, in *Aristide*, the court determined that the de facto military rulers of Haiti had not “waived” defendant Aristide’s immunity as a sitting head of state: “Here there has been no explicit waiver of President Aristide’s immunity recognized as a waiver by the United States. . . . [T]he unrecognized *de facto* rulers of Haiti have no power to and have not undertaken any action accepted by our government as an implicit waiver of immunity.”⁶² However, in two other cases, foreign governments were found to have waived the immunity of their leaders. In a case examining the possible head-of-state immunity of former President Ferdinand Marcos of the Philippines, the Court of Appeals for the Fourth Circuit concluded that the successor government of the Philippines had waived Marcos’s immunity:

We think the waiver [of immunity] should be given full effect. Head-of-state immunity is founded on the need for comity among nations and respect for the sovereignty of other nations; it should apply only when it serves those goals. In this case, application of the doctrine to Ferdinand . . . Marcos would clearly offend the present Philippine government, which has sought to waive . . . Marcos’ immunity, and would therefore undermine the international comity that the immunity doctrine is designed to promote. Our view is that head-of-state immunity is primarily an

to recognize a government are binding on the courts, and the courts must give them legal effect.” *Id.* at 133 (citing *United States v. Pink*, 315 U.S. 203, 230 (1942)).

60. *Kadic v. Karadžić*, 70 F.3d 232, 248 (2d Cir. 1995) (citing *Mexico v. Hoffman*, 324 U.S. 30, 35 (1945); *In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988); *Aristide*, 844 F. Supp. at 133).

61. *Aristide*, 844 F. Supp. at 133 (“The government of a foreign state which is recognized by the Executive Branch may waive its head-of-state immunity.”).

62. *Id.* at 134.

attribute of state sovereignty, not an individual right. Respect for Philippine sovereignty requires us to honor the Philippine government's revocation of the head-of-state immunity of Mr. . . . Marcos.⁶³

Moreover, in *Paul v. Avril*, the District Court for the Southern District of Florida found that former President of Haiti Prosper Avril was not entitled to head-of-state immunity for the alleged atrocities committed under his leadership because the government of Haiti had waived his immunity.⁶⁴

C. *Former Heads of State*

Former heads of state are generally denied immunity in US courts for acts committed outside their official capacities while in office (e.g., "private" acts).⁶⁵ For example, courts may deny immunity to "a former head-of-state [who committed while in office] private or criminal acts in violation of American law."⁶⁶

63. *In re Grand Jury Proceedings*, 817 F.2d 1108, 1110–11 (4th Cir. 1987). Marcos was seeking immunity from process. Both Marcos and his wife had been subpoenaed to testify before a US grand jury on alleged corruption charges. *See id.* at 1109–10.

64. 812 F. Supp. 207 (S.D. Fl. 1993). The court said: "Defendant [Avril] next argues that he is immune from the jurisdictional arm of this court under the Head of State doctrine. This argument must also fail." *Id.* at 211. The court concluded that "[t]he waiver of immunity by the Haitian government is complete and also affects [defendant's] residual head of state immunity." *Id.* For the precise language of the waiver by the Aristide government, see *id.* at 210. In the waiver, defendant is referred to as "ex-Lieutenant-General of the Armed Forces of Haiti and former President of the Military Government of the Republic of Haiti." *Id.* According to plaintiffs' complaint, plaintiffs sought money damages in their suit against defendant Avril for "[t]orture; [a]rbitrary [d]etention; [c]ruel, [i]nhuman and [d]egrading [t]reatment; [f]alse [i]mprisonment; [a]ssault and [b]attery; and [i]ntentional [i]nfliction of [e]motional [d]istress." *Id.* at 209. Defendant allegedly ordered others to commit these acts. *See id.*

65. *See HENNER, supra* note 57, at 264 ("Head of state immunity extends only to the current head of state; it does not extend to former presidents or prime ministers."). Courts appear to use a common-law approach to immunity for former heads of state and do not rely upon FSIA. *See RESTATEMENT, supra* note 1, § 464 Reporter's Note 14 (1987) ("Former heads of state or government have sometimes sought immunity from suit in respect of claims arising out of their official acts while in office.").

66. *In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) ("[W]ere we to reach the merits of the issue, we believe 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." (citing *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 135, 144 (1812); *In re Grand Jury Proceedings*, 817 F.2d at 1111; *Republic of the Philippines v. Marcos*, 806 F.2d 344, 360 (2d Cir. 1986)); *see RESTATEMENT, supra* note 1, § 464, Reporter's Note 14 (1987) ("Former heads of state or government have sometimes sought immunity from suit in respect of claims arising out of their official acts while in office."). The immunity conferred on former heads of state or high officials, however, does not extend to

Such denial of immunity has also occurred when the US executive branch failed to make a suggestion of immunity on behalf of a former head of state.⁶⁷ Former heads of state may, however, claim immunity for acts committed in their official capacity while in office.⁶⁸

D. *Foreign Official Immunity and FSIA*

Most recently, in *Samantar v. Yousuf*, the US Supreme Court held that, similar to the case of foreign heads of state, FSIA immunity does not apply to individual foreign government officials.⁶⁹ This holding represents a significant departure from previous federal lower court jurisprudence finding foreign government officials immune under FSIA for acts committed within their official capacity.⁷⁰ In particular, the Court “agree[d]

violations of international law. See RESTATEMENT, *supra* note 1, § 404. The court in *Doe* did not reach the actual merits of the issue of former head-of-state immunity for the ex-leader of the Philippines, Ferdinand Marcos, because it found that the successor Philippine government waived Marcos’s immunity. *Id.* at 45–46. For further discussion of *Doe*, see *supra* note 54 and accompanying text.

67. See, e.g., *Estate of Domingo v. Republic of the Philippines*, 694 F. Supp. 782 (W.D. Wash. 1988) (denying immunity from suit for former President of the Philippines Ferdinand Marcos). *Estate of Domingo* also held that “[h]ead of state immunity serves to safeguard the relations among foreign governments and their leaders, not as [Marcos] assert[s], to protect former heads of state regardless of their lack of official status.” *Id.* at 786. Concerning the immunity question, the district court in *Estate of Domingo* found determinative the fact that the US government had not proffered a suggestion of immunity for Marcos after he left office. *Id.* The suit against Marcos and other defendants was for allegedly “plan[ing], execut[ing] and cover[ing] up the murder of two Filipino union leaders . . . who openly and actively opposed the Marcos regime.” *Id.* at 783; see CARTER ET AL., *supra* note 28, at 628. (“Similar to the situation with the present head of state, most courts look to the Executive Branch for guidance [to resolve the issue of former-head-of-state immunity].”).

68. RESTATEMENT, *supra* note 1, § 464, Reporter’s Note 14. (“Former heads of state or government have sometimes sought immunity from suit in respect of claims arising out of their official acts while in office.”) Note, however, that while a state may not generally legislate on the former-head-of-state immunity issue, its courts may entertain claims on the issue. See *id.* (“Ordinarily, such [official] acts [carrying potential immunity for the former head of state] are not within the jurisdiction to prescribe of other states. However, a former head of state appears to have no immunity from jurisdiction to adjudicate.”).

69. 130 S. Ct. 2278 (2010).

70. Prior to the US Supreme Court decision in *Samantar*, there was a split between US circuit courts of appeals, but a noticeable trend among these courts was that FSIA immunity did apply to individual foreign government officers for their official acts. See HENNER, *supra* note 57, at 259 (“The principle that an individual can assert FSIA immunity for actions taken within his or her official capacity has been upheld by at least

with the [Fourth Circuit] Court of Appeals on its broader ground that individual officials are not covered by the FSIA”⁷¹ The Court based its holding on the language, purpose, and history of FSIA itself:

Although Congress clearly intended [through its passage of FSIA] to supersede the common-law regime for claims against foreign states, we find nothing in the statute’s origin

five circuits.”); *see, e.g., In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 81 (2d Cir. 2008) (“We join our sister circuits in holding that an individual official of a foreign state acting in his official capacity is the ‘agency or instrumentality’ of the state, and is thereby protected by the FSIA.”); *see also* HENNER, *supra* note 57, at 256–62 & n.57 (discussing split among circuits). *In re Terrorist Attacks* involved four Saudi princes, among other defendants. Several of these princes apparently held high positions in the Saudi government, including Minister of the Interior, Director of the Department of General Intelligence, Chairman of the Supreme Council of Islamic Affairs, and First Deputy President of the Council of Ministers. 538 F.3d at 77; *see also* *Belhas v. Ya’Alon*, 515 F.3d 1279, 1283 (D.C. Cir. 2008) (“An individual qualifies for [FSIA] immunity when he acts in his official capacity for the state.” (citing *Jungquist v. Al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir.1997))); *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 815–16 (6th Cir. 2002) (“[N]ormally foreign sovereign immunity extends to individuals acting in their official capacities as officers of corporations considered foreign sovereigns.”). In *Belhas*, the circuit court of appeals found that the defendant, a former Israeli military general, was immune under the FSIA for official acts he committed that were authorized by the Israeli government. The court said, “We have no difficulty in holding . . . that the FSIA does not extend jurisdiction [i.e., it confers immunity] over this action against an officer for actions committed by the state in whose army he served.” *Belhas*, 515 F.3d at 1284. The plaintiffs, who were relatives of citizens killed or injured in a shelling by the Israeli military of a United Nations compound in Lebanon, alleged that the defendant’s military command responsibility in the shelling constituted “war crimes, extrajudicial killing, crimes against humanity, and cruel, inhuman or degrading treatment or punishment.” *Id.* at 1282. *But see* *Enahoro v. Abubakwar*, 408 F.3d 877, 882 (7th Cir. 2005) (“In our case, we conclude, based on the language of the statute, that the FSIA does not apply to General Abubakwar [as an individual member of a ruling committee, or junta, in Nigeria that exerted considerable control over that country]; it is therefore also clear that the Act does not provide jurisdiction over the case.”). Specifically, the court in *Enahoro* said that “[i]f Congress meant to include individuals acting in the official capacity in the scope of the FSIA, it would have done so in clear and unmistakable terms.” *Id.* at 881–82. Note that even under the prevailing trend of cases described above, if the foreign government official committed an act *not* in his official capacity, FSIA immunity was generally denied. *See, e.g., Hilao v. Marcos*, 25 F.3d 1467, 1470–71 (9th Cir. 1994) (finding that former President Marcos was not entitled to FSIA immunity for his authorization while in office of torture, arbitrary detentions, and extrajudicial executions, because these acts do not constitute official acts of state); *Trajano v. Marcos*, 978 F.2d 493, 498 (9th Cir. 1992) (finding that the daughter of former President of the Philippines Ferdinand Marcos was not entitled to FSIA immunity because the crimes she committed were not official acts of the state). For further discussion of these cases involving the Marcos family, *see* HENNER, *supra* note 57, at 260.

71. *Samantar v. Yousuf*, 130 S. Ct. at 2284 n.5.

or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity. Our review of the text, purpose, and history of the FSIA leads us to the conclusion that . . . the FSIA does not govern [the defendant foreign official's] claim of immunity.⁷²

Notably, *Samantar* involved a foreign official who allegedly committed crimes against the plaintiff victims both while a head of state (i.e., Prime Minister of Somalia) and while a governmental official of that state (i.e., First Vice President and Minister of Defense of Somalia).⁷³ The holding in *Samantar* will likely widen the scope of permissible suits against foreign government officials because these officials will no longer enjoy immunity under the FSIA; however, they will apparently continue to be subject to potential grants of immunity under the common law.⁷⁴

II. *HEAD OF STATE AND FOREIGN OFFICIAL IMMUNITY: INTERNATIONAL LAW APPROACH*

A. *International Case Law*

1. *Democratic Republic of the Congo v. Belgium*

On April 11, 2000, a Belgian judge, Mr. Vandermeersch, issued an international arrest warrant for the Minister of Foreign Affairs of the Democratic Republic of the Congo, Mr. Abdulaye Yerodia Ndombasi.⁷⁵ The warrant sought extradition of Yerodia for alleged breaches of the Geneva Convention of 1949 and

72. *Id.* at 2292.

73. *Id.* at 2282. The crimes alleged by the plaintiffs included torture, extrajudicial killing, and arbitrary detention, and plaintiffs sought money damages from defendant in his personal capacity as of result of his alleged authorization of these acts. *Id.* at 2282, 2292.

74. This is analogous to the opportunity for common-law immunity under US law enjoyed by foreign heads of state. *See supra* notes 43–54 and accompanying text. Also, cases involving former officials have generally been analyzed under the common law and not under the FSIA. For cases analyzing former heads of state immunity under a common-law approach, see *supra* notes 63–66 and accompanying text. For a case analyzing a former official under a common law approach, see *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009) (noting that it is unresolved whether FSIA applies to former officials but acknowledging that common-law immunity analysis would apply). *See HENNER, supra* note 57, at 262 (citing *Matar*, 2009 US App. LEXIS at 7877).

75. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belgium) 2002 I.C.J. 3, ¶¶ 1, 10 (Feb. 14).

commission of crimes against humanity.⁷⁶ Specifically, Yerodia was charged with making numerous speeches inciting racial hatred during August 1998, punishable in Belgium under the Law of June 16, 1993.⁷⁷ Yerodia was neither a Belgian national nor within Belgium territory at the time the arrest warrant was circulated.⁷⁸ The warrant was issued based on complaints filed by twelve Belgian citizens, five of whom are of Belgian nationality.⁷⁹

On October 17, 2000, the Democratic Republic of the Congo (“Congo”) filed an application with the Registry of the International Court of Justice to request that the court order the warrant annulled.⁸⁰ The Congo contended that, by issuing the warrant, Belgium violated international law norms concerning immunity;⁸¹ in particular, that the warrant violated the principle that one state may not exercise authority over another.⁸² To support its claim, the Congo relied upon Article 2 of the Charter of the United Nations, which establishes the sovereignty of member states.⁸³ Additionally, the Congo argued that Yerodia was entitled to a claim of immunity under the Vienna Convention on Diplomatic Relations (“VCDR”).⁸⁴

In contrast, Belgium sought to have the ICJ case dismissed, contending that, since Yerodia ceased to hold office in mid-April 2001, the issues before the court were now moot as he no longer

76. *Id.* ¶ 13.

77. *Id.* ¶ 15; Loi du 16 juin 1993 relative à la repression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces conventions [Law of 16 June 1993 Relative to the Repression of Grave Breaches of the Geneva Conventions of 12 August 1949 and Protocols I and II of 8 June 1977 Additional to These Conventions], MONITEUR BELGE [MB] [Official Gazette of Belgium], Aug. 5, 1993, 17751 [hereinafter Law of 16 June 1993]. Article 7 of this law provides that Belgian courts hold jurisdiction over breaches of the Geneva Convention and international humanitarian law wherever they may be committed. *See id.*; *see also Congo v. Belgium*, 2002 I.C.J. ¶ 15. Article 5 of the law stipulates that immunity stemming from an individual’s official capacity shall not prevent application of the law. Law of 16 June 1993, *supra*; *see also Congo v. Belgium*, 2002 I.C.J. ¶ 15.

78. *Congo v. Belgium*, 2002 I.C.J. ¶ 15.

79. *Id.* The charged offenses were committed outside of Belgian territory. *Id.*

80. *Id.* ¶¶ 1, 32.

81. *Id.* ¶ 1.

82. *Id.*

83. *Id.*

84. *Id.* In particular, the Congo cited Article 41, paragraph 2 of the Vienna Convention on Diplomatic Relations (“VCDR”).

enjoyed immunity as Minister of Foreign Affairs.⁸⁵ The ICJ, however, ruled against Belgium's contention, concluding that if ICJ jurisdiction existed on the date the case was referred to the court, such jurisdictional authority continues regardless of subsequent events.⁸⁶

Turning to the merits of the case, the court first acknowledged that it is firmly established in international law that certain high-ranking officers in a state, including heads of state and ministers of foreign affairs, enjoy immunity from criminal and civil jurisdiction in other states.⁸⁷ Because there are no conventions that speak specifically to the immunity of a minister of foreign affairs, the court examined the immunity provisions of other international treaties to support its decision.⁸⁸ In particular, the court relied upon the preamble of the VCDR establishing the overall purposes for diplomatic immunities and privileges. One such purpose cited by the court included the efficient function and performance of diplomatic missions.⁸⁹ According to the court, the VCDR preamble constitutes customary international law, a type of law the court reasons it must use in the absence of a relevant and applicable convention.⁹⁰ In light of the similar functions of diplomats and foreign affairs ministers and the similar need for immunity as a result of those functions, the court found that a minister of

85. *Id.* ¶ 24.

86. *Id.* ¶ 26. Both parties agreed that there existed a legal dispute at the time of referral of the case to the ICJ (i.e., whether Yerodia enjoyed immunity from prosecution as a sitting minister). *Id.* ¶ 24. Also, both parties agreed that they were bound by their previous consent to the compulsory jurisdiction of the ICJ. *Id.* ¶ 27. Belgium consented to the compulsory jurisdiction of the ICJ on June 17, 1958, and the Congo offered its consent to such jurisdiction on February 8, 1989. *Id.* Additionally, the change in Yerodia's status may have altered part of the case but did not end the dispute, as the Congo's challenge was, and is, in regard to the arrest warrant. *Id.* ¶ 32.

87. *Id.* ¶ 51 ("[I]n international law it is firmly established that . . . certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.").

88. *Id.* ¶ 52.

89. *Id.*; see Vienna Convention on Diplomatic Relations, pmbl., Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 ("[T]he purpose of such [diplomatic] privileges and immunities is . . . to ensure the efficient performance of the functions of diplomatic missions as representing states . . .").

90. *Congo v. Belgium*, 2002 I.C.J. ¶ 52.

foreign affairs should enjoy full personal immunity, or immunity *ratione personae*, under customary international law.⁹¹

The ICJ next turned to examining customary international law with regard to exceptions, or “bars,” to immunity for grave international crimes such as war crimes and crimes against humanity.⁹² The court examined state practice through investigation into national legislation and decisions by high national courts, finding no evidence of this type of criminal immunity exception for ministers of foreign affairs in national court trials.⁹³ Additionally, the court examined the immunity provisions in the statutes of multiple international tribunals and again found no mention of exceptions to immunity for these crimes in national court trials.⁹⁴ Thus, the court concluded that a sitting minister of foreign affairs, such as Yerodia, maintained immunity from trial in a foreign national court for grave international crimes.

Though foreign national courts may not exert jurisdiction over sitting ministers of foreign affairs accused of grave international crimes, the ICJ pointed out that immunity generally does not exist under international law norms if the sitting official is prosecuted in his or her own country, ceases to hold the office which granted immunity at the time relevant legal proceedings commence, is prosecuted before certain international criminal courts or tribunals, or if the “home” state waives immunity.⁹⁵ In the case at hand, the court reasoned that, though Yerodia was no longer the acting Minister of Foreign Affairs at the time of its decision, the warrant was issued while he held the position and enjoyed the immunities conferred by it.⁹⁶ The court concluded

91. *Id.* ¶ 54. The functions of a minister of foreign affairs include diplomatic activities, acting as a representative of a sending state, acting on behalf of a sending state, and coordinating international relations for a state. *Id.* ¶ 53. A distinction cannot be drawn between official and private acts for the purpose of immunity as arrest for either type of act would interfere with the minister’s official functions. *Id.* ¶ 55.

92. *Id.* ¶ 60.

93. *Id.* ¶ 58. The court examined rulings from such courts as the English House of Lords and French Court of Cassation. *Id.*

94. *Id.* The court examined the statutes of the ICC, ICTR, ICTY, International Military Tribunal of Nuremberg, and International Military Tribunal of Tokyo. *Id.*

95. *Id.* ¶ 61. Regarding a former senior foreign official or head of state, he or she may be tried for acts committed prior to obtaining or after leaving office, and for such acts committed in a private capacity while in office. *Id.* Immunity would, however, continue for official acts performed in office.

96. *Id.* ¶ 70.

that the mere issuance of the warrant on the part of Belgium violated its international obligations to the Congo.⁹⁷ As a remedy, the ICJ ordered Belgium to cancel its warrant and inform the appropriate authorities of the cancellation.⁹⁸

2. Charles Taylor Immunity Decision

Starting in the late 1980s, Charles Taylor served as the head of the National Patriotic Front of Liberia (“NPFL”), an organized military group.⁹⁹ Taylor was elected and served as President of the Republic of Liberia from August 2, 1997, to approximately August 11, 2003.¹⁰⁰ While President, Taylor worked with such

97. *Id.* Namely, Belgium violated its obligation to respect the Congo’s sovereignty.
Id.

98. *Id.* ¶ 76. Another decision regarding the immunity of heads of state and senior officials in foreign national courts is pending before the ICJ. See Press Release 2002/37, ICJ, The Republic of the Congo Seizes the International Court of Justice of a Dispute with France (Dec. 9, 2002), available at <http://www.icj-cij.org/docket/index.php?pr=60&case=129>. The Congo contends that France, in attempting to prosecute a Congolese Minister of Interior in a French court for crimes against humanity and torture allegedly committed during the execution of his official powers, violated “the principle that a State may not, in breach of the principle of sovereign equality among all Members of the United Nations . . . exercise its authority on the territory of another State.” Application Instituting Proceedings, Certain Criminal Proceedings in France (Congo v. Fr.) 3, (Apr. 11, 2003). In addition, the Congo contends that France, by seeking to execute a warrant for the Congolese President to appear as a witness for police regarding the accusations against the Congolese Minister of Interior, violated “the criminal immunity of a foreign Head of State—an international customary rule recognized by the jurisprudence of the Court.” *Id.* The ICJ has issued a decision in this case declining to issue a provisional measure to stop the French criminal investigation of the Congolese leaders. See Request for the Indication of a Provisional Measure, Certain Criminal Proceedings in France (Congo v. Fr.), 2003 I.C.J. 102, ¶¶ 4, 41. This decision still maintains the international law immunities for sitting heads of state and senior officials established in *Congo v. Belgium*. See O’Donnell, *supra* note 3, at 413 (“A major distinction, however, is that in [Congo v. Belgium], the concern was that any third state could execute an existing international arrest warrant against Yerodia. For this reason, the incumbent head of state’s immunity was upheld by denying the continued issuance of the international arrest warrant In this case, it was not the chance that any third state would utilize a document that was already in international circulation to draw a head of state into its courts. Instead, it was that one state had commenced a criminal investigation into another state’s head of state. By permitting the investigation in this case to go forward, the ICJ appears to have taken the position that any state suspecting another state’s leader of international crimes may proceed with investigations, even when the objective of such investigations may be to establish liability.”); see also discussion *supra* note 3.

99. Prosecutor v. Taylor, Case No. SCSL-2003-01-PT, Prosecution’s Second Amended Indictment, ¶ 2 (May 29, 2007).

100. *Id.* ¶ 3.

groups as the Revolutionary United Front (“RUF”), the Armed Forces Revolutionary Council (“AFRC”), the RUF/AFRC Junta or alliance, and Liberian fighters, including members and ex-members of the NPFL.¹⁰¹ Taylor supported, commanded, and encouraged these groups to carry out a campaign to terrorize the civilian population of the Republic of Sierra Leone.¹⁰²

Charles Taylor was indicted by Stephen Rapp, the Prosecutor of the Special Court for Sierra Leone, on May 29, 2007.¹⁰³ By this time, it had been several years since Taylor had resigned as President of Liberia.¹⁰⁴ The Prosecutor charged Taylor with eleven separate violations of international law as provided in the Statute of the Special Court for Sierra Leone¹⁰⁵: (1) acts of terrorism in violation of Common Article 3 of the Geneva Conventions and of Additional Protocol II (i.e., “war crimes”); (2) five counts of crimes against humanity, including murder, rape, sexual slavery, other inhumane acts, and enslavement; (3) violence to life, health, and physical or mental well-being of persons, including murder (Count 3) and cruel treatment (Count 7); and (4) outrages upon personal dignity, conscripting or enlisting children under the age of fifteen into the armed forces, and pillaging.¹⁰⁶

101. *Id.* ¶ 5.

102. *See id.*

103. *See generally id.*

104. *See* Somini Sengupta, *Liberian President Resigns as Peacekeepers Enter Capital*, N.Y. TIMES, Aug. 8, 2003, <http://query.nytimes.com/gst/fullpage.html?res=940CE6DC1431F93BA3575BC0A9659C8B63&pagewanted=1>.

105. Taylor was charged pursuant to paragraphs 1 and 3 of Article 6 of the Statute. Paragraph 1 of Article 6 of the Statute provides: “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in . . . the present Statute shall be individually responsible for the crime.” Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, art. 6, para. 1, U.N.-Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 138 [hereinafter Statute of the Special Court for Sierra Leone]. Paragraph 3 of Article 6 provides:

The fact that any of the [criminal] acts referred to in . . . the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Id. art. 6, ¶ 3.

106. *See* Prosecutor v. Taylor, Case No. SCSL-2003-01-PT, Prosecution’s Second Amended Indictment, ¶ 2 (May 29, 2007). Regarding terrorizing the civilian population:

“Members of the RUF, Armed Forces Revolutionary Council (AFRC), RUF/AFRC Junta or alliance, and/or Liberian fighters, were assisted and encouraged by, acted in concert with, under the direction and/or control of, and/or subordinate to [Taylor], burned civilian property . . . as part of a campaign to terrorize the civilian population of the Republic of Sierra Leone.

Id. ¶ 5.

In regard to murder:

Between about 30 November 1996 and about 18 January 2002, members of the RUF, AFRC, RUF/AFRC Junta or alliance, and/or Liberian fighters were assisted and encouraged by, acting in concert with, under the direction and/or control of, and/or subordinate to [Taylor], throughout Sierra Leone, unlawfully killed an unknown number of civilians

Id. ¶ 9.

In regard to rape and sexual slavery:

Between about 30 November 1996 and about 18 January 2002, members of the RUF, AFRC, RUF/AFRC Junta or alliance, and/or Liberian fighters were assisted and encouraged by, acting in concert with, under the direction and/or control of, and/or subordinate to [Taylor], committed widespread acts of violence against civilian women and girls

Id. ¶ 14.

In regard to other inhumane acts:

Between about 30 November 1996 and about 18 January 2002, members of the RUF, AFRC, RUF/AFRC Junta or alliance, and/or Liberian fighters were assisted and encouraged by, acting in concert with, under the direction and/or control of, and/or subordinate to [Taylor], committed widespread acts of physical violence against citizens

Id. ¶ 18.

In regard to enslavement:

Between about 30 November 1996 and about 18 January 2002, members of the RUF, AFRC, RUF/AFRC Junta or alliance, and/or Liberian fighters were assisted and encouraged by, acting in concert with, under the direction and/or control of, and/or subordinate to [Taylor], engaged in widespread and large scale abductions of civilians and use of civilians as forced labour

Id. ¶ 23.

In regard to conscripting or enlisting children under the age of fifteen into the armed forces:

Between about 30 November 1996 and about 18 January 2002, members of the RUF, AFRC, RUF/AFRC Junta or alliance, and/or Liberian fighters were assisted and encouraged by, acting in concert with, under the direction and/or control of, and/or subordinate to [Taylor], routinely conscripted, enlisted and/or used boys and girls under the age of 15 to participate in active hostilities. Many of these children were first abducted then trained in AFRC and/or RUF camps in various locations throughout the country, and thereafter used as fighters.

Id. ¶ 22.

In regard to pillaging:

Between about 30 November 1996 and about 18 January 2002, members of the RUF, AFRC, RUF/AFRC Junta or alliance, and/or Liberian fighters were assisted and encouraged by, acting in concert with, under the direction and/or control of, and/or subordinate to [Taylor], engaged in widespread unlawful taking of civilian property

On July 23, 2003, Taylor's counsel filed a motion to quash the indictment and declare void the arrest warrant on the basis of head-of-state immunity.¹⁰⁷ On May 31, 2004, the Appeals Chamber of the Special Court for Sierra Leone denied Taylor's motion.¹⁰⁸ It pointed out that Article 6 of the Special Court's governing statute stipulates that the official position of an accused does not remove individual criminal responsibility.¹⁰⁹ According to the Appeals Chamber, the International Law Commission had accepted this restriction on immunity as long ago as 1950 during the formation of the Charter for the Nuremberg Tribunal.¹¹⁰ Furthermore, the stripping of immunity before international judicial bodies for heads of state and other government officials has become well established since 1950, as evidenced by the governing statutes of the International Criminal Tribunal for Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda ("ICTR"), and the ICC.¹¹¹ Finally, to further support its denial of Taylor's motion for immunity from indictment and arrest, the Appeals Chamber considered the reasoning of the ICJ's decision in *Congo v. Belgium*.¹¹² Based upon the ICJ's reasoning in that case, the Chamber concluded that head-of-state prosecutions by international judicial bodies are acceptable.¹¹³ International judicial bodies are created by the authority of the international community as a whole, and thus do not infringe on the principles of sovereignty when passing judgment on heads of state and other high officials.¹¹⁴

Id. ¶ 28.

107. Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, 2 (May 31, 2004).

108. *Id.* ¶ 60.

109. *Id.* ¶ 44.

110. *Id.* ¶ 47.

111. *Id.* ¶ 45. The court also noted the decreased risk to international peace and stability posed by an international trial of a sitting head of state compared to a foreign national trial: "[S]tates have considered the collective judgment of the international community to provide a vital safeguard against the potential destabilizing effect of unilateral [foreign national court] judgment in this area." *Id.* ¶ 51 (quoting Professor Diane Orentlicher's amicus brief).

112. *Id.* ¶ 50; see *supra* Part II.A.1.

113. *Taylor*, Case No. SCSL-2003-01-I, ¶ 52.

114. *Id.* Charles Taylor's trial is still ongoing by the Special Court for Sierra Leone. Due to security concerns with trying Taylor at the court's headquarters in Sierra Leone, the court is using facilities in The Hague for Taylor's trial. *The Prosecutor vs. Charles Ghankay Taylor*, THE SPECIAL COURT FOR SIERRA LEONE, <http://www.sc-sl.org/CASES/ProsecutorvsCharlesTaylor/tabid/107/Default.aspx> (last visited Nov. 12, 2010).

B. *International Codification and the Developing ICC Case Against Sudanese President Al-Bashir*

As explicitly mentioned in the *Congo v. Belgium* decision, international criminal courts, in direct contrast to national courts under international law, maintain the authority to prosecute sitting heads of state and government officials for grave crimes.¹¹⁵ For example, the statutes of the ICC, ICTR, ICTY, and the Special Court for Sierra Leone decline to recognize immunity for grave crimes committed by heads of state and other governmental officials.¹¹⁶ The ICC recently charged the current head of state of Sudan, President Al-Bashir, with grave international crimes, including crimes against humanity, war crimes and, most recently over the summer of 2010, genocide. Thus the ICC has now issued two separate warrants for Al-Bashir's arrest.¹¹⁷

According to the court's website, "The Special Court trial of Charles Ghankay Taylor is taking place at the Special Tribunal for Lebanon (STL) courtroom in Leidschendam, the Netherlands." *Id.*

115. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 61 (Feb. 14).

116. *Id.* For a detailed explanation of the immunity provisions codified in the statutes of these respective international tribunals, see *infra* note 184.

117. The ICC Prosecutor charged President Al-Bashir, the current head of state of Sudan, with grave international crimes, including crimes against humanity and war crimes, for his role as an indirect perpetrator and conspirator of these crimes. The Pre-Trial Chamber issued a warrant for Al-Bashir's arrest. *See* Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest (Mar. 4, 2009). The prosecutor charged Al-Bashir with the following war crimes: pillaging and intentionally directing attacks against civilians. *Id.* ¶¶ 3, 7. The prosecutor charged Al-Bashir with the following crimes against humanity: murder, extermination, forcible transfer, torture, and rape. *Id.* ¶¶ 7–8. In the summer of 2010, the Pre-Trial Chamber issued a second arrest warrant for Al-Bashir for the crime of genocide. Al-Bashir is charged with three counts of genocide. *See* Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09, Second Warrant of Arrest (July 12, 2010). Significantly, the Chamber found the necessary genocidal intent to charge Al-Bashir with genocide. *See* Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09, Second Decision on the Prosecutor's Application for a Warrant of Arrest, ¶¶ 5–6 (July 12, 2010). In the Sudan, government military and police forces as well as local militias such as the *Janjaweed*, who are armed and often commanded by the government, have burned and looted rebel villages, raped women, killed people, and forced survivors to flee to Chad. John Ryle, *Disaster in Darfur*, N.Y. REV. BOOKS, Aug. 12, 2004, at 55. The Sudanese government has undertaken these violent actions in response to demands from rebel groups in the Darfur region of the Sudan for greater representation. *Id.*

III. *HEAD OF STATE AND FOREIGN OFFICIAL IMMUNITY:
FOREIGN NATIONAL APPROACHES*

A. *United Kingdom: The Case against Augusto Pinochet*

Augusto Pinochet led a coup d'état against Chilean President Salvador Allende on September 11, 1973 to claim the presidency.¹¹⁸ While Pinochet was in office, barbaric acts were committed within Chile, including torture, murder, and the unexplained disappearance of individuals en masse.¹¹⁹ Pinochet apparently instigated and had knowledge of these crimes.¹²⁰ On October 16, 1998, Spain issued an international arrest warrant for Pinochet while the former president was in England receiving medical treatment.¹²¹ This action, in turn, led a London magistrate to issue a provisional warrant for Pinochet under the Extradition Act of 1989.¹²² Pinochet was arrested on October 17, 1998 in a London hospital.¹²³ Following Pinochet's arrest, Spain issued a second warrant on October 18, which charged Pinochet with five offenses, and an English magistrate issued a second provisional warrant on October 22.¹²⁴

118. *R. v. Bow St. Metrop. Stipendiary Magistrate (Ex parte Pinochet Ugarte)* (No.3), [2000] 1 A.C. 147 (H.L.) 190 (appeal taken from Divisional Court of the Queen's Bench).

119. *Id.*

120. *Id.*

121. *Id.* at 191.

122. *Id.*

123. *Id.*

124. *Id.* The English magistrate warrant of October 22, 1998 reads:

(1) Between 1 January 1988 and December 1992 being a public official intentionally inflicted severe pain or suffering on another in the performance or purported performance of his official duties; (2) between 1 January 1988 and 31 December 1992 being a public official, conspired with persons unknown to intentionally inflict severe pain or suffering on another in the performance or purported performance of his official duties; (3) between 1 January 1982 and 31 January 1992 he detained other persons (the hostages) and in order to compel such persons to do or to abstain from doing any act threatened to kill, injure or continue to detain the hostages; (4) between 1 January 1982 and 31 January 1992 conspired with persons unknown to detain other persons (the hostages) and in order to compel such persons to do or to abstain from doing any act, threatened to kill, injure or continue to detain the hostages; (5) between January 1976 and December 1992 conspired together with persons unknown to commit murder in a Convention country.

Id.

In response, Pinochet's counsel filed habeas corpus petitions challenging both provisional warrants.¹²⁵ On October 28, 1998, the divisional court in England quashed both warrants.¹²⁶ The second warrant was quashed on the grounds that Pinochet enjoyed immunity as a former head of state and that certain alleged offenses were non-extradition crimes under the Extradition Act of 1989.¹²⁷

The Crown Prosecution Service, on behalf of the Government of Spain, appealed the divisional court's ruling to the Lords of Appeal.¹²⁸ Before the appeal was heard, Spain issued a formal Request for Extradition on November 4, 1998, expanding the list of alleged offenses.¹²⁹ The appeal was first heard by the Lords between November 4 and 12, 1998, resulting in a judgment on November 25 denying Pinochet immunity for crimes under international law.¹³⁰ This judgment, however, was set aside on January 15, 1999 on the grounds that the Committee of Lords that rendered the decision was improperly constituted.¹³¹

Following the setting aside of the initial judgment, another appeal was filed in the House of Lords on January 18, 1999.¹³² Before this appeal was heard, however, British Home Secretary Jack Straw ordered a magistrate judge to authorize extradition proceedings under the Extradition Act of 1989 for all charges except genocide.¹³³ Additionally, the Republic of Chile, which argued for Pinochet's immunity, was added as a party to the litigation.¹³⁴ Chile also sought to alter the charges against Pinochet.¹³⁵

125. *Id.*

126. *Id.*

127. *Id.* Certain offenses were deemed to be nonextraditable as they were not crimes in England on the date they were alleged to have been committed. *Id.*

128. *Id.* The point of law on appeal was "the proper interpretation and scope of the immunity enjoyed by a former head of state from arrest and extradition proceedings in the United Kingdom with respect to acts committed while he was head of state." *Id.*

129. *Id.* at 191-92.

130. *Id.* at 192.

131. *Id.*

132. *Id.*

133. *Id.* Straw relied in part on the previous decision of the House of Lords, finding that Pinochet did not enjoy immunity in issuing authorization to the magistrate to proceed. *Id.*

134. *Id.*

135. *Id.* Chile sought to alter the charges as follows:

Concerning the appeal to the House of Lords, Lord Browne-Wilkinson analyzed both the nature of the charged offenses and the status of former-head-of-state immunity to determine if Pinochet could indeed be extradited to Spain.¹³⁶ According to Wilkinson, any crimes allegedly committed by Pinochet that were not crimes under English law at the time of their commission cannot be considered extraditable.¹³⁷ The Extradition Act 1989 requires extraditable offenses to have dual-criminality, meaning the acts must be crimes both in England and in the location where the acts were committed.¹³⁸ This meant that Pinochet

Charges 1, 2 and 5: conspiracy to torture between 1 January 1972 and 20 September 1973 and between 1 August 1973 and 1 January 1990;

Charge 3: conspiracy to take hostages between 1 August 1973 and 1 January 1990;

Charge 4: conspiracy to torture in furtherance of which murder was committed in various countries including Italy, France, Spain and Portugal, between 1 January 1972 and 1 January 1990;

Charges 6 and 8: torture between 1 August 1973 and 8 August 1973 and on 11 September 1973;

Charges 9 and 12: conspiracy to murder in Spain between 1 January 1975 and 31 December 1976 and in Italy on 6 October 1975;

Charges 10 and 11: attempted murder in Italy on 6 October 1975;

Charges 13–29; and 31–32: torture on various occasions between 11 September 1973 and May 1977;

Charge 30: torture on 24 June 1989.

Id. at 192–93.

136. *Id.* at 193.

137. *Id.*

138. *Id.* The provisions of the Extradition Act 1989 are as follows:

(1) In this Act, except in Schedule 1, 'extradition crime' means—

(a) conduct in the territory of a foreign state, a designated Commonwealth country or a colony which, if it occurred in the United Kingdom, would constitute an offence punishable with imprisonment for a term of 12 months, or any greater punishment, and which, however described in the law of the foreign state, Commonwealth country or colony, is so punishable under that law;

(b) an extraterritorial offence against the law of a foreign state, designated Commonwealth country or colony which is punishable under that law with imprisonment for a term of 12 months, or any greater punishment, and which satisfies—

(i) the condition specified in subsection (2) below; or

(ii) all the conditions specified in subsection (3) below.

(2) The condition mentioned in subsection (1)(b)(i) above is that in corresponding circumstances equivalent conduct would constitute an extraterritorial offence against the law of the United Kingdom punishable with imprisonment for a term of 12 months, or any greater punishment.

(3) The conditions mentioned in subsection (1)(b)(ii) above are—

could not be extradited for alleged offenses related to torture that occurred before September 29, 1988, which was the date the United Kingdom ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention” or “Convention”); however, alleged acts of torture and conspiracy to commit torture committed by Pinochet after September 29, 1988, remained extraditable offenses.¹³⁹

For the Torture Convention and related torture provisions in English law to apply, Pinochet must be considered either a public official or a person acting in an official capacity.¹⁴⁰ Both Pinochet and representatives of Chile conceded that, should the alleged acts be proved, they were carried out by a public official or person acting in an official capacity.¹⁴¹ Agreeing with this concession, Lord Browne-Wilkinson reasoned that a finding that a head of state such as Pinochet was not a public official would result in no person being guilty under the Torture Convention.¹⁴²

(a) that the foreign state, Commonwealth country or colony bases its jurisdiction on the nationality of the offender;

(b) that the conduct constituting the offence occurred outside the United Kingdom; and

(c) that, if it occurred in the United Kingdom, it would constitute an offence under the law of the United Kingdom punishable with imprisonment for a term of 12 months, or any greater punishment.”

Extradition Act, 1989, c. 33 § 2 (Eng.).

139. *R v. Bow St. Metrop. Stipendiary Magistrate (Ex parte Pinochet Ugarte) (No.3)*, [2000] 1 A.C. 147 (H.L.) 197 (appeal taken from Divisional Court of the Queen’s Bench). Note that charges of alleged hostage-taking were also non-extraditable as they were not offenses under the Taking of Hostages Act of 1982. *Id.* With regard to the revised charges, only charge 9 and parts of charges 2, 4, and 30 committed prior to September 29, 1988, were extraditable. *Id.*

140. *Id.* at 199 (“Article 1 of the Convention defines torture as the intentional infliction of severe pain and of suffering with a view to achieving a wide range of purposes ‘when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.’”); *see also* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, S. Treaty Doc. No. 100-22, 1465 U.N.T.S. 85. Similarly, Section 134 of the English Criminal Justice Act 1988 requires that acts of torture be carried out by or with the instigation or consent of a public official or person acting in an official capacity. *Id.* at 231; *see also* Criminal Justice Act, 1988, c. 33 § 134 (“A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.”).

141. *Ex parte Pinochet Ugarte (No.3)*, [2000] 1 A.C. 147 (H.L.) 200.

142. *Id.*

Such a finding would be problematic because Chile, Spain, and the United Kingdom, as state parties to the Convention, are obligated either to prosecute or extradite Convention violators.¹⁴³

Lastly, Lord Browne-Wilkinson examined the extent of Pinochet's immunity as a former head of state.¹⁴⁴ A basic principle of international law holds that one sovereign shall not adjudicate the conduct of another.¹⁴⁵ The immunity from foreign state jurisdiction extends to sitting heads of state and ambassadors, rendering them immune from all judicial actions or prosecutions by foreign states.¹⁴⁶ The immunities enjoyed by sitting heads of state and ambassadors are complete with regard to both civil and criminal offenses and are attached to the officials themselves.¹⁴⁷ Former heads of state retain a limited amount of immunity for official acts carried out while in office.¹⁴⁸

Pinochet, as a former Chilean head of state, enjoys immunity in relation to official acts performed while in office.¹⁴⁹ Lord Brown-Wilkinson, however, found strong evidence to suggest that Pinochet's immunity does not protect him from prosecution under the Torture Convention.¹⁵⁰ According to Wilkinson, individual criminal responsibility for those who violate international law is well established.¹⁵¹ In particular, Lord Brown-Wilkinson doubted that even before the establishment of the Torture Convention, torture could be considered an official state function.¹⁵² Actions such as torture which are universally prohibited by international law cannot be considered official functions.¹⁵³ Additionally, an essential element of torture under

143. *Id.* at 199.

144. *Id.* at 201–05.

145. *Id.* at 201.

146. *Id.*

147. *Id.* Immunity which attaches to the officials themselves regardless of the nature of their actions is known as immunity *ratione personae*. *Id.* at 202.

148. *Id.* Immunity which attaches only to the official acts of an official is referred to as immunity *ratione materiae*. *Id.* Lord Brown-Wilkinson found that heads of state lose their immunity *ratione personae*, or personal immunity, when leaving office. *Id.* (citing Arthur Watts, *The Legal Position in International Law of Heads of States, Heads of Government and Foreign Ministers*, 247 *Receuil des Cours* 9, 88 (1994)).

149. *Ex parte Pinochet Ugarte* (No.3), [2000] 1 A.C. 147 (H.L.) 202–03 (appeal taken from Divisional Court of the Queen's Bench).

150. *Id.*

151. *Id.* at 204 (citing the reasoning of Watts, *supra* note 148).

152. *Id.*

153. *Id.* at 205.

the Torture Convention is that it be carried out by or under the order of a public official.¹⁵⁴ If Pinochet had organized and authorized torture after the enactment of the Torture Convention in the United Kingdom, he was not acting in any capacity that triggered immunity. Thus, Pinochet, as a former head of state, could be extradited for acts of torture and conspiracy to commit torture he allegedly committed after September 29, 1988 (the United Kingdom's date of ratification of the Convention).¹⁵⁵

In March 1999, the House of Lords upheld the validity of Spain's warrant and ordered Pinochet's extradition.¹⁵⁶ British Home Secretary Straw, however, doubted Pinochet's ability to stand trial. Indeed, on January 11, 2000, Straw informed Pinochet's counsel and those representing Spain that he had ordered a medical examination to discern Pinochet's competency to stand trial.¹⁵⁷ The first indication of his failing health was on October 6, 1999, when the Bow Street Magistrate excused him from appearing at the judgment stage of the trial.¹⁵⁸ Following this incident, Straw received information from the Chilean Embassy on October 14 indicating a significant deterioration in Pinochet's health.¹⁵⁹ Based on the excusal from proceedings and the report filed by the Chilean Embassy, Straw invited Pinochet to submit to a medical examination, to which he consented.¹⁶⁰ On January 11 and 12, Straw announced that the

154. *Id.*

155. *Id.* However, Lord Brown-Wilkinson found no reason Pinochet should not enjoy immunity with regard to the crimes of murder and conspiracy to commit murder. *See id.*; *see also* LOUIS HENKIN ET AL., *HUMAN RIGHTS 775* (2d ed. 2009) ("Lord Brown-Wilkinson accepted that torture was a jus cogens crime. But he also concluded that the British courts exercise jurisdiction over [Pinochet for the purpose of ordering his extradition to Spain to face the relevant charges] only for tortuous acts occurring after the coming into force of the Torture Convention for Chile, Spain and the United Kingdom.>").

156. *Ex parte Pinochet Ugarte* (No.3), [2000] 1 A.C. 147 (H.L.) 205.

157. 2 Mar. 2000, PARL. DEB., H.C. (2000) 358W-371W (U.K.), ¶ 5, available at http://www.publications.parliament.uk/pa/cm199900/cmhansrd/vo000302/text/00302w09.htm#00302w09.html_spnew3 [hereinafter *Straw Extradition Statement*].

158. *Id.* ¶ 9. Pinochet was excused from attendance based on evidence produced by the general practitioner who attended the senator. *Id.*

159. *Id.* ¶ 10.

160. *Id.* An independent medical team was formed to obtain an independent report of relevant clinical facts. *Id.* The team consisted of Sir John Grimley Evans and Dr. Michael Denham, geriatric specialists; Professor Andrew Lees, specialist in movement disorders and dementia; and Dr. Maria Wyke, neuropsychologist. *Id.* These

medical reports indicated that Pinochet was unfit to stand trial.¹⁶¹ In his opinion, trying Pinochet would be a violation of Article 6 of the European Convention on Human Rights (the right to a fair trial).¹⁶²

B. *Spain and Germany*

In the aftermath of the ground-breaking Pinochet decision, countries such as Spain and Germany began to take a more aggressive stance towards the prosecution of former heads of state and senior foreign officials under universal jurisdiction principles. For example, under Spain's universal jurisdiction criminal statute, its courts have entertained lawsuits against a former Chinese head of state for genocide in Tibet, Guatemalan generals for various international crimes against the Mayan people, and actually convicted a former Argentine military officer for his commission of crimes against humanity in Argentina.¹⁶³ Notably, Spain places certain limitations upon its exercise of universal criminal jurisdiction, including a bar of prosecution on sitting heads of state and senior governmental officials.¹⁶⁴ In addition, Spanish courts will defer to criminal

examiners were asked to evaluate Pinochet specifically with regard to his ability to follow questioning, recall events, and give coherent evidence. *Id.* ¶ 11. The examination took place over a period of six hours on January 5, 2000 at Northwick Park hospital in London. *Id.* ¶ 13.

161. *Id.* ¶ 14. The medical examiners were convinced that Pinochet was not faking his disability nor was it likely to improve significantly. *Id.*

162. *Id.* ¶ 20. In June 2000, a Chilean court stripped Pinochet of immunity from prosecution; the Supreme Court of Chile upheld the decision in August 2000. *Timeline: The Pinochet Legal Saga*, BBC NEWS, <http://news.bbc.co.uk/2/hi/americas/1209914.stm> (last visited Oct. 17, 2010). In August 2000, the Chilean Supreme Court upheld the lower court decision. *Id.*

163. *See* HENKIN ET AL., *supra* note 155, at 776; *see also* Ley Orgánica del Poder Judicial [Organic Law of Judicial Power] art. 23(4) (B.O.E. 1985, 157 (Spain)). For a translation of Article 23(4) of Spain's Organic Law of Judicial Power, see LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES 183 (2003) ("Spanish courts have jurisdiction over acts committed abroad by Spaniards and foreigners, if these acts constitute any of the following offenses under Spanish law: (a) genocide; (b) terrorism; (c) sea or air piracy; (d) counterfeiting; (e) offenses in connection with prostitution and corruption of minors and incompetents; (f) drug trafficking; [and] (g) any other offense which Spain is obliged to prosecute under an international treaty or Convention.").

164. HENKIN ET AL., *supra* note 155 at 777 (citing Mugambi Jouet, *Spain's Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China and Beyond*, 35 GA. J. INT'L & COMP. L. 495, 497, 511-13 (2007)).

prosecutions by international tribunals.¹⁶⁵ Finally, under the subsidiarity principle, Spanish courts must generally defer to ongoing or impending foreign national prosecutions in the territorial state of the crime; however, “they need not defer to such proceedings when ‘serious and reasonable proofs of judicial inactivity [demonstrate] a fault, whether of will or of capacity, to effectively prosecute the crimes.’”¹⁶⁶

Similarly, German courts have the authority to exercise universal jurisdiction over certain international crimes with no actual connection to that nation. In fact, “the German Code of Crimes Against International Law, enacted on June 30, 2002, creates universal jurisdiction over genocide, crimes against humanity, and war crimes.”¹⁶⁷ The German prosecutor has wide discretion under this statute to commence a criminal proceeding; however, there are certain factors that limit this discretion:

The German federal prosecutor will only exercise universal jurisdiction if the competent authorities of the territorial state, or of the state of nationality of the suspect or victim, refrain from carrying out a genuine investigation and where the International Criminal Court or another competent international tribunal does not investigate the case.¹⁶⁸

Notably, the German prosecutor applied these limiting factors, which together form the “subsidiarity” principle, in a case brought by Iraqi nationals against former US Secretary of Defense Donald Rumsfeld and other US military officials for alleged torture at the Abu Ghraib prison in Iraq.¹⁶⁹ As a result of his application of the subsidiarity principle, the German prosecutor chose not to proceed against the US officials:

[T]he prosecutor argued that the crimes referred to in the complaint (war crimes against persons and grievous bodily harm), were already under investigation by US authorities and therefore the principle of subsidiarity would not permit

165. *Id.*

166. *Id.* (quoting Jouet, *supra* note 164, at 511–13). Another limitation concerning the exercise of universal jurisdiction by Spanish courts is that “defendants may not be tried in absentia.” *Id.*

167. *Id.*

168. *Id.* (quoting HUMAN RIGHTS WATCH, UNIVERSAL JURISDICTION IN EUROPE: THE STATE OF THE ART 65 (2006)). This is the “subsidiarity” principle.

169. *Id.*

German authorities to investigate the complaint. According to the prosecutor's argument, the principle of subsidiarity does not permit national authorities to take into account whether national authorities are investigating the individual referred to in the complaint but rather whether the US authorities were investigating the *complex* as a whole.¹⁷⁰

IV. ANALYSIS

The doctrines of foreign head-of-state immunity and foreign official immunity in the United States are in a state of disarray. In light of the overall dearth of precedent cases in the head-of-state context, it is exceedingly difficult to predict an outcome in any current case, particularly when the US Executive Branch declines to make an immunity recommendation. Regarding official immunity, *Samantar* appears to have removed the increased precision and certainty of outcome that the FSIA offered for the foreign official immunity inquiry. After *Samantar*, similar to the head-of-state immunity inquiry, foreign official immunity will be evaluated under the more nebulous common-law standards.¹⁷¹ In addition, *Samantar* may increase the likelihood of suits against foreign government officials by removing FSIA's protective cloak of immunity. Thus, what is needed is a clear set of criteria, or guidelines, for US courts to use when confronted with an immunity claim by a foreign head of state or foreign governmental official. Such criteria could be fashioned by either US courts through the development of common-law precedent or through the legislative codification process in Congress.

Rather conveniently, evolving jurisprudence on immunity for foreign heads of state and officials may provide a basis for formulating US domestic guidelines in this area. For example, under international law, sitting heads of state and senior officials enjoy full immunity before foreign national courts for conduct performed while in office.¹⁷² In the absence of guidance from the

170. *Id.* at 777–78 (emphasis in original).

171. See *supra* text accompanying notes 42–62 (discussing this common law analysis used in the head-of-state immunity context, including the independent determination made by courts in the absence of executive-branch guidance).

172. See Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belgium), 2002 I.C.J. 3, 21–22 (Feb. 14).

executive branch,¹⁷³ US courts could draw upon the ICJ precedent in *Congo v. Belgium*, which generally allows full personal immunity from prosecution, or immunity *ratione personae*, to sitting heads of state and other high-ranking foreign officials under customary international law.¹⁷⁴ Such reliance would conform to US executive branch practice because the branch has generally recommended immunity for sitting heads of state who are recognized as the official leaders of their country.¹⁷⁵ In addition, this approach conforms to the spirit if not the letter of the Restatement (Third) of the Foreign Relations Law of the United States, which states that heads of state are accorded immunity from suit for actions performed during official visits to foreign countries.¹⁷⁶ This reliance also seems appropriate because ICJ decisions, such as *Congo v. Belgium*, though only formally binding on the parties to a particular dispute, constitute respected sources of international law. As a

173. See *supra* text accompanying notes 42–47 (discussing US judicial reliance on executive branch guidance in the context of head-of-state immunity); *supra* text accompanying notes 49–56 (discussing US court cases involving instances when executive branch guidance was lacking); see also *supra* text accompanying note 59.

174. See *Congo v. Belgium*, 2002 I.C.J. at 22, 25 (noting that this immunity applies in foreign national trials of sitting heads of state and other senior officials, meaning that it does *not* apply in international tribunals with jurisdiction or in the courts of the head of state's home country). The *Congo v. Belgium* decision focused primarily on immunity from *criminal* prosecution for sitting heads of state and officials in the courts of foreign nations. For a case holding that these individuals also enjoy immunity from civil suits for damages in foreign national courts, see *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (The Kingdom of Saudi Arabia)*, [2006] UKHL 26 (2006), [2007] 1 A.C. 270 (appeal taken from Eng.). In addition to the *Congo v. Belgium* decision, US courts could rely upon the Charles Taylor Immunity Decision, discussed *supra*, Part II.A.2.

175. See, e.g., *Ye v. Zemin*, 383 F.3d 620, 627 (7th Cir. 2004); *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 304 (S.D.N.Y. 2001); *Lafontant v. Aristide*, 844 F. Supp. 128, 139–40 (E.D.N.Y. 1994). In contrast, when a head of state is not the recognized constitutional leader, has left office, or has had his immunity waived by his home state, the executive branch has generally declined to suggest immunity. See, e.g., *Estate of Domingo v. Republic of the Philippines*, 694 F. Supp. 782, 786 (D.C. Cir. 1988) (executive branch did not suggest immunity for former head of state Ferdinand Marcos of the Philippines); *Paul v. Avril*, 812 F. Supp. 207, 210–11, (S.D. Fl. 1992) (executive branch did not suggest immunity in context of waiver); *United States v. Noriega*, 746 F. Supp. 1506, 1518–19 (S.D. Fl. 1990) (executive branch did not suggest immunity for constitutionally unrecognized leader). Note that the Philippine government had also waived Marcos's immunity. See *In re Doe*, 860 F.2d 40, 46 (2d Cir. 1988).

176. See *infra* note 178. Notably, the Restatement's concept of immunity for heads of state is technically more limited in nature (e.g., immunity for actions performed while on official visits abroad).

corollary, the ICJ pronouncement in *Congo v. Belgium* that the norm implicating head-of-state immunity stems from customary international law means that the United States is generally obligated to follow that norm.¹⁷⁷ Finally, providing full immunity to sitting heads of state, particularly those making official foreign visits, aligns nicely with long-standing policy goals such as promoting friendly relations, peace, and international security among states.¹⁷⁸

While there is a strong argument to be made that under international law, US courts should refrain from prosecuting a foreign sitting head of state even in the absence of an executive branch suggestion of immunity, a US court contemplating such a prosecution should first consider a range of circumstances and factors prior to proceeding. For example, a court could consider whether the foreign state made any formal or informal gesture to waive their leader's immunity.¹⁷⁹ Such a waiver would serve as strong evidence that the foreign state had no objection—or

177. The binding nature of ICJ judgments on the parties to a particular case is expressed in Article 59 of the ICJ Statute. *See* Statute of the International Court of Justice, arts. 38(1)(b), 59, June 26, 1945, 59 Stat. 1055, T.S. No. 993, (demonstrating that customary international law is binding on nations by defining international customary law as “evidence of a general practice accepted as law” and expressing the binding nature of ICJ judgments on the parties to a particular case); *see also* Steven Koh, *Respectful Consideration after Sanchez-Llamas: Why the Supreme Court Owes More to the International Court of Justice*, 93 CORNELL L. REV. 243, 265–73 (2007) (arguing that US courts, particularly the US Supreme Court, should give more weight to ICJ decisions: “As legal systems continue to integrate in a globalizing world, US courts will increasingly face divergent domestic and international obligations. Though the International Court of Justice does not assert any formal authority over the US Supreme Court, its mounting influence over a variety of international legal matters should cause the Court to heavily weigh the ICJ’s decisions.”); HENKIN ET AL., *supra* note 155, at 193 (“In essence, international custom . . . is comprised of rules that states implicitly accept as legally binding through their conduct.”).

178. *See* Vienna Convention on Consular Relations, ¶¶ 2, 4, Apr. 24, 1963, 596 U.N.T.S. 261 (mentioning these policy goals in the context of visiting foreign consuls); *see also* RESTATEMENT, *supra* note 1, § 464 (“When a head of state or government comes on an official visit to another country, he is generally given the same personal inviolability and immunities as are accorded to members of special missions, essentially those of an accredited diplomat.”) Under the VCDR, diplomatic agents are immune from the jurisdiction of any receiving state. This immunity extends to criminal, civil, and administrative jurisdiction. VCDR, *supra* note 89, art. 31, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95. These standards for diplomatic relations were created to recognize the status of diplomatic agents and reinforce international equality, peace, and security. *Id.* pmbl.

179. *See supra* text accompanying notes 60–63 (discussing the waiver issue in the head-of-state context).

consented—to US courts exercising jurisdiction over its leader. In addition, a court may evaluate whether the US government recognized the putative head of state as the official leader of the country.¹⁸⁰ A denial of such recognition would suggest that the US executive branch does not seek immunity in the particular case and perhaps more importantly, that the “leader” is not entitled to immunity as a legitimate head of state. Another factor that courts may consider is the nature of the acts committed by the head of state. For example, purely private, commercial acts could be viewed as not triggering immunity while official acts would be entitled to immunity.¹⁸¹ Thus, when a head of state commits an illegal act as part of a personal business venture (e.g.,

180. See *supra* text accompanying notes 56–59 (discussing the factor of formal recognition of a foreign leader by the US government).

181. The private versus public nature of acts is an analytical criterion that is also used in the former-head-of-state context. See, e.g., *supra* notes 63–66 and accompanying text (US law); *supra* notes 91, 144, and accompanying text (international law). Note that the ICJ in *Congo v. Belgium* rejected any exception to immunity under customary international law for sitting heads of state and senior officials for certain, potentially “private” activity committed while in office, namely war crimes or crimes against humanity (e.g., international crimes). See Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belgium), 2002 I.C.J. 3, 25 (Feb. 14). Thus, US courts contemplating using the public-private distinction to evaluate immunity for a sitting head of state must give “due regard” to this pronouncement regarding customary law by the ICJ; however, using or applying this distinction is not necessarily in violation of customary law. See *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. US)*, 1986 I.C.J. 14, 97–98 (June 27) (“If a state acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.”); see also Mallory, *Resolving the Confusion*, *supra* note 3, at 190–93 (arguing that, similar to the FSIA exceptions in the context of foreign sovereign immunity, in the context of head-of-state immunity there should be immunity exceptions in cases of waiver, commercial activity, certain kinds of property (e.g., expropriated property gifts, inheritances and moveable property), and for certain non-commercial torts that cause injury or death in the United States). For the actual text pertaining to these FSIA provisions, see *supra* notes 34–42 and accompanying text. Mallory also argues that the person of a head of state should be inviolable; therefore, like diplomats, heads of state should not be subject to arrest or detention when on official, foreign visits. Because Mallory argues for freeing heads of state completely from the criminal jurisdiction of the United States and for the inviolability of the head of state’s person (i.e., from arrest or detention), his argument for maintaining head-of-state liability in criminal cases requires that civil tort liability be “appended to criminal acts.” *Id.* at 193–96. Successful plaintiffs in such a tort suit would be awarded monetary damages (e.g., as opposed to a jail sentence for the defendant). *Id.* at 195–96.

drug trafficking), immunity would not apply.¹⁸² “Ordinary” type crimes such as murder or theft not connected with official, state-sanctioned policies (e.g., legitimate military action, a duly authorized court sentence, etc.) could also be considered “private” acts. Conversely, decisions related to the implementation of state policy by the head of state, such as those touching upon the economy, health care, the environment, or foreign relations would be immune from the jurisdiction of US courts.¹⁸³

In addition, if the foreign head of state has committed a grave crime in violation of international law norms, US courts should consider deferring to any ongoing or pending investigation by an international prosecuting body that has jurisdiction. For example, the ICC was created for the express purpose of prosecuting serious international crimes such as genocide, war crimes, and crimes against humanity, and can exercise its jurisdiction to try such crimes in a variety of instances, including exercising jurisdiction over sitting heads of state.¹⁸⁴

182. For example, the Court in *Noriega* viewed drug trafficking for personal monetary gain to be an unofficial, private act. See *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997).

183. For a detailed discussion of how crimes “fit” into the public versus private dichotomy, see *infra* notes 191–194 and accompanying text, addressing the former head-of-state issue.

184. In *Congo v. Belgium*, the ICJ acknowledged that even sitting heads of state (and other senior officials) can be tried by international tribunals such as the ICC. See *Congo v. Belgium*, 2002 I.C.J. at 25. For the idea that the ICC is focused on grave international crimes, see Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. For a list of the qualifying crimes over which the ICC has substantive jurisdiction, see *id.* art. 5, ¶ 1. These crimes (e.g., genocide, crimes against humanity and war crimes) are defined more specifically in Articles 6 to 8 of the Rome Statute. For the situations in which the ICC can exercise its jurisdiction over qualifying crimes, see *id.* art. 12 (explaining that the court may exercise its jurisdiction over crimes occurring on the territory of state parties to the Rome Statute or if the person accused of a crime is a national of one of the state parties) and art. 13 (explaining that situations, or cases, may be referred to the ICC by a state party, by the UN Security Council—in which case the Article 12 requirements are inapplicable—or as a result of the prosecutor’s own investigations). The ICC can prosecute sitting (or former) heads of state and other governmental officials. See *id.* art. 27, ¶ 1 (“Th[e Rome] Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.”); see also *supra* note 117 (discussing the ICC’s indictment of President Al-Bashir of Sudan). The statutes of other international criminal tribunals, including the ICTR, ICTY, and the Special Court for

Though US courts formally have jurisdiction over certain grave international crimes such as genocide and war crimes, and although the United States is not yet a state party to the ICC,¹⁸⁵ strong conceptual and policy-oriented reasons point in the direction of deference to an international body that has jurisdiction, such as the ICC. For example, subjecting a current foreign leader to US criminal jurisdiction represents a significant

Sierra Leone, all contain similar provisions to the ICC provision prohibiting immunity for heads of state and other officials. *See, e.g.*, Statute of the Special Court for Sierra Leone, *supra* note 105, at art. 6, para. 2 (“The official position of accused as head of state or government official does not relieve accused of responsibility or mitigate punishment.”); Statute of the International Criminal Tribunal for Rwanda, Nov. 8, 1994, 33 I.L.M. 1598 (“The official position of accused as head of state or government official does not relieve accused of responsibility or mitigate punishment.”); Statute for the International Criminal Tribunal for the Former Yugoslavia, art. 7, para. 2, May 25, 1993, 32 I.L.M. 1159 (“The official position of accused as head of state or government official does not relieve accused of responsibility or mitigate punishment.”). Former President of Liberia Charles Taylor was denied any immunity for his crimes, including crimes against humanity and war crimes, before the Special Court of Sierra Leone despite having committed them while in office. *See* Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction (May 31, 2004). The former Prime Minister of Rwanda, Jean Kambanda, was tried and convicted before the ICTR for genocide and crimes against humanity, *see* Prosecutor v. Kambanda, Case No. ICTR-97-23-DP, Indictment, at 6–7 (Oct. 16, 1997), and received a life sentence. *See* ICTR 97-23-S, Judgment and Sentence, 28 (Sept. 4, 1998). Finally, the President of the Federal Republic of Yugoslavia (“FRY”), Slobodan Milošević, was indicted before the ICTY for genocide, war crimes, and crimes against humanity. *See, e.g.*, Prosecutor v. Milošević, Case No. IT-02-54-T, Amended Indictment (June 29, 2001). Milošević died before his trial could be completed before the ICTY. *See Key Figures*, ICTY, <http://www.icty.org/sections/TheCases/KeyFigures#concprios> (last visited Oct. 10, 2010).

185. *See, e.g.*, 18 U.S.C. § 1091 (2009) (criminalizing, under US law, the international crime of genocide); *id.* § 2441 (2006) (criminalizing war crimes under US law). For a further discussion of these domestic statutes, see CARTER ET AL., *supra* note 28, at 1160–79. There are treaty obligations on the part of the US to punish certain international crimes. For example, the United States, a state party to the Genocide Convention, must punish criminal acts of genocide either in its domestic courts—provided the acts were committed on US territory—or “by such international penal tribunal as may have jurisdiction with respect to those [states] which shall have accepted its jurisdiction.” *See* Convention on the Prevention and Punishment of the Crime of Genocide, arts. 5–6, Dec. 9, 1948, 78 U.N.T.S. 277. Thus, in the case of genocide, these international obligations would be satisfied by deferring to a prosecution of a head of state by an international tribunal. In the case of deference to the ICC, the United States, not a formal member of the court, could make an ad hoc agreement with the court to accept its jurisdiction in the particular case. *See* Rome Statute, *supra* note 184, art. 87, ¶¶ 5(a)–(b). Of course, if the international forum made no effort to proceed against the foreign leader, there would be no forum to which US courts might defer. For a discussion of legislation that the US Congress passed to implement obligations under the Genocide Convention, including a discussion of the Genocide Accountability Act of 2007, see HENKIN ET AL., *supra* note 155, at 979.

affront to the sovereignty of the foreign nation, likely greater than any affront posed by an international court.¹⁸⁶ Perhaps most importantly, the trial of a sitting head of state in the United States is likely to have substantial and primarily negative foreign policy implications for the United States. In most instances, the state whose current leader is being prosecuted will not view favorably such a maneuver by US courts. In addition, trying foreign leaders in US courts may have a chilling effect on the frequency of visits by foreign leaders to US soil or on productive interaction in general between these foreign leaders and their US counterparts. Furthermore, US courts aggressively exercising their jurisdiction over heads of state for international crimes may attract retaliatory actions by foreign states in the form of potentially frivolous lawsuits against US leaders in foreign courts. Finally, international trials of heads of state, though certainly not free of stability concerns,¹⁸⁷ would seem to pose a lesser threat to international peace than “third party” national prosecutions.

Moreover, deference by US courts in the head-of-state context to an on-going or pending international prosecution or to certain, legitimate foreign national prosecutions aligns nicely with the principle of complementarity inherent within the ICC system and with the principle of subsidiarity present in an increasing number of national jurisdictions.¹⁸⁸ For example,

186. The international forum draws its authority from the consensus and consent of multiple nations; indeed, in the case of the ICC, 113 countries are already parties to it. See *The States Parties to the Rome Statute*, ICC, <http://www.icc-cpi.int/Menu/ASP/states+parties> (last visited Oct. 8, 2010).

187. The warrant issued by the ICC for President Al-Bashir of the Sudan has attracted criticism, in part for its ability to further destabilize an already dire and precarious human rights situation in Sudan. For a description of the warrant issued by the ICC for Al-Bashir, see *supra* note 117. For a description of the human rights situation in Sudan, see Christopher D. Totten & Nicholas Tyler, *Arguing for an Integrated Approach to Resolving the Crisis in Darfur—The Challenges of Complementarity, Enforcement and Related Issues in the International Criminal Court (ICC)*, 98 J. CRIM. L. & CRIMINOLOGY 1069 (2008). For criticism of the consequences of the ICC executing this warrant and proceeding with the prosecution of Al-Bashir, see Roza Pati, *The ICC and the Case of Sudan’s Omar Al Bashir: Is Plea-Bargaining a Valid Option?*, 15 U.C. DAVIS J. INT’L L. & POL’Y 265, 324 (2009) (“[T]he concern that Sudan, the largest nation in the African Continent, might risk partition, augmented by the fear of the collapse of a fragile peace process, creates a situation where a potential plea-bargain should be an option under consideration [instead of a full trial against al-Bashir].”).

188. For example, both Germany and Spain have applied the principle of subsidiarity in their criminal prosecutions of foreign officials. See HENKIN ET AL., *supra* note 155, at 777 (explaining that because US authorities were investigating the matter,

under the concept of subsidiarity, US courts would defer to the courts of the territorial state in which the crime occurred (or the state of which the victim or suspect is a citizen) provided that those courts are both able and willing to carry out a fair, impartial trial of the head of state. Alignment with this emerging concept of subsidiarity will help to foster greater esteem for the United States in its foreign relations as this approach respects the sovereignty of foreign states. It also helps ensure that the United States will receive similar treatment when suits are contemplated abroad against its leaders (e.g., foreign nations will likewise be more inclined to defer to an on-going or impending US trial of the head of state, assuming the alleged crime occurred in the United States, the victim or the suspect is a US citizen, or there is a similarly strong US link to the crime in question).

Notably, a call for deference by US courts to an on-going or pending international criminal prosecution of a foreign head of state fits within the spirit of the ICC's complementarity principle, if not the letter.¹⁸⁹ Such a call may perhaps best be termed

the German prosecutor applied the principle of subsidiarity in an action brought by Iraqi nationals against US Secretary of Defense Donald Rumsfeld and others for alleged abusive treatment they suffered at the hands of US military personnel at Abu Ghraib prison in Iraq). Notably, for the German subsidiarity principle to apply, an investigation by the ICC or a "genuine" investigation by competent authorities of the territorial state of the crime (or of the state of nationality of the victim or suspect) is all that is required. *See id.* (citing HUMAN RIGHTS WATCH, *supra* note 168). The German universal criminal jurisdiction statute allows for prosecution of war crimes, genocide, and crimes against humanity. *See id.*; *see also* Strafgesetzbuch [StGB] [Criminal Code], Nov. 13, 1998, Bundesgesetzblatt, TEIL I at 3322 § 6 (Ger.). Similarly, Spain has placed certain limitations on its own exercise of universal jurisdiction for crimes committed abroad by foreigners:

[T]he [Spanish] Constitutional Tribunal has held that Spanish courts must give priority to prosecutions in the territorial state if proceedings there have already been or will soon be initiated. But they need not defer to such proceedings when "serious and reasonable proofs of judicial inactivity [demonstrate] a fault, whether of will or of capacity, to effectively prosecute the crimes."

HENKIN ET AL., *supra* note 155, at 777 (citing Jouet, *supra* note 164, at 511-13). In addition, Spanish jurisprudence indicates that Spain will also defer to international criminal prosecutions. *Id.* Finally, Spain does not permit trials under its universal jurisdiction statute against sitting heads of state or senior foreign officials (though trials against former heads and former officials as well as low-level officials is permitted), and in absentia trials are prohibited. *Id.*

189. The complementarity principle of the ICC appears in Article 17 of the Rome Statute. In the head-of-state context, the United States or another national jurisdiction would defer to an impending or on-going ICC prosecution under the complementarity concept if it was unwilling to proceed with the prosecution of the head of state. *See*

“selective” or “premeditated” reverse complementarity in the sense that the national jurisdiction (i.e., the United States) would actively choose to defer to a proceeding by the ICC in the context of a putative head of state by intentionally delaying or withholding domestic prosecution. This concept of “complementarity” in the context of a trial of a foreign head of state best supports policy goals related to the promotion of friendly foreign relations among nations (i.e., comity) as well as international peace and stability because such a trial represents less of an affront to the sovereignty of the nation of the head of state (as compared to a trial by a foreign national jurisdiction). In addition, in the context of grave international crimes committed by individuals such as heads of state, international tribunals like the ICC would appear to have greater expertise and experience with this particular type of crime.

In their attempts to formulate a doctrine for former heads of state, US courts can draw upon both domestic and international law to fill existing gaps, in particular when the US executive branch declines to offer a suggestion of immunity.¹⁹⁰ Under relevant US and international jurisprudence former heads of state may not be prosecuted by a domestic or national court for official acts performed while in office, but these individuals may be prosecuted for private or commercial acts performed during this time.¹⁹¹ US and other national courts have indicated that activities like drug trafficking¹⁹² and torture¹⁹³ do not

Rome Statute, *supra* note 184, art. 17 (1)(a). Delay in prosecution is one indicator of a state’s unwillingness to prosecute. *Id.* art. 17 (2)(b). A state may be unwilling to prosecute for a variety of reasons related to foreign relations, security, and stability.

190. For a discussion of the role of executive branch guidance in determinations of immunity for former heads of state, see *supra* Part I.A.

191. See, e.g., *supra* notes 63–66 and accompanying text (discussing US approach to immunity for former heads of state); see also *supra* notes 93–94 and accompanying text (discussing international law approach to immunity in national trials for former heads of state). Arguably, according to the dicta in the ICJ decision of *Congo v. Belgium*, former heads of state and officials no longer enjoy any immunity under international law for suits filed after they leave office (regardless of whether the act committed in office was “private” or “public”). See Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belgium), 2002 I.C.J. 3, 25 (Feb. 14). But since the part of the ICJ decision addressing former-head-of-state immunity in national prosecutions was dicta, and since ICJ decisions are technically binding only on the parties to the litigation, this aspect of the decision awaits further development at the international level. For further explanation of the binding nature of ICJ decisions, see *supra* note 177.

192. See *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) (noting that drug trafficking for personal gain is a private activity conducted by a head of state).

constitute official acts (i.e., they are “private”). Therefore, torture and other international crimes of an intensely grave nature, such as genocide and war crimes, could also be considered “private.” In addition, US courts may also consider placing domestic acts that constitute crimes of a less grievous nature in the category of private acts. For example, “ordinary” felonies that do not rise to the level of an international crime, such as murder or rape, may arguably fall in the category of private acts. Finally, certain white-collar crimes committed for personal gain may qualify as private (e.g., bribery, embezzlement, fraud, and similar crimes constituting felonies under local law).¹⁹⁴ Accordingly, absent an explicit suggestion of immunity by the executive branch, a former head of state should not be afforded immunity in US domestic courts for these types of acts, and could face prosecution for them despite the fact that they occurred while in office.

In addition, absent executive branch guidance, US courts contemplating whether to try a former head of state may also consider whether the head of state’s “home” country has waived immunity for its former leader.¹⁹⁵ Even absent such a waiver, trials of former heads of state by US courts would tend to generate less resentment by the “home” state, due to both the passage of time and the lesser degree to which the former leader would be viewed as intrinsically linked to his or her home country. Such a waiver of immunity by the “home” state, though not a strict requirement for a US trial of a former head of state, would nonetheless constitute clear and compelling evidence that

193. See *R. v. Bow St. Metro. Stipendiary Magistrate (Ex parte Pinochet Ugarte)* (No.3), [2000] 1 A.C. 147 (H.L.) 190 (appeal taken from Eng.) (finding that former heads of state may be tried in non-domestic national courts—for acts of torture as a result of universal jurisdiction over these acts bestowed by the Torture Convention); see also *supra* notes 118–162.

194. Immunity should still attach, however, for misdemeanor crimes because a prosecution by a foreign court for such a crime would not generally be worth any costs associated with such a prosecution (e.g., negative foreign policy repercussions, threats to peace and stability, retaliatory prosecutions, etc.). In addition, immunity should still attach for certain “justifiable” felonies such as a killing committed as part of legitimate, state-sanctioned warfare or as part of a lawfully mandated judicial sentence. In these particular cases, the act attributed to the former head of state should remain “official.”

195. See *Paul v. Avril*, 812 F. Supp. 207, 209–11 (S.D. Fl. 1993); see also *supra* text accompanying note 63 (discussing waiver in the context of former heads of state); *supra* notes 59–62 and accompanying text (discussing waiver in the context of sitting heads of state).

the nation does not consider the trial a challenge to its own sovereignty or national interest.

Notably, under the developing concept of subsidiarity already used by various states, US courts should consider deferring to an ongoing impartial trial or investigation of the former head of state in the country where the crime originally occurred, or in a state to which there is a similarly “strong” link to the crime.¹⁹⁶ Such deference respects the sovereignty of the foreign nation while also ensuring the maintenance and promotion of peaceful relations between the foreign nation and the United States. Such an approach also ensures similar treatment to former US heads of state travelling abroad (e.g., deference by a foreign national court to an ongoing or impending trial or investigation in the United States of the former head of state, in those cases where the crime originally occurred in the United States or there is a similarly “strong” link between the crime and US interests).

Furthermore, US courts should also consider deferring to an ongoing or pending trial or investigation of a former foreign head of state conducted by an international forum, such as the ICC, that has jurisdiction over serious crimes. International criminal tribunals, such as the ICC have particular expertise and experience in trying grave international crimes; in fact, it is often their sole mission or purpose.¹⁹⁷ The nation of the former head of state will also likely view a trial by an international forum with less disdain or contempt than a similar trial by another, potentially rival, foreign nation; thus, a trial in this forum may represent less of a threat to international stability. In addition, international tribunals typically derive their authority from multiple nations or the international community as a whole, thus representing less of a threat to the sovereignty of the nation whose former head of state is being tried or investigated. Moreover, a US court’s deferral to an ongoing or pending

196. For example, deferral should occur if an impartial trial or investigation is underway or soon to be underway by the state whose citizen is accused of or was victimized by the crime. See HENKIN ET AL., *supra* note 155, at 777 (providing examples of the existence or application of the subsidiarity principle by Germany and Spain).

197. See e.g., Rome Statute, *supra* note 184. The Special Court for Sierra Leone, a hybrid domestic/international court, also has as its chief purpose the trial of international crimes. See Statute of the Special Court for Sierra Leone, *supra* note 105, art. 1, ¶ 1.

criminal case by an international tribunal case aligns nicely with the actual practice of other states.¹⁹⁸ Finally, such deferral falls within the scope of the complementarity concept inherent within the framework of the ICC, the most prominent international criminal tribunal.¹⁹⁹

Perhaps most significant, however, is that, in the context of foreign official immunity, *Samantar* has left both the content and scope of the foreign official immunity doctrine uncertain. Prior to *Samantar*, US courts generally looked to the FSIA for guidance; accordingly, if no exception under the FSIA applied (e.g., waiver, commercial activity), foreign officials were ordinarily conferred immunity for official acts performed during their tenure in office.²⁰⁰ *Samantar*'s holding that the FSIA no longer applies in the official-immunity analysis essentially means that traditional common-law analysis now will be the focus of inquiry in most foreign official immunity cases. As a result, similar to the common-law immunity inquiry for heads of state, executive branch guidance will begin to have a more prominent role in official immunity cases. This, in turn, places an increased burden on the executive branch to provide guidance in the naturally larger number of official immunity cases (compared to the relative dearth of cases in the context of head-of-state immunity). As a related matter, this larger reliance on executive branch guidance increases the risk of inconsistency and incoherence in official immunity analysis by replacing reasoned, precedent-based judicial analysis with more ad-hoc and potentially politically-influenced executive branch decision making.

As a result, courts in the wake of *Samantar* should use executive branch guidance, when provided, as one factor in an overall "totality of the circumstances" inquiry into the foreign official immunity issue. When executive branch guidance is provided, it should, of course, be given enhanced weight by the courts as the valued opinion of a coordinate branch of the US government with a particular expertise and authority in foreign

198. For a description of a similar practice of deferral by Spanish and German courts to international tribunals, see *supra* text accompanying notes 164–166, 168–170.

199. For a detailed explanation of this "fit," termed "selective" or "premeditated" reverse complementarity, see *supra* note 184 and accompanying text.

200. See *supra* note 70 (discussing pre-*Samantar* cases applying FSIA in foreign official immunity context).

relations, and courts should generally follow such guidance absent a strong reason to the contrary. But certain policy and other considerations that are present in the context of head-of-state immunity are present to a lesser degree in the context of foreign-official immunity, and these considerations favor a more flexible, totality-of-circumstances approach to official immunity analysis (e.g., as a result of these considerations, executive branch guidance should be one important factor in the foreign official immunity inquiry, but this guidance should not be determinative on the immunity question, as it is in the head-of-state context). For example, while the decision to try a head of state can have significant foreign policy implications, such an impact is lesser in the case of a governmental official, particularly a low-level official. In the course of conducting a full inquiry into the immunity question for one of these governmental officials, courts are less likely to interfere in the foreign relations dealings of the executive, or somehow harm these relations.

Accordingly, US courts examining the immunity of a low-level foreign governmental official should examine not only executive branch guidance, when it exists, but also the nature of the conduct engaged in by the official, any waiver by the foreign government, and whether the official engaged in a private or official act. For example, even before *Samantar*, US courts examining the official immunity issue generally refrained from bestowing immunity for private acts committed by the official while in office.²⁰¹ In addition, if the act for which immunity was sought constituted a domestic or international crime, immunity was generally denied.²⁰² This previous judicial inquiry into the nature of the act should continue even after *Samantar*.²⁰³ In addition, even though FSIA does not strictly apply after *Samantar*, US courts could still look toward its provisions, particularly the various exceptions to immunity, as suggested guidelines on the official immunity question. Precedent cases from the pre-*Samantar* era that examined, for example, the waiver, commercial

201. *See supra* note 70.

202. *See* *Belhas v. Ya'Alon*, 515 F.3d 1279, 1284 (D.C. Cir. 2008); *see also supra* note 70. If the alleged crime was committed as part of state-sanctioned warfare, courts in the pre-*Samantar* era were likely to maintain the immunity of the foreign official. *See id.*

203. For example, when a foreign official commits a crime that is not connected to his official state duties or commits a crime as part of a private business venture, immunity would generally not apply.

activity, or terrorism exceptions to immunity under FSIA, though no longer formally applicable in the foreign official immunity inquiry, may still serve as useful guideposts in the largely undeveloped common law analysis for this area.²⁰⁴

In addition, special immunity considerations may apply in the case of a sitting high, or senior, governmental official. A failure to provide immunity in these cases may have serious, adverse foreign policy consequences for the United States. Thus, even if the underlying conduct by the high official was private in nature or constituted a crime, US courts should almost certainly defer to the executive branch in this instance.²⁰⁵ In addition, apart from deference to the executive branch, trials by national courts of sitting foreign government officials in senior positions are generally prohibited by international law as well as the law of several national jurisdictions.²⁰⁶ Only if the executive branch fails to provide guidance, or the guidance offered was in direct contravention of these international law norms, should US courts undertake a more flexible, totality of circumstances analysis.

204. For a list and description of these pre-*Samantar* cases applying FSIA in the foreign official immunity context, see *supra* note 70.

205. The US Constitution places foreign relations authority in the executive branch; hence, generally speaking, the executive branch has not only more power in this area but also more expertise and experience. See U.S. CONST. art. II; see also CARTER ET AL., *supra* note 28, at 191 (“[T]he President has always exercised substantial foreign relations power. Indeed, the President is often described as having the dominant role in the conduct of US foreign relations.”). Senior government officials include heads or deputy heads (e.g., “vice” heads) of government departments or ministries, officers with command authority in the state military, officials directly below the head of state and within the “chain of command” in the event of the head of state’s death or incapacitation, etc.

206. For relevant international law on this topic, see *supra* notes 85–92. For relevant Spanish law on this issue, see HENKIN ET AL., *supra* note 155, at 777. A sitting senior foreign governmental official can only be tried by a foreign national court under international law once leaving office (and then only for acts committed prior to obtaining or after leaving office, or for “private” acts committed while in office), or in cases where the official’s home country waives immunity or undertakes the trial itself. See Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belgium), 2002 I.C.J. 3, ¶¶ 58–61. In the case of a contemplated US trial of a former foreign governmental official, not only do different international standards exist but also different policy considerations appear to apply. Former officials, even senior ones, may be tried under international law standards in foreign national courts for “private” acts committed in office (as well as for acts performed before entering or after leaving office). See *id.* Also, US trials of former officials are less likely to impact United States foreign relations than trials of sitting officials.

Finally, similar to the head-of-state context, US courts should seriously consider deferring to an ongoing or pending international criminal trial of a foreign official, particularly a senior one, as well as deferring to a legitimate trial of such an official by the foreign national jurisdiction in which the alleged crime occurred (or of which the accused or victim is a citizen). Many of the theoretical and policy reasons discussed above in the context of heads of state and deference by US courts to international and certain foreign domestic proceedings (e.g., sovereignty and foreign policy concerns, reciprocity considerations, the principles of subsidiarity and complementarity) apply with equal force in the context of foreign officials, particularly high-ranking ones. In the case of low-level foreign officials, a deference analysis will largely be absent because international tribunals have primarily been created for the purpose of trying more prominent participants in mass atrocities and will be less, if at all, interested in pursuing low-level criminals.²⁰⁷ Likewise, in terms of limiting provisions on the application of universal criminal jurisdiction by foreign states and their courts, these states appear not to include such a provision in the context of prosecution of low level officials.²⁰⁸ Moreover, foreign nations are less likely to construe a US trial of a low level official as an affront to their sovereignty, and therefore foreign policy and stability concerns in this context are diminished.

CONCLUSION

Head-of-state and official immunity jurisprudence in the United States is in a state of flux and confusion, particularly after the US Supreme Court decision in *Samantar*. Regarding heads of state, US courts need more precise guidelines to evaluate immunity decisions, particularly in the absence of executive branch guidance. Developing international norms in the area of head-of-state immunity, in combination with the limited precedential US cases in this area, can help to provide content for these guidelines. In addition, the vacuum created by *Samantar* may be filled, in part, by drawing upon the existing head-of-state

207. See, e.g., Rome Statute, *supra* note 184, art. 1, ¶ 1.

208. See HENKIN ET AL., *supra* note 155, at 777 (explaining Spain's limiting principle in this area on the exercise of its universal criminal jurisdiction).

immunity precedent, FSIA-era cases in the official immunity context, and international law jurisprudence and codification in this area. Nonetheless, *Samantar* may signal an increased number of lawsuits against foreign officials in light of its removal of judicial application of immunity under the FSIA. Finally, in the context of both head-of-state and foreign-official immunity, developing notions of subsidiarity and complementarity in the foreign domestic and international arenas provide strong policy reasons for US courts to incorporate these notions into US jurisprudence.