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The Modern Common Law of Foreign Official Immunity

Beth Stephens

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In Samantar v. Yousuf*, 130 S. Ct. 2278 (2010), decided in June 2010, the U.S. Supreme Court held that the Foreign Sovereign Immunities Act (FSIA), the federal immunity statute, does not protect foreign government officials sued in U.S. courts. The decision resolved longstanding splits among the circuits and between the circuits and the Executive Branch on an issue that is key to international relations and hotly contested around the world: When are government officials immune from suit in the courts of a foreign state? The Court remanded to the lower court to determine whether common law immunity protects foreign officials such as the defendant, a former official of Somalia who has been sued for torture and summary execution.*

With little guidance from the Supreme Court, the lower courts are now charged with developing common law standards to determine when a foreign official is immune from suit in the United States. Suits for human rights violations will be particularly contentious, as the courts seek to reconcile the competing demands of sovereign immunity and human rights norms.

The courts will not be able to simply adopt common law principles applied before the FSIA was enacted in 1976, because both international and U.S. norms governing accountability for human rights violations have changed dramatically since that time. Instead, courts should look for guidance to international and domestic immunity principles and doctrines developed in U.S. human rights litigation. When foreign officials violate clearly defined, widely accepted international law norms, they act outside of their lawful authority and are not entitled to immunity.

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INTRODUCTION

When government officials acting on behalf of the state abduct, torture, or kill political opponents, can those officials be held personally accountable? Under international law and the domestic law of most states, the answer should be "yes." Universally accepted international law norms both prohibit state-sponsored arbitrary detention, torture, and summary execution and require that perpetrators of human rights abuses be held accountable. Most states incorporate some version of the international norms into their domestic legal systems. In practice, however, progress toward holding government officials accountable has been painstakingly slow. States themselves are generally immune from legal actions in their own courts and in the courts of other states. When facing criminal prosecution or civil litigation for human rights abuses, state officials inevitably assert that, because they acted on behalf of the state, they should be protected by the same broad immunity that shields the state.

In dozens of human rights lawsuits against former foreign government officials over the past thirty years, U.S. courts have rejected immunity

claims.[1] With the exception of suits against heads of state, diplomats, and others protected by specialized immunities, most courts have held that human rights abuses were outside the officials' lawful authority and, therefore, outside the reach of official immunity. That general agreement, however, masked splits among the circuits and between the courts and the Executive Branch about the source and breadth of foreign official immunity. Most circuits held that foreign officials were protected by the Foreign Sovereign Immunities Act (FSIA),[2] but two held that the statute applied only to the foreign state, not to its officials.[3] The Executive Branch argued that the FSIA did not protect foreign officials, but that they were instead protected by common law immunity.[4] Most decisions held that immunity would not protect foreign officials accused of human rights abuses. Those cases did not develop clear rules to govern which actions taken in the course of employment were protected by immunity, however, and two cases decided in 2008 and 2009 granted immunity without considering whether the acts alleged violated international law.[5]

In *Samantar v. Yousuf*,[6] decided in June 2010, the U.S. Supreme Court resolved the most pressing circuit split, holding unanimously that foreign officials are not protected by the FSIA.[7] The Court remanded to the lower courts to resolve the two equally important remaining issues: Are foreign officials protected by common law immunity? And, if common law immunity does apply, what conduct falls within its protection?[8] Answering those questions will require courts to consider the significant evolution of international and U.S. human rights norms over the past decades and the impact of those changes on modern notions of sovereignty and sovereign immunity.

The lower courts will find only minimal guidance from pre-FSIA decisions involving the common law immunity of foreign officials. Those cases were "few and far between,"[9] and none addressed claims of human rights abuses. After passage of the FSIA in 1976, most courts held that the statute governed foreign official immunity; as a result, the possible reach of common law immunity received little attention. Moreover, even if the pre-FSIA common law provided clear standards, courts resolving claims of human rights abuses could not simply adopt the rules as they existed in 1976. Significant changes in international human rights norms have altered the standards governing personal accountability for human rights abuses. These international developments are reflected in treaties ratified by the

1. For a discussion of the cases and Executive Branch views mentioned in this paragraph, see *infra* Part I.

2. 28 U.S.C. §§ 1330, 1602–1611 (2006).

3. *See infra* notes 65–66 and accompanying text.

4. *See infra* note 62 and accompanying text.

5. See the discussion of *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009), and *Belhas v. Ya'alon*, 515 F.3d 1279 (D.C. Cir. 2008), *infra* notes 75–81 and accompanying text.

6. 130 S. Ct. 2278 (2010).

7. *See id.* at 2292–93.

8. *Id.*

9. *Id.* at 2291.

United States, in new U.S. statutes, and in U.S. judicial doctrines that the modern common law must take into account.

The courts will be able to draw upon several bodies of law as they develop a modern common law of official immunity applicable to allegations of human rights abuses. The relevant international law principles offer useful insights, although international law is ultimately inconclusive, neither requiring nor prohibiting immunity for foreign officials accused of human rights abuses. In addition, U.S. law governing the immunity of domestic officials establishes an important framework for key decisions about the scope of foreign official immunity.

Most helpful, however, are standards developed in human rights cases over the past thirty years. First, in cases applying the FSIA to foreign officials sued for human rights abuses, courts have generally held that such abuses are outside the officials' lawful authority and therefore not protected by immunity. Although *Samantar* overruled the holding that the FSIA governs foreign official immunity, the lower court cases addressed the same underlying issue of immunity and lawful authority that will arise under the common law, and their resolution of that issue remains relevant. Second, cases refusing to apply the act of state doctrine to claims involving human rights violations, because of the high degree of codification and consensus underlying those norms, have developed standards that can be incorporated into the new common law of foreign official immunity. Finally, in the 2004 decision in *Sosa v. Alvarez-Machain*,[10] the Supreme Court held that federal courts are authorized to recognize a common law cause of action for violations of clearly defined, widely accepted human rights norms.[11] In developing common law rules to govern foreign official immunity, the lower courts can adapt that pre-existing common law standard, recognizing that violations of *Sosa* norms are not within the lawful authority of a foreign official, and, therefore, that such acts are not protected by immunity.

Part I of this Article analyzes the history of the U.S. doctrine of foreign sovereign immunity, the passage of the FSIA, and the *Samantar* decision, setting the stage for development of post-*Samantar* common law. Part II examines some of the sources that courts will find useful in developing a new common law of foreign official immunity, including international immunity doctrines, U.S. domestic immunity principles, and pre-FSIA common law. Part III analyzes the precedents found in human rights decisions discussing the limits on FSIA immunity and the act of state doctrine, as well as the common law guidance provided by the *Sosa* decision. Part IV addresses crucial questions about the role of the Executive Branch and foreign governments in determining the reach of common law immunity.

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10. 542 U.S. 692 (2004).

11. *Id.* at 732 (holding that federal courts should recognize a common law cause of action for violations of international norms with a "definite content and acceptance among civilized nations" comparable to the norms in effect when the Alien Tort Statute (ATS), 28 U.S.C. § 1350 (2006), was enacted in the late eighteenth century).

Finally, Part V outlines the modern common law of official immunity. As explained in that section, foreign officials sued in their personal capacity may be entitled to immunity from civil suit in the United States in some circumstances, such as when the suit would compel the state to act, when officials act in representation of the state, or when a judgment would impose a rule of law on the state itself. However, officials accused of violations of clearly defined, widely accepted international law norms should not be entitled to immunity. Moreover, while courts should defer to Executive Branch determinations of the status of foreign officials, they should give only respectful consideration to Executive Branch conclusions about whether the acts at issue are within lawful authority.

Hardly anyone today would claim that government officials can kidnap, torture, and murder with impunity. International law both prohibits such acts in the strongest terms and obligates states to provide redress to the victims and survivors. One means by which states comply with that obligation is by denying immunity to government officials accused of egregious human rights abuses. Drawing upon a variety of international and domestic law principles, the new common law of foreign official immunity should reflect the commitment to hold accountable those accused of egregious human rights violations.

I. THE HISTORY AND CURRENT STATUS OF FOREIGN OFFICIAL IMMUNITY IN U.S. LAW

Since 1980, victims and survivors of human rights abuses have filed dozens of civil lawsuits in U.S. federal courts seeking damages from former foreign government officials for abuses committed in the officials' home states.[12] These cases, which began with the Second Circuit's decision in *Filártiga v. Peña-Irala*,[13] have been filed under a handful of statutes authorizing claims for a range of human rights abuses, including the Alien Tort Statute (ATS)[14] and the Torture Victim Protection Act (TVPA).[15] In

12. For an overview of these cases, see Beth Stephens, *Judicial Deference and the Unreasonable Views of the Bush Administration*, 33 BROOK. J. INT'L L. 773 app. at 810 (2008).

13. 630 F.2d 876 (2d Cir. 1980) (holding that the ATS permitted aliens to sue for torture in U.S. courts); *see Sosa*, 542 U.S. at 732 (holding that courts should implement the ATS by recognizing a common law cause of action for clearly defined, widely accepted violations of international law).

14. 28 U.S.C. § 1350 (providing federal jurisdiction over a claim by an alien for a "tort . . . in violation of the law of nations").

15. 28 U.S.C. § 1350 (note) (authorizing claims for torture and extrajudicial execution). In addition to the ATS and Torture Victim Protection Act (TVPA), cases have been litigated under the Antiterrorism Act of 1990, 18 U.S.C. §§ 2331, 2333–2338 (2006) (creating a civil cause of action for certain acts of terrorism), and the "state sponsor[s] of terrorism" exception to the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C.A. § 1605A (West 2011) (permitting suits against states labeled "sponsor[s] of terrorism" by the U.S. Department of State).

most cases, the defendants committed the alleged violations while in a position of authority within their government.[16]

For almost thirty years, courts held that former officials were not entitled to immunity, even when their governments were immune under the FSIA. In a few cases, governments waived any immunity that might be claimed by the former official.[17] In most cases, the foreign government remained silent, declining to suggest that the official's acts were authorized or lawful. In *Filártiga*, for example, the government of Paraguay made no representations to the court, despite the defendant's argument that his torture and murder of a young man could be considered the public acts of the Paraguayan government.[18]

Two cases filed in 2005 against Israeli government officials, each alleging war crimes and other human rights abuses, highlighted a question that had been largely dormant in human rights cases: Are officials immune if their governments assert that the alleged abuses were authorized?[19] In each case, the government of Israel informed the court that the defendant had been acting within his "official duties," and the courts concluded that the defendants were entitled to immunity.[20]

The two Israeli-defendant decisions drew attention to longstanding disagreements among the federal courts and between the courts and the Executive Branch about whether the FSIA applied to foreign officials; whether common law immunity protected any of those officials; and, if officials were entitled to immunity under either theory, whether human rights violations could fall within that immunity. The Supreme Court decision in *Samantar v. Yousuf* answered one of these questions, holding that the FSIA does not protect foreign government officials, but left the others unresolved.

After reviewing the history of the disputes over the source and breadth of foreign official immunity in U.S. law, this part analyzes the *Samantar* decision and explains the issues facing the lower courts as they consider the post-*Samantar* common law of foreign official immunity.

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16. Many human rights violations require that the act be done with some official authority. The Convention Against Torture, for example, defines torture as certain acts "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." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1(1), Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85, 114 [hereinafter Convention Against Torture]. The Convention Against Torture entered into force for the United States on November 20, 1994. *See* UNITED STATES DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INT'L AGREEMENTS OF THE U.S. IN FORCE ON JANUARY 1, 2010, at 465 (2010), *available at* http://www.state.gov/documents/organization/143863.pdf.

17. *See, e.g.*, Paul v. Avril, 812 F. Supp. 207, 210–11 (S.D. Fla. 1993) (accepting Haitian government's waiver of any possible immunity to which the defendant, a former head of state, might be entitled).

18. *See Filártiga*, 630 F.2d at 889–90.

19. Matar v. Dichter, 563 F.3d 9, 15 (2d Cir. 2009) (finding immunity under common law); Belhas v. Ya'alon, 515 F.3d 1279, 1283 (D.C. Cir. 2008) (finding immunity under the FSIA).

20. *Matar*, 563 F.3d at 11, 14; *Belhas*, 515 F.3d at 1284; *see infra* notes 75–81 and accompanying text.

A. Foreign Official Immunity Prior to Enactment of the Foreign Sovereign Immunities Act

Foreign official immunity is a derivative of the immunity of the official's state.[21] Starting in the mid-twentieth century, the U.S. government began to limit the immunity offered to foreign states, but left unclear the protections afforded to their officials, an issue that remains unresolved today.

United States courts recognize foreign sovereign immunity not as a constitutional obligation, but rather as "a matter of grace and comity."[22] Until 1952, the Executive Branch routinely asserted immunity claims on behalf of friendly nations.[23] At that point, the U.S. Department of State adopted the "restrictive" theory of foreign sovereign immunity, which grants foreign states immunity only for public acts, not for commercial acts.[24] Application of the restrictive theory after 1952 proved difficult. Foreign governments seeking immunity applied political pressure on the State Department. When the State Department did not offer its views, the courts were tasked with discerning rules from often contradictory State Department practices.[25] As a result, "sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied."[26]

Most claims of foreign official immunity in U.S. courts involve the specialized immunities granted to diplomats and consuls by international treaties[27] or the common law immunity afforded to recognized heads of state.[28] Cases against other foreign government officials were rare between the adoption of the Constitution and the late twentieth century, and, as Professor Chimène Keitner has detailed, the scattered cases were not always consistent.[29] In the earliest discussions of foreign official immunity—two

21. *See* Samantar v. Yousuf, 130 S. Ct. 2278, 2290–91 (2010) ("[W]e do not doubt that in some circumstances the immunity of the foreign state extends to an individual for acts taken in his official capacity.").

22. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983). See *id.* at 486–89 for a detailed account of the history summarized in this paragraph.

23. *Id.* at 486.

24. The new approach was announced in a document known as the Tate Letter. Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952), 26 DEP'T ST. BULL. 984 (1952), *reprinted in* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711–12 app. 2 (1976) [hereinafter Tate Letter].

25. *Verlinden*, 461 U.S. at 487–88.

26. *Id.* at 488.

27. *See* Vienna Convention on Consular Relations art. 43, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261; Vienna Convention on Diplomatic Relations art. 31, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95. For an overview of the immunities provided by these treaties, see *infra* notes 148–49.

28. *See, e.g.*, Lafontant v. Aristide, 844 F. Supp. 128, 132 (E.D.N.Y. 1994) (recognizing common law head of state immunity).

29. The analysis of pre-FSIA foreign official cases in this section draws on an amicus brief drafted by Professor Chimène Keitner and submitted to the U.S. Supreme Court in *Samantar* and on two articles by Keitner. *See* Brief of Professors of Public International and

opinions issued in the 1790s—the U.S. Attorney General concluded that foreign officials were not entitled to immunity in suits involving acts taken within official authority, but that they could not be held liable for those acts because of an early version of the act of state doctrine, a defense on the merits but not a bar to litigation of the suit.[30] In the nineteenth century, a New York court rejected Alexander McLeod's claim to immunity in a criminal prosecution arising out of an attack on the *Caroline*, a steamboat allegedly involved in acts of war against Canada.[31] As Keitner has pointed out, the court held that the fact that McLeod's government had endorsed his acts "by adopting and approving [his] crime[s]" did not "place[] the offenders above the law."[32] That is, the official could be prosecuted for unlawful acts taken with the full authorization of his government.

Two early twentieth century cases denied immunity to foreign officials accused of acting outside the scope of their authority. In *Pilger v. U.S. Steel Corp.*,[33] a New Jersey court held that immunity could not apply to a lawsuit alleging that the defendant, a public trustee acting on behalf of the government of Great Britain, had acted unlawfully.[34] Sovereign immunity, the court ruled, did not extend to "suits arising out of the unlawful acts of [the state's] representatives," and does not bar "suits brought against them for the doing of such unlawful acts."[35] Similarly, in *Lyders v. Lund*,[36] a federal district court rejected the claim that a suit against a consul was in fact an action against his government.[37] The court held that the official's immunity was limited to claims in which the state itself was the real party in interest, not those where the officer acted "in excess of his authority or under void authority"[38]:

Comparative Law as Amici Curiae in Support of Respondents at 7–14, Samantar v. Yousuf, 130 S. Ct. 2278 (2010) (No. 08-1555); Chimène I. Keitner, *The Common Law of Foreign Official Immunity*, 13 GREEN BAG 2d 61 (2010) [hereinafter Keitner, *The Common Law*]; Chimène I. Keitner, *Officially Immune? A Response to Bradley and Goldsmith*, 36 YALE J. INT'L L. ONLINE 1, 3 (2010), www.yjil.org/docs/pub/o-36-keitner-officially-immune.pdf [hereinafter Keitner, *Officially Immune?*].

30. Actions Against Foreigners, 1 OP. ATT'Y GEN. 81, 81 (1797) (suggesting that a British official could be tried in a U.S. court for acts taken as part of his official position); Suits Against Foreigners, 1 OP. ATT'Y GEN. 45, 46 (1794) (opining that a French official was subject to suit for acts taken while governor of a French colony); *see* Keitner, *Officially Immune?*, *supra* note 29, at 11 (analyzing these opinions); *see also* Jones v. Le Tombe, 3 U.S. (3 Dall.) 383, 385 (1798) (dismissing a claim for refusal to pay a debt after finding that there was no claim against the individual government official who had actually signed the bills of exchange because the credit had been extended to the government of France, not to him as an individual).

31. People v. McLeod, 1 Hill 377, 437 (N.Y. Sup. Ct. 1841).

32. Keitner, *Officially Immune?*, *supra* note 29, at 11 (quoting *McLeod*, 1 Hill at 377). For a full history of the controversy surrounding the case and its contribution to the debate over the defense of superior orders, see David J. Bederman, *The Cautionary Tale of Alexander McLeod: Superior Orders and the American Writ of Habeas Corpus*, 41 EMORY L.J. 515 (1992).

33. 130 A. 523 (N.J. 1925).

34. *Id.* at 524.

35. *Id.*

36. 32 F.2d 308 (N.D. Cal. 1929).

37. *Id.* at 308–09.

38. *Id.* at 309.

> [I]n actions against the officials of a foreign state not clothed with diplomatic immunity, it can be said that suits based upon official, authorized acts, performed within the scope of their duties on behalf of the foreign state, and for which the foreign state will have to respond directly or indirectly in the event of a judgment, are actions against the foreign state. Acts of such officials, beyond the scope of their authority or in connection with their private business, cannot be regarded as acts of the foreign state, and the official may be sued on account of any such acts.[39]

The courts decided only four cases against foreign officials in the years between the 1952 adoption of the restrictive theory and passage of the FSIA in 1976.[40] At least one case declined to afford immunity.[41] The other three granted immunity, but none indicated that foreign officials were automatically entitled to immunity for all acts committed in the course of their employment: one case was dismissed because an absent government agency was a real party in interest;[42] one granted immunity because the case sought to enforce a contract against the foreign state;[43] and one granted immunity without explanation.[44]

These scattered decisions do provide support for two conclusions. First, foreign officials were entitled to immunity in lawsuits in which a judgment would in fact be enforceable against the state. Second, none of the pre-FSIA cases offer any indication that an official acting outside of lawful authority would be entitled to immunity. These guidelines are generally consistent with the rule adopted by the Restatement (Second) of Foreign Relations Law, which was in effect at the time the FSIA was debated and

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39. *Id.* In a 2010 article, Professors Curtis Bradley and Jack Goldsmith stated categorically that, prior to enactment of the FSIA, the common law extended immunity to foreign officials sued in U.S. courts. Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity and Domestic Officer Suits*, 13 GREEN BAG 2d 137, 142 (2010). But the cases they cited, *id.* at 142–44, stand for the more limited proposition that immunity extended to "official, authorized acts, performed within the scope of [the officials'] duties on behalf of the foreign state, and for which the foreign state will have to respond," *Lyders*, 32 F.2d at 309, or where "'the effect of exercising jurisdiction would be to enforce a rule of law against the state,'" *Heaney v. Gov't of Spain*, 445 F.2d 501, 504 (2d Cir. 1971) (quoting RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 66(f) (1965)). This language is entirely consistent with the views expressed here: Acts beyond an official's authority are not entitled to immunity.

40. *See Sovereign Immunity Decisions of the Dep't of State, May 1952 to Jan. 1977* (Michael Sandler, Detlev F. Vagts, & Bruno A. Ristau eds.), *in* 1977 DIG. U.S. PRAC. INT'L L. 1017, 1020 [hereinafter *Sovereign Immunity Decisions*] (cited in Samantar v. Yousuf, 130 S. Ct. 2278, 2291 n.18 (2010)). The survey found a total of 110 foreign sovereign immunity cases during that period. *Id.* at 1080. Two additional cases claimed head-of-state immunity. *Id.*

41. *See* Keitner, *The Common Law*, *supra* note 29, at 72–73 & n.35 (citing *Sovereign Immunity Decisions*, *supra* note 40, at 1062) (discussing *Cole v. Heidtman* (S.D.N.Y. 1968), where the Executive Branch declined to suggest immunity for a government official accused of civil rights violations).

42. Oliner v. Can. Pac. Ry. Co., 34 A.D.2d 310, 315 (1970).

43. *Heaney*, 445 F.2d at 503–04.

44. Greenspan v. Crosbie, No. 74 Civ. 4734 (GLG), 1976 WL 841 (S.D.N.Y. Nov. 23, 1976).

enacted.[45] The Restatement (Second) stated that the immunity of a foreign state extended to heads of state, foreign ministers, and "any other public minister, official, or agent of the state with respect to acts performed in his official capacity *if the effect of exercising jurisdiction would be to enforce a rule of law against the state*."[46] A comment to that section added:

> Public ministers, officials, or agents of a state . . . do not have immunity from personal liability even for acts carried out in their official capacity, unless the effect of exercising jurisdiction would be to enforce a rule against the foreign state or unless they have one of the specialized immunities [such as diplomatic or consular immunity].[47]

As this language made clear, foreign officials were not immunized for all acts performed in an official capacity, but only for those in which the state itself would be bound by a judgment against the official.

B. The Foreign Sovereign Immunities Act and Foreign Officials

Congress enacted the FSIA in 1976 "to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to 'assur[e] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process.'"[48] The FSIA, the "sole basis for obtaining jurisdiction over a foreign state in our courts,"[49] recognized foreign sovereign immunity as the rule, while providing a list of exceptions to that immunity that largely codified the restrictive theory.[50]

Very few human rights claims fall within one of the exceptions, which generally require either torts or contractual arrangements occurring in the United States or commercial activity that has a significant impact within the United States.[51] The Supreme Court in *Argentine Republic v. Amerada Hess Shipping Corp.*[52] specifically rejected the argument that violations of international law triggered an additional, implicit exception to immunity,

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45. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 66 (1965). The Restatement (Second) has been superseded by the Restatement (Third) of the Foreign Relations Law of the United States. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987).

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

47. *Id.* § 66 cmt. b.

48. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 488 (1983) (quoting H.R. REP. NO. 94-1487, at 7 (1976)).

49. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989).

50. *See* 28 U.S.C. § 1604 (2006) (stating general rule of immunity); *id.* § 1605 (listing exceptions to immunity). For a description of the requirements of the separate provision permitting some claims against "state sponsor[s] of terrorism," 28 U.S.C.A § 1605A (West 2011), see *infra* note 54.

51. See exceptions listed in 28 U.S.C. § 1605. Two cases held foreign governments liable for the assassinations of political opponents within the United States under the § 1605(a)(5) exception for deaths occurring in the United States. *See* Liu v. Republic of China, 892 F.2d 1419 (9th Cir. 1989); Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980). In another case, the court held that a government implicitly waived its immunity to a claim alleging torture. *See* Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 720–22 (9th Cir. 1992).

52. 488 U.S. 428 (1989).

and, as a result, dismissed claims against Argentina for the bombing of a commercial oil tanker at sea in violation of the laws of war.[53] Congress in 1994 rejected an effort to create an additional broad exception for some human rights abuses but adopted a limited exception for lawsuits by U.S. nationals filed against a state on the State Department's list of "state sponsor[s] of terrorism."[54] As a result, with the exception of claims for violations committed within the United States and those filed against states on the "sponsors of terrorism" list, foreign states are generally immune from suit in U.S. courts for human rights abuses.

Perhaps because there had previously been only a handful of cases against foreign officials in U.S. courts, the debates preceding the enactment of the FSIA contained no indication that Congress intended the statute to apply to foreign officials, and there was no mention of officials in the statute.[55] The Executive Branch, which drafted the statute and strongly urged Congress to enact it, viewed it as applying only to foreign states, not to their officials.[56]

Despite the statutory silence, the Ninth Circuit in 1990 concluded that Congress must have intended that the FSIA protect foreign officials acting within their official capacity. In *Chuidian v. Philippine National Bank*,[57] the circuit dismissed a lawsuit against Raul Daza, a Philippine government official sued after he instructed the California branch of the Philippine National Bank to dishonor a letter of credit. Daza acted on government instructions after a Philippine government commission determined that the letter of credit was the result of a fraudulent transaction.[58] The Ninth Circuit held that the FSIA applied to an individual official such as Daza "for acts committed in his official capacity," but not for "acts beyond the

53. *Id.* at 431, 436, 443. For a contrary view, see the dissenting opinion of Judge Patricia Wald in *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1176–84 (D.C. Cir. 1994) (Wald, J., dissenting).

54. *See* 28 U.S.C. § 1605(a)(7), *amended by* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3 (replacing § 1605(a)(7) with § 1605A) (authorizing claims for torture, extrajudicial killing, aircraft sabotage, and hostage-taking). The list of state sponsors of terrorism currently includes Cuba, Iran, Sudan, and Syria. *See* 22 C.F.R. § 126.1(d) (2009). Iraq, Libya, and North Korea were on the list when the exception was enacted in 1996, but have since been removed. *See* 22 C.F.R. § 126.1(d) (1996).

When originally introduced in Congress, the proposal would have created an FSIA exception to immunity for all foreign states sued for human rights violations; last-minute negotiations limited the final version to claims against "state sponsors of terrorism." *See* ALLAN GERSON & JERRY ADLER, THE PRICE OF TERROR 293–97 (2001) (explaining the compromise that limited the statute to the short list of "state sponsors of terrorism.").

55. *See* Samantar v. Yousuf, 130 S. Ct. 2278, 2289 n.12 (2010) (noting references that suggest that Congress did not intend statute to apply to individuals); *id.* at 2291 ("The immunity of officials simply was not the particular problem to which Congress was responding when it enacted the FSIA.").

56. *See Sovereign Immunity Decisions*, *supra* note 40, at 1020 ("[T]he Foreign Sovereign Immunities Act does not deal with the immunity of individual officials, but only that of foreign states and their political subdivisions, agencies and instrumentalities.").

57. 912 F.2d 1095 (9th Cir. 1990).

58. *Id.* at 1097.

scope of his authority."[59] Holding that Daza's actions were within his official capacity, the court applied the FSIA, and, since the acts did not fall within one of the FSIA exceptions to immunity, the court dismissed the case.[60] The court assumed that the FSIA occupied the field, so that it must either find a source of immunity within the statute or hold that Daza was not immune from suit.[61]

The Executive Branch agreed that Daza was entitled to immunity, but based on common law, not on the FSIA.[62] Indeed, the Executive Branch has consistently maintained that the FSIA only addresses the immunity of foreign states, and that foreign official immunity is governed by common law immunity doctrines that pre-date the FSIA and survived its passage.[63] Until 2009, no court had adopted that view.[64] Instead, four circuits followed the Ninth Circuit's holding in *Chuidian*, finding that the FSIA covered government employees acting within their authority.[65] Two circuits disagreed, including the Fourth Circuit in *Yousuf v. Samantar*,[66] setting up the circuit split and the split between the courts and the Executive Branch that the Supreme Court resolved in *Samantar*.

Until 2009, the dispute about the application of the FSIA to foreign officials had no impact on human rights claims, because *Chuidian* and the cases that adopted its holding limited FSIA immunity to acts committed within official authority, and the courts consistently held that human rights abuses were not within that authority. Shortly after the *Chuidian* decision, for example, the Ninth Circuit confirmed that *Chuidian* would not bar claims for human rights abuses because such acts were "beyond the scope of [the official's] authority," and involved "doing something the sovereign

59. *Id.* at 1103, 1106. The court reached this ruling by finding that a foreign official fell within the FSIA's definition of "an agency or instrumentality of a foreign state." *Id.* at 1098 (analyzing 28 U.S.C. § 1603).

60. *Id.* at 1105–06.

61. The *Chuidian* court relied on the assumption that the FSIA had eliminated all common law foreign sovereign immunity and replaced it with statutory norms, leaving the FSIA as the only source of immunity for officials, as well as for states. *Id.* at 1102 ("[W]e disagree with the government that the Act can reasonably be interpreted to leave intact the pre-1976 common law with respect to foreign officials.").

62. *See* Statement of Interest of the United States at 4–6, *Chuidian*, 912 F.2d 1095 (No. 86-2255).

63. *See Sovereign Immunity Decisions*, *supra* note 40, at 1020; Brief for the United States of America as Amicus Curiae in Support of Affirmance at 9–18, Matar v. Dichter, 563 F.3d 9 (2d Cir. 2009) (No. 07-2579) [hereinafter U.S. *Matar* Amicus Brief]. The *Matar* filing is scathing in its review of *Chuidian*'s conclusion that the FSIA applies to government officials, stating that the statutory analysis is "unpersuasive," "flawed," and "inconsistent with [the FSIA's] text and legislative history." U.S. *Matar* Amicus Brief at 15.

64. *See infra* notes 78–81 and accompanying text (discussing *Matar*).

65. *See In re* Terrorist Attacks on September 11, 2001, 538 F.3d 71, 81 (2d Cir. 2008); Keller v. Cent. Bank of Nigeria, 277 F.3d 811, 815 (6th Cir. 2002); Byrd v. Corporacion Forestal y Industrial de Olancho, 182 F.3d 380, 388 (5th Cir. 1999); El-Fadl v. Cent. Bank of Jordan, 75 F.3d 668, 671 (D.C. Cir. 1996).

66. 552 F.3d 371, 379–83 (4th Cir. 2009); Enahoro v. Abubakar, 408 F.3d 877, 881–83 (7th Cir. 2005).

has not empowered the official to do."[67] In a class action against the estate of former Philippine dictator Ferdinand Marcos, the court held that the alleged "acts of torture, execution, and disappearance were clearly acts outside of his authority as President,"[68] and that "acts [that] were not taken within any official mandate"[69] did not fall within the immunity of the FSIA. "[T]he illegal acts of a dictator," the court concluded, "are not 'official acts' unreviewable by federal courts."[70]

States generally did not claim that the human rights abuses alleged against their former officials were committed within lawful authority. In one exception, the government of China sought to assert immunity on behalf of a Chinese government official in a case alleging torture and arbitrary detention.[71] The Chinese government sent a letter to the State Department stating that, when government officials such as the defendant "performed their functions and duties in accordance with the power entrusted to them under [the] Chinese Constitution and laws," the actions should be seen as public acts of state that were immune from the jurisdiction of the courts of the United States.[72] The district court, however, refused to afford immunity to the defendant because his acts were outside the scope of his authority: "Where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do."[73] The court found that the acts alleged by the plaintiffs violated Chinese law, which specifically prohibited arbitrary detention, torture, and other physical abuse of detainees.[74] The

67. Trajano v. Marcos, 978 F.2d 493, 497 (9th Cir. 1992) (discussing claims against Imee Marcos-Manotoc, daughter of Ferdinand Marcos).

68. Hilao v. Marcos *(In re* Estate of Marcos, Human Rights Litig.), 25 F.3d 1467, 1472 (9th Cir. 1994).

69. *Id.*

70. *Id.* at 1471. The court in *Hilao v. Marcos* also rejected defendant Marcos' argument that acts outside the scope of his official authority (and thus not immunized by the FSIA) did not violate international law because such acts were not committed under "color of authority." *Id.* at 1472 n.8. The court held that "[a]n official acting under color of authority, but not within an official mandate, can violate international law and not be entitled to immunity under [the] FSIA." *Id.* (citing Filártiga v. Peña-Irala, 630 F.2d 876, 890 (2d Cir. 1980)).

71. Doe I v. Liu Qi, 349 F. Supp. 2d 1258, 1271 (N.D. Cal. 2004).

72. Statement of the Government of the People's Republic of China on "Falun Gong" Unwarranted Lawsuits (unpaginated) at 3, 5, attached to Notice of Filing of Original Statement by the Chinese Government, *Liu Qi*, 349 F. Supp. 2d 1258 (No. C 02 0672 (EMC)).

73. *Liu Qi*, 349 F. Supp. 2d at 1282 (quoting Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1106 (9th Cir. 1990)).

74. *Id.* at 1285. The court also rejected the argument that the defendant's acts were within the scope of his authority because they had been authorized by the government's "covert unofficial policy." *Id.* at 1286. Since "*ultra vires* actions are not subject to sovereign immunity," government officials are entitled to immunity only if they act with a "*legally valid* grant of authority." *Id.* at 1287 (citing United States v. Yakima Tribal Court, 806 F.2d 853 (9th Cir. 1986)). For an overview of the Chinese government's detention and other harsh treatment of Falun Gong practitioners, see U.S. DEP'T OF STATE, 2009 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CHINA (INCLUDES TIBET, HONG KONG, AND MACAU) (2010), *available at* http://www.state.gov/g/drl/rls/hrrpt/2009/eap/135989.htm.

court in *Doe I v. Liu Qi* thus refused to grant immunity where the government merely asserted that an official was performing a job-related task. The court instead undertook an independent assessment of the government's claim that the acts were lawful.

In two cases against Israeli government officials, U.S. courts granted immunity based on the government's general statements that the officials acted within the scope of their authority, without considering the illegality of the underlying acts. The result enabled Israel to avoid taking a position on a key issue: Were the acts alleged in the complaints within the lawful authority of the officials? The first case, *Belhas v. Ya'alon*,[75] was filed by survivors of an Israeli missile attack on a Palestinian refugee camp in Lebanon. The defendant, an Israeli general, submitted a letter from the Israeli Ambassador stating that "'anything [he] did in connection with the events at issue in the suit[] was in the course of [his] official duties.'"[76] The court accepted this argument, holding that the acts fell within the defendant's official authority and thus within the protections of the FSIA, even though Israel never confronted the allegations of the complaint.[77]

Similarly, in *Matar v. Dichter*,[78] a lawsuit challenging the bombing of a civilian apartment building in Gaza, the court relied on a letter from the Israeli government that used the same language as the *Belhas* letter, stating that "'anything Mr. Dichter did . . . in connection with the events at issue [in the suit] was in the course of [his] official duties.'"[79] The State Department filed a Statement of Interest urging the court to dismiss the claim based on common law immunity.[80] The Second Circuit in *Matar* agreed, holding that the acts were protected by common law immunity.[81] *Matar* was the first case to adopt the Executive Branch view that common law governs foreign official immunity.

By the time the Supreme Court granted certiorari in *Samantar*, three questions were pending: Are foreign officials protected by the FSIA? Are foreign officials protected by common law immunity? If any immunity protects foreign officials, does it immunize all acts taken in the course of their employment, including human rights violations? In *Samantar*, the Supreme Court directly answered only the first of those questions, although the opinion sets the framework for lower court consideration of the second and third issues.

C. Samantar *and the End of Statutory Foreign Official Immunity*

The *Samantar* case illustrates the tension between sovereign immunity and human rights accountability. In 1981, Bashe Abdi Yousuf was arrested

75. 515 F.3d 1279 (D.C. Cir. 2008).

76. *Id.* at 1282 (quoting Letter from Daniel Ayalon, Ambassador to the U.S., State of Isr., to Nicholas Burns, Under-Secretary for Political Affairs, State Dep't (Feb. 6, 2006)).

77. *Id.* at 1283–84.

78. 563 F.3d 9 (2d Cir. 2009).

79. *Id.* at 11 (quoting Letter from Daniel Ayalon to Nicholas Burns, *supra* note 76).

80. *Id.*; *see* U.S. *Matar* Amicus Brief, *supra* note 63, at 11.

81. *Matar*, 563 F.3d at 13–14.

in northern Somalia by security forces operating under the command of Mohamed Ali Samantar, then Minister of Defense of Somalia.[82] Yousuf, a community organizer, was brutally tortured and detained in solitary confinement for seven years. Years later, after discovering that Samantar was living in Virginia, Yousuf filed a lawsuit against him in federal district court. He was joined in the lawsuit by other Somalis who had themselves been tortured and imprisoned by Samantar's forces or who were relatives of people killed by those forces.

The district court dismissed the complaint, holding that Samantar was protected by foreign sovereign immunity because he was at all times acting "'in an official capacity, and not for personal reasons or motivation.'"[83] The court relied on letters from representatives of the Somali Transitional Federal Government that stated that Samantar's alleged actions were taken in his official capacity,[84] although the United States did not recognize that government.[85] On appeal, the Fourth Circuit reversed the dismissal, holding that the FSIA did not apply to foreign officials and, therefore, did not protect Samantar.[86] The court remanded the case to the district court to consider whether Samantar was entitled to common law immunity.[87] The Supreme Court granted certiorari to resolve the circuit split over the application of the FSIA to foreign officials.[88] The Executive Branch filed a brief that reiterated the position it had taken consistently since the passage of the FSIA: The statute does not apply to foreign officials, but they are protected by a nonstatutory immunity that survived passage of the FSIA.[89]

In a unanimous decision, the Supreme Court rejected application of the FSIA, holding that the statute does not apply to foreign officials.[90] The decision turned upon statutory construction, holding that the clear language of the statute, bolstered by its legislative history,[91] indicated that Congress did not intend to include foreign officials within its reach. The Court

82. For the facts of the case, see *Yousuf v. Samantar*, 552 F.3d 371, 373–74 (4th Cir. 2009), and the website of the Center for Justice and Accountability, counsel for the plaintiffs, at http://cja.org/article.php?list=type&type=85 (last visited Apr. 20, 2011).

83. *Samantar*, 552 F.3d at 376 (quoting Yousuf v. Samantar, No. 1:04cv1360, 2007 WL 2220579, at *14 (E.D. Va. Aug. 1, 2007)).

84. Samantar v. Yousuf, 130 S. Ct. 2278, 2283 n.3 (2010). The government of Somaliland, a de facto state with an unrecognized government that currently governs the region in which the abuses took place, also wrote to the court, stating that the acts alleged did not constitute official actions. Brief for the Respondents at 7, *Samantar*, 130 S. Ct. 2278 (No. 08-1555), 2010 WL 265636 (citing Somaliland letter).

85. *Samantar*, 130 S. Ct. at 2283 n.3 (citing Brief for the United States as Amicus Curiae Supporting Affirmance at 5, *Samantar*, 130 S. Ct. 2278 (No. 08-1555) [hereinafter U.S. *Samantar* Brief]).

86. *Samantar*, 552 F.3d at 379–83.

87. *Id.* at 383–84.

88. Samantar v. Yousuf, 130 S. Ct. 49 (2009).

89. U.S. *Samantar* Brief, *supra* note 85, at 6 ("In the view of the United States, principles articulated by the Executive Branch, not the FSIA, properly govern the immunity of foreign officials from civil suit for acts in their official capacity.").

90. *Samantar*, 130 S. Ct. at 2285–92.

91. Justices Scalia, Thomas, and Alito each wrote a separate concurring opinion objecting to the majority's reliance on legislative history to support the result. *Id.* at 2293.

affirmed the Fourth Circuit's decision to remand the case to the trial court to consider Samantar's other defenses, including whether he is protected by common law immunity.[92]

The Court's discussion of the substance of any common law immunity was understandably meager, given that the lower courts did not reach the issue. The opinion did provide guideposts, however, that are likely to be used as a foundation for lower court analysis of the issue. To begin, the opinion recognizes that a foreign official may be protected by common law immunity in some circumstances: "Even if a suit is not governed by the [FSIA], it may still be barred by foreign sovereign immunity under the common law."[93] The official's immunity is derivative of state immunity, but is not "coextensive with the law of state immunity."[94] That is, "*in some circumstances* the immunity of the foreign state extends to an individual *for acts taken in his official capacity*."[95]

The Court offered no indication of the "circumstances" in which immunity would protect an official, and no explanation of when an act is to be characterized as "taken in official capacity." While quoting the Restatement (Second) caveat that a foreign official is only immune "'if the effect of exercising jurisdiction would be to enforce a rule of law against the state,'"[96] the Court dropped a footnote to avoid any endorsement of that view.[97]

However, the reasoning employed by the Court to analyze the FSIA did provide a few lessons. First, *Samantar* recognized that any immunity to which an official is entitled is derivative of the immunity of the state, stating that the foreign state's immunity, "in some circumstances," may "extend[] to an individual."[98] This suggests that, since the official has no independent immunity, any foreign official immunity can be waived by the state.[99] Second, foreign official immunity is not co-extensive with the

92. After the remand, the Executive Branch filed a Statement of Interest concluding that Samantar was not entitled to immunity, Statement of Interest of the United States of America, Yousuf v. Samantar, No. 1:04 CV 1360 (LMB) (E.D. Va. Feb. 14, 2011) [hereinafter Statement of Interest, Yousuf v. Samantar], and the District Court promptly issued an order rejecting Samantar's immunity defense, Order, Yousuf v. Samantar, 1:04cv1360 (LMB/JFA) (E.D. Va. Feb. 15, 2011). For a discussion of the Statement of Interest, see *infra* notes 280–83 and accompanying text.

93. *Samantar*, 130 S. Ct. at 2292.

94. *Id.* at 2289.

95. *Id.* at 2290–91 (emphasis added).

96. *Id.* at 2290 (emphasis omitted) (quoting RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 66(f) (1965)).

97. "We express no view on whether Restatement § 66 correctly sets out the scope of the common law immunity applicable to current or former foreign officials." *Id.* at 2290 n.15.

98. *Id.* at 2290–91.

99. *See also* U.S. *Samantar* Brief, *supra* note 85, at 26 ("[A] foreign state may seek to waive the immunity of a current or former official, *because immunity is accorded to foreign officials not for their personal benefit, but for the benefit of the foreign state*." (emphasis added)). Given that an official's immunity is derived from that of the state, the state has the authority to waive that immunity. *See* Paul v. Avril, 812 F. Supp. 207, 210–11 (S.D. Fla. 1993) (accepting Haitian government's waiver of any possible immunity to which the defendant, a former head of state, might be entitled).

immunity of the state. The Court rejected the argument that, since states can only act through individuals, state immunity would be drained of meaning if the state's representatives were not immunized to the same extent as the state.[100] The Court noted that states can protect themselves from the impact of litigation aimed at their officials through two doctrines—real party in interest and indispensable party—that would enable a state to obtain dismissal of suits that affect their interests.[101] Finally, the Court's reliance on the real party in interest and indispensable party doctrines suggested that the Court was concerned with protecting the *legal* interests of the state—not its political, diplomatic, or policy interests. That is, *Samantar* indicated that a state's interest in obtaining immunity for its officials would be satisfied to the extent that the state can protect itself from a judgment that would impact its legal interests.

With just that basic framework from the Court, the lower courts now face the task of discerning the substance of the common law of foreign official immunity.[102] As explained in Part II, courts will derive useful—although not definitive—guidance from international law, U.S. domestic immunity doctrines, and early cases addressing common law immunity. Part III will discuss the more substantive guidance found in the many cases that have applied FSIA immunity and the act of state doctrine to defendants accused of human rights abuses, and in the Supreme Court's *Sosa* decision, which recognized common law causes of action for human rights claims.[103]

II. BACKGROUND SOURCES FOR THE MODERN COMMON LAW OF FOREIGN OFFICIAL IMMUNITY

After rejecting the FSIA as a source of immunity for foreign officials, the Supreme Court in *Samantar* remanded the case to the lower courts to determine whether, and under what circumstances, those officials would be

100. *Samantar*, 130 S. Ct. at 2292 ("[O]ur reading of the FSIA will not 'in effect make the statute optional,' as some Courts of Appeals have feared, by allowing litigants through 'artful pleading . . . to take advantage of the Act's provisions or, alternatively, choose to proceed under the old common law . . . .'" (quoting Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1102 (9th Cir. 1990)).

101. "[I]t may be the case that some actions against an official in his official capacity should be treated as actions against the foreign state itself, as the state is the real party in interest." *Id.* If a case attacks the interests of the foreign state, the state may be an indispensable party because it has "'an interest relating to the subject of the action' and 'disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest.'" *Id.* (quoting FED. R. CIV. P. 19(a)(1)(B)) (citing Republic of Philippines v. Pimentel, 553 U.S. 851, 867 (2008) ("[W]here sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign.")).

102. Two post-*Samantar* district court decisions denied defendants' claims to common law immunity: *Yousuf v. Samantar*, 1:04cv1360 (LMB/JFA) (E.D. Va. Feb. 15, 2011) (after remand from the Supreme Court), *see infra* notes 280–85 and accompanying text, and *Hassen v. Al Nahyan*, CV 09-01106 DMG (MANx) (C.D. Cal. Sept. 17, 2010), *see infra* notes 256–58 and accompanying text.

103. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

protected by common law immunity for acts taken in their course of their employment.

The Supreme Court's decision in *Erie Railroad Co. v. Tompkins*[104] famously imposed strict limits on the federal court's common law-making power. Issues relating to foreign affairs, however, fall within one of the remaining "enclaves" of federal common law: Federal courts are empowered to develop common law rules in "narrow areas," including "international disputes implicating . . . our relations with foreign nations,"[105] because of the "uniquely federal interests in foreign affairs."[106] To determine the substance of the applicable common law in cases that involve foreign affairs, federal courts fashion rules that take into account the foreign policy interests of the federal government.[107] In an area touching upon relations with foreign governments and their officials, courts developing common law rules are likely to consider relevant international law doctrines. They are also likely to look at analogous domestic law principles and judicial decisions in related areas.[108]

Each of these sources has significant limitations, as discussed in the following sections. There is no binding international law governing the scope of official immunity. Domestic immunity doctrines offer interesting insights, but are based on a distinct constitutional foundation. United States courts today cannot simply apply pre-FSIA common law decisions. Those decisions were sparse and provided minimal guidance, and intervening developments in international and domestic law have largely superseded them.

Nevertheless, although none of these sources provides a clear rule, together they offer substantial insight to guide development of rules of common law immunity. The analysis of international and domestic immunity doctrines in this part is followed in Part III by a discussion of the limits on lawful authority that will inform the modern common law of official immunity.

A. International Law: Neither Prohibited Nor Required

The U.S. law of sovereign immunity has developed in coordination with international law. In enacting the FSIA in 1976, Congress referred

104. 304 U.S. 64 (1938).

105. Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981).

106. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 383 (5th ed. 2007).

107. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421–23 (1964) (adopting the rule most suited to protecting the interests of the federal government in an act of state case).

108. *See* Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, SUP. CT. REV. (forthcoming 2011) (manuscript at 30–35, 39–46) (suggesting that courts look at customary international law and at policies reflected in U.S. domestic law in developing the common law of immunity); Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT'L L. (forthcoming 2011) (manuscript at 53–54), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1811604 (suggesting that, in determining the federal common law of official immunity, courts look to the guidance offered by domestic statutes, particularly the FSIA, and to international law).

explicitly to then-existing customary international law;[109] as a result, the courts frequently refer to international law when interpreting the statute.[110] The Executive Branch has expressed its concern with respecting international law immunity rules, in part so that other states will show similar concern in their treatment of U.S. government officials.[111] As a result, courts will consider international law rules as they develop the U.S. common law of foreign official immunity. However, there are no binding, comprehensive international treaties or customary international law norms governing the immunity of foreign officials. Thus, although international law principles will be of interest as the courts formulate a common law approach, an analysis of international law will not resolve the issue.

1. The Curious History of Sovereign Immunity

No government has the right to hide behind national sovereignty in order to violate the human rights or fundamental freedoms of its peoples.
– Kofi Annan, U.N. Secretary General[112]

The doctrine of sovereign immunity developed from the concept of sovereignty: In recognition of their equal sovereign status, states accepted limits on their ability to judge the conduct of other states. Both doctrines, however, have been significantly weakened by the dramatic expansion of substantive international human rights protections that began in the second half of the twentieth century. Through human rights norms, states have accepted significant limits on their own behavior and imposed those limits on other states. States have also accepted obligations to hold accountable those who violate human rights norms.

The concept of absolute state sovereignty was articulated in the mid-eighteenth century by Emerich Vattel, who declared in his influential treatise that "all [sovereign states] have a right to be governed as they think proper, and that none have the least authority to interfere in the government of another."[113] As the Supreme Court stated in the following century, "The jurisdiction of the nation within its own territory is necessarily exclusive

109. *See* 28 U.S.C. § 1602 (2006) (including a reference to international law in the section declaring the purpose of the FSIA).

110. *See, e.g.*, Samantar v. Yousuf, 130 S. Ct. 2278, 2289 (2010) (stating that one purpose of the FSIA was "'codification of international law at the time of the FSIA's enactment'" (quoting Permanent Mission of India to United Nations v. City of New York, 551 U.S. 193, 199 (2007))).

111. U.S. *Samantar* Brief, *supra* note 85, at 27 ("[F]idelity to international norms and the protection of United States officials abroad are important factors that the Executive Branch considers in determining whether to suggest immunity for particular foreign officials.").

112. Press Release, Secretary-General Calls for Renewed Commitment in New Century To Protect Rights of Man, Woman, Child—Regardless of Ethnic, National Belonging, U.N. Press Release SG/SM/6949, HR/CN/898 (Apr. 7, 1999), *available at* http://www.un.org/News/Press/docs/1999/19990407.sgsm6949.html.

113. EMMERICH DE VATTEL, THE LAW OF NATIONS, OR THE PRINCIPLES OF THE LAW OF NATURE bk. II, ch. 4 § 54 (Thomas M. Pomroy 1805) (1758); *see* STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 21 (1999) (discussing Vattel's use of the term "nonintervention").

and absolute."[114] In the modern era, the U.N. Charter codified state authority over domestic affairs, specifying that, with the exception of issues that affect international peace and security, the United Nations is not authorized "to intervene in matters which are essentially within the domestic jurisdiction of any state."[115]

Despite repeated invocations of each state's right to absolute domestic sovereignty, the practical reality has long been far different. Throughout the history of sovereign states, "[r]ulers have intervened in the internal affairs of other states through coercion and imposition and invited the insinuation of external authority in their own polities through contracting and conventions."[116] During the centuries since the modern state emerged, states have repeatedly invaded other states in order to rearrange their internal affairs, have used economic coercion to achieve the same result, and have entered into agreements whereby they "voluntarily" agreed to cede some part of their internal authority—whether truly voluntary or as a result of military or economic threats.[117]

Moreover, while extolling sovereign authority over internal affairs in its Charter, the United Nations led the movement to codify human rights commitments that restricted the domestic authority of member states.[118] These protections are now included in widely ratified multilateral treaties, and many are recognized as *jus cogens* norms, binding on all states whether or not they consent, or as norms of customary international law, binding on all states unless they make timely objections.[119] Human rights obligations impose crucial limits on a state's power over persons and things within its territory.

Professor John Jackson has highlighted the "antiquated" nature of sovereignty understood as "a nation-state's supreme absolute power and authority over its subjects and territory,"[120] which he characterized as "the nation-state's power to violate virgins, chop off heads, arbitrarily confiscate

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114. The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812).

115. U.N. Charter art. 2, para. 7.

116. KRASNER, *supra* note 113, at 125.

117. *See* Stephen D. Krasner, *The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law*, 25 MICH. J. INT'L L. 1075, 1078–84 (2004) (describing interventions in the internal affairs of other states as "an enduring characteristic of the sovereign state system" and offering multiple examples).

118. *See* KRASNER, *supra* note 113, at 126 (describing human rights norms as "the latest example of a long-standing tension between autonomy and international attempts to regulate relations between rulers and ruled"); Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM L. REV. 1, 4–5 (1999) (stating that "the idea of human rights" caused "a major rent" in "the cloak of sovereignty").

119. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) (defining customary international law as "a general and consistent practice of states followed by them from a sense of legal obligation"); *id.* § 102 cmt. d (noting that a state is not bound by a customary international law norm if it objects during its formation); *id.* § 102 cmt. k (defining *jus cogens* norms as rules of international law "recognized by the international community of states as peremptory, permitting no derogation"); *id.* § 702 (listing violations of the customary law of human rights).

120. John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT'L L. 782, 790 (2003).

property, torture citizens, and engage in all sorts of other excessive and inappropriate actions."[121] "Today," he observes, "no sensible person would agree that this antiquated version of sovereignty exists. A multitude of treaties and customary international law norms impose international legal constraints (at the least) that circumscribe extreme forms of arbitrary actions even against a sovereign's own citizens."[122]

Despite the archaic implications of the absolutist concept of sovereignty, its ongoing impact is evident in tensions over efforts to enforce human rights protections. Although substantive human rights norms now apply to all states, most norms include weak or no enforcement mechanisms.[123] Meanwhile, states routinely invoke sovereignty and non-interference in domestic affairs to deter efforts to enforce human rights norms.

One means by which states deflect efforts to enforce human rights norms is by claiming immunity. Sovereign immunity began as the personal immunity of monarchs and their diplomatic representatives.[124] At the time the theory developed, "most States were ruled by personal sovereigns who, in a very real sense, personified the State."[125] Courts viewed immunity as "highly personalized" and necessary "to preserve the dignity of the foreign sovereign."[126] Early treatises on international law addressed the immunity of heads of state and diplomats, not the abstract entity of the state itself or its lower-ranking officials.[127]

The Supreme Court's 1812 decision in *The Schooner Exchange v. McFaddon*[128] applied the personal immunity of royal sovereigns to the distinct entity of the state and its possessions. In an opinion by Chief

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121. *Id.*

122. *Id.*

123. For example, several human rights treaties establish committees empowered to monitor compliance, but without enforcement powers. *See, e.g.*, Convention Against Torture, *supra* note 16, arts. 17–24 (creating the Committee Against Torture to monitor compliance and issue its "views" of possible violations of the Convention). International and hybrid criminal tribunals have limited mandates. The jurisdiction of the International Criminal Court is limited to genocide, crimes against humanity, and war crimes, *see* Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90, while the International Criminal Tribunals for the former Yugoslavia and Rwanda, and the hybrid international-domestic criminal tribunals for Sierra Leone, East Timor, and Kosovo are each limited to conflicts in individual locations, *see* Jane E. Stromseth, *Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?*, 38 GEO. J. INT'L L. 251, 267–310 (2007) (explaining the background and limited mandate of each of the criminal tribunals).

124. *See* Lee M. Caplan, *State Immunity, Human Rights, and* Jus Cogens*: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L L. 741, 745 n.31 (2003) (citing THEODORE R. GIUTTARI, THE AMERICAN LAW OF SOVEREIGN IMMUNITY: AN ANALYSIS OF LEGAL INTERPRETATION 7 (1970)) (recounting this history).

125. Harvard Law School, *Competence of Courts in Regard to Foreign States*, 26 AM. J. INT'L L. SUPP. 451, 527 (1932) (draft convention with reporter commentary).

126. Joan E. Donoghue, *Taking the "Sovereign" Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception*, 17 YALE J. INT'L L. 489, 496 (1992).

127. ROSANNE VAN ALEBEEK, THE IMMUNITY OF STATES AND THEIR OFFICIALS IN INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW 12 n.4 (2008) (citing treatises from the sixteenth, seventeenth, and eighteenth centuries).

128. 11 U.S. (7 Cranch) 116 (1812).

Justice John Marshall, the Court held that the United States should refrain from asserting jurisdiction over a French warship seized within U.S. territory:

> One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.[129]

Marshall, however, presented the conflicting rule of sovereign territorial jurisdiction with equal force: "The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself."[130] Nations agreed, he wrote, to waive a portion of that absolute jurisdiction in certain "peculiar circumstances"[131] that included claims against a head of state or foreign minister and those at issue in *The Schooner Exchange*: claims against a foreign sovereign's troops or warships when the forum state has explicitly or implicitly given them leave to enter its territory.[132] While the forum state was not bound to grant immunity, it refrained from exercising jurisdiction because of its explicit or implicit consent and remained free to withdraw that consent.[133]

Despite the limited holding of *The Schooner Exchange*, the opinion "came to be regarded as extending virtually absolute immunity to foreign sovereigns."[134] Absolute sovereign immunity, however, is subject to the same historical challenge as absolute sovereignty. In her exhaustive survey, Roseanne Van Alebeek demonstrated that, over the course of several centuries, many states in practice followed only a limited version of sovereign immunity.[135]

As a foundation for a discussion of the common law of official immunity, this curious history offers an important lesson. Both absolute sovereignty and absolute sovereign immunity have historical roots in a world governed by absolute monarchies, far removed from modern state structures. Neither doctrine is as firmly entrenched in historical practice as supporters often claim. This foundation has been further undermined by the modern human rights norms developed in the aftermath of World War II. Through a comprehensive body of treaty law, much of which is now recognized as

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129. *Id.* at 137.
130. *Id.* at 136.
131. *Id.*
132. *Id.* at 137–43.
133. "Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals." *Id.* at 146.
134. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983). The *Verlinden* Court also stressed another significant prong of the case: "[A]s *The Schooner Exchange* made clear, . . . foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Id.*
135. VAN ALEBEEK, *supra* note 127, at 14–21.

customary international law, the international community has agreed upon a detailed list of obligations that impose limits on state behavior within their own territories and require both that victims of abuses receive redress and that violators be held accountable.[136] Neither absolute sovereignty nor absolute sovereign immunity is consistent with modern human rights obligations.

2. International Law, Human Rights, and Sovereign Immunity

Although some states continue to recognize absolute sovereign immunity,[137] the restrictive theory now dominates modern sovereign immunity doctrine.[138] Under the restrictive theory, "the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)."[139] States adopting the restrictive theory, however, have not reached consensus on how to draw the crucial line between immunized public acts and non-immunized private acts. In the absence of an internationally accepted distinction, each state draws the line in its domestic law according to its own assessment of the relevant international, diplomatic, and political interests at stake. As a result, the restrictive doctrine has led to an "extraordinary complexity and variety in the emerging rules,"[140] with consensus "only at a rather high level of abstraction."[141]

The limited domestic and international codification in this area exacerbates the lack of clarity as to the rules governing sovereign immunity. Very few states even have domestic statutes governing foreign sovereign immunity.[142] Two broad international treaties have been drafted and

136. For a discussion of the evolution of victims' rights in international law, see M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUM. RTS. L. REV. 203 (2006).

137. *See* Kate Parlett, *Immunity in Civil Proceedings for Torture: The Emerging Exception*, 2006 EUR. HUM. RTS L. REV. 49, 52–53 (stating that, as of 2006, at least fifteen states still applied absolute sovereign immunity). The former socialist states have been the strongest opponents of the restrictive theory. Caplan, *supra* note 124, at 749 (noting that socialist theory held that, because politics and trade were both public functions of the socialist state, they were equally entitled to sovereign immunity); Donoghue, *supra* note 126, at 490 (same).

138. As noted in the previous section, *supra* notes 24, 48–50 and accompanying text, the United States adopted the restrictive theory in 1952 and codified it in the FSIA in 1976.

139. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711 (1976); *see Verlinden*, 461 U.S. at 487. In enacting the FSIA, Congress intended to codify the restrictive theory's limitation of immunity to sovereign acts. Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 612 (1992).

140. HAZEL FOX, THE LAW OF STATE IMMUNITY 127 (2002). In the second edition of her treatise, Fox reiterated that "[t]he restrictive doctrine and the criteria . . . on which it depends have not produced uniformity of practice nor reliable guidance as to when a national court will assume or refuse jurisdiction." HAZEL FOX, THE LAW OF STATE IMMUNITY 530 (2d ed. 2008) [hereinafter FOX, STATE IMMUNITY].

141. Joseph W. Dellapenna, *Foreign State Immunity in Europe*, 5 N.Y. INT'L L. REV. 51, 61 (1992); *see also* Donoghue, *supra* note 126, at 491 (noting that "simply put, there exists no coherent restrictive theory").

142. The immunity statutes of the United Kingdom, Argentina, Australia, Canada, Pakistan, Singapore, and South Africa are reprinted in ANDREW DICKINSON ET AL., STATE

opened for ratification, but neither is widely ratified and neither has come into force.[143] As a result, sovereign immunity continues to be governed primarily by uncodified domestic rules, often focused on domestic interpretations of customary international law, as filtered through each state's constitutional and judicial doctrines.

States recognize different exceptions to sovereign immunity. The United States permits suits for torts committed within U.S. territory, including human rights abuses.[144] Both Greece and Italy have denied Germany's claims of immunity in lawsuits arising out of abuses committed in their territory during World War II.[145] The United States also permits suits for torture and extrajudicial killing against states on the U.S. list of "state

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IMMUNITY: SELECTED MATERIALS AND COMMENTARY 329–442, 461–522 (2004). Fox mentions that Malaysia and Malawi also have immunity statutes, as do "other small common law jurisdictions" such as St. Kitts. FOX, STATE IMMUNITY, *supra* note 140, at 201 n.1.

143. The United Nations Convention on Jurisdictional Immunities of States and Their Property, Dec. 2, 2004, U.N. Doc A/59/38 [hereinafter Convention on Jurisdictional Immunities], will come into force when thirty states have ratified it. *Id.* art. 30. As of February 2011, only eleven states had become parties to the treaty (Austria, Iran, Japan, Kazakhstan, Lebanon, Norway, Portugal, Saudi Arabia, Sweden, Switzerland, and Romania), while twenty-eight states had signed it. For the status of signatures and ratifications, see http://treaties.un.org (last visited April 20, 2011).

The European Convention on State Immunity, May 16, 1972, E.T.S. 074, 11 I.L.M. 470, had been ratified by only eight states as of February 2011, with no new ratifications or signatures since 1990. For the status of signatures and ratifications, see http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=074&CM=1&DF=14/03/2011&CL=ENG (last visited April 20, 2011).

144. *See* Liu v. Republic of China, 892 F.2d 1419, 1425–26 (9th Cir. 1989) (holding that execution of political opponents in California triggered tort exception to FSIA); Letelier v. Republic of Chile, 488 F. Supp. 665, 673 (D.D.C. 1980) (applying exception to assert jurisdiction over claim for assassination committed in Washington, D.C.).

145. The Greek case, *Prefecture of Voiotia v. Federal Republic of Germany*, Areios Pagos [A.P.] [Supreme Court] 11/2000 (Greece), awarded damages for a German massacre of over 200 Greek civilians. For a summary of the facts, see Elena Vournas, Prefecture of Voiotia v. Federal Republic of Germany*: Sovereign Immunity and the Exception for Jus Cogens Violations*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 629, 635 (2002). A later Greek decision refused to allow enforcement of the judgment. *See* Andrea Gattini, *To What Extent Are State Immunity and Non-Justiciability Major Hurdles to Individuals' Claims for War Damages?*, 1 J. INT'L CRIM. JUST. 348, 356–60 (2003) (explaining the refusal to enforce and the complicated procedural history of the case).

Multiple cases have been filed against Germany in the Italian courts. For extended analysis, see Antonio Cassese, *The Italian Court of Cassation Misapprehends the Notion of War Crimes: The* Lozano *Case*, 6 J. INT'L CRIM. JUST. 1077, 1082–83 (2008); Carlo Focarelli, *Denying Foreign State Immunity for Commission of International Crimes: The* Ferrini *Decision*, 54 INT'L & COMP. L.Q. 951 (2005); Carlo Focarelli, Federal Republic of Germany v. Giovanni Mantelli and Others, 103 AM. J. INT'L L. 122 (2009). Italy has also allowed Greek petitioners to enforce their judgments against German property in Italy. *See* Annalisa Ciampi, *The Italian Court of Cassation Asserts Civil Jurisdiction Over Germany in a Criminal Case Relating to the Second World War: The* Civitella *Case*, 7 J. INT'L CRIM. JUST. 597, 601 n.23 (2009).

In 2008, Germany initiated proceedings in the International Court of Justice challenging Italy's denial of immunity. *See* Application Instituting Proceedings on Jurisdictional Immunities of the State (Ger. v. It.) (Dec. 23, 2008), *available at* http://www.icj-cij.org/docket/files/143/14923.pdf. Greece has requested permission to intervene in the proceedings. *See* Press Release, International Court of Justice, No. 2011/2 (Jan. 17, 2011).

sponsors of terrorism."[146] The European Court of Human Rights has held that states are not *required* to deny immunity to states accused of human rights abuses in their own territory[147]—but has not held that states are *prohibited* from denying such immunity.

International law has achieved even less clarity on the rules governing foreign official immunity, particularly as applied to allegations of human rights abuses. Two narrow rules are codified in widely ratified treaties: Diplomats are immune from criminal prosecution and, with minor exceptions, from civil lawsuits;[148] and consuls are immune "in respect of acts performed in the exercise of consular functions."[149] In addition, the International Court of Justice has found that, as a matter of customary international law, heads of state and foreign ministers are immune from any claims filed while they are in office.[150]

Two additional propositions seem clear. At one extreme, with the narrow exception of the status-based immunities of current diplomats, heads of state, and foreign ministers, foreign officials are not immune from suit for private acts that are not attributable to the state. At the other extreme, foreign officials are likely entitled to immunity when they perform acts as the representatives of their governments: when, for example, an official signs a treaty or signs a contract in the name of the government that imposes a legal obligation on the state itself.[151]

The most recent international effort to arrive at rules governing official immunity, the Convention on Jurisdictional Immunities, finalized by the

146. 28 U.S.C.A. § 1605A (West 2011) (authorizing claims for torture, extrajudicial killing, aircraft sabotage, and hostage-taking against states on a list of "state sponsors of terrorism"); 22 C.F.R. § 126.1(d) (2009) (identifying Cuba, Iran, Sudan, and Syria as state sponsors of terrorism).

147. *See* Al-Adsani v. United Kingdom, App. No. 35763/97, Eur. Ct. H.R. ¶ 67 (2001), *available at* http://www.unhcr.org/refworld/docid/3fe6c7b54.html (in a case against the government of Kuwait alleging torture in Kuwait, holding that the United Kingdom did not violate the European Convention on Human Rights when it dismissed the claim on the basis of sovereign immunity); Kalogeropoulou v. Greece, App. No. 59021/00, Eur. Ct. H.R. (2002), *available at* http://www.echr.coe.int (follow "Case-Law; Decisions and judgments; HUDOC database" hyperlink; click "This site in English" hyperlink; click "Decisions" box; then enter search term "Kalogeropoulou") (in a case challenging the Greek government's refusal to enforce the judgment against Germany in the *Voiotia* case, holding that a state does not violate international law when it bars enforcement against another state of a judgment based on human rights violations). For a summary of the *Voiotia* case, see *supra* note 145.

148. The Vienna Convention on Diplomatic Relations art. 31, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, states that a diplomat "shall enjoy immunity from the criminal jurisdiction of the receiving State" and immunity from civil jurisdiction except in cases involving private property in the receiving state or legal or commercial affairs "outside his official functions."

149. Vienna Convention on Consular Relations art. 43, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. The Convention recognizes an exception for civil actions "by a third party for damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft." *Id.* art. 43(2)(b).

150. Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶¶ 51–58 (Feb. 14)).

151. *See* Keitner, *The Common Law*, *supra* note 29, at 68–69 (distinguishing between "purely private" and "purely public" acts).

General Assembly in 2004 but not yet in force,[152] is arguably consistent with this approach. The Convention defines a state as including "representatives of the State acting in that capacity."[153] The International Law Commission, in its 1999 Commentaries on the draft convention, interpreted that language as including "all the natural persons who are authorized to represent the State," including "sovereigns and heads of State," and "heads of Government, heads of ministerial departments, ambassadors, heads of mission, diplomatic agents and consular officers, in their representative capacity."[154] This language focuses on officials who represent the state in its relationships with other governments, rather than mandating application to all government employees.[155]

During the drafting of the Convention, human rights advocates proposed an explicit human rights exception to the immunity of foreign government officials.[156] Some of those involved expressed concern that the failure to include such language would permit immunity for the worst abuses,

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152. *See supra* note 143 (noting that the 2004 Convention is not yet in force).

153. Convention on Jurisdictional Immunities, *supra* note 143, art. 2(1)(b)(iv).

154. *Draft Articles on Jurisdictional Immunities of States and Their Property, with commentaries*, [1991] 2 Y.B. Int'l L. Comm'n 13, 18, ¶ 17, U.N. Doc. A/46/10. In the subsequent paragraph, the commentary stated:

> It is to be observed that, in actual practice, proceedings may be instituted, not only against the government departments or offices concerned, but also against their *directors or permanent representatives* in their official capacities. Actions against such representatives or agents of a foreign Government in respect of their official acts are essentially proceedings against the State they represent.

Id. ¶ 18 (emphasis added) (footnote omitted).

The Convention on Jurisdictional Immunities also provides that a proceeding "shall be considered to have been instituted against another State if . . . the proceeding in effect seeks to affect the property, rights, interests or activities of that other State." *Id.* at 23, art. 6(2)(b). The 1991 commentary analyzed this language in terms of the property rights of states, indicating that the "interests" involved primarily concern interest in property. *See id.* at 24–25; *see* Jane Wright, *Retribution but No Recompense: A Critique of the Torturer's Immunity from Civil Suit*, 30 OXFORD J. LEGAL STUD. 143, 175–76 (2010) (discussing focus on property).

155. Hazel Fox has described this language as extending the immunity to any acts that are attributable to the state. FOX, STATE IMMUNITY, *supra* note 140, at 455. She reached this conclusion in part by relying on principles of state responsibility that hold states responsible for acts performed by individuals on their behalf. *Id.* at 457 (citing International Law Commission, Responsibility of States for Internationally Wrongful Acts, art. 7 (2001)). But those same principles specify that state responsibility does not exclude individual responsibility. *Responsibility of States for Internationally Wrongful Acts*, [2001] 2 Y.B. Int'l L. Comm'n 31, 142, art. 58, U.N. Doc. A/56/10. Moreover, Fox based her argument on a claim that state immunity is rendered meaningless if the government officials who act on behalf of the state are denied immunity. FOX, STATE IMMUNITY, *supra* 140, at 456. As the Supreme Court decision in *Samantar* makes clear, however, this proposition is not universally accepted. *See supra* notes 94–95 and accompanying text (quoting Samantar v. Yousuf, 130 S. Ct. 2278, 2292 (2010)). The language of the Convention leaves open the question as to whether it extends the immunity of the state to government officials who commit human rights violations in the course of their employment.

156. Christopher Keith Hall, *U.N. Convention on State Immunity: The Need for a Human Rights Protocol*, 55 INT'L & COMP. L.Q. 411, 412 (2006) (noting that drafters rejected inclusion of specific reference to human rights and humanitarian law).

including genocide, crimes against humanity, and torture.[157] However, two of the only eight states that had become party to the treaty as of July 2010 stated explicitly, as part of their formal ratification documents, that they understood that the Convention did not bar future efforts to protect human rights.[158] In the absence of specific language defining "representative capacity," even states that ratify the Convention will be neither required to nor prohibited from recognizing immunity for human rights claims. Rather, as in the pre-Convention state of the law, they will be left to resolve the issue in accordance with their own interpretations of domestic and international law.

State practice reflects increased acceptance of criminal and civil actions against former foreign government officials. After a challenge to the attempted prosecution of Chilean General Augusto Pinochet in the mid-1990s, the United Kingdom's House of Lords held that immunity did not apply because it had been implicitly waived through ratification of the Convention Against Torture.[159] The Statute of the International Criminal Court includes a specific waiver of immunity.[160] Most states permit domestic criminal prosecutions for some violations of international law when the acts took place in another country,[161] and several states have prosecuted former foreign officials for such crimes.[162] The growing body

157. *Id.* at 411. *See generally id.* (arguing for adoption of a "human rights protocol" to ensure that the Convention is not interpreted so as to preclude human rights claims).

158. Norway and Sweden deposited identical declarations along with their instruments of ratification, stating that each state "understands that the Convention is without prejudice to any future international development in the protection of human rights." *See* Status of the U.N. Convention on Jurisdictional Immunities of States and Their Property: Declarations and Reservations, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-13&chapter=3&lang=en.

159. Regina v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte* Pinochet, [1999] 2 W.L.R. 827 (H.L.). Pinochet was arrested in England in 1998, after charges were filed against him in Spain for torture and other abuses during his military dictatorship in Chile; England held that he could be extradited to Spain, but declined to do so because of the poor state of Pinochet's health. For a general overview of the Pinochet case, see Michael Byers, *The Law and Politics of the Pinochet Case*, 10 DUKE J. COMP. & INT'L L. 415 (2000); Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 NEW ENG. L. REV. 311 (2001).

160. Article 27 of the Statute of the International Criminal Court, titled "Irrelevance of official capacity," states:

> 1. This 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 . . . .
>
> 2. [I]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Rome Statute of the International Criminal Court art. 27, July 17, 1998, 2187 U.N.T.S. 90, 106.

161. As of 2001, over 125 countries permitted domestic prosecutions for some international crimes, no matter where committed, according to Amnesty International. AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION: QUESTIONS AND ANSWERS 8 (2001).

162. One report lists criminal investigations or prosecutions in twelve European countries, as well as Senegal, Canada, the United States, and Australia. JOSEPH RIKHOF,

of domestic and international prosecutions of former government officials for international crimes suggests, at a minimum, that international law does not require that such officials receive immunity for crimes committed in the exercise of governmental authority.[163]

In the United States, as discussed in Part I, the courts have applied U.S. foreign sovereign immunity laws to deny immunity to former foreign officials in civil lawsuits seeking damages for violations of human rights. Civil lawsuits are less common than criminal prosecutions in other countries, at least in part because many domestic legal systems do not permit such claims, permit them only as adjuncts to criminal prosecutions, or impose other procedural barriers that make civil litigation difficult, if not impossible.[164]

In *Jones v. Kingdom of Saudi Arabia*,[165] the House of Lords declined to extend the *Pinochet* decision, which denied immunity in a criminal prosecution, to a civil claim.[166] *Jones* addressed the civil claims of a British national who was arrested in Saudi Arabia and tortured while in custody. The court held that Saudi Arabia and its officials were entitled to immunity under the English immunity statute, reversing a lower court holding in Jones' favor. Although the Law Lords relied on different theories, they all noted the distinction between civil and criminal liability and concluded that the Convention Against Torture does not require that

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FEWER PLACES TO HIDE? THE IMPACT OF DOMESTIC WAR CRIMES PROSECUTIONS ON INTERNATIONAL IMPUNITY (2008), *available at* www.isrcl.org/Papers/2008/Rikhof.pdf. In addition, Argentina has undertaken prosecutions of Spanish and Chinese officials. *See* Matthew Robertson, *Argentine Judge Issues Arrest Warrants for 2 Top China Officials, Jiang Zemin and Luo Gan, for Genocide*, EPOCH TIMES (Dec. 18, 2009), *available at* http://chinaview.wordpress.com/2009/12/18/argentine-judge-issues-arrest-warrants-for-2-top-china-officials-jiang-zemin-and-luo-gan-for-genocide; Giles Tremlett, *Argentinian Judge Petitions Spain To Try Civil War Crimes of Franco*, THE GUARDIAN, Oct. 26, 2010, *available at* http://www.guardian.co.uk/world/2010/oct/26/argentina-spain-general-franco-judge.

163. *See* Memorandum by the Secretariat, *Immunity of State Officials from Foreign Criminal Jurisdiction*, Int'l Law Comm'n, U.N. Doc. A/CN.4/596 (Mar. 31 2008), at 116–37, ¶¶ 180–207 (concluding that both domestic judicial decisions and international law scholarship indicate a trend toward recognizing an exception to immunity for international crimes); Inst. of Int'l Law, *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in Case of International Crimes*, art. III (2009) (Hazel Fox, Rapporteur), *available at* http://www.idi-iil.org/idiE/resolutionsE/2009_naples_01_en.pdf (stating that individuals who commit international crimes are not entitled to conduct-based immunity); Bradley & Helfer, *supra* note 108, at 20–21 (discussing the likely emergence of an exception to conduct-based immunity in criminal proceedings for *jus cogens* violations).

164. *See* Beth Stephens, *Translating* Filártiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 17–34 (2002) (discussing barriers to domestic civil claims for human rights violations). For an example of a civil damage award appended to a criminal prosecution for human rights abuses, see *Milde v. Bottcher*, Tribunale militare di La Spezia, Judgment No. 49 (Oct. 10, 2006, registered Feb. 2, 2007), summarized in Ciampi, *supra* note 145, at 597 (criminal conviction followed by civil damages award that both ordered the defendant to pay damages to the victims, who had intervened in the criminal proceedings, and held Germany jointly and severally liable for the damages).

165. [2006] UKHL 26 (appeal taken from Eng.).

166. *Id.* ¶ 19.

states deny immunity for civil claims for torture. Canadian courts have reached the same result, rejecting civil claims for torture filed by Canadian citizens against Iran and Syria.[167] The Committee Against Torture, the body of experts charged by the Convention with interpreting its provisions, reached the opposite conclusion, stating that the Convention requires that states provide civil redress to victims of torture, regardless of the sovereign status of the perpetrator.[168]

Efforts to distinguish between immunity for criminal and civil claims are subject to challenge. The line between civil and criminal actions varies in different legal systems: Different parties initiate and conduct the proceedings; the role of the judiciary varies; and the proceedings offer different remedial schemes.[169] Criminal and civil claims can overlap, particularly in civil law systems that permit private plaintiffs to join criminal prosecutions.[170] In addition, civil claims generally are less onerous for the defendant than a criminal prosecution. Finally, international law has traditionally been less concerned with regulating domestic civil litigation than with regulating domestic assertions of criminal jurisdiction.[171] As a result, the civil/criminal distinction has only limited value when assessing the remedies available in different legal systems.

International law governing accountability for human rights violations is currently evolving, with strongly contested debates about how to resolve the competing interests of human rights and sovereign immunity. In the absence of definitive international law guidelines, each state will resolve the conflict according to its own interpretations of international law and domestic law. In the United States, this issue is influenced by a longstanding recognition of government official liability for injuries inflicted in the course of employment. This fundamental principle is captured by the deeply ingrained practice of suing government officials in

167. Bouzari v. Islamic Republic of Iran (2004), 71 O.R. 3d 675 (Can. Ont. C.A.); Arar v. Syrian Arab Republic (2005), 137 A.C.W.S. 3d 823 (Can. Ont. Sup. Ct. J.). In both cases, the Canadian courts held that the foreign states were entitled to immunity under the Canadian immunity statute, and that the Convention Against Torture did not require that states provide access to a civil remedy for torture committed outside of Canada.

168. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture: Canada, 34th Sess., May 2–20, 2005, UN Doc. CAT/C/CR/34/CAN, at 3–4 (July 7, 2005); *see* Convention Against Torture, *supra* note 16, art. 14(1) ("Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation . . . ."); *id.* arts. 17–19 (creating a committee of experts to review compliance with the treaty and investigate violations of its terms).

169. *See* Special Rapporteur, *Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, Int'l Law Comm'n, U.N. Doc. A/CN.4/601, at 26–27, ¶¶ 53–55 (May 29, 2008) (by Roman Anatolevitch Kolodkin) (noting that civil claims can arise out of criminal prosecutions, and that civil proceedings are no more of an interference in the internal affairs of a foreign state than criminal prosecutions); Stephens, *Translating* Filártiga, *supra* note 164, at 17–21, 44–45 (discussing multiple ways in which different legal systems define the relationship between criminal prosecutions and civil claims).

170. Stephens, *supra* note 164, at 19.

171. *Id.* at 50–51.

their private capacity for acts committed in the course of their employment. The next section discusses this approach and its relevance for the development of a modern common law of foreign official immunity.

B. Official Capacity, Private Capacity, and Color of Law

Many foreign commentators find an inherent contradiction in the U.S. recognition that acts committed by government employees under color of law can form the basis for suing those employees in "a private capacity," rather than suing them "in an official capacity."[172] The confusion stems in part from the terminology: A personal capacity lawsuit against a government employee indicates only that any judgment will run against the employee *personally*, not the government itself.[173] In personal capacity suits, the officials "come to court as individuals," while in "official capacity suits," they come as representatives of the government.[174] Personal capacity suits seeking "the payment of damages by the individual defendant" do not trigger sovereign immunity because "[t]he judgment sought will not require action by the sovereign or disturb the sovereign's property."[175] That is, U.S. law uses the terms "personal capacity" and "official capacity" to categorize the capacity in which the government official is sued, not to indicate whether or not the acts were performed in the exercise of governmental authority.[176] Indeed, "personal capacity"

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172. Antonio Cassese, for example, labels the distinction between "'official' and 'unofficial public acts'" as "unsound and even preposterous from the strictly legal viewpoint." Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the* Congo v. Belgium *Case*, 13 EUR. J. INT'L L. 853, 869 (2002). Yet the central thesis of his article is that "official capacity" is not a defense to liability for international crimes. He points out that such crimes are not committed "in a private capacity." *Id.* at 868. Instead, "individuals commit such crimes by making use (or abuse) of their official status," *id.*, and lose their immunity when they commit international crimes. *Id.* at 870–74. His position is consistent with the U.S. view that officials who abuse their authority to commit crimes can be held personally accountable. The disagreement seems to be with the terminology (calling challenges to such actions "private capacity" lawsuits), rather than with the underlying concept of liability.

173. "When damages are sought from a government official, the officer is ordinarily sued in a 'personal' or 'individual' capacity. This designation indicates that any judgment will be assessed against the officer personally, rather than against the government employer." RICHARD H. FALLON, JR. ET AL., THE FEDERAL COURTS AND THE FEDERAL SYSTEM 957 (6th ed. 2009). By contrast, "When an official is sued for damages in an 'official' . . . capacity, . . . the suit will be treated as one against the official's employer." *Id.* at 958. Suits seeking equitable relief—seeking an order that would force the government to act—are also generally termed suits in an official capacity. *Id.*

174. Hafer v. Melo, 502 U.S. 21, 27 (1991).

175. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 687–88 (1949) (suit against official for "compensation for an alleged wrong" is not against the state, but suit seeking injunctive relief is against the state if it results in "compulsion against the sovereign, although nominally directed against the individual officer"); *see also* Alden v. Maine, 527 U.S. 706, 757 (1999) ("[A] suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct . . . so long as the relief is sought not from the state treasury but from the officer personally.").

176. *Hafer*, 502 U.S. at 26 ("[T]he phrase 'acting in their official capacities' is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury.").

lawsuits address actions taken within the course of employment and under color of law: The plaintiff is seeking "to impose personal liability upon a government official for actions he takes under color of state law."[177]

Underlying this terminology is the principle that government employees are not immune from suit for all acts committed under color of law. United States domestic immunity law rests upon the longstanding belief that employees should be held personally responsible when they cause harm during the course of their employment. If the officer's actions exceeded limits on her authority imposed by controlling law, "actions beyond those limitations are considered individual and not sovereign actions."[178]

Historically, government employees had no protection from liability suits: "[T]he principle that an agent is liable for his own torts 'is an ancient one and applies even to certain acts of public officers or public instrumentalities.'"[179] As a result, if a government employee committed a tort or breached a contract, "the fact that the officer is an instrumentality of the sovereign does not, of course, forbid a court from taking jurisdiction over a suit against him."[180] Because a tort by a government official was considered to be, by definition, outside that person's authority, it was a personal tort triggering personal liability. Following the instructions of a supervisor provided no protection: Employees were held responsible for recognizing that their actions were unlawful.[181] This rule applied whether or not the government was also held liable, and whether or not the government was protected by sovereign immunity. Federal employees were routinely sued and held liable for torts committed in the course of their employment, even while the U.S. government—their employer—was immune from suit.[182]

At the end of the nineteenth century, the Supreme Court began a process that slowly extended immunity to some government officials.[183] A small set of government officials, such as judges and prosecutors, are now entitled to absolute immunity for acts in the exercise of their professional authority,[184] while others may be protected by "qualified immunity" if the

177. Kentucky v. Graham, 473 U.S. 159, 165 (1985).

178. *Larson*, 337 U.S. at 689. By violating the law, "[t]he officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden." *Id.*

179. *Id.* at 686–87 (quoting Brady v. Roosevelt S.S. Co., 317 U.S. 575, 580 (1943)).

180. Sloan Shipyards Corp. v. U.S. Shipping Bd. Emergency Fleet Corp., 258 U.S. 549, 567 (1922). "[T]he agent, because he is agent, does not cease to be answerable for his acts." *Id.*

181. *See, e.g.*, Little v. Barreme, 6 U.S. (2 Cranch) 170, 178–79 (1804) (holding the commander of warship personally liable for damages caused to a captured ship, even though he was following orders); *see* also Karen Lin, Note, *An Unintended Double Standard of Liability: The Effect of the Westfall Act on the Alien Tort Claims Act*, 108 COLUM. L. REV. 1718, 1722 n.25 (2008).

182. For a history of U.S. government official liability, see Lin, *supra* note 181, at 1721–22.

183. This evolution is detailed in Lin, *id.* at 1722–28.

184. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982); FALLON ET AL., *supra* note 173, at 995, 998–1002 (discussing the absolute immunity of judges, prosecutors, legislators, and the President).

acts alleged do not violate "clearly established" statutory or constitutional norms, "of which a reasonable person would have known."[185] In 1988, with the passage of the Westfall Act,[186] Congress codified an additional basis for official immunity. The Westfall Act provides that, if the Attorney General certifies that an employee "was acting within the scope of his office or employment," the government will substitute into the lawsuit in place of the employee, who is dropped from the litigation.[187] The Westfall Act thus permits the U.S. government to relieve government employees of personal liability for acts committed within the scope of their employment.

Still central to U.S. domestic immunity law, however, is the principle that government officials should be held personally responsible for acts that go beyond the scope of their employment. As a Justice Department official testified to the subcommittee that drafted the Westfall Act, "employees accused of egregious misconduct—as opposed to mere negligence or poor judgment—will not generally be protected from personal liability for the results of their actions."[188]

Domestic and foreign sovereign immunity are based on different legal foundations within U.S. law.[189] Nevertheless, U.S. judges and legislators often borrow from domestic concepts when interpreting foreign sovereign immunity. In particular, the U.S. recognition that acts committed under color of law can trigger personal liability has heavily influenced the U.S. view of foreign official immunity.

The Supreme Court applied the distinction between personal capacity and official capacity lawsuits in *Samantar*, noting that Samantar had been sued in his personal capacity for "conduct undertaken in his official capacity."[190] The Court thus recognized that the lawsuit was directed against Samantar as an individual, not against the government that employed him at the time of

185. *Harlow*, 457 U.S. at 807–08, 818.

186. 28 U.S.C. § 2679 (2006). This Act was known formally as the Federal Employees Liability Reform and Tort Compensation Act. Pub. L. No. 100-694, 102 Stat. 4563 (codified as amended at 28 U.S.C. §§ 2671, 2674, 2679).

187. 28 U.S.C. § 2679(d)(1). The government's certification is subject to judicial review. Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 425–26 (1995).

188. *Legislation to Amend the Federal Tort Claims Act: Hearing on H.R. 4358, H.R. 3872, H.R. 3083, Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 100th Cong. 79 (1988) (statement of Robert L. Willmore, Deputy Assistant Att'y Gen., Civil Div., Dep't of Justice).

Application of the Westfall Act to U.S. executive branch actions post-September 11, 2001, has been controversial, as courts have accepted the Attorney General's certification that acts were within the scope of employment if they were the reasonably foreseeable consequence of the employee's job-related activities. *See* Elizabeth A. Wilson, *Is Torture All in a Day's Work? Scope of Employment, the Absolute Immunity Doctrine, and Human Rights Litigation Against U.S. Federal Officials*, 6 RUTGERS J.L. & PUB. POL'Y 175, 198–204 (2008) (discussing and critiquing cases); *see also* Lin, *supra* note 181, at 1735–48 (same).

189. The Supreme Court has stated that domestic immunity rests upon the Constitution and separation of powers among the three branches of the federal government, while foreign sovereign immunity is a matter of "grace and comity." Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983); *see also* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98–99 (1984) (domestic sovereign immunity is a constitutional limit on the power of the judiciary).

190. Samantar v. Yousuf, 130 S. Ct. 2278, 2286 (2010).

the acts, and regardless of the capacity in which he performed the acts at issue in the complaint. The Court noted that "this case, in which respondents have sued petitioner in his personal capacity and seek damages from his own pockets, is . . . not a claim against a foreign state"[191]

In a recent article, Jane Wright explained the concept of personal liability for acts taken under color of law in her analysis of the "official capacity" requirement of the Convention Against Torture:

> [T]he definition of "torture" in Article 1 of [the Convention] requires the act to have been carried out by a public official, but it does not say that torture is an official act. An act can be carried out by an official without it being an official act for the purposes of immunity. . . . [T]he international crime is constituted by conduct carried out by an official but that conduct is denuded of its status as an official act for the purposes of state immunity.[192]

As Professor Keitner has pointed out,

> both U.S. and international law make individuals liable for engaging in certain types of conduct *precisely because* they act under color of law. . . . [I]t makes no sense for the very criteria that define a violation (such as a requirement that the defendant acted under color of law) to shield the defendant from legal consequences.[193]

U.S. courts have relied heavily on the domestic concept of state action and color of law in analyzing human rights claims filed against foreign officials. In *Kadic v. Karadžić*,[194] for example, the Second Circuit held that "the 'color of law' jurisprudence" of the U.S. civil rights statute "is a relevant guide to whether a defendant has engaged in official action" sufficient to trigger the jurisdiction of the ATS.[195] The TVPA explicitly requires that the defendant act "under actual or apparent authority, or color of law, of any foreign nation."[196] The legislative history explains that this phrase "is used to denote torture and extrajudicial killings committed by officials both within and outside the scope of their authority," and instructs courts to "look to principles of liability under U.S. civil rights laws . . . in construing 'under color of law.'"[197]

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191. *Id.* at 2292.

192. Wright, *supra* note 154, at 172. Ed Bates notes that, "by their reference to 'official capacity' in Article 1, . . . the drafters of the [Torture] Convention were concerned with the 'official' *status* of the *person* inflicting 'torture' and not the debate as to whether or not torture may be recognised as an 'official' act of the State for the purposes of State immunity." Ed Bates, *State Immunity for Torture*, 7 HUM. RTS. L. REV. 651, 672 n.121 (2007) (citing J. HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE 45–46, 119–20 (1988); NIGEL S. RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 100 (1999)).

193. Keitner, *Officially Immune?*, *supra* note 29, at 3, 6 (citing Hafer v. Melo, 502 U.S. 21, 27–28 (1991)).

194. 70 F.3d 232 (2d Cir. 1995).

195. *Id.* at 245 (citing 42 U.S.C. § 1983 (2006); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1546 (N.D. Cal. 1987), *reconsideration granted in part on other grounds*, 694 F. Supp. 707 (N.D. Cal. 1988)).

196. 28 U.S.C. § 1350 (note), § 2(a) (2006).

197. S. REP. NO. 102-249, at 8 (1991).

In the absence of binding international law rules governing the immunity of foreign officials accused of human rights violations, each state develops its own approach based on both its domestic law and its understanding of international law. In the United States, domestic law includes the important legal principle that government officials can be held liable for acts taken under color of law in the course of their employment.

C. The Limited Value of Pre-FSIA Common Law

The courts will not be able to turn to pre-FSIA common law decisions and commentary to determine the scope of the modern common law of official immunity in part because the cases were sparse, leaving a few guidelines but no substantial body of law.[198] As summarized in Part I, the pre-1976 cases suggest only two general conclusions. First, foreign officials were afforded immunity in cases in which a judgment would be enforceable against the state. Second, the early common law cases offer no indication that officials were entitled to immunity for acts outside of their lawful authority. Even if the common law decisions had established a cohesive common law of official immunity, however, modern common law must reflect the current state of the law. That is, the common law of foreign official immunity was not frozen in place in 1976, when the majority of the lower courts (erroneously, we now know) assumed that it had been displaced by the FSIA. Common law today must take into account significant changes since 1976 in both international and U.S. law.

The international law governing human rights has expanded exponentially over the past several decades. The prohibitions of genocide, torture, and other egregious abuses have been adopted into widely ratified treaties,[199] and several have been recognized as *jus cogens* norms.[200] Some of those treaties require that states either prosecute or extradite persons accused of violations, including officials who acted under governmental authority.[201] Although no international body has held that international law *requires* that states deny foreign officials immunity in civil lawsuits alleging violations of these norms,[202] neither has any held that a denial of immunity is *prohibited* by international law.[203] That is, as Section A of this

198. *See supra* notes 40–45 and accompanying text.

199. *See, e.g.*, Convention Against Torture, *supra* note 16; Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (entered into force for the United States Nov. 4, 1988) [hereinafter Genocide Convention].

200. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. n (1987) (stating that the prohibitions against genocide, slavery, murder, and torture, among others, constitute *jus cogens* norms).

201. *See, e.g.*, Convention Against Torture, *supra* note 16, art. 7 (providing that states must either prosecute or extradite persons who torture).

202. Immunity from criminal prosecution, however, is prohibited by treaties such as the Convention Against Torture and the Statute of the International Criminal Court. *See supra* notes 159–60 and accompanying text.

203. The main exceptions, as noted earlier, are the immunities of diplomats and consuls, which are required by treaty, and the customary international law immunities of heads of states and foreign ministers. *See supra* notes 148–50 and accompanying text.

part explains, given the lack of binding international law guidance, each state must develop rules according to its own understanding of the interaction between immunity doctrines and human rights norms.

United States law addressing accountability for human rights abuses has also evolved significantly since 1976.[204] The United States has ratified several major human rights treaties, including the Genocide Convention and the Convention Against Torture,[205] and has implemented them through both criminal and civil statutes.[206] The 1980 *Filártiga* decision and dozens of subsequent cases recognized a federal cause of action for human rights abuses committed abroad, a holding affirmed by the Supreme Court in 2004.[207] The Executive Branch supported the *Filártiga* interpretation of the ATS at the time[208] and has intervened only very rarely to assert immunity for ATS defendants.[209] Most ATS claims have been filed against former foreign government officials, and most courts have denied defendants' claims of immunity. The TVPA, the Anti-Terrorism Act, and the "state sponsors of terrorism" exception to the FSIA each created explicit civil causes of action permitting suits for torture and extrajudicial execution against officials acting under color of foreign law.[210]

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204. For an overview of U.S. human rights commitments, including treaties, congressional oversight, and Executive Branch engagement with international treaty bodies, see Tara J. Melish, *From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies*, 34 YALE J. INT'L L. 389, 395–96, 400–03 (2009).

205. Genocide Convention, *supra* note 199, was ratified in 1988, and the Convention Against Torture, *supra* note 16, was ratified in 1994. During the same period, the United States also ratified the Convention Concerning the Abolition of Forced Labour, *opened for signature* June 25, 1957, S. TREATY DOC. NO. 102-3 (1991), 320 U.N.T.S. 291; International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. TREATY DOC. NO. 95-20 (1978), 999 U.N.T.S. 171; International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, S. TREATY DOC. NO. 95-18 (1978), 660 U.N.T.S. 195; Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, *opened for signature* June 17, 1999, S. TREATY DOC. NO. 106-5 (1999), 2133 U.N.T.S. 161; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, Annex I, U.N. Doc. A/RES/54/263/ (May 25, 2000); and Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, Annex II, U.N. Doc. A/RES/54/263/ (May 25, 2000).

206. Implementing legislation includes 18 U.S.C. § 1091 (2006) (creating the crime of genocide) and *id.* § 2340A (creating the crime of torture). Congress enacted the TVPA in 1992, in part, to implement U.S. obligations under the Convention Against Torture.

207. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004) (noting that its holding was consistent with that of *Filártiga*).

208. Memorandum for the United States as Amicus Curiae, Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), 1980 WL 340146.

209. Most Executive Branch interventions to support an immunity claim on behalf of an ATS defendant have addressed specialized immunities such as head-of-state immunity. *See, e.g.*, Wei Ye v. Jiang Zemin, 383 F.3d 620, 625–27 (7th Cir. 2004) (dismissing claim against head of state based on Executive Branch statement of immunity); Lafontant v. Aristide, 844 F. Supp. 128, 131–32 (E.D.N.Y. 1994) (same).

210. *See supra* note 15.

In a pre-*Samantar* article, Professors Bradley and Goldsmith claimed that Congress had done nothing to "alter" the pre-existing "common law backdrop," which, they argued, granted immunity to foreign officials. Bradley & Goldsmith, *supra* note 39, at 145–47. Even if they were correct in their interpretation of the common law, they ignored the impact of the

The impact of the TVPA on prior common law is particularly striking. Congress in that statute created explicit causes of action for torture and extrajudicial execution committed under color of foreign law.[211] The clear language of the statute thus applies to claims against foreign officials for acts committed during the course of their employment. A blanket grant of immunity to foreign officials who act under color of law would contradict the statute. Such explicit statutory language overrides any pre-existing common law provision granting immunity to defendants in TVPA suits, and bars imposition of new common law rules that would conflict with the statute.[212]

In sum, when courts today determine the common law of foreign official immunity, resuming a task that they put aside when the FSIA was adopted in 1976, they will not apply the common law as it existed at that time, but will instead develop new standards that draw upon current principles of U.S. and international law.

III. HUMAN RIGHTS ABUSES, LAWFUL AUTHORITY, AND THE LIMITS ON COMMON LAW IMMUNITY

A modern doctrine of foreign official immunity should start with the limited guidance available from the Supreme Court's decision in *Samantar*, and then look to the highly relevant analysis found in cases addressing human rights claims under the ATS and applying the act of state doctrine.

Samantar made clear that not all foreign officials sued for actions taken in the course of their employment are entitled to immunity. The Supreme Court stated that the immunity of the state and that of the official are not co-extensive. If they were identical, there would have been no need to consider the application of procedural rules such as indispensable party and real party in interest, and no need to refute the concern that a suit against a foreign official would constitute an end-run around the immunity due to the state.[213] The Executive Branch submission to the Court in *Samantar* supported this approach, noting several factors, discussed below, that might lead to the conclusion that foreign officials were not entitled to immunity for particular acts taken in the course of their employment.

Many claims filed against foreign officials will be easily resolved pursuant to the clear, albeit limited, guidance in the *Samantar* opinion, because a foreign state is either an indispensable party or the real party in interest. Those procedural protections parallel U.S. domestic immunity principles that recognize that cases that would require an outlay of funds

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developments discussed here: U.S. ratification of human rights treaties; multiple new statutes that codify civil and criminal remedies against persons accused of violations of fundamental human rights norms; and the court decisions discussed in Part III.

211. The statute creates a cause of action against "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation" subjects an individual to torture or extrajudicial execution. 28 U.S.C. § 1350 (note), § 2(a) (2006).

212. *See* H.R. REP. NO. 101-55 (1989) ("[S]overeign immunity would not generally be an available defense" to a TVPA claim).

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

from the public treasury, or other government action, constitute claims directly against the government.[214] The Restatement (Second) captured the substance of these principles, stating that a claim against a foreign official constitutes a claim against the state "if the effect of exercising jurisdiction would be to enforce a rule of law against the state."[215] A comment following this section explained that officials do not have immunity "even for acts carried out in their official capacity," unless they are entitled to a specialized immunity, such as head of state or diplomatic immunity, or the claim seeks "to enforce a rule [of law] against the foreign state."[216] The comment also provided two useful examples. First, a suit against a foreign official seeking to enforce a contract by ordering payment from government funds would "enforce a rule against the state"; as a result, the official is protected by the immunity of the state.[217] Second, a foreign official involved in a car accident during the course of employment and sued for damages is not entitled to immunity.[218]

In cases such as *Samantar*, plaintiffs allege violations of domestic and international law and seek only "damages from [the defendant's] own pockets."[219] A judgment in one of these cases, therefore, would neither require an outlay from the foreign state's treasury nor compel the state to take an action. In the words of the Restatement (Second), a judgment against the official would not "enforce a rule against the state."

In human rights cases, however, foreign officials may argue that they should receive immunity for intentional acts undertaken to support state policies, even if their acts violated domestic and international law. In rejecting such claims, courts can look to pre-*Samantar* decisions applying the FSIA to foreign officials. Although those decisions have now been overruled by *Samantar* to the extent that they relied on the FSIA, they addressed an issue central to determination of the common law of official immunity, holding that acts beyond the scope of an official's authority are not protected by the immunity of the state. In *Chuidian v. Philippine National Bank*,[220] for example, the Ninth Circuit held that the FSIA immunized only acts by an official "committed in his official capacity," but not "acts beyond the scope of his authority."[221] "'[W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do . . . .'"[222]

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214. *See, e.g.*, Edelman v. Jordan, 415 U.S. 651, 668 (1974) (sovereign immunity bars claims against state officials when there is a "virtual certainty" that a judgment will be paid by the state government, "not from the pockets of individual state officials.").

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

216. *Id.* cmt. b.

217. *Id.* cmt. b, illus. 2.

218. *Id.* cmt. b, illus. 3.

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

220. 912 F.2d 1095 (9th Cir. 1990).

221. *Id.* at 1106.

222. *Id.* (quoting Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689 (1949)).

Other circuits agreed, holding that immunity only applied to actions taken in an official capacity and within the scope of authority. The Fourth Circuit, for example, stated, "[a]lthough the [FSIA] is silent on the subject, courts have construed foreign sovereign immunity to extend to an individual acting in his official capacity on behalf of a foreign state,"[223] but "[t]he FSIA . . . does not immunize an official who acts beyond the scope of his authority."[224] Similarly, the Sixth Circuit held that "foreign sovereign immunity extends to individuals acting in their official capacities as officers," but does not apply to officials who act outside the scope of their authority.[225]

In two human rights cases decided soon after *Chuidian*, the Ninth Circuit applied the scope-of-authority test to bar immunity to foreign officials accused of human rights abuses. In *Trajano v. Marcos*,[226] the circuit recognized that the FSIA did not immunize an official who committed abuses that were manifestly "beyond the scope of her authority" and involved "doing something the sovereign has not empowered the official to do."[227] Similarly, in *Hilao v. Marcos*,[228] the court rejected the defendant's argument that the abuses at issue were carried out under Ferdinand Marcos' official authority and thus immunized, finding that "acts of torture, execution, and disappearance were clearly acts outside of his authority as President."[229] As the "acts were not taken within any official mandate," they were not the acts of the foreign state.[230]

Both the Marcos litigation and *Xuncax v. Gramajo*,[231] a case against a former Minister of Defense of Guatemala, involved high-ranking government officials. The courts in those cases were not concerned with the possibility that the defendants' brutal actions might have been consistent with the covert policies of their governments. To the contrary, the Ninth Circuit held that "the illegal acts of a dictator are not 'official acts' unreviewable by federal courts."[232] The court in *Xuncax* also held that

223. Velasco v. Gov't of Indonesia, 370 F.3d 392, 398 (4th Cir. 2004).

224. *Id.* at 399.

225. Keller v. Cent. Bank of Nigeria, 277 F.3d 811, 813, 815 (6th Cir. 2002); *see also* Jungquist v. Sheikh Sultan bin Khalifa al Nahyan, 115 F.3d 1020, 1027 (D.C. Cir. 1997) (officials may only be immunized for acts that fall within the scope of their authority).

226. 978 F.2d 493 (9th Cir. 1992).

227. *Id.* at 497.

228. Hilao v. Marcos (*In re* Estate of Marcos, Human Rights Litig.), 25 F.3d 1467 (9th Cir. 1994).

229. *Id.* at 1472.

230. *Id.* (citation omitted). In *Xuncax v. Gramajo*, 886 F. Supp. 162, 175–76 (D. Mass. 1995), the court reached the same result. While questioning the result reached in *Chuidian*, the *Xuncax* court found it unnecessary to decide whether the FSIA applied to foreign officials, because the court agreed with the Ninth Circuit's conclusion that any immunity would "be unavailable in suits against an official arising from acts that were beyond the scope of the official's authority." *Id.* at 175.

231. 886 F. Supp. 162 (D. Mass. 1995).

232. *Hilao*, 25 F.3d at 1471. The *Hilao* court also rejected Marcos' argument that acts outside the scope of his official authority (and thus not immunized by the FSIA) did not violate international law because such acts were not committed under "color of law." The court held that "[a]n official acting under color of authority, but not within an official

the defendant was not entitled to immunity because the acts alleged "exceed anything that might be considered to have been lawfully within the scope of [his] official authority."[233] The district court in *Doe I v. Liu Qi* addressed this issue directly, finding that acts were not within the scope of an official's lawful authority even if authorized by the "covert unofficial policy" of his government.[234] Since "*ultra vires* actions are not subject to sovereign immunity," officials are entitled to immunity only if they act with a "*legally valid* grant of authority."[235]

In its submission to the Supreme Court in *Samantar*, the Executive Branch endorsed a similar limitation on the reach of foreign official immunity, noting that "the basis for recognizing the immunity for current and former foreign officials is that 'the acts of the official representatives of the state are those of the state itself, *when exercised within the scope of their delegated powers*.'"[236] By quoting *Underhill*, a case applying the act of state doctrine, in support of this point, the Executive Branch recognized the close relationship between the factors underlying official immunity and those relevant to the act of state doctrine. That doctrine precludes courts "from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory," in "the absence of a treaty or other unambiguous agreement regarding controlling legal principles."[237] The doctrine differs from sovereign immunity in that it is rooted in constitutionally imposed separation of powers concerns, reflecting the limited role of the judicial branch in foreign affairs.[238] In addition, act of state is a defense on the merits, whereas immunity deprives a court of jurisdiction.[239] Despite these important differences, however, the analysis of when an act that violates domestic or international law can be considered a "public" act for the purposes of the act of state doctrine can assist the courts in developing the common law of official immunity. Many of the cases cited in cases analyzing foreign official immunity involve the act of state doctrine.[240]

Courts have recognized that the acts of an official "acting outside the scope of his authority as an agent of the state are simply not acts of

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mandate, can violate international law and not be entitled to immunity under [the] FSIA." *Id.* at 1472 n.8 (citing Filártiga v. Peña-Irala, 630 F.2d 876, 890 (2d Cir. 1980)).

233. *Xuncax*, 886 F. Supp. at 176 (citing Letelier v. Republic of Chile, 488 F. Supp. 665, 673 (D.D.C. 1980)). "[A]ssassination is 'clearly contrary to the precepts of humanity as recognized in both national and international law' and so cannot be part of official's 'discretionary' authority." *Id.* (quoting *Letelier*, 488 F. Supp. at 673).

234. 349 F. Supp. 2d 1258, 1286 (N.D. Cal. 2004).

235. *Id.* at 1287 (citing United States v. Yakima Tribal Court, 806 F.2d 853 (9th Cir. 1986)).

236. U.S. *Samantar* Brief, *supra* note 85, at 12 (quoting Underhill v. Hernandez, 65 F. 577, 579 (2d Cir. 1895), *aff'd* 168 U.S. 250 (1897) (emphasis added)).

237. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401, 428 (1964).

238. *Id.* at 423.

239. *See* Samantar v. Yousuf, 130 S. Ct. 2278, 2290 (2010) ("[T]he act of state doctrine is distinct from immunity, and instead 'provides foreign states with a substantive defense on the merits . . . .'" (quoting Republic of Austria v. Altmann, 541 U.S. 677, 700 (2004))).

240. *See, e.g.*, *id.* (discussing *Underhill* and act of state doctrine).

state."[241] As a starting point, illegal acts are not "public acts" for purposes of the doctrine[242]: "[C]ommon crimes committed by the Chief of State done in violation of his position and not in pursuance of it . . . are as far from being an act of state as rape."[243] This applies with force to human rights violations. The TVPA legislative history, for example, states explicitly that torture and similar violations of human rights can *never* be considered the "public acts" required to invoke the act of state doctrine: "Since this doctrine applies only to 'public' acts, and no state commits torture as a matter of public policy, this doctrine cannot shield former officials from liability under this legislation."[244] The Ninth Circuit applied this reasoning in *In re Estate of Marcos Human Rights Litigation*,[245] holding that murders committed "by military intelligence personnel who were acting under [direction of the head of military intelligence], pursuant to martial law declared by" the nation's president, were not acts of state.[246]

In addition, the act of state doctrine does not apply where acts are barred by controlling international legal principles. As the Supreme Court stated in *Banco Nacional de Cuba v. Sabbatino*[247]:

> It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.[248]

Thus, the act of state doctrine would not preclude judicial review of claims asserting human rights violations when the acts violate generally accepted international law principles.[249]

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241. Sharon v. Time, Inc., 599 F. Supp. 538, 544 (S.D.N.Y. 1984).

242. *See* Filártiga v. Peña-Irala, 630 F.2d 876, 889–90 (2d Cir. 1980) ("[W]e doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could properly be characterized as an act of state."); *see also* Kadic v. Karadžić, 70 F.3d 232, 250 (2d Cir. 1995).

243. Jimenez v. Aristeguieta, 311 F.2d 547, 558 (5th Cir. 1962). As the Second Circuit noted in *Kadic*, 70 F.3d at 250, a case involving allegations of genocide and war crimes in Bosnia-Herzegovina, including widespread rape and other torture, "[T]he appellee has not had the temerity to assert in this Court that the acts he allegedly committed are the officially approved policy of a state."

244. S. REP. NO. 102-249, at 8 (1991) (citing Trajano v. Marcos, 878 F.2d 1439 (9th Cir. 1989)).

245. 978 F.2d 493 (9th Cir. 1992).

246. *Id.* at 496.

247. 376 U.S. 398 (1964).

248. *Id.* at 428.

249. The RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987), in comments b and c to section 443, confirms that the act of state doctrine does not preclude review of an act of a foreign state that violates widely accepted international law norms, and emphasizes that courts can decide claims "arising out of . . . alleged violation[s] of fundamental human rights." *Id.* § 443 cmt. c; *see also* Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 718 (9th Cir. 1992) ("International law does not recognize an act that violates *jus cogens* as a sovereign act.").

This standard fits neatly with the Supreme Court's interpretation of the ATS in *Sosa*, which held that courts implementing the statute should recognize common law causes of action for clearly defined, widely accepted violations of international law.[250] As stated in *Sosa*, "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted."[251] The Court noted that this standard is "generally consistent" with the standard applied by the lower courts, which had required that ATS claims be based on definable (or specific), universal and obligatory norms.[252] Violations of clearly defined, widely accepted international human rights norms—*Sosa* norms—are excluded from consideration as acts of state and are outside the bounds of an official's lawful authority and, therefore, are not protected by official immunity.

The Executive Branch submission to the Supreme Court in *Samantar*, which listed factors that suggest that Samantar may not be protected by common law immunity, is consistent with this approach:

> In this case, for example, the Executive reasonably could find it appropriate to take into account [Samantar's] residence in the United States rather than Somalia, the nature of the acts alleged, [plaintiffs'] invocation of the statutory right of action in the TVPA against torture and extrajudicial killing, and the lack of any recognized government of Somalia that could opine on whether petitioner's alleged actions were taken in an official capacity or that could decide whether to waive any immunity that petitioner otherwise might enjoy.[253]

Two of these factors—Samantar's residence in the United States and the lack of a recognized government in Somalia—are not relevant to all human rights cases, although many defendants do reside in the United States.[254] Two other factors, however, are generally applicable. First, the Executive Branch focused on "the nature of the acts alleged," and confirmed elsewhere that the nature of the acts alleged is relevant to considering "whether they should properly be regarded as actions in an official

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250. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004). Professors Randall and Keitner, recognizing this convergence between the act of state and ATS standards, have referred to a norm that satisfies the *Sabbatino-Sosa* tests as a "supernorm," which they define as "an international legal prohibition that has become so crystallized and entrenched as to be effectively unquestionable and inviolable either by sovereign entities or by individuals, particularly those acting under color of state authority." Kenneth C. Randall & Chimène I. Keitner, Sabbatino, Sosa, *and "Supernorms"*, *in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW 559, 559 (Mahnoush Arsanjani, et al. eds. forthcoming).

251. *Sosa*, 542 U.S. at 732.

252. *See id.* (citing *In re* Estate of Marcos, Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring); Filártiga v. Peña-Irala, 630 F.2d 876, 890 (2d Cir. 1980)).

253. U.S. *Samantar* Brief, *supra* note 85, at 7; *see also id.* at 22–23 n.10, 25 (discussing the relevance of the same factors).

254. The Statement of Interest filed by the Executive Branch after *Samantar* was remanded to the district court emphasized these two points. *See infra* notes 283, 290 and accompanying text.

capacity."[255] Egregious violations of human rights such as torture, execution, and other abuses that meet the *Sosa* standard are not within the lawful authority of a government official. Second, the Executive Branch reference to the statutory right of action created by the TVPA indicated support for the view that a common law of immunity should not supersede Congress' decision to authorize claims against foreign officials.

One early post-*Samantar* district court decision on foreign official immunity reached a result consistent with the analysis in this part. In *Hassen v. Al Nahyan*,[256] a U.S. citizen sued officials of the United Arab Emirates, alleging that the defendants had abducted, imprisoned, and brutally tortured him for almost two years.[257] The court noted that the plaintiff alleged that the defendant had acted outside the scope of his official position, and concluded that, as a result, he was not entitled to immunity because he had not acted "on behalf of the state."[258] This decision follows the pre-*Samantar* cases in recognizing that illegal acts performed in the course of employment are not entitled to immunity.

The modern common law of foreign official immunity must take into account international human rights norms and judicial and statutory developments in the United States. Consistent with the current state of international and domestic law, courts should decline to recognize the immunity of foreign officials accused of violations of clearly defined, widely accepted international human rights norms.

As in any issue touching upon foreign affairs, the views of the Executive Branch and of the foreign government whose officials are facing civil claims will often play an important role in a court's evaluation of an immunity claim. As explained in Part IV, however, excessive deference to those views would undermine both the constitutional division of powers between the executive and the judiciary and fundamental human rights norms.

IV. THE DEFERENCE DUE THE EXECUTIVE BRANCH AND THE FOREIGN STATE

In cases touching upon foreign affairs, the courts generally give deference to the views of the Executive Branch, the branch of the federal government to which foreign affairs powers are assigned by the Constitution.[259] The Executive Branch, in turn, often considers the views of the foreign government concerned with the lawsuit. The Constitution, however, does not mandate absolute deference on the key factual disputes at issue in foreign official immunity cases. Moreover, the views of the foreign

255. U.S. *Samantar* Brief, *supra* note 85, at 25.

256. CV 09-01106 DMG (MANx) (C.D. Ca. Sept. 17, 2010).

257. *Id.*

258. *Id.* at 9 (emphasis omitted). The court noted that the State Department had not requested immunity for the defendant. *Id.* at 10.

259. *See* Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918) (stating that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government.").

government cannot be decisive: No government has the authority to immunize its own officials when they commit violations of core human rights norms.

A. The Role of the U.S. Executive Branch

In its submission to the Supreme Court in *Samantar*, the Executive Branch chose unusual language to characterize the non-statutory immunity protecting foreign officials from suit in U.S. courts: Rather than proposing "common law" immunity, the brief suggested that "*principles articulated by the Executive Branch* . . . govern the immunity of foreign officials from civil suit for acts in their official capacity."[260] The phrase appears carefully crafted to express a central theme of the submission, which repeatedly states that courts must follow the guidance of the Executive Branch when deciding whether a foreign official is entitled to immunity.[261]

Tellingly, the Supreme Court in *Samantar* made no reference to "principles articulated by the Executive Branch," considering instead whether foreign officials might be protected by common law immunity. The courts, not the Executive Branch, articulate common law rules. The Court in *Samantar* quoted prior cases suggesting that, in prior practice, the courts "typically" had surrendered jurisdiction when the Executive Branch filed a Suggestion of Immunity.[262] The Executive Branch argued that this deference to its views should be absolute, and offered two explanations for that position. Neither rationale supports the sweeping conclusion that, in the absence of legislative guidance, the courts must defer to the Executive Branch in determining the scope of foreign official immunity.[263]

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260. U.S. *Samantar* Brief, *supra* note 85, at 6 (emphasis added); *see also id.* at 7–9, 11, 14 (using the same phrase). In its submissions in two earlier cases addressing this issue, the Executive Branch used somewhat broader language, referring to "general principles of sovereign immunity" in Statement of Interest of the United States at 5, Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095 (9th Cir. 1990) (No. 86-2255-RSWL), to "common-law immunity for foreign officials" in Statement of Interest of the United States at 4, Matar v. Dichter, 500 F. Supp. 2d 284 (S.D.N.Y. 2007) (No. 05-10270), and to "[p]rinciples of [c]ustomary [i]nternational [l]aw as [r]ecognized by the Executive" in U.S. *Matar* Amicus Brief, *supra* note 63, at 5.

261. The Executive Branch Statement of Interest on remand in *Yousuf v. Samantar* repeats this position with even more force, stating that courts "must . . . defer to Executive determinations of foreign official immunity." Statement of Interest, Yousuf v. Samantar, *supra* note 92, at 6.

262. Samantar v. Yousuf, 130 S. Ct. 2278, 2284–85 (2010). The Court added, "We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity." *Id.* at 2291.

263. For a thoughtful examination of the constitutional and functional arguments asserted in support of Executive Branch control over official immunity decisions, see Wuerth, *supra* note 108, at 9–39. Wuerth argues that the few pre-FSIA decisions suggesting that Executive Branch immunity decisions were binding on the courts were "wrongly reasoned—if not wrongly decided," *id.* at 6, and, in any event, those decisions are no longer controlling after passage of the FSIA, *id.* at 13–14. She concludes that permitting the Executive Branch to govern immunity decisions would constitute an unconstitutional extension of executive law-making powers. *Id.* at 16–35; *see also* Bradley & Helfer, *supra* note 108, at 35–36 (noting that, although the views of the Executive Branch may be "relevant" to the development of

First, the Executive Branch brief argued that immunity decisions are constitutionally committed to the Executive Branch, "as an aspect of the Executive Branch's prerogative to conduct foreign affairs on behalf of the United States."[264] This is only partly accurate. Executive Branch "suggestions of immunity" for heads of state and diplomats are controlling on the judiciary,[265] in recognition of the Constitution's assignment of the power to "receive Ambassadors and other public Ministers" to the President.[266] This power includes the recognition of both foreign governments and those who represent them.[267] As a result, courts defer to Executive Branch suggestions of immunity as to diplomats and heads of state. The immunity of other officials, however, is not subsumed within this constitutional power to recognize ambassadors. Those immunity decisions turn upon issues of foreign law, international law, and foreign policy as to which the courts afford deference to the views of the Executive Branch, but do not automatically follow its views.[268]

The Supreme Court has pointedly refused to cede to the Executive Branch control over cases touching upon foreign affairs. In Justice William Douglas' memorable words, absolute deference to the Executive Branch in such cases would render the court "a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from the fire, but not others."[269] As Justice Lewis Powell stated, "a doctrine which would require the judiciary to receive the Executive's permission before

post-*Samantar* common law immunity, "the constitutional rationale" for deference to Executive Branch views "is under-theorized and thus may be open to challenge," and listing the "countervailing considerations" that would point against deference to those views).

264. U.S. *Samantar* Brief, *supra* note 85, at 28.

265. *See, e.g.*, Wei Ye v. Jiang Zemin, 383 F.3d 620, 626 (7th Cir. 2004) ("[A] determination by the Executive Branch that a foreign head of state is immune from suit is conclusive . . . ."); Doe v. State of Israel, 400 F. Supp. 2d 86, 111 (D.D.C. 2005) ("When, as here, the Executive has filed a Suggestion of Immunity as to a recognized head of a foreign state, the jurisdiction of the Judicial Branch immediately ceases."). *But see* Republic of Phil. by the Cent. Bank of Phil. v. Marcos, 665 F. Supp. 793, 797–99 (N.D. Cal. 1987) (declining to defer to the Department of State's suggestion of head-of-state immunity for the Philippine Solicitor General because it constituted a "radical departure from past custom.").

266. U.S. CONST. art. II, § 3.

267. LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 43 (2d ed. 1996) ("It is no longer questioned that the President does not merely perform the ceremony of receiving foreign ambassadors but also determines whether the United States should recognize or refuse to recognize a foreign government . . . .").

268. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004) (noting that "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy"); Republic of Austria v. Altmann, 541 U.S. 677, 702 (2004) (suggesting that with respect to foreign sovereign immunity, "should the State Department choose to express its opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy") (footnote omitted); Keitner, *The Common Law*, *supra* note 29, at 71–75 (concluding that Executive Branch views as to status-based immunity are entitled to absolute deference, but not those as to conduct-based immunity).

269. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 773 (1972) (Douglas, J., concurring).

invoking its jurisdiction" would violate separation of powers.[270] Noting that six members of the Court shared his view on this point, Justice William Brennan added: "[T]he representations of the Department of State are entitled to weight for the light they shed on the permutation and combination of factors underlying the act of state doctrine. But they cannot be determinative."[271]

Second, the Executive Branch asserted that absolute deference was the practice prior to enactment of the FSIA, relying on pre-1976 case law.[272] Although the Supreme Court has said that the courts in the past "surrendered jurisdiction" after the Executive Branch filed a suggestion of immunity,[273] there was little historical basis for this practice prior to 1943. In *The Schooner Exchange*, for example, the Court received the views of the Executive Branch,[274] but conducted its own review of the relevant international law doctrines.[275] As late as the early twentieth century, the Court declined to follow the Executive Branch's views.[276] In the 1952 Tate Letter, the Department of State itself acknowledged that its views as to sovereign immunity were not binding on the courts: "It is realized that a shift in policy by the executive *cannot control the courts* but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so."[277]

The Supreme Court cases supporting absolute deference, as Professor Keitner has discussed, involved state ownership of ships or recognition of foreign envoys—status questions that are constitutionally delegated to the Executive Branch.[278] As to those issues, the Executive Branch's views are binding on the courts. The issue of how to categorize acts committed by a foreign official does not fall within that binding power. It should be given respectful deference, but not blindly followed.[279]

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270. *Id.* at 773 (Powell, J., concurring).

271. *Id.* at 788–90 (Brennan, J., dissenting).

272. U.S. *Samantar* Brief, *supra* note 85, at 6 ("[C]ourts traditionally deferred to the Executive Branch's judgment whether the foreign state should be accorded immunity in a given case.").

273. Samantar v. Yousuf, 130 S. Ct. 2278, 2284–85 (2010) (describing process and noting that it "was typically followed when a foreign official asserted immunity.").

274. The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 117–19 (1812).

275. *Id.* at 135–47.

276. See Keitner, *The Common Law*, *supra* note 29, at 73, discussing *Berizzi Bros. v. Steamship Pesaro*, 271 U.S. 562 (1926), in which the Supreme Court declined to follow the Department of State's view that the steamship was not entitled to immunity.

277. Tate Letter, *supra* note 24 (emphasis added).

278. Keitner, *The Common Law*, *supra* note 29, at 71–75. As Keitner notes, "foreign officials[,] unlike ships, may also be personally responsible for their conduct." *Id.* at 75. She concludes that "there is . . . no consistent, well-settled practice from which to infer a standard of absolute deference to the Executive on questions of conduct-based immunity." *Id.* at 73; *see also* Wuerth, *supra* note 108, at 13, 30 (concluding that the holdings as to deference to the Executive Branch in pre-1976 admiralty cases are no longer good law after enactment of the FSIA).

279. *But see* Matar v. Dichter, 563 F.3d 9, 15 (2d Cir. 2009) (pre-*Samantar* decision holding that, "in the common-law context, we defer to the Executive's determination of the scope of immunity").

In the decision on remand in *Yousuf v. Samantar*, the Executive Branch filed a Statement of Interest stating that Samantar was not entitled to immunity.[280] The district court then denied the defendant's claim to immunity, in an order that simply followed the government's views.[281] The Statement of Interest quoted in full the list of possibly relevant factors included in the amicus brief that the Executive Branch submitted to the Supreme Court in *Samantar*, including the nature of the acts alleged and the fact that the plaintiffs relied on the TVPA.[282] The Statement of Interest, however, focused on the application of two of the factors: The United States did not recognize a government in Somalia, and Samantar resided in the United States.[283] Since these factors controlled the immunity decision, the submission included no further discussion of the other factors.

The district court's response to the Statement of Interest may indicate that, in cases where the Executive Branch concludes that a foreign official is not entitled to immunity, some district courts will be inclined to follow that conclusion without further discussion. Moreover, *Yousuf* turned in part on the fact that the U.S. did not recognize a government in Somalia, a status assessment that is constitutionally assigned to the Executive Branch. As argued in this section, deference to a factual assessment of the lawful authority of a foreign official raises distinct constitutional issues.

The views of the Executive Branch as to the immunity of a foreign government official are binding on the courts only to the extent that they determine the status of heads of state, diplomats, and other officials. As to other issues, those views should be treated with respectful deference. The courts should not consider such views binding when they concern the question of whether a foreign official's conduct falls within his or her lawful authority. Indeed, in cases alleging violations of clearly defined, widely accepted norms, there is little need for Executive Branch guidance as to the unlawfulness of the defendant's actions. The key issue has already been determined by international law and by the Supreme Court's incorporation of those norms into federal common law in *Sosa*.

B. The Role of the Foreign State

Foreign states have only rarely intervened in U.S. human rights lawsuits against their former government officials. Governments generally do not claim the right to commit egregious human rights violations.[284] Thus,

280. Statement of Interest, Yousuf v. Samantar, *supra* note 92.

281. The court order stated simply, "The government has determined that the defendant does not have foreign official immunity. Accordingly, defendant's common law sovereign immunity defense is no longer before the Court." Yousuf v. Samantar, 1:04cv1360 (LMB/JFA) (Feb. 15, 2011). As of April 14, 2011, the district court's full written opinion explaining the denial of immunity had not yet been released.

282. Statement of Interest, Yousuf v. Samantar, *supra* note 92, at 4 n.2.

283. *Id.* at 7–9.

284. As the Department of State informed the court during the *Filártiga* litigation, "no government has asserted a right to torture its own nationals. Where reports of such torture elicit some credence, a state usually responds by denial or, less frequently, by asserting that the conduct was unauthorized or constituted rough treatment short of torture." Memorandum

when their officials face credible accusations of such violations, they generally do not defend the litigation by asserting that the violations were within the official's lawful authority.

In a few cases, however, the state has asserted a claim to immunity on behalf of its official. In *Doe I v. Lui Qi*,[285] a lawsuit alleging torture and arbitrary detention of practitioners of Falun Gong, the government of China asserted that because the defendant had "performed [his] functions and duties in accordance with the power entrusted to [him] under [the] Chinese Constitution and laws," he was immune from the jurisdiction of the courts of the United States.[286] In two cases against former Israeli government officials, the government of Israel submitted letters stating in general terms that "'anything [the defendant] did in connection with the events at issue in the suit[] was in the course of [his] official duties.'"[287]

The Executive Branch has said that "the foreign state's position on whether the alleged conduct was in an official capacity would be *an important consideration* in determining an official's immunity."[288] That much seems uncontroversial: The foreign state's views as to whether an official was acting within the course of her employment and as to the legality of those actions under domestic law should certainly play a role in the assessment of immunity.

For several reasons, however, those views cannot be determinative. *Samantar* reflects one difficulty. In that case, the district court deferred to the views of an unrecognized government that claimed that Samantar's actions fell within his official authority, despite the plaintiffs' complaint that the officials who signed the letters had ties to the same abusive government that, along with Samantar himself, engaged in multiple human rights violations.[289] The United States has not recognized a government in Somalia, and the Executive Branch relied heavily on that fact in concluding that Samantar was not entitled to immunity.[290]

Additional problems would arise if an abusive government asserted a claim to immunity on behalf of its officials. For example, what if the *Samantar* lawsuit had been filed earlier, when the government he served was still the lawful government of Somalia? The United States recognized

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of the United States as Amicus Curiae at 16 n.34, Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090) (quoted in *Filártiga*, 630 F.2d at 884).

285. 349 F. Supp. 2d 1258 (N.D. Cal. 2004).

286. Statement of the Government of the People's Republic of China on "Falun Gong" Unwarranted Lawsuits (unpaginated) at 3, 5, attached to Notice of Filing of Original Statement by the Chinese Government, *Liu Qi*, 349 F. Supp. 2d 1258 (No. C 02 0672 (EMC)).

287. *See Belhas v. Ya'alon*, 515 F.3d 1279, 1282 (D.C. Cir. 2008) (quoting Letter from Daniel Ayalon to Nicholas Burns, *supra* note 76).

288. U.S. *Samantar* Brief, *supra* note 85, at 25 (emphasis added).

289. *See* Brief of Appellants at 9–10, Yousuf v. Samantar, 552 F.3d 371 (4th Cir. 2009) (No. 07-1893), 2007 WL 4355216 at *9, (noting allegation that at least one of the officials who had claimed that Samantar acted within his official authority was "a longtime political ally" of Samantar).

290. Statement of Interest, Yousuf v. Samantar, *supra* note 92, at 7–9; U.S. *Samantar* Brief, *supra* note 85, at 7, 25–26.

that government at the time, but also accused it of responsibility for widespread human rights violations.[291] If that government had submitted a letter to the court stating that Samantar's alleged acts of torture, prolonged arbitrary detention, and extrajudicial executions were all within his lawful authority, the courts would not have been required to give credence to that view: Despots who control a state should not be empowered to invoke sovereign immunity to protect officials accused of violations of clearly defined, widely accepted human rights norms.

Finally, even democratic, lawful governments have no right, under international or U.S. law, to protect their former officials from accountability for violations of fundamental human rights norms. In *Sosa*, the Supreme Court recognized common law causes of action for a small number of international norms that prohibit the most egregious human rights violations. Those same standards define the outer limits of lawful authority: international law norms that are clearly defined and widely accepted. Acts that violate *Sosa* norms do not trigger foreign official immunity, no matter the views of the foreign state.

The importance of invoking core international law norms as a limit on acts entitled to immunity becomes clear if we consider the possibility of a state that authorizes genocide, defined by international law as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group."[292] If an official from that state were sued for genocide, the common law of official immunity would not protect him, even if local law clearly legalized his actions. United States courts would not be bound to respect or apply the genocide-authorizing local law. As a structural matter, foreign sovereign immunity is a matter of comity. In the absence of a statute or binding treaty governing foreign official immunity, U.S. courts are not required to ignore the gravity of the accusations when determining whether a foreign official is entitled to immunity. In addition, both international and domestic laws prohibiting genocide would override the contradictory foreign law. Finally, as a matter of public policy, U.S. courts should refuse to give legal effect to a foreign law that contradicts a basic tenet of both international and U.S. law.

In the *Liu Qi* case, plaintiffs asserted that the defendant was responsible for the torture and detention of members of the Falun Gong and alleged that the Chinese government had targeted the group for violent repression solely because of its members' beliefs, a clear violation of international law.[293] Under the modern common law of official immunity, the court was justified in rejecting the Chinese government's claim of immunity for the defendant, because his acts violated clearly defined, widely accepted international law norms.

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291. U.S. *Samantar* Brief, *supra* note 85, at 4 (the United States recognized the government in power at that time); *id.* at 3 n.2 ("At the time, the State Department documented massive human rights violations by the Somali government.").

292. Genocide Convention, *supra* note 199, art. 2.

293. Doe I v. Liu Qi, 349 F. Supp. 2d 1258, 1266 (N.D. Cal. 2004).

The two cases against Israeli officials illustrate another problem with deference to the views of the foreign state. In those cases, the Israeli government declined to address the specific acts alleged in the complaints. In *Belhas*, plaintiffs sued for damages caused by an attack on a refugee camp that caused over one hundred deaths and many injuries, in violation of the laws of war.[294] In *Matar*, plaintiffs alleged that the defendant was responsible for bombing an apartment building at night in order to kill one person, knowing that many civilians would be killed and injured, in violation of the laws of war.[295] Rather than asserting that those specific acts were within the lawful authority of the defendants, Israel, in each of the cases, stated in general terms that "'anything [the defendant] did . . . in connection with the events at issue [in the suit] was in the course of [his] official duties.'"[296]

This general statement is not a sufficient basis to invoke common law immunity. As the Supreme Court made clear in *Samantar*, not all acts undertaken in the course of government employment trigger immunity. At the very least, foreign state submissions seeking to invoke immunity for their officials should address the key issue: Were the acts alleged within the lawful authority of the official, as circumscribed by clearly defined, widely accepted international law norms? In the *Belhas* and *Matar* cases, Israel might claim that its acts complied with human rights and humanitarian law. But it failed to make that argument to the courts in either case and thus failed to justify recognition of common law immunity.[297]

V. THE MODERN COMMON LAW OF FOREIGN OFFICIAL IMMUNITY AND HUMAN RIGHTS

The *Samantar* decision left to the federal courts the task of developing the modern common law of foreign official immunity. As with any common law doctrine, the full contours of that immunity will emerge over

294. Belhas v. Ya'alon, 515 F.3d 1279, 1281–82 (D.C. Cir. 2008).

295. Matar v. Dichter, 563 F.3d 9, 10–11 (2d Cir. 2009).

296. *Id.* at 11 (quoting Letter from Daniel Ayalon to Nicholas Burns, *supra* note 76); *Belhas*, 515 F.3d at 1284 (same).

297. The *Belhas* and *Matar* cases are outliers and may in fact reflect the "special relationship" between the United States and Israel that constrains both the courts and the Executive Branch. *See, e.g.*, ABRAHAM BEN-ZVI, THE UNITED STATES AND ISRAEL: THE LIMITS OF THE SPECIAL RELATIONSHIP (1993); Noura Erakat, *Litigating the Arab-Israeli Conflict: The Politicization of U.S. Federal Courtrooms*, 2 BERKELEY J. MIDDLE E. & ISLAMIC L. 27 (2009) (discussing the politicization of litigation involving claims against Israel); Bernard Reich, *The United States and Israel: The Nature of a Special Relationship*, *in* DAVID W. LESCH, THE MIDDLE EAST AND THE UNITED STATES: A HISTORICAL AND POLITICAL REASSESSMENT 233 (1996). If those constraints are the true reasons for dismissing the cases, it would be better to address them directly, rather than ignore international law limits on a government official's lawful authority. As many courts and commentators have pointed out, courts can respond to any diplomatic or foreign policy problems triggered by human rights litigation through application of doctrines such as the act of state doctrine, the political question doctrine, or forum non conveniens. For an early discussion of such doctrines, see Harold Hongju Koh, *Civil Remedies for Uncivil Wrongs: Combatting Terrorism Through Transnational Public Law Litigation*, 22 TEX. INT'L L.J. 169, 203–04 nn.112–13 (1987).

time, in response to myriad factual situations. Two principles, however, define its outer limits. First, foreign officials should be afforded common law immunity if a claim is one that would force the government to act, as when a case seeks damages from the state itself or requests an order that would bind the foreign state. Second, at the other end of the immunity spectrum, common law should not grant immunity to foreign officials for violations of clearly defined, widely accepted human rights norms, because those acts are, as a matter of international and U.S. law, beyond the officials' lawful authority.

Within that framework, the post-*Samantar* common law should include the following key points:

(1) Suits against foreign officials in a personal capacity, that do not seek to compel the state to act or require payment from the foreign treasury and in which the state is neither an indispensable party nor the real party in interest, are not suits against the foreign state and do not trigger that state's sovereign immunity. If sovereign immunity extends to acts taken in a representative capacity, such immunity applies only to formal acts on behalf of the state such as signing a treaty, entering into a contract, or otherwise binding the state.

(2) The federal courts may conclude that common law immunity extends beyond these situations to cover foreign officials engaged in lawful activities as part of their employment. To the extent that they do so, however, they should recognize the constraints imposed by international human rights norms. Foreign official immunity does not apply to acts outside of the official's lawful authority. Violations of clearly defined, widely accepted international human rights norms are outside lawful authority, and acts in violation of those norms do not fall within the scope of foreign official immunity.

(3) Courts should defer to the Executive Branch suggestions of immunity to the extent that they indicate the status of a foreign official or a foreign government as, for example, in recognizing an official as a diplomat, consul, or head of state, or indicating whether the U.S. government recognizes a foreign government. Courts should give only respectful deference to Executive Branch conclusions about the factual allegations at issue in a human rights complaint, such as, for example, whether the acts alleged fall within the lawful authority of an official. And courts should not defer to requests for immunity from foreign governments that seek to immunize acts that violate clearly defined, widely accepted human rights norms.

CONCLUSION

Supporters of absolute immunity defend it as a deeply rooted historical practice, necessary to the smooth functioning of government. These arguments, however, exaggerate its proper role. Absolute immunity is a distortion of much narrower historical principles of sovereignty and sovereign immunity and has little justification in a world that has moved beyond monarchies and the divine rights of kings. Moreover, absolute

immunity ignores modern international law limits on lawful government authority. The new common law of foreign official immunity should recognize that the most egregious human rights abuses are not within the lawful authority of a state official and, therefore, are not entitled to immunity.