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INTERNATIONAL LAW AND THE U.S. COMMON LAW OF FOREIGN OFFICIAL IMMUNITY

In *Samantar v Yousuf*,[1] the Supreme Court unanimously held that the Foreign Sovereign Immunities Act (FSIA) does not apply to lawsuits brought against foreign government officials for alleged human rights abuses.[2] The Court did not necessarily clear the way for future human rights litigation against such officials, however, cautioning that such suits "may still be barred by foreign sovereign immunity under the common law."[3] At the same time, the Court provided only minimal guidance as to the content and scope of common law immunity. Especially striking was the Court's omission of any mention of the immunity of foreign officials under customary international law (CIL), the body of international law that "results from a general and consistent practice of states followed by them

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[1] 130 S Ct 2278 (2010).

[2] Id at 2282.

[3] Id at 2289–92.

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from a sense of legal obligation."[4] Not only were international law issues extensively briefed by the parties and amici, but the question of whether foreign officials are immune from suits alleging human rights violations had recently been extensively litigated in other national courts and international tribunals, and these decisions were brought to the Court's attention.

Notwithstanding the Supreme Court's inattention to the international law backdrop in *Samantar*, CIL immunity principles are likely to be relevant to the development of the common law of foreign official immunity. The Court has taken account of CIL in related contexts and has endorsed a canon of statutory construction designed to avoid unintended breaches of CIL. Both Congress and the Executive Branch have also indicated that they consider CIL to be relevant to immunity, and the judiciary is usually attentive to the views and actions of the political branches when developing common law relating to foreign affairs.

There is also a rich and growing body of CIL materials that courts can draw upon. As we will explain, these materials show that CIL traditionally extended immunity to individual officials in proceedings in foreign courts for actions taken on behalf of their state. In the criminal context, this immunity has eroded over the past decade, with national courts outside of the United States increasingly exercising criminal jurisdiction over former officials, including heads of state, charged with human rights violations. No comparable erosion has yet occurred, however, in the civil context. Although a few decisions have embraced a human rights exception to immunity, the courts of several other countries have expressly declined to adopt such an exception. At the same time, the relationship between immunity and human rights law is still very much in flux, and international tribunals currently are considering cases that concern this relationship.

The unsettled state of CIL raises important issues concerning the role and competence of U.S. courts as they develop the common law of foreign official immunity. On the one hand, they have an opportunity to participate in a global judicial dialogue over the proper balance between immunity and accountability and to shape international law's future trajectory. On the other hand, the uncertain state of the law may indicate that U.S. courts should exercise

[4] Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987).

caution before advancing an interpretation of CIL that may offend foreign governments or create foreign relations difficulties for the Executive Branch. Ultimately, as we will discuss, a variety of institutional and policy considerations are likely to shape the relevance of CIL to the post-*Samantar* common law of immunity.

The development of this body of common law immunity also implicates long-standing debates over the incorporation of CIL into federal common law. In the past, scholars who argued for such incorporation did so primarily to promote accountability for past human rights abuses and to expand the opportunities for litigating human rights claims in U.S. courts. Other scholars, however, challenged the federal adjudication of customary human rights norms on the basis of domestic considerations such as separation of powers. There may be a reversal of positions in the wake of *Samantar*. Commentators who previously opposed adjudication of CIL in U.S. courts may be favorably disposed to incorporating international immunity rules into the common law—a doctrinal move that could significantly narrow the scope of international human rights litigation. Conversely, commentators who previously supported application of CIL by U.S. courts may now oppose the incorporation of CIL in this context, or argue that it is too indeterminate, and urge courts to apply instead the immunity principles of domestic civil rights law—principles that may facilitate holding foreign government officials accountable for human rights abuses.

This article self-consciously avoids taking a position on these theoretical debates or on the ultimate question of the proper scope of foreign official immunity. Instead, we seek to make three contributions. First, we set forth a case for CIL's relevance to the post-*Samantar* common law of immunity that is not dependent on a single theoretical perspective regarding the domestic status of CIL. Second, we present what we believe is a relatively dispassionate assessment of the evolving CIL landscape, an assessment that is aided by the fact that we ourselves have somewhat differing perspectives about the proper role of international law in general and in human rights litigation in U.S. courts in particular. Third, by emphasizing institutional considerations, we are able to isolate particular variables—such as the views of the Executive Branch and the policies embodied in domestic statutes—that will shape how CIL affects the common law of immunity after *Samantar*.

The article proceeds as follows. Part I briefly discusses the history

of foreign sovereign immunity in the United States. It then reviews the facts, procedural history, and decision in *Samantar*, highlighting the international law backdrop of the case. Part II reviews the CIL of foreign official immunity and recent national and international court rulings. Part III returns to the United States. It explains how the relevance of CIL immunity rules will depend not only on international law's relationship to federal common law, but also on other considerations such as the degree to which U.S. courts should be active players in the development of CIL, the authority of the Executive Branch to affect ongoing litigation, and the policies reflected in existing statutes.

I. Samantar and the International Law Road Not Taken

In this part, we begin by describing the historical background and text of the FSIA, as well as the lower court precedent that had developed prior to *Samantar* concerning suits against foreign officials. We then describe the facts and proceedings in *Samantar*. Finally, we consider the Court's decision and explain why, regardless of whether the Court reached the right conclusion, it is noteworthy that its analysis takes no direct account of international law.

A. Foreign Sovereign Immunity

The application of foreign sovereign immunity in U.S. courts is usually traced to the Supreme Court's early nineteenth-century decision in *Schooner Exchange v McFaddon*.[5] In that case, two individuals brought a "libel" action against a French naval vessel that had docked in Philadelphia, claiming that they were the original owners of the vessel and that it had been seized from them unlawfully. In upholding a dismissal of the action, the Court, in an opinion by Chief Justice Marshall, began by noting that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute" and "is susceptible of no limitation not imposed by itself."[6] As a result, said the Court, "[a]ll exceptions . . . to the full and complete power of a nation within its own

[5] 11 US (7 Cranch) 116 (1812); see also *Republic of Austria v Altmann*, 541 US 677, 688 (2004) ("Chief Justice Marshall's opinion in *Schooner Exchange* . . . is generally viewed as the source of our foreign sovereign immunity jurisprudence.").

[6] *Schooner Exchange*, 11 US (7 Cranch) at 136.

territories, must be traced up to the consent of the nation itself."[7] The Court found, however, based on "common usage" and "common opinion," that there was "a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction."[8] In reaching this conclusion, the Court analogized to the well-settled immunity under CIL for both heads of state and foreign ministers.[9] The Court also appears to have been influenced by the fact that the Executive Branch had intervened in the case to support a grant of immunity.[10]

Although *Schooner Exchange* specifically addressed only the immunity of foreign warships, over time U.S. courts applied a doctrine of absolute immunity in suits brought against foreign states and their instrumentalities, a doctrine that was viewed as stemming from considerations of both international law and international comity.[11] The courts also developed an "act of state" doctrine that barred U.S. courts from judging the validity of the acts of foreign governments taken within their own territory.[12] As originally developed, the act of state doctrine was intertwined with considerations of immunity.[13] Eventually, however, it evolved into a distinct doctrine that was grounded in considerations of separation of powers.[14]

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[7] Id.

[8] Id at 136, 145–46.

[9] See id at 137–38.

[10] See *Schooner Exchange*, 11 US (7 Cranch) at 147 ("There seems to be a necessity for admitting that the fact [of immunity] might be disclosed to the Court by the suggestion of the Attorney for the United States.").

[11] See Gamal Moursi Badr, *State Immunity: An Analytical and Prognostic View* 9–20 (Martinus Nijhoff, 1984); Restatement (Third) of Foreign Relations Law, pt IV, ch 5, Introductory Note at 390–91 (cited in note 4). See also, for example, *Wulfsohn v Russian Socialist Federated Soviet Republic*, 138 NE 24, 26 (NY Ct App 1923) ("[Courts] may not bring a foreign sovereign before our bar, not because of comity, but because he has not submitted himself to our laws. Without his consent he is not subject to them."); *Hassard v United States of Mexico*, 29 Misc 511, 512 (NY Sup Ct 1899) ("It is an axiom of international law, of long-established and general recognition, that a sovereign State cannot be sued in its own courts, or in any other, without its consent and permission."), aff'd, 46 AD 623 (1899).

[12] See, for example, *Underhill v Hernandez*, 168 US 250, 252 (1897).

[13] See id ("The immunity of individuals from suits brought in foreign tribunals for acts done within their own States, in the exercise of governmental authority, whether as civil officers or as military commanders, must necessarily extend to the agents of governments ruling by paramount force as matter of fact.").

[14] See *Banco Nacional de Cuba v Sabbatino*, 376 US 398, 438 (1964) ("The act of state doctrine . . . although it shares with the immunity doctrine a respect for sovereign states,

From the earliest days of the nation, the Executive Branch expressed the view that the immunity of a foreign state also extended to officials acting on its behalf, at least when the conduct in question occurred outside the United States.[15] The Supreme Court endorsed this proposition in *Underhill v Hernandez*.[16] In that case, a U.S. citizen sued a Venezuelan military commander, whose revolutionary government had been recognized by the United States, for unlawful assault and detention in Venezuela. The decision is most famous for its articulation of the act of state doctrine, pursuant to which "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[17] The Supreme Court also recognized, however, that individual officials have "immunity . . . from suits brought in foreign tribunals for acts done within their own States, in the exercise of governmental authority, whether as civil officers or as military commanders."[18] Similarly, the Second Circuit in *Underhill* had concluded that a foreign state's immunity extends to suits against the state's officials for actions carried out on behalf of the state. "[B]ecause the acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers," the Second Circuit explained, "courts and publicists have recognized the immunity of public agents from suits brought in foreign tribunals for acts done within their own states in the exercise of the sovereignty thereof."[19]

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concerns the limits for determining the validity of an otherwise applicable rule of law."); see also *Altmann*, 541 US at 700 ("Unlike a claim of sovereign immunity, which merely raises a jurisdictional defense, the act of state doctrine provides foreign states with a substantive defense on the merits.").

[15] See Curtis A. Bradley and Jack L. Goldsmith, *Foreign Sovereign Immunity and Domestic Officer Suits*, 13 Green Bag 2d 137, 141–44 (2010); see also Brief for the United States of America as Amicus Curiae in Support of Affirmance, *Matar v Dichter*, No 07-2579-cv, *7 (2d Cir, filed Dec 19, 2007) ("United States *Matar* Brief") (available on Westlaw at 2007 WL 6931924) ("The immunity of a foreign sovereign was, early on, generally understood to encompass not only the state, heads of state, and diplomatic officials, but also other officials insofar as they acted on the state's behalf."); Statement of Interest of the United States of America, *Yousuf v Samantar*, at 4, No 1:04 CV 1360 (LMB) (ED Va, Feb 14, 2011) ("The immunity of a foreign state was, early on, generally understood to extend not only to the state, heads of state, and diplomatic officials, but also to other officials acting in an official capacity.").

[16] 168 US 250, 252 (1897).

[17] Id.

[18] Id. See also *Sabbatino*, 376 US at 430 (noting that "sovereign immunity provided an independent ground" in *Underhill*).

[19] *Underhill v Hernandez*, 65 F 577, 579 (2d Cir 1895). See also John Bassett Moore, 2

Starting in the late 1930s, U.S. courts began to give absolute deference to suggestions from the State Department about whether to grant immunity in particular cases.[20] If the department did not take a position on immunity, courts attempted to decide the issue "in conformity to the principles accepted by the department."[21] In 1952, the department issued the Tate Letter, which announced an important shift in the U.S. approach to sovereign immunity.[22] Addressed from the State Department's Acting Legal Adviser to the Acting Attorney General, the Tate Letter asserted that, consistent with the practice of a number of other countries, the department now supported only a "restrictive" approach to immunity, pursuant to which "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*)."[23] Among other things, the letter explained that "the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts."[24] The letter concluded with this observation: "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."[25]

Despite the letter's modesty about its potential impact on judicial decision making, courts followed the department's new re-

A Digest of International Law § 179 (1906) (collecting authorities from the late 1700s through *Underhill*).

[20] See *Compania Espanola de Navegacion Maritima, SA v The Navemar*, 303 US 68, 74 (1938); *Ex parte Republic of Peru*, 318 US 578, 588–89 (1943). Consider also *Berizzi Bros. Co. v The Pesaro*, 271 US 562, 574 (1926) (granting immunity even though the State Department had argued in the lower court that immunity should not be granted). For discussion, see Curtis A. Bradley and Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 Mich L Rev 2129, 2161–65 (1999); G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 Va L Rev 1, 27–28, 134–45 (1999).

[21] *Republic of Mexico v Hoffman*, 324 US 30, 35 (1945).

[22] See Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dept. of State, to Acting U.S. Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dept State Bull 984 (1952).

[23] Id at 984.

[24] Id at 985.

[25] Id.

strictive immunity approach.[26] They also continued to defer to the department's case-by-case suggestions about whether to grant immunity, in those cases in which the department made such suggestions,[27] even where such suggestions were arguably contrary to the Tate Letter.[28] These suggestions sometimes included suggestions of immunity for foreign officials.[29] In the absence of a State Department suggestion, courts attempted to decide the immunity issue in a manner that was consistent with the Tate Letter, although that letter did not provide much guidance about how to distinguish between a foreign state's public and private acts.[30] A two-track system eventually developed, in which in some cases a foreign state would seek an immunity determination from the State Department and in other cases the state would ask the court to make its own determination.[31] The result was that "sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations."[32] Perhaps not surprisingly, this regime did not always produce consistent decisions. The State Department also found itself acting as an adjudicative body, a role that it was ill equipped to perform, and it was frequently lobbied and pressured by foreign states to support their requests for immunity.[33]

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[26] See Restatement (Third) of Foreign Relations Law, pt IV, ch 5, Introductory Note at 392 (cited in note 4) (noting that after the Tate Letter the "courts in the United States also adopted the restrictive theory and developed criteria for its application").

[27] See, for example, *Spacil v Crowe*, 489 F2d 614, 616–17 (5th Cir 1974); *Isbrandtsen Tankers, Inc. v President of India*, 446 F2d 1198, 1201 (2d Cir 1971).

[28] See, for example, Monroe Leigh, *Sovereign Immunity—The Case of the "Imias,"* 68 Am J Intl L 280, 281 (1974), citing *Rich v Naviera Vacuba, SA*, 295 F2d 24 (4th Cir 1961), and *Chemical Natural Resources, Inc. v Republic of Venezuela*, 215 A2d 864 (Pa 1966).

[29] See, for example, *Greenspan v Crosbie*, No 74 Civ 4734 (GLG), 1976 WL 841, at *2 (SDNY, Nov 23, 1976) ("The Suggestion of Immunity removes the individual defendants from this case.").

[30] See, for example, *Victory Transport, Inc. v Comisaria General de Abastecimientos y Transportes*, 336 F2d 354, 360 (2d Cir 1964).

[31] See id at 358 ("A claim of sovereign immunity may be presented to the court by either of two procedures. The foreign sovereign may request its claim of immunity be recognized by the State Department, which will normally present its suggestion to the court through the Attorney General or some law officer acting under his direction. Alternatively, the accredited and recognized representative of the foreign sovereign may present the claim of sovereign immunity directly to the court.").

[32] *Verlinden BV v Central Bank of Nigeria*, 461 US 480, 487 (1983).

[33] For discussion of some of the problems posed by the Tate Letter regime, see Leigh, 68 Am J Intl L at 281–82 (cited in note 28), and Andreas F. Lowenfeld, *Litigating a Sovereign Immunity Claim—The Haiti Case*, 49 NYU L Rev 377, 389–90 (1974).

In 1976, with the State Department's support, Congress enacted the FSIA.[34] The statute comprehensively regulates the issue of foreign sovereign immunity in U.S. courts and provides the exclusive basis for jurisdiction over civil suits against foreign states.[35] The FSIA's legislative history makes clear that the statute was designed to "codify the so-called 'restrictive' principle of sovereign immunity, as presently recognized in international law."[36] Indeed, the statute's findings and declaration of purpose specifically provide that "[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities."[37] The FSIA also reflected an effort by Congress to transfer immunity determinations solely to the judiciary and away from the Executive Branch. As noted in the legislative history, under the FSIA "sovereign immunity decisions [would be] made exclusively by the courts and not by a foreign affairs agency."[38]

The FSIA provides that foreign states "shall be immune" from the jurisdiction of U.S. courts except as provided in certain specified exceptions.[39] Consistent with the restrictive theory of immunity, the FSIA has a broad exception to immunity for cases involving commercial activity.[40] It also has an exception to immunity for tort claims, but this exception applies only if the damage or injury from the tort occurs within the United States.[41] There is no express reference in the FSIA to suits against individual

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[34] See Foreign Sovereign Immunities Act (FSIA), Pub L No 94-583, 90 Stat 2891 (1976), codified at 28 USC §§ 1330, 1602–11.

[35] See *Republic of Argentina v Weltover, Inc.*, 504 US 607, 610 (1992); *Argentine Republic v Amerada Hess Shipping Corp.*, 488 US 428, 434–39 (1989).

[36] Foreign Sovereign Immunities Act of 1976, HR Rep No 94-1487, 94th Cong, 2d Sess 6 (1976), reprinted in 1976 USCCAN 6604, 6605.

[37] 28 USC § 1602.

[38] HR Rep No 94-1487 at 7 (cited in note 36); see also *Altmann*, 541 US at 691 (noting that the FSIA "transfers primary responsibility for immunity determinations from the Executive to the Judicial Branch").

[39] See 28 USC § 1604.

[40] 28 USC § 1605(a)(2).

[41] See 28 USC § 1605(a)(5). Since 1996, the FSIA has had an exception for certain egregious torts committed by designated "state sponsors of terrorism," but this exception currently applies to only four nations: Cuba, Iran, Sudan, and Syria. For the latest version of this exception, see 28 USC § 1605A.

officials. The statute applies to suits against "foreign state[s]," which is defined to "include[] a political subdivision of a foreign state or an agency or instrumentality of a foreign state."[42] An "agency or instrumentality" is in turn defined as "a separate legal person, corporate or otherwise . . . which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof."[43]

B. HUMAN RIGHTS LITIGATION

As a result of its limited exception for tort claims, the FSIA generally does not permit suits in U.S. courts against foreign states for human rights abuses committed abroad. International human rights litigation has nevertheless flourished in the United States during the last thirty years. The foundational decision was the Second Circuit's 1980 decision in *Filartiga v Peña-Irala*.[44] That case involved a suit by two Paraguayan citizens against a former Paraguayan police inspector for allegedly torturing and killing their family member in Paraguay. For subject matter jurisdiction, the plaintiffs relied on the Alien Tort Statute (ATS), a provision that dates back to the First Judiciary Act of 1789 and states that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[45] In allowing the case to proceed, the court in *Filartiga* famously held that foreign victims of human rights abuses committed abroad could use this statute to sue for violations of CIL, including violations of customary human rights norms.[46] Since this decision, numerous suits have been brought under the ATS concerning human rights abuses from around the world.[47]

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[42] 28 USC § 1603(a).

[43] See 28 USC § 1603(b)(1), (2). In addition, to qualify as an agency or instrumentality of a foreign state, the entity must be neither a U.S. citizen as defined in provisions governing diversity jurisdiction involving corporations nor created under the laws of a third country. 28 USC § 1603(b)(3).

[44] 630 F2d 876 (2d Cir 1980).

[45] Alien Tort Statute (ATS), 28 USC § 1350.

[46] See *Filartiga*, 630 F2d at 887–88 ("This is undeniably an action by an alien, for a tort only, committed in violation of the law of nations.").

[47] The Second Circuit assumed for the sake of argument that the ATS is only a jurisdictional statute that does not create any substantive rights. See id at 887. In 2004, the

Even though the defendant in *Filartiga* was a state official at the time of the alleged acts, and even though most violations of international law (including torture) require state action, there was no discussion in *Filartiga* of whether the suit implicated Paraguay's sovereign immunity.[48] The court's only mention of immunity was an observation that the defendant had not claimed *diplomatic* immunity.[49] Nor did the parties, or the United States as amicus curiae, raise the sovereign immunity issue.[50]

Ten years after *Filartiga*, the Ninth Circuit issued what was to become an influential decision holding that suits against foreign officials, for actions taken in their official capacity, constitute suits against the foreign state for purposes of the FSIA. In *Chuidian v Philippine National Bank*,[51] the Marcos government of the Philippines had issued a letter of credit to Chuidian, payable through the Philippine National Bank, as part of a litigation settlement. An official in the new Aquino government stopped payment on the letter of credit out of a concern that the former government might have given it to Chuidian to keep him quiet about its wrongdoing. Chuidian sued both the national bank and the official. The national bank obviously was an agency or instrumentality of the Philippines for purposes of the FSIA. The issue was whether the individual official was also covered by the FSIA. The Ninth Circuit considered three possibilities: the official was entitled to no im-

Supreme Court confirmed this assumption, while also holding that courts are authorized to recognize a modest number of common law causes of action for violations of international law when exercising jurisdiction under the ATS. See *Sosa v Alvarez-Machain*, 542 US 692, 713–14, 724 (2004).

[48] The court did "note in passing," however, that it doubted that the suit was barred by the act of state doctrine, given that the alleged conduct was "in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government." *Filartiga*, 630 F2d at 889.

[49] See id at 879.

[50] See Appellants' Brief, *Filartiga v Pena-Irala*, No 79-6090 (2d Cir, filed July 25, 1979) (available on Westlaw at 1979 WL 200205); Defendant-Appellee's Brief in Support of Judgment of Dismissal, *Filartiga v Pena-Irala*, No 79-6090 (2d Cir, filed Sept 19, 1979) (available on Westlaw at 1979 WL 200206); Memorandum for the United States as Amicus Curiae, *Filartiga v Pena-Irala*, No 79-6090 (2d Cir, filed June 6, 1980) (available on Westlaw at 1980 WL 340146). One amicus brief discussed the FSIA and argued that it was inapplicable because the defendant had not shown that he was "invested with sovereign authority" to carry out the acts alleged by the plaintiff, and because the Paraguayan government had not asserted immunity on his behalf. See Brief of the International Human Rights Law Group, the Council on Hemispheric Affairs, and the Washington Office on Latin America as Amici Curiae Urging Reversal, *Filartiga v Pena-Irala*, No 79-6090, *30 (2d Cir, filed July 23, 1979) (available on Westlaw at 1979 WL 200209).

[51] 912 F2d 1095 (9th Cir 1990).

munity whatsoever; the official was covered by the FSIA as an agency or instrumentality of a foreign state; or the official was not covered by the FSIA but was entitled to immunity under common law principles.

The Executive Branch filed an amicus curiae brief supporting the third, common law approach. The Ninth Circuit, however, adopted the second approach and applied the FSIA to the claim against the official.[52] The court noted that neither the text of the FSIA nor its legislative history specifically excluded individuals, and it reasoned that failing to apply the statute to these sorts of suits would undermine the policies of the act.[53] If no immunity were allowed in this situation, the court reasoned, the act's limitations could be circumvented by pleading: litigants could "accomplish indirectly what the [FSIA] barred them from doing directly."[54] Alternatively, if immunity were to be determined by the common law, the court reasoned, Congress's effort in the FSIA to regulate foreign sovereign immunity and its exceptions comprehensively would be undermined.[55] The Ninth Circuit also noted that under a common law approach courts likely would feel obligated to defer to the case-by-case views of the State Department, as they had done before the enactment of the FSIA, even though one of the purposes of the statute was to shift immunity determinations away from the Executive Branch.[56]

Over time, most circuit courts that considered the issue agreed with the reasoning in *Chuidian*.[57] At first, these decisions had little effect on international human rights litigation. The court in *Chuidian* had noted that the FSIA applied only to actions taken by officials in their official rather than personal capacity,[58] and most

[52] Id at 1103.

[53] Id at 1102–03.

[54] Id at 1102.

[55] See *Chuidian*, 912 F2d at 1102.

[56] See id at 1102–03.

[57] See *In re Terrorist Attacks on Sept. 11, 2001*, 538 F3d 71, 81 (2d Cir 2009); *Keller v Central Bank of Nigeria*, 277 F3d 811, 815–16 (6th Cir 2002); *Byrd v Corporacion Forestal y Industrial de Olancho, SA*, 182 F3d 380, 388–89 (5th Cir 1999); *El-Fadl v Central Bank of Jordan*, 75 F3d 668, 671 (DC Cir 1996). Courts concluded, however, that the FSIA did not apply to suits against heads of state and that such suits were instead governed by the pre-FSIA immunity regime, including deference to the Executive Branch. See, for example, *Ye v Zemin*, 383 F3d 620, 625 (7th Cir 2004); *United States v Noriega*, 117 F3d 1206, 1212 (11th Cir 1997); *Lafontant v Aristide*, 844 F Supp 128, 136–37 (EDNY 1994).

[58] See *Chuidian*, 912 F2d at 1106 ("Plainly [the defendant] would not be entitled to sovereign immunity for acts not committed in his official capacity.").

courts concluded that, when officials committed human rights abuses, they were not acting in an official capacity. The rationales for this conclusion were somewhat unclear. Several courts referred to foreign law to determine the scope of the official's authority and found, without extended analysis, that the alleged human rights violations exceeded anything that could plausibly be considered within that authority. Other courts appear to have assumed that human rights abuses are per se unauthorized acts. In general, these decisions did not consider the CIL of foreign official immunity.[59]

Two years after *Chuidian*, Congress legislated in the area of human rights litigation by enacting, in 1992, the Torture Victim Protection Act (TVPA).[60] Subject to certain limitations, the TVPA, codified as a note to the ATS, creates a cause of action for damages against individuals who, "under actual or apparent authority, or color of law, of any foreign nation," commit acts of torture or "extrajudicial killing."[61] Although the text of the TVPA does not mention immunity, there are several ambiguous references to immunity in its legislative history.[62]

Eventually, greater conflict developed between the *Chuidian* line of decisions and human rights litigation. In several cases alleging war crimes and human rights violations by Israeli officials, courts held that suits against foreign officials for their official acts, even if those acts constituted human rights abuses, were covered by the FSIA.[63] As one court explained, "[a]ll allegations stem from actions taken on behalf of the state and, in essence, the personal capacity

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[59] See, for example, *Hilao v Estate of Marcos*, 25 F3d 1467, 1471 (9th Cir 1994); *Trajano v Marcos*, 978 F2d 493, 498 (9th Cir 1992); *Doe I v Qi*, 349 F Supp 2d 1258, 1282, 1287 (ND Cal 2004); *Cabiri v Assasie-Gyimah*, 921 F Supp 1189, 1198 (SDNY 1996); *Xuncax v Gramajo*, 886 F Supp 162, 175–76 (D Mass 1995); *Paul v Avril*, 812 F Supp 207, 212 (SD Fla 1993); *Forti v Suarez-Mason*, 672 F Supp 1531, 1546 (ND Cal 1987). But see *Matar v Dichter*, 563 F3d 9, 15 (2d Cir 2009) ("A claim premised on the violation of *jus cogens* does not withstand foreign sovereign immunity.").

[60] See Torture Victim Protection Act of 1991 (TVPA), Pub L No 102-256, 106 Stat 73 (1992), codified at 28 USC § 1350 note.

[61] 28 USC § 1350 note.

[62] These references are discussed below in Section C of Part III.

[63] See *Belhas v Ya'alon*, 515 F3d 1279, 1284 (DC Cir 2008); *Matar v Dichter*, 500 F Supp 2d 284, 291 (SDNY 2009), aff'd on other grounds, 563 F3d 9 (2d Cir 2009); *Doe I v State of Israel*, 400 F Supp 2d 86, 104–05 (DDC 2005). The Second Circuit also applied the reasoning of *Chuidian* to a suit brought against (among others) four Saudi Arabian princes in which it was alleged that the princes had facilitated the September 11 terrorist attacks. See *Terrorist Attacks on Sept. 11, 2001*, 538 F3d at 83–85.

suits amount to suits against the officers for being Israeli government officials."[64] The Seventh Circuit interpreted the FSIA differently, however, in a case brought against a former Nigerian general for acts of torture and killing in Nigeria. This court reasoned that "[i]f Congress meant to include individuals acting in the official capacity in the scope of the FSIA, it would have done so in clear and unmistakable terms."[65] The court also noted that it had held in another case that the FSIA did not apply to suits against heads of state, and it asked rhetorically, "[h]ow much less, then, could the statute apply to persons, like [the general in this case], when he was simply a member of a committee, even if, as seems likely, a committee that ran the country?"[66]

C. THE SAMANTAR CASE

The conflict among the courts of appeals deepened with the Fourth Circuit's decision in *Samantar*. The plaintiffs in that case were members of the Isaaq clan in Somalia. They alleged that the defendant, Mohamed Ali Samantar, a former Prime Minister and Minister of Defense of Somalia, was responsible for human rights abuses perpetrated against the Isaaq and other Somali clans who opposed the country's Supreme Revolutionary Council. The council, which seized power in a 1969 coup in which Samantar participated, responded to growing political opposition in the 1980s by "terroriz[ing] the civilian population" with "widespread and systematic use of torture, arbitrary detention and extrajudicial killing."[67] The plaintiffs and their family members were victims of this policy. In 2004, they filed a complaint in a federal district court in Virginia, alleging that Samantar was responsible for these human rights violations because, in his capacity as Prime Minister (a position he held from January 1987 to September 1990) and Minister of Defense (an office he occupied from January 1980 to December 1986), "he knew or should have known about this conduct and, essentially, gave tacit approval for it."[68] The plaintiffs sought damages under the ATS and the TVPA.

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[64] *Doe I v Israel*, 400 F Supp 2d at 105, citing *El-Fadl*, 75 F3d at 671.

[65] *Enahoro v Abubakar*, 408 F3d 877, 881–82 (7th Cir 2005).

[66] Id at 881, citing *Ye*, 383 F3d at 625.

[67] *Yousuf v Samantar*, 552 F3d 371, 373–74 (4th Cir 2009).

[68] Id. Samantar fled to the United States in 1991 after the Council's fall from power and was living in Virginia at the time of suit. See id.

Samantar moved to dismiss the complaint, arguing that the FSIA provided him with immunity from suit and deprived the district court of subject matter jurisdiction. The district court agreed, adopting the reasoning of the *Chuidian* line of cases that the FSIA applies to suits against foreign officials for actions taken in their official capacity. The court then considered the plaintiffs' argument that Samantar's conduct could not be considered official for these purposes because it violated international norms. In rejecting this argument, the court noted that the complaint "does not allege that Samantar was acting on behalf of a personal motive or for private reasons."[69] The court also assigned "great weight" to two letters sent to the U.S. Department of State by the Prime Minister and Deputy Prime Minister of the Somali Transitional Federal Government,[70] which asserted that Samantar was "acting within the scope of his authority during the events at issue" and that his actions were "taken . . . in his official capacities."[71] The court further reasoned that allowing the lawsuit to proceed would effectively abrogate Somalia's sovereign immunity by enabling the plaintiffs to achieve "indirectly what the [FSIA] barred them from doing directly."[72]

The plaintiffs appealed the dismissal to the Fourth Circuit, which reversed the district court's immunity ruling. The court of appeals analyzed the text of the FSIA's "agency or instrumentality" provision as well as the statute's overall structure, purpose, and legislative history. It reasoned that, in choosing the words "separate legal person" in the FSIA, Congress intended to include within the statute's ambit only organizations and corporate entities, not individuals.[73] The court also agreed with the plaintiffs

[69] *Yousuf v Samantar*, 2007 WL 2220579, *11 (ED Va 2007). Each count of the complaint contained the following statement: "Defendant Samantar's acts or omission described above and the acts committed by his subordinates against [plaintiffs] were committed under actual or apparent authority, or color of law, of the government of Somalia." First Amended Complaint, *Yousuf v Samantar*, No 1:04 CV 1360 (LMB/BRP) ¶ 99 (ED Va, filed Jan 27, 2005) (available on Westlaw at 2005 WL 6382922).

[70] *Samantar*, 2007 WL 2220579 at *11. The district court had previously stayed the proceedings "to determine whether the State Department planned to provide a Statement of Interest" as the Somali officials had requested. Id at *6. When, after two years, the officials' request was "still under consideration," the court reinstated the case to the active docket and ruled on the defendant's motion to dismiss. Id.

[71] Id at *11.

[72] Id at *14, quoting *Chuidian*, 912 F2d at 1102.

[73] *Samantar*, 552 F3d at 379–80.

that "even if an individual foreign official could be an 'agency or instrumentality under the FSIA,' sovereign immunity would be available only if the individual were still an 'agency or instrumentality' at the time of suit," which Samantar clearly was not.[74] Having concluded that the FSIA did not bar the plaintiffs' ATS and TVPA claims, the Fourth Circuit declined to address Samantar's alternative argument that he was "shielded from suit by a common law immunity doctrine such as head-of-state immunity."[75] Instead, it directed the district court to consider that issue on remand.

The Supreme Court affirmed. While acknowledging that the petitioner's interpretation of the FSIA as extending to suits against foreign officials for their official acts was "literally possible," the Court said that its "analysis of the entire statutory text persuades us that petitioner's reading is not the meaning that Congress enacted."[76] "Reading the FSIA as a whole," said the Court, "there is nothing to suggest we should read 'foreign state' in [the statute] to include an official acting on behalf of the foreign state, and much to indicate that this meaning was not what Congress enacted."[77] The Court also considered the background, purposes, and legislative history of the FSIA and concluded that, although Congress had in that statute attempted to codify the common law governing *state* sovereign immunity, it had not attempted to codify the separate common law "field" of foreign official immunity.[78]

Finally, the Court disagreed with the petitioner's contention that, unless the FSIA applied to suits against foreign officials, plaintiffs could easily circumvent the FSIA's immunity protections by suing responsible officials rather than the state. Among other things, the Court noted that, "[e]ven if a suit is not governed by the [FSIA], it may still be barred by foreign sovereign immunity

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[74] Id at 383. In *Dole Food Co. v Patrickson*, 538 US 468 (2003), the Supreme Court held that the determination of whether an entity qualifies as an "instrumentality" of a foreign state for purposes of the FSIA should be based upon the facts that exist at the time of the lawsuit rather than at the time of the defendant's conduct. See id at 478–80.

[75] *Samantar*, 552 F3d at 383; see also id at 383–84 (noting Samantar's reliance on an "immunity doctrine arising under pre-FSIA common law").

[76] *Samantar*, 130 S Ct at 2286.

[77] Id at 2289 (footnote omitted).

[78] Id at 2289–90.

under the common law."[79] The Court did not, however, provide any guidance about the contours of this possible common law immunity. Emphasizing the "narrowness" of its holding, the Court observed that, "[w]hether petitioner may be entitled to immunity under the common law, and whether he may have other valid defenses to the grave charges against him, are matters to be addressed in the first instance by the District Court on remand."[80]

D. LACK OF CONSIDERATION OF INTERNATIONAL LAW

Although seemingly straightforward, the *Samantar* decision is noteworthy for what is missing from the Court's analysis, namely, any consideration of what international law might have to say about immunity in suits brought against foreign officials. This omission is significant for a number of reasons.

First, as explained above, the FSIA was intended to codify principles of international law relating to sovereign immunity. Indeed, the Court had acknowledged only a few years before *Samantar* that the FSIA had "two well-recognized and related purposes"—the "adoption of the restrictive view of sovereign immunity and codification of international law at the time of the FSIA's enactment."[81] Although the Supreme Court has sometimes stated that sovereign immunity "is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution,"[82] it has never denied that immunity also implicates principles of international law, and that is also the widespread view of commentators and of courts in other nations.[83] In light of this,

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[79] Id at 2292. The Court also described two other limitations that mitigated "the risk that plaintiffs may use artful pleading to attempt to select between application of the FSIA or the common law." Id. First, "the foreign state itself, its political subdivision, or an agency or instrumentality [may be] a required party," a result that might result in dismissal of the suit "regardless of whether the official is immune or not under the common law." Id. Second, "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. In both of these instances, the FSIA would presumably be brought back into play and determine whether the district court had subject matter jurisdiction.

[80] Id at 2292–93.

[81] *Permanent Mission of India to the United Nations v City of New York*, 551 US 193, 199 (2007). The Court in *Samantar* acknowledged this point, noting further that it had previously "examined the relevant common law *and international practice* when interpreting the [FSIA]." *Samantar*, 130 S Ct at 2289 (emphasis added).

[82] *Verlinden*, 461 US at 486.

[83] See, for example, Hazel Fox, *The Law of State Immunity* 13 (Oxford, 2d ed 2008) ("That immunity is a rule of law is generally acknowledged by States."); Restatement

one might have expected the Court to consider what international law had to say—at least as of 1976—about whether and to what extent the immunity of a state was triggered by a suit against the state's officials.

Second, many of the briefs submitted to the Court in *Samantar* discussed international law. The petitioner devoted several pages of his brief to the topic, contending that "international law in 1976 extended the state's immunity to its officials for the obvious reason that, since the state can only act through its officials, those officials are indistinguishable from the state itself, so stripping their immunity would substantially undermine the state's immunity."[84] Several of the amicus briefs submitted in support of the petitioner, especially the brief submitted by the American Jewish Congress, elaborated in detail on the contours of foreign official immunity under international law.[85] On the other side of the case, the respondents, while emphasizing the FSIA's text, argued at length that international law did not require immunity in damages suits brought against individual officials.[86] Some of the amicus briefs in support of the respondents, most notably the brief submitted on behalf of a group of international law professors, elaborated on this argument.[87]

Third, there is a well-settled canon of construction pursuant to which courts will interpret federal statutes, when reasonably possible, in a manner that avoids violations of international law.[88]

(Third) of Foreign Relations Law, pt IV, ch 5, Introductory Note at 390 (cited in note 4) ("The immunity of a state from the jurisdiction of the courts of another state is an undisputed principle of customary international law."); Green Haywood Hackworth, 2 *Digest of International Law* § 169 (1941) ("While it is sometimes stated that [jurisdictional exemptions for sovereigns] are based upon international comity or courtesy, and while they doubtless find their origin therein, they may now said to be based upon generally accepted custom and usage, i.e. international law.").

[84] Brief of Petitioner, *Samantar v Yousuf*, No 08-1555, *21–*22 (filed Nov 30, 2009) ("Brief of Petitioner") (available on Westlaw at 2009 WL 4320417); see also id at *35–*41.

[85] See Amicus Curiae Brief of the American Jewish Congress in Support of Petitioner, *Samantar v Yousuf*, No 08-1555, *10–*28 (filed Dec 4, 2009) (available on Westlaw at 2009 WL 4709540).

[86] Brief for the Respondents, *Samantar v Yousuf*, No 08-1555, *39–*48 (filed Jan 20, 2010) (available on Westlaw at 2010 WL 265636).

[87] See Brief of Professors of Public International Law and Comparative Law as Amici in Support of Respondents, *Samantar v Yousuf*, No 08-1555, *14–*34 (filed Jan 27, 2010) (available on Westlaw at 2010 WL 342033).

[88] See Restatement (Third) of Foreign Relations Law, § 114 (cited in note 4); *Murray v Schooner Charming Betsy*, 6 US (2 Cranch) 64, 118 (1804).

Samantar invoked this "*Charming Betsy*" canon and argued that a denial of immunity in the case would violate CIL.[89] This invocation of the *Charming Betsy* canon prompted the decision's only reference to international law. In a short footnote, the Court stated:

> We find similarly inapposite petitioner's invocation of the canon that a statute should be interpreted in compliance with international law, see Murray v. Schooner Charming Betsy, [6 U.S.] 2 Cranch 64, 118 (1804), and his argument that foreign relations and the reciprocal protection of United States officials abroad would be undermined if we do not adopt his reading of the Act. Because we are not deciding that the FSIA bars petitioner's immunity but rather that the Act does not address the question, we need not determine whether declining to afford immunity to petitioner would be consistent with international law.[90]

Technically, the Court was correct. Even if CIL requires the conferral of immunity in suits against foreign officials, the United States would still be in compliance with international law if it conferred this immunity through application of the common law rather than through a statute. As a result, the Court's interpretation of the FSIA—whereby the statute does not address the issue of immunity in suits against foreign officials but instead leaves that issue to be resolved through the common law—does not necessarily place the United States in breach of international law. Nevertheless, the Court has at other times assumed that Congress has not left open the issue of international law compliance. Perhaps most notably, the Court in *Hamdan v Rumsfeld*,[91] in construing the references in the Uniform Code of Military Justice to the use of military commissions, assumed that Congress intended to require compliance with international law.[92] The Court's opinion in *Hamdan*, moreover, was authored by Justice Stevens, the same Justice who wrote the opinion in *Samantar*.[93]

A final reason why the omission of international law in *Samantar*

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[89] See Brief of Petitioner at *40 (cited in note 84).

[90] *Samantar*, 130 S Ct at 2290 n 14.

[91] 548 US 557 (2006).

[92] See id at 625–35.

[93] The comprehensive nature of the FSIA, and Congress's desire to shift immunity determinations away from the Executive Branch, might also have weighed against the conclusion that Congress had allowed the pre-1976 common law regime to continue. Consider also *Altmann*, 541 US at 699 (noting that "Congress established a comprehensive framework for resolving any claim of sovereign immunity").

is noteworthy concerns recent judicial rulings from other countries that *have* taken account of the CIL of immunity when construing similar statutory provisions. For example, the British House of Lords, in a 2006 decision that was discussed extensively in the briefs, relied heavily on international law in construing the word "State" in Britain's State Immunity Act to encompass foreign officials acting in an official capacity.[94] The structure of the British statute is similar to that of the FSIA and, like the FSIA, does not expressly cover suits against individual officials. Nevertheless, in large part because of what it believed international law to require, the House of Lords concluded that the statute should be construed to apply to such suits.[95]

Regardless of whether foreign court decisions such as this one correctly assessed the current state of CIL immunity for foreign officials (an issue we address below in Part II), they demonstrate the potential relevance of international law to the construction of foreign sovereign immunity statutes. It is unclear why the Justices in *Samantar* did not at least consider whether those decisions or other sources of international law might be instructive. By contrast, only three years earlier, in *Permanent Mission of India to the U.N. v City of New York*,[96] the Court considered "international practice at the time of the FSIA's enactment" when construing an ambiguity in the statute.[97] The authorities that the Court referenced there included a multilateral treaty on diplomatic immunity, a report of the International Law Commission, and judicial decisions from the United Kingdom and the Netherlands.[98]

Of course, even if the Court had taken account of international law in *Samantar*, it might still have reached the same conclusion as a matter of statutory interpretation. Regardless of whether international law requires the conferral of immunity in suits alleging

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[94] See *Jones v Saudi Arabia*, 129 Intl L Rep 713 (House of Lords 2006).

[95] See, for example, id at 717–18, ¶ 10 (Lord Bingham) (reasoning that when a foreign state's officials are sued for acts taken within the foreign state, there is a "wealth of authority" in support of allowing the foreign state to "claim immunity for its servants as it could if sued itself"). See also, for example, *Zhang v Zemin*, NSWSC 1296, ¶¶ 20–23 (New South Wales S Ct), online at http://www.lawlink.nsw.gov.au/scjudgments/2008nswsc.nsf/2008nswsc.nsf/WebView2/716C1BB1E68711A3CA25751500191BE0?OpenDocument (construing the Foreign States Immunities Act of Australia, in light of international law, as extending immunity "to members of the foreign government through whom the State acts").

[96] 551 US 193 (2007).

[97] Id at 200.

[98] Id at 201.

human rights violations by foreign officials, the Court could reasonably have concluded that Congress did not address that issue in the FSIA. There were, after all, relatively few suits against foreign officials prior to the FSIA's enactment in 1976, and there is no mention of them in the FSIA's legislative history.[99] In subsequent years, the *Filartiga* line of cases and other developments have made the issue much more salient, but Congress probably did not anticipate that development.

Seen in this light, the case might have raised the question of whether the Court should, in effect, adjust or update the FSIA to address an issue not specifically considered by Congress. There are institutional arguments against such judicial updating, although these considerations may have been tempered by the longstanding nature of the *Chuidian* line of cases and Congress's failure to overturn those cases' construction of the statute. Moreover, in other contexts, the Court has attempted to translate statutory purposes to take account of current conditions; indeed, the Court expressly did so when interpreting the ATS to allow for modern human rights litigation.[100] In any event, the Court in *Samantar* never addressed this question because it did not expressly consider the international law backdrop of the case.

II. The Immunity of Foreign Officials Under Customary International Law

In this part, we consider the extent to which foreign officials are entitled to immunity in other nations' courts as a matter of

[99] See *Samantar*, 130 S Ct at 2291 n 18 (noting that "[a] study that attempted to gather all of the State Department decisions related to sovereign immunity from the adoption of the restrictive theory in 1952 to the enactment of the FSIA reveals only four decisions related to official immunity, and two related to head of state immunity, out of a total of 110 decisions"). Mark Feldman, a participant in the drafting of the FSIA, explained the statute's silence on the issue of head-of-state immunity (a status immunity under international law for certain high-level officials) as follows: "Frankly, we forgot about it, or didn't know enough about it at the time, during those two or three critical years when the statute was being formulated." Panel, *Foreign Governments in United States Courts*, 85 Am Socy Intl L Proc 251, 276 (1991).

[100] See *Sosa v Alvarez-Machain*, 542 US 692, 725 (2004); see also Curtis A. Bradley, Jack L. Goldsmith, and David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 Harv L Rev 869, 873 (2007) (explaining that *Sosa* "was, in effect, a translation of the specific intentions of the [Alien Tort Statute] framers to the regime of post-*Erie* federal common law"); Richard H. Fallon, Jr. et al, *Hart and Wechsler's The Federal Courts and the Federal System* 682–83 (Foundation, 6th ed 2009) (discussing the translation issue presented in *Sosa*).

CIL. As noted above, CIL arises from state practice that is followed out of a sense of legal obligation. For the issue of foreign official immunity, the most relevant state practice will likely be the decisions of national courts.[101] The decisions of international tribunals, even if not technically part of state practice,[102] will also be relevant, in that they may reflect consensus or create expectations about the relevant legal principles.[103]

A review of these materials shows that CIL has long distinguished between immunity based on the status of a government official and immunity based on the subject matter of an official's conduct. With respect to the first type of immunity, referred to as "status immunity" or "immunity *ratione personae*," certain officials such as diplomats and "heads of state" (a category that includes presidents, prime ministers, monarchs, and foreign ministers) are immune from the civil and criminal jurisdiction of other nations' courts.[104] The rationales for granting status immunity are threefold: "to ensure the effective performance of [the officials'] functions on behalf of their respective States";[105] to facilitate "the proper functioning of the network of mutual inter-State relations";[106] and to preserve the sovereign equality and dignity of the state itself, which

[101] See International Law Association, Committee on Formation of Customary (General) International Law, *Statement of Principles Applicable to the Formation of General Customary International Law* § 9, cmt d (2000) ("Domestic courts, too, are organs of the State, and their decisions should also be treated as part of the practice of the State. . . . [such as with] a determination that international law does or does not require State immunity to be accorded in a particular case . . . .").

[102] See id at § 10.

[103] Although there is general agreement on the definition of CIL, there are many theoretical debates and uncertainties surrounding its application. These include how extensive and widespread state practice must be, how quickly CIL can develop, and the circularity of requiring nations to act out of a sense of legal obligation (*opinio juris*) before they are bound to an emerging custom. See Curtis A. Bradley and Mitu Gulati, *Withdrawing from International Custom*, 120 Yale L J 202, 210–11 (2010). We do not engage with these debates in this article, but the materials that we rely on in discussing the CIL of foreign official immunity are relatively standard for this topic.

[104] In addition to diplomatic and head-of-state immunity, foreign officials who participate in task-specific visits to other states may enjoy "special mission immunity," a doctrine recognized in CIL and in the Convention on Special Missions, Dec 8, 1969, 1410 UNTS 231. See, for example, *Li v Bo*, 568 F Supp 2d 35 (DDC 2008) (deferring to Executive suggestion of special mission immunity).

[105] *Case Concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v Belgium*) (merits), 2002 ICJ Rep 3, 22 at ¶ 53.

[106] *Immunity of State Officials from Foreign Criminal Jurisdiction: Memorandum Prepared by the Secretariat*, International Law Commission, 60th Sess (Mar 31, 2008), UN Doc A/CN.4/596 36 at ¶ 148 ("ILC Secretariat Memorandum").

the official embodies. Status immunity is substantively broad; it applies to all claims against the official, regardless of whether they concern public or private acts or whether the acts took place during the official's time in office. But status immunity is also temporary; it ends when the official leaves office.

The second type of immunity is "conduct immunity" or "immunity *ratione materiae*." Unlike status immunity, conduct immunity "covers only official acts, that is, conduct adopted by a State official in the discharge of his or her functions."[107] The rationales for conduct immunity are linked to its scope. Since a state can only act through its officials, the state's immunity would be undermined if those officials could be sued for acts carried out on the state's behalf. A related justification is that "a state official is not accountable to other states for acts that he accomplishes in his official capacity and that therefore must be attributed to the state" under the international law of state responsibility.[108] Inasmuch as conduct immunity is based on the individual's actions and not his personal status, it extends to all government officials who carry out state functions. For the same reason, conduct immunity does not depend on whether the official is currently in office and thus applies equally to former officials.[109]

Traditionally, CIL has extended immunity *ratione materiae* to officials sued or prosecuted in foreign courts for conduct that is imputable to their state. Hazel Fox, a leading expert on foreign sovereign immunity, describes this traditional view:

> An individual enjoys no immunity in his or her own right. But a State as an artificial person created by the law can act only by means of individual human beings. Under municipal law acts performed by an agent on behalf of another may give rise to liability on behalf of both principal and agent or, where the agent is understood purely as a conduit, a means of communication, give rise to sole liability on the part of the principal. The doctrine of imputability of the acts of the individual to the State has in classical law assumed the second analysis to be correct and con-

[107] Id at ¶ 154; see also *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v France*) (merits), 2008 ICJ 177, 243 at ¶ 191 (indicating that immunity *ratione materiae* extends only to "acts within the scope of [officials'] duties as organs of State").

[108] See Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, 13 Eur J Intl L 853, 862 (2002).

[109] As this description indicates, the two types of immunities sometimes overlap, such as when a high-ranking official performs acts in the exercise of his or her official functions. See id at 864.

> sequently imputes the act solely to the state, who alone is responsible for its consequence. In consequence any act performed by the individual as an act of the State enjoys the immunity which the State enjoys.[110]

This view that the conduct immunity of foreign officials derives from the CIL of foreign state immunity was understood as a general rule, "any exception [to which] must be based on a special rule of customary or conventional international law."[111] This approach is also reflected in the UN Convention on Jurisdictional Immunities of States and their Property ("UN Immunities Convention"), a proposed multilateral treaty that was endorsed by the UN General Assembly in 2004.[112] The Convention—which defines a "State" to include "representatives of the State acting in that capacity"[113]—provides as one of its "general principles" that "[a] State enjoys immunity . . . from the jurisdiction of the courts of another State," and it expressly enumerates the limited exceptions to immunity in "the provisions of the present Convention."[114]

Over the last decade, however, a growing number of domestic and international judicial decisions have considered whether a foreign official acts as an arm of the state, and thus is entitled to conduct immunity, when that official allegedly violates a *jus cogens* norm of international law or commits an international crime. A *jus cogens* norm is a rule of international law that has been "accepted and

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[110] Fox, *The Law of State Immunity* at 455 (cited in note 83). See also, for example, Hans Kelsen, *Principles of International Law* 235 (Rinehart, 1952) (explaining that "no state has jurisdiction over another state . . . not only in case a state as such is sued in a court of another state but also in case an individual is the defendant or the accused and the civil or criminal delict for which the individual is prosecuted has the character of an act of state"); *Underhill*, 168 US at 252.

[111] Hans Kelsen, *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals*, 31 Cal L Rev 530, 551 (1943).

[112] UN Convention on Jurisdictional Immunities of States and their Property, Resolution 59/38, UN General Assembly, 59th Sess (Dec 2, 2004), UN Doc A/Res/59/38 Annex. Although the Convention had not entered into force as of early 2011, many commentators consider it as "the most authoritative restatement of current customary law on state immunity." Thilo Rensmann, *Impact on the Immunity of States and Their Officials*, in Menno T. Kamminga and Martin Scheinin, eds, *The Impact of Human Rights Law on General International Law* 151, 153 (Oxford, 2009).

[113] UN Convention on Jurisdictional Immunities, Art 2(b)(iv) (cited in note 112); see also id at Art 6(2)(b) ("A proceeding before a court of a State shall be considered to have been instituted against another State if that other State . . . is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State").

[114] Id at Art 5; see also Christopher Keith Hall, *UN Convention on State Immunity: The Need for a Human Rights Protocol*, 55 Intl & Comp L Q 411, 415 (2006) ("The Convention establishes a broad general rule of immunity, subject to a number of limited exceptions.").

recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[115] Norms commonly said to qualify as *jus cogens* include the prohibitions on genocide, slavery, and torture.[116] International crimes include genocide, war crimes, and crimes against humanity.[117] (For ease of reference, we label all of these acts as *jus cogens* violations.)

The cases addressing the relationship between *jus cogens* norms and immunity are numerous and varied. They include both criminal prosecutions and civil suits for damages; complaints against both serving and former heads of state, military officers, and lower-level government officials; litigation in domestic courts; and proceedings before international tribunals and review bodies. A review of this burgeoning case law, as well as the drafting history of international conventions, studies of expert bodies such as the International Law Commission,[118] and the writings of commentators that have interpreted these developments, suggests the following propositions.

First, sitting heads of state are entitled to status immunity in both criminal investigations and prosecutions and in civil suits for damages in the domestic courts of other countries, including in cases alleging violations of *jus cogens*.[119] The International Court of Justice (ICJ) reaffirmed this principle in its 2002 judgment in the *Arrest*

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[115] Vienna Convention on the Law of Treaties, Art 53, 1155 UN Treaty Ser 332, 8 Intl Leg Mat 679 (1969). The *jus cogens* category of international law is not free from controversy. See, for example, A. Mark Weisburd, *The Emptiness of the Concept of Jus Cogens, as Illustrated by the War in Bosnia-Herzegovina*, 17 Mich J Intl L 1 (1995).

[116] See Restatement (Third) of Foreign Relations Law § 702, cmt n (cited in note 4).

[117] See, for example, Rome Statute of the International Criminal Court, Art 5, 2187 UN Treaty Ser 90 (1998).

[118] The International Law Commission (ILC) is a body composed of twenty-four international law experts elected by the General Assembly to promote the codification and progressive development of international law, including by proposing draft conventions. In 2007, the ILC began a study of the "immunity of State officials from foreign criminal jurisdiction" with the aim of making a contribution to ensuring a proper balance between combating impunity for human rights abuses and stable and predictable interstate relations. See *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, International Law Commission (Roman Anatolevich Kolodkin, Special Rapporteur), 60th Sess (May 29, 2008), UN Doc A/CN4/601 9 at ¶ 17–18. In 2008, the ILC Secretariat published a detailed analysis of state practice and national and international court decisions. ILC Secretariat Memorandum (cited in note 106).

[119] Immunity does not apply to international prosecutions for violations of *jus cogens* norms because the treaties and statutes of international courts and tribunals expressly abrogate both status and conduct immunity. See Robert Cryer et al, *An Introduction to International Criminal Law and Procedure* 550–56 (Cambridge, 2d ed 2010).

Warrant Case,[120] which concerned a warrant for the arrest of the foreign minister of the Democratic Republic of Congo issued by a magistrate judge in Belgium pursuant to that country's "universal jurisdiction" statute.[121] The ICJ held that the warrant violated the status immunity of incumbent foreign ministers, whose functions as state representatives entitle them to "full immunity from criminal jurisdiction and inviolability" during their term of office even against allegations "of having committed war crimes or crimes against humanity."[122] National courts have consistently followed the ICJ's analysis and dismissed suits against sitting heads of state alleging *jus cogens* violations.[123]

Second, a growing number of international and national courts have abrogated the conduct immunity of former heads of state as well as current and former lower-level officials from *criminal* investigations and prosecutions for *jus cogens* violations, especially where international law provides a basis for exercising universal jurisdiction. This trend can be traced to the *Pinochet* case,[124] a watershed 1999 decision in which the British House of Lords held that Chile's former head of state could be extradited to Spain to stand trial for torture. The majority opinions relied heavily on the Convention Against Torture, in particular the provision authorizing states parties to exercise universal criminal jurisdiction. According to Lord Brown-Wilkinson, "the whole elaborate structure of universal jurisdiction over torture committed by officials [would be] rendered abortive and one of the main objectives of the Torture Convention—to provide a system under which there is no safe haven for torturers—[would be] frustrated"[125] if former officials charged

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[120] *Case Concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v Belgium*) (merits) 2002 ICJ 3.

[121] When an offense falls within universal jurisdiction, all nations of the world are said to have the authority to prosecute the offense. See Restatement (Third) of Foreign Relations Law § 404, cmt a (cited in note 4).

[122] *Arrest Warrant Case*, 2002 ICJ 3, at 22–24, ¶¶ 54, 58.

[123] See, for example, *Re General Shaul Mofaz*, 128 Intl L Rep 709 (Dist Ct, Bow Street 2004) (Israeli Minister of Defense); *Re Bo Xilai*, 128 Intl L Rep 713 (Dist Ct, Bow Street 2005) (Chinese Minister for Commerce and International Trade); *SOS Attentats et Béatrice Castelnau d'Esnault c Gadafy*, 125 Intl L Rep 490 (French Court of Cassation) (Mar 13, 2001) (Libyan head of state); *Auto del Juzgado Central de Instrucción No. 4* (Spanish Audiencia Nacional 2008), at 151–57 (granting immunity to the President of Rwanda and noting similar grants of immunity to Cuban President Fidel Castro, the King of Morocco, and the President of Equatorial Guinea).

[124] *Regina v Bartle*, ex parte *Pinochet*, 38 Intl Legal Mat 581 (House of Lords 1999).

[125] Id at 595 (Lord Brown-Wilkinson).

with torture were accorded conduct immunity. Consistent with this reasoning, the court limited Pinochet's extradition to allegations that occurred after Chile, Spain, and the United Kingdom had all ratified the Convention and after the United Kingdom had enacted legislation making torture an extraterritorial crime.

In the decade following *Pinochet*, courts and prosecutors across Europe and elsewhere have commenced criminal proceedings against former officials of other nations for torture and other violations of *jus cogens*.[126] In Spain, criminal investigations are under way against former heads of state, government ministers, and high-level military officials from Argentina, China, El Salvador, Guatemala, Israel, Morocco, Rwanda, and the United States.[127] In France, prosecutors obtained convictions for torture *in absentia* against a former Mauritanian army officer[128] and *in personam* against a Tunisian ex-police chief.[129] After the Netherlands amended its criminal code to recognize status but not conduct immunity for *jus cogens* violations,[130] a former head of Afghan intelligence and his deputy and a former Zairian army colonel were tried and convicted of torture.[131] A judge in Argentina is investigating the torture and disappearances of political opponents of the Franco regime in Spain.[132] And in Italy, a Nazi army sergeant was convicted *in absentia*

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[126] For a review of recent cases in Europe, see ILC Secretariat Memorandum (cited in note 106). See also *The AU-EU Expert Report on the Principle of Universal Jurisdiction*, Council of the European Union, Council Secretariat (Apr 16, 2009), EU Doc 8672/1/09 Rev 1 24–26 at § 24(vii). For a thoughtful analysis of these cases, see Ed Bates, *State Immunity for Torture*, 7 Hum Rts L Rev 651 (2007).

[127] See Ignacio de la Rasilla del Moral, *The Swan Song of Universal Jurisdiction in Spain*, 9 Intl Crim L Rev 777, 778–80, 785–86 (2009); see also Naomi Roht-Arriaza, *Making the State Do Justice: Transnational Prosecutions and International Support for Criminal Investigations in Post-Armed Conflict Guatemala*, 9 Chi J Intl L 79 (2008).

[128] *Fédération Internationale des Ligues des Droits de l'Homme v Ould Dah* (Nîmes Assize Ct 2005).

[129] *Gharbi v Ben Saïd* (Strasbourg Assize Ct 2008); see also *France Jails Tunisian Diplomat for Torture*, AFP, Dec 15, 2008, online at http://www.google.com/hostednews/afp/article/ALeqM5gTIWQI7cr9uGHdU-0zW5gfr0mjxA.

[130] International Crimes Act 2003, Art 16 (excluding prosecutions of *jus cogens* violations committed by "foreign heads of state, heads of government and ministers of foreign affairs, *as long as they are in office*") (emphasis added); see also M. Boot-Matthijssen and R. van Elst, *Key Provisions of the International Crimes Act 2003*, 35 Neth YB Intl L 251, 286–88 (2004) (analyzing the influence of the ICJ's *Arrest Warrant Case* on the Act).

[131] See Naomi Roht-Arriaza, *Guatemala Genocide Case*, 100 Am J Intl L 212, 213 & n 32 (2006).

[132] Giles Tremlett, *Argentinian Judge Petitions Spain to Try Civil War Crimes of Franco*, The Guardian (Oct 26, 2010), online at http://www.guardian.co.uk/world/2010/oct/26/argentina-spain-general-franco-judge.

of war crimes against Italian civilians during World War II.[133] International courts and treaty bodies have also consistently upheld assertions of criminal jurisdiction by domestic courts over former officials charged with torture.[134] There are a few exceptions to this trend,[135] and several countries have recently narrowed their universal jurisdiction statutes in response to controversies engendered by criminal complaints against foreign officials.[136] But these developments are unlikely to prevent the formation of a CIL exception to conduct immunity in criminal proceedings involving alleged *jus cogens* violations.[137]

Third, there has been less erosion to date of foreign official immunity in the civil context. Most noteworthy is a series of rulings by the Court of Cassation of Italy asserting jurisdiction over civil suits against Germany and German military officers alleging *jus cogens* violations committed in part on Italian territory during World War II.[138] But a number of other jurisdictions have rejected a *jus*

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[133] *Criminal Proceedings Against Milde*, 92 Rivista di diritto internazionale 61 (Italian Ct of Cassation 2009), reprinted and translated in Oxford Rep Intl L in Dom Cts 1224 (discussing conviction *in absentia* by Military Court of First Instance of La Spezia and subsequent civil proceedings).

[134] See, for example, *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite* (*Belgium v Senegal*), ICJ Order No 144 (May 28, 2009) (criminal proceedings against ex-President of Chad for torture), online at http://www.icj-cij.org/docket/files/144/15149.pdf; *Communication No. 181/2001: Senegal*, Committee Against Torture, 36th Sess (May 19, 2006), UN Doc CAT/C/SR.646/Add.1 ¶¶ 9–11 (same); *Ould Dah v France*, App No 13113/03 (Eur Ct Hum Rts 2009) (admissibility decision) (dismissing Mauritanian ex-army officer's challenge to a conviction for torture by a French court and affirming France's authority to exercise universal criminal jurisdiction over allegations of torture).

[135] The two most prominent examples are a French prosecutor's refusal, in 2008, to investigate torture allegations against former U.S. Secretary of Defense Donald Rumsfeld, Letter from Public Prosecutor (Procureur général), Court of Appeal of Paris, to Patrick Baudouin (Feb 27, 2008), online at http://ccrjustice.org/files/Rumsfeld_FrenchCase_ProsecutorsDecision_02_08.pdf, and a German federal prosecutor's decision in 2005 to recognize the conduct immunity of former Chinese President Jiang Zemin. See Human Rights Watch, *Universal Jurisdiction in Europe: The State of the Art* 64 (2006).

[136] See, for example, de la Rasilla del Moral, 9 Intl Crim L Rev at 804 (cited in note 127) (discussing 2009 revision of Spain's universal jurisdiction statute); Steven R. Ratner, *Belgium's War Crimes Statute: A Post-Mortem*, 97 Am J Intl L 888 (2003) (discussing 2003 revision of similar statute in Belgium); see also Police Reform and Social Responsibility Bill, UK House of Commons (Nov 30, 2010), online at http://www.publications.parliament.uk/pa/cm201011/cmbills/116/11116.i-v.html (proposing amendment to the United Kingdom's universal jurisdiction statute to remove the exclusive power of local magistrates to grant arrest warrants and require that all such warrants be approved by the Director of Public Prosecutions).

[137] The precise contours of this exception could be affected by the views of the ILC, which has been studying the immunity of state officials from foreign criminal jurisdiction since 2007. See explanation and sources cited in note 118.

[138] The leading Italian case is *Ferrini v Germany*, 87 Rivista di diritto internazionale 539

cogens exception to foreign official immunity in civil cases, including appellate court decisions from Australia,[139] New Zealand,[140] and the United Kingdom.[141] Although not directly on point, the reasoning of a decision from Canada is also consistent with this pro-immunity position.[142] Furthermore, although a decision from Greece seemed to accept a *jus cogens* limitation on immunity, a subsequent decision from another court in Greece reached the opposite conclusion.[143]

Jones v Saudi Arabia,[144] a 2006 ruling of the British House of Lords, is the leading case for the pro-immunity view. The plaintiffs in *Jones* sued Saudi Arabia and several Saudi officials (a colonel in

(Italian Ct of Cassation 2004), reprinted and translated in Oxford Rep Intl L in Dom Cts 19. For further analysis, see Andrea Gattini, *War Crimes and State Immunity in the Ferrini Decision*, 3 J Intl Crim Just 224, 230 (2005). In addition, a few domestic courts in Europe reviewing criminal prosecutions for *jus cogens* violations appear to have awarded damages to victims. See Written Comments by Redress, Amnesty International, Interights, and Justice, *Jones v UK*, App No 34356/06; *Mitchell v UK*, App No 40528/06, *6, at ¶ 21 (Eur Ct Hum Rts, filed Feb 24, 2010), online at http://www.interights.org/jones.

[139] See *Zhang v Zemin*, NSWSC 1296, at ¶¶ 20–23 (New S Wales S Ct 2008), online at http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2008/1296.html; see also *Habib v Commonwealth of Australia*, FCAFC 12, at ¶¶ 85, 115 (Fed Ct of Austl 2010) (in a suit against Australian government for aiding and abetting torture by foreign officials, the court stated that it was "common ground" that "if the agents of Pakistan, Egypt and the USA were sued directly in an Australian court for the alleged acts . . . those agents would be entitled to invoke sovereign immunity," citing *Jones*), online at http://www.austlii.edu.au/au/cases/cth/FCAFC/2010/12.html.

[140] See *Fang v Jiang*, NZAR 420, ¶ 62 (High Ct of NZ 2007), reprinted in Oxford Rep Intl L in Dom Cts 1226.

[141] See *Jones*, 129 Intl L Rep 713, 726 at ¶ 24 (House of Lords 2006).

[142] In *Bouzari v Islamic Republic of Iran*, 71 OR (3d) 675, at ¶ 95 (Ontario Ct of App 2004), the Court of Appeal concluded that Canada's State Immunity Act, Section 2 of which defines "foreign state" to include "any sovereign or other head of the foreign state or of any political subdivision of the foreign state while acting as such in a public capacity," applied even to claims of torture. It should be noted, however, that the Committee Against Torture—the body of human rights experts that reviews implementation of the Convention Against Torture and issues nonbinding recommendations to states parties—expressed concern over this interpretation of the State Immunity Act when reviewing Canada's periodic report in 2005. See *Fourth and Fifth Periodic Reports of Canada*, Committee Against Torture, 34th Sess (May 13, 2005), UN CAT/C/SR.646/Add.1.

[143] In *Prefecture of Voiotia v Federal Republic of Germany*, Case No 11/2000 (Greek Ct of Cassation 2000), the Greek Court of Cassation adopted an implied waiver theory to deny immunity to Germany in a case alleging *jus cogens* violations by the German military in Greece during World War II. See Maria Gavouneli and Elias Bantekas, *Case Report: Prefecture of Voiotia v. Federal Republic of Germany*, 95 Am J Intl L 198 (2001). The Greek Special Supreme Court—convened to decide cases involving the interpretation of international law—later disagreed with the Court of Cassation and rejected the plaintiffs' attempt to enforce the judgment against Germany. See *Margellos v Federal Republic of Germany*, Case No 6/2002 (Greek Special S Ct 2002). For a discussion, see Elena Vournas, Comment, *Prefecture of Voiotia v. Federal Republic of Germany: Sovereign Immunity and the Exception for Jus Cogens Violations*, 21 NY L Sch J Intl & Comp L 629, 648 (2002).

[144] 129 Intl L Rep 713 (House of Lords 2006).

the Ministry of Interior, a deputy prison governor, and two police officers), whom they alleged were responsible for torture that occurred "in discharge or purported discharge of [their] duties."[145] As with its earlier *Pinochet* decision, the House of Lords gave careful consideration to the Convention Against Torture. It first rejected the plaintiffs' contention that "torture . . . cannot attract immunity *ratione materiae* because it cannot be an official act,"[146] reasoning that this contention was inconsistent with the treaty's definition of torture: acts "inflicted by or with the connivance of a public official or other person acting in an official capacity."[147] The court also reasoned that whereas the Convention implicitly abrogated immunity in criminal cases by authorizing universal jurisdiction, no similar jurisdictional grant existed for civil suits.[148] The court further expressed the view that "[t]he foreign state's right to immunity cannot be circumvented by suing its servants or agents."[149] Finally, the House of Lords denied that the recognition of immunity conflicted with torture's unquestioned status as a *jus cogens* norm. By refusing to allow the suit, the court asserted that it was not "justifying the use of torture"; rather, it was giving effect to "a procedural rule going to the jurisdiction of a national court" and "divert[ing] any breach of [*jus cogens*] to a different method of settlement."[150]

The leading decision supporting a *jus cogens* exception to immunity in civil suits is *Ferrini v Germany*,[151] a case involving the Nazi military's deportation of the plaintiff from Italy to a German

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[145] Id at 714–18, ¶¶ 2–3, 11 (Lord Bingham).

[146] Id at 744, ¶ 85 (Lord Hoffman).

[147] Id at 723–24, ¶ 19 (Lord Bingham); see also id at 744, ¶¶ 83–84 (Lord Hoffman).

[148] Id at ¶ 25 (Lord Bingham); id at 733–37, ¶¶ 46, 57 (Lord Hoffman).

[149] Id at ¶ 10 (Lord Bingham); see also Bates, 7 Hum Rts L Rev at 655 (noting "the Law Lords' clear conclusion that the immunity *ratione materiae* that attached to the State could not be circumvented by claims being brought against individuals who acted on behalf of the State") (cited in note 126); United States *Matar* Brief at 23 (statement by Executive Branch that "there is broad agreement in international law that, where a foreign state is immune, '[t]he foreign state's right to immunity cannot be circumvented by suing its servants or agents.'") (quoting *Jones*).

[150] See *Jones*, 129 Intl L Rep at 726, ¶ 24 (Lord Bingham); id at 732, ¶ 44 (Lord Hoffman) (both quoting Hazel Fox, *The Law of State Immunity* 525 (Oxford, 1st ed 2004)). For criticism of the court's reasoning on this point, see Alexander Orakhelashvili, *State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong*, 18 Eur J Intl L 965 (2007).

[151] 87 Rivista di diritto internazionale 539 (Italian Ct of Cassation 2004), reprinted and translated in Oxford Rep Intl L in Dom Cts 19.

concentration camp. The Italian Court of Cassation characterized the actions as "an expression of [Germany's] sovereign power since they were conducted during war operations."[152] But it refused to recognize "the functional immunity of foreign state organs"[153] for acts that violate *jus cogens*, which stand "at the apex of the international system [and] tak[e] precedence over all other norms whether of conventional or customary nature and therefore also over those norms governing immunity."[154] In 2008 and 2009, the Court of Cassation exercised jurisdiction over more than a dozen additional complaints seeking damages for the German military's actions during World War II.[155] The court reaffirmed that the clash between *jus cogens* and immunity should be resolved on the basis of "value judgments" and a "balancing of interests" that gives primacy to legal principles of higher rank,[156] and it deemphasized the fact that the challenged conduct occurred partly in Italy.[157]

International tribunals have yet to take a definitive position on whether there is a *jus cogens* exception to foreign official immunity in civil cases. In *Al-Adsani v United Kingdom*,[158] a Grand Chamber of the European Court of Human Rights (ECHR) held, by a sharply divided 9–8 vote, that recognizing the immunity of foreign states from civil suits alleging torture did not violate the right of access to the courts protected by the European Convention on Human Rights.[159] Interpreting the Convention "in harmony with other rules of international law . . . , including those relating to the grant of

[152] Id at ¶ 7.

[153] Id at ¶ 11.

[154] Id at ¶ 9 (citations and internal quotations omitted). In support of this conclusion, the Court of Cassation cited the International Criminal Tribunal for the Former Yugoslavia (ICTY) Trial Chamber's decision in *Prosecutor v Furundzija*, IT-95-17/I-T 59 at ¶ 155 (ICTY 1998), which "lists the possibility of victims 'bringing civil suits for compensation before Courts of a foreign state' among the effects of the violation of [*jus cogens* norms] at 'an inter-State level.'" Id ¶ 155.

[155] See, for example, *Germany v Mantelli*, 45 Rivista di diritto internazionale privato e processuale 651 (Italian Ct of Cassation 2009), and *Milde*, Oxford Rep Intl L in Dom Cts at 1224. For analysis of these decisions, 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 Intl Crim Just 597 (2008); Carlo Focarelli, *Case Report: Federal Republic of Germany v. Giovanni Mantelli and Others, Order No. 14201*, 103 Am J Intl L 122 (2009).

[156] Ciampi, 7 J Intl Crim Just at 603–04 (cited in note 155).

[157] See Focarelli, 103 Am J Intl L at 126 (cited in note 155).

[158] App No 35763/97 (Grand Chamber, Eur Ct Hum Rts 2001), online at http://www.unhcr.org/refworld/docid/3fe6c7b54.html.

[159] Id at 20.

State immunity,"[160] the ECHR concluded that, notwithstanding "the special character of the prohibition of torture in international law," it was "unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged."[161] The dissenting judges, in contrast, reasoned that the *jus cogens* character of torture overrides immunity, which does not share its hierarchically superior status.[162] Although the majority rejected this view, it left open the possibility that CIL might evolve to abrogate immunity from such suits.[163]

The conduct immunity of foreign officials was not at issue in *Al-Adsani*, but it has been raised in a pending ECHR challenge to *Jones*.[164] The key issue before the ECHR is whether the House of Lords' grant of immunity to the Saudi officials violated the right of access to the courts under the European Convention, even if the recognition of Saudi Arabia's immunity did not.[165] In addition, Germany recently challenged the *Ferrini* line of cases before the ICJ, asking the court to declare that, "by allowing civil claims based on violations of international humanitarian law by the German Reich during World War II," Italy had "failed to respect the jurisdictional immunity which . . . Germany enjoys under international law."[166] The CIL of foreign official immunity from civil damage claims is

[160] Id at 16, ¶ 55.

[161] Id at 18, ¶ 61.

[162] See *Al-Adsani*, App No 35763/97 at 26, ¶ 3 (joint dissenting opinion).

[163] See id at 19, ¶ 66.

[164] See *Jones v United Kingdom*, App No 34356/06 (Eur Ct Hum Rts, filed on July 26, 2006); *Mitchell v United Kingdom*, App No 40528/06 (Eur Ct Hum Rts, filed on Sept 22, 2006).

[165] Application Statement of Facts and Questions to the Parties, *Jones v UK* and *Mitchell v UK* (Eur Ct Hum Rts, filed on Sept 18, 2009). The ECHR also asked the parties to address whether European countries "allow civil proceedings to be brought against officials of another State and/or for compensation to be awarded to victims in criminal proceedings brought against those officials." Id.

[166] *Jurisdictional Immunities of the State* (*Germany v Italy*), ICJ Press Release no 2008/44 (Dec 23, 2008) at 1, online at http://www.icj-cij.org/. In June 2010, the Italian Parliament adopted a law that suspends until the end of 2011 the execution and enforcement of judgments against a foreign state that has filed a complaint with the ICJ against Italy on matters relating to immunity. The law was "adopted in order to stop the enforcement of proceedings pending before the Italian courts against Germany" during the pendency of the ICJ proceedings in *Germany v Italy*. Andrea Atteritano, *Immunity of States and Their Organs: The Contribution of Italian Jurisprudence over the Past Ten Years*, 19 Ital YB Intl L 33, 46 (2009).

likely to remain unsettled at least until the ECHR and ICJ have issued judgments in these cases.

A fourth principle that is emerging from recent national court decisions—both those that uphold immunity and those that abrogate it—is that *jus cogens* violations committed by officials are governmental rather than private acts.[167] The rationales for this conclusion are first, that illegal and *ultra vires* acts by officials can be attributable to the state under the international law of state responsibility,[168] and, second, that proceedings against officials for acts carried out in an apparently official capacity are equivalent to proceedings against the foreign state itself.[169] However, several international law expert groups and commentators have advanced proposals to disaggregate conduct immunity from state attribution in the case of *jus cogens* violations.[170] Such proposals would enable

[167] See ILC Secretariat Memorandum at 116, ¶¶ 180–83 (reviewing authorities) (cited in note 106).

[168] See id at 102, ¶ 156 ("[T]here appear to be strong reasons for aligning the immunity regime with the rules on attribution of conduct for purposes of State responsibility."); id at 105, ¶ 160 ("If unlawful or criminal acts were considered, as a matter of principle, to be 'non-official' for purposes of immunity *ratione materiae*, the very notion of 'immunity' would be deprived of much of its content."); International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* Art 7, cmt 8 (2001) ("*Articles on States' Responsibility*") (acts of a state official or organ in excess of authority or in contravention of instructions is nonetheless attributable to the state provided that the organ or official was "purportedly or apparently carrying out official functions"), online at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf; id at Art 4, cmt 13 ("[T]o determine whether a person who is a State organ acts in that capacity . . . [i]t is irrelevant . . . that the person concerned may . . . be abusing public power."). But see id at Art 7, cmt 8 (distinguishing "between unauthorized but still 'official' conduct, on the one hand, and 'private' conduct on the other," and indicating that "isolated instances of outrageous conduct on the part of persons who are officials" should be treated as private conduct not attributable to the state).

[169] See *Ferrini*, Oxford Rep Intl L in Dom Cts at ¶ 11; *Jones*, 129 Intl L Rep at 744, ¶ 84 (Lord Hoffman); id at 723–24, ¶ 19 (Lord Bingham); see also *Articles on States' Responsibility* at Art 4, cmt 13 (cited in note 168) ("Where [a government official] acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the State."). To be sure, the Draft Articles are "without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State." Id at Art 58. The commentary makes clear, however, that "[s]o far this principle has operated in the field of [individual] criminal responsibility," although "it is not excluded that *developments may occur* in the field of individual civil responsibility." Id at Art 58, cmt 2 (emphasis added). The commentary also reiterates that "[w]here crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them." Id at Art 58, cmt 3.

[170] See, for example, Hazel Fox, *Imputability and Immunity as Separate Concepts: The Removal of Immunity from Civil Proceedings Relating to the Commission of an International Crime*, in Kaiyan Homi Kaikobad and Michael Bohlander, eds, *International Law and Power: Perspectives on Legal Order and Justice* 165 (Brill, 2009).

domestic courts to assert both criminal and civil jurisdiction over former officials alleged to have committed such violations without, at the same time, implicating the responsibility of the foreign state itself.[171]

Two additional considerations are also relevant. First, the UN Immunities Convention, discussed above, does not contain an exception to immunity for civil suits alleging violations of *jus cogens*. In fact, the Convention's drafters twice rejected proposals to adopt such an exception, both because there was no settled state practice to support it and because "any attempt to include such a provision would almost certainly have jeopardized the conclusion of the Convention."[172] As a result, even commentators critical of this omission concede that "state officials and other state agents may benefit from the immunity of the state afforded by the Convention, even with respect to civil suits seeking to recover pecuniary compensation for crimes under international law."[173] This conclusion is reinforced by declarations that Norway and Sweden filed when ratifying the Convention in 2006 and 2009, respectively, which assert that the Convention is "without prejudice to any *future* international legal development concerning the protection of human rights."[174]

A second consideration relates to the persuasiveness of distinguishing between civil and criminal cases. If *jus cogens* are higher-order legal norms, they should arguably negate immunity "in relation to any legal liability whatsoever," whether civil or criminal.[175]

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[171] See, for example, Rosanne Van Alebeek, *The Immunities of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford, 2008); Fox, *The Law of State Immunity* at 699–700, 750 (cited in note 83) (reviewing a proposal by the Institut de Droit International); Donald Francis Donovan and Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 Am J Intl L 142 (2006); Stacy Humes-Schulz, *Limiting Sovereign Immunity in the Age of Human Rights*, 21 Harv Hum Rts J 105 (2008).

[172] Hall, 55 Intl & Comp L Q at 412 & n 5 (internal quotations omitted) (cited in note 114).

[173] Id at 416; see also Lorna McGregor, *State Immunity and Jus Cogens*, 55 Intl & Comp L Q 437, 438 (2006).

[174] UN Convention on Jurisdictional Immunities of States and Their Property, Declarations of Norway and Sweden (emphasis added), online at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-13&chapter=3&lang=en; see also id, Declaration of Switzerland (asserting that the Convention "is without prejudice to developments in international law" regarding "pecuniary compensation for serious human rights violations which are alleged to be attributable to a State").

[175] See, for example, *Al-Adsani*, App No 35763/97 at 34 (Grand Chamber) (Loucaides dissenting); see also Fox, *Imputability and Immunity* at 167 (proposing "an extension of the removal of functional immunity to civil proceedings in respect of the commission of . . . an international crime") (cited in note 170).

One might also argue that immunity should be determined by the nature of the underlying acts rather than the type of proceeding involved.[176] This claim is supported by the fact that many civil law countries allow victims to recover damages as part of a criminal proceeding.[177] Lastly, abrogating the immunity *ratione materiae* of foreign officials in criminal cases may result in a conviction that deprives the official of his or her liberty for many years. In civil suits, by contrast, lifting immunity may result in an award of monetary damages against the official that, in some instances, may be paid or reimbursed by the foreign state. If immunity is abrogated in criminal proceedings where the penalties are greater, it might seem to follow a fortiori that it should also be disregarded in civil suits.

There are a number of potential responses to these arguments. First, the abrogation of immunity in criminal proceedings has a long pedigree, one that dates back at least to the Nuremberg trials of Nazi officials after World War II and that is more recently reflected in multilateral conventions that impose a duty on states parties to exercise universal criminal jurisdiction over the alleged perpetrators of *jus cogens* violations, and in international criminal tribunals whose statutes expressly override the immunity of government officials charged with those violations.[178] Second, domestic criminal proceedings are subject to screening mechanisms and procedural safeguards that do not exist in civil suits, most notably review by public prosecutors or government agencies that are authorized

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[176] See, for example, Humes-Schulz, 21 Harv Hum Rts J at 118–19 (cited in note 171); McGregor, 55 Intl & Comp L Q at 444 (cited in note 173).

[177] See, for example, Written Comments by Redress et al at 6 (cited in note 138). See also Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 22 Yale J Intl L 1, 19 (2002) (noting that "[m]any civil law systems permit civil claims to be filed as an adjunct to a criminal prosecution").

[178] See, for example, Cryer et al, *An Introduction to International Criminal Law and Procedure* at 531–60 (cited in note 119); William Schabas, *Genocide in International Law: The Crimes of Crimes* 316–24 (2000). The General Assembly adopted the UN Immunities Convention with the understanding that it did not apply to criminal proceedings "out of concern that the availability of immunity in [such] proceedings would conflict with the duty to prosecute certain crimes under international law." McGregor, 55 Intl & Comp L Q at 444 (cited in note 173). The trend toward accountability and monetary reparations in civil cases is more recent and less well developed. See, for example, Dinah Shelton, *Remedies in International Human Rights Law* 10–12, 291–353 (Oxford, 2d ed 2006); UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Resolution 60/147, UN General Assembly, 60th Sess (Mar 21, 2005), UN Doc A/Res/60/147.

to dismiss complaints on various grounds.[179] Third and relatedly, the permissive approach to civil litigation in the United States—including broad personal jurisdiction rules, contingent attorneys' fees, expansive discovery, and punitive damages—is controversial in many other countries, whereas the exercise of U.S. criminal jurisdiction is much less so.[180]

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The foregoing overview reveals that, although CIL traditionally conferred immunity on foreign officials for actions taken on behalf of their state, this immunity has eroded over the past decade, although primarily in the criminal rather than civil context. It is difficult, however, to reach firm conclusions about the current state of the CIL of foreign official immunity because the law in this area is unsettled and rapidly evolving. This has implications for whether and how U.S. courts apply CIL in shaping the common law of foreign official immunity after *Samantar*, a subject we address below.

Before turning to this issue, we first bracket the ongoing debate among scholars of U.S. foreign relations law over the proper relationship between CIL and federal common law. There are three basic positions in this debate. One position is that, at least in the absence of a directive by Congress to the contrary, CIL automatically has the status of federal common law.[181] At the other end of the spectrum is the view that CIL should never operate as federal law unless and until it is affirmatively incorporated as such by the political branches.[182] An intermediate position (of which there are

[179] The universal jurisdiction statutes in Spain and Belgium were amended to incorporate such procedural safeguards, and a similar proposal is pending in the United Kingdom. See citations in note 136.

[180] See, for example, Paul B. Stephan, *A Becoming Modesty: U.S. Litigation in the Mirror of International Law*, 52 DePaul L Rev 627 (2002).

[181] See, for example, Louis Henkin, *International Law as Law in the United States*, 82 Mich L Rev 1555, 1561 (1984); Harold Hongju Koh, *Is International Law Really State Law?* 111 Harv L Rev 1824, 1835 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 Fordham L Rev 371, 373 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 Fordham L Rev 393, 397 (1997).

[182] It is not clear whether there are currently any academic proponents of this view, although it is possible to read some critiques of CIL as having this implication. See, for example, John O. McGinnis and Ilya Somin, *Should International Law Be Part of Our Law?* 59 Stan L Rev 1175 (2007), and J. Patrick Kelly, *The Twilight of Customary International Law*, 40 Va J Intl L 449 (2000); see also *Al-Bihani v Obama*, 619 F3d 1, 16 (DC Cir 2010) (Kavanaugh concurring in the denial of rehearing en banc) ("[I]nternational-law principles found in non-self-executing treaties and customary international law, but not incorporated into statutes or self-executing treaties, are not part of domestic U.S. law.").

many variants) is that CIL can inform federal common law in select instances, but only if it is applied interstitially in a manner consistent with the policy choices made by the political branches.[183]

Although one of us has written extensively on the topic, we do not take a position here on which of these views is correct. For present purposes, it is sufficient to note two points. First, CIL is potentially relevant to the post-*Samantar* common law of immunity under each of these three views, since even those who contend that CIL should not be applied absent incorporation by the political branches might accept that statutes such as the ATS or TVPA have incorporated principles of CIL or have delegated to courts some authority to incorporate them. Second, one of the paradigmatic cases cited by proponents of the view that CIL applies automatically as federal common law is the issue of foreign official immunity,[184] and even skeptics of that view have acknowledged that CIL may be relevant to judicial development of this area of law.[185]

III. International Law and the Post-Samantar Common Law of Immunity

In this part, we consider the potential relevance of the international law discussed in the last part to the post-*Samantar* common law of foreign official immunity. Our goal here is to frame the possible judicial choices in this area rather than argue for a particular approach. As we will explain, CIL's relevance is likely to

[183] See, for example, Bradley, Goldsmith, and Moore, 120 Harv L Rev at 904–05 (cited in note 100); see also Curtis A. Bradley and Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 Harv L Rev 2260, 2270 (1998) ("When the political branches cannot plausibly be viewed as having authorized the incorporation of CIL, and especially when they have explicitly precluded incorporation, federal courts cannot legitimately federalize CIL."). For somewhat similar views, see Anthony J. Bellia Jr. and Bradford R. Clark, *The Federal Common Law of Nations*, 109 Colum L Rev 1, 76–90 (2009) (arguing that, although CIL is not automatically part of federal common law, courts should apply some rules derived from CIL as a means of implementing the Constitution's assignments of authority to the federal political branches), and Daniel J. Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 Va J Intl L 513, 536, 550 (2002) (arguing that federal courts have some authority to develop federal common law "interstitially in the area of foreign affairs to serve important federal interests," while also noting that such federal common law "should take its cue from congressional enactments").

[184] See, for example, Koh, 111 Harv L Rev at 1829 (discussing head-of-state immunity) (cited in note 181); Neuman, 66 Fordham L Rev at 382–83 (discussing consular immunity) (cited in note 181).

[185] See Bellia and Clark, 109 Colum L Rev at 90 (cited in note 183); Bradley and Goldsmith, 111 Harv L Rev at 2270 (cited in note 183); Bradley, Goldsmith, and Moore, 120 Harv L Rev at 922–24 (cited in note 100).

depend in part on institutional considerations relating to the proper role of U.S. courts in the area of foreign affairs, the authority of the Executive Branch to affect pending litigation, and the congressional policies reflected in existing statutes.

a. customary international law

For several reasons, we believe that courts will take account of CIL when developing the post-*Samantar* common law of foreign official immunity. As explained in Part I, the Supreme Court has recognized that sovereign immunity is governed by principles of international law and that the FSIA codified some of those principles.[186] The Court's conclusion in *Samantar* that the statute codified only principles relating to suits against foreign states and not those against foreign officials does not suggest that the Court believed that international law was irrelevant to the latter suits. Indeed, in rejecting the assertion that its interpretation of the FSIA might create a conflict with international law, the Court did not deny CIL's relevance, but rather noted that common law immunity could protect against a breach of international law.[187]

The Court has also looked to international law for guidance in other related contexts. A good example is *First National City Bank v Banco Para El Comercio Exterior de Cuba*.[188] In that case, a Cuban government-owned instrumentality sued to recover on a letter of credit, and the issue was whether the defendant could assert a counterclaim against the instrumentality for the value of assets that the Cuban government had expropriated. In allowing the counterclaim (and thus piercing the veil between the instrumentality and the state), the Court applied principles "common to both international law and federal common law, which in these circumstances is necessarily informed both by international law principles and by articulated congressional policies."[189] As part of its analysis, the Court considered the history and purposes of the

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[186] See, for example, *Permanent Mission of India*, 551 US at 200 (considering "international practice at the time of the FSIA's enactment" when construing an ambiguity in the statute).

[187] See *Samantar*, 130 S Ct at 2290 n 14.

[188] 462 US 611 (1983).

[189] Id at 623.

FSIA, judicial decisions from the United States and other countries, and general principles of equity.[190]

Assuming that international law is relevant, there are a number of ways that U.S. courts could interpret and apply CIL immunity rules when developing the common law. We begin with the easiest case: sitting heads of state. With regard to ATS and TVPA suits against these national leaders, we foresee at least three reasons that federal courts will follow the ICJ's *Arrest Warrant* judgment and interpret CIL to require dismissal on status immunity grounds.[191] First, as Part II reveals, the immunity *ratione personae* of officials that international law recognizes as "heads of state"—presidents, prime ministers, monarchs, and foreign ministers—has become more rather than less entrenched over the last decade. Second, actions against serving heads of state are the closest that litigants can come to suing the foreign state itself. Such suits thus raise serious foreign relations concerns that weigh heavily against adjudication. Finally, interpreting CIL as mandating status immunity is consistent with pre-*Samantar* decisions that dismissed suits alleging even *jus cogens* violations by heads of state.[192]

With regard to the immunity *ratione materiae* of lower-level officials and all officials no longer in office, the key issue that U.S. courts will face is whether CIL includes a *jus cogens* exception to conduct immunity. As discussed in Part II, a growing number of national and international courts recognize such an exception in criminal proceedings against former officials who served at all levels of government. In civil suits for damages, by contrast, there has been less recognition of such an exception. Below, we identify a number of competing legal and policy considerations that U.S.

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[190] Although more controversial, a majority of the Court has even looked to international law when interpreting certain provisions of the U.S. Constitution that have an exclusively domestic application. See, for example, *Graham v Florida*, 130 S Ct 2011, 2033–34 (2010); *Roper v Simmons*, 543 US 551, 575–78 (2005). A fortiori, the Court is likely to view CIL as germane to developing common law doctrines that are closely related to foreign affairs, such as the common law governing foreign official immunity.

[191] A potential exception would be where the Executive suggests nonimmunity, an issue we discuss in Section B below.

[192] See *Ye v Zemin*, 383 F3d 620, 624–30 (7th Cir 2004); *Lafontant v Aristide*, 844 F Supp 128, 131–39 (EDNY 1994) (recognizing head-of-state immunity of exiled Haitian President in suit under TVPA alleging extrajudicial killing); *Tachiona v Mugabe*, 169 F Supp 2d 259, 294–97 (SDNY 2001) (recognizing head-of-state immunity of President of Zimbabwe in a suit alleging numerous human rights violations), aff'd in part and rev'd in part on other grounds, 386 F3d 205 (2d Cir 2004).

courts should take account of when addressing this question of CIL.

We begin with a general point about the relationship between immunity and human rights. As we explained in Part II, the erosion of conduct immunity during the decade since the House of Lords' *Pinochet* decision represents a striking shift from the traditional approach to the CIL immunity of foreign officials. This erosion serves an important international interest—expanding domestic accountability mechanisms for individuals responsible for human rights abuses. To date, however, these accountability mechanisms are mandatory only where states have a treaty- or CIL-based obligation to extradite or criminally prosecute the perpetrators of *jus cogens* violations. In civil suits relating to those same violations, by contrast, efforts to promote accountability outside a government official's home country must be consistent with CIL immunity rules.[193] Stated differently, the recent narrowing of conduct immunity has not (or at least not yet) created a concomitant CIL obligation that *requires* national courts to exercise jurisdiction in civil cases.[194]

This fact has important implications for which approach U.S. courts follow. A court that interprets immunity broadly will not violate CIL, whereas a court that interprets immunity narrowly may. To avoid the risk of foreign relations frictions and accusations that the United States is disregarding international law, U.S. courts may decide to follow the reasoning of their colleagues in Australia, New Zealand, and the United Kingdom and hold that CIL presumptively shields former government officials from suits alleging human rights violations.

The arguments in favor of adopting this approach to conduct

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[193] The Grand Chamber of the European Court of Human Rights has emphasized this point, reasoning that the rights protected in the European Convention—including the *jus cogens* ban on torture—must be interpreted "in harmony with other rules of international law . . . , including those relating to the grant of State immunity." *Al-Adsani*, App No 35763/97 at 16, ¶ 55; see also *Kalogeropoulou v Greece and Germany*, App No 59021/00 (Eur Ct Hum Rts 2002) (inadmissibility decision) (unreported) (rejecting the petitioners' argument that "international law on crimes against humanity was so fundamental that it amounted to a rule of *jus cogens* that took precedence over all other principles of international law, including the principle of sovereign immunity").

[194] The hierarchy argument adopted by the Italian Court of Cassation in *Ferrini* arguably imposes an obligation to assert jurisdiction in civil cases. Although such an obligation has been endorsed by a number of commentators, see, for example, Orakhelashvili, 18 Eur J Intl L at 967 (cited in note 150), it has received little support in state practice or the decisions of domestic and international courts.

immunity are especially strong where a foreign state asserts either that the official's actions were carried out on its behalf or that it is willing to assume responsibility for his or her conduct. In both instances, dismissal can be seen as furthering the policy rationale of aligning CIL immunity principles with the international law of state responsibility.[195] As the ICJ indicated in *Djibouti v France*,[196] a case involving the immunity *ratione materiae* of two Djiboutian officials, a "State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs."[197]

Interpreting CIL to require conduct immunity for foreign officials in civil cases would not completely bar ATS or TVPA suits against such officials. A court adopting this approach could continue to assert jurisdiction over ATS and TVPA complaints against foreign officials in at least two instances: first, where the foreign state waives immunity;[198] and second, where the foreign state indicates that the defendant's actions were unauthorized or not within the scope of his or her authority.[199] As discussed below in Section B, it is also possible that the Executive Branch may have some case-specific authority to override an official's immunity even where CIL recognizes it.

Nevertheless, the recognition of CIL conduct immunity for foreign officials is in tension with the approach that U.S. courts

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[195] See discussion and authorities in notes 168–69 and accompanying text.

[196] *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v France*) (merits), 2008 ICJ 177.

[197] Id at 244, ¶ 196.

[198] Where a state has recently undergone a regime change, for example, the new government may favor human rights litigation in the United States against its former officials. See, for example, *In re Grand Jury Proceedings*, 817 F2d 1108, 1110–11 (4th Cir 1987) (giving effect to the Philippine government's waiver of head-of-state immunity claimed by the former President and his wife).

[199] Prior to *Samantar*, courts gave considerable weight to the views of foreign governments on these issues. See, for example, *Belbas v Ya'alon*, 515 F3d 1279, 1283 (DC Cir 2008) ("In cases involving foreign sovereign immunity, it is also appropriate to look to statements of the foreign state that either authorize or ratify the acts at issue to determine whether the defendant committed the alleged acts in an official capacity."); *Hilao v Estate of Marcos*, 25 F3d 1467, 1472 (9th Cir 1994) (citing a letter from the Philippine government urging the court to exercise jurisdiction over its former President for "acts of torture, execution, and disappearance [that] were clearly acts outside of his authority"); see also *Kline v Kaneko*, 685 F Supp 386, 389–90 (SDNY 1988) (deferring to submission of Mexican government that defendant was acting "within the scope of his official duties" for purposes of the FSIA).

followed during the thirty years between *Filartiga* and *Samantar*. During that period, most courts held that suits against former government officials were covered by the FSIA. Courts also concluded, however, that *jus cogens* violations were not official acts and, as a result, that the individuals who committed such violations were not entitled to immunity.[200] In the wake of the Court's holding in *Samantar* that federal common law now controls these issues, a judge that endorses the pro-immunity view may, in effect, be conceding that many of the cases decided during those three decades were in violation of CIL. Indeed, the House of Lords in *Jones* suggested precisely this conclusion, as did the separate opinion in the *Arrest Warrant Case*, albeit using more diplomatic language.[201]

In light of the division in foreign court decisions, and the lower court precedents that have built up since *Filartiga*, U.S. courts could plausibly hold that conduct immunity is unavailable to foreign officials in civil suits alleging *jus cogens* violations. This approach would advance important international interests that are in tension with immunity, such as expanding domestic accountability mechanisms for *jus cogens* violations and providing damage remedies to victims.[202] The U.S. political branches have expressed support for these interests, albeit not always consistently, during the three decades of domestic human rights litigation since *Filartiga*.[203]

In choosing between these positions, U.S. courts will need to

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[200] See citations in note 59.

[201] *Jones*, 129 Intl L Rep at 724–25, ¶20 (Lord Bingham) (describing the TVPA as not "express[ing] principles widely shared and observed among other nations"); id at 737, ¶ 58 (Lord Hoffman) (labeling the TVPA as "not required and perhaps not permitted by customary international law"); *Arrest Warrant Case* (Joint Separate Opinion of Higgins, Kooijmans, and Buergenthal), 2002 ICJ at 77, ¶ 48 (characterizing the ATS as a "unilateral exercise of the function of guardian of international values [that] has not attracted the approbation of States generally").

[202] See, for example, Shelton, *Remedies in International Human Rights Law* at 10–12, 291–353 (cited in note 178); UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (cited in note 178).

[203] For example, the Carter administration submitted an amicus brief in support of the plaintiffs in *Filartiga*, and the Clinton administration submitted an amicus brief in support of the plaintiffs in *Kadic v Karadžić*, 70 F3d 232 (2d Cir 1995). In addition, Congress in 1992 enacted the TVPA, which was signed by the first President Bush (although he articulated some concerns about the statute in a signing statement). Both the Reagan administration and the second Bush administration, however, argued for curtailing ATS litigation.

take account of the fact that CIL immunity rules are unsettled. The leading national exemplars of the two contending approaches have both been challenged before international courts. As noted in Part II, the ECHR is considering whether the British House of Lords' decision in *Jones* is contrary to the European Convention, and the ICJ is reviewing Germany's challenge to the *Ferrini* line of cases from Italy. At least until the ECHR and ICJ have issued their judgments in these cases, the international law of foreign official immunity will remain in flux.

This uncertainty raises difficult issues concerning the institutional competence of U.S. courts to interpret and apply CIL. On the one hand, the unsettled content of international law provides a unique opportunity for federal judges to participate in the global judicial dialogue over the proper balance between immunity and accountability and shape CIL's future trajectory.[204] But this uncertainty also suggests that U.S. courts should exercise caution before advancing an interpretation of CIL that may offend foreign governments or create foreign relations difficulties for the Executive.

The Supreme Court sounded a similar note of caution in what is arguably the leading decision concerning the role of federal common law in the area of foreign affairs, *Banco Nacional de Cuba v Sabbatino*.[205] In that case, the Cuban government attempted to recover proceeds from the sale of a shipment of sugar and the issue was whether it should be barred from recovery because it had violated CIL in expropriating the sugar factory. In holding that the expropriation did not bar recovery, the Court relied on the act of state doctrine, pursuant to which U.S. courts will not

[204] See generally Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U Richmond L Rev 99 (1994). Many of the foreign and international court decisions cited in Part II refer to U.S. statutes and judicial decisions when canvasing state practice regarding the immunity of foreign officials, sometimes characterizing the same evidence in conflicting ways. Compare *Ferrini*, Oxford Rep Intl L in Dom Cts at ¶ 10.2 (interpreting 1996 amendment to FSIA authorizing certain suits against foreign states designated as sponsors of terrorism as evidence of "the priority importance that is now attributed to the protection of basic human rights over the interests of the State in securing recognition for its own immunity from foreign jurisdiction"), with *Al-Adsani*, App No 35763/97 at 19, ¶ 64 (interpreting the same amendment as "confirm[ing] that the general rule of international law remain[s] that immunity attache[s] even in respect of claims of acts of official torture" in civil suits for damages). By participating in the global judicial dialogue on CIL immunity issues, U.S. courts could help to resolve these differences and clarify the implications of recent developments in the United States.

[205] 376 US 398 (1964).

question the validity of the acts of foreign governments taken within their own territory, a doctrine that the Court made clear had the status of federal common law.[206]

In applying the act of state doctrine even in the face of an alleged violation of CIL, the Court reasoned that the propriety of federal judicial involvement in interpreting and applying CIL was directly proportional to how widely accepted it was,[207] and it concluded that "[t]here are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens."[208] The Court also characterized as "quite unpersuasive" the countervailing argument in favor of judicial review—that "United States courts could make a significant contribution to the growth of international law."[209] At the same time, the Court made clear that it was "in no way intimat[ing] that the courts of this country are broadly foreclosed from considering questions of international law" in "areas . . . in which consensus as to standards is greater and which do not represent a battleground for conflicting ideologies."[210]

Although there are similarities between the expropriation issues in *Sabbatino* and the immunity issues in ATS and TVPA suits against foreign officials, there are also important differences. First, U.S. courts have been contributing, albeit indirectly, to the erosion of CIL immunity principles for more than three decades. Second, all states, or nearly all, are participants in the international human rights system and have recognized, via treaty ratifications and state practice, the importance of abrogating official immunity for *jus cogens* violations in at least some contexts. The divisions in CIL are thus less "a battleground for conflicting ideologies" than a debate over how to strike a proper balance between two widely shared international values. Third, the U.S. political branches (as well as the Supreme Court) have sanctioned at least some forms of judicial interpretation and application of CIL in litigation under the ATS and TVPA. Taken together, these distinguishing factors

[206] See id at 432–33.

[207] Id at 428 (explaining 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").

[208] Id.

[209] *Sabatino*, 376 US at 434.

[210] Id at 430 n 34.

suggest that *Sabbatino* is not a categorical bar to a more assertive judicial role in the development of CIL immunity principles. Finally, a key consideration in *Sabbatino* was the need to protect the institutional prerogatives of the Executive Branch, an issue to which we now turn.

B. ROLE OF THE EXECUTIVE

There are a number of reasons to believe that the views of the Executive Branch will be relevant to the development and application of the post-*Samantar* common law of immunity. As discussed above, courts gave absolute deference to Executive suggestions of immunity and non-immunity prior to the enactment of the FSIA in 1976.[211] Since that time, courts have continued to defer to Executive suggestions of immunity for heads of state—including in suits alleging violations of *jus cogens*.[212] Furthermore, in *Samantar*, the Supreme Court observed that it had "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."[213] It is also arguable that the Executive's interpretation of CIL is entitled to some deference, just as it is with respect to treaty interpretations,[214] in which case its views regarding the scope of the CIL of foreign official immunity would likely be influential. Finally, in the context of both the FSIA and the ATS, the Supreme Court has suggested (albeit cryptically) that the Executive's views concerning whether particular cases should proceed might be a relevant consideration for the courts.[215]

There are, to be sure, countervailing considerations. Courts have addressed the immunity of foreign officials (other than heads

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[211] See text accompanying notes 20–28.

[212] See citations in note 57.

[213] 130 S Ct at 2291 (footnote omitted).

[214] See Restatement (Third) of Foreign Relations Law § 112, cmt c ("Courts give particular weight to the positions taken by the United States Government on questions of international law because it is deemed desirable that so far as possible the United States speak with one voice on such matters. The views of the United States Government, moreover, are also state practice, creating or modifying [customary] international law.") (cited in note 4); consider also *Medellín v Texas*, 552 US 491, 513 (2008) ("It is . . . well settled that the United States' interpretation of a treaty 'is entitled to great weight.'"), quoting *Sumitomo Shoji America, Inc. v Avagliano*, 457 US 176, 184–85 (1982).

[215] See *Republic of Austria v Altmann*, 541 US 677, 702 (2004) (FSIA); *Sosa v Alvarez-Machain*, 542 US 692, 733 n 21 (2004) (ATS).

of state) for over thirty years without deferring to the Executive. Moreover, as discussed above, one of the principal reasons for the FSIA's enactment was to shift immunity determinations away from the Executive Branch.[216] Furthermore, the constitutional rationale for the pre-FSIA deference regime is under-theorized and thus may be open to challenge. The Constitution assigns to the President the authority to receive foreign ambassadors, and the Supreme Court has plausibly interpreted this authority to include the power to determine which governments and heads of state should be recognized by the United States.[217] It is not clear, however, why that recognition power encompasses a power to decide whether particular officials of a recognized government are entitled to immunity, which turns on questions of law rather than status. For a sitting head of state, an Executive recognition might *in effect* determine immunity, assuming CIL gives absolute immunity to sitting heads of state (as it probably does). But for other officials as well as all former officials, immunity does not automatically follow from recognition.

As for the implications of *Samantar*, although the Court referred to the pre-FSIA deference regime, it also repeatedly suggested that foreign official immunity is governed by the common law, and it did not direct the courts on remand to solicit or consider the Executive Branch's views in determining the content of the common law. Moreover, in a closely analogous context—judicial development of the common law governing the act of state doctrine—the Supreme Court has declined to treat as dispositive the Executive's views concerning the contours of that law,[218] and a majority of Justices have also balked at the idea of giving absolute deference to the Executive in the case-specific applications of the doctrine.[219]

After *Samantar*, the question of whether federal courts should defer to the Executive's views regarding immunity will be a key point of contention in many ATS and TVPA suits. In particular,

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[216] See text accompanying note 38.

[217] See *Sabbatino*, 376 US at 410.

[218] See *W.S. Kirkpatrick & Co., Inc. v Environmental Tectonics Corp., Intl.*, 493 US 400, 408 & n * (1990) (rejecting the Executive Branch's proposed multifactored approach to the act of state doctrine).

[219] See *First National City Bank v Banco Nacional de Cuba*, 406 US 759 (1972), in which six Justices rejected the "*Bernstein* exception" to the act of state doctrine that would have allowed the Executive Branch to turn the doctrine off on a case-by-case basis.

the Court's conclusion that the FSIA does not apply to individuals may lead the State Department to reconsider its prior practice as to when it suggests immunity in suits against foreign officials.[220] The Executive Branch had previously expressed the view that foreign officials were protected by immunity for acts taken on behalf of their state and that "customary international law does not recognize any *jus cogens* exception to foreign official immunity."[221] That view was expressed during the Bush administration, however, and it is possible that the current administration or future administrations will adopt a different position.

At a minimum, foreign governments are likely to pressure the State Department to suggest immunity in a nontrivial number of cases, much as they did in the years prior to the FSIA's adoption. Conversely, U.S. human rights advocates may urge the department to intervene on behalf of plaintiffs by indicating that immunity would not be appropriate.[222] This raises the question of what process the department should employ in deciding how to respond to these competing pressures.

There are several ways in which the Executive Branch might express its views regarding the common law of foreign official immunity. First, the State Department might suggest immunity in individual cases, just as it did before the FSIA's enactment. Such suggestions are likely to reflect the foreign policy interests of the United States and thus may not track perfectly the contours of CIL. Nevertheless, because international law does not require that U.S. courts hear civil suits against foreign officials, such suggestions pose little risk of placing the United States in breach of CIL.

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[220] The State Department "has a longstanding practice of affirmatively 'suggesting' head-of-state immunity to our courts when a person who enjoys the immunity has been served with judicial process." John Bellinger, *Immunities* (Opinio Juris, Jan 18, 2007), online at http://opiniojuris.org/2007/01/18/immunities/. Less frequently, the department has expressed a position on the immunity of other foreign officials. See, for example, Statement of Interest of the United States of America, *Matar v Dichter*, 05 Civ 10270 (WHP) (SDNY, filed Nov 17, 2006), online at http://ccrjustice.org/files/StatementofInterestDichter 11.17.06.pdf. As a procedural matter, "suggestions of immunity normally respond to requests from a foreign government made after its official has been served with a complaint in a civil action. [The Department] usually asks that the request be conveyed through a diplomatic note, with all relevant information and documents . . . ." Bellinger, *Immunities* (cited in this note).

[221] United States *Matar* Brief at *22 (citation omitted) (cited in note 15).

[222] See John B. Bellinger III, *Ruling Burdens State Dept.*, Natl L J (June 28, 2010), in which the former State Department Legal Adviser predicts that, as a result of *Samantar*, the department "will be subject in the future to intensive lobbying by both plaintiffs and defendants."

At worst, if courts defer to these suggestions, the United States might provide more immunity than international law requires. The decision whether to defer to such suggestions, therefore, will primarily be informed by domestic separation of powers considerations, even for courts that might otherwise conclude that CIL conduct immunity does not protect foreign officials from civil suits alleging violations of *jus cogens*.

Second, the State Department might make suggestions of *non*-immunity in particular cases. Since the enactment of the FSIA, the Executive Branch has not made such suggestions, although in two cases courts relied on what they perceived as de facto Executive opposition to immunity.[223] Suggestions of non-immunity pose a greater risk of conflict with international law than suggestions of immunity, since, as discussed above in Part II, CIL can still reasonably be interpreted as providing officials with conduct immunity from civil suits in foreign courts, even for alleged *jus cogens* violations. The Supreme Court has indicated, however, that CIL should not be applied by U.S. courts in the face of a "controlling executive or legislative act" to the contrary.[224] Even putting to one side whether a suggestion of non-immunity qualifies as such an act, if the Executive Branch argues that CIL does not require immunity in a particular situation, courts are likely to give that view some weight, as noted above. So, once again, the issue of deference to these suggestions is likely to turn more on domestic rather than international law considerations.[225]

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[223] See *United States v Noriega*, 117 F3d 1206, 1212 (11th Cir 1997) (rejecting claim of head-of-state immunity in part because the government's decision to prosecute constituted implicit rejection of immunity); *Kadic v Karadžić*, 70 F3d 232, 248–50 (2d Cir 1995) (rejecting head-of-state immunity in part because the State Department had filed a Statement of Interest in favor of allowing the plaintiffs' ATS claims to proceed).

[224] See *The Paquete Habana*, 175 US 677, 700 (1900); see also, for example, *Gisbert v U.S. Attorney General*, 988 F2d 1437, 1447 (5th Cir 1993).

[225] On remand in *Samantar*, the Department of Justice filed a Statement of Interest with the district court explaining that "[u]pon consideration of the facts and circumstances of this case, as well as the applicable principles of customary international law, the Department of State has determined that Defendant enjoys no claim of official immunity from this civil suit." "Particularly significant among the circumstances of this case and critical to the present Statement of Interest," the Justice Department further stated, "are (1) that Samantar is a former official of a state with no currently recognized government to request immunity on his behalf, including by expressing a position on whether the acts in question were taken in an official capacity, and (2) the Executive's assessment that it is appropriate in the circumstances here to give effect to the proposition that U.S. residents like Samantar who enjoy the protections of U.S. law ordinarily should be subject to the jurisdiction of our courts, particularly when sued by U.S. residents." Finally, the statement asserted that "[b]ecause the Executive Branch is taking an express position in this case, the Court should

A third way that the Executive Branch might express its view would be through a document akin to the Tate Letter. Such a document would likely describe a variety of factors that the State Department considers relevant to determinations of immunity. Indications of what such a document might contain are found in the government's amicus brief in *Samantar*. Emphasizing the "complexities that could attend the immunity determination in this and other cases," the brief explained that "the Executive might find it appropriate to take into account [1] issues of reciprocity, [2] customary international law and state practice, [3] the immunity of the state itself, and, when appropriate, [4] domestic precedents."[226] Additional considerations mentioned in the brief include [5] "the nature of the acts alleged—and [6] whether they should properly be regarded as actions in an official capacity," [7] whether the United States has recognized the foreign government at issue, [8] "the foreign state's position on whether the alleged conduct was in an official capacity," [9] whether the foreign state has "waive[d] the immunity of a current or former official," [10] whether the suit "relie[s] on the ATS to assert a federal common law cause of action" or "the statutory right of action in the TVPA," [11] whether one or more plaintiffs or defendants reside in the United States, [12] "fidelity to international norms," and [13] the consequences of immunity or non-immunity for "the protection of United States officials abroad."[227]

By itself, a list of such numerous and diverse factors is unlikely to provide much guidance to courts attempting to decide whether to recognize immunity in particular ATS or TVPA cases. As Judge Easterbrook remarked in a somewhat different context, such a list does little more than "call[] on the district judge to throw a heap of factors on a table and then slice and dice to taste."[228] If the letter were to closely track the government's brief in *Samantar*, it would likely leave considerable freedom to courts to apply the

accept and defer to the determination that Defendant is not immune from suit." Statement of Interest, *Yousuf v Samantar* at 6–7 (cited in note 15).

[226] Brief for the United States as Amicus Curiae Supporting Affirmance, *Samantar v Yousuf*, No 08-1555, *24–*25 (filed Jan 27, 2010) (available on Westlaw at 2010 WL 342031) (enumeration added).

[227] Id at *25–*27 (enumeration added).

[228] *Reinsurance Co. of America, Inc. v Administratia Asigurarilor de Stat*, 902 F2d 1275, 1283–284 (7th Cir 1990) (Easterbrook concurring) (criticizing the creation of a federal common law of privileges based on the indeterminate multifactor balancing test in the Restatement (Third) of Foreign Relations Law).

CIL principles discussed in Part II above or the domestic statutory policies reviewed in Section C below.[229]

The State Department may, however, attempt to distill these factors into a more coherent set of legal and policy guidelines that explain the types of suits, claims, and contexts in which recognition of immunity for foreign officials would or would not be appropriate. For example, the department might identify specific situations in which immunity would be recognized or abrogated, presumptions that could be rebutted by particular factual showings, and inferences courts should draw from the department's failure to express a position. Immunity *ratione personae* for sitting heads of state and foreign ministers (and perhaps for other high-level officials), and non-immunity for officials whose immunity has been waived by a foreign government that the United States has recognized, are two obvious candidates for categorical rules. A presumption against conduct immunity might apply to suits against former officials for alleged torture or extrajudicial killing, unless the foreign state indicates that the officials were acting in the scope of their authority or otherwise agrees to accept responsibility for the officials' acts.[230] Such a presumption would arguably be consistent with Congress's intent in enacting the TVPA,[231] and with a recent ICJ judgment linking state responsibility to immunity *ratione materiae*.[232] It would also provide a rationale for U.S. courts to dismiss cases where the alleged human rights violations are

[229] On remand in *Samantar*, the Executive Branch said the following about the list of factors it had recited in its Supreme Court brief: "The identification of certain considerations that the Executive could or might find it appropriate to take into account served to underscore the range of discretion properly residing in the Executive under the Constitution to make immunity determinations in particular cases. It did not reflect a judgment by the Executive that the considerations mentioned were exhaustive or would necessarily be relevant to any particular immunity determination if, as the United States argued to the Supreme Court, the responsibility for doing so was vested in the Executive and not governed by the FSIA." Statement of Interest, *Yousuf v Samantar*, at 5 n 2 (cited in note 15).

[230] Although the Transitional Federal Government of Somalia did request immunity for the defendant in *Samantar*, the Supreme Court noted that the United States does not currently recognize this government. See *Samantar*, 130 S Ct at 2283 and n 3.

[231] See the Torture Victim Protection Act of 1991, S Rep No 102-249, 102d Cong, 1st Sess 8 (1991) (explaining that, to successfully assert immunity from suit under the TVPA, "a former official would have to prove an agency relationship to a state, which would require that the state 'admit some knowledge or authorization of relevant acts'").

[232] *Djibouti v France*, 2008 ICJ at 244, ¶ 196 ("[T]he State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs.").

inextricably linked to de jure or de facto government policies—such as in the suits against high-level Israeli officials involved in authorized military operations—and where, in addition, the foreign state is prepared to officially and publicly identify the defendant's conduct as linked to those policies.

A remaining question is how much deference U.S. courts should give to a letter that contains such rules and presumptions. The answer may turn on several factors, such as whether the document explains the Executive's views as to the scope of CIL immunity for foreign officials and the extent to which it is consistent with the policies of Congress as reflected in statutes such as the FSIA, ATS, and TVPA, an issue discussed in the next section.

c. domestic law considerations

In developing the common law of immunity, courts are also likely to take into account the policies reflected in U.S. domestic law. As Justice Jackson has explained, "[f]ederal common law implements the federal Constitution and statutes, and is conditioned by them."[233] As illustrated by the *Sabbatino* and *First National City Bank* decisions discussed in Section A, this is true even of federal common law that relates to CIL.

Foreign official immunity does not directly implicate the Constitution, although the role of the judiciary in developing this body of law may be affected by the separation of powers considerations discussed above in Sections A and B. More immediately relevant are four federal statutes: the FSIA, the ATS, the TVPA, and 42 USC § 1983. We discuss below how the policies of each statute intersect with the common law of foreign official immunity.

Although the Court in *Samantar* held the FSIA generally inapplicable to suits against foreign officials,[234] this does not mean that the statute is irrelevant to the development of common law immunity. In *First National City Bank*, the Court concluded that the FSIA did not address when it is appropriate to pierce the veil

[233] *D'Oench, Duhme & Co., Inc. v FDIC*, 315 US 447, 472 (Jackson concurring) (footnote omitted). See also, for example, Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U Chi L Rev 1 (1985) (discussing the circumstances under which federal common law is legitimate).

[234] For discussion of how the FSIA may continue to apply in some cases involving suits against foreign officials, see generally Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 Va J Intl L 1 (2011).

of a state-owned corporation, but it nevertheless relied in part on the statute's policies in fashioning a common law rule.[235] Moreover, in an important domestic federal common law decision, *Boyle v United Technologies Corp.*,[236] the Court concluded that, although the Federal Tort Claims Act did not address the immunity of U.S. government contractors, its policies were relevant to the development of a federal common law of government contractor immunity.[237]

The FSIA is likely to cast a shadow in a variety of contexts. For example, the FSIA generally limits tort suits against foreign states and their instrumentalities to situations in which the damage or injury occurs in the United States.[238] In developing the common law of foreign official immunity, courts may seek to avoid a regime that allows for circumvention of this limitation by simply naming responsible foreign officials rather than the state itself. The Court in *Samantar* did not think this concern compelled application of the FSIA to suits against foreign officials, but this was in part because, as the Court noted, "[e]ven if a suit is not governed by the [FSIA], it may still be barred by foreign sovereign immunity under the common law."[239] The Court also noted 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," distinguishing those actions from suits against an official "in his personal capacity and [that] seek[s] damages from his own pockets."[240]

A related issue concerns the governmental character of abusive police conduct, including torture. When interpreting the FSIA, the Supreme Court has explained that "however monstrous such abuse undoubtedly may be," it is a "peculiarly sovereign" activity shielded by immunity.[241] Similarly, a number of circuit courts have

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[235] See *First National City Bank*, 462 US at 627–28.

[236] 487 US 500 (1988).

[237] See id at 511–12.

[238] See 28 USC § 1605(a)(5). Suits against state sponsors of terrorism are a narrow exception. See 28 USC § 1605A.

[239] 130 S Ct at 2292.

[240] Id.

[241] See *Saudi Arabia v Nelson*, 507 US 349, 361 (1993) ("[T]he intentional conduct alleged here [the wrongful arrest, imprisonment, and torture of Nelson] . . . boils down to abuse of the power of its police by the Saudi Government, and however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been

held that even *jus cogens* violations by a state fall within the immunity provided for in the FSIA and have rejected arguments that a state constructively waives its immunity when it engages in such conduct.[242] These conclusions are in tension with the holdings of several lower federal courts, which, prior to *Samantar*, held that torture and other *jus cogens* violations are not official acts and that, as a result, the individuals who commit them were not entitled to immunity under the FSIA or to dismissal under the act of state doctrine.[243]

As for the ATS, the Supreme Court discussed its policies at length in *Sosa v Alvarez-Machain*.[244] The Court unanimously concluded that the ATS was by its terms "only jurisdictional."[245] That holding suggests that the ATS should not be construed as affecting issues of immunity—issues that the Court has in other contexts distinguished from issues of jurisdiction.[246] The Court in *Sosa* proceeded, however, to construe the ATS as also "underwrit[ing] litigation of a narrow set of common law actions derived from the law of nations."[247] That conclusion would not necessarily affect immunity, since even statutory causes of action—such as the domestic civil rights statute, 42 USC § 1983—have been construed as not overriding common law immunities.[248]

Of greater potential relevance are the reasons for "judicial caution" recited by the Court in *Sosa* for deciding whether to allow claims under the ATS. Included among these is the Court's "general practice . . . to look for legislative guidance before exercising

understood for purposes of the restrictive theory as peculiarly sovereign in nature."); see also *Abiola v Abubakar*, 267 F Supp 2d 907, 916 (ND Ill 2003) (recognizing common law immunity of former head of state of Nigeria for *jus cogens* violations, including torture, and quoting *Saudi Arabia v Nelson*, 507 US at 361), aff'd on other grounds, *Enaboro v Abubakar*, 408 F3d 877 (7th Cir 2005).

[242] See *Sampson v Federal Republic of Germany*, 250 F3d 1145, 1152 (7th Cir 2001); *Smith v Socialist People's Libyan Arab Jamahiriya*, 101 F3d 239, 242–45 (2d Cir 1996); *Princz v Federal Republic of Germany*, 26 F3d 1166, 1174 (DC Cir 1994); *Siderman de Blake v Republic of Argentina*, 965 F2d 699, 714–19 (9th Cir 1992).

[243] See citations in note 59.

[244] 542 US 692 (2004).

[245] Id at 729.

[246] See, for example, *Verlinden BV v Central Bank of Nigeria*, 461 US 480, 496–97 (1983).

[247] *Sosa*, 542 US at 721.

[248] See, for example, Jack M. Beermann, *Common Law Elements of the Section 1983 Action*, 72 Chi Kent L Rev 695, 698 (1997) (noting that the Supreme Court has "presumed that Congress intended to incorporate well-established common law rules that were in operation at the time the statutes were passed into the causes of action created by the statutes").

innovative authority over substantive law," as well as the "risks of adverse foreign policy consequences."[249] These factors could be read to suggest that the judiciary should not take the lead in expanding the civil liability of foreign officials beyond what is generally accepted under CIL. On the other hand, although the Court in *Sosa* was not focused on the issue of foreign official immunity, it seemed to endorse *Filartiga* and other lower court decisions that had allowed ATS suits against former government officials for alleged *jus cogens* violations.[250]

The third statute—the TVPA—likely provides the strongest domestic law argument for limiting immunity in at least some human rights cases. The TVPA provides a cause of action for damages for acts of torture or "extrajudicial killing" done "under actual or apparent authority, or color of law, of any foreign nation."[251] By its terms, the statute focuses on what are typically the actions of foreign government officials. If such officials were entitled to immunity for *jus cogens* violations, including acts of torture or extrajudicial killings, the statute might be rendered largely a nullity.

To be sure, the TVPA would still apply when a foreign government waived the official's immunity. In addition, if the Executive Branch has the ability to make binding suggestions of nonimmunity (an issue discussed above in Section B), the statute would still be effective in that circumstance.[252] Nothing in the TVPA's text or legislative history, however, indicates that it was intended to be limited to these situations. As a result, it is possible to construe the TVPA as a "controlling legislative act" that would override the CIL of immunity that might otherwise apply to these claims, although the *Charming Betsy* canon of construction might require that Congress's intent to override CIL be manifest.[253] Presumably this construction would apply only to conduct rather than status immunity.

The legislative history is unclear about the TVPA's relationship to foreign official immunity. It suggests that the statute was not designed to override either diplomatic immunity or head-of-state immunity—which are both forms of status immunity—but it does

[249] *Sosa*, 542 US at 726, 728.

[250] See id at 725, 730.

[251] 28 USC § 1350 note.

[252] See *Matar v Dichter*, 563 F3d 9, 15 (2d Cir 2009) (making this point).

[253] For discussion of this canon, see text accompanying notes 88–90.

not mention conduct immunity.[254] Complicating matters further, the TVPA was enacted after the *Chuidian* decision, and Congress appears to have assumed that suits against foreign officials (other than heads of state) would fall under the FSIA. In this respect, the House Report states that the TVPA is "subject to the restrictions" of the FSIA, but it also expresses the view that "sovereign immunity would not generally be an available defense."[255] The Senate Report elaborates as follows:

> To avoid liability by invoking the FSIA, a former official would have to prove an agency relationship to a state, which would require that the state "admit some knowledge or authorization of relevant acts." 28 USC § 1603(b). Because all states are officially opposed to torture and extrajudicial killing, however, the FSIA should normally provide no defense to an action taken under the TVPA against a former official.[256]

It is difficult to know how to interpret this passage, both because relying on legislative history to establish propositions not addressed in the text of a statute is hazardous, but also because the legislative history appears to be premised on an assumption—the suits against foreign officials are covered by the FSIA—that the Supreme Court has now rejected.[257] In any event, whatever the implications of the TVPA for foreign official immunity, by its terms it only covers claims for torture or extrajudicial killing and does not apply to other human rights violations.[258]

In addition to these three statutes, human rights advocates are likely to urge courts to look to domestic civil rights litigation as a model for the proper scope of official immunity. In this litigation, such as in suits brought under 42 USC § 1983, government officials can often be sued for violating federal rights, especially constitutional rights, even if the government itself would have

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[254] See Torture Victim Protection Act of 1991, HR Rep No 102-367(I), 102d Cong, 1st Sess 5 (1991), reprinted in 1992 USCCAN 84, 87–88.

[255] Id.

[256] S Rep No 102-249 at 8 (cited in note 231).

[257] Consider also *Belhas v Ya'alon*, 515 F3d 1279, 1293 (DC Cir 2008) (Williams concurring) (finding "the overall message of the legislative history [of the TVPA] to be mixed—and thus ultimately not that helpful").

[258] See *Sosa*, 542 US at 728 (explaining that the "affirmative authority [in the TVPA] is confined to specific subject matter, and although the legislative history includes the remark that [the ATS] should 'remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law,' . . . Congress as a body has done nothing to promote such suits").

sovereign immunity from the suit. This is true even though most constitutional violations require state action.

In the famous *Ex parte Young*[259] decision, for example, the Supreme Court permitted a suit for injunctive relief against a state attorney general for violating the Fourteenth Amendment in enforcing allegedly confiscatory railroad rates on behalf of the state, even though the state itself was protected by Eleventh Amendment immunity. The Court reasoned that, when an official acts contrary to the "superior authority" of the federal Constitution, the official is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."[260] Some federal courts scholars have described this reasoning as a "fiction," since it envisions that an official can simultaneously engage in state action for purposes of constitutional liability but act in a personal capacity for purposes of immunity,[261] and the Supreme Court has itself described the doctrine this way.[262] Whether fictional or not, the Court has defended the *Ex parte Young* idea as "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'"[263]

Ex parte Young applies only to suits for prospective relief. The rules for suits seeking monetary damages are more complex, although mainly in form rather than in substance. The Supreme Court has held that sovereign immunity applies in damages suits brought against state officers in their "official" capacity, but not when the suit is brought against the officers in their "personal" capacity. However, in distinguishing between official and personal capacity suits, the Court has, at least for tort suits, allowed plaintiffs to decide how the case should be characterized: if the plaintiff pleads against an official in their personal capacity, the court will accept that characterization, but the plaintiff will be allowed to seek damages only from the official, not the state.[264] Thus, the bottom line in many damages suits, just as with claims for injunctive relief, is

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[259] 209 US 123 (1908).

[260] Id at 159–60.

[261] See, for example, Peter W. Low and John C. Jeffries, Jr., *Federal Courts and the Law of Federal-State Relations* 1021 (Foundation, 6th ed 2008) ("However desirable the result in *Ex parte Young*, the Court's theory rests on a fictional tour de force.").

[262] See, for example, *Idaho v Coeur d'Alene Tribe of Idaho*, 521 US 261, 270 (1997).

[263] *Pennhurst State School & Hospital v Halderman*, 465 US 89, 105 (1984), quoting *Ex parte Young*, 209 US at 160.

[264] See, for example, *Hafer v Melo*, 502 US 21, 27 (1991).

that plaintiffs can avoid sovereign immunity by suing state officials rather than the state itself. With some minor complications, a similar regime applies to suits against federal officials for constitutional violations.

Some scholars have urged courts to adopt a similar approach to foreign official immunity after *Samantar*.[265] This approach would be consistent with the pre-*Samantar* lower court decisions that concluded that *jus cogens* violations cannot be official acts.[266] Suits under the ATS are all tort suits, so the argument would be that, as long as the plaintiff is seeking damages only from the foreign officials personally, the suits should be deemed to be brought against the defendants in their personal capacity. This is true even though the official was a state actor when violating the international law norm in question. In this way, the proponents of this approach would contend, U.S. courts can vindicate the supremacy of international human rights law in the same way that they vindicate the supremacy of the Constitution under cases such as *Ex parte Young*.

As one of us has argued, however, there are a number of complications associated with applying the domestic civil rights regime to suits brought against foreign officials.[267] First, the domestic regime is premised on the idea that the federal courts have the role of ensuring that federal and state actors comply with the supreme federal Constitution. It is not clear, however, that the federal courts do or should have a comparable role of ensuring that foreign officials comply with international human rights law. As the Court noted in *Sosa*:

> It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits.[268]

That said, there are arguments, as discussed in Part II, that inter-

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[265] See, for example, Chimène I. Keitner, *The Common Law of Foreign Official Immunity*, 14 Green Bag 2d 61 (2010); Beth Stephens, *The Modern Common Law of Foreign Official Immunity*, 79 Fordham L Rev (forthcoming 2011).

[266] See cases cited in note 59.

[267] See generally, Bradley and Goldsmith, 13 Green Bag 2d at 137 (cited in note 15).

[268] *Sosa*, 542 US at 727.

national law increasingly provides national courts with just this sort of authority with respect to *jus cogens* violations.[269]

Second, in the domestic immunity context, the Supreme Court has based its approach on a balancing of competing policy considerations. But it is not clear that courts can or should engage in comparable balancing in the international context. For example, the Supreme Court in the domestic context has developed a "qualified immunity" doctrine that shields domestic officials from damages claims unless it is shown that they violated "clearly established" federal rights "of which a reasonable person would have known"[270]—a doctrine that the Court has described as resulting from "the balancing of 'fundamentally antagonistic social policies.'"[271] These polices include, on the one hand, the vindication of federal law, the compensation of victims, and the deterrence of future misconduct, and, on the other, the promotion of vigorous public decision making without fear of harassing litigation.[272]

There has been much scholarly debate in the domestic context about whether it is proper for the judiciary to attempt to balance such complicated social trade-offs. Regardless of how that debate is resolved, U.S. courts may face greater challenges in identifying and resolving the relevant social trade-offs for other countries, given that foreign nations have different legal and political cultures, different attitudes toward spreading risk through civil damages, and different degrees of wealth (and thus different capacities to pay or indemnify civil damages). At the same time, when U.S. courts apply *jus cogens* norms, they can be seen as vindicating fundamental international human rights norms that all nations, including the United States, have endorsed. Courts could thus reasonably conclude that less policy balancing is required to adjudicate complaints alleging violations of *jus cogens*, at least absent additional guidance from the political branches.

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[269] There is also growing evidence that national courts are actually exercising this authority in a variety of contexts. See generally Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 Am J Intl L 241 (2008) (analyzing national courts' increasing reliance on international law to "challeng[e] executive unilateralism in what could perhaps be a globally coordinated move").

[270] *Harlow v Fitzgerald*, 457 US 800, 818 (1982).

[271] *United States v Stanley*, 483 US 669, 695 n 13 (1987), quoting *Barr v Mateo*, 360 US 564, 576 (1959) (plurality).

[272] See, for example, *Harlow*, 457 US at 807; *Gregoire v Biddle*, 177 F2d 579 (2d Cir 1949) (L. Hand).

Third, suits against foreign officials implicate international law and foreign relations considerations that do not apply to domestic officer suits. The international law of immunity has nothing to say about whether a state allows suits against or prosecutions of its own officials, but, as discussed in Part II, it long ago developed rules to limit the power of one nation's courts to sit in judgment on the officials of other states. There can be reasonable debates, of course, about the contours of the CIL of immunity, but there is no question that it introduces a factor wholly absent from the civil rights context. In addition, even apart from the specific question of what international law requires, suits against foreign officials present issues of foreign relations friction and reciprocity that are not posed by domestic suits.[273] Of course, if CIL continues to evolve toward greater accountability, the adjudication by U.S. courts of at least certain human rights claims against foreign officials in at least some contexts (for example, those encompassed by the hypothetical State Department letter discussed in Section B above) might become less contentious. Such adjudication would also enable U.S. courts to further a basic principle of international human rights law—"the recognition that the treatment by a state of its own citizens is a legitimate matter of international concern and thus of import to its fellow states."[274]

Finally, we note that the critiques of the civil rights paradigm have less force in cases brought under the TVPA. As noted above, the TVPA might have little effect if foreign officials could claim immunity for acts of torture or extrajudicial killing. Moreover, unlike the ATS, which is written only in jurisdictional terms, the TVPA creates a cause of action, its language is similar to the language used in Section 1983, and its legislative history also contains references to that statute.[275]

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[273] For a discussion of potential foreign relations friction posed by ATS litigation, see John B. Bellinger III, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 42 Vand J Transnatl L 1, 9 (2009); Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 Chi J Intl L 457 (2001). For discussion of concerns expressed by the U.S. government concerning the broad exercise of criminal jurisdiction by Belgium over U.S. and other officials, see Ratner, 97 Am J Intl L at 890–91, 893 (cited in note 136).

[274] Anne-Marie Burley (now Slaughter), *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am J Intl L 461, 490 (1989); consider also *Filartiga*, 630 F2d at 890 ("Our holding today . . . is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.").

[275] See HR Rep No 102-367(I) at 5 (cited in note 254); S Rep No 102-249 at 8 (cited in note 231).

IV. Conclusion

This article has examined the relevance of CIL to the common law of foreign official immunity that U.S. courts will now develop in the wake of *Samantar v Yousuf*. The immunity of states and their representatives from the judicial process of other nations has been a central concern of international law since its inception. The last decade, however, has seen an erosion of international immunity protections for government officials who are criminally prosecuted for their alleged involvement in genocide, torture, war crimes, and other grave human rights abuses. In their place, international and national mechanisms of accountability are expanding. Thus far, however, there has not been a general trend outside the United States to extend the erosion of foreign official immunity to civil suits in domestic courts, even in suits for alleged violations of *jus cogens*.

These evolving CIL immunity rules have important implications for U.S. courts as they develop the common law of foreign official immunity. Although the decision in *Samantar* did not analyze CIL, the Court was aware of the international backdrop of the case, and it has emphasized international law's relevance in a variety of related contexts. As a result, it is likely that CIL will influence judicial assessments of common law immunity claims raised in human rights litigation after *Samantar*.

The precise influence of CIL will be affected by three considerations: the proper institutional role of U.S. courts in the area of foreign affairs, the weight that should be given to the views of the Executive Branch, and the congressional policies embodied in domestic statutes. In analyzing each variable, we have intentionally held the other two variables constant to highlight the relevant legal and policy choices within that variable. We recognize, of course, that the variables will often overlap. For example, if the State Department favors abrogating the conduct immunity of former officials for *jus cogens* violations in certain circumstances, courts that would otherwise interpret CIL to afford immunity to such officials will need to consider how much weight to give to the department's views.

This article has not attempted to advocate particular answers to these interconnected questions. Nor has it purported to address all of the conceptual and doctrinal debates implicated by *Samantar*. We have focused instead on other important issues—such as the

evolution of CIL immunity rules and their relevance to human rights litigation—to isolate the key decisional choices that U.S. courts will face and to clarify points of uncertainty that other scholars may wish to explore in the future.