# THE ADJUDICATION OF FOREIGN OFFICIAL IMMUNITY DETERMINATIONS IN THE UNITED STATES POST-*SAMANTAR*: A CIRCUIT SPLIT AND ITS IMPLICATIONS

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## INTRODUCTION

The common law of conduct-based, foreign official immunity in the United States is in a state of flux. In the wake of the U.S. Supreme Court's finding in *Samantar v. Yousuf* that individual foreign official immunity is no longer governed by the Foreign Sovereign Immunity Act (FSIA), but rather by common law,[1] the federal circuit courts of appeals have diverged



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1. *See generally* Samantar v. Yousuf, 560 U.S. 305, 308 (2010). Justice Stevens wrote the majority opinion in Samantar, in which Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, Alito and Sotomayor joined. Justices Alito, Thomas, and Scalia wrote concurring opinions. *Id.* at 306.

on two pivotal issues related to conduct-based, foreign official immunity. The first is how much deference, or "weight," to give an executive branch suggestion of immunity (SOI). The second is whether to recognize a *jus cogens* exception to this conduct-based immunity.[2] This Article analyzes the implications of these two key splits—not only for outcomes, but for fairness, consistency, deterrence, and impunity. It also addresses strategies putative plaintiffs may wish to adopt to "pierce the veil" of immunity. These strategies are based on jurisprudence related to the "splits" and on other post-*Samantar* cases addressing both conduct-based, foreign official and status-based, head of state immunity.

The uncertainty surrounding conduct-based, foreign official immunity may mean that defendants will experience disparate outcomes in similar cases, creating deterrence-related challenges and perceived unfairness. This uncertainty also makes it less likely that litigants will be able to predict

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For an explanation of the differences between the conduct-based and status-based varieties, or "types," of foreign official immunity, *see* Curtis A. Bradley & Laurence R. Helfer, International Law and the U.S. Common Law of Foreign Official Immunity, 2010 SUP. CT. REV. 213, 234–35 (2011) (["…Customary International Law] 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. 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." 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." Id. at 234-35 (quoting 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)(other internal citations omitted). For the rationales underlying these two types of foreign official immunities, see *id*.

2. *See infra* Part II for a detailed description of the two "splits." For an explanation of a *jus cogens* norm, see Curtis A. Bradley & Laurence R. Helfer, International Law and the U.S. Common Law of Foreign Official Immunity, 2010 SUP. CT. REV. 213, 236–37 (2011)("[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 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." Norms commonly said to qualify as *jus cogens* include the prohibitions on genocide, slavery, and torture. International crimes include genocide, war crimes, and crimes against humanity.") *Id.* at 236–37 (quoting Vienna Convention on the Law of Treaties, Art 53, 1155 UN Treaty Ser 332, 8 Intl Leg Mat 679 (1969)(other internal citations omitted). For purposes of this Article, all of these norms, prohibitions, and crimes fall under the rubric, or category, of "*jus cogens*."

immunity outcomes in individual cases, muddling their decision-making calculus and creating associated inefficiencies.[3]

Moreover, the aforementioned divergence, or "split," may be connected to the status of foreign precedent and customary international law with regard to conduct-based immunity. For example, the split in the federal circuit courts on whether a *jus cogens* exception to conduct-based immunity exists for foreign officials may itself reflect uncertainty in customary international law and foreign national precedent on this issue (at least in the civil context).[4] But although this law and these precedents can inform judicial decision-making on the issue in the United States,[5] both the ultimate resolution of the split and the particular direction U.S. jurisprudence will take on this issue, awaits a future decision by the U.S. Supreme Court or, perhaps, congressional intervention through targeted legislation. Evolving U.S. jurisprudence on this issue may, in turn, contribute to the development of customary international law.

However, in the wake of *Samantar*, there is uniform agreement among the lower courts in the United States that executive branch guidance in the context of status-based, head of state immunity is determinative, though certain limited exceptions to this immunity have been recognized.[6] In addition, the jurisprudence following *Samantar* suggests several possible strategies for plaintiffs suing heads of state and foreign officials claiming immunity for alleged human rights and other abuses, including exerting certain pressures on the executive branch and obtaining a waiver from the foreign state.[7] Plaintiffs suing foreign officials may also wish to consider certain strategies related to "forum-shopping," framing their allegations, and selecting a case theory.[8] Though these tactics do not ensure that courts will pierce the immunity veil, and may not be available in all cases, the strategies at least offer plaintiffs possible avenues for overcoming immunity.

Part I explains the landmark *Samantar v. Yousuf* case in detail. Part II then describes the aforementioned circuit splits. Part III canvases key post-

3. Some litigants may believe—incorrectly—that they can succeed at trial and forego settlement. Others may not want to risk losing at trial and settle cases they could perhaps have won, thereby stymieing jurisprudential development.

4. *See infra* note 120 and accompanying text.

5. *Id.*

6. *See infra* notes 102–112 and accompanying text.

7. *See infra* notes 60, 77, 118, and 127.

8. See *infra* notes 135–139 and accompanying text for a discussion of the strategies related to forum shopping and framing allegations and case theory. For a discussion of waiver, see *infra* notes 127 and 132 and accompanying text. For the general idea of exerting pressure on the executive branch to influence its guidance on the immunity question, see *infra* notes 118 and 132 and accompanying text.

*Samantar* decisions issued by U.S. district courts both on conduct-based, foreign official immunity and on status-based, head of state immunity. The cases selected for inclusion in Part III illustrate strategies plaintiffs may wish to adopt to overcome these immunities. Part IV analyzes the implications of the two circuit splits described in Part II regarding the appropriate level of judicial deference to afford executive SOIs in the conduct-based, foreign official immunity context, and on whether this immunity should be granted to officials in cases of alleged *jus cogens* violations. Part IV also examines status-based, head of state immunity issues in the wake of *Samantar*, including deference to executive SOIs in this context and possible immunity exceptions. Finally, Part IV explores certain strategic considerations for plaintiffs suing foreign officials for human rights abuses in U.S. courts.

## I. *SAMANTAR V. YOUSUF*

In *Samantar v. Yousuf*, plaintiffs-respondents were several Somalis who sought damages under the Torture Victim Protection Act (TVPA) and Alien Tort Statute (ATS) for torture and extrajudicial killings allegedly authorized by defendant-petitioner Samantar.[9] At the time of the alleged acts, Samantar was the First Vice-President and Minister of Defense of Somalia and had served as the Prime Minister during the 1980s.[10] However, in 1991, Samantar fled Somalia for the United States. The United States declined to recognize any official government of Somalia following the collapse of the military regime in that country in the early 1990s.[11]

The federal district court in *Samantar* found that it lacked subject matter jurisdiction over plaintiffs' claims because Samantar was entitled to official immunity under the FSIA.[12] The court also found that the FSIA applied to individual officials acting on behalf of the state in their official capacity.[13] The Court of Appeals for the Fourth Circuit, however, reversed. It held, citing the statute's text and structure, that the FSIA did not apply to individual officials.[14]

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9. Samantar v. Yousuf, 560 U.S. 305, 308 (2010) ("Respondents are members of the Isaaq clan, which included well-educated and prosperous Somalis who were subjected to systematic persecution during the 1980's by the military regime then governing Somalia. They allege that petitioner exercised command and control over members of the Somali military forces who tortured, killed, or arbitrarily detained them or members of their families; that petitioner knew or should have known of the abuses perpetrated by his subordinates; and that he aided and abetted the commission of these abuses.").

10. *Id.*

11. *Id.* at 308–09.

12. *Id.* at 309.

13. *Id.*

14. *See id.* at 310.

The Supreme Court began its analysis in *Samantar* by tracing the history of foreign sovereign immunity in the United States, noting that it had developed under the common law in the landmark case of *Schooner Exchange v. McFaddon*:

> The doctrine of foreign sovereign immunity developed as a matter of common law long before the FSIA was enacted in 1976. In *Verlinden* . . ., we explained that in *Schooner Exchange v. McFaddon* . . . , "Chief Justice Marshall concluded that . . . the United States had impliedly waived jurisdiction over certain activities of foreign sovereigns." The Court's specific holding in *Schooner Exchange* was that a federal court lacked jurisdiction over "a national armed vessel . . . of the emperor of France," . . . but the opinion was interpreted as extending virtually absolute immunity to foreign sovereigns as "a matter of grace and comity[.]"[15]

According to the Court in *Samantar*, a two-pronged procedure developed at common law for deciding questions of foreign sovereign immunity, including questions of foreign official immunity, following *Schooner Exchange*. First, a foreign state's representative requests an SOI for itself or its official from the United States Department of State. Then, if the request is granted, the district court declines to exercise its jurisdiction over the sovereign or official.[16] In addition, the Court noted that although the State Department had previously sought "immunity in all actions against friendly sovereigns,"[17] it began to follow an immunity approach known as the restrictive approach, or "theory," of immunity in 1952.

Under the restrictive theory—laid down in the now-famous Tate Letter[18]—foreign states have immunity for official, public acts but do not enjoy immunity for commercial acts.[19] Unfortunately, the State Department did not always follow its own guidance as a result of political pressure, and, at times, recommended the immunity of a foreign state even though it had

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15. *Id.* at 311 (third and fourth ellipses in original) (quoting Verlinden B. V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983) (citing Schooner Exch. v. McFaddon, 11 U.S. 116, 146 (1812))).

16. *Id.* at 311–12. If the State Department did not issue an SOI, the district court decided the immunity question itself. In so doing, the "district court inquired 'whether the ground of immunity is one which it is the established policy of the [State Department] to recognize.'" *Id.* at 312 (alteration in original) (quoting Republic of Mexico v. Hoffman, 324 U.S. 30, 36 (1945)).

17. *Id.*

18. *Id.* (citing *Verlinden*, 461 U.S. at 486–87); *see* Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952), *reprinted in* 26 Dept. State Bull. 984–85 (1952).

19. *See id.* (citing *Verlinden*, 461 U.S. at 487). States engage in commercial acts when they perform acts in a way that is similar to a corporation engaged in business-related activities (e.g., purchasing and selling goods for profit, etc.).

engaged in commercial activity.[20] Due to the inconsistencies in State Department SOIs under the Tate Letter, Congress codified the common law restrictive theory of foreign sovereign immunity in 1976 by passing the Foreign Sovereign Immunities Act ("FSIA").[21] In so doing, Congress shifted the task of determining immunity from the State Department to the courts.[22]

In light of this history, the Court in *Samantar* initially framed the issue and holding as follows:

> [W]hether the Foreign Sovereign Immunities Act of 1976 (FSIA or Act) . . . provides petitioner [Samantar] with immunity from suit based on actions taken in his official capacity. We hold that the FSIA does not govern the determination of petitioner's immunity from suit.[23]

And later in its opinion, the Court commented:

> Our review of the text, purpose, and history of the FSIA leads us to the conclusion that the Court of Appeals correctly held the FSIA does not govern petitioner's claim of immunity. The Act therefore did not deprive the District Court of subject-matter jurisdiction.[24]

In holding that the FSIA did not apply to individual foreign officials, the Court looked to the text of the FSIA. The Court focused, in particular, on the fact that individuals sued for conduct undertaken in their official capacities are not "foreign states" subject to immunity under the FSIA. The FSIA's definition of foreign state includes its political subdivisions, agencies, and instrumentalities.[25] The Court held that this phasing does not encompass foreign officials because,

> Congress has specifically defined "agency or instrumentality" in the FSIA, and all of the textual clues in that definition cut against such a broad construction. . . . [T]he statute specifies that "'agency or instrumentality . . .' means any entity" matching three [particular]

20. *See id.* at 312–13 (citing Republic of Austria v. Altmann, 541 U.S. 677, 690 (2004) (quoting *Verlinden*, 461 U.S. at 487)).

21. *See id.*

22. *Id.* at 313 (citing *Altmann*, 541 U.S. at 690–91; *Verlinden*, 461 U.S. at 487–88; Foreign Sovereign Immunities Act of 1976 [FSIA], 28 U.S.C. § 1602 (2012)). The Court also said that "[a]fter the enactment of the FSIA, the Act—and not the pre-existing common law—indisputably governs the determination of whether a foreign state is entitled to sovereign immunity." *Id.*

23. *Id.* at 308 (citing FSIA §§ 1330, 1602–11).

24. *Id.* at 325.

25. *See* FSIA § 1603(a).

> characteristics, . . . and "entity" typically refers to an organization, rather than an individual.[26]

In addition, the FSIA statutory terms "agency and instrumentality" refer to an entity which is a "separate legal person . . . ."[27] According to the Court in *Samantar*, this definition ordinarily refers to entities, not to individual persons:

> The phrase "separate legal person, corporate or otherwise," . . . could conceivably refer to a natural person, solely by virtue of the word "person." But the phrase "separate legal person" typically refers to the legal fiction that allows an *entity* to hold personhood separate from the natural persons who are its shareholders or officers.[28]

Moreover, an agency or instrumentality under the FSIA must be either "an organ of a foreign state" or an entity "a majority of whose shares or other ownership interest is owned by a foreign state."[29] According to the Court, "[i]t is similarly awkward to refer to a person as an 'organ' of the foreign state."[30] Finally, under the FSIA, an agency or instrumentality means an entity "which is neither a citizen of a State of the United States as defined in [certain FSIA subsections], nor created under the laws of any third country."[31] According to the Court, this aspect of the "agency or instrumentality" definition:

> could not be applied at all to a natural person. A natural person cannot be a citizen of a State [under the applicable FSIA subsections], because those subsections refer to the citizenship of corporations and estates. Nor can a natural person be 'created under the laws of any third country.'[32]

Thus, the Court held that Congress did not intend to include individual officials in the meaning of "agency or instrumentality."[33]

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26. *Samantar*, 560 U.S. at 315 (second ellipsis in original) (citing FSIA § 1603(b) &); BLACK'S LAW DICTIONARY 612 (9th ed. 2009)).

27. FSIA § 1603(b)(1).

28. *Id.* at 315 (emphasis added) (citing FSIA § 1603(b)(1)).

29. *Id.* at 314 (quoting FSIA § 1603(b)(2)).

30. *Id.* at 315 (citing FSIA § 1603(b)(2)).

31. *Id.* at 314 (quoting FSIA § 1603(b)(3)).

32. *Id.* at 315–16.

33. *Id.* at 314–15.

The Court rejected defendant's argument that the FSIA's basic definition of foreign state can include individual officials because the definition itself is illustrative, not exclusive:

> [Defendant] argues that the definition of "foreign state" . . . sets out a nonexhaustive list that "includes" political subdivisions and agencies or instrumentalities but is not so limited . . . . . It is true that use of the word "include" can signal that the list that follows is meant to be illustrative rather than exhaustive. . . . But even if the list [defining foreign state] is merely illustrative, it still suggests that "foreign state" does not encompass officials, because the types of defendants listed are all entities.[34]

Furthermore, the Court pointed out that had Congress intended to include individuals within the meaning of the term "foreign state," it would have more directly stated its intent since it had done so in other parts of the FSIA.[35] In particular, the Court explained that the FSIA's tortious activity exception to foreign state immunity, unlike the "foreign state" definition, includes a specific reference to individual officials and employees.[36] According to the Court, "[i]f the term 'foreign state' by definition includes an individual acting within the scope of his office, the phrase 'or of any official or employee . . .' in [the FSIA tortious activity exception] would be unnecessary."[37] In addition, according to the Court, other FSIA provisions, such as those dealing with service of process and remedies, counsel against interpreting the "foreign state" definition to include individuals.[38]

The Court also disagreed with defendant's argument that "because state and official immunities are coextensive, Congress must have codified official immunity when it codified state immunity [in the FSIA]."[39] This caveat relates to the fact that, according to the Restatement of Foreign Relations, the "immunity of a foreign state . . . extends to . . . any other public minister, official, or agent of the state with respect to acts performed in his official capacity *if the effect of exercising jurisdiction would be to*

34. *Id.* at 316–17 (footnote omitted) (citing FSIA § 1603(a); Russell v. United States, 261 U.S. 514 (1923)).

35. *Id.*

36. *Id.*

37. *Id.* at 318 (ellipsis in original) (citing FSIA § 1605(a)(5) (tortious activity exception); Dole Food Co. v. Patrickson, 538 U.S. 468, 476–77 (2003)).

38. *Id.* ("Congress made no express mention of service of process on individuals in § 1608(a) . . ., which governs service upon a foreign state or political subdivision."); *id.* at 319 ("The Act's careful calibration of remedies among the listed types of defendants suggests that Congress did not mean to cover other types of defendants [i.e., individual officials] never mentioned in the text.").

39. *Id.* at 321.

*enforce a rule of law against the state*."[40] The Court also pointed out that the U.S. government had, in the past, suggested immunity for officials even though the state did not enjoy immunity under the FSIA.[41] In sum, the Court found "little reason to presume that when Congress set out to codify state immunity, it must also have, sub silentio, intended to codify official immunity."[42]

Furthermore, the Court noted that the legislative history of FSIA does not reflect that Congress intended to include individual officials within the scope of the statute.[43] In particular, the Court emphasized that Congress did not intend the FSIA to remove the State Department's role in foreign official immunity decisions.[44]

Finally, the Supreme Court dismissed the argument that "artful pleading" by plaintiffs who chose to proceed against the foreign official under the common law would make the FSIA "optional." In this regard, the Court said that:

> Even if a suit is not governed by the Act, it may still be barred by foreign sovereign immunity under the common law. And not every suit can successfully be pleaded against an individual official alone. Even when a plaintiff names only a foreign official, it may be the case that the foreign state itself, its political subdivision, or an agency or instrumentality is a required party, because that party has "an interest relating to the subject of the action" and "disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest." . . . If this is the case, and the entity is immune from suit under the FSIA, the district court may have to dismiss the suit, regardless of whether the official is immune or not under the common law.[45]

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40. *Id.* (quoting RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 66 (AM. LAW INST. 1965)) (italics in original).

41. *Id.* at 321–22.

42. *Id.* at 322.

43. *Id.* at 323 ("[T]he legislative history points toward an intent to leave official immunity outside the scope of the Act. . . . And although questions of official immunity did arise in the pre-FSIA period, they were few and far between. The immunity of officials simply was not the particular problem to which Congress was responding when it enacted the FSIA." (footnote omitted)).

44. *Id.* ("We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity.").

45. *Id.* at 324–25 (footnote omitted) (first ellipsis in original) (quoting FED. R. CIV. P. 19(a)(1)(B)). And in a subsequent passage, the Court said: "We are thus not persuaded that our construction of the statute's text should be affected by the risk that plaintiffs may use artful pleading to attempt to select between application of the FSIA or the common law. And we think this case, in which respondents have sued petitioner in his personal capacity and seek damages from his own pockets, is properly governed by the common law because it is not a claim against a foreign state as the Act defines that term." *Id.* at 325.

Accordingly, regardless of how the plaintiff originally pleads her case, the foreign state may be determined to be a required party. If the foreign state is a required party, the state may be found immune under the FSIA. This finding, in turn, will lead to the termination of the suit regardless of the official's immunity status under the common law. In addition, the Court found that in certain suits against foreign officials, the state may be the real party in interest. And, where that is the case, the FSIA would apply regardless of how the plaintiff originally pleaded her case.[46] Under the facts of *Samantar*, the Court concluded that the common law applied because the suit was both directed against and sought damages from Samantar in his personal capacity; however, the court remanded the case back to the district court to decide whether defendant was ultimately entitled to immunity.[47]

## II. POST-*SAMANTAR* CIRCUIT SPLIT

In the approximately five years since *Samantar* was decided, a split has emerged among the federal appellate circuits on two significant issues related to determinations of conduct-based, foreign official immunity: (1) the degree of deference courts should give to an SOI by the executive branch; and (2) whether there is a *jus cogens* exception to immunity for certain grave, international human rights abuses. The differing approaches taken by the Fourth and Second Circuits illustrate the substance of the circuit split.

46. *Id.* at 325 (in particular, the Court said that "it may be the case that some actions against an official in his official capacity should be treated as actions against the foreign state itself, as the state is the real party in interest").

47. *Id.* at 325–26. *See also supra* note 45.

### A. The Fourth Circuit: *Yousuf v. Samantar*[48] ("Samantar II")

On remand from the Supreme Court decision in *Samantar*, the U.S. District Court for the Eastern District of Virginia found that the executive branch's SOI expressly opposing immunity for defendant Samantar ("Defendant") was entitled to considerable deference and denied Defendant immunity under the common law. In particular, according to the Fourth Circuit:

> [I]n denying Samantar's subsequent motion to reconsider, the district court implied that it performed its own analysis and merely took the State Department's view into account: "The Executive Branch has spoken on this issue and . . . [is] entitled to a great deal of deference. They don't control but they are entitled to deference in this case." The district court noted that both "the residency of the defendant" and "the lack of a recognized government" were factors properly considered in the immunity calculus.[49]

The executive branch based its SOI on the overall impact it would have on the foreign relations of the United States as well as on two specific considerations. First, although Defendant was a former state official, no recognized government existed to request immunity or to comment on the official nature of his acts. Since immunity for acts rendered in an official capacity stems from the immunity of the foreign state itself, the executive branch reasoned that Defendant could not justifiably receive immunity unless a foreign state existed to claim it.[50] Second, Defendant was a permanent legal resident of the United States who "enjoy[s] the protections

48. 699 F.3d 763 (4th Cir. 2012). For a summary of the status of the jos cogens exception prior to *Samantar* under the FSIA, *see* Curtis A. Bradley & Laurence R. Helfer, International Law and the U.S. Common Law of Foreign Official Immunity, 2010 SUP. CT. REV. 213, 264–65 (2011)( "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. Similarly, a number of circuit courts have 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. 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." *Id.* (quoting Saudi Arabia v. Nelson, 507 US 349, 361 (1993)(other citations omitted).

49. *Id.* at 767–68 (third ellipsis and alteration in original) (quoting Yousuf v. Samantar, No. 1:04CV1360 (LMB/JFA), 2011 WL 7445583, at *1 (E.D. Va. Feb 15, 2011)).

50. *Id.* at 767.

of [United States] law," and should, therefore, "be subject to the jurisdiction of [United States] courts."[51]

In *Samantar II*, the Fourth Circuit examined how much deference U.S. courts should give SOIs by the State Department in foreign official immunity cases.[52] The court found that following the landmark *Schooner Exchange* case, which established the doctrine of absolute sovereign immunity,[53] there had not been complete deference to the executive branch in cases involving questions of foreign sovereign immunity.[54] By the 1930s, however, courts had begun to regard executive branch determinations concerning foreign sovereign immunity as controlling.[55] Courts faced with a foreign sovereign immunity claim generally applied the two-step procedure involving the evaluation of whether the foreign state had requested an SOI from the executive branch, whether that request was granted, and if not, whether it (the court) believed immunity should be granted based on established branch policy.[56] According to the Fourth Circuit, the decision by the State Department to adopt the restrictive view of foreign sovereign immunity in the Tate Letter had little effect on courts' deference to State Department SOIs.[57] By the time Congress passed the FSIA in 1976, the "clearly established practice of judicial deference to executive immunity determinations had been expressed largely in admiralty cases."[58]

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51. *Id.* (internal quotation marks and citation omitted).

52. *Id.* at 769–70. As part of this analysis, the Court recognized the two distinct immunities of head of state immunity and foreign official immunity, both of which were claimed by defendant Samantar. *See id.*

53. *Id.* at 770 ("Foreign sovereign immunity, insofar as American courts are concerned, has its doctrinal roots in [*Schooner Exchange*], which ushered in nearly a century of 'absolute' or 'classical' immunity, 'under which a sovereign [could not], without his consent, be made a respondent in the courts of another sovereign.'" (quoting Permanent Mission of India to the United Nations v. City of New York, 551 U.S. 193, 199 (2007))).

54. *Id.* ("'Absolute' immunity for the foreign sovereign, however, is not to be confused with absolute judicial deference to the Executive Branch. In fact, during the lengthy period of absolute immunity, courts did not necessarily consider themselves obliged to follow executive pronouncements regarding immunity."). The Court of Appeals noted that in 1921, in *Berizzi Brothers*, the United States Supreme Court found "that a steamship owned by a foreign sovereign was entitled to immunity despite the fact that the Secretary of State had expressed the opposite view earlier in the litigation." *Id.* at 770–71 (citing Berizzi Bros. Co. v. Pesaro, 271 U.S. 562, 576 (1926)).

55. *Id.* at 771 (noting, for example, in the specific context of admiralty suits against foreign ships, "[i]t was not until the late 1930s—in the context of in rem actions against foreign ships—that judicial deference to executive foreign immunity determinations emerged as standard practice" (citing The Navemar, 303 U.S. 68 (1938); *Ex parte* Republic of Peru, 318 U.S. 578 (1943); Republic of Mexico v. Hoffmann, 324 U.S. 30 (1945))).

56. *Id.* (quoting *Samantar*, 560 U.S. at 312 (quoting *Hoffman*, 324 U.S. at 36)).

57. *Id.* at 771 n.5 (citing Republic of Austria v. Altmann, 541 U.S. 677, 690 (2004)).

58. *Id.* at 771–72.

In addition, the Fourth Circuit noted that the power to receive ambassadors is bestowed upon the executive branch under Article II, Section III of the U.S. Constitution. This provision, the court reasoned, impliedly confers the power to recognize foreign heads of state on the executive branch. It then held that because the State Department's power to issue SOIs for heads of state is a constitutional power, those SOIs are entitled to absolute deference.[59] In light of this constitutional pedigree and the wealth of precedent finding that executive branch guidance on head of state immunity questions binds courts, the Fourth Circuit determined that Defendant was not entitled to head of state immunity.[60]

But because the constitutional considerations are different, the Court of Appeals determined that State Department guidance in the conduct-based foreign official immunity context is not controlling, despite being entitled to "substantial weight." For example, the Court explained that foreign official immunity cases "do not involve any act of recognition . . . rather, they simply involve matters about the scope of defendant's official duties."[61] Significantly, the Court nevertheless recognized that the Executive Branch still plays an important advisory role in foreign official immunity cases because they implicate CIL and foreign policy considerations.[62] In sum, the Court found that it affords complete deference to the State Department's finding on head-of-state immunity but that regarding conduct-based immunity, the Department's view is "not controlling, but it carries substantial weight in our analysis."[63]

Finally, to determine whether Defendant was entitled to foreign official immunity, the Fourth Circuit looked to immunity law in the United States and internationally as well as to executive branch guidance. The court noted that international law, in particular, has played an influential

59. *See id.* at 772.

60. *See id.* ("[T]he State Department's pronouncement as to head-of-state immunity is entitled to absolute deference. The State Department has never recognized Samantar as the head of state for Somalia; indeed, the State Department does not recognize the Transitional Federal Government or any other entity as the official government of Somalia, from which immunity would derive in the first place. The district court properly deferred to the State Department's position that Samantar be denied head-of-state immunity.").

61. *Id.* at 773.

62. *Id.* ("This is not to say, however, that the Executive Branch has no role . . . These immunity decisions turn upon principles of customary international law and foreign policy, areas in which the courts respect . . . the views of the Executive Branch. . . . With respect to foreign official immunity, the Executive Branch still informs the court about the diplomatic effect of the court's exercising jurisdiction over claims against an official of a foreign state, and the Executive Branch may urge the court to grant or deny official-act immunity based on such considerations." (citations omitted) (citing Peter B. Rutledge, *Samantar, Official Immunity and Federal Common Law*, 15 LEWIS & CLARK L. REV. 589, 606 (2011))).

63. *Id.*

role in foreign sovereign immunity jurisprudence and legislation throughout U.S. history.[64] In addition, the United States, and in particular the Supreme Court, has adopted "the international law principle that sovereign immunity, which belongs to a foreign state, extends to an individual official acting on behalf of that foreign state."[65] However, "[a] foreign official or former head-of-state will . . . not be able to assert this immunity for private [or individual] acts that are not arguably attributable to the state, such as drug possession or fraud."[66] In addition, the court concluded that under international law, *jus cogens* violations are essentially private acts for which official immunity may not be warranted:

> There has been an increasing trend in international law [following the *Pinochet* decision] to abrogate foreign official immunity for individuals who commit acts, otherwise attributable to the State, that violate *jus cogens* norms—*i.e.,* they commit international crimes or human rights violations[.][67]

Furthermore, according to the Fourth Circuit, conduct-based foreign official immunity does not extend to violations of *jus cogens* norms, but head of state immunity still applied notwithstanding these violations.[68] In sum, the Fourth Circuit held that based on United States and international

64. *Id.* at 773–74.

65. *Id.* at 774 (citing Underhill v. Hernandez, 168 U.S. 250, 252 (1897)). The Court of Appeals elaborated that "[b]y the time the FSIA was enacted, numerous domestic courts had embraced the notion, stemming from international law, that '[t]he immunity of a foreign state . . . extends to . . . any . . . public minister, official, or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state.'" *Id.* (all alternations in original) (quoting RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 66(f) (AM. LAW INST. 1965)).

66. *Id.* at 775 (citing In re Doe, 860 F.2d 40, 45 (2d Cir. 1988)).

67. *Id.* at 777 (citing Curtis A. Bradley & Laurence R. Helfer, International Law and the U.S. Common Law of Foreign Official Immunity, 2010 SUP. CT. REV. 213, 236–37 (2011)). The Court of Appeals noted that "[a] number of decisions from foreign national courts have reflected a willingness to deny official-act immunity in the criminal context for alleged *jus cogens* violations, most notably the British House of Lords' Pinochet decision denying official-acts immunity to a former Chilean head of state accused of directing widespread torture." *Id.* (citing R v. Bartle, ex parte Pinochet [1999] 1 AC 147 (HL) 203–06 (appeal taken from Eng.). Interestingly, in the civil context, the Court of Appeals pointed out that "[s]ome foreign national courts have pierced the veil of official-acts immunity to hear civil claims alleging *jus cogens* violations, but the *jus cogens* exception appears to be less settled in the civil context." Id. (citing Cass., sez. un., 11 marzo 2004, n. 5044, Foro it. 2004, I (It.) [Ferrini v. Republic of Germany]); Jones v. Saudi Arabia [2006] UKHL 26 [24], [2007] 1 AC (HL) 270 (Lord Bingham of Cornhill LJ) (appeal taken from Eng.)). The Court interpreted *Jones* as "rejecting [a] *jus cogens* exception to foreign official immunity in [the] civil context." *Id.*

68. *Id.* ("American courts have generally [found] that *jus cogens* violations are not legitimate official acts and therefore do not merit foreign official immunity but still recognizing that head-of-state immunity, based on status, is of an absolute nature and applies even against *jus cogens* claims.").

law, foreign officials "are not entitled to foreign official immunity for *jus cogens* violations, even if they were performed in their official capacity."[69]

Finally, the Fourth Circuit gave substantial weight to the factors underlying the State Department's executive guidance that Defendant ought to be denied immunity.[70] In conclusion, the Court of Appeals held that Defendant was not entitled to conduct-based, foreign official immunity under the common law because of both the various *jus cogens* violations and the particular executive branch guidance involved in the case.[71]

B. The Second Circuit: *Rosenberg v. Pasha*

Plaintiffs-appellants ("Plaintiffs") were American and Israeli citizens who were victims or relatives of victims injured or killed during terrorist attacks in Mumbai, India. Plaintiffs alleged that the attacks themselves were committed, in part, by Pakistani nationals of Lashkar-E-Taiba ("Le-T"), a United States government-designated terrorist organization.[72] Plaintiffs further alleged that the Inter-Services Intelligence Directorate of Pakistan ("ISI"), and in particular two of its former Directors General, Ahmed Shuja Pasha and Nadeem Taj ("Pasha and Taj"), carried out intelligence gathering for the Pakistani military and essentially coordinated the attacks with Le-T.[73] Plaintiffs brought suit under the TVPA, the ATS, and the Antiterrorism Act.[74] The district court had held that Pasha and Taj were protected from suit by common law sovereign immunity, basing its decision on the SOI provided by the State Department which stipulated that Pasha and Taj were foreign officials acting within the scope of their positions.[75] Plaintiffs, relying upon the Fourth Circuit's decision in *Samantar* II, argued that immunity should not apply to defendants Pasha and Taj because they committed *jus cogens* violations; moreover, plaintiffs argued that under *Samantar* II, SOIs themselves are not entitled to absolute

69. *Id.* The Fourth Circuit also found that "Congress's enactment of the TVPA, and the policies it reflects, [is] both instructive and consistent with our view of the common law regarding these aspects of *jus cogens*." *Id.*

70. *Id.* at 777–78. For a list of the factors put forth by the State Department in suggesting Samantar be denied immunity, see *supra* notes 50–51 and accompanying text.

71. *Id.* at 778.

72. Rosenberg v. Pasha, 577 Fed. Appx. 22, 23 (2d Cir. 2014).

73. *Id.* at 23.

74. *Id.*

75. *Id.* The District Court had earlier found that ISI itself should receive immunity under the FSIA since no exception (to immunity) applied and the United States executive branch had suggested immunity. *See* Rosenberg v. Lashkar-e-Taiba, 980 F. Supp. 2d 336, 342–43 (E.D.N.Y. 2010) ("Based on the pleadings and the record in these actions, the Court is satisfied that the ISI has met its burden under the FSIA and the ISI is entitled to immunity from these actions.").

deference.[76] However, the Court of Appeals for the Second Circuit in *Pasha* was not persuaded. The Second Circuit held that under *Matar v. Dichter*, absolute deference to the executive branch is warranted in foreign official immunity claims. It also held that, under *Matar*, *jus cogens* violations do not overcome these immunity claims.[77] Specifically, the Second Circuit disagreed with plaintiffs' contention that *Matar* had been overruled by the Supreme Court's decision in *Samantar.* According to the Second Circuit, the Supreme Court did not address common law official immunity in any significant way and, therefore, did not overrule *Matar*. On the contrary, the Second Circuit pointed out, the Supreme Court noted that "[w]hether [the foreign official] may be entitled to immunity under the common law . . . [is a] matter [ ] to be addressed in the first instance . . . on remand."[78] Therefore, the Second Circuit affirmed the district court's opinion finding conduct-based, foreign official immunity for defendants Pasha and Taj in accordance with the executive branch's SOI.[79]

## III. OTHER KEY, POST-*SAMANTAR* CASES

Several federal district court opinions in the wake of *Samantar* have expounded upon its holding and rationale related to foreign official immunity. While some of these cases address the issues pertaining to the split described in the preceding Part (Part II), others shed light on certain strategies plaintiffs may adopt to potentially overcome the immunity of foreign officials. This Part will examine cases involving the conduct-based immunity of foreign officials before turning to those implicating status-based immunity.

### A. Foreign Official, Conduct-based Immunity Cases

In *Giraldo v. Drummond Co*., Plaintiffs were legal representatives of individuals allegedly killed at the hands of a paramilitary group in

76. *Rosenberg*, 577 Fed. Appx. at 23 (citing *Yousuf*, 699 F.3d at 773, 777).

77. *Id*. (citing Matar v. Dichter, 563 F. 3d 9, 15 (2d Cir. 2009)).

78. *Id.* at 24 (alterations in original) (quoting Samantar v. Yousuf, 560 U.S. 305, 325–26 (2010)). Note that the Court of Appeals for the Second Circuit had previously found that there is "no *jus cogens* exception to the FSIA." *Rosenberg*, 980 F. Supp. 2d at 344 (citing Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 242–45 (2d Cir. 1996)).

79. *Rosenberg*, 577 Fed. Appx. at 24. The Court of Appeals said that "Matar remains binding precedent in this Circuit, and in applying it, the District Court correctly determined that, in light of the Statement of Interest filed by the State Department recommending immunity for Pasha and Taj, the action must be dismissed." *Id.* Regarding defendants/appellees, the District Court had said that "it is the position of the Executive Branch that defendants Pasha and Taj, former Directors General of the ISI, are entitled to foreign sovereign immunity under the common law as foreign officials who were sued in their official capacity for acts conducted in their official capacity. Under the common law on sovereign immunity, the Court's inquiry ends here." *Rosenberg*, 980 F. Supp. 2d at 343.

Columbia.[80] They sought to compel the testimony of the former President of Columbia, Alvaro Uribe, concerning his alleged involvement with the paramilitary group during his presidency.[81] The executive branch issued an SOI affirmatively recognizing the former president's immunity from testifying about his official actions while president.[82]

The District Court for the District of Columbia in *Giraldo* first noted that in cases where the executive branch issued an SOI affirmatively granting immunity to a former president, the traditional or historical practice had been for courts to defer to that guidance.[83] The district court rejected Plaintiffs' argument that the testimony they sought related to conduct that had occurred before Uribe was president, reasoning that the testimony "still relate[d] to information he received and acts he took in his official capacity as a government official—[in this case as] the Governor of [the department of] Antioquia."[84] In response to the Plaintiffs' argument that the former President's conduct consisted of "unofficial" actions, the district court determined that "allegations of illegality do not serve to render an action unofficial for purposes of foreign official immunity. . . . [S]uch a rule [that illegal actions fall outside the scope of official immunity] would eviscerate the protection of foreign official immunity and would contravene federal law. . . ."[85]

The district court also pointed out that under its own precedent even violations of *jus cogens* norms—which plaintiffs alleged the former president had perpetrated—do not fall outside the scope of foreign official immunity: "The D.C. Circuit has rejected the argument that *jus cogens* violations defeat foreign official immunity in the context of the [FSIA]," and the district court found this conclusion "instructive" even given *Samantar*'s holding that FSIA did not apply to individual, foreign official

80. Giraldo v. Drummond Co., 808 F. Supp. 2d 247, 248 (D.D.C. 2011).

81. *Id.* Plaintiffs brought their claims against a certain corporation, its subsidiaries and employees for war crimes, crimes against humanity and extrajudicial killings under the ATS and TVPA. *Id.* Plaintiffs also sought testimony from the former president regarding conduct that transpired while he was a provincial governor in Columbia. *Id.* at 249.

82. *Id.*

83. *Id.* (citing *Samantar*, 560 U.S. at 311). The District Court then observed, "In this case, the State Department has granted respondent's request for a suggestion of immunity and suggests that former President Uribe enjoys residual immunity as to information relating to acts taken or obtained in his official capacity as a government official. . . . Plaintiffs do not take issue with this standard [as reiterated in *Samantar*] for determining respondent's immunity [i.e., if the State Department grants immunity, the district court surrenders jurisdiction over the case]." *Id. See also* Abi Joudi & Azar Trading Corp. v. Cigna Worldwide Ins., 391 Fed. Appx. 173, 178–80 (3d Cir. 2010) (remanding foreign official immunity claims in order to allow parties to argue these claims under the common law in light of *Samantar* and in order to allow executive branch to provide guidance concerning these claims).

84. *Giraldo*, 808 F. Supp. 2d at 249–50.

85. *Id.* at 249–50.

immunity claims.[86] The district court reasoned that a *jus cogens* exception would "place a strain upon our courts [in the form of innumerous human rights lawsuits] and our diplomatic relations, [and] it would also eviscerate any protection that foreign official immunity affords."[87] Basing its reasoning for declining to recognize this exception on its own precedent as well as foreign precedent, the court commented that:

> As soon as a party alleged a violation of a *jus cogens* norm, a court would have to determine whether such a norm was indeed violated in order to determine immunity—i.e., the merits would be reached. When the foreign official is the defendant, there will effectively be no immunity—a civil action by definition challenges the legality of the official's acts.[88]

In sum, the District Court for the District of Columbia found that there was not adequate precedent to support plaintiff's argument for a *jus cogens* exception.[89]

In *Smith v. Ghana Commercial Bank, Ltd.*, the District Court for the District of Minnesota decided, in a case against a foreign official for fraud

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86. *Id.* at 250 (citing Belhas v. Ya'alon, 515 F.3d 1279, 1287 (D.C. Cir. 2008)). The District Court stated, "Because the court [in *Belhas*] decided the issue under the FSIA, that holding does not squarely govern the issue here regarding the effect of a *jus cogens* violation on foreign official immunity for purposes of the common law. But as the Supreme Court noted in Samantar, rules that appellate courts developed for foreign official immunity under the FSIA 'may be correct as a matter of common-law principles.' . . . And the D.C. Circuit's reasoning in Belhas is instructive." *Id.* (quoting *Samantar*, 560 U.S. at 322 n.17).

87. *Id.*

88. *Id.* In terms of foreign precedent, the District Court stated that "[B]oth the Second and Seventh circuits have found [t]he Executive Branch's determination that a foreign leader should be immune from suit even where the leader is accused of acts that violate *jus cogens* norms is established by a suggestion of immunity. . . . Even the Supreme Court has suggested that *jus cogens* violations are still official actions." *Id.* at 251 (internal quotation marks omitted) (second alteration in original) (citing Saudi Arabia v. Nelson, 507 U.S. 349, 361 (1993); Matar v. Dichter, 563 F. 3d 9, 15 (2d Cir. 2009); Ye v. Zemin, 383 F.3d 620, 627 (7th Cir.2004)).

89. *Id.* ("[Plaintiffs] contend that [President Uribe] acted within his official capacity but illegally, and hence such unlawful acts [involving violations of *jus cogens* norms] were outside the scope of his official duties by definition. But that position is just what Belhas and other cases reject. Accordingly, plaintiffs' allegations of *jus cogens* violations do not defeat former President Uribe's immunity.") Finally, the District Court found that *if* plaintiffs were to seek information related to unofficial actions taken by the former Columbian president, they first needed to investigate whether there may be alternative sources for this information. *Id.* at 252 ("The Court agrees with the position of the United States that, although immunity is not available with respect to information relating to acts taken or obtained by former President Uribe outside of his official capacity as a government official, comity and foreign relations interests nonetheless require that all other reasonably available means to acquire such information be exhausted before a deposition is permitted. Accordingly, to the extent plaintiffs were to seek information unrelated to acts taken or obtained in respondent's official capacity, they must first show that the information is both necessary and unavailable through other means.").

involving no executive branch guidance (*i.e.*, the official was Ghana's attorney general at the time), that the appropriate test for foreign official immunity under the common law was the rule contained in Section 66 of Restatement (Second) of Foreign Relations Law: "'[t]he immunity of a foreign state . . . extends to . . . any other public minister, official, or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state."[90] In particular, the Court said that:

> The rule stated in Restatement § 66(f) is consistent with the principles underlying the common law of foreign sovereign immunity. Allowing an American court to reach the merits of a suit against a public official for acts taken on behalf of the foreign state, and, thereby enforcing a rule of law against the foreign state, would certainly affect the "power and dignity" of that foreign state.[91]

In addition, the Court applied the rule from *Samantar* that certain official capacity suits should be regarded as "actions against the foreign state itself, as the state is the real party in interest."[92] Based on these rules, the Court in *Smith* found that the foreign official, who was Ghana's attorney general at the time, enjoyed immunity from suit because the plaintiff's allegations concerned conduct by the attorney general in his official capacity.[93]

Finally, the court found that declaring that the attorney general of Ghana was not entitled to foreign official immunity and exercising jurisdiction over him would mean "'enforc[ing] a rule of law against' the Republic of Ghana."[94] In the end, the court held that the Attorney General

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90. No. 10–4655 (DWF/JJK), 2012 WL 2930462, at *9 (D. Minn. June 18, 2012) (all alterations in original) (quoting RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 66(f) (AM. LAW INST. 1965)).

91. *Id.* at *9.

92. *Id.* (quoting Samantar v. Yousuf, 560 U.S. 305, 325 (2010)).

93. *Id.* at *10 ("Plaintiff's allegations against Ghana's Attorney General render the Republic of Ghana the real party in interest here and show that Plaintiff seeks to hold the Attorney General liable for acts performed in his official capacity. Indeed, Plaintiff states in his Complaint that references to Defendants [including the Attorney General] throughout his Complaint are to be construed as allegations concerning acts within the scope of Defendants' official duties."). These duties primarily consisted of the attorney general's decision whether or not to pursue criminal charges against those individuals who allegedly defrauded plaintiff (i.e., kept him from his money). *Id.*

94. *Id.* (citing RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 66(f) (AM. LAW INST. 1965)). *See also id.* ("At the core of the Attorney General's responsibilities as an agent of the Ghanaian government is making decisions about how to pursue those accused of wrongdoing within Ghana's territory. Were this Court to exercise jurisdiction, examine the merits of Plaintiff's claim that Ghana's Attorney General allowed some unsavory characters to get away with fraud [and in the process take his money], and conclude that the Attorney General's alleged failure to act subjected him to liability, we would certainly be enforcing some rule of law against the Republic of Ghana.").

of Ghana was entitled to conduct-based, foreign official immunity under the common law.[95]

Similarly, in *Mohammadi v. Islamic Republic of Iran*, the U.S. District Court for the District of Columbia found that a suit against foreign officials should be treated as a suit against the foreign state because the state (i.e., Iran) was the "real party in interest."[96] In *Mohammadi*, plaintiffs sued then-President of Iran, Mahmoud Ahmadinejad, Iran's head of state, Supreme Leader Ayatollah Khamenei, along with Iran and its Revolutionary Guard for torture, unlawful imprisonment, and extrajudicial killing under the TVPA, ATS, and FSIA.[97] The Court in *Mohammadi* found that Iran and the Revolutionary Guard were immune from suit under the FSIA. The Court reasoned that the terrorism exception to FSIA did not apply because plaintiffs were not nationals of the United States when the alleged torture and extrajudicial killings were committed.[98]

Second, with regard to plaintiffs' claims against then-President Ahmadinejad and the Ayatollah Khamenei, the Court found that the state of Iran was the "real party in interest" and that because Iran had immunity under FSIA, the Court lacked jurisdiction. According to the Court, Samantar left undecided the issue of which "actions against an official in his official capacity should be treated as actions against the foreign state itself."[99] Though the Court refrained from determining exactly which actions against an official in his official capacity should be treated in this way, the Court did "conclude[] that in this case the foreign state of Iran is the real party in interest, not Khamenei or Ahmadinejad."[100]

The court reached its conclusion that Iran was the "real party in interest" by looking to the nature of plaintiffs' allegations and the overall

95. *Id.*

96. 947 F. Supp. 2d 48, 72 (D.D.C. 2013).

97. *Id.* at 54. For the role of Ayatollah Khamenei in Iran's government, see Akbar Ganji, *Who is Ali Khamenei? The Worldview of Iran's Supreme Leader*, FOREIGN AFF., Sept./Oct. 2013, at 24, 24 ("But the dominant figure in Iranian politics is not the president but rather the supreme leader, Ayatollah Ali Khamenei. The Iranian constitution endows the supreme leader with tremendous authority over all major state institutions, and Khamenei, who has held the post since 1989, has found many other ways to further increase his influence. Formally or not, the executive, legislative, and judicial branches of the government all operate under his absolute sovereignty; Khamenei is Iran's head of state, commander in chief, and top ideologue.").

98. *Mohammadi*, 947 F. Supp. 2d at 68 ("Since neither the claimants nor the non-plaintiff victim (Akbar) were 'nationals of the United States' from 1999–2006, during which time the defendants perpetrated the relevant acts of torture and extrajudicial killing, the plaintiffs do not satisfy the jurisdictional requirements of the FSIA's terrorism exception [to immunity].").

99. *Id.* at 72 (quoting Samantar v. Yousuf, 560 U.S. 305, 325 (2010)).

100. *Id.* Interestingly, the Court did not subject the claims against either then-current President Ahmadinejad or the Ayatollah Khamenei to head of state immunity analysis.

theory of the case. The Court emphasized that "plaintiffs make clear, both in their Third Amended Complaint and in their briefing, that they are suing defendants Khamenei and Ahmadinejad in their official, as opposed to their personal, capacities. . . . It is [therefore] apparent that . . . any actions taken by Khamenei and Ahmadinejad were actions of the Iranian 'regime.'"[101]

B. Status-Based, Head of State Immunity Cases

In *Manoharan v. Rajapaksa*,[102] a decision from the United States Court of Appeals for the District of Columbia Circuit, the plaintiffs, who were relatives of victims of alleged extrajudicial killings in Sri Lanka, brought suit against defendant, the President of Sri Lanka, under the TVPA. Citing *Samantar*, the Court of Appeals for the District of Columbia first applied the two-part test for foreign official immunity from *The Schooner Exchange*. According to the court, "Under the first step of that procedure, the only one that is relevant here, 'the diplomatic representative of the sovereign could request a 'suggestion of immunity' from the State Department,' and '[i]f the request was granted, the district court surrendered its jurisdiction.'"[103]

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101. *Id.* at 72 (citations omitted). *See also* Odhiambo v. Republic of Kenya, 930 F. Supp. 2d 17, 34–35 (D.D.C. 2013) ("[T]o determine whether a suit against a foreign official is governed by the FSIA, this Court must look to whether the suit is against the official personally or whether the state is 'the real party in interest.' If the suit is against the official personally, then the common law regarding sovereign immunity applies, but if the state is 'the real party in interest,' then the suit should be treated as an action against the foreign state itself to which the FSIA would apply. . . . Odhiambo's suit against the individual defendants will be governed by the FSIA because the suit is in all respects a suit against the Kenyan government. This is a breach of contract case and the only contract at issue is between Odhiambo and the Kenyan government. . . . Further, unlike the plaintiff in *Samantar*, Odhiambo has sued the individual defendants in their official capacities. . . . And any damages that Odhiambo recovers in this suit will be payable by the Kenyan government and not from the individual defendants' 'own pockets.' . . . Therefore, the Kenyan government is 'the real party in interest' and the suit against the individual defendants will be treated as one against the Republic of Kenya. The Court's FSIA analysis thus applies to all defendants including the individuals." (citations omitted)). The District Court in *Odhiambo* determined that Kenya was immune from suit under the FSIA. *See id.* at 35.

102. 711 F.3d 178 (D.C. Cir. 2013).

103. *Id.* at 179 (alteration in original) (quoting *Samantar*, 560 U.S. at 311). For a discussion of the origins of the two-part test, see Manoharan v. Rajapaksa, 845 F. Supp. 2d 260, 262–63 (D.D.C. 2012). Also, the District Court in *Rajapaksa* based its decision to follow executive branch guidance on head of state immunity because the executive branch is more well-suited to evaluating the foreign policy implications of these immunity determinations: "As the Seventh Circuit explained [in *Ye*], '[t]he determination to grant (or not grant) immunity can have significant implications for this country's relationship with other nations. A court is ill-prepared to assess these implications and resolve the competing concerns the Executive Branch is faced with in determining whether to immunize a head of state.' . . . This Court is not in a position to second-guess the Executive's determination that in this case, the nation's foreign policy interests will be best served by granting Defendant [and President of Sri Lanka] Rajapaksa head of state immunity while he is in office." *Id.* at 266 (quoting Ye v. Zemin, 383 F.3d 620, 626–27 (7th Cir. 2004)). One possible type of foreign policy implication stemming from head of state immunity determinations implicates the concern of reciprocity. See John Bellinger, *Immunities*,

In *Manoharan*, the diplomatic representative had requested an SOI and the U.S. State Department affirmatively granted it. As a result, the DC Circuit found that defendant was entitled to immunity. The court treated as "binding" the executive branch guidance granting head of state immunity to defendant.[104] In addition, the D.C. Circuit found that neither the legislative history nor text of the TVPA indicated that it was meant to override the common law of head of state immunity.[105] In conclusion, the court held that "[b]ecause, as a consequence of the State Department's suggestion of immunity, the defendant is entitled to head of state immunity under the common law while he remains in office, and because the TVPA did not abrogate that common law immunity, the judgment of the district court dismissing the plaintiffs' complaint is affirmed."[106]

Similarly, in *Tawfik v. Al-Sabah*, the District Court for the Southern District of New York relied upon the first part of the two-part procedure described above to determine head of state immunity under the common law, which essentially meant treating the "State Department's immunity decision[] [in the case as] mandatory . . . [and] binding and not subject to judicial review."[107] Plaintiffs in *Tawfik* were Egyptian citizens residing in Kuwait who were also members of a political organization that worked to further democratic governance in Egypt. They were arrested by the Kuwaiti police and allegedly subjected to torture, rape, and other abuses.[108] Plaintiffs sued various defendants, including the sitting head of state of Kuwait, Sheihk Al-Sabah.[109] After obtaining a default judgment against Sheihk Al-Sabah, Plaintiffs requested a hearing on damages. However, before the hearing, the United States Department of State issued an SOI affirmatively granting immunity to Sheihk Al–Sabah.[110]

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available at <http://opiniojuris.org/2007/01/18/immunities/> (last visited 6/4/16) (The … official immunity rules the United States applies domestically [including head of state immunity] have important implications for how the United States and its officials are treated abroad. ")

104. *See Manoharan*, 711 F.3d at 179 (citing Saltany v. Reagan, 886 F.2d 438, 441 (D.C. Cir. 1989)). Note that the Court did say that "[t]his case does not require us to decide what deference we should give to the State Department when the Department indicates that a defendant, whether a sitting head of state or otherwise, should *not* receive immunity." *Id.* at 180 n.1.

105. *Id.* at 179–80.

106. *Id.* at 180 (footnote and emphasis omitted).

107. Tawfik v. Al-Sabah, No. 11 Civ. 6455(ALC)(JCF), 2012 WL 3542204, at *2 (S.D.N.Y. Apr. 22, 2012).

108. *Id.* at *1. Plaintiffs were allegedly arrested at the request of the Egyptian President. *See id.*

109. *Id.*

110. *Id.* at *1, *3.

The Court, relying in part upon *Samantar*, also found that the enactment of FSIA in 1976 did not alter the nature of sitting head of state immunity determinations:

> Since 1976, the Foreign Sovereign Immunities Act (the "FSIA"), rather than the prior common law framework, has governed the standards for determining whether foreign states are amenable to suit. . . . [T]he pre-FSIA practice of judicial deference to the State Department's immunity determinations, [however,] remains intact in the context of immunity for sitting heads of state.[111]

Because the United States Department of State had issued an SOI granting immunity to the sitting head of state of Kuwait, Sheihk Al–Sabah, the District Court in *Al-Sabah* deferred absolutely to this executive branch determination.[112]

Finally, in the post-*Samantar* case of *Smith v. Ghana Commercial Bank, Ltd.*, also discussed above for its relevance to the foreign official immunity issue, since there was no executive SOI, the District Court decided on its own that the President of Ghana, who was another defendant in the case, was entitled to head of state immunity in a suit alleging fraud. In particular, the court refused to consider plaintiff's claim that the President, John A. Mills, should have chosen different methods to identify and investigate the persons who allegedly defrauded him (*i.e.*, the plaintiff). The court refused to consider plaintiff's claim because it believed that by doing so, "it would be directly interfering with President Mills' duty to enforce Ghana's laws."[113] In addition, the court found that to prevent such interference, common law doctrines such as comity meant that "a head of state is immune from suit."[114] Finally, the court explained that "the head of state of a foreign sovereign [here, President Mills] enjoys immunity from suit at least to the same extent as the state itself, . . . and a foreign state

111. *Id.* at *2 (citations omitted).

112. *Id.* at *3. *See also* Habyarimana v. Kagame, 821 F.Supp. 2d 1244, 1260–64 (W.D. Okla. 2011) (adopting approach of absolute deference to State Department SOI asserting head of state immunity for Rwandan President because of Executive's primary role in foreign policy arena and separation of powers concerns).

113. No. 10–4655 (DWF/JJK), 2012 WL 2930462, at *8 (D. Minn. June 18, 2012) (footnote and citations omitted). *See also id.* at *7 (noting that "[h]ere, because the State Department has filed no suggestion of immunity, this Court must address step two of the established procedure"—i.e., the court decides on its own whether immunity requirements have been met, basing its decision on whether the immunity ground has a basis in executive branch policy).

114. *Id.* ("Comity and each nation's mutual respect for the exclusive and absolute authority within one another's respective territories are the backbone of the common law of foreign sovereign immunity.").

[*e.g.*, Ghana] cannot be subject to suit for decisions concerning whether or how to investigate fraud between private parties."[115] In sum, the court determined that the President of Ghana enjoyed immunity from suit.[116] Thus, the limited, extant federal district court case law that has emerged following *Samantar* reflects a reluctance to embrace a *jus cogens* exception to conduct-based, foreign official immunity or to deviate too far from executive branch guidance in this area. In addition, this jurisprudence has begun to develop certain criteria for deciding when the state is "the real party in interest" in a lawsuit again a foreign official (for example, an examination of the substance or "nature of the allegations"). When the state is the real party in interest, the FSIA and not the common law applies to the underlying immunity claim. In the head-of-state immunity context, the post-*Samantar* jurisprudence appears to maintain the common law practice of deferring to the guidance of the executive branch on the question of immunity.

## IV. ANALYSIS

Four main issues emerging from the jurisprudence in the wake of *Samantar* are explored in this Part: (1) the implications of the recent circuit-split on the appropriate level of deference to executive SOIs in the conduct-based, foreign official immunity context, (2) the implications of the split concerning whether conduct-based immunity should be granted to foreign officials in cases of alleged *jus cogens* violations, (3) status-based, head of state immunity issues, and (4) strategic considerations for putative plaintiffs suing foreign officials for human rights abuses and other alleged wrongs in U.S. courts.

### A. The Split Concerning the "Weight" to Give Executive Branch Guidance: Conduct-Based, Foreign Official Immunity Context

The circuit split regarding the amount of deference to give executive branch SOIs in the conduct-based, foreign official immunity context bears certain implications, including those related to fairness, deterrence, case predictability, and jurisprudential development. Because of the split, foreign official defendants in U.S. courts may, for example, receive different outcomes in similar cases, creating injustice or unfairness across cases and deterrence-related challenges. Deterrence-related challenges have the potential to exacerbate impunity for grave human rights violations. In addition, the split may make it increasingly difficult for litigants in certain

115. *Id.*
116. *Id.*

courts to predict immunity determinations in individual cases. That unpredictability could impact the decision-making calculus for litigants and create associated inefficiencies (*e.g.*, wasting scarce judicial and other resources, preventing or delaying further jurisprudential development, etc.).

The Fourth Circuit has determined that executive branch SOIs in the conduct-based, foreign official immunity context are entitled to considerable or substantial deference, but the Second Circuit has held that these same SOIs are entitled to absolute deference.[117] Accordingly, one can imagine a scenario in the wake of this split where two factually identical or substantially similar conduct-based, foreign official immunity cases are presented to the executive branch by the diplomatic representative of the foreign state (under the two-step procedure outlined above), and the executive branch recommends immunity in each case. This may be because the executive believes that the conduct in question, done while the foreign official was in office, consisted of official and state duties. One potential approach to such cases is that taken by the Second Circuit, which defers absolutely to the executive branch, by essentially adopting the executive's view of whether the defendant/ foreign official is entitled to immunity.

117. See *supra* notes 63 and 77 and accompanying text. For differing assessments by scholars on the proper weight courts should give executive branch guidance on the immunity question, compare Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against The State Department*, 51 VA. J. INT'L L. 915, 915 (2011) (rejecting executive branch "lawmaking" power to make individual foreign official immunity determinations that are binding on the judiciary) with Lewis S. Yelin, *Head of State Immunity as Sole Executive Lawmaking*, 44 VAND. J. TRANSNAT'L L. 911, 911 (2011) (arguing that the State Department's practice of deciding head of state immunity is "an example of sole executive lawmaking, deriving from the President's constitutional responsibility as the only authorized representative of the United States in its relations with foreign states"). Professor Wuerth argued that inconsistencies may arise in individual foreign official immunity cases following Samantar if executive SOIs are given controlling weight; for example, "the executive branch sometimes [may suggest] immunity in a case where its prior policy was to deny immunity on essentially the same facts." Wuerth, supra, at 945; *see also id.* ("If the executive suggestion system is retained in claims against individual officials [i.e., as is possible after *Samantar*], claims against states themselves will nevertheless still be governed by the FSIA with very little or no deference to the executive branch. But there are many issues of overlap in resolving these two types of claims, substantially raising the costs and likelihood of inconsistent adjudications." (footnote omitted)). And, significantly, Professor Wuerth saw as one implication of inconsistent adjudications the "undermin[ing of] diplomatic objectives and the confidence of other countries." *Id.* at 952. Finally, Professor Wuerth envisioned that the incentive "calculus" for putative plaintiffs would change in the wake of *Samantar*, thereby leading to an increase in cases: "Before *Samantar*, most courts had held that the FSIA covered individuals as well, leaving little or no opportunity for State Department suggestions of immunity. After *Samantar*, however, plaintiffs have greater incentives to sue both the state and an individual, especially if they expect the State Department to be sympathetic to their claim. Plaintiffs also have a greater incentive to sue the individual even if they believe the state is immune because the two cases could now be treated differently." *Id.* at 948 (footnote omitted); *see also id.* at 949 ("In the government's hands, immunity determinations are thus likely to be opaque and difficult to predict—increasing the incentives to sue individual defendants even if it appears likely they should be immune for suit. An increase in cases also increases the possibility of inconsistent adjudications. . . .").

However, a different court adjudicating the other, substantially similar case could decide to follow the approach of the Fourth Circuit giving the executive immunity determination considerable or substantial deference and conducting its own independent immunity determination. Moreover, this latter court may decide to abrogate the executive determination of immunity because, for example, it believes some of the conduct in question was ultimately private in nature or because some of the conduct was performed before the official formally took office.

Regardless of the reason for reversing a given executive immunity determination, the possibility that courts (or the executive, for that matter) may make divergent immunity determinations on the same or similar facts presents certain challenges. This has the potential to lead to perceived injustice across cases. Putative abusers and other wrongdoers may attempt to escape liability by obtaining a favorable immunity decision from the executive branch (*i.e.*, if that branch's guidance is found to be "absolute"). Not only does this lead to deterrence-related problems, but it also invites a return to the pre-FSIA traditions of politically-oriented appeals to the executive for immunity—as opposed to judicially-determined immunity outcomes based on pre-established rules and norms, such as those provided under the FSIA.[118] The fervency of these appeals, of course, will only be heightened in conduct-based, foreign official immunity cases in which executive branch guidance is anticipated to be controlling in nature. Even in cases where deference to executive branch SOIs is less than controlling,

118. Here, the discussion of human rights abuses refers to ones falling below the threshold of *jus cogens* violations, such as indiscriminate killings or pillaging. *Jus cogens* violations will be addressed later in the analysis. For the general idea that political pressure will be applied to the executive to influence its guidance related to immunity, see Curtis A. Bradley &. Lawrence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 SUP. CT. REV. 213, 243–59 (2010) ("After *Samantar*, the question of whether federal courts should defer to the Executive's view regarding immunity will be a key point of contention . . . At a minimum, foreign governments are likely to pressure the State Department to suggest immunity in a non-trivial 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."). *Id.* at 259 (citing and quoting John B. Bellinger III, Ruling Burdens State Dept., Natl L J (June 28, 2010)). Also, the deterrence equation may be influenced by other possible factors, such as the possibility of criminal prosecution, the deterioration in the reputation/ status of one's country (and its accompanying impact on foreign relations), or even civil suits in other countries. But the deterrence impact from possible civil suits in the United States should not be underestimated because the United States has become a major forum for the adjudication of human rights claims with little or no connection to it. *See* Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity, Individual Officials and Human Rights Litigation*, 13 GREEN BAG 2D 9, 10 (2010) ("Since *Filartiga*, plaintiffs from around the globe have relied on the ATS to sue in U.S. courts for human rights abuses. In many of these suits, as in *Filartiga*, a foreign plaintiff sues a foreign official for an alleged violation of international law committed on foreign soil."). Finally, many current and former officials, including former heads of state, may want to travel to or even reside in the United States.

political pressure should still be rather strong. In turn, this pressure in individual foreign official cases and associated foreign policy considerations could itself result in inconsistent immunity determinations by the executive branch across cases.

### B. The Split on *Jus Cogens* Exceptions: Foreign Official, Conduct-Based Immunity Context

Interestingly, in the years since *Samantar* was decided, a circuit split has emerged on whether to recognize an exception to conduct-based immunity for foreign officials in the case of alleged *jus cogens* violations. The Fourth Circuit, relying on its own and international precedent, determined that a *jus cogens* exception existed, while the Second Circuit concluded that immunity persevered even in the face of *jus cogens* violations. The Fourth Circuit has reasoned that *jus cogens* violations do not constitute "official acts" warranting conduct-based, foreign official immunity.[119] The divergence that has developed on the *jus cogens* issue presents similar difficulties to the disagreement among the circuits about the proper weight to accord executive branch guidance on the foreign official immunity question (*i.e.*, the "conduct-based" variety). For example, similar and rather evident perceptions of injustice may arise when one defendant who has committed heinous human rights abuses—torture, extrajudicial killings, genocide, and the like—receives immunity for his or her official acts while another court pierces the immunity veil, finds liability, and awards damages. In addition, any deterrent effects may become more attenuated when certain courts choose to grant immunity in the *jus cogens* context, and these effects may themselves be more consequential in light of the egregious nature of the conduct. However, the split that has developed surrounding the *jus cogens* exception to immunity in U.S. circuit courts may itself reflect the state of uncertainty in customary international law and among foreign national precedents on this question, particularly in the civil context.[120] In any event, as other circuits further

119. *See supra* notes 68–69 and accompanying text (Fourth Circuit); *see also supra* note 77 and accompanying text (Second Circuit).

120. *See* Bradley & Helfer, *supra* note 118, at 243 ("International tribunals have yet to take a definitive position on whether there is a *jus cogens* exception to foreign official immunity in civil cases."). *See also id.* at 259 (noting that "international law does not require that U.S. courts hear civil suits against foreign officials"). On a related note, Professors Bradley and Helfer also argued that "it is likely that [customary international law] will influence judicial assessments of common law immunity claims raised in human rights litigation after *Samantar*." *Id.* at 272; s*ee also* Chimène Keitner*, Foreign Official Immunity and the Baseline Problem*, 80 FORDHAM L. REV. 605, 612, 613 (2011) ("[In Jones v. Saudi Arabia], Lord Bingham observed that there is no overwhelming international consensus requiring states to exercise universal civil jurisdiction over serious international law violations. However, even if this were true, it does not mean that states are prohibited from exercising civil jurisdiction within the

develop their jurisprudence on this issue in the wake of *Samantar*, they will, in turn, contribute to the development of customary international law in this context. But any development in this area, at least in terms of the contribution from the United States, will be incremental and gradual unless and until the U.S. Supreme Court intervenes to resolve the circuit split or the U.S. Congress passes legislation providing a resolution.

C. Head of State Immunity Issue

In the wake of *Samantar*, American courts appear to agree that executive guidance is determinative on the question of status-based, head of state immunity. This viewpoint stems from the notions of comity and respect for another nation's authority within its own territory as well as the

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[other] limits . . . Even if Lord Bingham's conclusion were correct, it would mean only that [the United Kingdom's statute regarding foreign official immunity] is not . . . inconsistent with . . . international law. Although the United Kingdom's decision to grant individuals immunity under its [immunity statute] does count as state practice for the purpose of customary international law formation, that decision is not uniformly reflected in the legislative and judicial choices of other countries." (footnote and internal quotation marks omitted)). Note that the *Jones v. Saudi Arabia* case was appealed to the European Court of Human Rights (the ECHR), and the ECHR essentially affirmed Lord Bingham's earlier ruling in *Jones* under the United Kingdom's state immunity act, which had found immunity from civil suit for torture allegedly perpetrated by a foreign government and its officials. *See* Emile MacKenzie, *International Law in Brief: European Court of Human Rights Delivers Judgment on State Immunity in Jones v. United Kingdom (January 14, 2014)*, AM. SOC'Y OF INT'L LAW, (Jan. 23, 2014 5:19 PM), https://www.asil.org/blogs/european-court-human-rights-delivers-judgment-state-immunity-jones-v-united-kingdom-january-14> ("On January 14, 2014, the Fourth Section of the European Court of Human Rights (the Court) issued its judgment . . . in Jones and Others v. United Kingdom. The Court found that the United Kingdom (UK) had not violated the right of access to court under Article 6 § 1 of the European Convention on Human Rights when UK courts granted immunity to Saudi Arabia and its State officials, thus dismissing the Applicants' [civil] claims for compensation for torture they allegedly suffered at the hands of Saudi Arabian officials. The Court stated that 'measures taken by a State which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1.' However, the Court concluded that 'in light of the developments currently under way in this area of public international law, this is a matter which needs to be kept under review.'"); s*ee also* Sevrine Knuchel, *State Immunity and the Promise of Jus cogens*, 9 NW. J. INT'L HUM. RTS. 149, 156 (2011) ("So far, the European Court of Human Rights (ECHR), the only international court to have dealt with the [separate] issue [of an exception to *state* immunity for gross human rights violations], has rejected the view that a grant of immunity to the respondent state in a damage claim for acts of torture violated the individual's right of access to a court guaranteed by the European Convention on Human Rights."). More recently, the International Court of Justice in the *Germany v. Italy* case decided that there was no *jus cogens* exception to state immunity. *See* Alexander Orakhelashvili, *International Decisions: Jurisdictional Immunities of the State (Germany v. Italy; Greece Intervening)*, 106 AM. J. INT'L L. 609, 609, 611–12 (2012) ("[T]he International Court of Justice decided that, by allowing civil claims against Germany for wartime [World War II] atrocities to proceed before Italian courts, the Italian Republic had violated its obligation to respect Germany's sovereign immunity. . . . Turning to Italy's claim that the German acts in question violated *jus cogens* and were thus not entitled to immunity, the Court disagreed, finding no conflict between *jus cogens* and rules of state immunity." (footnote omitted)).

executive branch's constitutional power to receive and appoint ambassadors.[121] The conclusion is also grounded in a desire to maintain cordial relations among states and to avoid any reciprocal, negative consequences for American heads of state travelling abroad.[122] Finally, executive branch SOIs are binding because the branch may be better suited to evaluate the foreign policy considerations underpinning head of state immunity determinations.[123]And, notably, even when the executive branch does not provide an SOI in a case involving a claim of head of state immunity, the court's own analysis related to the immunity question must be based on previous executive policies and grounds for bestowing immunity (*e.g.*, as evidenced in earlier SOIs from similar contexts).[124]

Though courts in the wake of *Samantar* have acknowledged in dicta that it may be possible to pierce the immunity veil for heads of state in the case of conduct committed in a "private capacity,"[125] no post-*Samantar* case appears to have done so. In addition, head of state immunity may be abrogated if the U.S. government does not recognize the official as head of state (or does not recognize the government for which the head of state serves).[126] And in the FSIA era—and ostensibly continuing following *Samantar*—the foreign state could waive the immunity of its head.[127]

Finally, the resolution of sitting head of state immunity questions in the United States appears to align with that of customary international law (at least in the criminal context).[128] For example, the *Arrest Warrant of 11 April 2000* case by the International Court of Justice, though it involved a sitting foreign minister, likely supports the general proposition that immunity from the criminal jurisdiction of a foreign state attaches to incumbent heads of state. However, similar exceptions to this general

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121. *See supra* note 114 and accompanying text; *see also supra* note 59 and accompanying text.

122. *See supra* notes 103, 114 and accompanying text.

123. *See supra* note 103 and accompanying text.

124. *See supra* note 16 and accompanying text; *see also supra* notes 56, 112 and accompanying text.

125. *See, e.g.*, Smith v. Ghana Comm. Bank, Ltd., No. 10–4655 (DWF/JJK), 2012 WL 2930462, at *8 (D. Minn. June 18, 2012).

126. *See supra* notes 50, 60 and accompanying text.

127. *See* Christopher Totten, *Head-of-State and Foreign Official Immunity in the United States after* Samantar*: A Suggested Approach*, 34 FORDHAM INT'L. L. J. 332, 347–48 (2011); Lafontant v. Aristide, 844 F. Supp. 128, 133 (E.D.N.Y. 1994); Paul v. Avril, 812 F. Supp. 207, 211 (S.D. Fl. 1993). No cases in the post-*Samantar* head of state immunity context appear to suggest that waiver of immunity by the foreign state is no longer available.

128. BETH VAN SCHAAK & RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT 1063 (3d ed. 2014) ("The ICJ held [in the *Arrest Warrant of 11 April 2000* case] that under customary international law, sitting foreign ministers enjoy full immunity from criminal jurisdiction of another state . . . .").

immunity rule exist, such as a waiver by the home state allowing prosecution in a third state as well as prosecutions by international tribunals.[129]

D. Post-*Samantar* Strategies for Plaintiffs

With regard to incumbent heads of state asserting status-based immunity, obtaining a waiver of immunity from the foreign government is one way to overcome that official's immunity (and perhaps the most certain path). Short of obtaining a waiver, putative plaintiffs could apply pressure on the executive branch of the United States to issue an SOI declining immunity, whether by highlighting a particularly abhorrent series of human rights abuses committed under the head of state's supervision or by recommending that the U.S. government decline to recognize the individual's status as head of state or government.[130] Finally, before both executive branch officials and in court, plaintiffs attempting to sue heads of state may argue that the conduct in question is purely private in nature and not connected in any way to the head's public duties.

The post-*Samantar* jurisprudence suggests several other tactics for potential plaintiffs bringing human rights or other suits against foreign officials who have asserted conduct-based immunity.[131] As in the status-based, head of state immunity context, a waiver of immunity by the official's home state could be obtained, or pressure could be brought to bear against the executive branch because the official is not entitled to immunity, whether because the conduct was "private" in nature or because the conduct occurred prior to the official's assumption of office.[132] The

129. *Id.* The ICJ noted in dicta that "there were three ways that a Foreign Minister could be held accountable for violations of international criminal law while still in office. First, the home state of the Foreign Minister could prosecute him. Second, the state could waive the immunity, thus allowing another state to prosecute him. Third, the immunity was not valid against a prosecution undertaken by an international tribunal." *Id.* (citing Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. Rep. 3 (Feb. 14)).

130. *See supra* notes 60, 118 and accompanying text.

131. For example, these suits could be brought under the Torture Victim Protection Act of 1991 ("TVPA"). *See* 28 U.S.C. § 1350 (2012) (subjecting defendant to potential civil liability for torture and extrajudicial killing).

132. For the idea that there may be a *jus cogens* exception to foreign official immunity, see *supra* note 67 and accompanying text. For the waiver possibility, albeit in the related head of state context, *see supra* note 127. *See also* Chimène Keitner, *Foreign Official Immunity After* Samantar, VAND. J. TRANS. L. 837, 855 (2011) (noting that if the foreign government recognized by the United States has not requested conduct-based immunity, "or if the foreign state has waived immunity, then the consensus appears to be that there should be no immunity, because immunity is for the benefit of the state, not the individual"). Note that Professor Keitner puts forth a list of five questions that can be asked "in order to determine whether or not a particular individual who is not covered by an existing treaty or statute is entitled to conduct-based immunity as a matter of common law." *Id.* at 855–58. In addition to waiver,

"private" conduct may consist of particularly heinous human rights abuses, including *jus cogens* violations.

But in the post-*Samantar* jurisprudential landscape, there is uncertainty about whether the executive branch's guidance on the foreign official, conduct-based immunity question will be viewed as "binding" by a court.[133] There is also uncertainty about whether courts will find a *jus cogens* exception to this type of immunity.[134] Concerning the proper weight for courts to accord executive guidance, for plaintiffs who "lose" on the foreign official immunity question before the executive, there may still be an additional opportunity following *Samantar* for plaintiffs to argue successfully in court that immunity is not warranted. This opportunity would exist in those situations where courts view executive branch guidance as entitled to some deference but not controlling deference. For those plaintiffs who "win" on the immunity question before the executive, there is the also the possibility, however, that these courts will overturn the executive's finding. In addition, for plaintiffs who obtain executive branch guidance on the foreign official immunity question, whether favorable or not, there is also the possibility in the wake of *Samantar* that this guidance will be essentially determinative (i.e., because the particular court will view it as binding). In these courts, plaintiffs who obtain a favorable immunity determination from the executive will be able to assert and have their claims heard and possibly obtain a damages award. These different judicial approaches to the treatment of executive branch guidance in the wake of *Samantar* suggest plaintiffs may want to engage, to the extent possible, in strategic "forum shopping;" for example, selecting a court that is most likely to "pierce" the immunity veil and address the merits of the plaintiffs claims (*i.e.*, in those cases where the executive guidance is unfavorable), or choosing a court that is most likely to uphold the executive's determination (*i.e.*, in those cases where the executive guidance is favorable).[135] Such an approach may also be warranted in light of the different court approaches to the *jus cogens* exception. Though such a "forum-shopping" strategy may

these questions relate to whether the conduct by the foreign official was attributable to the state, whether the conduct was performed with actual authority, whether the defendant is present within the U.S. at the time of arrest or service, and whether Congress has attached legal consequences to the conduct. *Id.* For support for the notion that conduct-based immunity would not apply to conduct performed prior to the official's assumption of office, *see supra* note 84 and accompanying text.

133. *See supra* notes 63, 77 and accompanying text.

134. *See supra* notes 69, 77 and accompanying text.

135. *See* 28 U.S.C. § 1391(b) (2012) (generally basing proper venue on defendant's place of residence/domicile and the location of where the relevant conduct occurred); *see also* 28 U.S.C. § 1391(c)(3) (2012) ("[A] defendant not resident in the United States may be sued in *any judicial district* . . . ." (emphasis added)).

make good, practical sense from a litigation standpoint, it is not without certain potential consequences. For example, the continued development of the jurisprudence along disparate "lines" may be facilitated through aggressive adoption of this strategy by plaintiffs (for example, separate lines favoring and opposing a *jus cogens* exception for grave human rights violations). As a result, the inconsistencies in the jurisprudence will become more marked and entrenched, leading to additional challenges related to deterrence, impunity and fairness.

Yet one additional strategy may be emerging in the wake of *Samantar* for plaintiffs bringing suits against foreign officials for human rights abuses. In certain cases where plaintiffs have attempted to sue the foreign official directly (i.e., as opposed to his or her government or state), courts have determined that the "real party in interest" is the state itself and proceeded to apply FSIA and not the common law. This judicial reasoning, which is supported by *Samantar* itself, has resulted in outcomes granting conduct-based immunity to defendants under the FSIA for their official conduct.[136] In order to possibly avoid the general, "default" grant of immunity under the FSIA, and proceed under the potentially more lenient common law, plaintiffs may want to more explicitly and specifically frame their allegations and case theory directly against defendants in their *personal capacities*.[137] For example, in order to possibly increase their chances of "piercing" the immunity veil and to the extent possible under the case facts, plaintiffs could frame their allegations as involving conduct directly attributable to the defendant himself without explicit connection to the state.[138] In this regard, plaintiffs could seek damages exclusively from the defendant and not the state.[139]

In sum, in the context of plaintiffs seeking to sue foreign official defendants in U.S. courts, the following sequential approach may be preferred in light of the post-*Samantar* jurisprudential landscape:

(1) Obtain a waiver of immunity from the official's home government and/or apply pressure on the Executive Branch to issue an SOI expressly denying immunity to the official;

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136. *See supra* notes 92–101 and accompanying text; *see also supra* note 88 and accompanying text; Keitner, *supra* note 132, at 847 ("The defendant can claim that the state is the real party in interest . . . if the relief sought would run directly against the state. If the state is the real party in interest, the claim against the defendant should be dismissed based on common law immunity or failure to name the real party in interest; the plaintiff might be required to refile the complaint against the state itself under the FSIA . . . .").

137. *See supra* note 101 and accompanying text.

138. *See supra* notes 100–101 and accompanying text (referring to "personal capacity" versus "official capacity" suits).

139. *See supra* notes 45, 101 and accompanying text.

(2) To the extent possible, engage in forum shopping by selecting a court that is most likely to "pierce" the immunity veil and address the merits of the claims in those cases where the executive guidance on immunity is unfavorable or a foreign government waiver is not obtained, or alternatively, choosing a court that is most likely to uphold a foreign government waiver or the executive's determination in those cases where the executive guidance is favorable).

(3) To increase the chance of avoiding the application of FSIA and its general grant of immunity and instead proceed under the potentially more favorable common law, explicitly frame allegations and case theory against defendants in their personal or private capacities (i.e., as opposed to against the state), and seek damages exclusively from the defendant himself.

## CONCLUSION

The common law of foreign official, conduct-based immunity is in a state of flux. As a result, even the most deserving plaintiffs face barriers to suit. The uncertainty may mean that two foreign official defendants with similar case facts experience different outcomes depending on where a lawsuit is brought, leading to concerns related to deterrence and overall fairness. The uncertainty may also make it more difficult for individual litigants to predict likely immunity findings. This, in turn, may lead to fewer case settlements and an accompanying strain on the resources of both the plaintiff and the judiciary. The uncertainty or unpredictability may also have the opposite effect of delaying jurisprudential development, if putative plaintiffs (incorrectly) perceive their chances of winning a lawsuit to be weak, and therefore decline to bring suit. On the *jus cogens* issue in particular, it is at least possible that the split among the U.S. circuits reflects the state of uncertainty in customary international law and among foreign national precedents on this question. Though U.S. courts can contribute to the further development of customary law on this issue, its ultimate resolution, at least in the U.S., awaits a future decision by the Supreme Court (or perhaps legislation by the U.S. Congress). Regarding status-based, head of state immunity following *Samantar*, a clear consensus has developed that executive guidance is determinative. In addition, a limited number of exceptions to this immunity have been explored in the case law. Finally, the post-*Samantar* jurisprudence suggests several strategies for putative plaintiffs suing heads of state and foreign officials claiming immunity for human rights abuses and other wrongs, including seeking a waiver from the foreign state and applying pressure on the

executive branch. In the case of suits against foreign officials alleging conduct-based immunity, plaintiffs may wish, to the extent possible, to engage in strategic "forum-shopping" as well as frame their allegations and case theory in particular ways. These tactics nonetheless do not guarantee that American courts will ultimately pierce the immunity veil and address the merits of the underlying claim.