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Abstract:

In the recent Samantar decision, the Supreme Court held that individual foreign officials were not covered by the Foreign Sovereign Immunities Act but might still be covered by common law immunity. This article analyzes the extent of that common law immunity and discusses whether more recent developments in domestic and international human rights law should impact the availability of immunity for officials accused of torture, extra-judicial killings, and other violations of the law of nations.

Although the bulk of authority from US and foreign courts suggests that foreign officials should enjoy immunity for acts committed within the scope of their authority, a strong argument can be made that most nations are no longer willing to consider international crimes to be valid state acts. The article suggests that the district court consider this trend when considering whether Mohamed Ali Samantar should enjoy immunity for authorizing, planning, and overseeing human rights abuses against Somali citizens.

Introduction:

In the recent Samantar decision, the Supreme Court found that “the FSIA does not govern whether an individual foreign official enjoys immunity from suit” in United States courts for acts taken in his official capacity. While the FSIA “indisputably governs the determination of whether a foreign state is entitled to sovereign immunity,” the plaintiffs’ case against Samantar, “in his personal capacity and seek[ing] 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.”

The Court declined to examine the applicability of common law foreign official immunity to Samantar, nor rule on the potential applicability of “head of state immunity” or other common law immunities. The Court simply remanded the case to the District Court to determine whether the defendant, a former vice-president, Minister of Defense, and prime minister of Somalia, was entitled to foreign immunity for his role in the “systematic persecution during the 1980's by the military regime then governing Somalia.” Plaintiffs specifically contend that that Samantar “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.” The Supreme Court remanded to the District Court to determine “[w]hether [Samantar] may be entitled to immunity under the common law,

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3 Id. at 2292.
4 Id. at 2282.
5 Id.
and whether he may have other valid defenses to the grave charges against him.”

The Court specifically left to the District Court the determination of whether any common law immunity applied to Samantar, and expressed “no view on whether Restatement § 66 correctly sets out the scope of the common law immunity applicable to current or former foreign officials.”

The District Court now must consider the question of whether an ex-foreign official “may be entitled to immunity under the common law” when sued for conduct allegedly undertaken in his official capacity. The state of that immunity is not clear. Because of the paucity of pre-FSIA cases addressing the issue of immunity for foreign officials, appellate courts have developed most of the relevant common law on foreign official immunity since 1976 under the shadow of the FSIA. In many of the cases in which the appellate courts found that the FSIA did not apply to individuals, the courts looked to the Restatement (Second) of Foreign Relations Law to determine the applicability of an individual immunity. The Restatement (Second) and relevant court decisions that pre-date FSIA are therefore the most clearly applicable to the District Court’s determination of the traditional bounds of foreign law foreign sovereign immunity. However, decisions in US courts subsequent to the passage of the FSIA may,

6 Id. at 2292
7 Prior to the enactment of the FSIA, federal courts in the United States accepted § 66 of the Restatement (Second) of Foreign Relations as the definitive description of the bounds of common law immunity for foreign officials sued in US courts. Whether § 6 still applies is a matter of great importance to the determination of the Samantar case in the District Court, and one that will be addressed later in this paper.
8 Samantar at 2292-93.
9 Id. at 2291 fn.18 (“A study that attempted to gather all of the State Department decisions related to sovereign immunity from the adoption of the restrictive theory in 1952 to the enactment of the FSIA reveals only four decisions related to official immunity, and two related to head of state immunity, out of a total of 110 decisions.”) citing Sovereign Immunity Decisions of the Dept. of State, May 1952 to Jan. 1977 (M. Sandler, D. Vagts, & B. Ristau eds.), in Digest of U.S. Practice in Int’l Law 1020, 1080 (1977) (“Digest”).
10 Restatement (Second) of Foreign Relations Law. (1966)
and should, inform the District Court of evolving legal standards relevant to the scope of
the immunity. Recent cases interpreting the Torture Victims Protection Act and the
Alien Tort Statute may also give shape to the District Court’s opinion, perhaps especially
when such cases interpret the evolving international legal standards reflected in the UN
Convention Against Torture\textsuperscript{11} and the International Convention Against the Taking of
Hostages.\textsuperscript{12}

US courts have repeatedly stated that common law foreign immunity is premised
on notions of comity and consensus,\textsuperscript{13} therefore, the decisions of foreign and
international tribunals interpreting the bounds of immunity for foreign officials also
may be relevant to the District Court’s decision. These decisions often give great weight
to treaties addressing the type of conduct of which Mohamed Samantar is accused—
torture, extrajudicial killings, and other violations of international humanitarian law.
Whether such treaties have risen to the level of international norms that may abrogate
the common law of immunity for foreign officials as applied in foreign and international
courts also may inform the District Court’s determination of the availability of foreign
immunity for an ex-official sued for conduct done in his official capacity.

\textsuperscript{11}A/RES/39/46 (1994).
\textsuperscript{12}G.A. Res. 146 (1983).
\textsuperscript{13}See, e.g., \textit{Verlinden B.V. v. Central Bank of Nigeria}, 481 U.S. 480, 486, 103 S.Ct. 1962 (1983) (“\ldots foreign sovereign immunity is a matter of grace and comity on the part of the United States. \ldots”); \textit{Schooner Exchange v. McFaddon}, 7 Cranch 116, 144, 11 U.S. 116 (U.S. Pa. 1812) (In which Chief Justice Marshall found that “\ldots by the unanimous consent of nations, a foreigner is amenable to the laws of the place; but certainly in practice, nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception” and supporting his finding of immunity of a ship in Napoleon Bonaparte’s navy from seize in US ports by a finding that “\ldots the whole civilized world concurred in this construction.”); Letter from Acting Legal Adviser Tate to Acting Attorney General Perlman (1952) (Tate Letter), reprinted in \textit{Alfred Dunhill of London, Inc. v. Republic of Cuba}, 425 U.S. 682 App. (1976) (demonstrating the level of acceptance of the “restrictive theory” of sovereign immunity among foreign nations in support of advocating that US courts adopt the same position); FSIA, Findings and Declarations of Purpose, 28 U.S.C. § 1602 (“Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities.”).
This article addresses each source of authority in turn—domestic decisions and the common law prior to the enactment of the FSIA, decisions subsequent to the FSIA including an analysis of US obligations under more recent human rights treaties and statutes and the relatively recent emergence of a strong Alien Tort Statute jurisprudence after *Filártiga*, international legal decisions, and foreign legal decisions. The majority position among these sources is that current and former officials enjoy immunity for any acts done in their official capacity during their time in office.

Whether authorizing or committing acts of almost universal proscription may be considered proper acts of sovereign states and therefore within the “official capacity” of their agents, is far from settled. Courts in the United States may be willing to defer to State Department determinations of foreign official immunity in cases in which diplomacy and international relations concerns are paramount, but the common law of foreign official immunity may not—and should not—foreclose recognition of domestic and international recognition and support of human rights. More recent trends in the United States, in foreign countries, and among nations reflect a strong consensus that the type of acts which Samantar is alleged to have authorized and supported—torture, rape, extrajudicial killings—are outside the authority of any nation. If a foreign state lack the authority to authorize these acts, US courts reasonably could find that a foreign official does not enjoy immunity for his part in them.

**The Samantar Decision**
The plaintiffs in *Samantar* are natives of Somalia who brought an action under the Torture Victim Protection Act \(^{14}\) (TVPA) against Mohamed Ali Samantar in the United States District Court for the Eastern District of Virginia in 2004. Plaintiffs allege that “in October 1969, a coup led by Major General Mohamed Siad Barre ushered in an authoritarian socialist rule to Somalia. Power was assumed by the Supreme Revolutionary Council, which consisted primarily of the Army officers who had supported and participated in the coup, including Samantar.”\(^{15}\) The military government favored the ethnic clans which supported it and engaged in a campaign of oppression against those clans, particularly the Isaaq clan in northern Somalia, which the government perceived as a threat.\(^{16}\)

During the 1980s, however, when Samantar was Minister of Defense and then Prime Minister, the government . . . began utilizing the military forces in a campaign to eliminate Isaaq clan opposition. In response to this campaign, some members of the Isaaq clan established the Somali National Movement (“SNM”) in 1981. In 1983 and 1984, some members of the SNM began a campaign of violent resistance and, operating from bases in Ethiopia, SNM commandos attacked military posts near the northern Somali cities of Hargeisa, Burao, and Berbera.

Plaintiffs allege that in response to the SNM attacks, human rights abuses and war crimes by the Somali military forces increased dramatically. The Somali National Army initiated a counterinsurgency campaign that disregarded the distinction between civilians and SNM fighters. It killed and looted livestock, blew up water reservoirs, destroyed homes, tortured and detained alleged SNM supporters, and indiscriminately killed civilians. These violent confrontations between SNM and the Somali Armed Forces lasted from 1983 to 1990.

Throughout 1989 and 1990 the oppression and armed resistance [sic] continued, gradually leading to the reduced effective territorial control of the Barre regime and the withdrawal of American and


\(^{16}\) *Id.*
international support. By the end of 1990, the Barre regime was in the final stages of complete state collapse. In early December 1990, President Barre declared a state of emergency and, in January 1991, armed opposition factions finally drove Barre out of power, resulting in the complete collapse of the central government. When Barre and his supporters were ousted in 1991, Samantar fled to Italy, finally arriving in the United States in 1997.\footnote{Id. at *1-2}

At the time the Plaintiffs brought their case, Samantar, a Somalian citizen, resided in Fairfax, Virginia.\footnote{Id. at *6.}

Plaintiffs are a group of Somalis who suffered persecution, incarceration without trial, torture, and rape at the hands of government forces during this period, and the families of those who were executed or “disappeared” during this period.\footnote{Id. at *3-5.} The Plaintiffs filed a complaint against Samantar in the Eastern District of Virginia, the district in which Samantar resided, on November 10, 2004.\footnote{Id. at *6.} Samantar responded by filing a motion to dismiss on grounds of sovereign immunity.

After a hearing on Samantar's motion, the court “stayed the proceedings to determine whether the State Department planned to provide a Statement of Interest regarding Samantar's assertion that he was entitled to sovereign immunity. The Court ordered Samantar to provide monthly updates regarding the State Department's position. Each of Samantar's monthly reports to the Court reported that the State Department had the matter 'still under consideration.'”\footnote{Id.} After two years during which
the State Department failed to file a Statement of Interest, the court reinstated the case on its active docket in January, 2007.\textsuperscript{22}

The court granted Plaintiffs leave to file a second amended complaint, to which Samantar responded by arguing, \textit{inter alia}, that the court lacked subject matter over the plaintiffs' complaint because Samantar is immune from jurisdiction under the FSIA.\textsuperscript{23} The district court agreed that Samantar was “entitled to immunity under the FSIA for the acts he undertook on behalf of the Somali government.”\textsuperscript{24} Although the Fourth Circuit had not yet considered the issue, the district court found guidance from other district courts that previously had ruled that a foreign official acting in his official capacity is an “agency or instrumentality” of a foreign state within the meaning of the FSIA and he therefore enjoys full immunity under the Act for such conduct.\textsuperscript{25} The court distinguished cases in which other courts had found no immunity for former foreign officials on the grounds that either the defendant\textsuperscript{26} of the foreign state itself\textsuperscript{27} had

\begin{footnotesize}
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\item \textsuperscript{22} Id.
\item \textsuperscript{23} Id.
\item \textsuperscript{24} Id.
\item \textsuperscript{25} Id. (citing \textit{Belhas v. Ya’Alon}, 466 F.Supp.2d 127 (D.D.C.2006) (The former Israeli general Moshe Ya’Alon enjoyed immunity under the FSIA in a suit brought by Lebanese citizens under the ATCA and the TVPA alleging that the April 1996 Qana bombing, in which the Israeli military bombed a UN compound in southern Lebanon, killing civilians and UN soldiers, constituted war crimes, extrajudicial killing, crimes against humanity, and cruel, inhuman, or degrading treatment. At 128. The court reasoned that Ya’Alon was acting under color of Israeli law, that the plaintiffs alleged that Ya’Alon “had command responsibility for the attack,” and that it was “undisputed that General Ya’Alon was acting in his official capacity with respect to the events underlying this lawsuit” and therefore that he enjoyed immunity under the FSIA); \textit{Matar v. Dichter}, 2007 WL 1276960 (S.D.N.Y. May 2, 2007) (The former director of the Israeli General Security Service enjoyed immunity under the FSIA for authorizing, planning, and directing the bombing of a residential neighborhood in Gaza and Israel's “targeted killing” policy. The court gave great weight to a letter from the State of Israel In determining that Dichter acted within the scope of his authority, and rejected the plaintiffs' contention that the type of acts of which Dichter was accused were “necessarily beyond the scope of an official's lawful authority.” At 292.).
\item \textsuperscript{26} \textit{Trajano v. Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation)}, 978 F.2d 493 (9th Cir. 1992) (The Ninth Circuit deemed a default judgment against the defendant to operate as an admission of the allegations against her and a concession that she operated outside the scope of her authority.).
\item \textsuperscript{27} \textit{Hilao v. Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation)}, 25 F.3d 1467 (9th Cir. 1994) (A letter from the Philippine government stating that the defendant's acts contravened Philippine law and
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denied that the acts at issue were within the defendant’s official authority. The court noted also that violation of \textit{jus cogens} norms was not sufficient grounds for abrogating FSIA immunity.\textsuperscript{28}

The Fourth Circuit reversed. Although “the majority view [among the Courts of Appeals] clearly is that the FSIA applies to individual officials of a foreign state”\textsuperscript{29} the court found “based on the language and structure of the statute, that the FSIA does not apply to individual foreign government agents like Samantar.”\textsuperscript{30} The Court of Appeals remanded to the District Court to review the case in light of its decision, as well as in consideration of Samantar’s claim that he was “shielded from suit by a common law immunity doctrine such as head-of-state immunity.”\textsuperscript{31}

The Supreme Court granted certiorari to consider the issue and found that “there is nothing [in the FSIA] to suggest [that] “foreign state” in § 1603(a) . . . include[s] an official acting on behalf of the foreign state, and much to indicate that this meaning was not what Congress enacted.”\textsuperscript{32} Writing for the Court,\textsuperscript{33} Justice Stevens went on to examine the legislative history and purpose of the Act and found that, although

\textsuperscript{28} \textit{Yousuf v. Samantar}, supra n.15, *14 (citing \textit{Sampson v. Federal Republic of Germany}, 250 F.3d 1145, 1156 (7th Cir.2001) (“We conclude that Congress did not create an implied waiver exception to foreign sovereign immunity under the FSIA for \textit{jus cogens} violations.”); \textit{Smith v. Socialist People’s Libyan Arab Jamahiriya}, 101 F.3d 239, 245 (2d Cir.1996) (“Our rejection of the claim that a \textit{jus cogens} violation constitutes an implied waiver within the meaning of the FSIA ... rests on our understanding that Congress did not intend the implied waiver exception of section 1605(a)(1) to extend so far, however desirable such a result might be.”); \textit{Siderman de Blake v. Republic of Argentina}, 965 F.2d 699, 714 (9th Cir.1992) (“While we agree with the Sidermans that official acts of torture of the sort they allege Argentina to have committed constitute a \textit{jus cogens} violation, we conclude that Amerada Hess forecloses their attempt to posit a basis for jurisdiction not expressly countenanced by the FSIA.”)).

\textsuperscript{29} \textit{Yousuf v. Samantar}, 552 F.3d 371, 378 (4th Cir. 2009).

\textsuperscript{30} \textit{Id.} at 381.

\textsuperscript{31} \textit{Id.} at 383.

\textsuperscript{32} \textit{Samantar}, 130 S.Ct. at 2289.

\textsuperscript{33} Justices Alito, Scalia, and Thomas each wrote separately, concurring in the judgment but disagreeing with Justice Steven’s use of legislative history. \textit{See id.} at 2293-94.
Congress intended to codify the common law of foreign state immunity in the FSIA, they did not intend to codify the common law of immunity for individual officers.\textsuperscript{34}

The FSIA was intended “to address 'a modern world where foreign state enterprises are every day participants in commercial activities,' and to assure litigants that decisions regarding claims against states and their enterprises 'are made on purely legal grounds,'”\textsuperscript{35} the Court found, but saw “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.”\textsuperscript{36}

That the FSIA does not apply to suits against individuals, however, does not mean that foreign officials enjoy no protections in US courts. “Even if a suit is not governed by the Act, it may still be barred by foreign sovereign immunity under the common law,”\textsuperscript{37} and “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.'”\textsuperscript{38} “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.”\textsuperscript{39}

\textsuperscript{34} \textit{Id.} at 2289.
\textsuperscript{36} \textit{Id.}
\textsuperscript{37} \textit{Id.}
\textsuperscript{38} \textit{Id.} at 2292 (citing Fed. Rule Civ. Proc. 19(a)(1)(B)).
\textsuperscript{39} \textit{Id.} (citing \textit{Republic of Philippines v. Pimentel}, 553 U.S. 851, 867, 128 S.Ct. 2180, 171 L.Ed.2d 131 (2008) (“[W]here sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign”).
“should be treated as actions against the foreign state itself, as the state is the real party in interest.”\textsuperscript{40}

The Court concluded that the \textit{Samantar} 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”\textsuperscript{41} and remanded the case to the district court.

On remand, the scope of common law immunity for foreign officials may be decisive. The decision whether to afford Samantar immunity will be informed and perhaps controlled by the suggestion of the State Department. In its \textit{amicus} brief to the Supreme Court in the \textit{Samantar} matter, the Department of Justice stated that the FSIA did not abrogate the common law role of the State Department in determining the immunity of foreign officials sued in US courts. The government argued that the “Executive Branch principles” on which the State Department makes its determinations of immunity reflect “the recognition that both current and former officials of a foreign state usually enjoy immunity for acts undertaken in their official capacity,”\textsuperscript{42} but are also “informed by customary international law and practice”\textsuperscript{43} and include “complex considerations” like the defendant’s place of residence, “the nature of the acts alleged,” statutory rights under the TVPA, “and the lack of any recognized government of Somalia

\textsuperscript{40} \textit{Id.}
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} U.S. Amicus Br. at 6, \textit{Samantar v. Yousuf}, 130 S.Ct. 2278.
\textsuperscript{43} \textit{Id.}
that could opine on whether petitioner’s alleged actions were taken in an official capacity or that could decide whether to waive immunity.”

**Pre-FSIA decisions and the State Department’s Insistence on Common Law Immunity:**

Prior to the enactment of the FSIA in 1976, district courts determined the applicability of foreign immunity as a matter of judicial inquiry informed by State Department suggestions. In the absence of statutory authority, “[t]he doctrine of foreign sovereign immunity developed as a matter of common law.” As early as 1797, the Attorney General declared it “well settled in the United States . . . that a person acting under a commission from the sovereign of a foreign nations is not amenable for what he does in pursuance of his commission, to any judiciary tribunal in the United States.”

In 1812, the Supreme Court held that federal courts lacked jurisdiction to determine title of “a public national vessel of France” moored in a Philadelphia harbor. In 1810, John McFaddon and William Greetham sailed their vessel, the *Schooner Exchange* from Baltimore for St. Sebastiens, Spain. While on that journey, French forces seized the vessel pursuant to orders given by Napoleon Bonaparte, the Emperor of France. One year later, when that same vessel, now a French military cargo vessel sailing as the *Balao*, “arrived in distress” in Philadelphia harbor after encountering
sever weather, McFaddon and Greetham brought suit to determine their title to the ship.51

The Supreme Court, asking “whether a public national vessel of France . . . is liable to be arrested upon the claim of title by an individual?” found that US courts lacked jurisdiction to determine title of the ship because such a claim was, in effect, a claim against the owner of the ship—the Emperor of France. Thus the vessel “was seized by a sovereign, in virtue of his sovereign prerogative” and an “act [] done by a sovereign in his sovereign character” was not reviewable in US courts. The Court wrote that the recourse against sovereign actions was in “negotiation, or [] reprisals, or [] war, according to its importance.”52

Following the decision in Schooner Exchange, “the State Department ordinarily requested immunity in all actions against friendly foreign sovereigns.”53 Courts hearing actions against foreign states applied “a two step procedure . . . for resolving a foreign state’s claim of sovereign immunity, typically asserted on behalf of the foreign sovereign of seized vessels,”54 under which the foreign government could request a suggestion of immunity from the State Department to the district court or, in the absence of a State Department suggestion a district court “had authority to decide for itself whether all the requisites for such immunity existed”55 by making an inquiry into “whether the ground

51 Id.
52 Id. at 122.
53 Id.
55 Ex parte Peru, 318 U.S. 578, 587, 63 S.Ct. 793, 87 L.Ed. 1014 (1943).
of immunity is one which it is the established policy of the [State Department] to recognize."\(^{56}\)

As the Supreme Court noted in *Samantar*, “cases involving individual foreign officials as defendants were rare” at this time, but in such cases “the same two step procedure was typically followed when a foreign official asserted immunity."\(^{57}\) In the very few cases in which the courts ruled on the immunity of foreign officials, they applied the classic, or absolute, theory of immunity, refusing to “sit in judgment on the acts of the government of another” state.\(^{58}\)

In 1952, reasoning that “the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts,”\(^{59}\) the State Department adopted the “Restrictive Theory” of sovereign immunity—a policy of recognizing the immunity of foreign sovereign “with regard to sovereign or public acts . . . of a state, but not with respect to private acts.”\(^{60}\) The restrictive theory required more searching determinations on the part of the State Department, which began evaluating the alleged acts to determine their public or commercial nature, rather than merely suggesting immunity for friendly governments. The State Department continued to consider “a variety of factors, sometimes including diplomatic considerations” and “political considerations [sometimes] led to suggestions of

\(^{56}\) *Hoffman*, 324 US at 36.

\(^{57}\) *Samantar* at 2284.


\(^{59}\) Tate Letter, *supra* n.13.

\(^{60}\) *Id.*
immunity in cases where immunity would not have been available under the restrictive theory.⁶¹

As the Supreme Court noted in the Samantar,⁶² State Department decisions relating to the sovereign immunity of foreign officials after the adoption of the restrictive theory but prior to the adoption of the FSIA are particularly sparse, with only five decisions discussing the immunity of heads of state or other non-diplomatic and non-consular state officials.⁶³ While some of these decisions reflect a relatively simple calculus in which the State Department determined whether the official’s conduct was a commercial or private act or an official one and made recommendations accordingly,⁶⁴ others indicate that the political or diplomatic concerns that underlay the absolute theory of sovereign immunity still influenced State Department suggestions.

In Kendall v. Kingdom of Saudi Arabia, the State Department suggested and the district court found immunity for King Faisal Al-Saud and the Kingdom of Saudi Arabia when plaintiffs attempted to proceed in a suit quasi in rem against property located in New York for claims for damages arising out of an incident in which Saudi militiamen allegedly fired at the plaintiffs and their aircraft in the Gulf of Aqaba. The State

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⁶² Samantar, 120 S.Ct. at 2291 fn.18 (“A study that attempted to gather all of the State Department decisions related to sovereign immunity from the adoption of the restrictive theory in 1952 to the enactment of the FSIA reveals only four decisions related to official immunity, and two related to head of state immunity, out of a total of 110 decisions.”) citing Digest, 1020, 1080 (1977).
Department suggested immunity on the grounds that a foreign “Head of State is not subject to the jurisdiction of any foreign Court without his consent.”65

In Isbrandtsen Tankers, Inc. v. President of India, the State Department recommended immunity for the Director General of the India Supply Mission, representing the President of India, who was being sued for damages arising from delaying of plaintiff’s cargo ships in Calcutta, after the defendants had entered into commercial contracts for the purchase of grain. Noting that it “might well find that the actions of the Indian government were . . . purely private commercial decisions”66 if it were to inquire into the facts of the case, the court nonetheless dismissed the case, reasoning that “[i]n situations where the State Department has given a formal recommendation . . . the courts need not reach questions of this type.”67 The court went so far as to find that State Department recommendations of immunity would control even when “the foreign sovereign had initially contracted to waive its claim of sovereign immunity.”68

In Psinakis v. Marcos, “taking note of international authority supporting an immunity from jurisdiction of persons who are serving as head of a foreign state, and for foreign relations reasons,” the State Department suggested immunity for Philippine President Ferdinand E. Marcos and the district court dismissed a suit against him.69 Although the State Department declined to make a suggestion as to the immunity of

65 Digest 1053-54.
66 Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198, 1200 (Ct. App. N.Y. 1971).
67 Id.
68 Id.
69 Id. at 1201.
other Philippine officials named as defendants in that case, the State Department indicated the breadth of the immunity in

_Greenspan v. Crosbie_, in which the Department suggested immunity for officials of the Province of Newfoundland accused of violating US securities disclosure regulations.\(^70\) In that case, the district court deferred to the State Department’s suggestion of immunity even when “it [was] alleged that the defendant officials of the Province of Newfoundland acted _in excess of_ their authority,” but it was “not alleged that these officials acted other than _in their official capacities and on behalf of_ the Province.”\(^71\)

The Restatement (Second) of Foreign Relations Law, published before the passage of the Foreign Sovereign Immunities Act, reflects the broad common law interpretation of immunity for foreign officials applied in the previous cases. In addition to immunity for heads of state and heads of government, § 66 of the Restatement provides that “the immunity of a foreign state . . . extends to . . . [a] 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.”\(^72\)

While the district court now must consider the applicability of common law sovereign immunity to Mohamed Samantar, the relative dearth of cases in which foreign officials were actually sued in US courts prior to the enactment of the FSIA means that there is little common law guidance on which the State Department may draw when

\(^70\) _Greenspan v. Crosbie_, 1976 WL841. Supra n.63.

\(^71\) _Id._ (emphasis added).

\(^72\) Restatement (Second) of Foreign Relations Law §66. Supra n.7.
making those determinations now. Indeed, the Restatement (Second) cites mainly to foreign law in support of the principle that foreign officials enjoy the immunity of the foreign state when acting in their official capacity. Of the few cases at issue, most dealt with commercial activities of foreign officials and immunity was resolved by the State Department with regard to only the public or private nature of the act and, if the Executive so desired, diplomatic concerns.

Cases *after* the enactment of the FSIA may provide the most guidance to the State Department when determining what weight to give to, among other considerations, recent human rights treaties to which the US is a party, the nature of the acts alleged, the status of the defendant as a current or former official, whether the foreign state has acknowledged the acts alleged as within the official capacity of the defendant, and other concerns which appellate courts have identified as relevant to immunity findings under the FSIA. Many of the issues that the US identified as relevant in an Executive determination of sovereign immunity, including some of those just listed, have been repeatedly litigated in the appellate courts. Decisions on these issues should constitute an important part of the common law to which the State Department looks when determining the immunity of foreign officials accused of international crimes.

**Decisions After the Passage of the FSIA**

Since the passage of the FSIA in 1976 and especially since the influential decisions in *Filártiga v. Peña-Irala*\(^{73}\) and *Sosa v. Álvarez-Machain*,\(^ {74}\) which opened the

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\(^{73}\) 630 F.2d 876 (2d Cir. 1980).
door for foreigners to bring human rights claims in US courts against foreign defendants for entirely foreign acts, federal courts have dealt with an increase in the number of claims against foreign officials and have consequently developed a body of law relating to the immunity thereof. Together, Filártiga and Sosa grant federal courts jurisdiction under the Alien Tort Statute (“ATS”)\textsuperscript{75} to hear civil actions brought by aliens for 

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“committed in violation of the law of nations or a treaty of the United States”\textsuperscript{76}
\end{quote}

As in Samantar, many plaintiffs bringing cases under the jurisdiction of the ATS allege violations of international law against foreign government officials and, when doing so, often rely on the Torture Victim Protections Act to provide the requisite cause of action.

In cases brought since the passage of the FSIA, courts have come to conflicting results in their determinations of the scope and justification of immunity for foreign officials sued in US courts. In part, this is due to the wide variation among the small number of foreign officials who have been sued—plaintiffs have attempted to sue current and former officials of varying rank including foreign leaders, and have sued them for a variety of offenses. Despite the fact that the State Department’s public position shortly after the passage of the FSIA was that the Act does not deal with the immunity of individual officials, but only that of foreign states and their political subdivisions, agencies and instrumentalities,"\textsuperscript{77} judicial decisions on the immunity of

\begin{footnotes}
\item[76] \textit{Id.}
\item[77] Digest, 1020 (1977) supra n.9; \textit{see also Chuidian v. Philippine Nat’l Bank}, 912 F.2d 1095, 1099 (9th Cir. 1990)(describing the government’s contention that a Philippine government official was “not covered by the Act because is an individual rather than a corporation or an association, but he is nonetheless entitled to sovereign immunity under the general principles of sovereign immunity expressed in the Restatement (Second) of Foreign Relations Law § 66(b).”).
\end{footnotes}
foreign officials have been the largest source of common law rules on the matter.\textsuperscript{78} These decisions reflect a significant amount of judicial inquiry and common-sense analysis and, more importantly, the increasing weight of human rights concerns, laws, and treaties in the immunity analysis. The analysis therein is likely to be of significant value to State Department officials seeking to apply the “common law” of foreign official immunity in human rights cases.

Nonetheless, many of these decisions upheld the role, often the exclusive role, of the State Department in determining the applicability of immunity. In Ye v. Zemin, the Seventh Circuit held that the former President of China was immune in an action brought by practitioners of Falun Gong alleging that the Chinese government engaged in human rights abuses against them in an effort to suppress the spiritual movement.\textsuperscript{79} Because the FSIA does not apply to heads of state, the court reasoned, “the decision concerning the immunity of foreign heads of states remains vested where it was prior to 1976—with the Executive Branch.”\textsuperscript{80} The Seventh Circuit refused to recognize an exception from the Executive’s longstanding right to determine immunity for foreign heads of state in cases alleging violations of \textit{jus cogens} norms, reasoning that “[t]he Supreme Court has held . . . that the Executive Branch's suggestion of immunity is conclusive and not subject to judicial inquiry.”\textsuperscript{81}

\textsuperscript{78} See Samantar, 130 S.Ct. 2291 fn.17 (“The courts of appeals have had to develop, in the complete absence of any statutory text, rules governing when an official is entitled to immunity under the FSIA.”).

\textsuperscript{79} Ye v. Zemin 383 F. 3d 620 (7th Cir. 2004).

\textsuperscript{80} Id. 625.

\textsuperscript{81} Id. citing \textit{Ex Parte Republic of Peru}, 318 U.S. at 589, supra n.55 (“The certification and the request that the vessel be declared immune must be accepted by the courts as a conclusive determination by the political arm of the Government that the continued retention of the vessel interferes with the proper conduct of our foreign relations.”) (emphasis added); \textit{Compañía Española de Navegación Marítima, S.A. v. The Navemar}, 303 U.S. 68, 74, 58 S.Ct. 432, 82 L.Ed. 667 (1938) (“If [a claim of immunity by a foreign government] is recognized and allowed by
Although the cases that the Seventh Circuit relied on were exclusively “concerned with foreign sovereign immunity involve libel actions or other actions involving commercial marine vessels [or other commercial contracts] rather than a head of state,” the court found that the distinction “does not make a difference to the question at issue: whether a suggestion of immunity by the Executive Branch is dispositive” on the grounds that “[c]ourts appropriately accept an immunity determination as conclusive when it involves ships out of concern that the court might otherwise interfere with the foreign policy objectives of the Executive Branch. Clearly such concerns would be greater when the suggested immunity involves a foreign leader.”

Similarly, in *LaFontant v. Aristide*, the Haitian head of state was absolutely immune from personal jurisdiction in the United States when he had been recognized in that capacity by the US government. In that case, brought by the widow of a man killed in an extra-judicial execution on the orders of the Haitian president, the plaintiff alleged violations of the TVPA in addition to the UN Charter, the Universal Declaration of the Rights and Duties of Man, and customary international law. Additionally, the plaintiff claimed that the alleged acts were committed in violation of Haitian law and outside the authority of the head of state. Like the Chinese President in *Ye v. Zemin*, Aristide was

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82 *Id.* fn 8.

recognized by the Executive Branch as the Haitian head of State, which Judge Weinstein found conclusive. Judge Weinstein rejected the claim that the TVPA created an exception to head of state immunity, reasoning that head of state immunity “is premised on the concept that a state and its ruler are one for purposes of immunity” and that the TVPA created subject matter jurisdiction only for claims against foreign individual tortfeasors, not foreign states.

In Ye and Aristide, the determination of the Executive that the defendant was the current or former head of state of a foreign nation was sufficient to prevent the courts from exercising jurisdiction over him. However, neither court suggested that the determinations of the State Department would be conclusive as to the immunity of lesser officials of foreign governments. In those cases in which courts held that immunity for foreign officials was not governed by the FSIA, courts still considered the relevance of international diplomacy and the interests of the executive branch, but also considered whether the defendant was currently serving as a foreign official or had since left the post, whether the acts alleged were done in the defendant’s “official capacity,” and whether the foreign government asserted immunity on behalf of the defendant in some way.

In Matar v. Dichter, the court deferred to the Executive Branch’s determination that its former official “acted in furtherance of the official policies of the state of Israel”

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84 Id. at 133 (“[P]residential decisions to recognize a government are binding on the courts.”).
85 Id. at 132
86 Id. at 139. Judge Weinstein also referenced numerous sections of the TVPA’s legislative history indicating that the act was never intended to overcome head of state immunity.
87 The extent of the extreme deference to State Department determinations on head of state status is seen in United States v. Noriega, 746 F.Supp. 1506 (S.D.Fla.1990). Although General Noriega had acted as the de facto head of Panama and US officials had repeatedly dealt with him as if he were the head of state while he was in power, he was not immune from suit in US “absent explicit recognition from the United States.” At 1520.
when he allegedly ordered the aerial bombing of a residential neighborhood in Gaza, notwithstanding that the official had since retired.88 In that case, plaintiffs who had been injured or lost family members in a 2002 aerial bombing of a Gaza apartment complex brought an action under the ATS and the TVPA against Avraham Dichter, the former head of the Israeli Security Agency, for his role in personally planning and authorizing the strike. The Second Circuit held that the FSIA did apply to current foreign officials and declined to determine whether it applied to former officials because the defendant was “nevertheless immune from suit under common-law principles that pre-date, and survive, the enactment of that statute.”89 Accepting the Executive’s determination that the acts alleged were performed in the defendant’s official capacity, the court ruled that there was no relevant distinction between current and former officials as “[a]n immunity based on acts-rather than status-does not depend on tenure in office.”90 Having found that the Dichter’s immunity could come from either the FSIA or traditional common law immunity, the court gave deference to the Executive’s determination in support of immunity.

The State Department advocated this same position in its amicus brief in Samantar, arguing that “affording immunity to former officials for matters within their official capacity serves the important purposes of protecting the reciprocal interests of sovereigns, ensuring that officials are not unduly chilled in the performance of their

88 563 F.3d at 11.
89 Id. at 14.
90 Id.
duties, and preventing litigants from circumventing the FSIA’s stringent limitations on suit against the state through suits against its former officials.” 91

In appellate courts that did not recognize the continuing role of the State Department in conclusively determining immunity before the recent *Samantar* decision, immunity often turned on whether the defendant was acting within his “official capacity” when committing the acts in question. Such a concern reflects the Restatement (Second) formulation of common law foreign immunity in which “the immunity of a foreign state . . . extends to . . . [a] 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.” 92 Under the traditional formulation that “a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly,” 93 the scope of the defendant’s “official capacity” or the legitimacy of considering certain conduct, especially human rights violations, an “official act” frequently determines the availability of immunity.

In *Filártiga v. Peña-Irala*, the Second Circuit determined that an act being done under “color of government authority” was insufficient to prevent US courts from adjudicating that issue under the Act of State doctrine. The court held that it had jurisdiction over a claim by Paraguayan citizens against the former Inspector General of

91 Brief of the US as Amicus Curiae at 29. Supra n.42.
92 Restatement (Second) of Foreign Relations Law § 66. Supra n.7.
93 Chuidian at 1102, supra n.77 (citing Monell v. Department of Social Services, 436 US 658, 690 n.55, 98 S.Ct. 2018, 2035 n.55, 56 L.Ed.2d 611 (1978)).
the police in Asunción, Paraguay for his part in the torture and death of their relative.\(^{94}\)

The court took notice of the fact that a necessary element of torture is that it be done under “color of government authority”\(^{95}\) but found that this was not sufficient to make the act one done in the defendant’s “official capacity” for which immunity would be available under the Act of State doctrine. That Paraguay had renounced “torture as a legitimate instrument of state policy . . . does not strip the tort of its character as an international law violation, if it in fact occurred under color of government authority.”\(^{96}\)

Although the defense was not raised at the district court and was therefore not properly before the Court of Appeals, the court nonetheless expressed their “doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could properly be characterized as an act of state.”\(^{97}\)

The court went on to note that while “torture was once a routine concomitant of criminal interrogations in many nations, during the modern and hopefully more enlightened era it has been universally renounced” and concluded “that official torture is now prohibited by the law of nations,”\(^{98}\) but did not entertain the question of whether “universally renounced” or internationally prohibited acts could still be considered an “official act” for the purposes of determining the immunity of foreign officials.

\(^{94}\) *Filártiga v. Peña-Irala*, 630 F.2d 876. Supra n.73.

\(^{95}\) Under the UN Convention Against Torture, an act must be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity” to be considered torture. United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment Art. 1 UN Doc. A/39/51 (1984) (“UN Torture Convention”).

\(^{96}\) *Id.*

\(^{97}\) *Filartiga*, at 890.

\(^{98}\) *Id.* at 884.
In claims against Ferdinand Marcos, former President of the Philippines, and his daughter Imee Marcos-Manatoc, former head of military intelligence during her father’s rule, brought by citizens of the Philippines for torture and wrongful death, the Ninth Circuit ruled that, although the FSIA covered the actions of foreign officials, it did so only when the official was acting as an agent or instrumentality of the foreign government, which the Ninth Circuit interpreted to mean acting with an “official mandate” or within the “scope of her authority.” The Ninth Circuit found this determination as it applied to defendant Imee Marcos-Manatoc “easy” when she had admitted that she “acted on her own authority, not on the authority of the Republic of the Philippines” but later interpreted that decision to mean that the FSIA afforded no immunity for “alleged acts of torture and execution by a foreign official.”

Elaborating on that principle, the Ninth Circuit analogized to Act of State cases. The court had previously rejected the argument that acts of a former head of state taken with no basis in or in violation of the law of his state could be nonjusticiable “official acts” under the Act of State doctrine. In support, the court cited Jimenez, in which the Fifth Circuit similarly rejected the applicability of the Act of State doctrine to the former dictator of Argentina, holding that

It is only when officials having sovereign authority act in an official capacity that the Act of State Doctrine applies. Appellant's acts ... were not acts of Venezuelan sovereignty.... They constituted common crimes committed by the Chief of State done in violation of

100 Id. 498.
101 Id.
102 Republic of the Philippines v. Marcos, 862 F.2d 1355, 1361 (9th Cir. 1988).
his position and not in pursuance of it. They are as far from being an act of state as rape [is].\textsuperscript{103}

The Ninth Circuit also distinguished \textit{Siderman},\textsuperscript{104} in which the Republic of Argentina enjoyed immunity under the FSIA against allegations of official acts of torture, on the grounds that claims were brought in that case against the state itself, against which jurisdiction can only be had through one of the FSIA’s explicit exceptions.\textsuperscript{105} Acts of heads of state, the Ninth Circuit found, cannot be considered Acts of State or official acts when they are in contravention of the law of the state they represent. Contrary to this view, the Court of Appeals for the District of Columbia found that even acts that are illegal under the foreign state’s laws and which may contravene the TVPA properly are considered acts of the foreign state under the FSIA absent an explicit exemption in that statute stating otherwise. In \textit{Belhas v. Ya’alon},\textsuperscript{106} the D.C. Circuit ruled that neither \textit{jus cogens} norms nor the TVPA superseded the FSIA grant of immunity for foreign officials acting within the scope of their authority.\textsuperscript{107} Following the \textit{Samantar} decision, it is possible that the determination of what constitutes the scope of the defendant foreign officials authority may be more freely influenced by the TVPA and \textit{jus cogens} norms.

\begin{itemize}
\item \textsuperscript{103} \textit{Jimenez v. Aristeguieta}, 311 F.2d 547 557-58 (5th Cir.1962).
\item \textsuperscript{104} \textit{Siderman de Blake v. Republic of Argentina}, 965 F.2d 699, 706.
\item \textsuperscript{105} It is also worth noting that \textit{Siderman} was decided in 1992 and the ruling depended in part on the court’s finding that there was no “international agreement to which the United States is a party that ‘expressly conflict[s] with the immunity provisions of the FSIA’” sufficient to bring Argentina’s acts within the Act’s “treaty exception.” 28 U.S.C. § 1604. The court may have decided differently had the TVPA, which was passed that same year, been in effect at the time of the decision.
\item \textsuperscript{106} \textit{Belhas v. Ya’alon}, 515 F.3d 1279. Supra n.25. In \textit{Belhas}, alleged victims of an Israeli bombing of a UN compound in southern Lebanon brought claims under the ATCA and TVPA against the former head of the Israeli Army Intelligence who allegedly ordered and planned the bombing strike.
\item \textsuperscript{107} \textit{Id.} at 1286-89.
\end{itemize}
Against Ferdinand Marcos, determining the scope of the defendant’s authority was made much easier by the agreement of the government of the Philippines that the acts of Marcos “like torture, inhuman treatment of detainees, etc. are clearly in violation of existing law” and stating the Philippine’s position that “the government or its officials may not validly claim state immunity for acts committed against a private party in violation of existing law.”\textsuperscript{108} Such a statement from the foreign government in question completely alleviates the concern for comity that courts and the State Department have echoed when applying foreign immunity but they will not exist in every case. In the absence of an affirmation that relations between the US and the foreign state will not be affected by exercising jurisdiction over the foreign official or head of state, or in the more likely event that the foreign government will be offended and does claim that the acts in question were within the defendant’s authority, should US courts defer to that statement or to the statement of the State Department stating the same, or should they undertake a more searching inquiry into the underlying authority of the acts in question? In \textit{Jimenez}, it was obvious to the Fifth Circuit that rape could not properly be considered an act of state. It should be equally obvious that torture and similar acts contravening widely accepted treaties to which the US is a party are not acts of state nor part of the valid authority of state officials.

For the moment, the courts that have applied the “common law foreign immunity” during the tenure of the FSIA seem willing to defer to the State Department for a conclusive determination of immunity to individual defendants. However, courts that found the FSIA was applicable to foreign officials sued for torture and similar acts

\textsuperscript{108} \textit{Hilao v. Marcos}, 25 F.3d at 1472. Supra n.27.
(a position that Samantar overruled) and courts ruling on the applicability of the Act of State doctrine to those same acts have advanced cogent arguments that the “officialness” of an act should be limited to the authority under which the official acts. This position may put foreign states in the uncomfortable position of choosing between abandoning their former officials to the justice of US courts or, in order to preserve their immunity, publicly admitting that torture is a legitimate instrument of their state policy. It is not clear that we should wish to avoid this result.

Applying this precedent to Mohamed Samantar, however, does not produce clear results. As the government noted in its amicus brief to the Supreme Court in the Samantar case, currently there is no “recognized government of Somalia that could opine on whether petitioner's alleged actions were taken in an official capacity or that could decide whether to waive any immunity that petitioner otherwise might enjoy.”\textsuperscript{109} Should the court defer to the suggestion of the State Department, it is not clear what their response will be. The government indicated a willingness to consider “petitioner's residence in the United States rather than Somalia the nature of the acts alleged, [and] respondents' invocation of the statutory right of action in the TVPA against torture and extrajudicial killing,”\textsuperscript{110} despite that none of these concerns have been consistently addressed in precedent on which the State Department might rely. Perhaps the most troubling concern, however, is that by relying on the principle that an act will be considered “official” when the current government of the foreign nations opines that it is, the State Department and courts relying on the State Department’s suggestions will be facilitating rights-abusing nations to protect themselves from judicial scrutiny. Any

\textsuperscript{109} Brief of the United States as Amicus Curiae 7, \textit{Samantar}, 130 S.Ct. 2292. Supra n. 42.

\textsuperscript{110} Id.
rights abusing government will wish to screen itself from scrutiny, even if that scrutiny is of its former officials.

While risking unbalancing the delicate system of diplomatic relations that the State Department seeks to preserve, the holdings in Jimenez and the Marcos reflect a more sensible approach to the scope of the authority under which foreign officials act. These cases reflect the same principles pronounced in the statutes of various international criminal tribunals, in a recent resolution passed by the Institut de Droit International (“IDI”), and, perhaps most persuasively to US legal audiences, in the multilateral treaty for the prosecution of Axis war criminals at Nuremberg after World War II: An act contravening sufficiently established international legal norms should not considered an official act of state nor within the authority of state actors. The State Department and many US courts, however, have not embraced human rights protections to this extent, preferring to rely on the historic principle that acts that a foreign state claims are “official” are not to be judged in the courts of another, even when the United States, numerous other nations, and international organizations have repeatedly recognized that certain acts should not be considered valid state actions.

**Customary International Law**

The law of foreign immunity has traditionally been determined in the United States with frequent reference to and partial reliance on international and foreign law. The Executive Branch affirmed its fidelity to international and foreign law in its amicus

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113 Supra, note 13.
brief in *Samantar*, stating that the principles on which the State Department makes immunity determinations “are informed by customary international law and practice.” However, the current state of customary international law in the area of foreign sovereign immunity does not provide an unambiguous answer or suggestion to the State Department. Some recent high profile decisions in the United Kingdom and in international courts, and a handful of cases in the courts of other nations, have upheld or repeated the traditional formulation of foreign official immunity which protects current or former state officials from being haled into foreign courts to answer for acts committed “in the exercise of government authority.” However, other decisions have questioned the extent of that immunity and held that, at least for acts that contravene widely accepted international norms, no immunity should protect former foreign officials. Some international organizations and scholars have supported this position, pointing out the increasing importance of individual rights and humanitarian concerns as compared to traditional notions of state sovereignty. Thus, while customary international law would generally favor granting immunity to Mohammed Samantar in US courts, the US would hardly be a voice alone if it chose to require him to answer for his actions in our domestic courts.

In 2000 and 2004, two international courts—the International Court of Justice in the *Arrest Warrant Case* and the Special Court for Sierra Leone in *Prosecutor v. Taylor*—considered the application of immunity to sitting and former state officials

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114 US Brief as Amicus Curiae at 6, Samantar, 130 S.Ct. 2292. Supra. n.42.
under customary international law.\textsuperscript{116} Although the courts in both cases ultimately found the defense unavailing, the reasoning on which both courts relied and a substantial amount of dicta contained within the decisions indicated that the courts found their special status as international tribunals essential to their ability to overcome an otherwise “settled” principle of law that foreign officials enjoy immunity as to their “official” acts in domestic courts.

In the \textit{Arrest Warrant Case}, the International Court of Justice considered the legality of an arrest warrant issued by Belgium against the sitting Congolese foreign minister for “offences constituting grave breaches of the Geneva Conventions of 1949 and . . . crimes against humanity”\textsuperscript{117} allegedly perpetrated before he took office. Belgium submitted that the warrant, served on the foreign minister while he was on a private trip to Belgium, was permissible under international law as foreign ministers were protected from the jurisdiction of foreign states only while on official visits, but enjoyed no immunity during visits in a private capacity. The ICJ stated that it was narrowly limiting its decision to “the immunity from criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs,” and determined that

No distinction can be drawn between a Minister for Foreign Affairs in an ‘official’ capacity, and those claimed to have been performed in a ‘private capacity’ or, for that matter, between acts performed before the

\textsuperscript{116} \textit{Arrest Warrant Case.}
\textsuperscript{117} \textit{Id.} \textnumero 13.
person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office.\textsuperscript{118}

Foreign Ministers, the Court held, are absolutely immune from criminal jurisdiction in foreign States during their term of office. This personal immunity is necessary to prevent another state from interfering with the Minister’s ability to exercise the functions of his office as “the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions.”\textsuperscript{119}

Addressing Belgium’s assertion that State practice, including the \textit{Pinochet} decision by the UK House of Lords\textsuperscript{120} and the \textit{Qaddafi} decision by the French Court of Cassation,\textsuperscript{121} and instruments creating international legal tribunals like the those at Nuremberg, the ICTY, and the ICTR, implicitly recognize the principle that there can exist no immunity for incumbent heads of state accused for international crimes, the ICJ found that none of those sources “enable[d] it to conclude that any such an exception exists in customary international law in regard to national courts.”\textsuperscript{122} Although the case is clearly distinguishable from \textit{Samantar}, in which the plaintiffs are suing a former foreign official and not a sitting foreign minister, the ICJ stated broadly that it found no grounds for an exception to the customary international law principle that the officials

\textsuperscript{118} \textit{Id.} ¶¶ 47, 55.
\textsuperscript{119} \textit{Id.}
\textsuperscript{120} \textit{Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte} (No. 3), [2000] 1. A. C. 147 (U.K House of Lords).
\textsuperscript{121} \textit{Qaddafi} Cour de Cassation,. \textit{Arrêt No. 1414} (Mar. 13 2001), 125 ILR 456.
\textsuperscript{122} \textit{Arrest Warrant Case}, ¶ 58 (emphasis added). Supra n.115.
of foreign states enjoy immunity for acts committed in their official capacity even when such acts contravene widely held and specific international norms, like violations of international humanitarian law.

The Special Court for Sierra Leone in *Prosecutor v. Taylor*, dealing not with immunities before a national court but with its own ability as a “truly international” tribunal to overcome the jurisdiction of a former State official, followed the reasoning in the *Arrest Warrant Case* to hold that a former head of State (Charles Taylor, the former President of Liberia) was not entitled to immunity on charges of human rights abuses including authorizing the terrorisation of civilian populations, unlawful killings, physical and sexual violence, use of child soldiers, abductions and forced labor, and attacks on peacekeepers. Although the validity of the Special Court’s assertion that is an “international court” under the reasoning of the ICJ in the *Arrest Warrant Case* has been questioned, in justifying its ability to indict a former head of State because of its status as an *international tribunal*, the Special Court entrenched the principle in the *Arrest Warrant Case* that only international tribunals may overcome the immunities of State officials.

123 The Court noted that at the time of the indictment, Charles Taylor was the sitting Head of State of Liberia. But because he had ceased to be the Head of State at the time of that case, his personal immunity had also ceased and the only consequence of the personal immunity was forcing the Prosecutor to issue a fresh warrant. *Prosecutor v. Taylor*, SCSL-2003-01-I, at 3018. Supra n. 115.


The Special Court cited to its own statute, which uses language substantially the same as Article 7(2) of the Statute of the ICTY, Article 6(2) of the Statute of the ICTR, and Article 7 of the Charter of the International Military Tribunal, and similar to Article 27(2) of the Statute of the International Criminal Court (ICC), providing that “[t]he official position of any accused persons, whether as Head of State or Government or as a responsible Government official, shall not relieve such a person of responsibility,” as support for its holding that international tribunals enjoy the unique ability to disregard the immunity of Heads of State for international crimes. The Special Court distinguished international courts from national ones on the “principle that one state does not adjudicate on the conduct of another state.”

The Arrest Warrant and Taylor decisions applied long-standing international law and found support in scholarship suggesting that no immunity should inure to a state official for grave international crimes. This principle was expressed most powerfully following World War II, when the major Allied powers made a treaty for the prosecution of the “major war criminals of the European Axis” that denied the availability of head of State or State official immunity for anyone accused of crimes against peace, war crimes, or crimes against humanity. However, both courts

128 Nuremberg Rules, supra n.112.
132 Nuremberg Rules, supra n.112, Art. 1.
133 Id., Arts. 6, 7.
premised their jurisdiction to hear such claims on their nature as international tribunals and expressly stated that domestic courts do not enjoy the same power.

However, it is not so clear that the foundations of this principle that the ICJ and Special Tribunal enunciated is so easily delimited. The Agreement to Prosecute between the four major Allied Powers following World War II applied to war criminals “whether they be accused individually or in their capacity as members of organisations or groups or in both capacities”\(^{134}\) and stated that “[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.”\(^{135}\)

In 1950, the Agreement was turned into a report adopted by the International Law Commission and submitted to the UN General Assembly.\(^{136}\) That report stated the principle that “[a]ny person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment . . . [and] the fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.”\(^{137}\) The statutes for the International Criminal Tribunals for Rwanda and Yugoslavia and the International Criminal Court in the Rome Statute apply the same principle.\(^{138}\)

\(^{134}\) Nuremberg Rules, supra n.112, Art. 1.

\(^{135}\) Id. Art. 7.

\(^{136}\) International Law Commission, Principles of International Law Recognized in the Charter of the Nürenberg Tribunal and in the Judgment of the Tribunal (1950).

\(^{137}\) Id. Principles I, III.

\(^{138}\) ICTY Statute, Art 7. (“The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.”); ICTR Statute, Art. 6 (same); Rome Statute (“official capacity as a Head of State or
These sources indicate the existence in international law of a strong presumption that human rights abusers and those who commit grave violations of international law should be held to answer for their acts despite their status as a state official. Since the Nuremberg trials, many states have made treaties expressing clearer views of what constitutes an international crime or and strengthening human rights. However, most foreign and international bodies that have considered the issue continue to assert that the domestic courts of one nation may not sit in judgment of the actions of the officials of another, even when these officials are accused of violating those rights.

Although US law in the area has been convoluted and confusing, the US has, according to some commentators, “taken a lead [in regard to civil proceedings against state officials] and allows claims to be brought in US courts for torture and other human rights violations committed abroad by foreign state officials.” Other states have generally followed the traditional restrictive theory of foreign official immunity, granting immunity for all acts in the exercise of sovereign authority, with only narrow exceptions for entirely private or commercial acts.

Cited repeatedly in the Arrest Warrant and Taylor decisions, the UK House of Lords opinion in the Pinochet decision reflects a view that former heads of state are not immune from criminal prosecution in national courts for violations of international law. However, the more recent Jones decision casts doubt on the viability of this

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140 Ex Parte Pinochet, 1 A.C. 47. Supra 120.
reasoning and precludes any similar exception for current officials in civil cases.\footnote{Jones v. Ministry of the Interior of Saudi Arabia, [2007] 1 AC 270 (U.K. House of Lords).} Relatively few cases exist from other English speaking nations, although a small number of cases indicate that most of these take a similarly restrictive approach.

The UK State Immunity Act of 1978, much like the European Convention on State Immunity and the UN Convention on Jurisdictional Immunities of States, extends immunity to agents of the state in “proceedings relate[d] to anything done by it in the exercise of sovereign authority.”\footnote{Id.} In 1999, noting that Section One of the State Immunity Act applies only to civil matters, the House of Lords determined a former head of State is entitled to immunity in criminal proceedings only “in relation to acts done as part of his official functions when head of state.”\footnote{Pinochet, supra n.120.} In that case, the House of Lords found that Augusto Pinochet, the former head of State of Chile, enjoyed no immunity for charges of mass torture, murder, and kidnappings committed under his authority and control because violations of international law and \textit{jus cogens} norms cannot be considered a state function.\footnote{Id. Opinion of Lord Browne-Wilkinson.} This decision reflects the reasoning in the IDI Resolution that certain acts which have been almost universally condemned as illegitimate tools of state power and an abuse of human rights cannot be considered to be acts in the exercise of sovereign authority. As discussed above, US courts have also found certain acts cannot be considered “sovereign” or “official” functions entitled to protection by foreign immunity of the Act of State doctrine.\footnote{See Jimenez, Supra n.103; In re Estate of Marcos. Supra n.26.}
In *Pinochet*, Lord Browne-Wilkinson found that the UN Convention Against Torture and the UN Hostage Convention “authorized and required [State parties] to take jurisdiction internationally” for claims arising under these agreements.\(^\text{146}\) Although Lord Browne-Wilkinson doubted whether torture or hostage taking, prior to the existence of the UN Conventions, would be offenses for which no immunity could arise, he found that the Conventions made such offenses “a fully constituted international crime.”\(^\text{147}\) Asking, “How can it be for international law purposes an official function to do something which international law itself prohibits and criminalises?” Lord Browne-Wilkinson and the House of Lords found that contraventions of international criminal law cannot be official acts “in any capacity which gives rise to immunity *ratione materiae*.”\(^\text{148}\) Although it is reasonably clear that Lord Browne-Wilkinson believed the absence of immunity for international crimes applied equally in civil and criminal cases, it is equally clear that other Lords “expressly accepted that the grant of immunity in civil proceedings was unaffected.”\(^\text{149}\)

Those expressing reservations that an exception extended to civil cases were vindicated in *Jones v. Ministry of the Interior of Saudi Arabia*. In *Jones*, the House of Lords rejected the contention that “torture cannot be a governmental or official act, since under article 1 of the Torture Convention torture must, to qualify as such, be inflicted by or with the connivance of a public official or other person acting in an

\(^{146}\) *Pinochet*, Opinion of Lord Browne-Wilkinson. Supra n.120.  
\(^{147}\) *Id.*  
\(^{148}\) *Id.*  
\(^{149}\) *Jones, supra* n.144, citing *Pinochet*, 264 (opinion of Lord Hutton), 278 (opinion of Lord Millett) and 280, 281, 287 (opinion of Lord Phillips of Worth Matravers).
official capacity.”150 Referring to the ICJ’s decision in the *Arrest Warrant Case*, Lord Bingham found that no rule in international law supported a finding of no immunity for incumbent foreign State officials in the domestic courts of another State.151 Lord Bingham stated that “the *Arrest Warrant case* confirms the opinion of the judges in the *Pinochet* case that General Pinochet would have enjoyed immunity, on a different basis [personal immunity], if he had still been Head of State,”152 but nowhere notes that this holding would support extending the reasoning in *Pinochet* to the civil case before the court while reaching the same result of a finding of immunity: Under the reasoning in *Pinochet*, the accused torturers would have been immune from the civil jurisdiction of the UK while employed as Saudi State officials, but the Torture Convention would have precluded their assertion of a defense of act based immunity for torture committed while an agent of the foreign State.

The *Jones* decision is currently being appealed, joined with another case arising out of the same events, to the European Court of Human Rights.153 Although the matter concerns the immunity of sitting State officials, it will be interesting to see if the ECHR chooses to rule on the applicability of act based immunity for State officials accused of international crimes. As it currently stands, UK practice somewhat mirrors the decisions in *Matar v. Dichter* and *In re Marcos*, granting authority to the foreign government to proclaim whether the act in question was conducted in the exercise of foreign authority or in the individual’s official capacity.

150 *Id.* at 286.
151 *Id.* at 294.
152 *Id.*
Australia also grants broad immunity to foreign officials under the Australian Foreign States Immunities Act. The Act defines “states” to include individual officials serving the foreign government, and Australian courts have held that individual officials are protected by a grant of immunity with no exception for violations of *jus cogens* norms.\(^{154}\)

In *Zhang v. Zemin*, the Supreme Court of New South Wales, the highest court in that state, considered the application of the Foreign States Immunities Act to the former president of the People’s Republic of China.\(^{155}\) Noting first that the Australian FSIA “extends [immunity] to any part of the government of a foreign State, including the executive government and foreign officials,”\(^{156}\) the court rejected the plaintiff’s contentions that torture committed by Chinese officials on Falun Gong practitioners was either the act of private individuals not acting in their official capacity or, in the alternative, that the UN Torture Convention created an exception to foreign official immunity under the Australian Act.

In a case almost identical to *Ye v. Zemin*,\(^{157}\) plaintiffs, Falun Gong practitioners who allegedly had been persecuted, detained, and tortured by Chinese officials, argued that torture could not be considered an “official act” of the foreign officials for which immunity was available because of China and Australia’s responsibilities under the Convention. The Australian court, like the House of Lords in *Jones*, found these arguments unavailing—reasoning that because the Torture Convention defines torture

\(^{155}\) *Id.*
\(^{156}\) *Id.* at ¶ 8.
\(^{157}\) Supra, n.79.
as an action of a public official or a person acting in an official capacity, an individual acting on his individual authority, and not under color of official authority, cannot commit torture under the Convention.\footnote{See UN Torture Convention, supra n.95.} Moreover, the court found that the alleged acts of torture “were undoubtedly connected with the policy of the Peoples’ Republic of China and of the CPC towards the Falun Gong,” which supported the conclusion that the torture was an official act of the State.\footnote{Id. at ¶ 31. The Seventh Circuit considered similar claims in \textit{Ye v. Zemin}, supra n.79. There, they rejected the notion that the US FSIA grants immunity to individuals, but held that the authority to confer immunity on a foreign official remained vested in the Executive Branch as it had before the enactment of the FSIA; a view that was upheld in the Supreme Court’s recent decision in \textit{Samantar}.} 

Relying largely on Lord Bingham’s opinion in \textit{Jones}, the court found that no principle in international law supported an exception to foreign immunity for “civil proceedings alleging acts of torture committed in a foreign state.”\footnote{Id. ¶ 35.} The Australian Act, according to the Supreme Court of New South Wales, is “consistent with international law on the subject of foreign State immunity.”\footnote{Id. ¶ 20.} US courts, however, have not felt so tied by the interaction between the requirement that an act be done under the color of government authority and the principle that if an act is done under such authority it necessarily is an official act on which foreign courts may not rule. As discussed earlier, the Second Circuit in \textit{Filártiga v. Peña-Irala} determined that acts of torture done by a foreign official under color of government authority were nonetheless not properly considered acts done in the defendant’s “official capacity” which would make them nonjusticiable under the Act of State doctrine. Thus, while the Seventh Circuit found that head of state immunity protected the Chinese President in a case almost identical to
Zhang, it seems possible that some US courts would have been willing to entertain the same action against non-head of state officials in the Chinese government responsible for the torture and killings of Falun Gong members.

**Treaty Law**

Although state and sovereign immunity are generally regarded as stemming from the principle of comity between nations,\(^{162}\) there is a dearth of treaty law that might demonstrate this understanding. The two main treaties on the specific issue of immunity for foreign State officials—the United Nations Convention on Jurisdictional Immunities of States and Their Properties (“UN Immunity Convention”) and the European Convention on State Immunity—do not provide bright line rules that would either reinforce or help create a norm for or against act based immunity for former officials. Both treaties refer only to the immunity of foreign *States*, leaving that term relatively undefined and creating the same textual problem resolved recently in the *Samantar* decision regarding the FSIA. In the absence of an argument compelling one interpretation, it is unclear whether the term “State” in the UN Immunity Convention or the European Convention on State Immunity should include current or former State officials. Additionally, treaties relating to human rights and international criminal law—like the United Nations Convention Against Torture\(^ {163}\) or the International Convention Against the Taking of Hostages\(^ {164}\)—suggest that the need for prosecution and punishment of international crimes is so great that no immunities should inure to former state officials accused of such acts.

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\(^{163}\) UN Torture Convention, supra n.79.

\(^{164}\) International Convention Against the Taking of Hostages, supra n.12.
The recent United Nations Convention on Jurisdictional Immunities of States and Their Property attempts to provide a universally accepted statement of judicial immunities in civil matters.\footnote{165} Although so far only eight states are party to the convention, “it is generally thought to reflect the broad principles of international law.”\footnote{166} The Convention, while trying to produce a harmonized system to ensure consistency among states, recognizes that “the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law.”\footnote{167} The Convention explicitly addresses itself to the justiciability of claims against one state \textit{in the courts of another state}, unlike the holdings in \textit{Taylor} and the \textit{Arrest Warrant Case} which dealt only with immunities before international tribunals.

Although the Annex to the Convention recognizes the need for legal certainty “particularly in the dealings of States with natural . . . persons,”\footnote{168} the Convention definition of “state” neither explicitly mentions individuals state officials nor natural persons. The relevant provision of Article 2 of the Convention define “State” as “agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State,”\footnote{169} indicating that immunity will be based on the commonly formulated notion of “sovereign authority.”

\footnote{165}{The Convention states that it “does not cover criminal proceedings.” \textit{Id.}} \footnote{166}{Foakes \& WIlmhurst, supra n.139 at 4.} \footnote{167}{\textit{Supra} n.67.} \footnote{168}{\textit{Id.}} \footnote{169}{United Nations Convention on Jurisdictional Immunities of States and Their Property Art. 1(b)(ii-iv) A/59/49 (2004).}
While never using the words “individual” or “natural person,” Article 2(1)(b)(iii) provides immunity to individual state officials to the extent that they are performing acts in the exercise of sovereign power. This could be both a grant and a restriction of immunity; extending immunity to state actors fulfilling government obligations but restricting the immunity afforded to a state actor to only those acts that properly can be called an exercise of sovereign power. However, despite the many sources of international law stating that torture, extrajudicial killings, and other human rights abuses are not valid state acts, many countries are unwilling to obviate immunity for such acts on the grounds that they are not properly “in the exercise of sovereign power.”

The Convention clarifies the distinction between immunities immunity that attaches to the act and immunities attach to the person in Article 3, which states that “[t]he present Convention is without prejudice to privileges and immunities accorded under international law to heads of State ratione personae.”170 Article 6 treats any proceeding which “in effect seeks to affect the property, rights, interests or activities of” another state as a proceeding against that state.171 Although Foakes and Wilmhurst posit that holding a former state official liable for systematic torture affects the rights, interests, or activities of a state,172 it is clear that Article 6 does not obviate the Article 2 limitation on when individuals are considered states, it merely prevents affecting the legitimate interests of a state through a “back-door” proceeding against an individual.

170 UN Immunity Convention Art. 3(2).
171 UN Immunity Convention Art. 6(2)(b).
172 Foakes & WIlmhurst, at 9, supra n.139.
Much like the UN Convention, the European Convention on Sovereign Immunity\textsuperscript{173} ("ECSI") was motivated in part by the "tendency [in international law] to restrict the cases in which a State may claim immunity before foreign courts."\textsuperscript{174} Although the relaxation referenced was more likely the growing application of the "restrictive theory" of foreign sovereign immunity than the threat of increased human rights litigation against state officials, the resulting framework reflects the fundamental principle in the UN Convention that immunity extends only to acts that are "in the exercise of sovereign authority."\textsuperscript{175}

While the ECSI provides no definition of a "State," Article 27 grants immunity before the courts of another State to Contracting States, withholding immunity from "any legal entity of a Contracting State which is distinct therefrom and is capable of suing or being sued, even if that entity has been entrusted with public functions."\textsuperscript{176} While it is unlikely that the ECSI intended to abolish the common law personal immunity for sitting state officials, that Article 27(2) granted immunity to individuals only so far as they were performing acts in the exercise of sovereign authority indicates that the drafters of the Convention recognized and upheld the fundamental difference between personal and act based immunities and chose to establish immunities only for state acts, not state persons. This reading is supported by Article 32, which states that "[n]othing in the present Convention shall affect privileges and immunities relating to

\begin{itemize}
\item[173] European Convention on State Immunity, CETS No.174 (1972).
\item[174] Id. Preamble.
\item[175] Id. Art. 27.
\item[176] Id.
\end{itemize}
the exercise of the functions on diplomatic missions and consular posts and of persons
connected with them.”

It is revealing that the ECSI explicitly disclaims any intent to restrict the personal
immunity of diplomatic and consular officers. Piecing the structure together, the ECSI
deprecates to intrude on the personal immunities of diplomatic and consular officers, says
nothing about the personal immunities of any other state official, excludes from the
definition of a “State” “any legal entity . . . which is distinct therefrom and capable of
suing or being sued,” and grants immunity only “in respect of acts performed by the
entity in the exercise of sovereign authority.” Were it to be read in a vacuum, the ECSI
grants equal immunity to sitting state officials (other than diplomatic and consular
officials) and former state officials. Both are protected “in respect of acts performed by
the entity in the exercise of sovereign authority” but no more than that. If the ECSI
incorporates the customary international law norms iterated at Nuremberg and in more
recent treaties and declarations like the UN Conventions on torture, hostage-taking, and
extrajudicial killing, acts such as genocide, torture, and human rights abuses properly
would not be considered acts of sovereign authority and the perpetrators thereof would
enjoy no immunity whatsoever. This interpretation would be consistent with those few
US cases limiting what may properly be called an act in the “official capacity” of a
foreign capacity, but is clearly contrary to the decisions of the ICJ and Special Court for
Sierra Leone in the Arrest Warrant case and Charles Taylor. Although Lord Browne-
Wilkinson questioned whether courts should ever consider acts like torture to be part of
the “official capacity” of foreign officials, the Jones opinion made it clear that the UK

177 Id. Art. 32.
believes such an interpretation is contrary to customary international law principles of
foreign immunity in civil cases.

The United States is one of many nations party to the United Nations Convention
Against Torture, which requires signatories to establish jurisdiction over offenses of
torture when the alleged offender is present within that nation’s territory, and the
authorizing statutes of the International Tribunals for Rwanda and the Former
Yugoslavia both proscribe immunity based on the “official position of any accused
person, whether as Head of State or Government or as a responsible Government
official,” language almost identical to a similar clause in the statute authorizing the
creation of the Nuremberg Tribunal.179

The Institut de Droit International, a private organization of renowned
international lawyers, recently passed a resolution supporting this principle and
extending it to deny immunity to any official sued for international crimes in even
domestic courts. Recognizing the obligations on States under conventional and
customary international law “to respect and to ensure the human rights of all persons,”
the IDI resolved that “[n]o immunity from jurisdiction other than personal immunity in
accordance with international law applies with regard to international crimes” in
national courts, whether civil, criminal, or administrative and that “[w]hen the position
or mission of any person enjoying personal immunity has come to an end, such personal
immunity ceases.”180 The Resolution reflects a determination that acts that have been
almost universally condemned and are widely considered to be illegitimate tools of

178 ICTY Statute, supra n.126; ICTR Statute, supra n.127.
179 Nuremberg Statute, supra n. 112.
180 IDI Resolution, supra n.111.
modern states cannot possibly be considered acts within the authority of foreign officials.

Despite these trends and developments, most notable decisions in international and foreign courts have upheld the restrictive principle of sovereign immunity for foreign officials: recognizing an exception to the immunity of a foreign official only for acts undertaken in a commercial or private capacity while upholding immunity for any act in the exercise of sovereign authority, even when such acts constitute international crimes.

**Conclusion**

In *Samantar*, The Supreme Court reaffirmed the role of the State Department, informed by common and customary international law, to make suggestions of immunity for foreign officials sued in US courts. The sources of law that will inform the State Department, however, are many and varied, and while the trend is in favor of granting immunity to foreign officials sued in domestic courts for acts allegedly undertaken in their official capacity, numerous sources indicate a resistance to recognizing any and all acts in pursuance of state goals or policies as done within the legitimate authority of foreign officials.

While cases in the United States and foreign courts have upheld protecting foreign officials by offering act based immunity for all acts conducted “in the exercise of sovereign authority,” the US has increasingly affirmed its support of human rights and international humanitarian norms that have been considered, in other contexts, to supersede or negate sovereign immunity. Numerous national and international bodies
have previously held that international crimes cannot be acts in the exercise of sovereign authority and that officials should be entitled to no immunity for acts which contravene clear international laws against torture, genocide, rape, and human rights abuses. Such acts have been repeatedly condemned as outside the range of legitimate acts in which states may engage. The United States has previously upheld its commitment to the international law norm of foreign official immunity and has been reluctant to risk comity and good well with foreign nations by stretching the bounds of the international custom of foreign immunity; but to paraphrase Lord Browne-Wilkinson in *Pinochet*, “How can an individual enjoy immunity under international law for something which international law itself prohibits and criminalises?”