SAMANTAR v. YOUSUF: DEVELOPMENT IN THE LAWS GOVERNING CIVIL TORTURE CLAIMS IN U.S. COURTS.

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The Supreme Court’s recent opinion in Samantar v. Yousuf1 forecloses one possible avenue by which former foreign-government officials residing in the United States have sought to escape liability for human rights violations. Ruling simply that the Foreign Sovereign Immunities Act of 1976 (“FSIA” or “Act”)2 does not provide immunity to individuals, the decision raises the question of what common law principles will govern the issue in the future. This article reviews the case and the common law doctrines that are likely to figure prominently in future civil suits alleging torture. Ultimately, the Samantar decision read together with existing principles of domestic and international law indicate the beginning contours of a more sophisticated regime of immunity. Under that regime, perpetrators of torture residing in the United States will not be immune from legitimate lawsuits on the basis of their former status as foreign officials where the pursuit of such claims does not interfere with the executive’s pursuit of foreign policy objectives.

Background on the case and the FSIA

The case involves atrocities committed in Somalia during the 1980s and includes allegations of rape and other forms of torture, arbitrary imprisonment and extrajudicial killings. Plaintiffs were Somali members of the Isaaq clan and include two United States citizens and three Somaliland residents.3 They were either the victims of torture or represent the estates of victims of torture and extrajudicial killings.4 Defendant Samantar was an official in the government of Major General Barre, the individual who in 1969 overthrew the Somali democratic government put in place after British and Italian colonial rule.5 Samantar served as Barre’s First Vice President, Minister of Defense, and finally as Prime Minister.6 During Samantar’s government service, the Barre regime used military and security forces to violently suppress opposition movements and ethnic minorities, including the Isaaq clan in the north, who was seen as a threat to the regime.7 When the Barre regime collapsed, Samantar fled the country, settling eventually in Fairfax, Virginia.8

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1 Samantar v. Yousef, slip op. no 08-1555 (June 1, 2010); 560 U.S. ___ (2010).
3 See Samantar v. Yousef, slip op. no 08-1555 at 1-2 (June 1, 2010); 560 U.S. ___ (2010); Samantar v. Yousef, 552 F.3d 371, 373-4 (4th Cir. 2009); Resp. Br., No. 08-1555, January 20, 2009 at 3.
4 Samantar v. Yousef, 552 F.3d 371, 374 (4th Cir. 2009).
6 Samantar v. Yousef, 552 F.3d 371, 374 (4th Cir. 2009).
7 Id. at 373-4.
8 Id.; Samantar v. Yousef, slip op. no 08-1555 at 2 (June 1, 2010); 560 U.S. ___ (2010).
Plaintiffs filed suit in 2004 under the Torture Victim Protection Act (TVPA)\(^9\) and the Alien Tort Statute (ATS).\(^{10}\) They argued 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. They alleged that Samantar knew or should have known of the abuses, and gave his tacit approval for and aided and abetted their commission.\(^{11}\) The district court stayed the proceedings pending a statement of interest from the State Department, but after two years elapsed with no response, it lifted the stay.\(^{12}\) In 2007, the court granted Samantar’s motion to dismiss on the sole ground that the FSIA extends immunity to former government officials and thus shielded Samantar’s acts from civil liability.\(^{13}\) The court of appeals reversed, adopting the minority view that the FSIA does not apply to individuals,\(^{14}\) and the Supreme Court granted \textit{certiorari}.\(^{15}\)

The FSIA, enacted in 1976, codified then-existing practice, developed by the United States Department of State and the courts, of providing “restrictive” immunity to foreign governments sued in United States courts.\(^{16}\) The principle of restrictive immunity had displaced the earlier approach to sovereign immunity whereby the executive branch provided near absolute immunity to foreign states; thus, restrictive immunity (and ultimately the FSIA) limited the availability of sovereign immunity and shifted any discretion for granting such immunity away

\(^9\) The TVPA, Pub. L. No. 102-256, 28 U.S.C. § 1350 note, creates a cause of action for money damages against individuals who “under actual or apparent authority, or color of law, of any foreign nation” commit torture or extrajudicial killings, provided the claimant exhausts “adequate and available remedies in the place in which the conduct giving rise to the claim occurred.”

\(^{10}\) The ATS, 28 U.S.C. § 1350, provides jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” That has been translated as a grant of jurisdiction to hear cases for treaty-based or federal common law causes of action enforcing universally accepted and carefully defined international norms admitting of a judicial remedy. Sosa v. Alvarez-Machain, 542 U.S. 692, 715, 732 (2004). The prohibitions on torture and extrajudicial killing have been considered to rise to the level of universal acceptance and definition sufficient to fall within the ambit of the ATS. \textit{See id.} at 728; Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980).

\(^{11}\) \textit{See} Samantar v. Yousef, slip op. no 08-1555 at 2 (June 1, 2010); 560 U.S. ___ (2010); Samantar v. Yousef, 552 F.3d 371, 374 (4th Cir. 2009).

\(^{12}\) \textit{See} Samantar v. Yousef, slip op. no 08-1555 at 2 (June 1, 2010); 560 U.S. ___ (2010). While an assertion of immunity by the executive branch is still very much a possibility in theory, \textit{see, e.g.} John B. Bellinger III, \textit{Ruling Burdens State Dept., THE NATIONAL LAW JOURNAL,} June 28, 2010, the State Department’s long silence in this case suggests that the dispute will remain within the jurisdiction of the courts to decide. The appropriate balance between the judiciary and the executive on this matter is beyond the scope of this article.

\(^{13}\) \textit{Id.}; \textit{See also} Samantar v. Yousef, 2007 WL 2220579 (E.D.Va. Aug. 01, 2007) (No. 1:04CV1360).

\(^{14}\) Samantar v. Yousef, 552 F.3d 371, 383 (4th Cir. 2009).

\(^{15}\) Samantar v. Yousef, 130 S Ct. 49 (Sept. 30, 2009).

\(^{16}\) \textit{See} House Report No. 94-1487, Report on H.R. 11315, Sept. 9, 1976; \textit{see also} Samantar v. Yousef, slip op. no 08-1555 at 6 (June 1, 2010); 560 U.S. ___ (2010).
from the Executive branch and towards the courts. The FSIA starts from the general rule that foreign governments are immune from suit unless otherwise provided by international agreement. It then carves out a number of exceptions to this general rule, relating to commercial activities, express or implied waiver, expropriation of property in violation of international law, noncommercial torts occurring in the U.S., and disputes over rights in real property and estates located in the United States. These exceptions have been used with some success by human rights litigants. The exception for noncommercial torts occurring in the United States was added as an amendment in 1996, and has raised some hope for a human rights exception to sovereign immunity. However, it has provided only limited means for pursuing remedies for human rights violations, and is intended primarily for victims of terrorism.

The Court’s Decision

The Court held without dissent that the FSIA does not provide immunity to individuals for acts taken in their official capacities as officers of foreign governments. The decision reversed a number of circuit court opinions to the contrary and left some important questions

17 See, e.g., Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983) (“For more than a century and a half, the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country... however, foreign sovereign immunity is a matter of grace and comity on the part of the United states, and not a restriction imposed by the Constitution.”); Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, C.J.); Letter of Acting Legal Adviser Jack B. Tate to the Department of Justice, Maya 19, 1952, 26 Dep’t of State Bull. 984 (1952) (questioning the practice of granting absolute immunity to foreign sovereigns and announcing the adoption of the restrictive theory of sovereign immunity).


19 28 U.S.C. §§ 1605 – 1607. The Supreme Court has held that these exceptions apply to the exclusion of other exceptions that may have existed at common law. See also Argentine Republic v. Amerada Hess Shipping Corp, 488 U.S. 428 (1989) (“We hold that the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country.”).

20 See, e.g., Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992), cert. denied, 507 U.S. 1017 (1993) (reinstating torture claims against Argentina where the plaintiffs presented evidence sufficient to support a finding that Argentina had implicitly waived its sovereign immunity with respect to the plaintiffs’ claims of torture).


22 The main impediment in this regard is the requirement that the tort occur in the United States. 28 U.S.C. § 1605(a)(5). However, the provision has proved useful in providing a remedy to United States citizens injured by a terrorist attack occurring in the United States. In Letelier v Republic of Chile, 488 F.Supp. 665 (D.D.C. 1980), the plaintiff successfully invoked the noncommercial tort exception to overcome the sovereign immunity of Chile in connection with the Chilean secret service’s car bombing, in Washington D.C., of the former Chilean Ambassador and an aide. See also Liu v. Republic of China, 642 F. Supp. 297, 304 (N.D. Cal. 1986) (refusing to dismiss wrongful death suit on FSIA grounds in assassination case).
unanswered concerning the ultimate ability of former government officials to claim immunity from human rights allegations under the common law.

While Samantar has been widely applauded by human rights groups as an important step forward, its result was fairly narrow and driven not by the facts but by the text of the FSIA. The FSIA provides that “a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States” except as provided elsewhere in the Act. The central issue before the Court in Samantar was whether an individual sued for conduct undertaken in his official capacity is immune as a “foreign state” within the meaning of the Act. Resolving a circuit split, the Court held that the meaning of “foreign state” did not encompass “an individual sued for conduct undertaken in his official capacity.” Focusing on the text of the Act, the Court declined to extend the FSIA’s provisions to individuals “without so much as a whisper from Congress on the subject.”

Justice Stevens, writing for the Court, stressed that the ruling was a narrow one, holding only that the FSIA did not govern the defendant’s immunity claims, but expressing no opinion as to whether the defendant had viable claims to immunity based on customary international law or common law principles not codified in the FSIA and not before the Court. Those issues were left to the District Court on remand.

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24 Samantar v. Yousef, slip op. no 08-1555 at 7 (June 1, 2010); 560 U.S. __ (2010).
25 Compare In Re Terrorist Attacks on September 11, 2001, 538 F.3d 71, 80 (2d Cir. 2008) (“We join our sister circuits in holding that an individual official of a foreign state acting in his official capacity is the “agency or instrumentality” of the state, and is thereby protected by the FSIA.”); Keller v. Cent. Bank of Nig., 277 F.3d 811, 815 (6th Cir. 2002); Byrd v. Corporacion Forestal y Industrial de Olancho S.A., 182 F.3d 380, 388 (5th Cir. 1999); Jumquist v. Sheikh Sultan Bin Khalifa Al Nahyan, 115 F.3d 1020, 1027 (D.C.Cir.1997); and Chuidian v. Philippine Nat’l Bank, 912 F.2d 1095, 1101-03 (9th Cir. 1990) (holding that the immunity granted by the FSIA extends to individual governmental officials for acts taken in their official capacity), with Enahoro v. Abubakar, 408 F.3d 877, 882 (7th Cir. 2005), and Yousuf v. Samantar, 552 F.3d 371, 381 (4th Cir. 2009) (holding that it does not).
26 Samantar v. Yousef, slip op. no 08-1555 at 7 (June 1, 2010); 560 U.S. __ (2010).
27 Samantar v. Yousef et al., slip op. no 08-1555 at 13 (June 1, 2010); 560 U.S. __ (2010). The opinion referenced the statute’s legislative history—a choice that caused Justices Scalia, Thomas and Alito to write separately, concurring in the result but objecting to the Court’s use of legislative history as an interpretive tool. A lengthy footnote in the Stevens opinion addresses the use of legislative history, engaging in a dialogue with Scalia’s concurrence and revealing some of the technical differences between the two Justices’ judicial philosophies and adding to a long-standing debate regarding the proper approach to statutory interpretation. Compare Samantar v. Yousef, slip op. no 08-1555 at 10, n. 9, with slip op. no 08-1555 at 1-4 (Scalia, J., concurring).
28 Samantar v. Yousef et al., slip op. no 08-1555 at 20 (June 1, 2010); 560 U.S. __ (2010).
29 Id.
Implications for human rights prosecutions and remaining issues of immunity

The exclusion of individuals from the scope of the FSIA has several important implications for the civil prosecution of torture committed by former officials who seek refuge in the United States. First, in the context of such cases, defendants may no longer raise the shield of FSIA immunity; nor may plaintiffs avail themselves of the exceptions to foreign state immunity codified in the Act. This establishes the common law as the arena for the fight over the availability of immunities for foreign officials—a fight that has been central to many United States lawsuits seeking vindication for the victims of torture committed abroad.

In view of the Samantar decision, the next critical question is one that the district court must grapple with on remand: whether the defendant is entitled to immunity under the common law. The ability of district courts to properly understand and apply the various common law doctrines governing immunity will be central to the ability of the federal court system to achieve the appropriate balance between the rising tide of interest in seeing justice for international human rights violations, and the foreign relations concerns animating traditional doctrines of immunity, including principles of sovereignty, comity, and the ability of the executive to pursue on its own terms the peaceful maintenance of international relations. As discussed below, some of the common law doctrines that guide courts in achieving this balance, and will be litigated in the context of claims of torture and summary execution such as those raised against Samantar, include the act of state doctrine, head of state immunity, and the *jus cogens* status of the prohibition on torture.\(^{30}\)

*Act of State Doctrine*

The act of state doctrine is a principle of comity whereby national courts refrain from passing judgment on the legality of public acts undertaken by a foreign government within its own territory.\(^{31}\) It seems an especially likely argument for Samantar to raise on remand in light of the multiple letters from the current Somali regime to the United States Department of State that support Samantar’s immunity claims and assert that “the actions attributed to Mr. Samantar

\(^{30}\) Certain immunities also apply to specific officers, such as diplomats, individuals on official missions, and other foreign representatives, but those immunities are largely governed by treaties and statutes, and premised on the international consensus that as a general rule, a State’s ability to pursue activities in foreign relations through its officers and agents should not be compromised by allowing suits against those officers to proceed. *See, e.g.*, Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227 (diplomatic immunity); Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77 (consular immunity); NATO Status of Forces Agreement, June 19, 1951, 4 U.S.T. 1792 (immunity for NATO military and civilian personnel).

\(^{31}\) *See* Banco National de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) (“act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.”).
in the lawsuit . . . would have been taken by Mr. Samantar in his official capacity on behalf of Somalia.”

Like sovereign immunity, the act of state doctrine is born of the principle that “[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.” However, it provides a defense on the merits rather than a jurisdictional bar, and as applied it focuses not on the identity of the defendant, but “on the relief sought or the defense interposed.”

The Act of State Doctrine has been applied to resolve human rights claims against individual foreign officials for actions taken in their official capacity. Several United States courts have held that human rights violations were not lawful or authoritative public acts justifying application of the act of state doctrine, particularly in connection with violations of jus cogens norms. A review of relevant cases from the United States, international criminal

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32 Pet. Br., No. 08-1555, Nov. 30, 2009 at 10 (internal quotation marks and ellipses omitted).
35 See In re Estate of Marcos Human Rights Litigation, 25 F.3d 1467, 1472 (9th Cir. 1994) (finding that torture, execution, and disappearance at the hands of the former Philippine President were outside his authority as President, and could not be considered Acts of State; FSIA accordingly did not apply, and plaintiff was not required to demonstrate an exception to immunity); Hilao v. Marcos, 878 F.2d 1438 (9th Cir. 1989) (reversing the dismissal of several human rights suits against President Marcos on act of state grounds); Trajano v. Marcos, 878 F.2d 1439 (9th Cir. 1989); Xuncax v. Gramajo, 886 F. Supp. 162, 175 (D. Mass. 1995) (holding that Gramajo’s alleged commission torture and arbitrary detention exceeded anything that could be considered lawfully within the scope of his official authority, and could not be considered acts of state for purposes of the FSIA or immunity); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1546 (N.D.Cal. 1987) (holding that acts of torture, extrajudicial execution and arbitrary detention by a former member of the junta conducting Argentina’s “dirty war” were not acts of state); Paul v. Avril, 812 F. Supp. 207, 212 (S.D. Fla. 1993). In Republic of Philippines v. Marcos, 806 F.2d 344 (2d Cir. 1986) cert, denied, 481 U.S. 1048, and Republic of the Philippines v. Marcos, 862 F.2d 1355 (9th Cir. 1988), cert. denied, 490 U.S. 1035 (1989), courts continued the trend of declining to apply the act of state doctrine to conduct beyond the scope of proper governmental authority. Although those cases involved claims that Marcos had looted the national treasury, their rejection of a liberal approach to the act of state doctrine, and their reliance upon a distinction between official and private acts, suggests the possibility that the act of state doctrine will not bar recovery for victims of torture. For a discussion of exceptions to immunity developed under international law and under regional human rights systems, see Cynthia R.L. Fairweather, Obstacles to Enforcing International Human Rights Law in Domestic Courts, 4 U.C. DAVIS J. INT’L L. & POL’Y 119 (1998). For discussion of the inapplicability of the act of state doctrine in human rights litigation, see, e.g., Tom Lininger, Overcoming Immunity Defenses to Human Rights Suits in U.S. Courts, 7 HARY. HUM. RTS. J. 177 (1994); Lynn E. Parseghian, Defining the “Public Act” Requirement in the Act of State Doctrine, 58 U. CHI. L. REV. 1151 (1991); Andrew Saindon, Note, The Act of State Doctrine and International Human Rights Cases In United States Courts, 7 MD. J. CONTEMP. L. ISSUES 287 (1995/96).
tribunals and foreign courts reveals an emerging consensus that egregious violations of *jus cogens* norms such as the prohibition on torture cannot be official acts of states that preclude review by the courts.\(^{36}\) Senate documents note that the act of state doctrine “applies only to ‘public’ acts, and no state commits torture as a matter of public policy.”\(^ {37}\) The Senate Judiciary Committee was unmistakable in saying that it “does not intend the ‘act of state’ doctrine to provide a shield from lawsuit.”\(^ {38}\)

And while like sovereign immunity the act of state doctrine is not compelled by the constitution, it does have constitutional underpinnings in the sense that it arises out of the separation of powers, and the recognition that the executive branch is the appropriate arbiter of matters affecting foreign relations.\(^ {39}\) This character provides potential openings for victims to seek redress before the courts, even based on the very cases that traditionally have given act of state doctrine its broad sweep.

For example, the Supreme Court has said that the “continuing vitality” of the act of state doctrine depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs.\(^ {40}\) Importantly, this means that “the greater the degree of codification or consensus concerning a particular area of international law, the more the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.”\(^ {41}\) Accordingly, the strength of the consensus that torture should be prohibited and the pervasiveness of statutes and treaties doing so makes it a proper principle for courts to apply to facts without having to worry about disturbing the national interest or international justice.

This reasoning represents an opportunity for torture victims to argue that, due to the well established nature of the prohibition against torture and its universal recognition by nations, the act of state doctrine should not impede civil claims alleging torture because they do not disturb the executive branch’s prerogative in foreign relations; quite the contrary, civil prosecution of torture is fully consistent with well-established domestic and international policies, statutes and treaties prohibiting torture.

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\(^{39}\) See Banco National de Cuba v. Sabbatino, 376 U.S. 398 (1964) (act of state “arises out of the basic relationships between branches of government in a system of separation of powers”).

\(^{40}\) *Id.*

\(^{41}\) *Id.*
The so-called “Bernstein exception” presents another basis for arguing against the applicability of the act of state doctrine to torture claims. According to this exception, courts should not apply the act of state doctrine where the Executive Branch expressly declines the use of the doctrine to advance American foreign policy interests. Given the United States’ increased attention to the prohibition against torture, soliciting such an expression from the executive branch may present another potential avenue for torture victims to preclude application of the act of state doctrine.

Like foreign sovereign immunity, the act of state doctrine only extends to public acts, and thus allows of a “commercial activity” exception intended to protect the reasonable expectations of trading partners of state and state entities. A second analogous exception exists where a treaty provides a controlling legal standard in the area of international law. This provides another argument in light of the United States’ obligations under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture), and the clear and detailed regime it prescribes for imposing civil and criminal liability for acts of torture.

*Head of state immunity*

Head of state immunity developed under the common law premised on the concept that a state and its ruler are one for purposes of immunity, that all states are equal, and no one state

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42 First National City Bank v. Banco National de Cuba, 406 U.S. 759 (1972) (“where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts.”


44 Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) (“we are nevertheless persuaded . . . that the concept of an act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities.”).


47 The U.K. House of Lords adopted the essence of this exception in the famous Pinochet case, where it concluded that immunities did not apply to claims including torture in light of the U.K.’s obligations under the controlling provisions of the Convention Against Torture. See Regina v. Bartle and the Commissioner of Police for the Metropolis and Other, *Ex Parte Pinochet*, U.K. House of Lords (24 March 1999) (opinion of Saville of Newdigate, L.J.).
may exercise judicial authority over another. A head of state recognized by the United States government is absolutely immune from personal jurisdiction in United States courts unless that immunity has been waived by statute or by the foreign government recognized by the United States. In the context of human rights cases, head of state immunity applies on an almost de-facto basis as a matter of political expediency, since a diplomatic promise not to prosecute is often a key negotiating piece when the head of a dictatorial regime having committed human rights violations is pressured to stand down, or other political pressures make prosecution a political impossibility.

Former, as opposed to sitting, heads of state have generally not been granted immunity from prosecution for violations of domestic and international law. A number of factors contribute to the possibility of redress for torture committed by former heads of state.

First, a current head of state may waive immunity as to former heads of state no longer in power. Second, unlike sitting heads of state, former heads of state do not enjoy immunity for acts taken outside the scope of official duties. For example, in Republic of the Philippines v.

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49 Lafontant v. Aristide, 844 F. Supp. 128 (E.D.N.Y. 1994) (applying immunity to shield Haiti’s head of state from liability for an alleged extrajudicial killing on the basis that the executive branch’s suggestion of immunity was controlling).


52 See, e.g., In re Grand Jury Proceedings, 817 F.2d 1108 (4th Cir. 1987), cert denied, 484 U.S. 890 (1987) (finding the former leader of the Philippines civilly liable for failing to comply with federal grand jury subpoenas where the then-current President of the Philippines waived the privilege); Paul v. Avril, 812 F. Supp. 207 (S.D.Fla. 1993) (the Haitian government then recognized could waive head of state immunity of the former head of military government, and that waiver extended to whatever residual head-of-state immunity defendant possessed).

53 See, e.g., In re Doe v. United States of America, 860 F.2d 40, 45 (2d Cir. 1988) (“there is respectable authority for denying head-of-state immunity to a former head-of-state for private or criminal acts in violation of American law”); Note, Resolving the Confusion over Head of State Immunity: The Defined Rights of Kings, 86 COLUM. L. REV. 169, 195 (1986) (noting that one of the principle reasons for granting immunity to heads of state does not apply to former heads of state: that the “inviolability of the head of state’s person coheres with the basic rules of diplomatic intercourse, which allow government officials to perform their functions unencumbered by the threat or possibility of arrest or detention.”); Restatement (Third) Foreign Relations Law of the United States § 464, RN 14 (a former head of state “would have no
Marcos, the Second Circuit rejected Marcos’ claim of sovereign immunity to claims of systematic torture, disappearances and summary execution, expressing doubt that “the immunity of a foreign state, though it extends to its head of state, . . . goes so far as to render a former head of state immune as regards his private acts.”

Third, tension exists between the traditional immunity doctrines and the United States’ efforts to eradicate torture. Legislative acts intended to incorporate the international prohibition against torture appear later in time than the development of traditional principles of immunity, and thus ostensibly supersede and derogate from traditional immunity principles. While some support exists for the argument that the TVPA was not intended to overcome traditional immunities, it logically must overcome at least some level of official or sovereign immunity. Congress intended the TVPA to “carry out the intent of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment . . . by making sure that torturers and death squads will no longer have a safe haven in the United States.” Since torture is by definition committed under color of law, the TVPA per force may encroach on some amount of official or foreign sovereign immunity, whether under the FSIA or common law.

immunity from [U.S. court’s] jurisdiction to adjudicate” claims arising out of their acts while in office); Regina v. Bartle and the Commissioner of Police for the Metropolis and Other, Ex Parte Pinochet, U.K. House of Lords (24 March 1999) (“my conclusion that Senator Pinochet is not entitled to immunity is based on the view that the commission of acts of torture is not a function of a head of state, and therefore in this case the immunity to which Senator Pinochet is entitled as a former head of state does not arise in relation to, and does not attach to, acts of torture”) (opinion of Hutton, L.J.).

Republic of Philippines v. Marcos, 806 F.2d 344, 360 (2d Cir. 1986). See also United States v. Noriega, 746 F. Supp. 1506, 1519, n. 11 (S.D. Fla. 1990 (observing in dictum that “there is ample doubt whether head of state immunity extends to private or criminal acts in violation of U.S. law”).

The Extraterritorial Torture Statute, criminalizing torture in accordance with United States obligations under the U.N. Convention Against Torture, went into effect on November 20, 1994; the TVPA, providing a civil action for torture, came into effect March 12, 1992. Presumably these efforts would trump any inconsistent common law immunity doctrine pre-dating them. The FSIA was enacted in 1976; while it was amended in 1996 as part of the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996), far from reverting to a more comprehensive immunity regime, the 1996 amendments were intended to allow suits by U.S. nationals for certain international crimes and human rights violations against states designated as “terrorist” by the U.S. Department of State.


Id.

In an analogous argument in the Pinochet case, the U.K. House of Lords has said that “I cannot see how, so far as torture is concerned, this immunity can exist consistently with the terms of [the Convention Against Torture, whereby] each State party has agreed that the other states parties can exercise jurisdiction over alleged official torturers found within their territories.” Regina v. Bartle and the Commissioner of Police for the Metropolis and Other, Ex Parte Pinochet, U.K. House of Lords (24 March 1999) (opinion of Saville of Newdigate, L.J.).
Moreover, there may be significant limitations on the immunity doctrines allowing prosecution of former officials. For example, the Second Circuit denied head of state immunity to Radovan Karadzic, the former president of the Republic of Srpska, in two suits brought under the ATS and the TVPA because the United States did not recognize him as the head of state of a friendly nation.\(^59\) Similarly, while noting that “nothing in the TVPA overrides the doctrines of diplomatic and head-of-state immunity,” Congress has said that “[t]hese doctrines would generally provide a defense to suits against foreign heads of state and other diplomats visiting the United States on official business.”\(^60\) This careful delimitation by Congress, asserting that these immunity doctrines merely apply “generally” and to officials visiting “on official business,” suggests that head of state immunity and diplomatic immunity may not be insurmountable hurdles for torture victims seeking redress in U.S. courts.

\textit{The jus cogens character of the prohibition against torture}

Finally, there is significant support for the theory that defendants charged with violations of an international \textit{jus cogens} norm such as the prohibition against torture may not avail themselves of immunity under the common law. The argument goes that because principles of immunity are themselves creatures of international law, and because \textit{jus cogens} norms supersede other principles of international law, suits charging violations of the prohibition on torture are not subject to dismissal on immunity grounds.\(^61\) The Ninth Circuit has cited this argument with approval, but noted that Supreme Court precedent precluded its adoption with respect to the FSIA, and it was up to Congress to develop the law of immunity in view of the absolute character of norms such as the prohibition on torture.\(^62\) However, where the FSIA is not involved, there is a strong argument that the \textit{jus cogens} status of the prohibition on torture, which has been recognized in the United States,\(^63\) supersedes any claim to immunity that could be asserted under the common law.\(^64\)

\begin{itemize}
\item \(^59\) Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996)
\item \(^60\) \textit{See} House Comm. on the Judiciary, The Torture Victims Protection Act of 1991, H.R. Rep. No. 367, 102nd Cong., 1st Sess., Pt. 1 (1991), 1992 U.S. Code Cong. and Admin. News 84, 88 (“nothing in the TVPA overrides the doctrines of diplomatic and head-of-state immunity . . . . These doctrines would generally provide a defense to suits against foreign heads of state and other diplomats visiting the United States on official business.”). This careful delimitation by Congress, asserting that these immunity doctrines merely apply “generally” and to officials visiting “on official business,” suggests that head of state immunity and diplomatic immunity may not be insurmountable hurdles for torture victims seeking redress in U.S. courts.
\item \(^61\) \textit{See, e.g.,} Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992), cert. denied, 507 U.S. 1017 (1993) (“A state’s violation of the \textit{jus cogens} norm prohibiting official torture therefore would not be entitled to the immunity afforded by international law”)
\item \(^62\) \textit{See id., citing} Amerada Hess, 488 U.S. at 436.
\end{itemize}
Conclusion

While leaving the assessment of any common law immunity claims to the district court, the Samantar opinion did hint at some of the principles that ought to be considered in making the assessment. For instance, it noted, under section 66 of the Restatement (Second) of the Foreign Relations Law of the United States, “the immunity of a foreign state extends to a foreign official or agent with respect to acts performed in his official capacity [only] if the effect of exercising jurisdiction would be to enforce a rule of law against the state.”65 While the Samantar opinion declined to express a view on “whether Restatement § 66 correctly sets out the scope of the common law immunity applicable to current or former foreign officials,”66 other Supreme Court decisions suggest that it does. For example, the Court has held that when determining whether a suit against an individual official is in substance a suit against a state for purposes of applying immunity, the critical question is whether the suit seeks money damages from the individual named defendant or whether it seeks damages or some other relief from a sovereign.67 Immunity attaches by operation of the “effect of the judgment” in “restraining the Government from acting, or compel[ling] it to act.”68 This provides compelling reasoning to


64 For a discussion of how the jus cogens status of the prohibition against torture, as well as a state’s ratification of the U.N. Convention Against Torture, interact with traditional immunity doctrines, see Regina v. Bartle and the Commissioner of Police for the Metropolis and Other, Ex Parte Pinochet, U.K. House of Lords (24 March 1999) (concluding that the former dictator of Argentina had “no immunity from prosecution for the charges of torture and of conspiracy to torture which relate to the period after [the ratification of the Convention against Torture]”)(opinion of Browne-Wilkinson, L.J.).

65 Samantar v. Yousef, slip op. no 08-1555 at 15 (June 1, 2010); 560 U.S. ___ (2010) (majority opinion) (adding emphasis to the quotation of the Restatement § 66).

66 Id. at n. 15.

67 See Larson v. Domestic & Foreign Commerce Corp., 502 U.S. 682, 687-88 (1949) (suits seeking “the payment of damages by the individual defendant” do not trigger sovereign immunity because the money judgment sought “will not require action by the sovereign or disturb the sovereign’s property, while suits seeking injunctive relief are against the state if they would result in “compulsion against the sovereign, although nominally directed against the individual officer.” See also Alden v. Maine, 527 U.S. 706, 757 (1999) (a state officer may be sued in his individual capacity for unconstitutional or wrongful conduct “so long as the relief is sought not from the state treasury but from the officer personally.”).

hold that sovereign immunities should not apply to civil claims seeking money damages against former officials for acts of torture.

The common law hints at several other potential doors in the wall of immunity. The Bernstein exception and the principle that act of state doctrine shouldn’t preclude an action where it requires application of a well-settled law and would not disturb international relations support the argument that act of state doctrine should not apply to torture claims brought against former foreign officials. The fact that the act of state doctrine and traditional immunities lose much of their force in the context of suits against former heads of state and officials supports efforts to end the use of the United States as a refuge for people who were responsible for acts of torture in their former roles as foreign officials. Finally, the *jus cogens* status of the prohibition against torture mandates at least some derogation from the traditional rules of immunity under fundamental principles of customary and treaty-based international law.