

ANNOTATED BRIEF OF PROFESSORS OF PUBLIC
INTERNATIONAL LAW AND COMPARATIVE LAW AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENTS IN *SAMANTAR V. YOUSUF*

by
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This annotated amicus brief from Samantar v. Yousuf presents the argument, which was advanced by amici Professors of Public International Law and Comparative Law, that non-FSIA sources of foreign official immunity do not provide a blanket shield from personal liability for universally recognized international law violations, even if such violations were committed by individuals who held government positions. Because non-FSIA immunities derive from a variety of legal sources, it is not possible to reduce them to a single category. Sources of immunity outside the FSIA include international treaties providing certain immunities for accredited diplomats and consuls. They also include customary international law, which may be incorporated as federal common law, providing limited immunities such as that afforded sitting heads of state.

Additionally, some courts have recognized certain immunities for foreign officials who were not diplomats, consuls, or sitting heads of state, but they have done so inconsistently, usually in the contexts of suits in which the state is either the real party in interest or a necessary party. As amici Professors had counseled, the Supreme Court did not need to

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Editor's note: Much of this Article is composed of quotations of the original *amicus* brief submitted to the Supreme Court of the United States, which are clearly set off from the author's commentary as block quotations. The footnotes within those quotations are reprinted from the original brief and were not added for this Article. However, the numbering and citation format of those footnotes was edited to comply with Lewis & Clark Law Review practices. Note 13 *infra* is the only note from the original brief that contains additional commentary added for this Article, which is indicated by brackets surrounding the addition.

address these authorities in order to find that the FSIA does not apply to cases such as the one against Samantar. The research contained in this brief will remain relevant in determining the scope of common-law immunity on remand in the Samantar case, and in other cases.

I.	INTRODUCTION	610
II.	INTEREST OF THE AMICI CURIAE.....	610
III.	SUMMARY OF ARGUMENT	611
IV.	PRE-FSIA U.S. CASE LAW	612
V.	THE ACT OF STATE DOCTRINE.....	614
VI.	TWENTIETH-CENTURY U.S. DECISIONS.....	616
VII.	CUSTOMARY INTERNATIONAL LAW	619
VIII.	CONCLUSIONS.....	631

I. INTRODUCTION

On June 1, 2010, the Supreme Court handed down its decision in *Samantar v. Yousuf*,¹ a case involving the interpretation of the Foreign Sovereign Immunities Act of 1976 (FSIA).² The Court held unanimously that the FSIA does not govern the immunity of current or former foreign officials from suit in U.S. courts. Instead, such immunity “is properly governed by the common law.”³

Although the *Samantar* decision focused the spotlight on common-law immunity, it refrained from delineating the scope of such immunity.⁴ That is consistent with the position advanced by *amici* Professors of Public International Law and Comparative Law. This symposium contribution places the arguments of *amici* in context, and suggests how these arguments should inform judicial reasoning about the scope of common-law immunity going forward.

II. INTEREST OF THE AMICI CURIAE

Amici intervened in support of Respondents to provide the Court with an analysis of certain legal authorities that Petitioner had misconstrued:

Amici curiae . . . have an interest in the proper understanding of the legal authorities bearing on the potential immunities of former

¹ 130 S. Ct. 2278 (2010).

² Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.).

³ *Samantar*, 130 S. Ct. at 2292. See Chimène I. Keitner, *Officially Immune? A Response to Bradley and Goldsmith*, 36 YALE J. INT’L L. ONLINE 1 (2010), <http://www.yjil.org/docs/pub/o-36-keitner-officially-immune.pdf> (setting forth arguments against applying the FSIA to suits against foreign officials).

⁴ *Samantar*, 130 S. Ct. at 2292–93. See Chimène I. Keitner, *The Common Law of Foreign Official Immunity*, 14 GREEN BAG 2D 61 (2010) (sketching the legal landscape for immunity claims following *Samantar*).

foreign officials who are otherwise subject to the jurisdiction of U.S. courts [footnote omitted]. Petitioner and his *amici* have filed briefs in this case that misconstrue such authorities and rely on them for the overly broad proposition that current and former foreign officials enjoy absolute immunity from suit under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1602–1606, 1608, and as a matter of international law.

This Court should not address non-FSIA sources of immunity in the first instance.⁵ There is no need to address these authorities in order to find, as the Fourth Circuit properly did, that the FSIA does not apply in this case. However, because Petitioner and his *amici* have relied on certain non-FSIA authorities, we respectfully submit this brief in order to provide the Court with what is, in our view, a more accurate and faithful account of their meaning, and to call other, more relevant cases to the Court's attention.

III. SUMMARY OF ARGUMENT

Amici began by emphasizing two main points of disagreement:

Petitioner makes two unsupported assertions. First, Petitioner asserts that “pre-1976 common law immunized a state’s officials for their official acts.” Pet. Br. at 17. He relies heavily on this assertion for his conclusion that the FSIA should be read to include former foreign officials notwithstanding the FSIA’s omission of any reference to individuals in its definition of the term “foreign state.” See 28 U.S.C. § 1603(a). Second, Petitioner claims that “the overwhelming *current* international authority” provides immunity to former foreign officials sued in their personal capacity for acts of torture and extrajudicial killing. *Id.* at 19. The authorities Petitioner cites, and significant authorities that he omits to cite, do not support these assertions.

Refuting these two assertions was important because Samantar argued that the FSIA should be read as codifying a pre-existing law of blanket immunity for foreign officials, and that any other reading would violate a current international law requirement of blanket immunity.⁶ *Amici* countered:

Simply put, non-FSIA sources of foreign official immunity do not provide a blanket shield from personal liability for universally recognized international law violations, even if such violations were

⁵ As Justice Kennedy wrote for himself, the Chief Justice [Rehnquist], and Justice Thomas in *Republic of Austria v. Altmann*, this Court “need not, and ought not, resolve the question [of pre-FSIA immunity] in the first instance. Neither the District Court nor the Court of Appeals has yet addressed it. The issue is complex and would benefit from more specific briefing, arguments, and consideration of the international law sources bearing upon the scope of [non-FSIA] immunity.” 541 U.S. 677, 728 (2004) (Kennedy, J., dissenting). The same is true here.

⁶ See Brief of Petitioner at 31–41, *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010) (No. 08-1555).

committed by individuals who held government positions. Because non-FSIA immunities derive from a variety of legal sources, it is not possible to reduce them to a single category. Sources of immunity outside the FSIA include international treaties providing certain immunities for accredited diplomats and consuls. They also include customary international law, which may be incorporated as federal common law, providing limited immunities such as that afforded sitting heads of state. Additionally, some courts have recognized certain immunities for foreign officials who were not diplomats, consuls, or sitting heads of state, but they have done so inconsistently, usually in the contexts of suits in which the state is either the real party in interest or a necessary party.

Amici went on to emphasize that “[t]he cases on which Petitioner relies do not support the blanket immunity he claims. Instead, they support much narrower, specialized immunities, none of which applies to Petitioner.” That said, they repeated that “this Court need not and should not pronounce on the scope of any immunities that might exist outside the FSIA in the first instance.” The Court agreed, stating that “we need not and do not resolve the dispute among the parties as to the precise scope of an official’s immunity at common law.”⁷

IV. PRE-FSIA U.S. CASE LAW

Samantar argued that the FSIA codified a pre-existing law of blanket immunity for foreign officials,⁸ but pre-1976 cases involving foreign officials were relatively few and far between. These cases did not support blanket immunity. For example, Samantar cited a 1797 Attorney General opinion.⁹ *Amici* indicated that this opinion, and a similar opinion issued three years earlier, did not support a rule of blanket immunity:

Petitioner cites a 1797 opinion by Attorney General Charles Lee indicating that “a person acting under a commission from a foreign sovereign is not amenable for what he does in pursuance of his commission” to any U.S. court. 1 Op. Att’y Gen. 81 (1797), *cited in* Pet. Br. 27. Petitioner fails to mention that Lee specifically affirmed in the same opinion that the controversy between the plaintiffs and the defendant “is entitled to a trial according to law,” and that Lee declined to intervene in the case. 1 Op. Att’y Gen. 81 at *2. Lee’s position appears to have been that the claim of official authority could be a defense on the merits, not an immunity from suit.

Petitioner also fails to mention a 1794 opinion by Attorney General William Bradford, cited in Lee’s opinion, in which the Executive similarly declined to intervene in pending litigation against a former foreign official. In that case, Bradford opined that

⁷ *Samantar*, 130 S. Ct. at 2290.

⁸ *See id.* at 2289.

⁹ *See* Brief of Petitioner, *supra* note 6, at 27 (citing *Actions Against Foreigners*, 1 Op. Att’y Gen. 81 (1797)).

Victor Collot, the late Governor of the French colony of Guadeloupe, should not be obliged to give bail, but that the former Governor would nevertheless have to “defend himself by such means as his counsel shall advise.” 1 Op. Att’y Gen. 45 at *2 (1794). The Supreme Court of Pennsylvania found that the defendant properly could be held to bail, whether or not he would ultimately be found liable. *Waters v. Collot*, 2 U.S. (2 Dall.) 247, 248 (1796).

Amici also highlighted the case of *People v. McLeod*,¹⁰ a nineteenth-century precedent involving criminal and civil charges against an alleged participant in the attack on the steamboat *Caroline*.¹¹

In the important case of *People v. McLeod*, 25 Wend. *483 (N.Y. Sup. Ct. 1841), which Petitioner does not discuss or cite, the highest court of general jurisdiction sitting in New York at that time *rejected* the defendant’s claim to immunity. Alexander McLeod, a British subject and former deputy sheriff of the Niagara District in Upper Canada, faced criminal and civil charges in a New York court for his alleged involvement in the 1837 attack on the steamboat *Caroline*. The British Ambassador to the United States, Henry Fox, claimed that McLeod should be entitled to immunity because the attack “was a public act of persons in her majesty’s service, obeying the order of their superior authorities.” Letter from Mr. Fox to Mr. Forsyth (Dec. 13, 1840).¹² Secretary of State John Forsyth replied that the circumstances would not justify intervention by the U.S. government, even if the government could intervene (which he doubted):

The president is not aware of any principle of international law, or, indeed, of reason or justice, which entitles such offenders to impunity before the legal tribunals, when coming voluntarily within their independent and undoubted jurisdiction, because they acted in obedience to their superior authorities, or because their acts have become the subject of diplomatic discussion between the two governments.

Letter from Mr. Forsyth to Mr. Fox (Dec. 26, 1840).¹³ A unanimous three-judge panel of the New York Supreme Court of Judicature,

¹⁰ 25 Wend. 483 (N.Y. Sup. Ct. 1841).

¹¹ For additional materials related to the *Caroline* incident and the McLeod prosecution, see John E. Noyes, *The Caroline: International Law Limits on Resort to Force*, in *INTERNATIONAL LAW STORIES* 263 (John E. Noyes, Laura A. Dickinson & Mark W. Janis eds., 2007).

¹² All cited correspondence is reprinted in the *McLeod* opinion.

¹³ Secretary of State Daniel Webster, who was appointed when President Martin Van Buren replaced William Henry Harrison, would have given more weight to McLeod’s “superior orders” defense, but he also disclaimed any power to intervene. Letter from Mr. Webster to Mr. Fox (Apr. 24, 1841). [That said, it appears that Webster did all he could to ensure that McLeod was represented by skilled legal counsel, since he was afraid that McLeod’s detention and conviction would further strain relations with the United Kingdom. See Noyes, *supra* note 11, at 279–80. McLeod presented an alibi defense and was ultimately acquitted by the jury. See David

which included future U.S. Supreme Court Justice Samuel Nelson,¹⁴ denied McLeod's claim of immunity.

V. THE ACT OF STATE DOCTRINE

The argument that foreign officials enjoy blanket immunity for their "official acts" rests at least in part on the idea that one sovereign state should not sit in judgment on the acts of another sovereign state.¹⁵ As the Justices recognized, however, this does not mean that officials are automatically entitled to immunity. Consider the following exchange from oral argument between Samantar's counsel Shay Dvoretzky and Justice Ginsburg:

JUSTICE GINSBURG: Well, when you—going back to where you started—you started saying the officer must go together with the state, because in reality it's the same thing; it's a suit against the state.

But this is a case seeking money out of the pocket of Samantar and no money from the treasury of Somalia, so why is the suit against the officer here equivalent to a suit against the state?

MR. DVORETZKY: Because the touchstone of foreign sovereign immunity law, which the FSIA codified, is that one nation's courts cannot sit in judgment of another nation's acts. And the basis for liability that's asserted in this case is Samantar's acts on behalf of the state of Somalia.

The issue is not who pays the judgment; the issue is whose acts are in question. Now, in the domestic context, of course, the distinction between personal liability and liability from the state may matter, but that's only because—

JUSTICE GINSBURG: Well, that sounds like you're—you're talking about an "act of state" doctrine, not that the suit against one is the equivalent of a suit against the other.

MR. DVORETZKY: The "act of state" doctrine is distinct from immunity doctrines, although they have certain shared underpinnings and shared comity considerations. And just as the under—act of state doctrine is concerned with not judging the acts of foreign states, so too is foreign sovereign immunity law. That's the fundamental premise of foreign—of foreign sovereignty immunity law.¹⁶

J. Bederman, *The Cautionary Tale of Alexander McLeod: Superior Orders and the American Writ of Habeas Corpus*, 41 EMORY L.J. 515, 526 (1992).]

¹⁴ See Bederman, *supra* note 13, at 523 (citing 5 CARL B. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD 1836–64, at 186 (1974)).

¹⁵ See *Samantar v. Yousuf*, 130 S. Ct. 2278, 2290 (2010).

¹⁶ Transcript of Oral Argument at 8–9, *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010) (No. 08-1555).

2011] ANNOTATED BRIEF OF PROFESSORS AS *AMICI CURIAE* 615

Amici counseled against conflating the Act of State doctrine with foreign official immunity, which Samantar had also done in his written submissions:

Petitioner cites two additional cases from this period, but these cases both involved the Act of State doctrine, not jurisdictional immunity. Pet. Br. 32 n.3, citing *Underhill v. Hernandez*, 168 U.S. 250 (1897) (upholding a directed verdict for defendant who allegedly requisitioned plaintiff's water works during a military occupation, after the case was tried on the merits); *Hatch v. Baez*, 14 N.Y. Sup. Ct. 596, 600 (N.Y. Sup. Ct. 1876) (holding that acts of a "foreign and friendly" government taken within its own territory should not be subject to adjudication in U.S. courts). Petitioner cannot bootstrap cases on the prudential Act of State doctrine, which is a defense on the merits, to support his blanket claim to immunity from jurisdiction.¹⁷

In concrete terms, the distinction between official immunity and the Act of State doctrine means that an individual defendant cannot simply assert in response to a particular claim: "I was acting on behalf of a foreign state, therefore I am automatically immune from the jurisdiction of any U.S. court." The absence of automatic immunity is also clear from the United States' brief in *Samantar v. Yousuf*, in which the United States declined to support a rule of blanket immunity under the FSIA and instead opined that, in determining whether or not to suggest immunity for Samantar,

the Executive [or, presumably, courts] reasonably could find it appropriate to take into account petitioner's residence in the United States rather than Somalia, the nature of the acts alleged,

¹⁷ This Court has emphasized that the prudential Act of State doctrine is separate and distinct from the jurisdictional doctrine of sovereign immunity. See, e.g., *Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004) (stating that "[u]nlike a claim of sovereign immunity, which merely raises a jurisdictional defense, the act of state doctrine provides foreign states with a substantive defense on the merits."); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 438 (1964) (distinguishing between act of state doctrine and foreign sovereign immunity). Cases applying the Act of State doctrine have established that universally condemned human rights violations are not "acts of state." See, e.g., *Ochoa Lizarbe v. Rivera Rondon*, 642 F. Supp. 2d 473, 488 (D. Md. 2009) (finding that alleged acts of torture, extrajudicial killing, and crimes against humanity by a former Lieutenant in the Peruvian army "are not deemed official acts for the purposes of the acts of state doctrine"); *Trajano v. Marcos*, 978 F.2d 493, 498 n.10 (9th Cir. 1992) (restating earlier holding that claims of torture and summary execution against President Ferdinand Marcos are not "nonjusticiable 'acts of state'"); *Jimenez v. Aristeguieta*, 311 F.2d 547, 557-58 (5th Cir. 1962) (rejecting Act of State defense to extradition of former President of Venezuela for offense of "embezzlement or criminal malversation by public officers"); S. REP. NO. 102-249, at 8 (1991) (indicating that the Act of State doctrine "cannot shield former officials from liability" under the TVPA); cf. *Liu v. Republic of China*, 892 F.2d 1419, 1432-33 (9th Cir. 1989) (denying application of Act of State doctrine because the foreign state was not acting in the public interest, there was a large degree of international consensus prohibiting the activity, and the act occurred in the United States).

respondents' invocation of the statutory right of action in the TVPA [Torture Victim Protection Act] against torture and extrajudicial killing, and the lack of any recognized government of Somalia that could opine on whether petitioner's alleged actions were taken in an official capacity or that could decide whether to waive any immunity that petitioner otherwise might enjoy.¹⁸

The executive branch's insistence on a multi-factor approach, which is not yet comprehensively codified in any statute, was more consistent with past U.S. practice than Samantar's argument for blanket immunity.

VI. TWENTIETH-CENTURY U.S. DECISIONS

Samantar repeated the claim to blanket immunity in his reply brief, stating that "the common law of foreign sovereign immunity . . . draws no distinction between suits seeking a judgment against the state and those seeking money from the official, but immunizes *all* official acts on the state's behalf."¹⁹ To the contrary, *amici* presented the following analysis of prior cases, which could not fairly be read to support Samantar's sweeping characterization:

The more recent cases Petitioner cites do not support his sweeping claim that U.S. courts "routinely held that officials acting in their official capacities were entitled to immunity derived from that of the state itself" before 1976. Pet. Br. 27. To the contrary, courts did not uniformly find immunity, and no court found immunity in circumstances resembling those at issue here.

The pre-FSIA, twentieth-century cases Petitioner cites involved the specialized context of suits in property and contract. *See, e.g., Oetjen v. Central Leather Company*, 246 U.S. 297 (1918) (affirming the dismissal of two suits in replevin involving the title to hides confiscated and sold by Mexican revolutionary forces in the occupied city of Torreon). Although the "restrictive" theory of sovereign immunity emerged during this period to justify subjecting foreign states themselves to U.S. jurisdiction for their commercial activities, individual officials were sometimes—but not always—afforded immunity in connection with these commercial activities.

Federal and state courts granted immunity to individual government officials in three cases from the 1970s involving commercial transactions. *See Greenspan v. Crosbie*, 1976 U.S. Dist. LEXIS 12155, Fed. Sec. L. Rep. (CCH) P95, 780 (S.D.N.Y. Nov. 23, 1976), reported in 1977 Dig. U.S. Prac. Int'l L. 1017, 1076 (No. 62) (indicating that the State Department issued a Suggestion of Immunity for the three individual defendants, who included the current Premier of Newfoundland, for alleged violations of § 10b of

¹⁸ Brief for the United States as Amicus Curiae Supporting Affirmance at 7, *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010) (No. 08-1555).

¹⁹ Reply Brief of Petitioner at 15, *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010) (No. 08-1555).

2011] ANNOTATED BRIEF OF PROFESSORS AS *AMICI CURIAE* 617

the Securities Exchange Act of 1934); *Heaney v. Government of Spain*, 445 F.2d 501, 503–04 (2d Cir. 1971) (determining, in an action against the Government of Spain and its current Consul General for the alleged non-payment of fees due under a contract, that the contract was not enforceable by a U.S. court because it concerned diplomatic activity); *Oliner v. Can. Pac. Ry. Co.*, 311 N.Y.S.2d 429, 434 (N.Y. App. Div. 1970) (finding that the current Custodian of the Department of the Secretary of State of Canada could not be brought within the court’s jurisdiction in a suit involving the ownership of shares of capital stock issued by a Canadian corporation). It is in this specialized context that a Texas court had previously found that a claim for breach of contract against an individual official was really a suit against the foreign government itself. See *Bradford v. Dir. Gen. of R.R.s of Mex.*, 278 S.W. 251 (Tex. Civ. App. 1925) (finding that a suit for breach of contract to paint railroad bridges against a current “agent of the Mexican government in the management of its railroad” was really a suit against the Mexican government). *Bradford* illustrates circumstances in which “the effect of exercising jurisdiction [over the individual defendant] would be to enforce a rule of law against the state.” Restatement (Second) of the Foreign Relations Law of the United States, § 66(f) (1965).

Importantly, not all courts during this period found immunity for individual officials, even when the claims in suit involved actions taken by those individuals in their capacities as agents of a foreign state. See *Pilger v. United States Steel Corp. and Public Trustee*, 98 N.J. Eq. 665 (N.J. Ct. App. 1925) (determining that a German citizen could sue a British public trustee for allegedly unlawfully seizing stock certificates belonging to the plaintiff from a London bank); *Lyders v. Lund*, 32 F.2d 308, 309 (N.D. Cal. 1929) (where plaintiff sought an accounting by the consul of Denmark, a decree for the balance due, and the sale of assets to satisfy plaintiff’s claim, observing that the acts of foreign officials should be treated as acts of the foreign state if “the foreign state will have to respond directly or indirectly in the event of a judgment,” and declining to find immunity in the instant case); Sovereign Immunity Decisions of the Department of State from May 1952 to January 1977 (M. Sandler, D. Vagts, & B. Ristau, eds.), in 1977 Dig. U.S. Prac. Int’l L. 1017, 1062–63 (No. 62) (reporting that, in *Cole v. Heitman* (S.D.N.Y. 1968), the State Department declined to suggest immunity for the British West Indies Central Labor Organization or its liaison officer, despite the Jamaican ambassador’s representation that the organization was “an official agency and arm of the Government acting without profit to itself in the conduct of public acts”). Petitioner fails to cite either *Pilger* or *Lyders*, and he fails to mention that *Cole* denied immunity for alleged civil rights violations including false arrest and imprisonment, which the State Department deemed “private” activities in the circumstances under the 1952 Tate Letter standard. 1977 Dig. U.S. Prac. Int’l L. 1017 at 1063.

In sum, pre-FSIA cases do not support Petitioner's sweeping claim to blanket immunity for foreign officials. The cases did not uniformly find immunity, and no case found immunity from jurisdiction in circumstances remotely resembling those at issue here.

At oral argument, the Justices grappled with the question of what limiting principle would prevent a plaintiff from simply naming a state official as the defendant in order to circumvent the immunity of the state, if the state and its officials were separable. Their questions focused largely on the nature of the relief requested.

JUSTICE BREYER: Why can't you say that if . . . the relief would affect the foreign state, you are suing the foreign state?

But where [the individual defendant] was a member of the foreign state, and you want money from him, even though what he did in the past was an act of a foreign state, this lawsuit is not affecting him in his capacity—is not affecting the foreign state. Indeed, there isn't even one. So in the first set, he falls in the FSIA. In the second set, he doesn't. And you happen to have the second set, and, therefore, he may still be immune for what he did in the past, but that would be a different docket.

MR. DVORETZKY: All right.

JUSTICE BREYER: That—that's where this is all leading me.

MR. DVORETZKY: Because the Restatement—what the Restatement, which summarized the common laws as of the time of the FSIA's enactment, says that an official is immune for his acts on behalf of a state if exercising jurisdiction would enforce a rule of law against the foreign state. You enforce a rule of law against a foreign state just as much by threatening to bankrupt an official as soon as he leaves office—

JUSTICE GINSBURG: How does this case—

MR. DVORETZKY:—as you do by issuing—

JUSTICE GINSBURG: How does this very case establish a rule of law for the foreign state? The Act is aimed at torturers. The remedy comes out of the private pocket. How does this establish—if the thing plays out and the plaintiffs prevail, there will a remedy against an individual actor; there will be no relief awarded against any government. How would it set a rule for the foreign government?

MR. DVORETZKY: Because enforcing a judgment against a foreign official, threatening to bankrupt the person as soon as he or she leaves office, has just as much effect on the state itself as—as enforcing a judgment directly against the state.²⁰

Ultimately, the Court decided that the threat of bankrupting officials was insufficient to bring individual officials within the text of the FSIA. The Court was careful not to decide at this juncture whether § 66(f) of the

²⁰ Transcript of Oral Argument, *supra* note 16, at 61–63.

Restatement (Second) of Foreign Relations Law, which Mr. Dvoretzky referenced in his response to Justice Breyer, accurately reflects the scope of common law immunity.²¹ It did, however, note that a suit against an individual official might have to be dismissed if the state is a necessary party under Federal Rule of Civil Procedure 19 and that state is immune under the FSIA.²² It also noted that, in some cases where an individual official is the named defendant, the state might actually be the real party in interest,²³ thereby entitling the individual to assert common-law immunity (or, alternatively, to request dismissal for failure to name the real party in interest). These two scenarios are consistent with the account that *amici* provided of pre-FSIA case law in the United States and elsewhere, in which courts found that individuals were immune when “the state is either the real party in interest or a necessary party.”

VII. CUSTOMARY INTERNATIONAL LAW

Even though the claims against Samantar were based on his alleged violations of international law, Samantar relied on international law to argue that he was entitled to immunity.²⁴ Justice Kennedy summarized this argument as follows:

JUSTICE KENNEDY: Well, and then I—I had thought—again, correct me if I am wrong—that, ultimately, in this case, whether or not within the issues here present—ultimately, you have two arguments. One is that it’s just implicit, inherent, necessary for the Foreign Sovereign Immunities Act that agents be covered; otherwise it won’t work.

The other—I take it you have a backup position that even if that’s wrong, that under generally accepted principles of international law, that agents still have immunity.²⁵

Counsel for Samantar responded: “Our position is that the FSIA incorporates the common law and that Mr. Samantar is entitled to immunity under the statute. If you disagree with us on that, we would certainly wish to assert common law defenses on remand, but we believe that the statute resolves the question.”²⁶ In this exchange, and in the *Samantar* opinion itself, the relationship between customary international law and the common law remains unclear. The Court rejected Samantar’s argument that international law compels an expansive reading of the FSIA to encompass foreign officials.²⁷ The Court further

²¹ *Samantar*, 130 S. Ct. at 2290 n.15.

²² *Id.* at 2292 (citing *Republic of Philippines v. Pimentel*, 128 S. Ct. 2180 (2008)).
See also FED. R. CIV. P. 19.

²³ *Samantar*, 130 S. Ct. at 2292 (citing *Kentucky v. Graham*, 473 U.S. 159 (1985)).

²⁴ Brief of Petitioner, *supra* note 6, at 31–41.

²⁵ Transcript of Oral Argument, *supra* note 16, at 25.

²⁶ *Id.* at 26.

²⁷ *Samantar*, 130 S. Ct. at 2289–90, 2290 n.14.

indicated that “[b]ecause we are not deciding that the FSIA bars petitioner’s immunity but rather that the Act does not address the question, we need not determine whether declining to afford immunity to petitioner would be consistent with international law.”²⁸ With respect to the current state of customary international law, *amici* argued as follows:

Petitioner’s claim that “the overwhelming *current* international authority,” Pet. Br. 19, provides immunity to former foreign officials sued in their personal capacity for acts of torture and extrajudicial killing is simply incorrect.²⁹ Petitioner cites a Reporter’s Note to § 464 of the Restatement (Third) of Foreign Relations Law of the United States (1987), which states that “[o]rdinarily” the acts of foreign officials “are not within the jurisdiction to prescribe of other states.” Pet. Br. 38. He relies on this for the proposition that former foreign officials should therefore be immune from suit. *Id.* But jurisdiction to prescribe (as opposed to jurisdiction to adjudicate) is not at issue here. The very comment Petitioner cites indicates, in a sentence he does not quote: “However, a former head of state appears to have no immunity from jurisdiction to adjudicate.” Rest. (3d) of For. Rel. § 464 n.14. Petitioner’s other foreign and international law citations are similarly misguided.

Under international law, the immunities of foreign officials are governed by a combination of treaties and customary international law principles, not all of which have been codified in domestic statutes. Some officials, notably current diplomats, sitting heads of state, and a narrow class of current high-level officials such as incumbent foreign ministers, may benefit from status-based immunity (immunity *ratione personae*). Some others, whether currently in office or not, may invoke certain forms of conduct-based immunity (immunity *ratione materiae*). Although some foreign courts have recognized certain immunities for foreign officials who were not diplomats, consuls, or sitting heads of state, they have

²⁸ *Id.* at 2290 n.14.

²⁹ Petitioner also conspicuously ignores the well established *lack* of immunity from criminal proceedings for former foreign officials under international law, which even his *amici* acknowledge. See *Amicus Curiae* Brief of the American Jewish Congress in Support of Petitioner at 5, 7–8, 43, *Samantar*, 130 S. Ct. 2278 (No. 08-1555) (emphasizing that there is no immunity from prosecution “in any court of a state empowered to exercise universal criminal jurisdiction”); Brief of *Amici Curiae* Former Attorneys General of the United States in Support of Petitioner at 17, *Samantar*, 130 S. Ct. 2278 (No. 08-1555) (assuming incorrectly that a lack of immunity from criminal prosecution can coexist with blanket immunity from civil suit under the FSIA or as a matter of international law); cf. Brief for *Amicus Curiae* the Anti-Defamation League, Supporting Neither Side at 6, *Samantar*, 130 S. Ct. 2278 (No. 08-1555) (“When individuals acting under color of law perpetrate such atrocities, they can and should be held criminally responsible regardless of rank or title.”). See also *infra* note 36 (indicating that there is no legal basis for drawing a sharp distinction for immunity purposes between civil proceedings for torture and criminal proceedings for the same conduct).

done so inconsistently, usually in the contexts of suits in which the state is either the real party in interest or a necessary party.

Because these cases have been relatively few and far between, it is difficult to draw meaningful generalizations from them Moreover, none of the specialized immunities found by these few cases would shield Petitioner from suit.

A. Former Officials Cannot Claim Status-Based Immunity

The two recognized forms of status-based immunity are diplomatic immunity and head of state immunity. Former officials cannot claim status-based immunity under international law.

Diplomatic immunity is solely intended to enable diplomats to perform their missions free from interference by the receiving state. Today, diplomatic immunity is governed primarily by the Vienna Convention on Diplomatic Relations. Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 96 (entered into force with respect to the United States on December 13, 1972); *see also* Diplomatic Relations Act of 1978, 22 U.S.C. §§ 254a-254e.³⁰ Under the Vienna Convention, foreign diplomatic agents accredited by a receiving state enjoy status-based immunity from criminal and most civil proceedings during their appointment, *see* Art. 31(1), although such immunity may be waived by the sending state. *See* Art. 32.

The State Department has the exclusive authority to accredit diplomats. The State Department may also suggest status-based immunity from service of process for members of special diplomatic missions. *See, e.g.*, Suggestion of Immunity and Statement of Interest of the United States, *Li Weixun v. Bo Xilai*, Civ. No. 04-0649 (D.D.C. July 24, 2006) at *11 n.9 (suggesting immunity from service of process for invitee of the Executive branch but emphasizing that “[s]pecial mission immunity would not . . . encompass all foreign official travel”).³¹

The International Court of Justice has recognized the status-based immunity of an *incumbent* foreign minister under the principle that sitting heads of state are entitled to immunity from the legal process of foreign courts. *See* Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v.*

³⁰ In the United States, status-based diplomatic immunity also extends to certain accredited members of U.N. Missions, who may be treated as diplomats. *See* Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, U.S.-U.N., § 15, June 26, 1947, 61 Stat. 3416.

³¹ In contrast to accredited diplomats, consular officials do not enjoy status-based immunity, and are instead protected by conduct-based immunity under the Vienna Convention on Consular Relations, for acts performed in the exercise of their consular functions. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77. By the express terms of the applicable treaties, former diplomats and consuls continue to enjoy limited conduct-based immunity after they leave office for acts specifically performed in the exercise of their diplomatic or consular functions. Vienna Convention on Diplomatic Relations art. 39(2), Apr. 18, 1961, 23 U.S.T. 3227; Vienna Convention on Consular Relations, *supra*, art. 53(4).

Belgium), Judgment, I.C.J. Reports 2002, at 3 (Feb. 14, 2002). U.S. courts have also recognized the status-based immunity of sitting heads of state. *See, e.g., Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004) (rejecting application of FSIA to President of China but finding him immune from service of process as sitting head of state); *Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994) (finding elected President of Haiti immune from suit as sitting head of state, even in exile).

By definition, status-based immunities only apply during a diplomat's or head of state's tenure in office. *See* Arrest Warrant Case at 25–26 (emphasizing that absolute immunity ends once a foreign minister leaves office); *see also* Notice of Changed Circumstances Submitted by the United States of America, *Mumtaz v. Ershad*, No. 74258/89 (N.Y. Sup. Ct. March 1991) (withdrawing previous suggestion of immunity in light of defendant's resignation as President of Bangladesh). Because former foreign officials such as Petitioner are private individuals who no longer represent their respective governments, they cannot claim status-based immunity from the jurisdiction of U.S. courts.

B. The Handful Of Foreign Cases That Have Found Immunity For Individual Officials All Involved Specialized Circumstances, And Do Not Support Blanket Immunity

The foreign and international cases cited by Petitioner do not in any way support his assertion that “[n]ow, as in 1976, courts around the world recognize that officials are entitled to sovereign immunity in civil suits challenging their official-capacity acts.” Pet. Br. 36. It is true that several foreign courts have declined to find individual officials personally liable for engaging in certain transactions purely on behalf of a foreign state. However, all of the cases that Petitioner cites can be distinguished from the claims at issue here. Contrary to Petitioner's assertion, Pet. Br. 36, no “reciprocity” concerns require inventing a category of immunity that has not been recognized consistently by courts in other countries.³²

³² Citations by one of Petitioner's *amici* to cases involving the immunity of states themselves are not germane to the analysis here, because such immunity is clearly governed in the United States by the FSIA. *See* Bouzari v. Islamic Republic of Iran (2004), 220 O.A.C. 1, para. 48, 50–51 (Can. Ont. C.A.) (in a case brought directly against the state of Iran, finding that Iran was entitled to immunity under the Canadian SIA, because torture is not a commercial act); *Kalogeropoulou v. Greece & Germany*, App. 59021/00, 129 I.L.R. 537, 545–47 (Eur. Ct. H.R. 2002) (admissibility) (finding that Greece had not violated the applicants' right of access to court by allowing Germany to invoke state immunity as a defense to civil enforcement proceedings in Greece); *Al-Adsani v. Government of Kuwait*, 107 I.L.R. 536, 540 (Ct. App. 1996) (Eng.) (finding no exception under the U.K. SIA for damages claim for alleged acts of torture brought directly against the Government of Kuwait); *Saudi Arabia v. Nelson*, 507 U.S. 349, 362 (1993) (in the context of a claim brought directly against the state of Saudi Arabia, stating that “[e]xercise of the powers of police and penal officers is not the sort of action by which private parties can engage *in commerce*” under the FSIA) (emphasis added). Moreover, some foreign courts have denied immunity for states *and* for individual co-defendants. *See, e.g.,* *Ferrini v. Federal*

i. Courts Have Not Found Immunity Where Only The Assets Of The Individual Are At Issue, Although Some Courts Have Found Immunity Where A Judgment Would Involve The Assets Of The Foreign State

Petitioner cites several cases involving the assets of foreign states. Pet. Br. 28–29, 32. However, the assets of a foreign state are not at issue here. Of utmost relevance here, where only the assets of the individual but not the state are at issue, foreign courts have not granted immunity. See *Saorstat and Continental Steamship Co. v. Rafael de las Morenas*, [1945] I.R. 291, reprinted in 12 I.L.R. 97, 98 (S.C.) (Ir.) (finding that a colonel in the Spanish army who had contracted to carry horses from Dublin to Lisbon for use by the Spanish army was not entitled to immunity because “[h]e is sued in his personal capacity and the judgment which has been, or any judgment which may hereafter be, obtained against him will bind merely the appellant personally, and any such judgment cannot be enforced against any property save that of the appellant”).³³

On the other hand, when a suit nominally brought against an individual official would in fact involve adjudicating ownership of a foreign state’s assets or granting a damages remedy directly against

Republic of Germany, 128 I.L.R. 659, 674 (Ct. Cass. 2004) (It.) [notation regarding availability of English translation omitted] (ordering Germany to pay damages to an Italian abducted by the German army in 1944 and deported to Germany to work as a forced laborer); *Al-Adsani v. Government of Kuwait*, 100 I.L.R. 465, 466–67 (Ct. App. 1994) (Eng.) (referencing but not reviewing the High Court’s conclusion that the three *individual* defendants were *not* immune from service of process outside the jurisdiction).

³³ According to the Irish Supreme Court in *Saorstat*, the possibility that the Spanish Government might indemnify the colonel, whether voluntarily or compulsorily, did not turn the suit into one against the Government. *Saorstat & Cont’l S.S. Co. v. Rafael de las Morenas*, [1945] I.R. 291 (Sup. Ct. 1944) (Ir.), reprinted in 12 Ann. Dig. 97, 99. Justice O’Byrne wrote for the court, “Where the Sovereign is not named as a party and where there is no claim against him for damages or otherwise, and where no relief is sought against his person or his property, [the Sovereign cannot] be said to be impleaded either directly or indirectly.” *Id.* at 101. One foreign intermediate appellate court has taken a broader view of the role of potential indemnification in a case involving a prosecutor’s decision to file criminal charges. See *Jaffe v. Miller* (1993), 64 O.A.C. 20, para. 31–34 (Can. Ont. C.A.) (finding that the defendants, who included the Attorney General of Florida, were “functionaries” acting “within the scope of [their] duties and in furtherance of a public act” when they filed criminal charges that led to the plaintiff’s conviction in Florida, and that these defendants could claim immunity because “[i]n the event that the plaintiff recovered judgment, the foreign state would have to respond to it by indemnifying [them]”). The *Jaffe* court emphasized that its ruling was limited to the facts of the cases before it, noting that both the person sued and the function performed must be considered, and that “[i]t will be a matter of fact for the court to decide in each case whether any given person performing a particular function is a functionary of the foreign state” for immunity purposes. *Id.* at para. 33. There is certainly no broad consensus or settled law in favor of immunity that would warrant judicially imputing immunity into the FSIA’s text, the terms of which provide no framework for individual immunity analysis or resolution of the role of indemnification.

the treasury of a foreign state, some courts have found immunity. For example, in *Duke of Brunswick v. King of Hanover*, (1848) 9 E.R. 993 (H.L.) (U.K.), which provides the foundation for much of the subsequent jurisprudence, the House of Lords refused to inquire into the legality of the appointment of a guardian for the management of the Duke of Brunswick's property, under the laws of Brunswick and Hanover. Lord Lyndhurst, who agreed with the court's disposition, affirmed that "[other] circumstances may exist in which a foreign Sovereign may be sued in this country for acts done abroad." *Id.* at 1001. Other cases, relying on a similar principle, all involved claims for which the foreign state was a necessary party or otherwise the real party in interest. See *Grunfeld v. United States*, (1968) 3 N.S.W.R. 36 (Austl.) (finding the Commanding Officer of the U.S. Rest and Recuperation Office in Sydney immune from claims arising from the termination of a contract to obtain civilian clothing for hire on behalf of the office); *Rahimtoola v. Nizam of Hyderabad*, [1958] A.C. 379 (H.L.) (U.K.) (finding a suit that named the former High Commissioner of Pakistan as a defendant barred by sovereign immunity because it involved determining Pakistan's entitlement to funds held in a London bank account); *Johnson v. Turner*, G.R. No. L-6118 (S.C. Apr. 26, 1954) (Phil.) (finding U.S. officers immune from suit by a U.S. citizen for the dollar value of military payment certificates (scrip money) because the claim and judgment would be "a charge against and a financial liability to the U.S. Government"); *Syquia v. Almeda Lopez*, G.R. No. L-1648, 84 Phil. Rep. 312 (S.C. Aug. 17, 1949) (finding that the United States was the real party in interest in a claim for back rents owed by the U.S. military for the lease of civilian apartment buildings in which U.S. army officers were billeted and quartered); *Compania Naviera Vascongada v. Steamship Cristina*, [1938] A.C. 485 (H.L. 1938) (U.K.) (specifying, in a judgment by Lord Atkin, that courts will not seek "specific property or damages" from a foreign sovereign, and will not "seize or detain property which is his, or of which he is in possession or control"); *Twycross v. Dreyfus*, (1877) 5 Ch.D. 605 (Ct. App.) (U.K.) (finding lack of jurisdiction over plaintiffs' claim to the proceeds of the sale of guano owned by the Republic of Peru because the Republic was a necessary party as the owner of the guano).

Because Respondents are not attempting to recover damages from Somalia or to adjudicate the title to Somali assets, but instead sue Petitioner in his "personal capacity," *Saorstat*, 12 I.L.R. at 98, the rationale of these foreign cases does not support immunity for him.

ii. One Court Found Immunity For A Current Official From An Injunction Involving A Document Request, But This Does Not Support Blanket Immunity For A Former Official For Torture And Extrajudicial Killing

Petitioner relies on the *Church of Scientology Case*, reprinted in 65 I.L.R. 193 (BGH 1978) (F.R.G.), for the proposition that suing individual officials automatically undermines the sovereignty of the state. Pet. Br. 37. This single case cannot support such a sweeping

claim. In *Church of Scientology*, the plaintiff sought an injunction against the *current* head of New Scotland Yard to prevent him from complying with a document request from Germany to the United Kingdom under their 1961 Agreement on Mutual Assistance in Criminal Matters. Because the United Kingdom had a treaty obligation to comply with Germany's request, the German Supreme Court reasoned that the U.K. official's act of complying with the request "can *only* be attributed to the British State and not to him or any other official acting on behalf of the State, because the State is always to be considered the actor when one of its functionaries performs acts which are *incumbent* on it." *Id.* at 195 (emphasis added). This reasoning relates to the state's "sovereign activity" of complying with international law—not (as in Petitioner's case) violating it. It would turn *Church of Scientology* on its head to find that its holding as to compliance with international law obligations is relevant to a claim arising out of the breach of the international prohibitions against torture and extrajudicial killing.³⁴

iii. Several Additional Cases Found Immunity For Current Officials In Specialized Circumstances That Do Not Apply To Petitioner

A few foreign courts have found immunity for *current* officials in a handful of *sui generis* contexts, including the application of specialized domestic immunity statutes. These cases do not support Petitioner's assertion that *international law* requires granting blanket immunity to *former* officials.

One case found immunity for a current official because he was not even in office at the time the alleged acts occurred. In these circumstances, there was no basis for finding the official personally liable and no basis for bringing a suit against him in his personal capacity. *See Propend Finance Pty. Ltd. v. Sing*, reprinted in 111 I.L.R. 611, 662 (U.K. Ct. App 1997) (finding no basis for suing the

³⁴ Analogously, an international tribunal found that a current individual official was immune from service of a subpoena because *only* the state, not the individual, would be subject to sanction for non-compliance. *See* Prosecutor v. Blaskic, Case No. IT-95-14, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ¶ 38 (Int'l Crim. Trib. for the Former Yugoslavia [ICTY] Oct. 29, 1997), <http://www.icty.org/x/cases/blaskic/acdec/en/71029JT3.html> (finding that the ICTY does not have the legal authority to seek documents under ICTY Statute Article 29(2) by issuing subpoenas to current government officials in their official capacity, because the ICTY is not empowered to impose sanctions on states in the event of non-compliance). The decision in *Blaskic* does not affect the scope of conduct-based immunity for former officials from the jurisdiction of national courts, because it only deals with acts that "are not attributable to [the official] personally" and that can *only* be enforced against the state itself, such as the act of complying with a request to produce official documents. *Id.* at ¶ 38. As the ICTY emphasized in *Blaskic*, "those responsible for [war crimes, crimes against humanity, or genocide] cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity," just as spies "although acting as State organs, may be held personally accountable for their wrongdoing." *Id.* at ¶ 41.

current Commissioner of the Australian Federal Police Force for an improper fax sent by an Australian diplomat, where the Commissioner in office at the time the fax was sent had died by the time of the suit). Going beyond these unique circumstances, the U.K. Court of Appeal opined that “[t]he protection afforded by the [U.K. State Immunity] Act of 1978 to States would be undermined if employees, officers (or as one authority puts it, ‘functionaries’) could be sued as individuals for matters of State conduct in respect of which the State they were serving had immunity.” *Id.* at 669. This statement might be true on the limited facts of *Propend Finance* and as a matter of U.K. law, but not in this case. First, the “matter of state conduct” at issue in *Propend* was the ministerial act of faxing criminal evidence to an investigating authority, not torture and extrajudicial killing under color of foreign law. Second, as indicated below, the U.K. State Immunity Act contemplates immunity for individual officials, whereas the FSIA does not.

Another case found immunity under a specialized statute for the current Secretary of the European Commission of Human Rights in a suit alleging that he had presented an edited version of the plaintiff’s claim, rather than the entire claim in plaintiff’s own words, to the Commission. *See Zoernsch v. Waldock*, (1964) 2 All E.R. 256 (C.A.) (U.K.) (finding immunity for the current Secretary of the Commission under the Council of Europe (Immunities and Privileges) Order, 1960, and finding immunity for the former President of the Commission because his name was on a list of officials entitled to immunity compiled under the International Organisations (Immunities and Privileges) Act, 1950).

Two remaining cases similarly involved current officials who were sued for conduct that does not resemble the claims at issue here. *See Holland v. Lampen-Wolfe*, [2000] UKHL 40, [2000] 3 All E.R. 833 (H.L.) (U.K.) (finding a supervisor on a U.S. military base immune from claims for defamation for writing a negative report about U.S. citizen plaintiff’s job performance on the base); *Schmidt v. The Home Secretary*, 103 I.L.R. 322 (1994) (H. Ct.) (Ir.) (finding immunity for current police commissioner and officer in a British extradition squad who allegedly lured plaintiff to the United Kingdom so that he could be arrested and extradited to Germany on drug trafficking charges). These two cases do not support the blanket immunity Petitioner claims he is owed as a matter of international law.

Petitioner is not a current official, and his alleged conduct does not fall within the reasoning of these few foreign cases. These cases do not in any way support blanket immunity for *former* foreign officials for torture and extrajudicial killing, much less demonstrate the even broader proposition that international law requires such immunity.

Finally, *amici* addressed the U.K. House of Lords’ opinion in *Jones v. Saudi Arabia*, which held that Saudi Arabia was immune from suit for torture and that its officials (who were not physically present in the United Kingdom) were entitled to the immunity of the state under the

State Immunity Act 1978 (U.K.) (SIA).³⁵ Although the claimants in *Jones* had an application challenging that decision pending before the European Court of Human Rights at the time of oral argument in *Samantar*, and although the U.K. SIA is not identical to the U.S. FSIA, proponents of blanket immunity understandably have sought to recruit *Jones* in support of their interpretation of the FSIA. *Amici* began by emphasizing the differences between the U.K. SIA and the U.S. FSIA, and the different role played by customary international law in interpreting the provisions of these statutes.

In contrast to the FSIA, the SIA defines a “State” to include at least some individuals, specifically heads of state. *See* SIA § 14(1) (a). Also unlike the FSIA, the SIA expressly excludes criminal proceedings, *see id.* § 16(4), suggesting that individual officials are covered by the SIA. Because the SIA did not expressly provide immunity for suits against officials, however, Lord Bingham of Cornhill looked to foreign and international authorities to determine whether individual officials should be considered part of the “State” for purposes of the SIA. *See Jones* ¶¶ 10–12; *see also id.* ¶¶ 65–101 (Lord Hoffmann). Lord Bingham made clear that the source of the immunity he was applying was domestic law. “It is not suggested that the Act is in any relevant respect ambiguous or obscure,” he said, and “the duty of the English court is therefore to *apply the plain terms of the domestic statute.*” *See id.* ¶ 13 (emphasis added).

Lord Bingham’s other statements about customary international law in *Jones* were made in a context that renders them inapplicable to the United States and to this case. Specifically, the plaintiffs in *Jones* argued that Article 6 of the European Convention on Human Rights (providing *inter alia* for access to courts) required an exception to the immunity granted by the SIA in cases of torture. *See id.* ¶¶ 14–28. Because of the relationship between the European Convention and U.K. law, the burden was on the plaintiffs to show that international law required such an exception. *See id.* ¶ 14 (“the onus is clearly on [the claimants] to show that the ordinary approach to application of a current domestic statute should not be followed”). Lord Hoffmann also considered whether Article 6 of the European Convention required an implied exception to the immunity granted by the SIA and concluded that plaintiffs had failed to show that an exception was *required* by international law. *See id.* ¶¶ 39–64.

In the United States, the burden is obviously not on a plaintiff to show that an exception to state immunity is required under Article 6 of the European Convention. Rather, the burden is on the defendant to show that a clear rule of immunity exists. With respect

³⁵ *Jones v. Ministry of Interior of Saudi Arabia*, [2006] UKHL 26, [2007] 1 A.C. 270 (appeal taken from Eng.). Interestingly, Lord Phillips, who sat on the appellate panel whose opinion in *Jones* was overturned by the House of Lords, attended oral argument in *Samantar*. *See* Adam Liptak, *Justices Weigh Claims Over Torture in Somalia*, N.Y. TIMES, Mar. 3, 2010, <http://www.nytimes.com/2010/03/04/us/04scotus.html>.

to sovereign immunity, this Court has long held that “[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute” and that “[a]ll exceptions, therefore, . . . must be traced up to the consent of the nation itself. They can flow from no other legitimate source.” *The Schooner Exchange v. M’Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812).

Amici also indicated that the opinions in *Jones* misread certain precedents that do not, in fact, support generalizations about the scope of official immunity under international law, as opposed to under a specific domestic statute.

The authorities relied upon by Lords Bingham and Hoffmann in *Jones* do not support the proposition that customary international law requires states to immunize foreign officials from civil suits alleging torture.³⁶ Lord Hoffmann relied heavily on the International Law Commission’s 2001 Draft Articles on State Responsibility for Internationally Wrongful Acts, Article 7 of which deals with a state’s responsibility for the acts of persons empowered to exercise government authority. *See Jones* ¶¶ 76–78; *see also id.* ¶ 12 (Lord Bingham). But whether a state is responsible under international law for the acts of its officials is a separate question from whether an individual is responsible under international law for his or her acts on behalf of a state.³⁷ On this second question, the Draft Articles state expressly that they “are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.” *See International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* (2001), Art. 58.

³⁶ There is also no basis in international law (as opposed to U.K. domestic law) for drawing a sharp distinction between civil proceedings for torture and criminal proceedings for the same conduct, from which there would be no immunity under the holding in *R. v. Bow St. Metro. Stipendiary Magistrate*, [1999] 2 All E.R. 97 (H.L.) (appeal taken from Eng.) (finding no immunity for former Chilean head of state for torture that occurred in Chile, where dual criminality requirement for extradition was satisfied). Multiple legal systems blend civil and criminal proceedings, meaning that a lack of immunity from criminal proceedings entails the possibility of civil damages. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 762–63 (2004) (Breyer, J., concurring in part and concurring in the judgment) (indicating that “the criminal courts of many nations combine civil and criminal proceedings”). Additionally, “[e]ven within common law systems, torts were historically considered the civil counterparts of crimes.” *See Chimène I. Keitner, Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 83–84 (2008) (citing sources).

³⁷ Lord Hoffmann’s conflation of these two questions is also clear in his misplaced reliance on the 1927 arbitral decision in *Mallén v. United States*. *See Jones*, [2006] UKHL 26, ¶ 75 (citing *Mallén v. United States*, 4 R.I.A.A. 173 (Gen. Claims Comm’n. 1927) (awarding damages to Mexico for the 1907 assault on a former Mexican consul (Mallén) by a U.S. deputy constable (Franco))). There is no indication in that decision that the responsibility of the United States precluded any concurrent civil or criminal responsibility for the deputy constable whose acts were at issue; to the contrary, he was fined \$100 for the assault. *See Mallén*, 4 R.I.A.A. at 181.

Inexplicably, neither Lord Bingham nor Lord Hoffmann cited Article 58, which discredits their reliance on Article 7.³⁸

Lords Bingham and Hoffmann both relied heavily on the 2004 U.N. Convention on the Jurisdictional Immunities of States and Their Properties, which defines “State” to include “representatives of the State acting in that capacity” and contains no express exception for torture. *See Jones* ¶¶ 10, 26 (Lord Bingham); *id.* ¶¶ 47, 66 (Lord Hoffmann). The U.N. Convention, which deals largely with state liability for commercial transactions, has not obtained even the 30 ratifications necessary for it to enter into force. The United States has not signed the Convention and is unlikely to do so because it differs substantially from the terms of the FSIA. *See* David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Properties*, 99 Am. J. Int’l L. 194, 205 (2005) (noting that the Convention does not contain exceptions for expropriation or terrorism); *see also id.* at 210–11 (noting other objections of the U.S. delegation). The absence of an exception to immunity from this Convention does not make such an exception unlawful under customary international law. As Mr. Stewart, who led the U.S. delegation, has observed with respect to the terrorism exceptions in the FSIA, that “would read far too much into the consensus adoption of the convention.” *Id.* at 206.

In sum, neither *Jones* nor the authorities on which it relies support Petitioner’s assertion of blanket immunity for all acts taken by a foreign government official. The question before the House of Lords in *Jones*—whether customary international law requires an *exception* to the statutory immunity granted by the SIA—is different from the question in the United States—whether customary international law requires a *grant* of immunity in the first place. With respect to torture and extrajudicial killing at least, it does not.

In his reply brief, Samantar objected strongly to *amici*’s characterization of the *Jones* opinion and argued that “*Jones* clearly holds that ‘international law’ imposes a duty to recognize the immunity of officers accused of committing torture while acting in an official capacity, and that a state may not, ‘as a matter of discretion, relax or abandon’ this immunity.”³⁹ Of course, even if this were the United Kingdom’s position based on its reading of relevant materials, U.S. courts would not be

³⁸ The Commentaries to the Draft Articles also make clear that “the rules concerning attribution set out in this chapter are formulated for this particular purpose, and not for other purposes for which it may be necessary to define the State or its Government.” Rep. of the Int’l Law Comm’n, 53d sess, Apr. 23–June 1, July 10–Aug. 10, 2001, at 82, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001). It is inappropriate to use Draft Article 7, which codifies an international law principle developed to *protect* victims by providing them with a basis for diplomatic claims against the offending state, to curtail the remedies available to victims of such conduct. *See id.* at 99–100 (explaining rationale for attributing conduct performed with apparent authority to the state).

³⁹ Reply Brief of Petitioner, *supra* note 19, at 21 (quoting *Jones*, [2006] UKHL 26, ¶ 101).

bound by that position, especially in cases involving defendants who are present on U.S. territory. It is also worth noting that even those who argue that Samantar should benefit from immunity from civil proceedings for torture agree that he would *not* be immune from criminal prosecution in a U.S. court.⁴⁰ While there might be policy reasons to differentiate between civil and criminal proceedings in the United States (for example, a general preference for having claims brought by the Executive, rather than by private individuals), these reasons are insufficient as a legal matter to compel immunity from civil proceedings while denying it in criminal proceedings for the same conduct.

Although the difference between civil and criminal proceedings was not raised during oral argument, the question of the executive branch's role was discussed at some length, for example in this exchange between Justice Scalia and counsel for Yousuf:

JUSTICE SCALIA: I mean, the—the State Department wants to be able to decide whether individuals will be held liable, whether they were acting in an official capacity or not; isn't that it?

MS. MILLETT: Well, they—that—I'll let them speak for their own position. I think certainly—certainly there are a variety of doctrines, a variety of hurdles any case has to get through. And it's not just the Executive's views on a case. There's things like exhaustion. There's necessary party inquiries. There's the act of state doctrine. There's substantive limits on what one can sue for.

You know, the Torture Victim Protection Act is Congress's judgment that individuals who do this, consistent with international law, whatever else—individuals who engage in torture and extrajudicial killing are held personally liable in Congress's views and in the views of international law. And the Foreign Sovereign Immunities Act doesn't stop that.

And what's critical, again, is the—

JUSTICE SCALIA: I must say—

MS. MILLETT:—language that's missing—

JUSTICE SCALIA:—that I find it much more acceptable to have the State Department say that a particular foreign country should be let off the hook, which is what they used to do with the Tate letters, than I do to leave it up to the State Department whether—whether an individual human being shall be—shall be punished or not. I—I somehow find that less within the realm of the—of the foreign affairs power of the State Department.⁴¹

⁴⁰ See *Amicus Curiae* Brief of the American Jewish Congress, *supra* note 29, at 5; Brief of *Amici Curiae* Former Attorneys General of the United States, *supra* note 29, at 17.

⁴¹ Transcript of Oral Argument, *supra* note 16, at 44–45.

The precise role of the Executive is one of the various issues that lower courts will have to address in the first instance, beginning with the district court on remand in *Samantar* itself.⁴²

VIII. CONCLUSIONS

Although the *Samantar* opinion is primarily an exercise in statutory interpretation, one can take a step back and view the case as part of an evolving jurisprudence on accountability for international law violations in U.S. courts. In *Sosa v. Alvarez-Machain*, the Supreme Court confirmed that the Alien Tort Statute (ATS) provides U.S. federal courts with jurisdiction over a limited number of particularly serious international law violations.⁴³ The *Sosa* Court did not specifically hold that official torture was actionable under the ATS, but it did endorse a line of reasoning that had previously reached this result.⁴⁴ In addition, Congress has enacted the Torture Victim Protection Act as a note to § 1350, which specifically provides a cause of action against individual defendants for torture and extrajudicial killing committed under color of foreign law.⁴⁵

One of the numerous current battlegrounds in ATS litigation involves the question of whether or not corporations, in addition to individual human beings, can be sued under that statute. In finding that corporations cannot be sued under the ATS, a panel of the Second Circuit emphasized that “the moral responsibility for a crime so heinous and unbounded as to rise to the level of an ‘international crime’ has rested solely with the individual men and women who have perpetrated it.”⁴⁶ Given this emphasis on individual moral responsibility, one might expect a corresponding resistance to the idea that individuals are automatically immune from legal consequences for their internationally unlawful acts, particularly when such individuals have voluntarily entered the United States and are neither current heads of state nor diplomats.

The complementarity principle, whereby domestic courts act as decentralized enforcers of international law prohibitions, has been more explicitly institutionalized in criminal than civil proceedings.⁴⁷ However,

⁴² See Keitner, *supra* note 4, at 71–75 (arguing that the views of the Executive are entitled to absolute deference on questions of status-based immunity, but only to substantial weight on questions of conduct-based immunity).

⁴³ 542 U.S. 692, 732 (2004). See also 28 U.S.C. § 1350.(2006).

⁴⁴ *Sosa*, 542 U.S. at 732 (citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980)).

⁴⁵ Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992), (codified as a note after 28 U.S.C. § 1350).

⁴⁶ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 119 (2d Cir. 2010); see generally Chimène I. Keitner, *Kiobel v. Royal Dutch Petroleum: Another Round in the Fight Over Corporate Liability Under the Alien Tort Statute*, AM. SOC’Y INT’L L. (Sept. 30, 2010), <http://www.asil.org/insights100930.cfm>.

⁴⁷ See, e.g., *Sosa*, 542 U.S. at 761–63 (Breyer, J., concurring in part and concurring in the judgment) (discussing the international “consensus as to universal criminal

many of the core justifications for criminal complementarity also apply to civil proceedings. International law governs the conduct of individuals, not only states. Given the limited capacity and mandate of international tribunals to adjudicate individual culpability in many instances, the task falls to domestic courts to provide an additional layer of enforcement, albeit one that is circumscribed by considerations of reasonableness and comity. A rule of blanket immunity for individual foreign officials is incompatible with this framework, and does not have greater support under the common law than it does under the FSIA.

jurisdiction” and suggesting that “universal tort jurisdiction would be no more threatening,” particularly since “universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well”).