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United States District Court for the Southern District of New York

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SAMANTAR V. YOUSUF: RECENT DEVELOPMENTS IN THE LAWS GOVERNING CIVIL TORTURE CLAIMS IN U.S. COURTS

*Solomon B. Shinerock**

The Supreme Court's recent opinion in *Samantar v. Yousuf*¹ 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 which common law principles will govern the issue in the future. This article reviews the case as well as the common law doctrines that will likely be prominent in future civil suits alleging torture. Ultimately, the *Samantar* decision, when read together with existing principles of domestic and international law, indicates 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.

I. BACKGROUND OF THE CASE AND FSIA

The *Samantar* case involves atrocities committed in Somalia during the 1980s, including allegations of rape, torture, arbitrary imprisonment, and extrajudicial killings. The plaintiffs were Somali members of the Isaaq clan, and included two U.S. citizens and three Somaliland residents.³ They

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¹ 130 S. Ct. 2278 (2010).

² 28 U.S.C. §§ 1602-1611 (1976).

³ See *Samantar*, 130 S. Ct. at 2280; 552 F.3d 371, 373-4 (4th Cir. 2009), cert. granted 130 S. Ct. 49 (2009), aff'd and remanded by 130 S. Ct. 2278 (2010); see also Brief of Respondent at 4, *Samantar v. Yousuf*, 130 S. Ct. 2278 (Jan. 20, 2010) (No. 08-1555).

were either the victims of torture or represented the estates of victims of torture and extrajudicial killings.⁴ The defendant, Bashe Abdi Samantar, was an official in the government of Major General Mohamed Siad Barre, the individual who in 1969 overthrew the Somali democratic government put into place after the end of 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, which were seen as threats to the regime.⁷ After the Barre regime collapsed, Samantar fled the country, eventually settling in Fairfax, Virginia.⁸

The 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 that he gave his tacit approval for the abuses and "aided and abetted in their commission."¹¹ The district court stayed the proceedings pending a statement of interest from the State Department, but after two

⁴ *Yousuf*, 552 F.3d at 374.

⁵ *Id.* at 373; Brief of Respondent at 3, *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010) (No. 08-1555).

⁶ Brief of Respondent, *supra* note 5, at 3.

⁷ *Yousuf*, 552 F.3d at 373-74.

⁸ *Id.* at 374; Brief of Respondent, *supra* note 5, at 3.

⁹ Pub. L. No. 102-256, 1992 U.S.C.C.A.N. (106 Stat. 73) 84 (1992) (codified as amended at 28 U.S.C.A. § 1350 (West 2010) 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 28 U.S.C.A. § 1350 (West 2010) (provides that the district courts "shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."). This grant of jurisdiction has been translated as applying to cases for treaty-based or federal common law causes of action enforcing universally accepted and carefully defined international norms admitting of a judicial remedy. *See 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. *See id.* at 728; *Filatiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980).

¹¹ *Samantar*, 130 S. Ct. at 2280; *Yousuf*, 552 F.3d at 374.

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, thus shielding Samantar's acts from civil liability.¹³ The Fourth Circuit reversed, adopting the minority view that the FSIA does not apply to individuals,¹⁴ and the Supreme Court granted *certiorari*.¹⁵

The FSIA, enacted in 1976, codified then-existing practice developed by the U.S. Department of State and the courts of providing "restrictive" immunity to foreign governments sued in U.S. courts.¹⁶ The principle of restrictive immunity 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 – came to limit the availability of sovereign immunity and shifted any discretion for granting such immunity away from the Executive branch and towards the courts.¹⁷ The FSIA starts from the general rule that foreign governments are

¹² *Samantar*, 130 S. Ct. at 2283. The State Department's long silence in this case suggests that the dispute will remain within the jurisdiction of the courts to decide. *But see* John B. Bellinger III, *Ruling Burdens State Dep't.*, NAT'L L.J., June 28, 2010, at para. 5, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202463009727&slreturn=1&hbxlogin=1> ("[T]he State Department is likely to assert immunity on behalf of most foreign government officials sued for alleged human rights violations.").

¹³ Bellinger, *supra* note 12, at para. 3; *see also* *Samantar v. Yousuf*, No. 1:04CV1360, WL 2220579 at 8, 14-15 (E.D. Va. Aug. 1, 2007), *rev'd and remanded by* *Yousuf v. Samantar*, 552 F.3d 371 (2009), *cert. granted* *Samantar v. Yousuf*, 130 S. Ct. 49 (2009), *aff'd and remanded by* *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010) (quoting *Velasco v. Gov't of Indon.*, 370 F.3d 392, 398 (4th Cir. 2004)).

¹⁴ *Yousuf*, 552 F.3d at 383.

¹⁵ *Samantar v. Yousuf*, 130 S. Ct. 49 (Sept. 30, 2009), *aff'd and remanded by* *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010).

¹⁶ *See Samantar*, 130 S. Ct. at 2278; H.R. Rep. No. 94-1487 at 6605 (1976).

¹⁷ *See, e.g.,* *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486-89 (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); Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of St. to Philip B. Perlman, Acting Att'y Gen., DEP'T ST. BULL. 984 (May 19, 1952) (questioning the practice of granting absolute immunity to foreign sovereigns and announcing the adoption of the restrictive theory of sovereign immunity).

immune from suit unless otherwise provided by international agreement.¹⁸ 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, non-commercial torts occurring in the United States, and disputes over rights in real property and estates located in the United States.¹⁹ These exceptions have been used with some success by human rights litigants.²⁰ The exception for non-commercial 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.²¹ However, it has provided only limited means for pursuing remedies for human rights violations, and is intended primarily for victims of terrorism.²²

II. THE SUPREME COURT'S DECISION

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

¹⁸ 28 U.S.C. § 1604 (1976).

¹⁹ 28 U.S.C. §§ 1605–1607 (2008); *see also* *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989) (holding that “FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country . . .” to the exclusion of other exceptions that may have existed at common law).

²⁰ *See, e.g.*, *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992) (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).

²¹ *See* Ismael Diaz, *A Critique of Proposals to Amend the Foreign Sovereign Immunities Act to Allow Suits Against Foreign Sovereigns for Human Rights Violations*, 32 U. MIAMI INTER-AM. L. REV. 137, 146 (2001) (discussing the successful utilization of the non-commercial tort exception where the former Ambassador of Chile was murdered in Washington, D.C. by the Chilean Secret Service).

²² The main impediment in this regard is the requirement that the tort occur in the United States. *See* 28 U.S.C. § 1605(a)(5) (2008). However, the provision has proved useful in providing a remedy to U.S. citizens injured by a terrorist attack occurring in the United States. *See* *Letelier v. Republic of Chile*, 488 F. Supp. 665, 672-73 (D.D.C. 1980) (plaintiff successfully invoked the non-commercial 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); *cf.* *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).

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 in holding torturers accountable, its holding is fairly narrow and was driven not by the facts, but by the text of the FSIA. The FSIA provides, “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.²³ 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.²⁴ Resolving a circuit split,²⁵ the Court held that the meaning of “foreign state” did not encompass “an individual sued for conduct undertaken in his official capacity.”²⁶ 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.”²⁷

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, he expressed no opinion as to whether the defendant had viable claims to immunity based on customary international law or common

²³ 28 U.S.C. § 1604 (1976).

²⁴ *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010).

²⁵ *Compare In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 81 (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, 815-16 (6th Cir. 2002); *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388-89 (5th Cir. 1999); *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir. 1997); *and Chuidian v. Phil. 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 Yousuf*, 552 F.3d 381, *and Enahoro v. Abubakar*, 408 F.3d 877, 882 (7th Cir. 2005) (holding that it does not).

²⁶ *Samantar*, 130 S. Ct. at 2286.

²⁷ *Id.* at 2288. The majority opinion references 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 id.* at 2287 n.9, *with id.* at 2293-94 (Scalia, J., concurring).

law principles that were not codified in the FSIA and therefore not before the Court.²⁸ Those issues were left to the district court on remand.²⁹

III. IMPLICATIONS FOR HUMAN RIGHTS PROSECUTIONS AND REMAINING ISSUES OF IMMUNITY

The exclusion of individuals from the scope of the FSIA has several important implications in civil prosecution for 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. These implications establish the common law as the arena for the fight over the availability of immunity for foreign officials – a fight that has been central to many U.S. lawsuits seeking vindication for the victims of torture committed abroad.

In view of the *Samantar* decision, the next critical issue 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 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 the peaceful maintenance of international relations on its own terms. Notably, several common law doctrines guide courts in achieving this balance, including the act of state doctrine, head of state immunity, and the *jus cogens* status of the prohibition against torture, and, as seen in *Samantar*, have been raised in litigation concerning claims of torture and summary execution.³⁰

²⁸ *Id.* at 2293-94.

²⁹ *Id.*

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 and Optional Protocol on Disputes, April 18, 1961, 23 U.S.T. 3227 (diplomatic immunity); Vienna Convention on Consular Relations and Optional Protocol on Disputes, 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).

A. *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 is closely related to the more general foreign official immunity, according to which a foreign sovereign is generally immune from suit in the territory of another sovereign³² – an immunity that was understood to extend to foreign officials acting in an official capacity.³³ 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 U.S. Department of State, which support Samantar’s immunity claims and assert that “the actions attributed to Mr. Samantar in the lawsuit . . . would have been taken by Mr. Samantar in his official capacity on behalf of Somalia.”³⁴

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.”³⁵ 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.”³⁶

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 U.S. courts have held that human rights violations were not lawful or authoritative public acts justifying application of the act of state doctrine, particularly when viewed in conjunction with violations of *jus cogens* norms.³⁷ A review of relevant cases from the United States, in-

³¹ See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964) (“The 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.”).

³² See *Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 145-46 (1812).

³³ *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

³⁴ Brief of Petitioner, *supra* note 5, at 10 (internal quotation marks and brackets omitted).

³⁵ *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

³⁶ *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 405 (1990).

³⁷ 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

ternational criminal tribunals, and foreign courts reveals an emerging consensus that egregious violations of *jus cogens* norms, such as the prohibition of torture, cannot be official acts of state that preclude review by the courts.³⁸ 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.”³⁹ The Senate Judiciary Committee’s intent was unmistakable when it articulated that it “does not intend the ‘act of state’ doctrine to provide a shield from lawsuit.”⁴⁰

Furthermore, while the act of state doctrine, like sovereign immunity, is not compelled by the Constitution, its constitutional underpinnings

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, 176 (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); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993); *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); *see also* *Republic of the Philippines v. Marcos*, 862 F.2d 1355 (9th Cir. 1988) *and* *Republic of the Philippines v. Marcos*, 806 F.2d 344, 357-60 (2d Cir. 1986) (declining to apply the act of state doctrine to conduct beyond the scope of proper governmental authority, where both cases involved claims that Marcos had looted the national treasury and where both courts rejected a liberal approach to the act of state doctrine and relied upon a distinction between official and private acts, suggesting 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, 139-45 (1998). For a 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 HARV. 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. LEGAL ISSUES 287 (1995/96).

³⁸ *See, e.g.*, Stacy Humes-Schulz, *Limiting Sovereign Immunity in the Age of Human Rights*, 21 HARV. HUM. RTS. J. 105, 114-16 (2008).

³⁹ SEN. COMM’N ON THE JUDICIARY, THE TORTURE VICTIM PROTECTION ACT OF 1991, S. REP. NO. 102-249, at 8 (1991).

⁴⁰ *Id.*

arise out of the separation of powers and through the recognition that the Executive branch is the appropriate arbiter of matters affecting foreign relations.⁴¹ This characteristic provides potential openings for victims to seek redress before the courts, even potentially based on the very cases that have traditionally given the act of state doctrine its broad sweep. For example, the Supreme Court has stated 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.”⁴² Importantly, this statement 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 upon 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.”⁴³ Accordingly, the pervasiveness of statutes and treaties affirming the prohibition against torture, which reinforces a strong international consensus, makes the act of state doctrine a proper principle for courts to utilize without having to worry about disturbing 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 it does not disturb the Executive branch’s prerogative in foreign relations; to the contrary, civil prosecution of torture is fully consistent with well-established domestic and international policies, statutes, and treaties prohibiting torture.

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 U.S. foreign policy interests.⁴⁴ Given the United States’ increased

⁴¹ *Banco National de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (act of state “arises out of the basic relationships between branches of government in a system of separation of powers”).

⁴² *Id.* at 427-28.

⁴³ *Id.* at 428.

⁴⁴ *First National City Bank v. Banco National de Cuba*, 406 U.S. 759, 768 (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.”).

attention to the prohibition against torture,⁴⁵ 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 a “commercial activity” exception intended to protect the reasonable expectations of trading partners of a state and its entities.⁴⁶ A second analogous exception exists where a treaty provides a controlling legal standard in the area of international law.⁴⁷ These exceptions provide another argument in light of U.S. obligations under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture),⁴⁸ and the clear and detailed regime it prescribes for imposing civil and criminal liability for acts of torture.⁴⁹

B. *Head of state immunity*

Head of state immunity developed under the common law “pre-mised on the concept that a state and its ruler are one for purposes of immunity,” and “that all states are equal, and that no one state may exercise

⁴⁵ See, e.g., Elise Keppler, Shirley Jean, & J. Paxton Marshall, *First Prosecution in the United States for Torture Committed Abroad: The Trial of Charles ‘Chuckie’ Taylor, Jr.*, 15 No. 3 HUM. RTS. BRIEF 18, 18 (2008) (discussing increased legislative and prosecutorial efforts aimed at the prohibition against torture).

⁴⁶ *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695 (1976) (“[W]e 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 *Kalamazoo Spice Extraction Co. v. Provisional Military Gov’t of Socialist Eth.*, 729 F.2d 422, 425-27 (6th Cir. 1984) (allowing the treaty exception to preclude application of the act of state doctrine in view of a Treaty of Amity between Ethiopia and the United States that provided a controlling legal standard).

⁴⁸ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (June 26, 1987).

⁴⁹ 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 Others, Ex Parte Pinochet*, [1999] UKHL 17 (H.L.) (appeal taken from Q.B.) (opinion of Saville of Newdigate, L.J.), available at <http://iilj.org/courses/documents/Reginav.Bartle-ex.p.Pinochet.pdf>.

judicial authority over another.”⁵⁰ An early court noted, “[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.”⁵¹ In the context of human rights cases, head of state immunity applies on an almost de facto basis as a matter of political expediency, because 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.⁵²

However, former, as opposed to sitting, heads of state generally have not been granted immunity from prosecution for violations of domestic and international law.⁵³ A number of factors thus contribute to the possibility of redress for torture committed by former heads of state.

First, a current head of state may waive immunity of former heads of state.⁵⁴ Second, unlike sitting heads of state, former heads of state do not enjoy immunity for acts taken outside the scope of official duties.⁵⁵ For

⁵⁰ *Lafontant v. Aristide*, 844 F. Supp. 128, 132 (E.D.N.Y. 1994) (citing *Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 137 (1812)).

⁵¹ *Id.* at 131-32 (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 M. Sherif Bassiouni, *Perspectives on International Criminal Justice*, 50 VA. J. INT’L L. 269, 311-17 (2010).

⁵³ *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) (“[T]he FISA addresses neither head-of-state immunity, nor foreign sovereign immunity in the criminal context”), *aff’g* 746 F. Supp. 1506, 1519 n.11 (S.D. Fla. 1990) (“[T]here is ample doubt whether head of state immunity extends to private or criminal acts in violation of U.S. law.”); *Jiminez v. Aristeguieta*, 311 F.2d 547, 557-58 (5th Cir. 1962) (no immunity for violations of foreign law); see, e.g., *Doe v. United States*, 860 F.2d 40, 45 (2d Cir. 1988) (citing *Schooner Exchange*, 11 U.S. (7 Cranch) at 135); cf. *Santissima Trinidad*, 20 U.S. 283, 350-55 (1822) (no immunity for violations of international law).

⁵⁴ See, e.g., *In re Grand Jury Proceedings*, 817 F.2d 1108, 1111 (4th Cir. 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); see also *Paul v. Avril*, 812 F. Supp. 207, 210-11 (S.D. Fla. 1993) (providing that the then-recognized Haitian government could waive head of state immunity of the former head of military government, which waiver extended to whatever residual head-of-state immunity defendant possessed).

⁵⁵ See, e.g., *Doe v. United States*, 860 F.2d at 45 (“[T]here is respectable authority for denying head-of-state immunity to a former head-of-state for private or criminal

example, the Second Circuit rejected the claim of Ferdinand Marcos of sovereign immunity against allegations of systematic torture, disappearances, and summary execution in *Republic of Philippines v. Marcos*.⁵⁶ The court expressed 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.”⁵⁷

Third, tension exists between the traditional immunity doctrines and U.S. efforts to eradicate torture. Legislation incorporating the international prohibition against torture appears after the development of traditional principles of immunity, and thus ostensibly supersedes and derogates from traditional immunity principles.⁵⁸ While some support exists for the argument that the TVPA was not intended to overcome traditional immuni-

acts in violation of American law.”); *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet*, [1999] UKHL 17 (H.L.) (appeal taken from Q.B.) (opinion of Saviile of Newdigate, L.J.), available at <http://iilj.org/courses/documents/Reginav.Bartle-ex.p.Pinochet.pdf> (“[M]y 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.”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 464, REP. NOTE 14 (1987) (a former head of state would “have no immunity from [a U.S. court’s] jurisdiction to adjudicate” claims arising out of their acts while in office); 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”).

⁵⁶ *Republic of Philippines v. Marcos*, 806 F.2d 344, 348, 360 (2d Cir. 1986).

⁵⁷ *Id.* at 360; see also *Noriega*, 746 F. Supp. at 1519 n.11 (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”).

⁵⁸ See Extraterritorial Torture Statute, 18 U.S.C. §§ 2340–2340A (1994) (criminalizing torture in accordance with U.S. obligations under the U.N. Convention Against Torture) and TVPA, 28 U.S.C. § 1350 (1992) (providing a civil action for torture), which presumably trump any inconsistent common law immunity doctrine pre-dating them. See also FSIA, 28 U.S.C. §§ 1330, 1602–1611 (1976) amended by Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 1996 U.S.C.C.A.N. (110 Stat. 1214) 944 (1996) (far from reverting to a more comprehensive immunity regime, the 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).

ties,⁵⁹ logically, the TVPA 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 . . . by making sure that torturers and death squads will no longer have a safe haven in the United States.”⁶⁰ Because torture is by definition committed under color of law, the TVPA may encroach on some amount of official or foreign sovereign immunity, whether under the FSIA or common law.⁶¹

Moreover, the immunity doctrine may face significant limitations, thus 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.⁶² 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.”⁶³ 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

⁵⁹ See SENATE COMM’N ON THE JUDICIARY, THE TORTURE VICTIM PROTECTION ACT OF 1991, S. REP. NO. 102-249, at 7-8 (1991) (“The TVPA is not intended to override traditional diplomatic immunities which prevent the exercise of jurisdiction by U.S. courts over foreign diplomats. . . . Nor should visiting heads of state be subject to suits under the TVPA.”).

⁶⁰ *Id.* at 3.

⁶¹ In an analogous argument in the *Pinochet* case, the U.K. House of Lords has said that it “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 Others, Ex Parte Pinochet*, [1999] UKHL 17 (H.L.) (appeal taken from Q.B.) (opinion of Saville of Newdigate, L.J.), available at <http://iilj.org/courses/documents/Reginav.Bartle-ex.p.Pinochet.pdf>.

⁶² See *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

⁶³ See HOUSE COMM’N ON THE JUDICIARY, THE TORTURE VICTIMS PROTECTION ACT OF 1991, H.R. REP. NO. 102-367, at 5 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 88 102nd Cong., 1st Sess., Pt. 1 (1991), 1992 U.S. Code Cong. and Admin. News 84, 88 (“[N]othing 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.”).

diplomatic immunity may not be insurmountable hurdles for torture victims seeking redress in U.S. courts.

C. *The jus cogens character of the prohibition against torture*

Finally, there is significant support for the theory that the defendants charged with violations of an international *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 *jus cogens* norms supersede other principles of international law, suits charging violations of the prohibition of torture are not subject to dismissal on immunity grounds.⁶⁴ 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 against torture.⁶⁵ However, where the FSIA is not involved, there is a strong argument that the *jus cogens* status of the prohibition of torture, which has been recognized in the United States,⁶⁶ supersedes any claim to immunity that could be asserted under the common law.⁶⁷

⁶⁴ See, e.g., *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 718 (9th Cir. 1992) (“A state’s violation of the *jus cogens* norm prohibiting official torture therefore would not be entitled to the immunity afforded by international law.”).

⁶⁵ See *id.* at 718-19, citing *Argentine Republic v. Amerada Hess Shipping Co.*, 488 U.S. 428, 436.

⁶⁶ See Extraterritorial Torture Statute, 18 U.S.C. §§ 2340, 2340A (making it a crime to commit torture abroad, and applying to U.S. citizens and non-citizens present in the United States); Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (June 26, 1987); *Siderman de Blake*, 965 F.2d at 717 (concluding that “the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*”); *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 941 (D.C. Cir. 1988) (announcing that torture is one of a handful of acts that constitute violations of *jus cogens*); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. n (1987); *Keppler*, *supra* note 43, at 18 (discussing the exceptional jurisdictional reach of the Extraterritorial Torture Statute).

⁶⁷ See *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet*, [1999] UKHL 17 (H.L.) (appeal taken from Q.B.) (opinion of Browne-Wilkinson, L.J.), available at <http://iilj.org/courses/documents/Reginav.Bartle-ex.p.Pinochet.pdf>, paras. 47-57 (concluding that the former dictator of Argentina had no immunity from prosecution for the charges of torture and

IV. 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, the Court noted that, 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.”⁶⁸ 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,”⁶⁹ 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 avoiding an immunity doctrine, the critical question is whether the suit seeks monetary damages from the individual named defendant or whether it seeks damages or some other relief from a sovereign.⁷⁰ Immunity attaches by operation of the “effect of the judgment” in “restrain[ing] the Government from acting, or compel[ing] it to act.”⁷¹ This application provides convincing reasoning to hold that sovereign immunities should not apply to civil claims seeking monetary damages against former officials for acts of torture.

of conspiracy to torture which relate to the period after the ratification of the Convention against Torture).

⁶⁸ *Samantar v. Yousuf*, 130 S. Ct. at 2290 (quoting THE RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 66 (1965)).

⁶⁹ *Id.* at n.15.

⁷⁰ See *Larson v. Domestic & Foreign Commerce Corp.*, 337 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.”).

⁷¹ *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1983). Similarly, as noted above, the act of state doctrine focuses not on the identity of the defendant, but on “the relief sought or the defense interposed.” *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 405 (1990); see also *Underhill v. Hernandez*, 168 U.S. 250, 250-52, 254 (1897).

The common law hints at several other potential doors in the wall of immunity. The Bernstein exception, together with the principle that the act of state doctrine should not preclude an action involving the application of well-settled law where it would not disturb international relations, supports the argument that the 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.

Recent Update – April 21, 2011

At the time of publication, the district court has begun to address alternative claims to immunity. In November 2010, Samantar filed a new motion with the district court to dismiss the complaint. In his complaint, he argued, among other things, that he was entitled to common law immunity. On February 14, 2011, the U.S. government filed a Statement of Interest asserting that Samantar was not entitled to immunity. As plaintiffs' counsel notes, "[t]he filing is significant because the U.S. rarely intervenes in litigation where it is not a party, and it is extremely uncommon for the government to intervene to state that a defendant is not entitled to immunity."⁷²

The government's Statement of Interest asserts the Executive branch's authority to determine the immunity from suit of a foreign official in the United States.⁷³ The discussion indicates that in the wake of the Supreme Court's decision last June, the Executive branch may in the future choose to increase its role in determinations of who is entitled to sovereign immunity. The government's reference to the alleged human rights abuses at issue in Samantar suggests that the nature of the allegations may play some part in the Executive branch's determination.⁷⁴

In addition to discussing the alleged abuses, the United States found it particularly significant that Samantar is a former official of a state with no currently recognized government to request immunity on his behalf, and

⁷² Center for Justice and Accountability, Case Summary, <http://cja.org/article.php?list=type&type=85> (last visited Apr. 12, 2011).

⁷³ Statement of Interest of the United States of America at para. 3, *Yousef v. Samantar*, No. 1:04 CV 1360 (LMB) (E.D.N.Y. Feb. 14, 2011), available at http://cja.org/downloads/Samantar_Stmt_of_Interest.pdf.

⁷⁴ *Id.* at 4-5, n.2.

that as a U.S. resident who enjoys the protection of U.S. laws, he should be subject to the jurisdiction of U.S. courts, especially when being sued by another U.S. resident.⁷⁵

Once it received the government's submission, the district court ruled the very next day. It denied Samantar's assertion of common law immunity in a one-page order based entirely on the Executive branch's determination.⁷⁶ This apparent willingness to go along with the government's position sets the stage for future immunity determinations to rest firmly in the hands of the Executive.

⁷⁵ *Id.* at para. 9.

⁷⁶ *Yousef v. Samantar*, No. 05 Civ. 1360 (LMB), (E.D.N.Y. Feb. 15, 2011), available at http://cja.org/downloads/Samantar_Order_Denying_Common_Law_Immunity.pdf.