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A Hidden Compromise: Qualified Immunity in Suits Against Foreign Governmental Officials

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INTRODUCTION

Over the course of the last century, the immunity from lawsuit of sovereign states, their political subdivisions, and their officials in federal and state court has become an increasingly complex topic, as both the role of the state and its willingness and ability to act similar to a private party change.[1] Governments have long been lenders,[2] guarantors, and investors around the world. The financial crisis of 2008 seemed to highlight and enhance their involvement as quasi-private actors in these roles. These governmental actions raise sovereign immunity-related questions. For instance, when may the government be held accountable just as any other private entity would, and when does it maintain special immunity? The sweeping movements to contract out certain social service functions of government to private sector entities, and even that of providing security in war zones, have also raised complex issues related to sovereign immunity.[3] Under what circumstances do those private entities derive immunity from the governments they serve? And, in nations such as Libya and Venezuela, where the nationalization of industries dealing in certain key natural resources has occurred, as well as in other places where state owned enterprises have

1 *See, e.g.*, Christopher Bean, *Can California Declare Bankruptcy?*, SLATE MAG. (Mar. 8, 2010), http://www.slate.com/id/2246915 (discussing the implications of sovereign immunity in the case of a bankruptcy filing by a sovereign entity like the state of California or Greece). These issues could also affect sovereign states that themselves need bailouts. *Id.*

2 *See, e.g.*, Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 360 (2006).

3 See ALASDAIR S. ROBERTS, THE LOGIC OF DISCIPLINE: GLOBAL CAPITALISM AND THE ARCHITECTURE OF GOVERNMENT 1–20 (2010) (discussing efforts to maximize government efficiency by adopting certain elements of corporate governance from the private sector and contracting out certain functions of government); Al-Quraishi v. Nakhla, Civ. No.: PJM 08-1696, 2010 U.S. Dist LEXIS 76450, at *733-34 (D. Md. July 29, 2010) (discussing derivative sovereign immunity for government contractors in Iraq).

experienced a resurgence, these governmental actions have raised still different issues for courts in the United States.[4]

Changes have come in other areas as well. As the debate about basic universal principles of international human rights continues, sovereigns, officials, quasi-sovereign militants, and multi-national corporations find themselves increasingly brought to court to defend their actions against principles of human rights.[5] Should individual responsibility under international law defeat any, or some, forms of sovereign immunity?[6] Globalization is pressing these questions, because these global debates are taking place against a backdrop of changes in statutory and federal common law that, commentators have noted, signals the gradual decline of sovereignty and of the relevance of territoriality to issues of jurisdiction.[7] The evolution of sovereign immunity protections is highly relevant to this trend. History illuminates that sovereign immunity is becoming an elastic doctrine that permits common law courts[8] to respond to changes in the role of

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4 Michael Wines, *China Fortifies State Businesses to Fuel Growth*, N.Y. TIMES, Aug. 29, 2010, at A1; Francisco Flores-Macias and Aldo Musacchio, *The Return of State-Owned Enterprises*, HARVARD INT'L REV., Apr. 4, 2009, http://hir.harvard.edu/print/the-return-of-state-owned-enterprises.

5 GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING THE MONSTER: ALIEN TORT CLAIM ACT 18–36 (2003). *See also Alien Tort Statute Only Applies to Individuals, Not Corporations, 2nd Circuit Rules*, NEWSINFERNO.COM (Sept. 20, 2010), http://www.newsinferno.com/legal-news/alien-torts-statute-only-applies-to-individuals-not-corporations-2nd-circuit-rules/; Jad Mouawad, *Shell to Pay $15.5 Million to Settle Nigerian Case*, N.Y. TIMES, June 8, 2009, *available at* http://www.nytimes.com/2009/06/09/business/global/09shell.html; Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 117 (2010) (listing significant ATCA cases reviewed on appeal, but noting that many more settled before that and concluding that corporations may not be sued under the ATCA statute for violations of international law).

6 Gwynne Skinner, *Nuremberg's Legacy Continues: The Nuremberg Trials' Influence on Human Rights Litigation in U.S. Courts Under the Alien Tort Statute*, 71 ALB. L. REV. 321, 326–27 (2008) (discussing Nuremberg trials as a basis for individual responsibility for violation of customary international law human rights norms via the Alien Tort Claims Act).

7 Kal Raustiala, *The Evolution of Territoriality: International Relations & American Law*, *in* TERRITORIALITY AND CONFLICT IN AN ERA OF GLOBALIZATION (Miles Kahler & Barbara Walter, eds. 2005) (noting "[c]asual empiricism suggests that globalization has driven the US to relax doctrines of legal spatiality as interdependence has risen in the postwar era"); Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L REV. 1921, 1925, n.17 (2003) (discussing the "dynamic nature of the content of sovereignty" and citing to further relevant literature on this subject).

8 The doctrine of sovereign immunity was and is a judge-made doctrine. Although Congress has codified exceptions to the doctrine in statutes, large bodies of judge-made common law exist that grant immunity to, for example, Native American tribes.

the state by balancing what they conceive to be a need to preserve state authority with the legitimate need for compensation for official wrongs.[9]

The doctrine of sovereign immunity in common law systems has a long history, dating in some form back to the twelfth century.[10] British political philosophers and scholars generally believed that sovereigns should have absolute immunity from suit, and in practice in England the sovereign could not be sued in court absent his consent.[11] Officers of the king or sovereign, however, could be subject to suit for unlawful acts done on the king's behalf.[12] Since that time, legal commentators, judges, and legislators have carved out similar exceptions to the doctrine of absolute sovereign immunity, either by creating rights of action against the state through legislation or by refusing to grant immunity to their fellow sovereigns under certain circumstances.[13]

Cash Advance & Preferred Cash Loans v. Colo., ex rel. Suthers, 2010 Colo. LEXIS 911 (Colo. Nov. 30, 2010) ("It is this judicially promulgated body of sovereign immunity principles, rather than any congressional or Supreme Court treatment of Indian Tribes in particular, that has led to the widespread acceptance by both state and lower federal courts that tribal immunity, as a species of sovereign immunity generally, extends to state judicial orders that would operate, in fact even if not in name, against a sovereign tribe.").

9 Some judges, such as Justice Stevens, view sovereign immunity very negatively: "Sovereign immunity inevitably places a lesser value on administering justice to the individual than on giving government a license to act arbitrarily." Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 54 (1994) (Stevens, J. concurring). Justice O'Connor, however, seems to display a more accepting view of sovereign immunity; she states that if the state acts permissibly then it is indeed entitled to claim sovereign immunity. *Id.* at 57 (O'Connor, J. dissenting) ("Sovereign immunity, after all, inheres in the permissible exercise of state power."). Katherine Florey, *Sovereign Immunity's Penumbras: Common Law "Accident" and Policy in the Development of the Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765–66 (2008) (discussing the "fuzziness" of the boundaries of the sovereign immunity doctrine).

10 MELVYN R. DURCHSLAG, STATE SOVEREIGN IMMUNITY: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 3 (2002).

11 DONALD L. DOERNBERG, SOVEREIGN IMMUNITY OR THE RULE OF LAW: THE NEW FEDERALISM'S CHOICE 13–70 (2005) (setting forth the philosophical literature behind sovereignty).

12 *Id.* at 77–80 (noting that under English law the actions of the King's agents were not imputable to the King and therefore the agents enjoyed no sovereign immunity for actions done on his behalf; a practice which differs from American jurisprudence which does grant state officials varying extensions of sovereign immunity).

13 *See, e.g.*, 28 U.S.C. 1605 (exceptions to immunity of foreign sovereigns); 28 U.S.C. 1346(b) (Federal Tort Claims Act waives federal government immunity); 41 U.S.C. 602(a) (Contract Disputes Act permits suits by those doing business with the federal government).

Today, I would argue that it is instructive to think of sovereign immunity as divided into three types or categories. The first type is the sovereign's immunity in its own territory. The federal government (United States) enjoys absolute sovereign control over its own jurisdiction and has therefore absolute immunity from suit.[14] Although this type of sovereign immunity is not mentioned in the Constitution itself, U.S. courts have found implicit support for this concept on the basis of the structure of provisions in the Constitution, such as the jurisdiction of the federal courts and Congress's power over appropriations.[15] United States courts have often applied sovereign immunity to the federal government with same force they would an express Constitutional mandate. [16]

The immunity of federal and state governments from suit in court has been the target of criticism from those scholars who see sovereign immunity as an anachronistic concept that is contrary to the rule of law.[17] Those scholars have called for its abolishment. Alternatively, other scholars have defended sovereign immunity, seeing it as an important mechanism to preserve the functionality of government, and its separation of powers, in the face of costly, protracted civil litigation.[18] While the doctrine remains in force, the federal and state governments have gradually waived their immunity by statute over a variety of different types of suits, such as those suits permitted by the

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14 Nevada v. Hall, 440 U.S. 410, 414 (1979) ("The immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries. Only the sovereign's own consent could qualify the absolute character of that immunity.").

15 Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 523–25 (2003).

16 Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98–99 (1984) ("In short, the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III[.]"). *Cf.* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1561 (2002).

17 *See, e.g.*, Erwin Chemerinksy, *Against Sovereign Immunity*, 53 STANFORD L. REV. 1201 (2001) (arguing that sovereign immunity is antithetical to our constitutional system); Don Mayer, *Sovereign Immunity and the Moral Community*, 2 BUS. ETHICS Q. 411 (1992) (arguing that sovereign immunity impairs the building of a strong moral and ethical community by reducing the accountability of government for its actions); Kenneth Culp Davis, *Sovereign Immunity Must Go*, 22 ADMIN. L. REV. 383 (1969).

18 Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529 (1992). *See also* Larson v. Domestic & Foreign Corp., 337 U.S. 682, 704 (1949).

Federal Tort Claims Act, the Tucker Act, the Contract Disputes Act, and the Administrative Procedure Act.[19]

The second type of immunity is immunity amongst sovereigns. For example, states within the United States (as quasi-sovereign entities) enjoy immunity from suit in United States federal court under the Eleventh Amendment and related common law.[20] That immunity, while complex, is not the subject of this Article.[21] This Article focuses on the implications of the immunity that exists amongst foreign, and not domestic, sovereigns.

Foreign sovereigns enjoy a kind of qualified immunity from suit in the U.S. federal and state courts. Under U.S. law, this immunity is based on the equality of sovereigns in the world, and on principles of comity,[22] but it is not something that the federal government is required to grant as of right to another sovereign.[23] The Supreme Court has noted that foreign sovereign immunity is a privilege and a "matter of grace and comity rather than a constitutional requirement."[24] Foreign sovereign immunity of this type has its basis in "common interests" amongst nations, as articulated by Justice John Marshall in the case of *Schooner*

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19 Courts may also find an implicit waiver of sovereign immunity, although the standard is high. *See, e.g.*, Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 243–44 (2d Cir. 1996); Princz v. Fed. Republic of Ger., 26 F.3d 1166, 1174 (D.C. Cir. 1994); Siderman de Blake v. Republic of Arg., 965 F.2d 699, 720–22 (9th Cir. 1992).

20 *See* Northern Ins. Co. v. Chatham County, 547 U.S. 189, 193–94 (2006) (describing the source and general contours of state sovereign immunity).

21 I would also classify tribal immunity as a type of sovereign versus sovereign immunity. *See, e.g.*, Kiowa Tribe v. Mfg. Techs., 523 U.S. 751, 754–55 (1998).

22 Philippines v. Pimentel, 553 U.S. 851, 865, (2008) ("The doctrine of foreign sovereign immunity has been recognized since early in the history of our Nation. It is premised upon the 'perfect equality and absolute independence of sovereigns, and th[e] common interest impelling them to mutual intercourse.'" (internal citations omitted)). "'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." Turner Entm't Co. v. Degeto Film GmbH, 25 F.3d 1512, 1519 (11th Cir. 1994) (quoting Hilton v. Guyot, 159 U.S. 113 (1895)).

23 "[C]omity in the legal sense [is] 'neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.'" Banco Nacional de Cuba v. Sabbatino Receiver, et al., 376 U.S. 398, 408–09 (1964) (quoting Hilton v. Guyot 159 U.S. 113, 163–64 (1895)) (The Supreme Court in Sabbatino noted that it is rare for foreign sovereigns to be denied the privilege of suing in U.S. court, unless we are at war with them.). *Id.* at 409–10.

24 Republic of Austria v. Altmann, 541 U.S. 677, 689 (2004).

Exchange v. McFaddon, which still serves as a reference to U.S. courts.[25] Today, however, foreign sovereign immunity has a more defined statutory basis under the Foreign Sovereign Immunities Act (FSIA).[26]

Under FSIA, with some exceptions such as in the case of state sponsors of terrorist activities and expropriation, foreign sovereigns primarily enjoy immunity for their public acts.[27] More specifically, under the current, and internationally accepted, theory of restrictive sovereign immunity codified in FSIA, foreign sovereigns may be sued when they act just as any other private party would in, for example, a commercial transaction connected to the United States. If FSIA does not provide for jurisdiction, a foreign sovereign is absolutely immune.[28] Nearly all of the Supreme Court opinions interpreting FSIA have emphasized that it is the exclusive means for obtaining both personal and subject matter jurisdiction over foreign sovereigns and their component entities.[29]

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25 Schooner Exch. v. McFaddon, 7 Cranch 116, 137 (1812). *See also*, Lee M. Caplan, *State Immunity, Human Rights, and* Jus Cogens*: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L L. 741, 745–48 (2003) (describing the origins in international law of state immunity from suit in the courts of another state as one rooted in the principles of state equality).

26 28 U.S.C. § 1602, et seq. (2010).

27 28 U.S.C § 1605.

28 28 U.S.C. § 1602.

29 *See, e.g.*, Permanent Mission of India to the U.N. v. City of New York, 551 U.S. 193, 197 (2007) (reinforcing that FSIA is the "sole basis" for obtaining jurisdiction over foreign sovereigns in U.S. courts); *Altmann*, 541 U.S. at 691 (describing FSIA as "a comprehensive statute containing a set of legal standards governing claims of immunity in every civil action against a foreign state.") (internal quotation marks omitted); Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993) ("The Foreign Sovereign Immunities Act provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country.") (internal quotation marks omitted); Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 610 (1992) ("The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. § 1602 *et seq*., establishes a comprehensive framework for determining whether a court in this country, state or federal, may exercise jurisdiction over a foreign state."); Arg. Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989) ("We think that the text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts."); Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 488 (1983) (stating that FSIA "contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities."). Despite this, a plaintiff must also satisfy the due process clause's requirements for personal jurisdiction, although this is typically the case wherein the plaintiff has alleged the adequate nexus between the commercial or tortious behavior covered by FSIA and the United States. Joseph F. Morrissey, *Simplifying the Foreign Sovereign Immunities Act: If Sovereign Acts Like a*

The third type of immunity is derivative sovereign immunity. This term, "derivative immunity," is sometimes used to describe immunity that private actors derive from sovereigns when acting in concert with them. I would argue, however, that it makes conceptual sense to use the term very broadly to describe any entity or person that receives sovereign immunity protection on the basis of some relationship to the sovereign. Therefore, although not the core sovereign entity, agencies, instrumentalities, political subdivisions, and majority owned corporations[30] of both the U.S. government and foreign governments derive immunity from their respective sovereigns. The same may be true for officials of the state.[31] In addition, contractors and private companies that work with the government and that effectively stand "in the shoes of the sovereign" may also derive sovereign immunity.[32] Because this derivative sovereign immunity is not viewed as inherent in the entity or person itself, determining under what circumstances if any an entity or person related to the sovereign qualifies has historically proven to be a dynamic and complex inquiry.

Immunity of individual government officials is a strong example of this complexity. Under English common law, and older U.S. precedents, officials were not entitled to sovereign immunity from suit.[33] This has changed and officials are now entitled to a spectrum of immunity depending on their rank or position, their status (current or former), and the capacity in which they are sued (personal or official).[34] Certain officials are treated as virtually inseparable from the sovereign itself, at least

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Private Party, Treat it Like One, 5 CHI. J. INT'L L. 675, 678–79 (Winter 2005) (discussing whether a court must also take into account due process demands on personal jurisdiction, despite FSIA framework of obtaining personal jurisdiction through a statutorily mandated form of service of process).

30 Dole Food Co. v. Patrickson, 538 U.S. 468, 477 (2003) ("A corporation is an instrumentality of a foreign state under the FSIA only if the foreign state itself owns a majority of the corporation's shares.").

31 *See, e.g.*, Guevara v. Republic of Peru, 468 F.3d 1289, 1305 (11th Cir. 2006) (noting that the immunity of officials of the state is derivative of state immunity).

32 *See, e.g.*, Al-Quraishi v. Nakhla, Civ. No.: PJM 08-1696, 2010 U.S. Dist LEXIS 76450, at *733 (D. Md. July 29, 2010) (discussing derivative sovereign immunity cases).

33 Jackson, *Suing the Federal Government*, *supra* note 15, at 525–26; DOERNBERG, *supra* note 11, at 77–78.

34 *Infra* Part II.A.2 text and accompanying notes.

while they are in office.[35] This category of inseparable officials includes certain heads of state.[36] These officials may be entitled to absolute immunity for their public acts while in office.

In the United States, under the Westfall Act, government officials are immune from state common law tort actions if the attorney general certifies that they were acting in the scope of their employment.[37] In other contexts, lower ranking federal officials enjoy qualified immunity. Although they cannot usually be sued in their official capacity as a pretext for suing the sovereign itself, [38] they can be sued in their personal capacity for serious violations of law, including grave violations of constitutional rights or federal law.[39] Both lower ranking federal and state officials can be sued in this personal capacity.[40] The Supreme Court's formulation of this common law doctrine of qualified immunity has changed from one that assessed official behavior from both subjective and objective points of view to an objective approach, such that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[41]

Foreign official immunity is more complex. As this Article will discuss, until recently the rule in the majority of the federal circuits that had considered the issue was that foreign officials received the same immunity from suit that foreign states did

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35 *Infra* Part II.C.2; Nixon v. Fitzgerald, 457 U.S. 731, 751 (1982) (President entitled to immunity for official acts).

36 *Infra* Part 3.A text and accompanying notes.

37 28 U.S.C. § 2679 (2011).

38 *Cf.* Osborn v. Haley, 549 U.S. 225, 229–30 (2007) ("The Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the Westfall Act, accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties. *See* 28 U.S.C. § 2679(b)(1). When a federal employee is sued for wrongful or negligent conduct, the Act empowers the Attorney General to certify that the employee 'was acting within the scope of his office or employment at the time of the incident out of which the claim arose.'"). *Infra* Part II.A.2.

39 *See, e.g.*, Ex Parte Young, 209 U.S. 123, 157–59 (1908).

40 *Infra* Part II.A.

41 Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The objective inquiry makes it easier for the court to dispose of the case on pretrial motion, as the subjective intent of an official making a discretionary judgment call frequently presents factual disputes not permissibly resolved on motions for summary judgment or other pretrial dispositive motions. *Id.* at 816.

under the FSIA.[42] FSIA's exclusivity as a statute led a majority of courts to declare that FSIA's definition of an agency or instrumentality of a foreign state could be read to include foreign officials in addition to the list of political subdivisions, agencies, state-run organizations and state-owned enterprises that find a more express basis in FSIA's text.[43]

The Second, Fifth, Sixth, Ninth, and District of Columbia circuits concluded that FSIA covered officials[44] because, as the Second Circuit noted, the state cannot act except through its agents.[45] But, the Seventh Circuit,[46] later joined by the Fourth Circuit,[47] espoused a minority view that FSIA's text and legislative history do not support coverage of individual foreign officials. Ultimately, the Supreme Court's recent decision in the case of *Samantar v. Yousuf* ended the battle and rejected the majority rule, concluding that foreign official immunity is not covered by FSIA and leaving its future in doubt. [48] After *Samantar*, foreign officials sued in their personal capacity must look to various common law doctrines for immunity.

Thus, the *Samantar* decision may have a significant impact on the interpretation of federal common law and on practice of transnational civil litigation in federal courts. Courts are beginning to grapple with these issues and the amount of scholarship on them is growing.[49] In order to ensure that suits

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42 *See, e.g.*, *In re* Terrorist Attacks on September 11, 2001, 538 F.3d 71, 84 (2d Cir. 2008) (listing cases from the other circuits supporting the rule that FSIA applies to foreign officials).

43 Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1101–03 (9th Cir. 1990).

44 Matar v. Dichter, 563 F.3d 9, 12 (2d Cir. 2009); Belhas v. Ya'alon, 515 F.3d 1279, 1284 (D.C. Cir. 2008); *In re Terrorist Attacks on September 11, 2001*, 538 F.3d at 81; Keller v. Cent. Bank of Nigeria, 277 F.3d 811, 815 (6th Cir. 2002); Byrd v. Corporacion Forestal y Indus. de Olancho S.A., 182 F.3d 380, 388 (5th Cir. 1999); Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan, 115 F.3d 1020, 1027 (D.C. Cir. 1997); Chuidian, 912 F.2d at 1101–03; *see also* Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah, 184 F. Supp. 2d 277, 286–87 (S.D.N.Y. 2001); Tannenbaum v. Rabin, 1996 WL 75283, at *2 (E.D.N.Y. Feb. 13, 1996); Bryks v. Canadian Broad. Corp., 906 F. Supp. 204, 210 (S.D.N.Y. 1995); Kline v. Kaneko, 685 F. Supp. 386, 389 n.1 (S.D.N.Y. 1988).

45 *In re* Terrorist Attacks on September 11, 2001, 538 F.3d 71, 84 (2d Cir. 2008).

46 Enahoro v. Abubakar, 408 F.3d 877, 881–82 (7th Cir. 2005).

47 Yousuf v. Samantar, 552 F.3d 371, 381–83 (4th Cir. 2009).

48 Samantar v. Yousuf, 130 S. Ct. 2278, 2292–93 (2010).

49 *E.g.*, *cf.* Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity and Domestic Officer Suits*, 13 GREEN BAG 2D 137 (2010). This Article argues that there are good justifications for dealing with foreign and domestic immunities for public officials so differently. *Id.* at 145–46. Specifically, they argue that U.S. courts should not attempt the same type of social balancing—vindication of clearly established law

against foreign officials are adjudicated in a principled and regularized way—the goals that FSIA was meant to effectuate—the situation now calls for a comprehensive solution.

This Article reviews the debate regarding official immunity that culminated in the *Samantar* decision, and argues, in contrast to other commentators,[50] that in civil human rights litigation involving foreign officials, federal courts should eschew analyzing these questions under other common law doctrines and—where a statute does not indicate otherwise and where a political question is not presented—draw heavily on guidance from the common law doctrine developed to determine questions of domestic official immunity for constitutional torts, primarily under 42 U.S.C. §1983.[51] This doctrine provides "qualified immunity" for officials so long as an official has not violated a "clearly established" law or constitutional right.[52] In comparison,

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to compensate victims and preservation of officials' abilities to exercise their discretion freely—when it comes to a suit against an official of a foreign nation that has a different political culture. *Id.* at 147–48. Permitting international human rights suits against foreign officials might put foreign governments in a position where they would feel compelled to indemnify foreign officials sued in the United States. *Id.* at 148–49. Furthermore, the Supreme Court and the federal courts are not in a position to determine whether or not international law is clearly established, such that a qualified immunity defense might apply—this is particularly so given that our Supreme Court's interpretations of international law are considered "idiosyncratic." *Id.* at 149–50. Finally, they argue that there are other (nonjudicial) channels to vindicate international law that better preserve our foreign relations with other regimes. I disagree that foreign and domestic immunity frameworks cannot serve the same ends for reasons set forth in Part II of this Article, but I do not take issue with the points above necessarily in the same order as they are presented here.

50 *Id.*

51 Other commentators have noted that domestic law on official immunity provides useful analogies. *See, e.g.*, Beth Stephens, *The Modern Common Law of Foreign Official Immunity*, 79 FORDHAM L. REV. 2669, 2686 (2011) ("Domestic immunity doctrines offer interesting insights, but are based on distinct constitutional foundation.").

Although the immunity of a sovereign may differ depending on where it is sued (i.e. domestically or in foreign courts) the principles guiding derivative immunity need not be so different when it comes to determining the degree of derivation of sovereign immunity for officials of varying ranks. *See also* Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2011 SUP. CT. REV. 213, 267-70 *available at* http://ssrn.com/abstract=1719707 (stating that human rights advocates will want to turn to 42 U.S.C. § 1983 principles in the wake of *Samantar*, but arguing that this is inappropriate because U.S. courts should not be deciding qualified immunity questions and making social judgments and tradeoffs that could influence foreign relations).

52 Pearson v. Callahan, 555 U.S. 223, 129 S. Ct. 808, 815–16 (2009).

under customary international law, there is support for the notion that an official may be liable even for acts committed while he was in office, if he acted in an illegitimate fashion that was in violation of international law.[53] But, there is little agreement as to the best framework for determining what acts in what circumstances disqualify the official for immunity.

The doctrine of qualified immunity furthers the role of sovereign immunity in preserving a sometimes awkward compromise—one that I argue is at the heart of this immunity generally—between preserving the authority of the state and the need for channels by which individuals can fight their aggressors when they are the victims of wrongful official behavior. The domestic framework, with slight modifications, permits the courts to conduct an intensive objective evaluation of the official's conduct under the circumstances, paying due attention to a balance between international human rights law and the domestic law of the official's home nation, through the lens of the civil rights principles embodied in U.S. federal law.

This Article will be divided into two additional sections. Section II discusses the circuit split leading up to the Supreme Court's decision and the history of the *Samantar* case itself, and it examines the implications of *Samantar* on future cases of foreign official immunity. Finally, section III proposes how courts could utilize the common law inquiry developed by the decisions of the Supreme Court in domestic constitutional tort cases and in the various circuit courts, with certain modifications, to determine whether foreign officials are entitled to qualified immunity from suit.

I
THE DEBATE OVER OFFICIAL IMMUNITY UNDER FSIA

A. The Circuit Split

Although the circuit court cases that analyzed the question of official immunity under FSIA are now water under the bridge, some of the sub-issues that they analyzed are not. A discussion of those cases *ex post facto* is useful to understanding why *Samantar* came out the way it did, what the *Samantar* decision did not analyze, and what concepts and approaches may prove useful to plaintiffs and defendants in the future. Importantly for this

53 *Infra* Part II.C.6.

discussion, the circuit court cases are peppered with citations to and concepts from § 1983 qualified immunity cases, which show that courts have found the analogy to the constitutional tort context useful in some respects.

The primary debate amongst the circuits concerned the scope and purposes of FSIA and what portion of the old patchwork of common law immunity doctrines Congress meant to codify in that statute. In determining whether FSIA applied, the Circuits, to different degrees, wrestled with three issues (1) what do the text and legislative history of FSIA support; (2) what did the common law provide for in terms of the relationship between the foreign state and the official in terms of immunity prior to Congress's enactment of FSIA; and (3) what decision would best effectuate the purposes of FSIA.

The cases involved in the circuit split involved both commercial and human rights claims. An example is the Ninth Circuit's decision in *Chuidian v. Philippine National Bank*, which concerned claims of the holder of a letter of credit, which the defendant Bank refused to honor, against an employee of the Bank (and an official) for tortious interference with contract.[54]

Plaintiffs in these cases typically brought the human rights claims pursuant to the Alien Tort Claims Act (ATCA), which states that "[t]he 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."[55] In addition, many of the plaintiffs also asserted claims under the Torture Victims Protection Act (TVPA), which states, in relevant part, that "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation—(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual[.]"[56]

The Seventh Circuit's decision in *Enahoro v. Abubakar* involved the claims of seven Nigerian citizens against a former Nigerian general and member of the ruling military junta for torture and extra-judicial killing under the ATCA and the TVPA.[57] In the Fourth Circuit's case, *Yousuf v. Samantar*, plaintiffs brought claims against the defendant, a former prime minister, vice president, and minister of defense in Somalia, under the ATCA and the TVPA

54 912 F.2d at 1097–98.

55 28 U.S.C. § 1350 (2010).

56 *Id.*

57 *Enahoro*, 408 F.3d at 880.

for torture and extra-judicial executions.[58] In the Second Circuit's decision, *In re Terrorist Attacks on September 11, 2001*, several plaintiffs who were injured by the terrorist attacks on September 11th filed tort actions under the ATCA, the TVPA, the Racketeer Influenced and Corrupt Organizations Act,[59] and the Antiterrorism Act[60] in the Southern District of New York against, *inter alia*, four princes of the Kingdom of Saudi Arabia.[61] The plaintiffs alleged that the princes had caused funds to be transferred to Muslim charities that, in turn, gave money to Al Qaeda.[62] The relevant complaints averred that the princes had arranged for donations from the Kingdom itself and from their own personal funds.[63]

In addition, in order to understand the debate more fully, some further background on the development of the concept of foreign sovereign immunity at common law leading to the enactment of the FSIA and the circuit split is important. In 1812—the time of the most famous case on sovereign immunity, *Schooner Exchange v. McFaddon*—the prevailing view was that sovereigns enjoyed absolute immunity from suit, except where they had consented.[64] Although the *Schooner* opinion suggested there were additional exceptions to sovereign immunity and even hinted at the paradigm that exists today wherein there is no sovereign immunity when a sovereign acts like any other private party, those dicta are not typically mentioned and the *Schooner* opinion "came to be regarded as extending virtually absolute immunity to foreign sovereigns."[65]

After *Schooner*, however, the courts gradually began to relax the idea of absolute immunity.[66] Until approximately the 1940s, the federal courts still made determinations of foreign sovereign

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58 *Yousuf*, 552 F.3d at 379.

59 18 U.S.C. § 1961 (2010).

60 18 U.S.C. § 2331 (2010).

61 *In re Terrorist Attacks on September 11, 2011*, 538 F.3d at 75–76.

62 *Id.*

63 *Id.* at 76–77.

64 HAROLD HONGJU KOH, TRANSNATIONAL LITIGATION IN UNITED STATES COURTS 108 (2008) [hereinafter KOH, TRANSNATIONAL LITIGATION].

65 Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 486 (1983).

66 JOSEPH W. DELLAPENNA, SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS 26 (2003) (discussing 19th century cases that appeared to reject the absolute theory of sovereign immunity).

immunity.[67] At that time, the courts began to defer to the judgment of the political departments of the executive, that is, the State Department. The oft-cited source of this trend is the case of *Ex Parte Peru*.[68] Although the relevant suits were filed in the courts, the courts would wait for a determination by the State Department regarding a foreign nation's or official's immunity and treat that determination as nearly conclusive.[69] This procedure still continues in some respects today.[70]

Ultimately, a two-step procedure developed under which the sovereign or its component—including officials—would apply to the State Department for a suggestion of immunity.[71] If the State Department issued such a suggestion, then the courts dismissed the case. If the State Department did not respond, however, then the court would make its own determination by examining State Department policies.[72] The State Department's policies and procedures to make these determinations were not always clear.[73] In 1952, however, the State Department determined that

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67 Republic of Mex. v. Hoffman, 324 U.S. 30, 34 (1945) ("[P]olicy recognized both by the Department of State and the courts that the national interests will be best served when controversies growing out of the judicial seizure of vessels of friendly foreign governments are adjusted through diplomatic channels rather than by the compulsion of judicial proceedings[.]"); *Ex parte* Republic of Peru, 318 U.S. 578, 589–90 (1943) (determination of executive on immunity is conclusive). *See also* William R. Dorsey, III, *Reflections on the Foreign Sovereign Immunities Act after Twenty Years*, 28 J. MAR. L. COM. 257, 259 (1997).

68 In the case of *Ex Parte* Peru, a ship belonging to the government of Peru was seized in conjunction with a civil action for failing to deliver sugar as agreed upon between a Peruvian company, acting on behalf of the Peruvian government and a Cuban company. 318 U.S. at 580. The Peruvian government intervened in the case, and, at the same time, the Peruvian ambassador filed a request for sovereign immunity with the State Department. *Id.* at 580–82. The State Department accepting the request for sovereign immunity applied to the attorney general and asked that it direct the appropriate U.S. attorney to file a suggestion of immunity in the district court. *Id.* In spite of the Department of State's suggestion of immunity, however, the district court ruled that Peru had waived its sovereign immunity by applying to the court for certain extensions of time. *Id.* The Supreme Court reversed and concluded that the district court was required to accept the State Department's suggestion of immunity as a conclusive determination of the political arm of government that further adjudication of the case would interfere with foreign relations. *Id.* at 589.

69 *Ex parte* Republic of Peru, 318 U.S. at 589.

70 Yousuf v. Samantar, 2007 U.S. Dist. LEXIS 56227, at *20–21 (E.D. Va. Aug. 1, 2007) (discussing failure of the State Department to file a statement of interest regarding the defendant).

71 Robert B. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 38–39 (1978).

72 KOH, TRANSNATIONAL LITIGATION, *supra* note 64, at 109.

73 *Id.* at 110.

it should adopt a "restrictive" approach to determinations of foreign sovereign immunity and thus aimed to confine its suggestions of immunity only to those cases that involved the public acts of the sovereign.[74] It issued a statement to this effect in what has come to be known as the "Tate Letter."[75] But, in the years that followed, the State Department's decisions were erratic and political considerations sometimes led the Department to file suggestions of immunity in cases where immunity would not have been available under the restrictive theory."[76] There is a paucity of precedent from this period, whether administrative or otherwise, on foreign official immunity.[77] As this Article will discuss later in more detail, the act of state doctrine—which prohibited suits in which courts were required to judge the validity of the act of another sovereign—shielded some officials from suit.[78]

The FSIA was enacted to create uniformity and predictability both for foreign states and for the private parties doing business with them. Since its enactment, the Supreme Court has been clear that FSIA is "the sole basis for obtaining jurisdiction over a foreign state in our courts," eclipsing all other jurisdictional statutes that might apply, including the ATCA.[79] Indeed, the text of FSIA strongly supports the Court's earlier assertion that its coverage is broad.[80] For example, the Act covers not only the sovereign itself (i.e., the "foreign state"), but also its "agenc[ies]

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74 Mehren, *supra* note 71, at 41.

75 *Id.* at 41–42. *See also* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 698 (1976) (stating that "[a]lthough it had other views in years gone by, in 1952, as evidenced by Appendix 2 (the Tate letter) attached to this opinion, the United States abandoned the absolute theory of sovereign immunity and embraced the restrictive view under which immunity in our courts should be granted only with respect to causes of action arising out of a foreign state's public or governmental actions and not with respect to those arising out of its commercial or proprietary actions. This has been the official policy of our Government since that time . . . " and annexing the Tate Letter thereto).

76 Altmann, 541 U.S. at 690–91.

77 Samantar v. Yousuf, 130 S. Ct. 2278, 2291 n.18 (2010) ("A study that attempted to gather all of the State Department decisions related to sovereign immunity from the adoption of the restrictive theory in 1952 to the enactment of the FSIA reveals only four decisions related to official immunity, and two related to head of state immunity, out of a total of 110 decisions.")

78 *See infra* Part II.C.4. text and accompanying notes.

79 Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 443 (1989) (concluding that the Alien Tort Claims Act does not provide independent jurisdiction, when an exception to FSIA does not apply).

80 DELLAPENNA, *supra* note 66, at 31–34 (discussing history and purposes of FSIA).

and instrumentalit[ies]" which are defined as "*any* entity" that is a "separate legal person" and is an organ of the foreign state or majority owned by the foreign state, and is *not* "a citizen" of any of the United States or created under the laws of a third country.[81]

1. FSIA's Text and Legislative History

The circuit and district courts debated the question of whether FSIA's definitions of "foreign state" and "agency or instrumentality" could be read to include individuals.[82] Courts that sought to include officials under FSIA appeared to struggle to find a textual basis to support their conclusion, because the definitions of both foreign state and agency or instrumentality seemed to refer only to entities.[83] Ultimately those courts determined that, while those definitions spoke in terms of entities and not individuals, the definitions were not exhaustive, and used the word "includes," which can be read to mean "including but not limited to" the items in a specific list.[84] Therefore, while FSIA did not expressly *include* officials, it did not expressly *exclude* them either.[85] The same logic applied to the legislative history of FSIA, which is replete with mentions of the entities that it covers, but does not make mention of any coverage for individual officials, except to say that diplomatic immunity would not be affected.[86] Therefore, while FSIA's legislative history did not explicitly mention individuals, it did not explicitly exclude them from the Act's coverage.[87] The "ambiguity" of the text and legislative history on these points prompted the courts to consider other factors that are discussed below.[88]

For the courts that ultimately concluded that FSIA did not cover individuals, the textual analysis was stronger. Again, Congress's use of words, such as political subdivision, agency, instrumentality, entity, legal person, and corporate, that are

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81 28 U.S.C. § 1603(a)–(b) (2010).

82 Chuidian v. Phillippine Nat'l Bank, 912 F.2d 1095, 1101 (9th Cir. 1990); *see also In re* Terrorist Attacks on September 11, 2001, 538 F.3d 71, 83–84 (2d Cir. 2008).

83 *Chuidian*, 912 F.2d at 1101–02.

84 *Chuidian*, 912 F.2d at 1101; *see also In re Terrorist Attacks on September 11, 2001*, 538 F.3d at 83.

85 *Chuidian*, 912 F.2d at 1101–02.

86 *In re Terrorist Attacks on September 11, 2001*, 538 F.3d at 83–84.

87 *Id.*

88 *Chuidian*, 912 F.2d at 1103; *see also In re Terrorist Attacks on September 11, 2001*, 538 F.3d at 85.

naturally read to include legal fictions such as entities and institutions, convinced these courts that there was no basis for including individuals.[89] One court drew an analogy that these terms in general corporate law parlance are meant to refer to "the fiction of corporate personhood."[90] Moreover, the courts noted that other parts of FSIA do explicitly reference individual officials.[91] Therefore, if Congress had wanted to include individual officials it would have done so explicitly in the terms that it used in other parts of the statute.[92] Regarding the legislative history, the minority courts noted the flipside of what the majority courts did: the House and Senate Reports only mentioned legal entities and did not explicitly include or exclude individual persons.[93]

2. Common Law Codified by FSIA

Finding little in FSIA's congressional legislative history, the courts examined the common law that existed prior to FSIA's enactment, which FSIA was meant to codify.[94] The court in *Chuidian* focused on the Restatement (Second) of Foreign Relations Law of the United States.[95] The Restatement Second stated that a "public minister" other than a head of state or foreign minister would be immune with respect to "acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state."[96] Because this immunity attached to their acts, and not their positions, it was a conduct-based immunity—at least one court noted this point,[97] which is important because it means that an official would receive immunity even after he loses the status that accompanies his position. The Ninth Circuit in *Chuidian* noted that once FSIA was enacted, however, the Restatement (Third) of Foreign Relations deleted the section on official immunity and

89 Enahoro v. Abubakar, 408 F.3d 877, 881–82 (7th Cir. 2005).

90 Yousuf v. Samantar, 552 F.3d 371, 379 (4th Cir. 2009).

91 *Id.* at 379–80.

92 *Id.*

93 *Id.* at 381.

94 Permanent Mission of India v. City of New York, 551 U.S. 193, 198 (2007).

95 Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1103 (9th Cir. 1990).

96 RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 66 (1965).

97 Matar v. Dichter, 563 F.3d 9, 13 (2d Cir. 2009).

replaced it with a section on FSIA itself.[98] The reasonable conclusion, particularly in light of the emphasis the Supreme Court has placed on the comprehensiveness of FSIA, was that FSIA had replaced and codified the derivative immunity of officials for official acts.[99]

The circuits analyzed whether the suit was an "official capacity" suit.[100] It is not clear from the opinions, however, what the courts considered an official capacity suit to mean—that is, whether it is defined by official acts, representative capacity, or remedies. The Seventh Circuit seemed to adopt an official-act - based definition of an official capacity suit. It noted that in contrast to an individual acting in his official capacity, a foreign official "being sued by a personal family employee [or a domestic servant] was not immune because he was not acting within the scope of his official duties" and would therefore not qualify for sovereign immunity.[101] Under this formulation, any suit containing allegations relating to official duties could conceivably be characterized as an official capacity suit.

Two other circuit decisions—those of the Ninth and the Second Circuits—also viewed suits against individual officials for official acts as inseparable from the legal entity of the sovereign itself.[102] The Second Circuit noted that it was an "evident principle" that the state cannot act except through individuals, and it borrowed from a line of reasoning from § 1983 constitutional tort cases in which suits against the agents of municipal corporations are against the entity itself when the agents were executing the official policy of the state.[103] Both the Second and the Ninth

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98 *Chuidian,* 912 F.2d at 1103–04. *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 451 (1990).

99 *In re* Terrorist Attacks on September 11, 2001, 538 F.3d 71, 83–84 (2d Cir. 2008).

100 *See, e.g.*, Enahoro v. Abubakar, 408 F.3d 877, 883 (7th Cir. 2005).

101 *Id*. at 882.

102 *Chuidian*, 912 F.2d at 1101 ("It is generally recognized that a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly.").

103 *In re Terrorist Attacks on September 11, 2001*, 538 F.3d at 85. Put differently, "municipalities and other bodies of local government are 'persons's within the meaning of [42 U.S.C. § 1983]. Such a body may therefore be sued meaning of this statute. Such a body may therefore be sued directly if it is alleged to have caused a constitutional tort through 'a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.'" St. Louis v. Praprotnik, 485 U.S. 112, 121 (1988) (quoting Monell v. N.Y. City Dept. of Soc. Servs., 436 U.S. 658, 690 (1978)).

Circuits cited *Monell v. Department of Social Services* for the proposition that "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent."[104] *Monell* overturned the holding in *Monroe v. Pape* that local municipal governments are not within the scope of § 1983, and therefore not liable under it.[105] This is an interesting case to cite from regarding the proposition that a suit against an official is essentially one against the state in the human rights context, because one cannot sue the local government on a *respondeat superior* theory of liability but rather must sue the local government based on the claim that its illegal policy deprived individual(s) of their constitutional rights.[106] If officials are named in the suit in their official capacity, then they are representing the state with the illegal policy.[107] So is the implication of the citation to the conception of official capacity in *Monnell* that these foreign officials accused of torture and other heinous acts were representing a foreign state with policies that support those actions?

The Second Circuit reviewed claims against the four Saudi princes in their official and personal capacities.[108] The distinction between those two claims rested on whether the princes were donating funds (which ultimately ended up with Al Qaeda) from their personal accounts (personal capacity) or from the Kingdom's treasury (official capacity).[109] If the terms personal and official capacity were used as they are in the § 1983 context, then the princes could be sued for supervising government donations in both their personal and official capacities; the difference would be in the conception of the relationship between the official and the state, and the source of the damages.

In the constitutional tort context, "personal-capacity suits seek to impose personal liability upon a government official for actions

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104 *In re Terrorist Attacks on September 11, 2001*, 538 F.3d at 85 (quoting *Monell*, 436 U.S. at 691 n.55).

105 *Monell*, 436 U.S. at 690.

106 *Id.* at 691–92.

107 *Id.* at 694–96.

108 *Id.* at 77–78.

109 *Id. See also In re Terrorist Attacks of September 11, 2001*, 392 F. Supp. 2d 539, 553 (S.D.N.Y. 2005) ("To the extent the allegations concern actions undertaken in their government positions, the Court finds that [the princes] are foreign states for FSIA purposes.").

he takes under the color of state law."[110] In a personal-capacity suit, the official is being sued because he or she has acted illegitimately, that is, in a way that is "constitutionally void."[111] And, the damages being sought in a personal-capacity suit come from the individual official's pockets.[112] If the state has a policy of indemnifying officials for these types of suits, that does not mean that the court is compelling damages from the state treasury for purposes of sovereign immunity.[113]

An officer's ostensible official acts—that is, acts taken "under color of law"—may properly be the substance of the allegations in a personal capacity suit, because "personal" refers to the capacity in which the officer "is sued" and "not the capacity in which the officer inflicts the alleged injury."[114] Any immunity that attaches to an official in a personal capacity suit for acts taken under the color of state law is conduct-based, meaning that it attaches to the conduct of the individual himself, whether a former[115] or current official, and not to his current status or position.[116]

An official-capacity suit is an action in which the official is named as a representative of the sovereign entity, and in which damages, for example, would come from the state's treasury and not the individual official. Sued in this capacity, the official is entitled to the same immunity as the sovereign entity itself, if

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110 Kentucky v. Graham, 473 U.S. 159, 165 (1985).

111 *See* Malone v. Bowdoin, 369 U.S. 643, 647–48 (1962) (seeking to resolve a debate brought on by two contrary lines of decisions in which officers of the United States could be sued for acting under color of law without incurring the consequences of the sovereign immunity of the federal government itself); *see also* Sanchez-Espinoza v. Reagan, 770 F.2d 202, 207 (D.C. Cir. 1985).

112 *See* Hafer v. Melo, 502 U.S. 21, 30–31 (1991). *See also* MARTIN A. SCHWARTZ & KATHRYN R. URBONYA, SECTION 1983 LITIGATION 127–28 (2d ed. 2008) (noting that in personal capacity suits the damages come from the official's "personal funds" and that even if the state decides to indemnify the official then that is the state's choice and does not generate sovereign immunity).

113 SCHWARTZ & URBONYA, SECTION 1983 LITIGATION, *supra* note 112 at 128 (citing Stoner v. Wis. Dep't of Agric., 50 F.3d 481, 482–83 (7th Cir. 1995)) ("The fact that the state agreed to indemnify the state official for a personal capacity monetary judgment does not create Eleventh Amendment immunity because the decision to indemnify is a voluntary policy of the state government; it is not compelled by mandate of the federal court.").

114 *Hafer*, 502 U.S. at 26.

115 *See, e.g.*, Price v. Hawaii, 921 F.2d 950, 958–59 (9th Cir. 1990).

116 *See Hafer*, 502 U.S. at 30.

any.[117] It has become axiomatic that official capacity suits of this character are essentially suits against the sovereign itself.[118] Because the official is essentially representing the sovereign, when that official dies or is replaced, then the successor in that position will automatically assume his role in the litigation.[119]

Finally, there is another type of suit that a plaintiff brings against an individual who only coincidentally happens to be a current or former official, and the suit alleges no public/official-act connection, but rather seeks liability for the private acts.[120] In most cases of this type no immunity should attach.[121]

The circuit courts cited to the case law associated with official-capacity suits under 42 U.S.C. § 1983, but they did not make full use of it in reasoning through the cases on FSIA and foreign official immunity. Instead, the circuit courts treated the suits as official-capacity suits because they were predicated on conduct that the official undertook in relation to his job. Therefore, it would also be safe to presume under this formulation that, if the state or instrumentality that employed the official would not have immunity under the exceptions in 28 U.S.C. § 1605 of the FSIA, then there is no immunity for the official to derive from the state,[122] and courts would have to handle cases of this type according to principles of agency, corporate, civil procedure,[123] or general commercial law that permit individuals to be separated from entities for purposes of damages.[124]

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117 Such as state officials in the United States, for example, protected under the State government's sovereign immunity as bestowed by the Eleventh Amendment in this type of suit.

118 *In re* Terrorist Attacks on September 11, 2001, 538 F.3d 71, 84 (2d Cir. 2008) (citing Monell v. N.Y. City Dept. of Soc. Servs., 436 U.S. 658, 691 n.55 (1978)). *See also* Printz v. United States, 521 U.S. 898, 930–31 (1997) (same proposition).

119 *Hafer*, 502 U.S. at 30–31.

120 Park v. Shin, 313 F.3d 1138, 1142 (9th Cir. 2002).

121 *Id.*

122 Guevara v. Republic of Peru, 468 F.3d 1289, 1305 (11th Cir. 2006).

123 *See infra* Part II.C.5. text and accompanying notes (discussing suits in which the case against an individual official must be dismissed because it would prejudice the necessary party of the immune sovereign itself).

124 This inquiry can be difficult. *See* First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba, 462 U.S. 611, 622 (1983) ("[W]here state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances. The statute is silent, however, concerning the rule governing the attribution of liability among entities of a foreign state."), *superseded in part by statute*, Terrorism Risk Insurance Act, 28 U.S.C. § 1610, *as stated in*, Weinstein v. Islamic Republic of Iran, 609 F.3d 43, 51 (2d Cir. 2010). The Court in *Banco Para El Comercio Exterior De Cuba* concluded, under principles of

3. Effectuating the Purposes of FSIA

The circuits analyzed implications of suing an official in terms of the broader context of foreign sovereign immunity, and for the majority-rule courts this consideration seemed to be significant in their decision to include officials in FSIA. More specifically, the courts analyzed whether the suit against the official was tantamount to a suit against the state itself and thereby damaging of the immunity conferred on the state by the FSIA.[125] Or, rather, the courts asked when the individual official can be separated from the state for purposes of suit? For the majority rule courts, the effects of excluding officials from coverage of FSIA produced results that would unduly frustrate the congressional purpose. The Ninth Circuit stated:

> [W]e cannot infer that Congress, in passing the [FSIA], intended to allow unrestricted suits against individual foreign officials acting in their official capacities. Such a result would amount to a blanket abrogation of foreign sovereign immunity by allowing litigants to accomplish indirectly what the Act barred them from doing directly. It would be illogical to conclude that Congress would have enacted such a sweeping alteration of existing law implicitly and without comment. Moreover, such an interpretation would defeat the purposes of the Act: the statute was intended as a comprehensive codification of immunity and its exceptions. The rule that foreign states can be sued only pursuant to the specific provisions of sections 1605-07 would be vitiated if litigants could avoid immunity simply by recasting the form of their pleadings.[126]

Separation of the individual from the state for purposes of suit has historically been a subject of debate in U.S. courts. Nineteenth century decisions of the federal courts show that citizens often pled suits against individual officers of the U.S. government in order to avoid sovereign immunity and to seek redress for a

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international law and federal common law that foreign states and their instrumentalities are juridically distinct entities for purposes of liability, but that this presumption could be overcome if a requisite degree of control was shown or if the circumstances involved fraud. *Banco Para El Comercio Exterior De Cuba*, 462 U.S. at 622–23. For the Court in *Banco Para El Comercio Exterior De Cuba* the law of the place of incorporation could not be applied because, in that case, the government had already dissolved the corporation to escape liability, and the application of internal law would permit the nation—i.e., Cuba—to avoid the obligations of international law with impunity. *Id.* at 623–24. *See also* Oveissi v. Islamic Republic of Iran, 573 F.3d 835, 841 (D.C. Cir. 2009) (same proposition); DELLAPENNA, *supra* note 66, at § 8.1 (agreeing that choice of law questions under FSIA are complex, to say the least).

125 *In re* Terrorist Attacks on September 11, 2001, 538 F.3d 71, 85 (2d Cir. 2008).

126 Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1102 (9th Cir. 1990).

variety of wrongs, such as disputes over government payments, uncompensated takings of land, and unlawful seizures of movable chattels.[127] Courts permitted these suits to proceed, provided that the United States itself was not named as a defendant, in order to alleviate the tension between the tradition of granting the sovereign immunity from suit and the need to provide common law avenues for individuals to seek relief in their disputes with the State.[128]

Courts gradually stopped using this line of decisions as the federal government set in place institutions, such as the federal Court of Claims, and statutory mechanisms for bringing suits against it.[129] Accordingly, courts increasingly barred suits against specific federal officers based on the doctrine of sovereign immunity.[130]

In addition, the idea that individuals can be an extension of the sovereign state finds support in the definition of the nation state under the U.N. Convention on Jurisdictional Immunities of States and Their Property.[131] As one commentator has remarked "The UN Convention . . . treats an individual whose acts can be identified as those of a foreign State as coming within the definition of a State. State immunity is extended to a person who performs an act on behalf of the State to prevent proceedings which indirectly implead the foreign State, where the State would have enjoyed immunity had the proceedings been brought against it."[132]

Despite this, the court in *Chuidian* went on to conclude that if any official acted outside the legal mandate of his authority, then he would not be part of the state and would not be part of FSIA.

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127 Jackson, *supra* note 15, at 534.

128 *Id.* at 534 ("[T]he disruptive potential of the conceptual tensions surrounding the idea of sovereign immunity was mitigated in the early years by its coexistence with traditions of specific relief against individual officers, of both state and federal governments."). *See also, e.g.*, United State v. Lee, 106 U.S. 196 (1882).

129 Jackson, *supra* note 15, at 561–63.

130 *Id.* at 567 ("Whereas in the early nineteenth century remedies against individual officers were a predominant mode of judicial redress and accountability (and remain so for state officers), today remedies against individual federal officers are often precluded, and the only remedy is against the government."). *See also* Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612 (1997) (describing the availability of non-statutory review of official action under the sovereign immunity waiver of the APA).

131 HAZEL FOX, THE LAW OF STATE IMMUNITY 457 (2d ed. 2008).

132 *Id.* at 455–56.

The question of whether particular acts should be attributed or identified with the state is difficult, and the following sections will deal with that issue in more detail.[133]

4. Tangential Debate Over Conduct and Status–Based Immunities for Former Officials

Another more narrow debate emerged in the circuit decisions leading up to the Supreme Court's *Samantar* decision: even if FSIA covered officials, did it cover *former* officials? This debate relates somewhat to the Supreme Court's decision in *Dole Foods v. Patrickson.* In *Dole Foods* the Court determined that in order to receive FSIA immunity as a majority owned instrumentality of a foreign state the instrumentality had to be majority owned by the sovereign at the time of the suit in question, rather than at the time of the allegedly improper conduct.[134] The defendant thus must have the *status* of a state-owned corporation.[135] Similarly, the Fourth Circuit's decision in *Yousuf v. Samantar* concluded, as a backstop to its holding that FSIA did not apply to individuals, that the defendant (and former Somalian official) Muhamed Samantar would, in any event, not qualify because he was a former official at the time of the suit and therefore did not hold the required status for FSIA immunity to apply.[136] In support of the counter position, Samantar's lawyers argued, before the Supreme Court, that the *Dole Foods* decision only applied to agencies or instrumentalities of foreign states and not the foreign state itself, of which Samantar was a part, or that it could be limited to state owned corporations.[137] Consequently, they argued, former officials would not lose immunity under FSIA when they left office because their immunity emanates directly from the foreign state.[138]

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133 Mizushima Tomonori, *The Individual as the Beneficiary of State Immunity: Problems of the Attribution of Ultra Vires Conduct*, 29 DENV. J. INT'L L. & POL'Y 261 (2001). *See also* Jones v. Saudi Arabia, [2006] UKHL 26, [30], [2007] 1 A.C. 270, 290 (appeal taken from England) ("A state can only act through servants and agents; their official acts are the acts of the state; and the state's immunity in respect of them is fundamental to the principle of state immunity.").

134 538 U.S. 468, 480 (1993).

135 *Id*. at 479–80.

136 Samantar, 552 F.3d at 381–82.

137 Brief of the Petitioner at 9, Samatar v. Yousuf 2008 U.S. Briefs 1555 at *19.

138 Brief for Petitioner at 20, Samantar v. Yousuf 130 S. Ct. 2278 (2010) (No. 08-1555) [hereinafter Petitioner's Brief].

In dictum in another case, the D.C. Court of Appeals disagreed with the Fourth Circuit. In *Belhas v. Moshe Ya'lon*, the plaintiff brought suit against a former Israeli general under the ATCA and the TVPA for targeting civilians during the shelling of a village where a United Nations compound was located in southern Lebanon.[139] The D.C. Circuit ultimately dismissed the case on other grounds but noted that the fact that the defendant was a former official did not mean that he was not entitled to sovereign immunity.[140] According to the court, FSIA codified the common law of official immunity that granted conduct-based immunity to officials for their official acts on behalf of the state.[141] To hold a former official liable for official acts would be contrary to this immunity and to the purposes of foreign sovereign immunity generally, because foreign sovereign immunity exists to free states from the inconvenience of suit in a foreign court—particularly a suit that would allow that court to "micromanage" its military decisions.[142]

The circuit court decisions (and the parties' arguments that shaped them) enunciated a number of points of statutory interpretation and common law doctrines that found their way into the Supreme Court's decision in *Samantar.* Indeed, as the sections below will show and post-*Samantar* commentary has argued,[143] these issues of, for example, personal capacity versus official capacity and conduct-based versus status-based immunities will likely continue to be relevant as the lower courts determine what non-FSIA immunity applies to foreign officials

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139 515 F.3d 1279, 1285–86 (D.C. Cir. 2008).

140 *Id.*

141 *Id.*

142 *Id.*

143 Professor Keitner argues that status-based immunities apply only when the individual holds a certain position, and conduct based immunities attach to the acts of an official and remain even when the position is gone. *See* Chimene I. Keitner, *The Common Law of Foreign Official Immunity*, 14 GREEN BAG 2D 61, 63 (2010). She argues that the distinction has been confused in some U.S. case law, but should be revived and utilized going forward. *Id*. at 63, 69–70. In terms of analyzing an individual official's acts, Professor Keitner sees three formulations. *Id*. An individual official may perform acts that are purely private, purely public, and acts—resulting in individual responsibility under international law, such as genocide and war crimes—that are neither purely public nor purely private. *Id*. at 68–69. Whether an individual official is entitled to conduct-based immunity for these acts falling into the third category may depend on the remedy sought and whether its effect would be to enforce a rule against the state—a standard articulated by the Restatement Second of Foreign Relations. *Id*. at 69–70.

and in what contexts. The next Section discusses the Supreme Court's viewpoint, and the significance of its viewpoint, on the issues discussed above.[144]

B. The Samantar *Decision*

The *Samantar* decision ended the circuit split over FSIA's coverage of individual officials, and has left the determination of foreign official immunity under the common law in a state of doubt.[145] The court's decision will likely have a significant impact on pending and future cases in this area of the law, and may increase the number of international human rights-based law suits that foreign plaintiffs file in federal court each year. Despite the size of its impact, the decision itself is remarkably short and general. It does not discuss the extensive amounts of U.S. and international cases potentially related to foreign official immunity that the parties cited in their briefs; indeed, it does not mention a single international law decision. Like the circuit decisions, the *Samantar* opinion essentially offers three relevant analytical parts: (1) the textual and legislative history analysis of the phrases "foreign state" and "agency or instrumentality" under FSIA, (2) a discussion of the evolution of the common law prior to FSIA, and (3) hints about the future of suits against foreign officials under the common law.

The Court's opinion provides some, but not a great deal, of factual and procedural background on the dispute and the disposition of the case before the district court and the court of appeals. For purposes of this discussion and the discussion that follows as to how this Article proposes that similar suits are handled in the future, some additional background from the

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144 Several commentators also supported the rule of the majority of circuit courts that applied FSIA to foreign officials before the Supreme Court's decision. Their rationale was essentially this interpretation of FSIA provided a comprehensive solution to the problem of official immunity, despite the fact that it would clearly narrow the scope of human rights litigation in the federal courts. *See, e.g.*, Curtis A. Bradley and Jack L. Goldsmith, *Foreign Sovereign Immunity, Individual Officials, and Human Rights Litigation*, 13 GREEN BAG 2D 9, 22–23 (2009); Lila Kanovsky, *Better Never than Late: Why Yousuf v. Samantar Should be Overturned by the Supreme Court* (Working Paper, 2009), *available at* http://SSRN.com/abstract=1519491; Working Group of the American Bar Association, *Report: Reforming the Foreign Sovereign Immunities Act*, 40 COLUM. J. TRANSNAT'L L. 489, 537–41 (2002).

145 Peter Rutledge, *Thoughts on Samantar*, OPINIO JURIS 9 (June 4, 2010, 9:12 PM), http://opiniojuris.org/2010/06/04/thoughts-on-samantar.

factual record and analysis of the lower court decisions and the general history of the dispute may be useful.

Somalia gained independence from colonial powers and became a sovereign nation-state in or about 1960. [146] The resulting state adopted a constitution that "pledged respect for internationally recognized human rights" and "provided for an independent judiciary, incorporating elements of British, Italian, and Shar'ia legal codes."[147] Article 6 of the 1963 Constitution pledges acceptance of international law and mandates that international law and international treaties have the force of law.[148] In addition, Article 7 of the 1963 Constitution states, "[t]he laws of the Somali Republic shall comply, in so far as applicable, with the principles of the Universal Declaration 0£ [*sic*] Human Rights adopted by the General Assembly of the United Nations on 10 December 1948." Another constitution adopted in 1979 also pledged support for human rights.[149]

By 1969, a military coup d'état installed Mohamed Siad Barre, who would later turn out to be a ruthless dictator, as the president.[150] The Siad Barre regime would control Somalia for over twenty years, from 1970 through 1991, until opposition militias ultimately overthrew it.[151] The regime ignored the principles it ascribed to in its constitution in favor of a system of widespread oppression of minority groups and political opponents, increasingly employing "arrests, detentions, and executions" to suppress dissent.[152] The plaintiffs in the case against Muhamed Ali Samantar, the former first vice president, prime minister, and minister of defense under the Barre regime, alleged that they or their family members were tortured or executed without judicial process during the 1980s while Samantar was in power.[153] The Barre regime ultimately collapsed

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146 Brief of *Amici Curiae* Academic Experts in Somali History and Current Affairs in Support of Respondents at 6 Samantar v. Yousuf, 130 S. Ct. 2278 (2010) (No. 08-1555) [hereinafter Somali History Brief].

147 *Id.* at 6–7.

148 CONST.OF SOM., http://www.somalilaw.org/Documents/Constitution1960.pdf (last visited Mar. 27, 2011).

149 Somali History Brief, *supra* note 146 at 17, n.17.

150 *Id*. at 7.

151 *Id.* at 19.

152 *Id.* at 7–19.

153 Brief for the Respondents at 3 Samantar v. Yousuf, 130 S. Ct. 2278 (2010) (No. 08-1555) [hereinafter Brief for the Respondents].

in 1991 and its leaders fled Somalia. Samantar ultimately settled in the United States in Virginia.[154]

Since the fall of the Barre regime, Somalia has ceased to exist as the state it was in the 1960s.[155] The northern part of former Somalia has essentially seceded and become The Republic of Somaliland, which is a relatively stable state with a working government.[156] Although Somaliland is not yet formally recognized by most nations, including the United States, its governmental officers have paid visits to the United States and met with U.S. federal officials.[157] In the south and central parts of the former Somalia, an independent state is also growing, called the Puntland State of Somalia.[158] The United States does not recognize this entity either, but Puntland State of Somalia has become an increasingly stable self-governing unit.[159] Southern and central Somalia meanwhile have fallen into chaos.[160] A governing body called the Transitional Federal Government is the fifteenth *attempt* at recreating a government in Somalia.[161] Currently the TFG controls only a fraction of the capital city of Mogadishu.[162] Somalia, ostensibly under the rule of the TFG, does not enjoy formal U.S. recognition, although Samantar's lawyers asserted that it does. [163] Despite a lack of international recognition of these different governments in the area formerly known as Somalia, the general debate about FSIA's coverage of officials in the *Samantar* case was more prominent than any discussion of resolving the case on the basis that Samantar could not obtain immunity from a sovereign that no longer exists. One reason for this approach might be forcing a court to resolve a

154 Samantar, 552 F.3d at 374.

155 Somali History Brief, *supra* note 146, at 19–21.

156 *Id.* at 24.

157 *Id.*

158 *Id.* at 28.

159 *Id.* at 29–30.

160 *Id.*

161 Somali History Brief, *supra* note 146, at 20.

162 *Id.*

163 Petitioner's Brief, *supra* note 138 at 8. *But see*, Somali History Brief, *supra* note 146, at 4 ("*Amici* note that, in the case at Bar, Petitioner has made certain representations concerning the recent history and current status of Somalia that are inconsistent with their own observations and understanding of the facts on the ground in that country. In particular, Petitioner suggests . . . that the Transitional Federal Government of Somalia ("TFG") is currently a functioning government that administers the territory of Somalia, provides services to its citizens, and has received the official recognition of the United States.").

potentially even more complicated question regarding what attributes constitute a state for purposes of sovereign immunity.

It was against this background that the plaintiffs, two named individuals and two who chose to remain anonymous, filed a sealed complaint in the U.S. District Court for the Eastern District of Virginia against Muhamed Samantar. The complaint alleged that Samantar, as an official in the Barre regime, had presided over individuals engaged in acts of torture and extrajudicial killing against the plaintiffs and their families in violation of the Alien Tort Claims Act[164] and the Torture Victims Protection Act.[165]

The defendant filed a motion to dismiss for lack of personal and subject matter jurisdiction. The district court subsequently stayed the proceedings pending a determination from the State Department on the entitlement of the defendant to sovereign immunity.[166] Receiving no response from the State Department after several years, the district court reinstated the case and ultimately dismissed the plaintiffs' Second Amended Complaint because the court concluded, in accordance with the majority view of official immunity under FSIA, that it lacked subject matter jurisdiction over the defendant.[167] The Fourth Circuit reversed.[168] It concluded that the text of FSIA lent no support for inclusion of governmental officials in the definitions of a foreign state and agency or instrumentality of a foreign state in 28 U.S.C. § 1603.[169]

The Supreme Court affirmed. In a short decision, the court rejected the view of the majority of the federal courts of appeals and concluded that the text and legislative history of the FSIA did not support the inclusion of foreign governmental officials within its coverage. Writing for a unanimous court on this issue, Justice Stevens, who notably has been an opponent of the expansion of sovereign immunity,[170] began by summarizing the development

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164 28 U.S.C. § 1350 (2010) ("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.").

165 Complaint at ¶¶ 94–118 Samantur v. Yousuf, No. 1:04 CV 1360 (E. D. Va. Aug. 1, 2007); *see also* Brief for the Respondents, *supra* note 153, at 6.

166 Samantar v. Yousuf, 2007 U.S. Dist. LEXIS 56227, at *20–21 (E.D. Va. Aug. 1, 2007).

167 *Id.*

168 Yousuf v. Samantar, 552 F.3d 371, 384 (4th Cir. 2009).

169 *Id.*

170 *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44, 93 (1996) (Stevens, J., dissenting) (identifying "the questionable heritage of the doctrine [of sovereign

of the doctrine of foreign sovereign immunity from a common law concept to a privileged granted (somewhat arbitrarily) by the State Department, and finally to an element of a statutory regime under the FSIA.[171]

Moving to a textual analysis, Justice Stevens analyzed the case in a manner similar to the Seventh and Fourth Circuits' analysis. He concluded that the definition of "agency or instrumentality" of a foreign state is not susceptible to a reading that included *natural,* as opposed to corporate, legal persons.[172] Furthermore, he concluded that a natural person, that is an official, could also not be included in the definition of foreign state itself, because the list of legal persons illustrative of the components of a foreign state also consisted of all corporate entities.[173] And, no provisions in the FSIA suggest officials are meant to be included within the definition of agency or instrumentality.[174] In addition, if the court were forced to choose whether officials were part of a foreign state or an agency or instrumentality of a foreign state, then it would be making an arbitrary choice that would have an arbitrary consequence vis-à-vis FSIA's application to officials.[175] The court concluded that the legislative history provided no support for the inclusion of officials in FSIA's legislative history and purpose.[176]

Justice Stevens touched upon the common law that existed prior to Congress's enactment of FSIA. He noted, first, that there were few cases concerning the immunity of foreign officials prior to the enactment of FSIA, and therefore, it was reasonable to conclude Congress did not view these types of suits as a problem the FSIA was meant to resolve.[177] And, second, even in the few cases that there were, official and state immunity could be treated separately.[178]

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immunity] and [suggesting] that there are valid reasons for limiting, or even rejecting that doctrine altogether, rather than expanding it").

171 Samantar v. Yousuf, 130 S. Ct. 2278, 2284–85 (2010).

172 *Id.* at 2284–87.

173 *Id.*

174 *Id*.

175 *Id.* at 2287–89.

176 *Id.* at 2290–91 (Justice Stevens's analysis focused mainly on the purpose of codifying the common law and, in light of that purpose, it was clear that Congress was not thinking in terms of individuals because the common law was so concerned with entities.).

177 *Id.* at 2290.

178 *Id.*

But, the Court did not stop with FSIA. Rather, the Court continued to discuss various concepts not necessarily related to the statutory interpretation question. It suggested that litigants might resort to the "common law" for immunity, as well as perhaps the State Department's intervention, the act of state doctrine, and other civil procedure doctrines such as Rule 19 and personal jurisdiction for defenses. It also suggested that the distinction between official and personal capacity suits would be relevant in future common law determinations.[179] The Court concluded that there would be "some circumstances [in which] the immunity of the foreign state extends to an individual for acts taken in his *official capacity*."[180] But, although it cited to them, the Court did not seem to endorse expressly the formulation of the Restatement Second.[181] More interestingly, continuing with a trend that commentators have noted of citing domestic sovereign immunity cases in the context of foreign sovereign immunity cases,[182] the Supreme Court cited *Kentucky v. Graham*, a Section 1983 cases that made the distinction between personal and official capacity cases clearer.[183] This might suggest that Section 1983 jurisprudence could become more meaningful in international cases. Under the Court's reasoning, although all official capacity cases might be essentially against the state, certainly this case, in which the plaintiffs sued Samantar "in his personal capacity and seek damages from his own pockets," is not a suit against a foreign state as FSIA defines that term.[184]

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179 *Id.* at 2290–91.

180 *Id.* (emphasis added).

181 *Id.* at 2291, n.16.

182 Katherine Florey, *Sovereign Immunity's Penumbras: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 769–70 (2008) ("On a theoretical level, all [forms of sovereign immunity] derive from the common notion that limited amenability to suit (with the question of how far those limits extend being, of course, a subject of debate) is an inherent attribute of sovereignty. Moreover, as a practical matter, courts often speak of the various immunities interchangeably, relying on cases discussing one sort of immunity as authority in a case about another. As a result, more often than not, core aspects of the doctrines have developed in tandem. Precisely because this process of mutual influence is often overlooked, it is an important element in any attempt at a comprehensive understanding of sovereign immunity's development.").

183 *Samantar*, 130 S. Ct. at 2291.

184 *Id.* at 2292.

C. Implications of the Samantar *Decision*

Through his reference to the "common law" Justice Stevens implies that there might be some immunity left for officials like Samantar. The court did not propose to do away with official immunity altogether in these cases. Such a proposal would not be unheard of, though. As discussed above, there is a body of scholarly literature calling for the abolishment of sovereign immunity at least in the domestic context.

This section examines the remaining avenues for foreign official immunity using Muhamed Samantar's case as a reference. There is head of state immunity, which protects sitting heads of state. There are suggestions of immunity offered by the State Department, to which a court may defer in order to avoid making its own determination, and there is the act of state doctrine, which provides a defense on the merits. Finally there is the potential for customary international law to inform federal common law as to whether an official can seek immunity. All of these doctrines might play a role in determining foreign official immunity, in addition to certain statutory and treaty-based diplomatic or consular immunities.

1. Common Law of Executive-Deference

Prior to the *Samantar* decision, at least one circuit had the occasion to decide what immunity under the "common law" could mean for a former official. In *Matar v. Dichter*, individual plaintiffs brought a civil complaint against a former director of the Israeli Security Agency for violating international law by injuring the plaintiffs or killing their relatives during Israel's bombing of an apartment complex in the Gaza strip.[185] The bombing was designed to kill Hamas leader Saleh Mustafah.[186] Plaintiffs brought claims under both the ATCA and the TVPA.[187] The Israeli government wrote to the State Department asserting that the defendant was acting in the course of his official duties and should therefore be declared immune.[188] The State Department then issued a memorandum supporting immunity for the defendant.[189] The district court concluded that the defendant was

185 Matar v. Dichter, 563 F.3d 9, 10–11 (2d Cir. 2009).

186 *Id.*

187 *Id*. at 11; Matar v. Dichter, 500 F. Supp. 2d 284, 286 (S.D.N.Y. 2007).

188 Matar, 500 F. Supp. 2d at 286.

189 *Id*. at 287.

entitled to immunity under FSIA or, alternatively, the allegations in the complaint framed a non-justiciable political question.[190]

The Second Circuit affirmed.[191] It acknowledged that decisions by the D.C. Circuit and the Fourth Circuit had concluded that former officials were not covered by FSIA.[192] But, the court declined to conclusively answer that question because, even if a former official were not covered by FSIA, in this case the defendant was eligible for immunity under the common law.[193] Beginning its analysis under the common law, the court noted that under the Restatement (Second) of Foreign Relations, which existed before FSIA, a foreign official was entitled to immunity based on acts performed in the course of his duties.[194] Because this immunity attached to acts, and not status, a former official could be entitled to immunity.[195] Thus, in principle, the court determined that a former official could be entitled to common law immunity.[196] Ultimately the court concluded the common law principle of deference to the suggestions of the executive, which pre-dated FSIA, was the applicable common law and, therefore, the defendant was entitled to immunity because the State Department had filed a suggestion of immunity on his behalf.[197] This holding, said the court, was in accordance with the tenet of foreign sovereign immunity that these types of cases presented questions of "policy" rather than law and, thus, are more "for diplomatic rather than legal discussion."[198]

The Supreme Court might support a similar policy of executive deference in future cases. The Court implicated this position when it stated in *Samantar*, "We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity."[199] The amicus brief of the United States, which the Court's decision appears to follow closely in

190 Matar, 563 F.3d at 12–13.
191 *Id*. at 15.
192 *Id.* at 13.
193 *Id*. at 14.
194 *Id.* at 13–14.
195 *Id.* at 14.
196 *Id.*
197 *Id.*
198 *Id.* at 10 (citing Schooner Exchange v. McFaddon, 11 U.S. 116, 146 (1812)).
199 Samantar v. Yousuf, 130 S. Ct. 2278, 2290 (2010).

some respects, argued for this approach.[200] Moreover, other prior Supreme Court decisions illustrate a view as stated in *Schooner Exchange* that the executive retains some prerogative to take away the immunity of a foreign state or its components based on foreign policy concerns. For example, in a recent case regarding the President's power to waive Iraq's liability under the FSIA's terrorism exception, the Court emphasized in passing the appropriateness of the executive's role in determining foreign sovereign immunity because the doctrine reflects "current political realities" and its "availability (or lack thereof) is not something on which the parties can rely in shaping their primary conduct."[201] This sentiment echoes from *Republic of Austria v. Altmann*, from which the above language is quoted and in which Justice Stevens made it clear that, even when FSIA does apply, the State Department is free to offer its views via a suggestion of immunity and the court can accord those views particular weight as the considered judgment of the executive branch.[202] Indeed, Justice Stevens notes that historically "foreign sovereigns have no right to immunity in our courts."[203]

Given this authority, courts following *Samantar* may indeed follow the analysis of the court in *Matar*, under which deference to the State Department's determination *is* the common law. If foreign sovereigns have no right to immunity, it would seem odd to grant their officials any kind of derivative immunity as a matter of right.

If the process that existed prior to the enactment of FSIA was to resume control, the State Department would presumably make a determination as to the immunity of an official, according to the principles of restrictive immunity that it announced in the Tate Letter.[204] If the State Department denies immunity, then courts will hear the case, and if it grants immunity then the court must dismiss it.[205] If, however, there is no opinion as to immunity from the State Department, courts may make their own independent determination, but they must do so in accordance with the

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200 Brief for the United States as Amicus Curiae Supporting Affirmance at 27–28, Samantar v. Yousuf, 130 S. Ct. 2278 (2010) (No. 08-1555).

201 Republic of Iraq v. Beaty, 129 S. Ct. 2183, 2194 (2009).

202 Republic of Austria v. Altmann, 541 U.S. 677, 701–02 (2004).

203 *Id*. at 688.

204 Republic of Mexico v. Hoffman, 324 U.S. 30, 34 (1945); *Ex parte* Republic of Peru, 318 U.S. 578, 589–90 (1943).

205 *Ex Parte Peru*, 318 U.S. at 590.

principles of restrictive immunity accepted by the State Department and the prior experience in similar matters.[206]

Professors Stephens and Keitner have argued that the *Ex Parte Peru* deference is not appropriate in the case of individual officials because prior cases only extend that absolute deference to questions related to ownership of ships or diplomatic officials, questions which are "constitutionally delegated to the executive branch."[207] Indeed, deferral to the State Department may present a number of practical problems. On the one hand, it provides flexibility for the executive branch to manage foreign affairs without (embarrassing) interference from the judiciary. On the other hand, it potentially raises fairness concerns for individuals who are parties to suits involving foreign officials because the State Department may not have a transparent and regularized hearing process to adjudicate issues of foreign official immunity.[208] Would the Department's determination be reviewable by a court and, if so, according to what standard? Or, would the Department's determination simply be binding on a court and, if so, under what authority? A similar debate ensued under the Westfall Act concerning the reviewability of a certification of substitution of the United States as a defendant in place of a U.S. government official.[209]

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206 In *Mexico v. Hoffman*, 324 U.S. 30, the plaintiff sued for damage to his fishing vessel caused by a ship owned by the Mexican government. The State Department filed a suggestion of immunity with the district court stating that it recognized the *ownership* of the ship by the Mexican government, but the court did not dismiss the suit on this basis. *Id.* at 31-32. The Ninth Circuit Court of Appeals determined that the ship, while owned by the Mexican government, was not immune from seizure because it was not in the use and service of that government. *Id.* at 33. The Supreme Court affirmed. *Id.* at 34-36. Citing the practice from *Ex Parte Peru*, with its roots in *Schooner Exchange*, under which courts must give deference to the views of the executive as to whether the ship is immune. *Id.* at 37-38. In the absence of guidance from the State Department as to immunity, the court should make its own determination according to the prior practices of the executive. Following this rationale, the court determined by examining case law and prior executive practice that the executive had never allowed immunity based solely on ownership of the vessel.

207 Stephens, *supra* note 51, at 2713 (agreeing with and citing Keitner).

208 *See* Jerrold L. Mallory, Note, *Resolving the Confusion Over Head of State Immunity: The Defined Rights of Kings*, 86 COLUM. L. REV. 169, 184–85 (1986) (discussing the inadequacies of State Department for making head of state determinations).

209 *See* Juan R. Balboa, *Legislative Reform: The Westfall Act and Scope of Employment: The Role of the Attorney General*, 21 J. LEGIS. 125, 126 (1995); Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 419–20 (1995).

Second, permitting a foreign affairs agency to make the conclusive determination may damage the policy that Congress meant to promote with the enactment of the FSIA.[210] Specifically, a "principal purpose" of the FSIA was to reduce foreign policy implications of immunity determinations by placing those determinations in the hands of the judiciary and to thereby reduce pressures on the State Department to grant immunity for foreign officials.[211] In this respect, the FSIA was also meant to bring U.S. practice into accord with other nations that used the judiciary, as opposed to their foreign affairs ministry or agency, to make immunity determinations.[212] If the State Department is permitted to exercise control over immunity determinations for foreign officials, then it could re-politicize the immunity process and interfere with the FSIA's purpose—even if only the official is sued the suit will be associated with the official's home state in the media and political channels.

In addition, it is not entirely clear why courts should automatically defer to the State Department in lieu of conducting a more principled analysis of whether the dispute is nonjusticiable because it involves a political question more appropriately handled by the executive.[213] An analysis under the political question doctrine would permit the court to consider "the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial

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210 *See* Republic of Philippines v. Marcos, 665 F. Supp. 793, 797 (N.D. Cal. 1987) ("The power of the executive to determine when courts may exercise jurisdiction over foreign sovereigns has been abolished, and those cases inconsistent with the FSIA are obviously no longer persuasive.").

211 H.R. Rep. No. 94-1487 at 8–11 (1976).

212 *Id.*

213 *See* Freund v. Republic of France, 592 F. Supp. 2d 540, 565 (S.D.N.Y. 2008) (citing Baker v. Carr, 369 U.S. 186, 217 (1962)) (*Baker* enunciates a six factor test to guide the analysis: "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question." This test allows a court to assess all of the concerns—particularly the concern for the "potentiality of embarrassment from multifarious pronouncements by various departments" in the area of foreign affairs—that deferral to the State Department was and will potentially be meant to address.).

determination."[214] The district court in *Matar* conducted precisely this analysis concluding that adjudicating a case in which the allegations related to military action coordinated on behalf of Israel, a U.S. ally, in response to a threat of terrorism in a uniquely volatile region would (1) express a lack of respect for a coordinate branch of government, that is the executive; and (2) potentially embarrass the executive branch by resulting in multifarious pronouncements by different branches of government.[215]

In any event, courts will still have to handle the cases wherein the State Department remains silent. For example, in the case of Muhamed Samantar, the State Department had issued no suggestion of immunity after several years, and the district court had to make its own decision.

2. Head of State Immunity

Head of state immunity may be available. Head-of-state immunity is a matter of federal common law and international law. Heads of state, heads of government, and, perhaps, foreign ministers are eligible for this type of immunity.[216] The general consensus, now cemented by *Samantar*, is that the FSIA was not intended to supplant the common law head of state immunity,[217] but law as to when—former heads of state versus current—and for what acts—public versus private—a head-of-state is immune is not entirely clear. State Department suggestions of immunity are deemed conclusive in the area of head of state immunity. Once the State Department has spoken on a head of state's immunity the courts may not even inquire into whether the Department followed its own internal procedures in rendering the decision.[218] For example, in *Ye v. Zemin* the Seventh Circuit concluded the FSIA did not apply and the State Department's decision granting immunity was binding as to the former president of China for actions that allegedly violated *jus cogens* norms of customary international law.[219]

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214 *Baker*, 369 U.S. at 210.

215 Matar, 563 F.3d at 10; Matar, 500 F. Supp. 2d at 293–94.

216 *Marcos*, 665 F. Supp. at 797; *see also* Abiola v. Abubakar, 267 F. Supp. 2d 907, 916–17 (N.D. Ill. 2003) (listing cases).

217 Matar v. Dichter, 500 F. Supp. 2d 284, 288 (S.D.N.Y. 2007).

218 Doe v. Roman Catholic Diocese of Galveston-Houston, 408 F. Supp. 2d 272, 278 (S.D. Tex. 2005).

219 383 F.3d 620, 624 (2004).

Taken together, the cases seem to indicate that a head of state is immune both for private and public acts while he is in office.[220] Once the head of state leaves office, however, he may enjoy immunity only for public acts taken in his official capacity, which may exclude acts taken in contravention of state laws.[221] The Ninth Circuit explained, "[w]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions."[222] Furthermore, the head of state of an unrecognized state will not be entitled to immunity absent intervention by the State Department.[223]

Head of state immunity might be applicable in some cases like Muhamed Samantar's. Whether that type of official gets head of state immunity would, at present, probably depend on the State Department and its political determination. The State Department would have to certify that Samantar is entitled to head of state immunity. Some of the positions that Samantar has held, such as such as minister of defense, seem less likely to receive protection.[224] An additional obstacle is the fact that Samantar is a former official of a non-existent government**,** and head of state immunity is typically a status-based immunity that may disappear once the official has left office.[225]

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220 Howland v. Resteiner, 2007 U.S. Dist. LEXIS 89593, at *6 (E.D.N.Y. Dec. 5, 2007) (concluding that sitting head of state and his wife were immune for "acts taken in their private capacities" and dismissing case accordingly); Lafontant v. Aristide, 844 F. Supp. 128, 135 (E.D.N.Y. 1994); *see also* FOX, LAW OF STATE IMMUNITY, *supra* note 131, at 692 ("[U]nder US law, recognized serving heads of State are probably immune from civil proceedings in respect of all acts whether of a public or private nature.").

221 *In re* Estate of Ferdinand Marcos, 25 F.3d 1467, 1470 (9th Cir. 1994); FOX, LAW OF STATE IMMUNITY, *supra* note 131 at 692 ("Immunity may be extended to former heads of State on the suggestion of the State Department but they are likely to be held to enjoy no immunity in respect of acts of a private nature performed while in office; the tendency of US courts is to construe acts of theft, fraud, and corrupt practices as performed in a private capacity."). *Cf. Lafontant*, 844 F. Supp. at 128.

222 *In re Estate of Ferdinand Marcos*, 25 F.3d at 1470 (quoting Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095 (9th Cir. 1990)).

223 *Lafontant,* 844 F. Supp. at 850.

224 Abiola v. Abubakar, 267 F. Supp. 2d 907, 916–17 (N.D. Ill. 2003).

225 For a more comprehensive discussion of head of state immunity under U.S. and international law, see Christopher D. Totten, *Head-of-State and Foreign Official Immunity in the United States After Samantar: A Suggested Approach*, 34 FORDHAM INT'L L.J. 332, 336–51 (2011).

3. Diplomatic and Consular Immunity

Third, treaty and statutory law accord diplomatic and consular immunity to members of staff and the families of foreign diplomatic missions to the United States from "the exercise by the receiving state of jurisdiction to prescribe in respect of acts or omissions in the exercise of the agent's official functions, as well as from other regulation that would be incompatible with their status."[226] The State Department certifies which officials qualify as diplomatic agents for purposes of this immunity.[227] The sources of this immunity are the Vienna Treaty on Diplomatic Relations and the Diplomatic Relations Act.[228] The Vienna Convention on Consular Relations governs consular activities, and provides limited immunity for consular officials in the exercise of certain consular functions.[229] Pursuant to those sources, diplomats and foreign ministers are also immune from criminal prosecution while in office. But diplomatic immunity is status-based.[230] Once the officer leaves office, he may be sued civilly and prosecuted criminally for acts taken in his private capacity; he may, however, retain some immunity for official acts.[231]

4. Act of State Doctrine

Fourth, the common law act of state doctrine has been and can be used to shield officials from suit for public acts. The doctrine's original purpose was to "afford personal immunity to foreign officials who acted consistently with the laws of their jurisdiction."[232] The doctrine has since expanded to protect

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226 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 464(1) (1987). *See also* Swarna v. Badar Al Awadi, 622 F.3d 123, 133 (2d Cir. 2010) ("Under 22 U.S.C. § 254d, a district court must dismiss '[a]ny action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the [Vienna Convention].' This statutory dictate is consistent with the Vienna Convention itself, which provides that a 'diplomatic agent shall enjoy immunity from the criminal, . . . civil and administrative jurisdiction' of the receiving state.").

227 Philippines v. Marcos, 665 F. Supp. 793, 797 (N.D. Cal. 1987).

228 22 U.S.C. § 254(a), et seq. (2010).

229 *See* Risk v. Halvorsen, 936 F.2d 393, 396–98 (1991) (citing relevant provisions and dismissing the case in part on those grounds).

230 *See Swarna,* 622 F.3d at 133–34.

231 *Id.* at 134.

232 Michael J. Bazyler, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 387 (1986). Bazyler makes several arguments why the doctrine should be abolished by courts, including that more universal devices, such as forum *non conveniens* and the political question doctrine, may provide better standards that do not permit a

foreign states generally and, in its most recent formulation, now permits a court to dismiss a case in which "the relief sought or the defense interposed" would "require[] a court in the United States to declare invalid the official act of a foreign sovereign performed within its territory."[233] A party may only invoke the act of state doctrine if the court "*must decide*" the effect of official action by a foreign sovereign.[234] The act of state doctrine is not a form of immunity from suit; rather, it is a principle of decision and defense on the merits.[235] Where the policies of the doctrine, that is the maintenance of the preeminence of the political branches in the area of foreign relations, are not implicated, it is within a district court's discretion to refuse to apply the doctrine altogether.[236]

For the act of state doctrine to apply, the act at issue should be legally attributable to an existing sovereign. Where the act in question is not authorized by the state, the act of state doctrine will not apply. However, certain alleged violations of international law may not suffice to bar the application of the doctrine, unless perhaps the party pleads a violation of a fundamental norm of international law or a treaty.[237] The act may also be subject to some additional conditions such as (1) no statute, treaty or agreement bars the act; (2) the act is a public act; (3) the act is of a recognized sovereign; (4) the act is fully executed in the sovereign's territory; (5) the act is raised in an affirmative claim; or (6) the executive branch has not otherwise made a statement for or against the application of the doctrine to the act.[238]

With regard to the third condition listed above, if the government that authorized the act in question has ceased to exist, then a court might refrain from applying the doctrine to dismiss the case. In early act of state doctrine cases, courts

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court to dismiss cases touching on matters of concern to a foreign sovereign. *Id.* at 381–92.

233 Kirkpatrick v. Envtl. Tectonics Corp., 493 U.S. 400, 405 (1990).

234 *Id.*

235 *Id. See also* Samantar v. Yousuf, 130 S. Ct. 2278, 2291 (2009).

236 *Kirkpatrick*, 493 U.S. at 409; Sirico v. British Airways, PLC, 2002 U.S. Dist. LEXIS 1551, at *5–7 (E.D.N.Y. 2002).

237 Mathias Reimann, *A Human Rights Exception to Sovereign Immunity: Some Thoughts on Princz v. Federal Republic of Germany*, 16 MICH. J. INT'L L. 403, 428–30 (1995).

238 KOH, TRANSNATIONAL LITIGATION, *supra* note 64, at 95.

focused on the status of the government under which the act was committed to determine whether an accused official could derive immunity. For example, in *Underhill v. Hernandez* a U.S. citizen sued a Venezuelan general for refusing to permit him to leave a city under the general's control during a revolution.[239] At that time, the general and his colleagues were not yet in control of the entire nation, but they did eventually seize power.[240] The Supreme Court dismissed the case.[241] It concluded that, in refusing to grant the plaintiff leave to flee the city, the defendant, General Hernandez was acting on behalf of the sovereign state of Venezuela.[242] The fact that he and his allies later seized control of the country was sufficient to render it an act of state.[243]

The act of state doctrine would likely be unhelpful to individuals like Muhamed Samantar. Despite the extraordinary laws lifting individual freedoms in Somalia at the time, there was no law that expressly authorized, for example, extreme torture, and rape, which are crimes that may not be considered acts of state under U.S. case law.[244] More importantly, the government, that is the Barre regime, no longer existed by any standards, and therefore, the application of the doctrine would not protect against the embarrassment of an existing government with which the United States had foreign relations.[245]

These technical issues aside, the act of state doctrine is also generally problematic. The doctrine can be applied extremely broadly—and inconsistently—to cover nearly any act connected with the state.[246] Indeed, this seems similar to what the circuits

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239 *Underhill v. Hernandez* 168 U.S. 250, 253–54 (1897).

240 *Id.* at 254.

241 *Id*.

242 *Id.* ("The acts complained of were the acts of a military commander representing the authority of the revolutionary party as a government, which afterwards succeeded and was recognized by the United States. We think the Circuit Court of Appeals was justified in concluding that the acts of the defendant were the acts of the government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government." (internal quotation marks omitted)).

243 *Id.*

244 Jimenez v. Aristeguieta, 311 F.2d 547, 557–58 (5th Cir. 1962) (concluding that "common crimes" such as fraud, embezzlement, and rape are not considered acts of state).

245 Kirkpatrick v. Envtl. Tectonics Corp., 493 U.S. 400, 409 (1990).

246 Bazyler, *supra* note 232, at 344 ("One of the most alarming aspects of the [act of state] doctrine is the potential breadth of its application to American jurisprudence. The decisions of the lower federal courts illustrate that the act of state

did when they defined official capacity suits as essentially any act that an official takes in relation to his job. In this respect, the doctrine may not act to curb official abuse.

As with deference to the State Department described above, perhaps the best fate for the act of state doctrine is for it to be swallowed by the political question doctrine. Justice Brennan touched on this approach in his dissent in *First Nat'l City Bank v. Banco Nacional de Cuba*, part of a line of cases[247] regarding the expropriation of the property of U.S. entities by the government under Fidel Castro in Cuba.[248] The issue in *First National City Bank* was essentially whether a court should refrain from applying the act of state doctrine if the executive so instructed it, which is famously referred to as the "Bernstein Exception."[249] In other words, would a court examine the act of another sovereign government if the executive branch advised that it is in the interests of foreign policy. For Justice Brennan, the act of state doctrine was an international political question doctrine and—by extension—*courts*, not the executive, should determine its contours in deciding whether to dismiss a case on those grounds.[250] This approach might be more consistent with the established principle that courts have jurisdiction to determine their own jurisdiction.[251]

5. "Necessary Party" Defense

Rule 19 of the Federal Rules of Civil Procedure (Rule 19), concerning joinder of necessary parties to a litigation, may also provide some derivative immunity for foreign officials prosecuted

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doctrine might be invoked whenever a claim arises that involves events outside of the United States.").

247 The other case is Banco National de Cuba v. Sabbatino, 376 U.S. 398, 399–400 (1964). In *Sabbatino*, the court refused to examine the legality of Cuba's expropriation of property on the basis of the act of state doctrine stating courts should defer to the executive when passing on the validity of the act of a foreign sovereign. The court thus connected the act of state doctrine to separation of powers concerns. *Id. See also* KOH, TRANSNATIONAL LITIGATION, *supra* note 64, at 92.

248 406 U.S. 759, 787–88 (1972) (Brennan, J., dissenting).

249 The Bernstein Exception to the act of state doctrine refers to litigation brought by Arnold Bernstein in the Second Circuit for compensation for the forced transfer of his property to the Nazis during World War II. The Second Circuit originally dismissed the case. However, when a State Department official wrote to the court and asked it to take up the case again, the court did so due to the intervention of the executive branch. KOH, TRANSNATIONAL LITIGATION, *supra* note 64, at 89–90.

250 First Nat'l City Bank, 406 U.S. 759, 790–91 (Brennan, J., dissenting).

251 United States v. United Mine Workers, 330 U.S. 258, 292 n.57 (1947).

civilly. Rule 19 states in pertinent part that: "If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed."[252] The inquiry therefore, has two basic parts, (1) whether the unavailable party is necessary and (2) whether, in consideration of that and other equitable factors, the court should dismiss the case.[253]

In the case of *Pimentel v. Republic of the Philippines*, a class of several thousand plaintiffs sought to obtain offshore assets of former President of the Philippines Ferdinand Marcos in satisfaction of a judgment for violations of fundamental human rights norms while he was in office.[254] The government of the Philippines also asserted claim to the assets pursuant to a domestic Philippine law regarding the return of assets wrongly diverted by a corrupt official.[255] Accordingly, it filed a claim to those assets in a local court in the Philippines.[256]

The financial institution with control over the assets, aware of the competing claims to the money, filed an interpleader action.[257] The government of the Philippines successfully asserted a defense of sovereign immunity to that action and requested the entire action be dismissed pursuant to Rule 19 because the sovereign entities were required parties whose interests would be materially prejudiced if the court permitted the interpleader action to proceed in their absence.[258] Ultimately both the district court and the court of appeals refused to dismiss the case because they concluded, even if the parties entitled to sovereign immunity were necessary, any claim to the funds they would assert was unlikely to succeed under the applicable statute of limitations.[259]

The Supreme Court reversed this holding, analogizing the *Pimentel* case to instances in which the Court had dismissed suits against officers of the United States because the government itself

252 FED. R. CIV. PROC. 19 (2010).

253 *See id.*

254 Republic of Philippines v. Pimentel, 553 U.S. 851, 855, (2008).

255 *Id.*

256 *Id.*

257 28 U.S.C. § 1335 (2010).

258 *Pimentel*, 553 U.S. at 860.

259 *Id.*.

was a necessary party.[260] Although it declined to opine on a more blanket standard for Rule 19 cases, the Court appeared to treat sovereign immunity as a primary concern in the 19(b) determination as to dismissal, and stated, in no uncertain terms, that this type of case could "not proceed when a required-entity sovereign is not amenable to suit."[261] The Court went on to state, however, that the case could proceed if the sovereign's claims were determined to be frivolous.[262] Therefore, in addition to the Rule 19 inquiry to determine whether the sovereign was required and if the case could continue in its absence, the court must determine whether the sovereign's claims are colorable.[263] The Court cautioned that this analysis does not permit a court to decide if the sovereign's claims would succeed on their merits, but rather to look them over to decide whether there is any legal basis for them.[264] The Court ultimately determined that the statute of limitations did not necessarily dispose of the claims of the sovereign parties.[265]

A Rule 19 inquiry under the formulation in *Pimentel*—which seems to make the sovereign immunity of required nonparties an important factor in the decision whether to dismiss the case—could bar a number of suits where an official is sued for damages from the immune state,[266] provided that no exception to the FSIA

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260 *Id.* at 866–67 (citing Mine Safety Appliances Co. v. Forrestal, 326 U.S. 371, 373–75 (1945); Minnesota v. United States, 305 U.S. 382, 386–88 (1939)).

261 *Id.* at 867.

262 *Id.*

263 *Id.* at 868–69.

264 *Id.*

265 *Id.* at 867.

266 Where damages would come from the state treasury, the sovereign would be a required party. *See* Lopez v. Arraras, 606 F.2d 347 (1st Cir. 1979) (concluding that if Department of Housing and Urban Development was a required party the damages would come from it, but not reaching the question of dismissal); Hovensa, L.L.C. v. Technip Italy S.p.A., 2009 U.S. Dist. LEXIS 21191, at *8 (S.D.N.Y. Mar. 16, 2009) ("[T]he Court [must] ... determine whether a party is not only 'required,' but also indispensable. Rule 19(b) sets out the relevant considerations as follows: '(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for non-joinder.'" (quoting FED. R. CIV. PROC. 19(b))).

applies.[267] The concern in *Pimentel* was that money, which might belong to an immune-sovereign, could be lost if the suit were allowed to proceed. But, lf the official were sued in his personal capacity, then this concern might be abated.[268]

The focus on the Rule 19 inquiry is always the state's interests, and not the official's actions or their legitimacy. For purposes of a determination of derivative immunity, the Rule 19 inquiry views the state itself as the subject of international law and not the individual—an approach which conflicts with the modern paradigm of international law that treats individuals as subjects in certain circumstances. Furthermore, using Rule 19 might prompt a court to dismiss the case too early, fearing a host of unintended consequences for the sovereign.

One commentator has noted that courts have applied the Rule 19 inquiry broadly and inappropriately to rid themselves of cases where an immune sovereign's interests might be affected.[269] Professor Katherine Florey argues that using Rule 19 like an abstention doctrine in sovereign immunity related cases is problematic, because the case law shows disregard for plaintiff's rights when courts do not give due consideration to the availability of a viable alternative forum when sovereigns are involved.[270] This concern is certainly valid in cases wherein a plaintiff challenges the egregious actions of an official of his own government, and dismissal would result in these serious violations of international law going unaddressed. Professor Florey also argues that courts have shown an ability to use Rule 19's provisions as imposing a procedural technicality that offers them no choice but to dismiss the case.[271] Again, this could have been dangerous in a case like Samantar's—although it might have been difficult to argue how a non-existent government's interests would be prejudiced—if temptation led a court to use Rule 19 as a

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267 The parties in *Pimentel* had agreed that no exception to the FSIA applied. *Pimentel*, 553 U.S. at 865 (2008).

268 Pettiford v. City of Greensboro, 556 F. Supp. 2d 512, 522–23 (M.D.N.C. 2008).

269 Florey, *supra* note 182, at 809 ("In recent years, certain circuits have come close to developing a near-absolute rule that, if an absent sovereign's interests may be affected by allowing an action to proceed—in other words, if the sovereign meets the criteria for a 'necessary' party—that sovereign is also indispensible and the action must be dismissed.").

270 Katherine Florey, *Making Sovereigns Indispensable, Pimentel and the Evolution of Rule 19*, 58 UCLA L. REV. 667, 712–16 (2011).

271 *Id*. at 715–16.

tool avoid a difficult foreign policy-related question, much in the same way that they could use automatic deference to the executive.

6. International Law

The *Samantar* decision did not expressly mention a role for international law in the form of a treaty,[272] customary international law (via incorporation into federal common law), or other generally accepted principles[273] as a source of immunity. Commentators have found this absence puzzling considering the citation to international sources in the briefs, and the proposition acknowledged on prior occasions by the Supreme Court that the FSIA was meant to codify international law.[274] The absence of any mention of the role of international law might have been more expected had the court framed its decision entirely in terms of a statutory interpretation of the FSIA, but it didn't. Instead it went on, as described above, to note several different avenues for obtaining immunity in the future: for instance, suggestions of immunity by the executive, Rule 19, the act of state doctrine, and personal versus official capacity suits.[275] Still, the absence of international law does not foreclose courts from looking to

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272 The U.N. Convention on State Immunity provides some guidance on the issue of official immunity under international law—although the United States has not signed or ratified it and it has not yet entered into force. Under the U.N. Convention, representatives of the state acting in their official capacity are considered part of the state and thus are entitled to utilize the state's immunity. The U.N. Convention, like the FSIA, also contains exceptions to the state's presumptive immunity. Although they are similar to those under FSIA—consent, commercial acts and certain torts—the contours of the exceptions are complex and it is unclear whether a U.S. court would recognize those exceptions. Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, U.N. GAOR, 59th Sess., Supp. No. 49, U.N. Doc. A/59/49, at articles 10-17 (Dec. 2nd, 2004). The Convention was adopted by the General Assembly in 2004, but has not seen extensive ratification. ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 148–57 (2010) (describing the U.N. Convention and the exceptions to immunity under it).

273 United States v. Gi-Hwan Jeong, 624 F.3d 706, 712 (5th Cir. 2010) ("There are three accepted sources of international law in the United States: customary international law, international agreement, and general principles common to the major legal systems of the world." (internal quotation marks omitted)).

274 Bradley and Helfer, *supra* note 51 at 230-31. *See also* FOX, LAW OF STATE IMMUNITY *supra* note 131 at 13 (noting that while many states do accept the proposition that immunity is a rule of international law, where that rule has not been reduced to a statute such as FSIA, they tend to defer entirely to the executive).

275 *Supra* Part II.B.

treaties or customary international law in order to determine whether foreign officials of differing ranks are immune from suit.

Assuming courts examine decisions both from international tribunals and domestic courts, in factual scenarios such as those presented in the case of Muhamed Samantar, courts will find guidance both granting and denying immunity where allegations of human rights abuses are at stake.[276] Again, the distinction comes back to conceptions and definitions of official capacity. While most courts around the world agree that officials are immune for their official actions, some courts have taken pains to craft the definition of official acts or official capacity as excluding certain egregious violations of fundamental or universally accepted norms.[277] This type of thinking was present in the *Pinochet* opinions in which the House of Lords of the United Kingdom concluded that former Chilean Pinochet's alleged acts of torture did not qualify as official acts of a head of state for purposes of immunity from *criminal* prosecution.[278] This holding was later rejected in the civil context by the House of Lords in *Jones v. Saudia Arabia*, which was an action by several plaintiffs seeking compensation for alleged acts of torture by the Saudi Minister of the Interior and Saudi police officers.[279] The House of Lords rejected the application of *Pinochet* to the civil context because, it said that *Pinochet* held that the U.N. Torture Convention provided an exception to immunity for crimes of torture, but there is no similar exception for civil suits under the Convention or international law generally. In civil suits of that

276 Jones v. Saudi Arabia, [2006] UKHL 26, [2007] 1 A.C. 270 (appeal taken from Eng.) (denying access to officials to remedy these abuses in civil cases); Francesco Moneta, State Immunity for International Crimes: The Case of Germany versus Italy before the ICJ, Hague Justice Portal, *available at* http://www.haguejusticeportal.net /Docs /Commentaries%20PDF/Moneta_Germany-Italy_EN.pdf (last visited Mar. 27, 2011) (describing similar Italian cases).

277 Bradley and Helfer, *supra* note 51 at 246-49 (recognizing minority and majority positions, and that U.S. court ATCA jurisprudence has contributed to the erosion of official immunity for human rights violations). *Ex parte Pinochet Ugarte* (No. 3), [2000] 1 A.C. 147 (appeal taken from Eng.) (acts of torture not official acts for purposes of criminal jurisdiction).

278 Amnon Reichman, *"When we Sit to Judge we Are Being Judge" The Israeli GSS Case, Ex Parte Pinochet and Domestic/Global Deliberation*, 9 CARDOZO J. INT'L & COMPARATIVE L. 41, 72–73 (2001) (describing the holding in the case).

279 [2006] UKHL 26, [4]–[10], [2007] 1. A.C. 270 (appeal taken from Eng.).

type an official is protected under Britain's State Immunity Act.[280] The debate amongst national courts, international tribunals, and regional courts over whether certain universally condemned practices should be exempted from sovereign immunity defenses is still "controversial."[281]

In 2009, a "resolution" by the Institute of International Law abolished immunity for former officials for "international crimes" committed under the color of law.[282] "International crimes" includes crimes such as torture, genocide, crimes against humanity, and war crimes "as reflected in relevant treaties, statutes, and jurisprudence of international tribunals."[283] The status-based immunities of heads of state and diplomats were retained.[284] As one commentator noted, however, "international crimes" is a misnomer because these offenses can be tried under the criminal, civil or administrative jurisdiction of national courts.[285] "Gross human rights abuses" might, therefore, have been a more appropriate term.[286]

United States courts have carved out an exception for heinous acts by foreign officials that are deemed legally illegitimate or outside the scope of their authority. One prominent example of an *ultra vires* exception to foreign sovereign immunity comes from the various cases filed against former President of the Philippines Ferdinand Marcos and his family, including his wife, Imelda Marcos, and his daughter, Imee Marcos-Manotoc, for fraud, embezzlement of government funds, and human rights violations.[287] With regard to the human rights violations, in *In re*

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280 Marko Milanovic, *Norm Conflict in International Law: Whiter Human Rights*, 21 DUKE J. COMP. & INT'L L. 131 n.10 (2009) (describing the relationship between the two cases).

281 JENNIFER K. ELSEA, CONG. RESEARCH SERV. R 41379, SAMANTAR V. YOUSEF: THE FOREIGN SOVEREIGN IMMUNITIES ACT AND FOREIGN OFFICIALS (2010) (noting the view by some scholars that foreign officials are not always entitled to immunity for their official acts); FOX, LAW OF STATE IMMUNITY, *supra* note 131, at 462–67.

282 Annyssa Bellal, *The 2009 Resolution of the Institute of International Law on Immunity and International Crimes: A Partial Codification of the Law*, 9 J. INT'L CRIM. JUSTICE, 227 (2011); Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in Case of International Crimes, *available at* http://www.idi-iil.org/idiE/resolutionsE/2009_naples_01_en.pdf (last visited Mar. 27, 2011).

283 *Id.* at 7.

284 *Id.* at 11.

285 *Id.* at 14.

286 *Id.*

287 *In re* Estate of Ferdinand Marcos, 25 F.3d 1467, 1469 (9th Cir. 1994).

Estate of Ferdinand Marcos (*Hilao*), the plaintiffs claimed that they or their family members were tortured, summarily executed or disappeared during Marcos's tenure as President of the Philippines.[288] They brought claims under the ATCA.[289]

Despite the fact that the Ninth Circuit had already ruled in *Chuidian* that foreign officials were entitled to immunity under FSIA, it had exempted acts that fell outside the scope of official duties. For this reason, the court in *Marcos* did not grant Marcos immunity for his alleged actions.[290] Rather, the panel noted that Marcos's actions violated the Philippines own laws, stating "Marcos' acts of torture, execution, and disappearance were clearly acts outside of his authority as President. Like those of Marcos-Manotoc, Marcos' acts were not taken within any official mandate and were therefore not the acts of an agency or instrumentality of a foreign state within the meaning of FSIA."[291] In reaching this conclusion, the court relied in part on act of state doctrine cases that concluded common crimes which lack statutory basis could not be considered the sovereign—or public—acts of a foreign official.[292] The court also noted that Marcos himself was not the core sovereign entity, rather: "[a]lthough sometimes criticized as a ruler and at times invested with extraordinary powers, Ferdinand Marcos does not appear to have had the authority of an absolute autocrat. He was not the state, but the head of the state, bound by the laws that applied to him."[293] One of the primary factors that separated Marcos from the core sovereign entity, therefore, was the illegitimacy of his actions. On these grounds, the Ninth Circuit refused to dismiss the complaint on immunity grounds.[294] Marcos was therefore deemed to be acting under the color of state authority but without

288 *Id.*

289 *Id*. at 1473.

290 *Id.* at 1472.

291 *Id.*

292 *Id.* at 1471.

293 *Id.* (citing Republic of Philippines v. Marcos, 862 F.2d 1355, 1361 (9th Cir. 1998)).

294 *Id.* at 1471–72. *See also* Republic of Philippines v. Marcos, 665 F. Supp. 793, 797 (N.D. Cal. 1987) (discussing the *Jimenez* case cited by the Ninth Circuit in *In re* Estate of Ferdinand Marcos and its implications).

an official mandate in violation of international law.[295] Other cases have conducted a similar analysis in these circumstances.[296]

II
A PROPOSAL FOR QUALIFIED IMMUNITY FOR FOREIGN OFFICIALS

This section does not argue that courts should abrogate well-settled questions of head-of-state immunity or diplomatic immunity, for which the international standards articulated above are evident in the decisions of federal courts on these matters. Nor do I argue that where a genuine political question exists, a court should not dismiss the case as nonjusticiable and leave it to the judgment of the executive branch. And, of course, if another statute grants immunity in some instance, then the common law may no longer apply.

What happens when courts have to decide when parties' alleged violations of international law, (as federal common law, or in whatever form), entitle a foreign official to immunity on the basis of actions that relate in some way to his employment? A court considering this question may determine that it will apply international law in some form, whether a treaty or customary international law as incorporated into federal common law, to resolve the foreign official immunity question. A court might rely on the Supreme Court's decision in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba (BANCEC)*.[297] That case involved a suit by a bank of the Cuban government to recover on a letter of credit from an American bank, Citibank.[298] Citibank counterclaimed for setoff against the assets that the Cuban government had seized during the revolution.[299] The plaintiff

295 *In re Estate of Ferdinand Marcos*, 25 F.3d at 1472 n.8.

296 *See, e.g.*, *id.* at 1472; In re Estate of Marcos Human Rights Litig., 978 F.2d 493, 498 (9th Cir. 1992); Chuidian v. Philippine Nat'l Bank, 912 F2d 1095, 1106 (9th Cir. 1990); United States v. Yakima Tribal Court, 806 F.2d 853, 859 (9th Cir. 1986); Doe v. Qi, 349 F. Supp. 2d 1258, 1282 (N.D. Cal. 2004); Caribri v. Assasie Gyimay, 921 F. Supp. 1189 (S.D.N.Y. 1996). *See also* Chamber of Commerce of the United States v. Reich, 74 F.3d 1322, 1328–29 (D.C. Cir. 1996) (non-statutory review of *ultra vires* official action in the United States is available, "[s]ince the [Secretary of Labor's] powers are [allegedly] limited by [the NLRA], his actions beyond those limitations [*viz.*, enforcing the Executive Order] are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do ...."') (internal quotation marks omitted).

297 First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba, 462 U.S. 611 (1983).

298 *Id.* at 613.

299 *Id.*

bank was dissolved during the litigation and the ultimate beneficiary of the letter of credit would be the government, which claimed immunity from the setoff claim.[300] The Supreme Court held that commonly accepted principles of international law and federal common law should be used to determine whether the components of a foreign state are juridically distinct for purposes of liability.[301] The Court in *BANCEC* applied this formulation of international law, as opposed to the law of the place of incorporation of a foreign sovereign owned entity, because it wanted to prevent a foreign nation from simply passing a law to shield itself from international liability.[302]

If international law applies, what is the law? Presented with this question, a court could look to the different views amongst courts in the world, summarized above as to whether egregious violations of human rights may be characterized as official acts, and perhaps, meld the minority position with an analog in U.S. jurisprudence, such as the line of *ultra vires* cases. The *ultra vires* cases look to whether the official was acting in an official capacity or within the scope of his authority under his own domestic laws.[303] The question for U.S. courts is whether they will attempt to define what is an official act under international law and how they will do so. Even if applying the international law of official immunity, U.S. courts retain some prerogative in itsimplementation. As commentator Hazel Fox notes "[i]mmunity . . . is a doctrine of international law which is applied in accordance with municipal law in national courts. Its requirements are governed by international law but the individual municipal law of the State before whose courts a claim against another State is made determines the precise extent and manner of application . . . Consequently the law of State immunity is a mix of international and municipal law."[304] The melding of international and domestic approaches could mean asking whether the official was acting *ultra vires* because he was in violation of *international* law. The qualified immunity inquiry

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300 *Id.* at 615.

301 *Id.* at 622–23.

302 *Id.* at 633–34.

303 Doe v. Qi, 349 F. Supp. 2d 1258, 1287 (N.D. Cal. 2004) ("The authorities presented by Plaintiffs establish that the alleged conduct for which the Defendants are responsible were inconsistent with Chinese law.").

304 FOX, LAW OF STATE IMMUNITY, *supra* note 131 at 1.

under Section 1983 provides an answer to this, as the next section will argue.

Still, it should be acknowledged that the application of international law to sovereign immunity determinations arguably conflicts with the conception of foreign sovereign immunity under the *Ex Parte Peru* line of cases as a "privilege" that may be determined by the State Department acting on behalf of the executive with foreign policy considerations in mind[305]—a strain of thinking that was echoed later on in the Supreme Court's *Altmann* decision.[306] That approach leads to the conclusion that foreign sovereign immunity is a procedural device and almost wholly a matter of domestic prerogatives and principles.

There are important considerations that militate in favor of applying international law in some measure to determine immunity for egregious human rights violations. Not the least of these considerations are the ones that led Congress to enact FSIA initially—that is the depoliticization of the process and conformity with other nations that increasingly make these determinations as a matter of law rather than a matter of ad hoc privilege.[307] Further, the Supreme Court has stated that FSIA was meant to codify international law, which acknowledges that immunity determinations should be made thereunder.[308]

One might consider the interaction between the federal government and the state governments—also a sovereign to sovereign relationship—in the constitutional tort context as an analogy to this context. Unless Eleventh Amendment immunity applies, states are not permitted to immunize their agencies or their officials from § 1983 cases in their own courts of general jurisdiction.[309] A state may not refuse to grant jurisdiction on the basis that a suit is brought under federal law.[310] This is not

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305 *See* Nat'l City Bank v. Republic of China, 348 U.S. 356, 359–62 (1955).

306 Altmann, 541 U.S. at 701–02.

307 *Supra* Part II.C.1. (discussing the purposes of the FSIA).

308 Permanent Mission of India to the U.N. v. City of New York, 551 U.S. 193, 195, 199–200 (2007).

309 Howlett v. Rose, 496 U.S. 356, 373 (1990); Martinez v. Cal., 444 U.S. 277, 284 (1980) ("Conduct by persons acting under color of state law which is wrongful under 42 U. S. C. § 1983 or § 1985 (3) cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced.").

310 *Id.*

simply a neutral, procedural rule[311] that it is the state's prerogative to apply; rather, broader state-court immunity in this context results in a lack of enforcement of federal rights in state courts.[312] The Supreme Court has concluded that such a result would violate the Supremacy Clause.[313] An underlying concern in this type of a case is of course that permitting states to immunize their own officials in this way would allow them to discriminate against federal law, and therefore violate and effectively weaken important rights.[314] In contrast, the lack of an avenue for an interlocutory appeal from a denial of immunity *is* a neutral procedural rule that states may apply without denigrating an individual's federal rights.[315]

These propositions a lens for thinking about immunity questions in national courts for violations of international law. In that context, it is equally problematic to think of immunity as something that is entirely procedural and therefore left entirely to the national court to determine with no reference to international law. Indeed, the Supreme Court has by implication concluded that denying or granting immunity under FSIA is a substantive determination that creates a cause of action arising under federal law for purposes of Article Three of the Constitution.[316] Courts should therefore not be permitted to discriminate against, and thereby violate, international law by paying no attention to it in immunity determinations.

This analogy is not the only one that is possible between various aspects of domestic and foreign sovereign immunities. Although they domestic and foreign sovereign immunity rest on different foundations, both are justified on similar grounds. They seek to protect the state, whether it is the state or the nation-state, from the inconvenience of suit, and both doctrines also seek to preserve its dignity [317] or authority.[318] Under both domestic

311 *Cf.* Peter D. Trooboff, *Foreign State Immunity: Emerging Consensus on Principles*, 200 RECUEIL DES COURS 235, 254–55 (1986) (describing foreign sovereign immunity as a procedural rule that does not affect substantive liability).

312 *Howlett*, 496 U.S. at 374–75.

313 *Id.* at 375.

314 *Id.* at 377–78.

315 Johnson v. Fankell, 520 U.S. 910, 918–19 (1997).

316 Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 492 (1983).

317 Philippines v. Pimentel, 553 U.S. 851, 865–66, (2008) (noting that the foreign state has an interest in not having its officials subject to costly litigation); Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (noting essentially same for domestic officials).

and foreign sovereign immunity, the sovereign itself, whether an entity, or more rarely a person, receives the most if not absolute protection. The closer and more tied to the core sovereign that an entity or person is, the more protection he receives.

And, when circumstances arise in which the actions of an official or an entity of the state are somehow disconnected with the state's unique public authority, then it is likely to be more acceptable to courts to sue a state or its entities, such as in the case of commercial activities that private parties could also perform. In addition, courts have introduced the idea in both foreign and domestic cases that an official is not entitled to immunity if he acts under the color of law, but illegitimately.[319] Under these circumstances, the official's actions are disaggregated from the state which creates a channel in court for citizens to obtain relief for egregious official wrongs.[320] Although both international and domestic laws have recognized the need for this type of channel, the domestic framework executes the immunity inquiry in a clearer and more balanced way.

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318 With authority typically comes the state's power to implement its policies. *See* JOHN O. HALEY, AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX 193 (1991) (noting that there is an "unstated premise" in most political and legal orders that with the authority of the state to command also comes the *power* to coerce implementation of those commands, but also noting that in reality authority and power are divorced in the case of Japan, and the Japanese government must rely on persuasion and consent in order to implement its policies).

319 Sanchez-Espinosa, 770 F.2d at 207; *supra* Part II.C.6.

320 *Hearing on Courtroom Use: Access to Justice, Effective Judicial Administration, and Courtroom Security before Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. 84 (2011) (statement of Judith Resnik, Arthur Liman Professor of Law, Yale Law School). "Courts are themselves a site of democratic practices. Public courts are one of many venues to understand, as well as to contest, societal norms. Courts both model the democratic precepts of equal treatment and subject the state itself to democratic constraints. The obligations of judges to protect disputants' rights, and the requirements imposed on litigants (the government included) to treat their opponents as equals, are themselves democratic practices of reciprocal respect. By imposing processes that dignify individuals as equals before the law, litigation makes good on one of democracy's promises—or may reveal democracy's failures to conform to its ideological precepts. Moreover, rights of audience divest the litigants and government of exclusive control over conflicts and their resolution. Empowered, participatory audiences can therefore see and then debate what legal parameters ought to govern." *Id. See also* Malone v. Bowdoin, 369 U.S. 643, 653 (1962) ("The balance between the convenience of the citizen and the management of public affairs is a recurring consideration in suits determining when and where a citizen can sue a governmental official."); *supra* Parts II.A.2 & II.C.6.

The sections below will argue that referencing the qualified immunity framework employed in constitutional tort cases would help courts to adapt the *ultra vires* cases to the position of international law that officials should not be immune for gross human rights abuses, and thereby avoid some of the more complex and technical questions by taking advantage of the conceptual similarities between foreign and domestic sovereign immunities. This Article will also argue that the inquiry will help courts to adjudicate questions of official immunity in a fair and meaningful way, furthering the development of international law, while also taking into account significant differences between nations.

A. Qualified Immunity for Domestic Officials

Section 1983 cases, which punish state officials for illegal deprivations of federal rights, have steadily increased in their number on federal court dockets.[321] "This act is remedial, and in the aid of the preservation of human liberty and human rights."[322] The provision 42 U.S.C. § 1983 states in pertinent part that

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .[323]

To oversimplify and summarize, the provision allows state officials to be sued in federal court for their unconstitutional behavior, and the Supreme Court's decision in *Bivens v. Six Unknown Named Agents*[324] permits approximately the same relief against federal officials.

Because § 1983 is such a powerful tool in combating unconstitutional official behavior,[325] federal courts have become

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321 SCHWARTZ & URBONYA, *supra* note 112, at 4.

322 Monell v. N.Y. City Dept. of Soc. Servs. of New York, 436 U.S. 658, 684 (1978) (quoting Representative Shellabarger).

323 42 U.S.C. § 1983 (2010).

324 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

325 *See* Akhil Reed Amar, *Of Sovereignty and Federalism,* 96 YALE L.J. 1425, 1504 (1987).

familiar with the various procedural and substantive doctrines involved in adjudicating the constitutional tort cases brought under § 1983. Indeed, these doctrines provide useful analogs in different types of cases.[326]

In *Harlow v. Fitzgerald*, which enunciates the current standard for evaluating claims of qualified immunity, the Supreme Court set forth its rationale for providing government officials with such immunity. Qualified immunity was meant, as a matter of public policy, to resolve the tension between providing a realistic avenue for "vindication of constitutional guarantees" in situations of official abuse of office and the social costs of potentially unsuccessful constitutional tort litigation against officials such as "the expenses of the litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office."[327]

Therefore, although public policy dictated that the head of the government (the president) receives nearly absolute immunity, U.S. courts generally granted only qualified immunity for lower ranking officials or former officials. Although other immunities might exist under English and American common law,[328] the current form has been modified to be a completely objective (but fact-specific) standard that applies across the board to all constitutional torts, whether under § 1983 or the *Bivens* case.[329] Qualified immunity applies to suits in which a governmental

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326 Section 1983 jurisprudence is as highly developed as that surrounding the statutory and common law regimes governing Habeas Corpus or Title VII of the Civil Rights Act of 1964, which also makes up a large percentage of cases heard in the federal courts. Perhaps because these cases make up such a significant part of the diet of the federal courts, § 1983 jurisprudence serves as a useful analog in other contexts. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 123, 165, 177 (2010) (looking to § 1983 cases for analogy in an ATCA case); Liu Bo Shan v. China Constr. Bank Corp., 2010 U.S. Dist. LEXIS 63938, at *10–11 (S.D.N.Y. June 28, 2010) (looking to § 1983 cases to determine whether state action is present for purposes of the ATCA).

327 Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982). I would argue that a similar tension exists for foreign official immunity. That is a tension between providing an avenue of civil relief for gross and horrific violations of international law, which the growth in such claims since the 1980s and more recently during the war on terror has shown a great desire for, and preventing the damage to delicate foreign relationships that could result if current or former officials are subjected to protracted civil litigation in federal court.

328 Anderson v. Creighton, 483 U.S. 635, 645–46 (1987).

329 *See id.*; Harlow, 457 U.S. at 814–16.

official would be personally liable for his conduct, or rather is sued in his or her personal capacity.[330]

The current doctrine rests upon the explicit rationale that the social costs of long and costly litigation against individual federal and state officials in their personal capacity may be too great.[331] Qualified immunity permits officials of varying ranks to exercise their discretion without the fear that they will ultimately incur personal liability for their official acts so long as they do not violate a clearly established constitutional right of an individual of which a reasonable person would have known.[332] The basic premise is that it is unfair to subject an official to personal liability for the discretionary actions that she is legally obligated to take, and such liability would ultimately deter her from exercising her discretionary power under the law for the good of the people that she serves.[333]

Whether a right or law is "clearly established" is a question that has been a considerable bother to the Supreme Court and the circuit courts. As such, the circuit courts have developed various tests for determining whether an individual governmental officer is entitled to immunity from suit under the doctrine of qualified immunity. Most of these tests permit courts a great deal of flexibility to deny immunity only in the most factually appropriate scenarios,[334] and some have noted that the doctrine may be too official-friendly.[335] Still others believe that the doctrine is flexible enough in general so as to permit both plaintiffs and defendants to be able to make potentially convincing immunity arguments.[336]

Central to the qualified immunity inquiry is whether the law violated was clearly established at the time that the allegedly offensive official behavior was committed such that the official had or should have had fair notice, or that it was obvious that his conduct was problematic.[337] The Second Circuit applies a three-factor test to make this determination and asks: "(1) whether the

330 Kentucky v. Graham, 473 U.S. 159, 165–67 (1985).

331 Harlow, 457 U.S. at 814–16.

332 *Id.*

333 *Id.*

334 Karen M. Blum, *The Qualified Immunity Defense: What's "Clearly Established" and What's Not,* 24 TOURO L. REV. 501, 519 (2008).

335 Allen H. Denson, *Neither Clear Nor Established: The Problem with Objective Legal Reasonableness*, 59 ALA. L. REV. 747, 764–65 (2008).

336 Blum, *supra* note 334, at 579.

337 Hope v. Pelzer, 536 U.S. 730, 739–40 (2002).

right in question was defined with 'reasonable specificity'; (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and (3) whether under preexisting law a reasonable defendant would have understood that his or her acts were unlawful."[338]

The Eleventh Circuit has employed a three-tiered and instructive approach to assess whether the right at issue is clearly established. First, in some cases, "the words of a federal statute or federal constitutional provision may be so clear and the conduct so bad that case law is not needed to establish that the conduct cannot be lawful."[339] In other cases, the case law will articulate a set of principles that may be detached from the original factual scenario and applied to other cases—that is, "the decision on 'X Conduct' can be read as having clearly established a constitutional principle: put differently, the precise facts surrounding 'X Conduct' are immaterial to the violation."[340] Finally, a case with fairly undistinguishable facts may clearly establish law in a specific area.[341]

Qualified immunity defenses may be raised early on in the litigation at, for example, the summary judgment stage, or they can be raised much later after discovery at the trial stage of the proceedings.[342] At the motion to dismiss stage, the court will take the plaintiff's allegations as true in its examination of whether the complaint states a constitutional claim.[343] The question of whether a right is clearly established is often a question of law,[344] but certain questions of fact may be submitted to the jury or judge where there are narrowly disputed issues of fact material to the determination of whether a reasonable person in the defendant's position would have known what he was doing violated the plaintiff's rights.[345]

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338 Jermosen v. Smith, 945 F.2d 547, 550 (2d Cir. 1991).

339 Vinyard v. Wilson, 311 F.3d 1340, 1350–51 (11th Cir. 2002).

340 *Id.* at 1351.

341 *Id.* at 1351–52. The case must come from the Supreme Court of the United States, the relevant Circuit Court, or the highest court of the relevant state. *Id.* at 1351 n.22.

342 *See* Sanchez v. Pereira-Castillo, 590 F.3d 31, 52 (1st Cir. 2009).

343 *Id.*

344 *Id.*

345 Gonzales v. Duran, 590 F.3d 855, 859–60 (10th Cir. 2009).

B. The Qualified Immunity Framework Furthers the Development of International Law by National Courts

There is certain guidance that domestic courts can derive from the qualified immunity framework in situations where international law is the rule of decision. As already discussed, and noted by Justice Stevens in *Samantar*, the personal versus official capacity distinction may be useful in differentiating between suits brought against the official himself for damages and suits brought against an official merely as a representative of the state in which damages come from the state itself.[346] While Professors Bradley and Goldsmith have argued that permitting personal capacity suits would force the foreign state to indemnify the official, there is no such compulsion.[347] Indemnification is a matter of free choice and not the basis for immunity under domestic law.

First, qualified immunity looks to the substantive law under which the cause of action arises to evaluate the actions that a state official takes under the color of law. In other words, although the state official is acting in the course of his or her duties under state law, his actions are deemed objectively illegitimate and not entitled to immunity because he acted in violation of a clearly established Constitutional right or a federal law. If it did not, then states could immunize their officials from failing to enforce federal rights. Under § 1983, a court may now choose to first determine whether the plaintiff has stated a constitutional claim and then assess whether the defendant allegedly violated clearly established law, or reverse the inquiry.[348] One reason that the Supreme Court has endorsed the first step in the inquiry as beneficial is that it furthers the development of federal constitutional law.[349]

The same may be said with regard to international law versus national law. If a court were to apply the framework developed in the *ultra vires* cases then the court might look to the law of the foreign nation to determine whether the official had acted

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346 *Supra* Part II.A, text and accompanying notes.

347 *Supra* note 50.

348 Pearson v. Callahan, 129 S. Ct. 808, 815–16 (2009).

349 *Id*. at 816 ("This two-step procedure, [the Supreme Court] reasoned, is necessary to support the Constitution's 'elaboration from case to case' and to prevent constitutional stagnation. (citation omitted) The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.'").

legitimately. This approach is problematic for several reasons. First, it allows municipal, that is national law, to trump international law and renders international law weak and avoidable. Second, and closely related, if immunity is determined by focusing on the legitimacy of the action under the law of the foreign state, then a state could structure its laws to enable officials to escape liability under international law. These problem are similar to the dilemma that caused the Supreme Court to determine that principles of international law, and not the law of the state of incorporation, should govern the relationships between a foreign state and its agencies vis-à-vis third parties for purposes of liability, as in the aforementioned *BANCEC* case.[350] The Cuban government had dissolved the agency at issue but attempted to recover on a letter of credit, while shielding itself from liability by way of sovereign immunity for the illegal expropriation of U.S. corporate assets.[351] The court explained,

> Giving effect to [the agency's] separate juridical status in these circumstances, even though it has long been dissolved, would permit the real beneficiary of such an action, the Government of the Republic of Cuba, to obtain relief in our courts that it could not obtain in its own right without waiving its sovereign immunity and answering for . . . a seizure previously held . . . to have violated international law.[352]

Third, if domestic law is taken too heavily into account, then it is much less likely that national courts will be able to develop the international law of immunity because the inquiry will be particularized to the laws of each individual nation however similar those laws might be to one another. It will be difficult to reach even a rough consensus on the general principles of the immunity determination. And, achieving such a consensus, or at least a more regularized and less political way for making immunity determinations, is one of the founding motivations for the FSIA.[353] Although Professors Bradley and Goldsmith have

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350 First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba, 462 U.S. 611, 633–35 (1983). *See also* Stephens, *supra* note 51, at 2714 (positing a scenario in which a state authorizes genocide).

351 *Banco Para El Comercio Exterior De Cuba*, 462 U.S. at 611.

352 *Id.* at 632.

353 Philippines v. Pimentel, 553 U.S. 851, 854, (2008) (noting that, when officials are sued in their official capacity, joinder of the sovereign is required and without such joinder the suit must be dismissed).

argued that the U.S. Supreme Court would not be an able body to determine if a rule of international law is clearly established, because it is not the ultimate arbiter of international law and its interpretations of that body of law are considered idiosyncratic[354], all national courts' interpretations of international law may in some way bear the quirks of their own legal systems. Despite this, the courts of individual nations have long been recognized as important sources of international law in the horizontal international legal order.[355] Applying the qualified immunity framework would allow national courts to develop international law by assessing (1) whether a violation of international law has been adequately alleged and/or (2) whether an official was acting in an objectively reasonable fashion.

C. Assessing a Range of Sources to Clearly Establish a Norm

Second, courts may look to the qualified immunity debate to determine what sources they should examine to determine whether an international norm is clearly established. In the United States, while there is agreement that sources of *binding* law or precedent—decisions of the Supreme Court, federal laws, decisions of the applicable federal circuit court—may clearly establish a norm, courts in the different circuits differ on whether decisions from other circuits or lower courts' decisions may do so.[356] Parties have also argued, albeit unsuccessfully, that a court's acceptance of a settlement in a highly factually similar case might be one factor in suggesting that a right is clearly established.[357] To some extent the nature of that question is whether only a binding source of law, or that and a

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[354] *Supra* note 49.

[355] RICHARD A. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER 19 (1964).

[356] Al-Kidd v. Ashcroft, 598 F.3d 1129, 1134 (9th Cir. 2010) (district court decisions, both published and unpublished, are acceptable evidence, albeit not conclusive, of clearly established law); Armijo v. Peterson, 601 F.3d 1065, 1070–71 (10th Cir. 2010) (cases from multiple circuits); Holzemer v. City of Memphis, 621 F.3d 512, 519 (6th Cir. 2010) (binding precedent from the Sixth Circuit and Supreme Court). *See also* Jonathan M. Stemerman, *Issues in the Third Circuit: Unclearly Establishing Qualified Immunity: What Sources of Authority May be Used to Determine Whether the Law is "Clearly Established" in the Third Circuit*, 47 VILL. L. REV. 1221, 1228–29 (2002) (discussing approaches of the circuits as to sources of clearly established law).

[357] Doe v. Delie, 257 F.3d 309, 321–22 (3d Cir. 2001).

preponderance of persuasive authority will suffice.[358] Another question is what weight, if any at all, should be given to lower sources of law such as state statutory law, court decisions of various levels,[359] and perhaps even related secondary sources in that determination.

Like courts in the § 1983 context, courts faced with a legal question of clearly established international law will have to determine what way to treat other international sources, such as treaties, the decisions of international tribunals, and customary international law. Courts will also have to determine whether a binding source of law is required or whether only a preponderance of authority will suffice. Courts may also determine what effect, if any, they should give to the official's domestic court's, legislature's, and executive's interpretation of international law, and what authority to give to the laws of the official's home state that arguably could conflict with certain points of international law. Considering these questions in the official immunity context may be different from considering them in other contexts. As the qualified immunity framework teaches, the clearly established framework centers not just on whether there is sufficient authority for liability, but on whether there is sufficient authority for fair notice to the official.

Courts should avoid using the test that the Supreme Court has developed for understanding whether a rule of international law is sufficiently specific for an ATCA claim, for immunity purposes. In those ATCA cases, the Supreme Court requires that violations under the law of nations cognizable under the ATCA be "accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized" or rather those recognized when the ATCA was enacted.[360] As one court stated:

> '[T]he question of whether a particular customary international law norm is sufficiently specific, universal, and obligatory to permit the recognition of a cause of action under the [ATCA],' courts must 'examine how the specificity of the norm compares with 18th-century paradigms, whether the norm is accepted in

358 Stemerman, *supra* note 356 at 1239 (discussing Judge Nygaard's dissent in *Doe v. Delie*).

359 *Id.* at 1240.

360 Sosa v. Alvarez Machain, 542 U.S. 692, 725 (2004).

> the world community, and whether States universally abide by the norm out of a sense of mutual concern.'[361]

This test serves a different purpose than an immunity inquiry. It is designed to aid a court in deciding if the plaintiff has stated a claim under the ATCA and reflects specific policy considerations in that respect.[362] Indeed, as *Sosa* articulates, this test is designed to serve five separate rationales: (1) a change in the prevailing perception of the common law as something that is made and not found; (2) retrenchment of the federal judiciary's power to make federal common law; (3) the development of Supreme Court decisions leaving the creation of private rights of action typically in the hands of Congress; (4) the potential for the courts to interfere impermissibly in the foreign affairs powers of the executive and congress; and (5) the lack of a Congressional mandate permitting the court to define violations of the law of nations for purposes of the ATCA.[363] Therefore, courts should be wary of conflating this test with the clearly established qualified immunity standard. Again, they should consider the specificity of a norm in light of the last parts of the qualified immunity inquiry, which are whether the law is clearly established in the sense that a reasonable official would have known of the law and would have seen its applicability under the circumstances.[364] For example, in the Fourth Amendment context, a search may have been unreasonable for liability purposes, but an officer may have still acted reasonably for immunity purposes.[365]

D. Guidelines for Determining the Reasonableness of Official Behavior Under the Circumstances[366]

Applying the clearly established standard for qualified immunity to international cases and considering the cases and

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361 Liu Bo Shan v. China Constr. Bank Corp., 2010 U.S. Dist. LEXIS 63938, at *10–11 (citing Abdullahi v. Pfizer, Inc., 562 F.3d 163, 173–74 (2d Cir. 2009)).

362 *Cf.* Stephens, *supra* note 51, at 2709. The *Sosa* inquiry is an inquiry to determine whether the plaintiff has stated a claim under the ATCA, not an inquiry into whether or not the official had some fair notice that his conduct under the circumstances clearly violated an international norm.

363 *Sosa*, 542 U.S. at 725–29.

364 Holzemer v. City of Memphis, 621 F.3d 512, 519 (6th Cir. 2010).

365 Saucier v. Katz, 533 U.S. 194, 199–201 (2001).

366 Ghaleb Nassar Al-Bihani v. Obama, 619 F.3d 1, 14 (D.C. Cir. 2010) ("When incorporating international-law norms into domestic U.S. law, Congress sometimes simply enacts statutes that refer generically to 'international law' (or some variation thereof) without further defining what international law requires.").

commentary that have surrounded its development as part of that determination will permit courts to evaluate the compliance of officials with international law in a more meaningful way, taking into account a number of factors including the circumstances surrounding the official decision at issue, the time for reflection, and the degree of knowledge of international law with which the official was acting.[367]

The clearly established qualified immunity standard focuses on the reasonableness of the official's conduct under the circumstances in relation to the degree of fair notice that he had of the norm. Originally courts employed a subjective and objective test in this respect.[368] In other words, because qualified immunity stemmed from a defense that the official was acting in good faith,[369] an official could be liable if he acted with malice in violating the plaintiff's rights or if the right was so clear that he should have known that his conduct was problematic.[370] The adoption of an entirely objective standard in the case of *Harlow v. Fitzgerald* was intended to permit courts to dismiss cases early in a lawsuit, at the summary judgment stage, and save the defendant the onerous burden of the substantial discovery permitted under the Federal Rules.[371] Avoiding the inconvenience of suit is also one of the purposes that foreign sovereign immunity is meant to serve.

Despite the switch, courts—including the Supreme Court—seemed to have struggled to balance a policy of to disposing of cases early on before engaging in expensive discovery, while still engaging in what is essentially a fact-intensive inquiry as to

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367 Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 622 (1989) (noting that in order to contextualize official behavior three considerations might be relevant "the defendant's legal training or access to legal advice; her rank and responsibilities; and the time constraints under which she operated").

368 Wood v. Strickland 420 U.S. 308, 321–22 (1975) (concluding that an official should sincerely believe that he is doing the right in acting as he did, but that, despite any sincere belief of right, he should be held accountable for negligently violating a clear and well settled right of the plaintiff's, and, therefore, that an official shall liable under Section 1983 if he knew or should have known that what he was doing would violate a plaintiff's rights).

369 Pierson v. Ray, 386 U.S. 547, 557 (1967).

370 *Strickland*, 420 U.S. at 322.

371 Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.").

whether a reasonable official under the circumstances should have know that what he was doing was violative of the plaintiff's rights; put differently, how clearly established does a right need to be. Two cases described below illustrate this dilemma.

In *Anderson v. Creighton*,[372] the plaintiffs brought a *Bivens* action against an FBI agent that had searched their home without a warrant under the erroneous belief that a suspect was there, in violation of their rights under the Fourth Amendment.[373] The district court that heard the case dismissed it pre-discovery on the ground that the officer was entitled to qualified immunity because the search was justified by the presence of exigent circumstances.[374] The Eight Circuit disagreed and reformulated the qualified immunity inquiry to hold that the right that the defendant was alleged to have violated, "the right of persons to be protected from warrantless searches of their home unless the searching officers had probable cause and there are exigent circumstances," is clearly established.[375] The Supreme Court reversed the Eighth Circuit, however. In order to do the objective, clearly established standard justice, the right must be established in a more "particularlized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[376] Thus, the question is whether a reasonable officer *could* have believed that the warrantless search in *Anderson* was lawful given the well-settled law at the time and the information that the defendant possessed. What the officer did in fact believe, however, is still irrelevant to the inquiry.[377] In so holding, the Court seemed to be endeavoring to protect against highly abstract rights serving as the basis for eviscerating any substance the qualified immunity doctrine has.

But the Court later had to explore the limits to this particularization in response to authority from the circuits that the facts of the prior precedent clearly establishing this right had to be materially similar to the case at bar. In *Hope v. Pelzer* the plaintiff, an inmate at an Alabama prison, alleged that the guards

372 Anderson v. Creighton, 483 U.S. 635 (1987).
373 *Id.* at 637.
374 *Id.*
375 *Id.* at 638.
376 *Id*. at 639–40.
377 *Id.*

had chained him to a hitching post in the scorching sun without water in retaliation for allegedly disruptive behavior on two occasions while on a work squad.[378] The plaintiff alleged under § 1983 that the guards had violated his right to be free from cruel and unusual punishment.[379] With little to no analysis, the district court dismissed the case on qualified immunity grounds.[380] The Eleventh Circuit affirmed, but conducted a more reasoned analysis and concluded (1) that the conduct had violated the Eight Amendment, and (2) that law was not clearly established because clearly established law for purposes of qualified immunity must be preexisting, obvious, and mandatory, and established, not by abstractions but by cases that are materially similar to the facts of the present case.[381]

The Supreme Court reversed the Eleventh Circuit. It concluded that the clearly established standard is similar to the "fair warning" or "fair notice" standard developed under the jurisprudence for a criminal deprivation of rights under 18 U.S.C. § 242.[382] The Court adopted this standard and stated

> In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary. But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'[383]

The court concluded, therefore, that although the hitching post punishment had not *per se* been held to be unlawful by binding precedent, other Eighth Amendment decisions, coupled with an Alabama Department of Corrections Regulation and Department of Justice report indicating that the hitching post was constitutionally problematic, was enough to give fair notice of the unreasonableness of the conduct in question.[384]

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378 Hope v. Pelzer, 536 U.S. 730, 734–35 (2002).

379 *Id.* at 735.

380 *Id.* at 735–36.

381 *Id.* at 736.

382 *Id.* at 739–40.

383 *Id.* at 741.

384 *Id.* at 741–42.

The boundaries set forth in *Andersen* and *Hope* could provide guidance for difficult questions in the international context as well. Adjudicating issues that might involve foreign or international legal sources and facts or events that occurred outside of the forum are not unfamiliar to courts in areas such as antitrust and asylum contexts. And, adjudicating the fair notice inquiry according to the above described, well-established standards, will turn what Professors Bradley and Goldsmith perceive to be a difficult foreign policy inquiry into a simpler question of law.[385] In the international context, evaluating the reasonableness of the official's conduct under the circumstances permits courts to ask questions similar to the ones in the above cases. As one scholar has suggested in the domestic context, courts might ask questions such as whether the official had legal training; whether the official had the benefit of legal advice on questions of international law; or whether the official had previously dealt with international or foreign affairs.[386] These questions guide a fairer evaluation of vastly disparate and varied circumstances in the nations where violations occur. And, this standard allows for an examination of the domestic law of the official's home state that is less threatening to the development of international law. Compliance with an official's domestic law might be a factor in whether he was acting reasonably under international law. For example, whether domestic law prohibited the action would be a significant factor. And, a court might consider the appropriateness of analyzing whether domestic law and policy reasonably obscured the official's understanding of the legality of his actions.

Courts may also have to consider not only an expanded number of legal sources than they are used to considering when interpreting foreign law,[387] but also the historical legal experience of the nation at issue in conducting a fair notice inquiry. For example, in the Samantar's case, Somalia's 1963 and 1979 constitutions pledged to support and uphold the rule of law,

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385 *See supra* note 50.

386 *See* Kinports, *supra* note 367, at 622.

387 *See* Arthur R. Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 613, 620 (1966-1967). Courts in the United States have traditionally been reluctant to interpret and apply foreign law if they can possibly avoid it. *Id.* Yet, a number of cases cannot be resolved without resort to foreign law. *Id.*

international law, and human rights.[388] Samantar was a high official in that regime, having served as vice president, prime minister, and minister of defense. He likely visited other countries on diplomatic missions and can be presumed to have known of various positions in the international community on norms such as torture, rape, and extrajudicial killing in multi-lateral organizations like the United Nations. In addition, Somalia had ratified numerous international treaties such as the Torture Convention[389] and the International Covenant on Civil and Political Rights.[390] These sources may provide answers as to whether a reasonable official in Samantar's position would have known that what he was doing in the circumstances alleged would violate international law. Section 1983 cases may provide useful analogs in such cases, and serve as a reminder just how complex and fact-intensive an immunity inquiry can be. Although some violations will be heinous and undoubtedly unworthy of immunity, § 1983 cases provide a useful heuristic for the closer cases.

CONCLUSION

The critique of sovereign immunity is frequently that it should be written out of existence or severely curtailed, and commentators argue that immunities from one subject area (foreign, federal, state, tribal) should not be applied by courts so freely in another to expand the doctrine.[391] This Article conceives of sovereign immunity not organized by subject area, but organized more conceptually—domestic jurisdiction (intra), foreign jurisdiction (inter), and derivative. As well, I have argued that where a statute does not apply, courts should utilize common solutions and frameworks to what, upon closer examination, are not such disparate problems—that is whether an official should

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388 Somali History Brief, *supra* note 146 at 17 n.17.

389 *See* U.N. Treaty Collection, *9. Convention Against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment* (last visited Mar. 27, 2011) http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9 &chapter=4 &lang=en#3.

390 *See* Signatures to the United Nations Covenant on Civil and Political Rights, HUMAN RIGHTS WEB (last visited Mar. 27, 2011) http://www.hrweb.org/legal/cprsigs .html. Ratification occurred in 1990 just before the Barre regime fell in 1991. U.N. Treaty Collection, *4. International Covenant on Civil and Political Rights* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Mar. 27, 2011).

391 Florey *supra* note 9, at 782-84, 824-25.

be permitted to derive immunity from the state when she has acted willfully in contravention of a clearly established higher norm. My hope is that by thinking in a more conceptually rigorous manner and using common standards, courts will engage in a more constructive dialogue with litigants about the compromise between the state and the individual, and the public and private spheres that restrictive sovereign immunity embodies.

In short, courts may use the § 1983 cases and the qualified immunity framework as a guide because § 1983 is meant domestically to cover the same thing that *Samantar* was meant to cover internationally: individuals being responsible to individuals under international law for illegitimate actions taken as an officer of the government. These government officials are thus responsible personally for the damages they have caused. But, officials may still be entitled to immunity for ostensible official action because that immunity preserves certain key functions of sovereign immunity, for example, preserving the willingness of officials to exercise their discretion in good faith. The qualified immunity applied under § 1983 may guide courts in answering several salient questions in the foreign official context, such as: (1) why they should adjudicate the immunity question, to the extent possible, according to international law; (2) whether they should focus on the degree of establishment of an international norm in relation to the objectively reasonable knowledge of an official of it under specific circumstances; and (3) what sources of international law they might utilize and what questions to ask to determine whether the official had fair notice of the norm and yet chose to act in a way that may be objectively evaluated to be deemed a willful violation of that norm.

Congress has not yet introduced—and it is not clear that it will—an amendment to FSIA in response to the *Samantar* decision. The lower courts are slowly absorbing the decision and will likely utilize the alternative doctrines enumerated above and by Justice Stevens in his opinion. My argument remains the same—that the § 1983 cases provide a well-developed framework that courts can readily apply to international and human rights tort cases like *Samantar*. Application of that framework provides a consistent, logical, and uniform solution to the problem of foreign official immunity in controversial circumstances. And, it will force U.S. courts to grapple with foreign law issues and different political cultures—a practice that

it is important for them to develop more thoroughly in a globalizing and multi-polar world.