NOTE

Immunity Disorders: The Conflict of Foreign Official Immunity and Human Rights Litigation

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ABSTRACT

In Samantar v. Yousuf, *the U.S. Supreme Court held that the Foreign Sovereign Immunities Act does not immunize foreign officials. By excluding individuals, the Act preserved the common law doctrine of foreign official immunity and the Executive's traditional power to "suggest" immunity. Yet the Court did not address a normative conflict lurking behind the* Samantar *decision. Human rights cases against foreign officials, brought under the Torture Victim Protection Act and the Alien Tort Statute, have proliferated in recent decades. These cases are on a collision course with the revived doctrine of foreign official immunity. How should the conflict between human rights accountability and individual immunity be resolved?*

This Note proposes that courts approach foreign official immunity as a conflict of laws problem: courts must determine whether a foreign state's authorization of crimes such as torture is compatible with U.S. and international law, which prohibit such crimes. In resolving this conflict, courts should adopt a presumption against immunity for human rights violations. This presumption could only be rebutted by an executive immunity suggestion, which

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provides a conclusive showing that countervailing foreign policy interests favor immunity. This rebuttable presumption would permit many human rights cases to reach the merits, while reining in the foreign policy costs of such litigation. Finally, this Note addresses the constitutionality of executive immunity suggestions and functional concerns of politicization and reciprocity.

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INTRODUCTION

In 1981, a young Somali businessman named Bashe Yousuf and several friends formed a group dedicated to volunteering in local schools and hospitals.[1] They named their group "*uffo*" after the "refreshing whirlwind that precedes the desert rains."[2] But instead of desert rains, this *uffo* brought agents from Somalia's National Security Service who seized Yousuf, bound him with ropes, and ordered him to confess to an antigovernment conspiracy.[3] When he refused, Yousuf was severely beaten, electrocuted, waterboarded, and eventually sentenced, after a sham trial, to six years' imprisonment in solitary confinement.[4]

Finally freed in 1989, Yousuf received asylum in the United States and became a naturalized citizen.[5] But escaping past traumas would not be easy. Yousuf eventually learned that General Mohamed Ali Samantar—the former Somali Defense Minister who Yousuf believed ordered his torture—had retired to Fairfax, Virginia, in 1997 and had become a permanent resident of the United States.[6]

Yousuf had a legal remedy. In 1991, Congress enacted the Torture Victim Protection Act ("TVPA"),[7] creating a cause of action for victims of torture and extrajudicial killings to sue their abusers who come to U.S. shores.[8] The TVPA supplemented a plaintiff's ability to bring suit for torts in violation of international law under the Alien Tort Statute ("ATS").[9] In 2004, Yousuf and other Somali survivors vindicated their human rights in a quintessentially American fashion: they sued Samantar for torture and other violations of international law under the ATS and TVPA in the U.S. District Court for the Eastern District of Virginia.[10] Moving to dismiss, Samantar successfully argued that an official acting on behalf of a foreign state is immune

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1 First Amended Complaint ¶ 26, Yousuf v. Samantar, No. 1:04cv1360, 2007 WL 2220579 (E.D. Va. Aug. 1, 2007).

2 *Id.*

3 *Id.* ¶ 29.

4 *Id.* ¶¶ 29–36.

5 *Morning Edition* (NPR radio broadcast Mar. 3, 2010), *available at* http://www.npr.org/templates/story/story.php?storyId=124252845.

6 Brief in Support of Defendant Samantar's Motion to Dismiss Second Amended Complaint at 1, *Yousuf*, 2007 WL 2220579.

7 Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2006)).

8 *Id.*

9 Alien Tort Statute, 28 U.S.C. § 1350.

10 First Amended Complaint, *supra* note 1.

from jurisdiction under the Foreign Sovereign Immunities Act of 1976 ("FSIA").[11]

The U.S. Court of Appeals for the Fourth Circuit reversed and held that the FSIA does not apply to individual foreign officials.[12] On June 1, 2010, in a unanimous decision, the U.S. Supreme Court affirmed the Fourth Circuit.[13] The Court held that because the FSIA does not include individual officials within the statutory definition of a "foreign state," foreign officials have no immunity under the FSIA.[14] The Court clarified that the FSIA did not occupy the entire field of sovereign immunity.[15] By excluding individual officials from the FSIA, Congress left intact the previous common law regime governing the status-based immunity of heads of state and the conduct-based immunity of lower-level foreign officials.[16] In preserving these common law immunities, Congress also preserved the traditional power of the U.S. State Department to determine whether a foreign official is entitled to immunity.[17]

After *Samantar v. Yousuf*,[18] courts will determine the immunity of foreign officials under long-dormant common law.[19] They will do so with scant guidance from the Supreme Court and will apply a rule with few precedents.[20] Unlike the pre-FSIA courts, today's courts will face claims of foreign official immunity in human rights cases that highlight the tension between individual accountability for human rights abuses and individual immunity for official acts.[21]

Recent scholarship tends to view this tension as a choice between per se rules of immunity and accountability.[22] But inflexibility on ei-

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11 Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.); *Yousuf*, 2007 WL 2220579, at *6–7, *11, *rev'd*, 552 F.3d 371 (4th Cir. 2009), *aff'd and remanded*, 130 S. Ct. 2278 (2010).

12 *Yousuf*, 552 F.3d 371.

13 *Samantar v. Yousuf*, 130 S. Ct. 2278.

14 *Id.* at 2292.

15 *Id.*

16 *Id.*

17 *See id.* at 2284.

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

19 *See* Beth Stephens, *The Modern Common Law of Foreign Official Immunity*, 79 FORDHAM L. REV. 2669, 2671 (2011).

20 *Id.*

21 *E.g.*, Pugh v. Socialist People's Libyan Arab Jamahiriya, No. Civ.A.02-02026 HHK, 2006 WL 2384915, at *7 (D.D.C. May 11, 2006) (noting that foreign official immunity is incompatible with the tort of torture and denying immunity to Libyan officials).

22 *Compare* Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity and Domestic Officer Suits*, 13 GREEN BAG 2D 137, 142–43 (2009) [hereinafter Bradley & Goldsmith, *Domestic Officer Suits*] (advocating for official immunity for all acts performed on behalf of a

ther extreme leads to undesirable results. Blanket immunity would cast doubt on U.S. commitments to enforce human rights.[23] Yet removing foreign official immunity from the diplomatic toolkit could threaten bilateral relations and expose U.S. officials to retaliatory litigation.

This Note offers an alternative to this rigid immunity-versus-accountability dichotomy. Courts should approach the tension between foreign official immunity and human rights accountability as a conflict of laws problem: courts must determine whether to give domestic effect to a foreign state's authorization of a human rights violation as a basis for individual official immunity. Because such violations are contrary to international law and the public policies underlying U.S. human rights legislation, courts should deny immunity for human rights abuses, unless a countervailing foreign policy interest expressed by the executive branch tilts in immunity's favor. It is therefore the role of the executive branch to communicate to a court whether foreign affairs interests require immunity.

This conflicts analysis produces a simple rule: a presumption against immunity for human rights violations, rebuttable by an executive immunity suggestion. Such a presumption would deny immunity in many human rights cases, but leave a diplomatic escape hatch in those few cases that trigger compelling foreign affairs interests. By preserving latitude for the Executive, a rebuttable presumption against immunity would ultimately ensure the continued viability of human rights litigation.

Part I of this Note provides an overview of human rights litigation and the doctrines of foreign state and foreign official immunity under common law and the FSIA. Part II analyzes the *Samantar* decision and explores the contours of the post-*Samantar* doctrine of foreign official immunity. Part III examines the rationales for foreign official immunity and the competing interests at stake. Building on this base, Part IV proposes a conflict of laws analysis and a rebuttable presump-

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foreign state), *and* Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity, Individual Officials, and Human Rights Litigation*, 13 GREEN BAG 2D 9, 13 (2009) [hereinafter Bradley & Goldsmith, *Individual Officials*] (same), *with* Stephens, *supra* note 19, at 2718 (arguing that neither the State Department nor the courts should grant individual immunity for acts that violate international human rights law).

23 *E.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14, Dec. 10, 1984, S. TREATY DOC. No. 100-20 (1988), 1465 U.N.T.S. 85, 113; *see also* 137 CONG. REC. 2672 (1991) (statement of Sen. Kennedy) (arguing that the TVPA was a "crucial step in America's contribution to the enforcement of international laws against torture").

tion against immunity. Finally, Part V considers counterarguments to the proposal, including those relating to separation of powers concerns and policy issues of politicization and reciprocity in foreign relations.

I. HUMAN RIGHTS LITIGATION AND THE FOREIGN IMMUNITIES REGIME

> *"[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis, *an enemy of all mankind."*[24]

When "enemies of all mankind" enjoy the benefits of U.S. law, should they be immune to the law's burdens? This Part orients the reader to the rise of human rights litigation against the centuries-old backdrop of foreign sovereign immunity. After reviewing the evolution of the foreign immunities regime, this Part discusses the circuit split over the source and scope of foreign official immunity that led to *Samantar*.

A. *Safe Haven for Human Rights Abusers? The Scope of the Problem*

Torture committed abroad does not stay abroad. The United States shelters an estimated 400,000 persons who survived torture by foreign government officials.[25] It also helps fund their rehabilitation: from the fiscal years 2010 to 2012, an estimated $32.7 million in federal grants were awarded to torture treatment centers[26] pursuant to the Torture Victims Relief Act of 1998.[27]

But open doors bring unwelcome guests—an unknown number of foreign human rights abusers live freely in the United States.[28] In 2002, Amnesty International estimated that up to 1100 suspected per-

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24 Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) (denying a Paraguayan police captain's motion to dismiss a complaint for the torture and murder of a political dissident's teenaged son).

25 OFFICE OF REFUGEE RESETTLEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., REPORT TO CONGRESS—FY 2007, at 50 (2007), *available at* http://www.acf.hhs.gov/programs/orr/data/ORR_2007_report.pdf.

26 Admin. for Children & Families, U.S. Dep't Health & Human Servs., *Assistance for Torture Victims*, CATALOG FED. DOMESTIC ASSISTANCE, https://cfda.symplicity.com (enter "93.604" in the "Keyword or Program Number" box; click "Search"; then click the magnifying glass icon) (last visited Feb. 25, 2012).

27 Torture Victims Relief Act, 22 U.S.C. § 2152 (2006).

28 *See* WILLIAM J. ACEVES, AMNESTY INT'L, UNITED STATES OF AMERICA: A SAFE HAVEN FOR TORTURERS 23 (2002).

petrators were present in the United States.[29] Today, the number is likely greater; as of 2009, U.S. Immigration and Customs Enforcement ("ICE") has 1000 active human rights removal cases.[30] Since 2004, ICE has removed more than 300 human rights abusers.[31] Yet these 1300 represent only those human rights abusers detected by officials.

With both the tortured and the torturers living in the United States, survivors have turned to the courts for redress.[32] They do so under the ATS,[33] a section of the Judiciary Act of 1789,[34] which provides federal jurisdiction over a civil action brought by an alien for a tort that is a violation of international law.

Rarely used for nearly 200 years, the ATS was revived by the Second Circuit in 1980, in *Filartiga v. Pena-Irala*,[35] when the court held that foreign victims of human rights abuses could sue responsible foreign officials present in the United States.[36] Congress reaffirmed *Filartiga* in the TVPA, which created a private cause of action against persons who commit torture or extrajudicial killing under color of law of any foreign state.[37] And in 2004, in *Sosa v. Alvarez-Machain*,[38] the Supreme Court gave its imprimatur to the exercise of ATS jurisdiction over a narrow class of human rights claims arising under customary international law.[39] Thus, for more than thirty years, U.S. courts have exercised jurisdiction over foreign officials sued in tort for violating

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29 *Id.* at 24.

30 *No Safe Haven: Accountability for Human Rights Violators, Part II: Hearing Before the S. Subcomm. on Human Rights and the Law of the S. Comm. on the Judiciary*, 111th Cong. 116 (2009) (statement of John Morton, Assistant Secretary, U.S. Immigration and Customs Enforcement).

31 *Id.*

32 *See* Gerald Gray, Profile, *The Center for Justice and Accountability*, 4 HEALTH & HUM. RTS. 277, 278–79 (1999).

33 28 U.S.C. § 1350 (2006).

34 Judiciary Act of 1789, ch. 20, 1 Stat. 73.

35 Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

36 *Id.* at 878.

37 18 U.S.C. § 1350 note (2006).

38 Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

39 *Id.* at 725, 732 (holding that the ATS gives federal courts subject matter jurisdiction over a narrow class of federal common law claims derived from norms of customary international law that are "specific, universal, and obligatory," and comparable to eighteenth-century norms on piracy, safe conduct, and offenses against ambassadors). Actionable norms of customary international law include torture; "disappearances; war crimes; genocide; cruel, inhuman, and degrading treatment—including sexual assault; arbitrary detention; and crimes against humanity." Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest:* Sosa v. Alvarez-Machain *and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241, 2264–65 (2004) (footnotes omitted).

human rights.[40] But *Filartiga* and its progeny have exposed a potential paradox in the law: how can the liability of foreign officials for human rights abuse be squared with immunity doctrines?[41]

B. *Unthreading the Knot: The Immunities of Foreign States and Their Officials*

An understanding of foreign official immunity begins with a key distinction: under international law, the immunity regime comprises three discrete doctrines.[42] First, the rule of state immunity bars the exercise of jurisdiction over the public acts of a foreign state.[43] Second, the rule of status-based immunity[44] bars the exercise of jurisdiction over certain categories of foreign officials (heads of state, diplomats, and foreign ministers) regardless of the nature of their acts but only during their term of office.[45] Third, the rule of conduct-based immunity[46] bars the exercise of jurisdiction over current or former foreign officials for certain "acts performed in [an] official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state."[47] The conduct-based immunity of lower-level foreign officials—called foreign official immunity—is the subject of this Note. But to understand the modern application of this doctrine, one

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40 *See, e.g.*, Chavez v. Carranza, 559 F.3d 486, 491, 495 (6th Cir. 2009) (upholding $1.5 million jury verdict for ATS and TVPA claims against Salvadoran ex-Vice Minister of Defense and denying recognition of El Salvador's amnesty law).

41 *See* Bradley & Goldsmith, *Individual Officials*, *supra* note 22, at 9 ("[I]nternational human rights litigation in U.S. courts has developed with little attention to a lurking doctrinal objection.").

42 *See* ROSANNE VAN ALEBEEK, THE IMMUNITY OF STATES AND THEIR OFFICIALS IN INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW 2 (2008).

43 *See id.*

44 Also called "personal immunity" or "immunity *ratione personae*." *See id.*

45 Chimène I. Keitner, *The Common Law of Foreign Official Immunity*, 14 GREEN BAG 2D 61, 63–65 (2010). Status-based diplomatic immunity is governed by the Vienna Convention on Diplomatic Relations art. 31, Apr. 18, 1961, 23 U.S.T. 3227, 3240, 500 U.N.T.S 95, 113. By contrast, head of state immunity derives from customary international law, incorporated into federal common law. *See* Ye v. Zemin, 383 F.3d 620, 624 (7th Cir. 2004). Because the *Samantar* decision addressed conduct-based immunity, a full examination of head of state and diplomatic immunity is beyond the scope of this Note. *See* JENNIFER K. ELSEA, CONG. RESEARCH SERV., R41379, *SAMANTAR V. YOUSEF*: THE FOREIGN SOVEREIGN IMMUNITIES ACT AND FOREIGN OFFICIALS 11 (2011).

46 Also called "functional immunity" or "immunity *ratione materiae*." Keitner, *supra* note 45, at 63.

47 RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 66(f) (1965), *quoted in* Samantar v. Yousuf, 130 S. Ct. 2278, 2290 (2010).

must first examine the evolution of state immunity, from which individual immunity (both status-based and conduct-based) derives.[48]

1. *Foreign State Immunity: From First Formulations to the Foreign Sovereign Immunities Act*

In U.S. law, foreign state immunity derives from the Marshall Court's opinion in *The Schooner Exchange*.[49] That case came to represent a foreign state's absolute immunity from suit.[50] It also marked the beginning of a longstanding practice of deference to executive "suggestions of immunity."[51] In two cases in the 1940s, the Supreme Court made that deference mandatory. In *Ex parte Republic of Peru*[52] and *Republic of Mexico v. Hoffman*,[53] the Court held that executive determinations of immunity bind the courts: "It is . . . not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."[54]

However, both the scope of foreign state immunity and the role of the Executive would undergo a dramatic change in the midtwentieth century. In the Tate Letter of 1952,[55] the State Department abandoned absolute immunity in favor of the international legal principle of the "restrictive theory," which limits a state's immunity to its public acts, excluding its private commercial activities.[56] Yet the rising volume of commercial foreign sovereign litigation made it impractical for the State Department to continue making case-by-case immunity determinations.[57] At the same time, the availability of international

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48 *See* Stephens, *supra* note 19, at 2675.

49 *See* The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 116, 147 (1812).

50 *See* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983).

51 *See The Schooner Exchange*, 11 U.S. (7 Cranch) at 147; *see also* A. B. Lyons, *The Conclusiveness of the 'Suggestion' and Certificate of the American State Department*, 24 BRIT. Y.B. INT'L L. 116, 118 (1947).

52 *Ex parte* Republic of Peru, 318 U.S. 578 (1943).

53 Republic of Mexico v. Hoffman, 324 U.S. 30 (1945).

54 *Id.* at 35; *see also Ex parte Peru*, 318 U.S. at 589. *But see* Phillip Jessup, Comment, *Has the Supreme Court Abdicated One of Its Functions?*, 40 AM. J. INT'L L. 168, 169 (1946) (criticizing automatic deference as an erosion of the role of the judiciary).

55 Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments, 26 DEP'T STATE BULL. 971, 984–95 (1952).

56 *Id.*; *see also Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings Before the Subcomm. on Admin. Law and Gov't Relations of the H. Comm. on the Judiciary*, 94th Cong. 26, 26–27 (1976) (statement of Monroe Leigh, Legal Advisor, Department of State).

57 *See Jurisdiction of U.S. Courts in Suits Against Foreign States*, *supra* note 56, at 32–34 (statement of Bruno A. Riston, Chief, Foreign Litigation Section, Civil Division, Department of Justice).

legal standards under the restrictive theory made it easier for courts to determine foreign state immunity as a question of law.[58] As a result, Congress enacted the FSIA, which committed the determination of foreign state immunity to the judiciary[59] and created a presumption of immunity for foreign states, rebuttable under several enumerated exceptions.[60]

But one thing was conspicuously absent from the text of the FSIA: the immunity of individual foreign officials.[61] Courts grew divided on whether Congress intended the statutory term "foreign state" to include individual officials.[62] Because of this uncertainty, it was unclear whether Congress intended the FSIA to supersede the common law principles of foreign official immunity.[63] The next Subsection of this Note explores the development of these common law principles.

2. *Individual Immunities: The Early Common Law of Foreign Official Immunity*

An individual foreign official's immunity derives from the immunity of his or her state.[64] Most foreign official immunity cases have involved status-based immunities: the treaty-based immunities of diplomats or the common law immunity granted to recognized heads of state.[65] Until the late twentieth century, cases involving the conduct-based immunity of lower level foreign officials were scarce and inconsistently decided.[66]

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58 *See id.* at 26 (statement of Monroe Leigh, Legal Advisor, Department of State).

59 LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 56 n.1 (2d ed. 1996). *But see* Republic of Austria v. Altmann, 541 U.S. 677, 702 (2004) (noting that executive views on foreign policy may be entitled to deference).

60 28 U.S.C. §§ 1604–1611 (2006). Exceptions to immunity under § 1605 include, inter alia, express or implied waiver, commercial activities of the foreign sovereign conducted or having direct effects within the United States; and noncommercial torts committed within the United States. *Id.* § 1605; *see also* Verlinden B.V. v. Bank of Nigeria, 461 U.S. 480, 486–87 (1983).

61 *See* Samantar v. Yousuf, 130 S. Ct. 2278, 2291 (2010).

62 *Compare* Enahoro v. Abubakar, 408 F.3d 877, 881–83 (7th Cir. 2005) (holding that the FSIA does not apply to individual officials), *with* Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1103, 1106 (9th Cir. 1990) (immunizing an official under the FSIA), *abrogated by Samantar*, 130 S. Ct. 2278.

63 *See Samantar*, 130 S. Ct. at 2290–91.

64 *See id.* ("[W]e do not doubt that in some circumstances the immunity of the foreign state extends to an individual for acts taken in his official capacity."); Stephens, *supra* note 19, at 2675.

65 *See* Stephens, *supra* note 19, at 2675.

66 *Id.*

Two principles can be discerned from these early cases. First, State Department positions on foreign official immunity were entitled to deference.[67] Second, foreign official immunity had substantive limits; officials acting outside the scope of lawful authority had no claim to immunity.[68]

The earliest opinions on foreign official immunity subjected officials to jurisdiction, but indicated that acting under official authority could be a defense on the merits.[69] One notable case, *People v. McLeod*,[70] suggested that an official could be immune for official acts, but held that violations of international laws of war did not constitute official acts requiring immunity.[71] In *McLeod*, the New York Supreme Court of Judicature denied immunity to a British official for the 1837 attack on the American steamboat *Caroline*, which was set aflame and sent over Niagara Falls.[72] After two successive U.S. Secretaries of State offered inconsistent views on the availability of official acts immunity for law of war violations,[73] the court denied immunity.[74] The opinion noted that foreign tribunals were not bound to recognize Britain's attempt to authorize—and immunize—a violation of international law.[75]

Courts did grant immunity in foreign official suits not involving international law violations.[76] In commercial cases, courts immunized

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67 *See* Sovereign Immunity Decisions of the Department of State, May 1952 to January 1977, 1977 DIGEST 1017, 1049, 1053–54, 1075–77 (reporting only six head of state and foreign official immunity cases between 1952 and 1977, all of which upheld the State Department's suggestion).

68 *See* Stephens, *supra* note 19, at 2677.

69 *E.g.*, Suits Against Foreigners, 1 Op. Att'y Gen. 45 (1794) (opining that a French colonial governor was subject to suit for seizing a private vessel). In that case, the Supreme Court of Pennsylvania found that jurisdiction was proper and held the French official to bail. Waters v. Collot, 2 Yeates 26, 31 (Pa. 1796). For further analysis of early opinions, see Chimène I. Keitner, *Officially Immune? A Response to Bradley and Goldsmith*, 36 YALE J. INT'L L. ONLINE 1 (2010), http://www.yjil.org/online/volume-36-spring-2010/officially-immune-a-response-to-bradley-and-goldsmith.

70 People v. McLeod, 25 Wend. 483 (N.Y. Sup. Ct. 1841).

71 *See id.* at 589.

72 *Id.* at 588.

73 *Compare* Letter from John Forsyth, U.S. Sec'y of State, to H.S. Fox, Minister Plenipotentiary of Her Britannic Majesty in Washington (Dec. 26, 1840), *reprinted in McLeod*, 25 Wend. at 502–03 n.1 (stating that international law does not entitle foreign officials to impunity merely "because they acted in obedience to their superior authorities"), *with* Letter from Daniel Webster, U.S. Sec'y of State, to H.S. Fox, Minister Plenipotentiary of Her Britannic Majesty in Washington (Apr. 24, 1841), *reprinted in McLeod*, 25 Wend. at 512 n.1 (stating that an official cannot be responsible for acting under orders).

74 *See McLeod*, 25 Wend. at 589.

75 *See id.*

76 *See, e.g.*, Greenspan v. Crosbie, No. 74 Civ. 4734 (GLG), 1976 WL 841, at *2 (S.D.N.Y.

foreign officials when the absent foreign government was the real party in interest and a judgment or contract would be enforced against the foreign state.[77] But cases against foreign officials were "few and far between,"[78] and there was little elaboration on the definition of official acts or the scope of the immunity.[79] It was in this context of sparse and inconsistent caselaw that Congress enacted the FSIA in 1976.[80] The FSIA failed to address the immunity of officials, however, and courts were unsure whether to determine foreign official immunity under the FSIA or under the inconsistent common law.[81]

3. *Foreign Official Immunity as a Gloss on the Foreign Sovereign Immunities Act:* Chuidian *and Its Discontents*

Just four years after the enactment of the FSIA, the immunity of individual foreign officials took on new significance. With *Filartiga* and the rise of human rights litigation, courts began to face claims against foreign officials that tested the source and scope of foreign official immunity.[82]

In 1990, the Ninth Circuit held, in *Chuidian v. Philippine National Bank*,[83] that FSIA immunity extended to a foreign official for acts "committed in his official capacity," but not to "an official who acts beyond the scope of his authority."[84] *Chuidian* stood for two propositions: first, the FSIA shields individual officials, and second, purely private acts or ultra vires acts in abuse of authority do not receive conduct-based immunity.[85] A majority of circuits followed *Chuidian*'s

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Nov. 23, 1976) (granting immunity to Canadian officials for securities violations). *But see* Pilger v. U.S. Steel Corp., 130 A. 523, 524 (N.J. 1925) (holding that foreign official immunity does not extend to an official's unlawful or ultra vires acts).

77 *See, e.g.*, Heaney v. Gov't of Spain, 445 F.2d 501, 503–04 (2d Cir. 1971) (immunizing Spanish consul for nonperformance of a contract about diplomatic activities).

78 Samantar v. Yousuf, 130 S. Ct. 2278, 2291 (2010).

79 *See* Stephens, *supra* note 19, at 2671.

80 *See id.* at 2678.

81 *See id.* at 2679–81. The State Department consistently argued that foreign official immunity was still decided under the common law and subject to executive suggestions of immunity. Sovereign Immunity Decisions of the Department of State, *supra* note 67, at 1020.

82 *See supra* text accompanying notes 36–40.

83 Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095 (9th Cir. 1990) (immunizing under the FSIA a Philippine official who stopped payment on a check issued by the defunct Marcos regime), *abrogated by Samantar*, 130 S. Ct. 2278.

84 *Id.* at 1103, 1106.

85 *Id.* at 1106 (drawing on U.S. law of domestic official immunity: "[W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do . . . ." (omission in original) (quoting Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689 (1949)) (internal quotation marks omitted).

first proposition and construed the FSIA to apply to individuals.[86] The Seventh and Fourth Circuits broke rank, however, holding that because the plain language of the FSIA omitted individuals, the FSIA did not immunize foreign officials.[87]

In turn, courts grew divided on *Chuidian*'s second proposition, whether foreign officials are only immune for acts committed within the scope of lawful authority and whether human rights abuses are within that authority.[88] The Ninth Circuit, after *Chuidian*, held that acts of torture and other international crimes were not entitled to immunity under the FSIA.[89] Drawing on reasoning developed under the act of state doctrine,[90] several courts held that torture and other international crimes could not be considered official acts for immunity purposes because these acts are illegal in every country, violate nonderogable norms of international law, and are rarely if ever ratified by foreign states as official policy.[91]

But sometimes, foreign states *do* ratify prima facie international law violations. A series of controversial lawsuits against Israeli officials prompted the D.C. and Second Circuits to hold that ratification could place a facially unlawful, ultra vires act within the scope of au-

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86 *In re* Terrorist Attacks on Sept. 11, 2001, 538 F.3d 71, 81 (2d Cir. 2008), *abrogated by Samantar*, 130 S. Ct. 2278; Velasco v. Gov't of Indonesia, 370 F.3d 392, 398–99 (4th Cir. 2004), *abrogated by Samantar*, 130 S. Ct. 2278; Keller v. Cent. Bank of Nigeria, 277 F.3d 811, 815 (6th Cir. 2002), *abrogated by Samantar*, 130 S. Ct. 2278; Byrd v. Corporacion Forestal y Indus. de Olancho S.A., 182 F.3d 380, 388 (5th Cir. 1999), *abrogated by Samantar*, 130 S. Ct. 2278; Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan, 115 F.3d 1020, 1027 (D.C. Cir. 1997); *Chuidian*, 912 F.2d at 1101–03, *abrogated by Samantar*, 130 S. Ct. 2278.

87 Yousuf v. Samantar, 552 F.3d 371, 379–83 (4th Cir. 2009) (reversing the court's position in *Velasco* and holding that the FSIA excluded individual officials), *aff'd and remanded*, 130 S. Ct. 2278; Enahoro v. Abubakar, 408 F.3d 877, 881–83 (7th Cir. 2005).

88 *Compare In re* Estate of Marcos Human Rights Litig., 25 F.3d 1467, 1472 (9th Cir. 1994) (denying immunity for international human rights law violations), *and* Xuncax v. Gramajo, 886 F. Supp. 162, 175–76 (D. Mass. 1995) (same), *with* Matar v. Dichter, 563 F.3d 9, 14 (2d Cir. 2009) (immunizing officials for international law violations after the acts were ratified by the foreign state and the State Department intervened).

89 *See In re Estate of Marcos*, 25 F.3d at 1472.

90 *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 250 (2d Cir. 1995) (holding the act of state doctrine inapplicable where torture and crimes against humanity violate the forum and foreign states' laws and are not ratified by the foreign sovereign); Trajano v. Marcos, Nos. 86-2448, 86-15039, 1989 WL 76894, at *2 (9th Cir. July 10, 1989) (same); Jimenez v. Aristeguieta, 311 F.2d 547, 558 (5th Cir. 1962) (holding that acts for personal profit are "as far from being an act of state as rape").

91 *See, e.g.*, Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 717 (9th Cir. 1992) ("[N]o state claims a sovereign right to torture its own citizens."); Letelier v. Republic of Chile, 488 F. Supp. 665, 673 (D.D.C. 1980) (holding that no official has "discretionary" authority to commit a political assassination).

thority and under the cloak of immunity.[92] In 2008, in *Belhas v. Ya'alon*,[93] the D.C. Circuit held that the FSIA barred ATS and TVPA claims against an Israeli general for civilian casualties in a shelling attack on Lebanon.[94] For the court, Israel's ratification of the operation was proof that Ya'alon acted within the scope of authority.[95]

The following year, in *Matar v. Dichter*,[96] the Second Circuit held that an Israeli general sued for allegedly targeting civilians was entitled to common law immunity[97] because the U.S. State Department filed a suggestion of immunity. Thus, in 2010, the circuits were split on two questions: (1) whether foreign official immunity was governed by the FSIA or by common law, and (2) under what circumstances, if any, international crimes committed under color of foreign law could constitute official acts entitled to immunity.[98]

II. *Samantar* and the Revival of Common Law Immunity

In *Samantar*, a unanimous Supreme Court resolved the circuit split on the first question and held that the FSIA does not extend immunity to foreign officials.[99] The Court, however, left the second question unresolved.[100] This Part first analyzes the *Samantar* opinion, noting that the Court did not announce a rule of decision on foreign official immunity at common law. It then examines lower court decisions post-*Samantar* to inform a proposed framework.

A. *The* Samantar *Decision*

In *Samantar*, plaintiffs—U.S. and Somali citizens—sued the former Somali Minister of Defense under the ATS and the TVPA for torture, extrajudicial killing, and crimes against humanity.[101] The district court granted Samantar's motion to dismiss, holding that Samantar was entitled to FSIA immunity.[102] The court noted that the

92 *See Dichter*, 563 F.3d at 14; Belhas v. Ya'alon, 515 F.3d 1279, 1284 (D.C. Cir. 2008); Doe I v. State of Israel, 400 F. Supp. 2d 86, 111 (D.D.C. 2005).

93 Belhas v. Ya'alon, 515 F.3d 1279 (D.C. Cir. 2008).

94 *Id.* at 1283.

95 *Id.*

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

97 *Id.* at 10, 14; *see also* Brief for the United States of America as Amicus Curiae in Support of Affirmance at 5, *Dichter*, 563 F.3d 9 (Dec. 19, 2007) (No. 07-2579-cv).

98 *See* Stephens, *supra* note 19, at 2680–82.

99 Samantar v. Yousuf, 130 S. Ct. 2278, 2289 (2010).

100 *See* Stephens, *supra* note 19, at 2671.

101 First Amended Complaint, *supra* note 1, ¶¶ 2–3.

102 Yousuf v. Samantar, No. 1:04cv1360, 2007 WL 2220579, at *14 (E.D. Va. Aug. 1, 2007), *rev'd*, 552 F.3d 371 (4th Cir. 2009), *aff'd and remanded*, 130 S. Ct. 2278.

complaint did not allege private motives[103] and deferred to a letter from the Transitional Federal Government of Somalia that ratified the alleged conduct as official state policy,[104] even though the United States did not recognize the Transitional Federal Government as the official government of Somalia.[105]

The Fourth Circuit reversed, holding that the text of the FSIA did not provide individual immunity and remanding for determination of common law immunity.[106] A unanimous Supreme Court affirmed, finding that individuals were not within the FSIA's definition of states and their agencies or instrumentalities.[107] Moreover, nothing in the text or the legislative history indicated that Congress intended to codify the common law of foreign official immunity or displace the role of the Executive.[108]

Writing for the Court, Justice Stevens rejected Samantar's contention that a suit against an official is in effect a suit against the state and that the FSIA must therefore apply to officials.[109] First, the Court noted that state and official immunities are not coextensive.[110] Foreign official immunity is uniquely subject to a caveat: officials are only immune for "acts performed in [their] official capacity *if the effect of exercising jurisdiction would be to enforce a rule of law against the state.*"[111] Drawing on domestic sovereign immunity analogues, the Court suggested in dicta that the capacity in which the official is sued and the remedy sought could be determinative.[112]

Justice Stevens suggested that the Federal Rules of Civil Procedure already guard against the risk that plaintiffs may artfully plead around sovereign immunity.[113] Where the foreign state is clearly the real party in interest, the complaint will be treated as one against the state, regardless of how it is captioned.[114] Moreover, if the remedy

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103 *Id.* at *11.

104 *Id.*

105 Statement of Interest of the United States at 8, *Yousuf*, 2007 WL 2220579.

106 *Yousuf*, 552 F.3d at 381, 383.

107 *Samantar*, 130 S. Ct. at 2286.

108 *Id.* at 2291 ("The immunity of officials simply was not the particular problem to which Congress was responding when it enacted the FSIA.").

109 *Id.* at 2290.

110 *Id.* (noting that courts have immunized officials for commercial acts for which the state itself would not be immune).

111 *Id.* at 2290 (emphasis added) (quoting RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 66 (1965)) (internal quotation marks omitted).

112 *See id.* at 2292.

113 *See id.*

114 *Id.* (citing Kentucky v. Graham, 473 U.S. 159, 166 (1985)).

affects a state's legal interests through injunctive relief or damages drawn from its treasury, the absent sovereign might be an indispensable party requiring mandatory joinder.[115] If joinder were impossible due to FSIA immunity, the suit would be dismissed.[116] But the Court noted that because Samantar would have to satisfy the judgment personally, Somalia's legal rights—and hence its immunity—were not implicated in the case.[117]

Finally, the Court noted that the executive branch retains its power to suggest immunity.[118] The foreign state can request a suggestion of immunity.[119] If the suggestion is granted, it binds the court under *Ex parte Peru*.[120] If the State Department abstains from suggesting immunity, the district court can look to common law principles for a rule of decision.[121]

B. *Guesswork: Divining the Standard for Common Law Immunity After* Samantar

The *Samantar* Court refrained from prescribing a rule of common law immunity.[122] Advocates on both sides of the issue have offered per se rules that either immunize all acts taken on behalf of a foreign state—regardless of international or domestic illegality[123]—or deny immunity for all human rights violations, irrespective of foreign state ratification or executive branch intervention.[124] In turn, the State Department identified several factors it may consider when deciding a state's request of immunity for its officials.[125] But the Department has

115 *See id.* at 2292 (citing FED. R. CIV. P. 19(a)(1)(B)).

116 *Id.*

117 *See id.*

118 *Id.* at 2291 ("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.").

119 *Id.* at 2284.

120 *Id.* (citing *Ex parte* Republic of Peru, 318 U.S. 578, 589 (1943)).

121 *Id.*

122 *See* Stephens, *supra* note 19, at 2671.

123 *See, e.g.*, Bradley & Goldsmith, *Individual Officials*, *supra* note 22, at 22 (advancing a rule of blanket immunity for foreign officials).

124 *See, e.g.*, Stephens, *supra* note 19, at 2718 (arguing that executive branch status designations bind the courts and that executive views on the scope of a foreign official's authority are entitled to respect, but that foreign state immunity requests for human rights violations command no deference).

125 Brief for the United States as Amicus Curiae Supporting Affirmance at 24–27, *Samantar*, 130 S. Ct. 2278 (Jan. 27, 2010) (No. 08-1555). The factors include (1) issues of reciprocity and the protection of U.S. officials abroad, (2) customary international law, (3) the immunity of the foreign state itself, (4) domestic precedents, (5) the "nature of the acts alleged—and whether they should properly be regarded as actions in an official capacity," (6) whether the foreign

also cautioned that these factors are particular to given cases and do not supply a general rule of decision for the courts.[126]

The first lower court decision to apply foreign official immunity at common law after *Samantar* indicates that an executive suggestion may be the *only* source of immunity for an official when the suit does not seek to enforce a judgment against the state.[127] When sued for alleged acts of torture and arbitrary detention, Sheikh Khalifa, current ruler of the United Arab Emirates, and Sheikh Mohammed, de facto head of the armed forces, asserted immunity.[128] The State Department suggested head of state immunity for Sheikh Khalifa, but was silent as to Sheikh Mohammed.[129] With little analysis, the district court treated that silence as fatal to the conduct-based foreign official immunity defense.[130]

Recent State Department practice establishes several additional considerations. After the Supreme Court remanded *Samantar* back to the district court, the State Department filed a statement of interest denying immunity on two grounds. First, because the United States does not officially recognize a government of Somalia, no foreign state can request immunity on Samantar's behalf or assert that he acted in an official capacity.[131] Second, because Samantar is a permanent U.S. resident, he should be subject to the jurisdiction of its courts.[132] The district court deferred to the government's views, illustrating the executive power not only to suggest, but also to deny, immunity.[133]

The executive branch position in *Samantar* suggests several principles. First, immunity is not a private right of the official.[134] Instead, the intended beneficiary of immunity is the foreign state.[135] Thus, the foreign state may waive an official's immunity.[136] Second, it follows

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government has diplomatic recognition, (7) "the foreign state's position on whether the alleged conduct was in an official capacity," (8) whether the foreign state has "waive[d] the immunity of a current or former official," (9) whether the suit raises federal common law claims under the ATS or a statutory right of action under the TVPA, and (10) whether the defendant resides in the United States. *Id.*

126 Statement of Interest of the United States, *supra* note 105, at 5 n.2.

127 *See* Al Hassen v. Al Nahyan, No. CV 09-01106 DMG (MANx), slip op. at 9–10 (C.D. Cal. Sept. 17, 2010).

128 *Id.* at 7.

129 *Id.* at 7–10.

130 *Id.* at 9–10.

131 Statement of Interest of the United States, *supra* note 105, at 8.

132 *Id.* at 9.

133 Yousuf v. Samantar, No. 1:04cv1360 (LMB/JFA) (E.D. Va. Feb. 15, 2011).

134 Statement of Interest of the United States, *supra* note 105, at 9.

135 *Id.*

136 *Id.* at 7.

that a foreign state's failure to assert immunity or to ratify an official's conduct might cast doubt on whether the official acted within the scope of lawful authority.[137] Third, a foreign government that the United States does not recognize is incapable of "waiving or asserting a claim of immunity on behalf of a [foreign] official or of taking a position on whether Defendant's alleged acts were taken in an official capacity."[138] And finally, a foreign official with long-established residency in the United States might be subject to a "bitter with the sweet" principle that the benefit of U.S. law comes with the burden of its courts' jurisdiction.[139] Although these principles lay guidelines for the courts, the State Department has insisted that in future cases, these principles will not limit the Department's ability to suggest or deny immunity.[140]

Beyond these basic principles, the doctrinal state of foreign official immunity remains unsettled. *Samantar* and its progeny shed light on the Executive's role and the factors that might influence an executive immunity determination, but lower courts have yet to articulate a clear standard to apply in the absence of executive guidance. The next Part analyzes the rationales for immunity and the relevant stakeholder interests as a guide to developing such a standard.

III. RATIONALIZING IMMUNITY, BALANCING INTERESTS

What is the purpose of foreign official immunity? Three distinct rationales underpin the doctrine: one procedural, one substantive, and one prudential.[141] First, the procedural rationale aims to protect state immunity from collateral attack.[142] By treating a suit against an official as a suit against a state, the foreign official immunity defense bars the indirect litigation of a claim that could not be brought against the

137 *Cf.* Filartiga v. Pena-Irala, 630 F.2d 876, 889 (2d Cir. 1980) ("[W]e doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could properly be characterized as an act of state.").

138 Statement of Interest of the United States, *supra* note 105, at 8.

139 *See id.* at 9.

140 *See id.*

141 *See* Spacil v. Crowe, 489 F.2d 614, 618–19 (5th Cir. 1974) (giving a rationale for judicial deference to executive preference based on a constitutional separation of powers argument); Dapo Akande, *US Appeals Court Holds that Former Foreign Officials Entitled to Immunity in Civil Suit Alleging War Crimes*, EJIL: TALK! BLOG EUR. J. INT'L L. (May 3, 2009), http://www.ejiltalk.org/us-appeals-court-holds-that-former-foreign-officials-entitled-to-immunity-in-civil-suit-alleging-war-crimes (noting that functional (i.e., conduct-based) immunity has a procedural and substantive rationale).

142 Akande, *supra* note 141.

state itself.[143] Yet, as discussed in Part II.A, this procedural concern is already addressed by the rules of joinder under the Federal Rules of Civil Procedure.[144]

Second, the substantive rationale seeks to ensure that officials, as agents of a state, are not held personally responsible for acts attributable to that state.[145] To judge these acts would be against international comity, as it would require judging the public acts of a coequal sovereign.[146] International and national tribunals, however, have rejected this substantive defense for international crimes.[147] For example, the Nuremberg Tribunal held that an official who carries out an authorized act that violates international law is not excused by such authorization.[148] Similarly, in the trial of Nazi official Adolf Eichmann, the Israeli Supreme Court held that a state's responsibility for international crimes does not detract from the personal responsibility of its officials.[149]

Finally, foreign official immunity has a prudential rationale based on the separation of powers.[150] Immunity offers the judicial branch—inexpert in international affairs—a means to avoid embarrassing the Executive in the conduct of foreign relations.[151] Because the execu-

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143 *See, e.g.*, Hans Kelsen, *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals*, 31 CALIF. L. REV. 530, 539–41 (1943); *see also* Bradley & Goldsmith, *Individual Officials*, *supra* note 22, at 13.

144 *See* Samantar v. Yousuf, 130 S. Ct. 2278, 2292 (2010). For more on the interaction between the rules of joinder and foreign sovereign immunity, see Katherine Florey, *Making Sovereigns Indispensable:* Pimentel *and the Evolution of Rule 19*, 58 UCLA L. REV. 667, 710 (2011).

145 Statement of Interest of the United States of America at 9–10, Matar v. Dichter, 500 F. Supp. 2d 284 (S.D.N.Y. 2007) (05 Civ.10270(WHP)) (explaining that official actions by foreign officials "were not attributable to them in their personal capacity; they were instead attributable only to the state, and accordingly the state was the only proper defendant in the case").

146 *See* R v. Bow St. Metro. Stipendiary Magistrate (No. 3), [2000] 1 A.C. 147 (H.L.) 286 (appeal taken from Eng.) (opinion of Phillips, L.) (noting the similarity between the "official capacity defense" and the American act of state doctrine).

147 *See* Dapo Akande & Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EURO. J. INT'L L. 815, 828–29 (2011).

148 United States v. Göring, Judgment (Int'l Military Trib. Oct. 1, 1946), *in* 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 171, 223 (1947) ("He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law.").

149 CrimA 336/61 Att'y Gen. of Isr. v. Eichmann 16(3) PD 2033 [1962] (Isr.), *translated in* 36 I.L.R. 5, 308–10.

150 *See* Spacil v. Crowe, 489 F.2d 614, 618 (5th Cir. 1974) (holding that sovereign immunity has separation of powers underpinnings); Brief for the United States as Amicus Curiae Supporting Affirmance, *supra* note 125, at 9 (extending constitutional argument to foreign official immunity).

151 *See Spacil*, 489 F.2d at 618.

tive branch is the "guiding organ in our conduct of foreign affairs,"[152] judicial deference to executive determinations of foreign official immunity is the preferred public policy.[153]

The procedural, substantive, and prudential underpinnings of foreign official immunity suggest that fundamental public and private interests are implicated when foreign officials are sued, especially in the context of human rights litigation. First, the plaintiff has an interest in having a claim tried on its merits.[154] Beyond the constitutional mandate of due process,[155] international treaties require the United States to provide effective remedies to victims of human rights abuses, including access to U.S. courts.[156]

Second, Congress has a strong interest in the enforcement of substantive human rights law.[157] In enacting the TVPA, Congress expressed a policy favoring the exercise of federal court jurisdiction over claims by victims of torture or extrajudicial killing.[158] Indeed, Congress enacted the TVPA to fulfill the United States' treaty obligations under the Convention Against Torture.[159] Moreover, Congress has favored enforcing human rights through civil litigation by enacting a series of statutes that create private causes of action for human rights abuse victims.[160] Yet Congress's interest in providing tort remedies to

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152 Ludecke v. Watkins, 335 U.S. 160, 173 (1948).

153 *Spacil*, 489 F.2d at 618 (holding that executive immunity suggestions are not reviewable under the Administrative Procedure Act). Some scholars suggest that foreign official immunity should borrow from the domestic common law doctrine of qualified immunity. *E.g.*, John Balzano, *A Hidden Compromise: Qualified Immunity in Suits Against Foreign Government Officials*, 13 OR. REV. INT'L L. 81, 123–25 (2011). But because foreign official immunity implicates sensitive questions of foreign relations between coequal sovereigns, domestic immunity doctrines are inadequate to address all relevant policy concerns. *See* Bradley & Goldsmith, *Domestic Officer Suits*, *supra* note 22, at 148–49.

154 *See* Michael H. Cardozo, *Sovereign Immunity: The Plaintiff Deserves a Day in Court*, 67 HARV. L. REV. 608, 613 (1954) (suggesting that the State Department ruling in a foreign official immunity case, without plaintiff's right to appeal before a court, could violate the plaintiff's due process rights).

155 *Id.*

156 *E.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 23, 1465 U.N.T.S. at 113 ("Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation[.]").

157 *See* Wiwa v. Royal Dutch Petrol. Co., 226 F.3d 88, 106 (2d Cir. 2000).

158 *See id.*

159 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 23, art. 14; H.R. REP. No. 102-367, at 3 (1991).

160 *E.g.*, Human Rights Enforcement Act of 2009, Pub. L. No. 111-122, § 3(d), 123 Stat. 3480, 3481–82 (codified at 18 U.S.C. § 2339A(a) (Supp. IV 2010)) (creating rights of action for the material support of genocide and child soldier recruitment); Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, sec. 4(a)(4)(A), § 1595, 117 Stat. 2875 (codi-

victims is in tension with foreign official immunity. Because human rights abuses generally are committed under color of law, granting foreign official immunity for torture, extrajudicial killing, or sponsorship of terrorism would nullify the TVPA and other human rights statutes.[161]

Third, the executive branch has an interest in resolving the competing foreign policy imperatives of enforcing human rights law and avoiding diplomatic friction. In some cases, Congress's policy of accountability might clash with executive foreign policy interests.[162] Denying immunity to a requesting state's officials could strain foreign relations and lead to a reciprocal denial of immunity to U.S. officials.[163]

But in other cases, holding foreign officials accountable can further U.S. foreign policy. As the government's amicus brief in *Filartiga* observed, courts may embarrass the Executive by *not* recognizing international principles of accountability.[164] Indeed, U.S. efforts to influence states with records of human rights abuses could be hampered by the loss of international credibility.[165] Appeals to widely recognized human rights norms provide a useful tool of diplomatic leverage, illustrated by U.S. efforts to respond to the 2011 "Arab Spring" uprisings.[166] The Executive should be wary of surrendering its ability

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fied as amended at 18 U.S.C. § 1595) (providing a cause of action for human trafficking victims); Federal Courts Administration Act of 1992, Pub. L. No. 102-572, sec. 1003(a)(3), § 2333, 106 Stat. 4506, 4522 (codified as amended at 18 U.S.C. § 2333 (2006)) (providing a private right of action for U.S. victims of terrorism).

161 Pugh v. Socialist People's Libyan Arab Jamahiriya, Civ.A.02-02026 HHK, 2006 WL 2384915, at *7 (D.D.C. May 11, 2006). *But see* Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity,* 2010 SUP. CT. REV. 213, 266 (noting that even under a blanket immunity regime, the ATS and the TVPA would still be a basis for human rights litigation in the few instances where the foreign state expressly waives immunity or disclaims the official's conduct).

162 *See* Statement of Interest of the United States of America, *supra* note 145, at 2.

163 *Id.*

164 Memorandum for the United States as Amicus Curiae at 22–23, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. June 30, 1980) (No. 79-6090) (arguing that the international consensus against torture means that "there is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights.").

165 *Cf.* Colum Lynch, *U.S. Faces Doubts About Leadership on Human Rights*, WASH. POST, Sept. 22, 2009, at A8 (suggesting that the Obama Administration's international credibility on human rights abuses may have suffered from perceived selective enforcement).

166 *See* Anne-Marie Slaughter, *Interests vs. Values? Misunderstanding Obama's Libya Strategy*, NYRBLOG (Mar. 30, 2011, 2:15 PM), http://www.nybooks.com/blogs/nyrblog/2011/mar/30/interests-values-obamas-libya-strategy (noting that the Egyptian youth leadership's perception of U.S. support for ousted dictator Mubarak undermined strategic U.S. regional interests).

to leverage human rights norms through grants of immunity that shield abusers.

Indeed, the perception of the United States as a safe haven for war criminals and ousted despots could be a source of reputational harm.[167] The international community has emphasized individual accountability as essential to the transition from periods of conflict or repression.[168] The United States would obstruct transitional justice abroad if responsible officials could evade justice by retiring to our shores.[169] Thus, the short-term benefits of immunity must be weighed against the long-term national interest in human rights and promotion of democracy; this delicate political task, ill suited to the judiciary, is squarely within the Executive's foreign affairs expertise.[170]

Finally, the foreign state has a sovereign interest in sending current officials to the United States without fear of litigation.[171] This practical concern reflects a discomfort with subjecting official acts to the jurisdiction of foreign states.[172] Litigation-free visits to the United States are less likely to be implicated, however, when former officials choose to visit or reside in the United States.[173] As for subjecting official acts to the jurisdiction of foreign states, one may question the legitimacy of a foreign state's interest in shielding international law violations from view, particularly when human rights law already contemplates external scrutiny of such acts.[174]

The preceding analysis shows that foreign official immunity rests on three rationales: a procedural protection of foreign sovereign immunity, a substantive doctrine of deference to foreign acts of state, and a prudential concern for the proper distribution of powers in matters touching on foreign relations. These rationales reflect a struggle

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167 *See* 137 CONG. REC. 2671 (1991) (statement of Sen. Spector).

168 *See, e.g.*, U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary General*, ¶ 64, U.N. Doc. S/2004/616 (Aug. 23, 2004).

169 *Cf.* Jean v. Dorelien, 431 F.3d 776, 778 (11th Cir. 2005). In *Dorelien*, Haitian massacre survivors used an ATS suit as a vehicle for enforcing a Haitian judgment against an ex-military coup leader who fled to the U.S. and won the Florida state lottery. *Id.*

170 *See* Spacil v. Crowe, 489 F.2d 614, 619 (5th Cir. 1974).

171 *Cf.* Suggestion of Immunity and Statement of Interest of the United States at 15, Weixum v. Xilai, 568 F. Supp. 2d 35 (D.D.C. 2008) (No. 04-0649(RJL)) (noting that a civil suit against a Chinese minister risks friction in bilateral relations).

172 *See* HAZEL FOX, THE LAW OF STATE IMMUNITY 28 (2002) (arguing that "the independence and equality of States" bars one State from exercising jurisdiction over the acts of another).

173 *See* Statement of Interest of the United States of America, *supra* note 105, at 9.

174 *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 cmt. c (1987).

between (1) the plaintiff's interest in reaching the merits, (2) the United States' interests in the domestic enforcement of human rights and the preservation of bilateral relations, and (3) a foreign state's interest in guarding its policies from external scrutiny. The next Part suggests a framework for resolving these competing imperatives.

IV. A Flexible Framework for Foreign Official Immunity in Human Rights Cases

The previous Parts demonstrate that the *Samantar* Court removed the immunity of officials from the statutory framework of the FSIA, but did not offer a clear prescription for the applicable common law rule of immunity. This Part offers a framework for resolving claims of foreign official immunity when raised as a defense to human rights claims. The framework conceptualizes foreign official immunity as a conflict of laws problem. While this conflicts approach may be applicable in other contexts, here, the focus is on its particular application to human rights litigation. This Part distills this conflicts analysis into a simple rule: a presumption against immunity for human rights abuses, rebuttable only by an executive suggestion of immunity.

A. Foreign Official Immunity as a Conflict of Laws Problem

Foreign official immunity is a jurisdictional immunity, rather than a merits defense.[175] However, the tension between the doctrine's rationales and interests means that determining conduct-based immunity requires resolving a conflict of U.S., foreign, and international law. Any plea of foreign official immunity is predicated on ex ante authorization or ex post ratification by the foreign state.[176] Accordingly, the question in a human rights setting is whether a U.S. court should give extraterritorial effect to a foreign state's authorization of acts such as torture or terrorism that violate international and domestic law.

Viewing this question as a conflict of laws problem is illuminating. Classical conflicts doctrine creates a presumption in favor of the law of the state where the occurrence took place—the *lex loci*

175 *See* Samantar v. Yousuf, 130 S. Ct. 2278, 2290–91 (2010).

176 Absent some form of official authorization, the conduct for which immunity is claimed would be private and beyond the scope of authority. *Cf.* Filartiga v. Pena-Irala, 630 F.2d 876, 889 (2d Cir. 1980) ("[W]e doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could properly be characterized as an act of state.").

delicti.[177] When a foreign law is contrary to the public policy of the forum, however, a court will normally decline to give that law domestic effect.[178]

The act of state doctrine—a close relative of foreign official immunity[179]—is an exception to this public policy bar.[180] Under the act of state doctrine, U.S. courts will not judge the "validity of the public acts [that] a recognized" foreign state carries out "within its own territory," absent "a treaty or other unambiguous agreement regarding controlling legal principles."[181] The act of state doctrine does not apply, however, when international law clearly prohibits the purported "act of state" because the norm of international law provides a judicially manageable standard and a rule of decision.[182]

The manner in which courts apply the act of state doctrine in human rights litigation provides a model for how foreign official immunity should be applied in this same context. Like the act of state doctrine, foreign official immunity also addresses when U.S. courts should adopt a foreign state's laws or orders as a rule of decision. When a foreign official claims conduct-based immunity because his government authorized him to commit torture, he is asking the U.S. court to apply that authorization as the rule of decision. But because international law clearly prohibits torture or genocide, U.S. courts are not bound to recognize a foreign state's authorization of such crimes.[183] The official may be immune vis-à-vis his own government, but a foreign tribunal need not recognize that immunity.[184] Instead,

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177 *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971) (noting that the law of the state with the most significant relationship to the occurrence and the parties should apply).

178 *Id.* § 90.

179 *Cf. Samantar*, 130 S. Ct. at 2290–91.

180 *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 446 (1964).

181 *Id.* at 404, 428. Early formulations of the act of state doctrine often merged foreign official immunity and act of state. *See, e.g.*, Underhill v. Hernandez, 168 U.S. 250, 252 (1897) (holding that a Venezuelan general sued for injuring a U.S. national was protected by "[t]he immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of governmental authority").

182 *See Sabbatino*, 376 U.S. at 428; *cf.* Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 296 (7th Cir. 1990) (Cudahy, J., concurring) (stating that courts should have respect for international agreements when deciding whether to give effect to foreign decrees in violation of those agreements).

183 *See* Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1209–10 (9th Cir. 2007) (holding that international human rights norms constitute unambiguous rules of law and preclude application of the act of state doctrine); *cf. Sabbatino*, 376 U.S. at 428 ("[T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it . . . .").

184 *See* United States v. Göring, Judgment (Int'l Military Trib. Oct. 1, 1946), *in* 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 171, 223

U.S. courts should normally follow Congress's expressed policy preference for human rights accountability.[185]

But foreign policy concerns may tilt the scales. If the executive branch asserts that compelling foreign policy interests require immunity, then courts must defer to that finding under *Ex parte Peru*.[186] If, on the other hand, the State Department asserts no countervailing foreign affairs interest, then courts should follow the congressional policy favoring human rights litigation and refuse to recognize a foreign state's assertion of immunity.[187]

B. The Presumption Against Immunity for Human Rights Abuses

The preceding conflicts analysis can be distilled into a simple rule: A prima facie violation of international human rights law creates a rebuttable presumption that a foreign official is not entitled to immunity. The presumption against immunity may only be rebutted if the State Department officially suggests immunity to the court. Such a suggestion is binding on the court as a conclusive determination of U.S. foreign affairs interests.[188] Absent an executive suggestion of immunity, a foreign official sued for human rights abuses under the ATS, TVPA, or another federal statute has no claim to foreign official immunity at common law.

This rebuttable presumption seeks to address the competing rationales and interests triggered when immunity is asserted in a human rights case. Congress has already expressed a policy favoring human rights litigation,[189] and international human rights norms are unambig-

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(1947); *see also* People v. McLeod, 25 Wend. 483, 589 (N.Y. Sup. Ct. 1841) (declaring that Britain may "justify the offender as between him and his own government[,] [but] [s]he cannot bind foreign courts of justice"); *cf.* Chavez v. Carranza, 559 F.3d 486, 495 (6th Cir. 2009) (refusing to enforce a Salvadoran amnesty law as a defense to human rights claims).

185 *See supra* text accompanying notes 157–61.

186 *Ex parte* Republic of Peru, 318 U.S. 578, 589 (1943).

187 Note that a treaty conferring or waiving immunity would preempt this common law analysis. *Cf.* Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Eth., 729 F.2d 422, 428 (6th Cir. 1984) (noting that common law doctrines of abstention must be interpreted in light of controlling treaties). However, the United States is not a party to any multilateral treaty on conduct-based immunity. And state practice is too inconsistent to produce a norm of immunity for human rights abuses under customary international law. *Compare* Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia, [2006] UKHL 26, [2007] 1 A.C. 270 (H.L) (appeal taken from Eng.) (immunizing foreign officials for torture), *with* Ferrini v. Repubblica Federale di Germania, Cass. sez. un., 11 marzo 2004, n. 5044, Giust. Civ. 2004 II, 1191 (It.), *translated in* 128 I.L.R. 658 (denying conduct-based immunity for human rights abuses).

188 Samantar v. Yousuf, 130 S. Ct. 2278, 2284 (2010); Republic of Mexico v. Hoffman, 324 U.S. 30, 34 (1945); *Ex parte Peru*, 318 U.S. at 587–89.

189 *See supra* text accompanying notes 156–61.

uous.[190] When the State Department does not object on foreign policy grounds, the court should exercise jurisdiction over the foreign official defendant.[191]

The presumption against immunity would allow many ATS claims to go forward under a conflicts analysis that accounts for the strong forum interest in enforcing human rights, but preserves the diplomatic safety valve of executive suggestions of immunity. The upshot for litigants is that such doctrinal flexibility invites creative advocacy: the case for and against immunity will be made in court and before the Office of the Legal Advisor in the State Department. The proofs offered will range from statements of congressional or executive policy, to foreign decrees, to international law. The next Part analyzes whether the suggested test comports with principles of separation of powers and addresses concerns of reciprocity and politicization.

V. COUNTERPOINTS

Any change in foreign policy requires analysis of the constitutional separation of powers and consideration of the change's impact on foreign affairs. This Part first analyzes the Executive's power to suggest or deny immunity within the framework of Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*[192] and concludes that this power of suggestion passes constitutional muster. Then, weighing the policy implications of the proposed framework, this Part suggests that the politicization of the immunity determination is necessary to give the executive branch flexibility in foreign relations, particularly when the reciprocal treatment of U.S. officials overseas is at stake.

A. *The Power of Suggestion: Immunity, Deference, and the Separation of Powers*

Commentators suggest that placing immunity decisions in the Executive's hands would violate principles of separation of powers by trenching on congressional authority and judicial independence.[193]

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190 *See* Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1209–10 (9th Cir. 2007).

191 *See* Al Hassen v. Al Nahyan, No. CV 09-01106 DMG (MANx), slip op. at 9–10 (C.D. Cal. Sept. 17, 2010).

192 Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring).

193 *See, e.g.*, Derek Baxter, *Protecting the Power of the Judiciary: Why the Use of State Department "Statements of Interest" in Alien Tort Statute Litigation Runs Afoul of Separation of Powers Concerns*, 37 RUTGERS L.J. 807, 821 (2006); Keitner, *supra* note 45, at 72; Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*,

According to this argument, a suggestion of immunity for a human rights violation would override the ATS or TVPA and nullify Congress's intent to provide a judicial forum for violations of international law.[194] Opponents of executive influence point out that neither the ATS nor the TVPA delegate the determination of an Article III court's jurisdiction to the executive branch.[195] According to this argument, the Executive appears to lack a clear constitutional or statutory authorization to strip federal courts of jurisdiction by granting a request for immunity.

Although this argument has normative appeal, this Note concludes that executive suggestions of immunity are nonetheless constitutional, given the President's broad foreign affairs powers[196] and Congress's longstanding acquiescence to the Executive's power to immunize.[197] Although suggestions of immunity do not maximize human rights enforcement, they are a fixed feature of the law, to which litigants must adapt their tactics.

Conflicts between executive and congressional power in the field of foreign affairs are analyzed under the tripartite framework announced in Justice Jackson's concurrence in *Youngstown*.[198] Because Congress has neither expressly granted nor denied executive authority to determine immunity, the power of suggestion falls within the "zone of twilight" where the two branches share concurrent authority.[199]

In this zone, the Executive has two constitutional sources of authority for the power of suggestion. The first is the President's Article

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51 VA. J. INT'L L. 915, 953–54 (2011) (arguing that the FSIA stripped the State Department of the power to suggest immunity and that post-FSIA executive immunity suggestions could fall within Justice Jackson's category-three zone of conflict with Congress).

194 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 719 (2004) (noting that Congress, in passing the ATS, must have understood it to allow actions for violations of the law of nations); Wiwa v. Royal Dutch Petrol. Co., 226 F.3d 88, 106 (2d Cir. 2000) (noting that the ATS and the TVPA embody congressional policy in favor of adjudicating human rights claims).

195 *See* Baxter, *supra* note 193, at 821.

196 United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936) (quoting 10 ANNALS OF CONG. 613 (1800) (statement of Chief Justice John Marshall)).

197 Samantar v. Yousuf, 130 S. Ct. 2278, 2291 (2010) (noting that the FSIA did not occupy the field of foreign official immunity at common law with its long history of executive suggestion).

198 *Steel Seizure*, 343 U.S. at 635–38 (Jackson, J., concurring) (noting that presidential authority is at its zenith when pursuant to an express or implied grant of Congress ("category one"), at its lowest ebb when in conflict with a congressional denial ("category three"), and limited to some independent source of power or pattern of congressional acquiescence when in a "zone of twilight" where it is neither authorized nor denied by Congress ("category two")).

199 *See id.* at 637; *see also* HENKIN, *supra* note 59, at 96 (noting that the President and Congress share concurrent authority in immunity determinations not governed by the FSIA).

II power to recognize foreign governments.[200] Because only a recognized government has standing to assert immunity for its officials,[201] foreign official immunity will almost always implicate the Article II recognition power.[202]

The second source of executive authority is congressional acquiescence, which "may be treated as a gloss on 'executive Power,'"[203] especially when coupled with the Executive's broad foreign affairs power as the "sole organ of the nation in its external relations."[204] In fact, the power to suggest immunity has been recognized for centuries as a presidential prerogative in the conduct of foreign relations.[205] In *Ex parte Peru* and *Republic of Mexico v. Hoffman*, the Supreme Court confirmed the conclusive nature of executive branch immunity determinations.[206] Because the FSIA did not strip the Executive of the power to immunize officials, and neither the ATS nor the TVPA expressly abrogate immunity, there is not a *Youngstown* category-three conflict.[207] Similarly, the long pattern of congressional (and judicial)

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200 U.S. CONST. art II, § 3 (providing that the President shall "receive Ambassadors and other public Ministers"); *see also* Statement of Interest of the United States of America, *supra* note 105, at 8. The recognition power authorizes binding suggestions of head of state immunity. *See, e.g.*, Tachiona v. United States, 386 F.3d 205, 212–13 (2d Cir. 2004); Lafontant v. Aristide, 844 F. Supp. 128, 133 (E.D.N.Y. 1994).

201 *See* Statement of Interest of the United States of America, *supra* note 105, at 8 (denying immunity, in part, because the unrecognized Somali transitional government lacked standing to assert it).

202 *But see* Keitner, *supra* note 45, at 71–72 (arguing that deference to the Executive's suggestion of foreign official immunity lacks a constitutional basis); Stephens, *supra* note 19, at 2712–14.

203 *Steel Seizure*, 343 U.S. at 610–11 (Frankfurter, J., concurring); *see also* Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) (holding that a pattern of congressional acquiescence to executive agreements settling claims authorized executive agreement that "suspended" claims against Iran).

204 United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936) (quoting 10 ANNALS OF CONG. 613 (1800) (statement of Chief Justice John Marshall)) (internal quotation marks omitted).

205 *See* The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 147 (1812) (recognizing the executive power to suggest immunity).

206 Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945); *Ex parte* Republic of Peru, 318 U.S. 578, 588 (1943). Some commentators attempt to distinguish this line of cases as outliers in common law admiralty. *See* Wuerth, *supra* note 193, at 949. Although the immunity of vessels and foreign officials are factually distinguishable, it is not obvious why this distinction has constitutional significance. Indeed, the immunity of flesh and blood officials seems even more likely to trigger the foreign policy concerns that motivated Congress and the courts to acquiesce to executive immunity determinations in admiralty cases. *See supra* Part III.

207 *Steel Seizure*, 343 U.S. at 635–38 (Jackson, J., concurring) (noting that Presidential authority is at its lowest ebb when in conflict with a congressional denial ("category three")).

acquiescence to immunity suggestions provides a source of authority for the power of suggestion within *Youngstown* category two.[208]

Doubtless, the President has independent authority to immunize foreign officials for conduct ratified by a foreign state;[209] the more interesting question is when such authority should be exercised in contravention of congressional policy. As the framework suggests, such an inherently political question is not for the courts to decide alone.[210] Nevertheless, the State Department should tread carefully on the congressional policy favoring human rights litigation and international law obligations to give a judicial forum to victims. The suggestion of immunity should be reserved for cases where U.S. foreign policy interests are truly compelling.

B. Politicization and Reciprocity

Any approach that relies on State Department intervention can be accused of politicizing the issue and forcing the Department to take uncomfortable positions on questions of impunity and accountability.[211] If the point of the FSIA was to unburden the State Department,[212] why hand the reins back to the executive branch?

One answer is that the reins on individual immunity never left the Executive's hands because the FSIA codified only state, not individual, immunity.[213] A second answer is that two key differences between the international law of state and individual immunity rendered the judicialization of state immunity both desirable and feasible.[214] The first difference is volume: the Tate Letter's announcement of the restrictive theory of immunity, with its public/private distinction, roughly coincided with a wave of commercial foreign sovereign litigation that drained executive resources.[215] The second is the availability of clear standards for state immunity: the crystallization of the restric-

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208 Samantar v. Yousuf, 130 S. Ct. 2278, 2291 (2010) (noting that the FSIA did not occupy the field of foreign official immunity at common law with its long history of executive suggestion).

209 *See supra* text accompanying notes 200–02.

210 *See* Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948).

211 John B. Bellinger III, *Ruling Burdens State Dept.*, NAT'L L.J., June 28, 2010, at 47.

212 *See Jurisdiction of U.S. Courts in Suits Against Foreign States*, *supra* note 56, at 32–34 (statement of Bruno A. Riston, Chief, Foreign Litigation Section, Civil Division, Department of Justice).

213 *See Samantar*, 130 S. Ct. at 2291.

214 *See supra* Part I.B.3.

215 *See Jurisdiction of U.S. Courts in Suits Against Foreign States*, *supra* note 56, at 32–34 (statement of Bruno A Riston, Chief, Foreign Litigation Section, Civil Division, Department of Justice).

tive theory as customary international law provided a manageable legal standard for the bulk of immunity claims against states.[216] Because the FSIA harmonized with international law, the State Department could extract itself from commercial disputes, and courts could apply a codified restrictive theory without risking diplomatic friction.[217]

None of these concerns are true for today's cases against foreign officials. Even with the rise of ATS, TVPA, and terrorism litigation,[218] personal jurisdiction requirements inherently limit the number of cases that can be brought against foreign officials.[219] And international norms on conduct-based immunity, particularly those from human rights suits, are far from coalescing into clear standards comparable to the restrictive theory.[220]

In this landscape, any domestic immunity determination will contribute to the formation of customary international law.[221] Because the State Department has a fuller view of foreign relations and expertise in developing international norms, it has greater institutional competence to operate in this politically fraught environment, where each move sets international precedent.[222] For this very reason, the Department has long asserted the power of suggestion for individual official immunity without concern for its attendant burdens.[223]

Moreover, there are several reasons why politicization in the foreign official immunity context is more appropriate than it first appears. First, the only likely alternative to forcing the Executive to speak is to have the federal judiciary speak, which could result in different foreign policy preferences arising in different federal circuits.[224] If the Executive seeks to retain a unitary voice in foreign affairs, it should not balk at clarifying for the courts any friction between congressional human rights policies and the conduct of foreign relations.

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216 *See id.* at 25–26 (statement of Monroe Leigh, Legal Advisor, Department of State) (noting that the global rise of the restrictive theory allowed courts to adopt international principles as a rule of decision).

217 *See id.* at 34.

218 *Supra* Part I.A.

219 Samantar v. Yousuf, 130 S. Ct. 2278, 2292 n.20 (2010).

220 *See supra* note 187.

221 *See* Bradley & Helfer, *supra* note 161, at 255.

222 *See* Spacil v. Crowe, 489 F.2d 614, 619 (5th Cir. 1974).

223 *See, e.g.*, Memorandum of Law in Support of the Suggestion of Immunity Filed on Behalf of the Defendant by the United States, at 7–8, Mumtaz v. Ershad, No. 74258/89 (N.Y. Sup. Ct. June 15, 1990) (arguing that the State Department retained the ability to suggest immunity following enactment of the FSIA).

224 *Cf.* Michael D. Ramsey, *Multinational Corporate Liability Under the Alien Tort Claims Act: Some Structural Concerns*, 24 HASTINGS INT'L & COMP. L. REV. 361, 376–78 (2001) (arguing that courts should not create foreign policy from the bench).

Second, because the State Department already regularly condemns foreign human rights practices through its Country Reports, it rarely would be forced to articulate hitherto unknown positions.[225]

Finally, incorporating diplomatic channels into the framework governing immunity decisions gives the government flexibility in influencing the reciprocal treatment of U.S. officials abroad.[226] In some states, immunity is predicated on reciprocity; in others, reciprocity is inconsequential.[227] Because there is no international consensus on the legal standards governing official acts immunity, nor on the effect of reciprocity, a domestic rule of blanket foreign official immunity would not guarantee that U.S. officials receive immunity overseas.[228] Indeed, because the determination of foreign official immunity is often ad hoc, the U.S. government tends to defend its officials sued abroad through bilateral diplomatic negotiations, rather than through strict reliance on unsettled legal doctrines of immunity.[229]

If uniformity is the goal, the United States should press for a multilateral agreement on immunity, rather than pin its hopes on reciprocity. Until a shared regime coalesces, the country is better served by offering foreign states a margin of diplomatic maneuvering, within a framework of clear—if not absolute—normative limits. A presumption against immunity for international crimes, with a diplomatic escape hatch, provides this framework.

CONCLUSION

The Supreme Court's decision in *Samantar* raised more questions than it answered. In excluding foreign officials from the statutory framework of the FSIA and reviving an ill-defined common law of

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225 *See* Jacques deLisle, *Human Rights, Civil Wrongs and Foreign Relations: A "Sinical" Look at the Use of U.S. Litigation to Address Human Rights Abuses Abroad*, 52 DEPAUL L. REV. 473, 489 (2002).

226 *See* Brief of Amici Curiae Former Attorneys General of the United States in Support of Petitioner at 13, Samantar v. Yousuf, 130 S. Ct. 2278 (2010) (No. 08-1555) (arguing that blanket immunity will protect U.S. officials abroad). *But see* Brief for Retired Military Professionals as Amici Curiae in Support of Respondents at 19, *Samantar*, 130 S. Ct. 2278 (No. 08-1555) (arguing that immunity for torture risks exposing American service members to abuse because "the reciprocity on which our military depends is the reciprocity of accountability").

227 *See* FOX, *supra* note 172, at 71.

228 Even within the European Union, immunity regimes vary. *See supra* note 187.

229 *See, e.g.*, 2 SEAN MURPHY, UNITED STATES PRACTICE IN INTERNATIONAL LAW: 2002–2004, at 249–52 (2006) (observing the use of diplomatic pressure to defeat criminal complaints against U.S. officials for the Iraq war). This Note does not necessarily endorse these tactics; it merely observes that the United States already pursues a hybrid between a legal and diplomatic approach when its officials face lawsuits overseas.

foreign official immunity, the Court created a doctrinal vacuum. While courts struggle to cobble together an immunity standard from inconsistent caselaw, advocates seek to fill the gaps with per se rules of accountability or blanket immunity.

The stakes are high. When Bashe Yousuf stood on the Supreme Court steps and asked for a day in court, he claimed a right that Congress provided to all survivors of human rights abuse who find their aggressors on U.S. soil. Congress's decision to open the courts to human rights claims—a product of the democratic process—should be the starting point for any analysis of immunity for torture and other international crimes. But the analysis cannot stop there, for the delicate questions of immunity's impact on foreign relations and on the domestic distribution of powers cannot be wished away.

This Note suggests that the history of foreign official immunity has been one of tension between political expediency and normative limits. Concerns of comity and reciprocity have made absolute immunity appear at times attractive. But when "official acts" shock the conscience—whether in the attack on the steamboat *Caroline* or the horrors of the Third Reich—the normative limits of immunity are revealed. Accordingly, firm rules will invariably breed exceptions.

In shaping the twenty-first century doctrine of foreign official immunity, courts should avoid per se rules and instead adopt the framework proposed in this Note. Assertions of immunity should be approached as a conflict of laws problem, and interest analysis should determine whether giving extraterritorial effect to a foreign state's authorization of a human rights violation is compatible with international law, the public policies underlying congressional human rights legislation, and U.S. foreign policy. This analysis produces a compromise: a presumption against immunity for international crimes, rebuttable only by an executive suggestion of immunity. This test sets a high bar for immunity, but a high bar is needed if Congress's goal of denying safe haven to human rights abusers is to be realized.