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# EDITORIAL COMMENT

## Conflicting Approaches to the U.S. Common Law of Foreign Official Immunity

*By Curtis A. Bradley*[*]

Abstract

*For more than a decade, U.S. courts have struggled to develop a common law immunity regime to govern suits brought against foreign government officials, and they are now divided on a number of issues, including the extent to which they should defer to the executive branch and whether to recognize a* jus cogens *exception. This Editorial Comment considers a more conceptual division in the courts, between an "effect-of-judgment" approach that would confer immunity only when the judgment that the plaintiff is seeking would be directly enforceable against the foreign state, and a broader "nature-of-act" approach that would confer immunity whenever the plaintiff's case is challenging conduct carried out on behalf of the state. The Comment argues in favor of the nature-of-act approach and explains why analogies in this context to domestic civil rights litigation are misplaced.*

### I. Introduction

For more than a decade, the lower federal courts in the United States have struggled to develop a common law immunity regime to govern suits brought against foreign government officials. Although the Foreign Sovereign Immunities Act comprehensively regulates the immunity of foreign states and their agencies and instrumentalities, the U.S. Supreme Court concluded in a 2010 decision, *Samantar v. Yousuf*, that this statute does not address the immunity of individual officials.[1] The Court did not dispute that foreign officials are entitled to some immunity from suit, but it indicated that this immunity was to be governed by judicial application of common law rather than by statute.[2] Provided with little guidance about how to discern and develop this body of common law, the lower courts are now divided on a number of issues relating to the scope of foreign official immunity.

Although claims of foreign official immunity can arise in a wide variety of cases, including in commercial disputes, they most commonly arise in suits alleging international human

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[1] *See* 560 U.S. 305 (2010).

[2] *See, e.g.*, *id.* at 324 ("Even if a suit is not governed by the Act, it may still be barred by foreign sovereign immunity under the common law.").

rights abuses. In recent years, the Supreme Court has substantially limited international human rights litigation, especially in litigation brought under the Alien Tort Statute (ATS).[3] Nevertheless, the immunity issues are still recurring and important, both for the international human rights suits that remain viable (such as those under a separate statute, the Torture Victim Protection Act (TVPA)), and in non-human rights cases. Indeed, despite the Supreme Court's ATS decisions, the conflicts in the courts over foreign official immunity have only deepened in the last couple of years.

After reviewing various methodological and substantive disagreements over the scope of foreign official immunity, this Editorial Comment considers a more conceptual division, between what I will call an "effect-of-judgment" approach and what I will call a "nature-of-act" approach. Under an effect-of-judgment approach, foreign officials would have no immunity from damage claims when the plaintiff is seeking to recover the damages from the official personally rather than from the foreign state itself. By contrast, under a nature-of-act approach, foreign officials would generally have immunity if the suit is challenging conduct carried out on behalf of the foreign state, regardless of who is formally being asked to pay the judgment. Part of the conflict in the courts over how to conceptualize foreign official immunity stems from differing interpretations of a provision in the *Restatement (Second) of the Foreign Relations Law of the United States*, published in 1965, which states that a foreign official has common law immunity "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."[4] (The issue of common law immunity for official acts is not addressed in either the *Restatement (Third)* or *Restatement (Fourth)*.)

As between these two approaches, this Comment argues in favor of the nature-of-act approach. As I will explain, the effect-of-judgment approach is difficult to reconcile with *Samantar*, does not take sufficient account of the foreign relations considerations implicated in suits against foreign officials, and does not reflect the best reading of the *Restatement (Second)*. Although the effect-of-judgment approach finds some support in U.S. civil rights litigation, that litigation is not a useful analogue, I contend, for suits brought against foreign officials.

Part II briefly describes the current state of international law concerning foreign official immunity. Part III reviews the *Samantar* decision and the issues that it left open, as well as the conflicts in the lower courts that these issues have generated. Part IV describes both the effect-of-judgment and nature-of-act approaches to foreign official immunity and critiques the effect-of-judgment approach. It also explains why the TVPA is best read not to override foreign official immunity. Part V concludes.

## II. The (Somewhat Uncertain) International Law Backdrop

Because foreign official immunity is regulated by international law as well as domestic law, it is useful before proceeding further to take note of the somewhat uncertain international law backdrop.

Under international law, there are two basic types of foreign official immunity from domestic legal proceedings: status immunity (also called immunity *ratione personae* or personal immunity) and conduct immunity (also called immunity *ratione materiae* or functional

[3] *See infra* text accompanying notes 44–45.

[4] Restatement (Second) of the Foreign Relations Law of the United States § 66(f) (1965).

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immunity).[5] Status immunity is based on an official's position and extends even to their private conduct while they remain in office. Conduct immunity, by contrast, is generally limited to official acts, although it can be invoked even after the official leaves their position. Pursuant to treaty obligations, diplomats and consular officials are entitled to immunity while they are serving in their posts. But many other immunities are not reflected in the relevant treaties. As a matter of customary international law, it is generally accepted that "heads of state" are entitled to status immunity while in office, although there is no general treaty addressing this issue. There is some international debate about which officials qualify for this head-of-state immunity, but by most accounts the covered officials include at least the "troika" of the head of state, the head of government, and the minister of foreign affairs.

Other officials, as well as former heads of state, are entitled under customary international law only to conduct immunity. There has been substantial international debate about the scope of conduct immunity since at least the *Pinochet* litigation in Great Britain in the 1990s.[6] Despite allowing criminal jurisdiction over a former head of state in that case for claims of torture, the British House of Lords later held, in *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia*, that broad conduct immunity applies in civil cases, even for torture and other egregious human rights abuses.[7] The Law Lords expressed concern that, without such immunity, the foreign state's own immunity could easily be circumvented simply by suing the officials that act on its behalf.[8]

Some national courts have adopted a narrower view of conduct immunity in criminal cases. This has been especially true in cases alleging violations of *jus cogens* norms of international law—that is, norms "accepted and recognized by the international community of States as a whole . . . from which no derogation is permitted."[9] In 2012, for example, a Swiss criminal court rejected conduct immunity in a case involving alleged war crimes by Algeria's former minister of defense. In doing so, the court expressed the view that there was an international trend in favor of restricting conduct immunity for *jus cogens* violations.[10] There are a number of similar decisions in other countries, such as in Spain, France, and Italy.[11]

Notwithstanding these decisions, the European Court of Human Rights endorsed a broad scope for conduct immunity in 2014, when reviewing the British House of Lords' decision in

[5] *See, e.g.*, Dapo Akande & Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EUR. J. INT'L L. 815 (2010).

[6] For a detailed account of the *Pinochet* decision, see Curtis A. Bradley & Jack L. Goldsmith, Pinochet *and International Human Rights Litigation*, 97 MICH. L. REV. 2129 (1999).

[7] *See* Jones v. Ministry of Interior of the Kingdom of Saudi Arabia, [2006] UKHL 26 (UK), *available at* https://publications.parliament.uk/pa/ld200506/ldjudgmt/jd060614/jones.pdf.

[8] *See, e.g.*, *id.*, para. 10 (Lord Bingham). For similar reasoning from a court in Australia, see Zhang v. Zemin, [2010] NSWCA 255, para. 66 (New South Wales Ct. App. Oct. 5, 2010) (Austl.), *available at* https://documents.law.yale.edu/sites/default/files/zhang_243flr299.pdf.

[9] Vienna Convention on the Law of Treaties, Art. 53, May 23, 1969, 1155 UNTS 331.

[10] *See* A v. Ministère Public de la Confédération, B and C (2012) (Fed. Cr. Ct. Switz. July 25, 2012) (Switz.), *translated into English at* https://www.asser.nl/upload/documents/20130221T040104-Nezzar_Judgm_Eng_translation%2025-07-2012.pdf.

[11] *See* Curtis A. Bradley & Laurence R. Helfer, *International Law and the Common Law of Foreign Official Immunity*, 2010 SUP. CT. REV. 213, 239–40. *But cf.* Ingrid Wuerth, Pinochet*'s Legacy Reassessed*, 106 AJIL 731, 732 (2012) (arguing, based on a review of state practice, that there is no established human rights or international crimes exception to conduct immunity); Roger O'Keefe, *An "International Crimes" Exception to the Immunity of State Officials from Foreign Criminal Jurisdiction: Not Currently, Not Likely*, 109 AJIL UNBOUND 167, 168 (2015) (similar).

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*Jones*.[12] After an extensive consideration of state practice, a chamber of the Court concluded that the United Kingdom's grant of immunity to the Saudi officials in that case "reflected generally recognised rules of public international law,"[13] and thus did not violate the right of court access under the European Convention on Human Rights. While noting that there was "some emerging support in favour of a special rule or exception in public international law in cases concerning civil claims for torture lodged against foreign State officials," the court found that "the bulk of the authority is . . . to the effect that the State's right to immunity may not be circumvented by suing its servants or agents instead."[14]

Debates over the proper scope of foreign official immunity have continued in connection with the work on this topic by the UN's International Law Commission (ILC), including most notably its issuance of Draft Article 7, which states that conduct immunity does not bar foreign criminal prosecution of six egregious offenses: genocide, crimes against humanity, war crimes, apartheid, torture, and enforced disappearance.[15] A number of ILC members dissented from this draft on the ground that it did not reflect the current state of customary international law.[16] A Dutch court subsequently concluded that there is still conduct immunity for egregious conduct under customary international law in civil cases, noting, among other things, that Draft Article 7 had not generated consensus and was addressed only to the criminal context.[17]

In sum, there is substantial controversy today over whether national courts are obliged to recognize conduct immunity in criminal cases involving certain egregious international offenses. To the extent that there has been some erosion of conduct immunity for such offenses, it appears primarily to have occurred in the criminal rather than civil context.

## III. *Samantar* and What It Left Open

This Part describes the Supreme Court's decision in *Samantar*, the issues left open by the decision, and the conflicts in the lower courts that have developed since the decision.

### *A. What* Samantar *Decided*

In *Samantar*, members of a clan in Somalia alleged that Mohamed Ali Samantar, a former prime minister and minister of defense of Somalia, was responsible for egregious human rights abuses (including torture, killings, and arbitrary detention) perpetrated against them during

[12] *See* Case of Jones and Others v. The United Kingdom, App. Nos. 34356/06 and 40528/06, Judgment (Eur. Ct. Hum. Rts. Jan. 14, 2014), *available at* https://www.justsecurity.org/wp-content/uploads/2014/01/Jones-v-United-Kingdom-ECtHR-2014.pdf.

[13] *Id.*, para. 215.

[14] *Id.*, para. 213. For a critique of the decision, see William S. Dodge, *Is Torture an "Official Act?" Reflections on* Jones v. United Kingdom, Opinio Juris (Jan. 15, 2014), *at* http://opiniojuris.org/2014/01/15/guest-post-dodge-torture-official-act-reflections-jones-v-united-kingdom.

[15] *See* Int'l L. Comm'n Rep., Immunity of State Officials from Foreign Criminal Jurisdiction, 69th Sess., UN Doc. A/CN.4/L.893 (July 10, 2017), *at* https://legal.un.org/docs/?symbol=A/CN.4/L.893.

[16] *See* Sean D. Murphy, *Immunity* Ratione Materiae *of State Officials from Foreign Criminal Jurisdiction: Where Is the State Practice in Support of Exceptions?*, 112 AJIL Unbound 4 (2018).

[17] *See* Case C/09/554385/HAZA18/647, Judgment (Hague Dist. Ct. Jan. 29, 2020) (Neth.), *at* https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2020:667#_3d669af3-966f-40db-ba3a-4a53baab9313.

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the 1980s. They brought suit against him under the ATS and TVPA, seeking damages for his alleged authorization of the abuses. Samantar had fled Somalia for the United States in the early 1990s and was living in Virginia at the time the suit was brought.

Samantar argued, among other things, that the suit was barred by the Foreign Sovereign Immunities Act (FSIA), which confers immunity on "foreign states," subject to various exceptions. The Supreme Court disagreed, holding that "the FSIA does not govern whether an individual foreign official enjoys immunity from suit."[18] Although the term "foreign state" is defined in the FSIA to include not only the state itself but also an "agency or instrumentality" of the state, natural persons do not easily fit within this category, reasoned the Court.[19] In addition, the Court observed that there were potential differences between a foreign government's immunity and an individual official's immunity, and thus "there is . . . little reason to presume that when Congress set out to codify state immunity, it must also have, *sub silentio*, intended to codify official immunity."[20] "Reading the FSIA as a whole," the Court concluded, "there is nothing to suggest we should read 'foreign state' in [the FSIA] to include an official acting on behalf of the foreign state, and much to indicate that this meaning was not what Congress enacted."[21]

Importantly, however, the Court made clear that it was not holding that there was no immunity in U.S. courts for foreign officials. "Even if a suit is not governed by the Act," the Court noted, "it may still be barred by foreign sovereign immunity under the common law."[22] Indeed, the Court said that it did "not doubt that in some circumstances the immunity of the foreign state extends to an individual for acts taken in his official capacity"; it simply noted that "it does not follow from this premise that Congress intended to codify that immunity in the FSIA."[23] Because of the possibility of common law immunity, the Court denied that its holding would make the FSIA "optional" by allowing plaintiffs to plead around a state's immunity by suing the state's officials.

The Court further noted that, in addition to common law immunity, the FSIA's immunity provisions might themselves be triggered in some suits brought against foreign officials. This would happen, for example, if a foreign state were deemed under the Federal Rules of Civil Procedure to be a necessary party to a lawsuit.[24] The Court further observed that "it may be the case that some actions against an official in his official capacity should be treated as actions against the foreign state itself, as the state is the real party in interest."[25] For this "real party in interest" idea, the Court cited a domestic police abuse case brought under the civil rights statute, 42 U.S.C. § 1983, in which the plaintiff was seeking to collect attorney's fees. In that case, *Kentucky v. Graham*, the Court had explained that "[p]ersonal-capacity suits seek

[18] *See Samantar*, 560 U.S. 305 at 310 n. 3.
[19] *See id.* at 315–18.
[20] *Id.* at 322.
[21] *Id.* at 319.
[22] *Id.* at 324.
[23] *Id.* at 322.
[24] *See* Fed. R. Civ. Proc. 19(a)(1)(B)(i) (describing parties that are required to be joined in a suit in federal court, including where "disposing of the action in the [party's] absence may . . . as a practical matter impair or impede the person's ability to protect the interest"). *See also* Republic of Philippines v. Pimentel, 553 U.S. 851, 867 (2008) ("[W]here sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign.").
[25] *Samantar*, 560 U.S. at 325.

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to impose personal liability upon a government official for actions he takes under color of state law," whereas official-capacity suits "'generally represent only another way of pleading an action against an entity of which an officer is an agent.'"[26] The Court there also observed that "while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself."[27] Invoking that analysis, the Court in *Samantar* concluded that the case before it should not be treated as one in which the nation of Somalia was the real party in interest, noting that the "respondents have sued petitioner in his personal capacity and seek damages from his own pockets."[28]

The Court's analysis in *Samantar* appears to invite the lower federal courts to develop a common law of foreign official immunity, and that is how it has been construed. Although the Court did not say so specifically, scholars have generally assumed that this common law should be treated as *federal* common law. That is, as developed by the federal courts, this law is assumed to be binding on the states, including the state courts, under the Supremacy Clause.[29] This appears to be a reasonable assumption, even in light of the Supreme Court's restrictive approach to federal common law in recent years,[30] for several reasons: the law of foreign official immunity is related to and sometimes overlaps with the issues addressed in the FSIA, and federal common law has commonly been used for statutory gap-filling;[31] this common law intersects with the constitutional powers of the president, including most notably the president's power to recognize foreign governments;[32] and the common law of immunity implicates national foreign affairs interests that are comparable to those implicated by the act of state doctrine, which has long been treated as a rule of federal common law.[33]

The Court did not give much guidance, however, about *how* to identify or develop the federal common law of foreign official immunity. There are a number of questions the Court left open, and these questions have divided the lower federal courts.

[26] 473 U.S. 159, 165 (1985) (quoting Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690 n. 55 (1978)).

[27] *Id.* at 166.

[28] *Samantar*, 560 U.S. at 325.

[29] *See, e.g.*, David P. Stewart, Samantar *and the Future of Foreign Official Immunity*, 15 LEWIS & CLARK L. REV. 633, 648–49 (2011); Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT'L L. 915, 967 (2011); *see also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964) (referring to "enclaves of federal judge-made law which bind the States").

[30] *See, e.g.*, Rodriguez v. FDIC, 140 S. Ct. 713, 717 (2020) ("Judicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal government's 'legislative Powers' in Congress and reserves most other regulatory authority to the States.").

[31] *See* Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639, 1642–43 (2008) ("It is just a step beyond this idea of explicit or implicit delegation to say that when Congress leaves gaps in federal statutes . . . it means for the courts to fill in those gaps through federal common lawmaking."); *see also* Ingrid Wuerth, *The Future of the Federal Common Law of Foreign Relations*, 106 GEORGETOWN L.J. 1825, 1852 (2018) ("[T]he law governing *individual* immunities is extremely closely linked to the law governing foreign *state* immunity.").

[32] For a discussion of the president's recognition power, see Zivotofsky v. Kerry, 135 S. Ct. 2076 (2015).

[33] *See Sabbatino*, 376 U.S. at 425.

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### *B. What* Samantar *Left Open*

There were at least four questions left open after *Samantar*. First, to what extent, when faced with a claim of common law immunity, should courts defer to the case-specific views of the executive branch? There are statements in the Court's opinion that can be read to invite deference to the executive in making these immunity determinations. In particular, in explaining its conclusion that the FSIA did not address foreign official immunity, the Court observed: "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."[34] This statement adverts, without disapproval, to the pre-FSIA role of the State Department, which involved essentially absolute deference by the courts, especially on issues of foreign governmental immunity.[35] The Court also observed in a footnote that "the Department has from the time of the FSIA's enactment understood the Act to leave intact the Department's role in official immunity cases."[36]

These descriptive statements about Congress and the State Department need not be read, however, to mandate absolute judicial deference to the State Department. The Court in *Samantar* was not required to resolve the issue in that case, given that the executive branch at that point had not taken a position on whether Samantar should receive common law immunity.[37] Moreover, allowing the executive branch to determine for the judiciary on a case-by-case basis whether foreign official immunity is available poses potential separation of powers concerns, as Professor Ingrid Wuerth has argued.[38] In addition to concerns about interfering with judicial independence, it is not clear what constitutional or statutory law gives the executive branch the authority to make these binding determinations. In the context of the common law act of state doctrine, the Supreme Court has resisted the idea that the executive branch should have case-specific control over judicial application of the doctrine.[39]

[34] *Samantar*, 560 U.S. at 323.

[35] *See, e.g.*, Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945) ("It is therefore 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.").

[36] *Samantar*, 560 U.S. at 323 n. 19.

[37] In its amicus brief to the Court, the executive branch argued in favor of a remand to the lower courts "to consider whether [Samantar] is entitled to official immunity under background principles recognized by the Executive and the courts." Brief for the United States as Amicus Curiae Supporting Affirmance, Samantar v. Yousuf, No. 08-1555, at 28 (U.S. Sup. Ct. Jan. 2010), *at* https://www.justice.gov/osg/brief/samantar-v-yousuf-amicus-merits.

[38] *See generally* Wuerth, *supra* note 29. For arguments in support of absolute deference to the executive branch on issues of foreign official immunity, see John B. Bellinger III & Stephen K. Wirth, *Foreign-Official Immunity Under the Common Law*, *in* THE RESTATEMENT AND BEYOND: THE PAST, PRESENT, AND FUTURE OF U.S. FOREIGN RELATIONS LAW (Paul B. Stephan & Sarah H. Cleveland eds., 2020); and Lewis S. Yelin, *Head of State Immunity as Sole Executive Lawmaking*, 44 VAND. J. TRANSNAT'L L. 911 (2011).

[39] *See* First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972) (six of the nine Justices rejected case-specific executive branch control over the act of state doctrine). The separation of powers concerns are probably greater in cases involving conduct immunity than in cases involving status immunity. An implied executive authority to determine whether a sitting head of state should receive immunity can potentially be seen as flowing from the executive's broad authority over the recognition of foreign governments. Conduct immunity, however, is less directly tied to the executive branch's recognition power, since it turns not on whether the official holds a particular position in a recognized foreign government but rather on the nature of the conduct in question.

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Second, what is the relationship between the common law immunity that courts are to develop and international law? As discussed in Part II, foreign official immunity is regulated by customary international law, although the precise scope of this immunity is currently a matter of controversy. Yet the Supreme Court said almost nothing about international law in its opinion. Its only reference to international law came in its response to Samantar's argument that interpreting the FSIA not to cover suits against foreign officials would run afoul of the *Charming Betsy* canon of statutory construction. Under this canon, federal statutes are to be construed, where fairly possible, to avoid violations of international law.[40] The Court said that, even if Samantar were entitled to immunity under international law, it was "not deciding that the FSIA bars [Samantar's] immunity but rather that the Act does not address the question."[41] As a result, reasoned the Court, its decision was not inconsistent with the *Charming Betsy* canon. But the Court said nothing about whether or to what extent courts should take account of international law when developing the U.S. common law of immunity, a question that potentially implicates longstanding debates about the domestic status of customary international law.

Third, the Court appeared to assume, consistent with international law, that conduct immunity is limited to "official acts." But what acts qualify as official, and what materials are relevant to making that determination? Moreover, should conduct immunity apply whenever a suit is challenging official acts, or only when a favorable judgment would be directly enforceable against the foreign state? In domestic civil rights cases, tort suits brought against the officials of U.S. states are treated as "personal capacity" suits that do not trigger the state's immunity if damages are sought from the officer personally, even if the state might ultimately indemnify the official.[42] Moreover, this is true even though liability in these cases typically requires the existence of state action. The Court adverted to this line of cases in *Samantar*, but it did so in the context of explaining when a suit might trigger application of the FSIA, not in analyzing the scope of the common law immunity. The Court also referred in a different part of its opinion to Section 66 of the *Restatement (Second) of Foreign Relations Law*, which had said that there is common law immunity for foreign officials "if the effect of exercising jurisdiction would be to enforce a rule of law against the state," but the Court did not elaborate on what this might mean and did not take a position on whether the *Restatement* standard was the correct one.

Finally, what effect, if any, does the TVPA have on the common law immunity of foreign officials? The TVPA, which was enacted in 1992, provides a cause of action for torture and "extrajudicial killing" carried out "under actual or apparent authority, or color of law, of any foreign nation."[43] Although the TVPA was invoked in *Samantar*, the Court did not address its relationship to the common law of foreign official immunity. This question is particularly salient today in light of the Supreme Court's restrictive approach to the other statute invoked in *Samantar*—the ATS. Since *Samantar*, the Court has held that the ATS generally does not

[40] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987); RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 309(1) and reporters' note 1 (2018); *id.* § 406; *see also* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . .").

[41] *Samantar*, 560 U.S. at 320 n. 14.

[42] *See, e.g.*, Hafer v. Melo, 502 U.S. 21, 27–28 (1991).

[43] 28 U.S.C. § 1350 note, Sec. 2.

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apply to foreign conduct unless the suit sufficiently "touches and concerns the United States,"[44] and that the statute does not apply to suits against foreign corporations.[45] Because of these holdings, the TVPA is now the principal statutory vehicle for attempting to litigate foreign human rights abuses.

### *C. Conflicts in the Lower Courts*

Since *Samantar*, the lower federal courts have become divided on these four questions and related issues. As for deference to the executive branch, although courts have consistently deferred to suggestions of immunity for sitting heads of state (who have broad status immunity),[46] they have disagreed over whether to give absolute deference to the views of the executive branch concerning conduct immunity. Perhaps not surprisingly, the executive branch has consistently maintained since *Samantar* that courts should entirely defer to its case-specific views about whether to confer either status or conduct immunity.[47] In the remand proceedings in *Samantar*, however, the U.S. Court of Appeals for the Fourth Circuit stated that, while "substantial weight" should be given to the executive branch's views about whether to confer conduct immunity, those views are not controlling.[48] The court reasoned that, while head of state immunity is closely connected to the executive branch's constitutional power over the recognition of foreign states and governments, "there is no equivalent constitutional basis suggesting that the views of the Executive Branch control questions of foreign official immunity."[49] Moreover, the court observed that determinations of conduct immunity "turn upon principles of customary international law and foreign policy, areas in which the courts respect, but do not automatically follow, the views of the Executive Branch."[50] By contrast, other courts have stated, albeit often in dicta, that they are required to defer to the executive branch on whether to confer conduct immunity.[51] These courts have cited to, among other things, the history of judicial deference to executive determinations of foreign state immunity prior to the enactment of the FSIA.

As for the relevance of international law, no court has attempted simply to apply customary international law directly to determine whether to accord common law immunity to a foreign official. Many courts considering foreign official immunity have not even mentioned international law. Moreover, the executive branch has not suggested that the customary international law of foreign official immunity operates directly as federal law. Rather, it has merely

[44] *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013).

[45] *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018).

[46] *See, e.g.*, Manoharan v. Rajapaksa, 711 F.3d 178, 180 (D.C. Cir. 2013) (per curiam); Habyiarimana v. Kagame, 696 F.3d 1029, 1032 (10th Cir. 2012).

[47] *See, e.g.*, Brief for the United States of America as Amicus Curiae Supporting Petitioner, Doğan v. Barak, No. 16-56704, at 11 (9th Cir. July 26, 2017), *available at* https://ccrjustice.org/sites/default/files/attach/2017/07/41_7-26-17_US%20Amicus%20Brief%20web.pdf ("Governing precedent of the Supreme Court and this Court requires a court to dismiss a civil suit against a foreign official when the State Department determines that the official is immune from suit.").

[48] Samantar v. Yousuf, 699 F.3d 763, 773 (4th Cir. 2012).

[49] *Id.*

[50] *Id.* at 773.

[51] *See, e.g.*, Doe v. Zedillo Ponce de Leon, 555 Fed. Appx. 84, 85 (2d Cir. 2014); Burma Task Force v. Sein, 2016 U.S. Dist. LEXIS 42326, *3 (S.D.N.Y. Mar. 30, 2016); Ben-Haim v. Edri, 453 N.J. Super. 526, 537 (N.J. Super. App. Div. 2018).

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informed courts that it—the executive branch—takes account of this international law along with a variety of other considerations when making suggestions concerning immunity.[52] The absence of direct judicial application of the customary international law of foreign official immunity is noteworthy in light of the scholarly debate that has been waged for the last several decades over whether customary international law should be directly applied by courts as federal law.[53]

Although no court has attempted to apply the customary international law of foreign official immunity directly as federal law, the U.S. Court of Appeals for the Fourth Circuit has held that there is an exception to conduct immunity for *jus cogens* violations of international law—that is, for violations of "peremptory" norms of international law that are "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[54] The Fourth Circuit based this holding on a variety of considerations, including international trends, U.S. lower court decisions, and congressional policies reflected in the TVPA. Other courts, by contrast, have rejected a categorical *jus cogens* exception to foreign official immunity, as has the executive branch.[55] These courts have reasoned, among other things, that such an exception would unduly infuse questions about the merits of the plaintiff's claim into the issue of immunity and thereby undercut immunity's protective function.[56]

Finally, judges are also divided with respect to whether the TVPA itself overrides the common law of foreign official immunity. Some judges have concluded that, because this statute specifically addresses torture and extrajudicial killings carried out under color of foreign law, it must implicitly override the conduct immunity of foreign officials.[57] Otherwise, the reasoning goes, the statute would largely be a dead letter. Other judges have reasoned, by contrast, that statutes should not be construed to override common law immunity by implication and that the TVPA would still have some applicability even without overriding conduct immunity.[58] For its part, the executive branch has argued that the TVPA does not override the common law of foreign official immunity.[59]

[52] *See, e.g.*, Statement of Interest of the United States of America, *Yousuf v. Samantar*, Civ. No. 1:04 CV 1360 (LMB) (E.D. Va. Feb. 14, 2011), *available at* https://2009-2017.state.gov/documents/organization/194067.pdf (attaching letter from State Department Legal Adviser referring to a variety of case-specific circumstances, "relevant principles of customary international law," and "the overall impact of this matter on the foreign policy of the United States").

[53] *See* CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM ch. 5 (3d ed. 2020).

[54] Vienna Convention on the Law of Treaties, *supra* note 9, Art. 53; *see Samantar*, 699 F.3d at 777.

[55] For rejection of a *jus cogens* exception, see, for example, Doğan v. Barak, 932 F.3d 888, 897 (9th Cir. 2019); Doe v. Buratai, 318 F. Supp. 3d 218, 236 (D.D.C. 2018); and In re Terrorist Attacks on September 11, 2001, 122 F. Supp. 3d 181, 189 (S.D.N.Y. 2015). For a rejection of such an exception by the executive branch, see, for example, Brief for the United States as Amicus Curiae, *Ali v. Warfaa*, No. 15–1345, at 18 (U.S. Sup. Ct. May 2017), *available at* https://www.justice.gov/sites/default/files/briefs/2017/05/30/15-1345_ali_ac_pet.pdf.

[56] *See, e.g.*, *Buratai*, 318 F. Supp. 3d at 233–35.

[57] See, for example, the two concurring opinions in Lewis v. Mutond, 918 F.3d 142 (D.C. Cir. 2019).

[58] *See, e.g.*, *Doğan*, 932 F.3d at 897; *Buratai*, 318 F. Supp. 3d at 236.

[59] *See, e.g.*, Brief for the United States of America, *Doğan v. Barak*, *supra* note 47, at 15 ("The TVPA does not address, let alone abrogate, the common law immunity of foreign officials.").

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## IV. Conflicting Approaches to Foreign Official Immunity

As discussed, U.S. courts are now divided on a number of methodological and substantive issues concerning the post-*Samantar* common law of foreign official immunity. This Part considers a more conceptual division among the courts about the sort of protection conferred by the U.S. common law of foreign official immunity—a division between what I will call an "effect-of-judgment" approach and what I will call a "nature-of-act" approach.

### *A. Two Approaches*

Under an effect-of-judgment approach to foreign official immunity, U.S. courts would recognize conduct immunity only when a judgment would be directly enforceable against a foreign state. This would mean that such immunity would generally be unavailable in tort suits (including suits asserting human rights violations), as long as the plaintiff made clear they were seeking damages only from the defendant official. A number of commentators have endorsed the effect-of-judgment approach.[60]

This approach is similar to the one that is followed in domestic civil rights litigation, including against officials of U.S. states. State governments have broad sovereign immunity.[61] Nevertheless, state officials can often be sued without triggering the state's immunity. There are two principal bodies of doctrine that allow for this.[62] First, state officials can freely be sued for injunctive relief to compel them to comply with federal law, pursuant to the *Ex parte Young* doctrine.[63] The Court in *Ex parte Young* reasoned that, when an official acts contrary to the "superior authority" of federal law, the official is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."[64] Some scholars have described this reasoning as a "fiction," since it envisions that an official can simultaneously engage in state action for purposes of liability but act in a personal capacity for purposes of immunity, and the Supreme Court has itself described the doctrine this way.[65] Whether fictional or not, the Court has defended the *Ex parte Young* idea as "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'"[66]

Second, state officials can often be sued for damages as well, as long as the plaintiff seeks the money directly from the official rather than the state. The Supreme Court has freely allowed such "personal capacity" suits in tort cases, even for conduct that an official has carried out on behalf of the state.[67] This is true even if the officer will be indemnified by the state for any

[60] *See, e.g.*, Chimène Keitner, *The Common Law of Foreign Official Immunity*, 14 Green Bag 2d 61, 70–71 (2010); Beth Stephens, *The Modern Common Law of Foreign Official Immunity*, 79 Fordham L. Rev. 2669, 2707–10 (2011).

[61] *See, e.g.*, Alden v. Maine, 527 U.S. 706 (1999); Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

[62] *See* Stephens, *supra* note 60, at 2672 (arguing that "U.S. law governing the immunity of domestic officials establishes an important framework for key decisions about the scope of foreign official immunity").

[63] *See* Ex parte Young, 209 U.S. 123 (1908).

[64] *Id.* at 160.

[65] *See, e.g.*, Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 270 (1997).

[66] Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 105 (1984) (quoting *Ex parte Young*, 209 U.S. at 160).

[67] *See, e.g.*, *Hafer*, 502 U.S. at 27.

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damage award against them, which is common.[68] However, such personal capacity suits are not always allowed. In particular, in cases seeking the restitution of money that is held by the state (such as in suits for refunds and backpay), courts tend to conclude that the state is the "real party in interest" even if the state is not named in the complaint, and that sovereign immunity is therefore triggered.[69]

Although suits against U.S. state officials will often avoid triggering state sovereign immunity, the officials themselves are entitled to certain common law immunities. Most of these immunities offer protection only against damage claims, not suits for injunctive relief. Certain officials, such as judges, legislators, and prosecutors, receive immunity based on their positions, but only for certain functions.[70] Executive officials, including police offers and prison officials, are entitled to what is known as "qualified immunity": they cannot be sued for damages unless they have violated clearly established law of which a reasonable officer would have known.[71] These common law immunities apply even in cases brought under Section 1983, on the theory that the statute was enacted against the backdrop of the common law and is presumed not to displace it without a clear indication of such intent by Congress.[72]

A noteworthy example of a court following the effect-of-judgment approach with respect to foreign official immunity is the 2019 decision by the U.S. Court of Appeals for the D.C. Circuit in *Lewis v. Mutond*.[73] That case involved a damages suit brought under the TVPA by an American citizen against two foreign officials from the Democratic Republic of the Congo (DRC) for alleged torture over a six-week period. Despite a request from the DRC, the executive branch declined to take a position on whether immunity should be accorded. The D.C. Circuit concluded that the defendant was not entitled to common law immunity. Noting that "both parties assume § 66 [of the *Restatement (Second) of Foreign Relations Law*] accurately sets out the scope of common-law immunity for current or former officials," the court said it would "proceed on that understanding without deciding the issue."[74] As discussed above, Section 66 of the *Restatement (Second)* states that common law immunity is appropriate "if the effect of exercising jurisdiction would be to enforce a rule of law against the state." According to the court, exercising jurisdiction over a case enforces a rule of law against a foreign state only when a judgment in favor of the plaintiff "would bind (or be enforceable against) the foreign state."[75] That was not true here, reasoned the court, because the plaintiff was not seeking "to draw on the DRC's treasury or force the state to take specific action."[76]

[68] *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885 (2014); *see also* John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 Va. L. Rev. 47 (1998).

[69] *See, e.g.*, Edelman v. Jordan, 415 U.S. 651 (1974); Ford Motor Co. v. Dep't of Treasury of Indiana, 323 U.S. 459 (1945).

[70] *See* Erwin Chemerinsky, Federal Jurisdiction 584 (8th ed. 2020).

[71] *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[72] *See* Chemerinsky, *supra* note 70, at 577; *see also* Jack M. Beermann, *Common Law Elements of the Section 1983 Action*, 72 Chi. Kent L. Rev. 695, 698 (1997) (noting that the Supreme Court has "presumed that Congress intended to incorporate well-established common law rules that were in operation at the time the statutes were passed into the causes of action created by the statutes").

[73] 918 F.3d 142 (D.C. Cir. 2019), *cert. denied*, 2020 U.S. LEXIS 3396 (2020).

[74] *Id.* at 146.

[75] *Id.*

[76] *Id.* at 147. *See also* Stephens, *supra* note 60, at 2678 (interpreting Section 66 of the *Restatement (Second)* as applying only when "the state itself would be bound by a judgment against the official").

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Not all courts have embraced the effect-of-judgment approach to foreign official immunity. Some courts have instead conceptualized foreign official immunity in broader terms, adopting what I will call a "nature-of-act" approach. The U.S. Court of Appeals for the Ninth Circuit did so, for example, in a 2019 decision, *Doğan v. Barak*.[77] In that case, parents of a U.S. citizen killed during an Israeli naval blockade of Gaza sued a former Israeli defense minister for damages under the TVPA. In concluding that the defendant was entitled to immunity, the court reasoned that exercising jurisdiction over the defendant "would be to enforce a rule of law against the sovereign state of Israel" under the standard set forth in Section 66 of the *Restatement*. The court emphasized that "[t]he Complaint's claims for relief state—several times—that [the defendant's] actions were done under 'actual or apparent authority, or color of law, of the Israeli Ministry of Defense and the Government of the State of Israel.'"[78] Thus, unlike the court in *Lewis*, the court in *Doğan* construed Section 66 as focusing on the nature of the acts being challenged as opposed to where the damages award would come from.[79] A number of other decisions since *Samantar* have reached the same conclusion.[80]

### *B. A Critique of the Effect-of-Judgment Approach*

Despite its endorsement by some courts and scholars, there are a number of doctrinal and policy problems with the effect-of-judgment approach. As an initial matter, by limiting the conduct immunity of foreign officials to situations in which a judgment will be directly enforceable against a foreign state, this approach collapses the issue of foreign official immunity with the issue of whether the foreign state is the "real party in interest." In *Samantar*, however, the Supreme Court treated these two issues as distinct. The Court reasoned that, *in addition* to the potential barrier of common law immunity, in some cases the foreign state will be the real party in interest, in which case *the FSIA will apply*.[81] If the common law of foreign official immunity were limited to situations in which the foreign state was the real party in interest, there effectively would be no separate category of conduct immunity for foreign officials in U.S. courts. Rather, there would be simply either foreign sovereign immunity under the FSIA (and thus no liability for the named official) or no immunity (because the state is not the real party in interest). Yet the Supreme Court assumed that there was a separate common law governing immunity for official conduct.

Second, contrary to the reasoning of the D.C. Circuit in *Lewis*, it is far from clear that Section 66 of the *Restatement (Second)* calls for the effect-of-judgment approach. This section refers to a *rule of law* being enforceable against a state, but the D.C. Circuit treated it as if it were referring only to situations in which a *judgment* is enforceable against a foreign state.

[77] *Doğan*, 932 F.3d 888.

[78] *Id.* at 894.

[79] Unlike in *Lewis*, the State Department had submitted a suggestion of immunity to the court in *Doğan*. The court in *Doğan* said that the suggestion was entitled at least to "considerable weight," but it did not decide whether the suggestion merited absolute judicial deference. *Id.* at 893–94.

[80] *See, e.g.*, *Buratai*, 318 F. Supp. 3d at 232; Smith v. Ghana Commer. Bank Ltd., 2012 U.S. Dist. LEXIS 99735 (D. Minn. 2012).

[81] *See Samantar*, 560 U.S. at 325. For examples after *Samantar* in which courts have found a foreign state to be the real party in interest in a suit nominally brought against a foreign official, thereby triggering application of the FSIA, see Nnaka v. Fed. Republic of Nigeria, 238 F. Supp. 3d 17, 30–31 (D.D.C. 2017); and Odhiambo v. Republic of Kenya, 930 F. Supp. 2d 17, 34–35 (D.D.C. 2013).

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When a court holds that an official has violated international human rights law for conduct carried out on behalf of their state, that can reasonably be characterized as enforcing the rule against the state, since states act through their officials. That would be true regardless of whether the damages *judgment* operates only against the official.[82] As one court explained in concluding that a suit against Nigerian military and police officials would involve enforcing a rule against the state even though the damages were sought from the officials personally: "The defendants' alleged actions were part of their official duties within the Nigerian government, military, and police. . . . A decision by this Court on the legality of the defendants' actions would amount to a decision on the legality of Nigeria's actions."[83]

The only example that Section 66 gives of a situation in which immunity should not apply involves a traffic accident occurring in the United States, but that example does not support a lack of immunity from international human rights suits. Under the FSIA, there is not even *sovereign* immunity for traffic accidents in the United States; indeed, it is the primary example in the FSIA's legislative history of when tort liability for foreign sovereigns would be appropriate.[84] But it is well established that, absent a specific statutory exception (such as for certain claims relating to terrorism), FSIA immunity applies to international human rights claims, even for *jus cogens* violations.[85] Moreover, a traffic accident typically involves negligence by the driver, not any policy decision by the foreign state, so allowing for liability against the official does not constitute a challenge to foreign state action in the way that international human rights suits tend to do.[86]

More fundamentally, the effect-of-judgment approach gives insufficient attention to the foreign relations context implicated by these suits. In effect, this approach mimics the approach taken by U.S. courts in domestic civil rights cases, but there are significant differences between these two contexts.

As an initial matter, the foreign official immunity context implicates U.S. responsibilities under international law. As noted in Part II, there can be and are reasonable debates about the contours of the customary international law of foreign official immunity. Its existence, however, introduces a factor that is absent from the domestic civil rights context. And it is possible that the effect-of-judgment approach, at least in some cases, is inconsistent with international law. U.S. courts have long attempted to construe federal statutes in a way that will avoid

[82] One might also question whether it makes sense to put much weight on an observation by the American Law Institute about the state of the common law, published nearly a half-century before *Samantar* and before the enactment of the FSIA, when discerning the post-*Samantar* common law of immunity. For doubts about this, see *Lewis*, 918 F.3d at 148–50 (Randolph, J., concurring in the judgment).

[83] *Buratai*, 318 F. Supp. 3d at 232–33; *see also, e.g.*, *Smith*, 2012 U.S. Dist. LEXIS 99735, *29 ("Allowing an American court to reach the merits of a suit against a public official for acts taken on behalf of the foreign state, and, thereby enforcing a rule of law against the foreign state, would certainly affect the 'power and dignity' of that foreign state.").

[84] *See* 28 U.S.C. § 1605(a)(5) (exception to immunity for noncommercial torts applies only if the harm occurs in the United States); Argentine Republic v. Amerada Hess Shipping Co., 488 U.S. 428, 439 (1989) ("Congress' primary purpose in enacting § 1605(a)(5) was to eliminate a foreign state's immunity for traffic accidents and other torts committed in the United States, for which liability is imposed under domestic tort law.").

[85] Courts have consistently rejected the argument that states implicitly waive their immunity under the FSIA by engaging in *jus cogens* violations. *See, e.g.*, Price v. Socialist People's Libyan Jamahiriya, 101 F.3d 239, 242–44 (2d Cir. 1996).

[86] *See* Bellinger & Wirth, *supra* note 38 ("The conduct at issue [in the traffic accident illustration] is not of a sovereign nature, and the official's negligence is in no way attributable to the foreign state.").

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violations of international law, and there is a strong argument for applying a similar presumption to federal common law rules developed by the courts themselves.[87]

The effect-of-judgment approach also may have the effect of undermining foreign state immunity. It is well established that nations are entitled under international law to broad immunity from suit in other nations' courts, especially for noncommercial conduct. In a case between Germany and Italy, for example, the International Court of Justice held in 2012 that there is sovereign immunity in other nations' courts even for the most egregious human rights violations.[88] Yet nations always act through their officials, and they are broadly responsible under international law for the actions of the officials, even when the officials abuse their authority.[89] If the officials could freely be sued for the actions they take on behalf of the state, the foreign government's immunity could be significantly compromised. To be sure, as some commentators have emphasized, a state's responsibility for an official's conduct should not by itself relieve an official of his or her own responsibility under international law for the conduct.[90] That an individual official may bear their own responsibility for the conduct, however, does not establish that *another nation's court* should be the adjudicator of that responsibility.[91]

Even apart from the specific question of what international law requires, suits against foreign officials present issues of foreign relations friction and reciprocity that are not posed by domestic suits. The Supreme Court has made clear that when such foreign affairs implications are present, the doctrinal considerations when seeking remedies are substantially altered. It did so, for example, in its recent decision in *Hernandez v. Mesa*.[92] That case involved a cross-border shooting by a U.S. customs officer that resulted in the death of a teenager in Mexico. In declining to allow a damages claim against the officer, the Court emphasized that the foreign affairs context of the case was a factor that "counsels hesitation."[93] It also noted that the case implicated potentially conflicting interests of Mexico and the United States and that it was not the Court's "task to arbitrate between them."[94] The Supreme Court has invoked

[87] *Cf.* Hernandez v. Mesa, 140 S. Ct. 735, 748 (2020) ("Where Congress has not spoken at all, the likelihood of impinging on its foreign affairs authority is especially acute."); *Kiobel*, 569 U.S. at 116 (noting that "the danger of unwarranted judicial interference in the conduct of foreign policy is magnified" where the "question is not what Congress has done but instead what courts may do").

[88] *See* Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), Judgment, 2012 ICJ Rep. 99 (Feb. 3).

[89] *See* International Law Commission, Responsibility of States for Internationally Wrongful Acts, Arts. 4, 7, II Y.B. Int'l L. Comm'n (2001), *available at* https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf.

[90] *See* Chimène I. Keitner, *Categorizing Acts by State Officials: Attribution and Responsibility in the Law of Foreign Official Immunity*, 26 Duke J. Comp. & Int'l L. 451, 458 (2016); Dodge, *supra* note 14; *see also* International Law Commission, *supra* note 89, Art. 58 ("These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.").

[91] *Cf. Ger. v. It.*, *supra* note 88, at 140, para. 93 ("The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.").

[92] 140 S. Ct. 735.

[93] *Id.* at 744.

[94] *Id.* at 745.

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similar foreign relations considerations as part of its justification for curtailing litigation under the ATS in recent years.[95]

Not only are there policies at stake not presented in domestic civil rights litigation, but that litigation is also premised on policies that are absent from the foreign official immunity context. As noted above, the domestic immunity regime is premised on the idea that the federal courts have the role of ensuring that federal and state actors comply with the supreme federal Constitution. That is the basis for the "fiction" whereby abuses by state officials are not deemed to be actions by the state for purposes of state immunity. It is not clear, however, that the federal courts do or should have a comparable role of ensuring that foreign officials comply with international human rights law. As the Supreme Court has observed, "it is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits."[96] There is consequently no analogue in international human rights litigation to the *Ex parte Young* doctrine: courts assume that it would *not* be appropriate to enjoin foreign government actors from conduct in their own countries.[97] International human rights litigation therefore tends to involve only requests for damages, not equitable relief.

Moreover, in the domestic context, the Supreme Court has developed a "qualified immunity" doctrine that shields domestic officials from damage claims unless it is shown that they violated "clearly established" federal rights "of which a reasonable person would have known"[98]—a doctrine that the Court has described as resulting from "the balancing of 'fundamentally antagonistic social policies.'"[99] Although the doctrine is controversial, it has been widely applied by the courts, and it serves to substantially reduce the exposure of domestic officials to liability in personal capacity lawsuits. There is no comparable immunity doctrine for suits against foreign officials, however, making it hazardous to try to replicate the domestic regime in the foreign official immunity context.[100]

### *C. What About the TVPA?*

For the above reasons, this Editorial Comment contends that courts should (like the court in *Doğan*) apply the nature-of-act approach to foreign official immunity rather than

[95] *See Kiobel*, 569 U.S. at 124 (expressing concern about the possibility of generating "diplomatic strife"); *Jesner*, 138 S. Ct. at 1408 ("The political branches . . . surely are better positioned than the Judiciary to determine if corporate liability would, or would not, create special risks of disrupting good relations with foreign governments.").

[96] Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004).

[97] *See, e.g.*, In re "Agent Orange" Prod. Liability Litig., 373 F. Supp. 2d 7, 45 (E.D.N.Y. 2005) ("Requests for extraterritorial injunctions often raise serious concerns for sovereignty and enforceability which compel denial.").

[98] *Harlow*, 457 U.S. at 818.

[99] United States v. Stanley, 483 U.S. 669, 695 n. 13 (1987) (quoting Barr v. Mateo, 360 U.S. 564, 576 (1959) (plurality)).

[100] For an argument that courts should create a qualified immunity doctrine for suits against foreign officials, see John Balzano, *A Hidden Compromise: Qualified Immunity in Suits Against Foreign Governmental Officials*, 13 Ore. Rev. Int'l L. 71 (2011). One potential problem with this argument is that the domestic qualified immunity doctrine seeks to balance considerations that may not apply in suits against foreign officials, such as the need to vindicate federal law within a national legal system.

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the effect-of-judgment approach. The most challenging question in applying the nature-of-act approach is its relationship to the TVPA.

Although a difficult question, I conclude that the TVPA is best read not to displace the common law of foreign official immunity, even for alleged acts that violate the provisions of the statute. The text of the TVPA does not mention immunity, and statutes are normally assumed not to displace the common law by implication—a proposition that the Court in *Samantar* itself referenced.[101] Thus, for example, federal common law immunities apply to suits brought under the civil right statute, 42 U.S.C. § 1983. This is true even though Section 1983, like the TVPA, applies only to official actions. The Supreme Court has stated that the common law immunities should be presumed to continue to operate absent a "clear indication" that Congress meant to abolish them,[102] and it has developed and refined these immunities (especially qualified immunity) after Section 1983's enactment. Moreover, the Court in *Samantar* accepted that a common law of foreign official immunity pre-dated even the FSIA's enactment, which was well before the enactment of the TVPA.[103]

Nor can one find such a clear indication to override immunity in the TVPA's legislative history. There are statements in the House and Senate reports indicating that the statute was not intended to override diplomatic immunity or head-of-state immunity.[104] The reports do not mention conduct immunity, and there are suggestions that Congress did not expect that former officials would be entitled to immunity in suits brought under the statute.[105] However, the TVPA was enacted when some lower courts were applying the FSIA to suits brought against individual officials, and the legislative history appears to assume that the FSIA would govern this issue, and that its requirements would typically not be satisfied in suits against former officials.[106] The Supreme Court in *Samantar* has since concluded that the issue is governed by common law rather than the FSIA, and the legislative history does not address the statute's relationship to that common law. In any event, even the outdated assumptions about the applicability of the FSIA in the legislative history do not indicate that Congress was attempting to abrogate any immunity that would otherwise apply. It is also worth noting that the executive branch, which is attuned to the foreign relations considerations presented in these cases, has consistently declined to construe the TVPA as abrogating conduct immunity.[107]

Treating the TVPA as overriding conduct immunity would also potentially violate customary international law. As noted in Part II, there are currently debates about the scope of conduct immunity under customary international law, especially in criminal cases, but there is still substantial support for applying it even to egregious human rights abuses, especially in

[101] *See Samantar*, 560 U.S. at 320.

[102] *See* note 72 *supra*.

[103] *See, e.g.*, *Samantar*, 560 U.S. at 320 ("[W]e do not think that the [FSIA] codified the common law with respect to the immunity of individual officials.").

[104] *See* H. Rpt. No. 102-367, 102d Cong., 1st Sess. 5 (Nov. 25, 1991); S. Rpt. No. 102-249, 102d Cong., 1st Sess. 7–8 (Nov. 26, 1991).

[105] *See* S. Rpt., *supra* note 104, at 8.

[106] *See id.* ("To avoid liability by invoking the FSIA, a former official would have to prove an agency relationship to a state, which would require that the state 'admit some knowledge or authorization of relevant acts.' 28 U.S.C. 1603(b). Because all states are officially opposed to torture and extrajudicial killing, however, the FSIA should normally provide no defense to an action taken under the TVPA against a former official.").

[107] *See, e.g.*, U.S. Amicus Brief in *Doğan v. Barak*, *supra* note 47, at 16–20.

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civil cases. Moreover, the debates have concerned the nature of the acts that qualify for conduct immunity, not whether the judgment would be directly enforceable against a foreign state. As noted earlier, under the *Charming Betsy* canon of construction, federal statutes are supposed to be construed where fairly possible not to violate international law.[108] Although the state of international law is uncertain on this issue, that uncertainty itself is a reason not to construe the TVPA as overriding immunity by implication: it will not violate international law to confer immunity, but it might violate international law not to do so.[109] To put it differently, even if it seems normatively desirable to push the international law of immunity in a less protective direction, it is doubtful that U.S. courts, without any clear direction from Congress and any support from the executive branch, should be leading that effort.

The best argument for treating the TVPA as an override of the common law of foreign official immunity is the concern that, otherwise, the statute would in effect be a nullity. The statute applies only to acts of torture and killing carried out under "actual or apparent authority, or color of law, of any foreign nation," so if there is conduct immunity for all such acts, then the statute would have no effect. Implicitly, the argument goes, Congress must have intended to displace any common law conduct immunity that would otherwise apply. This was the reasoning, for example, of Judge Randolph in his concurrence in *Lewis v. Mutond*. As he noted, "the [TVPA] thus imposes liability for actions that would render the foreign official eligible for immunity under the Restatement."[110] "When there is such a clear conflict between statutory law and judge-made common law," Randolph argued, "the common law must give way."[111]

This is a powerful argument, which is why this is a close question. As other courts have noted, however, the TVPA would still have some effect even without overriding a broad common law of foreign official immunity. Even under the nature-of-act approach, conduct immunity could be denied if the defendant's alleged actions, while carried out under color of law or with apparent authority, were not within the outer bounds of the defendant's official responsibilities.[112] This might be confirmed if the foreign state informed the court that the alleged actions were not taken in an official capacity, an intervention that Congress may have expected to be common in TVPA cases.[113] In fact, it might make sense for courts to require that foreign states specifically affirm that a defendant was acting in an official capacity as a prerequisite for receiving conduct immunity. By linking conduct immunity to the foreign state's willingness to accept responsibility for the conduct, the TVPA, as one court noted,

[108] *See* text accompanying note 40 *supra*.

[109] *See* Bradley & Helfer, *supra* note 11, at 252 ("A court that interprets immunity broadly will not violate [customary international law], whereas a court that interprets immunity narrowly may."); Wuerth, *supra* note 29, at 974 ("Denial of immunity by U.S. courts to foreign officials thus risks putting the United States in violation of international law with unclear diplomatic and foreign policy risks.").

[110] *Lewis*, 918 F.3d at 150 (Randolph, J., concurring in the judgment); *see also* Stephens, *supra* note 60, at 2704 ("A blanket grant of immunity to foreign officials who act under color of law would contradict the statute.").

[111] 918 F.3d at 150 (Randolph, J., concurring in the judgment).

[112] *Cf. Buratai*, 318 F. Supp. 3d at 232 (emphasizing that "the defendants' alleged actions were part of their official duties within the Nigerian government, military, and police").

[113] *Cf. Doğan*, 932 F.3d at 895 ("The parties agree that Congress expected foreign states would generally disavow conduct that violates the TVPA because no state officially condones such actions."); *see also* Hilao v. Estate of Marcos, 25 F.3d 1467, 1472 (9th Cir 1994) (citing letter from the Philippine government urging the court to exercise jurisdiction over its former president for "acts of torture, execution, and disappearance [that] were clearly acts outside of his authority").

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would "impose[] liability on true outlaws, *i.e.*, individuals who commit acts for which no foreign sovereign is willing to accept responsibility—but not individuals whose conduct is authorized."[114] In any event, even for official acts, there would be no immunity under the TVPA if the foreign state decided to expressly waive the immunity. Like other immunities, foreign official immunity is freely waivable by the official's state, and states do sometimes waive this immunity, especially after a regime change.[115] Finally, if the executive has the authority to make binding suggestions of non-immunity, as some courts have reasoned,[116] then the statute would still be effective in that circumstance as well.

## V. Conclusion

The Supreme Court in *Samantar* cited as one of the reasons not to interpret the FSIA to cover foreign officials the fact that "[t]he Courts of Appeals have had to develop, in the complete absence of any statutory text, rules governing when an official is entitled to immunity under the FSIA."[117] That, however, is precisely what the lower courts have had to do since *Samantar* in developing a common law of foreign official immunity, and the conflicting approaches illustrate some of the drawbacks to using a common law method to regulate this issue. Courts have difficulty assessing the relevant policy tradeoffs and thus tend to defer to the executive branch, and yet this case-specific deference raises separation of powers concerns. While in theory courts could look to customary international law for guidance, that law is itself evolving and difficult to assess, and its proper status in the U.S. legal system is uncertain. In the absence of additional statutory guidance, this Editorial Comment contends that both separation of powers and foreign relations considerations are best served through a nature-of-act approach rather than an effect-of-judgment approach.

[114] *Buratai*, 318 F. Supp. 3d at 238. A requirement that the foreign state attest that the alleged actions were taken in an official capacity would ensure that the state accepts responsibility in return for its officials receiving immunity in U.S. courts. *Cf.* Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.), Judgment, 2008 ICJ Rep. 177, 244, para. 196 (June 4) (noting that "a State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs").

[115] *See, e.g.*, In re Grand Jury Proceedings, Doe # 700 (Under Seal), 817 F.2d 1108, 1110–11 (4th Cir. 1987); Paul v. Avril, 812 F. Supp. 207, 210 (S.D. Fla. 1992).

[116] *See, e.g.*, *Buratai*, 318 F. Supp. 3d at 238.

[117] *Samantar*, 560 U.S. at 322 n. 17.

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