. . . .

10. *Reiterates* its call for the Syrian authorities to allow immediate, full and unimpeded access of humanitarian personnel to all populations in need of assistance, in accordance with international law and guiding principles of humanitarian assistance and calls upon all parties in Syria, in particular the Syrian authorities, to cooperate fully with the United Nations and relevant humanitarian organizations to facilitate the provision of humanitarian assistance. . . .[13]

The brief April ceasefire did not hold. A small and unarmed UN monitoring mission had little effect on the situation, and violence rose during May 2012. In late May, pro-government forces were implicated in the massacre of at least 108 civilians in Houla, including 49 children. The Security Council adopted a strongly worded statement condemning the massacre,[14] and the United States and ten other nations expelled senior Syrian diplomats to express condemnation.[15]

The ongoing violence in Syria has become a subject of political debate in the United States, with Republican presidential candidate Mitt Romney criticizing U.S. support for the Annan peace plan and calling for the United States to help arm Syrian resistance groups.[16] Senators Lindsey Graham, John McCain, and Joseph Lieberman have called for U.S. airstrikes to protect civilians.[17]

STATE JURISDICTION AND IMMUNITIES

U.S. District Court Upholds Head of State Immunity for Sri Lankan President

In March 2012, the U.S. District Court for the District of Columbia ruled that President Percy Mahendra Rajapaksa of Sri Lanka is immune from suit under the Torture Victim Protection Act[1] (TVPA) while in office.[2] The plaintiffs alleged that Rajapaksa was liable for extrajudicial killings of their relatives during Sri Lanka's internal conflict with the Liberation Tigers of Tamil Eelam and that the TVPA overrode the immunity of heads of state under federal common law. The United States filed a suggestion of immunity in the case. Judge Colleen Kollar-Kotelly found "that the United States' Suggestion of Immunity is binding on the Court and dispositive of the Court's jurisdiction" and dismissed the suit.[3] Portions of her thorough opinion follow:

The immunity of foreign sovereigns in United States courts is a common law doctrine recognized by the Supreme Court nearly two centuries ago. In *Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812), Chief Justice John Marshall "concluded that, while the

[13] SC Res. 2042, *supra* note 11.

[14] Neil MacFarquhar, *Security Council Condemns Syria over Massacre*, N.Y. TIMES, May 28, 2012, at A1; Liz Sly & Colum Lynch, *U.N. Security Council Blames Syrian Government for Civilian Massacre*, WASH. POST, May 28, 1012, at A1; Editorial, *The Massacre at Houla*, N.Y. TIMES, May 29, 2012, at A20.

[15] Karen DeYoung & Liz Sly, *U.S., Allies Expel Syrian Diplomats over Massacre*, WASH. POST, May 29, 2012, at A1; Neil MacFarquhar, *10 Allies Join U.S. in Move to Expel Syria Diplomats*, N.Y. TIMES, May 30, 2012, at A1.

[16] MacFarquhar, *supra* note 14.

[17] Mark Landler, *Romney Calls for Action, but His Party Is Divided*, N.Y. TIMES, May 30, 2012, at A6.

[1] 28 U.S.C. §1350.

[2] Manoharan v. Rajapaksa, 2012 U.S. Dist. LEXIS 25732, at *16 (D.D.C. Feb. 29, 2012) (mem. op.).

[3] *Id.* at *2.

jurisdiction of a nation within its own territory 'is susceptible of no limitation not imposed by itself,' the United States had impliedly waived jurisdiction over certain activities of foreign sovereigns." Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983) (quoting *id.* at 136). The decision in *Schooner Exchange* "came to be regarded as extending virtually absolute immunity to foreign sovereigns." *Id.* Following *Schooner Exchange*, courts employed a two-part procedure to determine whether a foreign sovereign or foreign official was immune from suit. As the Supreme Court explained:

> Under that procedure, the diplomatic representative of the sovereign could request a "suggestion of immunity" from the State Department. If the request was granted, the district court surrendered its jurisdiction. But "in the absence of recognition of the immunity by the Department of State," a district court "had authority to decide for itself whether all the requisites for such immunity existed.". . . Although cases involving individual foreign officials as defendants were rare, the same two-step procedure was typically followed when a foreign official asserted immunity.

Samantar v. Yousuf, 130 S.Ct. 2278, 2284–85 (2010) (quoting *Ex parte Peru*, 318 U.S. 578, 581, 587–88 (1943)).

Prior to 1952, the State Department generally suggested immunity in all actions brought against foreign sovereigns. *Id.* at 2285. In 1952, the State Department departed from this practice, and adopted a "restrictive" theory of foreign sovereign immunity, which limited immunity to "suits involving the foreign sovereign's public acts," but not "cases arising out of a foreign state's strictly commercial acts." *Id.* (quoting *Verlinden*, 461 U.S. at 487). However, the influence of political considerations led to inconsistent submission of suggestions of immunity under this "restrictive" theory. *Id.* To remedy the inconsistent application of foreign sovereign immunity by the State Department, Congress enacted the Foreign Sovereign Immunities Act ("FSIA") in 1976. *Id.* Until 2010, a majority of Circuits held that the FSIA governed not only foreign *sovereign* immunity, but also claims of immunity by individual officers of foreign states. *Yousuf v. Samantar*, 552 F.3d 371, 378 (4th Cir. 2009) (collecting cases). In *Samantar*, the Supreme Court interpreted the FSIA to govern only the application of foreign sovereign immunity to foreign states, not foreign officials. 130 S.Ct. at 2292–93. Rather, the pre-FSIA common law regarding head of state and diplomatic immunities continues to govern whether, as in this case, an individual official from a foreign sovereign is entitled to immunity from suit. *Id.*

In accordance with the post-*Schooner Exchange* procedure, the State Department filed a Suggestion of Immunity in this case, reflecting the State Department's determination that Defendant Rajapaksa is entitled to head of state immunity while in office. The State Department's Suggestion of Immunity is conclusive and not subject to judicial review. *E.g.*, *Ex parte Peru*, 318 U.S. at 589–90 ("The certification and the request that the vessel be declared immune must be accepted by the courts as a conclusive determination by the political arm of the Government."); *Ye v. Zemin*, 383 F.3d 620, 625–27 (7th Cir. 2004) (holding courts must defer to the State Department's Suggestion of Immunity even in cases involving alleged violations of *jus cogens* norms). "The precedents are overwhelming. For more than 160 years American courts have consistently applied the doctrine of sovereign immunity when requested to do so by the executive branch." *Spacil v. Crowe*, 489 F.2d 614, 617 (5th Cir. 1974). "When, as here, the Executive has filed a Suggestion of Immunity as to a recognized head of a foreign state, the jurisdiction of the Judicial Branch immediately ceases." *Doe I v. State of Israel*, 400 F.Supp.2d 86, 111 (D.D.C. 2005); *accord*, *id.* ("When the Executive Branch concludes that a recognized leader of a foreign sovereign should be immune from the jurisdiction of American courts, that

> conclusion is determinative."); *First Am. Corp. v. Al-Nahyan*, 948 F.Supp. 1107, 1119 (D.D.C. 1996) ("The United States has filed a Suggestion of Immunity on behalf of H. H. Sheikh Zayed, and courts of the United States are bound to accept such head of state determinations as conclusive."); *Saltany v. Reagan*, 702 F.Supp. 319, 320 (D.D.C. 1988) ("[T]he United States has suggested to the Court the immunity from its jurisdiction of Prime Minister Thatcher as the sitting head of government of a friendly foreign state. . . . The Court must accept [the suggestion] as conclusive.") *rev'd in part on other grounds*, 886 F.2d 438 (D.C. Cir. 1989).[4]

The court rejected the plaintiff's argument that the TVPA overrode customary head of state immunity.

> It is undisputed that head of state immunity is a well established common law principle, *see* Pls.' Opp'n at 17, and according to Plaintiffs, the TVPA covers the issue of head of state immunity for extrajudicial killings, which is traditionally governed by the common law, *id.* at 7. Therefore, the relevant question for the Court is whether there is any evidence to suggest Congress did *not* intend to maintain the common law doctrine of head of state immunity when it enacted the TVPA.
>
> Framed this way, it is clear Congress intended to maintain head of state immunity to suit under the TVPA. The House Report accompanying the TVPA explicitly stated "nothing in the TVPA overrides the doctrines of diplomatic and head of state immunity." H.R. Rep. No. 102-367, at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 88; *see also* S. Rep. No. 102-249, at 8 (1991) ("Nor should visiting heads of state be subject to suit under the TVPA."). The clear statutory purpose behind the TVPA was to *maintain* the common law doctrine of head of state immunity, not override it. To the extent Plaintiffs are correct that immunizing heads of state from liability under the TVPA runs contrary to the general purposes of the statute, that contradiction was recognized by Congress before the statute was enacted, and the Court is not in a position to remedy that contradiction.[5]

Second Circuit Rules RICO Does Not Reach Extraterritorially

In January 2012 in *Cedeño v. Castillo*,[1] the U.S. Court of Appeals for the Second Circuit affirmed in an unpublished opinion a lower court's ruling that the U.S. Racketeer Influenced and Corrupt Organizations Act[2] (RICO) does not reach alleged money laundering and other offenses committed in Venezuela. The case continues a trend toward limiting the extraterritorial range of statutory causes of action stemming from the U.S. Supreme Court's 2010 decision in *Morrison v. National Australia Bank Ltd.*[3]

The lead plaintiff in *Cedeño* is a Venezuelan banker living in Miami. The suit alleges that Venezuelan officials and bankers engaged in money laundering[4] and extortion[5] to gain

[4] *Id.* at *5–9 (footnote omitted).

[5] *Id.* at *11–12.

[1] 457 Fed.Appx. 35 (2d Cir. 2012).

[2] 18 U.S.C. §§1961–1968.

[3] Morrison v. Nat'l Austl. Bank Ltd., 130 S.Ct. 2869 (2010); *see* John R. Crook, Contemporary Practice of the United States, 104 AJIL 654, 654 (2010).

[4] *Cedeño*, 457 Fed.Appx. at 37 (citing 18 U.S.C. §1956).

[5] *Id.* (citing 18 U.S.C. §1951).