

Seeking Accountability and Justice for Torture Victims: The Hurdle of the Foreign Sovereign Immunities Act in Suing Foreign Officials under the Torture Victims Protection Act

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“Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”¹

I. INTRODUCTION

Bashe Abdi Yousuf² was a young Somali businessman who had just started UFFO,³ an organization that sought to improve the conditions in a local hospital, when he was subject to the “Mig.”⁴ On or around

¹ *Opinion and Judgment of the International Military Tribunal for the Trial of German Major War Criminals*, The Nuremberg Trial, 6 F.R.D. 69, 110 (1946).

² Courts and news sources use ‘Yousef,’ ‘Yousuf,’ and ‘Youseff’ interchangeably. For consistency, this comment will refer to the plaintiff in the case as ‘Yousuf.’

³ UFFO, literally meaning “the wind behind the storm,” was founded in 1983 as a self-help organization comprised of local Somaliland intellectuals based in Hargeisa, Somalia. “In the eyes of UFFO, the government was not properly fulfilling its role as a provider of basic social services. The organization wanted to make a statement and undertook to rehabilitate the hospital of Hargeisa, without government participation or approval.” Marleen Renders, *Turbans and Tribes: The Building of a State and the Political Role of Islam in Somaliland*, in 489 L’ISLAM POLITIQUE AU SUD DU SAHARA – IDENTITÉS, DISCOURS ET ENJEUX (Muriel Gomez Perez ed., 2005).

⁴ *Yousuf v. Samantar*, No. 04–1360, 2007 U.S. Dist. LEXIS 56227, at *7 (E.D. Va. Aug. 1, 2007), *rev’d*, *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009), *cert. granted*, 78 U.S.L.W. 3169 (U.S. Sept. 30, 2009) (No. 08–1555). *See also* William Branigin, *Somali*

November 19, 1981, Somali National Security Service (“NSS”) agents⁵ barged into Yousuf’s warehouse in Hargesia, Somalia and forced him into a Land Cruiser.⁶ The guards took Yousuf to a detention center where interrogators forced him down to the ground, tightly tied his hands and feet together with rope so that his body was arched backwards in a slightly-tilted “U” shape, with his arms and legs in the air, and then placed a rock on his back, causing him excruciating pain.⁷ They then tightened the rope causing deep cuts to his arms and legs.⁸ The interrogators were subjecting Yousuf to the “Mig”—a torture method that placed the prisoner’s body in a shape that resembled the Somali Air Force’s MIG aircraft.⁹ Yousuf’s interrogators questioned him about his activities with UFFO and threatened to continue the torture unless he confessed to anti-government activities in connection with his work at the organization.¹⁰ During his three-month detention, Yousuf suffered through eight water-boarding sessions and twice endured electric shocks to his armpits.¹¹ He was eventually brought before the National Security Court, a special military court with jurisdiction over civilians accused of national security crimes and political offenses.¹² Although he pleaded not guilty, Yousuf was sentenced to twenty years imprisonment and spent six years in solitary confinement in near to total darkness in a six-by-six foot cell.¹³

Expatriates Charged with War Crimes – Two Men Accused Now Live in Northern Virginia, WASH. POST, November 11, 2004.

⁵ The district court opinion presents Yousuf’s account of the political scenario in Somalia at the time of Yousuf’s detention and subsequent torture. The court recounts that, [I]n October 1969, Major General Mohamed Siad Barre led a coup that set up an authoritarian socialist rule in Somalia [P]ower was assumed by the Supreme Revolutionary Council (“SRC”), which consisted primarily of the Army officers who had supported and participated in the coup, including Samantar. The SRC suspended the existing Constitution, closed the National Assembly, abolished the Supreme Court and declared all groups not sponsored by the government . . . to be illegal. . . . Beginning in the early 1980s, the military committed numerous atrocities against ordinary citizens in an attempt deter the growing opposition movements. Security forces . . . were together responsible for the widespread and systematic use of torture, arbitrary detention, and extrajudicial killing against the civilian population of Somalia. *Samantar*, 2007 U.S. Dist. LEXIS 56227, at *2–3, *7. See also Brenda Sandburg, *Exporting Justice*, THE RECORDER, Apr. 18, 2005.

⁷ *Samantar*, 2007 U.S. Dist. LEXIS 56227, at *10.

⁸ *Id.*

⁹ *Id.* at *11 n.6.

¹⁰ *Id.* at *11.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* Yousuf eventually fled Somalia, and currently resides in Virginia, USA. *Id.* *18.

In 2004, seven members¹⁴ of the Isaaq clan,¹⁵ including Yousuf, filed suit against Mohamed Ali Samantar in the District Court for the Eastern District of Virginia.¹⁶ At various intervals between 1980 and 1990, Samantar served in positions of high authority in the Somali military-led government, including as First Vice President and Minister of Defense, and Prime Minister.¹⁷ Plaintiffs¹⁸ sued under the Torture Victim Protection Act of 1991 (“TVPA”),¹⁹ and the Alien Tort Claims Act (“ATCA”).²⁰ Plaintiffs alleged that Samantar, in his official capacity as Minister of Defense and later as Prime Minister, knew or should have known that his subordinates were engaged in conduct that amounted to gross human rights abuses such as torture, extrajudicial killings, cruel and inhuman treatment, and arbitrary detentions.²¹ Samantar argued that the district court lacked subject matter jurisdiction over plaintiffs’ claims pursuant to sovereign immunity under the Foreign Sovereign Immunities Act (“FSIA”).²² The district court dismissed plaintiffs’ suit, holding that

¹⁴ There were seven plaintiffs in total, only two of which are named, the rest “remaining anonymous fearing reprisals if identified.” See Branigin, *supra* note 5.

¹⁵ The district court noted that “[e]ven before Somalia became an independent nation, the clan system served as the fundamental building block of Somali society and attracted great emotional allegiance.” *Samantar*, 2007 U.S. Dist. LEXIS 56227, at *3 n.3. The post-coup military leadership favored its own clans, and oppressed the others through systematically building upon and exploiting the clan system. *Id.* This was achieved by “appointing members of favored clans to top governmental and military positions while also oppressing and targeting other clans, especially the Isaaq clan in the northern regions.” *Id.* The District Court noted that “[m]embers of the Isaaq clan, located primarily in the northwestern region of Somalia, were a special target of the government because they were among the best educated and most prosperous Somalis, and therefore perceived as potential opponents to the Barre regime.” *Id.* at *3.

¹⁶ *Id.* at *1.

¹⁷ *Id.* at *18.

¹⁸ The Fourth Circuit summarized the circumstances under which each plaintiff alleged that he or she suffered atrocities based on affiliation with the Isaaq clan: “Plaintiff Jane Doe [alleges that] she was abducted from her family home in Hargeisa by NSS agents, repeatedly tortured and raped, beaten to the point that she could not walk, and placed in solitary confinement for three and a half years [P]laintiff John Doe II [alleges that] although he was a non-commissioned officer in the Somali National Army, he was arrested . . . and then shot during a mass execution. Doe survived his non-fatal wound by hiding under a pile of bodies Plaintiff Aziz Mohamed Deria alleges that his father and brother were tortured and killed by soldiers Plaintiff John Doe I . . . asserts that his two brothers were abducted by government forces while tending the family’s livestock and then executed.” *Yousuf v. Samantar*, 552 F.3d 371, 374 (4th Cir. 2009), *cert. granted*, 78 U.S.L.W. 3169 (U.S. Sept. 30, 2009)(No. 08–1555).

¹⁹ Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2010).

²⁰ Alien Tort Claims Act, 28 U.S.C. § 1350 (2010).

²¹ *Samantar*, 2007 U.S. Dist. LEXIS 56227, at *19–20.

²² Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1604 (2010) (“[A] foreign state shall be immune from the jurisdiction of the courts of the United States except as provided in sections 1605 to 1607 of this chapter.”).

Samantar acted in his official capacity upon the directives of the Somali government and not for “personal reasons or motivation.”²³ The FSIA provided Samantar with immunity from suit based on those actions. The district court found that permitting such a suit against a foreign government official would amount to an abrogation of foreign sovereign immunity and would permit litigants to achieve “indirectly what the Act barred them from doing directly.”²⁴ Plaintiffs appealed.

In a decision shattering precedent set by other circuits, and distinguishing precedent set by itself, the Fourth Circuit reversed the district court’s opinion and found the FSIA inapplicable to Samantar on the grounds that sovereign immunity is only available to a foreign official *continuing* to be an “agency or instrumentality” of the foreign state.²⁵ According to the Fourth Circuit’s analysis of the linguistic construction of the FSIA, since Samantar was *no longer* an official of the state, immunity was not available to him under the FSIA.²⁶ Thus, the Fourth Circuit effectively removed the hurdle of the FSIA to most torture suits against former government officials. As Judge Duncan noted in his concurring opinion, the result of the Fourth Circuit’s decision was that future defendants would have to rely on “common law immunities that predate the FSIA” such as act of state immunity and head of state immunity.²⁷ Samantar filed a petition with the Supreme Court, which has interpreted the text of several provisions in the FSIA in recent years.²⁸ While it has long been the rule that the FSIA protects foreign governments from suit in United States courts, the Supreme Court has never addressed whether the FSIA also affords immunity to foreign government officials.

The circuits have split on the issue of whether the FSIA is a source of immunity from suit in the United States for individual foreign officials like Samantar.²⁹ The Seventh Circuit reversed precedent when it held

²³ *Samantar*, 2007 U.S. Dist. LEXIS 56227, at *44.

²⁴ *Id.*

²⁵ *Yousuf v. Samantar*, 552 F.3d 371, 383 (4th Cir. 2009), *cert. granted*, 78 U.S.L.W. 3169 (U.S. Sept. 30, 2009) (No. 08–1555).

²⁶ *Id.*

²⁷ *Id.* at 384. (Duncan, J., concurring).

²⁸ *See, e.g., Republic of Iraq v. Beaty*, 129 S.Ct. 2183 (2009) (interpreting the terrorism exception to immunity); *Permanent Mission of India to the U.N. v. City of New York*, 551 U.S. 193 (2007) (interpreting the property exception to immunity); *Republic of Aus. v. Altmann*, 541 U.S. 677 (2004) (regarding retroactivity); *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003) (interpreting the meaning of “instrumentalities of a foreign state”).

²⁹ *See RSM Prod. Corp. v. Fridman*, 2009 U.S. Dist. LEXIS 12898, at *19 n. 8 (S.D.N.Y. Feb. 19, 2009) (noting the split in the circuits). *Compare In Re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 80 (2d Cir. 2008), *Keller v. Cent. Bank of Nig.*, 277 F.3d 811, 815 (6th Cir. 2002), *Byrd v. Corporacion Forestal y Industrial de Olancho*

that the FSIA did not grant immunity in an ATCA suit against former Nigerian President, General Abdusalami Abubakar.³⁰ Prior to the Seventh Circuit's decision in *Abubakar*, the Fifth, Sixth, Ninth and District of Columbia circuits each held that the FSIA was a source of immunity for an individual foreign official.³¹ Three years after *Abubakar*, the Second Circuit rejected the Seventh Circuit's interpretation and sided with the majority opinion in the circuits.³² The Fourth Circuit's decision in *Samantar* complicates FSIA jurisprudence and leaves the question of redress under the TVPA and ATCA unclear. Future litigants—especially victims of torture—are left without a clear path to redress; although Congress specifically provided for accountability for torture victims through its passage of the TVPA, majority circuit precedent suggests that individual foreign officials responsible for the acts of torture are free from suit pursuant to the FSIA.³³

The Supreme Court granted certiorari in *Samantar*.³⁴ Commentators see the case as a “litigation litmus test” for the current administration's commitment to human rights.³⁵ The Supreme Court must answer two questions: first, whether a foreign state's immunity from suit under the FSIA extends to an individual acting in his official capacity on behalf of a foreign state, and second, whether an individual who is no longer an official at the time suit is filed retains immunity for acts taken in the individual's former capacity as an official acting on

S.A., 182 F.3d 380, 388 (5th Cir. 1999), *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir. 1997), and *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101–03 (9th Cir. 1990) (holding that FSIA immunity extends to individual governmental officials for acts taken in their official capacity), with *Enahoro v. Abubakar*, 408 F.3d 877, 882 (7th Cir. 2005), and *Samantar*, 552 F.3d at 374. (holding that it does not).

³⁰ *Enahoro*, 408 F.3d at 882. The complaint included claims for “torture; arbitrary detention; cruel, inhuman and degrading treatment; false imprisonment; assault and battery; intentional infliction of emotional distress; and wrongful death.” *Id.* at 880.

³¹ See *supra* note 30 for a list of cases.

³² *Terrorist Attacks*, 538 F.3d at 81.

³³ *In Re Terrorist Attacks* on Sept. 11, 2001, 538 F.3d 71, 80 (2d Cir. 2008), *Keller v. Cent. Bank of Nig.*, 277 F.3d 811, 815 (6th Cir. 2002), *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999), *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir. 1997), and *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101–03 (9th Cir. 1990).

³⁴ *Yousuf v. Samantar*, 78 U.S.L.W. 3169 (U.S. Sept. 30, 2009) (No. 08–1555).

³⁵ John B. Bellinger, *Litigation Litmus Test*, WASH. TIMES, Monday Jan. 18, 2010 (“[T]he [current] administration has a dilemma: If the Supreme Court concludes that former foreign government officials are subject to civil suits in the United States, it could open the door to human rights litigation against foreign government officials in the U.S. and complicate the administration's diplomatic initiatives.”).

behalf of the foreign state.³⁶ This note suggests that the Supreme Court should preserve the private right of action in the TVPA by holding that the FSIA does not grant blanket immunity to current or former foreign officials for official or unofficial acts that violate *jus cogens* norms.³⁷ This suggestion is made on two grounds. First, when the official acts of current or former individual foreign official violate *jus cogens* norms, immunity granted to foreign states in the FSIA does not extend to current or former individual foreign officials.³⁸ This is because under the normative hierarchy theory, a state's jurisdictional immunity is abrogated when the state violates human rights protections that are considered preemptory international norms, known as *jus cogens*.³⁹ Second, as reflected in both the legislative history and judicial interpretation of the TVPA, Congress intended that former and current officials would not be immune from suit for acts of torture.

Part II chronicles the development of the doctrine of sovereign immunity and its ultimate codification by Congress in the FSIA, and examines the provisions of the FSIA applicable to the debate at hand. Part III addresses the current circuit split before the Court in *Samantar*. Part IV discusses the legislative history surrounding the passage of the TVPA and ATCA, and their relationship with the FSIA. Specifically, Part IV will discuss triggering the FSIA in cases where foreign officials are sued under the ATCA and TVPA. Part V provides reasons why the Supreme Court should hold that the FSIA does not grant blanket immunity to former and current foreign officials in suits brought in United States courts.

II. THE DEVELOPMENT OF THE SOVEREIGN IMMUNITY DOCTRINE AND ITS CODIFICATION BY THE FSIA

The Supreme Court has said that the FSIA is the “sole basis” for obtaining jurisdiction over a foreign state in an action filed in a U.S.

³⁶ Petition for Writ of Certiorari, *Yousuf v. Samantar*, No. 08–1555 (June 18, 2009).

³⁷ A *jus cogens* (Latin for “compelling law”) norm is a preemptory norm that is a fundamental principle of international law as a norm from which no derogation is ever permitted.

³⁸ The note does not address all violations of *jus cogens* norms, but rather focuses on torture and the private right of action granted to victims and their survivors in the TVPA.

³⁹ For an exhaustive discussion of normative hierarchy theory, see Lee M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L L. 741(2003). Caplan summarizes the theory as follows:

[Normative hierarchy theory] postulates that because state immunity is not *jus cogens*, it ranks lower in the hierarchy of international law norms, and therefore can be overcome when a *jus cogens* norm is at stake. [The theory] thus seeks to remove one of the most formidable obstacles in the path of human rights victims seeking legal redress.

court.⁴⁰ The vague state of nineteenth century foreign sovereign immunity jurisprudence and the complicated and often conflicting procedures for seeking sovereign immunity in the twentieth century preceded Congress's passage of the FSIA in 1976.⁴¹ This history is crucial in understanding Congress's intention that the FSIA be the "sole basis" for obtaining jurisdiction over a foreign state against the landscape of the common law regarding foreign sovereign immunity for individuals prior to its enactment.⁴²

A. Nineteenth Century Origins of the Concept of Sovereign Immunity in The Schooner Exchange v. McFaddon

When Congress enacted the Foreign Sovereign Immunities Act ("FSIA") in 1976, the concept of foreign sovereign immunity in American jurisprudence was not a new one. As early as 1812, and in cases involving subjects as diverse as Napoleonic maritime vessels, Italian olive oil, the Venezuelan civil war, and Cuban sugar transportation, the Supreme Court had expressed its opinion on foreign sovereign immunity. In 1812, in *The Exchange*, Chief Justice Marshall wrote that while, within its own territory, a nation enjoys "exclusive and absolute" jurisdiction that is "susceptible of no limitation not imposed by itself," the United States had impliedly waived jurisdiction over certain activities of foreign states.⁴³ Widely regarded as the first definitive statement on the doctrine of foreign state immunity,⁴⁴ *The Exchange* involved a question of jurisdiction over a French ship in the service of Napoleon that had sailed into an American port.⁴⁵ According to the Chief Justice, the "distinct sovereignties" of the world possessed "equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other."⁴⁶ States therefore impliedly consent to waive jurisdiction over other foreign sovereigns, and in exchange derive the benefit of a continued good relationship, in commerce or otherwise, with one another. The Chief Justice explained his position:

⁴⁰ *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).

⁴¹ See *infra* notes 93 to 97.

⁴² See, e.g., Justice Duncan's observation in *Samantar* that "[t]he [State Department] has argued in analogous cases that the common law immunities that predate the FSIA remain the appropriate body of law under which courts should consider the sovereign immunity of individuals." 552 F.3d at 384 (Duncan, J., concurring).

⁴³ *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812).

⁴⁴ However, the sovereign immunity doctrine originated in the period of monarchical rule in Europe, and therefore pre-dates *The Exchange*. See CHARLES LEWIS, STATE AND DIPLOMATIC IMMUNITY 11 (1980).

⁴⁵ *The Exchange*, 11 U.S. at 116.

⁴⁶ *Id.* at 136.

One sovereign . . . being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory . . . in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.⁴⁷

The Chief Justice extended this rationale to consider the immunity of representatives of the foreign state and foreign ministers.⁴⁸ It was his understanding that if foreign sovereigns were not assured that their representatives and ministers would be exempt from jurisdiction, “every sovereign would hazard his own dignity by employing a public minister abroad.”⁴⁹ That minister, in turn, would “would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission.”⁵⁰ Therefore, Chief Justice Marshall concluded that a sovereign who “[commits] the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose,” should be assured that his minister would be afforded immunity from suit.⁵¹ Despite the narrow facts in *The Exchange*, the opinion by Chief Justice Marshall “came to be regarded as extending virtually absolute immunity to foreign sovereigns.”⁵² Under this theory, the foreign sovereign would be afforded the same immunity from suit that the domestic sovereign enjoyed.⁵³

In 1897, *Underhill v. Hernandez* directly presented the Supreme Court with the question of whether foreign sovereign immunity would apply to a foreign official.⁵⁴ In *Underhill*, a U.S. citizen sued a Venezuelan general for wrong committed against him during the civil war.⁵⁵ The Supreme Court agreed with the Second Circuit’s

⁴⁷ *Id.* at 137.

⁴⁸ *Id.* at 139. The Chief Justice wrote, “[w]hatever may be the principle on which this immunity is established, whether we consider him as in the place of the sovereign he represents, or by a political fiction suppose him to be extra-territorial . . . still the immunity itself is granted by the governing power of the nation to which the minister is deputed.” *Id.* at 138.

⁴⁹ *Id.* at 139.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Verlinden v. B.V. Cent. Bank of Nig.*, 461 U.S. 480, 486 (1983).

⁵³ For a discussion of the European and American historical underpinnings of the “absolute immunity” doctrine, including further discussion of *The Exchange*, see Robert B. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT’L L. 33, 34 nn. 3–7 (1978).

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

⁵⁵ *Id.*

determination “that the acts of the defendant were the acts of Venezuela, and as such are not properly the subject of adjudication in the courts of another government.”⁵⁶ Cases such as *The Exchange* and *Underhill* made it clear that the grant of foreign sovereign immunity was an exercise in “grace and comity,” and not a restriction imposed by the United States Constitution.⁵⁷

B. The Supreme Court’s Move From Absolute Immunity to Restrictive Immunity in the Twentieth Century.

By the early twentieth century, restrictive immunity replaced absolute immunity because of the “increasing respect in civilized states for the rule of law,” and the “[i]ncreasingly large involvement of states in commercial and trading activities.”⁵⁸ Although the absolute immunity principle had already been challenged in the courts of Europe,⁵⁹ the Supreme Court’s articulation of the “absolute immunity” principle in *The Exchange* remained largely unchallenged until 1921, when the Supreme Court heard a case on direct appeal from the Southern District of New York.⁶⁰ The case involved *The Pesaro*, an Italian government-owned vessel carrying olive oil for delivery to American customers.⁶¹ The cargo had been destroyed en route, and the recipients sued.⁶² The Southern District of New York had ruled that the restrictive theory of immunity applied at least in admiralty cases where the government had become a trading partner with a private party.⁶³ Therefore, the vessel was not immune from suit in the United States.⁶⁴ Largely relying on *The Exchange*, the Court reversed Judge Mack’s decision, holding that the absolute immunity theory still stood, and *The Pesaro* was immune from suit in the United States.⁶⁵

⁵⁶ *Id.*

⁵⁷ See *Verlinden*, 461 U.S. at 486 expressing this view.

⁵⁸ Von Mehren, *supra* note 54, at 36 (internal citations omitted).

⁵⁹ *Id.* at 36 nn. 13–14.

⁶⁰ *The Pesaro*, 277 F. 473 (1921).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 476. (“So it may be said here that the Italian government, by giving to the *Pesaro* the capacity to

be sued in the Italian courts, voluntarily strips the *Pesaro* of its sovereign character and waives all privileges of that character; and that therefore the *Pesaro* is not exempt from suit in the United States, by reason of its governmental ownership and operation. For if a libel can be maintained against the steamship *Pesaro* in the courts of Italy, it is difficult to see why our tribunals should decline jurisdiction. . . .”)

⁶⁴ *Id.* at 483.

⁶⁵ *Id.* at 483.

In the period between the initial articulation of this principle in *The Exchange* and *The Pesaro*, and the passage of the FSIA in 1976, the courts moved away from judicial determination on the question of sovereign immunity; the Executive Branch essentially controlled the grant of foreign sovereign immunity.⁶⁶ A foreign state faced with suit in the United States would apply to the State Department for a finding of immunity.⁶⁷ Once the State Department made a determination, it would convey the finding to the relevant court by filing a “suggestion.”⁶⁸ However, courts treated these “suggestions” as binding determinations and invoked or denied immunity based upon the State Department’s decision.⁶⁹

By the mid-1940s, the Supreme Court’s opinions in *Ex Parte Republic of Peru*⁷⁰ and *Republic of Mexico v. Hoffman*,⁷¹ made clear that the Court’s position on sovereign immunity was two-fold: first, the United States would retain the absolute immunity theory, and second, the courts would defer to the executive branch for sovereign immunity determinations.⁷² *Ex Parte Republic of Peru* presents a glimpse into the “accepted course of procedure” a foreign sovereign would undertake to request a determination of immunity from the State Department.⁷³ In

⁶⁶ See *Verlinden v. B.V. Cent. Bank of Nig.*, 461 U.S. 480, 486 (1983) (“Until 1952, the State Department ordinarily requested immunity in all actions against friendly foreign sovereigns.”). See also *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 81-82 (2d Cir. 2008).

⁶⁷ *Chuidian v. Phil. Nat’l Bank*, 912 F.2d 1095, 1100 (9th Cir. 1990).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Ex Parte Republic of Peru*, 318 U.S. 578 (1943). In the case, the Cuban corporation filed suit against the *Ucayali* for its failure to carry sugar from Peru to New York, as per the terms of an existing contract. *Id.* at 580. After suit was filed, the Peruvian government intervened, stating that it was the sole owner of the vessel and that it wished to raise the defense of sovereign immunity. *Id.*

⁷¹ *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945).

⁷² See *Republic of Aus. v. Altmann*, 541 U.S. 677, 689 (2004). See also Robert B. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT’L L. 33, 41 (1978).

⁷³ *Ex Parte Republic of Peru*, 318 U.S. at 581. The court details the course of procedure undertaken by the Government of Peru to secure a determination from the State Department that it was entitled to sovereign immunity: [The Government of Peru] . . . asked that the [State] Department advise the Attorney General of the claim of immunity and that the Attorney General instruct the United States Attorney for the Eastern District of Louisiana to file in the district court the appropriate suggestion of immunity. . . . These negotiations resulted in formal recognition by the State Department of the claim of immunity. This was communicated to the Attorney General by the Under Secretary’s letter [which] requested him to instruct the United States Attorney to present to the district court a copy of the Ambassador’s formal claim of immunity filed with the State Department, and to say that ‘this Department accepts as true the statements of the Ambassador concerning the steamship *Ucayali*, and recognizes and allows the claim of immunity.’ *Id.*

stating the rationale for deferring to the Executive branch, Chief Justice Stone reasoned that it would better serve the national interest if wrongs allegedly committed by a foreign power were “righted through diplomatic negotiations rather than by the compulsions of judicial proceedings.”⁷⁴ Therefore, as in *Ex Parte Republic of Peru*, once the executive had determined immunity was warranted, it was the court’s “duty” to submit the issue to the executive for a determination of relief attainable through diplomatic negotiations.⁷⁵

Two years later, in *Hoffman*, the Court took its deference to the executive branch one step further when it stated that even in the absence of a State Department determination on the issue of immunity, it would “inquire whether the ground of immunity is one which is the established policy of the department to recognize.”⁷⁶ In *Hoffman*, the State Department did not issue a suggestion either way, but rather, pointed to a case where a vessel was found to be in the possession and control of a foreign government, and one where it was not.⁷⁷ The Court interpreted the State Department’s silence to be controlling.⁷⁸ Further, the Court intimated that the determination of foreign sovereign immunity had implications in the sphere of foreign affairs, and therefore had the potential to embarrass the United States.⁷⁹ Therefore, it was constitutionally appropriate for the Court in *Ex parte Republic of Peru* and *Mexico v. Hoffman* to defer to the executive branch on an issue of foreign affairs.⁸⁰

⁷⁴ *Id.* at 589. The Chief Justice further noted that “. . . courts may not . . . exercise their jurisdiction . . . as to embarrass the executive arm of the Government in conducting foreign relations In such cases, the justice department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.” *Id.* (internal quotations and citations omitted).

⁷⁵ *Id.* at 588–89. The court noted that the courts must accept a certification and declaration of immunity as a “conclusive determination by the political arm of the Government” that continuing the suit in the courts would interfere with the proper conduct of foreign relations. *Id.* at 589. *See also Hoffman*, 324 U.S. at 34.

⁷⁶ *Hoffman*, 324 U.S. at 36.

⁷⁷ *Id.* at 31–32.

⁷⁸ *Id.* at 34–35. The court reasoned that it was “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. . . .” *Id.* at 35–36 (internal citations omitted).

⁷⁹ *Id.*

⁸⁰ *See generally* U.S. CONST. art. II, § 2, cl. 2 (delineating provisions of executive power, including the power to appoint and to receive ambassadors and consuls); *see also Verlindin*, 461 U.S. at 486 (“[F]oreign sovereign immunity is a matter of grace and comity . . . not a restriction imposed by the Constitution. Accordingly, this Court consistently has deferred to the decisions of the political branches – in particular, those of

C. The State Department Changes its Policy Towards Foreign Sovereign Immunity by Issuing the Tate Letter

The State Department continued its policy of requesting that courts grant immunity to friendly foreign states until 1952 when it issued the so-called Tate Letter.⁸¹ The Tate Letter's issuance articulated a shift from a theory of absolute foreign sovereign immunity to one of restrictive immunity.⁸² As the Tate Letter articulates,

According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*). . . . [I]t will hereafter be the Department's policy to follow the restrictive theory . . . in the consideration of requests of foreign governments for a grant of sovereign immunity.⁸³

Therefore, while the State Department's policy prior to the Tate Letter amounted to immunity in *all* actions involving friendly foreign sovereigns, the newer restrictive immunity policy meant that a court would not grant immunity to a foreign sovereign in suits arising out of private or commercial activity.⁸⁴ The Tate Letter changed the

the Executive Branch – on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities.”)

⁸¹ Letter from Jack B. Tate, Acting Legal Advisor, Dep't of State, to Philip B. Perlman, Acting Attorney Gen., Dep't of Justice (May 19, 1952), in 26 Dep't. St. Bull. 984, 984–85 (1952) [hereinafter Tate Letter] cited in *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711, 714 (1976); See also *Altmann*, 541 U.S. 677, 689–90 (“In [1952], the State Department concluded that immunity should no longer be granted in certain types of cases. [The Tate Letter] explained that the Department would thereafter apply the ‘restrictive theory’ of sovereign immunity” (internal quotations and citations omitted)).

⁸² Tate Letter.

⁸³ Tate Letter, as quoted in *Altmann*, 541 U.S. at 690.

⁸⁴ Letter from Monroe Leigh, Legal Adviser, Dep't of State, to Solicitor General, Dep't of Justice (Nov. 26, 1975), reprinted in *Alfred Dunhill of London, Inc.*, 425 U.S. 682 at 707 [hereinafter Leigh Letter] (“[S]ince 1952, the Department of State has adhered to the position that the commercial and private activities of foreign states do not give rise to sovereign immunity. Implicit in this position is a determination that adjudications of commercial liability against foreign states do not impede the conduct of foreign relations,

substantive nature of foreign sovereign immunities law in the United States.⁸⁵ The principles of the restrictive approach were collected in the Restatement (Second) of Foreign Relations Law § 65 et. seq. (1965).⁸⁶

However, the Tate Letter had little impact on the federal courts' *procedural* approach to immunity analysis; the State Department continued to issue statements regarding immunity, and federal courts continued to abide by them.⁸⁷ As the Supreme Court explained, foreign nations placed diplomatic pressure on the State Department when seeking immunity.⁸⁸ This occasionally led to suggestions of immunity even in situations where immunity would have been unavailable under the restrictive theory.⁸⁹ In an additional complication, where foreign nations did not make requests for immunity to the State Department, the courts had the responsibility to determine whether sovereign immunity existed.⁹⁰ Therefore, because "sovereign immunity determinations were made in two different branches, subject to a variety of facts, sometimes including diplomatic considerations," it was not surprising that "the governing standards were neither clear nor uniformly applied."⁹¹

D. Congress Speaks: The Foreign Sovereign Immunities Act

In 1976, Congress passed the FSIA⁹² to "free the government from the case-by-case diplomatic pressures, to clarify the governing standards,"⁹³ and to assure litigants that "decisions are made on purely legal grounds and under procedures that insure due process."⁹⁴ The purpose of the FSIA was the codification of the large body of common

and that such adjudications are consistent with international law on sovereign immunity.")

⁸⁵ See *Alfred Dunhill*, 425 U.S. at 703 ("It is fair to say that the 'restrictive theory' of sovereign immunity appears to be generally accepted as the prevailing law in [the United States].").

⁸⁶ See *Chuidian v. Phil. Nat'l Bank*, 912 F.2d 1095, 1099 (9th. Cir. 1990) (citing sections from the restatement).

⁸⁷ *Verlinden v. B.V. Cent. Bank of Nig.*, 461 U.S. 480, 487 (1983). See also *Chuidian*, 912 F.2d at 1100 ("[C]ourts treated such 'suggestions' as binding determinations, and would invoke or deny immunity based upon the decision of the State Department.")

⁸⁸ *Verlinden*, 461 U.S. at 487.

⁸⁹ *Id.*

⁹⁰ *Id.* at 487.

⁹¹ *Id.*

⁹² Foreign Sovereign Immunities Act of 1976, 28 U.S.C.S. § 1604 (2006).

⁹³ *Verlinden*, 461 U.S. at 488.

⁹⁴ H.R. REP. NO. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.A.A.N. 6604, 6605-06 ("At present, there are no comprehensive provisions in our law available to inform parties when they can have recourse to the courts to assert a legal claim against a foreign state."). See also *Verlinden*, 461 U.S. at 488.

law, and in particular, the development of the restrictive theory of sovereign immunity.⁹⁵ It is also possible that Congress did not want United States law to deviate from the existing state of international foreign sovereign immunity law.⁹⁶

The FSIA establishes a “comprehensive framework” for determining whether a United States court may exercise jurisdiction over a foreign state.⁹⁷ It grants federal courts jurisdiction over suits against foreign sovereigns even where the parties are not diverse, and the underlying claims do not present a federal question.⁹⁸ Importantly, the FSIA provides the “sole basis” for obtaining jurisdiction over a foreign sovereign in the United States.⁹⁹ Under the statute, a foreign state is presumptively immune from the jurisdiction of United States courts.¹⁰⁰ The FSIA provides that “a *foreign state* shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 – 1607”¹⁰¹ The statute defines a “foreign state” to be a “political subdivision of a foreign state or an *agency or instrumentality* of a foreign state.”¹⁰² Included in the statutory definition of an “agency or instrumentality” is any entity “which is a separate legal person, corporate or otherwise, and . . . which is an organ of a foreign state or a political subdivision thereof”¹⁰³

⁹⁵ H.R. REP. NO. 94-1487. *See also* Permanent Mission of India v. New York, 551 U.S. 193, 199 (2007) (“In enacting the FSIA, Congress intended to codify the restrictive theory’s limitation of immunity to sovereign acts.” (citations omitted)).

⁹⁶ Robert B. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT’L L. 33, 38 (1978). Prior to the passage of the FSIA, “all of the important trading and industrial countries of the Western world, with the sole exception of the United Kingdom,” had adopted some form of the restrictive doctrine. *Id.* Moreover, the restrictive doctrine had been incorporated in a number of important international conventions. *Id.* For a list of international courts that adopted the restrictive theory prior to the passage of the FSIA, *see* Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 702 n. 15 (1976) (citing to opinions from Austria, Belgium, Canada, England, Egypt, France, Germany, Greece, Hong Kong, Italy, Pakistan, Philippines and Yugoslavia.).

⁹⁷ Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 610 (1992).

⁹⁸ *Verlinden*, 461 U.S. at 493; 28 U.S.C.S. § 1330(a) (2006).

⁹⁹ Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989) (“We think that the text and structure of the FSIA demonstrate Congress’s intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts.”). *See also* Weltover, 504 U.S. at 610–11; Johnson v. U.K. Gov’t, 608 F. Supp. 2d 291, 295 (D. Conn. 2009); Cabiri v. Gov’t of Republic of Ghana, 165 F.3d 193, 196 (2d Cir. 1999).

¹⁰⁰ Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993).

¹⁰¹ 28 U.S.C.S. § 1604 (emphasis added).

¹⁰² § 1603(a) (emphasis added).

¹⁰³ § 1603(b).

Courts apply the FSIA in every action against a foreign sovereign.¹⁰⁴ Unless an exception applies,¹⁰⁵ “federal courts lack subject matter jurisdiction over a claim against a foreign state.”¹⁰⁶ Determining whether an entity, or individual, qualifies as a “foreign state,” and further, whether an exception applies, is therefore crucial to the sovereign immunity inquiry.¹⁰⁷ In its practical application, the statute “starts from a premise of immunity and then creates exceptions to the general principle.”¹⁰⁸ Scholars of human rights and international law criticize that the theoretical hurdles such an approach builds into human rights litigation has resulted in sovereign immunity becoming the rule rather than the exception.¹⁰⁹

III. THE CIRCUITS ARE SPLIT ON WHETHER UNDER THE FSIA, FOREIGN OFFICIALS SHOULD BE GRANTED IMMUNITY FOR ACTS TAKEN IN OFFICIAL CAPACITY

There is a split in the circuits as to whether a “foreign official” qualifies as a “foreign state” under the FSIA, and therefore enjoys the same sovereign immunity enjoyed by the state when sued for acts taken in official capacity.¹¹⁰ While the Second, Fifth, Sixth, Ninth and D.C.

¹⁰⁴ *Verlinden v. B.V. Cent. Bank of Nig.*, 461 U.S. 480, 493 (1983) (stating that the FSIA “must be applied by the district courts in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity.”)

¹⁰⁵ §§ 1605–1607. *See also* Eric Engle, *Frontiers In International Human Rights Law: The Alien Tort Statute and the Torture Victims’ Protection Act: Jurisdictional Foundations And Procedural Obstacles*, 14 WILLAMETTE J. INT’L & DISPUTE RES. 1, 44 (2006) (“[T]here are several exceptions which can be summarized as either based on (1) waivers of immunity or (2) commercial acts.”)

¹⁰⁶ *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) (citing *Verlinden*, 461 U.S. at 488–89).

¹⁰⁷ *See, e.g., Xuncax et. al. v. Gramajo*, 886 F.Supp. 162, 175–76 (D. Mass. 1995) (finding as a preliminary jurisdictional matter, no presumption of sovereign immunity, no applicable FSIA exception, and therefore, no FSIA shield to suit against former Guatemalan Minister of Defense).

¹⁰⁸ H.R. REP. NO. 94–1487, at 17 (1976), *reprinted in* 1976 U.S.C.A.A.N. 6604, 6606–07.

¹⁰⁹ *See* Lee M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT’L L. 741, 756 (2003). Caplan’s understanding is that state immunity is not a presumptive right under international law, but derives from a “forum state’s concession of jurisdiction.” *Id.*

¹¹⁰ It is fairly clear that officials are not immune from suit when they have acted in an unofficial capacity. *See Chuidian v. Phil. Nat’l Bank*, 912 F.2d 1095, 1107 (9th. Cir. 1990) (“[The official] would not be entitled to sovereign immunity for acts not committed in his official capacity. . . . [I]f the officer purports to act as an individual and not as an official, a suit directed against that action is not a suit against the sovereign.”); *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir. 1997) (“Individuals acting in their official capacities are considered ‘agencies or

Circuits have held that a foreign official should be granted immunity under the FSIA for acts carried out in his official capacity, the Seventh Circuit shattered precedent in holding the opposite.¹¹¹ More recently, the Fourth Circuit held that former officials were not immune from suit, but current officials could avail themselves of the FSIA.¹¹² While not siding with any one circuit's position *per se*, this note takes the view, reflected in legislative history and case-law interpreting the statute, that Congress never intended that the FSIA provide immunity to foreign sovereign officials.¹¹³ As an alternative theory, this note posits that foreign government officials are not immune in suits alleging violations of *jus cogens* norms; the passage of the TVPA was an explicit private right of action for victims and their survivors to sue perpetrators of torture, and Congress did not intend the FSIA to be a barrier to such suits.

The Ninth Circuit was the first circuit court to address this issue when it held in *Chuidian v. Phil. Nat'l Bank* that the FSIA applied to individual foreign officials sued in their official capacity.¹¹⁴ The *Chuidian* court rejected the government's suggestion of a bifurcated approach that relegated to the State Department the decision of whether to grant immunity to a foreign official while using the FSIA to determine the immunity of the state itself.¹¹⁵ According to the Ninth Circuit, such an approach would undermine the FSIA by promoting forum shopping, especially in situations where immunity is unclear.¹¹⁶ The court pointed out that although § 1603(b) does not explicitly use the term "individual" in defining foreign instrumentalities, neither does it expressly exclude

instrumentalities of a foreign state; these same individuals . . . are not entitled to immunity under the FSIA for acts that are not committed in an official capacity." (citations omitted)).

¹¹¹ See *infra* notes 130 to 134.

¹¹² See *supra* notes 26 to 28.

¹¹³ For a discussion of legislative history and case-law, see *infra* notes 227 to 235 and 243 to 255 respectively.

¹¹⁴ 912 F.2d at 1103. In *Chuidian*, a Philippine citizen sued an official of the Philippine government after the official instructed the Philippine National Bank to dishonor a Bank-issued letter of credit. *Id.* at 1097. The official was sued for alleged intentional interference with the plaintiff's contractual relations with the Bank. *Id.*

¹¹⁵ *Id.* at 1099. The government's position was that an official is not covered by the Act because he is an individual rather than a corporation or an association. *Id.*

¹¹⁶ *Id.* at 1102. The court explained that litigants who "doubted the influence and diplomatic ability of their sovereign adversary would choose to proceed against the official, hoping to secure State Department support." *Id.* However, litigants "less favorably positioned would be inclined to proceed against the foreign state directly, confronting the Act as interpreted by the courts without the influence of the State Department." *Id.*

it.¹¹⁷ The court highlighted a lack of evidence of Congressional intent to exclude individual foreign officials from the purview of the Act.¹¹⁸ To the *Chuidian* court, this was particularly significant because Congress intended to codify existing common law in the FSIA.¹¹⁹ To cement its point, the court noted that a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly.¹²⁰ The court concluded that allowing unrestricted suits against individual foreign officials would amount to a “blanket abrogation of foreign sovereign immunity by allowing litigants to accomplish indirectly what the [FSIA] barred them from doing directly.”¹²¹

Six years later, in *El-Fadl v. Central Bank of Jordan*, citing *Chuidian* for guidance on the theory that an individual can qualify as an “agency or instrumentality of a foreign state,” the District of Columbia Circuit dismissed claims against the Deputy Governor of the Central Bank of Jordan.¹²² The District of Columbia Circuit reaffirmed its position a year later in dismissing claims against members of the Abu Dhabi royal family for injuries to a United States citizen in a boating accident.¹²³ The Fifth Circuit followed suit in *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, holding that the FSIA extended sovereign immunity to individuals acting within their official capacity as officers of corporations that were considered foreign sovereigns.¹²⁴ The Fifth Circuit found that individual employees of a Honduran corporation

¹¹⁷ *Id.* at 1101 (“[A]gency,’ ‘instrumentality,’ ‘organ,’ ‘entity,’ and ‘legal person,’ while perhaps more readily connoting an organization or collective, do not in their typical legal usage necessarily exclude individuals.”).

¹¹⁸ *Id.* (“Nowhere in the text or legislative history does Congress state that individuals are not encompassed within the section 1603(b) definition . . . [A]side from some language which is more commonly associated with the collective, the legislative history does not even hint of an intent to exclude individual officials from the scope of the Act.”). *But see* Part IV *infra*, detailing legislative history that suggests the opposite.

¹¹⁹ *Id.* (“[P]re-1976 common law expressly *extended* immunity to individual officials acting in their official capacity. If in fact the Act does not include such officials, the Act contains a substantial unannounced departure from prior common law.”) (emphasis added).

¹²⁰ *Chuidian*, 912 F.2d at 1101; *See* Curtis Bradley and Jack Goldsmith, *Foreign Sovereign Immunity, Individual Officials and Human Rights Litigation*, 13 GREEN BAG 2D, 13 (2009) for a similar view.

¹²¹ *Chuidian*, 912 F.2d at 1101.

¹²² 75 F.3d 668 (D.C. Cir. 1996). The plaintiff alleged wrongful termination. *Id.* at 670. On appeal, the plaintiff claimed that the official was acting in an individual as opposed to official capacity, but the court found no evidence of this, and dismissed pursuant to the FSIA. *Id.* at 671.

¹²³ *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir. 1997). The court found that the drivers of the boat had acted in their official capacity as government officials. *Id.*

¹²⁴ 182 F.3d 380, 388 (5th Cir. 1999).

whose stock was almost entirely in the hands of a Honduran governmental entity constituted a “foreign state” within the purview of the FSIA.¹²⁵ The Sixth Circuit tackled the issue in *Keller v. Central Bank of Nigeria*, and citing *Chuidian* and *El-Fadl*, stated that “normally foreign sovereign immunity extends to individuals acting in their official capacities”¹²⁶ In *Kellar*, a Michigan-based manufacturer sued several Nigerian citizens, including a prince, and the Central Bank of Nigeria.¹²⁷ On appeal, the Sixth Circuit did not engage in a detailed discussion of the question, instead deferring to plaintiff’s concession that the defendant bank representatives enjoyed the same immunity as the sovereign state.¹²⁸

Against the weight of authority from the Fifth, Sixth, Ninth and District of Columbia circuits, the Seventh Circuit in *Enaharo v. Abubakar* held that the FSIA did not apply to individuals. Plaintiffs in *Enaharo* brought suit against former General Abdusalami Abubakar, then a ranking member of the Provisional Ruling Council who in 1998 had assumed the head of state position in Nigeria in 1998.¹²⁹ Abubakar claimed immunity under the FSIA.¹³⁰ The Seventh Circuit cautioned against the Ninth Circuit’s approach to statutory construction in *Chuidian* that the Fifth, Sixth and District of Columbia circuits had subsequently adopted:

[The *Chuidian* court] looked at the statute and concluded that its language – the terms agency, instrumentality, organ, entity, and legal person – while perhaps more readily connoting an organization or collective, do not in their typical legal usage necessarily exclude individuals. Because Congress did not exclude individuals, the court concluded that if the individual was acting in his official capacity, the

¹²⁵ *Id.* at 388–89.

¹²⁶ *Keller v. Cent. Bank of Nig.*, 277 F.3d 811, 815 (2002).

¹²⁷ *Id.* at 814–15. In *Keller*, plaintiff Keller had been approached by defendants, one of whom claimed to be Nigerian royalty. *Id.* at 814. Defendants wanted exclusive distribution rights to Keller’s medical care facilities in Nigeria, and promised \$25 million in funding. *Id.* However, after Keller expended \$25,000 of his own funds, he realized he was the victim of a scam. *Id.* Plaintiff asserted various claims, including RICO violations, common law fraud, and intentional misrepresentation. *Id.* at 814. The district court concluded that the defendants were not immune under the FSIA because the transaction fell within the FSIA’s commercial activity exception. *Id.* at 815.

¹²⁸ *Id.* at 815.

¹²⁹ *Enahoro v. Abubakar*, 408 F.3d 877, 908 (7th Cir. 2005). The complaint consisted of seven claims – torture, arbitrary detention, cruel, inhuman and degrading treatment, false imprisonment, assault and battery, intentional infliction of emotional distress and wrongful death. *Id.* at 880.

¹³⁰ *Id.* at 910.

FSIA was applicable. We are troubled by this approach – that is, by saying Congress did not exclude individuals; therefore they are included. Not only does it seem upside down as a matter of logic, but it ignores the traditional burden of proof on immunity issues under the FSIA.¹³¹

Noting that the FSIA defines “agency and instrumentality” as a “separate legal person,” a phrase that “refers to a legal fiction – a business entity which is a legal person,” the Seventh Circuit concluded that the FSIA did not provide immunity to individual foreign officials.¹³² Ultimately, the Seventh Circuit granted Abubakar immunity for acts committed while acting as the head of state of Nigeria, but denied immunity for acts committed in his capacity as a general and a member of the Nigeria’s Provisional Ruling Council.¹³³

Three years after *Abubakar*, in litigation related to the September 11, 2001 terrorist attacks, the Second Circuit rejected the Seventh Circuit’s interpretation and sided with the majority of other circuits.¹³⁴ In that case, survivors of the terrorist attacks along with insurers and property owners sued hundreds of parties, including four Saudi Arabian princes.¹³⁵ Largely relying on *Chuidian*, the Second Circuit emphasized that “agency” in the FSIA “has a more abstract common meaning than a governmental bureau or office: an agency is any thing or person through which action is accomplished.”¹³⁶ The Second Circuit opined that the term “agency” is broad enough “to include senior members of a foreign state’s government and secretariat.”¹³⁷ The Second Circuit therefore found that the FSIA provided immunity to the four Saudi Arabian princes.¹³⁸ In *Velasco*, the Fourth Circuit did not engage in a detailed discussion, but rather, deferred to the other circuits’ construction of the FSIA to extend sovereign immunity to individuals acting in their official capacity on behalf of a foreign state.¹³⁹ In *Samantar*, the Fourth Circuit

¹³¹ *Id.* at 882.

¹³² *Id.* at 881–82.

¹³³ *Id.* at 882.

¹³⁴ *In Re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 80 (2d Cir. 2008).

¹³⁵ *Id.* at 75. Plaintiffs claimed that the defendants played a critical role in the September 11, 2001 terrorist attacks because they funded Muslim charities that in turn funded al Qaeda. *Id.* at 76.

¹³⁶ *Id.* at 83.

¹³⁷ *Id.*

¹³⁸ *Id.* at 80.

¹³⁹ *Velasco v. Gov’t of Indon.*, 370 F.3d 392, 399 (4th Cir. 2004).

held that the FSIA does not protect a *former* official from suit for official acts.¹⁴⁰

In order for the Supreme Court to resolve the circuit split, it must determine the proper relationship between the Alien Tort Claims Act, the Torture Victim Protection Act, and the Foreign Sovereign Immunities Act. That in turn will determine the possibility of redress for victims of torture who wish to bring suit. Part III, immediately following, discusses the history behind the ATCA, the TVPA, and the FSIA and explains how the three statutes function with respect to each other. Part IV prescribes a course of action for the Supreme Court and gives reasons why the FSIA should not operate as a jurisdictional hurdle to suit under the TVPA.

IV. TORTURE AND IMMUNITY: THE RELATIONSHIP BETWEEN THE TVPA AND THE FSIA

The law surrounding torture, and more broadly, the violation of *jus cogens* norms, developed separately from sovereign immunity law.¹⁴¹ The sovereign immunity concept and the laws surrounding it had a unique evolution involving a combination of commercial and diplomatic concerns.¹⁴² *Jus cogens* norms, on the other hand, “evolved out of the recognition that certain values or interests are common to and affect the international community as a whole, and that the violation of these values of interests threatens peace, security, and world order.”¹⁴³ *Jus cogens* norms, by their very nature, are superior, and cannot be changed or derogated from.¹⁴⁴ Importantly, *jus cogens* norms have independent validity and status and are untouched by the consent and practice of states.¹⁴⁵ Despite debate on which norms can be considered to have reached this high standard, the prohibition of torture has been recognized to constitute a *jus cogens* norm.¹⁴⁶ However, because *jus cogens* norms like the prohibition of torture developed without specific reference to state immunity, the relationship between the prohibition of torture and

¹⁴⁰ *Yousuf v. Samantar*, 552 F.3d 371, 383 (4th Cir. 2009), *cert. granted*, 78 U.S.L.W. 3169 (U.S. Sept. 30, 2009) (No. 08–1555).

¹⁴¹ Lorna McGregor, *Addressing the Relationship Between State Immunity and Jus Cogens Norms: A Comparative Assessment*, in INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES 69, 69 (Wolfgang Kaleck et al. eds., Springer 2007).

¹⁴² See *supra* Parts I and II.

¹⁴³ *Id.* at 70 (internal citations omitted).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 71 (citing to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR 56th Sess., Supp. No. 10, UN Doc A/56/10 (2001)).

state immunity remains unclear.¹⁴⁷ This is undoubtedly the case in the United States, where the Supreme Court will assess the relationship between the Torture Victims Protection Act and the Foreign Sovereign Immunity Act in *Samantar*.

A. The TVPA Makes it Possible to Hold Torturers Civilly Liable When Criminal Liability is Unavailable

Yousuf, the plaintiff in *Samantar*, hopes his suit “sends a message that perpetrators of human rights [abuses] will be held accountable for their crimes.”¹⁴⁸ Models of accountability for human rights violations like torture take on various forms—international criminal suits, domestic and civil. It is preferable to hold abusers *criminally* liable in national or international courts because punishment often includes a combination of fines and lifetime imprisonment and, in some cases, death.¹⁴⁹ However, in many instances, such forms of criminal accountability are unavailable because of gaps in current federal law.¹⁵⁰ For example, the torture statute,¹⁵¹ which provides for criminal prosecution of any person who commits torture outside of the U.S. as long as the perpetrator is within

¹⁴⁷ McGregor, *supra* note 142, at 71. The author addresses the inconsistency in the treatment of sovereign immunity and *jus cogens* norms by comparing monist states with dualist states. In monist states like Italy and Greece, state immunity and *jus cogens* norms, as rules of international law, are directly incorporated into domestic law through constitutional provisions. *Id.* at 72. Therefore, because immunity and *jus cogens* are two rules of international law, the courts in monist states have denied immunity in *jus cogens* cases due to their preemptory status under international law. *Id.* On the other hand, in dualist states such as the United States, international law is not directly incorporated into domestic law. *Id.* at 78. Because the United States has legislation on immunity (that is, the FSIA), the courts have found immunity in cases concerning *jus cogens*. *Id.*

¹⁴⁸ Branigin, *supra* note 5.

¹⁴⁹ See, e.g., 18 U.S.C. § 2340A (1994) (“Whoever outside the United States commits or attempts to commit torture shall be fined . . . or imprisoned not more than 20 years, or both, and if death results to any person . . . shall be punished by death or imprisoned for any term of years or for life.”).

¹⁵⁰ See Testimony of Pamela Merchant, Executive Director, The Center for Justice and Accountability, Before the Subcommittee on Human Rights and the Law Committee on the Judiciary United States Senate, “From Nuremberg to Darfur: Accountability for Crimes Against Humanity,” June 24, 2008 [hereinafter Pamela Merchant Testimony]. Even Congress has recognized that the United States lacks criminal jurisdiction to prosecute the majority of acts that constitute “crimes against humanity,” and only held Congressional hearings on such crimes as recently as November 2007. See Congressional Panel – No Safe Haven: Accountability for Human Rights Violators in the United States, Part II – Statement of Lanny A. Breuer, Assistant Attorney General Criminal Division United States Department of Justice before the United States Senate Committee On the Judiciary Subcommittee on Human Rights and the Law. The subcommittee explored gaps in U.S. federal law that prevent criminal prosecution of human rights abusers who have sought safe haven in the United States.

¹⁵¹ 18 U.S.C. § 2340A (1994).

U.S. jurisdiction, is triggered only when the torture was committed after the date the statute was enacted, April 30, 1994.¹⁵² Defendants have also escaped criminal liability under the Genocide Accountability Act of 2007.¹⁵³ The war crimes statute also has limited applicability because it only provides for prosecution of those who commit war crimes as long as the victim or the perpetrator is a member of the U.S. armed forces or is a U.S. national.¹⁵⁴ Consequently, many of the most egregious human rights abusers escape criminal prosecution, finding a safe-haven in the United States.¹⁵⁵ Currently, there are approximately 1,000 open cases involving suspected perpetrators of serious human rights abuses from approximately ninety-five countries who are living in the United States.¹⁵⁶

In many situations, holding those who have abused human rights *civily* liable for their actions might be the only legal avenue available to victims. While civil actions do not have the advantage of keeping human rights abusers “off the streets” through lifelong imprisonment or death sentences, there are important benefits to be gained from civil redress,¹⁵⁷ including depletion of terrorist and torturer organization assets to prevent future acts.¹⁵⁸ In addition, combining various federal civil statutes

¹⁵² Pamela Merchant Testimony, *supra* note 151. (“To our knowledge, since World War II, the federal government has brought only one criminal human rights case against a human rights abuser who has sought safe haven [in the United States]. . . . In December 2006, Chuckie Taylor, Charles Taylor’s son, was indicted under [18 U.S.C. §2340A] [It] is the first and only case brought under the torture statute since it was enacted in 1994.”)

¹⁵³ 18 U.S.C. § 1091.

¹⁵⁴ 18 U.S.C. § 2441.

¹⁵⁵ See also Chitra Ragavan, *A Safe Haven, but for whom? The U.S. Provides Sanctuary For Many of the World’s Most Wanted*, U.S. NEWS AND WORLD REPORT, November 15, 1999. Congress has only recently addressed this problem. In late 2009, the Senate and House passed the Human Rights Enforcement Act, which would combine the two offices in the Justice Department with jurisdiction over human rights violations to create a consolidated department focused on prosecution and denaturalization of human rights abusers. See Press Release: Durbin’s Human Rights Enforcement Act Passes House, Sent to President for Signature, Dec. 16, 2009, available at <http://durbin.senate.gov/showRelease.cfm?releaseId=320958> [Durbin Press Release](last visited February 14, 2010).

¹⁵⁶ Durbin Press Release, *supra* note 156.

¹⁵⁷ See Debra M. Strauss, *Reaching Out To the International Community: Civil Lawsuits as the Common Ground in the Battle Against Terrorism*, 19 DUKE J.COMP. & INT’L L. 307, 308 (2009) (“A new type of lawsuit has emerged in the United States, in which victims . . . have pursued the perpetrators of terrorist acts and the organizations or nations who have enabled and funded them . . . [p]ursuant to several U.S. statutes – the Antiterrorism Act of 1991, the Antiterrorism and Effective Death Penalty Act of 1996, the Torture Victim Protection Act, and the Alien Tort Claims Act – along with common law tort claims, such as aiding and abetting liability. . . .”).

¹⁵⁸ *Id.* at 308. See generally Debra M. Strauss, *Enlisting the U.S. Courts in a New Front: Dismantling the International Business Holdings of Terrorist Groups Through*

“maximizes the types of money damages and the range of defendants that can be held civilly accountable, including terrorist groups, officials, and other individuals, along with the foreign states, organizations, and agencies that sponsor them.”¹⁵⁹ In allowing courts to hear civil claims against persons allegedly responsible for severe human rights abuses, the ATCA and the TVPA provide avenues through which victims of torture might seek justice.

B. The TVPA, Codified as a Note to the ATCA, Provides an Explicit Cause of Action for Acts of Torture.

The ATCA grants jurisdiction for the adjudication of violations of the law of nations, while the TVPA, codified as a note to the ATCA, provides an explicit cause of action for acts of torture. Congress adopted the ATCA in 1789 as part of the first Judiciary Act.¹⁶⁰ There is scarce legislative history on the passage of the ATCA.¹⁶¹ Legal historians have posited various theories, some quite colorful, on the reasons for its passage.¹⁶² The Supreme Court itself noted that modern commentators have concentrated on the statute’s text because of the dearth of drafting history.¹⁶³ In pertinent part, the ATCA provides district courts with “original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹⁶⁴ A plain reading of the ATCA indicates that it is a jurisdictional statute.¹⁶⁵ The ATCA does not grant an independent substantive cause of action, but provides jurisdiction in the United States

Federal Statutory and Common-Law Suits, 38 VAND. J. TRANSNAT’L L. 679 (2005) (detailing the cases decided under several U.S. statutes – the Antiterrorism Act of 1991, the Antiterrorism and Effective Death Penalty Act of 1996, the Torture Victim Protection Act, and the Alien Tort Claims Act).

¹⁵⁹ Strauss, *supra* note 158, at 308.

¹⁶⁰ See *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

¹⁶¹ *Id.* (referring to the ATCA as a “legal Lohengrin” because “no one seems to know whence it came.”)

¹⁶² See Eric Engle, *Frontiers In International Human Rights Law – The Alien Tort Statute and the Torture Victims’ Protection Act: Jurisdictional Foundations And Procedural Obstacles*, 14 WILLAMETTE J. INT’L & DISPUTE RES. 1, 6 (2006) (“[I]t is likely that Congress may have had the fight against piracy or possibly prize jurisdiction in mind. . . . [A]nother possibility is that it was enacted to demonstrate to foreign powers that the new U.S. government was in fact committed to the rule of law.”); see generally Eric Engle, *Alvarez-Machain v. United States and Alvarez Machain v. Sosa: The Brooding Omnipresence of Natural Law*, 13 WILLAMETTE J. INT’L & DISPUTE RES. 149 (2005), for an inquiry into the legislative roots of the ATCA in the writings of Coke and Blackstone, as well as in parallel British legislation.

¹⁶³ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 718 (2004).

¹⁶⁴ 28 U.S.C. § 1350 note.

¹⁶⁵ See *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980).

for the adjudication of torts in violation of the law of nations.¹⁶⁶ The ATCA provides jurisdiction over tort suits brought by aliens only.¹⁶⁷ Though it does not permit U.S. citizens to sue, defendants may be of any other citizenship.¹⁶⁸

The ATCA remained relatively dormant for 209 years; in that time, it was invoked in only twenty-two cases.¹⁶⁹ Plaintiffs in *Filartiga v. Pena Irala*, a landmark 1980 decision by the Second Circuit, successfully used the ATCA.¹⁷⁰ In *Filartiga*, a Paraguayan national, brought suit against the Inspector General of Police of Asuncion, Paraguay, for the torture and wrongful death of his son.¹⁷¹ In allowing plaintiffs to rely on the ATCA, *Filartiga* rests on the fundamental principle of international law that one has a right to be free from torture vis-à-vis one's own government.¹⁷² Since *Filartiga*, human rights lawyers have built an "impressive body of human rights jurisprudence" in ATCA cases.¹⁷³ The ATCA has become an important instrument for bringing claims of human rights abuse before United States courts.¹⁷⁴

The Supreme Court recently affirmed the validity of using the ATCA, stating that ATCA claims must "rest on a norm of international

¹⁶⁶ Eric Engle, *The Torture Victims' Protection Act, the Alien Tort Claims Act, and Foucault's Archaeology of Knowledge*, 67 ALB. L. REV. 501, 501 (2003).

¹⁶⁷ See *Enahoro v. Abubakar*, 408 F.3d 877, 887 (7th Cir. 2005).

¹⁶⁸ Engle, *supra* note 163, at 501.

¹⁶⁹ For a list of the twenty-two cases, see Karen Lin, Note, *An Unintended Double Standard of Liability: The Effect of the Westfall Act on the Alien Tort Claims Act*, 108 COLUM. L. REV. 1718, 1757 n.109 (2008).

¹⁷⁰ *Filartiga*, 630 F.2d 876. In *Filartiga*, plaintiff sued former Inspector General of Police of Asuncion, Paraguay, who was present in the United States, but not a citizen. *Id.* at 879. The court held that torture was a violation of the law of nations and could be used as a valid basis of an ATCA claim. *Id.* at 884. The court found that although torture may not have been against the law of nations at the time the ATCA became law, international law had since evolved to include it. *Id.* at 881.

¹⁷¹ *Id.* at 879.

¹⁷² *Id.* at 883–85.

¹⁷³ For a list of cases in which perpetrators of human rights abuses have been successfully held accountable, see Sandra Coliver, et al., *Holding Human Rights Violators Accountable By Using International Law In U.S. Courts, Advocacy Efforts, and Complementary Strategies*, 19 EMORY INT'L. L. REV. 170 n.8 (2005). However, commentators have also criticized an expansive reading of the ATCA. See Adam Liptak, *Class-Action Firms Extend Reach to Global Rights Cases*, N.Y. TIMES, June 3, 2007, at A33 ("Business groups and the State Department have urged the courts to interpret the law narrowly, saying that allowing such suits is a form of judicial imperialism that can interfere with American foreign policy.").

¹⁷⁴ See *Enahoro v. Abubakar*, 408 F.3d 877, 887 (7th Cir. 2005) (Cudahy, J., dissenting) ("[*Filartiga*] and its progeny made ATCA human rights suits a familiar feature of the federal judicial landscape . . ."). See also Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 832–33 (2006) (describing ATCA as an "iconic vehicle for international human rights litigation in U.S. federal courts.")

character accepted by the civilized world.”¹⁷⁵ *Sosa* held that the ATCA is a jurisdictional statute that creates no new causes of action, but that the grant of jurisdiction was “enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability.”¹⁷⁶ The Supreme Court left several issues unresolved, including, importantly, whether applicable immunities exist.¹⁷⁷ Although the courts have followed *Filartiga*’s lead with little judicial dissent in finding that the ATCA provides subject matter jurisdiction for violations of human rights and international law, courts disagree on which violations of international law are actionable under the statute.¹⁷⁸ Codified as a note to the ATCA, the TVPA was an attempt to clarify which types of claims could be brought under the ATCA by providing an explicit cause of action to U.S. citizens and non-citizens alike for extrajudicial killing and torture.¹⁷⁹ Congress adopted the TVPA in 1991, and President George

¹⁷⁵ *Sosa v. Alvarez-Machain*, 542 U.S. at 725. See Andrew B. Mohraz, Note, *The Impact of the U.S. Supreme Court’s Decision in Sosa v. Alvarez-Machain (2004) on the Alien Tort Statute*, 12 LAW & BUS. REV. AM. 363, 363 (2006) (noting that the Court affirmed the use of the ATCA in human rights cases in *Sosa*, despite the Court’s holding that the statute did not permit the plaintiff to recover under the circumstances.).

¹⁷⁶ *Sosa*, 542 U.S. at 700.

¹⁷⁷ Coliver, *supra* note 174, at 171. Other issues left unresolved are “which ‘law of nations’ violations can be remedied under the ATCA and exhaustion of remedies, forum non conveniens, . . . the application of the political question and act of state doctrines, and the choice of law – international, federal, state, or the law of the forum where the tort occurred – to be applied to ancillary issues such as third party complicity (e.g., aiding and abetting liability), capacity to sue and the measure of damages.” *Id.*

¹⁷⁸ See, e.g., *Aldana v. Del Monte Fresh Produce*, 416 F.3d 1242, 1251 (11th Cir. 2005) (holding that plaintiffs can raise separate claims for state-sponsored torture under the ATCA and also under the TVPA); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1144–45 (E.D. Cal. 2004) (recognizing claim for extrajudicial killing and torture under both the ATCA and the TVPA); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1179 (C.D. Cal. 2005) (recognizing claims for torture and extrajudicial killing under the ATCA). But see *Enahoro*, 408 F.3d at 885 (7th Cir. 2005) (construing *Sosa* to limit relief against torture and extrajudicial killing to the TVPA and dismissing plaintiffs’ torture claim brought solely under the ATCA). See also Hugh King, *Sosa v. Alvarez-Machain and the Alien Tort Claims Act*, 37 VICT. U. WELLINGTON L. REV. 1, 5–10 (2006) (detailing various cases and divergent standards).

¹⁷⁹ The statute, § 3(b)(1) defines torture to include: Any act, directed against an individual in the offender’s custody or physical control, by which severe pain or suffering (other than pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind”

H.W. Bush signed it into law in 1992.¹⁸⁰ The TVPA establishes “an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, [the ATCA]. . . .”¹⁸¹ Legislative history¹⁸² and the Supreme Court’s decision in *Sosa*¹⁸³ indicate that the TVPA did not replace the ATCA, but rather, *reinforced* it. In the TVPA, Congress prescribed a “new cause of action accessible to American victims of brutality abroad,” thereby seeking to augment and expand the reach of the ATCA.¹⁸⁴ The Court in *Sosa* reaffirmed this position; while cautioning courts to narrowly construe the set of international norms used for claims under the ATCA, the Court found a “clear mandate” for the same in the TVPA.¹⁸⁵

The TVPA’s passage as an extension to the ATCA confirmed congressional approval of the *Filartiga* line of human rights cases that stemmed from the ATCA.¹⁸⁶ Both the House and Senate Judiciary committees pointed out that the TVPA was not meant to supplant the ATCA, but that the ATCA was meant to remain “intact.”¹⁸⁷ This general intention is reflected in the fact that Congress enacted the TVPA without amending or repealing any portion of the ATCA.¹⁸⁸ However, the TVPA, limiting its scope to extrajudicial killing and torture, is narrower than the ATCA, which courts have interpreted to apply to genocide, crimes against humanity, war crimes, slavery, disappearances, cruel, inhuman or degrading treatment or punishment, and prolonged arbitrary

¹⁸⁰ 28 U.S.C. § 1350 and note.

¹⁸¹ H.R. REP. NO. 102–367, at 3 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86.

¹⁸² S. REP. NO. 102–249, at 4–5 (1991); H.R. REP. NO. 102–367, at 3–4 (1991).

¹⁸³ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 718 (2004).

¹⁸⁴ *Enahoro v. Abubakar*, 408 F.3d 877, 887 (7th Cir. 2005) (Cudahy, J., dissenting).

¹⁸⁵ *Sosa*, 542 U.S. at 728.

¹⁸⁶ *Enahoro*, 408 F.3d at 887 (Cudahy, J., dissenting). As Judge Cudahy notes, the House Report specifically refers to the concerns regarding human rights cases raised by Judge Bork’s concurring opinion in *Tel-Oren v. Libya*, 726 F.2d 774 (D.C. Cir. 1984). *Id.* at 888.

¹⁸⁷ S. REP. NO. 102–249, at 4–5 (“Section 1350 has other important uses and should not be replaced Claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350. Consequently, that statute should remain intact.”); H.R. REP. NO. 102–367, at 4 (“[C]laims based on torture and summary executions do not exhaust the list of actions that may appropriately be covered [under the ATCA] . . . [and therefore] that statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.”)

¹⁸⁸ *See Enahoro*, 408 F.3d at 886–87 (Cudahy, J., dissenting) (“[T]he plain text and the legislative history of the TVPA indicate that it was meant to expand, not restrict, the remedies available under the ATCA. The text of the TVPA itself contains no implicit or explicit repeal of the ATCA, nor does it indicate a Congressional intent to limit or supercede [sic] the ATCA in any way.”).

detention.¹⁸⁹ In addition, the TVPA is narrower than the ATCA in that it can only be used against “individuals” who act under the “actual or apparent authority . . . of any foreign nation.”¹⁹⁰ However, it is broader than the ATCA in one respect: it provides a remedy to U.S. citizens for torture and summary execution that occurs under the color of foreign law, while only foreign nationals may use the ATCA.¹⁹¹ Victims have successfully used the ATCA and the TVPA to sue perpetrators of human rights abuse including, but not limited to, torture.¹⁹² Together, the ATCA and the TVPA promote the protection of human rights internationally—the ATCA by granting aliens access to federal courts to redress torts committed in violation of the law of nations, and the TVPA by granting relief for victims of torture.

C. The FSIA is a Gatekeeper in ATCA and TVPA Suits Against Foreign Officials

The FSIA serves as a jurisdictional gatekeeper in suits against foreign states and foreign officials. To prove a claim of torture under either the ATCA or the TVPA, each plaintiff must first establish that governmental actors carried out the alleged torture to which they were subjected.¹⁹³ If sued in a U.S. court, federal or state, a defendant foreign official would invoke the FSIA in an attempt to show that the court lacks subject matter jurisdiction to hear the suit against him.¹⁹⁴ The burden of

¹⁸⁹ See, e.g., *Doe v. Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 2004) (extrajudicial killing, crimes against humanity); *In re “Agent Orange” Product Liability Litigation*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005) (war crimes).

¹⁹⁰ 28 U.S.C. § 1350 note § 2(a)(1)–(2).

¹⁹¹ H.R. REP. NO. 102–367, at 4; S. REP. NO. 102–249, at 5. As the Second Circuit noted, whereas the ATCA speaks only in terms of *jurisdiction*, the TVPA goes one step further to create *liability* for acts of torture and extrajudicial killing under U.S. law. See *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88, 104–5 (2d Cir. 2000).

¹⁹² See generally, Coliver, *supra* note 174, at 173 (“Since 1980, at least sixteen human rights perpetrators (including Pena-Irala, the defendant in the landmark *Filartiga* case) have been sued successfully. One of those was a current high-ranking government official: the Bosnian Serb leader Radovan Karadzic. Seven were former high-ranking civilian or military officials who continued to exercise considerable influence in their countries.”).

¹⁹³ See 28 U.S.C. § 1350 note § 2(a) (“An individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture shall . . . be liable . . .”; H.R. REP. NO. 102–367 (noting that suits against purely private groups are not actionable under the TVPA, and that plaintiffs must establish some governmental involvement in the torture in order to bring a claim under the TVPA).

¹⁹⁴ See, e.g., *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (finding as a preliminary jurisdictional matter, no presumption of sovereign immunity, no applicable FSIA exception, and therefore, FSIA did not provide a shield to suit against former Guatemalan Minister of Defense).

proving the applicability of the FSIA shifts between litigants.¹⁹⁵ For example, when sued under the TVPA, the party seeking immunity from suit must make a *prima facie* showing that it qualifies as a “foreign state” as per the FSIA’s definition in § 1603.¹⁹⁶ The burden of production then shifts to the non-movant to establish that the FSIA does not apply, either by showing that the entity is not a “foreign state,” or that one of the listed exceptions to immunity apply.¹⁹⁷ The burden finally shifts back to the party claiming immunity, since that party bears the “ultimate burden of proving immunity.”¹⁹⁸ If successful, the official cannot be sued, and the FSIA has operated as a jurisdictional gatekeeper in the action brought under the ATCA or TVPA against the foreign official.

In *Amerada Hess*, the Supreme Court held that the FSIA provides the exclusive basis for jurisdiction and that an exception to the general rule of immunity had to fall within the enumerated exceptions under the FSIA.¹⁹⁹ This approach has been adopted by several circuit courts in their reluctance to carve out exceptions to sovereign immunity not specifically enumerated in the FSIA.²⁰⁰ However, for the most part, perpetrators “were found to have had substantial responsibility for egregious human rights violations, [were] subject to the personal jurisdiction of the court, and [were] not entitled to immunity from suit (sovereign, diplomatic, or otherwise)” and “plaintiffs satisfied the requirements of standing and the statute of limitations, and demonstrated that they had exhausted any available and effective remedies in their

¹⁹⁵ *Enahoro v. Abubakar*, 408 F.3d 877, 882 (7th Cir. 2005).

¹⁹⁶ *Enahoro*, 408 F.3d at 882. *See also* *Keller v. Cent. Bank of Nig.*, 277 F.3d 811, 815 (6th Cir. 2002).

¹⁹⁷ *Enahoro*, 408 F.3d at 882. The litigant could also show that the actions fall under the Anti-terrorism and Effective Death Penalty Act (“AEDPA”), 28 U.S.C. § 2241 (2006), that amended the FSIA to permit claims against states which the United States considers sponsors of terrorism. *See also Keller*, 277 F.3d at 815.

¹⁹⁸ *Enahoro*, 408 F.3d at 882. *See also Keller*, 277 F.3d at 815 (“[T]he party claiming FSIA immunity retains the ultimate burden of persuasion throughout.”).

¹⁹⁹ *Argentine Republic v. Amerada Hess*, 488 U.S. 428, 434 (1989).

²⁰⁰ *See, e.g., Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 718–19 (9th Cir. 1992); *Princz v. F.R.G.*, 26 F.3d 1166, 1174 (D.C. Cir. 1994) (stating that although “it is doubtful that any state has ever violated *jus cogens* norms on a scale rivaling that of the Third Reich,” even violations of that magnitude do not create an exception to the FSIA where Congress has created none); *Smith v. Libya*, 101 F.3d 239, 242 (2d Cir. 1996) (noting that, although Congress had not done so for Libya’s role in the bombing of Pan Am Flight 103, “Congress may choose to remove the defense of sovereign immunity selectively for particular violations of *jus cogens*, as it has recently done in the 1996 amendment of the FSIA.”); *Belhas v. Ya’alon*, 515 F.3d 1279, 1287 (D.C. Cir. 2007) (“It is not necessary for this Court to reach the issue of whether the acts alleged by Plaintiffs constitute violations of *jus cogens* norms because the FSIA contains no unenumerated exception for violations of *jus cogens* norms.”).

home countries.”²⁰¹ Furthermore, “[i]n several cases the courts expressly found that the cases did not pose a significant interference to U.S. foreign policy or that the act of state doctrine applied.”²⁰²

The decision of the Court in *Samantar* is crucial because it will redefine the ability of torture victims and their survivors to seek civil redress in U.S. courts. In *Samantar*, the Supreme Court will answer two questions. First the Court will address whether a foreign state’s immunity from suit under the FSIA extends to an individual acting in his official capacity on behalf of the state.²⁰³ Second, the Court will decide whether an individual who is no longer an official at the time suit is filed retains immunity from acts taken in his former capacity as an official acting on behalf of the state.²⁰⁴ The Supreme Court’s decision will have a profound impact on the ability of torture victims and their survivors to bring suit under the ATCA and TVPA against current or former foreign officials for violations of *jus cogens* norms and in particular, for acts of torture.

V. THE SUPREME COURT SHOULD HOLD THAT THE FSIA DOES NOT PROVIDE SOVEREIGN IMMUNITY TO INDIVIDUAL FOREIGN OFFICIALS FOR ACTS OF TORTURE

A. Foreign Officials Should not be Permitted to use the Guise of Foreign Sovereign Immunity to Escape Liability for Torture, a Violation of a Jus Cogens Norm

When the official acts of current or former individual foreign officials violate *jus cogens* norms, immunity granted to foreign states in the FSIA does not extend to current or former individual foreign officials. Under the normative hierarchy theory, the state’s violation of human rights protections that are considered preemptory *jus cogens* norms abrogates the state’s jurisdictional immunity.²⁰⁵ A *jus cogens*

²⁰¹ Coliver, *supra* note 174, at 174–75. In addition, “the plaintiffs satisfied the requirements of standing and the statute of limitations, and demonstrated that they had exhausted any available and effective remedies in their home countries.” *Id.*

²⁰² Coliver, *supra* note 174, at 174. *See, e.g.,* Arce v. Garcia, 434 F.3d 1254 (11th Cir. 2006), Cabello v. Fernandez-Larios, 402 F.3d 1148 (11th Cir. 2005), Jean v. Dorelien, 431 F.3d 776 (11th Cir. 2005), Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996), Xuncax v. Gramajo, 886 F. Supp. 162, 173–74 (D. Mass. 1995), Chavez v. Carranza, 413 F. Supp. 2d 891 (D. Tenn. 2005).

²⁰³ Petition for Writ of Certiorari, Yousuf v. Samantar, No. 08–1555 (June 18, 2009).

²⁰⁴ *Id.*

²⁰⁵ For an exhaustive discussion of normative hierarchy theory, *see* Lee M. Caplan, *State Immunity, Human Rights, And Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT’L L. 741 (2003). Caplan summarizes that the theory “postulates that because state immunity is not *jus cogens*, it ranks lower in the hierarchy of

norm is “a peremptory norm of general international law . . . 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.”²⁰⁶ The major features of *jus cogens* norms are the egregious nature of their violation, and their indelibility.²⁰⁷ *Jus cogens* norms reflect the commitment of the international community to preventing human rights abuses.²⁰⁸ As scholars have pointed out, states *do not* have the freedom to decide not to abide by *jus cogens* norms.²⁰⁹

However, there remains uncertainty regarding which norms fit the *jus cogens* category,²¹⁰ and scholars and jurists have disagreed regarding the precise source of *jus cogens* norms.²¹¹ It is suggested that they derive from sources as diverse as international custom, express treaties, natural law, or a combination of such factors.²¹² It is a disagreement as to whether *jus cogens* norms are doctrinally derived or free-standing. Each view has its own failures. For example, it might be troubling to suggest that *jus cogens* norms arise out of customary international law because such law normally may be altered by contrary practice or consistent objection, thus defying the long-understood conception of *jus cogens* norms as being binding and non-derogable.²¹³ In fact, as the Ninth Circuit has pointed out, customary international law and *jus cogens* norms are related, but separate concepts:

Customary international law, like international law defined by treaties and other international agreements,

international law norms, and therefore can be overcome when a *jus cogens* norm is at stake.” *Id.* In this way, the normative hierarchy theory “seeks to remove one of the most formidable obstacles in the path of human rights victims seeking legal redress.” *Id.*

²⁰⁶ Vienna Convention on the Law of Treaties, article 53, May 23, 1969, 1155 U.N.T.S. 331.

²⁰⁷ IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 491 (6th ed. 2003).

²⁰⁸ *Id.* at 488–90.

²⁰⁹ Christopher Ford, *Adjudicating jus cogens*, 13 WIS. INT’L L.J. 145, 146–47 (1994) (citations omitted) (“Traditional sovereign-consent theories of international obligation do not apply to peremptory norms: while states retain the freedom to ‘contract out’ of other international rules (*jus dispositivum*) or to maintain the status of a persistent objector unbound by customary law, states appear to have no freedom to adopt ‘an attitude apart’ with respect to *jus cogens*.”).

²¹⁰ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 n.6 (1987) (“[A]lthough the concept of *jus cogens* is now accepted, its content is not agreed.”) See also BROWNIE, *supra* note 208, at 516–17 (“more authority exists for the category of *jus cogens* than exists for its particular content. . . .”)

²¹¹ See *id.* at 146–51 (discussing the introduction of *jus cogens* norms and acknowledging the highly contested claim that they are free-standing and independent of custom).

²¹² Ford, *supra* note 209, at 150.

²¹³ *Id.* at 152.

rests on the consent of states. A state that persistently objects to a norm of customary international law that other states accept is not bound by that norm In contrast, *jus cogens* embraces customary laws considered binding on *all* nations and is derived from values taken to be fundamental by the international community, rather than from the fortuitous or self-interested choices of nations. Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent²¹⁴

Therefore, while the concepts of customary international law and *jus cogens* norms might share some qualities, they are in fact two different concepts, and it is hard to see how one is derived from the other. Likewise, while a multinational treaty might be evidence of the existence of a *jus cogens* norm, and an affirmation of its status as such, the treaty itself may not be the source of the norm.²¹⁵ The disagreement over the source of *jus cogens* norms has therefore led commentators to suggest that preemptory norms are “creatures without definable legal pedigree or doctrinal standing” that ultimately derive from the conscience of the international community.²¹⁶ Despite disagreement regarding the source of a particular *jus cogens* norm, the establishment that something *is* a *jus cogens* norm informs the type of conduct that is presumptively illegal under international law.

Violations of *jus cogens* norms are particularly egregious. Torture, described as “a cruel assault upon the defenseless,”²¹⁷ is one of the most proscribed practices in international law. Its general aim is to “destroy a human being, destroy his personality, identity, . . . [and] soul.”²¹⁸ Although there are inconsistencies in the definition of what constitutes torture in both international and national treaties, torture is universally abhorred, and is regarded as a *jus cogens* norm of international human rights law.²¹⁹ Torture can lead to individual responsibility under customary international law to the extent that all states have the ability to

²¹⁴ See *Sideman de Blake v. Republic of Arg.*, 965 F.2d 699, 715 (9th Cir. 1992) (emphasis added) (internal citation omitted). See also BROWNLIE, *supra* note 208, at 5–7 (explaining the foundations of customary international law).

²¹⁵ Ford, *supra* note 210, at 152.

²¹⁶ *Id.*

²¹⁷ Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124, 125 (1978).

²¹⁸ Bent Sorensen & Inge Kemp Genefke, *Medical Aspects of Torture*, in THE INTERNATIONAL FIGHT AGAINST TORTURE 11, 12 (Antonio Cassese ed., 1991).

²¹⁹ *Sideman de Blake*, 965 F.2d at 714–18. See Julianne Harper, Note, *Defining Torture: Bridging the Gap Between Rhetoric and Reality*, 49 SANTA CLARA L. REV. 893, 894 (2009).

punish acts of torture committed anywhere. Recent scholarship has suggested that the almost universal acceptance of the United Nations Torture Convention,²²⁰ coupled with the *jus cogens* nature and non-derogability of the ban on torture, leads to the conclusion that international law recognizes torture as a freestanding international crime.²²¹ This view was confirmed by the International Criminal Tribunal for the former Yugoslavia, which stated that the prohibition of torture “is designed to produce a deterrent effect . . . that signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.”²²²

Therefore, government officials should never be immune for acts of torture because torture is *never* within the scope of a government official’s authority as sanctioned by the state. A foreign state may not provide immunity by authorizing an act that violates peremptory norms of international law.²²³ The Senate Report made this clear by quoting a letter sent by the State Department during the ratification process for the Convention Against Torture, which affirmed that the U.S. Government “does not regard authorized sanctions that unquestionably violate international law as ‘lawful sanctions’ exempt from the prohibition on torture.”²²⁴ Furthermore, in enacting the TVPA, Congress specifically referred to the obligation under the Torture Convention to provide victims of torture access to remedies. Despite these statements, the FSIA is at risk of being interpreted by the Supreme Court in *Samantar* to provide immunity to foreign officials accused of torture and sued in the United States under the TVPA.

²²⁰ United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 39/46 (Dec. 10, 1984) (“Torture Convention”).

²²¹ STUART RATNER, ET AL. ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 210 (3d ed. 2009).

²²² Prosecutor v. Furundzija, ICTY Case No. IT-95-17/1-T, judgment of December 10, 1998, at 153–54, cited in Lorna McGregor, *Addressing the Relationship between State Immunity and jus cogens Norms: A Comparative Assessment*, in INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES 69, 69 (Wolfgang Kaleck, Michael Ratner et al. eds., Springer Books 2007).

²²³ See S. REP. NO. 102-249, at 6–7 (1991).

²²⁴ Letter from Janet F. Mullins, Assistant Secretary of State for Legislative Affairs, to Senator Claiborne Pell, Chairman of the Senate Committee on Foreign Relations (Dec. 11, 1989); See also Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2(2), GA res. 39/46, entered into force June 26, 1987 (“no exceptional circumstances whatsoever, where a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”).

B. If the Supreme Court Holds That the Immunity Granted to Foreign States in the FSIA Extends to Foreign Officials, it Would be Stripping Torture Victims and their Survivors of a Congressionally Granted Express Right of Action

In resolving the circuit split, the Supreme Court should hold that the FSIA does not provide blanket immunity for all acts of a foreign official. Rather, when a current or former foreign official violates a *jus cogens* norm, like torture, he must be held accountable even if it was an official act, carried out under the state's mandate. The Supreme Court should interpret the TVPA and the FSIA together to strip away the immunity of current or former foreign officials who have engaged in acts of torture in their official capacity. Where Congress has created an express private right of action for victims of a violation of a *jus cogens* norm, the Supreme Court should not take away that right. Such a reading would follow congressional intent; Congress passed the ATCA and, importantly, the TVPA, giving a private right of action to torture victims. A foreign state may not provide immunity by authorizing an act that violates peremptory norms of international law.

The Supreme Court should resolve the split in favor of the Seventh Circuit's general view that officials who acted in their official capacity are not immune from suit. Specifically in response to the two questions on cert, the Court could broadly hold that a foreign state's immunity from suit under the FSIA, 28 U.S.C. § 1604, does not extend to an individual acting in his official capacity on behalf of a foreign state; and an individual who is no longer an official at the time suit is filed does not retain immunity for acts taken in the individual's former capacity as an official acting on behalf of the foreign state. However, to light the path towards accountability for foreign officials' human rights violations, the Court does not have to adopt an expansive holding; it can limit the unavailability of the FSIA to violations of *jus cogens* norms. And, at the narrowest, the court can hold that the TVPA is in itself an exception to the FSIA, thus foreclosing the possibility of foreign sovereign immunity in torture suits against foreign sovereign officials.

C. When Congress Passed the ATCA and TVPA, Congress Intended that Former and Current Foreign Officials Would not be Immune From Suit for acts of Torture

In the TVPA, Congress provided torture survivors with a private right of action against individuals who had been responsible for their torture. Congress codified landmark cases like *Filartiga* in the TVPA, with the intent to provide relief to victims of torture, explicitly extending the relief to U.S. citizens. As the Eleventh Circuit noted in *Arce v.*

Garcia, absent a cause of action in United States courts, some of the worst cases regarding human rights violations would go unheard and unpunished because regimes that commit the most egregious human rights abuses are often the ones that possess the least adequate legal mechanisms for redress.²²⁵ Congress recognized this problem when it enacted the TVPA:

Judicial protection against flagrant human rights violations is often least effective in those countries where such abuses are more prevalent. A state that practices torture . . . is not one that adheres to the rule of law. . . . [T]he . . . [TVPA] is designed to respond to this situation by providing a civil cause of action in U.S. courts for torture committed abroad.²²⁶

If the FSIA were to extend the immunity enjoyed by foreign states to government officials, the intentions of Congress would be undermined and contradicted. The stated purpose of the TVPA “is to provide a Federal cause of action against any individual who, under actual or apparent authority or under color of law of any foreign nation, subjects any individual to torture or extrajudicial killing.”²²⁷ Thus, when Congress passed the TVPA, it was with the understanding that immunity under the FSIA would not apply to former officials sued under the TVPA. Through the TVPA’s extension of a civil remedy to U.S. citizens subjected to torture abroad, Congress wanted to enhance the remedy already available under the ATCA.²²⁸ When Congress passed the TVPA, it did so knowing that there existed traditional diplomatic immunities afforded to foreign diplomats and heads of state codified in the FSIA. The TVPA is not intended to “override traditional diplomatic immunities which prevent the exercise of jurisdiction by U.S. courts over foreign diplomats.”²²⁹ The Senate Report also notes that the TVPA would “establish an unambiguous basis” for the cause of action in *Filartiga* and “extend a civil remedy to U.S. citizens who may have been tortured abroad.”²³⁰

²²⁵ *Arce v. Garcia*, 434 F.3d 1254, 1261–62 (11th Cir. 2006).

²²⁶ S. REP. NO. 102–249, at 3–4 (1991), quoted in *Arce*, 434 F.3d at 1262.

²²⁷ S. REP. NO. 102–249, at 3; 28 U.S.C. § 1350 note.

²²⁸ S. REP. NO. 102–249, at 5.

²²⁹ *Id.* See also H.R. REP. NO. 102–367, at 5 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 88 (“While sovereign immunity would not generally be an available defense, nothing in the TVPA overrides the doctrines of diplomatic and head of state immunity.”).

²³⁰ *Id.* at 4–5. See also *Kadic v. Karadi*, 74 F.3d 377, 378 (2d Cir. 1996) (“Congress has made clear that its enactment of the Torture Victim Protection Act of 1991 was intended to codify the cause of action recognized by this Circuit in *Filartiga*, even as it

The House and Senate Reports dictate the specific intended relationship between the FSIA and the TVPA, but an analysis of the same reveal conflicting statements. The Senate Report states that “only individuals may be sued,” and that consequently, “the TVPA is not meant to override the FSIA of 1976.”²³¹ The Senate Report also pointedly clarifies Congress’s intent in using the term “individual” in the TVPA “to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances.”²³² Therefore, as the Senate Report continues, “the TVPA is not meant to override the [FSIA].”²³³ Similarly, the House Report states that the TVPA is “subject to the restrictions” in the FSIA.²³⁴ The House Report and the Senate Report relating to the passage of the TVPA make it extremely clear that Congress was aware of the complications and contradictions that would arise with sovereign immunity under the FSIA on one hand, and a private right of action under the TVPA on the other.

When Congress passed the FSIA in 1976, the statute did not state that the immunity afforded to foreign states would be given to individual officials of those foreign states. The statute only referred to foreign states and their agents and instrumentalities.²³⁵ A plain reading of the statute indicates that it does not apply to individuals. The Second Circuit in *Tachiona v. United States* noted that with respect to § 1603(b),²³⁶ agencies and instrumentalities are defined “in terms not usually used to describe natural persons.”²³⁷ The Seventh Circuit noted in *Enaharo v. Abubakar* that if Congress wanted it to apply to foreign officials, Congress would have said so in clear and unmistakable terms.²³⁸ The codification of the *Filartiga* principle in the TVPA further evidences this

extends the cause of action to plaintiffs who are United States citizens). See H.R. REP. NO. 102–367, at 4.

²³¹ S. REP. NO. 102–249, at 7 (emphasis added).

²³² *Id.*

²³³ *Id.*

²³⁴ H.R. REP. NO. 102–367, at 4.

²³⁵ 28 U.S.C.S. § 1603(a).

²³⁶ § 1603(b) defines agency and instrumentality to mean “[a]ny entity . . . (1) which is a separate legal person, corporate or otherwise, and . . . (2) which is an organ of a foreign state or a political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and . . . (3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.

²³⁷ 386 F. 3d 205, 221 (2d Cir. 2004).

²³⁸ *Enaharo v. Abubakar*, 408 F.3d 877, 881–82 (7th Cir. 2005).

intent: torture victims can seek justice in courts in the United States against *individuals* who committed the crime.²³⁹

Furthermore, the Supreme Court's opinion in *Dole Foods Co. v. Patrickson* stands for the proposition that the FSIA protects neither former officials nor officials operating outside the scope of their lawful authority.²⁴⁰ In *Dole Foods Co. v. Patrickson* the Supreme Court held that in a suit against an entity that is potentially an agency or instrumentality of the state, thus implicating the possible application of FSIA immunity, the status of the entity is determined at the *time of the suit is filed*, not at the time of the conduct giving rise to the suit.²⁴¹ Therefore, although the Ninth Circuit in *Chuidian* and the Fourth Circuit in *Velasco* held that the FSIA applies to officials acting within their scope of authority in reasoning that the individuals can be considered agencies and instrumentalities, the Court's opinion in *Dole* mandates that FSIA immunity would not extend to former officials.

D. A Long Line of Cases has Permitted Torture Survivors to Seek Justice and Hold Former Officials Accountable in United States Courts in Accordance with Congressional Intent in Passing the TVPA.

Several cases in recent years have permitted torture survivors to seek civil redress against the foreign officials who have been perpetrators of human rights abuses.²⁴² Each case allowing aliens and U.S. citizens alike to seek civil redress in federal court for wrongs committed in violation of international law or United States treaties follows directly from *Chuidian's* and *Filartiga's* precedent. In *Xuncax v. Gramajo*, Guatemalan and U.S. citizens sued Hector Gramajo, a former Guatemalan Minister of Defense under the TVPA.²⁴³ Citing *Chuidian* for guidance, the court dismissed the applicability of the FSIA and stated that Gramajo was not entitled to immunity for acts of torture, because torture is beyond the scope of an official's authority.²⁴⁴ Furthermore, the

²³⁹ See S. REP. NO. 102-249, at 7 (1991). See also H.R. REP. NO. 102-367, at 3-4. The Senate Report cited the case as evidence of a "universal consensus" that "official torture . . . violate[s] standards accepted by virtually every nation." *Id.*

²⁴⁰ 538 U.S. 468, 478 (2003).

²⁴¹ *Id.* at 478-80. As the Court explained, "[c]onstruing § 1603(b) so that the present tense has real significance is consistent with the longstanding principle that the jurisdiction of the Court depends upon the state of things at the time of the action brought." *Id.* at 478.

²⁴² See *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995), *Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006), *Chavez v. Carranza*, 413 F. Supp. 2d 891 (W.D. Tenn. 2005), *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005), *Jean v. Dorelien*, 431 F.3d 776 (11th Cir. 2005).

²⁴³ *Xuncax*, 886 F. Supp. at 168.

²⁴⁴ *Id.* at 174.

court went as far as to apply the TVPA retroactively to Gramajo, despite the fact that the TVPA was not in effect at the time the atrocities against the plaintiffs were committed.²⁴⁵

In *Arce v. Garcia*, an Eleventh Circuit case, Salvadorian refugees successfully sued El Salvador's former Minister of Defense Jose Garcia and National Guard's Director General Carlos Vides Casanova under the TVPA, alleging that military personnel tortured them during a campaign of human rights violations between 1979 and 1983.²⁴⁶ In yet another case, *Chavez v. Carranza*, former and current citizens of El Salvador sued Nicholas Carranza, former Subsecretary of Defense and Public Security.²⁴⁷ Plaintiffs suffered egregious human rights abuses at the hands of military personnel.²⁴⁸ Suing under the TVPA, plaintiffs claimed that Carranza exercised command over his subordinates to commit acts of torture, and to cover up those and other human rights abuses.²⁴⁹ The court granted four out of five of the plaintiffs' summary judgment motions finding that the former Subsecretary committed the acts of torture were committed as per his command responsibility.²⁵⁰

Similarly, in *Cabello v. Fernandez-Larios*, the Eleventh Circuit affirmed the judgment against Armando Fernandez-Larios, a former Chilean military officer, alleged to have participated in the execution of Chilean economist Winston Cabello.²⁵¹ Cabello's survivors alleged that Fernandez participated in Cabello's extra-judicial killing as part of dictator General Augusto Pinochet's Caravan of Death.²⁵² The court found a private right of action in the TVPA to sue the official, and held that the TVPA was intended to reach beyond the person who actually committed the acts, to those ordering, abetting, or assisting in the violation.²⁵³ In *Jean v. Dorelien*, another Eleventh Circuit case, citizens of Haiti, successfully brought TVPA claims of torture and extrajudicial killing against Carl Dorelien, colonel in the Haitian Armed Forces, for acts of torture and extrajudicial killing.²⁵⁴ Scholars have identified a number of important objectives that these cases have accomplished.²⁵⁵

²⁴⁵ *Id.* at 177. ("[T]he public's interest in seeing that the TVPA is available to a plaintiff . . . who has suffered deliberately brutal abuse far outweighs any disappointment there might be of Gramajo's private expectations.")

²⁴⁶ 434 F.3d at 1254.

²⁴⁷ 413 F. Supp. 2d at 891.

²⁴⁸ *Id.* at 894-97.

²⁴⁹ *Id.* at 894.

²⁵⁰ *Id.* at 905.

²⁵¹ 402 F.3d 1148 (11th Cir. 2005).

²⁵² *Id.* at 1152-53.

²⁵³ *Id.* at 1157.

²⁵⁴ *Jean v. Dorelien*, 431 F.3d 776 (11th Cir. 2005).

²⁵⁵ Coliver, *supra* note 174, at 175.

These include ensuring that the United States does not remain a safe haven for human rights abusers, while creating an atmosphere of deterrence for future human rights abuses where individual perpetrators are held responsible for their human rights crimes.²⁵⁶ Reaching these goals have provided victims of human rights abuse with a sense of official acknowledgement and reparation and inspired efforts in other countries to set up procedures to prosecute human rights violations in their own courts.²⁵⁷

VI. CONCLUSION

Yousuf v. Samantar presents the Supreme Court with a unique opportunity to address important questions regarding the future of human rights litigation in United States courts because it will do so against the backdrop of centuries-old precedent on sovereign immunity juxtaposed with evolving ideas on *jus cogens* norms. First, the Court will be in a position to resolve the split in the circuits regarding whether former or current officials qualify as agents or instrumentalities of the state. Second, in addressing the reach of the TVPA, the Court will answer whether the United States provides victims with enforceable remedies against former officials of foreign governments responsible for torture. Underlying both issues is the fact that Congress passed the TVPA in 1991 specifically to ensure that the United States would abide by its international legal obligations under the Convention against Torture. Violations of *jus cogens* norms such as the prohibition of torture are particularly egregious. Foreign officials responsible for egregious human rights abuses should be held accountable and should not be permitted to hide under the guise of state immunity. When Congress enacted the TVPA, it did so with the express intention of establishing liability for torturers and thereby provided victims and their survivors redress in United States courts. The FSIA should not serve as a hurdle to such redress. Holding that the FSIA bars suit against individual foreign officials sued under the TVPA would thwart the intentions of Congress. Therefore, the Supreme Court should hold that current or former individual foreign officials are not immune from suit for official actions that violate *jus cogens* norms such as torture.

²⁵⁶ *Id.*

²⁵⁷ *Id.* (Other contributions are the contribution to the “development of international human rights law and . . . building a constituency in the United States that supports the application of international law in such cases and an awareness about human rights violations in countries in all regions of the world abusers.”).