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## The Immunity of State Officials Under the UN Convention on Jurisdictional Immunities of States and Their Property

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# The Immunity of State Officials Under the UN Convention on Jurisdictional Immunities of States and Their Property

David P. Stewart\*

## ABSTRACT

*The U.S. Supreme Court decided in Samantar v. Yousuf that claims of immunity by individual foreign officials in U.S. courts will be determined not under the Foreign Sovereign Immunities Act but instead under the common law, drawing on principles of international law. The 2004 UN Convention on the Jurisdictional Immunities of States and Their Properties represents the most recent and comprehensive international thinking on the question of jurisdictional immunities of foreign states and their officials in foreign courts. Under the Convention, individual representatives of a state acting in that capacity are entitled to the same immunities as the state itself. This Article examines the relevant provisions of the Convention and related decisional law.*

## TABLE OF CONTENTS

I.	BACKGROUND OF THE CONVENTION .....	1049
II.	THE CONVENTION'S APPLICATION TO INDIVIDUALS .....	1055
III.	SPECIFIC EXCEPTIONS .....	1057
	A. <i>Torts</i> .....	1058
	B. <i>Violations of International Law</i> .....	1062
IV.	SUBSEQUENT DEVELOPMENTS .....	1064
V.	CONCLUSION.....	1069

In deciding in *Samantar v. Yousuf*<sup>1</sup> that the Foreign Sovereign Immunities Act of 1976 (FSIA) does not apply to claims lodged in U.S.

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

courts against individual foreign government officials, the Supreme Court relied primarily on traditional principles of domestic law relating to statutory interpretation. International law appears to have played no role whatsoever.

Perhaps this is unremarkable. While expressly acknowledging that the FSIA had in fact been enacted in large part on the basis that it codified then-existing customary international law,<sup>2</sup> the majority opinion by Justice Stevens explained that “[b]ecause we are not deciding that the FSIA bars petitioner’s immunity but rather that the Act does not address the question, we need not determine whether declining to afford immunity to petitioner would be consistent with international law.”<sup>3</sup>

Questions of international law were, nonetheless, presented during the proceedings. The district court granted Samantar’s motion to dismiss on grounds that no exception to immunity under the FSIA applied to the case—rejecting the argument that Samantar was not entitled to immunity because, in allegedly violating international law, he had necessarily been acting beyond the scope of his authority.<sup>4</sup> The court of appeals did not contradict that holding but reversed on the ground that the FSIA did not govern, and that was the decision affirmed by the Supreme Court.<sup>5</sup>

The district court’s decision was consistent with the substantive provisions adopted by the international community in the 2004 UN Convention on the Jurisdictional Immunities of States and Their Property, which explicitly assimilates to the state its representatives acting in their official capacity and which contains no exception to immunity for actions alleged to have violated international law.<sup>6</sup> In his merits brief to the Supreme Court, petitioner Samantar referred to the Convention.<sup>7</sup> Not unsurprisingly, the respondents omitted any such mention in their reply brief, although it was referred to in one

2. See *id.* at 2289 (citing 28 U.S.C. § 1602 (1976) and *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199 (2007)) (“We have observed that a related purpose was ‘codification of international law at the time of FSIA’s enactment’ and have examined the relevant common law and international practice. . . .”); see also *Foreign Sovereign Immunities Act of 1976*, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended at 28 U.S.C. §§ 1330, 1441(d), 1602–1611 (2006)).

3. *Samantar*, 130 S. Ct. at 2290 n.14.

4. See *Yousuf v. Samantar*, No. 1:04cv1360, 2007 WL 2220579, at \*14 (E.D. Va. Aug. 1, 2007) (concluding that since the actions were taken in defendant’s official capacity, the suit should be dismissed).

5. See *Yousuf v. Samantar*, 552 F.3d 371, 383 (4th Cir. 2009), *aff’d*, 130 S. Ct. 2278 (2010) (finding that the FSIA does not apply to government officials).

6. *United Nations Convention on the Jurisdictional Immunities of States and Their Property*, G.A. Res. 59/38, Annex, U.N. Doc. A/RES/59/38 (Dec. 2, 2004) [hereinafter *UN Convention on Jurisdictional Immunities*].

7. Brief of Petitioner at 37, *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010) (No. 08-1555), 2009 WL 4320417, at \*xii.

amicus brief filed in respondents' support.<sup>8</sup> Nor was the Convention mentioned in the brief of the United States supporting affirmance.<sup>9</sup> However, the representative of the government did contend at oral argument that under international law the immunity exists for the benefit of the state, not the individual—without noting that the Convention adopts that very approach.<sup>10</sup>

That these references found no traction with the Court may be unsurprising for another (and simpler) reason: the United States has not signed, much less ratified, the UN Convention, and indeed the Convention is not yet in force. However, as a result of the Court's decision in *Samantar*, U.S. courts are now required to determine the immunity of foreign government officials under the common law.<sup>11</sup> Because the Convention represents the most recent and carefully considered international thinking on the point, it may thus be taken as informative (some might even say a form of "soft law"). An examination of its provisions is therefore appropriate to determine how they might bear on the issue of the immunity of foreign government officials for acts taken in their official capacity.

## I. BACKGROUND OF THE CONVENTION

The UN Convention on Jurisdictional Immunities of States and Their Property was adopted by the UN General Assembly on December 2, 2004, ending more than a quarter of a century of intense

8. See Brief of Respondents, *Samantar*, 130 S. Ct. 2278 (No. 08-1555), 2010 WL 265636 (omitting any mention of the Convention); Brief for Professors of Public International Law and Comparative Law as Amici Curiae Supporting Respondents at 33, *Samantar*, 130 S. Ct. 2278 (No. 08-1555), 2010 WL 342033, at \*viii (arguing that absence of exception in Convention did not preclude the court from finding an exception under international law).

9. See Brief for United States as Amicus Curiae Supporting Affirmance, *Samantar*, 130 S. Ct. 2278 (No. 08-1555), 2010 WL 342031 (omitting any mention of the Convention).

10. Oral Argument at 56:11, *Samantar*, 130 S. Ct. 2278 (No. 08-1555), available at [http://www.oyez.org/cases/2000-2009/2009/2009\\_08\\_1555/argument](http://www.oyez.org/cases/2000-2009/2009/2009_08_1555/argument).

11. Although the Supreme Court determined in *Samantar* that the FSIA "does not govern [an individual's] claim of immunity," it also said that a suit against a foreign official might nonetheless be precluded by principles of "foreign sovereign immunity under the common law." *Id.* at 2292. The case was remanded for a determination by the lower court. Following the Executive Branch's statement that *Samantar* was not entitled to immunity, the district court so held. See David P. Stewart, *Samantar and the Future of Foreign Official Immunity*, 15 LEWIS & CLARK L. REV. 633, 650–51 (2011) ("The government has determined that the defendant does not have foreign official immunity. Accordingly, the defendant's common law sovereign immunity defense is no longer before the Court . . ." (internal quotation marks omitted)).

international negotiations.<sup>12</sup> The Convention is the first modern multilateral instrument to articulate a comprehensive approach to the question of the immunity of sovereign states from suits in foreign courts. It was intended to codify existing principles of customary international law and to provide a basis for substantial harmonization of national laws in a vital area of transnational practice.<sup>13</sup> Although approved unanimously, it has yet to come into force. As of the beginning of October 2011, it had garnered thirteen of the required thirty ratifications (six in the past eighteen months alone: Kazakhstan, Switzerland, Japan, Saudi Arabia, France, and Spain), together with an additional eighteen signatures.<sup>14</sup>

Substantively the Convention embraces the so-called “restrictive theory” of sovereign immunity. Until the early to mid-twentieth century, there was virtual unanimity in international law and practice that sovereigns (both states and heads of state) were absolutely immune from the jurisdiction of foreign courts (under the doctrinal maxim *par in parem non habet imperium*).<sup>15</sup> By contrast, under the more recent restrictive theory, states maintain their immunity when engaged in sovereign activities (*acta jure imperii*) but

12. UN Convention on Jurisdictional Immunities, *supra* note 6. See generally Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 SUP. CT. REV. 213 (2010); Justin Donoho, *Minimalist Interpretation of the Jurisdictional Immunities Convention*, 9 CHI. J. INT'L L. 661 (2010); Hazel Fox, *In Defence of State Immunity: Why the UN Convention on State Immunity is Important*, 55 INT'L & COMP. L.Q. 399 (2006); Gerhard Hafner & Ulrike Köhler, *The United Nations Convention on Jurisdictional Immunities of States and Their Property*, 35 NETH. Y.B. INT'L L. 3 (2004); David P. Stewart, *Current Developments: The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 AM. J. INT'L L. 194 (2005); Chusei Yamada, *UN Convention on Jurisdictional Immunities of States and Their Property: How the Differences Were Overcome*, 53 JAPANESE Y.B. INT'L L. 243 (2010).

13. The Convention's first preambular paragraph states that “the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law.” UN Convention on Jurisdictional Immunities, *supra* note 6, pmb. According to the third preambular paragraph, the essential motivation for adoption of the Convention was the belief that it “would enhance the rule of law and legal certainty, particularly in dealings of States with natural and juridical persons, and would contribute to the codification and development of international law and the harmonization of practice in this area.” *Id.* The seventh preambular paragraph of the document stresses “the importance of uniformity and clarity in the law of jurisdictional immunities of States and their property.” *Id.*

14. *Status: Convention on Jurisdictional Immunities of States and Their Property*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=III-13&chapter=3&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-13&chapter=3&lang=en) (last visited Oct. 1, 2011).

15. See generally ERNEST K. BANKAS, *THE STATE IMMUNITY CONTROVERSY IN INTERNATIONAL LAW* (2005) (tracing the development of sovereign immunity in common law and civil law countries); HAZEL FOX, *THE LAW OF STATE IMMUNITY* (2d ed. 2008) (same). In U.S. law, this proposition is usually traced to Chief Justice Marshall's decision in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) (Marshall, C.J.).

are treated as private entities when claims arise from their commercial transactions or “private law” activities (*acta jure gestionis*).<sup>16</sup> The Convention embraces that approach and, in accord with the most developed domestic practices, provides that governments (and their agencies and instrumentalities) are subject to essentially the same jurisdictional rules as private entities in respect of their commercial transactions.<sup>17</sup>

The central exception is found in Article 10, which provides that a state cannot invoke immunity in a proceeding arising out of “a commercial transaction with a foreign natural or juridical person” when “by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State.”<sup>18</sup> This exception does not apply in the case of a commercial transaction between states or if the parties to the commercial transaction have expressly agreed otherwise.<sup>19</sup>

While that provision lies at the conceptual heart of the Convention, the limitations on immunity extend far beyond the exception for commercial transactions. Thus, Article 7 covers situations in which the state in question has expressly consented to the exercise of jurisdiction by the court with regard to a specific matter or case by international agreement, in a written contract, or by declaration or written communication.<sup>20</sup> Under Articles 8 and 9, a

16. This had long been the U.S. approach. See, e.g., *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983) (“[FSLA] codifies, as a matter of federal law, the restrictive theory of sovereign immunity.”); *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711–15 (1976) (reprinting the so-called Tate Letter, Letter from Jack B. Tate, Acting Legal Adviser, Dep’t of State, to Philip B. Perlman, Acting Att’y Gen., Dep’t of Justice (May 19, 1952)). For the relevant statutes of other countries, see ANDREW DICKINSON ET AL., *STATE IMMUNITY: SELECTED MATERIALS AND COMMENTARY* (2004).

17. Stewart, *supra* note 12, at 210 (“The convention’s text reflects an emergent global consensus, increasingly demonstrated in doctrine as well as practice, that states and state enterprises can no longer claim absolute immunity from the proper jurisdiction of foreign courts and agencies, especially for their commercial activities.”).

18. UN Convention on Jurisdictional Immunities, *supra* note 6, art. 10 (“If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.”).

19. *Id.*

20. *Id.* art. 7 (“A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case: (a) by international agreement; (b) in a written contract; or (c) by a declaration before the court or by a written communication in a specific proceeding.”).

state cannot invoke immunity where it has itself instituted or intervened in a specific proceeding or taken any other step relating to the merits of that proceeding, nor can it avoid jurisdiction in respect of any counterclaim arising out of the same legal relationship or facts as the principal claim.<sup>21</sup>

Other exceptions include, *inter alia*, claims arising from contracts of employment;<sup>22</sup> personal injury and damage to property;<sup>23</sup> ownership, possession, and use of property;<sup>24</sup> intellectual and industrial property;<sup>25</sup> participation in public companies;<sup>26</sup> state-owned or state-operated ships used for other than government noncommercial purposes;<sup>27</sup> and certain matters relating to arbitration proceedings.<sup>28</sup> The text also sets forth exceptions to protection from pre- and post-judgment measures of constraint.<sup>29</sup> Separate articles provide criteria for service of process and rendering default judgments.<sup>30</sup>

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21. Article 8 addresses the "effect of participation in a proceeding before a court" and Article 9 speaks to counterclaims. *Id.* arts. 8-9.

22. Subject to several important exceptions, Article 11 provides that "a State cannot invoke immunity . . . in a proceeding which related to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State." *Id.* art. 11.

23. Article 12 is discussed in some detail *infra* Part III.

24. Article 13 covers proceedings relating to immovable property situated in the forum state, rights or interests in movable or immovable property by way of succession, gift or *bona vacantia*; and the administration of property, such as trust property, the estate of a bankrupt, or "the property of a company in the event of its winding up." UN Convention on Jurisdictional Immunities, *supra* note 6, art. 13.

25. Article 14 precludes the invocation of immunity in proceedings relating to "the determination of any right of the State in a patent, industrial design, trade name or business name, trademark, copyright or any other form of intellectual or industrial property which enjoys a measure of legal protection, even if provisional, in the State of the forum" as well as an alleged infringement by the state in the territory of the state of the forum of such a right belonging to a third person. *Id.* art. 14.

26. Article 15 concerns proceedings relating to the state's "participation in a company or other collective body" if that body has "participants other than States or international organizations." *Id.* art. 15.

27. Under Article 16(1), a state which owns or operates a ship cannot invoke immunity in a proceeding "which relates to the operation of that ship if, at the time the cause of action arose, the ship was used for other than government non-commercial purposes." *Id.* art. 16(1).

28. Pursuant to Article 17, a state which has agreed in writing to submit to arbitration "differences relating to a commercial transaction" cannot invoke immunity in a proceeding which relates to (a) the validity, interpretation or application of the arbitration agreement, (b) the arbitration procedure, or (c) the confirmation or the setting aside of the award, unless the arbitration agreement provides otherwise. *Id.* art. 17.

29. Article 18 deals with pre-judgment measures of constraint, Article 19 deals with post-judgment measures of constraint, Article 20 deals with the effect of consent to jurisdiction to measures of constraint, and Article 21 handles specific categories of property. *Id.* arts. 18-21.

30. Article 22 deals with service of process and Article 23 provides for default judgment. *Id.* arts. 22-23.

Several of these provisions need to be read in light of related “understandings” adopted in response to various substantive difficulties which arose during the negotiations.<sup>31</sup> These understandings are set forth in the Annex to the Convention, which in accordance with Article 25 “forms an integral part of the Convention.”<sup>32</sup> In addition, reference is appropriately made to the pertinent reports of the International Law Commission (ILC), to the reports of the Ad Hoc Committee, and to the General Assembly resolution adopting the Convention that together form relevant *travaux préparatoires*.<sup>33</sup> Also relevant is a definitive statement by the chair of the Ad Hoc Committee, Gerhard Hafner, which the General Assembly expressly took into account in its resolution adopting the Convention and which is included in the Summary Records of the Sixth Committee.<sup>34</sup>

For purposes of a proper interpretation of the Convention, attention must be drawn to two important limitations on the scope of application found in these extra-textual materials. First, it was clearly understood during the negotiations, and was so stated by the chair of the Ad Hoc Committee in his introductory statement to the Sixth Committee, that the provisions of the Convention do not cover

31. Specifically, the understandings pertain to Articles 10, 11, 13, 14, 17, and 19. United Nations Convention on the Jurisdictional Immunities of States and Their Property, *supra* note 6, arts. 10–11, 13–14, 17, 19.

32. *Id.* art. 25. The understandings thus fall within the general rule of treaty interpretation provided by Article 31(2) of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331. Recourse to these sources will be appropriate under Article 32 of the Vienna Convention on the Law of Treaties. *Id.* Moreover, as noted by the Chair of the Ad Hoc Committee in his introductory remarks to the Sixth Committee on October 25, 2004, the 1991 Report of the International Law Commission and commentary, along with the Ad Hoc Committee’s reports, the General Assembly resolution adopting the Convention, and the chair’s statement to the Sixth Committee, all need to be considered “an important part of the *travaux préparatoires* of the Convention.” Gerhard Hafner, Chairman, Ad Hoc Comm. on Jurisdictional Immunities of States and Their Property, Remarks to the United Nations General Assembly Sixth Committee (Oct. 25, 2004) [hereinafter Hafner Statement], in *Summary Record of the 13th Meeting*, U.N. Doc. A/C.6/59/SR.13 (Mar. 22, 2005).

33. Chairman Hafner further noted:

Generally, it must be borne in mind that this Convention will have to be read in conjunction with the commentary as prepared by the ILC, at least as far as the text has remained unchanged as submitted by the ILC. The ILC Commentary, the Reports of the Ad Hoc Committee and the UN General Assembly Resolution adopting the Convention will form an important part of the *travaux préparatoires* of the Convention. This common reading of the text of the Convention and the commentary will certainly clarify the text if certain interpretative questions still remain.

Hafner Statement, *supra* note 32.

34. UN Convention on Jurisdictional Immunities, *supra* note 6.



criminal proceedings.<sup>35</sup> The General Assembly explicitly agreed with that interpretation in its resolution adopting the Convention.<sup>36</sup> Second, the Convention does not apply to military activities—a point expressly affirmed by the chair in his introductory statement and subsequently repeated by several ratifying states.<sup>37</sup>

Article 4 sets forth the general rule that the Convention is not retroactive; that is, it does not apply to any question of jurisdictional immunities of states or their property arising in a proceeding

35. Hafner Statement, *supra* note 32 (noting the Committee's recommendation that the General Assembly explicitly state that the Convention "does not cover criminal proceedings"). This view was fully in accord with the approach taken by the International Law Commission, *See Summary Records of the 2243rd Meeting*, [1991] 1 Y.B. Int'l L. Comm'n 247, 251, U.N. Doc. A/CN.4/SER.A/1991 ("Although the draft articles do not define the term 'proceeding', it should be understood that they do not cover criminal proceedings."); *see also* Hafner & Köhler, *supra* note 12, at 46. More recently, the International Law Commission has undertaken a study of the immunity of state officials from foreign criminal jurisdiction. According to the preliminary submission of the Special Rapporteur, Roman Kolodkin, "criminal jurisdiction was not exercised over the State" and "the legal norm or principle of immunity implied a right of the State of the official and of the official himself or herself not to be subject to jurisdiction and a corresponding obligation incumbent upon the foreign State." Rep. of the Int'l Law Comm'n, 60th Sess., May 5–June 6, July 7–Aug. 8, 2008, ¶¶ 271–72, U.N. Doc. A/63/10; GAOR 63d Sess., Supp. No. 10 (2008) (by Roman Kolodkin).

36. *See* Hafner & Köhler, *supra* note 12, at 46–47. In Resolution 59/38, the General Assembly stated that it "agrees with the general understanding reached in the Ad Hoc Committee that the United Nations Convention on Jurisdictional Immunities of States and Their Property does not cover criminal proceedings." UN Convention on Jurisdictional Immunities, *supra* note 6, pmb. ¶ 2. In ratifying the Convention, Switzerland specifically referred to that statement in stating its "understanding that the Convention does not cover criminal proceedings." *Status: Convention on Jurisdictional Immunities of States and Their Property*, *supra* note 14. This follows from the generally accepted principle that states are not criminally responsible under international law. *See, e.g.*, FOX, *supra* note 15, at 20 ("Unlike civil proceedings, the rule relating to immunity of a foreign state in respect of criminal proceedings in another state remains generally absolute.")

37. *See* Hafner Statement, *supra* note 32.

One of the issues raised was whether military activities will be covered by this Convention. I believe that a general understanding has always prevailed that they are not. In any case, one can refer to the commentary of the ILC on draft Article 12: "Neither does it (i.e. draft article 12) affect the question of diplomatic immunities, as provided in article 3, nor does it apply to situations involving armed conflicts." One has also to keep in mind the preamble stating that the "rules of customary international law continue to govern matters not regulated by the provisions of the present Convention."

*Status: Convention on Jurisdictional Immunities of States and Their Property*, *supra* note 14. In ratifying the Convention, Norway affirmed this view, stating its "understanding that the Convention does not apply to military activities, including the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, and activities undertaken by military forces of a State in the exercise of their official duties," and Sweden recorded a similar declaration. *Status: Convention on Jurisdictional Immunities of States and Their Property*, *supra* note 14.

instituted against a state before a court of another state prior to the Convention's entry into force for the states concerned.<sup>38</sup>

Another important consideration is found in Article 26, which confirms that nothing in the Convention affects the rights and obligations of states parties to existing international agreements that relate to matters dealt with in the Convention.<sup>39</sup> In turn, this provision needs to be read together with the Convention's fifth preambular paragraph that states, "[T]he rules of customary international law continue to govern matters not regulated by the provisions of the present Convention."<sup>40</sup>

## II. THE CONVENTION'S APPLICATION TO INDIVIDUALS

Article 5 states the following central proposition: "A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention."<sup>41</sup> The term "State" is defined broadly. Under Article 2(1)(b), it includes not only the state itself but also its various organs of government as well as the constituent units of a federal state or the political subdivisions of the state if "entitled to perform acts in the exercise of sovereign authority, and . . . acting in that capacity."<sup>42</sup> Also included are the "agencies and instrumentalities of the State or other entities, to the extent that they are entitled to perform and are

38. More specifically, Article 4 provides that,

[w]ithout prejudice to the application of any rules set forth in the present Convention to which jurisdictional immunities of States and their property are subject under international law independently of the present Convention, the present Convention shall not apply to any question of jurisdictional immunities of States or their property arising in a proceeding instituted against a State before a court of another state prior to the entry into force of the present Convention for the States concerned.

UN Convention on Jurisdictional Immunities, *supra* note 6, art. 4.

39. Article 26 states that "[n]othing in the present Convention shall affect the rights and obligations of States Parties under existing international agreements which relate to matters dealt with in the present Convention as between the parties to those agreements." *Id.* art. 26.

40. *Id.* pmbl. The first preambular paragraph affirms that "the rules of customary international law continue to govern matters not regulated by the provisions of the present Convention." *Id.*

41. *Id.* art. 5.

42. For background information on the inclusion of "constituent units of a federal State" and "political subdivisions," see *Summary Records of the 2602d Meeting*, [1999] 1 Y.B. Int'l L. Comm'n 254, 255-57, U.N. Doc. A/CN.4/SER.A/1999.

actually performing acts in the exercise of sovereign authority of the State.”<sup>43</sup>

Significantly, the definition of “State” in Article 2(1)(b)(iv) explicitly embraces “representatives of the State acting in that capacity.”<sup>44</sup> By including individuals who represent the state, the Convention unambiguously endorses the principle of immunity *ratione materiae* for acts performed in an official capacity.<sup>45</sup> The relevant ILC commentary confirms that a broad reading was intended because “[a]ctions against such representatives or agents of a foreign Government in respect of their official acts are essentially proceedings against the State they represent.”<sup>46</sup> In this sense, the Convention incorporates the doctrine of “foreign official immunity.”

The Convention carefully acknowledges and distinguishes other types of immunities applicable to individuals *ratione personae* under international law. Article 3(1) states that the Convention is “without prejudice” to the privileges and immunities enjoyed by a state under international law in relation to the exercise of the functions of (a) its diplomatic missions, consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences, as well as (b) persons connected with them.<sup>47</sup> The rationale, of course, is that these immunities are dealt with in other specialized international agreements.<sup>48</sup> Article 3(2) similarly excludes the privileges and immunities accorded under customary international law to heads of

43. UN Convention on Jurisdictional Immunities, *supra* note 6, art. 2(1)(b)(iii). The terms “organs,” “agencies,” and “instrumentalities” as used in the Convention thus do not have precisely the same meaning as they do under the FSIA.

44. *Id.* art. 2(1)(b)(iv).

45. As Lady Fox notes, “[F]unctional immunity, immunity *ratione materiae*, affords immunity to representatives of the State when they perform acts of State.” FOX, *supra* note 15, at 460.

46. “The expression ‘State’ should be understood in light of its object and purpose . . . as comprehending all types or categories of entities *and individuals* so identified which may benefit from the protection of State immunity.” Rep. of the Int’l Law Comm’n, 43d Sess., 29 Apr.–19 July, 1991, at 14, U.N. Doc. A/46/10; GAOR 46th Sess., Supp. No. 10 (1991), *reprinted in* [1991] 2 Y.B. Int’l L. Comm’n 14, U.N. Doc A/CN.4/SER.A/1991/Add.1 (emphasis added).

47. “The article is intended to leave existing special regimes unaffected, especially with regard to persons connected with the missions listed.” *Id.* at 22. For examples of such regimes, see Convention on Special Missions, Dec. 8, 1969, 1400 U.N.T.S. 231; Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77; Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227; Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418. Additionally, Article 26 of the present Convention states that nothing in it “shall affect the rights and obligations of States Parties under existing international agreements which relate to matters dealt with in the present Convention as between the parties to those agreements.” UN Convention on Jurisdictional Immunities, *supra* note 6, art. 26.

48. See Hafner & Köhler, *supra* note 12, at 44–46.

state *ratione personae*.<sup>49</sup> The Convention's negotiators were fully aware, in this regard, of the decision of the International Court of Justice in the *Arrest Warrant* case, which held that as a matter of customary international law foreign ministers, like heads of state, enjoy immunity *ratione personae* from the criminal, as well as civil, jurisdiction of other countries.<sup>50</sup>

### III. SPECIFIC EXCEPTIONS

Since the Convention is not yet in force, one can only speculate how it is most likely to be applied and interpreted by domestic courts in a given case. However, in *Samantar*-like circumstances where it is alleged that officials of a foreign state committed abuses within their own territory against individuals in violation of international law, the paradigmatic claim would be that immunity is unavailable because the abuses alleged to have been committed fall within the tort exception, violate international law, or both.

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49. UN Convention on Jurisdictional Immunities, *supra* note 6, art. 3(2). As noted in Rep. of the Int'l Law Comm'n, 43d Sess., *supra* note 46, at 22, this explicit exclusion was intended to preserve existing rules of customary international law. These rules, still respected in the United States and most other states, provide that heads of state are absolutely immune and that former heads of state are entitled to immunity for their official acts. See, e.g., *Arrest Warrant of 11 April 2000* (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14) (articulating an identical rule for foreign ministers). As stated by the Chair of the Ad Hoc Committee,

[the Convention] does not apply where there is a special immunity regime, including immunities *ratione personae* (*lex specialis*). Sometimes this is expressly stated in the text, sometimes not. Thus, for example, the express mention of heads of state in article 3 should not be read as suggesting that the immunity *ratione personae* of other officials is affected by the Convention.

Hafner Statement, *supra* note 32. The Convention's final preambular paragraph states that "the rules of customary international law continue to govern matters not regulated by the provisions of the present Convention." UN Convention on Jurisdictional Immunities, *supra* note 6, pmb. This point was emphasized by Sweden in a declaration made upon ratification, in which it stated that "the express mention of heads of State in article 3 should not be read as suggesting that the immunity *ratione personae* which other State officials might enjoy under international law is affected by the Convention." *Status: Convention on Jurisdictional Immunities of States and Their Property*, *supra* note 14.

50. *Arrest Warrant of 11 April 2000*, 2002 I.C.J. at 120 para. 61.

## A. Torts

The Convention incorporates the generally accepted rule of modern practice that those who suffer death, personal injury, or loss of tangible property resulting from a foreign state's tortious act or omission *within the forum* state may sue the foreign state for monetary compensation.<sup>51</sup> Specifically, Article 12 provides that unless the concerned states agree otherwise, a state cannot invoke immunity

in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.<sup>52</sup>

The required territorial nexus in Article 12 thus has two parts: the act or omission causing the death, injury, or damage to property must have occurred in whole or in part in the territory of the forum state, *and* the author of the act or omission must have been present in that state at the time of the act or omission.<sup>53</sup> By way of example, if an official of foreign state B commits a tortious act within forum state A, while present in state A, state B is subject to the jurisdiction of the courts of state A for liability arising from that act. However, state A would have no jurisdiction over state B or its officials for acts committed entirely outside the territory of state A. In this regard, the Convention is consistent with the "tort exception" codified in the FSIA since under section 1605(a)(5), the death or injury in question must occur within the United States.<sup>54</sup>

51. See, e.g., Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(5) (2006); State Immunity Act, 1978, c. 33 (U.K.); European Convention on State Immunity, May 16, 1972, 1495 U.N.T.S. 182.

52. UN Convention on Jurisdictional Immunities, *supra* note 6, art. 12. As stated in Rep. of the Int'l Law Comm'n, 43d Sess., *supra* note 46, at 44, the underlying intent is to "provide relief or possibility of recourse to justice for individuals who suffer personal injury, death or physical damage to or loss of property caused by an act or omission which might be intentional, accidental or caused by negligence attributable to a foreign State."

53. Rep. Int'l Law Comm'n, 43d Sess., *supra* note 46, at 45, states that the "basis for the assumption and exercise of jurisdiction in cases covered by this exception is territoriality." The term "territory" is not defined in the Convention proper or in its *travaux*, but the exception in Article 12 can most reasonably be read to apply to events occurring in the land territory or internal waters of the forum state, not to acts at sea or within a state's maritime jurisdiction. See *id.* ("The article is primarily concerned with accidents occurring routinely within the State of the forum . . .").

54. See, e.g., *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989) ("Section 1605(a)(5) is limited by its terms . . . to those cases in which the damage to or loss of property occurs *in the United States.*"); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 292 F. Supp. 2d 9, 19 (D.D.C. 2003) (noting that FSIA preserves

While purely extraterritorial torts (whatever their nature) are thus excluded, it may not be easy in particular transboundary circumstances to determine where the causal act or omission took place or to distinguish between the situs of the injury and the situs of the tort (*locus delicti commissi*).<sup>55</sup> Under Article 12, the presence of the foreign official in the forum state is required “at the time of the act or omission.”

Substantively, the scope of the exception is narrow. The intent was primarily to cover “insurable risks” such as accidental death or injury.<sup>56</sup> By its terms, however, the article appears to include intentional, deliberate acts and also those caused by negligence or omission.<sup>57</sup> So read, it would afford somewhat less immunity than the comparable provision of the FSIA, which was carefully drafted to apply to limited circumstances of “non-discretionary” accidental torts such as common “slip and fall” cases.<sup>58</sup> It seems clear, however, that

immunity for tort claims unless injury or death occurs in the United States). The Federal Tort Claims Act bars claims against the United States based on injuries occurring in a foreign country, regardless of where the tortious act or omission occurred. *See* 28 U.S.C. § 2680(k) (2000); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004) (holding that section 2680(k) bars all claims against the federal government based on any injury suffered in a foreign country, regardless of where the tortious act or omission giving rise to that injury occurred). However, the State Department has limited discretionary authority to settle certain tort claims arising from actions in other countries under a separate statute. *See* 22 U.S.C. §§ 2669(f), 2669-1 (2006).

55. *See* Stephen C. McCaffrey, *The Thirty-Fifth Session of the International Law Commission*, 78 AM. J. INT’L L. 457, 467 (1984) (“It would appear that the [draft] article requires that the tortious act as well as the resulting injury occur in the forum state, and that the tortfeasor be present therein when the injury occurs.”).

56. Stewart, *supra* note 12, at 201.

57. *See* UN Convention on Jurisdictional Immunities, *supra* note 6, art. 12 (“Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.”); *see also* Rep. of the Int’l Law Comm’n, 43d Sess., *supra* note 46, at 45 (“The areas of damage envisaged in article 12 are mainly concerned with accidental death or physical injuries to persons or damage to tangible property involved in traffic accidents, such as moving vehicles, motor cycles, locomotives or speedboats. In other words, the article covers most areas of accidents involved in the transport of goods and passengers by rail, road, air or waterways. Essentially, the rule of non-immunity will preclude the possibility of the insurance company hiding behind the cloak of State immunity and evading its liability to the injured individuals. In addition, the scope of article 12 is wide enough to cover also intentional physical harm such as assault and battery, malicious damage to property, arson or even homicide, including political assassination.”).

58. *See* 28 U.S.C. § 1605 (2006). Under § 1605(a)(5)(A)–(B), immunity is preserved with respect to claims based on official conduct involving the exercise of discretionary functions (even if discretion is abused) and also for certain intentional

the Convention does not cover claims based on damage to reputation or the interference with contractual rights.<sup>59</sup>

Perhaps most importantly, the provision does not clearly distinguish losses resulting from a foreign state's wrongful or tortious acts or omissions from those that are the consequence of sovereign acts. In discussing the draft articles, the ILC did state that situations not involving physical damage are excluded.<sup>60</sup> Thus, many sovereign acts that are sometimes claimed to constitute actionable torts (for example, arbitrary denial of a visa, refusal of a license, imposition of economic sanctions, defamatory statements, and wrongful arrest and detention on criminal charges) will not be subsumed regardless of where they are said to have occurred. As noted above, claims arising from military activities are outside the Convention's scope.<sup>61</sup>

Still, some concern was raised about claims for damages (whether direct or consequential) resulting from the exercise of sovereign authority. The ILC Commentary appeared to deemphasize the traditional distinction between *acta jure imperii* and *acta jure gestionis*, at least for the common kinds of "insurable risks" that it mentions, noting only that different rules may apply where the issues are regulated by treaties or other agreements limiting liability or providing different dispute settlement procedures.<sup>62</sup> It is debatable, however, whether the traditional "public/private" distinction has entirely lost its vitality or its relevance in the area of noncommercial torts. In *McElhinney v. Ireland*, for example, the European Court of Human Rights declined to adopt the view that states should be exposed to foreign court jurisdiction in respect of tortious acts or omissions committed *jure imperii*.<sup>63</sup>

torts. *Id.*; see also *Swarna v. al-Awadi*, No. 06 Civ. 4880 (PKC), 2009 WL 1562811, at \*5 (S.D.N.Y. Sept. 24, 2010) ("Actions are discretionary when they are 'grounded in the social, economic, or political policies' of the sovereign or 'performed at the planning level of government, as opposed to those at the operational level.'" (citing *In re Terrorist Attacks* on Sept. 11, 2001, 392 F. Supp. 2d 539, 554 (S.D.N.Y. 2005)), *aff'd*, 538 F.3d 71 (2d Cir. 2008)). See generally JOSEPH W. DELLAPENNA, *SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS* § 7.25–29 (2d ed. 2003).

59. See Hafner & Köhler, *supra* note 12, at 31.

60. See Rep. of the Int'l Law Comm'n, 43d Sess., *supra* note 46, at 45.

61. See Hafner Statement, *supra* note 32.

62. See Rep. of the Int'l Comm'n, 43d Sess., *supra* note 46, at 45 (noting that while the "distinction has been maintained in the case law of some States involving motor accidents in the course of official or military duties," preserving immunity for acts *jure imperii* and rejecting it for acts *jure gestionis*, Article 12 makes no such distinction). The Commentary also states that this "exception to the rule of immunity is applicable only to cases or circumstances in which the State concerned would have been liable under the *lex loci delicti commissi*." *Id.* at 44. Clearly, the exception cannot be read to apply to acts simply because they are, or are alleged to be, in violation of international law such as, acts of torture, arbitrary detention, international terrorism, or violations of humanitarian law.

63. See *McElhinney v. Ireland*, 2001-XI Eur. Ct. H.R. 37, 46–47 paras. 33–40 (holding that recognizing immunity was not a violation of Article 6(1) of the European

A further question is whether, under customary international law, individual governmental officials should uniformly benefit from the same rule of immunity—particularly in situations where their actions are claimed to be violative of peremptory international norms or to constitute international crimes.<sup>64</sup>

What is clear is that the Convention did not endorse the proposition that states can be subjected to claims related to torts occurring *outside the forum state*.<sup>65</sup>

Nor does the Convention provide an exception to this rule when those claims are for human rights abuses, whether characterized as violations of peremptory norms or not. The broad question of state liability for human rights abuses was of course raised during the negotiations and was specifically discussed by the ILC in its 1999 report to the Ad Hoc Working Group.<sup>66</sup> The negotiators were fully aware, for example, of the 1999 House of Lords decision in *Pinochet*, which held that while the former Chilean head of state enjoyed immunity *ratione personae* from the civil jurisdiction of the United Kingdom for acts done in his official capacity, that immunity could not prevent his extradition for torture since it was an international

Convention for the Protection of Human Rights and Fundamental Freedoms). While the *McElhinney* Court acknowledged that “there appears to be a trend in international and comparative law towards limiting State immunity in respect of personal injury caused by an act or omission within the forum State,” it noted that the practice is “by no means universal,” and thus,

may primarily refer to “insurable” personal injury, that is incidents arising out of ordinary road traffic accidents, rather than matters relating to the core area of State sovereignty such as the acts of a soldier on foreign territory which, of their very nature, may involve sensitive issues affecting diplomatic relations between States and national security. Certainly, it cannot be said that Ireland is alone in holding that immunity attaches to suits in respect of such torts committed by *acta jure imperii* or that, in affording this immunity, Ireland falls outside any currently accepted international standards.

*Id.* para. 38; see also *Propend Fin. Pty Ltd. v. Singapore*, [1997] EWCA (Civ) 1433 (Eng.), reprinted in 111 I.L.R. 611 (upholding immunity despite potentially tortious acts committed during an investigation).

64. See, e.g., *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, [2004] EWCA (Civ) 1394, [2005] Q.B. 699 [750] (Eng.) (upholding the state’s immunity but finding it no longer appropriate in light of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, to accord blanket immunity *ratione materiae* in respect of foreign state officials alleged to have committed acts of systematic torture). This decision was subsequently reversed by the House of Lords. See *infra* note 76.

65. See UN Convention on Jurisdictional Immunities, *supra* note 6, art. 12 (denying immunity if the tortious conduct occurs on the territory of the other state).

66. See, e.g., *Hafner & Köhler*, *supra* note 12, at 47.



crime and prohibited by *jus cogens* (peremptory norms of international law).<sup>67</sup>

They were also fully aware of the 2001 decision of the European Court of Human Rights in *Al-Adsani v. United Kingdom*, in which the Court stated:

Notwithstanding the special character of the prohibition of torture in international law [as a peremptory norm], the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.<sup>68</sup>

As adopted, the Convention does not express a rule on the issue. At best it leaves the question open but certainly does not endorse the idea of an exception. It was presumably for this reason that, in ratifying the Convention, Switzerland recorded its “interpretive declaration” that “article 12 does not govern the question of pecuniary compensation for serious human rights violations which are alleged to be attributable to a State and are committed outside the State of the forum. Consequently, this Convention is without prejudice to developments in international law in this regard.”<sup>69</sup>

### B. *Violations of International Law*

The Swiss declaration also illustrates that the Convention does not clearly address whether, or when, states may be held implicitly to have waived (or should otherwise be deprived of) their immunity because they acted (or are alleged to have acted) in contravention of generally applicable norms of international law. More specifically, the argument is sometimes made that claims based on alleged violations of peremptory norms of international law (such as genocide or torture) must necessarily prevail over any otherwise applicable principles of immunity.<sup>70</sup>

67. R v. Bow St. Metro. Stipendiary Magistrate *ex parte Pinochet* (No.3), [2000] 1 A.C. 147 (H.L.) at 148 (Eng.).

68. *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 79, 101. The Court said it could not find “a firm basis on which to conclude that the immunity of States *ratione personae* is no longer enjoyed in respect of civil liability for claims of acts of torture.” *Id.* at 102.

69. See *Status: Convention on Jurisdictional Immunities of States and Their Property*, *supra* note 14.

70. See, e.g., Beth Stephens, *The Modern Common Law of Foreign Official Immunity*, 79 FORDHAM L. REV. 2669, 2718–19 (2011) (“Absolute immunity is a distortion of much narrower historical principles of sovereignty and sovereign immunity and has little justification in a world that has moved beyond monarchies and the divine rights of kings. Moreover, absolute immunity ignores modern international law limits on lawful government authority. The new common law of foreign official immunity should recognize that the most egregious human rights abuses are not

There is no textual basis in the Convention, however, for a broad “human rights” or *jus cogens* exception to immunity along the lines asserted in U.S. and other courts from time to time.<sup>71</sup> Nor are there counterpart provisions, for example, to the more limited “expropriation” and “terrorism” exceptions to immunity in the FSIA. Under section 1605(a)(3), jurisdiction may be exercised in certain cases in which “rights in property taken in violation of international law” are at issue.<sup>72</sup> Under section 1605A, civil actions seeking money damages for personal injury or death may be brought in certain instances against designated state sponsors of terrorism.<sup>73</sup>

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within the lawful authority of a state official and, therefore, are not entitled to immunity.”). Cf. *Protodikeia Polymele Livadia* [Pol. Pr. Liv.] [District Court Livadia] 137/1997 (Greece) (holding that state immunity did not apply to actions *jure gestionis* and denying Germany’s claim to immunity for massacre committed by its soldiers in 1944), *aff’d*, *Areios Pagos* [A.P.] [Supreme Court] 11/2000 (Greece), *translated in* Maria Gavouneli, War Reparation and State Immunity, 50 *REVUE HELLÉNIQUE DE DROIT INTERNATIONAL* 595 (1997), *summarized in* Ilias Bantekas, Prefecture of Voiotia v. Federal Republic of Germany, 92 *AM. J. INT’L L.* 765 (1998). *But see* Sévrine Knuchel, *State Immunity and the Promise of Jus Cogens*, 9 *NW. J. INT’L HUM. RTS.* 149, 159–63 (2011) (arguing that international law does not formally recognize a *jus cogens* exception to the application of immunity rules, but noting that such a rule might be appropriate as a matter of policy). *See generally* Dapo Akande & Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 *EUR. J. INT’L L.* 815 (2010) (articulating a more nuanced view on the relationship between international crimes and immunity).

71. U.S. courts have routinely rejected such arguments. *See, e.g.*, *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992) (rejecting argument that there is a *jus cogens* exception to the FSIA). There is scant evidence of a contrary trend in other jurisdictions. *See also* Rep. of the Int’l Law Comm’n, 43d Sess., *supra* note 46, at 172. *See generally* 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) (noting that all states generally adhere to a restrictive theory of immunity drawn along the lines of the public-private distinction).

72. 28 U.S.C. § 1605 (2006). Under the statute, the property in question, or property exchanged for that property, must either be present in the United States in connection with a commercial activity carried on in the United States by the foreign state, or be owned or operated by an agency or instrumentality that is engaged in a commercial activity in the United States and that is the defendant in the lawsuit. *Id.*

73. *See* 28 U.S.C. § 1605A (2006). Section 1605A represents a revision and recodification of the “state-sponsored terrorism” exception first enacted in 1996 as § 1605(a)(7). *See* 28 U.S.C. § 1605(a)(7) (2006), *repealed by* Pub. L. No 110-181, § 1803, 122 Stat. 338–44 (2008). The state in question must have been designated as a state sponsor of terrorism under § 6(j) of the Export Administration Act of 1979, 50 U.S.C. App. § 2405(j) (2000), or § 620A of the Foreign Assistance Act of 1961, 22 U.S.C. § 2371 (2000), and the damages must have been “caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources” for such an act, engaged in by an official, employee, or agent of the foreign state in question while acting within the scope of his or her office, employment, or agency. 28 U.S.C. § 1605(a)(7) (current version at § 1605A). Moreover, if the act occurred in the foreign state against which the claim is brought, the claimant must have afforded that state “a reasonable opportunity to arbitrate the claim.” *Id.* Either

The omission of comparable exceptions to immunity in the Convention reflects the fact that such exceptions do not enjoy broad acceptance in the international community. The FSIA exceptions related to expropriation and terrorism have existed for several decades, and the litigation they have generated is well-known here and abroad.<sup>74</sup> Questions of state responsibility aside, it cannot be said as a matter of general practice that foreign states accept, or that forum states provide, jurisdiction to adjudicate disputes based solely on the allegation that the sovereign acts in question violated relevant treaty provisions or principles of customary international law—peremptory or otherwise.

By the same token, it would read far too much into the consensus adoption of the Convention to assert that the absence of such exceptions in the text renders existing statutory provisions unlawful under customary international law such as those in the Foreign Sovereign Immunities Act. Nothing in the negotiating history of the Convention supports that conclusion.<sup>75</sup> The issues remain controversial.

#### IV. SUBSEQUENT DEVELOPMENTS

Since the Convention is not yet in force, no authoritative record yet exists to indicate how the states party to the Convention will interpret and apply it in practice. Some clear implications can be drawn, however, from the 2006 decision of the UK House of Lords in *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*,<sup>76</sup> and from the case now pending before the International Court of Justice (brought by Germany against Italy) on the question of state immunity.<sup>77</sup>

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the claimant or the victim must have been a U.S. national at the time that the underlying conduct occurred. *Id.*

74. See, e.g., DICKINSON ET AL., *supra* note 16, at 217–329 (2004) (providing an extensive analysis of the FSIA); FOX, *supra* note 15, at 350 (“There is no parallel to this exception [for claims relating to expropriation] in the practice of other States, perhaps not surprisingly in view of the controversial nature of what constitutes a ‘taking’ of property contrary to international law.”).

75. See generally reports and other documents comprising the negotiating history of the Convention. *Ad Hoc Committee on Jurisdictional Immunities of States and Their Property*, UN.ORG, <http://www.un.org/law/jurisdictionalimmunities> (last visited Oct. 1, 2011).

76. See *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, [2007] 1 A.C. 270 (H.L.) (appeal taken from Eng.) (U.K.) (affirming a claim of state immunity and interpreting various provisions of the UN Convention on Jurisdictional Immunities).

77. See *Jurisdictional Immunities of the State (Ger. v. It.)*, Application Instituting Proceedings (Dec. 23, 2008), available at <http://www3.icj-cij.org/docket/files/143/14923.pdf>.

In *Jones*, the House of Lords confronted the question of whether the doctrine of state immunity, as enacted in UK law, precluded a civil action against the Kingdom of Saudi Arabia and several of its officials in respect of allegations that they committed “severe, systematic and injurious torture” against four UK citizens in Riyadh.<sup>78</sup> Relying on the State Immunity Act of 1978, the Court of Appeal had dismissed the plaintiffs’ claims against the Kingdom itself but permitted litigation to proceed against the individual Saudi officials who were alleged to have conducted or been responsible for the abuses in question.<sup>79</sup> The House of Lords rejected that decision, privileging immunity over the right to recover for serious injuries resulting from alleged *jus cogens* violations.

At the outset of his opinion, Lord Bingham unambiguously embraced the doctrine of foreign official immunity: “[T]he foreign state is entitled to claim immunity for its servants as it could if sued itself.”<sup>80</sup> The reason, he said, is straightforward: “The foreign state’s right to immunity cannot be circumvented by suing its servants or agents.”<sup>81</sup> Moreover, he continued:

International law does not require, as a condition of a state’s entitlement to claim immunity for the conduct of its servant or agent, that the latter should have been acting in accordance with his instructions or authority. A state may claim immunity for any act for which it is, in international law, responsible, save where an established exception applies.<sup>82</sup>

Since, in the case at hand, all of the individual defendants were acting as servants or agents of the Kingdom, their actions were attributable to the state. Thus, they were entitled to immunity on the same basis as the state itself.

Moreover, Lord Bingham concluded, the fact that the claims against the defendants were based on alleged violations of peremptory norms could not overcome that immunity. In its *Arrest Warrant* decision, he noted, “[t]he International Court of Justice has made plain that breach of a *jus cogens* norm of international law does not suffice to confer jurisdiction.”<sup>83</sup> In this regard, he stressed that (a)

78. *Jones*, [2007] 1 A.C. 270 (H.L.) 272.

79. *See id.* at 308–10.

80. *Id.* at 275.

81. *Id.*

82. *Id.* at 276–78. Lord Bingham acknowledged that in some “borderline cases” a question might be raised “whether the conduct of an individual, although a servant or agent of the state, had a sufficient connection with the state to entitle it to claim immunity for his conduct.” *Id.* at 276. But that issue pertains to the official’s relationship to the state, not to the nature of the conduct at issue.

83. *Id.* at 286 (citing *Armed Activities on the Territory of the Congo (Congo v. Rwanda)*, 2006 I.C.J. 6, para. 64 (Feb 3)).

the UN Convention Against Torture does not confer universal civil jurisdiction over claims based on torture, and (b) the UN Convention on State Immunities “provides no exception from immunity where civil claims are made based on acts of torture.”<sup>84</sup> The latter convention, he said, stands as “the most authoritative statement available on the current international understanding of the limits of state immunity in civil cases, and the absence of a torture or jus cogens exception is wholly inimical to the claimants’ contention.”<sup>85</sup> In short, Lord Bingham stated:

[T]here is no evidence that states have recognized or given effect to an international law obligation to exercise universal jurisdiction over claims arising from alleged breaches of peremptory norms of international law, nor is there any consensus of judicial and learned opinion that they should.<sup>86</sup>

In a companion opinion, Lord Hoffman reached the same conclusions. Referring to the ECtHR’s judgment in *Al-Adsani*, he said the fact that the rule against torture may be peremptory does not automatically confer civil jurisdiction or override immunity, and nothing in the UN Torture or State Immunities Conventions or the *Arrest Warrant* decision provides otherwise.<sup>87</sup> Lord Hoffman pointed to the superior court’s notation in *Bouzari v. Islamic Republic of Iran* that there is no general state practice which provides an exception from state immunity for acts of torture committed outside the forum state.<sup>88</sup>

In addition, Lord Hoffman concluded, the UN State Immunities Convention makes clear that:

[A]s a matter of international law, the same immunity against suit in a foreign domestic court which protects the state itself also protects the individuals for whom the state is responsible. . . . The traditional way of expressing this principle in international law is to say that the acts of state officials acting in that capacity are not attributable to them personally but only to the state.<sup>89</sup>

Thus, “[t]he official [of a state] acting in that capacity is entitled to the same immunity as the state itself.”<sup>90</sup> A state, he continued, will “incur responsibility in international law if one of its officials, under colour of his authority, tortures a national of another state, even though the acts were unlawful and unauthorized.”<sup>91</sup> But that

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84. *Id.* at 285–86.

85. *Id.* at 286.

86. *Id.* para. 27.

87. *Id.* paras. 45–48.

88. *Id.* para. 60 (citing *Bouzari v. Islamic Republic of Iran*, [2002] O.R. No. 1624 (Can. Ont. Sup. Ct. J.) (Swinton, J.)).

89. *Id.* para. 66.

90. *Id.* para. 69.

91. *Id.* para. 78.

responsibility does not deprive the state of its immunity from jurisdiction in foreign domestic courts.<sup>92</sup>

The International Court of Justice may have the opportunity to render another decision on some of these issues. In late 2008, the Federal Republic of Germany instituted proceedings against the Italian Republic, alleging that because the Italian courts “have repeatedly disregarded the jurisdictional immunity of Germany as a sovereign State,” Italy had violated its obligations toward Germany under international law.<sup>93</sup>

The trigger for this dispute was a judgment of the Italian *Corte di Cassazione* issued in March 2004 in *Ferrini v. Federal Republic of Germany*,<sup>94</sup> upholding the civil jurisdiction of Italian courts over a claim for compensation by an individual who was deported to Germany during World War II and required to perform forced labor in the armaments industry. The doctrinal basis for the *Ferrini* decision was precisely that foreign states are not protected by immunity from claims based on violation of fundamental human rights norms.<sup>95</sup>

In the wake of this decision, Germany said, numerous other proceedings were instituted against Germany before Italian courts by persons who also suffered injury as a consequence of the war.<sup>96</sup> Because the *Ferrini* judgment was subsequently confirmed in additional decisions rendered in 2008, Germany expressed concern that hundreds of additional cases might be brought against it.<sup>97</sup> Enforcement measures were in fact taken against German assets in Italy—including against the German–Italian cultural exchange center (Villa Vigoni).<sup>98</sup>

In addition to the claims brought against it by Italian nationals, Germany also cited efforts by Greek nationals to enforce in Italy a judgment obtained in Greece based on a massacre committed by German military units during their withdrawal in 1944. The Greek

92. See *id.* para. 52 (“[A] state whose national has been tortured by the agents of another state may claim redress before a tribunal which has the necessary jurisdiction. But that says nothing about state immunity in domestic courts.”).

93. Jurisdictional Immunities of the State, Application Instituting Proceedings, *supra* note 77, at 4.

94. *Ferrini v. Federal Republic of Germany*, Cass., sez. un., 11 marzo 2004, n.5044 (It.), translated in 128 I.L.R. 658 (2004).

95. See generally Pasquale de Sena & Francesca de Vittor, *State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case*, 16 EUR. J. INT’L L. 89 (2005) (analyzing the *Ferrini* decision’s treatment of state immunity from a human rights perspective).

96. See Jurisdictional Immunities of the State, Application Instituting Proceedings, *supra* note 77, at 16.

97. See *id.* at 4.

98. See *id.* at 16.

Supreme Court previously rejected Germany's claims of immunity and ordered Germany to pay for atrocities committed by its occupation forces in the village of Distomo in 1940.<sup>99</sup>

In its application, Germany asked the Court to rule that Italy had failed to respect Germany's jurisdictional immunities by (1) allowing civil claims to proceed in its courts against Germany based on violations of international humanitarian law by the German Reich during World War II, (2) permitting enforcement actions against Villa Vigoni (German state property used for government non-commercial purposes), and (3) enforcing Greek judgments based on similar occurrences as those being litigated in Italian courts.<sup>100</sup> In an accompanying declaration Germany acknowledged the "untold suffering inflicted on Italian men and women" during World War II.<sup>101</sup>

The case remains in its preliminary stages. Germany filed its memorial in June 2009 and Italy submitted its counter-memorial in December 2009.<sup>102</sup> In that counter-memorial, Italy asserted a counter-claim alleging that Germany violated its obligations under international law by failing to provide reparations to the victims of war crimes and crimes against humanity perpetrated by the Third Reich.<sup>103</sup> In July 2010, the Court held the Italian counter-claim inadmissible because it fell outside the scope of the relevant provisions of the European Convention for the Peaceful Settlement of Disputes of April 29, 1957, on which the Court's jurisdiction is based.<sup>104</sup> The Court then ordered Germany to file its Reply to the Italian counter-memorial by October 14, 2010, with Italy's Rejoinder due January 14, 2011.<sup>105</sup> On January 13, Greece filed an application to intervene in the proceeding, asserting that "its intention is to solely

99. See *Prefecture of Voiotia v. Federal Republic of Germany*, Protodikeia Polymele Livadia [Pol. Pr. Liv.] [District Court Livadia] 137/1997 (Greece), translated in Maria Gavouneli, *War Reparation and State Immunity*, 50 REVUE HELLÉNIQUE DE DROIT INTERNATIONAL 595 (1997), summarized in Ilias Bantekas, *Prefecture of Voiotia v. Federal Republic of Germany*, 92 AM. J. INT'L L. 765, 765-68 (1998). For a discussion of subsequent proceedings in this case, see Kerstin Bartsch & Björn Elberling, *Jus Cogens vs. State Immunity, Round Two: The Decision of the European Court of Human Rights in the Kalogeropoulou et al. v. Greece and Germany Decision*, 4 GERMAN L.J. 477 (2003).

100. See *Jurisdictional Immunities of the State*, Application Instituting Proceedings, *supra* note 77, at 18.

101. See *id.* at 20.

102. See *Jurisdictional Immunities of the State (Ger. v. It.)*, Order, paras. 2-3 (July 6, 2010), available at <http://www3.icj-cij.org/docket/files/143/16027.pdf> (listing the filing dates of the memorials).

103. See *Jurisdictional Immunities of the State (Ger. v. It.)*, Counter-Memorial, para. 7.2 (Dec. 22, 2009), available at <http://www3.icj-cij.org/docket/files/143/16017.pdf>.

104. See *Jurisdictional Immunities of the State*, Order, *supra* note 102, paras. 31-33.

105. *Id.* para. 35.

intervene in the aspects of the procedure relating to judgments rendered by its own [domestic] . . . Tribunals and Courts on occurrences during World War II and enforced (exequatur) by the Italian Courts.”<sup>106</sup> On July 4, 2011, the Court granted that application and set further filing deadlines.<sup>107</sup>

The *Ferrini* judgment has been the subject of considerable critical evaluation, and the implications of the ICJ’s decision, however it rules, will be significant.<sup>108</sup> Some believe that, in the absence of substantial support in either the conventional texts or decisional material referred to above, it is unlikely that the ICJ will endorse the position taken by the Italian *Corte di Cassazione*.<sup>109</sup> Others take a contrary view.<sup>110</sup> To the extent that the Court gives serious consideration to the UN Immunities Convention, however, it will hard-pressed to find support for the proposition that states have in fact consented as a matter of treaty law to a waiver of immunity for alleged violations of *jus cogens*.

## V. CONCLUSION

From the perspective of international law, the questions raised by *Samantar* can be summarized in the following manner:

- (1) Do individual foreign officials enjoy immunity *ratione materiae* for acts taken on behalf of the state they represent?

106. Jurisdictional Immunities of the State (Ger. v. It.), Application for Intervention, at 5 (Jan. 13, 2011), available at <http://www3.icj-cij.org/docket/files/143/16304.pdf>.

107. See Jurisdictional Immunities of the State (Ger. v. It.), Order, para. 34 (July 4, 2011), available at <http://www.icj-cij.org/docket/files/143/16556.pdf>. For a discussion of the immunity issues presented in this case, see generally Jasper Finke, *Sovereign Immunity: Rule, Comity or Something Else?*, 21 EUR. J. INT’L L. 853 (2010).

108. See, e.g., HAZEL FOX, *THE LAW OF STATE IMMUNITY* (2d ed. 2008); Ronald J. Bettauer, *Germany Sues Italy at the International Court of Justice on Foreign Sovereign Immunity—Legal Underpinnings and Implications for U.S. Law*, 13 ASIL INSIGHTS, Nov. 19, 2009, available at <http://www.asil.org/files/insight091119pdf.pdf>.

109. See, e.g., Michele Potestà, *State Immunity and Jus Cogens Violations: The Alien Tort Statute Against the Backdrop of the Latest Developments in the “Law of Nations,”* 28 BERKELEY J. INT’L L. 571, 586 (2010) (“[T]he stance taken by Italian courts appears to be (at least for the time being) an isolated position on the international level. . . . The absence of an explicit exception for *jus cogens* violations would appear to be an insurmountable obstacle to denying sovereign immunity in cases of gross human rights violations.”).

110. See, e.g., Graham Ogilvy, Note, *Belhas v. Ya’alon: The Case for a Jus Cogens Exception to the Foreign Sovereign Immunities Act*, 8 J. INT’L BUS. & L. 169 (2009) (arguing that the D.C. Circuit should have found a *jus cogens* exception to the Foreign Sovereign Immunity Act in *Belhas*).



- (2) Does the "tort exception" apply to extraterritorial acts when committed against citizens of the forum state?
- 3) Does international law recognize "universal civil jurisdiction" for *jus cogens* violations?

The UN Immunities Convention provides a definitive and affirmative answer to the first question. Under Article 2(1)(b)(iv), "representatives of the State acting in that capacity" are entitled to immunity on the same basis as the state itself. A state party failing to accord immunity to foreign officials for official acts would thus violate a central provision of the Convention.

As to the second question, the Convention is likewise unambiguous. The "tort exception" in Article 12 requires that the alleged act or omission causing the claimant's death, injury, or damage to property must have occurred in whole or in part in the territory of the forum state.<sup>111</sup> In addition, the official responsible for that act or omission must have been present in that state at the time of the act or omission.<sup>112</sup> In light of these specific requirements, the Convention simply cannot properly be read to support a less rigorous rule under which, for example, a state party's domestic law extended the exception to extraterritorial torts.

Finally, the Convention provides no textual basis whatsoever to indicate that states must provide civil jurisdiction over claims of alleged violations of peremptory norms committed by officials of foreign governments within their own territory. The absence of any such provision is significant in light of the well-known cases and vigorous debate over the issue at the time of the negotiations. The best interpretation is that states—at least those actively involved in the crafting of the Convention—did not believe that such jurisdiction was supported by international law and practice. Moreover, nothing in the Convention or its negotiating history supports a broad "human rights" or *jus cogens* exception to immunity.

At the same time, it cannot be said that the Convention expressly prohibits the exercise of such jurisdiction so that a state party would not violate its treaty obligations if, like Italy, its courts were to interpret domestic law as removing immunity for such claims. Whether or not customary international law would support that assertion is presumably to be decided by the International Court of Justice in the pending Germany–Italy proceeding.

In most areas, the Convention's text reflects a global consensus as to the specific areas in which states and state enterprises can no longer claim absolute immunity from the proper jurisdiction of foreign courts and agencies. This is especially clear with respect to

111. UN Convention on Jurisdictional Immunities, *supra* note 6, art. 12.

112. *Id.*

states' commercial activities. For the most part, the exceptions to the general rule of foreign state immunity are widely recognized and will operate to provide courts with reliable means of balancing the legitimate interests of states when acting in their sovereign capacity on the one hand, with the need to provide appropriate means of recourse for those who deal with, or are affected by, states when they act in a private capacity on the other. The result should be greater harmonization and compatibility within the world community, reflecting the shared interests of states in this increasingly important area of law.

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