Vanderbilt Journal of Transnational Law

Volume 44
Issue 5 *November 2011*

Article 1

2011

Abusing the Authority of the State: Denying Foreign Official Immunity for Egregious Human Rights Abuses

Beth Stephens

Abusing the Authority of the State: Denying Foreign Official Immunity for Egregious Human Rights Abuses

Beth Stephens[*]

ABSTRACT

Government officials accused of human rights abuses often claim that they are protected by state immunity because only the state can be held responsible for acts committed by its officials. This claim to immunity is founded on two interrelated errors. First, the post-World War II human rights transformation of international law has rendered obsolete the view that a state can protect its own officials from accountability for human rights violations. Second, officials can be held individually responsible for their own actions even when international law also holds the states liable for those acts. This Article begins with an analysis of U.S. foreign official immunity norms after the Supreme Court decision in Samantar v. Yousuf, *130 S. Ct. 2278 (2010). Based on a review of the historical roots of state and official immunity and the impact of modern human rights law on the principles underlying foreign official immunity, the Article then argues that both logic and policy support denying immunity to officials even if the state itself is granted immunity.*

TABLE OF CONTENTS

---

* Professor, Rutgers-Camden School of Law. As a member of the Board of Directors of the Center for Justice and Accountability, Professor Stephens represented the plaintiffs in *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010). Thanks to William Casto, Chimène Keitner, Lorna McGregor, and Sangeeta Shah for helpful comments, and to Rutgers-Camden reference librarian David Batista for his assistance on this and other projects.

I. INTRODUCTION

In a pattern repeated multiple times throughout 2011, tens of thousands of citizens gathered peacefully to protest the repressive actions of unelected governments. Senior government leaders ordered state officials to detain and torture the protesters or to shoot into unarmed crowds. The domestic legal systems, controlled by the regimes in each of these countries, provided no means by which those injured could seek redress or those responsible could be held accountable. The few international tribunals offered little or no relief because of their limited mandates and limited resources.

After being stymied elsewhere, victims and survivors of these massive abuses are likely to seek justice in other countries. But if the domestic courts of a foreign state seek to hold accountable government officials responsible for human rights abuses, those officials will inevitably claim immunity from criminal prosecution or civil lawsuits. They will argue that they are protected by the state's own immunity because only the state can be held responsible for acts committed by its officials, even if those actions violate international law.

This claim to immunity is founded on two interrelated errors, one based in history and one in logic. First, the human rights transformation of international law that began in the aftermath of World War II has also transformed immunity law. International human rights norms have rendered obsolete the view that a state can protect its own officials from accountability for international human rights violations. Second, immunity absolutists err when they insist that, because the state is responsible under international law for acts committed in the exercise of governmental authority, logic dictates that the officials who commit such acts must be protected by the state's immunity.

In the United States, the international law principles underlying official immunity have new relevance in the wake of the 2010 Supreme Court decision in *Samantar v. Yousuf*.[1] As explained in Part II, *Samantar* held that the immunity of foreign officials is governed by the common law, not by the Foreign Sovereign Immunities Act

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

(FSIA).[2] The post-*Samantar* common law will likely look, in part, to international law. To provide context for an understanding of the international doctrines governing official immunity, Part III reviews the historical roots of both state and official immunity, explaining how each has evolved to reflect significant changes in international law and foreign relations. Part IV explores the transformative impact of modern human rights law on the principles underlying foreign official immunity. In the era of international human rights norms that override conflicting domestic laws, foreign officials who commit egregious abuses cannot shelter behind the immunity of the state.[3]

Finally, as explained in Part V, both logic and policy support holding both states and their officials responsible for international human rights violations and denying immunity to officials even if the state itself is granted immunity. The policies underlying the various categories of immunity differ, and offering immunity to one actor does not require immunizing others. States themselves are governed by immunity rules that rest on comity and the requirements of diplomacy. Similar policies underlie the personal immunities granted to certain high-ranking officials, including heads of state and diplomats, while they are in office.[4] The functional immunities of state officials serve more limited purposes that are outweighed by the policies reflected in international human rights norms.

The category of human rights violations that should not receive immunity might be defined by different terms, including international crimes, *jus cogens* violations, violations that trigger extraterritorial jurisdiction, and egregious or core human rights violations. These different terms are not interchangeable, and some commentators emphasize and rely on the distinctions.[5] I intentionally

---

2. *Id.* at 2289–92 (interpreting the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602–1611 (2006)).

3. Although similar principles should deny *domestic* law immunity to government officials who commit egregious human rights abuses, far too many states refuse to hold their own officials accountable. Domestic immunity, however, is beyond the scope of this article.

4. Personal immunity, or immunity *ratione personae*, provides broad immunity for persons holding certain government positions, including heads of state and diplomats, while functional immunity, or immunity *ratione materiae*, refers to immunity that covers particular acts of state officials. *See* Chimène I. Keitner, *The Common Law of Foreign Official Immunity*, 13 GREEN BAG 2D 61, 63–66 (2010) (defining and applying the terms).

5. *See, e.g.*, Dapo Akande & Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EUR. J. INT'L L. 815, 832–38, 840–41 (2011) (rejecting argument that immunity cannot apply to violations of *jus cogens* norms, but arguing against immunity for international violations that trigger extraterritorial jurisdiction); *see also* Beth Stephens, *The Modern Common Law of Foreign Official Immunity*, 79 FORDHAM L. REV. 2669, 2709 (2011) (discussing, in the U.S. context, using the term "*Sosa* norms" to refer to the clearly defined, widely accepted norms defined in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and arguing that violations of those norms do not trigger common law immunity).

use the broadest terms, egregious or core human rights violations, to make a broader point. International human rights norms fundamentally altered the relationship between international law and domestic human rights violations. Government officials have no claim to immunity in foreign or international courts for acts in violation of those norms.

II. CUSTOMARY INTERNATIONAL LAW AND THE POST-*SAMANTAR* COMMON LAW OF OFFICIAL IMMUNITY

Prior to the enactment of the FSIA in 1976, only a handful of reported U.S. cases considered whether foreign officials who were not protected by personal immunity were nevertheless immune from suits arising out of acts taken in the exercise of governmental authority.[6] Where the lawsuits would have required some action by the foreign government—payment of funds or other injunctive relief—the courts generally recognized immunity. For example, in *Heaney v. Government of Spain*,[7] the court granted immunity to a foreign official because the case sought to enforce a contract against the foreign state.[8]

In other cases, however, the courts generally denied immunity, reasoning that, in suits against officials as individuals, the fact that the defendants exercised governmental authority did not render them immune from the jurisdiction of the U.S. courts.[9] These decisions were generally consistent with the approach adopted by the 1965 Restatement (Second) of Foreign Relations Law, which stated that immunity extended to a foreign official "with respect to acts

---

6. For further analysis of these cases, see Keitner, *supra* note 4, at 67–69; Chimène I. Keitner, *Officially Immune? A Response to Bradley and Goldsmith*, 36 YALE J. INT'L L. ONLINE 1, 3 (2010) [hereinafter Keitner, *Officially Immune?*]. In a forthcoming publication, Professor Keitner discusses additional, previously overlooked cases from the 1790s that confirm that foreign officials were not generally granted immunity from suit in U.S. courts. Chimène I. Keitner, *The Lost History of Foreign Official Immunity*, 87 N.Y.U. L. REV. (forthcoming 2012).

7. Heaney v. Gov't of Spain, 445 F.2d 501, 503–04 (2d Cir. 1971).

8. *Id.* at 504 ("[T]he effect of exercising jurisdiction would be to enforce a rule of law against the state . . . .") (quoting RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 66(f) (1965) (internal quotation marks omitted)); *see also* Oliner v. Canadian Pac. Ry. Co., 311 N.Y.S.2d 429, 434 (App. Div. 1970) (recognizing immunity because a government agency was the real party in interest).

9. *See, e.g.*, Lyders v. Lund, 32 F.2d 308, 308–09 (N.D. Cal. 1929) (denying immunity because the state was not the real party in interest and the officer had acted "in excess of his authority or under void authority"); Pilger v. U.S. Steel Corp., 130 A. 523, 524 (N.J. 1925) (denying immunity because the public official had acted unlawfully).

performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state."[10]

The FSIA codified the immunity of foreign states but made no mention of foreign official immunity. A majority of the circuit courts interpreted the FSIA as covering officials, but, consistent with the U.S. approach to domestic official immunity, held that immunity applied only to acts within an official's lawful authority.[11] As a result, the courts denied immunity in cases alleging egregious human rights abuses.[12]

Despite the majority support in the circuits, application of the FSIA to individual government officials was a stretch: the statute made no mention of officials; the Executive Branch consistently maintained that it did not address officials; and the legislative history gave no indication that Congress had considered official immunity.[13] In 2010, in *Samantar v. Yousuf*, the Supreme Court ruled unanimously that the FSIA did not apply to foreign officials.[14] The Court made clear, however, that foreign officials might nevertheless be entitled to nonstatutory immunity, stating that "in some circumstances the immunity of the foreign state extends to an individual for acts taken in his official capacity."[15]

The *Samantar* opinion offered little guidance as to the substance of the common law immunity that attaches to some officials "in some circumstances."[16] Courts and commentators seeking to develop rules governing common law immunity are likely to look at international law for guidance.[17] The following two parts offer an overview of that

---

10. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 66(f) (1965). The Restatement (Second) has been superseded by the Restatement (Third) of the Foreign Relations Law of the United States (1987).

11. *See, e.g.*, Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1097 (9th Cir. 1990) (holding that a Philippine government official was entitled to immunity "for acts committed in his official capacity," but not for "acts beyond the scope of his authority"). For additional cases, see Samantar v. Yousuf, 130 S. Ct. 2278, 2283 n.4 (2010).

12. *See, e.g.*, Hilao v. Estate of Marcos (*In re* Estate of Marcos, Human Rights Litig.), 25 F.3d 1467, 1472 (9th Cir. 1994) (no immunity for acts of torture); Trajano v. Marcos (*In re* Estate of Marcos, Human Rights Litig.), 978 F.2d 493, 497–98 (9th Cir. 1992) (same).

13. *Samantar*, 130 S. Ct. at 2286–91.

14. *Id.* at 2292.

15. *Id.* at 2290–92. ("Even if a suit is not governed by the Act, it may still be barred by foreign sovereign immunity under the common law.").

16. *Id.*

17. *See id.* at 2289 (stating that one purpose of the FSIA was "codification of international law at the time of the FSIA's enactment"); Brief for the United States as Amicus Curiae Supporting Affirmance at 27, Samantar v. Yousuf, 130 S. Ct. 2278 (2010) (No. 08-1555) ("[F]idelity to international norms [is an] important factor[ ] that the Executive Branch considers in determining whether to suggest immunity for particular foreign officials."). As I have explained elsewhere, courts developing common law immunity principles will find the most useful guidance in the extensive U.S. jurisprudence holding that foreign officials can be held accountable for violations of widely accepted, clearly defined international human rights norms. Stephens, *supra*

law, beginning in Part III with a brief history that explains the lack of international consensus about the reach of foreign official immunity. Part IV then addresses the dramatic impact of human rights law on the principles underlying foreign official immunity.

III. INTERNATIONAL LAW AND FOREIGN OFFICIAL IMMUNITY: THE HISTORICAL BACKGROUND

International law governing immunity has reached consensus on the application of immunity to only a small set of international actors. No widely ratified international agreements establish the framework for foreign immunity. A broad treaty, finalized in 2004, has only twelve state parties and has yet to come into force.[18] Narrow treaties afford personal immunity to diplomats, consular officials, and members of certain special missions,[19] while customary international law recognizes the personal immunity of sitting heads of state and foreign ministers.[20] The lack of international agreement as to other immunities leaves states to determine their immunity doctrine through domestic law. But few states have statutes governing foreign immunity, and those statutes rarely mention the immunities of officials.[21] States often look to international law for guidance, but just as often arrive at different understandings of its substance.

---

note 5, at 2704–10. Courts will likely also look to domestic immunity principles and pre-FSIA immunity decisions. *Id.* at 2685–704.

18. United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, U.N. Doc A/59/38 (Dec. 2, 2004) [hereinafter UN Convention on Jurisdictional Immunities], will come into force when ratified by thirty states. *Id.* art. 30. For the status of ratifications, see *Status: United Nations 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 (last updated Oct. 15, 2011).

19. *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, 596 U.N.T.S. 261; Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

20. *See* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 20–24 (Feb. 14).

21. In addition to the United States, the United Kingdom, Argentina, Australia, Canada, Pakistan, Singapore, and South Africa have enacted immunity statutes. ANDREW DICKINSON ET AL., STATE IMMUNITY: SELECTED MATERIALS AND COMMENTARY 329–442, 461–522 (2004). Fox mentions that Malaysia and Malawi also have immunity statutes, as do "other small common law jurisdictions" such as St. Kitts. HAZEL FOX, THE LAW OF STATE IMMUNITY 201 n.1 (2d ed. 2008). The Australian statute appears to be unique in explicitly discussing the immunity of natural persons aside from heads of state. *See Foreign States Immunities Act 1985* (Cth) art. 22 (Austl.) (stating that the statute applies to a "separate entity of a foreign State"); *id.* art. 3 (defining "separate entity" to include natural persons); Mizushima Tomonori, *The Individual as Beneficiary of State Immunity: Problems of the Attribution of* Ultra Vires *Conduct*, 29 DENV. J. INT'L L. & POL'Y 261, 264–65 (2001) (explaining that the Australian statute's explicit mention of immunity for natural persons is exceptional).

The lack of consensus on key issues of foreign state immunity reflects the absence of agreed upon historical foundations. The customary international law recognition of immunity as a bar to the jurisdiction of foreign states developed during the nineteenth century.[22] Legal historians trace the doctrine to the personal inviolability of absolute monarchs and to the practical reality that friendly relations required that ambassadors and diplomats travel unimpeded.[23] The recognition of state immunity carried a price, because immunity constitutes an exception to a state's authority over people and things within its territory.[24] The classic Supreme Court decision on sovereign immunity, *The Schooner Exchange v. McFaddon*,[25] articulated this tension, recognizing immunity as a limited exception to territorial jurisdiction.[26] Even during immunity's high point in the nineteenth century, states continued to claim the right to assert territorial jurisdiction, but recognized specific exceptions in which they would grant immunity.[27]

The tension produced by the competing demands of jurisdiction and immunity has triggered repeated modifications of immunity doctrines. In the twentieth century, as states increasingly engaged in commercial activities, many states adopted what is now known as the "restrictive theory," which denies immunity to foreign states for

---

22. THEODORE R. GIUTTARI, THE AMERICAN LAW OF SOVEREIGN IMMUNITY 3 (1970).

23. *Id.* at 7–8 & 7 n.5; Harvard Research in Int'l Law, *Competence of Courts in Regard to Foreign States*, 26 AM. J. INT'L L. SUPPLEMENT 451, 473, 527 (1932) (draft convention with reporter commentary).

24. GIUTTARI, *supra* note 22, at 6–7 & n.4 (quoting 1 CHARLES C. HYDE, INTERNATIONAL LAW 815–16 (2d ed. 1945)); *see also* Rosalyn Higgins, *Certain Unresolved Aspects of the Law of State Immunity*, 29 NETH. INT'L L. REV. 265, 271 (1982) ("It is sovereign immunity which is the exception to jurisdiction and not jurisdiction which is the exception to a basic rule of immunity."); Stacy Humes-Schulz, Note, *Limiting Sovereign Immunity in the Age of Human Rights*, 21 HARV. HUM. RTS. J. 105, 135 (2008) (same).

25. The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812).

26. In an opinion by Chief Justice John Marshall, the Court noted that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself." *Id.* at 136. The view that immunity is a voluntary ceding of territorial jurisdiction remains the law of the United States, which views immunity as "a matter of grace and comity." Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983).

27. *See, e.g.*, Lee M. Caplan, *State Immunity, Human Rights, and* Jus Cogens*: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L L. 741, 749–55 (2003) (analyzing history of state immunity and concluding that states retain the sovereign authority to decide whether or not to grant immunity to other states); Lorna McGregor, *Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty*, 18 EUR. J. INT'L L. 903, 914–15 (2007) (discussing the historical flexibility of immunity doctrine and its status as an exception to territorial sovereignty); Jane Wright, *Retribution but No Recompense: A Critique of the Torturer's Immunity from Civil Suit*, 30 OXFORD J. LEGAL STUD. 143, 157–59 (2010) (explaining that international law supports state authority to assert jurisdiction in the absence of specific immunity rules to the contrary).

commercial acts.[28] The new doctrine was controversial, as the socialist states insisted that, in their political–economic structures, such acts were public, not private, and were therefore entitled to immunity.[29] But the majority of states nevertheless adopted the new approach without seeking international agreement or authorization.[30] The adoption of the restrictive theory, which is now the dominant approach to state immunity,[31] reflects the flexibility of immunity doctrines, and the international community's ability to adjust immunity norms to respond to new legal and economic developments.

In some circumstances, states extend the immunity that they grant to each other to foreign officials who act on behalf of a foreign state. But individuals are different from states in ways that impact immunity. Officials are separate legal entities, so claims against them do not necessarily implicate the state. The state need not defend or indemnify officials who are sued or held criminally responsible—and may even denounce an official's actions.[32] Officials eventually finish their terms and sever their ties with the state. They may also leave their home state, placing themselves within the territorial jurisdiction of another state. Perhaps most important, individuals have agency or moral choice: they have the option of choosing whether to comply with state policies.

Perhaps as a result of these differences, the international doctrine governing foreign official immunity is even less settled than the immunity governing the state itself. The few early domestic court decisions that addressed the immunity of foreign officials reflect a hesitation to cede power over persons within the forum state's territory. In a 1932 Polish case described by Mizushima Tomonori, for example, a Polish customs officer was denied immunity for activities arising out of his state employment.[33] Similarly, a 1945 Irish decision

---

28. GIUTTARI, *supra* note 22, at 3–4. The United States adopted the restrictive doctrine in 1952 and largely codified it in the FSIA. *See Verlinden*, 461 U.S. at 486–89 (summarizing this history).

29. *See* Caplan, *supra* note 27, at 749 (noting that, under socialist theory, politics and trade are both public functions of the socialist state and therefore equally entitled to sovereign immunity).

30. McGregor, *supra* note 27, at 915.

31. FOX, *supra* note 21, at 201 (noting a "wide and ever increasing," but not universal, support for the restrictive doctrine).

32. In the modern U.S. civil litigation for human rights abuses, for example, foreign governments generally have not chosen to defend or indemnify their former officials. Some governments actually waive the former officials' immunity. Most remain silent. In cases in which plaintiffs collected damages awards from defendants, the governments have not indemnified the officials. *See* BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 533–34 (2d ed. 2008) (discussing judgments in human rights cases); *id.* at 383–84 (discussing waivers of immunity); Stephens, *supra* note 5, at 2681–82, 2716–17 (discussing foreign governments' role in U.S. litigation against their former officials and noting that the governments generally do not attempt to defend their officials' actions).

33. Polish Officials in Danzig case, 6 Ann. Dig. 130 (High Ct. 1932), *discussed in* Tomonori, *supra* note 21, at 266–67. For additional analysis of the cases discussed in

refused to grant immunity to a Spanish official sued for breach of contract with his government.[34] The court noted that "no relief is sought against any person save the appellant. He is sued in his personal capacity and the judgment . . . will bind merely the appellant personally, and . . . cannot be enforced against any property save that of the appellant."[35] The court stated that no rule of international law authorized a claim of immunity for foreign officials "[w]here the Sovereign is not named as a party and where there is no claim against him for damages or otherwise, and where no relief is sought against his person or his property . . . ."[36]

Other decisions did recognize foreign official immunity, although most often in cases in which a judgment against the individual would, in effect, constitute a judgment against the state itself. In *Twycross v. Dreyfus*, decided in 1877, a UK court dismissed a suit against companies acting as agents of the government of Peru because Peru was a necessary party in a dispute over the proceeds from the sale of property owned by Peru.[37] Similarly, in a 1958 case, *Rahimtoola v. Nizam of Hyderabad*,[38] the House of Lords found that a suit against the former High Commissioner of Pakistan was barred by sovereign immunity because it required determining Pakistan's entitlement to funds held in a London bank account.[39] In both of these cases, the concern "was to ensure that the proper defendant was before the court . . . . In other words, it is not a case of the official availing himself of the State's immunities, but rather of his not being the proper defendant to the action before the court."[40]

As reflected in this brief overview, both state immunity and official immunity are dynamic doctrines that states have adapted to meet their changing needs. Rules initially devised to protect foreign monarchs evolved to cover the state itself. When states began to engage in widespread commercial activities, the states adjusted the rules to limit immunity for those acts. By comparison, the functional immunities of foreign officials are largely undefined. The history reviewed here illustrates that, to the extent that a rule of customary international law developed in the mid-twentieth century, the most that can be concluded is that this rule granted immunity to officials in cases in which a judgment would run against the state.

---

this section, see Chimène I. Keitner, *Annotated Brief of Professors of Public International Law and Comparative Law as* Amici Curiae *in Support of Respondents in* Samantar v. Yousuf, 15 LEWIS & CLARK L. REV. 101, 115–16 (2011); Keitner, *Officially Immune?*, *supra* note 6, at 4–5; Tomonori, *supra* note 21, at 266–73.

34. Saorstat & Cont'l S.S. Co. v. De las Morenas, [1945] I.R. 291, 300 (Ir.).

35. *Id.*

36. *Id.* at 300–03.

37. Twycross v. Dreyfus, [1877] 5 Ch.D. 605 (C.A.) (Eng.).

38. Rahimtoola v. Nizam of Hyderabad, [1958] A.C. 379 (H.L.) (Eng.).

39. C. A. Whomersley, *Some Reflections on the Immunity of Individuals for Official Acts*, 41 INT'L & COMP. L.Q. 848, 850 (1992).

40. *Id.*

As explained in Part IV, the development of international human rights norms in the late twentieth century, followed by efforts to hold accountable those who violated those norms, transformed international law and triggered a significant response in the law governing foreign official immunity. As Harold Koh wrote over twenty years ago, once the restrictive doctrine had authorized the denial of immunity for claims arising out of commercial transactions, "the persistent question arose, 'if contracts, why not torture?'"[41]

IV. FOREIGN SOVEREIGN IMMUNITY AND THE HUMAN RIGHTS TRANSFORMATION OF INTERNATIONAL LAW

Sovereign immunity developed at a time when international law generally disclaimed the right to judge the lawfulness of a state's treatment of its own citizens within its borders. International recognition of the rights of individuals vis-a-vis their own governments solidified after World War II, when the United Nations adopted the Universal Declaration of Human Rights and drafted a series of multilateral human rights treaties, most of which came into effect in the 1970s and the following decades.[42] A core group of human rights obligations are now *jus cogens* norms, binding on all states.[43]

The development of international human rights norms had a dramatic impact on official immunity because those norms override domestic authority. International law now imposes limits on state officials, declaring certain acts to be unlawful even if permitted by domestic law. This transformation took root in the criminal prosecutions after World War II, as enunciated in what may be the most famous principle of the Nuremberg Tribunal: "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."[44] Although widely

---

41. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2365 (1991). Koh added, "If American courts could subject the commercial conduct of foreign sovereigns to legal scrutiny without offending comity, why should comity immunize that same sovereign from judicial examination of its egregious public conduct?" *Id.*

42. For an overview of international human rights law after World War II, see Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After* Filártiga v. Peña-Irala, 22 HARV. INT'L L.J. 53, 64–75 (1981).

43. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k (1987) (defining *jus cogens* norms as rules of international law "recognized by the international community of states as peremptory, permitting no derogation").

44. The Nurnberg Trial, 6 F.R.D. 69, 110 (Int'l Military Trib. at Nuremberg 1946).

accepted by the international community,[45] for several decades the deep divisions reflected in the Cold War stymied efforts to hold foreign states and their officials accountable for international crimes.[46] However, as detailed below, beginning with civil lawsuits in the United States in the 1980s and continuing with international criminal tribunals and domestic criminal prosecutions in the 1990s, immunity law has begun to adapt to the now-dominant human rights paradigm.

Given that *jus cogens* norms are binding on all states and override conflicting obligations, some commentators argue that *jus cogens* human rights obligations override state immunity: "The prohibition of torture, being a rule of *jus cogens* . . . deprives the rule of sovereign immunity of all its legal effects."[47] The Italian Court of Cassation adopted this "normative hierarchy" approach in 2008 in a series of lawsuits arising out of World War II.[48] The court denied immunity to Germany because "international crimes are prohibited by peremptory norms of international law, which are higher in rank and prevail over any other rules," including the rules of state

---

45. *See* Int'l Law Comm'n, *Principles of International Law Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal*, princs. 1–4, U.N. Doc. A/CN.4/22 (1950) [hereinafter *Nurnberg Principles*] (by Ricardo J. Alfaro), *reprinted in Summary Records of the Second Session*, [1950] 1 Y.B. Int'l L. Comm'n 28, 33–48, U.N. Doc. A/CN.4/Ser.A/1950 (stating that any person who commits an international crime can be held responsible under international law, regardless of whether the accused is a government official or acted pursuant to government orders).

46. Catherine Turner, *Human Rights and the Empire of (International) Law*, 29 L. & INEQUALITY 313, 316 (2011) ("The precedent set at Nuremberg was effectively frozen in its own historical moment as a result of increasing Cold War tensions, not to re-emerge until decades later.").

47. Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 79, 111–12 (2001) (Rozakis & Calfisch, JJ., dissenting). For commentary arguing that human rights obligations trump state immunity, see Adam C. Belsky et al., *Comment: Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CAL. L. REV. 365, 390–91 (1989); Caplan, *supra* note 27, at 757–69, 776–80; McGregor, *supra* note 27, at 916–17; *see also* Akande & Shah, *supra* note 5, at 817, 839–46 (rejecting the normative hierarchy approach, but arguing that recently developed norms permitting extraterritorial jurisdiction have displaced pre-existing immunity rules).

48. *See generally* Carlo Focarelli, Federal Republic of Germany v. Giovanni Mantelli and Others, 102 AM. J. INT'L L. 122, 124–25 (2009) (explaining Italian court holding that the "higher-ranking" international rule prohibiting crimes against humanity barred granting immunity for such acts).

immunity.[49] In a case raising similar issues, Greek courts also refused to accord immunity to Germany.[50]

Aside from the Italian and Greek decisions, efforts to recognize a broad human rights exception to state immunity have been largely unsuccessful. The U.S. Supreme Court, in *Argentine Republic v. Amerada Hess Shipping Corp.*, refused to read such an exception into the FSIA.[51] In *Al-Adsani v. Kuwait*, the United Kingdom similarly rejected the argument that international law prohibited granting immunity to foreign states accused of violations of *jus cogens* norms.[52] The *Al-Adsani* holding withstood challenge before the European Court of Human Rights in a close nine to eight decision.[53] The dissenters in the European Court would have adopted the normative hierarchy theory, arguing that the international *jus cogens* norm prohibiting torture overrides the "hierarchically lower rule" of sovereign immunity.[54] The majority rejected that view, however, and, in a subsequent case, a broad majority of the European Court affirmed the *Al-Adsani* holding.[55]

In contrast to these largely unsuccessful efforts to hold *states* accountable for human rights violations, an expanding body of scholarly commentary and domestic civil and criminal decisions, discussed below, indicates that immunity does not bar claims against

---

49. *Id.* at 128. The German government has challenged the Italian decision in the International Court of Justice. *See* Jurisdictional Immunities of the State (Ger. v. It.), Application Instituting Proceedings, at 4 (Dec. 23, 2008), *available at* http://www.icj-cij.org/docket/files/143/14923.pdf. The Court has granted Greece's application to intervene in the proceedings. Jurisdictional Immunities of the State (Ger. v. It.), Order, ¶ 34 (July 4, 2011), *available at* http://www.icj-cij.org/docket/files/143/16556.pdf.

50. Areios Pagos [A.P.] [Supreme Court] 11/2000 (Greece) (denying immunity and awarding damages for a German massacre of over 200 Greek civilians), *summarized in* Elena Vournas, Prefecture of Voiotia v. Federal Republic of Germany: *Sovereign Immunity and the Exception for* Jus Cogens *Violations*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 629, 635 (2002). A later Greek decision refused to allow enforcement of the judgment. Andrea Gattini, *To What Extent Are State Immunity and Non-Justiciability Major Hurdles to Individuals' Claims for War Damages?*, 1 J. INT'L CRIM. JUST. 348, 356–60 (2003) (explaining the refusal to enforce and the complicated procedural history of the case).

51. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989). The FSIA creates an exception for torture and extrajudicial execution only in cases filed against states on the U.S. list of sponsors of terrorism. 28 U.S.C. § 1605A (2006). The list of state sponsors of terrorism currently includes Cuba, Iran, North Korea, Sudan, and Syria. Prohibited Exports and Sales to Certain Countries, 22 C.F.R. § 126.1(d) (2009).

52. Al-Adsani v. Gov't of Kuwait, 107 I.L.R. 536 (Q.B.) 541–42 (1996) (Eng.).

53. Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 79, 103 (2001) (holding that the United Kingdom did not violate the European Convention on Human Rights when it granted immunity to the government of Kuwait in a case alleging torture in Kuwait).

54. *Id.* at 113–14 (Rozakis & Calfisch, JJ., dissenting).

55. Kalogeropoulou v. Greece, 2002-X Eur. Ct. H.R. 415, 429 (2002) (holding that international law does not require that a state enforce against another state a judgment based on human rights violations).

foreign *officials* for egregious abuses. The distinction between the state and its officials reflects the inescapable difference between the artificial entity of the state and human beings. Individual officials have the option of refusing to commit acts that violate international law, and they bear responsibility for their actions even if following orders given by the leaders of their government. As stated in the Nuremberg principles, government officials should be held responsible for international crimes as long as "a moral choice was in fact possible."[56]

As noted above, some commentators suggest that customary international law prohibits granting foreign officials immunity for egregious human rights violations. The International Court of Justice rejected this view, but only in the context of a high-ranking official entitled to personal immunity.[57] The British House of Lords also rejected this view in *Jones v. Saudi Arabia*, a decision that is now being challenged in the European Court of Human Rights.[58] Each of these decisions involved defendants who were not present in the jurisdiction where the lawsuit was filed.[59]

Even if customary international law does not *prohibit* granting immunity to officials in cases involving core human rights violations, the more modest proposition seems clear: there is no customary international law rule that *requires* foreign official immunity for violations of core human rights norms. This is important because immunity proponents claim that international law requires immunity and that the only way to override the obligation to grant immunity is to show that a newly emerged rule has replaced the preexisting obligation.[60] But the assumption that international law requires

---

56. *Nurnberg Principles*, *supra* note 45, at 42–49 princ. 4.

57. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 20–24 (Feb. 14). For discussion of this point, see Akande & Shah, *supra* note 5, at 841 (noting that international jurisprudence denying personal immunity to current, high-ranking officials does not necessarily apply to the functional immunity of lower ranking or former officials).

58. Jones v. Ministry of Interior of the Kingdom of Saudi Arabia, [2006] UKHL 26, [2007] 1 A.C. 270 (H.L.) 285–86 (appeal taken from Eng.) (U.K.).

59. As Akande and Shah have pointed out, objections to the assertion of jurisdiction over former officials have involved defendants sued *in absentia*. Akande & Shah, *supra* note 5, at 848–49. Claims against former officials physically present in the forum state—particularly those residing there—may trigger the territorial jurisdiction of that state. The U.S. Executive Branch has suggested that presence in the United States is relevant to the denial of common law immunity under U.S. law. *See* Statement of Interest of the United States of America at 9, Yousuf v. Samantar, No. 1:04 CV 1360 (LMB) (E.D. Va. Feb. 14, 2011) (stating that Mohamed Ali Samantar was not entitled to immunity, in part because he resided in the United States). For a discussion of the relevance of presence in the forum state, see Chimène I. Keitner, *Foreign Official Immunity after* Samantar, 44 VAND. J. TRANSNAT'L L. 837 (2011).

60. *See, e.g.*, Special Rapporteur, *Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, Int'l Law Comm'n, ¶¶ 18, 47, 71, U.N. Doc. A/CN.4/601 (by Roman Anatolevich Kolodkin). By contrast, Professor Keitner argues that, at least when claims are filed against foreign officials who are physically

immunity is not justified by the limited state practice addressing official immunity prior to the rise of the human rights movement, given that only a handful of decisions from a few states, scattered over two centuries, have been analyzed, and none of those cases involved egregious human rights violations. As Rosalyn Higgins pointed out in a 1982 discussion of the restrictive doctrine, immunity proponents bear the burden of demonstrating that international law requires immunity in particular circumstances.[61] As "an exception to the normal rules of jurisdiction[, immunity] should only be granted when international law requires—that is to say, when it is consonant with justice and with the equitable protection of the parties. It is not granted 'as of right.'"[62]

Moreover, significant scholarly commentary and state practice now support the denial of immunity in the face of egregious violations of international law. First, international commentary reflects increasing recognition for the conclusion that that states must deny immunity in criminal prosecutions for core human rights violations. In 2009, the Institute of International Law declared that "persons who act on behalf of a State" are not entitled to conduct-based immunity when charged with international crimes.[63] Hazel Fox, in her influential book on immunity, acknowledged that customary international law permits criminal prosecution of former officials in some circumstances.[64] State practice reflects a growing rejection of immunity from criminal prosecution in cases alleging egregious human rights violations.[65] In one recent example, a Spanish judge filed criminal charges against Salvadoran military officials for the

---

present in the territory of the forum state, international law presumes that the forum state has jurisdiction and requires that immunity proponents justify an exception to that presumption. Chimène I. Keitner, *Foreign Official Immunity and the "Baseline" Problem*, 80 FORDHAM L. REV. (forthcoming 2011).

61. Higgins, *supra* note 24, at 271.

62. *Id.*

63. Institute of Int'l Law, *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in Case of International Crimes* art. III(1) (2009) (by Lady Fox), *available at* http://www.idi-iil.org/idiE/resolutionsE/2009_naples_01_en.pdf. Hazel Fox served as the rapporteur in drafting the resolution, *id.*, which defines "international crimes" as "serious crimes under international law such as genocide, crimes against humanity, torture and war crimes," *id.* art. I(1).

64. FOX, *supra* note 21, at 52 ("With reasonable certainty it can be stated that international law permits the criminal prosecution of former State officials (other than head of State or the Minister of Foreign Affairs . . .) by national courts having some jurisdictional link, such as the place of commission of the offence or the nationality or habitual residence of the alleged offender."). Fox also recognized that "contemporary morality" mandates that "individual officials enjoy no impunity for torture, even if carried out on State orders." *Id.* at 21.

65. *See* Int'l Law Comm'n, *Immunity of State Officials from Foreign Criminal Jurisdiction: Memorandum by the Secretariat*, ¶¶ 184–87, U.N. Doc. A/CN.4/596 (Mar. 31, 2008); *see also* Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 SUP. CT. REV. 213, 238–40 & nn. 124–36 (listing cases).

murder in El Salvador of six Jesuit priests, their housekeeper, and her daughter.[66]

Second, a well-developed line of civil cases, primarily in the United States, rejects immunity for violations of clearly defined, widely accepted human rights norms.[67] In a case against Imee Marcos-Manotoc, daughter of former Philippine dictator Ferdinand Marcos, for instance, the Ninth Circuit rejected a claim of immunity because the human rights abuses were "beyond the scope of her authority," and involved "doing something the sovereign has not empowered the official to do."[68] Similarly, in a class action against Ferdinand Marcos's estate, the court held that the alleged "acts of torture, execution, and disappearance were clearly acts outside of his authority as President," and that "acts [that] were not taken within any official mandate" did not trigger immunity.[69] "[T]he illegal acts of a dictator," the court concluded, "are not 'official acts' unreviewable by federal courts."[70]

Judges and commentators increasingly recognize that a rule denying immunity for criminal prosecutions would apply equally to civil claims. Thus, Justice Stephen Breyer has noted that civil claims are less intrusive than criminal prosecutions.[71] Others see no significant difference between the two.[72] Perhaps most persuasive, the line between civil and criminal jurisdiction is drawn differently in different legal systems, and the two are often intertwined.[73] For example, in *Milde v. Bottcher*, an Italian court ordered a German official convicted of human rights abuses during World War II to pay damages to the victims, who had intervened in the criminal proceedings.[74] As a result, as Fox concludes, "the effect of [denying

---

66. *See* Elisabeth Malkin, *From Spain, Charges Against 20 in the Killing of 6 Priests in El Salvador in 1989*, N.Y. TIMES, May 30, 2011, at A4 (reporting that a Spanish judge had issued arrest warrants for twenty Salvadoran military leaders, accusing them of planning and carrying out the killings in 1989).

67. The U.S. cases are based on the Alien Tort Statute, 28 U.S.C. § 1350 (2006), as interpreted by the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004) (holding that the ATS grants jurisdiction over claims based on clearly defined, widely accepted international law norms).

68. Trajano v. Marcos (*In re* Estate of Marcos, Human Rights Litig.), 978 F.2d 493, 497 (9th Cir. 1992).

69. Hilao v. Estate of Marcos (*In re* Estate of Marcos, Human Rights Litig.), 25 F.3d 1467, 1472 (9th Cir. 1994).

70. *Id.* at 1471.

71. *Sosa*, 542 U.S. at 762–63 (Breyer, J., concurring).

72. *See Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, *supra* note 60, ¶ 88; FOX, *supra* note 21, at 750; Akande & Shah, *supra* note 5, at 851–52; Wright, *supra* note 27, at 152–53.

73. *See* Beth Stephens, *Translating* Filártiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 17–21, 44–45 (2002); *see also Sosa*, 542 U.S. at 762–63 (Breyer, J., concurring).

74. Trib. Militare Spezia, 10 ottobre 2006, n. 49 (It.), *summarized in* Annalisa Ciampi, *The Italian Court of Cassation Asserts Civil Jurisdiction over Germany in a*

immunity in criminal prosecutions] will be to permit the exercise of jurisdiction by national courts in respect of civil proceedings as well as criminal."[75]

The scope of foreign official immunity was debated in the negotiations that led to the adoption of the text of the Convention on Jurisdictional Immunities, which was finalized in 2004 but is not in force.[76] During the drafting process, negotiators rejected a specific statement that immunity should not apply to claims of human rights violations[77] because a formal exception for serious human rights violations was "not ripe enough" for codification.[78] However, Fox suggests that the Convention's failure to include a human rights exception is outdated and may not capture current customary international law, because much of the work on the Convention was completed in 1991 and therefore predated major shifts in the relevant international law.[79]

In the face of growing international rejection of immunity for core human rights abuses, immunity absolutists argue that logic requires that officials who commit acts in the exercise of state authority must be protected by the immunity of the state. Part V addresses this argument and the terminology that is partly responsible for confusion about the logic or illogic of the underlying claims.

Criminal Case Relating to the Second World War: The Civitella *Case*, 7 J. INT'L CRIM. JUST. 597, 597–98 (2009). The judgment also held Germany jointly and severally liable for the damages. *Id.* at 598.

75. FOX, *supra* note 21, at 750.

76. *See supra* note 18.

77. *See* Christopher Keith Hall, *U.N. Convention on State Immunity: The Need for a Human Rights Protocol*, 55 INT'L & COMP. L.Q. 411, 412 (2006) (discussing the debate over proposals to include a human rights exception).

The Convention defined a state as including "representatives of the State acting in that capacity," UN Convention on Jurisdictional Immunities, *supra* note 18, art. 2(1)(b)(iv), which may limit its reach to the high-ranking officials who represent the state in its relationships with other governments. *See* Rep. of the Int'l Law Comm'n, 43d Sess., Apr. 29–July 19, 1991, at 18, U.N. Doc. A/46/10, GAOR, 46th Sess., Supp. No. 10 (1991) (stating that the provision referred to "all the natural persons who are authorized to represent the State," including "sovereigns and heads of State," and "heads of Government, heads of ministerial departments, ambassadors, heads of mission, diplomatic agents and consular officers, in their representative capacity," and that actions against the "directors or permanent representatives" of government departments or against the "agents of a foreign Government" in respect of their official acts "are essentially proceedings against the State they represent").

78. FOX, *supra* note 21, at 140 (citing Chairman's report); Lorna McGregor, *State Immunity and* Jus Cogens, 55 INT'L & COMP. L.Q. 437, 437 (2006) (noting that it would have been "premature" to address immunity and *jus cogens* norms in the Convention, because the area of law was in "a state of flux").

79. FOX, *supra* note 21, at 3–4. After discussing the ongoing controversy over the treaty's failure to explicitly exclude immunity for *jus cogens* violations, Fox concluded that the treaty may only set a common international standard for "private law and commercial transactions," not for violations of *jus cogens* norms. *Id.*

V. HUMAN RIGHTS VIOLATIONS, STATE RESPONSIBILITY, AND FOREIGN OFFICIAL ACCOUNTABILITY

Proponents of immunity for foreign officials accused of human rights violations often rely on a logical construct which asserts that, because all acts in the exercise of governmental authority are attributed to the state, the officials who perform those acts are entitled to the same immunity as the state itself.[80] But this approach mistakenly views state responsibility as precluding individual responsibility, an anachronistic approach that has been rejected by international law at least since the post-World War II Nuremberg Tribunals, and is contrary to the state practice described in Part IV. Moreover, the state-responsibility-must-equal-official-immunity approach is based on two erroneous assumptions: (1) that *only* a state can be held liable for an act attributed to the state; and (2) that if a state is protected by immunity, then state officials must be as well. To the contrary, both the state and the official can be held responsible for an act committed in the exercise of state authority, and an official can be denied immunity even if the state is deemed to be immune.[81]

International law governing responsibility for violations of human rights norms rests on the important premise that states are responsible for the acts of their officials, even if those officials violate international law. The International Law Commission (ILC) Articles on State Responsibility mandate that states bear responsibility for all acts committed in the exercise of governmental authority, even if

---

80. *See, e.g., Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction, supra* note 60, ¶ 94(b). The report concluded that officials must be immune for acts performed in an official capacity, "since these are acts of the State which they serve itself." The report indicated that the author saw no other option:

> There can scarcely be grounds for asserting that one and the same act of an official is, for the purposes of State responsibility, attributed to the State and considered to be its act, and, for the purposes of immunity from jurisdiction, is not attributed as such and is considered to be only the act of an official.

Id. ¶ 94(c). Although strongly defending this conclusion, he notes that there is "no unanimity" on this. *Id.* at 16 n.59.

Professors Bradley and Goldsmith made an analogous point prior to the *Samantar* decision. Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity, Individual Officials, and Human Rights Litigation*, 13 GREEN BAG 2D 9, 13 (2009) ("Since a state acts through individuals, a suit against an individual official for actions carried out on behalf of the state is in reality a suit against the foreign state . . . ."). The Supreme Court rejected this argument, holding that the immunity of foreign officials is not identical to that of the foreign state. Samantar v. Yousuf, 130 S. Ct. 2278, 2290 (2010).

81. For a similar discussion of the logic underlying a rule that denies immunity to state officials even if the state is considered to be immune, in the context of the FSIA, see Keitner, *Officially Immune?*, *supra* note 6, at 3–6 (stating that in some instances international law holds officials liable "*precisely because* they act under the color of law").

those acts are unlawful and even if *ultra vires*.[82] That is, the conduct of "a person . . . empowered to exercise elements of the governmental authority shall be considered an act of the State under international law . . . even if it exceeds its authority or contravenes instructions."[83]

However, those same principles stress that the individual who commits the wrongful act is responsible as well. The rules of state responsibility "are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State."[84] The ILC Commentary explains that recognizing the legal responsibility of the state "is not to deny the elementary fact that the State cannot act of itself."[85] As a result, "[a]n 'act of the State' must involve some action or omission by a human being or group: 'States can act only by and through their agents and representatives.'"[86]

The Commentary makes the principle of dual responsibility crystal clear, emphasizing that individual responsibility has been the rule since the Nuremberg Tribunals,[87] and concluding that state officials may not "hide behind the state in respect of their own responsibility for conduct of theirs which is contrary to rules of international law which are applicable to them."[88] Individuals may be held accountable through criminal prosecution and perhaps through civil proceedings as well.[89]

Individual accountability is also mandated by modern international human rights norms. This was precisely the point of the

---

82. Rep. of the Int'l Law Comm'n, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, art. 7, U.N. Doc. A/56/10, GAOR, 56th Sess., Supp. No. 10 (2001) (Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries).

83. *Id.*

84. *Id.* art. 57.

85. *Id.* art. 2 cmt. 5.

86. *Id.* (quoting German Settlers in Poland, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 6, at 22 (Sep. 10)).

87. *Id.* art. 58 cmt. 2.

88. *Id.* art. 58 cmt. 3. Indeed, punishment of individual wrongdoers may be part of a state's obligation to provide reparation for a wrongful act. *Id.* art 58 cmt. 3 n.885.

89. *Id.* art. 58 cmt. 2. The Commentary does not specify whether the wrongful conduct could be "attributed" to both the individual officials and the state, or whether it views attribution and responsibility as separate issues. The key point, however, is that neither approach requires that the officials who actually commit unlawful acts be protected from responsibility for their wrongful conduct. *See, e.g.*, Rep. of the Int'l Law Comm'n, 61st Sess., May 4–June 5, July 6–Aug. 7, 2009, at 56, U.N. Doc. A/64/10, GAOR, 64th Sess., Supp. No. 10 (2009) (distinguishing between "attribution of conduct" and "attribution of responsibility"; noting that a party can be held responsible for conduct even if that conduct is not attributed to it; and recognizing the possibility of "dual or even multiple attribution of conduct"); Int'l Law Comm'n, *Second Report on Responsibility of International Organizations*, ¶ 6, U.N. Doc. A/CN.4/541 (Apr. 2, 2004) ("[C]onduct does not necessarily have to be attributed exclusively to one subject only."); *id.* at 4 ("[J]oint, or joint and several, responsibility does not necessarily depend on dual attribution."); *id.* at 6 (responsibility of an actor "does not necessarily rest on attribution of conduct to that" actor).

Nuremberg doctrine and of the criminal prosecutions and civil lawsuits that have become common over the past twenty years. The fact that acts are committed in the exercise of governmental authority is not a defense to liability for international crimes. To the contrary, "individuals commit such crimes by making use (or abuse) of their official status,"[90] and lose any claim to immunity when they commit them.[91]

There is no logical inconsistency in recognizing that joint responsibility can trigger different legal consequences, which are reflected in different rules as to immunity. Both criminal and civil liability rules permit one wrongdoer to be held liable even if another, equally culpable party escapes accountability for some reason. Immunity absolutists assume that the inherent logic of state responsibility forecloses this possibility. But, at least since Nuremberg, international law has punished government officials for the crimes they commit under the authority of the state.

International and comparative scholarship on immunity often bogs down in a disagreement about terms that may be mistaken for a logical disagreement about the legal consequences of unlawful acts committed in the exercise of state authority. Under longstanding U.S. law, government officials may be held personally responsible for injuries caused by their unlawful acts, even if committed in the exercise of their governmental authority—acts committed "under color of law" in the domestic U.S. terminology.[92] When those injured by such acts sue officials in their "personal capacity," they use the label as a legal term of art to indicate the intent to hold the officials personally liable for their actions.[93] Despite the label, a "personal capacity" lawsuit does not signify that the challenged acts were private, but rather that the official should be held personally responsible for unlawful acts committed under color of law, through the abuse of state authority.[94]

---

90. Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the* Congo v. Belgium *Case*, 13 EUR. J. INT'L L. 853, 868 (2002).

91. *Id.* at 870–74.

92. *See* Monroe v. Pape, 365 U.S. 167, 186 (1961) (stating that acts "under color of law" are those taken in the use or misuse of power "possessed by virtue of state law"); United States v. Classic, 313 U.S. 299, 326 (1941) (same).

93. "When damages are sought from a government official, the officer is ordinarily sued in a 'personal' or 'individual' capacity. This designation indicates that any judgment will be assessed against the officer personally, rather than against the government employer." RICHARD H. FALLON, JR. ET AL., THE FEDERAL COURTS AND THE FEDERAL SYSTEM 957 (6th ed. 2009). For a discussion of the history of this concept in U.S. law, see Stephens, *supra* note 5, at 2698–702.

94. By contrast, a lawsuit against an individual in an "official capacity" indicates that the claim runs directly against the state. "When an official is sued for damages in an 'official' . . . capacity, . . . the suit will be treated as one against the official's employer." FALLON, *supra* note 93, at 958; *see* Hafer v. Melo, 502 U.S. 21, 21 (1991) ("[T]he phrase 'acting in their official capacities' is best understood as a

Applied to claims alleging violations of international law, this terminology may seem counterintuitive because many human rights violations are considered violations of international law precisely because they are official—not private—acts.[95] But U.S. law recognizes that acts for which an individual may be liable are still committed in the exercise of governmental authority. Despite the confusion caused by the different terminology, this domestic law concept is analogous to that advanced by those who seek to hold state officials personally liable for human rights violations committed in their official capacity. In both situations, the individual's personal responsibility for his or her wrongful acts is unaffected by the fact that the acts involved the use or abuse of state authority or by the fact that the state as well is responsible for the wrongful acts.[96] And in both situations, a decision to deny immunity to the individual is separate from whether the state itself is immune—a distinction that reflects the different policy issues underlying state and official immunity. Thus, the U.S. approach is consistent with the analysis of commentators who recognize that international law holds states responsible for the acts of their officials whether or not those acts are lawful under international law, but conclude that officials should be denied immunity for such acts.[97]

Some commentators have called the U.S. approach a "fiction" because it treats actions taken under color of law as personal acts for the purposes of immunity.[98] But the opposite approach—that only the state can be held accountable—is equally fictitious. States act through men and women who have the moral and legal obligation to choose whether to violate fundamental human rights norms.

---

reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury.").

95. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1(1), Dec. 10, 1984, 1465 U.N.T.S. 85, 114 (defining torture as certain acts "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity").

96. *See* Stephens, *supra* note 5, at 2700 n.188 (citing 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, 1735–48 (2008) (discussing the controversial (mis)application of this doctrine to protect U.S. officials from domestic court liability for egregious misconduct in the aftermath of the attacks on September 11, 2001)); Elizabeth A. Wilson, *Is Torture All in a Day's Work? Scope of Employment, the Absolute Immunity Doctrine, and Human Rights Litigation Against U.S. Federal Officials*, 6 RUTGERS J.L. & PUB. POL'Y 175, 244–45 (2008) (arguing that U.S. government immunity should not protect individual officials sued for torture because such acts are outside the scope of employment).

97. *See, e.g.*, Akende & Shaw, *supra* note 5, at 830 (arguing that the sovereign or official status of act depends not on whether it is legal under international law but on whether act is "intrinsically governmental," but concluding that officials can, in some circumstances, be denied immunity for such acts); Cassese, *supra* note 90, at 869 (rejecting the distinction between private capacity and official capacity, but calling for denial of immunity for international crimes).

98. *See, e.g.*, Bradley & Helfer, *supra* note 65, at 42.

Regardless of the terminology employed, the logical, nonfictional approach is to recognize that both the abstract entity of the state and the officials who commit the acts are responsible for egregious human rights violations even if the legal consequences of that responsibility may differ.

VI. CONCLUSION

The rules determining when foreign states or their current or former officials should be granted immunity represent policies adopted by states over many decades and subject to reassessment and revision in response to changes in international law. Disagreements about immunity for the officials who commit abuses in the exercise of governmental authority are based not on logical constructs but on those policy choices. While immunity furthers orderly international relations, it also blocks accountability and denies redress to those injured by egregious human rights violations. When officials violate core international human rights norms, neither history nor logic requires that immunity protect them.

***