No. 08-1555

IN THE

Supreme Court of the United States

MOHAMED ALI SAMANTAR,

Petitioner,

v.

BASHE ABDI YOUSUF, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN JEWISH CONGRESS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS, STATUTES, LEGISLATIVE MATERIALS

OTHER AUTHORITIES

AMICUS CURIAE BRIEF OF THE AMERICAN JEWISH CONGRESS[1]

INTEREST OF THE *AMICUS*

The American Jewish Congress ("AJCongress") is an organization of American Jews founded in 1918 to protect the civil, economic, political and religious rights of American Jews and all Americans.

The issue before the Court is whether disputes about official compliance with someone's vision of international law, including notoriously amorphous customary international law, arising out of disputes anywhere in the world, are fully justiciable in a private action for damages in the courts of the United States under the protean Alien Tort Claim Act. The live wars in Gaza, Lebanon, Sri Lanka, Chechnya and Indonesia and elsewhere will, under the decision below, be re-fought in front of American judges and juries to determine whether each and every military action taken in those wars was consistent with international law.

Our interest is, of course, Israel, which finds itself engaged in law-fare as well as warfare, courts around the world being another battlefield on which Israel finds itself engaged. There are legitimate international *fora* for criticizing Israel's actions.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Absent Israel's consent, the courts of other nations are not that forum.

The question of whether officials enjoy the immunity of the state, the narrow question presented here, should not be decided only with regard to the independent and largely apolitical courts of the United States. If the Fourth Circuit's rule prevails, American officials who order remote targeted attacks, or are at the controls of a Predator missile launched at al-Qaeda or Taliban forces in Yemen, Afghanistan or Pakistan which also kills civilians,[2] could find themselves facing a civil action in any country which claims universal jurisdiction over violations of the law of war—say Iran, Venezuela or Libya—and pleas of immunity will be properly rejected on this Court's authority.

Because the decision of the court below misreads the Foreign Sovereign Immunities Act by isolating it from its international law matrix, AJCongress files this brief.

The parties have consented to the filing of this brief.

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[2] See *Pakistanis Confront Clinton Over Drone Attacks* (October 30, 2009), http://www.news.yahoo.com/s/ap/20091030/ap-on-re-as/as-clinton (last visited November 9, 2009).

SUMMARY OF ARGUMENT

1. The Foreign Sovereign Immunities Act (FSIA) was a codification of international law principles governing sovereign immunity. *Permanent Mission of India v. City of New York*, 551 U.S. 193 (2007). Congress wanted to shift the locus of sovereign immunity from domestic rules to compliance with international standards. The court below, however, looked only to the "language and structure" of FSIA, and ignored its international law context. It ignored as well the need to interpret federal statutes to be consistent with international law, *Murray v. Murray v. Schooner Charming Betsey*, 6 U.S. (2 Cranch) 64 (1804).
2. Sovereign immunity under both FSIA and international law is a firm rule of law, not a matter of comity—understood only as an international courtesy. *Permanent Mission*, *supra; Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 528 (1989).
3. International law mandates sovereign immunity because the international system is based, in the words of the UN Charter (Article II, § 1), on the "sovereign equality of all of its Members." That an equal has no dominion over an equal ("*Par in parem no habet imperium*") is a principle of law recognized by this Court as recently as last term in *Republic of Iraq v Beatty*, 129 S.Ct. 2183

(2009) and as long ago as *Schooner Charming Betsey*, 6 U.S. (2 Cranch) 64 (1804), by which time it was already a "venerable" principle.

4. An important application of the *par in parem* principle is that the courts of one state will not sit in judgment over the actions of another state, just as a court will not sit in judgment over the acts of state of another nation. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

5. Before and immediately after the adoption of FSIA, it was plain that sovereign immunity was available as a defense not only to states, but to their officials.

   The European Convention on State Immunity adopted in 1972 has a general rule of immunity with a list of exemptions—not including actions against officials. That Convention is regarded as declaratory of international law. *O'Muilleoir v. McDowell*, 2007 NIQB 108 (High Court of Justice, Northern Ireland).

6. The International Law Commission began working on a convention on "Jurisdictional Immunities of States" in 1977, only a year after adoption of FSIA. The rules it adopted—which "build on experience under the … European Convention, as well as state practice …" including FSIA, have been regarded by the House of Lords and the European Court of Humans Rights as authoritative expositions of

international law, even though they are not yet formally in force.

7. As adopted, the Articles on Jurisdictional Immunities explicitly include state officials under the protective umbrella of sovereign immunity (Article 2(b)(iv)). The explanatory note of the International Law Commission does not suggest anything but a codification of existing law. It observed: "Actions against such representatives or agents …in respect of their official acts are essentially proceedings against the state they represent."

8. When the General Assembly approved the Articles in 2004 as based on "state practice" and "conventional practice" (A.Res./59/38), it noted that sovereign immunity was no bar to criminal prosecution of individual officials for violation of international law. It pointedly did not include civil actions to redress such actions as an additional unwritten exception to sovereign immunity.

9. The Articles were declared authoritative on this point in *Jones v. Saudi Arabia* [2006] UKHL 26, a suit brought against Saudi Arabia and its officials alleging torture, a violation of *jus cogens* human rights law. The defendants asserted sovereign immunity, and Jones challenged the availability of the defense.

Citing the UN Articles, and international case law dating to as early as the 19th century, the

House of Lords upheld the claim of immunity of government officers in a case alleging torture. It is not alone. Northern Ireland, Ireland, Germany, New Zealand, Canada (in several cases involving American officials), and the International Court for the Former Yugoslavia, have all taken the same position.

10. The result is no different in cases involving human rights claims, including those with *jus cogens* status. Although academics have asserted that international human rights claims stand at the top of the "normative hierarchy," and thus displace immunity defenses, this is not the law.

11. The normative hierarchy theory has been repeatedly rejected in the courts. This Court in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), a case involving a claim of torture, examined only the statutory FSIA exemption from immunity, and did not recognize a "normative hierarchy" exception for *jus cogens* violations. Numerous federal courts have reached the same conclusion.

12. The House of Lords likewise rejected this theory in *Jones*, *supra*. It quoted Hazel Fox' authoritative treatise on sovereign immunity (The Law of State Immunity (2004), at p. 525):

> "State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a *jus cogens* norm but

> merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural plea of State immunity upon which a *jus cogens* mandate can bite."

13. The House of Lords relied in part on a similar decision of the European Court of Human Rights in *Al-Adsani v. United Kingdom* [2001] 34 EHRR 277, another torture case in which Kuwait was the original defendant. The British courts threw out the case on sovereign immunity grounds, and Al-Adsani challenged the ruling as denying him European treaty rights to access to court. The European court, relying, *inter alia*, on the UN's Jurisdictional Articles, found that human rights norms did not void claims of sovereign immunity.

14. The European Court (citing the decision of the House of Lords in the *Pinochet* case) acknowledged that immunity would not defeat a criminal prosecution, a holding reiterated the next year in an unpublished decision in *Kalogreopoulou v. Greece*.

15. The International Court of Justice, in *Armed Activities in the Congo* [2002] ICJ Report, ¶ 64, also held that an allegation of *jus cogens* violations did not supersede other valid restrictions on jurisdiction, such as those embodied in a Rwandan reservation to ICJ jurisdiction over questions arising under the

Genocide Convention. "[T]he mere fact that rights and obligations *erga omnes* may be at issue …would not give the [International] Court jurisdiction.

16. The Italian high court in *Ferrini v. Federal Republic of Germany*, did reach an opposite result, but what amounts to an appeal of that decision is presently pending before the International Court of Justice.

17. There is no reason to think that Congress, in codifying international law in FSIA intended to depart from the majority rule, and as Professor Fox observes "risk creating total judicial chaos."

18. Recognizing sovereign immunity in civil cases leaves a wide range of remedies open to redress human rights violations, including criminal prosecutions, political and diplomatic sanctions and a denial of visas or refugee status.

19. A state (or group of states) contemplating a criminal prosecution for human rights violations must consider whether it would accept a similar prosecution being brought against its own officials. Civil actions can be brought by those interested only in punishing one side to a dispute, and in disregard of any valid state interests that might be at stake.

20. A rejection of a plea of sovereign immunity here will (a) induce parties to international conflicts to continue their warfare in the courts of the United States. A plethora of lawsuits here about

clashing claims of international law violations arising out of Israel's Operation Cast Lead in Gaza, for example, will embroil U.S. courts in seemingly endless disputes; (b) make American courts into a quasi-legislative body passing on a wide range of novel international law claims; and (c) serve as a precedent for trying those members of the U.S. serving in Afghanistan, Iraq and elsewhere in civil suits in foreign and often unfriendly third-party states.

ARGUMENT

I. THE FOREIGN SOVEREIGN IMMUNITIES ACT MUST BE INTERPRETED AGAINST AN INTERNATIONAL LAW BACKGROUND

The Foreign Sovereign Immunities Act ("FSIA") is the domestic embodiment of international law's insistence on adjudicative sovereign immunity. *Permanent Mission of India v. City of New York*, 581 U.S. 191, 199 (2007). Although FSIA is "a law of the United States, much of it codifies and applies international law as the United States views it." Restatement (3rd) of the Foreign Relations Law of the United States, Chapter V, Subsection A, at p. 395 (hereinafter "Restatement").

The House Judiciary Committee, in describing the background giving rise to FSIA noted that "sovereign immunity is a doctrine of international law under which domestic courts relinquish jurisdiction over a foreign state." H.R. Rep. 94-1487, at 3, 94th Cong., 2nd Sess. (1976), 1976 USSCAN 6604, 6607.

Given that FSIA codifies international law, it makes sense to interpret any ambiguities in that statute so that it remains consistent with international law, unless the statutory language inescapably compels a different result. This is particularly so because the House Report expressed an intent to return sovereign immunity law from a

domestic locus to a focus on the "law and practice of nations," H.R.Rep. 94-1487 at 3.

As relevant to this case, there are two arguable ambiguities in the statute: (1) FSIA does not explicitly address the question of whether state immunity attaches to individual officers acting on behalf of a state; and (2) FSIA does not in terms address whether immunity attaches to allegations of violations of international human rights rules, including those that have attained *jus cogens* status.

We address these questions by describing what international law has to say about them. In this regard, three points are essential: (1) immunity is a matter of law, not inter-state courtesy; (2) sovereign immunity extends to officials acting in an official capacity; and (3) there is no unwritten exception for favored human rights norms.

We do not address separately the impact of the Torture Victims Protection Act. ("TVPA") on the principles we lay out here.

A. The Court Below Wrongly Ignored the International Law Background of a Statute Intended to Codify International Law

In deciding whether public officials are within FSIA immunity when acting on behalf of their governments,[3] the court below approached the

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[3] This case presents no question of whether immunity would attach when an official engaged in internationally

question—on which the statute is literally silent—as an ordinary question of statutory interpretation, emphasizing that immunity is a matter of comity, not constitutional law. Placing chief emphasis on the statute's "language and structure," *Yousuf v. Samantar*, 552 F.3d 371, 380 (4th Cir. 2009), the court found that foreign public officials did not share their sovereign's FSIA immunity.

By emphasizing the here largely irrelevant dichotomy between constitutional law and comity, the court below ignored the fact that the comity on which sovereign immunity rests is not a bare question of goodwill, but a requirement of international law. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 409 (1964), citing in another context *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895) (comity is "neither a matter of absolute obligation …nor of mere courtesy of goodwill").

It is true that sovereign immunity is not guaranteed foreign nations by constitutional text, but only by comity, *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). That fact is not dispositive here.

The invocation of comity in the FSIA context does not mean that international law does not require immunity. *Verlinden* held only that, for domestic law purposes, immunity was not a

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prohibited activity (torture) for a purely private purpose, *e.g.*, private sexual gratification.

constitutionally imposed limit on Article III jurisdiction, and hence that FSIA's exemptions from immunity did not exceed Congress' Article III powers. Nothing in *Verlinden* addresses the separate question of whether international law requires immunity or whether it is a matter of pure policy to be dispensed with when other policies appear stronger.

As to this question, unlike the question of enforcement of foreign judgments, Restatement, §§ 481-482, FSIA embodies a rule of international law, providing an exclusive list of exceptions to an otherwise comprehensive and unyielding rule of immunity. *Permanent Mission of India v. City of New York*, 551 U.S. 193, 197 (2007), citing *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989); *Verlinden B.V.*, *supra*, 461 U.S. at 488. Moreover, as the legislative history indicates, and as this Court has emphasized, one of the foundational purposes of FSIA was the "codification of international law at the time of FSIA's enactment." *Permanent Mission of India*, *supra.*

Had the court below considered the state of international law at the time FSIA was enacted, and as it continues to be, it could not have reached the conclusion it did, against, as it acknowledged, the majority view of American courts, *Yousuf v Samantar*, *supra*, at 378.

Even without this particular history and purpose, the conclusion below was erroneous. It is

long settled law that wherever possible statutes should be interpreted to be consonant with international law, not in breach of it. *Murray v. Schooner Charming Betsey*, 6 U.S. (2 Cranch) 64 (1804); Restatement, § 114. As will be shown, international law requires sovereign immunity in cases such as this. The Fourth Circuit inexplicably failed to account for international law in interpreting the statute's silence.

B. The State of International Sovereign Immunity Law When FSIA Was Enacted Required Immunity As a Matter of Law

International law mandates state immunity, not merely condones it. Ordinarily, a sovereign state may not exercise its sovereign power of adjudication over another equally sovereign state for conduct occurring outside of the adjudicating state's borders, because to do so is to trample on the sovereignty of the adjudged nation.

"*Par in parem no habet imperium*" ("An equal has no dominion over an equal") is a keystone of inter-states relations. This is not a dated maxim, a far-from-realized aspiration. The United Nations' Charter requires the organizations to act "based on the principle of the sovereign equality of all of its Members," Charter of the United Nations, Article II, §1.

Just recently, this Court observed that p*ar in parem* is, a "venerable principle," *Republic of Iraq v.*

Beatty, 129 S.Ct. 2183, 2186 (2009), rooted, Chief Justice Marshall earlier noted, in "the perfect equality and absolute independence of sovereigns." *Schooner Exchange*, 11 U.S. (7 Cranch) 116, 136 (1812). See G.M. Badr, State Immunity: An Analytical and Prognostic View (1984) at 89 (tracing history of the *par in parem* maxim); L. Caplan, *State Immunity, Human Rights and Jus Cogen: A Critique of the Normative Hierarchy Theory*, 97 AJIL 741, 748-49, nn. 54-61.[4]

Nor is *par in parem* a uniquely American view of international law. See, for examples of foreign formulations of the *par in parem* principle, *Playa Largo v. I Congriso del Parte* (1983), 1 A.C. 244, 262, 2 All E.R. 1064 (Lord Wilberforce); *The Parliament Belge*, 5 P.D. 197, 217 (1974-80), All E.R. Rep. 104 (CA).

Some scholars do offer a less 'legal' view of sovereign immunity, one closer to the "comity"

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[4] This is not to say that sovereign immunity has no policy implications Like its domestic counterpart, foreign sovereign immunity allows foreign public officials to carry out their often difficult and sometimes hazardous duties without fear of being hauled before a distant foreign court (which may be run through with hostile political agendas), to be judged under often amorphous and contested codes of customary international law, and, because of the lower standards of proof applicable in civil cases, the potential for ruinous financial liability for decisions made under immense pressure (or even in the heat of battle).

understanding of the Fourth Circuit. "[T]he doctrine also has important practical necessity, particularly the desire to promote goodwill and reciprocal courtesies among nations." Caplan, *id*., at n. 64.

Given its limited functional purpose, immunity should not be available, Caplan and others argue, when it does not promote goodwill or desirable reciprocal courtesies, as would be the case where immunity is invoked to shield alleged violations of international human rights law.

Although Caplan, reviewing the scholarly literature, insists that promoting international goodwill, not respect for equal sovereignty, is the true justification for immunity, he concedes (*id*. at 755) that "when one surveys the actual law of sovereign immunity as formulated and as applied, an entirely different picture emerges." That is, the *par in parem* principle is the governing motivation of the legal requirement of immunity.

The United States is obligated by the *par in parem* principle to ensure that its courts do not adjudicate claims against foreign governments.[5] To

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[5] This is not to say that Congress cannot breach its international obligations, if it chooses to do so. It may. Article I, § 8, cl. 10; *Republic of Iraq v. Beatty*, *supra*, 129 S.Ct. 2191; *Hartford Fire Ins. Co. v. California*, 509 U.S. 767 (1993); L. Henkin, Foreign Affairs and the U.S. Constitution (2nd ed.) 232 (1996); Restatement, § 115(1)(a) (1986). Arguably, the Tort Victims Protection Act is an instance of Congress doing so.

do otherwise would be to set the United States above other states. In this sense, limitations on the exercise of raw judicial power inherent in sovereign immunity reflect the limited scope of each nation's sovereignty that is the cornerstone of the system of international relations. These limits are binding on the courts no less than on presidents.

Just as a judge sits above the parties in a courtroom to signify that she stands over and above the parties, a nation judging another in its courts sits over the nation being judged. To the court it may appear that it is deciding only an ordinary tort case, but to the state defendant, the court is engaged in an act of judicial imperialism. The *par in parem* principle bars such an arrogation of authority and the assertion of the power to sit in judgment over those of equal stature.

In this same spirit, this Court has refused to sit in judgment of the actions of foreign governments, even where sovereign immunity is not a formal bar to adjudication. This is the justification for the act of state doctrine under which American courts will not pass on the validity of the actions of foreign governments, even those arguably in violation of international law. Thus, in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), this Court refused to pass on the international legality of the expropriation of property by Cuba's new communist government, citing *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) and its progeny.

The Court summarized its holdings on the act of state doctrine in a way that sounds in the *par in parem* principle, 376 U.S. at 416:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Sovereign immunity from suit is not a technical defense only—a disfavored obstacle to the implementation of important provisions of the international legal order. On the contrary, it is a fulfillment of the basic requirements of an international system composed of independent and legally equal sovereigns.

C. Foreign International Law Sets out a Broad Scope of Immunity as of Right

The major debate within the international community on the scope of sovereign immunity when FSIA was enacted was whether to adopt an absolute theory of immunity covering even purely commercial activities of foreign states (for example, communist state trading companies) and ordinary tort cases (of

the kind for which insurance is readily available) or the so-called restrictive theory of immunity adopted earlier by states as diverse as Belgium and Egypt, and embodied in the famous Tate Letter, and, if the latter, in which cases did immunity remain in place. See *Verlinden*, *supra*.

There was, when FSIA was adopted, no debate in international circles over the imperative of sovereign immunity applicable to purely governmental acts as a matter of law. In 1972, just prior to the adoption of FSIA, the Council of Europe (ancestor of today's European Union) adopted a European Convention on State Immunity,[6] a document "generally regarded as reflecting customary international law, *O'Muilleoir v. McDowell*, 2007 NIQB 108 at ¶ 21 (High Court of Justice, Northern Ireland).

After comprehensively listing exceptions tracking the restrictive theory of immunity, the European Convention (§ 15) states its general rule for cases not within any exception: "A Contracting State **shall be entitled** to immunity from the jurisdiction of the courts of another contracting State …." (Emphasis added.) So basic is immunity that the courts of signatory nations must invoke it on behalf of another contracting state whether or not the defendant state affirmatively asserts its own immunity. (Article 24)

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[6] http://conventions.coc.int/Treaty/en/Treaties/Html/074:htm.

The European Convention provides for certain additional exemptions from immunity for non-signatories to the Convention, but such exemptions do not extend to "acts performed in the exercise of sovereign authority," the core meaning of immunity under the restrictive theory. See Article 27 (2).

Despite the fact that the European Convention was adopted at a time of great ferment over the exact scope of sovereign immunity, there was no suggestion in the Convention that immunity was not a matter of law, or that public officials should not enjoy its protection. Similarly (as discussed in Point II, *infra*) there was no suggestion in the Convention that the rule of immunity adopted would not apply to all, or some, human rights claims.

England,[7] Canada,[8] South Africa,[9], Pakistan[10] and Singapore[11] have likewise codified sovereign immunity as a rule of law, rather than treating it just as a courtesy.

Although the European Convention is, as noted, overtly silent on the question of immunity for

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7 State Immunity Act, 1978 Chapter 33.

8 State Immunity Act, S.C. 1991, c. 41, § 13.

9 Foreign States Immunities Act of 1981 (Act 57).

10 State Immunity Ordinance, 1981, 21 Pakistan Code § 3.

11 State Immunity Act, Statute of the Republic of Singapore, ch. 313, § 3 (1979).

officials (and the statutes cited in notes 7-11 are likewise silent), the Northern Ireland High Court of Justice in *O'Muilleoir*, *supra*, thought it plain that they were immune under the Convention and that in this and other regards the Convention was merely declaratory of existing international law.

D. Sovereign Immunity Extends to Officials Sued for Official Acts

(i) Statutory and Like Materials

The United Nations International Law Commission ("ILC") began work on a draft set of rules, Articles on Jurisdictional Immunities of States and their Property[12] ("Jurisdictional Articles"), after the European Convention was adopted. These Articles are explicit about the availability of sovereign immunity as a matter of law, and that, again as a matter of law, immunity extends to foreign officials for actions undertaken in the course of their duties.

Those rules reflect then current understandings of international law, and while not yet formally binding, see below at p. 25, they reflect an expert and official consensus on the status of international law. The Articles have been cited as authoritative by both the United Kingdom House of

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[12] 1991 Yearbook of the International Law Commission (Vol. II, Part 2).

Lords, *infra* at 26, and the European Court of Human Rights, *infra* at 36.

Work on these Articles began in 1977, shortly after FSIA was enacted, and only a few years after the European Convention was promulgated and completed. "The [Articles] build on experience under the 1972 European Convention …as well as on state practice under various domestic statutory regimes." D. Stewart, *The U.N. Convention on Jurisdictional Immunities of States and Their Property*, 99 Am. J. Int'l L. 194, 195 and *id*. at n. 2 (2005), including FSIA. The European Convention, FSIA and other analogous immunity statutes and decisions are cited extensively in the ILC's explanatory materials.

The Jurisdictional Articles state that, subject only to listed exceptions immunity is the general rule (Article 5). "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."

Unlike FSIA and the European Convention, however, the Jurisdictional Articles are explicit in providing that the immunity of states also protects officers and employees acting in their official capacities.[13] Article 2(b)(iv) defines 'states' to include

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[13] Sovereign immunity is an immunity *ratione materiae*, by virtue of the subject matter of the suit, not the status of the individual, such as head of state or diplomatic immunity (*ratione personae*). Those immunities exist only so long as the

"representatives of the State acting in that capacity." Nothing in the preparatory materials generated by the ILC to explain the inclusion of this definition suggests that the drafters thought they were departing in any way from established principle or state practice in making this explicit.

In the official commentary to the Articles, the International Law Commission explained the inclusion of officials within the scope of state immunity (note 18):[14]

> It is to be observed that, in actual practice, proceedings may be instituted, not only against the government departments or offices concerned, but also against their directors or permanent representatives in their official capacities. Actions against such representatives or agents of a foreign Government in respect of their official acts are essentially proceedings against the State they represent. The foreign State, acting through its representatives is immune *ratione materiae*.

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person holds office. Sovereign immunity relates to the act, and does not evaporate when the actor leaves office.

[14] For ease of reading, we have broken the commentary into smaller paragraphs.

> Such immunities characterized as *ratione materiae* are accorded for the benefit of the State and are not in any way affected by the change or termination of the official functions of the representatives concerned. Thus, no action will be successfully brought against a former representative of a foreign State in respect of an act performed by him in his official capacity.
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> State immunity survives the termination of the mission or the office of the representative concerned. This is so because the immunity in question not only belongs to the State, but is also based on the sovereign nature or official character of the activities, being immunity *ratione materiae*.

(Footnotes omitted).

The Articles as finalized by the International Law Commission in 1991 and reaffirmed in 1999 were approved without relevant changes by the General Assembly (A.Res./59/38 (2004)), and sent for ratification to the UN member states. (They currently await the requisite number of signatures to be fully effective.) The preamble to the Articles recites that the Articles took into account "state practice with regard to the jurisdictional immunities

of States." The Resolution itself notes that the Articles reflect the importance of conventional practice.

The General Assembly Resolution further noted that the Assembly understood the Articles not to apply to criminal prosecutions for violations of international humanitarian law. Having taken note of the problem of enforcement of international law norms, and contemplating that immunity would not shield officials from criminal actions, the General Assembly notably failed to place civil actions against state employees as outside the immunity provided for in Article 2(b)(iv). Neither has any reservations on the inclusion of employees been entered by states ratifying the Articles.[15]

(ii) International Judicial Decisions Affirm That Immunity Extends to Officials

In *Jones v. Saudi Arabia*, [2006] UKHL 26 (2006), the House of Lords affirmed that a sovereign's immunity extends to its officials when acting in their official capacities. Jones, a British citizen, was allegedly tortured by Saudi officials who suspected him of involvement in terrorism. He sued those officials in English courts.

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[15] U.N. Treaty Collection, http://treaties.unorg/Pages/ViewDetails.aspx?stc=TREAT&mtdsg-no=III-138&chapter=3&kabg=en (last visited November 30, 2009).

His suit was met with a defense of sovereign immunity on behalf of both Saudi Arabia and its officials. Overturning a lower court decision that immunity did not extend to officials charged with torture in civil proceedings, the House of Lords upheld the claim of immunity.

The Lords acknowledged that both the European Convention and the implementing 1978 United Kingdom's State Immunity Act of 1978 were silent as to whether officials were protected by immunity. However, Lord Bingham observed in his speech to the House of Lords that the rule of the Judicial Articles adopted by the United Nations that officials enjoyed the state's immunity was supported by long-standing domestic and international authority, and this was not an innovation, but simply captured the existing rule of law. *Id*., at ¶ 10. Accordingly, the United Kingdom's law ought to be read to reach the same result:

> There is, however, a wealth of authority to show that in such case the foreign state is entitled to claim immunity for its servants as it could if sued itself. The foreign state's right to immunity cannot be circumvented by suing its servants or agents. Domestic authority for this proposition may be found in *Twycross v Dreyfus* [1877] LR 5 Ch D 605, 618-619; *Zoernsch v Waldock*

> [1964] 1 WLR 675, 692; *Propend Finance Pty Ltd v Sing* [1997] 111 ILR 611, 669; *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147, 269, 285-286; *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, 1583.
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> Courts in Germany, the United States, Canada and Ireland have taken the same view: see *Church of Scientology Case* [1978] 65 ILR 193, 198; *Jaffe v Miller* (1993) 13 O. (3d) 745, 758-759; *Schmidt v Home Secretary of the Government of the United Kingdom* [1994] 103 ILR 322, 323-325. The International Criminal Tribunal for the Former Yugoslavia has also taken the same view: *Prosecution v Blaskic* [1997] 110 ILR 607, 707.[16]

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[16] For Canadian holdings to the same effect, under a statute which also does not explicitly extend immunity to state officials, see *Ritler v. Donnell*, (2005) A.J. 598, 2005 ABQB 197, 2005 A.B. C Lexis 1136, ¶ 24 (U.S. officials as defendants); *U.S. v. Friedland*, 46 O.R. (3d) 321, 1999 Ont. Rep. Lexis 129 (1994) (discussing whether immunity of officials is independent or derivative; court finds that U.S. officials are immune either way); *Jaffe v. Miller*, 13 Or. (3d) 745 (1993), 1993 Ont. Rep. Lexis 233 (alleging illegal U.S. arrest), citing S.Sueharitkul, Immunities of Foreign

Id. (Some citations omitted)

In his speech, Lord Hoffman reached the same result, relying primarily on cases from the International Criminal Tribunal for the Former Yugoslavia (*Prosecution v. Blaskic*, 110 ILR 607, 707) (1997)) and Germany (Church of Scientology Case, 65 ILR 193, 198 (1978) ('any attempt to punish state conduct by targeting the foreign agent performing the act would undermine the absolute immunity of sovereign states in respect of sovereign activity.')).

Lord Hoffman joined Lord Bingham in concluding (¶ 68) that "state immunity affords individual employees … of a foreign state protection under the same cloak as protects the state itself."

Efforts to overturn *Jones* in Parliament have failed.[17]

States Before National Authorities, 149 Recueil (**29). "A State acts through its organs or agencies, which normally include the persons, representatives … which constitutionally form an organic part of the machinery of the central government of a sovereign State."

[17] Torture (Damages) Bill, HL Bill 30 (54/3), introduced by Lord Archer of Sandwell in February 2008. The text may be viewed at www.publications.parliament.uk/pa/Id200708/idbills/030/20008030.pdf (last visited 11/30/2009).

E. American Law Reflects the Same Understanding of International Law

There is statutory evidence that Congress anticipated the *Jones* result as the general rule. When Congress added 28 U.S.C § 1605(7), allowing actions for damages caused by terrorist acts sponsored by officially certified state sponsors of terrorism, it provided explicitly for actions against state officials—an iteration that would be wholly unnecessary if officials never enjoyed immunity under FSIA in the first place. [18]

Similarly, in *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009), petition for cert. pending, 09-227. plaintiffs formerly incarcerated at Guantanamo Bay sued several government officials for violations of the Geneva Conventions. The court upheld the dismissal of the case under the Westfall Act, which provides that tort actions against federal officials are to be treated as actions against the United States, and that therefore they are barred by sovereign immunity unless claimants came within the waiver provisions of the Federal Torts Claim Act.

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[18] See, generally, C. Bradley & J. Goldsmith, Foreign Sovereign Immunity and Human Rights Litigation, 13 Green Bay 2d 9, 10 (2009): '[T]he FSIA confers presumptive immunity in suits against state officials, and … this immunity applies even in human rights cases."

The decision has been criticized, but even one critic acknowledges "from the perspective of international law, one cannot find fault with the Westfall Act, substituting the United States as defendant … if the act of torture "were committed in the course of employment." B. Fassbender, *Can Victims Sue State Officials for Torture*, 6 Journal of International Criminal Justice 347, 362 (2008)

II. HUMAN RIGHTS CLAIMS ARE NO EXCEPTION TO SOVEREIGN IMMUNITY

A. The Normative Hierarchy Theory Excluding Human Rights Claims from Immunity Has No Basis in Law

If an official can ordinarily invoke sovereign immunity, the only remaining way to strip him of his immunity in cases such as this would be to carve out exceptions for human rights violations. No such exception has been recognized in international law. The typical statutes listed at notes 7-11, *supra*, each contain lengthy lists of exemptions from immunity, but not this one. Neither, of course, do the European Convention, the Judicial Articles or FSIA list a human rights exception, other than, perhaps, matters covered by the Torture Victims Protection Act, P.L. 102-256, 106–Stat.73. Hence, no such exemption should be read into FSIA.

Subsequent to the passage of FSIA (and certainly after the adoption of the Jurisdictional Articles), a theory has emerged, advanced almost

exclusively by academics, that civil actions pressing human rights claims, especially those having *jus cogens* status, cannot be defeated by invocation of sovereign immunity. See, *e.g.*, H. Fox, The Law of State Immunity (2d ed. 2008) at 150-41; L. M. Caplan, *State Immunity, Human Rights and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 Am.J.Int. Law 741 (2003). The theory envisions a "normative hierarchy" of international law principles, with human rights, and especially *jus cogens*, principles standing at their peak. Immunity is, on this theory, far lower down the values ladder. No lesser principle, and surely not a mere "procedural" rule such as sovereign immunity, can be allowed to stand in the way of vindicating universally accepted human rights rules.

An alternative form of the argument advanced by Caplan, *supra*, is reminiscent of the arguments that unconstitutional acts cannot be under color of law, since no state can authorize constitutional violations. Since immunity is a public policy designed to further good relations between states, and such relations are not furthered by *jus cogens* violations, immunity is unavailable in such cases. This latter argument fails because, as noted in Point I.B., *supra*, immunity is a foundational rule of an international system of states enjoying equal sovereign status, not a courtesy to further good inter-state relations. Lord Bingham rejected this

argument as a matter of international law in *Jones*, *supra*, at ¶¶ 17-28.

Whether advocates truly intend the full scope of the argument is open to question. *Jus cogens* prohibitions, for example, cannot be overridden in substance (*i.e.*, torture is permitted in cases of terrorism) but it hardly follows that there can be no procedural bars to enforcement of human rights norms. As best we know, no advocate of the normative hierarchy theory urges that those accused of human rights violations bear the burden of proving their innocence or that hearsay evidence can be admitted against the defendant, but not on her behalf.

Whatever the logical limits of the normative hierarchy theory, it has not been accepted by nations or their courts. This rejection, rather than abstract intellectual arguments advanced by those free of the responsibility for governance, is what matters.

In *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), a case brought against Saudi Arabia challenging acts of torture allegedly committed by Saudi officials, this Court said that FSIA provided the exclusive basis for jurisdiction over foreign states, and that in that case, alleging a violation of well-settled international human rights law absolutely banning torture, the only arguable basis for jurisdiction was the commercial activity exception, 28 U.S.C. § 1605(a)(2). This Court did not suggest a judicially created human rights exception.

Similarly, in *Argentine Republic v. Amerada Hess Shipping Co.*, 488 U.S. 428 (19889), the Supreme Court rejected the claim that FSIA's sovereign immunity protection did not apply to alien tort claims, *id.* at 435-37. The Court also rejected the claim that a nation's adherence to international treaties governing its challenged conduct constituted an implied waiver of immunity under FSIA, *id.*, 442-43. If this is true of treaty law, resting on state consent, it ought to be true *a fortiori* of claims arising under customary international law.

B. Most Domestic and Foreign Courts Reject the Normative Hierarchy Theory

Unlike the court below[19] several federal courts have held that an allegation of human rights violation does not supersede FSIA conferred sovereign immunity.[20] This American majority rule

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[19] See also *Enaharo v. Abubakar*, 408 F.3d 877 (7th Cir. 2007) (Cudahy, J., dissenting in part).

[20] *Belhas v. Ya'alan*, 515 F.3d 1279 (D.C. Cir. 2008); *Hwang Geum Joo v. Japan*, 323 F.3d 579 (D.C. Cir. 2003); *Sampson v. Federal Republic of Germany*, 250 F.3d 1145 (7th Cir. 2001); *Cabrini v. Government of Republic of Ghana*, 165 F.3d 193 (2d Cir. 1999); *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C .Cir. 1994); *Smith v. Socialist People's Libyan Arab Jamhiriya*, 101 F.3d 239 (2d Cir. 1996). See, *In Re Estate of Ferdinand Marcos*, 25 F.3d 1467 (9th Cir. 1994); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 694 (9th Cir. 1992). And see *Matar v.*

finds parallels in the rulings of most foreign courts to consider the issue. The normative hierarchy theory was advanced in the House of Lords in *Jones* and squarely rejected. Lord Bingham explained:

> In countering the claimants' argument the Kingdom … is able to advance …arguments which in my opinion are cumulatively irresistible. … [T]he claimants are obliged to accept, in light of the *Arrest Warrant* decision of the International Court of Justice [2002] ICJ Rep. 3 that state immunity *ratione personae* can be claimed for a serving foreign minister accused of crimes against humanity. Thus, even in such a context, the international law prohibition of such crimes, having the same standing as the prohibition of torture, does not prevail. It follows that such a prohibition does not automatically override all other rules of international law. The International Court of Justice has made plain that breach of a *jus cogen*s norm or international law does not suffice to

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Dichter, 563 F.3d 9 (2d Cir. 2009) (leaving issue open, noting split of authority and applying common law sovereign immunity).

> confer jurisdiction (*Democratic Republic of the Congo v. Rwanda* (unreported) 3 February 2006, ¶ 64). As Hazel Fox QC put it (The Law of State Immunity (2004), p. 525):
>
> > State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural plea of State immunity upon which a *jus cogens* mandate can bite.
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> *Id*. at ¶ 24).

Lord Bingham also dismissed as a legal fiction the argument that since a state was without authority to authorize a violation of international human rights norms, a government official carrying out such a violation could not be said to be an official actor. *Id*. at ¶¶ 17-27.

Lord Hoffman agreed. After surveying international decisions at length (some of which are further discussed below) he observed that there was

no torture exemption from sovereign immunity in international law. (*Id*. at ¶¶ 42-62)

Both Lords cited with approval the decision of the European Court of Human Rights in *Al-Adsani v. United Kingdom* [2001] 34 EHRR 273.[21] Al-Adsani claimed to have been tortured by various Kuwati officials. The English courts had held that sovereign immunity was a bar to suit under the United Kingdom's 1978 State Immunity Act, relying in part on *Argentine Republic v. Amerada Hess Shipping Corp.*, *supra*, and *Siderman*, *supra*.

The European Court held that this judgment did not violate European human rights treaty guarantees of access to courts. The European Court wrote:

> In its Report on Jurisdictional Immunities of States and their Property (1999), the working group of the International Law Commission (ILC) found that over the preceding decade a number of civil claims had been brought in municipal courts, particularly in the United States and United Kingdom,

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[21] Similar results were reached contemporaneously in two other cases before the European Court of Human Rights. *Fogarty v. U.K.* [2002] 34 EHRR 12; *McElhinney v. Ireland* [2002], 12 BHRC 114 (alleging unlawful killing). See, to the same effect, *Holland v. Lampen-Wolf* [2000], 1 WLR 1573 (libel).

against foreign governments, arising out of acts of torture committed not in the territory of the forum State but in the territory of the defendant and other States. The working group of the ILC found that national courts had in some cases shown sympathy for the argument that States are not entitled to plead immunity where there has been a violation of human rights norms with the character of *jus cogens*, although in most cases the plea of sovereign immunity had succeeded. The working group cited the following cases in this connection: (United Kingdom) *Al-Adsani v. State of Kuwait*, 100 International Law Reports 465 at 471; (New Zealand) *Controller and Auditor General v. Sir Ronald Davidson* [1996], 2 New Zealand Law Reports 278, particularly at 290 (per Cooke, P.); Dissenting Opinion of Justice Wald in (United States) *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994) at 1176-1185; *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992); *Argentine Republic v. Amerada Hess Shipping Corporation*, 488 U.S. 428

(1989); *Saudi Arabia v. Nelson*, 100 International Law Reports 544.

Moreover, the European Court drew an important line between criminal prosecution and civil actions. Distinguishing civil actions from the decision that allowed former Chilean dictator Pinochet to be extradited and tried outside of Chile for international crimes, the Court wrote (¶ 34):

> The coming into force of the UN Convention … had created a universal criminal jurisdiction in all the Contracting States in respect of acts of torture by public officials, and the States Parties could not have intended that an immunity for ex-heads of State for official acts of torture would survive their ratification of the UN Convention. The House of Lords (and, in particular, Lord Millet, at p. 278) made clear that their findings as to immunity *ratione materiae* from criminal jurisdiction did not affect the immunity *ratione personae* of foreign sovereign States from civil jurisdiction in respect of acts of torture.

Al-Adsani was reaffirmed by the European Court in the following year in a preliminary ruling on an appeal of a Greek high court decision finding that Germany enjoyed sovereign immunity for the

1944 Distomo massacre which took place on Greek soil. The claimant unsuccessfully sought relief in the European Court of Human Rights:[22]

> The … Court does not find it established, however, that there is yet acceptance in international law of the proposition that states are not entitled to immunity in respect of civil claims for damages against them in another state for crimes against humanity. The Greek Government cannot therefore be required to override the rule of complete immunity against their will.

Accord K. Bartsch & B. Elbering, *Jus Cogens v. State Immunity, Round Two: The Decision of the European Court of Human Rights in Kalogreopoulou v. Greece and Germany*, 4 German L.Jnl. 477 (2003).

A similar conclusion was reached by the ICJ in the *Armed Activities In the Congo* case, ICJ Reports [2002], ¶ 64. Rwanda was charged with various *jus cogens* violations under several treaties, including the Genocide Convention. That convention provides for ICJ jurisdiction over disputes arising

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[22] The decision in *Kalogreopoulou v. Greece and Germany*, is apparently not available in English. The translation here is from H. Fox, The Law of State Immunity (2d ed. 2008) at 275. The decision of the Greek court also appears to be unavailable in English.

under the Convention. Rwanda, however, had acceded to the Genocide Convention with a reservation against acceptance of ICJ jurisdiction. The Congo argued that, insofar as the reservation interfered with enforcement of an internationally binding human rights norm, it was invalid. The ICJ rejected the argument:

> "[T]he *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things" (*East Timor* (*Portugal v. Australia*), *Judgment*, I.C.J. Reports 1995, p. 102, para. 29), and that the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute. The same applies to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court's jurisdiction: the fact that dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute ... Under the Court's Statute that

> jurisdiction is always based in consent
> ....

Indeed, even those who disapprove of the invocation of immunity in some or all human rights claims acknowledge that their view is not now law. See, *e.g.*, S. Humes-Schultz, *Limiting Sovereign Immunity In The Age of Human Rights Litigation*, 25 Hastings Int'l & Comp. L.Rev. 261 (2002).

The sole international exception of which *amicus* is aware is a decision of the Italian Supreme Court in *Ferrini v. Federal Republic of Germany*,[23] a case seeking redress in Italy for a Nazi massacre occurring on Italian soil, but as Professor Fox notes (H. Fox, The Law of State Sovereignty, *supra*, at p. 150), the decision in that case (which does not involve extra-territorial adjudication) must be set against contrary decisions in Canada, England, France and Germany. More to the point, the correctness of *Ferrini* is now pending before the International Court of Justice, Case Concerning Jurisdictional Immunities of the State (Germany v. Italy), with final briefs due in December 2009. [24]

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[23] Cited in H. Fox, *supra*, at p 150 (citations omitted).

[24] In a reservation to the Jurisdictional Articles, *supra*, n. 12, Norway noted that its ratification was without prejudice to future developments in the field of human rights. The clear implication is that at present human rights claims are subject to the Convention's immunities.

As Professor Fox concludes,[25] "To confer on all national courts jurisdiction to entertain proceedings against a foreign State for violation of fundamental human rights affecting the physical integrity of the person would … 'risk creating total judicial chaos.'" There is no indication that Congress, in passing FSIA, intended such anomalous result so out of step with prevailing international law.

III. IMMUNITY FROM CIVIL ACTIONS DOES NOT AMOUNT TO IMPUNITY

A. There are Ample International Remedies Apart from Civil Suits in Other Countries

Sovereign immunity in the international context, as does its domestic counterparts of sovereign immunity and the Eleventh Amendment, closes off one avenue of relief. That is a reasonable price to pay for the respect for the equality of other nations.

The loss of a civil monetary remedy hardly amounts to a grant of impunity to those who trample settled international human rights norms. First and foremost, as the General Assembly said in approving the Jurisdictional Articles, and as the House of Lords held in the *Pinochet* case, immunity from civil damages suits does not extend to criminal prosecutions either in an international tribunal such

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[25] *Id.* at 158.

as the International Criminal Court, *ad hoc* tribunals (as in the case of Rwanda), or in any court of a state empowered to exercise universal criminal jurisdiction. Surely, the possibility of a lengthy jail sentence will have at least as much deterrent effect as the possibility of a civil suit in a far away state.

Second, a state may waive its own immunity—the immunity from which the official's immunity is derived. This will often happen when a successor government repudiates its predecessor's policies.

Third, excluding judicial actions does not foreclose other effective measures such as diplomatic sanctions, truth commissions, restraints on the right to travel and the denial of sanctuary or asylum to those accused of gross violations of human rights.

Fourth, private actors assisting or participating in human rights violations may, perhaps, be available as defendants, and they will have no claim to immunity. See, J. Davis, Justice Across Borders: The Struggle for Human Rights in U.S. Courts, 204-38 (2008) (describing many such lawsuits).

B. There Are Salient Reasons to Permit Criminal Actions But Bar Civil Ones

The difference between criminal actions and civil actions is not one of form only. Criminal actions are initiated by either a state or an international body, subject to political and prudential constraints

that are absent in the case of private plaintiffs. Surely, in the case of states (but in the case of international bodies, as well), a prosecution must stand the test of universality. Would the prosecutor act against all similarly situated violators from other states, or, more precisely, would the state support a similar prosecution brought against its own officials?

If, for example, the United States were to prosecute Israeli officials for the "targeted killing" of a Hamas bomber in Gaza as an extra-judicial killing, see *Matar*, *supra*, n. 20, it must take into account that others will use that precedent to prosecute the Americans responsible for the killing of al Qaeda members and civilian bystanders in Yemen, or the routine use of drone-launched missiles in Afghanistan and Pakistan.

Governments are likely to prosecute only the clearest violations, cases in which the law is clear and any countervailing national interests are weak. Prosecutorial discretion can be relied on to avoid marginal cases, or cases with great adverse impact on state interests of many countries.

None of this is true of private civil actions. Such suits can be brought on a non-reciprocal basis; they can be brought not to enforce clearly established law, but to make new law. They can be brought even where the law is unclear. Private suits can and will be brought without regard to countervailing state interests, indeed, often with the purpose of denigrating state interests. They can be

brought by those implacably hostile to a particular state, with no thought of even-handed application.

And, contrary to one of the purposes of FSIA, the resulting wave of cases will embroil the Executive Branch in deciding whether adjudication would adversely implicate the foreign policies of the United States.

Consider, for example, what would happen if Gazans were to file suit in a U.S. District Court, seeking damages for alleged Israeli violations of the law of war 'documented' in the Goldstone Report. Israel would tell the State Department that there could be no peace process if the Palestinian suit were to proceed. Palestinians would say to the State Department that there could be no peace if the impunity of Israel did not end. See *Palestinians, In Reversal, Press U.N. Gaza Report*, NY Times, October 14, 2009, www.nytimes.com /2009/10/15/ world/mideast/15nations.html?Sep=2859=Goldstone-report%26+peace. See also U.N. Press Release, *Leave All Politics and Selectivity At the Door and Take Up Cause of Justice*, GA/10882 (2009). The sub-caption is telling: "*Palestinian Observer Says Israel Must Be Held Accountable for Crimes In Gaza, Israeli Delegate says Politicized Report Damages Effort to Revitalize Peace Talks.*" The State Department would have to find a way through that thicket as it sought to advance the peace process.

Criminal proceedings are brought to enforce the law; civil complaints can and often will be

brought to challenge or expand the law globally. Federal courts will become legislators of international law without the legitimacy that comes through the treaty-making and other consensus building mechanisms by which international law is usually adapted to new circumstances.

CONCLUSION

For the reasons stated, the judgment should be reversed as to any claim not arising under TVPA.

Respectfully submitted.

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