

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

**BRIEF OF *AMICI CURIAE* MARTIN WEISS, GERALD
ROSENSTEIN, PROGRESSIVE JEWISH ALLIANCE,
ASSOCIATION OF HUMANISTIC RABBIS, JEWS AGAINST
GENOCIDE, STOP GENOCIDE NOW, SAVE DARFUR
COALITION, DARFUR AND BEYOND, DEFEND DARFUR
DALLAS, TEXANS AGAINST GENOCIDE, SAN FRANCISCO
BAY AREA DARFUR COALITION, AND MASSACHUSETTS
COALITION TO SAVE DARFUR IN SUPPORT OF
RESPONDENTS**

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STATEMENT OF INTEREST

More than a half-century ago, the United States played a leadership role in a series of trials in Nuremberg, Germany, that had a transformative effect on the international legal system. The Nuremberg trials marked a sea-change in the dignity afforded the Rule of Law in holding accountable persons who exploit government power to commit the most extreme atrocities against their fellow human beings. Among the most fundamental achievements of the trials was the recognition that persons who commit crimes against humanity cannot escape accountability by hiding behind the cloak of sovereign immunity, either as the authors of government policy or as those who simply follow the authors' orders. The Foreign Sovereign Immunities Act, enacted by the United States Congress three decades later, cannot, and should not, be interpreted in a way that undercuts this fundamental principle of law that the United States itself played a central part in establishing.¹

Amici here represent individuals and associations with a very direct understanding of the importance of legal accountability in the modern

¹ Counsel of Record for all parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. 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 persons other than the *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

world. They include survivors of the Holocaust, who experienced first-hand the horrific events that led to widespread acceptance of the Nuremberg Principles. They also include persons and organizations who hope one day to see accountability exacted for subsequent human rights atrocities, including those occurring recently in Darfur.

Amicus Martin Weiss was born in an area of the former Czechoslovakia that was occupied by Axis forces after the outbreak of World War II. Mr. Weiss, his mother, father, four sisters, and an older brother were deported to Auschwitz. Of these family members, only Mr. Weiss and one sister survived. He emigrated to the United States in 1946. For many years, Mr. Weiss has volunteered as a speaker on the events of the Holocaust. Through the auspices of the U.S. Holocaust Museum, he addresses law enforcement groups on the roots of extremist violence, while also traveling across the nation to speak on the role that hatred, prejudice, and abuse of power play in causing genocide. He submits this brief in the hope that the promise of Nuremberg will be fulfilled, and that perpetrators of genocide will continue to know that they cannot escape legal responsibility for their crimes.

Amicus Gerald Rosenstein was born in Southern Germany in 1927 and emigrated with his family to Amsterdam in 1936. After Nazi Germany invaded the Netherlands, Mr. Rosenstein was deported East, moving from one concentration camp to another. He survived Auschwitz-Birkenau, a death march, and eventual liberation by the Russian Army. In the process, Mr. Rosenstein witnessed first-hand all the

horrors of the Holocaust. He submits this brief in support of the proposition that individuals who carry out the most heinous and inhumane acts cannot rely on the cloak of sovereign immunity to evade legal responsibility.

The mission of *Amicus* Progressive Jewish Alliance (“PJA”) is to engage Jews of diverse backgrounds to learn, lead, and act in their local communities to create a more just and equal society. PJA serves as a vehicle connecting Jews to the critical social justice issues of the day and to the Jewish tradition of working for *tikkun olam* (repair of the world). At every level of government, the accountability of officials to the citizens and residents they govern is vital to the safe, secure operation of democracy. With the Jewish community’s history of legalized persecution, torture, and genocide, PJA is committed to ensuring that such atrocities do not occur elsewhere and that government officials are held accountable for their actions.

Amicus Association of Humanistic Rabbis (“AHR”) was founded in 1967 by rabbis committed to the values of a human-centered approach to Jewish life and culture. AHR views the protection of human rights as a cornerstone of this mission.

Amicus Jews Against Genocide was initially founded to respond to ethnically motivated attacks on civilians in Bosnia in the early 1990s. The organization has since expanded its advocacy on behalf of victims of large-scale human rights violations to include Kosovo, East Timor, Sierra

Leone, Sudan, Congo, and Burma. In the aftermath of the Holocaust, members of the group feel a particular responsibility to speak out as Jews for others in circumstances of massive violations of human rights.

Amicus Stop Genocide Now (“SGN”) is an organization dedicated to working to protect populations in grave danger of violence, death, and displacement resulting from genocide. Through active education, advocacy, and policy change, SGN resolves to change the way the world responds to genocide.

Amicus Save Darfur Coalition is a coalition of almost two hundred organizations, representing hundreds of thousands of people, who have joined together in response to the crisis in Sudan to promote goals of ending the violence against civilians, facilitating adequate and unhindered humanitarian aid, establishing conditions for the safe and voluntary return of displaced people to their homes, promoting the long-term, sustainable development of Darfur, and holding the perpetrators of the violence accountable.

Amici Darfur and Beyond, Defend Darfur Dallas, Texans Against Genocide, San Francisco Bay Area Darfur Coalition, and Massachusetts Coalition to Save Darfur are organizations dedicated to stopping and addressing genocide in Darfur and around the world. These organizations submit this brief with the belief that the imposition of individual liability in a court of law is necessary to deter future acts of

genocide and other crimes against humanity, both in Darfur and elsewhere.

SUMMARY OF ARGUMENT

In the years following World War II, the United States played a critical leading role in establishing as a fundamental principle of international law the rule that perpetrators of genocide, mass torture, and other gross human rights violations cannot escape legal accountability for their actions through reliance on sovereign immunity. This is one of the bedrock propositions enshrined in the “Nuremberg Principles” developed during the Nuremberg trials and broadly accepted thereafter by the international legal community.

As explained by the Nuremberg Tribunal, the national courts that tried Adolf Eichmann and other war criminals, and a wide variety of other international and national tribunals and courts, crimes against humanity are ultimately committed by individuals and fall outside the scope of any legitimate sovereign authority. Application of sovereign immunity to shield the perpetrators of gross human rights abuses from legal accountability is thus fundamentally inconsistent with the bedrock international law principle – established at Nuremberg and repeatedly acknowledged since – that perpetrators of genocide, torture, and similar atrocities can be held accountable for their actions, not simply through the Power of the Sword, but through the Rule of Law.

This international legal principle was firmly established by the time the Foreign Sovereign

Immunities Act (“FSIA”) was enacted in 1976. There is no indication that Congress intended the FSIA to undermine the legacy of Nuremberg in the manner sought by Petitioner here. This Court should not now construe the statute to impose such a result.

ARGUMENT

I. The Foreign Sovereign Immunities Act Should Be Construed in a Manner That Takes Appropriate Account of the Contemporaneous Legal Context at the Time of Its Enactment.

As the decision of the United States Court of Appeals for the Fourth Circuit in this case compellingly demonstrates, it is clear from the plain language of the Foreign Sovereign Immunities Act and its legislative history that the statutory grant of sovereign immunity does not extend to individual government officials – and that, even if it did, such an extension would not include a former official who has already left office. *Yousuf v. Samantar*, 552 F.3d 371, 380-83 (4th Cir. 2009). This Court should adopt the Fourth Circuit’s reasoning, and it need look no further than the plain language of the statute to do so.

However, if the Court elects to inquire further, basic principles of statutory construction require that the FSIA be construed in a manner that takes proper account of the existing legal context at the time of its enactment. *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 201 (1979) (statute must be construed in light of “the historical context from which the Act arose”); *see also Sosa v. Alvarez-*

Machain, 542 U.S. 692, 714-23, (2004) (analyzing the historical context of the Alien Tort Statute). This legal context includes the contemporaneous international legal regime.

For the past 200 years, this Court has consistently recognized, as a fundamental principle of statutory construction, that (absent a clear statement of congressional intent) a statute should not be construed in a manner that is inconsistent with international law. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”) (Marshall, C.J.); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (noting that the Court assumes Congress will generally attempt to follow international law). This rule should apply with particular force with respect to the rules of international law that the United States played a major role in establishing in the first place.

These principles of statutory construction apply with full force to the FSIA, which was enacted, not to create new expansive rules of sovereign immunity, but rather to “codif[y], as a matter of federal law, the restrictive theory of sovereign immunity” as then recognized by the United States and to “assure[e] litigants that ... decisions are made on purely legal grounds....” *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983) (quoting H.R. Rep. No. 94-1487, at 7 (1976)).

As shown below, it is – and was in 1976, when the FSIA was enacted – a firmly established principle of international law that an individual may not invoke sovereign immunity to escape legal accountability for genocide, crimes against humanity, mass torture, and other atrocities committed as a government official. The United States led the way in enshrining this principle in the prosecutions and judgments entered at Nuremberg. By the time the FSIA was enacted, the principle had been applied time and again to enforce the legal accountability of numerous individuals throughout the world. Absent a clear expression of congressional intent to reject this international legal principle – and there is none – the FSIA should similarly be interpreted as rejecting any application of sovereign immunity in this context.

II. The Post-World War II Legal Regime Eliminated Sovereign Immunity as a Barrier to Individual Accountability for Crimes Against Humanity.

A. The Nuremberg Principles Rejected Sovereign Immunity as a Barrier to Legal Action Against State Officials Who Commit *Jus Cogens* Violations.

There was once a time when the law recognized no meaningful distinction between the sovereign as the state and the sovereign – the king – as an individual; the immunity of one from accountability under the law was by definition the immunity of the other. By the middle of the Twentieth Century, however, the international legal regime (led, to a

large degree by the United States and other democracies) was well advanced in recognizing the critical legal distinction between the State and the persons who act in its name. The Versailles Treaty, for example, provided for prosecution of Kaiser Wilhelm II, although such a proceeding never actually took place. *See* ARCHBOLD INTERNATIONAL CRIMINAL COURTS: PRACTICE, PROCEDURE & EVIDENCE 770-73 (Karim A.A. Khan et al. eds., 2d ed. 2005) (“ARCHBOLD”).

In a parallel trend, international law in the Twentieth Century increasingly called into question the existence of sovereign immunity with respect to “*jus cogens*” offenses – the breaching of certain fundamental rules at the apex of the international law hierarchy, such as the prohibitions against genocide, torture and war crimes. *See* Restatement (Third) of the Foreign Relations Law of the United States § 102, cmt. k, § 702; cmt. n (1987). The peremptory norms that are violated by a *jus cogens* offense stand outside the legitimate scope of sovereign authority and thus, by extension, outside the scope of protection afforded by sovereign immunity. *See* Colin B. Picker, *International Law’s Mixed Heritage: A Common/Civil Law Jurisdiction*, 41 VAND. J. TRANSNAT’L L. 1083, 1091 (2008) (“[T]he concept of state sovereignty in international law has eroded with the growth of *jus cogens*, the

fundamental peremptory norms that apply to states regardless of their consent.”).²

In the landmark Nuremberg trials of Nazi war criminals after World War II, these concepts came together in a recognition that official capacity cannot immunize government officials from liability for *jus cogens* violations. See ARCHBOLD, *supra*, at 770-73; see also *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992) (“The universal and fundamental rights of human beings identified by Nuremberg – rights against genocide, enslavement, and other inhumane acts – are the direct ancestors of the universal and fundamental norms recognized as *jus cogens*.”) (citation omitted). At Nuremberg, the United States and its allies invoked the Rule of Law to hold accountable persons who were personally responsible for the torture and deaths of tens of millions of people. In doing so, they recognized principles of universal applicability that extended far beyond the defendants’ mere status as the losers in a war, or as the perpetrators of particular crimes against particular people. See TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUREMBERG WAR CRIMES TRIALS UNDER

² Technically, the defense of “official capacity” or “act of state” is different from the doctrine of “sovereign immunity.” The latter represents a threshold jurisdictional bar while the former constitutes a defense asserted once jurisdiction has been asserted by a court. See WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 369-70 (2d ed. 2009). Although courts often refer to them interchangeably, *id.*, this brief focuses on the jurisdictional issues of sovereign immunity encompassed within the Court’s grant of *certiorari*.

CONTROL COUNCIL LAW NO. 10 107 (1949) (“TAYLOR”) (noting that “Nuernberg was based on enduring [legal] principles and not on temporary political expedients”). The defendants at Nuremberg – who included Hermann Goering, Adolf Hitler’s principal deputy, and Admiral Karl Doenitz, who served as German Head of State following Hitler’s suicide – were subject to prosecution for their crimes because the law held them to be accountable, regardless of their former positions as senior officials of the German government and military.

The first Nuremberg trial was held pursuant to the Charter of the International Military Tribunal (“IMT”), which was drafted principally by United States officials. See Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407, 1469 (2002) (“[T]he primary impetus for the Nuremberg tribunal came from the United States [and] Justice Robert Jackson, the chief prosecutor for the United States, exercised a great deal of control in shaping the court and the prosecution.”). The IMT Charter authorized prosecution of Nazi leaders for war crimes and crimes against humanity.³

³ See Charter of the International Military Tribunal, Article 7, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, reprinted in REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 420-29 (1949).

Article 7 of the IMT Charter unequivocally declared: “The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.” *Id.* The rationale behind this principle was articulated in Justice Jackson’s historic opening statement, which emphasized that persons, not abstract entities, are responsible for human rights violations:

Of course, the idea that a state, any more than a corporation, commits crimes, is a fiction. Crimes always are committed only by persons. While it is quite proper to employ the fiction of responsibility of a state or corporation for the purpose of imposing a collective liability, it is quite intolerable to let such a legalism become the basis of personal immunity.

The Charter recognizes that one who has committed criminal acts may not take refuge in superior orders nor in the doctrine that his crimes were acts of states. These twin principles working together have heretofore resulted in immunity for practically everyone concerned in the really great crimes against peace and mankind. Those in lower ranks were protected against liability by the orders of their superiors. The superiors were protected because their orders were called acts of state. Under the Charter, no defense based on either of these doctrines can be entertained. Modern civilization puts

unlimited weapons of destruction in the hands of men. It cannot tolerate so vast an area of legal irresponsibility.

Robert Jackson, Opening Statement (Nov. 21, 1945), 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 98, 150 (1947).

The unassailable logic of Justice Jackson's argument was famously embraced by the IMT in its epochal judgment:

It was submitted that ... where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal [this contention] must be rejected.... 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.... The principle of international law, which under certain circumstances protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.

Judgment of the International Military Tribunal at Nuremberg (Oct. 1, 1946), *reprinted in Judicial Decisions*, 41 AM. J. INT'L L. 172, 220-21 (1947).

The inapplicability of sovereign immunity was further reaffirmed in what came to be known as the “Subsequent Nuremberg Trials.” After the IMT proceedings commenced, the Allied Control Council issued “Control Council Law No. 10,” which established the basis for prosecution of other high-level Nazi officials. Article II(4)(a) of that instrument confirmed that “[t]he official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment.”⁴

Telford Taylor, assistant to Justice Robert Jackson at the initial IMT trial and Chief Counsel for War Crimes at the Subsequent Nuremberg Trials, explained in his final report to the Secretary of the Army the lasting significance of Nuremberg’s rejection of official immunity:

Nuernberg was a process, not an episode. Despite the stature of the IMT judgment, had it stood as the sole judicial utterance at Nuernberg it would have been subject to the unwarranted criticism that it was merely the product of the political forces of the moment. In fact, however, Nuernberg was based on enduring principles and not on temporary political expedients, and this fundamental point is apparent from the reaffirmation of

⁴ Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Dec. 20, 1945, *reprinted in* TAYLOR, *supra*, at 250.

the Nuernberg principles in Control Council Law No. 10, and their application and refinement in the 12 judgments rendered under that law during the 3-year period, 1947 to 1949. During those years the international political situation underwent revolutionary changes, but the principles of Nuernberg continued to be applied there.

TAYLOR, *supra*, at 107.

Following the Pacific War, the International Military Tribunal for the Far East (IMTFE or Tokyo Tribunal), a court established in 1946 by the United States through orders of General Douglas MacArthur, also barred the defense of sovereign immunity in the trials of high-ranking Japanese officials accused of *jus cogens* violations.⁵ In particular, Article 6 of the IMTFE Charter provided that “[n]either the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged....” Charter of the International Military

⁵ See Dickinson, *supra*, at 1469; Christopher P. DeNicola, *A Shield for the “Knights of Humanity”: The ICC Should Adopt a Humanitarian Necessity Defense to the Crime of Aggression*, 30 U. PA. J. INT’L L. 641, 645 (2008) (describing creation of the Tokyo Tribunal as an effort to ensure that *jus cogens* perpetrators not “hide behind sovereign immunity” in order to “end the cycle of impunity”).

Tribunal for the Far East, Jan. 19, 1946, art. 6, T.I.A.S. No. 1589, 4 Bevens 20, 22.

In 1946, the rebuff of the sovereign immunity defense for *jus cogens* violations was enshrined in one of the cornerstone documents of the international legal order established by the United States and its allies after the war – the “Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal” – commonly referred to as the “Nuremberg Principles.” Principle III of that document reaffirms that “[t]he fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.” See Report of the International Law Commission Covering Its Second Session, at 11-14, U.N. Doc. A/1316 (June 5-July 29, 1950).

Thus, after World War II, it was firmly established, first by the actions of the United States and its allies, and then by the international community in general, that sovereign immunity is no barrier to legal action seeking to hold accountable government officials who invoke the power of the state to commit widespread murder, torture, and other *jus cogens* offenses. With the leadership of the United States, this principle became a cornerstone of international law.

B. National Courts Embraced the Nuremberg Principle that Individuals May Not Escape Liability for Human Rights Abuses By Asserting Sovereign Immunity.

1. The Landmark Trial of Adolf Eichmann Explained and Reinforced the Unavailability of Sovereign Immunity as a Defense to Individual Accountability.

In the decades following World War II, the Nuremberg principle on sovereign immunity was widely recognized and accepted by national courts. One of the most thorough analyses of the issue was provided in connection with the trial of Adolf Eichmann. Eichmann was the Nazi SS official responsible for coordinating the arrest, selection, transport and reception of millions of Jews throughout Europe to death camps and slave labor sites, as well as the seizure and sequestration of Jewish property. See Matthew Lippman, *Genocide: The Trial of Adolf Eichmann and the Quest for Global Justice*, 8 BUFF. HUM. RTS. L. REV. 45, 50-51 (2002). In 1960, Israeli agents captured Eichmann in Argentina, and he was prosecuted in Israel pursuant to that country's universal jurisdiction statute – the Nazis and Nazi Collaborators (Punishment) Act of 1950 – for crimes against humanity and war crimes. *Id.* at 53-54, 67.

As a former official in the German government, Eichmann claimed he was exempt from liability under the principle of sovereign immunity as his

conduct could only be considered “acts of state.” See *Attorney-General of the Government of Israel v. Adolf Eichmann*, 36 I.L.R. 18, ¶ 28, (Dist. Ct., Dec. 12, 1961) (1968) (“*Eichmann* District Court Judgment”), *aff’d* 36 I.L.R. 277 (Sup. Ct., May 29, 1962) (1968) (“*Eichmann* Supreme Court Judgment”). The Israeli District Court explained why this argument necessarily failed:

Only when official organs of sovereignty participated in atrocities and persecutions did those crimes assume international proportions. It can scarcely be said that governmental participation, the proof of which is necessary for conviction, can also be a defence in the charge.... The repudiation of the contention as to an ‘Act of State’ is one of the principles of international law that were acknowledged by the Charter and Judgment of the Nuremberg Tribunal, and were unanimously affirmed by the United Nations Assembly in its Resolution of 11 December 1946.

Eichmann District Court Judgment, ¶ 28.

Applying similar reasoning, Israeli Supreme Court “utterly reject[ed]” the defense of sovereign immunity:

In any event, there is no basis for the doctrine when the matter pertains to an act prohibited by the law of nations, especially when they are international crimes in the class of ‘Crimes against Humanity’ (in the wide sense). Of such heinous acts it must be

said that they are completely outside the 'sovereign' jurisdiction of the State that ordered or ratified their commission, and therefore those who participated in such acts must personally account for them and cannot seek shelter behind the official character of their task or mission, or behind the 'Laws' of the State by virtue of which they purported to act.

Their case may be compared with that of a person who, having committed an offence in the interests of a corporation which he represents, is not permitted to hide behind the collective responsibility of the corporation therefor. In other words, international law postulates that it is impossible for a State to sanction an act that violates its severe prohibitions, and from this follows the idea which forms the core of the concept 'international crime': that a person who was a party to such a crime must bear individual responsibility for his conduct.

Eichmann Supreme Court Judgment, ¶ 14.

2. Other National Courts Also Accepted the Nuremberg View of Sovereign Immunity.

Numerous other national courts also prosecuted former government officials for atrocities and other crimes committed during World War II. Consistent

with the Nuremberg Principles, not a single jurisdiction treated official capacity as a bar to legal accountability.⁶ Thus, for example, Vidkun Quisling was convicted and ultimately executed notwithstanding his position as “Minister-President” for the collaborationist Norwegian government.⁷ Marshal Philippe Pétain was similarly convicted notwithstanding the fact that his crimes were committed in his capacity of Chief of State for Vichy France.⁸

⁶ See Istvan Deak, *Retribution against Heads of State and Prime Ministers*, LOGOS JOURNAL, Summer 2007, available at http://www.logosjournal.com/issue_6.3/deak.htm (hereinafter “Heads of State”); see generally Istvan Deak, *Post World War II Political Justice in a Historical Perspective*, 149 MIL. L. REV. 137 (1995).

⁷ See Drexel Sprecher, *Telford Taylor Panel: Critical Perspectives on the Nuremberg Trial*, 12 N.Y.L. SCH. J. HUM. RTS. 453, 533-34 (1996).

⁸ See John Hilla, *The Literary Effect of Sovereignty in International Law*, 14 WIDENER L. REV. 77, 143 (2008). Others who similarly found no refuge in the sovereign immunity defense during their post-war trials included, among others, Pierre Laval in France (Pétain’s Prime Minister), Ioannis Rallis (Prime Minister of Greece), Risto Ryti (President of Finland), and Laszlo Bardossy (Prime Minister of Hungary). See Deak, *Heads of State*, *supra*.

III. The Nuremberg Rejection of Sovereign Immunity as a Shield for Perpetrators of Human Rights Abuses Remains a Vital Component of the International Legal Regime.

The principles established at Nuremberg and in other proceedings against the war criminals of the 1930s and 1940s were not specialized or limited to the events of that era. Sadly, the Holocaust survivors' pledge of "Never Again!" has yet to be redeemed, as the late Twentieth Century and the beginning of the Twenty-First have been marked by massive human rights violations in places such as Rwanda, Cambodia, Darfur, and the former Yugoslavia. *See generally* Kelly Dawn Askin, "Never Again" Promise Broken Again. Again. And Again, 27 CARDOZO L. REV. 1723, 1723-28 (2006) (reviewing record of atrocities post World War II).

While the task of calling the perpetrators of these atrocities to account has in many instances scarcely begun, those who have so far sought to do so have consistently hewed to the Nuremberg precedent on the issue of sovereign immunity.⁹ And, as at Nuremberg, the United States has regularly been at the forefront in promoting the use of the Rule of Law, unencumbered by claims of sovereign immunity, to

⁹ As Justice Breyer observed in his concurring opinion in *Sosa*, there is also international "procedural agreement that universal jurisdiction exists" to bring legal action against the perpetrators of "torture, genocide, crimes against humanity, and war crimes." 542 U.S. at 762.

hold accountable persons guilty of such severe human rights abuses. For example:

- In 1993, the United States spearheaded the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) and played a leading role in drafting its statute (which was appended to Security Council Resolution 827, which created the Tribunal).¹⁰ Article 7 of the ICTY Statute provides that “[t]he official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.”¹¹ This provision was applied in the subsequent prosecution of, among others, Slobodan Milosevic, the former President of Serbia.¹²

¹⁰ See Patricia M. Wald, *International Criminal Courts – A Stormy Adolescence*, 46 VA. J. INT’L L. 319, 321 (2006).

¹¹ The Secretary-General, *Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*, Annex 1, art. 7(1), U.N. Doc. S/25704 (May 3, 1993).

¹² See *Prosecutor v. Milosevic*, Case No. ICTY-99-37-PT, Decision on Preliminary Motions, ¶¶ 26-34 (Nov. 8, 2001) (the lack of immunity of heads of state for war crimes, genocide, and other crimes against humanity “reflects a rule of customary international law....”).

- In response to the 1994 Rwandan genocide, the United States championed the creation of the International Criminal Tribunal for Rwanda (ICTR) and once again took the lead in drafting its statute, which was appended to the Security Council Resolution creating the Tribunal.¹³ Article 6(2) of the ICTR statute addresses the issue of sovereign immunity in terms identical to those of the ICTY Statute, and subsequent proceedings under that statute have again pursued former officials for their human rights offenses.¹⁴
- The Statute of the Special Court for Sierra Leone contains provisions identical to those of the ICTY and ICTR statutes, thus permitting prosecution of Charles Taylor, former President of Liberia, for gross human rights violations.¹⁵

¹³ See Robert Cryer, *Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study*, 11 J. CONFLICT & SECURITY L. 239, 250 (2006).

¹⁴ See S.C. Res. 955, Annex 1, art. 6(2), U.N. Doc. S/RES/955 (July 1, 1994); see generally *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence (Sept. 4, 1998) (sentencing ex-Prime Minister for genocide and other crimes).

¹⁵ See The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, Enclosure, art. 6(2), U.N. Doc. S/2000/915 (Oct. 4, 2000).

- Article 29 of The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia similarly provides that “[t]he position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment.”¹⁶ This statute permitted prosecution of several high-ranking Khmer Rouge officials.
- Applying the same principle, former Iraqi leader Saddam Hussein was prosecuted under a law providing that “[t]he official position of any accused person, whether as president of the State, chairman or member of the Revolution Command Council, prime minister or member of the cabinet, or a member of the leadership of the Ba’ath Party, shall not relieve such person of criminal responsibility....”¹⁷

¹⁶ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, art. 29, NS/RKM/1004/006 (as amended Oct. 27, 2004), available at <http://www.eccc.gov.kh/english/law.list.aspx>; see Padraic J. Glaspy, *Justice Delayed? Recent Developments at the Extraordinary Chambers in the Courts of Cambodia*, 21 HARV. HUM. RTS. J. 143, 147-53 (2008).

¹⁷ Law of the Supreme Iraqi Criminal Tribunal (Law Number 10 of 2005), art. 15, Official Gazette of the Republic of Iraq (Oct. 18, 2005); Eric H. Blinderman, *The Conviction of Saddam Hussein for the Crime against Humanity of “Other Inhumane Acts”*, 30 U. PA. J. INT’L L. 1339 (2009).

The same principles have been applied in the first efforts to hold accountable persons responsible for the genocide in Darfur. The international community – including the United States – has broadly condemned the perpetrators of these atrocities and called for responsive action.¹⁸ In March 2005, the United Nations Security Council referred the situation in Darfur to the Prosecutor of the International Criminal Court.¹⁹ The ICC has issued arrest warrants for several Sudanese leaders, including President Omar al Bashir.²⁰

In its decision on the Bashir Arrest Warrant, the ICC Pre-Trial Chamber referred to Article 27 of the ICC Statute and ruled that President Bashir was subject to arrest and prosecution regardless of his status as sitting head of state: “[The] current position of Omar Al Bashir as Head of a state which is not a party to the Statute, has no effect on the Court’s jurisdiction over the present case.”²¹ One

¹⁸ In September 2004, for example, the United States government declared that genocide had been committed in Darfur. See Colin Powell, Testimony before the Senate Foreign Relations Committee (Sept. 9, 2004), available at <http://2001-2009.state.gov/secretary/former/powell/remarks/36042.htm>.

¹⁹ S.C. Res. 1593, ¶ 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

²⁰ John E. Tanagho & John P. Hermina, *The International Community Responds to Darfur: ICC Prosecution Renews Hope for International Justice*, 6 LOY. U. CHI. INT’L L. REV. 367, 385 (2009).

²¹ *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, § 41 (Pre-Trial Chamber I, March 4, 2009). Article 27 of the ICC Statute provides that (continued...)

commentator has noted that “[i]mplied in the Court’s statements is the view that the Security Council has implicitly ... sanctioned the exercise of jurisdiction by the Court over a serving head of state who would otherwise be immune from jurisdiction.”²²

Thus, from at least 1946 up through today, it has become universally accepted that a person who exploits a government position to commit gross human rights violations may not hide behind that

“official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility...” Rome Statute of the International Criminal Court, art. 27, July 17, 1998, 37 I.L.M. 999, 1017, 27 U.N.T.S. 90.

²² Dapo Akande, *The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir’s Immunities*, 7 J. INT’L CRIM. JUST. 333, 336 (2009). This is consistent with the view of the International Law Commission, which drafted the preliminary version of the ICC Statute. As that body observed more than a decade ago:

It would be paradoxical to allow the individuals who are, in some respects, the most responsible for the crimes covered by the [Code of Crimes against the Peace and Security of Mankind] to invoke the sovereignty of the State and to hide behind the immunity that is conferred on them by virtue of their positions particularly since these heinous crimes shock the conscience of mankind, violate some of the most fundamental rules of international law and threaten international peace and security.

Report of the International Law Commission on the Work of its Forty-Eighth Session, commentary (1) to art. 7, U.N. Doc. A/51/10 (May 6-July 26, 1996).

position when finally brought to account for those acts. Indeed, in the case of the Darfur, this principle has even been extended to a serving head of state. Defendant Samantar, of course, is not a serving official; rather, he is seeking to enjoy a comfortable retirement in the United States.²³ In his case, it is crystal clear that international law recognizes no defense of sovereign immunity to permit him to escape legal accountability for human rights abuses.

IV. The Principles Established at Nuremberg Have Necessary and Appropriate Application to the Statutory Remedies Plaintiffs Seek to Invoke in This Case.

Although the Nuremberg Principles had their primary genesis in criminal proceedings, they are of equal importance in both the criminal and civil contexts. The genius of Nuremberg was not its invocation of criminal law specifically – it was, rather, its invocation of the Law itself as the proper mechanism for holding perpetrators of gross human

²³ In the context of gross human rights violations of the type at issue in this case, the question of whether sovereign immunity applies to private tort actions against *serving* government officials is largely moot. Few, if any active perpetrators of gross human rights abuses are likely to find themselves within the personal jurisdiction of any U.S. court while still in office, and those that are would presumably seek to avail themselves of diplomatic immunity or other separate defenses not at issue on this appeal. Notwithstanding the effort represented by the Darfur warrants, history shows that legal accountability of any kind for major human rights abuses nearly always follows the removal of the perpetrators from office.

rights violations accountable for their actions.²⁴ And if sovereign immunity is no bar to criminal prosecution, it surely cannot stand as a barrier to civil liability, where there is much less at stake. It would be strange indeed if the principles of comity upon which sovereign immunity is based were interpreted to permit former government officials to be arrested, tried, and even executed – but not to be subject to monetary damages for their wrongful acts.

Moreover, in the context of the Alien Tort Statute and the Torture Victim Protection Act, “reliance on criminal law norms seems entirely appropriate given that ... international law does not maintain [a] kind of hermetic seal between criminal and civil law....” *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 270-71, 270 n.5 (2d Cir. 2007) (citing *Sosa*, 542 U.S. at 762-63 (Breyer, J., concurring)). As Justice Breyer observed in *Sosa*, “the criminal courts of many nations combine civil and criminal proceedings, allowing those injured by criminal conduct to be represented, and to recover damages, in the criminal proceeding itself.” 542 U.S. at 762-63. *See also Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶ 155 (Dec. 10, 1998) (recognizing the propriety of civil remedies for violations of international criminal law in certain circumstances, noting for example that a torture

²⁴ Following the Subsequent Nuremberg Trials of German industrialists, their companies were seized from them as part of the punishment for their crimes. *See WILLIAM MANCHESTER, THE ARMS OF KRUPP* 734-37 (Bantam Books 1970) (1968).

victim might “bring a civil suit for damage in a foreign court.”).

While the United States legal system does distinguish between civil and criminal proceedings, it similarly recognizes the critical importance of civil liability in ensuring full legal accountability, including for conduct that is itself criminal. *Cf. Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275 (1989) (noting that the civil remedy of punitive damages “advance[s] the interests of punishment and deterrence, which are also among the interests advanced by the criminal law”).

Criminal prosecution is often unavailable due to constraints on resources or other factors, and even where available it may provide little or no redress to the victims. The empowerment of private plaintiffs with a personal incentive to seek justice provides an important mechanism for ensuring that persons harmed by human rights violations are called to account. *See Kadie v. Karadzic*, 70 F.3d 232, 240 (2d Cir. 1995) (“Although the jurisdiction authorized by section 404 [of Restatement (Third) of the Foreign Relations Law of the United States] is usually exercised by application of criminal law, international law also permits states to establish appropriate civil remedies, *id.* § 404 cmt. b, such as the tort actions authorized by the Alien Tort Act.”); *see also Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (permitting civil claims under the ATS is an “important step in the fulfillment of the ageless dream to free all people from brutal violence.”); *Chavez v. Carranza*, 559 F.3d 486, 492 (6th Cir.

2009) (“The TVPA and the ATS share a common purpose in protecting human rights internationally.”); *Papa v. U.S.*, 281 F.3d 1004, 1012 (9th Cir. 2002) (“The TVPA, like the ATCA, furthers the protection of human rights...Moreover, it employs a similar mechanism for carrying out these goals: civil actions.”).

Reversal of the Court of Appeals’ decision here would all but eliminate the ability of the civil law to address human rights violations. As the *Eichmann* decisions pointed out, it is the perpetrators’ ability to exercise governmental power that typically permits such violations to occur in the first place. Permitting the perpetrators of such acts to escape civil liability *because* their acts were committed using government power – permitting the worst violations to escape full punishment in large part *because* they are the worst violations – is directly contrary to both the Nuremberg Principles and to the underlying purposes of the statutes plaintiffs invoke here. It would, for example, effectively nullify the TVPA – a statute that by its very terms creates a civil remedy against persons who act “under actual or apparent authority ... of any foreign nation.” 28 U.S.C. § 1350, note 2(a). Indeed, the TVPA (which was enacted after the FSIA) clearly reflects a congressional understanding that persons acting “under actual or apparent authority ... of any foreign nation” may be sued in U.S. courts notwithstanding the “actual ... authority” that they previously enjoyed. *See Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 444-45 (1987) (noting the “longstanding practice” of construing related statutes together).

As the Court of Appeals observed below, sovereign immunity is a principle of comity intended to ease existing relations with other states. *Yousuf*, 552 F.3d at 382 (citing *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004)). United States law recognizes no independent interest in protecting the former officials of foreign regimes from the full consequences of human rights violations they have committed. To the contrary, United States law, as reflected in the ATS and TVPA, reflects a judgment that former government officials *may* be called to account for their human rights abuses and that U.S. courts *should* provide a forum for such claims. *See, e.g., Filartiga*, 630 F.2d at 890 (finding jurisdiction appropriate under the ATS because “the nations of the world ... recognize that respect for fundamental human rights is in their individual and collective interest.”).

Nothing in the language or legislative history of the FSIA supports the conclusion that Congress intended to abrogate the Nuremberg Principles as applied in U.S. courts. This Court should accordingly refrain from imposing any such limitation and should affirm the judgment below.

V. CONCLUSION

At Nuremberg, the United States led the way in establishing the principle that perpetrators of genocide, mass torture, and similar atrocities cannot escape legal accountability for their actions by invoking sovereign immunity. This principle – which has been reconfirmed and applied repeatedly in the decades since – was a critical component of the

existing international legal regime when the FSIA was enacted. There is no indication in either the language or legislative history of the FSIA that Congress intended that statute to repudiate the hard-won fruits of Nuremberg. The judgment below should be affirmed.

Respectfully submitted,

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