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 PROFESSORS OF PUBLIC INTERNATIONAL LAW AND COMPARATIVE LAW AS *AMICI CURIAE*, IN SUPPORT OF RESPONDENTS

CHIMÈNE I. KEITNER
Counsel of Record
ASSOCIATE PROFESSOR OF LAW
UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW
200 McAllister Street
San Francisco, CA 94102
(415) 565-4790

ROBERT E. FREITAS
NITIN GAMBHIR
CHRISTOPHER YEH
ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
Menlo Park, CA 94025
(650) 614-7400

Attorneys for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are professors with expertise in public international law and comparative law who have an interest in the proper understanding of the legal authorities bearing on the potential immunities of former foreign officials who are otherwise subject to the jurisdiction of U.S. courts.[1] Petitioner and his *amici* have filed briefs in this case that misconstrue such authorities and rely on them for the overly broad proposition that current and former foreign officials enjoy absolute immunity from suit under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1602-1606, 1608, and as a matter of international law.

This Court should not address non-FSIA sources of immunity in the first instance.[2] There is no need to

[1] This brief is filed with the written consent of the parties, which has been lodged with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] As Justice Kennedy wrote for himself, the Chief Justice, and Justice Thomas in *Republic of Austria v. Altmann*, this Court "need not, and ought not, resolve the question [of pre-FSIA immunity] in the first instance. Neither the District Court nor the Court of Appeals has yet addressed it. The issue is complex and would benefit from more specific briefing, arguments, and consideration of the international law sources bearing upon the scope of [non-FSIA] immunity." *Republic of Austria v. Altmann*,

(Continued on following page)

address these authorities in order to find, as the Fourth Circuit properly did, that the FSIA does not apply in this case. However, because Petitioner and his *amici* have relied on certain non-FSIA authorities, we respectfully submit this brief in order to provide the Court with what is, in our view, a more accurate and faithful account of their meaning, and to call other, more relevant cases to the Court's attention.

David J. Bederman is the K.H. Gyr Professor of Private International Law at Emory University.[3] He has been a member of the Board of Editors of the American Journal of International Law since 1999. From 1998 to 2002 he served as a member of an American Bar Association Working Group on the Foreign Sovereign Immunities Act, the report of which appeared at 40 Colum. J. Transnat'l L. 489, 535-43 (2002) (for an analysis of the FSIA's application to foreign officials), and 30 Int'l Lawyer 1261 (2002), and which has been previously relied upon by members of this Court. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 484-86 (2003) (Breyer, J., dissenting).

Frederic L. Kirgis is the Law Alumni Association Professor of Law, Emeritus, at Washington

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541 U.S. 677, 728 (2004) (Kennedy, J., dissenting). The same is true here.

[3] Institutional affiliations are provided for identification only.

and Lee University School of Law. He served as Vice-President of the American Society of International Law from 1985-1987 and was on the Board of Editors of the American Journal of International Law from 1984-1996 and 1998-2003. He currently serves on the American Society of International Law Executive Committee and is a member of the American Law Institute.

Ved P. Nanda is the former Vice Provost at the University of Denver, where he holds two named professorships and serves as Director of the International Legal Studies Program at the University of Denver Sturm College of Law. He is Past President of the World Jurist Association and former honorary Vice President of the American Society of International Law and its counselor. He currently serves as an elected member of the American Law Institute, on the board of the Human Rights Center of the American Bar Association, and as a council member for the American Bar Association Section of International Law.

Mary Ellen O'Connell is the Robert and Marion Short Chair in Law and Research Professor of International Dispute Resolution – Kroc Institute, University of Notre Dame. She chairs the Use of Force Committee of the International Law Association, has been a member of the Executive Committee of the American Society of International Law, and is a member of the German Society of International Law and the International Institute of Humanitarian Law.

She is an incoming Vice President of the American Society of International Law.

Mathias Reimann is the Hessel E. Yntema Professor of Law at the University of Michigan Law School. He is the Editor-in-Chief of the American Journal of Comparative Law, a titular member of the International Academy of Comparative Law, a member of the American Society of International Law, and an honorary member of the German-American Lawyers Association. He is serving on the Executive Committee of the American Society of Comparative Law.

Steven R. Ratner is the Bruno Simma Collegiate Professor of Law at the University of Michigan School of Law. He has advised governments, NGOs, and international organizations on a range of international law issues. A member of the board of editors of the American Journal of International Law from 1998-2008, he began his legal career as an attorney-adviser in the Office of the Legal Adviser of the U.S. State Department.

Leila N. Sadat is the Henry H. Oberschelp Professor of Law and Director of the Harris World Law Institute at the Washington University School of Law. She is a member of the American Law Institute and the International Academy of Comparative Law. She has served on the Executive Committees of the American Society of Comparative Law and the American Society of International Law, and is a Vice-President of the American Branches of the

International Association of Penal Law and the International Law Association.

SUMMARY OF ARGUMENT

Petitioner makes two unsupported assertions. First, Petitioner asserts that "pre-1976 common law immunized a state's officials for their official acts." Pet. Br. at 17. He relies heavily on this assertion for his conclusion that the FSIA should be read to include former foreign officials notwithstanding the FSIA's omission of any reference to individuals in its definition of the term "foreign state." *See* 28 U.S.C. § 1603(a). Second, Petitioner claims that "the overwhelming *current* international authority" provides immunity to former foreign officials sued in their personal capacity for acts of torture and extrajudicial killing. *Id.* at 19. The authorities Petitioner cites, and significant authorities that he omits to cite, do not support these assertions.

Simply put, non-FSIA sources of foreign official immunity do not provide a blanket shield from personal liability for universally recognized international law violations, even if such violations were committed by individuals who held government positions. Because non-FSIA immunities derive from a variety of legal sources, it is not possible to reduce them to a single category. Sources of immunity outside the FSIA include international treaties providing certain immunities for accredited diplomats and consuls. They

also include customary international law, which may be incorporated as federal common law, providing limited immunities such as that afforded sitting heads of state. Additionally, some courts have recognized certain immunities for foreign officials who were not diplomats, consuls, or sitting heads of state, but they have done so inconsistently, usually in the contexts of suits in which the state is either the real party in interest or a necessary party.

These scattered authorities do not support Petitioner's sweeping conclusion that pre-1976 common law and current international law so uniformly require granting blanket immunity to former foreign officials for their ostensibly official acts that this Court should read a similar intent into the FSIA's non-hospitable text. Moreover, none of the specialized pockets of immunities recognized under pre-FSIA common law or current international law applies to Petitioner.

ARGUMENT

The cases on which Petitioner relies do not support the blanket immunity he claims. Instead, they support much narrower, specialized immunities, none of which applies to Petitioner. Although this Court need not and should not pronounce on the scope of any immunities that might exist outside the FSIA in the first instance, any such immunities would not, in any event, benefit Petitioner.

I. Pre-FSIA U.S. Case Law Does Not Support Blanket Immunity

Contrary to Petitioner's claim, Pet. Br. 17, pre-1976 common law did not recognize blanket immunity for foreign officials for acts performed on behalf of the state.

A. Eighteenth And Nineteenth Century Cases Denied Blanket Immunity For Government Officials

Most immunity cases from the eighteenth and nineteenth centuries involved ships, not individuals. *See, e.g., The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812) (involving a dispute about whether a ship was a French public vessel or the U.S. plaintiff's private property). The few cases that involved individuals did not find blanket immunity.

Petitioner cites a 1797 opinion by Attorney General Charles Lee indicating that "a person acting under a commission from a foreign sovereign is not amenable for what he does in pursuance of his commission" to any U.S. court. 1 Op. Att'y Gen. 81 (1797), *cited in* Pet. Br. 27. Petitioner fails to mention that Lee specifically affirmed in the same opinion that the controversy between the plaintiffs and the defendant "is entitled to a trial according to law," and that Lee declined to intervene in the case. 1 Op. Att'y Gen. 81 at *2. Lee's position appears to have been that the claim of official authority could be a defense on the merits, not an immunity from suit.

Petitioner also fails to mention a 1794 opinion by Attorney General William Bradford, cited in Lee's opinion, in which the Executive similarly declined to intervene in pending litigation against a former foreign official. In that case, Bradford opined that Victor Collot, the late Governor of the French colony of Guadeloupe, should not be obliged to give bail, but that the former Governor would nevertheless have to "defend himself by such means as his counsel shall advise." 1 Op. Att'y Gen. 45 at *2 (1794). The Supreme Court of Pennsylvania found that the defendant properly could be held to bail, whether or not he would ultimately be found liable. *Waters v. Collot*, 2 U.S. (2 Dall.) 247, 248 (1796).

In the important case of *People v. McLeod*, 25 Wend. *483 (N.Y. Sup. Ct. 1841), which Petitioner does not discuss or cite, the highest court of general jurisdiction sitting in New York at that time *rejected* the defendant's claim to immunity. Alexander McLeod, a British subject and former deputy sheriff of the Niagara District in Upper Canada, faced criminal and civil charges in a New York court for his alleged involvement in the 1837 attack on the steamboat *Caroline*. The British Ambassador to the United States, Henry Fox, claimed that McLeod should be entitled to immunity because the attack "was a public act of persons in her majesty's service, obeying the order of their superior authorities." Letter from Mr.

Fox to Mr. Forsyth (Dec. 13, 1840).[4] Secretary of State John Forsyth replied that the circumstances would not justify intervention by the U.S. government, even if the government could intervene (which he doubted):

> The president is not aware of any principle of international law, or, indeed, of reason or justice, which entitles such offenders to impunity before the legal tribunals, when coming voluntarily within their independent and undoubted jurisdiction, because they acted in obedience to their superior authorities, or because their acts have become the subject of diplomatic discussion between the two governments.

Letter from Mr. Forsyth to Mr. Fox (Dec. 26, 1840).[5] A unanimous three-judge panel of the New York Supreme Court of Judicature, which included future U.S. Supreme Court Justice Samuel Nelson,[6] denied McLeod's claim of immunity.

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[4] All cited correspondence is reprinted in the *McLeod* opinion.

[5] Secretary of State Daniel Webster, who was appointed when President Martin Van Buren replaced William Henry Harrison, would have given more weight to McLeod's "superior orders" defense, but he also disclaimed any power to intervene. Letter from Mr. Webster to Mr. Fox (Apr. 24, 1841).

[6] *See* David J. Bederman, *The Cautionary Tale of Alexander McLeod: Superior Orders and the American Writ of Habeas Corpus*, 41 Emory L.J. 515, 523 (1992), *citing* 5 Carl Swisher, *History of the Supreme Court of the United States: The Taney Period 1836-64*, at 186 (1974).

Petitioner cites two additional cases from this period, but these cases both involved the Act of State doctrine, not jurisdictional immunity. Pet. Br. 32 n.3, *citing Underhill v. Hernandez*, 168 U.S. 250 (1897) (upholding a directed verdict for defendant who allegedly requisitioned plaintiff's water works during a military occupation, after the case was tried on the merits); *Hatch v. Baez*, 14 N.Y. Sup. Ct. 596, 600 (N.Y. Sup. Ct. 1876) (holding that acts of a "foreign and friendly" government taken within its own territory should not be subject to adjudication in U.S. courts). Petitioner cannot bootstrap cases on the prudential Act of State doctrine, which is a defense on the merits, to support his blanket claim to immunity from jurisdiction.[7]

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[7] This Court has emphasized that the prudential Act of State doctrine is separate and distinct from the jurisdictional doctrine of sovereign immunity. *See, e.g., Republic of Austria v. Altmann,* 541 U.S. 677, 700 (2004) (stating that "[u]nlike a claim of sovereign immunity, which merely raises a jurisdictional defense, the act of state doctrine provides foreign states with a substantive defense on the merits"); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 438 (1964) (distinguishing between act of state doctrine and foreign sovereign immunity). Cases applying the Act of State doctrine have established that universally condemned human rights violations are not "acts of state." *See, e.g., Ochoa Lizarbe v. Rivera Rondon*, 642 F. Supp. 2d 473, 488 (D. Md. 2009) (finding that alleged acts of torture, extrajudicial killing, and crimes against humanity by a former Lieutenant in the Peruvian army "are not deemed official acts for the purposes of the acts of state doctrine"); *Trajano v. Marcos*, 978 F.2d 493, 498 n.10 (9th Cir. 1992) (restating earlier holding that claims of torture and summary execution against President Ferdinand Marcos are not "nonjusticiable 'acts of state' "); *Jimenez v.*

(Continued on following page)

These early cases do not provide any basis for inventing the blanket immunity that Petitioner claims existed prior to the enactment of the FSIA.

B. Twentieth-Century Decisions Did Not Recognize Blanket Immunity And None Found Immunity For Claims Such As Those At Issue Here

The more recent cases Petitioner cites do not support his sweeping claim that U.S. courts "routinely held that officials acting in their official capacities were entitled to immunity derived from that of the state itself" before 1976. Pet. Br. 27. To the contrary, courts did not uniformly find immunity, and no court found immunity in circumstances resembling those at issue here.

The pre-FSIA, twentieth-century cases Petitioner cites involved the specialized context of suits in property and contract. *See, e.g., Oetjen v. Central Leather Company*, 246 U.S. 297 (1918) (affirming the dismissal

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Aristeguieta, 311 F.2d 547, 557-58 (5th Cir. 1962) (rejecting Act of State defense to extradition of former President of Venezuela for offense of "embezzlement or criminal malversation by public officers"); S. Rep. No. 249, 102d Cong., 1st Sess. 8 (1991) (indicating that the Act of State doctrine "cannot shield former officials from liability" under the TVPA); *cf. Liu v. Republic of China*, 892 F.2d 1419, 1432-33 (9th Cir. 1989) (denying application of Act of State doctrine because the foreign state was not acting in the public interest, there was a large degree of international consensus prohibiting the activity, and the act occurred in the United States).

of two suits in replevin involving the title to hides confiscated and sold by Mexican revolutionary forces in the occupied city of Torreon). Although the "restrictive" theory of sovereign immunity emerged during this period to justify subjecting foreign states themselves to U.S. jurisdiction for their commercial activities, individual officials were sometimes – but not always – afforded immunity in connection with these commercial activities.

Federal and state courts granted immunity to individual government officials in three cases from the 1970s involving commercial transactions. *See Greenspan v. Crosbie*, 1976 U.S. Dist. LEXIS 12155, Fed. Sec. L. Rep. (CCH) P95, 780 (S.D.N.Y. Nov. 23, 1976), *reported in* 1977 Dig. U.S. Prac. Int'l L. 1017, 1076 (No. 62) (indicating that the State Department issued a Suggestion of Immunity for the three individual defendants, who included the current Premier of Newfoundland, for alleged violations of §10b of the Securities Exchange Act of 1934); *Heaney v. Government of Spain*, 445 F.2d 501, 503-04 (2d Cir. 1971) (determining, in an action against the Government of Spain and its current Consul General for the alleged non-payment of fees due under a contract, that the contract was not enforceable by a U.S. court because it concerned diplomatic activity); *Oliner v. Can. Pac. Ry. Co.*, 311 N.Y.S.2d 429, 434 (N.Y. App. Div. 1970) (finding that the current Custodian of the Department of the Secretary of State of Canada could not be brought within the court's jurisdiction in a suit involving the ownership of shares of capital stock

issued by a Canadian corporation). It is in this specialized context that a Texas court had previously found that a claim for breach of contract against an individual official was really a suit against the foreign government itself. *See Bradford v. Dir. Gen. of R.R.s of Mex.*, 278 S.W. 251 (Tex. Civ. App. 1925) (finding that a suit for breach of contract to paint railroad bridges against a current "agent of the Mexican government in the management of its railroad" was really a suit against the Mexican government). *Bradford* illustrates circumstances in which "the effect of exercising jurisdiction [over the individual defendant] would be to enforce a rule of law against the state." Restatement (Second) of the Foreign Relations Law of the United States, § 66(f) (1965).

Importantly, not all courts during this period found immunity for individual officials, even when the claims in suit involved actions taken by those individuals in their capacities as agents of a foreign state. *See Pilger v. United States Steel Corp. and Public Trustee*, 98 N.J. Eq. 665 (N.J. Ct. App. 1925) (determining that a German citizen could sue a British public trustee for allegedly unlawfully seizing stock certificates belonging to the plaintiff from a London bank); *Lyders v. Lund*, 32 F.2d 308, 309 (N.D. Cal. 1929) (where plaintiff sought an accounting by the consul of Denmark, a decree for the balance due, and the sale of assets to satisfy plaintiff's claim, observing that the acts of foreign officials should be treated as acts of the foreign state if "the foreign state will have to respond directly or indirectly in the event of a

judgment," and declining to find immunity in the instant case); Sovereign Immunity Decisions of the Department of State from May 1952 to January 1977 (M. Sandler, D. Vagts, & B. Ristau, eds.), *in* 1977 Dig. U.S. Prac. Int'l L. 1017, 1062-63 (No. 62) (reporting that, in *Cole v. Heitman* (S.D.N.Y. 1968), the State Department declined to suggest immunity for the British West Indies Central Labor Organization *or* its liaison officer, despite the Jamaican ambassador's representation that the organization was "an official agency and arm of the Government acting without profit to itself in the conduct of public acts"). Petitioner fails to cite either *Pilger* or *Lyders*, and he fails to mention that *Cole* denied immunity for alleged civil rights violations including false arrest and imprisonment, which the State Department deemed "private" activities in the circumstances under the 1952 Tate Letter standard. 1977 Dig. U.S. Prac. Int'l L. 1017 at 1063.

In sum, pre-FSIA cases do not support Petitioner's sweeping claim to blanket immunity for foreign officials. The cases did not uniformly find immunity, and no case found immunity from jurisdiction in circumstances remotely resembling those at issue here.

II. Current International Law Does Not Support Blanket Immunity

Petitioner's claim that "the overwhelming *current* international authority," Pet. Br. 19, provides

immunity to former foreign officials sued in their personal capacity for acts of torture and extrajudicial killing is simply incorrect.[8] Petitioner cites a Reporter's Note to § 464 of the Restatement (Third) of Foreign Relations Law of the United States (1987), which states that "[o]rdinarily" the acts of foreign officials "are not within the jurisdiction to prescribe of other states." Pet. Br. 38. He relies on this for the proposition that former foreign officials should therefore be immune from suit. *Id.* But jurisdiction to prescribe (as opposed to jurisdiction to adjudicate) is not at issue here. The very comment Petitioner cites indicates, in a sentence he does not quote: "However, a former head of state appears to have no immunity from jurisdiction to adjudicate." Rest. (3d) of For. Rel.

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[8] Petitioner also conspicuously ignores the well established *lack* of immunity from criminal proceedings for former foreign officials under international law, which even his *amici* acknowledge. *See Amicus Curiae* Brief of the American Jewish Congress in Support of Petitioner at 5, 7-8, and 43 (emphasizing that there is no immunity from prosecution "in any court of a state empowered to exercise universal criminal jurisdiction"); Brief of *Amici Curiae* Former Attorneys General of the United States in Support of Petitioner at 17 (assuming incorrectly that a lack of immunity from criminal prosecution can coexist with blanket immunity from civil suit under the FSIA or as a matter of international law); *cf.* Brief for *Amicus Curiae* the Anti-Defamation League, Supporting Neither Side at 6 (indicating that "When individuals acting under color of law perpetrate such atrocities, they can and should be held criminally responsible regardless of rank or title"). *See also infra* n.14 (indicating that there is no legal basis for drawing a sharp distinction for immunity purposes between civil proceedings for torture and criminal proceedings for the same conduct).

§ 464 n.14. Petitioner's other foreign and international law citations are similarly misguided.

Under international law, the immunities of foreign officials are governed by a combination of treaties and customary international law principles, not all of which have been codified in domestic statutes. Some officials, notably current diplomats, sitting heads of state, and a narrow class of current high-level officials such as incumbent foreign ministers, may benefit from status-based immunity (immunity *ratione personae*). Some others, whether currently in office or not, may invoke certain forms of conduct-based immunity (immunity *ratione materiae*). Although some foreign courts have recognized certain immunities for foreign officials who were not diplomats, consuls, or sitting heads of state, they have done so inconsistently, usually in the contexts of suits in which the state is either the real party in interest or a necessary party.

Because these cases have been relatively few and far between, it is difficult to draw meaningful generalizations from them, let alone infer a rule of customary international law, which would require a showing of consistent state practice accompanied by *opinio juris*. Moreover, none of the specialized immunities found by these few cases would shield Petitioner from suit.

A. Former Officials Cannot Claim Status-Based Immunity

The two recognized forms of status-based immunity are diplomatic immunity and head of state immunity. Former officials cannot claim status-based immunity under international law.

Diplomatic immunity is solely intended to enable diplomats to perform their missions free from interference by the receiving state. Today, diplomatic immunity is governed primarily by the Vienna Convention on Diplomatic Relations. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 96 (entered into force with respect to the United States on December 13, 1972); *see also* Diplomatic Relations Act of 1978, 22 U.S.C. §§ 254a-254e.[9] Under the Vienna Convention, foreign diplomatic agents accredited by a receiving state enjoy status-based immunity from criminal and most civil proceedings during their appointment, *see* Art. 31(1), although such immunity may be waived by the sending state. *See* Art. 32.

The State Department has the exclusive authority to accredit diplomats. The State Department may also suggest status-based immunity from service of

[9] In the United States, status-based diplomatic immunity also extends to certain accredited members of U.N. Missions, who may be treated as diplomats. *See* Section 15 of the Headquarters Agreement between the United States and the United Nations, 22 U.S.C. § 287.

process for members of special diplomatic missions. *See, e.g.*, Suggestion of Immunity and Statement of Interest of the United States, *Li Weixun v. Bo Xilai*, Civ. No. 04-0649 (D.D.C. July 24, 2006) at *11 n.9 (suggesting immunity from service of process for invitee of the Executive branch but emphasizing that "[s]pecial mission immunity would not . . . encompass all foreign official travel").[10]

The International Court of Justice has recognized the status-based immunity of an *incumbent* foreign minister under the principle that sitting heads of state are entitled to immunity from the legal process of foreign courts. *See* Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), Judgment, I.C.J. Reports 2002, at 3 (Feb. 14, 2002). U.S. courts have also recognized the status-based immunity of sitting heads of state. *See, e.g.*, *Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004) (rejecting application of FSIA to President of China but finding him immune from service of process as sitting

[10] In contrast to accredited diplomats, consular officials do not enjoy status-based immunity, and are instead protected by conduct-based immunity under the Vienna Convention on Consular Relations, for acts performed in the exercise of their consular functions. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. By the express terms of the applicable treaties, former diplomats and consuls continue to enjoy limited conduct-based immunity after they leave office for acts specifically performed in the exercise of their diplomatic or consular functions. Vienna Convention on Diplomatic Relations, Art. 39(2); Vienna Convention on Consular Relations, Art. 53(4).

head of state); *Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994) (finding elected President of Haiti immune from suit as sitting head of state, even in exile).

By definition, status-based immunities only apply during a diplomat's or head of state's tenure in office. *See* Arrest Warrant Case at 25-26 (emphasizing that absolute immunity ends once a foreign minister leaves office); *see also* Notice of Changed Circumstances Submitted by the United States of America, *Mumtaz v. Ershad*, No. 74258/89 (N.Y. Sup. Ct. March 1991) (withdrawing previous suggestion of immunity in light of defendant's resignation as President of Bangladesh). Because former foreign officials such as Petitioner are private individuals who no longer represent their respective governments, they cannot claim status-based immunity from the jurisdiction of U.S. courts.

B. The Handful Of Foreign Cases That Have Found Immunity For Individual Officials All Involved Specialized Circumstances, And Do Not Support Blanket Immunity

The foreign and international cases cited by Petitioner do not in any way support his assertion that "[n]ow, as in 1976, courts around the world recognize that officials are entitled to sovereign immunity in civil suits challenging their official-capacity acts." Pet. Br. 36. It is true that several foreign courts have declined to find individual officials personally liable

for engaging in certain transactions purely on behalf of a foreign state. However, all of the cases that Petitioner cites can be distinguished from the claims at issue here. Contrary to Petitioner's assertion, Pet. Br. 36, no "reciprocity" concerns require inventing a category of immunity that has not been recognized consistently by courts in other countries.[11]

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[11] Citations by one of Petitioner's *amici* to cases involving the immunity of states themselves are not germane to the analysis here, because such immunity is clearly governed in the United States by the FSIA. *See Bouzari v. Islamic Republic of Iran*, [2004] 71 O.R. (3d) 675 (Ont. Ct. App.) (Can.) (in a case brought directly against the state of Iran, finding that Iran was entitled to immunity under the Canadian SIA, because torture is not a commercial act); *Kalogeropoulou et al. v. Greece & Germany*, App. No. 59021/00 (Eur. Ct. H.R. Dec. 12, 2002) (admissibility) (finding that Greece had not violated the applicants' right of access to court by allowing Germany to invoke state immunity as a defense to civil enforcement proceedings in Greece); *Al-Adsani v. Government of Kuwait*, *reprinted in* (1996) 107 I.L.R. 536 (Ct. App.) (U.K.) (finding no exception under the U.K. SIA for damages claim for alleged acts of torture brought directly against the Government of Kuwait); *Saudi Arabia v. Nelson*, 507 U.S. 349, 362 (1993) (in the context of a claim brought directly against the state of Saudi Arabia, stating that "[e]xercise of the powers of police and penal officers is not the sort of action by which private parties can engage *in commerce*" under the FSIA) (emphasis added). Moreover, some foreign courts have denied immunity for states *and* for individual co-defendants. *See, e.g.*, *Ferrini v. Republica federale di Germania*, Cass., sez. un., 11 marzo 2004, n.5044, 87 Rivista di Diritto Internazionale 539 (2004) (English translation available at 128 I.L.R. 658 (2004)) (ordering Germany to pay damages to an Italian abducted by the German army in 1944 and deported to Germany to work as a forced laborer); *Al-Adsani v. Government of Kuwait* (Jan. 21, 1994) (Ct. App. Jan. 21, 1994) (U.K.)

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i. Courts Have Not Found Immunity Where Only The Assets Of The Individual Are At Issue, Although Some Courts Have Found Immunity Where A Judgment Would Involve The Assets Of The Foreign State

Petitioner cites several cases involving the assets of foreign states. Pet. Br. 28-29, 32. However, the assets of a foreign state are not at issue here. Of utmost relevance here, where only the assets of the individual but not the state are at issue, foreign courts have not granted immunity. *See Saorstat and Continental Steamship Co. v. Rafael de las Morenas*, [1945] I.R. 291, *reprinted in* 12 I.L.R. 97, 98 (S.C.) (Ir.) (finding that a colonel in the Spanish army who had contracted to carry horses from Dublin to Lisbon for use by the Spanish army was not entitled to immunity because "[h]e is sued in his personal capacity and the judgment which has been, or any judgment which may hereafter be, obtained against him will bind merely the appellant personally, and any such judgment cannot be enforced against any property save that of the appellant").[12]

(referencing but not reviewing the High Court's conclusion that the three *individual* defendants were *not* immune from service of process outside the jurisdiction).

[12] According to the Irish Supreme Court in *Saorstat*, the possibility that the Spanish Government might indemnify the colonel, whether voluntarily or compulsorily, did not turn the suit into one against the Government. *Id.* at 99. Justice O'Byrne

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On the other hand, when a suit nominally brought against an individual official would in fact involve adjudicating ownership of a foreign state's assets or granting a damages remedy directly against the treasury of a foreign state, some courts have found immunity. For example, in *Duke of Brunswick v. King of Hanover*, (1848) 9 E.R. 993 (H.L.) (U.K.), which provides the foundation for much of the subsequent jurisprudence, the House of Lords refused to

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wrote for the court: "Where the Sovereign is not named as a party and where there is no claim against him for damages or otherwise, and where no relief is sought against his person or his property, [the Sovereign cannot] be said to be impleaded either directly or indirectly." *Id*. at 101. One foreign intermediate appellate court has taken a broader view of the role of potential indemnification in a case involving a prosecutor's decision to file criminal charges. *See Jaffe v. Miller*, [1993] 64 O.A.C. 20, 33 (Can.) (finding that the defendants, who included the Attorney General of Florida, were "functionaries" acting "within the scope of [their] duties and in furtherance of a public act" when they filed criminal charges that led to the plaintiff's conviction in Florida, and that these defendants could claim immunity because "[i]n the event that the plaintiff recovered judgment, the foreign state would have to respond to it by indemnifying [them]"). The *Jaffe* court emphasized that its ruling was limited to the facts of the cases before it, noting that both the person sued and the function performed must be considered, and that "[i]t will be a matter of fact for the court to decide in each case whether any given person performing a particular function is a functionary of the foreign state" for immunity purposes. *Id.* at 34-35. There is certainly no broad consensus or settled law in favor of immunity that would warrant judicially imputing immunity into the FSIA's text, the terms of which provide no framework for individual immunity analysis or resolution of the role of indemnification.

inquire into the legality of the appointment of a guardian for the management of the Duke of Brunswick's property, under the laws of Brunswick and Hanover. Lord Lyndhurst, who agreed with the court's disposition, affirmed that "[other] circumstances may exist in which a foreign Sovereign may be sued in this country for acts done abroad." *Id*. at 1001. Other cases, relying on a similar principle, all involved claims for which the foreign state was a necessary party or otherwise the real party in interest. *See Grunfeld v. United States*, (1968) 3 N.S.W.R. 36 (Austl.) (finding the Commanding Officer of the U.S. Rest and Recuperation Office in Sydney immune from claims arising from the termination of a contract to obtain civilian clothing for hire on behalf of the office); *Rahimtoola v. Nizam of Hyderabad*, [1958] A.C. 379 (H.L.) (U.K.) (finding a suit that named the former High Commissioner of Pakistan as a defendant barred by sovereign immunity because it involved determining Pakistan's entitlement to funds held in a London bank account); *Johnson v. Turner*, G.R. No. L-6118 (S.C. Apr. 26, 1954) (Phil.) (finding U.S. officers immune from suit by a U.S. citizen for the dollar value of military payment certificates (scrip money) because the claim and judgment would be "a charge against and a financial liability to the U.S. Government"); *Syquia v. Almeda Lopez*, G.R. No. L-1648, 84 Phil. Rep. 312 (S.C. Aug. 17, 1949) (finding that the United States was the real party in interest in a claim for back rents owed by the U.S. military for the lease of civilian apartment buildings in which U.S. army officers were billeted and quartered); *Compania*

Naviera Vascongada v. Steamship Cristina, [1938] A.C. 485 (H.L. 1938) (U.K.) (specifying, in a judgment by Lord Atkin, that courts will not seek "specific property or damages" from a foreign sovereign, and will not "seize or detain property which is his, or of which he is in possession or control"); *Twycross v. Dreyfus*, (1877) 5 Ch.D. 605 (Ct. App.) (U.K.) (finding lack of jurisdiction over plaintiffs' claim to the proceeds of the sale of guano owned by the Republic of Peru because the Republic was a necessary party as the owner of the guano).

Because Respondents are not attempting to recover damages from Somalia or to adjudicate the title to Somali assets, but instead sue Petitioner in his "personal capacity," *Saorstat*, 12 I.L.R. at 98, the rationale of these foreign cases does not support immunity for him.

ii. One Court Found Immunity For A *Current* Official From An Injunction Involving A Document Request, But This Does Not Support Blanket Immunity For A *Former* Official For Torture And Extrajudicial Killing

Petitioner relies on the *Church of Scientology Case*, *reprinted in* 65 I.L.R. 193 (BGH 1978) (F.R.G.), for the proposition that suing individual officials automatically undermines the sovereignty of the state. Pet. Br. 37. This single case cannot support such a sweeping claim. In *Church of Scientology*, the

plaintiff sought an injunction against the *current* head of New Scotland Yard to prevent him from complying with a document request from Germany to the United Kingdom under their 1961 Agreement on Mutual Assistance in Criminal Matters. Because the United Kingdom had a treaty obligation to comply with Germany's request, the German Supreme Court reasoned that the U.K. official's act of complying with the request "can *only* be attributed to the British State and not to him or any other official acting on behalf of the State, because the State is always to be considered the actor when one of its functionaries performs acts which are *incumbent* on it." *Id.* at 195 (emphasis added). This reasoning relates to the state's "sovereign activity" of complying with international law – not (as in Petitioner's case) violating it. It would turn *Church of Scientology* on its head to find that its holding as to compliance with international law obligations is relevant to a claim arising out of the breach of the international prohibitions against torture and extrajudicial killing.[13]

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[13] Analogously, an international tribunal found that a current individual official was immune from service of a subpoena because *only* the state, not the individual, would be subject to sanction for non-compliance. *See Prosecutor v. Blaskic*, *reprinted in* 110 I.L.R. 607 (ICTY 1997) (finding that the ICTY does not have the legal authority to seek documents under ICTY Statute Article 29(2) by issuing subpoenas to current government officials in their official capacity, because the ICTY is not empowered to impose sanctions on states in the event of non-compliance). The decision in *Blaskic* does not affect the scope of conduct-based immunity for former officials from the jurisdiction

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iii. Several Additional Cases Found Immunity For Current Officials In Specialized Circumstances That Do Not Apply To Petitioner

A few foreign courts have found immunity for *current* officials in a handful of *sui generis* contexts, including the application of specialized domestic immunity statutes. These cases do not support Petitioner's assertion that *international law* requires granting blanket immunity to *former* officials.

One case found immunity for a current official because he was not even in office at the time the alleged acts occurred. In these circumstances, there was no basis for finding the official personally liable and no basis for bringing a suit against him in his personal capacity. *See Propend Finance Pty. Ltd. v. Sing*, *reprinted in* 111 I.L.R. 611, 662 (U.K. Ct. App. 1997) (finding no basis for suing the current Commissioner of the Australian Federal Police Force for an improper fax sent by an Australian diplomat, where the Commissioner in office at the time the fax

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of national courts, because it only deals with acts that "are not attributable to [the official] personally" *and* that can *only* be enforced against the state itself, such as the act of complying with a request to produce official documents. *Id.* at ¶ 38. As the ICTY emphasized in *Blaskic*, "those responsible for [war crimes, crimes against humanity, or genocide] cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity," just as spies "although acting as State organs, may be held personally accountable for their wrongdoing." *Id.* at ¶ 41.

was sent had died by the time of the suit). Going beyond these unique circumstances, the U.K. Court of Appeal opined that "[t]he protection afforded by the [U.K. State Immunity] Act of 1978 to States would be undermined if employees, officers (or as one authority puts it, 'functionaries') could be sued as individuals for matters of State conduct in respect of which the State they were serving had immunity." *Id.* at 669. This statement might be true on the limited facts of *Propend Finance* and as a matter of U.K. law, but not in this case. First, the "matter of state conduct" at issue in *Propend* was the ministerial act of faxing criminal evidence to an investigating authority, not torture and extrajudicial killing under color of foreign law. Second, as indicated below, the U.K. State Immunity Act contemplates immunity for individual officials, whereas the FSIA does not.

Another case found immunity under a specialized statute for the current Secretary of the European Commission of Human Rights in a suit alleging that he had presented an edited version of the plaintiff's claim, rather than the entire claim in plaintiff's own words, to the Commission. *See Zoernsch v. Waldock*, (1964) 2 All E.R. 256 (C.A.) (U.K.) (finding immunity for the current Secretary of the Commission under the Council of Europe (Immunities and Privileges) Order, 1960, and finding immunity for the former President of the Commission because his name was on a list of officials entitled to immunity compiled under the International Organisations (Immunities and Privileges) Act, 1950).

Two remaining cases similarly involved current officials who were sued for conduct that does not resemble the claims at issue here. *See Holland v. Lampen-Wolfe*, [2000] UKHL 40, (2000) 3 All E.R. 833 (H.L.) (U.K.) (finding a supervisor on a U.S. military base immune from claims for defamation for writing a negative report about U.S. citizen plaintiff's job performance on the base); *Schmidt v. The Home Secretary*, 103 I.L.R. 322 (1994) (H. Ct.) (Ir.) (finding immunity for current police commissioner and officer in a British extradition squad who allegedly lured plaintiff to the United Kingdom so that he could be arrested and extradited to Germany on drug trafficking charges). These two cases do not support the blanket immunity Petitioner claims he is owed as a matter of international law.

Petitioner is not a current official, and his alleged conduct does not fall within the reasoning of these few foreign cases. These cases do not in any way support blanket immunity for *former* foreign officials for torture and extrajudicial killing, much less demonstrate the even broader proposition that international law requires such immunity.

iv. The House Of Lords' Decision In *Jones*, Which Is The Subject Of A Pending Application To The European Court Of Human Rights, Does Not Apply Beyond The U.K. Context

The only case Petitioner cites from any court that involved the immunity of individual officials for claims of torture is *Jones v. Saudi Arabia*, [2007] 1 All E.R. 113 (H.L. 2006) (U.K.). The claimants in *Jones* have an application challenging this decision pending before the European Court of Human Rights. Applying the State Immunity Act 1978 (U.K.) (SIA), the House of Lords held that Saudi Arabia was immune from suit for torture and that its officials were entitled to the immunity of the state under the U.K. statute.

The immunity recognized by the House of Lords in *Jones* was founded not on customary international law but on § 1(1) of the SIA, which provides that "[a] State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of the Act." In contrast to the FSIA, the SIA defines a "State" to include at least some individuals, specifically heads of state. *See* SIA § 14(1)(a). Also unlike the FSIA, the SIA expressly excludes criminal proceedings, *see id.* § 16(4), suggesting that individual officials are covered by the SIA. Because the SIA did not expressly provide immunity for suits against officials, however, Lord Bingham of Cornhill looked to foreign and international authorities to determine whether individual officials

should be considered part of the "State" for purposes of the SIA. *See Jones* ¶¶ 10-12; *see also id.* ¶¶ 65-101 (Lord Hoffmann). Lord Bingham made clear that the source of the immunity he was applying was domestic law. "It is not suggested that the Act is in any relevant respect ambiguous or obscure," he said, and "the duty of the English court is therefore *to apply the plain terms of the domestic statute*." *See id.* ¶ 13 (emphasis added).

Lord Bingham's other statements about customary international law in *Jones* were made in a context that renders them inapplicable to the United States and to this case. Specifically, the plaintiffs in *Jones* argued that Article 6 of the European Convention on Human Rights (providing *inter alia* for access to courts) required an exception to the immunity granted by the SIA in cases of torture. *See id.* ¶¶ 14-28. Because of the relationship between the European Convention and U.K. law, the burden was on the plaintiffs to show that international law required such an exception. *See id.* ¶ 14 ("the onus is clearly on [the claimants] to show that the ordinary approach to application of a current domestic statute should not be followed"). Lord Hoffmann also considered whether Article 6 of the European Convention required an implied exception to the immunity granted by the SIA and concluded that plaintiffs had failed to show that an exception was *required* by international law. *See id.* ¶¶ 39-64.

In the United States, the burden is obviously not on a plaintiff to show that an exception to state

immunity is required under Article 6 of the European Convention. Rather, the burden is on the defendant to show that a clear rule of immunity exists. With respect to sovereign immunity, this Court has long held that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute" and that "[a]ll exceptions, therefore, . . . must be traced up to the consent of the nation itself. They can flow from no other legitimate source." *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812).

The authorities relied upon by Lords Bingham and Hoffmann in *Jones* do not support the proposition that customary international law requires states to immunize foreign officials from civil suits alleging torture.[14] Lord Hoffmann relied heavily on the

[14] There is also no basis in international law (as opposed to U.K. domestic law) for drawing a sharp distinction between civil proceedings for torture and criminal proceedings for the same conduct, from which there would be no immunity under the holding in *R. v. Bow Street Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3.)*, [2000] 1 A.C. 147 (H.L.) (U.K.) (finding no immunity for former Chilean head of state for torture that occurred in Chile, where dual criminality requirement for extradition was satisfied). Multiple legal systems blend civil and criminal proceedings, meaning that a lack of immunity from criminal proceedings entails the possibility of civil damages. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 762-63 (2004) (Breyer, J., concurring in part and concurring in the judgment) (indicating that "the criminal courts of many nations combine civil and criminal proceedings"). Additionally, "[e]ven within common law systems, torts were historically considered the civil counterparts of crimes." *See* Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 Hastings L.J. 61, 83-84 (2008) (citing sources).

International Law Commission's 2001 Draft Articles on State Responsibility for Internationally Wrongful Acts, Article 7 of which deals with a state's responsibility for the acts of persons empowered to exercise government authority. *See Jones* ¶¶ 76-78; *see also id.* ¶ 12 (Lord Bingham). But whether a state is responsible under international law for the acts of its officials is a separate question from whether an individual is responsible under international law for his or her acts on behalf of a state.[15] On this second question, the Draft Articles state expressly that they "are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State." *See* International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries (2001), Art. 58. Inexplicably, neither Lord Bingham nor Lord Hoffmann cited Article 58, which discredits their reliance on Article 7.[16]

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[15] Lord Hoffmann's conflation of these two questions is also clear in his misplaced reliance on the 1927 arbitral decision in *Mallén v. United States*. *See Jones* ¶ 75, *citing Mallén v. United States of America*, 4 RIAA 173 (1927) (awarding damages to Mexico for the 1907 assault on a Mexican consul (Mallén) by a U.S. deputy constable (Franco)). There is no indication in that decision that the responsibility of the United States precluded any concurrent civil or criminal responsibility for the deputy constable whose acts were at issue; to the contrary, he was fined $100 for the assault. *See id.* at 181.

[16] The Commentaries to the Draft Articles also make clear that "the rules concerning attribution set out in this chapter are formulated for this particular purpose, and not for other

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Lords Bingham and Hoffmann both relied heavily on the 2004 U.N. Convention on the Jurisdictional Immunities of States and Their Properties, which defines "State" to include "representatives of the State acting in that capacity" and contains no express exception for torture. *See Jones* ¶¶ 10, 26 (Lord Bingham); *id.* ¶¶ 47, 66 (Lord Hoffmann). The U.N. Convention, which deals largely with state liability for commercial transactions, has not obtained even the 30 ratifications necessary for it to enter into force. The United States has not signed the Convention and is unlikely to do so because it differs substantially from the terms of the FSIA. *See* David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Properties*, 99 Am. J. Int'l L. 194, 205 (2005) (noting that the Convention does not contain exceptions for expropriation or terrorism); *see also id.* at 210-11 (noting other objections of the U.S. delegation). The absence of an exception to immunity from this Convention does not make such an exception unlawful under customary international law. As Mr. Stewart, who led the U.S. delegation, has observed with respect to the terrorism exceptions in

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purposes for which it may be necessary to define the State or its Government." Draft Articles at 39. It is inappropriate to use Draft Article 7, which codifies an international law principle developed to *protect* victims by providing them with a basis for diplomatic claims against the offending state, to curtail the remedies available to victims of such conduct. *See* Draft Articles at 46 (explaining rationale for attributing conduct performed with apparent authority to the state).

the FSIA, that "would read far too much into the consensus adoption of the convention." *Id.* at 206.

In sum, neither *Jones* nor the authorities on which it relies support Petitioner's assertion of blanket immunity for all acts taken by a foreign government official. The question before the House of Lords in *Jones* – whether customary international law requires an *exception* to the statutory immunity granted by the SIA – is different from the question in the United States – whether customary international law requires a *grant* of immunity in the first place. With respect to torture and extrajudicial killing at least, it does not.

CONCLUSION

This Court should affirm the decision of the Fourth Circuit Court of Appeals.

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Respectfully submitted,

CHIMÈNE I. KEITNER
Counsel of Record
ASSOCIATE PROFESSOR OF LAW
UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW
200 McAllister Street
San Francisco, CA 94102
(415) 565-4790

ROBERT E. FREITAS
NITIN GAMBHIR
CHRISTOPHER YEH
ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
Menlo Park, CA 94025
(650) 614-7400

Attorneys for Amici Curiae