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The Significance of China's Views on the Jus Cogens Exception to Foreign Government Official Immunity

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INTRODUCTION

The "rise of China" has already become cliché among international relations scholars and policy analysts. Yet few disagree that the People's Republic of China's economic, military, and political power has reached new heights in recent years.[1] It is, therefore, surprising that relatively few international law scholars have studied whether and, if so how, the "rise of China" is affecting the development and growth of international law.

Take, for example, the application of the doctrine of sovereign immunity to foreign government officials—an area of substantial ferment and change. Numerous international authorities have suggested that, under international law, government officials cannot invoke the protections of sovereign immunity for acts that violate *jus cogens* norms. The United States Court of Appeals for the Fourth Circuit recently relied on this international law trend, holding that the "common law of sovereign

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1. *See, e.g.*, John Ikenberry, *The Rise of China and the Future of the West*, 87 FOREIGN AFF. 23 (2008).

immunity" does not shield former government officials accused of acts violating *jus cogens* from civil lawsuits.[2] But although the Fourth Circuit cited decisions from the United Kingdom and Italy to support its holding,[3] it did not cite China's views. This failure, while understandable, suggests that the impact of China's perspective on this key question of international law remains small.

This Essay uses the Fourth Circuit's holding as an opportunity to consider China's impact on the development of a complex and important doctrine of international law. It begins by observing that China's government would likely oppose the *jus cogens* exception to sovereign immunity recognized by the Fourth Circuit. This rejection of a *jus cogens* sovereign immunity exception would not be a matter of pure political expediency vulnerable to change with the political winds. Rather, rejecting a *jus cogens* exception to sovereign immunity would be consistent with the Chinese government's long-standing emphasis on the importance of sovereign *equality* under international law. Sovereign equality disapproves the notion that any country's courts can sit in judgment of another equal sovereign. China's commitment to this principle is reflected in its adherence to the doctrine of absolute sovereign immunity, despite the strong international trend to the contrary.

There are many examples of China's insistence on a broad sovereign immunity in U.S. courts. For instance, when Chinese government officials have become embroiled in U.S. litigation, the Chinese government has demanded immunity for all of its government officials, even for alleged *jus cogens* violations. Indeed, in a previous U.S. case involving allegations of *jus cogens* violations by a (non-head-of-state) Chinese government official, China demanded (and received) immunity for its government official in U.S. court.[4] The Chinese government has stated in official diplomatic notes that U.S. courts' failure to grant such immunity would be perceived by the Chinese government as a violation of the U.S. government's international law obligations.[5]

Although China's views on international law have rarely influenced international law scholars and theorists, China's vehement opposition to any exceptions to sovereign immunity would likely have practical

2. Yousuf v. Samantar, 699 F.3d 763, 773 (4th Cir. 2012).

3. *Id.* at 776.

4. *See* Li Weixum v. Bo Xilai, 568 F. Supp. 2d 35, 38–39 (D.D.C. 2008). The question of immunity for *jus cogens* acts was not addressed, however, because the court found that Bo was immune under diplomatic (as opposed to sovereign) immunity. See *id.* at 37.

5. *See, e.g.*, Lewis S. Yelin, *Head of State Immunity As Sole Executive Lawmaking*, 44 VAND. J. TRANSNAT'L L. 911, 924 (2011) (describing a U.S. State Department letter stating that the Chinese government had asked the U.S. government to act).

significance. In a post-*Samantar* case against a Chinese government official, a U.S. court endorsing a *jus cogens* exception would probably face serious Chinese protest and opposition. If such a case were to arise, it would represent a fascinating example of how China's new importance in world affairs affects (or perhaps does not affect) the evolution of this doctrine in U.S. courts and elsewhere.

This Essay begins by illustrating that the *Samantar* litigation reaffirmed a series of lower court decisions holding that foreign sovereign immunity does not attach to official acts that violate *jus cogens*. These decisions have been important evidence for scholars who claim that such an exception to foreign sovereign immunity is now accepted as a rule of customary international law. Part II then examines and describes China's views on sovereign immunity, arguing that China's government will almost certainly reject any exception to sovereign immunity for *jus cogens*. Finally the Essay concludes by considering the implications of China's rejection of a *jus cogens* exception for sovereign immunity on U.S. judicial practice post-*Samantar* and on international law more generally.

I. THE *JUS COGENS* EXCEPTION TO FOREIGN SOVEREIGN IMMUNITY

States have long granted immunity from the jurisdiction of their own domestic courts to foreign sovereigns. Such immunity is traditionally justified by comity and respect for foreign sovereigns, but it has also often been understood as a requirement of customary international law.[6] The precise scope of this immunity, however, has been the subject of much discussion and, in many cases, debate.

The scope of sovereign immunity protection afforded government officials—as opposed to the scope of protection afforded the foreign government itself—is one area of uncertainty. In the United States, foreign heads of state have historically enjoyed "status-based" immunity from U.S. jurisdiction.[7] Such immunity attaches due to the beneficiary's "status" as head of state, and not due to the type of acts he is claiming immunity for. Status-based immunity for heads of state has deep roots in customary international law and has received broad acceptance around the world. Diplomats, ambassadors, and similar high-level foreign emissaries have

6. *See, e.g.*, 1 OPPENHEIM'S INTERNATIONAL LAW 342 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen, 43 F.2d 705, 710 (2d Cir. 1930) (describing sovereign immunity rules as part of the "international rule of law.").

7. *See, e.g.*, Chimène I. Keitner, *The Common Law of Foreign Official Immunity*, 14 GREEN BAG 2D 61, 63 (2010).

also historically enjoyed status-based immunity.[8] Such status-based immunities attach only while the head of state or diplomat holds office.

Immunity for other types of government officials, former heads of state, and ambassadors has been less certain under international law. Indeed, the immunity of these non-head-of-state foreign government officials has hardly been considered in U.S. litigation for most of U.S. history. To the extent that such officials are afforded immunity, however, it is "conduct-based." This means that officials can invoke immunity only for official acts, or acts performed on behalf of the foreign state. Private acts or acts inconsistent with the grant of permission or law of the foreign state do not fall within this type of immunity.

In recent years, several jurisdictions around the world have recognized an exception to immunity for foreign government officials whose "official" acts violated *jus cogens* norms. *Jus cogens* norms are certain unusually heinous international acts prohibited by all states.[9] These jurisdictions reasoned that the universal prohibitions contained in *jus cogens* norms meant that no state could legitimately authorize its officials to violate them. The leading authority is a decision in which a United Kingdom court lifted a foreign government officials's sovereign immunity protection because his alleged acts of torture did not constitute an official act.[10] Other jurisdictions have also lifted conduct-based immunity for alleged *jus cogens* violations in the criminal context.[11] Some U.S. courts followed this trend, finding a *jus cogens* exception to conduct-based immunity and applying the concept in the slightly more controversial context of civil litigation.[12]

The Fourth Circuit's decision in the *Samantar* litigation illustrates the importance of the *jus cogens* exception. In *Samantar*, plaintiffs alleged that a series of *jus cogens* violations, including torture, were committed by the defendant, who had committed the acts while serving both as prime

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8. *Id.* at 64.

9. M. Cherif Bassiouni, *International Crimes: 'Jus Cogens' and 'Obligatio Erga Omnes'*, L. & CONTEMP. PROBS., Autumn 1996, at 63, 68.

10. *See* R v. Bartle, *ex Parte* Pinochet [1999] UKHL 17, [2000] 1 AC 147 (HL) 203–05 (appeal taken from Eng.) (concluding that official-acts immunity is unavailable to shield foreign officials from prosecution for international crimes because acts of torture do not constitute officially-approved acts).

11. *See* Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 SUP. CT. REV. 213, 238–40 (2010).

12. *See, e.g.*, Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1209 (9th Cir. 2007) (recognizing that acts in "violation[] of jus cogens norms . . . cannot constitute official sovereign acts"); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 718 ("International law does not recognize an act that violates *jus cogens* as a sovereign act."); Enahoro v. Abubakar, 408 F.3d 877, 893 (7th Cir. 2005) (Cudahy, J., dissenting) ("[O]fficials receive no immunity for acts that violate international *jus cogens* human rights norms (which by definition are not legally authorized acts).").

minister of and as a leading minister for the Somalian government.[13] Defendant Samantar invoked both head-of-state and conduct-based immunity and further argued that the Foreign Sovereign Immunities Act provided a statutory basis for his immunity.[14] The Supreme Court rejected Samantar's statutory argument and remanded his case to lower courts to determine whether he enjoyed immunity under the common law of foreign sovereign immunity.[15] On remand, both the district and appeals courts found that Samantar could not invoke immunity.[16] Although the district court appeared to defer to the executive's suggestion of non-immunity for reasons of foreign relations, the Fourth Circuit squarely held that the question of immunity was wholly judicial and largely controlled by the customary international law of foreign sovereign immunity.[17]

After surveying these international law authorities, the Fourth Circuit concluded that "[t]here has been an increasing trend in international law to abrogate foreign official immunity for individuals who have commited acts, otherwise attributable to the State, that violate *jus cogens* norms—i.e., they have commited international crimes or human rights violations."[18] Although the Fourth Circuit noted some contrary international authority[19] on the applicability of the *jus cogens* exception to civil lawsuits, it nonetheless concluded that "under international and domestic law, officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity."[20] Thus, Samantar could not avail himself of immunity and was subject to the U.S. courts' jurisdiction.

The Supreme Court did not grant certiorari to review the Fourth Circuit's decision. This leaves the *jus cogens* exception alive and well as part of the common law of sovereign immunity applied by at least some U.S. courts.[21] The decision also serves to further bolster the argument of

13. Yousuf v. Samantar, 552 F.3d 371, 373–74 (4th Cir. 2009).

14. *Id.*

15. Samantar v. Yousuf, 560 U.S. 305, 326 (2010).

16. *See, e.g.*, Yousuf v. Samantar, No. 1:04CV01360 (LMB/JFA), 2011 WL 7445583 (E.D. Va. Feb. 15, 2011), *aff'd*, 699 F.3d 763 (4th Cir. 2012).

17. Yousuf v. Samantar, 699 F.3d 763, 776 (4th Cir. 2012).

18. *Id.*

19. *Compare* Cass., sez. un., 11 marzo 2004, n. 5044, Foro it. 2004, I (It.) [Ferrini v. Republic of Germany] (denying "the functional immunity of foreign state organs" for *jus cogens* violations in criminal context), *with* Jones v. Saudi Arabia [2006] UKHL 26 [24], [2007] 1 AC 270 (HL) (appeal taken from Eng.) (rejecting *jus cogens* exception to foreign official immunity in civil context).

20. *Yousuf*, 699 F.3d at 777.

21. Several circuits have held differently, holding that there is no general *jus cogens* exception to sovereign immunity under customary international law. *See, e.g.*, Matar v. Dichter, 563 F.3d 9, 14 (2d Cir. 2009); Wei Ye v. Jiang Zemin, 383 F.3d 620, 627 (7th Cir. 2004).

international law scholars that the *jus cogens* exception has achieved the status of customary international law.

II. CHINA AND SOVEREIGN IMMUNITY

In its survey of international authorities, the Fourth Circuit considered Italian and British authorities on the question of a *jus cogens* exception for foreign government official immunity. The Fourth Circuit did not consider Chinese authorities—probably because no court in China had ever ruled on the question of a *jus cogens* exception to sovereign immunity. Yet as I explain below, China's government would almost certainly reject the *jus cogens* exception. This result, as I will explain in Part IV, calls into question the correctness of Fourth Circuit's holding as a matter of international law.

A. China's View on the Importance of Sovereignty

Wang Tieya, one of China's most preeminent international law scholars, observed that China has been the most "enthusiastic champion" of the principle of sovereignty under international law.[22] This enthusiasm extends back to China's announcement of its Five Principles for Peaceful Co-Existence in 1954, which declared sovereignty and non-interference in the domestic affairs of states to be China's core principles of international law.[23] As then-Prime Minister of China Wen Jiabao noted in a 2008 speech to the United Nations General Assembly,

> China's persistent stand of the primacy of State sovereignty has its deep roots embedded in the miserable experience in its modern history. . . . "Respect for sovereignty and non-interference in the internal affairs of other countries is the prerequisite for sound State-to-State relations. The Chinese people have learned from their modern history of humiliation that when a country loses sovereignty, its people lose dignity and status."[24]

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22. Wang Tieya, *International Law in China: Historical and Contemporary Perspectives*, 221 COLLECTED COURSES OF THE HAGUE ACAD. OF INT'L L. 195, 288 (1990).

23. *Id.* at 263. The Five Principles include: "(a) mutual respect for each other's territorial integrity and sovereignty; (b) mutual non-aggression; (c) mutual non-interference in each other's internal affairs; (d) equality and mutual benefit; (e) peaceful co-existence." *Id.*

24. Xue Hanqin, *Chinese Contemporary Perspectives on International Law: History, Culture, and International Law*, 355 COLLECTED COURSES OF THE HAGUE ACAD. OF INT'L L. 41, 90 (2011) (footnote omitted) (quoting H.E. Wen Jiabao, Premier of the State Council of the People's Republic of China, Statement at the General Debate of the 63rd Session of the U.N. General Assembly 3 (Sept. 24, 2008), http://www.un.org/ga/63/generaldebate/pdf/china_en.pdf).

Thus, for China, the principle of sovereignty is paramount. As China's then-President Hu Jintao stated in his remarks at the Second Round of the China-U.S. Strategic and Economic Dialogue, "sovereignty, independence, and territorial integrity are a country's most basic rights recognized by the norms governing international relations. To the Chinese people, nothing is more important than safeguarding national sovereignty and territorial integrity."[25]

China's emphasis on the inviolability of sovereignty was echoed by newly independent states in the era of decolonization following World War II. Despite China's economic growth and global prominence, many of its leaders and scholars still consider it to be a developing country.[26] Thus, China has continued to associate itself with newly independent states like India and has shared its commitment to sovereign equality and independence under international law with those states.

1. China's Adherence to Absolute Sovereign Immunity

Given the Chinese government's repeated, continuous emphasis on sovereignty, it is not surprising that China has also "consistently upheld the principle of State immunity for the maintenance of legal order and the stability of international relations."[27] Summarizing China's state practice, leading Chinese international scholar (and current ICJ member) Xue Hanqin stated:

> [China] holds absolute immunity in case of acts of foreign States from national jurisdiction and execution. It is of the view that the principle of immunity is a right of State under customary international law rather than [of] comity. . . . In its judicial practice, Chinese national courts have neither exercised jurisdiction over acts of foreign States, nor have they enforced any decisions involving public property of foreign States.[28]

China has linked its adherence to the doctrine of absolute sovereign immunity to the principle of sovereign equality. Despite the strong international trend toward a restrictive theory of immunity,[29] China has maintained its commitment to absolute immunity. For instance, in a U.S.

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25. President Hu Jintao, Address at the Second Round of the China-U.S. Strategic and Economic Dialogue (May 24, 2010), http://www.china-embassy.org/eng/xw/t696949.htm.

26. *See* Bing Bing Jia, *A Synthesis on the Notion of Sovereingyty and the Ideal of the Rule of Law: Reflections on the Contemporary Chiense Approach to International Law*, 53 GERMAN YEARBOOK OF INTERNATIONAL LAW 11, 20 n. 49 and 52 (2010).

27. Hanqin, *supra* note 24, at 100.

28. *Id.* at 100–01 (citing INTERNATIONAL LAW IN CHINA: CASES AND PRACTICE 35 (Duan Jie Long ed., 2011 [hereinafter INTERNATIONAL LAW IN CHINA]).

29. Samantar v. Yousuf, 560 U.S. 305, 319 (2010).

case involving creditors seeking to enforce defaulted Chinese government bonds in U.S. courts, the government of China sent an aide memoire to the U.S. government demanding full immunity even though its bond sales were commercial activities not normally granted immunity.[30] In this aide-memoire, China argued that:

> [T]he absolute jurisdictional immunity of States in foreign courts is still a valid rule under international law on the basis of the principle of sovereign equality (*par in parem non habet imperium*, an equal has no power over an equal). So far there has not been enough evidence to prove that by State practice and *opinio juris*, this customary international law rule has changed.[31]

It is worth noting that China's position in favor of absolute immunity appears driven by concerns over the arbitrary and inconsistent application of the restrictive theory. As Wang Houli, the leading international lawyer serving in China's Ministry of Foreign Affairs, explained in 1987:

> [I]t is China's view that the restrictive theory of sovereign immunity, characterized by classification of state acts into those which are "sovereign" and "non-sovereign," is theoretically unfounded. States, as sovereign entities, by definition behave in the capacity of sovereigns. It is erroneous to assume that states have dual and different identities. Moreover, the distinction between the two kinds of state acts is hardly workable in practice because it lacks consistency and precision in content, and it provides no common criterion for differentiation.[32]

When China signed the 2004 Convention on the Jurisdictional Immunities of States (which follows the restrictive approach), Chinese scholars hailed China's abandonment of its absolute immunity position. But China never ratified the Convention, nor has that Convention come into force due to the small number of countries that have ratified it. Still, it was somewhat surprising when the Chinese government reaffirmed its adherence to the absolute immunity position in 2011.

In *Democratic Republic of Congo v. FG Hemisphere Associates*,[33] the Chinese government required Hong Kong courts to abandon the restrictive

30. Aide Memoire from Wu Xuequian, Chinese Minister of Foreign Affairs, to George Shultz, U.S. Secretary of State (Feb. 10, 1983), *reprinted in* 22 INT'L LEGAL MATERIALS 81, 81 (1983).

31. Hanqin, *supra* note 24, at 102 (citing INTERNATIONAL LAW IN CHINA, *supra* note 28, at 36).

32. Wang Houli, *Sovereign Immunity: Chinese Views and Practices*, 1 J. CHINESE L. 23, 29 (1987).

33. Democratic Republic of the Congo v. FG Hemisphere Assocs., [2011] 14 H.K.C.F.A.R. 395, ¶¶ 62, 502–12 (C.F.A.) (H.K.).

theory that had been in effect during the British period, and to grant sovereign immunity to a foreign state involved in a commercial dispute with private creditors.[34] Thus, China today appears to have continued to endorse absolute immunity.

2. Foreign Government Official Immunity and the *Jus cogens* Exception

Like most states, China roots the immunity of its government officials in the sovereign immunity enjoyed by foreign states. Chinese government officials have faced several lawsuits in U.S. courts under the Alien Tort Statute. This U.S. law has been used by Chinese nationals to sue Chinese government officials for alleged complicity in torture and other human rights abuses.[35] In such lawsuits filed against Chinese government officials, the Chinese government has not participated in the litigation by appearing in court. Instead, the Chinese government has demanded that the U.S. government block the lawsuit based on the sovereign immunity due to Chinese officials.[36] Such demands were not affected by the fact that the government officials were accused of *jus cogens* violations.[37]

The Chinese government's filings on behalf of its then-Minister of Commerce Bo Xilai in 2006 revealed how China reacted to a lawsuit against its government officials. In *Li Weixum v. Bo Xilia*, a Falun Gong practitioner, alleged that Bo had authorized the torture of Falun Gong practitioners in China.[38] Bo was served with papers during his participation in a U.S. government sponsored conference on U.S.-China trade.[39] In the position paper that it sent to the U.S. Department of State explaining the basis for its demand for action, the Chinese government invoked sovereign immunity for Bo, noting that the doctrine is a "universally recognized norm of international law."[40] Despite the allegations of *jus cogens* violations, the

34. *Id.*; *see also* Yilin Ding, *Absolute, Restrictive, or Something More: Did Beijing Choose the Right Type of Sovereign Immunity for Hong Kong?*, 26 EMORY INT'L L. REV. 997, 997–98 (2012).

35. *See, e.g.*, Plaintiffs A, B, C, D, E, F v. Jiang Zemin, 282 F. Supp. 2d 875, 879 (N.D. Ill. 2003), *aff'd sub nom.* Wei Ye v. Jiang Zemin, 383 F.3d 620 (7th Cir. 2004).

36. *See, e.g.*, Yelin, *supra* note 5, at 924 (describing a U.S. State Department letter stating that the Chinese government had asked the U.S. government to act).

37. *See* Li Weixum v. Bo Xilai, 568 F. Supp. 2d 35, 36 (D.D.C. 2008).

38. *Id.* at 36 n. 2.

39. *Id.* at 36.

40. Position of the Chinese Government on the Assault and Attempted Frame-up by "Falun Gong" Against Minister Bo Xilai 17, *transmitted by* Letter from Liu Zhenmin, Dir. Gen. of the Chinese Dep't of Treaty & Law, to William Taft, Legal Advisor, U.S. Dep't of State (Aug. 23, 2004), http://www.state.gov/documents/organization/98830.pdf.

government warned that failure to dismiss the case could seriously harm U.S.-China relations.[41]

Although the *jus cogens* exception was not considered in the Chinese statement in the *Weixum v. Bo* case, Chinese scholars have noted the trend toward lifting sovereign immunity protections for international *jus cogens* violations.[42] Not surprisingly, Chinese scholars have been critical of this approach, at least with respect to state criminal jurisdiction.[43] In lauding the ICJ's decision in the *Arrest Warrant* case, Judge Xue stated that "the legal certainty [provided] by distinguishing the immunity rule from substantive law . . . is conducive to the development of international humanitarian law and human rights law,"[44] but simultaneously preserves the immunity principle that "touches on the foundation of the State system and fundamental principles of international law: sovereign equality and non-interference."[45]

It is worth noting that Chinese scholars and officials have aimed their criticism at individual states exercising criminal jurisdiction for *jus cogens* violations, rather than at international organizations. Thus, the Chinese representative at the 63rd Session of the General Assembly's Sixth Committee addressed the work of a special rapporteur on foreign government official immunity and noted that:

> [I]mmunity from foreign State criminal jurisdiction and criminal jurisdiction of international judicial institutions are two distinct legal issues. . . . [T]he fact that one State establishes jurisdiction over certain crimes under international law doesn't imply that foreign State officials automatically lose their immunity in relation to such crimes in the domestic court of the said state. . . . [E]xceptions to immunity of State officials from foreign criminal jurisdiction have the potential to be abused and misused as a tool for politically motivated prosecution. And in such an event, it will . . . lose its usefulness in fighting crimes and protecting human rights . . . .[46]

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41. *Id.* at 20.

42. 李揖, Li Sun 论政府官员在国家豁免中的地位问题 [On the Status of Government Officials Under State Immunity], 法制与社会 [Legal System and Society](May 2010) (noting the international trend toward greater limitations on government officials' exercise of sovereign immunity with respect to private actions, violations of domestic law, and violations of international crimes).

43. Wang Xiumei, *The Immunity of State Officials from Foreign Criminal Jurisdiction*, 30 J. OF XIAN JIAOTONG UNIV. 67 (2010).

44. Hanqin, *supra* note 24, at 103.

45. *Id.*

46. Liu Zhenmin, Deputy Permanent Representative of China to the U.N., Statement at the Sixth Committee of the 63rd Session of the U.N. General Assembly, on Item 75: Report of the International Law Commission on the Work of its 60th Session (Nov. 3, 2008), http://www.china-un.org/eng/hyyfy/t520980.htm.

China's representative criticized the way in which some states have manipulated immunity exceptions, a practice which will "have a serious impact on stable relations among states."[47]

In other words, China's objection to the *jus cogens* exception to sovereign immunity lies not in a belief that international crimes are not serious or deserving of punishment. Rather, its objection is to the possibility that individual states might abuse domestic judicial processes and undermine China's sovereign independence and equality. Such crimes would, presumably, be more appropriately handled at the international level by an international court. This position was confirmed by a Chinese delegate's recent remarks to the General Assembly's Sixth Committee during a discussion on universal jurisdiction:

> The Chinese delegation wishes to reiterate that a state must strictly follow international law in establishing and exercising universal jurisdiction. With the exception of piracy, there exist currently notable differences and controversies among member states on whether universal jurisdiction exists in other cases and on its scope and application conditions.[48]

Thus, "[i]n the absence of an international consensus on the definition, scope, and application of universal jurisdiction, states should refrain from going beyond the current international law and seeking to unilaterally claim and exercise universal jurisdiction not explicitly permitted by the current international law."[49]

This position may or may not be persuasive. But it is a good faith defense of sovereign immunity, even for *jus cogens* violations, rooted in China's historical insistence on sovereign equality and independence. It is not merely a matter of political expediency or even pure ideology. As Judge Xue explains,

> China reserves its position on the principles of sovereignty and non-interference, because it believes that sovereignty, in the final analysis, is not so much about the concept itself . . . ; it is a claim about the way in which how different political and social systems, different forms of

47. *Id.*

48. Zhou Wu, Chinese Delegate to the U.N., Statement at the 70th Session of the U.N. General Assembly on Agenda Item 86: The Scope and Application of the Principle of Universal Jurisdiction (Oct. 20, 2015), http://www.china-un.org/eng/chinaandun/legalaffairs/sixthcommittee1/t1307695.htm.

49. *Id.*

> civilization and culture should correlate and treat each other in international relations.[50]

CONCLUSION: THE SIGNIFICANCE OF CHINA'S REJECTION OF THE *JUS COGENS* EXCEPTION TO SOVEREIGN IMMUNITY

When it concluded that international law recognizes a *jus cogens* exception to sovereign immunity, the Fourth Circuit considered various international sources. It did not, however, consider China's views on the issue. This is understandable given the lack of Chinese judicial authority on the question. But as this Essay has demonstrated, China's long-standing "enthusiasm" for sovereign equality has led China to adopt the broadest, most absolutist form of sovereign immunity doctrine imaginable. This position rejects restrictive immunity for commercial activities and would reject a *jus cogens* exception to sovereign immunity for the same reasons. Allowing a departure from absolute sovereign immunity, in the eyes of the current Chinese government, would undermine China's hard-won sovereign equality and independence.

But do China's views on this question matter? While China is a rising global power, it is not yet clear that China's views can overcome the strong trend in the U.S. and Europe in the opposite direction. At the same time, the different reaction of the U.S. government to the *Samantar* case versus prior Chinese government official cases is instructive. In *Samantar*, the U.S. government actually determined that Samantar should *not* receive immunity because, among other things, the current government of Somalia did not acknowledge responsibility for his alleged acts. As Somalia did not have a single government at that time and had been in and out of civil war for decades, the U.S. did not have to fear negative repercussions in foreign relations.

China is a different story. From the Huguang railway bonds case in the early 1980s to the Bo ATS lawsuit in 2006, China has consistently demanded immunity for its government officials from any and all U.S. litigation. While the U.S. government's executive cannot force courts to adopt China's absolutist view of sovereign immunity outside of the head of state context, the U.S. did find ways to achieve China's goals through other legal doctrines. One would expect the U.S. government to find similar legal loopholes in future cases, but it is possible that a Chinese government official could again be subject to a lawsuit for alleged *jus cogens* violations. Could the U.S. (with China's criticism ringing in its ears) really allow a court to lift China's immunity for actions of its government officials?

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50. Hanqin, *supra* note 24, at 106.

If China's views were taken seriously, courts in the U.S. might be much less likely to find the existence of an international law consensus on the *jus cogens* exception. China opposes a *jus cogens* exception, and it maintains a robust and absolute conception of sovereignty. This insistence suggests that a global consensus on a *jus cogens* exception to sovereign immunity may remain out of reach, despite the contrary conclusions reached by the Fourth Circuit and numerous scholars.