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## Foreign Official Immunity *After Samantar*

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# Foreign Official Immunity After *Samantar*

Chimène I. Keitner\*

## ABSTRACT

*In Samantar v. Yousuf, the U.S. Supreme Court unanimously held that the Foreign Sovereign Immunities Act (FSIA) does not govern the immunity of foreign officials from legal proceedings in U.S. courts. Part I of this symposium contribution seeks to put in sharper focus exactly what is, and what is not, in dispute following Samantar. Part II presents three challenges to common assumptions about conduct-based immunity, which I consider under the headings of personal responsibility, penalties, and presence. Under the heading of personal responsibility, I emphasize that state responsibility and individual responsibility are not mutually exclusive. Under penalties, I argue that civil immunity and criminal immunity are not fundamentally distinct. Under presence, I emphasize that a defendant who enters the forum state's territory might justifiably have a weaker claim to conduct-based immunity than one who does not. Part III suggests some factors that should guide lower courts in determining an individual defendant's entitlement to immunity going forward.*

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The Supreme Court's unanimous decision in *Samantar v. Yousuf* vindicated the U.S. government's consistent position that current or

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former foreign officials cannot claim immunity under the Foreign Sovereign Immunities Act (FSIA).<sup>1</sup> Under *Samantar*, individual official immunity (as opposed to state immunity) is a matter of common law, and is not necessarily commensurate with the immunity of the state.<sup>2</sup> It now falls to the lower courts to define the role of the Executive and the precise contours of official immunity.

Part I of this contribution seeks to put in sharper focus exactly what is, and what is not, in dispute following *Samantar*. Even outside the FSIA, most individual immunity claims will fall into well-recognized categories of immunity (or lack thereof), and thus present fairly straightforward questions for adjudication. That said, it is precisely the few remaining contentious claims that pose the thorniest questions, because they implicate competing concerns for ensuring individual accountability and providing a forum for victims (which push towards less immunity), and avoiding foreign relations conflicts and protecting U.S. officials from legal proceedings in foreign courts (which push towards greater immunity).<sup>3</sup>

Part II presents three challenges to common assumptions about conduct-based immunity,<sup>4</sup> which I consider under the headings of personal responsibility, penalties, and presence. Under the heading of personal responsibility, I emphasize that state responsibility and individual responsibility are not mutually exclusive. This pushes against the view that the only relevant question for determining an individual's entitlement to conduct-based immunity is whether the

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1. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602–1611 (2006). For the U.S. government's position on the scope of the Foreign Sovereign Immunity Act (FSIA), see Brief for the United States as Amicus Curiae Supporting Affirmance, *Samantar v. Yousuf*, 130 S. Ct. 2278 (No. 08-1555) [hereinafter United States *Samantar* Amicus Brief]; Brief for the United States as Amicus Curiae in Support of Affirmance, *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009) (No. 07-2579-cv) [hereinafter United States *Matar* Amicus Brief]; Statement of Interest of the United States, *Matar v. Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007) (No. 05 Civ. 10270); Statement of Interest of the United States, *Chuidian v. Philippine Nat'l Bank*, 734 F. Supp. 415 (C.D. Cal. 1990) (No. 86-2255).

2. *Samantar v. Yousuf*, 130 S. Ct. 2278, 2290 (2010).

3. Although the principles governing immunity of foreign officials in U.S. courts will not necessarily be applied by foreign courts adjudicating the immunity of U.S. officials, one can anticipate that foreign courts will reference U.S. practice in establishing their own standards.

4. For more on the distinction between status-based and conduct-based immunity, see Chimène I. Keitner, *Annotated Brief of Professors of Public International Law and Comparative Law as Amici Curiae in Support of Respondents in Samantar v. Yousuf* 15 LEWIS & CLARK L. REV. 609, 620–22 (2011) [hereinafter Keitner, *Annotated Brief*]; Chimène I. Keitner, *The Common Law of Foreign Official Immunity*, 14 GREEN BAG 2D 61, 62–68 (2010) [hereinafter Keitner, *Common Law*]; Chimène I. Keitner, *Officially Immune? A Response to Bradley and Goldsmith*, 36 YALE J. INT'L L. ONLINE 1, 8–9 (2010) [hereinafter Keitner, *Officially Immune?*].

alleged conduct is attributable to the foreign state.<sup>5</sup> Briefly stated, conduct that is *not* attributable to the foreign state does not benefit from immunity. Conduct that is *solely* attributable to the foreign state and does not entail personal responsibility does benefit from immunity.<sup>6</sup> Conduct that entails both personal and state responsibility might or might not benefit from immunity, depending on other relevant factors.

The principle that certain conduct can entail both personal and state responsibility is most evident in international criminal law, which regularly imposes legal consequences on individuals for conduct performed on behalf of the state.<sup>7</sup> This principle is also reflected in national prosecutions for international crimes, which can be accompanied in some legal systems by claims for civil damages by *parties civiles*.<sup>8</sup> The current predominance of criminal penalties, as opposed to civil penalties, for individuals alleged to have engaged in internationally wrongful conduct has led some to treat civil and criminal penalties as though they were fundamentally distinct.<sup>9</sup> However, if a central concern of contemporary immunity doctrines is to preclude one country's courts from adjudicating the lawfulness of another country's conduct, then there seems to be little conceptual difference between civil and criminal penalties, even though there might be practical differences in the initiation and conduct of proceedings. I discuss the implications of this observation in the section on penalties.

The idea of presence highlights the difference between cases involving defendants who remain outside the territorial jurisdiction of the forum state, and those involving defendants who have entered the

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5. See, e.g., Special Rapporteur, *Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, Int'l Law Comm'n, ¶ 24, U.N. Doc. A/CN.4/631 (June 10, 2010) (by Roman A. Kolodkin) ("[It is] right to use the criterion of the attribution to the State of the conduct of an official in order to determine whether the official has immunity *ratione materiae* and the scope of such immunity.").

6. Rosanne van Alebeek also distinguishes a category of conduct that is solely attributable to the foreign state in her study of this topic. ROSANNE VAN ALEBEEK, *THE IMMUNITIES OF STATES AND THEIR OFFICIALS IN INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW* (2008).

7. To illustrate this principle, one need think only of the crimes perpetrated with state authority by individuals who were part of the Nazi government in Germany during World War II. See Charter of the International Military Tribunal art. 6, Oct. 6, 1945, 59 Stat. 1546, 82 U.N.T.S. 279 (establishing jurisdiction over such crimes).

8. See, e.g., Harold Hongju Koh, *Filártiga v. Peña-Irala*, in *INTERNATIONAL LAW STORIES* 45, 71 n.110 (John A. Noyes et al. eds., 2007) (enumerating domestic statutes).

9. See, e.g., Amicus Curiae Brief of the American Jewish Congress in Support of Petitioner at 5, 7–8, 42–46, *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010) (No. 08-1555) (indicating lack of immunity from criminal proceedings but arguing for immunity from civil proceedings for the same conduct); Brief of Amici Curiae of Former Attorneys General of the United States in Support of Petitioner at 17–18, *Samantar*, 130 S. Ct. 2278 (No. 08-1555); United States Matar Amicus Brief, *supra* note 1, at 24.

forum state's territory. When a defendant is physically present on the forum state's territory, then immunity represents a waiver of the forum state's plenary jurisdiction over individuals within its territory.<sup>10</sup> Absent such a waiver, individuals who enter U.S. territory are subject to the plenary jurisdiction of U.S. courts.<sup>11</sup>

Finally, Part III suggests criteria that should guide lower courts in determining an individual defendant's entitlement to conduct-based immunity. The Executive has currently declined to formulate bright-line rules, although it has articulated a non-exhaustive list of potentially relevant factors.<sup>12</sup> If the Executive offers guidance in the form of a suggestion of immunity, the court should give such a suggestion substantial deference, particularly insofar as it conforms to previously articulated criteria.<sup>13</sup> However, the ultimate goal should be to provide greater clarity to courts about how to weigh the legally relevant considerations, so that they can make principled and consistent determinations without executive intervention. Greater clarity will also put potential defendants who are not entitled to status-based immunity on heightened notice that traveling to, or residing in, the United States might come at the cost of defending themselves against criminal or civil proceedings in a U.S. court.

#### I. TYPES OF IMMUNITY CLAIMS AFTER *SAMANTAR*

After *Samantar*, a current or former foreign official named as a defendant in a U.S. legal proceeding can raise one of four objections to jurisdiction based on immunity. These immunity-based objections do not preclude making other arguments for dismissal (such as the absence of subject-matter jurisdiction, failure to state a claim, or forum non conveniens), or raising an affirmative defense such as the act of state doctrine.<sup>14</sup> In brief, the four objections are:

- (1) The defendant can claim status-based immunity.
- (2) The defendant can claim conduct-based immunity.

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10. See *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (clarifying that a nation's jurisdiction within its territory is absolute and exceptions to that jurisdiction require the nation's consent).

11. See *id.*

12. See United States *Samantar* Amicus Brief, *supra* note 1, at 7, 24–26.

13. I have suggested elsewhere that the level of deference owed to the Executive is different for status-based and conduct-based immunity. See Keitner, *Officially Immune?*, *supra* note 4, at 3 n.15. For a more extensive discussion of the Executive's current role, see Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT'L L. 915 (2011).

14. For more on the act of state doctrine, see Keitner, *Annotated Brief*, *supra* note 4, at 614–16.

(3) The defendant can claim that a foreign state or entity is a required party under Fed. R. Civ. Proc. 19(a)(1)(B), thus requiring dismissal of the case under *Republic of the Philippines v. Pimentel*, if the state or entity would be immune under the FSIA.<sup>15</sup>

(4) The defendant can claim that the state is the real party in interest by analogy to *Kentucky v. Graham*,<sup>16</sup> if the relief sought would run directly against the state. If the state is the real party in interest, the claim against the individual defendant should be dismissed based on common law immunity or failure to name the real party in interest; the plaintiff might then be required to refile the complaint against the state itself under the FSIA, subject to equitable tolling.<sup>17</sup> This option would not be available where a plaintiff sues a defendant “in his personal capacity and seek[s] damages from his own pockets.”<sup>18</sup>

The following three categories of defendants are generally entitled to claim status-based immunity from the jurisdiction of U.S. courts under objection one above:

*Diplomats:* Diplomatic agents (that is, heads of diplomatic missions and members of the staff of diplomatic missions who have diplomatic rank) are generally immune from the criminal and civil jurisdiction of the receiving state under the Vienna Convention on Diplomatic Relations.<sup>19</sup> Other staff and household members enjoy lesser forms of immunity under the Vienna Convention.<sup>20</sup> In the United States, the Vienna Convention has been implemented by the Diplomatic Relations Act,<sup>21</sup> with the proviso that “[t]he President may, on the basis of reciprocity and under such terms and conditions as he may determine, specify [diplomatic] privileges and immunities . . . which result in more favorable treatment or less favorable treatment than is provided under the Vienna Convention.”<sup>22</sup>

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15. *Samantar*, 130 S. Ct. at 2292 (citing *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 867 (2008)).

16. *Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985).

17. See Keitner, *Common Law*, *supra* note 4, at 61 n.3 (noting that under the domestic model of official capacity suits via 42 U.S.C. § 1983, the state would be the real party in interest where an official is sued in his or her official capacity); Keitner, *Officially Immune?*, *supra* note 4, at 4 (identifying circumstances in which the state, and not the individual, is the real party in interest).

18. *Samantar*, 130 S. Ct. at 2281.

19. Vienna Convention on Diplomatic Relations art. 31(1), Apr. 18, 1961, 23 U.S.T. 3227 (entered into force with respect to the United States Dec. 13, 1972). In the United States, this category may include certain members of UN Missions. See United States Headquarters Agreement, S.J. Res. 144, 80th Cong. § 15 (1947).

20. See, e.g., Vienna Convention on Diplomatic Relations, *supra* note 19, arts. 37–38 (defining the privileges and immunities available to diplomatic agents’ family members as well as the staff and servants of the members of the diplomatic mission).

21. Diplomatic Relations Act of 1978, 22 U.S.C. § 254a–e (2006).

22. *Id.* § 254c.

*Incumbent Heads of State and Foreign Ministers:* Customary international law provides status-based immunity for incumbent heads of state and foreign ministers.<sup>23</sup> Incumbent heads of state have successfully claimed status-based immunity from service of process in the United States.<sup>24</sup>

*Members of Special Diplomatic Missions:* The United States is not a party to the UN Convention on Special Missions.<sup>25</sup> However, the United States has previously suggested immunity from service of process for certain invitees of the Executive Branch under the rubric of “special mission immunity,”<sup>26</sup> and it has indicated its intention to continue doing so where specific criteria are met.<sup>27</sup>

Defendants who cannot claim status-based immunity (objection one above) may instead claim conduct-based immunity (objection two above). For example, the Vienna Convention on Consular Relations provides current and former consular officials with conduct-based immunity for acts performed in the exercise of their consular functions,<sup>28</sup> and the Vienna Convention on Diplomatic Relations provides former diplomats with immunity for acts performed in the exercise of their functions as a member of the diplomatic mission.<sup>29</sup>

In sum, U.S. courts need only consider the “common law of official immunity”<sup>30</sup> referred to in *Samantar* when a current or former official who is *not entitled to status-based immunity*, and whose entitlement to conduct-based immunity *is not otherwise governed by treaty or statute*, claims immunity from jurisdiction. A central challenge is determining the sources and content of the

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

24. See, e.g., *Wei Ye v. Jiang Zemin*, 383 F.3d 620, 627 (7th Cir. 2004) (finding Chinese President immune from service of process based on executive suggestion of head of state immunity).

25. Convention on Special Missions, *opened for signature* Dec. 16, 1969, 1400 U.N.T.S. 231 (entered into force June 21, 1985); see also *Status: Convention on Special Missions*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/pages/ViewDetails.aspx?src=UNTS&tabid=2&mtdsg\\_no=III-9&chapter=3&lang=en#Participants](http://treaties.un.org/pages/ViewDetails.aspx?src=UNTS&tabid=2&mtdsg_no=III-9&chapter=3&lang=en#Participants) (last visited Oct. 1, 2011).

26. See, e.g., Suggestion of Immunity and Statement of Interest of the United States at 11 n.9, *Li Weixum v. Bo Xilai*, 568 F. Supp. 2d 35 (D.D.C. 2006) (Civ. No. 04-0649 (RJL)) (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”).

27. Harold Hongju Koh, Legal Adviser, Dep’t of State, Keynote Address at the Vanderbilt Journal of Transnational Law Symposium: Foreign State Immunity at Home and Abroad (Feb. 4, 2011).

28. See Vienna Convention on Consular Relations arts. 43(1), 53(4), 71(1), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

29. See Vienna Convention on Diplomatic Relations, *supra* note 19, art. 39(2).

30. *Samantar v. Yousuf*, 130 S. Ct. 2278, 2290 (2010).

common law principles that govern these residual, conduct-based immunity claims.

## II. THREE PRINCIPLES

In *Samantar*, the Supreme Court held unequivocally that the FSIA does not govern individual immunity claims, but it was much more circumspect about defining the “common law” that does govern such claims.<sup>31</sup> The Executive has taken the position that the common law supports a historical practice of absolute deference to executive suggestions of immunity or, if the Executive remains silent, judicial application of “principles adopted by the Executive Branch, informed by customary international law.”<sup>32</sup> The Executive has, at present, refrained from issuing an exhaustive or hierarchical list of such principles, and has instead committed to developing such principles over time.<sup>33</sup>

Advocates of absolute judicial deference to the Executive on questions of both status-based and conduct-based immunity cite the Court’s statement in *Samantar* that “[w]e have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department’s role in determinations regarding individual official immunity.”<sup>34</sup> However, although the *Samantar* Court described the State Department’s pre-FSIA role in suggesting immunity for foreign *vessels*, it did not undertake its own analysis of the State Department’s role in cases brought against foreign *individuals*, nor did the Court need to define that role in order to conclude that the FSIA was not intended to supplant it.<sup>35</sup> If the Supreme Court meant to endorse absolute executive deference, it could easily have done so. Instead, it referred throughout its opinion to the “common law” and made no mention of “principles adopted by the Executive Branch,” despite having been urged by the United States to do so. The precise role of the Executive post-*Samantar* thus remains a matter of dispute, as evidenced by recent briefing on remand in *Samantar* itself.<sup>36</sup>

I have taken issue elsewhere with the claim that there is a consistent historical practice of absolute deference to the Executive on

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31. *Id.* at 2290.

32. United States *Samantar* Amicus Brief, *supra* note 1, at 8.

33. Koh, *supra* note 25.

34. *Samantar*, 130 S. Ct. at 2291.

35. *Id.* at 2284–85.

36. The pleadings on remand are available at *Pleadings: Yousuf v. Samantar*, CENTER FOR JUST. & ACCOUNTABILITY, <http://www.cja.org/article.php?list=type&type=142#U.S.%20District%20Court%20for%20the%20Eastern%20District%20of%20Virginia%20%28On%20Remand%29> (last visited Oct. 1, 2011).

questions of individual conduct-based immunity.<sup>37</sup> Even if there were such a practice, it is unlikely that the “common law” is reducible to it. Yet regardless of the degree of deference owed to executive suggestions, the question remains of what principles ought to govern conduct-based immunity—whether these principles are articulated and applied by the Executive, by courts, or by some combination of both. The rest of this Part identifies three such principles.

### A. *Personal Responsibility*

Under both international law and U.S. law, individuals may be held personally responsible for acts performed under color of foreign law.<sup>38</sup> Simply put, personal responsibility and state responsibility are not mutually exclusive. The predicate for individual, conduct-based immunity is thus not simply whether the alleged conduct is attributable to the foreign state.<sup>39</sup> If it were, then domestic criminal prosecutions for international crimes committed by foreign officials would also be barred by immunity, because many such crimes are also attributable to the foreign state.

Those who advocate a zero-sum account of the relationship between personal responsibility and state responsibility sometimes cite a statement by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY).<sup>40</sup> The Appeals Chamber found that the ICTY does not have the authority to issue subpoenas for the production of documents to current government officials *in their official capacity*, because it lacks the power to impose sanctions on *states themselves* in the event of noncompliance, given its

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37. See Keitner, *Common Law*, *supra* note 4, at 72 (describing the scant authority regarding deference to the Executive on questions of conduct-based immunity); see also Chimène I. Keitner, *The Lost History of Foreign Official Immunity*, 87 N.Y.U. L. REV. (forthcoming 2012) (exploring the Executive’s own understanding of constitutional limitations on its ability to intervene in civil suits during the Founding Era).

38. For example, the crime of torture requires action under color of law. See Torture Convention Implementation Act of 1994, 18 U.S.C. § 2340(1) (2006).

39. Article 7 of the International Law Commission’s Draft Articles on State Responsibility attributes officials’ *ultra vires* conduct to the state, but Article 58 makes clear that the provisions on attribution “are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.” Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Annex, arts. 7, 58, U.N. Doc. A/RES/56/83 (Dec. 12, 2001) (Draft Articles on State Responsibility).

40. See, e.g., United States Matar Amicus Brief, *supra* note 1, at 23.

limited mandate.<sup>41</sup> In finding the tribunal powerless to issue this type of subpoena, the Appeals Chamber reasoned:

Such [current] officials are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of a State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called “functional immunity.”<sup>42</sup>

This makes sense in the context of a discussion of a current official’s compliance or noncompliance with a request to produce documents on behalf of the state. However, it does not make sense in other contexts. As the ICTY emphasized in the same opinion, “Those responsible for [conduct within the tribunal’s jurisdiction] 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.”<sup>43</sup> Accordingly, state responsibility does not automatically confer individual immunity from the jurisdiction of international or domestic courts.

The United States has recognized the compatibility of state action with personal responsibility in at least some cases. For example, in a statement that pre-dates *Samantar* the United States argued that: “if the defendant were correct that color of law can simply be equated with sovereignty and that the FSIA is applicable in all such cases, the torture statute would be rendered meaningless. Such a result must be rejected.”<sup>44</sup> In that case, which involved the prosecution of Roy Belfast Jr. (a/k/a “Chuckie” Taylor) for torture in Liberia, the Court agreed with the U.S. government that the defendant could both act “in an official capacity” and still be held personally responsible for his conduct by a U.S. court.<sup>45</sup> Just as personal responsibility does not necessarily equal a lack of immunity

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41. Prosecutor v. Blaškić, Case No. IT-95-14-AR108, Judgment on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber of 18 July 1997, ¶ 38 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 29, 1997).

42. *Id.*

43. See *id.* ¶ 41; see also Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 (defining “spies”); Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2295 (Annex to the Hague Convention No. IV).

44. United States’ Response in Opposition to Defendant’s Motion to Dismiss the Indictment, *United States v. Emmanuel*, No. 06-20758-CR (S.D. Fla. July 5, 2007), at \*1.

45. See *United States v. Belfast*, 611 F.3d 783, 793, 808 (11th Cir. 2010) (“The Senate Executive Committee charged with evaluating the CAT aptly explained that there is no distinction between the meaning of the phrases ‘under the color of law’ [used in the 28 U.S.C. § 2340] and in ‘an official capacity’ [used in CAT].”).

(since immunity can depend on other factors), state responsibility does not automatically entail individual immunity, and should not be treated as though it does.

### B. Presence

Individuals who enter U.S. territory do so with the consent of the United States, and become subject to the personal jurisdiction of U.S. courts.<sup>46</sup> Even accredited diplomats can be expelled by the United States if they engage in unlawful conduct, and they can lose their status-based immunity if they remain in the United States beyond a specified grace period.<sup>47</sup>

Jurisdictional immunities accorded current or former foreign officials are therefore an *exception* to the baseline principle of plenary jurisdiction based on territorial presence.<sup>48</sup> When proceedings are brought against a defendant who is physically present within the forum state (as opposed to a defendant who remains outside the jurisdiction), the principle of plenary territorial jurisdiction comes into play. The FSIA declines to recognize the immunity of the state itself when tortious or criminal conduct takes place within U.S. territory.<sup>49</sup> Just as the location of the acts plays a role in determining whether the exercise of the forum state's jurisdiction to prescribe, adjudicate, and enforce would be reasonable, so too does the location of the defendant.

In its submission to the district court on remand in *Samantar*, the United States emphasized that “[b]asic principles of sovereignty . . . provide that a state generally has a right to exercise jurisdiction over its residents.”<sup>50</sup> The United States further opined that “U.S. residents like Samantar who enjoy the protections of U.S. law ordinarily should be subject to the jurisdiction of our courts,

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46. See *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (discussing extent of a nation's jurisdiction “within its own territory”).

47. See Vienna Convention on Diplomatic Relations, *supra* note 19, art. 9 (stating that a receiving state may declare a member of the diplomatic staff to be unacceptable); *id.* arts. 37(2)–(3), 38(1) (describing the extent of individual immunities).

48. For further discussion of the territorial principle, see Chimène I. Keitner, *Foreign Official Immunity and the “Baseline” Problem*, 80 *FORDHAM L. REV.* (forthcoming 2011).

49. See, e.g., 28 U.S.C. § 1605(a)(5) (2006) (amended 2008) (denying immunity where “damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment . . .”).

50. Statement of Interest of the United States at 9, *Yousuf v. Samantar*, No. 1:04cv1360 (E.D. Va. Aug. 1, 2007) (citing *The Schooner Exchange*, 11 U.S. (7 Cranch) at 136).

particularly when sued by U.S. residents.”<sup>51</sup> Due consideration of the role of a defendant’s presence within U.S. territory also serves the policy goal of ensuring that victims who have fled human rights abuses in their countries of origin will not be compelled to live side-by-side with their former abusers, by deterring potential defendants from traveling to, and especially taking up residence in, the United States.<sup>52</sup>

### C. Penalties

There is a tendency to differentiate axiomatically between criminal and civil proceedings for immunity purposes, and to find civil immunity even where criminal immunity would not exist.<sup>53</sup> Where this result is not compelled by statute, it does not make sense. If anything, one might expect criminal immunity to be more robust, rather than less robust, than civil immunity, because the potential consequences of criminal liability are more severe. For example, the U.S. government expressed concern in its submission in *Matar v. Dichter* that: “Even more worrisome, foreign *criminal* courts might look to U.S. civil immunity rules in an effort to justify assertions of jurisdiction over U.S. officials.”<sup>54</sup> That said, because U.S. government attorneys serve as gatekeepers in the criminal context, potential defendants might view the possibility of being held civilly liable as less predictable and, thus, more objectionable than the possibility of being prosecuted in U.S. courts.

Governmental control over criminal prosecutions has led others to draw a distinction between criminal and civil immunity. For example, at least one circuit court has taken the position that initiating a prosecution amounts to a denial of immunity.<sup>55</sup> This

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51. Statement of Interest of the United States, *supra* note 50, at 7.

52. This policy is also reflected in U.S. asylum laws, which deny political asylum in the United States to former persecutors. *See* 8 U.S.C. § 1101(a)(42) (2006) (defining “refugee” to exclude persecutors); *id.* § 1158(b)(2)(A)(i) (denying asylum status to persecutors); *id.* § 1231(b)(3)(B)(i) (granting Attorney General power to deport persecutors).

53. For example, in an English case decided after this symposium was convened, the High Court stated in dicta that “[a]ll State officials enjoy immunity *ratione materiae* for their official acts from the civil jurisdiction of the courts of other States,” but found that there was no such immunity from criminal jurisdiction. *See* *Khurts Bat v. Investigating Judge*, [2011] EWHC (Admin) 2029, [71], [101] (Eng.) (citing United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, Annex, art 1(b)(iv), U.N. Doc. A/RES/59/38 (Dec. 16, 2004), which is not yet in force and has not been signed or ratified by the United States, for support).

54. United States Matar Statement of Interest, *supra* note 1, at 22 n.20.

55. *See* *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) (interpreting prosecution by the Executive Branch as a “clear sentiment” that immunity should be denied).

seems somewhat problematic, particularly if, for example, the United States sought to prosecute a recognized, sitting head of state who is entitled to status-based immunity under customary international law. Moreover, it is not clear that prosecutorial discretion is the best form of executive gatekeeping where foreign official defendants are concerned. As former Acting State Department Legal Adviser Michael Matheson has observed, “[T]he fact is that the process of indictments in the U.S. system is not well integrated with foreign policy concerns.”<sup>56</sup> The myth of a unitary and coordinated Executive seems an insufficient reason to differentiate between civil and criminal proceedings for immunity purposes.

In his opinion in *Jones v. Saudi Arabia*—a challenge to which is currently pending before the European Court of Human Rights—Lord Bingham of the UK House of Lords (now the UK Supreme Court) distinguished civil from criminal proceedings on the grounds that a state’s interests are affected by civil proceedings, but not by criminal proceedings.<sup>57</sup> This rationale also seems unpersuasive. If the state is the real party in interest, then the individual might not be the proper defendant in a civil suit. However, the state is not always the real party in interest. Where the state’s interests are affected in some symbolic or indirect way, this is surely no different in a civil proceeding than it is in a criminal case. In fact, the potential offense to the foreign state seems greater in the criminal context, at least where U.S. courts are involved, because only government authorities can initiate criminal proceedings. Thus, from a diplomatic perspective, responsibility for the proceedings cannot be deflected onto private parties or onto the judicial branch.

Perhaps most puzzling, proponents of blanket civil immunity appear to acknowledge that criminal immunity is unwarranted in certain cases.<sup>58</sup> If there is no immunity from criminal proceedings, then it is not clear as a doctrinal matter why there would nevertheless be immunity from civil proceedings for the same conduct.<sup>59</sup>

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56. MICHAEL P. SCHARF & PAUL R. WILLIAMS, SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER 94 (2010).

57. See *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia*, [2006] UKHL 26, [31], [2007] 1 A.C. 270 (H.L.) (appeal taken from Eng.) (“A state is not criminally responsible in international or English law”; however, “a civil action . . . does indirectly implead the state”). The UK court of appeal had found that the foreign state was no more “impleaded” by civil proceedings for torture than by criminal proceedings for the same conduct. See *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia*, [2004] EWCA (Civ) 1394, [2005] Q.B. 699 [75]–[76], [127]–[28] (Eng.).

58. See sources cited *supra* note 9.

59. The only remaining basis for distinction, which I have criticized elsewhere, is the assumption that there is a “baseline” of immunity from both civil and criminal

## III. FACTORS TO CONSIDER

The principles canvassed above, and the immunity practices of the United States, suggest that it can be useful to ask the following questions in order to determine whether or not a particular individual who is not covered by an existing treaty or statute is entitled to conduct-based immunity as a matter of common law:

1. *Has the foreign government, recognized as such by the U.S. Department of State, requested immunity?* If the answer is “no,” or if the foreign state has waived immunity, then the consensus appears to be that there should be no immunity, because immunity is for the benefit of the state, not the individual.<sup>60</sup> Although this appears to leave former officials at the “mercy” of subsequent domestic regime changes, the same is true of the possibility that such officials could face legal proceedings in their own country’s courts for wrongdoings committed by a prior regime.

As a procedural matter, a request for immunity should first be addressed to the State Department.<sup>61</sup> That said, it is foreseeable that certain foreign governments will make representations to courts directly, in which case courts will have to ascertain whether the government is “recognized” by the United States. Either way, the burden should be on the defendant to ensure that his or her government is made aware of the legal proceedings, and intervenes in a timely fashion.

If the foreign government has requested immunity, then courts should go on to ask:

2. *Is the alleged conduct attributable to the foreign state?* If the answer is “no,” then there should be no conduct-based immunity from either criminal or civil proceedings. Even proponents of a robust form of immunity do not suggest that there ought to be immunity where the state bears no responsibility for the alleged conduct, because immunity is for the benefit of the state.<sup>62</sup>

3. *If the alleged conduct is attributable to the foreign state, was it performed with actual (as opposed to apparent, or no) authority?* This might be a difficult question to answer at the margins, but it will

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proceedings, and that this immunity has been eroded solely in the case of criminal proceedings. See Keitner, *supra* note 48. There would, however, be an incongruity in allowing criminal jurisdiction while precluding civil jurisdiction for the same claims.

60. Cf. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. Reports 3, 21–22, 25–26 (Feb. 14) (explaining that immunities are not granted for personal benefit of the diplomatic official, and that the sending state may waive that immunity in a foreign court).

61. This became the established practice in suits involving foreign ships. See *Samantar v. Yousuf*, 130 S. Ct. 2278, 2284 (2010) (citing *Ex parte Republic of Peru*, 318 U.S. 578, 581 (1943)).

62. See Vienna Convention on Consular Relations, *supra* note 28, art 43(1); *supra* text accompanying note 28.

inevitably involve, to a certain extent, taking a foreign state's representations about the individual's scope of authority at face value. If the conduct was not performed with actual authority, or was *ultra vires*, then there should be no conduct-based immunity from either criminal or civil proceedings, even if the conduct is also attributable to the state.<sup>63</sup> Immunity should only protect exercises of state authority that the foreign state embraces as such.

In my view, only if the answer to each of these three questions is "yes" does the question of immunity become tricky: i.e., when a recognized foreign government has requested immunity, the conduct is attributable to the foreign state, and the conduct was performed with actual authority. Notably, reasoning about immunity as a matter of "common law" under these conditions does not turn on whether the proceedings are civil or criminal in nature.<sup>64</sup> From a U.S. perspective, reciprocity concerns are the same—and might even be heightened—if a current or former U.S. official is subjected to foreign criminal proceedings, as opposed to proceedings that could only result in the award of money damages.<sup>65</sup>

Two additional factors seem especially relevant to the decision of whether to recognize immunity in these difficult cases:

4. *Was the defendant served or arrested while within the territorial jurisdiction of the United States?* Although immunity is for the benefit of the foreign state rather than the individual, the United States maintains plenary jurisdiction over individuals who have entered its territory.<sup>66</sup> The more sustained the individual's presence within U.S. territory, the stronger the United States' claim to exercise territorial jurisdiction might appear. Technically speaking, however, physical presence of any duration will suffice.<sup>67</sup>

Individuals who are not entitled to status-based immunity might need to think twice before entering the United States if they have

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63. The non-binding Draft Articles on State Responsibility do not compel a different result. See G.A. Res. 56/83, *supra* note 39, art. 7 (attributing state officials' *ultra vires* conduct to the state so long as the person or entity acts in an official capacity); *id.* art. 58 (indicating that attribution to the state is "without prejudice" to the question of individual responsibility).

64. See *supra* Part II.C.

65. See *supra* note 54 and accompanying text.

66. See Keitner, *supra* note 48, at 9 ("The territorial theory . . . starts with a baseline of plenary jurisdiction by the forum state over its territory and individuals present on that territory . . ."); *supra* text accompanying note 48.

67. See, e.g., *Burnham v. Superior Court*, 495 U.S. 604, 608, 628 (1990) (finding that personal jurisdiction based upon personal service of a summons and complaint on an individual physically present within a state in the United States comports with due process requirements); *Kadic v. Karadzic*, 70 F.3d 232, 246, 248 (2d Cir. 1995) (finding personal jurisdiction over defendant who was served during a brief visit to the United States).

previously engaged in illegal conduct. Conversely, if an individual defendant was not served or arrested within the territorial jurisdiction of the United States, then the United States' plenary jurisdiction over its own territory does not serve as a counterweight to a foreign state's claim to conduct-based immunity for its agent, assuming the alleged conduct occurred overseas. As a practical matter, it is also unlikely that a U.S. court would have personal jurisdiction over the absent defendant in such a case.

5. *Has Congress attached legal consequences to the alleged conduct?* Congress has criminalized conduct including torture, war crimes, genocide, use of child soldiers, aircraft hijacking, and child sex trafficking, even when this conduct occurs outside U.S. territory.<sup>68</sup> Some of this conduct, including torture and extrajudicial killing, can also entail civil liability under U.S. law.<sup>69</sup> These statutes, although they do not explicitly abrogate conduct-based immunity, embody a political determination that such conduct is harmful and should be discouraged, wherever it occurs.<sup>70</sup> Courts may justifiably look to such statutes in weighing whether or not to recognize conduct-based immunity in a particular case.

My current view is that if the defendant was served or arrested within the territorial jurisdiction of the United States, and Congress has attached legal consequences to the alleged conduct, then there should be a presumption of *no* conduct-based immunity. This formulation certainly does not answer all possible questions, but the public and clear articulation of these factors would at least serve to put individuals on notice about the potential legal consequences of travel to the United States.

An alternative approach is to grant blanket immunity for all conduct attributable to the state, absent a waiver from the foreign state. In my view, this would excessively restrict the jurisdiction of U.S. courts. At the other end of the spectrum, one could deny conduct-based immunity for all congressionally proscribed conduct, and perhaps for all internationally unlawful conduct as well. In my view, this would create excessive legal exposure, particularly in light of reciprocity concerns. In the middle of the spectrum, one could grant immunity to agents of our strategic allies and trading partners, and

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68. Genocide Accountability Act of 2007, 18 U.S.C. § 1091(d) (2006); Torture Convention Implementation Act of 1994, 18 U.S.C. §§ 2340–2340A (2006); War Crimes Act of 1996, 18 U.S.C. § 2441 (2006); Child Soldiers Accountability Act of 2008, 18 U.S.C. § 2442 (2006).

69. Torture Victim Protection Act, 28 U.S.C. § 1350 note (2006).

70. Certain “violations of the law of nations” also carry the potential for civil liability under the Alien Tort Statute, 28 U.S.C. § 1350 (2006), although the specific types of conduct that entail such liability have thus far been subject to judicial, rather than legislative, specification. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (discussing criteria used by courts for analyzing claims under this statute).

deny it to others. This concept is reflected to a certain extent in the state sponsors of terrorism exception to the FSIA, which exposes those states to greater legal liability because of purely political considerations.<sup>71</sup> However, such an uneven application of immunity would remove any pretense of impartiality in the application of neutral principles, and would also undermine our ability to argue for immunity based on reciprocity when U.S. officials face legal proceedings in inhospitable fora. Difficult as it might be, we should strive to find a principled middle ground, and to give potential defendants notice about the criteria that will be applied to determine whether immunity is likely to be available if they enter the United States.

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71. See *Terrorism Exception to the Jurisdictional Immunity of a Foreign State*, 28 U.S.C. § 1605(A) (2006) (creating exception for state sponsors of terrorism).