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Introduction

Jurisdictional rules, including immunity-based defenses to jurisdiction, allocate adjudicatory authority horizontally among sovereign states. Jurisdictional immunities may limit one state's ability to assert adjudicatory or enforcement jurisdiction that would otherwise exist over persons, conduct, or property, based on the relationship between the persons, conduct, or property and the governmental functions of another state. Although some commentators refer to a state's immunity in monolithic terms, it can be useful to subdivide state immunity into foreign official immunity, on the one hand, and the immunity of the state itself, including the state's property and assets, on the other.

Foreign official immunity can be further subdivided into the status-based or *ratione personae* immunity of certain incumbent officials during their terms in office, and the conduct-based or *ratione materiae* immunity of other officials, and of former officials, for certain acts they perform on behalf of the state. To the extent that legal proceedings identify an official as the nominal defendant but seek only the state's assets, or seek to compel or enjoin state conduct (for example, the production of evidence on behalf of the state), they may be regarded as impleading the state, directly or indirectly, and the state may properly be considered the real party in interest. Such proceedings are effectively against the state itself and raise questions of foreign state, rather than foreign official, immunity.

The status-based immunities accorded foreign heads of state, heads of government, foreign ministers, and diplomats represent internationally accepted limits on the territorial jurisdiction of the forum state.[2] As a general matter, the status-based immunities of foreign officials from legal proceedings (whether civil, criminal, or administrative in nature) are governed by customary international law, supplemented by treaty-based

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1. Summarized and excerpted from Chimène I. Keitner, *Immunities of Foreign Officials from Civil Jurisdiction*, *in* CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW (2019).

2. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 ICJ REP. 3, 61 (Feb. 14).

rules for diplomatic and consular personnel and members of special diplomatic missions.[3] The underlying proposition that certain incumbent senior officials are beyond the reach of foreign (although not necessarily international criminal) proceedings remains relatively uncontroversial. So, too, is the basic proposition that the exercise of certain core state functions, and of administrative or ministerial functions, should not subject an individual official to foreign legal proceedings either during or after her term in office—either because the exercise of such functions is so inextricably bound up with the legitimate exercise of a state's sovereignty that the act itself must remain outside the scope of examination by a foreign legal system (in the case of certain core governance functions), or because the individual herself cannot be deemed individually legally responsible for the act (in the case of administrative or ministerial functions). However, the question of which acts fall within the category of core governance functions for immunity purposes remains highly contested. This Chapter focuses the on conduct-based immunities of foreign officials from civil proceedings in light of the relative lack of consensus regarding their contours under international law.

The Historical Origins of Conduct-Based Immunity as a Defense on the Merits

A number of civil suits brought in U.S. courts in the 1790s illustrate the then-prevailing understanding that a defendant's lack of personal responsibility for certain acts performed with the authorization of a foreign state did not deprive a tribunal of jurisdiction over civil claims arising from those acts. For example, during this period, Attorneys General William Bradford and Charles Lee repeatedly affirmed that foreign defendants who claimed their acts had been authorized by a foreign sovereign were "with respect to [their] suability, on a footing with every other foreigner (not a [diplomatic official]) who comes within the jurisdiction of our courts."[4] The official nature of a defendant's acts could form the basis for an

3. *See* Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961, 500 U.N.T.S. 95); Vienna Convention on Consular Relations (Vienna, 24 April 1963, 596 U.N.T.S. 261); Convention on Special Missions (General Assembly, 16 December 1969, 1400 U.N.T.S. 231).

4. Chimène I. Keitner, *The Forgotten History of Foreign Official Immunity*, 87 N.Y.U. L. REV. 704, 716 (2012).

affirmative defense (foreshadowing the U.S. "act of state" doctrine[5]), but it did not preclude the exercise of adjudicatory jurisdiction over the person of the defendant or the subject-matter of the suit.

In contrast to Bradford's and Lee's affirmations of the reach of U.S. jurisdiction over the acts of foreigners (and hence their "suability"), an absolutist view of conduct-based immunity maintains that a foreign state is solely responsible for imposing—and has exclusive authority to impose—consequences on its own officials for acts that cause harm to others, and to provide redress to those harmed.[6] Writing in 1795, French Minister Pierre-August Adet summarized this position as follows:

> [T]he acts of a man in the character of a public agent are not his own; he represents his Government; and if he conducts [himself] so as to excite the complaints of the citizens of another State, or of this State, justice should not be required of him, but of the Government from whom he holds the authority in virtue of which he has done the act complained of.[7]

For one country to adjudicate the lawfulness of the acts of another, he continued, "would reverse the first principles of the rights of nations."[8]

Seen in this perspective, foreign official immunity performs the basic function of forum allocation. The very early history of claims to jurisdictional immunity by individuals who acted on behalf of foreign governments suggests that it may be useful to differentiate between two related, but distinct, propositions: (1) claims arising from conduct performed under color of foreign law can be adjudicated only in that foreign country's courts (a claim about the deficiency in the forum court's adjudicatory authority, which can be addressed at the pleading stage); and (2) the assertion that challenged acts were performed by virtue of the actual authority invested in the defendant by a foreign state provides a substantive, fact-bound defense to liability (which might require discovery, at least on the question of scope of authority).

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5. Chimène I. Keitner, *Adjudicating Acts of State*, *in* FOREIGN AFFAIRS LITIGATION IN U.S. COURTS: THE 25TH SOKOL COLLOQUIUM (2013).

6. Chimène I. Keitner, *Categorizing Acts by State Officials: Attribution and Responsibility in the Law of Foreign Official Immunity*, 26 DUKE. J. COMP. & INT'L L. 451 (2016).

7. Letter from P.A. Adet to Mr. Randolph (Aug. 9, 1795).

8. *Id.*

Immunity as a Defense to Jurisdiction

The development of jurisprudence on conduct-based immunity—and whether to treat functional immunity as a true jurisdictional immunity or a substantive defense on the merits—proceeded in fits and starts, with the majority of relevant cases arising from unfriendly acts by foreign consuls. As a procedural matter, it makes sense to consider the threshold question of jurisdictional immunity before proceeding to determine on the merits whether an official bears personal responsibility for a challenged act. However, as consular-immunity cases illustrate, conferring blanket conduct-based immunity on a defendant based solely on his claim that he acted on behalf of a foreign state—whether under a statutory scheme designed primarily to address foreign state immunity or based on other legal authority—could have the practical effect of placing the defendant beyond the reach of legal consequences for acts for which he bears personal responsibility. This conundrum has manifested itself most acutely in the context of proceedings involving alleged violations of fundamental human rights, which can in certain circumstances be subject to the prescriptive and adjudicatory jurisdiction of foreign states, as described below.

Immunity from Civil Proceedings for Alleged Human Rights Violations

Although the question of personal responsibility in international law has most often been considered in the context of individual criminal responsibility, civil proceedings have been initiated in national courts against foreign officials for international-law violations that are also attributable to a foreign state. The question has arisen whether domestic statutes codifying principles of foreign state immunity extend to these suits against foreign officials.

The U.K. House of Lords confronted this issue in *Jones v. Saudi Arabia*, a consolidated appeal involving torture survivors' requests to serve Saudi Arabian officials with process outside the United Kingdom. Section 1(1) of the U.K. State Immunity Act (SIA) 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 this Act."[9] The SIA then goes on to define a "State" to include at least some individuals, specifically heads of state.[10] Lord Bingham indicated that "[i]t is not suggested that the Act is in any relevant respect ambiguous or obscure"[11] with respect to a foreign official's immunity from civil proceedings. The central issue on appeal was whether the United Kingdom could provide such immunity under a domestic statute consistent with its obligations under Article 6(1) of the European Convention on Human Rights. This, in turn, depended on whether the SIA's restriction on the claimants' access to an English court was proportionate and directed to a legitimate objective. The House of Lords answered this question in the affirmative.

For its part, the U.S. Supreme Court in *Samantar v. Yousuf*[12] distinguished between civil suits against an official in his or her personal capacity (seeking only the individual's assets) and civil suits against an official in his or her official capacity (naming the individual official even if he or she did not actually perform the challenged act, and seeking assets from the state).[13] Under this reasoning, only a proceeding in which the foreign state is the "real party in interest" implicates the jurisdictional provisions of the Foreign Sovereign Immunities Act of 1976 (FSIA); immunity from jurisdiction in proceedings against other individual officials in U.S. courts remains a matter of common law.[14] This raises the additional question, addressed below, of the respective roles of the executive and judicial branches under this common-law regime.

The Role of The U.S. Executive Branch

Although the international legal and diplomatic issues raised by claims of conduct-based immunity may be similar across jurisdictions, differences persist in domestic law and procedures, as illustrated by the U.S. practice of filing "suggestions" of immunity. In the late eighteenth

9. State Immunity Act, 1978, c. 33, § 1(1) (U.K.); Jones v. Ministry of the Interior of Saudi Arabia, [2006] UKHL 26, [9] (Lord Bingham of Cornhill) (appeal taken from Eng.).

10. State Immunity Act § 14(1)(a).

11. *Jones*, [2006] UKHL at [13]. The U.K. SIA, unlike the U.S. FSIA, expressly excludes criminal proceedings. State Immunity Act § 16(4).

12. 560 U.S. 305 (2010).

13. *Id.* at 325.

14. *Id.*

century, other countries routinely requested the Executive Branch's assistance in having civil suits dismissed, even if it could not prevent them from being brought. The first "suggestion" of immunity filed in a U.S. court appears to have been the submission by U.S. Attorney William Rawle to the Pennsylvania district court in the 1795 case involving the French ship *Cassius*. Rawle informed the court that the ship, "so being the property of, and belonging to, the French Republic, cannot, by law, be rendered liable to civil process in the courts of the United States, at the suit of individuals."[15] Rawle did not, however, provide a suggestion of immunity for the individual defendant in the same case. The practice of suggesting immunity for foreign ships continued, although courts did not always follow these suggestions; in 1926, for example, the U.S. Supreme Court found that an Italian ship was entitled to immunity notwithstanding the Executive Branch's suggestion to the contrary.[16] By the 1940s, however, courts began to accord absolute deference to such suggestions.[17] The Supreme Court stated in *Ex Parte Peru* in 1943 that "[u]pon recognition and allowance of the claim [to immunity] by the State Department and certification of its action presented to the court by the Attorney General, it is the court's duty to surrender the vessel and remit the libelant to the relief obtainable through diplomatic negotiations."[18] Since the enactment of the FSIA, the Executive Branch has consistently asserted the authority to determine whether or not a particular foreign official enjoys conduct-based immunity from suit, and it has maintained that such determinations are entitled to absolute judicial deference. The Supreme Court has not weighed in on this question.

Conclusions

The law of foreign official immunity from civil proceedings continues to evolve, particularly in jurisdictions without an applicable immunity statute. At one end of the continuum, suits that seek the state's assets, or that seek to compel action by the state, clearly implicate principles of state immunity and should be treated accordingly. At the other end, suits

15. Suggestion of the Attorney of the United States for the Pennsylvania District, and the Plea of Samuel B. Davis to the Jurisdiction of the District Court for the Said District.

16. Berizzi Bros. Co. v. The Pesaro, 271 U.S. 562 (1926).

17. Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945); *Ex parte* Peru, 318 U.S. 578 (1943).

18. *Peru*, 318 U.S. at 588.

involving an official's purely private conduct do not implicate the state's immunity and should not be barred by conduct-based immunity. The difficulty lies in ascertaining whether actions that are attributable to the state and for which individual officials also bear personal responsibility are, or should be, shielded from foreign legal proceedings on the grounds that such proceedings impermissibly violate the state's immunity, even though the state itself is not the real party in interest.

The recognition that individuals bear personal responsibility for certain acts that violate international law undermines the traditional rationale that state and official immunity must be congruent because the state *alone* bears legal responsibility for its officials' acts. The problem of concurrent state and individual responsibility complicates questions of conduct-based immunity from both criminal and civil proceedings. Conceptually, there seems to be little difference between the rationale for conduct-based immunity (or lack thereof) from civil and criminal proceedings; to the extent there are differences, these relate more to variations in procedures (including who controls the initiation and conduct of proceedings), doctrine (such as whether or not a state immunity act applies), and other legal obligations (for example, whether the forum state has a treaty obligation to extradite or prosecute the defendant).

States may voluntarily circumscribe their own adjudicatory jurisdiction, even absent an obligation to do so under customary international law. With respect to civil proceedings, mechanisms include canons of statutory construction such as the presumption against extraterritoriality, limits on accepted bases for asserting personal and subject-matter jurisdiction, and doctrines such as *forum non conveniens*. The question of immunity from civil proceedings arises only where a claimant brings suit in a foreign court that would otherwise have personal jurisdiction over the defendant and subject-matter jurisdiction over the claim. Although factors such as a defendant's residency in the forum might seem unrelated to the core concerns animating jurisdictional immunity for acts performed on behalf of a foreign state, an individual's objections to being subjected to legal consequences for her actions might carry less weight if the individual has voluntarily availed herself of the protections of that legal system.

Evolving rules governing jurisdiction and immunities reflect states' efforts to accommodate the potentially competing goals of promoting reciprocal respect for state sovereignty and to ensure individual accountability for internationally unlawful conduct. In a world of international legal rules created by states, it is no surprise that sovereignty

often prevails. That said, over time, more robust shared understandings regarding individual responsibility for international-law violations, and concomitant expectations regarding the imposition of legal consequences on individuals who bear such responsibility, will continue to shape the contours of conduct-based immunity from both civil and criminal proceedings in foreign courts.