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International Law: A Roadmap for Foreign Official Immunity in U.S. Courts

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International Law

A Roadmap for Foreign Official Immunity in U.S. Courts

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Introduction

More than a decade ago, *Samantar v. Yousuf*[2] tore up the map that many courts had been following in cases involving foreign official immunity. The U.S. Supreme Court held that the Foreign Sovereign Immunities Act of 1976 (FSIA), which governs civil proceedings against foreign states and their agencies and instrumentalities, does not apply to foreign officials. Instead, the immunity of foreign officials "is properly governed by the common law."[3] But the Court provided no guidance on the common law's substance or where courts should look to find it.

This chapter provides an essential roadmap for courts faced with claims against foreign officials who argue that the claims should be dismissed because of the positions they hold or because they acted in an official capacity. U.S. courts should decide questions of foreign official immunity by applying relevant statutes and rules of federal common law. These common-law rules should not grant more immunity than customary international law clearly requires. Courts should give substantial deference to the State Department's interpretations of international law, but they are not bound to follow the State Department's determinations of immunity in individual cases or its articulations of general principles. Foreign official immunity should be treated as an affirmative defense with the burden of proof on the defendant. But it must also be treated as a threshold question and one that is immediately appealable to spare officials entitled to immunity from the burdens of litigation.

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[1] Excerpted and adapted from William S. Dodge & Chimène I. Keitner, *A Roadmap for Foreign Official Immunity Cases in U.S. Courts*, 90 FORDHAM L. REV. 677 (2021).

[2] 560 U.S. 305 (2010).

[3] *Id.* at 325.

Foreign Official Immunity Today

The U.S. law of foreign official immunity comes from several different sources. Diplomatic and consular immunities are codified in treaties and implemented by statutes. Head-of-state immunity and conduct-based immunity are governed by customary international law[4] and implemented by federal common law. *Samantar* further clarified that the FSIA will apply to certain suits against foreign officials if the foreign state is the "real party in interest."[5]

A. Diplomatic, Consular, and Other Treaty-Based Immunities

Treaties and statutes now govern many immunities accorded foreign officials in domestic courts. These include diplomatic immunity, consular immunity, and immunities for officials of the United Nations and other international organizations. Some of these immunities are principally status-based, whereas others are principally conduct-based.

The Vienna Convention on Diplomatic Relations (VCDR), implemented by the Diplomatic Relations Act,[6] governs diplomatic immunity in U.S. courts. Generally, diplomats enjoy absolute status-based immunity from the criminal jurisdiction of the receiving state, and near-absolute status-based immunity from civil and administrative proceedings. The State Department's certification of an individual's diplomatic status is conclusive. Diplomatic immunity shields an individual from legal proceedings even if the proceedings began before that status was acquired. When immunity applies, the receiving state can request that the sending state waive the diplomat's immunity. It can also declare the diplomat "persona non grata" and expel the diplomat from its territory. As with other forms of status-based immunity, former diplomats do not enjoy absolute immunity, but they do enjoy residual conduct-based immunity for acts performed "in the exercise of [their] functions as . . . member[s] of the mission."[7]

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[4] *See generally* Concerning the Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14).
[5] *Samantar*, 560 U.S. at 325.
[6] 22 U.S.C. § 254(a)–(e).
[7] VCDR, art. 39(2).

Under the Vienna Convention on Consular Relations (VCCR), consular officials, unlike diplomats, enjoy immunity only for acts performed in the exercise of their consular functions.[8] Delineating the scope of functional immunity has proved somewhat easier for consular officials than for diplomatic officials because consular functions can be enumerated with greater specificity and "are for the most part less sensitive than the functions of diplomats."[9] The State Department guide on diplomatic and consular immunity makes clear that "[n]o law enforcement officer, U.S. Department of State officer, diplomatic mission, or consulate is authorized to determine whether a given set of circumstances constitutes an official act" for immunity purposes.[10] Rather, "[t]his is an issue which may only be resolved by the court with subject matter jurisdiction over the alleged crime."[11]

B. Head-of-State Immunity

Sitting heads of state, heads of government, and foreign ministers are absolutely immune from suit during their terms of office. Head-of-state immunity is a status-based immunity (immunity *ratione personae*) that attaches to these officials while they occupy these positions "to ensure the effective performance of their functions on behalf of their respective States."[12] Head-of-state immunity is absolute in that it applies to all acts, including those taken in a private capacity and those performed before the official assumed office. But absolute immunity lasts only during the official's tenure in office.

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[8] VCCR, art. 43.

[9] Eileen Denza, *Diplomatic and Consular Immunities: Trends and Challenges*, *in* THE CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 433, 435 (Tom Ruys et al. eds. 2019).

[10] *See* U.S. DEP'T OF STATE OFF. OF FOREIGN MISSIONS, DIPLOMATIC AND CONSULAR IMMUNITY: GUIDANCE FOR LAW ENFORCEMENT AND JUDICIAL AUTHORITIES 11 (2018), https://perma.cc/SN8J-5MEY.

[11] *Id.*

[12] Concerning the Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 53 (Feb. 14).

C. Conduct-Based Immunity

A foreign official who is not entitled to head-of-state, diplomatic, or consular immunity is still immune from proceedings based on "acts taken in his official capacity."[13] This conduct-based immunity turns on the nature of the conduct, rather than on the status of the official. Because it does not depend on an official's status, conduct-based immunity continues after an official leaves office.

Whether a foreign official was acting in an official capacity for purposes of conduct-based immunity depends in part on the scope of the official's authority under foreign law. In some cases, foreign governments have confirmed that their officials were acting within their authority, and U.S. courts have given such statements significant weight. If disputed by the plaintiff, however, the question of an official's authority under foreign law is a question of law for a U.S. court to decide.[14] If the foreign state indicates that the official was not acting in an official capacity, or if the foreign state waives the official's immunity, then there is no basis for a court to find conduct-based immunity.

The more difficult question is whether to treat certain acts as beyond an official's capacity for purposes of conduct-based immunity even if those acts were authorized by the official's government. Not all acts authorized by foreign governments benefit from conduct-based immunity under international law. Many countries have denied immunity to officials alleged to have violated universally accepted prohibitions on torture, genocide, war crimes, and crimes against humanity, or to have committed acts of espionage, sabotage, and kidnapping.

Courts have struggled to define "official capacity" because "the phrase may have a different meaning and scope depending on

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[13] Samantar v. Yousuf, 560 U.S. 305, 322 (2010).

[14] *See* FED. R. CIV. P. 44.1. *Cf.* Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865, 1869 (2018) (stating, in a nonimmunity case, that although a federal court should give "respectful consideration" to a foreign government's interpretation of its own law, the court "is not bound to accord conclusive effect to the foreign government's statements").

the context."[15] For conduct-based immunity, whether an act is taken in an "official capacity" does not depend on whether the act is attributable to the state for purposes of state responsibility. Nor does it depend on whether the act meets the state-action requirement for some human rights norms. Instead, determining whether an act was committed in an official's "official capacity" depends upon how states treat this concept in the context of conduct-based immunity.

Courts also choose different starting-points for evaluating state practice. Some start from a baseline of immunity and look for state practice and *opinio juris* establishing exceptions. Others start from a baseline of jurisdiction and look for state practice and *opinio juris* establishing a customary international law requirement of immunity. The latter approach is more consistent with how U.S. courts have analyzed immunity since the founding era.[16] As a policy matter, it is also more consistent with the post-war recognition that state officials can bear personal responsibility under international law for egregious conduct even if the state itself is also legally responsible for the same conduct. An approach that equates the official's immunity with the state's immunity in all cases, absent an explicit waiver by the foreign state, rests on an outdated conception of state action that erases the individual actor's moral agency. Such an approach also undermines the ability of foreign courts to enforce universally accepted rules of conduct where forum law would otherwise permit adjudication.

The Role of the Executive Branch

In the evolving landscape of foreign official immunity, one of the most important—and most contested—issues is the proper role of the executive branch in making case-specific immunity determinations and in articulating principles of conduct-based immunity for courts to apply. Although the State Department's

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[15] William S. Dodge, *Foreign Official Immunity in the International Law Commission: The Meanings of Official Capacity*, 109 AJIL UNBOUND 156, 157 (2015).

[16] *See, e.g.*, The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself.").

role confirming a foreign official's entitlement to status-based immunity is well accepted, the executive branch's assertion of lawmaking authority over conduct-based immunity remains contested in the post-*Samantar* era.

Whether an act is taken in an "official capacity" for immunity purposes turns on questions of international law, foreign law, U.S. law, and fact. While the State Department has expertise on questions of international law, courts have expertise deciding questions of foreign law, U.S. law, and fact. The executive branch claims that its power to conduct foreign affairs gives it constitutional authority to issue binding case-specific suggestions of conduct-based immunity. As a practical matter, however, the U.S. experience with immunity from the founding to the FSIA shows that case-specific executive authority leads to political pressure, inconsistent determinations, and harm to U.S. foreign relations. Further, allowing the executive branch to dictate the outcome of specific cases would create separation-of-powers tensions with the judiciary's role of adjudication.[17] Finally, the executive branch's claim of constitutional authority to articulate binding legal principles that govern foreign official immunity also lacks support. As *Samantar* held, the conduct-based immunity of foreign officials not covered by existing statutes and treaties "is properly governed by the common law," a source of law based on judicial, not executive, authority.[18]

Undoubtedly, the executive branch will have considerable influence over the federal common law of foreign official immunity. Courts can and should give substantial deference to State Department interpretations of customary international law on foreign official immunity. But in the U.S. constitutional system, the executive branch does not make rules of federal common law; federal courts do.

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[17] *See* Chimène I. Keitner, *The Common Law of Foreign Official Immunity*, 14 GREEN BAG 2D 61, 72 (2010); *see also* Curtis A. Bradley, *Conflicting Approaches to the U.S. Common Law of Foreign Official Immunity*, 115 AM. J. INT'L L. 1, 7 (2021) (noting "potential separation of powers concerns").

[18] *See* Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT'L L. 915, 954–67 (2011).

Procedural Questions

Samantar's holding that the FSIA does not apply to suits against foreign officials unless the requested relief would run against the foreign state implicates a range of procedural issues.

A. Jurisdiction and Service of Process

Because the FSIA's provisions on service do not apply to most suits against foreign officials, the plaintiff must serve the foreign official with process under other rules. In federal court, plaintiffs must rely on Federal Rule of Civil Procedure 4(e) for service in the United States and on Rule 4(f) for service outside the United States. In state court, plaintiffs must rely on state rules for service. In some cases, serving a foreign official under these rules is easier for plaintiffs because the FSIA's rules can be quite demanding. But in other cases, serving a foreign official abroad under the Federal Rules has proved difficult.

The court must also have personal jurisdiction over the foreign official, subject to the limits imposed by the applicable Due Process Clause. Because the FSIA provisions on personal jurisdiction will not usually apply, the court's personal jurisdiction will depend upon the official's contacts with the forum. Some claims against foreign officials arise out of sufficient contacts with the forum to support the exercise of specific personal jurisdiction. But in other cases, the court is unlikely to have personal jurisdiction unless the defendant can be served with process in the forum. Lack of personal jurisdiction will be a substantial barrier to suit in many cases against foreign officials.

B. Pleading Immunity

The best way of characterizing foreign official immunity is as an affirmative defense. Courts treated claims of conduct-based immunity as an affirmative defense during the early years of the republic, and at least some courts characterized sovereign immunity as an affirmative defense during the pre-FSIA period. Indeed, this is precisely how a State Department guide for law enforcement treats the conduct-based immunity of consular

officers today.[19] Treating foreign official immunity as an affirmative defense is consistent with the proposition that it can be waived. It is also consistent with the way courts have treated other rules of federal common law, such as the act-of-state doctrine.[20] Further, it might be the only way to explain why the federal rule of foreign official immunity binds state courts, because rules of federal common law generally do not limit either the personal or the subject-matter jurisdiction of state courts. This argument also finds support in an analogy to *domestic* official immunity, which is an affirmative defense under federal law.[21]

C. Alternative Grounds for Dismissal

Because questions of foreign official immunity sometimes involve difficult questions of fact or law, courts should also consider alternative grounds for dismissal. In a pre-*Samantar* case applying the FSIA to a suit against foreign officials, the D.C. Circuit held that the district court erred by failing to consider "other potentially dispositive jurisdictional defenses."[22] The court observed:

> Immunity should reduce the expenses, in time and inconvenience, imposed on foreign sovereigns by litigation in U.S. courts. . . . It would be bizarre if an assertion of immunity worked to increase litigation costs via jurisdictional discovery, to the neglect of swifter routes to dismissal.[23]

Other non-merits grounds for dismissal are available even if foreign official immunity is jurisdictional. The U.S. Supreme Court has held that "a federal court has leeway to choose among threshold grounds for denying audience to a case on the merits."[24] Under this principle, a federal court may dismiss for lack of

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[19] *See* STATE DEPARTMENT GUIDANCE, *supra* note 10, at 11, 22.
[20] *See* Republic of Austria v. Altmann, 541 U.S. 677, 700 (2004) (characterizing the act-of-state doctrine as "a substantive defense on the merits").
[21] *See* Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982).
[22] *In re* Papandreou, 139 F.3d 247, 254 (D.C. Cir. 1998).
[23] *Id.*
[24] Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 431 (2007) (internal quotation marks omitted).

personal jurisdiction without reaching the question of subject-matter jurisdiction. And a federal court may dismiss on grounds of forum non conveniens without reaching either subject-matter or personal jurisdiction. Even though most federal courts today treat foreign official immunity as a question of subject-matter jurisdiction, they may dismiss claims against foreign officials on alternative, non-merits grounds without reaching the question of immunity.

If foreign official immunity is characterized as an affirmative defense, an important, additional ground for dismissal becomes available: that the plaintiff has failed to state a claim on which relief can be granted. To be clear, the basis of the plaintiff's failure to state a claim is not *because* the foreign official is entitled to immunity[25] but is rather *irrespective* of immunity. Under the pleading standard adopted by the Supreme Court, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."[26] Some complaints against foreign officials contain no more than conclusory statements and fail to establish a plausible claim under applicable law. In such cases, dismissal for failure to state a claim may be the simplest ground on which to dispose of a case.

D. Appealing Immunity Decisions

Regardless how immunity is characterized, all decisions on foreign official immunity should be immediately appealable. Decisions granting immunity are appealable as final decisions of the district court.[27] Decisions denying immunity, however, are not final decisions. Because foreign official immunity is an immunity from both liability and the burdens of litigation, immediate appealability is necessary to ensure that immunity performs its intended function.

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[25] Foreign official immunity can be raised on a motion to dismiss for failure to state a claim or on a motion for summary judgment before filing an answer, even if it is treated as an affirmative defense.

[26] Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal quotation marks omitted).

[27] 28 U.S.C. § 1291.

Under the collateral-order doctrine, the Supreme Court has recognized a small class of prejudgment orders that "are immediately appealable because they finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[28] The federal courts of appeals have held that orders denying foreign state immunity under the FSIA are immediately appealable because foreign state immunity, which also "is an immunity from suit rather than a mere defense to liability," would be "effectively lost if a case is erroneously permitted to go to trial."[29] Decisions denying foreign official immunity should be immediately appealable for the same reason.

Conclusion

Congress can address conduct-based, foreign official immunity in a statute, as it has done for other forms of immunity. Such legislation could answer both substantive and procedural questions, providing clear directions for courts to follow. But until Congress enacts such a statute, courts can still find their way with a proper roadmap.

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[28] Behrens v. Pelletier, 516 U.S. 299, 305 (1996) (internal quotation marks omitted).

[29] Compania Mexicana De Aviacon, S.A. v. U.S. Dist. Court, 859 F.2d 1354, 1358 (9th Cir. 1988).