ARTICLES

A ROADMAP FOR FOREIGN OFFICIAL IMMUNITY CASES IN U.S. COURTS

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This Article provides a roadmap for cases involving foreign official immunity in U.S. courts. In 2010, the U.S. Supreme Court held in Samantar v. Yousuf *that the Foreign Sovereign Immunities Act (FSIA) does not govern the immunity of foreign officials. Since* Samantar*, dozens of decisions have addressed questions of foreign official immunity. Yet, U.S. courts often seem lost. They frequently fail to engage with the customary international law rules of foreign official immunity, instead reaching back to an outdated provision of the* 1965 Restatement (Second) of Foreign Relations Law. *Courts are divided on how much deference to give the executive branch when it suggests immunity or nonimmunity in a particular case. They are even unsure of which procedural rules to apply. For example, courts continue to treat foreign official immunity as a question of subject matter jurisdiction, following a path worn by the FSIA, even though* Samantar *clearly held that the FSIA does not apply to natural persons.*

This Article makes three distinct contributions. First, it provides a concise overview of the international law rules that govern foreign official immunity and explains why courts should resist the temptation to expand the federal

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common law of immunity beyond what international law clearly requires. Second, it contributes to the literature on deference to the executive in foreign affairs by examining the deference owed to executive suggestions of foreign official immunity or nonimmunity. Third, it addresses a series of critical procedural questions that have so far received no academic attention, arguing among other things that foreign official immunity should be treated not as a question of subject matter jurisdiction but rather as an affirmative defense.

INTRODUCTION

More than a decade ago, *Samantar v. Yousuf*[1] tore up the map that many courts had been following in foreign official immunity cases. The U.S. Supreme Court held that the Foreign Sovereign Immunities Act of 1976[2] (FSIA), which governs civil proceedings against foreign states and their agencies and instrumentalities, does not apply to foreign officials.[3] Instead,

1. 560 U.S. 305 (2010).
2. Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.).
3. *Samantar*, 560 U.S. at 325.

the immunity of foreign officials "is properly governed by the common law."[4] But the Court provided no guidance on the common law's substance or where courts should look to find it.[5]

Making federal common-law rules[6] is supposed to be a limited enterprise after *Erie Railroad v. Tompkins*.[7] International law has rules on foreign official immunity that U.S. courts can follow,[8] but courts lack guidance on whether they should develop rules of foreign official immunity that go beyond what international law clearly requires.[9] The executive branch claims that only the U.S. Department of State is entitled to make rules of foreign official immunity and that courts are bound to follow both the rules it articulates and its immunity determinations in particular cases. These assertions raise substantial separation of powers concerns.[10]

Since *Samantar*, dozens of decisions have grappled with a host of substantive and procedural questions in proceedings against current and former foreign officials. Recent foreign official immunity cases have involved claims against the director of the Democratic Republic of the Congo's intelligence agency for the alleged torture of a U.S. citizen[11] and claims against Israel's former defense minister for the alleged extrajudicial killing of a Turkish citizen.[12] At the time of writing, Saudi Crown Prince Mohammed bin Salman, widely known as MBS, faced two lawsuits in U.S. courts: one brought by the fiancée of *Washington Post* journalist Jamal Khashoggi for his extrajudicial killing in a Saudi consulate in Turkey and the other by a former Saudi senior intelligence official who alleges that MBS attempted to assassinate him in Canada.[13]

U.S. courts require guidance on how to navigate this terrain.[14] At present, many of them seem lost. They frequently fail to engage with customary

4. *Id.*

5. *See id.* at 321 n.15 (expressing "no view" on whether section 66 of the *Restatement (Second) of Foreign Relations Law* correctly reflects the common law of foreign official immunity).

6. *See* Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT'L L. 915, 964 (2011) (noting that "[v]irtually every theorist to specifically consider foreign state or official immunity has favored application of some form of federal common law over state law").

7. 304 U.S. 64 (1938); *see* Rodriguez v. FDIC, 140 S. Ct. 713, 717 (2020) ("Judicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal government's 'legislative Powers' in Congress and reserves most other regulatory authority to the States.").

8. *See infra* Part II.

9. For further discussion of this question, see *infra* notes 108–21 and accompanying text.

10. *See infra* Part III.

11. Lewis v. Mutond, 918 F.3d 142 (D.C. Cir. 2019), *cert. denied*, 141 S. Ct. 156 (2020).

12. Doğan v. Barak, 932 F.3d 888 (9th Cir. 2019).

13. Eleanor Runde, *Saudi Crown Prince Facing Lawsuits in D.C.*, LAWFARE (Dec. 8, 2020, 8:01 AM), https://www.lawfareblog.com/saudi-crown-prince-facing-lawsuits-dc [https://perma.cc/FT7T-3LX7].

14. *See* Curtis A. Bradley, *Conflicting Approaches to the U.S. Common Law of Foreign Official Immunity*, 115 AM. J. INT'L L. 1, 1 (2021) (noting that "lower federal courts in the United States have struggled to develop a common law immunity regime to govern suits brought against foreign government officials"). Bradley focuses on the interpretation of

international law rules of foreign official immunity and have instead relied on an outdated and inapposite provision of the American Law Institute's 1965 *Restatement (Second) of Foreign Relations Law*.[15] Courts are divided on how much deference to give the executive branch when it suggests immunity or nonimmunity in a particular case.[16] They are even unsure of which procedural rules to apply. For example, courts continue to treat foreign official immunity as a question of subject matter jurisdiction, following a path worn by the FSIA, even though *Samantar* clearly held that the FSIA does not apply to foreign officials.[17] Habitual reliance on the FSIA's framework in cases that it was never intended to govern has created procedural confusion and incoherent results.

This Article 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. In so doing, the Article makes three distinct contributions. First, it provides a concise overview of the international law rules that govern foreign official immunity and explains why courts should resist the temptation to expand the federal common law of immunity beyond what international law clearly requires.[18] Second, it contributes to the literature on deference to the executive in foreign affairs by examining the deference owed to executive suggestions of foreign official immunity or nonimmunity.[19] Third, it addresses a series of critical procedural questions that have so far received no academic attention, arguing among other things that foreign official immunity should be treated not as a question of subject matter jurisdiction but rather as an affirmative defense.[20] This carries implications for the way in which foreign official immunity defenses should be pleaded and proven.

The Article proceeds in four parts. Part I briefly recounts the history of foreign official immunity from the early days of the republic through *Samantar*. The common-law tradition draws its strength from the development of doctrine through accumulated judicial practice. Unearthing the roots of foreign official immunity doctrines allows us to better understand its later growth. As early as the eighteenth century, U.S. courts treated diplomatic immunity as a privilege that shielded designated foreign officials from the exercise of domestic judicial power, whereas all other foreign

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section 66(f) of the *Restatement (Second) of Foreign Relations Law*. *Id.* at 11–16. We argue that this provision became superfluous following the enactment of the FSIA. *See infra* notes 96–98 and accompanying text.

15. *See, e.g.*, *Doğan*, 932 F.3d at 893–94; *Lewis*, 918 F.3d at 146–47. *But see* Yousuf v. Samantar, 699 F.3d 763, 773–77 (4th Cir. 2012) (discussing customary international law at length).

16. *Compare* Matar v. Dichter, 563 F.3d 9, 15 (2d Cir. 2009) (deferring to State Department determination), *with Yousuf*, 699 F.3d at 773 (holding that State Department determination "is not controlling, but it carries substantial weight").

17. *See, e.g.*, Eliahu v. Jewish Agency for Isr., 919 F.3d 709, 712 (2d Cir. 2019); *Lewis*, 918 F.3d at 145.

18. *See infra* Part II.

19. *See infra* Part III.

20. *See infra* Part IV.

officials were subject to suit but could raise the fact that they had acted in an official capacity as an affirmative defense. The executive branch could file a suggestion of immunity certifying the defendant's status as beyond the reach of U.S. judicial process. Resort to this procedure became more common as the nineteenth century saw an increasing number of in rem proceedings against foreign ships in U.S. ports. In the 1940s, against the backdrop of the Second World War, the Supreme Court held that courts should defer to the executive branch's suggestions of immunity for foreign ships and surrender in rem jurisdiction (the equivalent of personal jurisdiction for ships) if the executive said they should. As a general matter, the executive branch suggested immunity for foreign ships that were owned and possessed by foreign governments but not for commercial vessels.

The restrictive theory of foreign sovereign immunity holds that a foreign sovereign can properly be subject to another country's domestic jurisdiction when it acts like a private person. The executive branch officially adopted the restrictive theory of foreign sovereign immunity in 1952, while disavowing the ability for such an executive policy to bind the courts. The State Department established a procedure for deciding whether to suggest immunity for a particular defendant at the request of a foreign government, but only a few such requests involved foreign officials. In 1976, the FSIA superseded the State Department's process with respect to the immunity of foreign states and their agencies or instrumentalities. Some courts applied the FSIA to foreign officials too, but *Samantar* held in 2010 that foreign official immunity is governed by federal common law.

Part II describes the law of foreign official immunity today, including head-of-state immunity, diplomatic and consular immunity, and conduct-based immunity. Under customary international law, heads of state, heads of government, and foreign ministers are absolutely immune from suit in U.S. courts while they remain in office.[21] The immunities of diplomats and consuls are codified in two treaties.[22] Other officials, and all former officials, are entitled to conduct-based immunity for acts taken in their "official capacity," a question that turns on the scope of their authority under foreign law and on whether international law requires immunity for acts of the kind alleged.[23] Part II argues on separation of powers grounds that, absent a controlling statute, U.S. courts should apply the international law rules of foreign official immunity and should resist the temptation to expand that immunity beyond what international law clearly requires.[24]

Part III takes up the question of deference to the executive branch. In recent years, the State Department has claimed authority to make binding

21. *See* Case Concerning the Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14); *see also infra* Part II.A. Head-of-state immunity does not extend to crown princes. *See infra* notes 136–38 and accompanying text.

22. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 [hereinafter VCDR]; Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR]; *see also infra* Part II.B.

23. *See infra* Part II.C.

24. *See infra* notes 108–21 and accompanying text.

determinations of foreign official immunity in individual cases and to articulate principles of foreign official immunity that courts are bound to follow in other cases. These claims go beyond what the U.S. Constitution permits. For status-based immunity, the executive has constitutional authority to determine which officials hold the relevant offices, and immunity flows as a matter of course from that determination. But the executive has no similar constitutional authority to make determinations of conduct-based immunity, and allowing the executive to direct the outcome of individual cases raises serious separation of powers concerns. The executive also lacks lawmaking power to establish principles of foreign official immunity that are binding on courts. The State Department's interpretations of treaties and the customary international law governing foreign official immunity should be given substantial weight, especially where the executive explains the basis for its conclusions. Ultimately, however, the federal common law of immunity is for federal courts to develop, just like any other body of federal common law.

Part IV considers a series of important procedural questions and provides courts with concrete guidance about how to proceed in cases that raise questions of foreign official immunity. To begin, the FSIA's provisions do not apply after *Samantar*, which means that the same rules of service, personal jurisdiction, and subject matter jurisdiction apply in suits against foreign officials as apply in suits against other foreign, nonstate defendants.

Part IV.B argues for a substantial change in how courts deal with pleading foreign official immunity. The FSIA's peculiar linkage of immunity to personal and subject matter jurisdiction has no bearing on the question in suits against foreign officials. Thus, although most courts today treat foreign official immunity as a question of subject matter jurisdiction, this Article argues that they should treat it instead as an affirmative defense, just as conduct-based immunity was treated in the early republic. As a practical matter, treatment as an affirmative defense makes sense of some key aspects of foreign official immunity, such as the fact that it binds state as well as federal courts and the fact that it can be waived. Such treatment would still permit foreign official immunity to be decided as a threshold question at the outset of the proceedings because the affirmative defense may be raised by motion before filing an answer. If an official defaults or waives immunity without the consent of her state, federal courts can use Federal Rule of Civil Procedure 60(b) to provide relief from judgment on immunity grounds.

Proving foreign official immunity raises a number of issues. Part IV.C argues that the burden of proof should be on the foreign official, as it is with any affirmative defense. Statements by a foreign state that its official was acting in an official capacity should be given respectful consideration but are not binding on U.S. courts. Sometimes foreign official immunity will turn on disputed facts, and courts may order limited discovery to determine the facts necessary to decide the immunity question.

When the immunity question appears more difficult than other grounds for dismissal, a court should consider dismissing on alternative grounds. If foreign official immunity is treated as an affirmative defense, the court will

be required to address personal jurisdiction and subject matter jurisdiction before reaching immunity in any event. Lack of personal jurisdiction will often be an alternative ground for dismissal, unless the cause of action arose in the United States or the defendant was personally served with process in the United States. If foreign official immunity is treated as an affirmative defense, the court would have the additional option of dismissing on the ground that the plaintiff has failed to state a plausible claim for relief. For complaints that consist largely of conclusory allegations, this may be a better way to dispose of the case. International law is agnostic about the precise doctrinal basis for a dismissal on threshold grounds. Failure to state a claim thus presents an attractive way to dismiss far-fetched claims against foreign officials without broadening the scope of federal common law to shield conduct that, if properly alleged, would not be entitled to immunity under international law.

Finally, if a court reaches the question of immunity, both the grant and denial of foreign official immunity should be immediately appealable to spare the official from having to litigate liability before the immunity claim is resolved definitively. This is how the qualified immunity of domestic officials is treated, despite its status as an affirmative defense.

In sum, U.S. courts should decide questions of foreign official immunity by applying relevant statutes and rules of federal common law, which 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 either 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 who are entitled to immunity from the burdens of litigation.

I. A BRIEF HISTORY OF FOREIGN OFFICIAL IMMUNITY

Claimants have filed civil actions against current and former foreign officials since the beginning of the republic.[25] In the late eighteenth and early nineteenth centuries, claims against foreign officials often arose in connection with disputes about the ownership of vessels and their cargos. In addition to bringing proceedings in rem against ships that entered U.S. ports, claimants sometimes secured writs of capias authorizing the sheriff to arrest individual foreign defendants in order to compel them to respond to civil suits. This created diplomatic tensions when the arrested individuals sought assistance from their home states.

Courts dealt with different kinds of immunity arguments differently. They treated diplomatic immunity as a privilege that shielded designated foreign

25. For an overview of early cases, see Chimène I. Keitner, *The Forgotten History of Foreign Official Immunity*, 87 N.Y.U. L. REV. 704 (2012).

officials from any form of domestic judicial process. Any other foreign officials had to plead as an affirmative defense that they did not bear personal responsibility for the challenged acts and that only the foreign state itself was liable.[26] In other words, courts treated the argument that a particular claim against a foreign official could not properly be adjudicated in a U.S. court because the official had acted in an official capacity as an argument on the merits.

The general understanding, articulated by Secretary of State Edmund Randolph, was thus that "process may issue from [U.S.] courts against any person not of the Diplomatic corps, or under their protection."[27] Although the principle of diplomatic immunity was firmly established, other foreign officials 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."[28] When foreign governments protested judicial proceedings against their ships and their nondiplomatic officials, executive branch officials consistently disclaimed the authority to halt such proceedings, despite sharply worded entreaties.[29]

Although they disavowed the authority to direct dismissal, executive branch officials expressed confidence to their foreign counterparts that U.S. courts would ultimately dismiss claims against individuals who had acted within the scope of lawful authority conferred by a foreign state. For example, Attorney General William Bradford opined that a court would not find the defendant liable for "an official act, done by the defendant by virtue, or under color, of the powers vested in him" by a foreign country.[30] A foreign government's certification that a nondiplomatic official had acted "within his lawful powers" could provide an affirmative defense on the merits.[31]

In addition to highlighting the availability of affirmative defenses, the U.S. Department of Justice developed a practice of submitting "suggestions of immunity" while still disclaiming the constitutional authority to direct a court

26. *See, e.g.*, Dupont v. Pichon, 4 U.S. (4 Dall.) 321, 323–24 (Pa. 1805) (distinguishing between the jurisdictional privilege accorded diplomats, including chargés d'affaires, and the merits claim that a defendant had acted in his official capacity and should therefore not "be deemed personally responsible" for the alleged acts).

27. Letter from Edmund Randolph to Joseph Fauchet, Minister Plenipotentiary of the French Republic (June 8, 1794), *in* 6 DOMESTIC LETTERS OF THE DEPARTMENT OF STATE, 1784–1906, 349, 350 (1943).

28. Actions Against Foreigners, 1 Op. Att'y Gen. 81 (1797) (Case of Sinclair); Suits Against Foreigners, 1 Op. Att'y Gen. 49 (1794) (Case of Cochran[e]); *see also* Suits Against Foreigners, 1 Op. Att'y Gen. 45 (1794) (Case of Collot).

29. *See, e.g.*, Letter from Timothy Pickering to Mr. Adet, Minister Plenipotentiary of the French Republic (Mar. 14, 1796), *in* 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 550, 550 (1797) (indicating that any attempt by the executive to "remove" a suit against a French ship from the judiciary "would be a violation of the constitution").

30. Suits Against Foreigners, 1 Op. Att'y Gen. 45, 46 (1794) (Case of Collot).

31. *See, e.g.*, Letter from Timothy Pickering to Mr. Letombe, Consul Gen. of the French Republic (May 29, 1797), *in* 10 DOMESTIC LETTERS OF THE DEPARTMENT OF STATE, 1784–1906, 51, 51–52 (1943).

to dismiss a private suit.[32] Yet, this practice was not consistent: sometimes, the executive branch remained silent, and foreign governments filed submissions directly with the court; other times, the U.S. Attorney transmitted statements sent by the foreign government to the State Department; and still other times, the executive branch filed a "suggestion" confirming certain facts about the defendant or articulating its view of the applicable law.[33] Courts generally viewed these "suggestions" as conclusive of "the truth of the facts alleged."[34] In cases involving individual defendants, courts looked to the State Department to certify whether the defendant had been received as an official representative of a foreign state,[35] and they looked to common-law and international law principles to determine whether an official who was not entitled to diplomatic immunity could nonetheless establish an affirmative defense.[36]

Claims against foreign officials remained relatively rare compared to those against foreign ships and, as trade increased, to claims against companies owned or operated by foreign states. In the 1930s, the Supreme Court began to rely more heavily on executive branch suggestions as controlling—rather than merely informing—determinations of immunity from in rem proceedings.[37] Two decisions in the 1940s cemented the transition to a deferential posture. In 1943, the Supreme Court held in *Ex parte Republic of Peru*[38] that the State Department's "certification and the request that the vessel be declared immune must be accepted by the courts as a conclusive determination by the political arm of the Government that the continued retention of the vessel interferes with the proper conduct of our foreign relations."[39] The Court reiterated this principle in *Republic of Mexico v. Hoffman*.[40] There, the State Department declined to take a position on

32. On the development of this practice, see Chimène I. Keitner, *Between Law and Diplomacy: The Conundrum of Common Law Immunity*, 54 GA. L. REV. 217, 233–39 (2019).

33. *See* Francis Deák, *The Plea of Sovereign Immunity and the New York Court of Appeals*, 40 COLUM. L. REV. 453, 457 n.11 (1940).

34. *Id.* at 459.

35. *See, e.g.*, Carrera v. Carrera, 174 F.2d 496, 497 (D.C. Cir. 1949).

36. *See generally* Chimène I. Keitner, *Adjudicating Acts of State*, *in* FOREIGN AFFAIRS LITIGATION IN UNITED STATES COURTS 49, 50 (John Norton Moore ed., 2013) (tracing the common doctrinal roots of the act of state doctrine and conduct-based immunity).

37. *See* Compania Espanola De Navegacion Maritima, S.A. v. The Navemar, 303 U.S. 68, 74 (1938); *see also* Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity, Individual Officials, and Human Rights Litigation*, 13 GREEN BAG 2D 9, 11 (2009) ("[S]tarting in the late 1930s, courts began to give essentially absolute deference to Executive Branch views on whether immunity should be granted."); G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 134–38 (1999) (observing that, in the nineteenth century, "[j]udicial resolutions of foreign sovereign immunity issues were made on the basis of customary international law, which was treated as part of common law"); Wuerth, *supra* note 6, at 925 (noting that "the Court began to defer to the executive branch on all aspects of immunity" in the 1930s). *But see* Lewis Yelin, *Head of State Immunity as Sole Executive Lawmaking*, 44 VAND. J. TRANSNAT'L L. 911, 945 (2011) (arguing that the "trend toward absolute deference" began earlier).

38. 318 U.S. 578 (1943).

39. *Id.* at 589. On deference to the executive branch, see *infra* Part III.

40. 324 U.S. 30 (1945).

Mexico's assertion that the ship was immune from judicial seizure.[41] Citing its recent opinion in *Ex parte Peru*, the Court held that "it is an accepted rule of substantive law governing the exercise of the jurisdiction of the courts that they accept and follow the executive determination that the vessel shall be treated as immune."[42] In the absence of a suggestion of immunity, "the court will inquire whether the ground of immunity is one which it is the established policy of the [State] department to recognize."[43]

The nature of the proceedings in *Ex parte Peru* and *Hoffman* led the Supreme Court to characterize the protection from suit in those cases as a jurisdictional immunity. In *Ex parte Peru*, the Court said that if the claim of immunity were recognized, "it is the court's duty to surrender the vessel."[44] In an in rem proceeding, surrender of the vessel also meant surrender of jurisdiction, a point the Court made explicit in *Hoffman*.[45] The jurisdiction surrendered was not subject matter jurisdiction but rather personal jurisdiction, which broadly includes jurisdiction in personam, in rem, and quasi-in-rem.

Contemporary observers viewed *Ex parte Peru* and *Hoffman* as a pronounced break with prior practice. Francis Deák warned that the implications of these decisions were "far-reaching," since "[i]t would mean that the Department of State would be required to exercise judicial or quasi-judicial powers in each instance when a foreign government, involved in litigation in our courts, should request Executive assistance . . . ."[46] In his view, "[t]his result would seem to be inconsistent with our system of government, built on the theory of separation of powers, since it would require the exercise by the executive of powers which belong to the judiciary."[47]

The applicable principles of sovereign immunity were undergoing a shift during this period, as the State Department embraced the restrictive theory, under which foreign governments are not immune from suit for claims based on their private acts, including commercial activities (*acta jure gestionis*). The State Department formally announced its adoption of this theory in the 1952 Tate Letter.[48] In the State Department's view, "the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts."[49] Although

41. *Id.* at 31–32.
42. *Id.* at 36.
43. *Id.*
44. *Ex parte* Republic of Peru, 318 U.S. 578, 588 (1943).
45. *Hoffman*, 324 U.S. at 34 (noting that "jurisdiction in rem acquired by the judicial seizure of the vessel . . . will be surrendered on recognition" of immunity).
46. Deák, *supra* note 33, at 461.
47. *Id.*
48. Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952), *in* 26 DEP'T ST. BULL. 984, 984 (1952) [hereinafter Tate Letter] (indicating that "the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)").
49. *Id.* at 985.

the Tate Letter announced the official adoption of the restrictive theory, it did not offer "specific guidelines or criteria for differentiating between a sovereign's private and public acts."[50] It also acknowledged explicitly that "a shift in policy by the executive cannot control the courts," but it expressed the view "that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so."[51]

Relatively few suits were filed against foreign officials between the Tate Letter and the enactment of the FSIA in 1976. A compilation of State Department immunity decisions from 1952 to 1977 contains 110 decisions, only six of which involved requests for suggestions of immunity on behalf of individuals: two defendants who claimed head-of-state immunity and four defendants who claimed immunity on the grounds that they had acted on behalf of foreign states.[52] Like the Supreme Court in *Ex parte Peru* and *Hoffman*, the State Department appears to have treated immunity as a question of personal jurisdiction during this time. In one decision, for example, the State Department described the type of jurisdiction at issue as personal, explaining that "[u]nless a government engaging in *jure gestionis* activities will accept *in personam* jurisdiction, the only alternative is the *in rem* or *quasi in rem* jurisdiction obtainable by attachment in accordance with the law of the forum."[53] The nature of the foreign government's activities—public or private—thus dictated, at least in theory, whether it could be haled into a U.S. court.

The State Department developed an internal administrative procedure to handle requests from foreign states for suggestions of immunity.[54] This included inviting parties "to attend an informal hearing at the Department with an opportunity for oral argument and the submission of briefs."[55] Andreas Lowenfeld, a former senior official in the State Department's Office of the Legal Adviser, formed a withering view of this process, lamenting in 1969 that "[t]he law applied in the United States to claims against foreign states is at present an amalgam of judicial decisions, Executive Branch policies, some uncertain notions of international law and wholly inadequate procedure."[56] The situation ultimately became untenable, and the State Department and the Department of Justice found themselves wanting once

50. Robert B. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 41 (1978).

51. Tate Letter, *supra* note 48, at 985.

52. *See generally* Sovereign Immunity Decisions of the Department of State, May 1952 to January 1977, 1977 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW app. [hereinafter Sovereign Immunity Decisions]; *see also* Chimène I. Keitner, *The Common Law of Foreign Official Immunity*, 14 GREEN BAG 2D 61, 72 (2010).

53. Sovereign Immunity Decisions, *supra* note 52, at 1040; *see also id.* at 1040–41 (distinguishing between immunity from jurisdiction in personam or in rem, on the one hand, and immunity from execution, on the other).

54. von Mehren, *supra* note 50, at 41.

55. *Id.*

56. Andreas F. Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of United States Law*, 44 N.Y.U. L. REV. 901, 901 (1969).

again to be "in a position to assert that the question of immunity is entirely one for the courts."[57]

Congress responded by enacting the FSIA.[58] It found that "the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts."[59] State Department Legal Adviser Monroe Leigh wrote to Attorney General Edward Levi that the statute, "which was drafted by both of our Departments, has as one of its objectives the elimination of the State Department's current responsibility in making sovereign immunity determinations," and that "[i]n accordance with the practice in most other countries, the statute places the responsibility for deciding sovereign immunity issues exclusively with the courts."[60]

The FSIA applies to civil suits filed in both state and federal courts.[61] The Act governs suits against "foreign state[s]," which it defines to include "a political subdivision of a foreign state or an agency or instrumentality of a foreign state."[62] An agency or instrumentality means "a separate legal person, corporate or otherwise" that is either an "organ" of a foreign state, or an entity, the majority of whose "shares or other ownership interest" are owned directly by a foreign state.[63] Section 1330(a) gives the federal district courts original subject matter jurisdiction over any nonjury action against a foreign state where a statutory exception to immunity applies.[64] Section 1330(b) creates personal jurisdiction over a foreign sovereign "as to every claim for relief over which the district courts have [original] jurisdiction" if the defendant has been properly served.[65] The House report accompanying the FSIA described § 1330(b) as providing, "in effect, a Federal long-arm statute over foreign states" that embodies "[t]he requirements of minimum jurisdictional contacts and adequate notice."[66] Whether defendants who are served with process under the FSIA can seek dismissal on due process grounds has not been resolved definitively. The Supreme Court has suggested that foreign states might not be entitled to constitutional due

57. *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the H. Comm. on the Judiciary,* 93d Cong. 34 (1973).

58. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), 1602–1611 (2018).

59. *Id.* § 1602.

60. Letter from Monroe Leigh, Legal Adviser, Dep't of State, to Edward H. Levi, U.S. Att'y Gen. (Nov. 22, 1976), *in* 75 DEP'T ST. BULL. 649, 649 (1976).

61. *See* 28 U.S.C. § 1604. The FSIA neither provides a basis for, nor forecloses, the exercise of criminal jurisdiction over foreign states and their agencies and instrumentalities. Chimène I. Keitner, *Prosecuting Foreign States*, 61 VA. J. INT'L L. 221, 234 (2021). Section 1441(d) provides for the removal of a civil action against a foreign state from state court to federal court for a nonjury trial.

62. 28 U.S.C. § 1603(a).

63. *Id.* § 1603(b).

64. *Id.* § 1330(a).

65. *Id.* § 1330(b).

66. H.R. REP. NO. 94-1487, at 13 (1976).

process protections, and a number of lower courts have so held.[67] Foreign state-owned enterprises likely are entitled to due process, unless they are deemed agents of a foreign state.[68]

After the FSIA's passage, the treatment of head-of-state, diplomatic, and consular immunity continued much as before. Foreign officials who were entitled to status-based immunity as sitting diplomats or heads of state could still secure dismissal on the basis of a suggestion from the State Department.[69] The United States had also joined treaties regulating diplomatic and consular immunity.[70] The question arose whether other foreign officials could claim immunity under the FSIA, notwithstanding the executive's position that the FSIA did not govern claims against natural persons.

Courts were divided. In *Chuidian v. Philippine National Bank*,[71] the Ninth Circuit held that the FSIA shielded a foreign official from suit for acts performed in an official capacity—in this case, instructing the Philippine National Bank not to make payment on a letter of credit.[72] The court observed that "pre-1976 common law expressly extended immunity to individual officials acting in their official capacity."[73] It thus affirmed the district court's dismissal of the claims against the official, on the grounds that "a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly."[74]

Applying the FSIA to an individual defendant led the court in *Chuidian* to treat foreign official immunity as a question of subject matter jurisdiction, rather than as a matter of personal jurisdiction or as an affirmative defense. The same was true of the D.C. Circuit's decision in *Belhas v. Ya'alon*,[75]

67. *See* Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 619 (1992) (suggesting that foreign states would not qualify as "persons" for due process purposes); Frontera Res. Azer. Corp. v. State Oil Co. of the Azer. Republic, 582 F.3d 393, 399–400 (2d Cir. 2009); Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 96 (D.C. Cir. 2002).

68. *Compare* GSS Grp. Ltd. v. Nat'l Port Auth., 680 F.3d 805, 817 (D.C. Cir. 2012) (holding that an independent state-owned corporation was entitled to due process protection), *with Frontera*, 582 F.3d at 400 (holding that a foreign company does not enjoy due process protections if it is an agent of a foreign state). *See generally* Ingrid Wuerth, *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 FORDHAM L. REV. 633, 633 (2019) (arguing that "it makes little sense to afford litigation-related constitutional protections to foreign corporations . . . but to deny categorically such protections to foreign states").

69. *See, e.g.*, Saltany v. Reagan, 702 F. Supp. 319, 320 (D.D.C. 1988) (holding that Prime Minister Margaret Thatcher was entitled to head-of-state immunity).

70. *See* VCDR, *supra* note 22; VCCR, *supra* note 22; Diplomatic Relations Act of 1978, 22 U.S.C. § 254(a)–(e) (implementing VCDR); *see also infra* Part II.B.

71. 912 F.2d 1095 (9th Cir. 1990).

72. *Id.* at 1103.

73. *Id.* at 1101. The court noted that the official would not enjoy sovereign immunity for acts either "completely outside his governmental authority," *id.* at 1106 (quoting United States v. Yakima Tribal Ct., 806 F.2d 853, 859 (9th Cir. 1986)), or "beyond the scope of his authority," *id.*

74. *Id.* at 1101–02. Had this case arisen in the late eighteenth or early nineteenth century, the court could have found instead that the official did not bear personal responsibility for the alleged official acts. *See supra* note 26 and accompanying text.

75. 515 F.3d 1279 (D.C. Cir. 2008).

which upheld the district court's dismissal of claims against the former head of Israeli Army Intelligence relating to the shelling of a U.N. compound in Lebanon for lack of subject matter jurisdiction under the FSIA.[76]

The Second Circuit took a different route to the same result in another case against a former Israeli official. In *Matar v. Dichter*,[77] the district court found that the former head of the Israeli Security Agency was an "agency or instrumentality of [a] foreign state" under the FSIA.[78] On appeal, the Second Circuit relied on the common-law principle that an individual official is entitled to immunity for "acts performed in his official capacity."[79] The court of appeals thus found that "even if Dichter, as a former foreign official, is not categorically eligible for immunity under the FSIA (a question we need not decide here), he is nevertheless immune from suit under common-law principles that pre-date, and survive, the enactment of that statute."[80]

In *Samantar v. Yousuf*, the Supreme Court held definitively that the FSIA does not govern suits against foreign officials.[81] The Court characterized World War II era, pre-FSIA practice in cases involving seized vessels as entailing a "two-step procedure" for asserting sovereign immunity.[82] The Court observed that if the State Department granted a foreign state's request to provide a suggestion of immunity, "the district court surrendered its jurisdiction."[83] If the State Department did not suggest immunity, the court made its own determination by inquiring "whether the ground of immunity is one which it is the established policy of the [State Department] to recognize."[84] Although the FSIA "indisputably governs" the immunity from suit of a foreign state,[85] the Court rejected the argument that the term "foreign state" should be interpreted to include natural persons. Among other reasons, the Court noted that the terms used to define "agency or instrumentality" (like the word "entity") "apply awkwardly, if at all, to individuals,"[86] that the FSIA "expressly mentioned officials when it wished to count their acts as equivalent to those of the foreign state,"[87] and that the methods specified for service of process "are at best very roundabout ways of serving an individual official."[88] Viewing the statute as a whole, the Court concluded that the Act

76. *Id.* at 1284.
77. 500 F. Supp. 2d 284 (S.D.N.Y. 2007).
78. *Id.* at 291.
79. Matar v. Dichter, 563 F.3d 9, 14 (2d Cir. 2009).
80. *Id.* The court also noted that the United States had filed a Statement of Interest in the district court "specifically recognizing Dichter's immunity and urging that appellants' suit 'be dismissed on immunity grounds.'" *Id.*
81. Samantar v. Yousuf, 560 U.S. 305, 325 (2010).
82. *Id.* at 311. The Court also noted that diplomatic and consular officials could claim the "specialized immunities" accorded to those officials, as could officials qualifying as the "head of state." *Id.* at 312 n.6.
83. *Id.* at 311.
84. *Id.* at 312 (quoting Republic of Mexico v. Hoffman, 324 U.S. 30, 36 (1945) (alteration in original)).
85. *Id.* at 313.
86. *Id.* at 315.
87. *Id.* at 317.
88. *Id.* at 318.

did not "codif[y] the common law with respect to the immunity of individual officials."[89]

Having reached this conclusion, the Court declined to "resolve the dispute among the parties as to the precise scope of an official's immunity at common law."[90] The Court also did not take an affirmative position regarding the proper role of the executive branch in foreign official immunity determinations, noting simply that the State Department "has from the time of the FSIA's enactment understood the Act to leave intact the Department's role in official immunity cases."[91]

The Court noted several immediate implications of its decision. First, plaintiffs seeking to sue foreign officials cannot take advantage of the FSIA's provisions on personal jurisdiction and service of process.[92] Second, the foreign state might be a required party to the litigation whose joinder is not feasible, thereby compelling dismissal of the suit.[93] Third, in "some actions against an official in his official capacity," the foreign state might be what the Court called the "real party in interest," meaning in this context that the suit should be treated as if it were brought against the state because it seeks a remedy from the state rather than the named official.[94]

Under this reasoning, if the foreign state is what *Samantar* calls the "real party in interest," then the claim will be treated as if it had been made under the FSIA. The FSIA's provisions regarding service and jurisdiction, and its exceptions to jurisdictional immunity, will apply, and any resulting judgment will bind the foreign state, not the named individual.[95] This scenario is similar to that described in the American Law Institute's *Restatement (Second) of Foreign Relations Law* section 66(f), which the Court noted but

89. *Id.* at 320.

90. *Id.* at 321. The Court also noted, but did not take a position on, the rule applied by certain courts "that foreign sovereign immunity extends to an individual official 'for acts committed in his official capacity' but not to 'an official who acts beyond the scope of his authority.'" *Id.* at 322 n.17 (quoting Chuidian v. Philippine National Bank, 917 F.2d 1095, 1103, 1106 (9th Cir. 1990)).

91. *Id.* at 323 n.19; *see also id.* at 323 (stating that "[w]e have been given no reason to believe that Congress saw [the Department's role] as a problem" in the "few and far between" cases where it arose); *infra* Part III.

92. *Samantar*, 560 U.S. at 324 n.20.

93. *Id.* at 324–25.

94. *Id.* at 325; *cf. id.* at 324 n.20 (noting, conversely, that "a plaintiff seeking to sue a foreign official will not be able to rely on the Act's service of process and jurisdictional provisions").

95. When courts have found that the state is the real party in interest, some have applied the FSIA directly to the foreign official defendants. *See, e.g.*, Edwards v. Fed. Gov't of Nigeria, No. 18-11133, 2018 WL 6619741, at *3 (D. Mass. Dec. 18, 2018) ("Accordingly, the 'real party in interest' is plainly the foreign state of Nigeria, and the FSIA applies to the officials named as defendants."); Odhiambo v. Republic of Kenya, 930 F. Supp. 2d 17, 35 (D.D.C. 2013) (holding that because "the Kenyan government is 'the real party in interest[,]' . . . [t]he Court's FSIA analysis . . . applies to all defendants including the individuals"). Others have dismissed on the ground that the wrong party has been sued. *See, e.g.*, Gomes v. ANGOP, Ang. Press Agency, No. 11-CV-0580, 2012 WL 3637453, at *19 (E.D.N.Y. Aug. 22, 2012) ("[B]ecause the Individual Defendants are not the real parties in interest in this case this action against them is dismissed.").

did not analyze.[96] Although *Samantar* declined to take a position on the *Restatement (Second)*'s treatment of foreign official immunity, the rule articulated in section 66(f) is best understood as equivalent to *Samantar*'s "real party in interest" proviso: it provides for foreign official immunity "if the effect of exercising jurisdiction would be to enforce a rule of law against the state."[97] Because that situation is now covered by the FSIA, section 66(f) has no continuing force, although some courts have been urged to resurrect section 66(f) in a misguided attempt to define the scope of conduct-based immunity for a nondiplomatic official's "official acts."[98]

Samantar clarified the basic doctrinal landscape for foreign official immunity claims but left many questions unanswered. Broadly speaking, this landscape includes: (1) a statutory regime for the immunities of foreign states and state-controlled entities; (2) a treaty-based regime for diplomatic and consular immunity, which is also codified in domestic law; and (3) a federal-common-law regime for the immunities of foreign officials who do not fall within those provisions. Part II takes a closer look at the categories of foreign official immunity that form parts (2) and (3) of this doctrinal landscape.

II. FOREIGN OFFICIAL IMMUNITY TODAY

Following *Samantar*, courts have identified three basic categories of foreign official immunity: head-of-state immunity, diplomatic and consular immunity, and conduct-based immunity.[99] Although these immunities are typically raised in suits brought against individuals, the immunities ultimately belong to the foreign state.[100] This means, among other things, that the foreign state can waive all these forms of immunity.[101] This part examines current law with respect to each form of immunity.

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96. *Samantar*, 560 U.S. at 321 n.15 ("We express no view on whether Restatement § 66 correctly sets out the scope of the common-law immunity applicable to current or former foreign officials.").

97. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 66(f) (AM. L. INST. 1965) [hereinafter RESTATEMENT (SECOND)].

98. *E.g.*, Lewis v. Mutond, 918 F.3d 142, 145–46 (D.C. Cir. 2019) (applying section 66(f) upon agreement by the parties). *But see* Broidy Cap. Mgmt. LLC v. Muzin, No. 20-7040, 2021 WL 3950185, at *10 (D.C. Cir. Sept. 3, 2021) (noting that "[n]either the Supreme Court nor this court has ever endorsed [Section 66(f)]").

99. Each of these immunities applies only to natural persons, although at least one company has asserted conduct-based immunity because it was acting as the agent of a foreign government, albeit unsuccessfully at the district court level. *See* WhatsApp Inc. v. NSO Grp. Techs. Ltd., 472 F. Supp. 3d 649, 664–65 (N.D. Cal. 2020) (rejecting a corporation's claim of conduct-based immunity) (appeal pending).

100. *See* Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.), Judgment, 2008 I.C.J. 177, ¶ 188 (June 4) ("The Court observes that such [an immunity *ratione materiae*] claim is, in essence, a claim of immunity for the Djiboutian State, from which the *procureur de la République* and the Head of National Security would be said to benefit."); *see also* Statement of Interest of the United States at 7, *Yousuf v. Samantar,* No. 1:04cv1360 (E.D. Va. Feb. 15, 2011) ("The immunity protecting foreign officials for their official acts ultimately belongs to the sovereign rather than the official.").

101. *See* Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, ¶ 61 (Feb. 14) (noting that heads of state "will cease to enjoy

The U.S. law of foreign official immunity comes from a number of different sources.[102] Diplomatic and consular immunities are codified in treaties[103] and implemented by statutes.[104] Head-of-state immunity and conduct-based immunity are governed by customary international law[105] and implemented by federal common law.[106] As indicated above, *Samantar* further clarified that the FSIA will apply to certain suits against foreign officials because the foreign state is the "real party in interest."[107]

It is only with respect to head-of-state immunity and conduct-based immunity that U.S. courts must develop rules of federal common law to decide whether civil or criminal proceedings can move forward against a foreign official who comes within the court's personal jurisdiction. In such

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immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity"); VCDR, *supra* note 22, art. 32(1) ("The immunity from jurisdiction of diplomatic agents . . . may be waived by the sending State."); VCCR, *supra* note 22, art. 45(1) ("The sending State may waive, with regard to a member of the consular post, any of the privileges and immunities provided for in articles 41, 43 and 44."). U.S. courts have repeatedly given effect to waivers of foreign official immunity by foreign governments. *See, e.g.*, Mamani v. Berzain, 654 F.3d 1148, 1151 n.4 (11th Cir. 2011) (noting that Bolivia had waived immunity of former president); In re Grand Jury Proc., Doe No. 700, 817 F.2d 1108, 1111 (4th Cir. 1987) (giving effect to Philippines's waiver of former president's immunity); Free & Sovereign State of Chihuahua v. Duarte Jaquez, No. 20-00086, 2020 WL 3977672, at *6 (W.D. Tex. July 14, 2020) (holding that Mexican state waived immunity of foreign state official by filing civil suit against him); Paul v. Avril, 812 F. Supp. 207, 210–11 (S.D. Fla. 1993) (giving effect to Haiti's waiver of former president's immunity). One court has held that foreign officials may not waive their immunity if the foreign state objects. *See* Wultz v. Bank of China Ltd., 32 F. Supp. 3d 486, 494 (S.D.N.Y. 2014) (holding that Israel had standing to prevent official from testifying regardless of whether the official was willing to testify).

102. The American Law Institute's *Restatement (Second)* and *Restatement (Third) of Foreign Relations Law* addressed head-of-state, diplomatic, and consular immunity, but not conduct-based immunity. *See* RESTATEMENT (SECOND), *supra* note 97, §§ 66(b), 66(d)–(f), 73–82; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 464–465 (AM. L. INST. 1987) [hereinafter RESTATEMENT (THIRD)]. These restatements also addressed the immunities of officials of international organizations (IOs). RESTATEMENT (SECOND) §§ 85–86; RESTATEMENT (THIRD) §§ 469–470. The *Restatement (Fourth)* has not yet attempted to restate the law of foreign official immunity or IO official immunity.

103. *See* VCDR, *supra* note 22; VCCR, *supra* note 22.

104. *See* 22 U.S.C. § 254(a)–(e).

105. *See generally Arrest Warrant*, 2002 I.C.J. 3.

106. *See* Samantar v. Yousuf, 560 U.S. 305, 325 (2010). Although *Samantar* referred simply to "the common law," *id.*, lower courts have considered the common law of foreign official immunity to be "federal common law." United States v. Sinovel Wind Grp. Co., 794 F.3d 787, 791–92 (7th Cir. 2015). Federal common-law rules bind state courts as well as federal courts. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 (1964) (characterizing the federal common-law "act of state doctrine" as "a principle of decision binding on federal and state courts alike"). There is disagreement about whether customary international law more generally should be treated as federal common law. *Compare* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (arguing that customary international law should not be treated as federal common law), *with* Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) (arguing that customary international law should be treated as federal common law). But even critics of the more general proposition agree that foreign official immunity should be treated as federal common law. *See* Bradley, *supra* note 14, at 6.

107. *Samantar*, 560 U.S. at 325.

circumstances, as explained below, separation of powers principles suggest that courts should not develop federal common-law rules that exceed the immunity that international law clearly requires.[108] Several considerations support the need for judicial restraint in extending immunities. First, ever since *Erie*, the Supreme Court has counseled caution in developing new rules of federal common law, even in the area of foreign relations. In *Sosa v. Alvarez-Machain*,[109] for example, the Supreme Court noted that "the general practice has been to look for legislative guidance" before developing federal common law,[110] and it cautioned against courts defining "new and debatable" rules of international law.[111] Although *Sosa* was referring to international law rules of liability, the same goes for rules of immunity.

Second, judicially developed rules of foreign official immunity have the potential to frustrate the application of various statutes that Congress has passed. Congress has criminalized conduct such as torture, war crimes, genocide, and the use of child soldiers, even when this conduct occurs outside U.S. territory.[112] Some conduct, including torture and extrajudicial killing, can also lead to civil liability under U.S. law.[113] Broad rules of foreign official immunity could upset legislative expectations by shielding acts that Congress wanted to subject to criminal prosecution and civil liability.[114] Absent explicit guidance from Congress, courts should accord the immunities that international law requires, but no more. To be clear, this Article does not argue that statutes such as the Torture Victim Protection Act of 1991[115] (TVPA) override rules of foreign official immunity by their own force.[116] As the Supreme Court has noted, "Congress legislates against the

108. When the executive branch expresses a view about what customary international law clearly requires, courts should generally defer to that view. *See* RESTATEMENT (THIRD), *supra* note 102, § 112 cmt. c ("Courts give particular weight to the position taken by the United States Government on questions of international law because it is deemed desirable that so far as possible the United States speak with one voice on such matters."); *cf.* Abbott v. Abbott, 560 U.S. 1, 15 (2010) ("It is well settled that the Executive Branch's interpretation of a treaty 'is entitled to great weight.'" (quoting Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 184 n.10 (1982))). For further discussion of deference to executive branch interpretations of foreign official immunity under customary international law, see *infra* Part III.

109. 542 U.S. 692 (2004).

110. *Id.* at 726.

111. *Id.* at 728.

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

113. Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. § 1350 note. Certain violations of the "law of nations" also carry the potential for civil liability under the Alien Tort Statute, 28 U.S.C. § 1350.

114. The legislative history of the TVPA indicates that the statute would not override diplomatic and head-of-state immunity, but it goes on to state that "the committee does not intend these immunities to provide *former officials* with a defense to a lawsuit brought under this legislation." S. REP. NO. 102-249, at 7–8 (1991) (emphasis added); *see also* H.R. REP. NO. 102-367, at 5 (1991) ("While sovereign immunity would not generally be an available defense, nothing in the TVPA overrides the doctrines of diplomatic and head of state immunity.").

115. Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 note).

116. In *Lewis v. Mutond*, two judges interpreted the TVPA to override rules of conduct-based immunity. *See* 918 F.3d 142, 150 (D.C. Cir. 2019) (Randolph, J., concurring),

backdrop of the common law,"[117] and this includes common-law rules of immunity.[118] In the absence of a clear indication from Congress to the contrary, it is perfectly appropriate to read human rights statutes as recognizing and preserving clearly established international law rules on foreign official immunity.[119] But it is quite another thing for courts to create new rules of federal common law, not based in international law, to immunize conduct for which Congress has created liability.[120] If courts should be cautious about making federal common law generally, they should be particularly cautious when such lawmaking would limit the application of federal statutes.

Third, courts need not develop an expansive federal common law of foreign official immunity to avoid violating international law. When state practice and *opinio juris* are mixed, states can exercise jurisdiction without running afoul of customary international law prohibitions. As explained below, this is currently true with respect to violations of universally accepted prohibitions on torture, genocide, war crimes, and crimes against humanity.

Fourth, extending foreign official immunity further than international law clearly requires does little as a doctrinal matter to compel the reciprocal treatment of U.S. officials by foreign courts. Like the United States, other countries have an international legal obligation to accord immunities from legal process in certain circumstances, whether as a matter of customary international law or treaty law. But when the United States extends more immunity than international law requires, other countries are not bound to reciprocate by extending the same immunities to U.S. officials.

Finally, unless the United States is prepared to forego criminal prosecutions for a range of offenses committed by agents of foreign states, according greater immunity than international law clearly requires in the civil context could have the unintended effect of strengthening defenses to U.S. criminal prosecution. This militates against expanding the rules of foreign

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cert. denied, 141 S. Ct. 156 (2020) (mem.); *id.* at 148 (Srinivasan, J., concurring). Other courts have rejected this argument. *See* Doğan v. Barak, 932 F.3d 888, 895 (9th Cir. 2019); Matar v. Dichter, 563 F.3d 9, 15 (2d Cir. 2009).

117. Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media, 140 S. Ct. 1009, 1016 (2020).

118. Filarsky v. Delia, 566 U.S. 377, 389 (2012) (noting that § 1983 should be read "in harmony with general principles of tort immunities and defenses" (quoting Imbler v. Pachtman, 424 U.S. 409, 418 (1976))).

119. It is well established that federal statutes should be interpreted not to violate international law. *See* RESTATEMENT (THIRD), *supra* note 102, § 114 ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."); *see also* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (noting that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains").

120. *Cf.* Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part) (criticizing the practice of applying immunities under § 1983 that were not part of the common-law backdrop when the statute was passed).

official immunity beyond those that already exist under customary international law.[121]

In sum, U.S. courts should not find foreign officials immune from civil and criminal proceedings unless international law clearly requires them to do so. In addition to the usual reasons for caution in making federal common law, new rules of foreign official immunity may interfere with the application of laws that Congress has passed, without any clear reciprocal gain for the United States. If Congress, as a matter of policy, wishes to extend foreign official immunity beyond what international law clearly requires, it can do so. Courts, however, should not.

A. Head-of-State Immunity

Sitting heads of state, heads of government, and foreign ministers are absolutely immune from suit during their terms of office.[122] Head-of-state immunity is a status-based immunity (immunity *ratione personae*) that attaches because of these officials' positions "to ensure the effective performance of their functions on behalf of their respective States."[123] Head-of-state immunity is absolute in the sense that it applies to all acts, including those taken in a private capacity and those performed before the official assumed office.[124] But absolute immunity lasts only during the official's tenure in office.[125]

The State Department has repeatedly filed suggestions of immunity for foreign heads of state, heads of government, and foreign ministers.[126] For example, the United States has recently suggested immunity for the president

121. This reason also counsels against the executive branch adopting expansive interpretations of the customary international law governing foreign official immunity.

122. Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, ¶¶ 51, 54–55 (Feb. 14); Yousuf v. Samantar, 699 F.3d 763, 769 (4th Cir. 2012); Lafontant v. Aristide, 844 F. Supp. 128, 131–32 (E.D.N.Y. 1994); *see also* Suggestion of Immunity Submitted by the United States of America at 6, Miango v. Democratic Republic of the Congo, No. 15-01265, 2019 WL 2191806 (D.D.C. Jan. 19, 2019) [hereinafter U.S. *Miango* Suggestion] ("Under the customary international law principles accepted by the Executive Branch, head of state immunity attaches to a head of state's or head of government's status as the current holder of the office.").

123. *Arrest Warrant*, 2002 I.C.J. ¶ 53.

124. *Id.* ¶ 55 (noting that head-of-state immunity extends to acts performed in a "private capacity" and "before the person concerned assumed office"); Habyarimana v. Kagame, 696 F.3d 1029, 1032 (10th Cir. 2012) (noting that a foreign head of state is immune from suit "even for acts committed prior to assuming office"). The ICJ has also held that there is no exception to head-of-state immunity for war crimes and crimes against humanity. *Arrest Warrant*, 2002 I.C.J. ¶ 58.

125. *Arrest Warrant*, 2002 I.C.J. ¶ 61 (noting that absolute immunity ends when the official "ceases to hold the office"); Sikhs for Just. v. Singh, 64 F. Supp. 3d 190, 194 (D.D.C. 2014) ("The day he left office, however, [Prime Minister] Singh lost the absolute protection of status-based head-of-state immunity."); *see also infra* note 146 and accompanying text.

126. *See* John B. Bellinger & Stephen K. Wirth, *Foreign-Official Immunity Under the Common Law*, *in* THE RESTATEMENT AND BEYOND 433, 445 n.86 (Paul B. Stephan & Sarah H. Cleveland eds., 2020) (listing seventeen suggestions of head-of-state immunity since 2010); Yelin, *supra* note 37, at 992–95 (listing earlier cases in which suggestions of head-of-state immunity were filed).

of the Democratic Republic of the Congo,[127] the prime minister of Laos,[128] and the foreign minister of France.[129] U.S. courts have consistently treated State Department suggestions of head-of-state immunity as conclusive.[130] Courts may also dismiss suits against sitting heads of state when the executive branch remains silent.[131]

The absolute immunity that customary international law accords sitting foreign heads of state, heads of government, and foreign ministers also extends to criminal proceedings. U.S. courts have taken the initiation of criminal proceedings by the U.S. Department of Justice as an indication that the executive branch does not view the defendant as entitled to head-of-state immunity.[132] The opposite inference might be drawn in cases of prosecutorial restraint. For example, the Department of Justice has not sought to prosecute a sitting head of state for drug trafficking despite implicating the head of state in the indictment of another defendant.[133] Were the United States to indict a sitting foreign head of state absent a congressional statute explicitly abrogating head-of-state immunity for the charged conduct, a U.S. court would face the difficult and unresolved question of whether the executive branch has authority under domestic law to violate customary international law.[134] Although a full examination of this issue lies beyond the scope of this Article, there does not appear to be any domestic legal basis for the executive branch to violate a sitting head of state's status-based immunity.

Individuals who do not occupy these three positions are not entitled to head-of-state immunity because there is no general and consistent state practice extending such immunity to other categories of high-ranking officials on that basis alone.[135] Consequently, when the United States

127. U.S. *Miango* Suggestion, *supra* note 122.

128. Suggestion of Immunity and Statement of Interest of the United States of America, Savang v. Lao People's Democratic Republic, No. 16-02037 (E.D. Cal. July 13, 2017).

129. Suggestion of Immunity Submitted by the United States of America, France.com, Inc. v. French Republic, No. 18-00460 (E.D. Va. Dec. 4, 2019).

130. *See, e.g.*, Manoharan v. Rajapaksa, 711 F.3d 178, 179 (D.C. Cir. 2013); Yousuf v. Samantar, 699 F.3d 763, 772 (4th Cir. 2012); Wei Ye v. Jiang Zemin, 383 F.3d 620, 626 (7th Cir. 2004).

131. Weiming Chen v. Ying-jeou Ma, No. 12-5232, 2013 WL 4437607, at *3 (S.D.N.Y. Aug. 19, 2013) (finding that the President of Taiwan was "entitled to head-of-state immunity under the common law").

132. *See* United States v. Noriega, 117 F.3d 1206, 1212 (11th Cir. 1997).

133. *See* Press Release, Dep't of Justice, Honduran National Convicted on Drug Trafficking and Weapons Charges (Mar. 22, 2021), https://www.justice.gov/usao-sdny/pr/honduran-national-convicted-drug-trafficking-and-weapons-charges [https://perma.cc/29EY-4S8B].

134. The original understanding was that the president lacked authority to violate international law without authorization from Congress. William S. Dodge, *Customary International Law, Change, and the Constitution*, 106 GEO. L.J. 1559, 1565 (2018).

135. In *Arrest Warrant*, the ICJ raised the possibility that head-of-state immunity might extend to other "holders of high-ranking office in a State." Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 51 (Feb. 14). But there is no general and consistent state practice extending head-of-state immunity beyond these three officials. Int'l L. Comm'n, *Second Report on the Immunity of State Officials from Foreign Criminal Jurisdiction* 47, ¶ 63, U.N. Doc. A/CN.4/661 (Apr. 4, 2013). Other foreign

suggested head-of-state immunity for the head of state of the United Arab Emirates, it did not suggest immunity for other officials named in the same suit.[136] Recently, Saudi Crown Prince Mohammed bin Salman, widely known as MBS, has claimed immunity as a de facto head of state.[137] But because he is not the actual head of state, head of government, or foreign minister of Saudi Arabia, his claim is unfounded.[138] The suits against him might be dismissed on other nonimmunity grounds. But MBS is not entitled to status-based immunity and, as explored below, his alleged conduct in ordering the extrajudicial killing of journalist Jamal Khashoggi would not be shielded by conduct-based immunity under either international law or federal common law.

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

Many immunities accorded foreign officials in domestic courts are now governed by treaty and statute. 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, implemented by the Diplomatic Relations Act ,[139] governs diplomatic immunity in U.S. courts.[140] As a general matter, diplomats enjoy absolute status-based immunity from the criminal jurisdiction of the receiving state, and nearly absolute status-based immunity from civil and administrative proceedings.[141] The

officials may be granted absolute immunity on a temporary basis as a part of a visiting delegation. *See infra* notes 149–51 and accompanying text (discussing "special missions" immunity).

136. Hassen v. Nahyan, No. 09-01106, 2010 WL 9538408, at *5 (C.D. Cal. Sept. 17, 2010) (finding that "[b]ecause Defendant Sheikh Mohamed is not one of these three individuals or designated as a member of their official parties, he is not entitled to absolute immunity as a head of state").

137. *See* Runde, *supra* note 13.

138. *Cf.* Press Briefing by Press Secretary Jen Psaki (Feb. 16, 2021), https://www.whitehouse.gov/briefing-room/press-briefings/2021/02/16/press-briefing-by-press-secretary-jen-psaki-february-16-2021/ [https://perma.cc/R5K7-SKKY] (noting that "[t]he President's counterpart is King Salman"). In a separate case involving a commercial dispute, one U.S. court denied MBS's claim of head-of-state immunity while granting him conduct-based immunity from suit based on the arrest of the former crown prince that allegedly prevented a promised payment to the plaintiff. *See* Aldossari v. Ripp, No. 20-3187, 2021 WL 1819699, at *12–18 (E.D. Pa. May 6, 2021).

139. 22 U.S.C. § 254(a)–(e).

140. *See* VCDR, *supra* note 22; 22 U.S.C. § 254(a)–(e). The Diplomatic Relations Act extends diplomatic immunity even to envoys from countries that are not party to the VCDR. 22 U.S.C. § 254(b).

141. VCDR, *supra* note 22, art. 31(1). The receiving state can exercise civil jurisdiction with respect to certain actions involving private property and over actions "relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions." *Id.* Diplomatic immunity also extends to the members of a diplomat's household and to a diplomatic mission's administrative and technical staff, except that staff members must not be nationals or permanent residents of the receiving state in order to enjoy immunity, and their immunity does not encompass "acts performed outside the course of their duties." *Id.* art. 37.

State Department's certification of an individual's diplomatic status is conclusive.[142] Diplomatic immunity shields an individual from legal proceedings, even if the proceedings began before that status was acquired.[143] When immunity prevents legal recourse against an individual, the receiving state can request that the sending state waive the diplomat's immunity.[144] It can also declare the diplomat "persona non grata" and compel the diplomat's departure from its territory.[145] 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."[146]

Representatives and employees of international organizations (IOs) also enjoy certain immunities from the jurisdiction of a host state, as do members of foreign delegations to IOs.[147] These can include status-based or conduct-based immunities, depending on the individual's position and whether the individual is a national or permanent resident of the host state.[148]

Closely related to diplomatic and IO-immunity is "special-missions immunity." Although the United States is not a party to the U.N. Convention on Special Missions,[149] U.S. courts have deferred to executive branch suggestions of immunity for defendants who have been served with process

142. *See, e.g.*, United States v. Al-Hamdi, 356 F.3d 564, 573 (4th Cir. 2004) (holding that "the State Department's certification, which is based upon a reasonable interpretation of the Vienna Convention, is conclusive evidence as to the diplomatic status of an individual"); Abdulaziz v. Metro. Dade County, 741 F.2d 1328, 1331 (11th Cir. 1984) (noting that "the courts have generally accepted as conclusive the views of the State Department as to the fact of diplomatic status").

143. United States v. Khobragade, 15 F. Supp. 3d 383, 387 (S.D.N.Y. 2014); *Abdulaziz*, 741 F.2d at 1329–30.

144. VCDR, *supra* note 22, art. 31(1).

145. *Id.* art. 9.

146. *Id.* art. 39(2). *Compare* Tabion v. Mufti, 73 F.3d 535 (4th Cir. 1996) (discussing status-based diplomatic immunity from suit by domestic worker), *with* United States v. Al Sharaf, 183 F. Supp. 3d 45, 53 (D.D.C. 2016) (finding no residual diplomatic immunity for acts that were not performed in connection with the duties or official functions of a diplomatic employee); Swarna v. Al-Awadi, 622 F.3d 123, 135 (2d Cir. 2010) (recognizing residual conduct-based diplomatic immunity for suit only for "such acts as are directly imputable to the state or inextricably tied to a diplomat's professional activities").

147. *See* International Organizations Immunities Act, 22 U.S.C. § 288d (extending the same immunities as those afforded to officers and employees of foreign governments). The United States is party to the Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 1 U.N.T.S. 15, 90 U.N.T.S. 327 (corrigendum), but not the Convention on the Privileges and Immunities of the Specialized Agencies, Nov. 21, 1947, 33 U.N.T.S. 261.

148. The International Organizations Immunities Act defines conduct-based immunity as encompassing suits "relating to acts performed by [representatives] in their official capacity and falling within their functions as such representatives, officers, or employees . . . ." 22 U.S.C. § 288d(b); *see* Zuza v. Off. of the High Representative, 107 F. Supp. 3d 90, 99 (D.D.C. 2015); *cf.* Brzak v. United Nations, 597 F.3d 107, 113 (2d Cir. 2010) (indicating with respect to diplomatic immunity for former U.N. officials that the question is "whether the plaintiffs' allegations . . . involve acts that the defendants performed in the exercise of their United Nations functions").

149. Dec. 8, 1969, 1400 U.N.T.S. 231.

in the United States while on "special diplomatic missions."[150] They have grounded this deference in the president's authority "to conduct foreign affairs and receive foreign ministers."[151] Members of special diplomatic missions are accorded the same absolute, status-based immunity as foreign diplomats. Hence, for example, a U.S. president could accord a foreign official, such as MBS, temporary status-based immunity during an official diplomatic visit, understanding that the decision to accord such immunity might come at a political cost.

Consular officials, unlike diplomats, enjoy immunity only for acts performed in the exercise of their consular functions.[152] Delineating the scope of functional immunity for consular officials has proved somewhat easier 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."[153] The U.S. 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.[154] Rather, "[t]his is an issue which may only be resolved by the court with subject matter jurisdiction over the alleged crime."[155] As the guide indicates, only after appearing in court can a person who is not entitled to status-based immunity "assert as an affirmative defense that the actions complained of arose in connection with the performance of official acts."[156] The same should hold true for other current or former foreign officials who are not entitled to claim status-based immunity, as Part IV argues.

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

150. Li Weixum v. Bo Xilai, 568 F. Supp. 2d 35, 37 (D.D.C. 2008) (indicating that "[t]he logic that underlies deference to the Executive's assertion regarding a head of state or diplomatic agent is, in this Court's view, equally applicable to a foreign minister who is part of a special diplomatic mission").

151. *Id.* at 38.

152. VCCR, *supra* note 22, art. 43; *see* Bardales v. Consulate Gen. of Peru in N.Y., 490 F. Supp. 3d 696 (S.D.N.Y. 2020).

153. 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).

154. *See* U.S. DEP'T OF STATE OFF. OF FOREIGN MISSIONS, DIPLOMATIC AND CONSULAR IMMUNITY: GUIDANCE FOR LAW ENFORCEMENT AND JUDICIAL AUTHORITIES 11 (2018) [hereinafter STATE DEPARTMENT GUIDANCE], https://www.state.gov/wp-content/uploads/2019/07/2018-DipConImm_v5_Web.pdf [https://perma.cc/SN8J-5MEY].

155. *Id.*

156. *Id.*; *see also id.* at 22 (explaining that official acts immunity "is an affirmative defense to be raised before the U.S. court with subject matter jurisdiction over the alleged crime"). The same should hold true for a foreign state's assertion of conduct-based immunity on behalf of other current or former foreign officials. *See infra* notes 306–09 and accompanying text.

his official capacity."[157] This type of immunity is called conduct-based immunity because it turns on the nature of the conduct, rather than the status of the official.[158] Because it does not depend on an official's status, conduct-based immunity continues after an official leaves office.[159]

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.[160] If disputed, however, the question of an official's authority under foreign law is a question of law for a U.S. court to decide.[161] Indeed, the Supreme Court recently held 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."[162] 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. In particular, many countries have denied such immunity to violations of universally accepted prohibitions on torture, genocide, war

157. Samantar v. Yousuf, 560 U.S. 305, 322 (2010); *see also* Case Concerning the Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 61 (Feb. 14). Courts have rejected claims of foreign official immunity by private parties acting on behalf of foreign governments. *See* Broidy Cap. Mgmt. LLC v. Muzin, No. 20-7040, 2021 WL 3950185, at *8–9 (D.C. Cir. Sept. 3, 2021) (rejecting immunity claims by U.S. citizens hired by foreign governments). *But cf.* Butters v. Vance Int'l, Inc., 225 F.3d 462, 466 (4th Cir. 2000) (holding, in a pre-*Samantar* decision, that a private contractor following foreign government orders was entitled to "derivative immunity" under the FSIA).

158. *See, e.g.*, Lewis v. Mutond, 918 F.3d 142, 145 (D.C. Cir. 2019); Yousuf v. Samantar, 699 F.3d 763, 769 (4th Cir. 2012); *see also* Letter from Legal Adviser Harold Hongju Koh to Acting Assistant Att'y Gen. Stuart F. Delery (Sept. 7, 2012), Doe v. Zedillo, No. 11-01433 (D. Conn. July 18, 2013) [hereinafter Zedillo Letter]. Conduct-based immunity is sometimes also called "official acts immunity," *see, e.g.*, Warfaa v. Ali, 33 F. Supp. 3d 653, 662–63 (E.D. Va. 2014), "functional immunity," HAZEL FOX & PHILIPPA WEBB, THE LAW OF STATE IMMUNITY 570 (rev. 3d ed., 2015), or "immunity *ratione materiae*," *id.*

159. *Yousuf*, 699 F.3d at 774 ("This type of [conduct-based] immunity stands on the foreign official's actions, not his or her status, and therefore applies whether the individual is currently a government official or not.").

160. *See, e.g.*, Doe 1 v. Buratai, 318 F. Supp. 3d 218, 232–33 (D.D.C. 2018) (holding that "Nigeria's authorization and ratification establishes that the defendants acted in their official capacities"); Lewis v. Mutond, 258 F. Supp. 3d 168, 174 (D.D.C. 2017) (finding "the DRC Ambassador's ratification of the defendants' actions sufficient to establish that they were acting in their official capacities in the present case"), *vacated and remanded*, 918 F.3d 142 (D.C. Cir. 2019).

161. *See* FED. R. CIV. P. 44.1 (stating that a federal court's determination of foreign law "must be treated as a ruling on a question of law").

162. Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865, 1869 (2018).

crimes, and crime against humanity, as well as to acts of espionage, sabotage, and kidnapping by state officials.

There has been some confusion about how to define "official capacity" in this context. As one of the present authors has previously noted, "international law relies on the concept of 'official capacity' in many different contexts, and the phrase may have a different meaning and scope depending on the context."[163] Whether an act is taken in an official capacity for purposes of conduct-based immunity does not depend on whether it is attributable to the state for purposes of state responsibility.[164] Nor does it depend on whether the act meets the state-action requirement for some human rights norms.[165] Instead, one must look specifically at how states treat the concept of official capacity in the context of conduct-based immunity.

One must also choose the proper baseline from which to evaluate the state practice.[166] Some analyses start from a baseline of immunity and look for state practice and *opinio juris* establishing exceptions.[167] Others, including

163. William S. Dodge, *Foreign Official Immunity in the International Law Commission: The Meanings of Official Capacity*, 109 AJIL UNBOUND 156, 157 (2015); *see also* Zachary Douglas, *State Immunity for the Acts of State Officials*, 82 BRIT. Y.B. INT'L L. 281, 320 (2012) (questioning "the assumption that a single definition of 'official acts' . . . must be uniformly applied across distinct areas of international law").

164. *See* Draft Articles on the Responsibility of States for Internationally Wrongful Acts art. 58, 19 U.N. GAOR Supp. No. 10, U.N. Doc. A/56/10 (2001) ("These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State."); *see also* Douglas, *supra* note 163, at 296 (noting that it is "wrong to apply the rules of attribution in state responsibility to determine the scope of state immunity for the acts of state officials"); 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, 459 (2016) (noting that "the mere attributability of an act to the state is an inadequate touchstone, both conceptually and doctrinally, for determining whether a foreign official is entitled to claim conduct-based immunity for that act").

165. For example, torture is generally considered a violation of customary international law only if there is state involvement. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (defining "torture" for purposes of the convention as pain or suffering "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity"). But the "official capacity" that makes torture an international crime does not simultaneously confer immunity upon the torturer. *Cf.* Hafer v. Melo, 502 U.S. 21, 27–28 (1991) (rejecting argument that acting under color of state law for purposes of 42 U.S.C. § 1983 simultaneously immunizes the defendant from suit under that provision).

166. *See* Chimène I. Keitner, *Foreign Official Immunity and the "Baseline" Problem*, 80 FORDHAM L. REV. 605, 606–07 (2011) (distinguishing two baselines for conduct-based immunity); *see also* William S. Dodge, *A Modest Approach to the Customary International Law of Jurisdiction*, 32 EUR. J. INT'L L. (forthcoming 2021) (discussing different baselines for adjudicative and prescriptive jurisdiction under customary international law). Immunity statutes, like the Foreign Sovereign Immunities Act, typically begin with a default rule of immunity that is subject to enumerated exceptions. But this drafting choice does not necessarily reflect *opinio juris*.

167. *See* Sean D. Murphy, *Immunity* Ratione Materiae *of State Officials from Foreign Criminal Jurisdiction: Where is the State Practice in Support of Exceptions?*, 112 AJIL UNBOUND 4 (2018); Ingrid Wuerth, Pinochet*'s Legacy Reassessed*, 106 AM. J. INT'L L. 731, 743 (2012) (asking "whether national court litigation reflects either state practice or *opinio juris* demonstrating a human rights exception to immunity").

the present authors, start from a baseline of jurisdiction and look for state practice and *opinio juris* establishing a customary international law requirement of immunity.[168] The latter approach is more consistent with how U.S. courts have analyzed claims to immunity since the founding era.[169] As a policy matter, it is also more consistent with the post–World War II 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.[170] 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.[171] Such an approach also undermines the ability of foreign courts to enforce universally accepted rules of conduct where forum law would otherwise permit adjudication.[172]

Although full consideration of how baselines work in customary international law is beyond the scope of this Article, it is worth noting that the International Court of Justice (ICJ) appears to have proceeded from a baseline of no immunity in its foundational *Jurisdictional Immunities* decision, which involved foreign state immunity.[173] The question in that case

168. *See* Lee M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L L. 741, 744 (2003) ("[A]s a fundamental matter, state immunity operates as an exception to the principle of adjudicatory jurisdiction."); Rosalyn Higgins, *Certain Unresolved Aspects of the Law of State Immunity*, 29 NETH. INT'L L. REV. 265, 271 (1982) ("It is sovereign immunity which is the exception to jurisdiction and not jurisdiction which is the exception to a basic rule of immunity."); Lorna McGregor, *Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty*, 18 EUR. J. INT'L L. 903, 912 (2007) (characterizing immunity as "an exception to the jurisdiction of the forum state").

169. *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.").

170. *See Formulation of Nürnberg Principles, reprinted in* [1950] 2 Y.B. INT'L L. COMM'N 181, 192, U.N. Doc. A/CN.4/SER.A/1950/Add.1 ("The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law."); *see also* Beth Stephens, *The Modern Common Law of Foreign Official Immunity*, 79 FORDHAM L. REV. 2669, 2694 n.155 (2011) (noting the International Law Commission's position that state responsibility does not exclude individual responsibility).

171. Lady Fox has called this the "classical" view, which "imputes the act solely to the State, who alone is responsible for its consequences." HAZEL FOX, THE LAW OF STATE IMMUNITY 455 (2d ed. 2008). As ICJ Judges Higgins, Kooijmans, and Buergenthal have noted, "[t]he increasing recognition of the importance of ensuring that the perpetrators of serious international crimes do not go unpunished has had its impact on the immunities which high State dignitaries enjoyed under traditional customary law." Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, 63, ¶ 74 (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal).

172. This is important because, as Fox and Webb have noted, "without the possibility of criminal prosecution in national courts, in the majority of cases the international law principle of no immunity for the commission of international crimes becomes a dead letter lacking enforcement." FOX & WEBB, *supra* note 158, at 573; *see also Arrest Warrant*, 2002 I.C.J. ¶ 78 (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal) (noting that the unlikelihood of trial in an official's own country and the rarity of prosecutions by international criminal tribunals make proceedings in a foreign court "[t]he only credible alternative").

173. Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. 97 (Feb. 3).

was whether customary international law requires according a foreign state immunity from suit in another country's domestic courts based on the acts of the foreign state's armed forces during armed conflict. The court began with the classic distinction between private or commercial acts (*acta jure gestionis*) and public acts (*acta jure imperii*). It noted that the acts by Germany's armed forces during World War II "clearly constituted *acta jure imperii*"[174] and that "States are generally entitled to immunity in respect of *acta jure imperii*."[175] But the ICJ's decision did not rest on that generalization. Instead, it looked specifically at state practice and *opinio juris*—the necessary ingredients of customary international law—with respect to the conduct of a foreign state's armed forces during armed conflict.[176] It concluded that customary international law required immunity because it found both of these elements for the specific acts in question.

If one begins with a baseline of no immunity, then there is insufficient state practice and *opinio juris* to establish that conduct-based foreign official immunity applies to violations of the universally accepted prohibitions on torture, genocide, war crimes, and crimes against humanity, even if the foreign state itself would be immune from suit for the same acts.[177] This is not to say that there is a more general *jus cogens* exception that applies after immunity has already attached.[178] But whether immunity has attached and whether there is an exception to immunity after it has attached are separate questions.[179] Conduct-based immunity attaches only to acts taken in an official capacity, which does not include all acts performed under color of law or authorized by the foreign state. To the contrary, many decisions have

174. *Id.* ¶ 60.

175. *Id.* ¶ 61.

176. *Id.* ¶¶ 65–77. Of the nine states with territorial tort exceptions in their immunities statutes, the court found that two expressly excluded armed forces and that the other seven had not be called upon to apply their exceptions to armed forces during armed conflict. *Id.* ¶ 71. Turning to national court judgments, the court found decisions from France, Slovenia, Poland, Belgium, Serbia, Brazil, and Germany, holding that states are entitled to immunity from suit based on the acts of their armed forces during armed conflict. *Id.* ¶¶ 73–75. Only Italy and Greece had allowed such suits, and Greece had subsequently changed its practice. *Id.* ¶ 76. This extensive practice was accompanied by *opinio juris* showing that states considered this immunity to be required under customary international law. *Id.* ¶ 77.

177. *See infra* notes 182–99 and accompanying text.

178. The ICJ has rejected that argument for both state immunity and head-of-state immunity but only *after* finding that immunity had attached. In *Jurisdictional Immunities*, the court concluded that the acts of armed forces during armed conflict are entitled to immunity, 2012 I.C.J. ¶¶ 65–78, *before* going on to consider the possibility of a *jus cogens* exception, *id.* ¶¶ 92–97. In *Arrest Warrant*, the court concluded that foreign ministers are entitled to status-based immunity during tenure in office, Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶¶ 53–55 (Feb. 14), *before* going on to consider the possibility of a *jus cogens* exception, *id.* ¶¶ 56–58.

179. In dictum, the U.S. Supreme Court recently made precisely this mistake, reading the ICJ's rejection of a *jus cogens* exception in *Jurisdictional Immunities* as a conclusion that foreign states are entitled to jurisdictional immunity for all human rights violations. *See* Fed. Republic of Germany v. Philipp, 141 S. Ct. 703, 713 (2021). For discussion, see William S. Dodge, *The Meaning of the Supreme Court's Ruling in Germany v. Philipp*, JUST SEC. (Feb. 8, 2021), https://www.justsecurity.org/74598/the-meaning-of-the-supreme-courts-ruling-in-germany-v-philipp/ [https://perma.cc/7SR8-VCYZ].

not treated violations of these universally accepted prohibitions as official acts to which conduct-based immunity attaches.

State practice during the past few decades has been mixed. In criminal proceedings, some courts and prosecutors have found that former officials were entitled to conduct-based immunity even for violations of universally accepted prohibitions.[180] Most recently, a French court upheld a prosecutor's decision to dismiss criminal charges against former U.S. President George W. Bush, former U.S. Defense Secretary Donald Rumsfeld, and other former Bush administration officials, reasoning "that the arrest of the people transferred to Guantanamo, . . . as well as the treatment which was reserved for them, . . . fall within the exercise of the sovereignty of [the United States]."[181]

On the other hand, a number of courts have denied conduct-based immunity for violations of universally accepted prohibitions.[182] In addition,

180. *See* Letter from Pub. Prosecutor, Paris Ct. of Appeal, to Patrick Baudouin (Feb. 27, 2008), https://ccrjustice.org/files/Rumsfeld_FrenchCase_%20Prosecutors%20Decision_02_08.pdf [https://perma.cc/U7ZQ-SBFZ] (affirming Paris prosecutor's decision to dismiss charges against former U.S. Defense Secretary Donald Rumsfeld); Jiang Zemin, Decision of the Federal Prosecutor General of 24 June 2005, 3 ARP 654/03-2 (Ger.) (dismissing charges against the former president of China); Prosecutor v. Hissène Habré, July 4, 2000 (Ct. App. Dakar), March 20, 2001 (Court of Cassation) (Senegal), 125 I.L.R. 571–77 (dismissing claims against the former president of Chad).

181. *See* Cour de cassation [Cass.] [supreme court for judicial matters] crim., Jan. 13, 2021, No. 42 ¶ 20 (unofficial English translation), https://ccrjustice.org/sites/default/files/attach/2021/01/1-13-21_REDACTED_Unofficial%20Translation%20of%20French%20Decision%2013%20Jan%202021.pdf [https://perma.cc/3FGQ-2A4W]. It can be difficult to disentangle political considerations from *opinio juris* in these decisions. As Fox and Webb have noted, "practically and politically, the likelihood of prosecution of former officials of senior rank who recently have enjoyed personal immunity continues to be remote." FOX & WEBB, *supra* note 158, at 574. Máximo Langer has observed as an empirical matter in the criminal context that "universal-jurisdiction-prosecuting states have strong incentives to concentrate on defendants who impose low international relations costs because it is only in these cases that the political benefits of universal jurisdiction prosecutions and trials tend to outweigh the costs." Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT'L L. 1, 2 (2011). There is a danger in attributing the weight of *opinio juris* to political decisions. Instead, although the difficulty of gathering evidence in conflict situations means that plaintiffs must often rely on doctrines of complicity or command responsibility to establish a senior official's culpability, courts should appropriately consider the degree of attenuation between the defendant's acts and the victim's injury in determining whether the defendant bears personal responsibility under international law.

182. In 2017, the International Law Commission's Special Rapporteur on the Immunity of State Officials from Foreign Criminal Jurisdiction identified nine decisions since 1998 as denying conduct-based immunity for international crimes. *See* Int'l L. Comm'n, Report of the International Law Commission, Sixty-Ninth Session 179 n.762, U.N. Doc. A/72/10 (2017) [hereinafter ILC Report on Sixty-Ninth Session] (draft commentary to Draft Article 7) (citing Regina v. Bow St. Metro. Stipendiary Magistrate, *ex parte* Pinochet Ugarte (No. 3), [2000] 1 AC (HL) 147 (appeal taken from Eng.); [Tribunal of First Instance] *Re* Pinochet (Brussels, Nov. 6, 1998, 119 I.L.R. 345, 349 (Belg.); *In re Hussein*, Oberlandesgericht [Higher Regional Court] Cologne, May 16, 2000, No. 2 Zs 1330/99, ¶ 11; *In re* Bouterse, Hof Amsterdam, Nov. 20, 2000, NJ 2001, 51, ¶ 4.2, *Eng. trans. at* 2001 Neth. Y.B. Int'l L., *aff'd on other grounds*, Hoge Raad [Supreme Court], Sept. 18, 2001, NJ 2002, 59, *Eng. trans. at* 2001 Neth. Y.B. Int'l L. 282; H.S.A. v. S.A. (Ariel Sharon), Cour de cassation, Feb. 12, 2003, No. P.02.1139.F, 127 ILR 110, 123, 42 ILM 596 (2003) (Belg.); H v. Public Prosecutor, Hoge Raad, July 8, 2008,

a large number of states have exercised universal jurisdiction in criminal proceedings against foreign officials in which claims of conduct-based immunity were apparently not raised at all.[183] Based on an extensive review of state practice,[184] Germany's Federal Court of Justice recently concluded that there were "no doubts" that conduct-based immunity did not apply to war crimes.[185] The reasoning of the cases denying conduct-based immunity has varied, but several have specifically concluded that violations of certain universally accepted prohibitions cannot be considered acts that are taken in an official capacity, to which conduct-based immunity attaches. In an early and important example, the Supreme Court of Israel reasoned in *Attorney General of Israel v. Eichmann*[186] that crimes against humanity "are completely outside the 'sovereign' jurisdiction of the State that ordered or ratified their commission, and therefore those who participated in such acts must personally account for them and cannot shelter behind the official character of their task or mission."[187]

No. 07/10063 (E), Int'l L. Domestic Cts. [ILDC] 1017, ¶ 7.2 (Neth.); Lozano v. Italy, Corte suprema di cassazione, sez, un., July 24, 2008, No. 31171/2008, ILDC 1085, ¶ 6 (It.); A. v. Office of the Public Prosecutor, Bundesstrafgericht [Federal Criminal Court], July 25, 2012, No. BB.2011.140 (Switz.); FF v. Director of Public Prosecutions (Prince Nasser case), [2014] EWHC (Admin) 3419 (Eng.)). There is older state practice to the same effect. *See* Claus Kress, *Article 98: Cooperation with Respect to Waiver of Immunity and Consent to Surrender* ¶¶ 54–65, *in* ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (Kai Ambros ed., 4th ed. 2021). Consideration of conduct-based immunity for international crimes at the Sixth Committee of the General Assembly generated a wide range of views by states and no consensus. *See* Int'l L. Comm'n, Sixth Report on Immunity of State Officials from Foreign Criminal Jurisdiction 5–10, U.N. Doc. A/CN.4/722 (June 12, 2018) (summarizing debate over conduct-based immunity); *see also* Janina Barkholdt & Julian Kulaga, *Analytical Presentation of the Comments and Observations by States on Draft Article 7, Paragraph 1, of the ILC Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction, United Nations General Assembly, Sixth Committee, 2017*, at 14 (Berlin Potsdam Rsch. Grp., Working Paper No. 14, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3172104 [https://perma.cc/VG9F-XAPR] (reproducing comments and analyzing them).

183. *See generally* TRIAL INT'L, UNIVERSAL JURISDICTION ANNUAL REVIEW 2021 (2021), https://trialinternational.org/latest-post/ujar-2021/ [https://perma.cc/7GJY-R25V]; Máximo Langer & Mackensie Eason, *The Quiet Expansion of Universal Jurisdiction*, 30 EUR. J. INT'L L. 779 (2019). Professor Ingrid Wuerth has argued that cases in which conduct-based immunity was not raised should not count as state practice because the forum state is obligated to confer conduct-based immunity only if it is invoked by the foreign official's own state, but she acknowledges that state practice on the invocation requirement is mixed. Wuerth, *supra* note 167, at 745, 756.

184. Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 28, 2021, 3 StR 564/19, ¶¶ 18–33, http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=116372&pos=0&anz=1 [https://perma.cc/XU7U-NDLP].

185. *Id.* ¶ 56. This "no doubts" language is not simply rhetorical because the Federal Court of Justice would have been required to refer the question to the Federal Constitutional Court if such doubts had existed. *See id.* ¶¶ 50–55. For further discussion, see Claus Kress, *On Functional Immunity of Foreign Officials and Crimes Under International Law*, JUST SEC. (Mar. 31, 2021), https://www.justsecurity.org/75596/on-functional-immunity-of-foreign-officials-and-crimes-under-international-law/ [https://perma.cc/TYA6-CVRV].

186. 36 I.L.R. 277 (Isr. S. Ct. 1962).

187. *Id*. at 309–10; *see also* A. v. Off. of Pub. Prosecutor, Bundesstrafgericht [Federal Criminal Court], July 25, 2012, No. BB.2011.140, ¶ 5.4.3 (Switz.) ("[I]t would be difficult to admit that conduct contrary to fundamental values of the international legal order can be

The lack of a requirement to grant immunity from criminal prosecution should establish the same for civil proceedings.[188] But even if one looks separately at state practice in civil cases, there is no general and consistent practice of states treating violations of these universally accepted prohibitions as acts entitled to conduct-based immunity. Most of the cases commonly cited to support conduct-based immunity in the civil context involved situations where state immunity had been extended to foreign officials by statute.[189] The question in these cases was not, therefore, whether customary international law requires conduct-based immunity for the alleged acts but rather whether customary international law requires *an exception* to immunity that the state has chosen to extend. These are fundamentally different questions.[190] There appear to be only a handful of decisions holding that foreign officials were entitled to conduct-based immunity from civil proceedings for violations of universally accepted prohibitions in the absence of a statute granting such immunity.[191] On the other hand, a series of U.S. decisions has held that such violations cannot be considered official acts entitled to conduct-based immunity.[192] As in the

protected by rules of that very same legal order."); *In re* Bouterse, Hof Amsterdam, Nov. 20, 2000, NJ 2001, ¶ 4.2 (noting that "the commission of very serious offences as are concerned here—cannot be considered to be one of the official duties of a head of state").

188. Chimène I. Keitner, *Foreign Official Immunity After* Samantar, 44 VAND. J. TRANSNAT'L L. 837, 848 (2011) ("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."); *see also* Douglas, *supra* note 163, at 301–04 (arguing that there is no proper basis for distinguishing civil and criminal proceedings with respect to the immunity of state officials); Kress, *supra* note 185 (noting the difficulty of distinguishing criminal and civil proceedings for purposes of conduct-based immunity).

189. *See* Jones v. Ministry of Interior of the Kingdom of Saudi Arabia, [2006] UKHL 26; Propend Finance Ltd. v. Sing (1997) 111 I.L.R. 611 (Eng. & Wales Ct. App.); Jaffe v. Miller (1993) 5 O.R. 2d 133 (Can. Ont. C.A.); Zhang v. Zemin (2010) NSWCA 255 (Austl.); *see also* Jones v. United Kingdom, 2014-I Eur. Ct. H.R. 1. National statutes extending state immunity to *jus cogens* violations are themselves state practice, but such statutes contribute to the development of customary international law only if accompanied by a sense of legal obligation (*opinio juris*), which would need to be determined on a statute-by-statute basis. As the ICJ observed in *Jurisdictional Immunities*, "[s]tates sometimes decide to accord an immunity more extensive than that required by international law," but "the grant of immunity in such a case is not accompanied by the requisite *opinio juris* and therefore sheds no light upon [customary international law]." Jurisdictional Immunities of the State (Ger. v. It.), 2012 I.C.J. 97, ¶ 55 (Feb. 3).

190. For further discussion, see William S. Dodge, *Is Torture an "Official Act"?: Reflections on Jones v. United Kingdom*, OPINIO JURIS (Jan. 15, 2014), http://opiniojuris.org/2014/01/15/guest-post-dodge-torture-official-act-reflections-jones-v-united-kingdom/ [https://perma.cc/YK2M-B6N2].

191. *See* Case C/09/554385/HAZA18/647, Judgment (Hague Dist. Ct. 2020) (Neth.), https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2020:667#_3d669af3-966f-40db-ba3a-4a53baab9313 [https://perma.cc/LW2B-FEY7]; Fang v. Jiang, [2007] NZAR 420 (N.Z.).

192. *See* Yousuf v. Samantar, 699 F.3d 763, 776 (4th Cir. 2012) ("[A]s a matter of international and domestic law, *jus cogens* violations are, by definition, acts that are not officially authorized by the Sovereign."); Enahoro v. Abubakar, 408 F.3d 877, 893 (7th Cir. 2005) (discussing prior cases and concluding that "officials receive no immunity for acts that violate international *jus cogens* human rights norms (which by definition are not legally authorized acts)"); Hilao v. Estate of Marcos, 25 F.3d 1467, 1472 (9th Cir. 1994) (concluding

criminal context, mixed practice does not amount to a general and consistent practice accompanied by *opinio juris*, which is what one needs to establish a clear requirement of conduct-based immunity for such violations.

Outside the human rights context, one finds other examples of conduct authorized by foreign governments that is not entitled to conduct-based immunity. The classic example is espionage,[193] but authorities today typically include sabotage, kidnapping, and political assassination, as well.[194] "In such cases, the courts have denied immunity, despite recognizing the person concerned as a State official and establishing a connection between the State of the official and the act in question."[195] Some authorities emphasize the fact that these activities typically occur within the

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that "Marcos' acts of torture, execution, and disappearance were clearly acts outside of his authority as President"). Some U.S. courts have concluded that there is no *jus cogens* exception to foreign official immunity, but their reasoning presumed that such immunity had already attached. *See, e.g.*, Doğan v. Barak, 932 F.3d 888, 896–97 (9th Cir. 2019); Matar v. Dichter, 563 F.3d 9, 14–15 (2d Cir. 2009).

193. *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 28, 2021, 3 StR 564/19, ¶ 47 (Ger.) (citing Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 15, 1995, 92 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 277, 321) ("There is no general rule of international law according to which spies who are criminally prosecuted by the state affected by the spying can invoke the principles of state immunity."); Prosecutor v. Blaškić, Case No. IT-95-14-AR108, Appeals Chamber Decision, ¶ 41 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 29, 1997) ("[Spies], although acting as State organs, may be held personally accountable for their wrongdoing."); *see also* HAZEL FOX & PHILIPPA WEBB, THE LAW OF STATE IMMUNITY 97 (3d ed. 2013) (noting that "the victim State is entitled in international law to prosecute the individual spies"); Ingrid Delupis, *Foreign Warships and Immunity for Espionage*, 78 AM. J. INT'L L. 53, 63 (1984) (noting that spies "enjoy no protection by their home state and no immunity for their acts"). The United States continues to prosecute foreign officials for espionage. *See* Press Release, Dep't of Just., Evgeny Buryakov Pleads Guilty in Manhattan Federal Court in Connection with Conspiracy to Work for Russian Intelligence (Mar. 11, 2016), https://www.justice.gov/usao-sdny/pr/evgeny-buryakov-pleads-guilty-manhattan-federal-court-connection-conspiracy-work [https://perma.cc/NFJ6-NDF9].

194. FOX & WEBB, *supra* note 193, at 97 (referring to "espionage, acts of sabotage, [and] kidnapping"); Int'l L. Comm'n, Fifth Report on Immunity of State Officials from Foreign Criminal Jurisdiction, ¶ 227, U.N. Doc. A/CN.4/701 (June 14, 2016) [hereinafter ILC Fifth Report] (referring to "political assassination, espionage or sabotage"). With respect to sabotage, the leading example is New Zealand's prosecution of French agents for sinking the Greenpeace ship *Rainbow Warrior*. *See* Int'l L. Comm'n, Immunity of State Officials from Foreign Criminal Jurisdiction: Memorandum by the Secretariat ¶ 162 n.465, U.N. Doc. A/CN.4/596 (Mar. 31, 2008) [hereinafter ILC Secretariat Memo] (discussing the *Rainbow Warrior* case). With respect to kidnapping, see *id.* ¶ 163 n.466 (discussing Italy's prosecution of U.S. CIA agents for the abduction of Abu Omar); Khurts Bat v. Investigating Judge of the German Federal Court [2011] EWHC 2029 ¶¶ 86–101 (U.K.) (denying conduct-based immunity to Mongolian official charged with kidnapping).

195. ILC Fifth Report, *supra* note 194, ¶ 227. Foreign states do not assert foreign official immunity in such cases even when the foreign states acknowledge responsibility for the acts of their agents. *See* ILC Secretariat Memo, *supra* note 194, ¶ 162 n.465 (noting that France accepted responsibility for sabotage in the *Rainbow Warrior* case but did not assert immunity); Delupis, *supra* note 193, at 65–66 (noting that the United States accepted responsibility for espionage in the *Francis Gary Powers* case but did not assert immunity); *see also* Int'l L. Comm'n, Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction, ¶ 85, U.N. Doc. A/CN.4/631 (June 10, 2010) [hereinafter ILC Second Report] (noting that in cases of "espionage, acts of sabotage, [and] kidnapping . . . immunity has either been asserted but not accepted, or not even asserted").

territory of the victim state and view such cases as supporting a "territorial tort exception" to conduct-based immunity.[196] But prosecutions have occurred for acts of espionage outside the victim state's own territory,[197] and the relevance of territory is diminishing as sabotage and spying move online.[198] The principle that spies cannot "invoke the principles of state immunity" is often stated in broad terms without territorial limitations,[199] and the broader principle finds support in state practice.[200]

In sum, conduct-based immunity does not attach to everything foreign officials do. First, it does not attach to acts that were not authorized by the official's government. Second, it does not attach to certain acts that were authorized by the foreign official's government, including espionage and violations of the universally accepted prohibitions on torture, genocide, war crimes, and crimes against humanity. Many states have denied conduct-based immunity to such acts. Thus, there is no general and consistent state practice and *opinio juris* establishing that such acts must be considered "acts taken in an official capacity" for purposes of conduct-based immunity.

III. THE ROLE OF THE EXECUTIVE BRANCH

Given the evolving landscape of foreign official immunity, one of the most important—and most contested—questions 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. The State Department claims broad authority to do both. In a recent amicus brief

196. *See, e.g.*, ILC Fifth Report, *supra* note 194, ¶¶ 225–229 (discussing "territorial tort exception"); ILC Second Report, *supra* note 195, ¶ 81 (considering exception when "a crime is perpetrated in the territory of the State which exercises jurisdiction"); FOX & WEBB, *supra* note 158, at 97 (considering territorial exception).

197. *See, e.g.*, United States v. Zehe, 601 F. Supp. 196 (D. Mass. 1985) (holding that the U.S. Espionage Act applied to East German spy for acts of espionage in Mexico and East Germany).

198. *See* Press Release, Dep't of Just., Six Russian GRU Officers Charged in Connection with Worldwide Deployment of Destructive Malware and Other Disruptive Actions in Cyberspace (Oct. 19, 2020), https://www.justice.gov/opa/pr/six-russian-gru-officers-charged-connection-worldwide-deployment-destructive-malware-and [https://perma.cc/ZP45-M9L7]; Press Release, Dep't of Just., Chinese Military Personnel Charged with Computer Fraud, Economic Espionage and Wire Fraud for Hacking into Credit Reporting Agency Equifax (Feb. 10, 2020), https://www.justice.gov/opa/pr/chinese-military-personnel-charged-computer-fraud-economic-espionage-and-wire-fraud-hacking [https://perma.cc/S5XX-Q348]; Press Release, Dep't of Just., U.S. Charges Five Chinese Military Hackers for Cyber Espionage Against U.S. Corporations and a Labor Organization for Commercial Advantage (May 19, 2014), https://www.justice.gov/opa/pr/us-charges-five-chinese-military-hackers-cyber-espionage-against-us-corporations-and-labor [https://perma.cc/DR3G-PGE3].

199. *See, e.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 28, 2021, 3 StR 564/19, ¶ 47 (Ger.).

200. *See supra* notes 193–95 and accompanying text. Because of the virtually absolute nature of diplomatic immunity, *see supra* notes 140–43 and accompanying text, spying by diplomats is punished by expulsion. *See* Delupis, *supra* note 193, at 63 ("There is ample state practice that the diplomat in such circumstances is declared persona non grata and expelled.").

recommending a grant of certiorari in *Mutond v. Lewis*,[201] the United States said:

> Under this Court's decisions, the principles recognized by the Executive Branch governing foreign-official immunity are to be followed by the courts. That is true not only in cases in which the Executive files a suggestion of immunity, but also in cases in which courts must decide for themselves whether a foreign official is immune from suit.[202]

Although the State Department's 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.[203]

The State Department bases its claims of authority on the legal regime for deciding questions of state immunity established by the Supreme Court in *Ex parte Peru*[204] and *Republic of Mexico v. Hoffman*.[205] As described above, the *Samantar* Court described this regime as "a two-step procedure."[206] First, if a foreign sovereign requested immunity from the State Department and "the request was granted, the district court surrendered its jurisdiction."[207] Second, "'in the absence of recognition of the immunity by the Department of State,' a district court 'had authority to decide for itself whether all the requisites for such immunity existed'" under the policy established by the Department of State.[208] As *Samantar* noted, "the same two-step procedure was typically followed when a foreign official asserted immunity," although such cases were "rare."[209] The FSIA replaced this regime with respect to foreign state immunity.[210] But the *Samantar* Court

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201. 141 S. Ct. 156 (2020).

202. Brief for the United States as Amicus Curiae at 11, *Mutond*, 141 S. Ct. 156 (2020) (No. 19-185) [hereinafter U.S. *Mutond* Amicus Brief]; *see also* Brief for the United States as Amicus Curiae Supporting Affirmance, Doğan v. Barak, 932 F.3d 888 (9th Cir. 2019) (No. 16-56704) [hereinafter U.S. *Doğan* Amicus Brief]. The Supreme Court denied review in *Mutond*. 141 S. Ct. 156 (2020). It appears that the executive branch claims the authority to bind courts only with respect to foreign official immunities that are governed by federal common law. With respect to treaty-based immunity, the executive has argued that its interpretation of the VCDR is "entitled to great weight." Letter Brief of the United States as Amicus Curiae at 2, Broidy Cap. Mgmt. LLC v. Benomar, 944 F.3d 436 (2d Cir. 2019) (No. 19-236) [hereinafter *Broidy* Letter Brief]. But the executive's argument for diplomatic immunity in *Broidy* did not claim that the court was bound by either its interpretation of the VCDR or its views on how the treaty should be applied to the facts. *See id.* at 7–15.

203. *Compare* Yelin, *supra* note 37 (arguing that the executive branch has lawmaking authority over head-of-state immunity), *with* Wuerth, *supra* note 6, at 964–65 (arguing that the executive branch lacks lawmaking authority over foreign official immunity).

204. 318 U.S. 578 (1943).

205. 324 U.S. 30 (1945).

206. Samantar v. Yousuf, 560 U.S. 305, 311 (2010).

207. *Id.*

208. *Id.* at 311–12 (quoting *Ex parte Peru*, 318 U.S. at 587).

209. *Id.* at 312. A compilation of immunity determinations from 1952 to 1977 identified six decisions involving the immunity of foreign officials. Sovereign Immunity Decisions, *supra* note 52, at 1020. The State Department continued to make some determinations of foreign official immunity after the enactment of the FSIA in 1976. *See* Yelin, *supra* note 37, at 991–96 (listing head-of-state decisions).

210. *Samantar*, 560 U.S. at 312–13.

saw "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."[211] The immunity of foreign officials, the Court concluded, "is properly governed by the common law."[212]

Although the executive branch reads *Samantar* as endorsing its "historical authority to determine the immunity of foreign officials,"[213] Professor Ingrid Wuerth has suggested that the better reading is the more literal one—that "Congress did not seek to do anything with respect to individual immunity cases, either to authorize or eliminate the practice."[214] The more pertinent question is whether the Supreme Court today would, or should, endorse the regime established in *Ex parte Peru* and *Hoffman*.[215] There are substantial separation of powers concerns raised by the executive branch's claim of exclusive authority over conduct-based immunity determinations,[216] and the Roberts Court has been less deferential to the executive in foreign affairs than some of its predecessors.[217]

Even without a regime of absolute deference, the executive branch would still have considerable influence over questions of foreign official immunity. First, the executive branch has constitutional authority to determine conclusively who holds the offices that are entitled to head-of-state immunity, determinations that are essentially dispositive for status-based immunity.[218] Second, the executive branch can interpret the international law rules governing foreign official immunity. For treaty-based immunities, it is well established that the executive's interpretation of the relevant treaties "is entitled to great weight."[219] The same should be true for the executive's interpretation of immunities based on customary international law.[220] The State Department has substantial expertise on questions of customary international law, and courts would likely defer to its analysis of state practice and *opinio juris* in developing federal common law. But executive determinations of foreign official immunity typically assert without further explanation or analysis that the State Department's principles of foreign

211. *Id.* at 323.
212. *Id.* at 325.
213. U.S. *Mutond* Amicus Brief, *supra* note 202, at 11.
214. Wuerth, *supra* note 6, at 939–40.
215. *Cf. id.* at 921 (arguing that "the decisions in *Ex Parte Peru* and *Hoffman* were wrongly reasoned—if not wrongly decided").
216. *See infra* notes 224, 234 and accompanying text.
217. *See* Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380, 384 (2015); Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1930–31 (2015).
218. *See infra* notes 223–25 and accompanying text.
219. Broidy Cap. Mgmt. LLC v. Benomar, 944 F.3d 436, 442 (2d Cir. 2019) (quoting United States v. Stuart, 489 U.S. 353, 369 (1989)) (referring to the VCDR).
220. *See* RESTATEMENT (THIRD), *supra* note 102, § 112 cmt. c ("Courts give particular weight to the position taken by the United States Government on questions of international law because it is deemed desirable that so far as possible the United States speak with one voice on such matters."); *see also* Wuerth, *supra* note 6, at 971 (arguing that "deference may be appropriate to the executive branch where international law is uncertain or in a state of flux").

official immunity have been "informed by customary international law,"[221] without offering further explanation or analysis. By omitting the underlying analysis from its submissions, the executive branch has effectively forfeited its substantial power to persuade courts to adopt its interpretation of customary international law.

This part affirms that the executive branch's determinations with respect to the status of foreign officials are binding on courts and that courts should give substantial deference to the executive's interpretation of the international law rules governing immunity. But it also emphasizes that neither the executive's suggestions of immunity in specific cases nor its articulation of principles are binding on courts. In the end, courts are responsible both for developing foreign official immunity as federal common law and applying those rules in specific cases.

A. Executive Suggestions of Immunity

The executive branch sometimes files suggestions of immunity or nonimmunity in individual cases. It has taken the position in recent decades that "courts are required to defer to the Executive Branch's suggestion of immunity on behalf of a foreign official named as a defendant in a civil suit in the United States."[222]

U.S. courts do treat executive branch determinations of head-of-state immunity (which covers heads of state, heads of government, and foreign ministers) as conclusive.[223] This makes sense because the executive has the constitutional authority to determine whom the United States recognizes as holding those offices.[224] As Professor Wuerth has explained, "[b]ecause status-based immunity . . . follows almost always as a matter of course from these determinations, courts will rarely have a role to play in head of state and other status-based immunity cases."[225] But the executive branch asserts not just that its determinations of *status* are controlling in head-of-state cases, but that its determinations of *immunity* are controlling. Thus, the executive claims the authority to *deny* immunity to a sitting head of state in a particular

221. Letter from Legal Adviser Brian J. Egan to Principal Deputy Assistant Att'y Gen. Benjamin C. Mizer (June 10, 2016), Doğan v. Barak, 2016 WL 6024416 (C.D. Cal. Oct. 13, 2016) [hereinafter *Doğan* Letter] (referring to "principles of immunity articulated by the Executive Branch in the exercise of its constitutional authority over foreign affairs and informed by customary international law").

222. U.S. *Doğan* Amicus Brief, *supra* note 202, at 1.

223. *See, e.g.*, Manoharan v. Rajapaksa, 711 F.3d 178, 179 (D.C. Cir. 2013); Yousuf v. Samantar, 699 F.3d 763, 772 (4th Cir. 2012); Wei Ye v. Jiang Zemin, 383 F.3d 620, 626 (7th Cir. 2004).

224. *See* Keitner, *supra* note 52, at 71 ("Courts should treat Executive representations about status-based immunity as conclusive because they are a function of the Executive's power under Article II, section 3 of the Constitution to accredit diplomats ('receive ambassadors') and, by implication, to recognize foreign heads of state."); *see also Yousuf*, 699 F.3d at 772 ("The Constitution assigns the power to 'receive Ambassadors and other public Ministers' to the Executive Branch, U.S. Const. art. II, § 3, which includes, by implication, the power to accredit diplomats and recognize foreign heads of state."); Sikhs for Justice v. Singh, 64 F. Supp. 3d 190, 194 (D.D.C. 2014) (similar).

225. Wuerth, *supra* note 6, at 971.

case.[226] There are good reasons to doubt that the executive's authority extends so far. In the context of foreign state immunity, the Supreme Court has held that the recognition of a foreign government and its representatives is "conclusive on all domestic courts," but it has been careful to maintain that courts "are free to draw for themselves [the] legal consequences [of recognition] in litigations pending before them."[227] Additionally, to the extent that customary international law requires head-of-state immunity, the executive's denial of such immunity would raise difficult questions about the president's constitutional authority to violate international law without congressional authorization.[228]

Courts are divided on whether executive determinations of conduct-based immunity are conclusive. The Second Circuit has held that State Department determinations of conduct-based immunity are controlling,[229] whereas the Fourth Circuit has held that they are "not controlling" but carry "substantial weight."[230] The latter position is the better reasoned one. As the Fourth Circuit explained in *Yousuf*:

> Unlike head-of-state immunity and other status-based immunities, there is no equivalent constitutional basis suggesting that the views of the Executive Branch control questions of [conduct-based] immunity. Such cases do not involve any act of recognition for which the Executive Branch is constitutionally empowered; rather, they simply involve matters about the scope of defendant's official duties.[231]

As discussed above, the question of whether an act is taken in an "official capacity" for immunity purposes turns on questions of foreign law, U.S. law, and international law, as well as on questions of fact. While the State Department has expertise on questions of international law,[232] it is not better equipped than courts to interpret foreign or U.S. law, or to find or analyze facts. The executive branch roots its constitutional claim to issue binding case-specific suggestions of conduct-based immunity in its power to conduct foreign affairs.[233] As a practical matter, however, the United States's

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226. *See* U.S. *Miango* Suggestion, *supra* note 122, at 2 n.4 ("The fact that the Executive Branch has the constitutional power to suggest the immunity of a sitting head of state does not mean that it will do so in every case."). To our knowledge, the executive has never determined that a sitting head of state, head of government, or foreign minister is not entitled to immunity, although it has prosecuted individuals that it does not recognize as legitimate heads of state. *See* United States v. Noriega, 117 F.3d 1206 (11th Cir. 1997).

227. Guar. Tr. Co. of N.Y. v. United States, 304 U.S. 126, 138 (1938).

228. *See supra* note 134 and accompanying text.

229. Matar v. Dichter, 563 F.3d 9, 15 (2d Cir. 2009); *see also* Rosenberg v. Pasha, 577 F. App'x 22, 24 (2d Cir. 2014) (reaffirming *Matar*).

230. Yousuf v. Samantar, 699 F.3d 763, 773 (4th Cir. 2012); *see also* Warfaa v. Ali, 811 F.3d 653, 657 (4th Cir. 2016) (reaffirming *Yousuf*); Miango v. Democratic Republic of the Congo, No. 15-1265, 2020 WL 3498586, at *5 n.2 (D.D.C. June 29, 2020) (quoting *Yousuf*, 699 F.3d at 773). The Ninth Circuit found it unnecessary to decide "the level of deference owed to the State Department's suggestion of immunity." Doğan v. Barak, 932 F.3d 888, 893 (9th Cir. 2019).

231. *Yousuf*, 699 F.3d at 773.

232. *See supra* notes 219–21 and accompanying text.

233. U.S. *Mutond* Amicus Brief, *supra* note 202, at 13.

experience with immunity from the founding to the period before enactment of the FSIA shows that case-specific executive authority leads to political pressure, inconsistent determinations, and harm to U.S. foreign relations. Moreover, allowing the executive branch to dictate the outcome of specific cases would raise separation of powers concerns.[234] Although the Supreme Court has suggested in the context of foreign state immunity that the State Department's case-specific views "might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy,"[235] Justice Kennedy noted in dissent that "judicial independence [would be] compromised by case-by-case, selective determinations of jurisdiction by the Executive."[236] Outside the context of immunity, the Supreme Court has generally resisted giving the executive branch case-specific authority.[237]

B. Executive Articulations of Principles

If the United States does not file a suggestion of immunity or nonimmunity, courts must make their own immunity determinations. The U.S. government has argued that, in this situation, courts must still follow the principles of foreign official immunity articulated by the executive branch, discerned and distilled from its submissions in other cases.[238] Indeed, the government has taken the position that "courts have no authority to create federal common-law principles of foreign-official immunity, absent Executive Branch guidance."[239] In practice, status-based immunity has posed little difficulty, both because the State Department generally certifies the defendant's entitlement to immunity in such cases and because the principles of immunity are clear. In the few instances when no suggestion has been filed, courts have determined the official's status for themselves and have granted or denied head-of-state immunity accordingly.[240]

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234. *See* Keitner, *supra* note 52, at 72; *see also* Bradley, *supra* note 14, at 7 (noting "potential separation of powers concerns").

235. Republic of Austria v. Altmann, 541 U.S. 677, 702 (2004).

236. *Id.* at 735 (Kennedy, J., dissenting).

237. *See, e.g.*, W.S. Kirkpatrick & Co. v. Env't Tectonics Corp., Int'l, 493 U.S. 400, 408 (1990) (rejecting U.S. argument to resolve act of state case based on case-specific views of State Department); *see also* William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2132–40 (2015) (discussing the role of the executive under international comity doctrines).

238. U.S. *Mutond* Amicus Brief, *supra* note 202, at 11 ("Under this Court's decisions, the principles recognized by the Executive Branch governing foreign-official immunity are to be followed by the courts.").

239. U.S. *Doğan* Amicus Brief, *supra* note 202, at 25.

240. *See, e.g.*, Weiming Chen v. Ying-jeou Ma, No. 12-5232, 2013 WL 4437607, at *3 (S.D.N.Y. Aug. 19, 2013) (granting head-of-state immunity for the president of Taiwan); Gomes v. ANGOP, Angola Press Agency, No. 11-0580, 2012 WL 3637453, at *7 (E.D.N.Y. Aug. 22, 2012) (granting head-of-state immunity for the president of Angola); Smith v. Ghana Com. Bank, Ltd., No. 10-4655, 2012 WL 2930462, at *8 (D. Minn. June 18, 2012) (granting head-of-state immunity for the president of Ghana); Hassen v. Nahyan, No. 09-01106, 2010 WL 9538408, at *5 (C.D. Cal. Sept. 17, 2010) (denying head-of-state immunity for the crown prince of the United Arab Emirates).

Identifying the principles governing conduct-based immunity has posed a greater challenge. In practice, courts have looked to sources other than the executive branch for the principles to apply.[241] But they have not always looked in the right places. In *Doğan v. Barak*,[242] for example, although the State Department suggested conduct-based immunity for a former Israeli defense minister, the Ninth Circuit nonetheless performed its own legal analysis.[243] In doing so, the court looked to section 66(f) of the *Restatement (Second)*, a provision not cited in the U.S. amicus brief.[244] In *Lewis v. Mutond*,[245] the State Department did not file a suggestion, and the D.C. Circuit also looked to the *Restatement (Second)* rather than to previous executive branch filings, although only because the parties agreed (incorrectly) that section 66(f) governed.[246] The United States urged the Supreme Court to grant review of the decision, arguing that section 66(f) "contradicts the principles of foreign-official immunity long advanced by the Executive Branch."[247] Setting aside the question of section 66(f)'s obsolescence, discussed above, the key point here is that courts do not seem to understand *Samantar* as requiring them to follow the principles for conduct-based immunity articulated by the executive branch.

Some courts have also charted their own course on the question of whether a foreign official can claim conduct-based immunity for violating a *jus cogens* norm of international law, such as torture or genocide. In *Yousuf*, on remand from the Supreme Court's decision in *Samantar*, the State Department filed a suggestion of nonimmunity.[248] Because the Fourth Circuit concluded that this determination was "not controlling,"[249] it performed its own legal analysis. Looking to both foreign and U.S. decisions, the court 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."[250] Although the court reached the same result as the United States, its rationale for denying conduct-based immunity was

241. *See* Bellinger & Wirth, *supra* note 126, at 449 n.105 ("Notwithstanding the executive branch's insistence that courts rely on its statements in prior cases, courts have overwhelmingly relied on the cases themselves, not the executive branch's submissions.").

242. 932 F.3d 888 (9th Cir. 2019).

243. *Id.* at 893–94.

244. *Id.* at 894.

245. 918 F.3d 142 (D.C. Cir. 2019).

246. *Id*. at 146.

247. U.S. *Mutond* Amicus Brief, *supra* note 202, at 8–9. Specifically, the United States argued that the D.C. Circuit had erroneously adopted "a 'categorical rule' of non-immunity in personal-capacity suits against foreign officials." *Id.* at 9.

248. Yousuf v. Samantar, 699 F.3d 763, 777 (4th Cir. 2012).

249. *Id.* at 773.

250. *Id.* at 777; *see also* Warfaa v. Ali, 811 F.3d 653, 661 (4th Cir. 2016) (following *Yousuf*'s holding that conduct-based immunity does not apply to *jus cogens* violations); Omari v. Ras Al Khaimah Free Trade Zone Auth., No. 16-3895, 2017 WL 3896399, at *10 (S.D.N.Y. Aug. 18, 2017) ("Conduct-based foreign official immunity . . . may be held not to apply when the official's conduct violates peremptory norms of international law, known as *jus cogens*." (citing *Yousuf*, 699 F.3d at 775–78)).

different from the grounds urged by the United States, which focused instead on the lack of any recognized government in Somalia that could request immunity, as well as the defendant's status as a U.S. resident.[251]

It is perhaps not surprising that courts have asserted their authority to develop the rules of foreign official immunity absent a controlling statute or treaty because the task of articulating rules of federal common law has traditionally fallen to the courts. Indeed, it is difficult to see where the executive branch might get the constitutional authority to articulate legal principles of foreign official immunity that are binding on courts.[252] Looking to the Constitution, Article I states that "[a]ll legislative Powers herein granted" shall be vested in Congress.[253] Congress may, of course, delegate lawmaking power to the executive branch, but there is no plausible argument that it has done so with respect to foreign official immunity.[254] Article II of the Constitution gives the president "[t]he executive Power"[255] and imposes a duty to "take Care that the Laws be faithfully executed."[256] In *Youngstown Sheet & Tube Co. v. Sawyer*,[257] the Supreme Court observed:

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.[258]

More recently, in *Medellín v. Texas*,[259] the Court rejected the argument that the president had authority to assume a lawmaking role to give domestic effect to an ICJ decision.[260] Referring again to the Take Care Clause, the Court noted that "[t]his authority allows the President to execute the laws, not make them."[261]

If, as *Samantar* held, the conduct-based immunity of foreign officials that is not covered by existing statutes and treaties "is properly governed by the common law,"[262] it follows that courts, rather than the executive branch, are responsible for making it.[263] The common law of foreign official immunity

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251. *Yousuf*, 699 F.3d at 777.
252. *See generally* Wuerth, *supra* note 6.
253. U.S. CONST. art. I, § 1.
254. Wuerth, *supra* note 6, at 970 ("[T]he FSIA does not delegate power to the executive. To the contrary, the statute's purpose was to restrict the role of the executive branch, at least in cases against foreign states.").
255. U.S. CONST. art. II, § 1.
256. *Id.* art. II, § 3.
257. 343 U.S. 579 (1952).
258. *Id.* at 587.
259. 552 U.S. 491 (2008).
260. *Id.* at 532.
261. *Id.*; *see also id.* at 527–28 ("As Madison explained in The Federalist No. 47, under our constitutional system of checks and balances, '[t]he magistrate in whom the whole executive power resides cannot of himself make a law.'" (quoting THE FEDERALIST NO. 47, 326 (James Madison) (J. Cooke ed., 1961)).
262. Samantar v. Yousuf, 560 U.S. 305, 325 (2010).
263. *See* Wuerth, *supra* note 6, at 954–67.

is generally understood to be *federal* common law.[264] After *Erie*, federal common law is a limited enterprise, but the Supreme Court has recognized doctrines of federal common law such as the act of state doctrine in areas of strong federal interest. In *Sabbatino*, the Court made clear "that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law."[265] Rules of foreign official immunity fit that description.

This is not to deny that the executive branch will have considerable influence over the federal common law of foreign official immunity. As discussed above, 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.

IV. PROCEDURAL QUESTIONS

Apart from the substantive questions of foreign official immunity, courts have faced a host of procedural questions in cases against foreign officials, with no statutory guidance on how to resolve them. An overarching procedural issue is the extent to which claims of common-law foreign official immunity should be treated similarly to claims of foreign state immunity under the FSIA. On some procedural points, the answer is clear. *Samantar* itself held that the FSIA's provisions on jurisdiction and service do not apply in suits against foreign officials.[266] But on other questions of procedure, lower courts have treated cases involving foreign official immunity as though the FSIA applied, notwithstanding *Samantar*. A prime example is their treatment of foreign official immunity as a question of subject matter jurisdiction, based on a misapplication of the framework created by the FSIA.[267] Some courts have even adopted an unusual burden-shifting analysis for proving foreign official immunity that is based on the legislative history

264. *See* United States v. Sinovel Wind Grp. Co., 794 F.3d 787, 792 (7th Cir. 2015); *see also* Bradley, *supra* note 14, at 6 (noting that scholars have assumed that foreign official immunity is "*federal* common law" and calling the assumption "reasonable"); Wuerth, *supra* note 6, at 964 (noting that "[v]irtually every theorist to specifically consider foreign state or official immunity has favored application of some form of federal common law over state law").

265. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964). The Supreme Court has not looked to the executive branch to articulate rules for the act of state doctrine. Indeed, in *Kirkpatrick*, the Supreme Court rejected the rule suggested by the United States—a rule that would have given the executive case-specific authority. *See* W.S. Kirkpatrick & Co. v. Env't Tectonics Corp., Int'l, 493 U.S. 400, 408–09 (1990). By the same token, the federal common law of foreign official immunity is not a discretionary executive branch authority to avoid embarrassing cases. *Id.*

266. *See* Samantar v. Yousuf, 560 U.S. 305, 324 n.20 (2010).

267. *See infra* Part IV.A.

of the FSIA.[268] The result is a procedural mishmash that tethers foreign official immunity to a statutory framework that does not fit.

This part examines a range of procedural questions in light of *Samantar*'s holding that the FSIA does not apply to suits against foreign officials unless the requested relief would run against the foreign state. Part IV.A clarifies that suits against foreign officials may only be brought in or removed to federal court if an independent basis for federal jurisdiction exists, that the plaintiff must establish personal jurisdiction over the defendant, and that the usual federal or state rules for service of process apply. Part IV.B argues that foreign official immunity should be treated as an affirmative defense, rather than as a question of subject matter jurisdiction or personal jurisdiction. Such treatment would not require the foreign official to file an answer, for it is well established that a defendant can raise an affirmative defense in a motion to dismiss or for summary judgment before filing an answer.[269] Part IV.C discusses how foreign official immunity should be proven. It argues that the defendant should bear the burden of proof, analyzes the weight to be given to determinations by the U.S. and foreign governments, and discusses the standards for obtaining discovery on matters relevant to immunity. Part IV.D considers alternative grounds for dismissal, noting that it may sometimes be easier for a court to dispose of a case on such grounds than to resolve difficult questions of foreign official immunity. Even if foreign official immunity were treated as jurisdictional, a court could still dismiss a case on threshold grounds, such as lack of subject matter jurisdiction, lack of personal jurisdiction, or forum non conveniens. And if foreign official immunity is considered an affirmative defense, rather than a matter of jurisdiction, a court could also dismiss a complaint for failure to state a claim. Finally, Part IV.E argues that both the grant and the denial of foreign official immunity should be immediately appealable. Taken together, the answers provided in this part provide a procedural roadmap for judges faced with claims against foreign officials that will allow those judges to resolve questions of immunity efficiently at the outset of the case or to avoid such questions by dismissing on other grounds. This will also better enable the United States to comply with its obligations under international law to shield current and former foreign officials from the burdens of litigation in appropriate circumstances.

A. Jurisdiction and Service of Process

Samantar made one thing clear: the FSIA's provisions on jurisdiction and service of process do not apply in suits against foreign officials.[270] The FSIA

268. *See* Lewis v. Mutond, 918 F.3d 142, 145 (D.C. Cir. 2019); *see also infra* notes 330–32 and accompanying text.

269. *See infra* notes 310–11 and accompanying text.

270. *Samantar*, 560 U.S. at 324 n.20 (noting that "a plaintiff seeking to sue a foreign official will not be able to rely on the Act's service of process and jurisdictional provisions"). As noted above, this may not be true if a court determines that the foreign state is the "real party in interest." *Id.* at 325. When the foreign state is the real party in interest, some courts have held that the FSIA's provisions on service apply. *See, e.g.*, Photos v. People's Republic

gives federal courts subject matter jurisdiction over claims against foreign states that fall within an enumerated exception to immunity and provides for the removal of civil actions against foreign states from state to federal court.[271] The FSIA further provides for personal jurisdiction over a foreign state in any case where subject matter jurisdiction exists and the foreign state has been properly served.[272] And the FSIA contains specific rules for service of process on foreign states[273] and on their agencies or instrumentalities.[274] It might be wise for Congress to give the federal courts an independent basis for subject matter jurisdiction over all suits against foreign officials too, but with the exception of suits against ambassadors and consuls, it has not done so.[275]

The fact that the FSIA's provisions on service and jurisdiction do not apply to suits against foreign officials has a number of important implications. First, the plaintiff must serve the foreign official with process. 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, the fact that the FSIA's rules on service of process do not apply may be an advantage for plaintiffs because the FSIA's rules can be quite demanding.[276] But the cases show that it can also be difficult to serve a foreign official abroad under the Federal Rules of Civil Procedure.[277]

Second, the plaintiff must establish personal jurisdiction over the foreign official, subject to the limits imposed by the Due Process Clauses.[278] Some claims against foreign officials arise out of contacts with the United States

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of China, No. 20-656, 2020 WL 6889016, at *5–7 (N.D. Tex. Nov. 24, 2020) (holding that service pursuant to FSIA was required because China was the real party in interest).

271. 28 U.S.C. §§ 1330(a), 1441(d). The FSIA's legislative history shows that Congress sought "to encourage the bringing of actions against foreign states in Federal courts" and to permit removal "[i]n view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area." H.R. REP. NO. 94-1487, at 13, 32 (1978), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6612, 6631.

272. 28 U.S.C. § 1330(b). Courts have held that due process limits on personal jurisdiction do not apply to foreign states or to state-owned corporations that are agents of foreign states, *see* Frontera Res. Azer. Corp. v. State Oil Co. of the Azer. Republic, 582 F.3d 393, 399–400 (2d Cir. 2009), but that such limits do apply to state-owned corporations that operate independently, *see* GSS Grp. Ltd. v. Nat'l Port Auth., 680 F.3d 805, 817 (D.C. Cir. 2012).

273. 28 U.S.C. § 1608(a).

274. *Id*. § 1608(b).

275. *See id*. § 1251(b)(1) (giving the U.S. Supreme Court original, but not exclusive, jurisdiction over actions "to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties"); *id.* § 1351 (giving district courts jurisdiction, exclusive of state courts, over consuls and members of a mission (including ambassadors) or their families).

276. *See, e.g.*, Republic of Sudan v. Harrison, 139 S. Ct. 1048, 1062 (2019); Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148, 154 (D.C. Cir. 1994).

277. *See* Strange on Behalf of Strange v. Islamic Republic of Iran, 964 F.3d 1190, 1193–96 (D.C. Cir. 2020) (discussing plaintiff's difficulties in serving former Afghan President Karzai under Federal Rule of Civil Procedure 4(f)).

278. *See* Doe 1 v. Buratai, No. 18-7170, 2019 WL 668339, at *1 (D.C. Cir. Feb. 15, 2019) (holding that a foreign official "lacked sufficient contacts with the United States to justify the exercise of personal jurisdiction under the Due Process Clause of the Fifth Amendment").

and therefore support the exercise of specific personal jurisdiction.[279] But in other cases, the court is unlikely to have general personal jurisdiction unless the defendant can be served with process in the United States.[280] Lack of personal jurisdiction will be a substantial barrier to suit in many cases against foreign officials.

Third, if a case is to be brought in or removed to federal court, there must be an independent basis for federal subject matter jurisdiction. Suits under federal statutes, such as the TVPA, will fall within the grant of federal question jurisdiction,[281] and suits by U.S. citizens could fall within the grant of diversity jurisdiction.[282] But under the well-pleaded complaint rule, a foreign official's anticipated or actual assertion of an immunity defense under federal common law does not confer federal jurisdiction either as an original matter or for purposes of removal.[283]

B. Pleading Immunity

Another set of important procedural questions concerns how claims of foreign official immunity should be pleaded. This part argues that courts should treat foreign official immunity as an affirmative defense, rather than as a question of subject matter jurisdiction. Such a change in approach would answer some difficult questions about how foreign official immunity works in federal and state courts and account for the fact that such immunity can be waived. Characterization as an affirmative defense would still allow foreign official immunity to be treated as a threshold issue that protects defendants from the burdens of litigation.

Since *Samantar*, federal courts have treated foreign official immunity as a question of subject matter jurisdiction, following the path worn by cases applying the FSIA.[284] Some courts have strangely relied on pre-*Samantar* decisions applying the FSIA to foreign officials to support their view of

279. *See, e.g.*, Miango v. Democratic Republic of the Congo, No. 15-1265, 2020 WL 3498586 (D.D.C. June 29, 2020) (alleging that plaintiffs were beaten by defendants in Washington, D.C.).

280. *See generally* Burnham v. Super. Ct., 495 U.S. 604 (1990) (upholding general personal jurisdiction on the basis of service while the defendant was temporarily present within the forum).

281. 28 U.S.C. § 1331.

282. *Id.* § 1332(a)(2).

283. Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 808 (1986).

284. *See, e.g.*, Eliahu v. Jewish Agency for Isr., 919 F.3d 709, 712 (2d Cir. 2019) ("The district court properly dismissed all claims against the Israeli Officials for lack of subject matter jurisdiction because, as foreign government officials acting their official capacity, they are entitled to immunity."); Lewis v. Mutond, 918 F.3d 142, 145 (D.C. Cir. 2019) (reviewing district court's dismissal on grounds of foreign official immunity for lack of subject matter jurisdiction); Miango v. Democratic Republic of the Congo, No. 15-1265, 2019 WL 2191806, at *2 (D.D.C. Jan. 19, 2019) (dismissing claims against foreign head of state for lack of subject matter jurisdiction). Some courts have similarly treated diplomatic immunity as going to subject matter jurisdiction. *See* Broidy Cap. Mgmt. LLC v. Benomar, 944 F.3d 436, 443 (2d Cir. 2019).

foreign official immunity as going to subject matter jurisdiction.[285] Others have mistakenly cited *Samantar* itself for this proposition.[286] It is true that, in describing pre-FSIA practice, *Samantar* recounted that when the State Department issued a suggestion of immunity, "the district court surrendered its jurisdiction."[287] But *Samantar* never characterized the jurisdiction surrendered as subject matter jurisdiction, and the two cases that it cited both involved in rem jurisdiction over seized vessels—a form of personal jurisdiction.[288] As a general matter, pre-FSIA cases did not treat either foreign state immunity or foreign official immunity as a question of subject matter jurisdiction. The FSIA characterized it as such in order to permit claims against foreign states to be brought in and removed to federal courts. But *Samantar*'s holding that the FSIA's jurisdictional provisions do not apply to claims against foreign officials means that the decision to treat foreign official immunity as a question of subject matter jurisdiction cannot rest on the same basis.[289]

Characterizing foreign official immunity as subject matter jurisdiction is also inconsistent with common understandings of how subject matter jurisdiction works with respect to federal courts, state courts, and litigants. First, it is well established that "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction"[290] and that federal courts have a "virtually unflagging obligation" to exercise the jurisdiction that Congress has given them.[291] Allowing federal courts to create exceptions to subject matter jurisdiction by developing rules of federal common law is inconsistent with congressional control. Although the Supreme Court has allowed federal courts to decline jurisdiction in favor of state courts under a limited number of abstention doctrines[292] and in favor of foreign courts under the doctrine of forum non conveniens,[293] it has not treated immunity from suit as jurisdictional without direction from Congress.[294]

Second, characterizing foreign official immunity as subject matter jurisdiction makes it difficult to explain how these rules bind state courts. State courts are courts of general subject matter jurisdiction that can hear all categories of claims, and such limits as exist on the subject matter jurisdiction of state courts are imposed by state law. Federal statutes sometimes limit the

285. *See, e.g.*, *Eliahu*, 919 F.3d at 712 (citing Matar v. Dichter, 563 F.3d 9, 14 (2d Cir. 2009)); Doe 1 v. Buratai, 318 F. Supp. 3d 218, 226 (D.D.C. 2018) (citing Belhas v. Ya'alon, 515 F.3d 1279, 1281 (D.C. Cir. 2008)).

286. *Miango*, 2019 WL 2191806, at *2.

287. Samantar v. Yousuf, 560 U.S. 305, 311 (2010).

288. *See* Republic of Mexico v. Hoffman, 324 U.S. 30, 34 (1945); *Ex parte* Peru, 318 U.S. 578, 588 (1943).

289. *See* Ingrid Wuerth, *The Future of the Federal Common Law of Foreign Relations*, 106 GEO. L.J. 1825, 1851 (2018) (noting that "there is no federal statute conferring or withholding subject matter jurisdiction on or from the federal courts based on an individual immunity determination").

290. Kontrick v. Ryan, 540 U.S. 443, 452 (2004).

291. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

292. *See id.* at 813–17 (describing abstention doctrines).

293. *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

294. *See infra* note 305 and accompanying text.

subject matter jurisdiction of state courts indirectly by giving federal courts exclusive jurisdiction over claims under those statutes. But federal common-law rules of immunity are trans-substantive and apply to all claims, even claims under state and foreign law. Foreign official immunity fits better into the federal scheme if treated as an affirmative defense. The act of state doctrine provides a useful comparison. Like foreign official immunity, it is a rule of federal common law that is binding on state courts,[295] and it provides "a substantive defense on the merits" when raised by a defendant.[296]

Third, foreign official immunity can be waived,[297] whereas limitations on subject matter jurisdiction generally cannot be waived.[298] It is true that, under the FSIA, a foreign state's waiver of immunity allows the exercise of subject matter jurisdiction. But that is because of the FSIA's peculiar structure: it grants subject matter jurisdiction over any action with respect to which a foreign state is not immune,[299] and a foreign state is not immune if it has waived its immunity.[300] Outside the FSIA framework, treating immunity as a question of subject matter jurisdiction implies that a party can directly waive a limitation on subject matter jurisdiction, which parties are not ordinarily able to do.

There is some precedent for treating foreign official immunity as a question of personal jurisdiction. Pre-FSIA admiralty cases tended to treat foreign state immunity as going to personal jurisdiction, as did the State Department's determinations of immunity between 1952 and 1976.[301] Some pre-*Samantar* cases also treated doctrines of foreign official immunity as depriving the court of personal jurisdiction.[302] And the fact that foreign official immunity can be waived presents no difficulty under this approach because a defendant can consent to personal jurisdiction.[303] Limits on personal jurisdiction by federal courts, however, are typically found in rules, statutes, and interpretations of the Constitution's Due Process Clauses, not in federal common law. Characterizing foreign official immunity as depriving a court of personal jurisdiction would be particularly problematic with respect to state courts. The Supreme Court has long based its authority to

295. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426–27 (1964); *see also* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 441 cmt. b (AM. L. INST. 2018) [hereinafter RESTATEMENT (FOURTH)] ("The act of state doctrine constitutes federal common law that . . . overrides any contrary rule of State law.").

296. Republic of Austria v. Altmann, 541 U.S. 677, 700 (2004). Unlike foreign official immunity, the act of state doctrine may also be invoked by a plaintiff seeking recognition of foreign laws. *See, e.g.*, *Sabbatino*, 376 U.S. at 398 (recognizing Cuban expropriation).

297. *See supra* note 101 and accompanying text.

298. *See* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982).

299. 28 U.S.C. § 1330.

300. *Id.* § 1605(a)(1); *see also* RESTATEMENT (FOURTH), *supra* note 295, § 421 reporters' note 2 (discussing waiver under the FSIA in relation to subject matter jurisdiction).

301. *See supra* notes 52–53 and accompanying text.

302. *See, e.g.*, Lafontant v. Aristide, 844 F. Supp. 128, 131–32 (E.D.N.Y. 1994) ("A head-of-state recognized by the United States government is absolutely immune from personal jurisdiction in United States courts unless that immunity has been waived by statute or by the foreign government recognized by the United States.").

303. *See Ins. Corp.*, 456 U.S. at 703.

review the exercise of personal jurisdiction by state courts exclusively in the Due Process Clause of the Fourteenth Amendment,[304] and it has disclaimed authority to impose other jurisdictional limits.[305]

The best way of characterizing foreign official immunity is as an affirmative defense. As noted above, this is how courts treated claims of conduct-based immunity during the early years of the republic, and at least some courts characterized sovereign immunity as an affirmative defense during the pre-FSIA period.[306] Indeed, this is precisely how a State Department guide for law enforcement treats the conduct-based immunity of consular officers today.[307] 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.[308] Indeed, it might be the only way to explain how the federal common law rules of foreign official immunity bind state courts, because rules of federal common law generally do not limit either the personal or the subject matter jurisdiction of state courts. The argument for treating foreign official immunity as an affirmative defense also finds support in an analogy to *domestic* official immunity, which is an affirmative defense under federal law.[309]

Foreign official immunity provides protection against the burdens of litigation and not just against liability. But treating such immunity as an affirmative defense still permits a court to decide the question at the outset of the proceedings. Although defendants often raise affirmative defenses in their answers,[310] such defenses can instead be raised in a motion to dismiss or a motion for summary judgment before filing an answer.[311] "This is especially true as to those affirmative defenses that seem likely to dispose of the entire case or a significant portion of the case," as does foreign official immunity.[312] As discussed below, discovery, if any, may be limited to what is necessary to decide the question of immunity.[313]

304. *See, e.g.*, Bristol-Myers Squibb Co. v. Super. Ct., 137 S. Ct. 1773, 1779 (2017) ("It has long been established that the Fourteenth Amendment limits the personal jurisdiction of state courts.").

305. *See, e.g.*, Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 413 n.7 (1984) (disclaiming authority to review interpretation of state long-arm statute); *cf.* Am. Dredging Co. v. Miller, 510 U.S. 443, 457 (1994) (holding that federal doctrine of forum non conveniens "is not applicable to the States").

306. *See, e.g.*, Chem. Nat. Res., Inc. v. Republic of Venezuela, 215 A.2d 864, 867 (Pa. 1966) ("Sovereign Immunity is in the nature of an affirmative defense . . . .").

307. *See* STATE DEPARTMENT GUIDANCE, *supra* note 154, at 11, 22.

308. *See supra* note 296 and accompanying text.

309. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982) (holding that qualified immunity "is an affirmative defense that must be pleaded by a defendant official").

310. *See* FED. R. CIV. P. 8(c).

311. *See* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1277 (3d ed. 2021); *cf. Harlow*, 457 U.S. at 818 (indicating that the qualified immunity of domestic officials may be decided on motion for summary judgment).

312. 5 WRIGHT & MILLER, *supra* note 311, § 1277.

313. *See infra* notes 348–52 and accompanying text.

Treating foreign official immunity as an affirmative defense would make it a merits question. This means that a federal court would have to determine that it has subject matter jurisdiction over the claim and personal jurisdiction over the parties before addressing immunity.[314] But in suits against foreign officials, questions of subject matter jurisdiction and personal jurisdiction are generally straightforward,[315] and in many cases they provide alternative grounds for dismissal that ought to be addressed first in any event.[316] Treating foreign official immunity as an affirmative defense would also modestly increase the preclusive effect of a judgment granting immunity. A federal court's dismissal for lack of subject matter jurisdiction precludes the plaintiff from bringing the same claim again in federal court but not in state court.[317] A federal court's dismissal based on an affirmative defense of foreign official immunity would additionally preclude the plaintiff from bringing the same claim in state court. If dismissal is based on a current official's status-based immunity, then the plaintiff could attempt to serve the official once that official is no longer in office and argue that the earlier judgment is not preclusive because the underlying facts have changed.[318] If dismissal is based on conduct-based immunity, then it should be conclusive on the matter.

Finally, treating foreign official immunity as an affirmative defense would not increase the risk of a default judgment or the risk that the official might inadvertently waive immunity by not raising it. This sometimes happens even now, when foreign official immunity is treated as a question of subject matter jurisdiction, but federal courts have been willing to grant relief from judgment under Federal Rule of Civil Procedure 60(b) when this occurs.[319] Although Rule 60(b)(4) is limited to situations where the judgment is void (for example, for lack of subject matter jurisdiction), Rule 60(b)(6) allows a court to grant relief from judgment for "any other reason that justifies

314. Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 430–31 (2007) (noting that "a federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit (subject-matter jurisdiction) and the parties (personal jurisdiction)").

315. As noted above, courts will generally lack personal jurisdiction over foreign officials unless the cause of action arose in the United States or the official can be served with process here. *See supra* notes 279–80 and accompanying text.

316. *See infra* notes 353–67 and accompanying text. As explained below, because international law is agnostic about the details of how states implement their international legal obligations, dismissal on these threshold grounds would comply with the United States's obligation to shield foreign officials from the burdens of litigation, where such an obligation clearly exists. *See infra* notes 325–28 and accompanying text.

317. *See* 18A WRIGHT & MILLER, *supra* note 311, § 4436 ("The judgment remains effective to preclude relitigation of the precise issue of jurisdiction or venue that led to the initial dismissal.").

318. Because status-based immunity lasts only as long as the official holds office, dismissal on such grounds would not bar the plaintiff from refiling once the immunity has ended. *See id.* § 4437 ("In ordinary circumstances a second action on the same claim is not precluded by dismissal of a first action for prematurity or failure to satisfy a precondition to suit.").

319. *See, e.g.*, Miango v. Democratic Republic of the Congo, No. 15-1265, 2019 WL 2191806, at *2 (D.D.C. Jan. 19, 2019) (granting relief from default judgment on grounds of head-of-state immunity).

relief."[320] Courts have relied on this provision to grant relief from judgment to domestic officials based on qualified immunity,[321] and it would seem to be equally available to foreign officials. It is important to recall that the immunity of foreign officials ultimately belongs to their states.[322] When a foreign official is sued, a U.S. court should, if possible, give notice to the foreign state or require the plaintiff to do so in order to afford the foreign state an opportunity to assert or waive immunity. But when the foreign state learns of a suit only after final judgment, Rule 60(b) should allow the foreign state to have the judgment set aside by asserting the immunity of its official.[323] Finally, decisions on foreign official immunity should be immediately appealable but, as discussed further below, treating the question as an affirmative defense would not prevent this.[324]

Customary international law clearly requires the United States to recognize the immunity of foreign officials in at least some instances. However, international law does not dictate how such immunity is implemented in the U.S. legal system so long as immunity is treated as a threshold question. As a general matter, "international law does not itself prescribe how it should be applied or enforced at the national level."[325] In international law, immunity from suit is often referred to as "immunity from jurisdiction," but only to distinguish it from "immunity from enforcement," which is governed by different, and more stringent, international law rules.[326] Addressing state immunity in *Jurisdictional Immunities*, the ICJ observed:

> Immunity from jurisdiction is an immunity not merely from being subjected to an adverse judgment but from being subjected to the trial process. It is, therefore, necessarily preliminary in nature. Consequently, a national court is required to determine whether or not a foreign State is entitled to immunity as a matter of international law before it can hear the merits of the case brought before it and before the facts have been established.[327]

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320. FED. R. CIV. P. 60(b)(6); *see also* 11 WRIGHT & MILLER, *supra* note 311, § 2864 (discussing Rule 60(b)(6)).

321. *See, e.g.*, Aczel v. Labonia, 584 F.3d 52, 61 (2d Cir. 2009) (affirming a jury's finding that a police officer was entitled to qualified immunity).

322. *See supra* note 100 and accompanying text.

323. Both the VCDR and the VCCR require that a foreign state's waiver of diplomatic and consular immunity be "express." VCDR, *supra* note 22, art. 32(2); VCCR, *supra* note 22, art. 45(2). But the State Department does not appear to view these provisions as a bar to treating foreign official immunity as an affirmative defense, since it explicitly advises law enforcement officials to treat consular immunity that way. *See* STATE DEPARTMENT GUIDANCE, *supra* note 154, at 11, 22.

324. *See infra* notes 379–88 and accompanying text.

325. Eileen Denza, *The Relationship Between International and National Law*, *in* INTERNATIONAL LAW 423, 423 (Malcolm D. Evans ed., 2d ed. 2006); *see also* RESTATEMENT (THIRD), *supra* note 102, § 111 cmt. h ("In the absence of special agreement, it is ordinarily for the United States to decide how it will carry out its international obligations.").

326. *See, e.g.*, Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. 99, ¶ 113 (Feb. 3) (distinguishing immunity from jurisdiction and immunity from enforcement).

327. *Id.* ¶ 82. Although the customary international law governing foreign official immunity will not always be the same as the customary international law governing foreign

As long as a foreign official can raise a claim of immunity at the outset and avoid having to bear the burdens of litigation, customary international law is indifferent about how domestic procedural law characterizes the question of immunity. The U.S. executive branch has avoided taking a position in legal filings on how foreign official immunity should be characterized for pleading purposes, noting simply that "[f]oreign official immunity, like foreign state immunity, is a threshold question."[328] Yet even though state immunity is a "threshold question" under the FSIA, the foreign state must still appear and contest the application of an enumerated exception to immunity, and occasionally submit to limited jurisdictional discovery if relevant facts are disputed. It is not unreasonable, or inconsistent with the United States's international legal obligations, to expect foreign officials to do the same.

In sum, the reasons for treating foreign state immunity as a question of subject matter jurisdiction do not apply to foreign official immunity. It makes more sense to characterize the immunity of foreign officials as an affirmative defense, similar to courts' treatment of domestic official immunity. Procedurally, foreign official immunity can still be treated as a threshold issue, a ground for relief from a final judgment, and a question that is immediately appealable, as it is now. But treating foreign official immunity as an affirmative defense would affect the burden of proof, as the next part discusses.

C. Proving Immunity

It is one thing to plead immunity and another thing to prove it. Status-based immunity rarely requires complex factual determinations. For example, head-of-state immunity turns on a single fact—the defendant's status as head of state, head of government, or foreign minister—and the executive has unreviewable authority to determine whom the United States recognizes as holding those offices. Diplomatic immunity also turns primarily on the defendant's status as a diplomatic agent, which is also a question for the executive, although some exceptions to diplomatic immunity may require the determination of other facts.

Conduct-based immunity determinations can sometimes be more factually complicated, which raises both substantive and procedural questions. As we have seen, such immunity requires determining whether the suit is based on actions taken in the defendant's official capacity, which can involve questions of foreign law and international law, as well as disputed questions of fact. Foreign governments may assert that officials were acting within their official capacity, raising questions of the weight to be given to such assertions. The State Department might suggest conduct-based immunity. And sometimes discovery will be needed to answer factual questions relevant

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state immunity, both appear to treat it as immunity from suit and therefore as a preliminary question.

328. Statement of Interest Submitted by the United States of America at 9, Miango v. Democratic Republic of the Congo, No. 15-1265, 2020 WL 3498586 (D.D.C. June 29, 2020).

to the immunity determination. This part considers each of these questions about how to prove conduct-based immunity.

1. Burdens of Proof

Federal courts have struggled with how to allocate the burden of proof on questions of foreign official immunity. Although the D.C. Circuit treats foreign official immunity as a question of subject matter jurisdiction, it has held that the defendant bears the burden of proof.[329] The court borrowed this burden-shifting approach from the FSIA, based on that statute's legislative history.[330] The Second Circuit has criticized this borrowing, noting correctly that "common law foreign-official immunity is distinct from FSIA immunity and predates the FSIA."[331] The Second Circuit went on to hold that the plaintiff bears the burden of proving that the defendant *lacks* immunity, at least when the defendant claims diplomatic immunity.[332]

Generally, the party invoking federal subject matter jurisdiction bears the burden of alleging and proving facts sufficient to support it.[333] If, on the other hand, foreign official immunity is characterized as an affirmative defense, the burden of proof would lie with the defendant.[334] This is how federal law treats the qualified immunity of domestic officials.[335] Requiring foreign officials to demonstrate their entitlement to foreign official immunity also makes practical sense. For status-based immunity, the burden is minimal because the defendants must simply show that they hold offices that are entitled to such immunity.[336] Conduct-based immunity may be more fact-dependent, but foreign officials are likely to have better access to relevant facts about the capacity in which they were acting, the content of foreign law, and the views of their own governments.

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329. Lewis v. Mutond, 918 F.3d 142, 145 (D.C. Cir. 2019).

330. H.R. REP. NO. 94-1487, at 17 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6616 (characterizing foreign state immunity as "an affirmative defense" and stating that "[t]he ultimate burden of proving immunity would rest with the foreign state"); *see also* Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445, 451 (6th Cir. 1988) (citing legislative history in support of burden shifting).

331. Broidy Cap. Mgmt. LLC v. Benomar, 944 F.3d 436, 444 n.6 (2d Cir. 2019). The U.S. government has argued that the burden-shifting approach is mistaken, even with respect to questions of state immunity under the FSIA. *See Broidy* Letter Brief, *supra* note 202, at 17 ("That snippet of legislative history is inconsistent with the text of the FSIA.").

332. *Broidy*, 944 F.3d at 444.

333. *See* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994); McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 182 (1936).

334. If foreign official immunity were treated as a question of personal jurisdiction, it is not entirely clear where the burden of proof would lie. With respect to the constitutional requirements of minimum contacts and reasonableness, courts have generally held that the burden is on the plaintiff, but the burden then shifts to the defendant to show that the exercise of jurisdiction would not be reasonable. *See, e.g.*, M-I Drilling Fluids UK Ltd. v. Dynamic Air Ltda., 890 F.3d 995, 1000 (Fed. Cir. 2018); Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004).

335. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982) ("Qualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official." (quoting Gomez v. Toledo, 446 U.S. 635, 636 (1980))).

336. *See supra* notes 123–31 and accompanying text.

2. Determinations by the United States and by Foreign Governments

No matter who bears the burden of proof, whether foreign officials are entitled to immunity often turns on questions of fact. Sometimes the U.S. executive branch or foreign governments will express views on those facts, and sometimes discovery will be necessary. This part discusses how courts should treat factual submissions by the United States and foreign governments, and the following part turns to discovery.

As discussed in Part III, it is well established that executive branch suggestions of head-of-state immunity are controlling because the executive has constitutional authority to determine who holds these offices. Diplomatic immunity also turns largely on a person's status. However, the Vienna Convention creates exceptions to a diplomatic agent's immunity from civil suits for actions relating to real property, actions relating to succession, and actions relating "to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions."[337] Applying these exceptions may require jurisdictional discovery, which the district court has authority to grant.[338]

Conduct-based immunity for acts taken in an "official capacity" will often turn on factual determinations beyond the defendant's status. Whether foreign officials were acting within the scope of their authority depends in part on foreign law. The State Department has no special expertise in interpreting or applying foreign law. Foreign governments obviously do have expertise with respect to their own laws but may be tempted to bend the interpretation to shield their officials from suit in the United States. As noted above, U.S. courts "should accord respectful consideration to a foreign government's submission,"[339] but the ultimate determination of what foreign law permits remains a question for the court. Foreign officials would not be entitled to conduct-based immunity for acts that exceeded their authority under foreign law.

Finally, whether a foreign official was acting in an official capacity may depend on the facts of the particular case. Generally speaking, courts are in a better position to resolve factual questions than the State Department or foreign governments are,[340] as the State Department appears to recognize. For example, in one recent case, plaintiffs who were protesting outside the Washington, D.C., hotel of the Congolese president brought suit against the president and several Congolese officials, alleging that they had been beaten and robbed by those officials.[341] After entry of a default judgment, the

337. VCDR, *supra* note 22, art. 31(1)(c).

338. *See* Broidy Cap. Mgmt. LLC v. Benomar, 944 F.3d 436, 445–47 (2d Cir. 2019). Jurisdictional discovery is discussed below in Part IV.B.4.

339. Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865, 1869 (2018).

340. For claims that arise abroad, the foreign government might have better access to the facts, but it will often have an incentive not to disclose them. *Cf. Animal Sci. Prods., Inc.*, 138 S. Ct. at 1873 (noting that when a foreign government "offers an account in the context of litigation, there may be cause for caution in evaluating the foreign government's submission").

341. Miango v. Democratic Republic of the Congo, No. 15-1265, 2020 WL 3498586, at *1–2 (D.D.C. June 29, 2020).

United States filed a suggestion of immunity for Congo's president as head-of-state,[342] and the district court vacated the judgment against him.[343] Subsequently, the United States filed a statement of interest with respect to the other Congolese officials.[344] The State Department determined that the foreign officials were not entitled to diplomatic immunity,[345] but that further factual development was necessary to determine whether the officials were entitled to conduct-based immunity.[346] The State Department did not attempt to determine the facts for itself, suggesting instead that the district court should engage in limited discovery relevant to the question of immunity.[347]

3. Discovery

Sometimes discovery may be needed to determine facts relevant to foreign official immunity, even though such immunity is properly treated as a threshold matter. This is true regardless of whether such immunity is characterized as an affirmative defense or as a question of personal or subject matter jurisdiction. It has long been established that "discovery is available to ascertain the facts bearing on [jurisdictional] issues."[348]

The Supreme Court has recently affirmed the availability of limited jurisdictional discovery in the context of foreign state immunity under the FSIA.[349] The United States has argued with respect to discovery that "[t]he same principle applies to factual questions controlling a foreign official's immunity from suit."[350] One can seek guidance from the case law on discovery from foreign states without risking the fallacy of inappropriate borrowing from an inapplicable statute. That is because, with the exception of one limited provision, the FSIA simply does not address discovery.[351]

In cases against foreign states, lower courts have held that discovery "should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination."[352] Since both foreign state immunity and foreign official immunity serve the purpose of protecting the

342. U.S. *Miango* Suggestion, *supra* note 122.

343. Miango v. Democratic Republic of the Congo, No. 15-1265, 2019 WL 2191806, at *2 (D.D.C. Jan. 19, 2019).

344. Statement of Interest Submitted by the United States of America, Miango v. Democratic Republic of the Congo, No. 15-1265, 2020 WL 3498586 (D.D.C. June 29, 2020) [hereinafter U.S. *Miango* Statement].

345. *Id.* at 4–7.

346. *Id.* at 9.

347. *Id.*

348. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 n.13 (1978).

349. Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1316–17 (2017) (noting that "where jurisdictional questions turn upon further factual development, the trial judge may take evidence and resolve relevant factual disputes").

350. U.S. *Miango* Statement, *supra* note 344, at 9.

351. *See* Republic of Argentina v. NML Cap., Ltd., 573 U.S. 134, 142–43 (2014).

352. Packsys, S.A. de C.V. v. Exportadora de Sal, S.A. de C.V., 899 F.3d 1081, 1094 (9th Cir. 2018) (quoting Alpha Therapeutic Corp. v. Nippon Hoso Kyokai, 199 F.3d 1078, 1088 (9th Cir. 1999)); *see also* Arch Trading Corp. v. Republic of Ecuador, 839 F.3d 193, 206–07 (2d Cir. 2016) (similar); Arriba Ltd. v. Petroleos Mexicanos, 962 F.2d 528, 534 (5th Cir. 1992) (similar).

defendant from the burdens of litigation, it seems appropriate that the same approach should apply in cases against foreign officials. Whether foreign official immunity is characterized as jurisdictional or as an affirmative defense, it remains a threshold issue, and the district court should limit discovery to what is necessary to decide the immunity question.

D. 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.[353] 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."[354] The Court of Appeals observed:

> [P]rimacy of immunity values need not imply priority of immunity determination. Immunity should reduce the expenses, in time and inconvenience, imposed on foreign sovereigns by litigation in U.S. courts. If one (or more) of the other jurisdictional defenses hold out the promise of being cheaply decisive, and the defendant wants it decided first, it may well be best to grapple with it (or them) first. 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.[355]

During the period between the Tate Letter in 1952 and enactment of the FSIA in 1976, the State Department "generally refused to decide immunity claims while [other] jurisdictional defenses remained to be decided by the court,"[356] even if the foreign country wanted the State Department to prioritize its request for a suggestion of immunity. Although today the State Department does not insist that courts decide such defenses first in foreign official immunity cases, it has noted in recent filings that "a court need not address the immunity question until it has first reached determinations on

353. *See* Harold Hongju Koh, *Foreign Official Immunity After* Samantar*: A United States Government Perspective*, 44 VAND. J. TRANSNAT'L L. 1141, 1158–59 (2011) (identifying category of "'non-*Samantar* procedural cases,' in which the issue of foreign official immunity is not squarely presented because of a threshold flaw such as lack of personal jurisdiction, improper service of process, *forum non conveniens*, the absence of necessary parties, or because the official is not the real party in interest"); *see also* Bellinger & Wirth, *supra* note 126, at 466 (noting that dismissal on alternative grounds "conserves [State Department] resources").

354. *In re* Papandreou, 139 F.3d 247, 254 (D.C. Cir. 1998).

355. *Id.*

356. Sovereign Immunity Decisions, *supra* note 52, at 1019; *see, e.g.*, *id.* at 1072 (reporting that in *Pacheo Ruiz v. Air France*, "[t]he Department declined action pending resolution by the court of a question of sufficiency of service"); *id.* at 1073 (reporting that in *Soobitsky v. Ger. Fed. R.R.*, "[t]he Department declined to make a decision pending resolution of a defense of insufficient service of process"); *id.* at 1074 (reporting that in *Granados v. Linea Aeropostal Venezolava*, "[t]he Department declined action pending the resolution of certain outstanding jurisdictional issues by the court").

other threshold issues, including whether a foreign official defendant has been properly served and whether the court has personal jurisdiction."[357]

A number of alternative grounds for dismissal are available regardless of whether foreign official immunity is characterized as a question of subject matter or personal jurisdiction or as an affirmative defense. The U.S. Supreme Court held in *Sinochem* that "a federal court has leeway 'to choose among threshold grounds for denying audience to a case on the merits.'"[358] A federal court is thus free to dismiss for lack of personal jurisdiction without reaching the question of subject matter jurisdiction.[359] And a federal court is free to dismiss on grounds of forum non conveniens without reaching either subject matter or personal jurisdiction.[360] Even though most federal courts today treat foreign official immunity as a question of subject matter jurisdiction, a large number of decisions have either dismissed claims against foreign officials on alternative grounds without reaching the question of immunity[361] or have noted the availability of alternative grounds in addition to immunity.[362]

A good example is *Chen v. Shi*.[363] There, Chinese members of the Falun Gong movement residing in the United States brought human rights claims against a Chinese official under the Alien Tort Statute (ATS) and the TVPA. The plaintiffs moved for default judgment when the defendant, who was still

357. Suggestion of Immunity and Statement of Interest of the United States of America at 3 n.2, Savang v. Lao People's Democratic Republic, No. 16-02037 (E.D. Cal. July 23, 2018). The U.S. reference to personal jurisdiction here refers to rules other than immunity.

358. Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 431 (2007) (quoting Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 585 (1999)).

359. *Ruhrgas*, 526 U.S. at 578.

360. *Sinochem*, 549 U.S. at 432.

361. *See, e.g.*, Doe 1 v. Buratai, 792 F. App'x 6, 10 (D.C. Cir. 2019) (per curiam) (affirming dismissal for lack of personal jurisdiction); Doe 1 v. Buratai, No. 18-7170, 2019 WL 668339, at *1 (D.C. Cir. Feb. 15, 2019) (affirming dismissal for lack of personal jurisdiction); RSM Prod. Corp. v. Fridman, 387 F. App'x 72, 75 (2d Cir. 2010) (affirming for failure to state a claim); Sequeira v. Republic of Nicaragua, No. 16-25052, 2017 WL 8772507, at *11 (S.D. Fla. Aug. 1, 2017) (dismissing for lack of diversity jurisdiction); Kaldawi v. State of Kuwait, No. 14-07316, 2017 WL 6017293, at *9 (C.D. Cal. Mar. 17, 2017) (declining to enter default judgment because of lack of personal jurisdiction and insufficient pleading); S.K. Innovation, Inc. v. Finpol, 854 F. Supp. 2d 99, 118 (D.D.C. 2012) (denying leave to amend because proposed amended complaint did not establish personal jurisdiction); Habyarimana v. Kagame, 821 F. Supp. 2d 1244, 1257 (W.D. Okla. 2011) (setting aside default judgment against head of state for failure to serve process before the State Department had made a suggestion of immunity); *In re* Terrorist Attacks on Sept. 11, 2001, 718 F. Supp. 2d 456, 467 (S.D.N.Y. 2010) (dismissing for lack of personal jurisdiction).

362. *See, e.g.*, Doe 1 v. Buratai, 318 F. Supp. 3d 218, 230 (D.D.C. 2018) (dismissing for lack of personal jurisdiction); Newman v. Jewish Agency for Isr., No. 16-7593, 2017 WL 6628616, at *3 (S.D.N.Y. Dec. 28, 2017) (noting lack of personal jurisdiction as an additional ground for dismissal); Omari v. Ras Al Khaimah Free Trade Zone Auth., No. 16–3895, 2017 WL 3896399, at *9 (S.D.N.Y. Aug. 18, 2017) (dismissing certain claims for failure to state a claim before addressing immunity); Mireskandari v. Mayne, No. 12-3861, 2016 WL 1165896, at *20 (C.D. Cal. Mar. 23, 2016) (noting lack of personal jurisdiction as alternative ground for dismissal); Fotso v. Republic of Cameroon, No. 12–1415, 2013 WL 3006338, at *6 n.4 (D. Or. June 11, 2013) (noting lack of personal jurisdiction as alternative ground for dismissal).

363. No. 09-8920, 2013 WL 3963735 (S.D.N.Y. Aug. 1, 2013).

in China, failed to appear.[364] Although the district court invited the State Department to express its views on foreign official immunity, the Department declined to do so.[365] Rather than determine the question of foreign official immunity, which would have required the court to address factual questions, as well as whether conduct-based immunity extends to human rights violations, the court dismissed all the claims for lack of personal jurisdiction under New York's long-arm statute[366] and the ATS claims for lack of subject matter jurisdiction, in light of the Supreme Court's decision in *Kiobel*.[367] Because those grounds provided simpler, dispositive grounds for dismissal, there was no need for the court to reach the more complicated 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.[368] To be clear, the question here is not whether the plaintiff has failed to state a claim because the foreign official *is* entitled to immunity[369] but rather whether the plaintiff has failed to state a claim even if the foreign official *were not* entitled to immunity. Under the pleading standard adopted by the Supreme Court in *Twombly*[370] and *Iqbal*,[371] "[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.'"[372] Some complaints against foreign officials contain no more than "conclusory statements" and fail to establish a plausible claim under applicable law.[373] In such cases, dismissal for failure to state a claim may be the simplest ground on which to dispose of a case.

For example, it appears from the State Department's submission that the claims in *Doğan v. Barak*[374] against a former Israeli defense minister for torture and extrajudicial killing during the interception of the Gaza Freedom Flotilla by Israel Defense Forces (IDF) in 2010 could have been dismissed for failure to state a claim without reaching the question of foreign official

364. *Id.* at *1.
365. *Id.* at *3.
366. *Id.* at *4–5.
367. *Id.* at *7.
368. A few decisions have dismissed suits against foreign officials for failure to state a claim but without considering how foreign official immunity should be characterized. *See, e.g.*, RSM Prod. Corp. v. Fridman, 387 F. App'x 72, 75 (2d Cir. 2010); Omari v. Ras Al Khaimah Free Trade Zone Auth., No. 16-3895, 2017 WL 3896399, at *9 (S.D.N.Y. Aug. 18, 2017); Kaldawi v. State of Kuwait, No. 14-07316, 2017 WL 6017293, at *9 (C.D. Cal. Mar. 17, 2017).
369. As noted above, 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. *See supra* notes 310–11 and accompanying text.
370. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).
371. Ashcroft v. Iqbal, 556 U.S. 662 (2009).
372. *Id.* at 678 (quoting *Twombly*, 550 U.S. at 570).
373. *Id.* As Professor Arthur Miller has observed, *Twombly* and *Iqbal* "ignore the reality that at the outset of many cases there is a significant information asymmetry between plaintiffs and defendants, typically favoring defendants." Arthur R. Miller, *What Are Courts For?: Have We Forsaken the Procedural Gold Standard?*, 78 LA. L. REV. 739, 751 (2018).
374. 932 F.3d 888 (9th Cir. 2019).

immunity. The State Department's suggestion of immunity indicated that "[t]he [c]omplaint . . . d[id] not allege any conduct by former Defense Minister Barak in the events leading to Doğan's death beyond his general participation in the planning of the interception of the flotilla and his issuance of unspecified orders to the IDF forces who intercepted it."[375] The district court could have concluded that the alleged link between Barak's decisions and the death of civilians on board the Mavi Marmara was too attenuated to state a plausible claim for relief under applicable law.[376] By dismissing on Federal Rule of Civil Procedure 12(b)(6) grounds rather than immunity grounds, courts can also avoid creating overly expansive immunity doctrines that could erode plaintiffs' ability to seek relief in other cases.

Failure to state a claim is a threshold ground for dismissal that spares the defendant the burden of litigation. But it is also a decision on the merits,[377] and "a federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit (subject-matter jurisdiction) and the parties (personal jurisdiction)."[378] Only if foreign official immunity is considered an affirmative defense is dismissal for failure to state a claim a viable alternative to dismissal on immunity grounds, although a court would have to determine that it had personal and subject matter jurisdiction before considering the sufficiency of the complaint.

E. Appealing Immunity Decisions

Decisions on foreign official immunity should be immediately appealable, regardless of whether such immunity is characterized as an affirmative defense or as a question of personal or subject matter jurisdiction. Decisions granting immunity are appealable as final decisions of the district court.[379] Decisions denying immunity are not final decisions. But because foreign official immunity is an immunity not only from liability but also from the burdens of trial, immediate appealability is necessary to ensure that immunity performs its intended function.

Under the collateral order doctrine, the Supreme Court has recognized a small class of prejudgment orders that "are immediately appealable because

375. *Doğan* Letter, *supra* note 221, at 1.

376. *See* Yuval Shany & Keren R. Michaeli, *The Case Against Ariel Sharon: Revisiting the Doctrine of Command Responsibility*, 34 N.Y.U. J. INT'L. L. & POL. 797, 816–67 (2002) (discussing command responsibility under international law). The claims against former Mexican President Ernesto Zedillo for the 1997 massacre of villagers in Chiapas, Mexico, by paramilitary groups might similarly have been dismissed for failure to state a claim. *See* Zedillo Letter, *supra* note 158, at 2 (noting "the generalized allegations in the instant complaint").

377. Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 399 n.3 (1981) ("The dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a 'judgment on the merits.'").

378. Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 430–31 (2007); *see also In re* Lipitor Antitrust Litig., 855 F.3d 126, 151 (3d Cir. 2017).

379. 28 U.S.C. § 1291 ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .").

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.'"[380] The federal courts of appeals have held that orders denying foreign state immunity under the FSIA are immediately appealable.[381] Because foreign state immunity "is an immunity from suit rather than a mere defense to liability[,] it is effectively lost if a case is erroneously permitted to go to trial."[382] The Fourth Circuit has applied the same reasoning to decisions denying foreign official immunity.[383]

How foreign official immunity is characterized should not affect this result. If foreign official immunity is characterized as a question of personal or subject matter jurisdiction, it should be immediately appealable because these questions are separate from the merits. But even if foreign official immunity were considered an affirmative defense, it should still be immediately appealable. Courts may look for guidance on this question to the Supreme Court's treatment of qualified immunity. In *Harlow v. Fitzgerald*,[384] the Supreme Court held that qualified immunity "is an affirmative defense that must be pleaded by a defendant official."[385] But in *Mitchell v. Forsyth*,[386] the Court went on to hold "that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment."[387] This is so because qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation."[388] The same reasoning applies to foreign official immunity as an affirmative defense. Thus, no matter how foreign official immunity is characterized for pleading purposes, decisions granting or denying such immunity should be immediately appealable.

380. Behrens v. Pelletier, 516 U.S. 299, 305 (1996) (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)).

381. *See, e.g.*, Frank v. Commonwealth of Antigua & Barbuda, 842 F.3d 362, 366–67 (5th Cir. 2016); O'Bryan v. Holy See, 556 F.3d 361, 372 (6th Cir. 2009); Rux v. Republic of Sudan, 461 F.3d 461, 467 n.1 (4th Cir. 2006); Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 443 (D.C. Cir. 1990); Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic, 877 F.2d 574, 576 n.2 (7th Cir. 1989); Compania Mexicana de Aviacion, S.A. v. Cent. Dist. of Cal., 859 F.2d 1354, 1356 (9th Cir. 1988) (per curiam).

382. *Compania Mexicana*, 859 F.2d at 1358; *see also Rush-Presbyterian*, 877 F.2d at 576 n.2 ("Since sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits, the denial of a claim of sovereign immunity is an immediately appealable interlocutory order . . . .").

383. *See* Broidy Cap. Mgmt. LLC v. Muzin, No. 20-7040, 2021 WL 3950185, at *5 (D.C. Cir. Sept. 3, 2021); Warfaa v. Ali, 811 F.3d 653, 658 (4th Cir. 2016); Yousuf v. Samantar, 699 F.3d 763, 768 (4th Cir. 2012); *see also* Farhang v. Indian Inst. of Tech., 655 F. App'x 569, 570 (9th Cir. 2016) (allowing appeal of foreign official immunity determination under the collateral order doctrine without discussion).

384. 457 U.S. 800 (1982).

385. *Id.* at 815.

386. 472 U.S. 511 (1985).

387. *Id.* at 530.

388. *Id.* at 526.

CONCLUSION

Samantar's holding that the FSIA does not apply to foreign officials tore up the map that many courts had been following. And in the decade since, U.S. courts have struggled to find their way. But, as this Article has shown, there are answers to the questions that courts face in suits against foreign officials, even without a statute and without blindly following the executive's lead.

The substantive law of status-based immunity is relatively clear. Heads of state, heads of government, and foreign ministers are absolutely immune from suit during their tenure in office. Under the relevant treaties, diplomats are also entitled to nearly absolute immunity, whereas consuls are entitled to immunity for their official acts. Other foreign officials, as well as former officials, are entitled to immunity for acts taken in their "official capacity." In developing the federal common law of foreign official conduct-based immunity in the absence of an applicable statute or treaty, courts should listen carefully to the views of the executive branch. But unless the question involves a foreign official's status, courts are not bound to follow the executive's case-specific suggestions or its articulation of general principles governing immunity determinations.

There are also clear answers to the procedural questions raised by these cases. The familiar rules for service of process, personal jurisdiction, and subject matter jurisdiction apply in suits against foreign officials. Foreign official immunity should be treated as an affirmative defense, with the burden of proof on the official claiming immunity. The official's scope of authority under foreign law is a question of law for the court, just like any other question of foreign law. When immunity turns on questions of fact, a court may permit limited discovery. If it appears that the case should be dismissed on other grounds—such as lack of personal or subject matter jurisdiction, forum non conveniens, or failure to state a claim—courts should address those grounds first and avoid the question of immunity in order to shield the foreign official from the burdens of suit to the greatest extent possible. And when a court reaches the question of immunity and denies the foreign official's claim, that decision should be immediately appealable to spare the official from having to litigate liability before the immunity claim is resolved definitively.

Congress can certainly address foreign official conduct-based 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.