



## Foreign Official Immunity After *Samantar*: A United States Government Perspective

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I am delighted to speak here at Vanderbilt regarding the U.S. Government's perspective on Foreign Official Immunity after *Samantar v. Yousuf*.<sup>1</sup> In the *Samantar* case, the U.S. Supreme Court unanimously held that the immunity of foreign government officials

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1. 130 S. Ct. 2278 (2010).

sued in their personal capacity in U.S. courts, including for alleged human rights violations, is not controlled by the Foreign Sovereign Immunities Act of 1976,<sup>2</sup> but rather, by immunity determinations made by the Executive Branch. Let me break my topic today into three parts: first, the world of foreign official immunity as it existed before the *Samantar* case; second, the Supreme Court's decision in *Samantar* and its implications; and third, the State Department's "New *Samantar* Process," which has been emerging since the Supreme Court's decision—focusing, in particular, on distinguishing what we call *Samantar* issues from non-*Samantar* issues, the effect of a State Department suggestion of immunity, and the effect of State Department silence with respect to a foreign official's claim of immunity.

### I. THE WORLD BEFORE *SAMANTAR*

As almost every American international lawyer knows, the world before the Foreign Sovereign Immunities Act was one in which the U.S. Executive Branch was long considered the appropriate body to determine official immunity by providing courts with so-called suggestions of immunity. The State Department's practice regarding foreign official immunity grew out of its historical practice regarding foreign sovereign immunity. The 1812 decision in *The Schooner Exchange v. McFaddon* set out the early framework for foreign sovereign immunity, whereby wrongs perpetrated by foreign sovereigns were recognized as appropriate "for diplomatic, rather than legal," resolution.<sup>3</sup> Due to the potentially significant foreign policy consequences of subjecting another sovereign state to suit in our courts, the courts looked to the "political branch of the government charged with the conduct of foreign affairs" to decide whether immunity should be recognized.<sup>4</sup>

Traditionally, the State Department provided the judiciary with suggestions of immunity, based upon the Department's judgments regarding customary international law and reciprocal practice.<sup>5</sup> Before 1952, the State Department followed a theory of absolute foreign sovereign immunity for friendly sovereigns. Under that doctrine, "a sovereign cannot, without [its] consent, be made a respondent in the courts of another sovereign" regardless of the nature of the acts alleged to have been committed.<sup>6</sup> The Department

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2. 28 U.S.C. §§ 1330, 1602–1611 (2006).

3. 11 U.S. (7 Cranch) 116, 137, 146 (1812).

4. *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34 (1945).

5. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487 (1983).

6. *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199 (2007) (quoting Letter from Jack B. Tate, Acting Legal Adviser, Dep't of

would file “suggestions of immunity” with the court, invoking considerations of international law and international comity to request sovereign immunity in particular cases, and the U.S. courts generally gave absolute deference to those suggestions.<sup>7</sup> As the State Department’s practice with regard to suggestions of immunity evolved over time, courts came to adopt a two-track process, under either track looking to State Department policy to see whether official immunity was appropriate. Under one track—which I will call the “suggestion” track—if the State Department offered a suggestion of immunity, the court would allow that immunity and dismiss the case. Under the second track—which I will call the “silence” track—if the State Department stayed silent in a case where a foreign official’s immunity was at issue, the court would decide on its own “whether all the requisites for such immunity existed,” considering “whether the ground of immunity is one which it is the established policy of [the State Department] to recognize.”<sup>8</sup>

In 1952, Acting Legal Adviser of the State Department, Jack Tate,<sup>9</sup> sent a famous letter to the Acting Attorney General that became known as the “Tate Letter.”<sup>10</sup> The Tate Letter announced the United States’ adherence to the “restrictive theory” of sovereign immunity, which extended immunity to a foreign state for its public acts, but not for its commercial acts. Tate pointed out that 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” and that this shift away from absolute immunity was consistent with the practices of other countries.<sup>11</sup> The Tate Letter marked a tectonic shift in immunity theory, inasmuch as it recognized that the commercial revolution, in which virtually all foreign states had become involved, had caused their entry into the global marketplace in a way that required a move away from an

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State, to Philip B. Perlman, Acting Att’y Gen. (May 19, 1952) [hereinafter Tate Letter], reprinted in 26 DEP’T ST. BULL. 984 (1952)).

7. *Samantar v. Yousuf*, 130 S. Ct. 2278, 2285 (2010); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES ch. 5, intro. note (1987).

8. *Samantar*, 130 S. Ct. at 2284 (quoting *Hoffman*, 324 U.S. at 36 and *Ex parte Republic of Peru* 318 U.S. 578, 587 (1943)).

9. For the historical record, let me note with pride my own passing connection with the great Jack Tate, and the opposite paths that we took to arrive here in Tennessee. I was lucky enough to serve as Dean of Yale Law School, to become the Legal Adviser in 2009, and to come here to Tennessee for this keynote lecture. Jack Tate took the inverse path. Born in Bolivar, Tennessee, in 1902, he graduated from the University of Tennessee at Knoxville in 1924. After his historic service as Acting Legal Adviser, he moved to New Haven, Connecticut, where he served for many years as the beloved Deputy Dean of Yale Law School. There, he showed great kindness to my whole family, and his wonderful wife Elizabeth became my older sister’s revered high school English teacher!

10. Tate Letter, *supra* note 6, at 984–85.

11. *Id.* at 985.

unyielding doctrine of absolute foreign sovereign immunity toward a more nuanced doctrine of restrictive foreign sovereign immunity by executive suggestion.

After 1952, the State Department relied upon the restrictive theory to inform any suggestions of immunity it provided to courts, whether with respect to foreign sovereigns, agencies or instrumentalities, or foreign officials, and courts largely continued to defer to the Department's case-by-case suggestions.<sup>12</sup> During the next quarter century, the State Department rendered only four reported determinations with respect to immunity, in the absence of an applicable treaty or statute, in suits against individual foreign officials who were not heads of state.<sup>13</sup>

In several respects, the practice of executive suggestions of immunity with respect to foreign states was flawed. First, as several Legal Advisers acknowledged, the informality of the State Department's internal procedures did not provide the sort of process that sovereign states believed was due.<sup>14</sup> Second, critics charged that

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12. See Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 SUP. CT. REV. 213, 219–20.

13. See generally Sovereign Immunity Decisions of the Department of State, May 1952 to January 1977, 1977 DIGEST, at 1017 [hereinafter Sovereign Immunity Decisions]. In 1960, after the State Department recognized immunity, the court dismissed a suit against a Canadian consular officer who was sued for making statements to induce the plaintiff to move to Canada, on the ground that “[a] consular official is immune from suit when the acts complained of were performed in the course of his official duties.” *Waltier v. Thomson*, 189 F. Supp. 319, 320 (S.D.N.Y. 1960). In an unpublished 1968 civil rights suit against a Jamaican labor organization and its liaison officer, *Cole v. Heidtman* (S.D.N.Y. 1968), the State Department denied immunity for the labor organization and the officer on the ground that the activities were of a private nature, under the Tate Letter. See Sovereign Immunity Decisions, *supra*, at 1062–63. In two other cases—*Semonian v. Crosbie*, Civil Action No. 74-4893-T (D. Mass. 1974), and *Greenspan v. Crosbie*, No. 74 Civ. 4734 (GLG), 1976 WL 841 (S.D.N.Y. Nov. 23, 1976)—the State Department suggested immunity for officials of the Province of Newfoundland sued by shareholders of a Canadian corporation regarding a timber sales agreement, noting that “although it is alleged that the defendant officials . . . acted in excess of their authority, it is not alleged that these officials acted other than in their official capacities and on behalf of the Province . . .” Sovereign Immunity Decisions, *supra*, at 1076.

14. Critics charged that rules of evidence were not observed; that there was no full presentation of competing arguments, no particular time period within which the Department had to make a decision, and no right to review State Department documents which provided the basis or the reasons for its final determination; and that plaintiffs were not always notified of the Department's decision whether or not to file. See, e.g., *Hearings on H.R. 11315 Before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong. 94 (1976) [hereinafter *Hearings on H.R. 11315*] (testimony of Michael Cardozo). In 1973, then-Acting Legal Adviser Charles Brower described the process as a “reasonably informal” “internal procedure which permits the litigants and the interested parties involved to have a hearing within the Department and they present written statements, sometimes come in and present oral statements . . . heard in the Department. Once the decision is made on the basis of the hearing . . . there is no judicial recourse from it.” *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims*

the State Department did not always follow the Tate Letter criteria, leading to inconsistent results under the State Department process.<sup>15</sup> Third, the process arguably brought too much political pressure to bear on the State Department, which was incessantly lobbied by foreign states to support immunity requests.<sup>16</sup> Yet despite these criticisms, the Department found it useful to retain flexibility to take foreign relations concerns into account on a case-by-case basis.

Partly in response to these critiques, in 1976, with State Department support, Congress passed the Foreign Sovereign Immunities Act (FSIA), which codified the standards for foreign state immunity and “transferred primary responsibility for immunity determinations to the Judicial Branch.”<sup>17</sup> From the beginning, the Executive Branch saw the FSIA, by its terms, as applying only to foreign states, not to foreign officials,<sup>18</sup> and continued to assert that State Department immunity determinations were required in cases involving foreign officials. The courts divided on this issue.<sup>19</sup> In 1992, Congress legislated in the area of human rights litigation by enacting the Torture Victim Protection Act (TVPA), which does not expressly

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*and Governmental Relations of the H. Comm. on the Judiciary*, 93d Cong. 27 (1973) (statement of Charles Brower, Legal Adviser, Dep’t of State). In 1976, Legal Adviser Monroe Leigh acknowledged: “We in the Department of State and Legal Adviser’s office do not have the means of really conducting a quasi-judicial hearing to determine whether, as a matter of international law, immunity should be granted in a given case. Among other things, we don’t have the power to compel testimony or to take testimony under oath or any of the normal indicia of a true judicial hearing. So we are not in a position really to conduct the kind of inquiry that ought to be conducted to determine whether it’s a proper case for allowing sovereign immunity to be applied.” *Hearings on H.R. 11315, supra*, at 34 (testimony of Monroe Leigh, Legal Adviser, Dep’t of State).

15. *See, e.g., Hearings on H.R. 11315, supra* note 14, at 58 (testimony of Peter Trooboff, Att’y) (“The current practice has caused inequitable results for private litigants as a result of departmental suggestions of immunity in commercial cases.”); *see also* Bradley & Helfer, *supra* note 12, at 220 (“[I]n some cases a foreign state would seek an immunity determination from the State Department and in other cases the state would ask the court to make its own determination. The result was that ‘sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations.’ Perhaps not surprisingly, this regime did not always produce consistent decisions.” (footnotes omitted)).

16. *See, e.g.,* Andreas F. Lowenfeld, *Litigating a Sovereign Immunity Claim—The Haiti Case*, 49 N.Y.U. L. REV. 377, 390 (1974).

17. *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004).

18. *See Chuidian v. Philippine Nat’l Bank*, 912 F.2d 1095, 1100–01 (9th Cir. 1990) (discussing the U.S. position).

19. *Compare Samantar v. Yousuf*, 552 F.3d 371, 381 (4th Cir. 2009) (holding the FSIA does not govern the immunity of individual foreign officials), *aff’d*, 130 S. Ct. 2278 (2010), *and* *Enahoro v. Abubakar*, 408 F.3d 877, 881–82 (7th Cir. 2005) (same), *with In re Terrorist Attacks* on Sept. 11, 2001, 538 F.3d 71, 81 (2d Cir. 2009) (holding that the FSIA governs individual official immunity), *and* *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 815–16 (6th Cir. 2002) (same), *and* *Byrd v. Corporación Forestal y Industrial de Olancho, S.A.*, 182 F.3d 380, 388–89 (5th Cir. 1999) (same), *and* *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996) (same), *and* *Chuidian*, 912 F.2d 1095 (9th Cir. 1990) (same).

speak to immunity, but creates a cause of action for damages against individuals who, “under actual or apparent authority, or color of law, of any foreign nation,” commit acts of torture or “extrajudicial killing.”<sup>20</sup>

## II. SAMANTAR AND ITS IMPLICATIONS

In 2010, in *Samantar v. Yousuf*, the Supreme Court accepted the U.S. Government’s position that the FSIA does not govern immunity for foreign officials sued in their personal capacity. Defendant Mohamed Ali Samantar had served as First Vice President, Prime Minister, and Minister of Defense of Somalia under the Siad Barre regime in the 1980s, before fleeing to the United States. Somali plaintiffs, who included naturalized U.S. citizens, brought suit against Samantar under the TVPA and the Alien Tort Claims Act (ATCA) in federal court in Virginia, alleging his command responsibility for terrorizing the civilian population of Somalia with widespread and systematic use of torture, arbitrary detention, and extrajudicial killing. Although the United States had recognized the Barre regime, the United States has not recognized any government since its fall. The U.S. Government declined to participate in the litigation before either the district court or the Fourth Circuit.

After the district court dismissed, the U.S. Court of Appeals for the Fourth Circuit reversed, concluding—consistent with the U.S. Government’s longstanding view—that the FSIA applies only to foreign states and not to foreign officials, and remanded the case to the district court for consideration of what immunity, if any, should apply in these circumstances. The Supreme Court unanimously affirmed, clarifying that, as we had said, the Foreign Sovereign Immunities Act does not govern the immunity of foreign officials. The Court held that the FSIA applies only to states, not individual officials. The decision turned on statutory construction; the Court held that the clear language of the statute, coupled with its legislative history, indicated that Congress did not intend to include foreign officials.<sup>21</sup> The Court emphasized that the trial court could consider on remand whether Samantar might be entitled to common

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20. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at U.S.C. § 1350(a) note (2006)).

21. “Reading the FSIA as a whole,” Justice Stevens wrote for the Court, “there is nothing to suggest we should read ‘foreign state’ in [the statute] to include an official acting on behalf of the foreign state, and much to indicate that this meaning was not what Congress enacted.” *Samantar v. Yousuf*, 130 S. Ct. 2278, 2289 (2010). Nor, the Court concluded, did the background, purposes, and legislative history of the FSIA indicate that Congress had attempted to codify the common law doctrine of foreign official immunity in a statute designed to codify the common law governing foreign state sovereign immunity. *See id.* at 2289–90.

law immunities, but declined to offer guidance as to the scope of these immunities.

What are the implications of the *Samantar* decision? Obviously, we in the U.S. Government believe that *Samantar* was correctly decided. The decision was consistent with the longstanding executive branch view that the text, structure, and legislative history of the FSIA demonstrate that Congress did not intend the FSIA to govern individual officials' immunity. As a practical matter, based on historical experience, unless Congress passes legislation to govern official immunity, as it did with respect to foreign state immunity in the FSIA, we expect courts will again look to the State Department for authoritative guidance as to whether a foreign official enjoys immunity.

Before the enactment of the FSIA, courts recognized foreign official immunity in a variety of contexts. As in suits against foreign states, the courts traditionally deferred to the State Department's judgment whether an official should be accorded immunity in a given case,<sup>22</sup> and in cases where the State Department was silent, courts applied the principles articulated by the Department.<sup>23</sup> Thus, if courts follow historical practice, they will again request the State Department's "determinations regarding immunity" to decide whether or not to grant immunity to individuals for actions taken as foreign officials. When the Department is silent, courts may apply State Department principles to determine whether or not immunity is warranted.

Some commentators have already suggested that *Samantar's* deference to State Department immunity determinations marks an unfortunate return to the "bad old days" of executive suggestion.<sup>24</sup> But we at the State Department are more optimistic. In general, we consider it a good idea for courts in such cases to seek executive guidance, for the simple reason that institutionally, the State Department is best situated to establish the initial framework for making decisions regarding foreign official immunity, and best-positioned in the long run to consider the remedial, substantive, and prudential concerns raised by suits against foreign officials.

After all, there is nothing new about the State Department making recommendations to courts regarding the immunity of individuals. To the contrary, the Department has been making such recommendations all along in numerous other litigation contexts. Even after the enactment of the FSIA in 1976, the Department's

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22. See, e.g., *Greenspan v. Crosbie*, No. 74 Civ. 4734 (GLG), 1976 WL 841, at \*1-2 (S.D.N.Y. Nov. 23, 1976); *Waltier v. Thomson*, 189 F. Supp. 319, 320-21 (S.D.N.Y. 1960).

23. See *Heaney v. Gov't of Spain*, 445 F.2d 501, 504, 506 (2d Cir. 1971).

24. See, e.g., *Ingrid Wuerth, Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT'L L. 915, 917 (2011).

practice of suggesting *rationae personae* (or status-based) immunities continued undisturbed. For example, we have regularly provided guidance in cases regarding the immunity of heads of state,<sup>25</sup> the immunity of foreign officials on “special missions” for their governments,<sup>26</sup> and the immunity of diplomats in cases brought against them by their former domestic servants.<sup>27</sup> It is precisely because these determinations of individual immunity involve such a complex set of factors that courts have long trusted the State Department to play the lead role. Indeed, the U.S. Government’s Supreme Court amicus brief in *Samantar*—signed, *inter alia*, by then-Solicitor General Elena Kagan and myself—argued that:

The conclusion that the FSIA does not govern foreign official immunity is reinforced by the number of complexities that could attend the immunity determination in this and other cases—complexities that could not be accommodated under the rigid and ill-fitting statutory regime of the FSIA. Even in an ordinary case, in considering whether to recognize immunity of a foreign official under the generally applicable principles of immunity discussed above, the Executive might find it appropriate to take into account issues of reciprocity, customary international law and state practice, the immunity of the state itself, and, when appropriate, domestic precedents. But in this case, the Executive may also find the nature of the acts alleged—and whether they should properly be regarded as actions in an official capacity—to be relevant to the immunity determination.<sup>28</sup>

We argued, in effect, that determinations of official immunity are derivative of, but not identical to, determinations of state immunity. Even within foreign governments, individuals may change roles, and the immunity to which they are entitled may change as they do.

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25. See, e.g., *Wei Ye v. Jiang Zemin*, 383 F.3d 620 (7th Cir. 2004).

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

27. See, e.g., *Baoanan v. Baja*, 627 F. Supp. 2d 155 (S.D.N.Y. 2009).

28. Brief for the United States as Amicus Curiae Supporting Affirmance at 24–25, *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010) (No. 08-1555) [hereinafter *United States Samantar Brief*]. Elsewhere, the U.S. brief similarly noted:

Th[e conclusion that] foreign officials’ immunity continues to be governed by the generally applicable principles of immunity articulated by the Executive Branch . . . derives additional support from the complexity of certain official immunity determinations, which could not be accommodated under the rigid statutory framework of the FSIA. In this case, for example, the Executive reasonably could find it appropriate to take into account petitioner’s residence in the United States rather than Somalia, the nature of the acts alleged, respondents’ invocation of the statutory right of action in the TVPA against torture and extrajudicial killing, and the lack of any recognized government of Somalia that could opine on whether petitioner’s alleged actions were taken in an official capacity or that could decide whether to waive any immunity that petitioner otherwise might enjoy. It is unlikely that Congress, in enacting the FSIA, intended to divest the Executive of the ability to evaluate complex considerations like these in deciding whether to recognize a foreign official’s immunity.

*Id.* at 7–8.

Determining the degree of individual immunity to which current and former foreign officials may be entitled for their various acts while in office is a complex legal determination that entails a careful weighing of factors that the State Department is in the best position to perform.

In sum, the Court's *Samantar* decision clarified a number of issues, while leaving others to be determined. First, *Samantar* makes clear that the immunity of individual foreign officials derives from federal common law standards, not from the statutory standards of the FSIA. Accordingly, *Samantar*'s own case was remanded so that the trial court could consider what common law immunities might be available to that former official.<sup>29</sup> Second, historically, and now once again, courts must look to the State Department to suggest principles governing the immunities of foreign officials. Third, as our amicus brief in *Samantar* indicated, in making this determination, application of a highly rigid framework is not appropriate, given the flexibility we need to consider complex case-specific issues relying on a non-exhaustive range of factors.

### III. THE EMERGING POST-SAMANTAR PROCESS

After the Supreme Court's ruling, we in the State Department's Legal Adviser's Office have begun establishing a new process for making determinations regarding the immunity of foreign officials after *Samantar*. This "New *Samantar* Process," we believe, will be an improvement over the pre-FSIA process, which we have carefully analyzed in an effort to avoid repeating old mistakes. Although some question whether the State Department should be making these decisions,<sup>30</sup> we believe that the Department is better equipped today than it was when it lacked the necessary resources to appropriately evaluate such immunity issues in all cases. The *Samantar* Court

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29. On remand, the State Department determined that *Samantar* was not entitled to immunity, and the district court accepted that determination. At this writing, the case is on appeal to the Fourth Circuit, where the United States has filed an amicus brief. For further discussion of these subsequent developments, see *infra* notes 39–40 and accompanying text.

30. See, e.g., Wuerth, *supra* note 24. In his submission to this Symposium and elsewhere, my predecessor John Bellinger suggests that we should consider ourselves "the dog who caught the car," because of the "enormous burden" he fears will be visited on the Legal Adviser's Office by the task of making *Samantar* determinations. See, e.g., John Bellinger III, *Ruling Burdens State Dept.*, 32 NAT'L L.J., June 28, 2010, at 47 ("The Obama administration will now be buffeted by competing demands from foreign governments for protection for their officials and from human rights advocates for accountability for human rights abusers."); John Bellinger III, *The Dog that Caught the Car: Observations on the Past, Present, and Future Approaches of the Office of the Legal Adviser to Official Acts Immunities*, 44 VAND. J. TRANSNAT'L L. 819 (2011). But up to this point, although there has been an uptick in immunity requests after *Samantar*, we have found this workload entirely manageable.

made clear that it found “no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department’s role in determinations regarding individual official immunity.”<sup>31</sup> As the Court observed, before the FSIA was enacted, when the State Department suggested that a foreign sovereign defendant was immune from suit, courts surrendered jurisdiction over a case.<sup>32</sup> Or, as the Second Circuit put it, “once the State Department has ruled in a matter of this nature, the judiciary will not interfere.”<sup>33</sup> These judicial rulings recognize that the State Department, in consultation with others in the Executive Branch, remains best positioned to consider the policy, remedial, substantive, and prudential concerns raised by suits against officials, for at least four reasons.

First, the Department remains the Executive Branch’s acknowledged expert on international law and the immunities that flow from it.<sup>34</sup> There are roughly 180 lawyers in my office whose specialty is the interpretation, application, and development of international law. The Legal Adviser’s Office has unrivaled knowledge of treaties, conventions, and international instruments of all stripes. We participate in the negotiating process at every level on every multilateral agreement, and we are likewise intimately involved with the study, interpretation, and formation of customary international law. We also follow closely what other countries do with respect to their domestic law, and how they evaluate international law. Given our expertise in this area, we are best situated to offer guidance on the content of evolving international law principles relevant to determining whether our federal common law of official immunity provides immunity in any given case.

Second, the State Department has longstanding, special expertise in this precise area. For decades, the Department has played the lead role in formulating and applying the relevant executive branch principles—informed by customary international law and practice—which recognize that both current and former officials of a foreign state usually enjoy common law immunity for acts undertaken in their official capacity.<sup>35</sup> The scope of immunity that individual foreign officials enjoy under traditional principles can be either broader or narrower than the immunity of the state itself.<sup>36</sup>

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

32. *Id.* at 2285.

33. *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1201 (1971).

34. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487 (1983).

35. *See, e.g., Underhill v. Hernandez*, 65 F. 577, 579–80 (2d Cir. 1895), *aff’d*, 168 U.S. 250 (1897).

36. In some circumstances, the individual immunity will be narrower than state immunity. For example, a foreign state may be immune for any acts unless one of the FSIA’s exceptions applies, whereas individual officials are usually immune only for acts taken in official capacity. Conversely, in other circumstances, individual immunity can be broader than foreign state immunity. The Executive Branch has on occasion suggested immunity for an individual official even when the state would lack immunity

Third, as the home of the Bureau of Democracy, Human Rights, and Labor (which I was honored to head during the Clinton Administration) and the author of the annual Country Reports on Human Rights Practices, the State Department remains the agency best situated to keep track of changes in international human rights practice and norms. In the same way that the law of foreign state immunity eventually took into account the global commercial revolution, official immunity law will need to take into account the human rights revolution. Just as the Tate Letter acknowledged an important watershed in state practice—the increasing entry of governments into international commercial markets—changes in international human rights norms, as reflected in treaties ratified by the United States, new U.S. statutes, and U.S. judicial doctrines, have given rise to new views about the boundaries of official action appropriately subject to immunity, and call for review of the standards governing personal accountability for gross human rights abuses.<sup>37</sup>

Fourth, the State Department is best situated to evaluate the foreign policy and reciprocal consequences of subjecting a foreign official to suit in U.S. courts.<sup>38</sup> In some settings, personal damage actions against foreign officials may unduly chill their performance of duties, trigger reciprocity concerns about the treatment of U.S. officials sued in foreign courts, and potentially interfere with the Executive Branch's conduct of foreign affairs. The Department daily grapples with the impact of litigation on foreign states, and is best positioned to distinguish "genuine" *Samantar* issues, which involve complex questions of official conduct, from distinct legal issues, such as pure *status* questions and procedural issues including personal jurisdiction, service of process, *forum non conveniens*, indispensable parties, and real parties in interest.

In our filing before the Eastern District of Virginia, we determined that *Samantar* was not immune from suit based on a number of factors, including the facts of the case in conjunction with "the applicable principles of customary international law."<sup>39</sup> We noted, among other things, that the defendant was a U.S. resident sued *inter alia* by a U.S. citizen, that he was a former official who

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for the same conduct. See *Greenspan v. Crosbie*, No. 74 Civ. 4734 (GLG), 1976 WL 841, at \*2 (S.D.N.Y. Nov. 23, 1976) (official immunity for commercial activities).

37. Current common law doctrine, statutes, treaties, and customary international law may impose obligations to hold accountable those who commit gross violations of human rights that did not exist when the Executive Branch and courts first addressed the immunity of foreign government officials.

38. See, e.g., *Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974) ("[T]he degree to which granting or denying a claim of immunity may be important to foreign policy is a question on which the judiciary is particularly ill-equipped to second-guess the executive. The executive's institutional resources and expertise in foreign affairs far outstrip those of the judiciary.")

39. United States *Samantar* Brief, *supra* note 28, at 7.

would enjoy only residual immunity for acts taken in an official capacity, and that Somalia has no currently recognized government that could either assert or waive its immunity or assert that the relevant acts were taken in an official capacity. We also considered “the overall impact of this matter on the foreign policy of the United States,” and ultimately determined that Samantar was not immune from suit. Soon thereafter, based on our determination of non-immunity, the district court rejected Samantar’s motion to dismiss, and at this writing, the matter is on appeal before the Fourth Circuit.<sup>40</sup>

### A. Five Tenets of Official Immunity Practice

While it may be some time before the Executive Branch develops a full-fledged U.S. Government statement of official immunity principles—a definitive “Koh Letter,” if you will, parallel to those principles found in the 1952 Tate Letter—it is not too early to discern at least five basic tenets that we will apply in our official immunity practice.

The first, as acknowledged by the Supreme Court in *Samantar* itself, is that when State Department determinations of immunity and non-immunity are made in particular cases, the courts should defer to those State Department determinations.<sup>41</sup> Such deference is due both to State Department determinations with respect to the

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40. The United States has filed a brief as amicus curiae in the appeal, arguing that the district court correctly relied on the State Department’s determination in denying the motion to dismiss. See Brief for the United States as Amicus Curiae Supporting Appellees, *Yousuf v. Samantar*, No. 11-1479 (4th Cir. Oct. 24, 2011).

In the related case of *Ahmed v. Magan*, at the request of District Judge Smith, the State Department recently determined that defendant Abdi Aden Magan was not entitled to immunity in a suit brought by a Somali plaintiff in the U.S. District Court for the Southern District of Ohio under the TVPA and ATCA for alleged responsibility for torture, cruel, inhuman or degrading treatment, and arbitrary detention. See Order, *Ahmed*, No. 2:10-cv-34 (S.D. Ohio Dec. 6, 2010); Statement of Interest of the United States at 1–2, 7, *Ahmed*, No. 2:10-cv-34 (S.D. Ohio Mar. 15, 2011) [hereinafter *Magan Statement of Interest*]. The U.S. Government’s filing noted, *inter alia*, that: (1) Magan is a former, not sitting, official of a state with no current government formally recognized by the United States who generally would enjoy only residual immunity, unless waived, and even then only for acts that may properly be considered authorized by the foreign state; (2) plaintiff had alleged that while in office, Magan “directed and participated in the interrogation and torture of Plaintiff and other civilians perceived as opponents of the Barre regime”; and (3) Magan resides in the United States, and basic principles of sovereignty provide that a state generally has a right to exercise jurisdiction over its residents. See *Magan Statement of Interest*, *supra*.

41. See *Samantar v. Yousuf*, 130 S. Ct. 2278, 2291 (2010) (“[There is] no reason to believe that Congress [in passing the FSIA] saw as a problem, or wanted to eliminate, the State Department’s role in determinations regarding individual official immunity.”); see also *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) (“It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.” (footnote omitted)).

status of foreign officials and with respect to the character of the acts.<sup>42</sup>

A second conclusion that can be drawn from *Samantar* is that, absent a treaty or statute, general principles regarding immunity articulated by the State Department will govern foreign official immunity as a matter of federal common law.<sup>43</sup> Again, this is nothing new. For more than seventy years, both before and after the Tate Letter and enactment of the FSIA, the federal common law of immunity has given force not just to case-specific immunity determinations but also to principles of immunity articulated by the State Department.<sup>44</sup>

A third tenet is that the immunities of foreign officials belong to the foreign state—not to the officials personally—and thus, it has been historically recognized that those immunities may be waived by the foreign state.<sup>45</sup> States recognize special protections for officials where the balance of public interests requires even deserving claimants to find remedies outside of court systems. But it is also important to remember that official immunity does not extinguish liability; states and their officials may still bear responsibility for the underlying conduct, and the individuals themselves may be subject to suit, including criminal prosecution.<sup>46</sup> Just because an official may not be sued in a foreign court for an official act does not mean that the liability of the individual cannot be established elsewhere. Nor does it mean that the state's own responsibility cannot be addressed through some other mechanism, such as claims settlement or some other form of international remedy. Moreover, as a policy matter, because the U.S. Government is pressing for advancement of the rule of law internationally, this approach should lead in the longer term to reduced need for recourse to U.S. courts for injuries abroad, as more effective domestic remedies become available.

Fourth, in making official immunity determinations, the State Department will distinguish carefully between those immunities that

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42. See, e.g., *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1200 (2d Cir. 1971) (deferring to State Department determination that alleged conduct was “of a public, as opposed to a private/commercial nature”).

43. See *Samantar*, 130 S. Ct. at 2292–93. As an academic, I discussed federal common law rules governing foreign affairs in Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998).

44. See, e.g., *Hoffman*, 324 U.S. at 34–36; *Ex parte Republic of Peru*, 318 U.S. 578, 588–89 (1943); *The Navemar*, 303 U.S. 68, 74–75 (1938).

45. See Statement of Interest of the United States ¶ 10, *Yousuf v. Samantar*, No. 1:04 CV 1360 (LMB) (E.D. Va. Feb. 14, 2011); *Arrest Warrant of 11 April 2000* (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 61 (Feb. 14) (foreign officials “will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity”).

46. See *Arrest Warrant of 11 April 2000*, 2002 I.C.J. ¶ 61 (“[S]uch persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries’ courts in accordance with the relevant rules of domestic law.”).

are based on a person's *status* and those immunities that are based on a person's *claimed official acts*. As a number of articles in this Symposium have discussed,<sup>47</sup> there is a historical distinction between status immunities (immunities *ratione personae*)—i.e., immunities that apply to individual officials because of their current status, which are designed to protect their ability to carry out current functions (diplomatic, head of state, special missions)—and conduct immunities (immunities *ratione materiae*), which derive from the nature of those individuals' conduct and protect centrally against inappropriate judicial oversight of foreign government conduct. Thus, certain foreign officials—such as sitting heads of state, diplomats, and members of qualifying special missions—are entitled to immunities by virtue of their status, during the time they hold that status. Thereafter, as former officials, they are entitled only to those conduct immunities that attach to challenged acts that can be deemed official in nature, which may depend upon the nature of their former office.<sup>48</sup> Obviously, whether an act may be considered “official” for conduct immunity purposes also depends upon on the nature of the act alleged.<sup>49</sup> A government official's legitimate authority has not generally been thought to encompass a right to commit “official acts” that violate both international and domestic law.<sup>50</sup>

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47. See David P. Stewart, *The Immunity of State Officials Under the UN Convention on Jurisdictional Immunities of States and Their Property*, 44 VAND. J. TRANSNAT'L L. 1047, 1056 (2011); see also Chimène I. Keitner, *Foreign Official Immunity After Samantar*, 44 VAND. J. TRANSNAT'L L. 837, 838 (2011); Lewis S. Yelin, *Head of State Immunity as Sole Executive Lawmaking*, 44 VAND. J. TRANSNAT'L L. 911, 921 (2011).

48. A similar distinction between status and conduct immunities is found in the Vienna Convention on Diplomatic Relations (VCDR), Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, and the Vienna Convention on Consular Relations, Apr. 18, 1961, 23 U.S.T. 3227, 1 U.N.T.S. 16.

49. The *Samantar* decision notes, for example, a difference “as a matter of common law principles” between immunity “for acts committed in official capacity” and acts “beyond the scope of official authority.” *Samantar*, 130 S. Ct. at 2291 n.17; see also United States *Samantar* Brief, *supra* note 28, at 11 (“[T]he immunity of foreign officials arises from the official character of their acts.”). Whether or not an act is “official” does not turn on whether the act is attributable to the state. Under international law, attribution to a state for purposes of state responsibility is a question distinct from the question of an individual's responsibility for that act. Compare Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, art. 7, U.N. Doc. A/RES/56/83 (Dec. 12, 2001) (“The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.”), with *id.* art. 58 (“These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.”).

50. Pre-*Samantar* case law treated acts in violation of international and domestic law as falling outside the scope of “official acts.” See, e.g., *Enahoro v. Abubakar*, 408 F.3d 877, 893 (7th Cir. 2005) (noting 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

Fifth, and crucially, not every issue involving a foreign official will raise a *Samantar* issue that goes to the defendant's *substantive immunity* from suit. Even after *Samantar*, we expect that many cases can be disposed of, instead, based upon what we call "non-*Samantar* issues," which broadly depend upon the defendant's status immunities or various procedural considerations.

### B. Non-Samantar Status Issues

As already noted, State Department determinations of status immunity are nothing new—we have been making such recommendations throughout the FSIA era, and they will continue as before. These include, for example, cases involving claims of head of state immunity, immunity for diplomatic agents, and special missions immunity. Technically speaking, these are not pure "*Samantar*" cases, which require a fuller assessment of a foreign official's conduct as well as his or her status.

Cases disposed of purely on status grounds fall into four broad categories. First, with respect to *sitting heads of state*, over the past several decades, the Executive Branch has retained its traditional pre-FSIA authority to suggest immunity from suit. A number of courts have held that a suggestion of immunity by the Executive Branch on behalf of a sitting head of state is binding upon the federal courts and must be accepted as conclusive.<sup>51</sup> Those same immunities have not been routinely extended to former heads of state,<sup>52</sup> although some courts have acknowledged that former heads of state enjoy certain immunities based on a combination of their past status and conduct.<sup>53</sup>

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Cir.1994) (noting that Marcos's "acts of torture, execution, and disappearance were clearly acts outside of his authority as President"); see also Torture Victim Protection Act of 1991, S. REP. NO. 102-249, at 8 (1991) ("[B]ecause no state officially condones torture or extrajudicial killings, few such acts, if any, would fall under the rubric of 'official actions' taken in the course of an official's duties.").

51. See, e.g., *Wei Ye v. Jiang Zemin*, 383 F.3d 620, 628 (7th Cir. 2004).

52. See *Arrest Warrant of 11 April 2000* (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 61 (Feb. 14) ("[A]fter a person ceases to hold the office of [head of state], he or she will no longer enjoy all of the immunities accorded by international law in other States.").

53. Recently, for example, Judge Bates of the U.S. District Court for the District of Columbia ruled that former Colombian President Alvaro Uribe enjoys residual immunity from being forced to testify as a witness in a TVPA/ATCA suit against Drummond Company. *Balcerio Giraldo v. Drummond Co.*, No. 1:10-mc-00764 (JDB), 2011 WL 3926372, at \*4 (D.D.C. Sept. 8, 2011). Uribe had been served with a subpoena by a Georgetown University law student while teaching at Georgetown. In response to a request from Judge Bates, we filed a pleading stating that the former President "enjoys residual immunity from this Court's jurisdiction insofar as Plaintiffs seek information (i) relating to acts taken in his official capacity as a government official; or (ii) obtained in his official capacity as a government official." *Statement of Interest and Suggestion of Immunity of and by the United States at 1, Balcerio Giraldo v. Drummond Co.*, No. 1:10-mc-00764 (JDB) (D.D.C. Sept. 8, 2011).

Second, in cases brought against sitting *diplomats and consular officials*, the Executive Branch has filed indications of diplomatic and consular immunity where appropriate under the relevant Vienna Conventions.<sup>54</sup>

Third, the U.S. Government has also expressed its view as a host country regarding *residual diplomatic immunity* in several lawsuits brought by domestic servants against their diplomatic employers following the completion of the diplomat's official service.<sup>55</sup> Under the Vienna Convention on Diplomatic Relations, during the period of a diplomatic agent's accreditation the agent enjoys near absolute immunity from civil jurisdiction.<sup>56</sup> Because the purpose of such diplomatic immunity is not to benefit individuals, but to ensure the efficient performance of diplomatic missions in representing States, once an individual ceases to be a diplomatic agent in a receiving state, the scope of that individual's immunity is limited to that set forth in Article 39(2), which provides:

When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunity shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period of time in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.<sup>57</sup>

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54. See, e.g., *Sabbithi v. Al Saleh*, 605 F. Supp. 2d 122 (D.D.C. 2009); see also *Montuya v. Chedid*, 779 F. Supp. 2d 60 (D.D.C. 2011).

55. In *Baoanan v. Baja*, 627 F. Supp. 2d 155 (S.D.N.Y. 2009), for example, a former domestic servant sued her former employers, including the former Permanent Representative of the Philippines to the United Nations, for alleged violations of various laws against forced labor, human trafficking, and involuntary servitude. The State Department advised the court to consider whether the former diplomat's employment of the plaintiff was an "official act" carried out as a member of the mission such that he might enjoy residual immunity under Article 39(2) of the Vienna Convention on Diplomatic Relations, *supra* note 48. See Statement of Interest of the United States at 4–10, *Baoanan*, 627 F. Supp. 2d 155 (S.D.N.Y. 2009) (No. 08 Civ. 5692 (VM)) [hereinafter *Baoanan* Statement of Interest]. The court adopted our proposed approach and determined that the employment of the plaintiff was a private act, and therefore the former diplomat had no residual immunity under the VCDR. *Baoanan*, 627 F. Supp. 2d at 169–70. Similarly, in *Swarna v. Al-Awadi*, 622 F.3d 123 (2d Cir. 2010), a former domestic servant filed suit against a Kuwaiti diplomat, his wife, and the State of Kuwait, claiming violations of the ATCA and New York state labor law based on alleged slavery and slavery-like practices. The district court determined that the acts alleged by the former domestic servant in her case were private and non-official in nature, such that the former diplomats were not shielded by residual immunity. In our statement of interest filed on appeal to the Second Circuit, we reiterated our longstanding position that a former diplomat enjoys residual immunity under the VCDR, customary international law, and state practice only for those acts performed in exercise of his or her diplomatic functions. Statement of Interest of the United States at 14–15, *Swarna v. Al-Awadi*, 622 F.3d 123 (2d Cir. 2010) (No. 9-2525-cv (L)).

56. See Vienna Convention on Diplomatic Relations, *supra* note 48, art. 31.

57. *Id.* art. 39(2).

A former diplomat thus enjoys residual immunity only for those official acts that were performed in the exercise of his or her functions as a member of the mission.<sup>58</sup>

Fourth, at appropriate times we have acknowledged *special missions immunity*.<sup>59</sup> This is a durationally limited status immunity established in international law that applies to diplomatic missions that are temporary and transient, rather than permanent, in nature. It would, for example, extend limited immunity to a sitting high-level foreign official who visits the United States on diplomatic business at the invitation of the U.S. Government, but only for such time as the person is present in the United States on the official visit, and for the limited function of facilitating high-level contacts between governments. The United States has recognized special missions immunity several times to provide foreign officials with immunity from personal service of process while on the diplomatic mission.<sup>60</sup> This form of immunity does not address the official's underlying immunity from suit based on the nature of his or her conduct, and the State Department's role in ascertaining and asserting it rests upon the President's constitutional authority over foreign affairs, including the enumerated power to receive ambassadors and public ministers.

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58. See Baoanan Statement of Interest, *supra* note 55, at 5. As explained by a leading diplomatic law expert, residual immunity is limited to official acts because such acts "are in law the acts of the sending State. It has therefore always been the case that the diplomat cannot be sued in respect of such acts since this would be indirectly to implead the sending State." EILEEN DENZA, *DIPLOMATIC LAW: COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS* 439 (3d ed. 2008).

59. In the Minister Bo case, practitioners of the Falun Gong spiritual movement sued the sitting Chinese Minister of Commerce for actions he allegedly took in a prior governmental post, and purported to serve Minister Bo while he was in Washington, D.C. on a special diplomatic mission. *Li Weixum v. Bo Xilai*, 568 F. Supp. 2d 35, 36 (D.D.C. 2008). After the federal district court solicited the views of the State Department, we filed a suggestion of immunity and statement of interest, asking the court to find that Minister Bo, as a member of a special diplomatic mission, was immune from service of process and therefore not subject to the court's jurisdiction. Suggestion of Immunity and Statement of Interest at 4, *Li Weixum*, 568 F. Supp. 2d 35 (D.D.C. 2008) (Civ. No. 04-0649 (RJL)). The district court agreed, and noted that the Executive's authority to assert such immunity (for senior ministers who are part of a special diplomatic mission) derives from customary international law and the President's powers to conduct foreign affairs and receive foreign ministers. See *Li Weixum*, 568 F. Supp. 2d at 37-38 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 464, cmt. i ("High officials of a foreign state and their staffs on an official visit or in transit . . . enjoy immunities like those of diplomatic agents when the effect of exercising jurisdiction against the individual would be to violate the immunity of the foreign state.")).

60. See, e.g., *Baoanan*, 627 F. Supp. 2d 155.

### C. Non-Samantar Procedural Issues

The foregoing “non-Samantar status cases” should not be confused with what I call “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 (i.e., in reality is being sued in her official capacity). The *Samantar* Court took care to say that where the foreign state is the *real party in interest*, the case should be treated as one against the state itself, with the result that it would be governed by the FSIA and the common law issue of foreign official immunity would not arise.<sup>61</sup> In *Samantar*, by contrast, Somalia was neither a necessary party nor a real party in interest, and the Court noted that the suit against Samantar was being brought against a former foreign official in his personal capacity.<sup>62</sup>

Relatedly, where the foreign state is a *necessary* party, the case may not be able to proceed in its absence. In *Republic of the Philippines v. Pimentel*,<sup>63</sup> for example, the Supreme Court recently indicated that a civil lawsuit should generally be dismissed under Federal Rule of Civil Procedure 19 when it may prejudice an absent sovereign, observing that “where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign.”

Some cases may be dismissed even before reaching the merits under other sections of the Federal Rules, such as Rule 12(b)(3) and its requirement of proper venue. In making immunity determinations, it is well-recognized that the State Department may consider such factors as the connections of the parties and the case to the United States and the availability of other fora.<sup>64</sup> And the Supreme Court has held, in *Sinochem International Co. v. Malaysia*

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61. *Samantar v. Yousuf*, 130 S. Ct. 2278, 2292 (2010).

62. *Id.*

63. 553 U.S. 851, 867 (2008).

64. Basic principles of sovereignty provide that a state has the right to exercise jurisdiction over persons in its own territory and its permanent inhabitants. See *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.”). Thus, foreign sovereign immunity is not a principle of universal immunity, but rather a principle that, when it applies, reserves for the official’s own state the authority to establish jurisdiction and seek accountability for official misconduct. See *Arrest Warrant of 11 April 2000* (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 61 (Feb. 14) (foreign officials “enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries’ courts in accordance with the relevant rules of domestic law”).

*International Shipping Corp.*,<sup>65</sup> that although a federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the matter (subject-matter jurisdiction) and the parties (personal jurisdiction), a federal court can presume, rather than dispositively decide, its jurisdiction before dismissing under the doctrine of *forum non conveniens*. Thus, even if uncertainty exists about the ultimate scope of a defendant's immunity, a federal court may independently review the availability of other fora and dismiss a case at the outset under the doctrine of *forum non conveniens*.<sup>66</sup>

Alternatively, a case that involves inappropriate service against a foreign official or his or her diplomatic mission may be dismissed under Rule 12(b)(5), for insufficient service of process. Thus, for example, if a plaintiff attempts to serve an individual who enjoys personal inviolability and cannot be effectively served in the United States, the court should dismiss even before reaching the issue of the defendant's immunity because the process itself has not yet properly reached the defendant.<sup>67</sup>

#### D. *The Sound of Silence*

At this writing, we are in the early days of the New *Samantar* Process. As noted above, some of the overarching criticisms of the pre-FSIA executive suggestions of immunity were a perception of insufficient process, inconsistent results, and concern about too much political pressure being brought to bear on the State Department. We hope our new post-*Samantar* process will cure those problems and represent a more modern, reliable approach.

To accomplish the complex task of separating *Samantar* from non-*Samantar* issues and unraveling fact-based questions involving procedural issues and the status of parties, the Office of the Legal Adviser, at the Secretary of State's request, has developed a process whereby, after careful initial review of the matter, we solicit information from attorneys on both sides of a *Samantar* case. While we do not invite litigants to participate in a formal adversarial process with rigid administrative procedures, we do offer to meet with counsel on both sides, ask them to provide factual information and make their arguments as to whether or not official immunity should apply, and invite counsel to contribute written materials. If we believe a true *Samantar* issue is at stake, we will ask both sides to answer a standard list of questions regarding the various factual issues that might be relevant to such a determination. We have applied this flexible approach because cases differ considerably in

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65. 549 U.S. 422 (2007).

66. See *id.* at 429–35; *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247 (1981).

67. See *Tachiona v. United States*, 386 F.3d 205, 221–24 (2d Cir. 2004).

complexity, in the degree to which Department officials are already familiar with the issues and the legal doctrines, and in the resources of the parties. The lawyers in my office who handle these issues, particularly from the Office of Diplomatic Law and Litigation, have extensive familiarity with the international practice and domestic law precedents, often more than a private counsel taking his or her first case involving international law.

Sometimes, and notably, the State Department will make a conscious decision *not* to speak at the end of this process. We have long noted that the U.S. Government need not and should not speak in every case. As Justice Harlan observed in the *Sabbatino* case, "Often the State Department will wish to refrain from taking an official position, particularly at a moment that would be dictated by the development of private litigation but might be inopportune diplomatically."<sup>68</sup> In deciding whether and when to speak in official immunity cases, we will also balance the potential benefits of participation against the notion that it is better to file in situations where our pleadings will have the most impact. Obviously the State Department has a greater interest in participating when a case reaches an appellate level than when it is at the earliest pre-trial stages, and could be dismissed on other grounds and for other reasons that have nothing to do with foreign policy. Generally speaking, we want to be responsive when courts request our views, and if we do not file, we often note that no inference should be drawn from our decision not to participate in the case.

What if the State Department chooses to stay silent? *Samantar* suggests that absent a case-specific State Department determination, U.S. courts should, as in the pre-FSIA period, decide questions of immunity in conformity with principles articulated by the State Department. As one Supreme Court case put it:

[i]n the absence of recognition of the claimed immunity by the political branch of the government, the courts may decide for themselves whether all the requisites of immunity exist. That is to say, it is for them to decide whether the vessel when seized was that of a foreign government and was of a character and operated under *conditions entitling it to the immunity in conformity to the principles accepted by the department of the government charged with the conduct of our foreign relations.*<sup>69</sup>

Following the 1952 Tate Letter, courts consistently applied the restrictive theory of sovereign immunity articulated by the State Department even in cases where the Department did not make a case-specific determination.

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68. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 436 (1964).

69. *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34–35 (1945) (emphasis added).

The Supreme Court in *Samantar* echoed that directive, noting that under the common law if the Executive Branch chooses not to participate in the litigation, district courts must consider whether a foreign sovereign or foreign official defendant is entitled to immunity under “the established policy of the [State Department].”<sup>70</sup> The clear import is that the more the State Department establishes an official immunity policy over time, the more silent we can afford to be in most cases.<sup>71</sup>

At this conference, some have asked whether the courts should give absolute deference, substantial deference, reasonable deference, or some other measure of deference to State Department suggestions. Yet depending upon our practice, this may well turn out to be a non-issue. For so long as our own determinations of immunity are reasonable, soundly rooted in a close examination of the facts, a diligent sorting of *Samantar* from non-*Samantar* issues, and careful considerations of precedents from both common law and customary international law, the courts will likely defer to them. Only if our suggestions of immunity became unreasonable, it seems to me, would courts be tempted to explore the delicate and uncharted zone between “substantial deference” and “absolute deference” to executive branch immunity determinations.

In closing, let me say that in time, we hope that litigants will come to understand, with respect to State Department submissions in these cases, both the “sound of silence” and the notion that government silence is sometimes golden. In domestic litigation, our ultimate goal is, in fact, not more verbiage, but more silence. The government need not, and should not, speak in every case, and that is not what *Samantar* envisages, particularly when those cases are brought not by the U.S. Government, but by private litigants with their own motives and goals.

Sometimes, less is more. If the State Department says less but speaks clearly when it does speak, litigants and courts should be able to use our broader pronouncements to sort out government perspectives and revise their own positions accordingly. At the end of the day, a careful sorting of *Samantar* from non-*Samantar* issues and these nuances regarding the sound of silence may mark the most fundamental differences between the old process of executive suggestion and the New *Samantar* Process.

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70. *Samantar v. Yousuf*, 130 S. Ct. 2278, 2284 (2010) (internal quotation marks omitted).

71. This, I submit, is the ultimate antidote to the claimed workload burden that some have suggested *Samantar* will place upon the State Department. See, e.g., *supra* note 30. If the U.S. Government does not feel compelled to file in every case brought against a foreign official, the burden may prove to be far less than many fear.

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