The Common Law of Foreign Official Immunity

Chimène I. Keitner

In *Samantar v. Yousuf*, the U.S. Supreme Court unanimously rejected the argument that the Foreign Sovereign Immunities Act (FSIA) should be read to encompass all suits brought against individual foreign officials for acts performed in an official capacity.[1] The Court held that when plaintiffs sue a current or former foreign official "in his personal capacity and seek damages from his own pockets," the suit "is not a claim against a foreign state as the Act defines that term."[2] Instead, an individual defendant's immunity "is properly governed by the common law."[3]

Chimène Keitner is an Associate Professor of Law at the University of California, Hastings College of the Law. She represented Professors of Public International Law and Comparative Law as Amici Curiae in Support of Respondents in Samantar v. Yousuf, No. 08-1555.

[1] *See* Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity, Individual Officials, and Human Rights Litigation*, 13 Green Bag 2d 9 (2009).

[2] No. 08-1555 (decided June 1, 2010), slip op. at 19.

[3] *Id.* The Court noted that "it may be the case that some actions against an official in his official capacity should be treated as actions against the foreign state itself, as the state is the real party in interest," *id.*, following the basic model of official capacity suits under 42 U.S.C. § 1983. In such a case, the named official could invoke common law immunity. *See* Chimène I. Keitner, *Officially Immune? A Response to Bradley and Goldsmith*, 36 Yale J. Int'l L. Online 1, 4 (2010).

As commentators quickly pointed out,[4] and as the Court itself acknowledged,[5] holding that the common law governs foreign official immunity does not end debates about the contours of such immunity, or which branch of government should define them. The opinion in *Samantar* discussed but did not resolve these debates, leaving them in the first instance to the lower courts.

Immunity from jurisdiction is the exception, not the rule. Courts and commentators have become accustomed to speaking of "exceptions" to foreign sovereign immunity because the FSIA grants immunity to foreign states, and then carves out a series of exceptions to that immunity. As *Samantar* makes clear, this statutory framework only applies to claims against foreign states themselves. When it comes to natural persons, the United States maintains "exclusive and absolute" jurisdiction over its own territory and the individuals who enter it.[6] The limited jurisdictional immunities accorded to foreign officials derogate from this baseline.

Individual immunities fall into two categories: status-based immunities, which enable certain incumbent foreign officials to perform their duties unencumbered by legal proceedings; and conduct-based immunities, which shield individuals from legal consequences for some – but not all – acts performed on behalf of the state during their tenure in office. Not all acts performed under color of foreign law benefit from conduct-based immunity, even if those acts are also attributable to the foreign state.

International law, and many countries' domestic laws, impose individual responsibility on officials who commit acts such as war crimes, genocide, and crimes against humanity, even when they commit these acts in their official capacities. Conduct-based immunity does not automatically shield individual defendants from the

---

[4] *See* David P. Stewart, *Samantar v. Yousuf:* Foreign Official Immunity Under Common Law, 14 ASIL INSIGHT No. 15 (June 14, 2010), *at* www.asil.org/files/insight100614pdf.pdf; Curtis A. Bradley, *Samantar Insta-Symposium: Samantar and Foreign Official Immunity* (June 2, 2010), *at* opiniojuris.org/2010/06/02/samantar-insta-symposium-samantar-and-foreign-official-immunity/.

[5] *Samantar*, slip op. at 15 & 15 n.15.

[6] *See* Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 136 (1812).

legal consequences of these acts, whether in the form of criminal penalties or civil damages. The state's immunity does not necessarily prevent imposing legal consequences on the individual, where the individual also bears responsibility for the act.

Under the U.S. Constitution, the Executive Branch determines whether an individual is entitled to claim status-based immunity as a current diplomat or incumbent head of state. When individual defendants assert conduct-based immunity, courts will have to reason based on principles derived from historical and contemporary practice, Executive Branch input, and relevant domestic analogies. Although dismissing all human rights claims on immunity grounds might be an efficient way to clear the docket of these cases, neither historical practice nor common law principles justify that result.

STATUS-BASED AND CONDUCT-BASED IMMUNITY

In adjudicating claims to immunity, courts must first determine what kind of immunity the defendant is asserting. International law differentiates between immunity *ratione personae* (personal immunity, or what I call "status-based" immunity) and immunity *ratione materiae* (functional immunity, or what I call "conduct-based" immunity). Status-based immunity shields individuals from legal proceedings while they occupy certain offices, to avoid interference with their ability to perform official functions. Conduct-based immunity shields individuals from legal consequences for certain acts, whether or not the individuals are still in office, because those acts are considered acts of the state, rather than acts of the individual.

Two categories of current officials may claim status-based immunity: diplomats and heads of state. Diplomatic immunity shields diplomats (or "public ministers") who have been accredited by the receiving state from criminal and most civil proceedings during their appointment, unless such immunity is waived by the sending state.[7] Such immunity also extends to certain accredited members

[7] *See* Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227,

of U.N. Missions[8] and certain members of "special diplomatic missions."[9] Head of state immunity shields incumbent heads of state from the judicial processes of foreign courts, and has also been interpreted as extending to incumbent foreign ministers.[10] Status-based immunity attaches to an individual by virtue of his or her current official position, regardless of the substance of the claim. Consular immunity is not status-based, because consular officials only enjoy immunity for the exercise of consular functions, and not for any other activities.[11]

Status-based immunity only lasts during an individual's tenure in office.[12] Former diplomats and former heads of state, as well as other current and former officials, may not claim status-based immunity. Instead, they may claim conduct-based immunity for cer-

---

T.I.A.S. No. 7502, 500 U.N.T.S. 96 (entered into force with respect to the United States on Dec. 13, 1972), Art. 31(1) & Art. 32.

[8] *See* Section 15 of the Headquarters Agreement between the United States and the United Nations, 22 U.S.C. § 287.

[9] Suggestion of Immunity and Statement of Interest of the United States, *Li Weixun v. Bo Xilai*, Civ. No. 04-0649 (D.D.C. July 24, 2006) at 4; *see also id.* at 11 n.9 (indicating that "[s]pecial mission immunity would not, however, encompass all foreign official travel").

[10] *See* Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), Judgment, I.C.J. Reports 2002, at ¶ 53-54 (Feb. 14, 2002) (finding that the incumbent Congolese foreign minister was entitled to status-based immunity from criminal prosecution by a Belgian court because, like an incumbent head of state, an incumbent foreign minister is entitled to protection "throughout the duration of his or her office" from "any act of authority of another State which would hinder him or her in the performance of his or her duties").

[11] *See* Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, Art. 43(1) (providing immunity for current consular officials only for "acts performed in the exercise of consular functions"). While the Supreme Court in *Samantar* characterized both diplomatic and consular immunities as "position-based individual immunities," slip op. at 13 n.12, consular immunity is "position-based" only in the sense that one must be a consular official in order to claim it. *Cf. id.*, slip op. at 6 n.6 (instead using the term "specialized immunities," as that term is used in the Restatement (Second) of Foreign Relations Law of the United States § 66, Comment *b* (1964-1965)).

[12] *See* Arrest Warrant Case ¶ 54.

tain acts performed on behalf of the state.[13] Conduct-based immunity prevents an individual from incurring legal consequences for certain acts, regardless of the individual's current or former position.

The distinction between status-based immunity (*ratione personae*) and conduct-based immunity (*ratione materiae*) is firmly established as a matter of international law. Even so, courts and commentators sometimes fail to differentiate between these two categories. This can lead to confusing analysis and incorrect results. For example, the district court in *Abiola v. Abubakar* held that the defendant Abubakar, who had previously occupied successive high-level positions in the Nigerian military regime, was "entitled to head-of-state immunity for his acts [including atrocities] during the period that he was Nigeria's head of state."[14] The court confused status-based immunity, which shields incumbent heads of state from legal proceedings, with conduct-based immunity, which shields an individual from legal consequences for certain acts performed during his or her tenure as head of state even after that individual has left office. Having found that Abubakar was entitled to "head-of-state immunity" for acts performed during his tenure as head of state, the district court found that Abubakar was *not* entitled to immunity for the same acts performed during his tenure as Chief of Defense Staff. (The court of appeals upheld the finding of *no* immunity for acts performed while Abubakar was Chief of Defense Staff, but it did not revisit the issue of head of state immunity because the plaintiffs did not contest that finding.[15]) This does not make sense because, as a *former* head of state, Abubakar was not entitled to status-based immunity. Any claim to immunity could only have been conduct-based. Because Abubakar was not an incumbent head of state at the time of the legal proceedings, the court's assessment of his entitle-

[13] For consular officials and former diplomats, see Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, Art. 53(4); Vienna Convention on Diplomatic Relations, Art. 39(2).

[14] Abiola v. Abubakar, 267 F. Supp. 2d 907, 916 (N.D. Ill. 2003).

[15] Enahoro v. Abubakar, 408 F.3d 877, 879 (7th Cir. 2005).

ment to immunity should have focused on the nature of his alleged conduct, not on which title he held at the time that conduct occurred.

More recently, the United States filed an amicus brief in *Samantar* that fails to distinguish between precedents involving status-based immunity and those involving conduct-based immunity. Because it does not differentiate between these categories, the brief makes overly broad statements about conduct-based immunity based on cases involving status-based immunity. In discussing conduct-based immunity,[16] the U.S. brief cites *The Schooner Exchange* and *Jones v. Letombe* in support of the historical assertion that courts "have long recognized foreign official immunity in a variety of contexts."[17] However, neither *The Schooner Exchange* nor *Jones v. Letombe* involved an individual's conduct-based immunity from jurisdiction based on the official nature of his acts. The cited passage from *The Schooner Exchange* deals exclusively with the *status*-based immunity of current diplomats ("foreign ministers") and heads of state ("the person of the sovereign"), and says nothing about conduct-based immunity.[18] *Jones v. Letombe* also involved status-based immunity. In that case, French consul-general Joseph Letombe was deemed not to be immune from U.S. jurisdiction because he was not a diplomat, and he was compelled to post a hefty bail.[19] The *Letombe* case shows that claims of immunity do not automatically preclude the exercise of jurisdiction over foreign officials who are neither diplo-

---

[16] Brief of the United States as Amicus Curiae Supporting Affirmance, Samantar v. Yousuf, No. 08-1555 (U.S. argued Mar. 3, 2010) [hereafter U.S. *Samantar* Brief] at 11 (discussing immunity of foreign officials "based on the official character of their acts").

[17] U.S. *Samantar* Brief at 10.

[18] *See id.*, *citing* The Schooner Exchange, 11 U.S. (7 Cranch) 116, 138 (1812).

[19] *See* U.S. *Samantar* Brief at 10, *citing* Jones v. Letombe, 3 U.S. (3 Dall.) 384, 385 (1798); *cf.* 1 Op. Att'y Gen. 77 (1797) (indicating that Letombe "was not privileged from legal process, either by the general law of nations, or by the consular convention between the United States and France); Maeva Marcus, ed., 8 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, 77 (2007) (indicating that Letombe was forced to post $90,000 bail).

mats nor heads of state. The suit was allowed to proceed, even though Letombe was ultimately adjudged to have been acting on behalf of the French government in signing bills of exchange, and thus not personally liable for the French Republic's debts.

The United States's amicus brief in *Samantar* also cites two Attorney General opinions from the 1790's for the proposition that the Executive has deemed foreign officials immune from suit for acts performed "'in the exercise of governmental authority.'"[20] However, these two opinions do not support that proposition. Instead, the opinions state that, regardless of the merits of the respective suits (about which the Attorneys General expressed doubt), the individual defendants – a former Governor of the French colony of Guadeloupe and a British privateer, respectively – were "with respect to [their] suability, on a footing with every other foreigner (not a public minister) who comes within the jurisdiction of our courts."[21] Like the French consul-general Letombe, former Governor Victor Collot and Captain Henry Sinclair were not immune from the jurisdiction of U.S. courts.

Secretary of State Timothy Pickering emphasized this lack of immunity in a letter to consul-general Letombe about the suit against former Governor Collot. Pickering explained to Letombe that the Supreme Court of Pennsylvania had held the former Governor to bail because he "refused, as I am informed, to say anything more than that he was, at the time [of the alleged act], the *Governor of Guadeloupe*: as though a Governor could commit no unlawful act for which he would be personally responsible."[22] Pickering recognized that not all acts committed by foreign officials are shielded by immunity, whether or not they ultimately result in liability – a point not lost on Letombe, who was forced to post bail in a different proceeding. These historical examples cut against the argument

---

[20] U.S. *Samantar* Brief at 10, *quoting* Underhill v. Hernandez, 168 U.S. 250, 252 (1897), and *citing* 1 Op. Att'y Gen. 45 (1794); 1 Op. Att'y Gen. 81 (1797).

[21] *See* 1 Op. Att'y Gen. 45 (1794); 1 Op. Att'y Gen. 81 (1797).

[22] Letter from Pickering to Letombe (May 29, 1797), *available at* www.footnote.com/image/#6584593.

that foreign officials are entitled to blanket immunity from jurisdiction for acts taken during their tenure office.

"Official Acts"

Not all acts performed by foreign officials are shielded by conduct-based immunity. The central challenge for the district court in *Samantar* on remand, and for courts in other cases, will be to determine which acts are entitled to immunity, and which acts are not.

Foreign officials can perform different types of acts. At one end of the spectrum, foreign officials can perform "purely private" acts, which involve no actual or apparent exercise of state authority. Such acts are not attributable to the foreign state, and an aggrieved person will have recourse solely against the individual official. If the official is entitled to status-based immunity, the claimant will have to wait until the official has left office to pursue legal redress. (If the official is a current diplomat, he or she might be declared *persona non grata* and sent back to his or her home state.) If the individual official is not entitled to claim status-based immunity, he or she can be prosecuted or sued. Individual officials are not entitled to conduct-based immunity for their purely private acts.

At the other end of the spectrum, foreign officials can perform "purely public" acts, which involve the actual exercise of state authority and entail no individual responsibility. An example of such an act might be signing a treaty. If the foreign state subsequently violates the treaty, an aggrieved party might have recourse against the state, but not against the individual. The individual official would be entitled to conduct-based immunity, both during his or her tenure in office, and after. Commercial activities are another example of acts that may be engaged in by individuals purely on behalf of a state. Foreign officials will generally not bear individual responsibility for such activities, and will thus be deemed immune from suit, even though the foreign state itself will not be immune under the "restrictive theory" of sovereign immunity codified by the FSIA.

Many acts that violate international law, such as genocide, war crimes, and crimes against humanity, are neither "purely private" nor "purely public." When foreign officials perform such acts, the acts will be attributable to the foreign state if they are performed with actual or apparent state authority.[23] At the same time, such acts also entail individual responsibility under U.S. and/or international law.[24] As the International Law Commission has emphasized in elaborating principles of state responsibility, individual officials cannot "hide behind the State in respect of their own responsibility for conduct of theirs which is contrary to rules of international law which are applicable to them."[25]

Acting under the actual or apparent authority, or color of law, of a foreign state does not, by itself, entitle an individual defendant to conduct-based immunity from the jurisdiction of U.S. courts. For example, in 1841, the New York Supreme Court (the highest court of general jurisdiction sitting in New York at that time) rejected the claim to immunity of Alexander McLeod, a British subject and former deputy sheriff of the Niagara District in Upper Canada who was implicated in the 1837 attack on the steamboat *Caroline*. McLeod had been arrested and charged with the crimes of arson and murder, and civil claims were also brought against him. The court, which included future U.S. Supreme Court Justice Samuel Nelson, held that Britain had not "placed the offenders above the

---

[23] Article 7 of the non-binding Draft Articles on State Responsibility attributes conduct performed with apparent authority to the state. *See* International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* 46 (2001). Such attribution is "without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State." *Id.*, Art. 58.

[24] For example, Congress has provided civil remedies for torture or extrajudicial killing by an individual defendant who acted "under actual or apparent authority, or color of law, of any foreign nation," Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2006)), and criminal penalties for torture committed "under the color of law," including by a foreign official acting in a foreign country. 18 U.S.C. § 2340(1), 2340A(b)(2).

[25] *Draft Articles on Responsibility of States*, *supra* note 23, at 143.

law, and beyond our jurisdiction, by adopting and approving [the defendant's] crime."[26]

Whether or not an act that is attributable both to the individual and to the state is entitled to conduct-based immunity depends in large part on the remedy sought. The Restatement (Second) of Foreign Relations Law, which was current at the time the FSIA was enacted, provides for conduct-based immunity when "the effect of exercising jurisdiction [over the individual defendant] would be to enforce a rule of law against the state."[27] Reflecting this approach, other domestic courts have found immunity in civil suits against foreign officials when the court would have to determine ownership of a foreign state's property or funds, or would have to order the foreign state to take specific action.[28]

This remedy-centered approach is also consistent with U.S. domestic jurisprudence under 42 U.S.C. § 1983, under which "the phrase 'acting in their official capacities' is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury."[29] The Supreme Court in *Samantar* explicitly referenced the domestic law analogy of an "official capacity" suit under § 1983 with a " *cf.*" citation to illustrate the type of action that would *not* be "'a suit against the official personally'" because the state would be the real party in interest. By contrast, when an aggrieved party sues a current or

---

[26] People v. McLeod, 1 Hill 377, 25 Wend. 483 (N.Y. Sup. Ct. 1841).

[27] Restatement (Second) of the Foreign Relations Law of the United States § 66(f) (1965). The Restatement (Third) of Foreign Relations does not contain an analogous section, although it does contain a note indicating that "a former head of state appears to have no immunity from jurisdiction to adjudicate." Restatement (Third) of the Foreign Relations Law of the United States § 464 n.14 (1987).

[28] See, for example, the cases discussed in the Brief of Professors of Public International Law and Comparative Law as *Amici Curiae* in Support of Respondents in *Samantar v. Yousuf*, No. 08-1555, at 23-24; *see also* Keitner, *Officially Immune?*, *supra* note 3, at 5, 12.

[29] Hafer v. Melo, 502 U.S. 21, 26 (1991); *but see* Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity and Domestic Officer Suits*, 13 GREEN BAG 2D 137 (2009) (arguing against adopting this domestic model in suits against foreign officials).

former official "in his personal capacity and seeks damages from his own pockets," the action *is* a suit against the official personally,[30] not a suit against the foreign state. Conduct-based immunity does not automatically preclude civil or criminal proceedings against a foreign official in a U.S. court if the alleged conduct entails individual responsibility under U.S. or international law.[31]

THE ROLE OF THE EXECUTIVE

Disagreements persist about the appropriate role of the Executive Branch in immunity determinations. 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. When Panamanian General Manuel Noriega claimed head-of-state immunity from prosecution for cocaine trafficking, the court of appeals appropriately noted that the Executive had never recognized Noriega as Panama's legitimate head of state, and that "by pursuing Noriega's capture and this prosecution, the Executive Branch has manifested its clear sentiment that Noriega should be denied head-of-state immunity."[32] In civil cases, the Executive can, and often does, express its views in the form of a "suggestion" of immunity or lack thereof. For example, in *Mumtaz v. Ershad*, the Executive at first suggested status-based immunity, but then with-

---

[30] *Samantar*, slip op. *at* 19.

[31] Whether a suit against a current or former foreign official would implicate the prudential Act of State doctrine is a separate and distinct question, and not one addressed in *Samantar*. The Act of State doctrine does not shield individual defendants from jurisdiction, but it can provide a substantive defense on the merits. *See id.*, slip op. *at* 16 (distinguishing between immunity and Act of State doctrine).

[32] United States v. Noriega, 117 F.3d 1206, 1212 (11th Cir. 1997); *see also* U.S. *Samantar* Brief at 12 n.6 (noting that "[i]n choosing to prosecute a foreign official, the Executive Branch has necessarily determined that the official is not properly protected by immunity"); *see also* United States v. Emmanuel, 2007 WL 2002452 at *12-13 (S.D. Fla., July 5, 2007) (rejecting immunity defense to prosecution under 18 U.S.C. § 2340 for torture in Liberia).

drew its suggestion when the defendant resigned as President of Bangladesh.[33]

Absolute deference to the Executive on questions of conduct-based immunity has no equivalent constitutional basis, and would raise separation of powers concerns. Practice in this area is scant. As the Supreme Court noted in *Samantar*, pre-FSIA cases involving the immunity of individual foreign officials were "few and far between."[34] A compilation of the State Department's immunity decisions from 1952 to 1977 contains 110 decisions, only four of which involved the conduct-based immunity of individual defendants.[35] In the first case, which predated the Vienna Convention on Consular Relations, the State Department suggested conduct-based immunity for a Canadian consular official who made statements to induce the plaintiff to emigrate to Canada.[36] The district court found immunity, citing both the State Department's letter and an amicus brief filed by the Ambassador of Canada.[37] In the second and third cases, the State Department suggested conduct-based immunity for Canadian provincial officials for representations they made relating to the sale of securities owned by the Province of Newfoundland.[38] It is not clear what became of the second case;[39] in the third, the district court found in an unreported decision that the provincial officials were immune from suit, and treated the State Department's letter as binding.[40] In the fourth case, the State Department declined to suggest immunity; it is not clear what ultimately happened

---

[33] *See* Notice of Changed Circumstances Submitted by the United States of America, *Mumtaz v. Ershad*, No. 74258/89 (N.Y. Sup. Ct. March 1991).

[34] *Samantar*, slip op. at 17; *see also id.* at 5 (describing process in cases involving seized vessels).

[35] Sovereign Immunity Decisions of the Department of State from May 1952 to January 1977 (M. Sandler, D. Vagts, & B. Ristau, eds.), *in* 1977 Dig. U.S. Prac. Int'l L. 1017, 1020.

[36] *Id.* at 1037.

[37] Waltier v. Thomson, 189 F. Supp. 319, 320 (S.D.N.Y. 1960).

[38] 1977 Dig. U.S. Prac. Int'l L. at 1075-76.

[39] Semonian v. Crosbie, D. Mass. 1974 (no decision located).

[40] Greenspan v. Crosbie, 1976 WL 841 (S.D.N.Y.) at *2.

in the litigation.[41]

There is thus no consistent, well-settled practice from which to infer a standard of absolute deference to the Executive on questions of conduct-based immunity. There is also a scant record from which to derive "the principles accepted" by the Executive as governing claims to conduct-based immunity when the State Department declines to offer an opinion in a particular case.[42]

The Executive has argued that it is entitled to absolute deference on questions of both status-based and conduct-based immunity based on cases involving foreign ships.[43] These cases do not support a requirement of absolute deference in cases against foreign officials. In the 1926 *Berizzi Brothers* case, the U.S. Supreme Court found that the Italian steamship *Pesaro* was entitled to immunity even though it was a merchant ship and not a war ship, because it was owned and operated by the Italian government.[44] In reaching this conclusion, the Court did not "mention, let alone give weight to, the fact that the Department of State had explicitly stated its view that the *Pesaro* was *not* entitled to immunity."[45] In 1942, the State Department recommended granting immunity to the Peruvian

---

[41] 1977 Dig. U.S. Prac. Int'l L. at 1062 (in *Cole v. Heitman* (S.D.N.Y. 1968), declining to suggest conduct-based immunity for alleged civil rights violations by the liaison officer of the British West Indies Central Labour Organization).

[42] *See* Heaney v. Spain, 445 F.2d 501, 503 n.2 (2d Cir. 1971) (stating that "we invited the State Department to submit its views on the questions presented by this case" but that "[t]he Department has not even acknowledged our letter"). The district court in *Samantar* faced the same dilemma. *See Samantar*, slip op. at 2 (indicating that the district court stayed the proceedings for over two years to enable the State Department to provide a statement of interest, but the State Department remained silent).

[43] U.S. *Samantar* Brief at 9, *citing* Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945); Ex parte Peru, 318 U.S. 578, 589 (1943).

[44] Berizzi Bros. Co. v. The Pesaro, 271 U.S. 562 (1926); *see also* Bradley & Goldsmith, *supra* note 1, at 11 (indicating that "starting in the late 1930s, courts began to give essentially absolute deference to Executive Branch views on whether immunity should be granted").

[45] Myres S. McDougal & William T. Burke, THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA 146 (1962) (emphasis added).

steamship *Ucayali*, and transmitted that suggestion to the Attorney General, who instructed the U.S. Attorney to communicate the suggestion to the district court.[46] This time, the Supreme Court stated in *Ex parte Peru* that "[u]pon recognition and allowance of the claim [to immunity] by the State Department and certification of its action presented to the court by the Attorney General, it is the court's duty to surrender the vessel and remit the libelant to the relief obtainable through diplomatic negotiations."[47]

Two years after *Ex parte Peru*, the Supreme Court heard *Republic of Mexico v. Hoffman*, which also involved a foreign ship. The district court had reached a verdict denying the *Baja California* immunity after a trial on the merits, and the court of appeals had affirmed that verdict. The lower courts had found that the ship was not immune because, although the Mexican government held the title to the ship, the ship was not in the possession or public service of Mexico.[48] In *Hoffman*, the Supreme Court affirmed the finding of no immunity, and cited its recent holding in *Ex parte Peru* for the proposition that, if the State Department remains silent on the question of immunity, "the courts may decide for themselves whether all the requisites of immunity exist . . . in conformity to the principles accepted by the department of the government charged with the conduct of our foreign relations"[49] The Court could readily identify the "principles accepted" by the State Department in this context, because there was an extensive record of *in rem* admiralty proceedings denying immunity to ships that were owned but not possessed by foreign governments (reinforcing the principle that sovereign immunity only arises if the *res* is in the actual possession of the sovereign).[50] By contrast, the State Depart-

---

[46] Ex parte Peru, 318 U.S. 578, 581 (1943).

[47] *Id.* at 588.

[48] Republic of Mexico v. Hoffman, 324 U.S. 30 (1945).

[49] *Id.* at 34-35, *citing* Ex parte Peru, 318 U.S. 578, 588 (1943). The Court criticized and distinguished its 1926 decision in the *Berizzi Brothers* case. *Republic of Mexico*, 324 U.S. at 36 n.1.

[50] *See id.* at 36 ("It has been held below, as in *The Navemar*, [303 U.S 68 (1938)], to be decisive of the case that the vessel when seized by judicial process was not in

ment has not yet articulated a clear set of principles for determining the scope of conduct-based immunity in suits against foreign officials who, unlike ships, may also be personally responsible for their conduct.

In sum, although courts have deferred to Executive suggestions of *status*-based immunity for foreign officials, this does not compel the same level of deference to Executive suggestions of *conduct*-based immunity from the jurisdiction of U.S. courts.

There are many obstacles to civil suits against, and criminal prosecutions of, foreign officials for international law violations in U.S. courts. Conduct-based immunity is not invariably one of them.

the possession and service of the foreign government").