Immunity Games: How the State Department Has Provided Courts with a Post-*Samantar* Framework for Determining Foreign Official Immunity

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I. OPENING PLAY: INTRODUCTION

In 2010, the Supreme Court ruled in *Samantar v. Yousuf* that the Foreign Sovereign Immunities Act ("FSIA") does not govern the application or determination of foreign official immunity.[1] Instead, the Court found that the immunity of foreign officials was "properly governed by the common law."[2] While the Court failed to explicitly define these common-law principles, it did note that the State Department would play a role in individual official immunity determinations.[3] In the years since, the State Department has done just that. Through officially submitted Suggestions of Immunity and Statements of Interest, the State Department has rejuvenated its standards for granting foreign official immunity for both heads of state and current and former officials. These standards draw upon the foundational principles of customary international law for official immunity and establish the criteria by which officials are entitled to such immunity in the United States.

Nevertheless, this area of law is still fairly undeveloped. Courts struggle over questions of foreign official immunity and the appropriate amount of deference to give the State Department. This Note seeks to alleviate this ambiguity by demonstrating that the State Department's post-*Samantar* Suggestions of Immunity and Statements of Interest reveal a consistent and reliable framework for determining whether a foreign official is immune from suit. Courts should defer to the State Department's application of this framework and apply it themselves in the face of State Department silence.

This Note proceeds in five parts. Part II explains the dichotomy between status-based and conduct-based official immunity as well as a brief history of foreign sovereign immunity practice in the United

1. 560 U.S. 305, 324 (2010).
2. *Id.* at 325.
3. *Id.* at 323.

States through the *Samantar* decision. Part III discusses the evolution of the *Samantar* litigation through the Supreme Court ruling and further developments on remand.[4] In addition, Part III also discusses the recent Fourth Circuit decision holding that State Department determinations of head-of-state immunity are entitled to absolute judicial deference while determinations of foreign official immunity are not controlling.

Part IV presents detailed case studies of the post-*Samantar* State Department submissions in six head-of-state immunity cases and five foreign official immunity cases, analyzing the reasoning behind the Department's pronouncements on immunity and the level of deference claimed by the Department and awarded by the courts. Part V proposes a two-tiered framework distilled from the factors considered in these submissions for courts to apply in making independent head-of-state or foreign official immunity decisions should the State Department remain silent. Part V also proposes that a rebuttable presumption of immunity should arise when the State Department submits a Suggestion of Immunity in foreign official immunity cases. Part VI briefly concludes. Ultimately, this Note contends that a consistent framework has developed post-*Samantar* in the State Department's considerations of both head-of-state and official immunity and that courts should award that framework due deference.

II. LAYING THE BOARD: A QUICK PRIMER OF FOREIGN OFFICIAL IMMUNITY

A. Status-Based Versus Conduct-Based Immunity

It is a basic principle of customary international law that foreign states enjoy immunity from jurisdiction in the courts of other sovereign states.[5] This immunity is not restricted to the state itself but also extends to such entities as its head of state, its diplomatic envoys, and its armed forces stationed abroad.[6] The *Restatement (Second) of Foreign Relations Law of the United States* ("*Restatement*") extends the immunity of a foreign state further to "any other public

4. Yousuf v. Samantar (*Yousuf I*), No. 1:04-cv-1360, 2007 WL 2220579 (E.D. Va. Aug 1, 2007), *rev'd*, (*Yousuf II*), 552 F.3d 371 (4th Cir. 2009), *aff'd*, (*Yousuf III*), 560 U.S. 305 (2010); (*Yousuf V*), No. 1:04cv1360 (LMB/JFA), 2012 WL 3730617 (E.D. Va. Aug. 28, 2012), *aff'd*, (*Yousuf VI*), 699 F.3d 763 (4th Cir. 2012).

5. 1 OPPENHEIM'S INTERNATIONAL LAW 342 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992).

6. *Id.* at 460–61.

minister, official, or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state."[7] Former officials for the most part enjoy residual immunity for any acts conducted in their official capacity while in office.[8] However, as the *Restatement* makes clear, the immunity afforded to foreign officials is bound up in the inherent immunity of the foreign state. The immunity belongs to the foreign state rather than to the official, and officials enjoy immunity only for acts taken in their official capacity.[9] A foreign state may choose to waive immunity for current or former officials, even for acts conducted in their official capacity.[10] Former officials for the most part enjoy residual immunity for any acts conducted in their official capacity while in office.

Foreign official immunity has historically been divided into two types: status-based immunities and conduct-based immunities.[11] Status-based immunities apply to individuals because of their current status and are designed to protect the individual's ability to conduct affairs on behalf of the state.[12] Individuals entitled to status-based immunities include sitting heads of state,[13] diplomats and consular officials,[14] and members of special missions.[15] Conduct-based immunities, on the other hand, derive from the official nature of an individual's conduct and are designed to guard against judicial oversight of government conduct.[16] Conduct-based immunity applies to official acts of current and former foreign government officials, as well as to those official acts conducted by former heads of state, diplomats, and members of special missions while in office.[17] Whether or not an act is considered "official" depends on the nature of the act, and even

7. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE U.S. § 66 (1965).

8. OPPENHEIM'S INTERNATIONAL LAW, *supra* note 5, at 1043–44 ("For his official acts as Head of State he will, like any other agent of a state, enjoy continuing immunity.").

9. Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 22 ¶ 61 (Feb. 14).

10. Statement of Interest of U.S. at 7, *Yousuf V*, No. 1:04cv1360 (LMB/JFA), 2012 WL 3730617 (E.D. Va. Aug. 28, 2012) (No. 147) [hereinafter Yousuf SOI]. *See also In re* Doe, 860 F.2d 40, 45 (2d Cir. 1988) ("Because it is the state that gives the power to lead and the ensuing trappings of power – including immunity – the state may therefore take back that which it bestowed upon its erstwhile leaders.").

11. Harold Hongju Koh, *Foreign Official Immunity After* Samantar: *A United States Government Perspective*, 44 VAND. J. TRANSNAT'L L. 1141, 1154 (2011).

12. *Id.*

13. *Id.* at 1155.

14. *Id.* at 1156.

15. *Id.* at 1157.

16. *Id.* at 1154.

17. *Id.*

"official acts" which violate international or domestic law are not generally protected under conduct-based immunity.[18]

B. Foreign Sovereign Immunity Doctrine in the United States

The doctrinal roots of foreign sovereign immunity (and by extension foreign official immunity) can be traced to the 1812 decision *The Schooner Exchange v. McFaddon*.[19] In *The Schooner Exchange*, the title to a ship sailing under French colors was disputed while the vessel was anchored in U.S. waters for repair.[20] The U.S. Attorney submitted a suggestion of immunity to the Court, but the Court conducted its own independent evaluation.[21] The Court ultimately extended immunity to the vessel as an entity of a foreign sovereign nation,[22] drawing on precedents regarding the immunity of the person of the sovereign from arrest or detention within a foreign territory,[23] the immunity afforded by all states to foreign ministers,[24] and the consideration that a sovereign cedes a portion of its territorial jurisdiction when it allows foreign troops to pass through its territory.[25]

A period of absolute immunity followed the holding of *The Schooner Exchange*, "under which a sovereign [could not], without [its] consent, be made a respondent in the courts of another sovereign."[26] The Court again dealt with foreign sovereign immunity in 1943 in *Ex parte Republic of Peru*, another case involving the possible seizure of a foreign vessel.[27] There, the Court ruled that courts must unequivocally accept the State Department's certification of immunity.[28] Reinforcing the holding of *The Schooner Exchange*, the

18. *Id.*

19. 11 U.S. (7 Cranch) 116 (1812).

20. *Id.* at 122, 135.

21. *Id.* at 120–26.

22. *Id.* at 145–46 ("It seems then to the Court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction."). Moreover, the Court concluded that the avenging of wrongs committed by a foreign sovereign were "for diplomatic, rather than legal discussion" and determination. *Id.* at 146.

23. *Id.* at 137.

24. *Id.* at 138.

25. *Id.* at 139.

26. Permanent Mission of India to the United Nations v. City of New York, 551 U.S. 193, 199 (2007) (internal quotation marks omitted).

27. 318 U.S. 578, 579–80 (1943).

28. *Id.* at 589 ("The certification and the request that the vessel be declared immune must be accepted by the courts as a conclusive determination by the political arm of the Government that the continued retention of the vessel interferes with the proper conduct of our foreign

Court noted that in cases involving the United States' relations with foreign powers, "our national interest will be better served . . . through diplomatic negotiations rather than by the compulsions of judicial proceedings."[29] Two years later, in 1945, the Court reasserted the mandatory nature of the State Department's suggestions of immunity in *Republic of Mexico v. Hoffman*.[30] The Court asserted: "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."[31]

During this period, courts applied a two-track process in cases of foreign sovereign immunity, always looking to State Department policy for a determination.[32] If the State Department offered a suggestion in favor of immunity—track one—the court would accept the immunity and dismiss the case.[33] If the Department remained silent on the issue of immunity—track two—the court would "decide for itself whether all the requisites for such immunity existed,"[34] taking into account "whether the ground of immunity is one which it is the established policy of the department to recognize."[35] This process was applied to suits concerning foreign states and their property as well as to cases involving individual foreign officials asserting immunity.[36]

The Court continued to apply this deferential framework until 1952 when the "Tate Letter" ushered in a significant shift in State Department immunity practice.[37] The Tate Letter announced the United States' move to the "restricted theory" of sovereign immunity, whereby a foreign state enjoys immunity for its public acts but not for any commercial acts.[38] The Department's restrictive application of

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relations."). The Court went on to say that "[u]pon the submission of this certification to the district court, it became the court's duty, in conformity to established principles, to release the vessel and to proceed no further in the cause." *Id.*

29. *Id.*

30. 324 U.S. 30, 35 (1945).

31. *Id.*

32. Koh, *supra* note 11, at 1143.

33. *Id.*

34. *Ex parte* Republic of Peru, 318 U.S. 578, 587 (1943).

35. *Hoffman*, 324 U.S. at 36; Koh, *supra* note 11, at 1143.

36. *Yousuf III*, 560 U.S. 305, 310–11 (2010).

37. Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL. 984 (1952). The letter was prompted by the increasing engagement of foreign governments in commercial activities. *Id.* at 985.

38. Koh, *supra* note 11, at 1143.

immunity continued until 1976 when Congress enacted the FSIA.[39] The purpose of the Act was to codify the restrictive theory of sovereign immunity and transfer the responsibility of making immunity decisions for foreign states to the courts instead of the State Department.[40] Even after the FSIA's enactment, however, the Executive Branch asserted that State Department determinations of immunity were still required where claims of foreign official immunity were raised because the Act only governed immunity determinations for foreign *states*, not officials.[41] The Department continued to file suggestions of immunity in foreign official immunity cases,[42] asserting that they were entitled to absolute judicial deference.[43] Courts divided

39. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), 1602–1611 (2012).

40. *Yousuf III*, 560 U.S. at 313; Republic of Austria v. Altmann, 541 U.S. 677, 691 (2004) ("[The FSIA] transfers primary responsibility for immunity determinations . . . to the Judicial Branch.").

41. Koh, *supra* note 11, at 1145. The State Department's position accorded with the customary international law principle that a clear distinction is often drawn "between the foreign state as a legal entity and the head of such a state as an individual." SATOW'S GUIDE TO DIPLOMATIC PRACTICE 9 (Lord Gore-Booth ed., 5th ed. 1979).

42. Suggestions of Immunity and Statements of Interest are typically filed after an express request is received by the State Department from the foreign government whose head of state or official is the subject of litigation. *See, e.g.*, Letter from Gabriel Silva, Colom. Ambassador to the U.S., to Hillary Clinton, U.S. Sec'y of State at 2, Giraldo v. Drummond Co., 808 F. Supp. 2d 247 (D.D.C. 2011) (No. 13-2):

> The [Colombian] Embassy understands that this designation of immunity should come from the Department of State in the form of a Suggestion of Immunity letter. Thus, this Embassy kindly request [sic] the assistance of the Department of State in preparing a Suggestion of Immunity letter to be submitted to the District Court by the Attorney General.

The State Department, if it chooses to become involved, then submits a letter from the Legal Advisor to the Department of Justice with a determination of whether or not immunity should be extended to the official and the legal justifications for such a determination. The Department of Justice then writes and files the Suggestion of Immunity or Statement of Interest with the relevant court. *See* 28 U.S.C. § 516 ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."). For clarity, when referencing the views expressed in a Suggestion or Statement, I will refer to the submitting party as the "Executive" or "Executive Branch." It is important to note the potential for conflict this process may one day present should the State Department and Justice Department take opposing views on an official's entitlement to immunity. Technically it is the Department of Justice that makes the final determination in how the Suggestion or Statement will be framed for the court. Because such a conflict between Departments has not yet arisen in a head of state or conduct-based claim of immunity I only note the potential as a factor to remain aware of when reading the Legal Advisor Letters and Suggestions or Statements in tandem.

43. Brief for the U.S. as Amicus Curiae in Support of Affirmance at 3, 8–9, Matar v. Dichter, 563 F.3d 9 (2d Cir. 2009) (No. 07-2579-cv), 2007 WL 6931924. The Brief noted:

> [I]n situations where the State Department has given a formal recommendation . . . the courts need not reach questions of this type. The State

on the issue of whether or not the FSIA applied to foreign official immunity until the Supreme Court finally took up the issue in *Samantar v. Yousuf*, more than thirty years after passage of the Act.

III. GAME CHANGER: *SAMANTAR* REINSTATES FOREIGN OFFICIAL IMMUNITY UNDER THE COMMON LAW

The circumstances surrounding the *Samantar* litigation were anything but dull. In 2005, members of the Isaaq clan of Somalia filed a civil action against Mohamed Ali Samantar under the Torture Victim Protection Act ("TVPA") and the Alien Tort Statute ("ATS").[44] From 1980 until 1991, Samantar served as First Vice President[45] and Minister of Defense and then Prime Minister of Somalia under the military regime of General Mohamed Barre.[46] The clan members alleged that Samantar knew, or should have known, about the torture, killings, and arbitrary detentions perpetrated by the Somali military forces he commanded and that "he aided and abetted the commission of these abuses."[47] After the fall of the Barre regime in January 1991, Samantar fled Somalia for the United States and took up residence in Virginia.[48]

This Part details the *Samantar* litigation as it progressed from the district court to the Supreme Court and back again. Primarily at issue was whether Samantar was entitled to foreign official immunity for the alleged acts against the Isaaq clan members. In 2010, the Supreme Court held that the FSIA did not apply when determining the immunity of foreign officials.[49] In 2012, the Fourth Circuit ruled that Samantar was also not entitled to conduct-based foreign official immunity under the common law.[50] In addition to determining the fate of Samantar, the litigation also addressed the reemerging position of the State Department in determinations of foreign official immunity.

> Department is to make this determination, in light of the potential consequences to our own international position. Hence, once the State Department has ruled in a matter of this nature, the judiciary will not interfere.

Id. at 20 (quoting Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198, 1201 (2d Cir. 1971)).

44. *Yousuf III*, 560 U.S. at 308.

45. *Id.*

46. *Yousuf II*, 552 F.3d 371, 374 (4th Cir. 2009).

47. *Yousuf III*, 560 U.S. at 308.

48. *Yousuf II*, 552 F.3d at 374.

49. *Yousuf III*, 560 U.S. at 308.

50. *Yousuf VI*, 699 F.3d 763, 777–78 (4th Cir. 2012).

A. Turn I: The Lower Courts Collide

Before the district court in 2004, Samantar asserted that he was entitled to sovereign immunity. The court submitted the question to the State Department for a Statement of Interest, but after two years of waiting without a response, the court set about determining the status of Samantar's immunity itself.[51] The district court held that Samantar, as the former Minister of Defense and former Prime Minister during the alleged events, undertook the acts on behalf of the then–Somali government and was therefore entitled to immunity under the FSIA.[52] The court placed great weight on two letters submitted by the Somali Transitional Federal Government ("TFG") requesting immunity for Samantar and asserting that the alleged actions were taken in his official capacities.[53]

The Fourth Circuit reversed the district court, finding instead that the FSIA did not apply to individuals, only foreign states, and that Samantar was therefore not entitled to immunity under the Act.[54] The Fourth Circuit looked to the text of the FSIA and its definition of the term "foreign state," finding "no explicit mention of individuals or natural persons."[55] The court also examined the overall structure and purpose of the FSIA and found no congressional intention to include individuals within the ambit of the statute's immunity protections.[56] The court concluded that Samantar was not entitled to sovereign immunity under the FSIA but left open the possibility that Samantar could invoke immunity under pre-FSIA common-law immunity doctrines.[57]

B. Turn II: The Supreme Court Enters the Game

The Supreme Court granted certiorari on the question of whether the FSIA provided immunity from suit for an individual based on actions taken in his official capacity.[58] In its amicus brief supporting the Fourth Circuit's decision below, the State Department opined that "principles articulated by the Executive Branch, not the

51. *Yousuf I*, No. 1:04-cv-1360, 2007 WL 2220579, at *6 (E.D. Va. Aug. 1, 2007).

52. *Id.* at *11, *14.

53. *Id.* at *11. The court asserted that the United States both supported and recognized the Somali Transitional Federal Government as the governing body in Somalia. *Id.*

54. *Yousuf II*, 552 F.3d 371, 373 (4th Cir. 2009).

55. *Id.* at 377–78.

56. *Id.* at 380–81.

57. *Id.* at 383–84.

58. *Yousuf III*, 560 U.S. 305, 308 (2010).

FSIA, properly govern the immunity of foreign officials from civil suit for acts in their official capacity."[59]

Citing historical sovereign immunity practices, the Department recalled the pre-FSIA two-step procedure developed for determining claims of sovereign immunity.[60] Under step one, when a claim of foreign immunity was raised, "the Executive Branch traditionally provided the judiciary with suggestions of immunity, based on the Executive Branch's judgments regarding customary international law and reciprocal practice."[61] Under step two, "When the Executive Branch made no specific recommendation, the courts decided the immunity question 'in conformity to the principles' the Executive Branch had previously articulated."[62] As for foreign official immunity, the State Department asserted that immunity was not limited to current officials of the foreign government, but also attached residually to the acts of former officials taken in their official capacity. This conclusion was based on the customary international law principle that "the immunity of foreign officials arises from the official character of their acts."[63]

Turning to the FSIA, the State Department noted that the statute made no reference to immunity for individual foreign officials and therefore "left in place the pre-existing practice of recognizing official immunity in accordance with suggestions of immunity by the Executive Branch."[64] The State Department asserted that immunity for actions taken on behalf of a foreign state naturally "attaches when (and because) the individual was acting as an officer of the foreign state."[65] However, the State Department qualified that "it does not follow that Congress must have treated suits against individual foreign officials identically to suits against foreign states."[66]

The Supreme Court agreed, holding that the FSIA did not govern the immunity of foreign officials.[67] While the Act "indisputably

59. Brief for the U.S. as Amicus Curiae Supporting Affirmance at 6, *Yousuf III*, 560 U.S. 305 (2010) (No. 08-1555), 2010 WL 342031.

60. *Id.* at 9.

61. *Id.* (citing Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 487 (1983)).

62. *Id.*

63. *Id.* at 11. The State Department further asserted that this practice "promotes the United States' interests in comity with other nations." *Id.* at 12.

64. *Id.* at 13–14.

65. *Id.* at 21.

66. *Id.* The government specifically referenced the FSIA House Report, which noted that "with regard to discovery, 'official immunity,' of a kind existing separate from and outside of the FSIA, would apply if a litigant sought to depose a 'high-ranking official of a foreign government.' " *Id.* at 19 (quoting H.R. REP. NO. 1487, at 23 (1976)).

67. *Yousuf III*, 560 U.S. 305, 308 (2010).

governs the determination of whether a foreign state is entitled to sovereign immunity,"[68] the Court determined that nothing in the FSIA suggested that the reading of "foreign state" should "include an official acting on behalf of the foreign state."[69] This reading of the statute, according to the Court, also furthers the FSIA's dual purposes of codifying the common law of state foreign immunity and addressing the participation of foreign state enterprises in commercial activities.[70] The Court found it had "been given 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."[71]

Finally, the Court determined that although the immunity of an individual foreign official is not governed by the Act, a suit against the official may still be barred.[72] Specifically, the Supreme Court left open the option that Samantar could be entitled to immunity under common-law principles, a determination it relegated to the lower courts.[73] The Court did not, however, define those principles or explain how they should be applied in cases of foreign official immunity.

C. Turn III: The State Department Speaks

On remand to the district court, the State Department submitted a Statement of Interest conveying the Department's determination that Samantar was not immune from suit.[74] The State Department grounded its finding on two critical circumstances: (1) Samantar was a former official of a state with no recognized government that could request immunity on his behalf and verify that the acts in question were taken in an official capacity, and (2) Samantar was a U.S. resident.[75]

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68. *Id.* at 313.

69. *Id.* at 319.

70. *Id.* at 322–23. The Court noted that "[i]t hardly furthers Congress' purpose of 'clarifying the rules that judges should apply in resolving sovereign immunity claims' to lump individual officials in with foreign states without so much as a word spelling out how and when individual officials are covered." *Id.* at 322 (quoting Republic of Austria v. Altmann, 541 U.S. 677, 699 (2004)). Foreign official immunity "simply was not the particular problem to which Congress was responding when it enacted the FSIA." *Id.* at 323.

71. *Id.* at 323.

72. *Id.* at 325. For example, if the plaintiff names only a foreign official but the foreign state itself is a required party or if the foreign state is the real party in interest, then the suit will be barred regardless of the individual official's entitlement to immunity. *Id.* at 325–26.

73. *Id.*

74. Yousuf SOI, *supra* note 10, at 1.

75. *Id.* at 7.

First, the State Department explained that the associated foreign state typically requests a suggestion of immunity on behalf of its officials when a claim of foreign official immunity is raised.[76] In considering the request, the State Department takes into account the foreign state's understanding of the official's acts and whether or not they were performed in an official capacity.[77] At the time of the Suggestion of Immunity for Samantar, the United States did not recognize a government "authorized either to assert or waive [Samantar's] immunity or to opine on whether [Samantar's] alleged actions were taken in an official capacity."[78] Accordingly, the State Department determined that immunity should not be recognized[79] based on the principle that the "immunity protecting foreign officials for their official acts ultimately belongs to the sovereign rather than the official."[80]

The State Department then turned to the fact that Samantar had been a resident of the United States since June 1997.[81] While "[a] foreign official's immunity is for the protection of the foreign state," the Department noted that "a former foreign official's decision to permanently reside in the United States is not, in itself, determinative of the former official's immunity from suit for acts taken while in office."[82] However, because the United States "has a right to exercise jurisdiction over its residents," the State Department determined that a denial of immunity was warranted to allow "U.S. courts to adjudicate claims by and against U.S. residents."[83]

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76. *Id.* at 8.

77. *Id.*

78. *Id.* at 9. Two competing putative government entities both sent letters to the State Department regarding Samantar's immunity. The TFG sought to assert residual immunity on behalf of Samantar while the government of the "Republic of Somaliland" sought to waive any possible residual immunity. *Id* at 8. Because the Executive Branch did not recognize either entity as the government of Somalia, the State Department determined that neither of the entities was capable of waiving or asserting a claim of immunity on behalf of Samantar or confirming or denying whether his alleged acts were taken in an official capacity. *Id.*

79. *Id.* at 9. The State Department did, however, reserve the right to reach a different determination on the immunity of former foreign officials in future cases where no recognized government exists, if the circumstances were different. *Id.*

80. *Id.* at 7. "Samantar is a former 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 actions taken in an official capacity." Letter from Harold Hongju Koh, Legal Adviser, Dep't of State, to Tony West, Assistant Att'y Gen., U.S. Dep't of Justice (Feb. 11, 2001), *Yousuf V*, No. 1:04cv1360 (LMB/JFA), 2012 WL 3730617 (E.D. Va. Aug. 28, 2012) (No. 147, Exhibit 1).

81. Yousuf SOI, *supra* note 10, at 9.

82. *Id.*

83. *Id.*

Finally, the State Department asserted that the Court should defer to the Executive Branch's express determination of no immunity for Samantar.[84] The Department grounded its position in the separation of powers doctrine. The Executive Branch plays "the primary role in determining the immunity of foreign officials as an aspect of the President's responsibility for the conduct of foreign relations and recognition of foreign governments."[85] Therefore, because "it is . . . 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,"[86] the State Department asserted that courts must defer to Executive determinations of foreign official immunity.[87] The district court accepted the government's determination and dismissed Samantar's common-law sovereign immunity defense.[88]

Samantar appealed, contending that the court improperly deferred to the State Department's immunity determination without conducting its own independent assessment.[89] The Fourth Circuit affirmed the district court's denial of head-of-state and conduct-based official immunity for Samantar.[90] The court specifically addressed the level of judicial deference that should be afforded to a suggestion of immunity from the State Department, holding that head-of-state immunity determinations are entitled to absolute deference, while conduct-based immunity determinations for foreign officials are not controlling but "carr[y] substantial weight in [the court's] analysis."[91]

The Fourth Circuit found that absolute deference to the State Department's head-of-state immunity determinations lies in the

84. *Id.* at 6; *see also* Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198, 1201 (2d Cir. 1971) ("[O]nce the State Department has ruled in a matter of this nature, the judiciary will not interfere.").

85. Yousuf SOI, *supra* note 10, at 5–6. The Department elaborated that, given the Executive's role as "the guiding organ in the conduct of [the United States'] foreign affairs" under the Constitution, "it was 'an accepted rule of substantive law . . . that [courts] accept and follow the executive determination' on questions of foreign sovereign immunity." *Id.* at 3 (quoting Republic of Mexico v. Hoffman, 324 U.S. 30, 36 (1945)); *see also* Spacil v. Crowne, 489 F.2d 614, 618 (5th Cir. 1974).

86. Yousuf SOI, *supra* note 10, at 3 (quoting Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945)).

87. *Id.* at 6.

88. *Yousuf IV*, No. 1:04-cv-1360 (LMB/JFA), 2011 WL 7445583 (E.D. Va. Feb. 15, 2011). Samantar ultimately accepted a default judgment as to liability and the district court awarded the plaintiffs a total of $21 million in damages. *Yousuf V*, No. 1:04cv1360 (LMB/JFA), 2012 WL 3730617, at *16 (E.D. Va. Aug. 28, 2012), *aff'd*, 699 F.3d 763 (4th Cir. 2012).

89. *Yousuf VI*, 699 F.3d 763, 768 (4th Cir. 2012).

90. *Id.* at 768–69, 778.

91. *Id.* at 773.

constitutional assignment of "the power to receive Ambassadors and other public Ministers" to the Executive Branch, including "the power to accredit diplomats and recognize foreign heads of state."[92] Therefore, because head-of-state immunity involves the "quintessentially executive function" of "a formal act of recognition," the court determined that head-of-state immunity suggestions from the State Department should be controlling on the judiciary.[93] Nevertheless, there is no equivalent constitutional basis for a finding of conduct-based immunity for foreign officials, the court concluded, since foreign official immunity rests on the scope of officials' *duties* alone, not their *status*.[94] Because foreign official immunity "turn[s] upon principles of customary international law and foreign policy," courts should still respect the views of the Executive Branch, though not defer automatically to it.[95]

The Fourth Circuit then independently evaluated Samantar's claims of immunity. The court dismissed Samantar's head-of-state immunity claim because the State Department never recognized him as the head of state of Somalia.[96] Moreover, the court ultimately agreed with the State Department's determination that Samantar was not entitled to conduct-based foreign official immunity, since he was a former official of a State with no currently recognized government and was a resident of the United States subject to the jurisdiction of its courts.[97] However, the Fourth Circuit added an additional reason for denying Samantar's immunity: he had violated *jus cogens* norms.[98] The court concluded that, "under international and domestic law, officials from other countries are not entitled to foreign official

92. *Id.* at 772 (quoting U.S. CONST. art. II, § 3).

93. *Id.* (quoting Peter B. Rutledge, Samantar*, Official Immunity & Federal Common Law*, 15 LEWIS & CLARK L. REV. 589, 606 (2011)).

94. *Yousuf VI*, 699 F.3d at 773.

95. *Id.* at 773.

96. *Id.* at 772 (noting also that "the State Department does not recognize the Transitional Federal Government or any other entity as the official government of Somalia, from which immunity would derive in the first place").

97. *Id.* at 777–78.

98. *Id.* at 776–77. A *jus cogens* norm "is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 322. The Fourth Circuit looked to international precedent, namely Regina v. Bartle, *ex parte* Pinochet, 38 I.L.M. 581, 593–95 (H.L. 1999), as well as American cases in formulating its assertion that *jus cogens* violations operate to remove foreign official immunity even for acts undertaken in an official capacity. *Yousuf VI*, 699 F.3d at 776–77.

immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity."[99]

After the Fourth Circuit's most recent decision, Samantar petitioned the Supreme Court again for a writ of certiorari on the question of whether a foreign official's conduct-based immunity is abrogated by claims that his official acts violated *jus cogens* norms.[100] However, the Supreme Court declined to weigh in on this question, denying certiorari in January 2013.[101] It remains to be seen if other courts will side with the Fourth Circuit on this controversial issue.

IV. NEW MOVES: THE STATE DEPARTMENT'S POST-*SAMANTAR* SUGGESTIONS OF IMMUNITY

Taken together, the State Department has penned eleven Suggestions of Immunity and Statements of Interest since the Supreme Court ruled in *Samantar*. Of these determinations, six dealt with immunity claims for a sitting head of state,[102] and five dealt with conduct-based immunity claims for former officials.[103] These Suggestions and Statements provide key insights into the State

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99. *Id.* at 777. The court further noted that while violations of *jus cogens* norms remove foreign official immunity, head-of-state immunity is absolute and will operate even in the face of such claims. *Id.* at 776. While the implication of *jus cogens* norm violations on official immunity is a developing and controversial topic in international law, this Note will not address *jus cogens* violations in depth. For detailed analyses of *jus cogens* violations and state and official immunity, see generally Ingrid Wuerth, Pinochet*'s Legacy Reassessed*, 106 AM. J. INT'L L. 731 (2012); Sévrine Knuchel, *State Immunity and the Promise of Jus Cogens*, 9 NW. U. J. INT'L HUM. RTS. 149 (2011); Beth Stephens, *Abusing the Authority of the State: Denying Foreign Official Immunity for Egregious Human Rights Abuses*, 44 VAND. J. TRANSNAT'L L. 1163 (2011); Paul B. Stephan, *The Political Economy of Jus Cogens*, 44 VAND. J. TRANSNAT'L L. 1073 (2011); John B. 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).

100. Petition for Writ of Certiorari at 1, Samantar v. Yousuf, 2013 WL 836952 (U.S. Mar. 4, 2013) (No. 12-1078).

101. Denial of Petition for Writ of Certiorari at 1, Samantar v. Yousuf, 2014 WL 102984 (U.S. Jan. 13, 2014) (No. 12-1078).

102. Devi v. Rajapaksa, No. 11 Civ. 6634, 2012 WL 3866495 (S.D.N.Y. Sept. 4, 2012); Tawfik v. al-Sabah, No. 11 Civ. 6455, 2012 WL 3542209 (S.D.N.Y. Aug. 16, 2012); Manoharan v. Rajapaksa, 845 F. Supp. 2d 260 (D.D.C. 2012); United States v. Al-Nashiri (Military Comm'ns Trial Judiciary, Guantanamo Bay, Feb. 17, 2012) (No. AE 037C), *available at* http://www.mc.mil/CASES/MilitaryCommissions.aspx; Habyarimana v. Kagame, 821 F. Supp. 2d 1244 (W.D. Okla. 2011); Hassen v. al Nahyan, No. CV 09-01106 DMG, 2010 U.S. Dist. LEXIS 144819 (C.D. Cal. Sept. 17, 2010).

103. Doe v. Zedillo Ponce de Leon, No. 3:11-cv-01433-AWT (D. Conn. Sept. 7, 2012); Giraldo v. Drummond Co., 808 F. Supp. 2d 247 (D.D.C. 2011); Abi Jaoudi & Azar Trading Corp. v. Cigna Worldwide Ins. Co., 391 Fed. App'x. 173 (3d Cir. 2010); Ahmed v. Magan, No. 2:10-cv-00342 (S.D. Ohio Mar. 15, 2011); Rosenberg v. Lashkar-e-Taiba, No. 1:10-cv-05381-DLI-CLP (E.D.N.Y. Dec. 17, 2012).

Department's developing internal foreign official immunity doctrine. Parsing these submissions reveals a rubric that is taking shape, which can help guide both the State Department and the courts when faced with questions of foreign official immunity. This Part traces the State Department's Suggestions of Immunity and Statements of Interest chronologically, separated into the two categories of head-of-state immunity and conduct-based immunity.[104]

A. Head-of-State Immunity

1. Sheikh Khalifa, President, United Arab Emirates

In the first head-of-state Suggestion of Immunity submitted after the Supreme Court's decision in *Samantar*, the State Department suggested immunity for Sheikh Khalifa Bin Zayed Al Nahyan ("Sheikh Khalifa"), the President and sitting head of state of the United Arab Emirates ("UAE").[105] The plaintiff filed suit against Sheikh Khalifa, as well as Sheikh Mohamed Bin Zayed Al Nahyan ("Sheikh Mohamed") and General Saeed Hilal Abdullah Al Darmaki ("General Hilal"), under the TVPA for allegedly abducting, imprisoning, and torturing him over a period of two years.[106] All three defendants were citizens and residents of the UAE,[107] and all three sought immunity from the State Department.[108] The UAE formally requested a suggestion of immunity on behalf of Sheikh Khalifa.[109] The State Department submitted an opinion asserting immunity for Sheikh Khalifa but remained silent regarding Sheikh Mohamed and General Hilal.[110]

The Suggestion of Immunity for Sheikh Khalifa noted that the case had important foreign policy implications for the United

104. The chronological approach is altered slightly to discuss two cases filed against the same head of state together.

105. Suggestion of Immunity Submitted by the U.S. at 1, Hassen v. Sheikh Khalifa Bin Zayed Al Nahyan, No. CV 09-01106 DMG (MANx), 2010 U.S. Dist. LEXIS 144819 (C.D. Cal. Sept. 17, 2010) (No. 51) [hereinafter Sheikh Khalifa SOI].

106. *Hassen*, 2010 U.S. Dist. LEXIS 144819, at *1–2. At the time of the alleged torture, Sheikh Khalifa was head of both the army and the state security agency of the UAE, Sheikh Mohamed was a major with the UAE Air Force, and General Hilal was the Minister for Interior Affairs for the UAE and commander of the detention facility in which the plaintiff was held. *Id.* at *4.

107. *Id.*

108. *Id.* at *15–16. Both Sheikh Khalifa and Sheikh Mohamed asserted head-of-state immunity. *Id.*

109. Sheikh Khalifa SOI, *supra* note 105, at 1–2.

110. *Hassen*, 2010 U.S. Dist. LEXIS 144819, at *16.

States.[111] Allowing the suit to continue against Sheikh Khalifa "would be incompatible with the United States' foreign policy interests."[112] In his letter conveying the determination to the Department of Justice, the State Department's Legal Adviser Harold Hongju Koh stated that Sheikh Khalifa was entitled to immunity under the rule of customary international law that the sitting head of a foreign state "is immune from the jurisdiction of the United States courts."[113]

The Suggestion also asserted that the State Department's determination was controlling, citing extensive precedent that courts have routinely accepted Executive Branch determinations of head-of-state immunity as dispositive.[114] The Koh letter also cited the Executive Branch's constitutional authority to conduct foreign affairs, its institutional resources and expertise, and the sensitivity and complexity of international relations as further support for judicial deference to the State Department's determinations of head-of-state immunity.[115] The Suggestion also referenced a prior suggestion of immunity for the preceding President of the UAE, noting that the district court in that case had accepted it as determinative.[116]

The district court accepted the suggestion of immunity on behalf of Sheikh Khalifa, stating that "[w]hen the State Department grants a foreign sovereign's request for a suggestion of immunity, the district court surrenders its jurisdiction."[117] The court conducted its own analysis, however, of Sheikh Mohamed's entitlement to immunity. Relying on *Restatement* § 66, the court identified the UAE's head of state, head of government, and its foreign minister; because Sheikh Mohamed was not one of those three individuals or a designated member of their retinues, the court determined he was not entitled to absolute immunity as a head of state.[118]

The court then turned to the common law to determine if Sheikh Mohamed was entitled to any form of foreign official immunity for the acts taken in his official capacity.[119] Without any explanation,

111. Sheikh Khalifa SOI, *supra* note 105, at 1.

112. *Id.*

113. Letter from Harold Hongju Koh to Tony West, Sheikh Khalifa SOI, *supra* note 105, at 7 (Exhibit 1).

114. Sheikh Khalifa SOI, *supra* note 105, at 1–3 ("[T]his determination should be given binding effect by this Court.")

115. *Id.* at 4.

116. *Id.* at 3–4.

117. Hassen v. Sheikh Khalifa, No. CV 09-01106 DMG (MANx), 2010 U.S. Dist. LEXIS 144819, at *13 (C.D. Cal. Sept. 17, 2010).

118. *Id.* at *14–15.

119. *Id.* at *15 (citing the RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE U.S. § 66(f) (1965)).

the court ruled that Sheikh Mohamed was not entitled to immunity, finding "no legal basis to extend absolute immunity to either the head of a state's armed forces or to the head of a state's political subdivision."[120] Yet, as Crown Prince, head of the army, and, at the time of the alleged acts, head of state security, presumably Sheikh Mohamed was an "official" for the purposes of conduct-based immunity. It seems as though the court, instead of conducting its own investigation of Sheikh Mohamed's potential common-law immunity, simply accepted the State Department's silence as a de facto determination that he was not entitled to immunity. In the end, the district court dismissed Sheikh Khalifa while allowing the case to proceed against both Sheikh Mohamed and General Hilal.[121]

2. Paul Kagame, President, Rwanda

A little over a year later, the State Department filed another Suggestion of Immunity, arguing in favor of head-of-state immunity for Paul Kagame, the President of the Republic of Rwanda.[122] The widows of the deceased Presidents of Rwanda and Burundi brought suit against Kagame and others, alleging that they planned and executed the assassination of their former spouses.[123] The Government of Rwanda formally requested that the State Department intervene in the proceedings and suggest immunity for President Kagame.[124]

Citing its sole authority to determine sitting head-of-state immunity, the State Department recognized President Kagame's immunity from the suit "while in office," a specification not utilized in the previous Suggestion of Immunity for Sheikh Khalifa.[125] In determining President Kagame's immunity, the State Deparment considered customary international law, U.S. foreign policy, and international relations.[126] The language of this Suggestion was stronger than that of Sheikh Khalifa, with the State Department, asserting twice that "[n]o court has ever subjected a sitting head of state to suit once the Executive Branch has suggested the head of state's immunity."[127] Again, the Government referenced the historical

120. *Id.* at *16–17.

121. *Id.* at *69.

122. Suggestion of Immunity Submitted by the U.S. at 1, Habyarimana v. Kagame, 821 F. Supp. 2d 1244 (W.D. Okla. 2011) (No. 49) [hereinafter Kagame SOI].

123. *Kagame*, 821 F. Supp. 2d at 1247–48.

124. *Id.* at 1260.

125. Kagame SOI, *supra* note 122, at 2.

126. *Id.*

127. *Id.* at 2, 5.

precedent for absolute judicial deference to the Executive Branch's suggestions of head-of-state immunity, "motivated by the caution we believe appropriate of the Judicial Branch when the conduct of foreign affairs is involved."[128]

The Suggestion for President Kagame more fully clarified the customary international law principles behind the head-of-state immunity doctrine. Introducing a new limitation, the Suggestion noted that "head of state immunity attaches to a head of state's status as the current holder of the office."[129] While the individual is the sitting head of state, even acts committed *before* he assumed the position are protected because head-of-state immunity protects the office itself.[130] However, once the head of state leaves office, "that individual generally retains residual immunity only for acts taken in an official capacity while in that position and not for alleged acts predating the individual's tenure in office."[131]

After receiving the Suggestion of Immunity for President Kagame, the district court permitted the plaintiffs to respond and object to the Suggestion.[132] The court ultimately accepted the State Department's conclusion that President Kagame was immune from suit as the sitting head of state of Rwanda and dismissed the suit, noting that it was *bound* to do so.[133] The court cited both the Executive Branch's primacy in the conduct of foreign affairs and the separation of powers doctrine as justifications for judicial deference to its head-of-state immunity decisions.[134]

3. Mahinda Rajapaksa, President, Sri Lanka

In 2012, two Suggestions of Immunity were filed in two separate cases on behalf of Mahinda Rajapaksa, the President and sitting head of state of the Democratic Socialist Republic of Sri Lanka.[135] Sri Lanka had formally requested a suggestion of immunity

128. *Id.* at 5 (quoting Ye v. Jiang Zemin, 383 F.3d 620, 626 (7th Cir. 2004)) (internal quotations omitted).

129. *Id.* at 6.

130. *Id.*

131. *Id.*; *see* OPPENHEIM'S INTERNATIONAL LAW, *supra* note 5, § 456, at 1043–44.

132. Habyarimana v. Kagame, 821 F. Supp. 2d 1244, 1260 (W.D. Okla. 2011).

133. *Id.* at 1263–64 ("Where the United States' Executive Branch has concluded that a foreign head of state is immune from suit, and where it has urged the Court to take recognition of that fact and to dismiss the suit pending against said head of state, the Court is bound to do so.").

134. *Id.* at 1261.

135. Suggestion of Immunity Submitted by the U.S. at 1, Manoharan v. Rajapaksa, 845 F. Supp. 2d 260 (D.D.C. 2012) (No. 12) [hereinafter Rajapaksa SOI I]; Suggestion of Immunity

for President Rajapaksa in both cases.[136] Both Suggestions afforded head-of-state immunity to President Rajapaksa, utilizing nearly identical language and arguments, with the latter noting that the district court in the first case had dismissed the claims against President Rajapaksa because the State Department's Suggestion was "conclusive and not subject to judicial review."[137] The most significant difference between the two Suggestions is a subtle shift in terminology. The first Suggestion is framed in precatory language and "suggests" to the court that President Rajapaksa is immune,[138] while the second Suggestion "informs" the court of his immunity and strongly asserts the Executive Branch's control over head-of-state immunity decisions.[139] However, in both cases, the language of the letters from the State Department Legal Adviser to the Department of Justice was identical.[140]

The district court accepted both of the State Department's determinations of immunity for President Rajapaksa as binding. The court in *Manoharan v. Rajapaksa* found that it was "not in a position to second-guess the Executive's determination that in this case, the nation's foreign policy interests will be best served by granting

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Submitted by the U.S. at 1, Devi v. Rajapaksa, No. 11 Civ. 6634 (NRB), 2012 WL 3866495 (S.D.N.Y. Sept. 4, 2012) (No. 6) [hereinafter Rajapaksa SOI II].

136. Rajapaksa SOI I, *supra* note 135, at 2; Rajapaksa SOI II, *supra* note 135, at 2.

137. Rajapaksa SOI II, *supra* note 135 at 5–6.

138. *E.g.*, Rajapaksa SOI I, *supra* note 135, at 1 ("The United States . . . hereby *suggests* to the Court the immunity of President Rajapaksa from this suit." (emphasis added)); *id.* at 2 ("No court has ever subjected a sitting head of state to suit once the Executive Branch has *suggested* the head of state's immunity." (emphasis added)); *id.* at 2 ("Sri Lanka has formally requested the Government of the United States to *suggest* the immunity of President Rajapaksa from this lawsuit." (emphasis added)); *id.* at 4 ("When the Executive Branch *suggests* the immunity of a sitting head of state, judicial deference to that suggestion is predicated on compelling considerations arising out of the Executive Branch's authority to conduct foreign affairs under the Constitution." (emphasis added)).

139. *E.g.*, Rajapaksa SOI II, *supra* note 135, at 1 ("The United States . . . hereby *informs* the Court that President Rajapaksa is immune from this suit." (emphasis added)); *id.* at 1–2 ("Thus, no court has ever subjected a sitting head of state to suit once the Executive Branch has *determined* that a head of state is immune." (emphasis added)); *id.* at 2 ("Sri Lanka has formally requested the Government of the United States to *determine* that President Rajapaksa is immune from this lawsuit." (emphasis added)); *id.* at 4 ("When the Executive Branch *determines* that a sitting head of state is immune from suit, judicial deference to that determination is predicated on compelling considerations arising out of the Executive Branch's authority to conduct foreign affairs under the Constitution." (emphasis added)).

140. *Compare* Letter from Harold Hongju Koh to Tony West at 1, *Manoharan*, 845 F. Supp. 2d 260 (No. 12-1), *with* Letter from Harold Hongju Koh to Stuart F. Delery at 1, *Devi*, No. 11 Civ. 6634 (NRB), 2012 WL 3866495 (No. 6-1). The only elements to change from the first letter to the second were those necessary for proper identification of the case and the appropriate Assistant Attorney Generals to whom the letters were addressed.

Defendant Rajapaksa head-of-state immunity while he is in office."[141] In *Devi v. Rajapaksa*, the plaintiff and amicus curiae filed responses to the Suggestion of Immunity, arguing that the case against President Rajapaksa should be permitted to continue despite the State Department's recommendation.[142] The court, however, asserted that "[t]he determination that a defendant is entitled to head of state immunity is left to the discretion of the Executive Branch,"[143] a privilege resulting from the President's authority in international and diplomatic relations.[144] Finally, the court noted that its deference "reflects a considered judgment concerning the appropriate role of the courts within the constitutional order."[145]

4. Ali Abdullah Saleh, President, Yemen

The State Department's involvement in head-of-state immunity decisions extends beyond cases in traditional federal courts. In February 2012, the Department recognized the immunity of Ali Abdullah Saleh, the President and sitting head of state of the Republic of Yemen, in a case proceeding before the Military Commissions Trial Judiciary in Guantanamo Bay, Cuba.[146] Since President Saleh was not a party to the action, the Government Response specifically addressed his immunity from the Commission's jurisdiction to compel his testimony as sought by the defense.[147] The Response stated that, as a sitting head of state, President Saleh is immune "from jurisdiction of any court of the United States, including this Commission, to compel his oral deposition."[148] Citing the same historical and judicial authority outlined above, the Response asserts that the Executive Branch maintains the sole authority for head-of-state immunity

141. *Manoharan*, 845 F. Supp. 2d at 266.

142. *Devi*, 2012 WL 3866495, at *2.

143. *Id.* at *2.

144. *Id.* at *4.

145. *Id.*

146. Government Response to Defense Motion to Depose Yemeni President Ali Abdullah Saleh at 1, United States v. Al-Nashiri (Military Comm'ns Trial Judiciary, Guantanamo Bay, Feb. 17, 2010) (No. AE 037C), *available at* http://www.mc.mil/CASES/MilitaryCommissions.aspx (follow "Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri (2)" hyperlink; select "Docket" from "Category" drop down box; follow "Government Response to Defense Motion to Depose Yemeni President Ali Abdullah Saleh" hyperlink).

147. *Id.* at 7.

148. *Id.* at 1. It is unclear whether Yemen requested immunity on behalf of President Saleh as neither the State Department letter nor the Government Response filed in the case acknowledged a formal request.

determinations and that its determinations are controlling and not subject to judicial review.[149]

The State Department letter requesting the filing of a Suggestion of Immunity on behalf of President Saleh utilized the same framework and principles—and even some identical language—as those submitted for the cases in federal court.[150] While both the Government Response and the State Department letter framed President Saleh's immunity as head-of-state immunity, Military Judge Pohl framed it in terms of diplomatic immunity.[151] The opinion cites the Vienna Convention on Diplomatic Relations and the complementary Diplomatic Relations Act which "accord accredited diplomats absolute immunity from criminal suit and almost absolute immunity from civil or administrative action unless the diplomat is acting in certain, specified, circumstances outside their official duties."[152] The Commission noted that whether an individual is entitled to diplomatic immunity is a matter for the Department of State to decide, and when the Department issues such a certification, "courts are bound to accept a determination by the Department of State that a diplomatic agent, to include a head-of-state, is entitled to diplomatic immunity."[153]

5. Sheikh Al-Sabah, Emir, Kuwait

The most recent head-of-state immunity determination was filed on behalf of Sheikh Sabah Al-Ahmad Al-Jaber Al-Sabah ("Sheikh Al-Sabah"), the Emir and sitting head of state of the State of Kuwait.[154] After a formal request by Kuwait for a determination that

149. *Id.* at 2–3.

150. Letter from Harold Hongju Koh to Brigadier Gen. Mark Martins at 1, Government Response to Defense Motion to Depose Yemeni President Ali Abdullah Saleh at 1, United States v. Al-Nashiri (Military Comm'ns Trial Judiciary, Guantanamo Bay Feb. 17, 2010) (No. AE 037C, Attachment B). The letter does not request a note in the Department of Justice filing requesting the Executive Branch's retention of authority to refrain from making a similar immunity determination in future cases, a section included in all letters attached to Suggestions since the *Kagame* Suggestion.

151. Opinion on Defense Motion to Depose Yemini President Ali Abdulla Sale [sic] at 1, United States v. Al-Nashiri (Military Comm'ns Trial Judiciary, Guantanamo Bay Feb. 17, 2010) (No. AE 037F), *available at* http://www.mc.mil/CASES/MilitaryCommissions.aspx (follow "Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri (2)" hyperlink; select "Docket" from "Category" drop down box; follow "Military Judge's Opinion - Motion to Depose Yemeni President Ali Abdullah Saleh" hyperlink).

152. *Id.* at 2.

153. *Id.*

154. Suggestion of Immunity Submitted by the U.S. at 1, Tawfik v. Sheikh Al-Ahmad Al-Jaber Al-Sabah, No. 11 Civ. 6455 (ALC)(JCF), 2012 WL 3542209 (S.D.N.Y. Aug. 16, 2012) (No. 23) [hereinafter Al-Sabah SOI].

Sheikh Al-Sabah is immune, the State Department recognized his immunity.[155] The Suggestion remained consistent with previous Suggestions in both form and content and retained the more assertive language of the post-*Manoharan* Suggestions.[156] The State Department letter informing the Justice Department of its determination that Sheikh Al-Sabah was entitled to head-of-state immunity also mirrored the earlier Suggestions exactly.[157]

In the Suggestion for Sheikh Al-Sabah, the Government again asserted that its determination of immunity "is controlling and is not subject to judicial review."[158] The district court, however, while ultimately deferring to the Suggestion and dismissing the case, found that it "does not—and need not—adopt a broader holding that the Executive Branch's determination is perforce 'controlling' and 'not subject to judicial review.' "[159] Nevertheless, the court essentially contradicted itself, stating that "unless and until Congress (or a higher court) states otherwise, the State Department's determination that the Emir is immune from suit is controlling here."[160]

B. Conduct-Based Foreign Official Immunity

1. Abdi Aden Magan, Former Official, Somalia

Samantar was in good company after the Supreme Court determined that he was not entitled to immunity. The State Department, in its first post-*Samantar* conduct-based immunity determination, also refused to recommend immunity for Abdi Aden Magan, another former official of the Barre regime in Somalia.[161] Magan, a U.S. resident living in Ohio since 2000, served as Colonel in the National Security Service of Somalia and as Chief of its Department of Investigations from about 1988–1990.[162] The plaintiff, a native of Somalia and citizen of the United Kingdom, sued Magan in a U.S. district court under the TVPA and the ATS, alleging arbitrary

155. *Id.* at 2.

156. *Id.*

157. Letter from Harold Hongju Koh to Stuart F. Delery at 1, Al-Sabah SOI, *supra* note 154 (Exhibit A).

158. Al-Sabah SOI, at 1.

159. *Tawfik*, 2012 WL 3542209, at *2.

160. *Id.* at *3.

161. Statement of Interest of the United States of America at 1, Ahmed v. Magan, No. 2:10-cv-342 (S.D. Ohio Mar. 15, 2011) (No. 45) [hereinafter Magan Statement].

162. Letter from Harold Hongju Kohn to Tony West at 1, Statement of Interest of the United States of America at 1, Ahmed v. Magan, No. 2:10-cv-342 (S.D. Ohio Mar. 15, 2011) (No. 45-1) [hereinafter Koh Letter for Magan].

detention, cruel and inhumane treatment, and torture.[163] The State Department noted, as it did in its determination of no immunity for Samantar, that Magan was a former official of a state with a government that the United States did not formally recognize.[164] There was, therefore, no legitimate government to assert immunity on Magan's behalf.[165]

The two circumstances that the State Department deemed critical to determining that Magan was not entitled to foreign official immunity were identical to those that it asserted against Samantar: (1) Magan was a former official of a state with no recognized government to request immunity on his behalf or to verify that the acts in question were taken in an official capacity, and (2) U.S. residents who enjoy the protections of U.S. law should be subject to the jurisdiction of U.S. courts.[166] Because the immunity protecting the conduct of foreign officials belongs to the sovereign, former officials only "enjoy residual immunity for acts taken in an official capacity while in office" (assuming the foreign state does not waive that immunity).[167] In making a determination of conduct-based foreign official immunity, the Executive Branch considers whether a "foreign state understood its official to have acted in an official capacity," and absent a recognized government to assert such understanding, "the Department of State has determined that such immunity should not be recognized."[168] However, the Statement for Magan seemed to suggest that the State Department considers itself the ultimate determinant of whether or not the foreign official's acts were taken in an official capacity (and thus whether or not immunity attaches).[169] Finally, because "a state generally has a right to exercise jurisdiction over its residents," the State Department determined that the interest of allowing U.S. courts to adjudicate claims against U.S. residents

163. *Id.*

164. *Id.* The State Department elaborated that while the United States continues to recognize the State of Somalia, as well as support the efforts of the transitional government, the Transitional Federal Government (TFG), to establish a viable central government it does not recognize the TFG or any other entity as the formal government of Somalia. *Id.* at 1–2.

165. *Id.* at 2.

166. Magan Statement at 7.

167. *Id.* (citing Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belgium), 2002 I.C.J. 3, ¶ 61 (Feb. 14) (Merits)).

168. *Id.* at 8.

169. *Id.*:

> In future cases presenting different circumstances, the Department could determine either that a former official of a state without a recognized government is immune from civil suit for acts taken in an official capacity, or that a former official of a state with a recognized government is not immune from civil suit for acts that were not taken in an official capacity.

called for a denial of immunity in Magan's case.[170] However, the Statement noted that the decision by a former foreign official to permanently reside in the United States is not, by itself, determinative of whether the official is entitled to immunity for those acts taken in an official capacity while in office.[171]

The Statement of Interest for Magan also emphasized the deference that U.S. courts have historically shown to the Executive Branch's determinations of foreign immunity.[172] Utilizing an oft quoted phrase, the Statement asserted that "[t]he Supreme Court made clear that '[i]t is . . . 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.' "[173] The State Department again rooted this judicial deference in the separation of powers and the Executive's constitutional duty to manage the nation's foreign affairs.[174] The Statement recalls the Supreme Court's finding in *Samantar* that there was "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."[175] Therefore, because the Executive Branch submitted an express opinion on Magan's immunity, the court "should accept and defer to th[at] determination."[176] The district court, after responses from both Magan and the plaintiff, deferred to the State Department's determination and found that Magan was not immune from suit.[177]

2. Alvaro Uribe, Former President, Colombia

Once heads of state leave office, they lose their total immunity but retain classical conduct-based immunity for acts taken in their official capacity while they were in office.[178] The plaintiffs in *Giraldo v.*

170. *Id.* at 9.

171. *Id.*

172. *Id.* at 3.

173. *Id.* (quoting Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945)).

174. *Id.* (quoting Ludecke v. Watkins, 335 U.S. 160, 173 (1948)).

175. *Id.* at 5.

176. *Id.* at 6.

177. Opinion and Order at 3, Ahmed v. Magan, No. 2:10-cv-342 (S.D. Ohio Nov. 7, 2011) (No. 67). The suit proceeded, with Magistrate Judge Mark Abel eventually recommending an award to plaintiff of $5,000,000 in compensatory damages and $10,000,000 in punitive damages. Report and Recommendation at 13, No. 2:10-cv-342 (S.D. Ohio Aug. 20, 2013) (No. 112).

178. *See supra* Part III.A (explaining that while the *Samantar* court held that Congress did not intend to include individuals under FSIA sovereign immunity, individuals could invoke immunity under pre-FSIA common-law immunity doctrines).

Drummond Co., Inc. sought to depose former President of Colombia Alvaro Uribe regarding his relationship with the United Self Defense Forces of Colombia ("AUC") and the Drummond Company.[179] Specifically, the plaintiffs sought to depose Uribe regarding his role in starting the AUC while governor of Antioquia and other actions during his presidency.[180]

The State Department determined that Uribe was entitled to testimonial immunity, but only conditionally.[181] Uribe was immune from giving the plaintiffs information about acts taken in his official capacity as a government official,[182] but he was not immune from being questioned about acts taken outside of his official capacity or while he was not yet a government official.[183] The State Department based its determination on considerations of foreign policy, specifically, avoiding "unnecessary irritants" in the United States' relations with Colombia[184] and ensuring reciprocal treatment of former U.S. presidents traveling abroad.[185]

The Statement for Uribe drew on the same precedents cited in the *Magan* case justifying a deferential judicial posture toward Executive Branch determinations of foreign official immunity.[186] The Colombian government formally requested that the State Department suggest "any and all immunities applicable to President Uribe and to specifically request head-of-state immunity on his behalf."[187] However, the State Department limited President Uribe to the same conduct-based immunity afforded all former foreign officials, as he was no longer the sitting head of state of Columbia.

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179. 808 F. Supp. 2d 247, 248 (D.D.C. 2011).

180. *Id.*

181. Letter from Harold Hongju Koh to Tony West at 1, *Giraldo*, 808 F. Supp. 2d 247 (No. 13-2) [hereinafter Koh Letter on Uribe].

182. *Id.*

183. Statement of Interest and Suggestion of Immunity of and by the U.S. at 1–2, *Giraldo*, 808 F. Supp. 2d 247 (No. 13) [hereinafter Uribe Suggestion]. In addition, "in light of President Uribe's immunity and for reasons of comity," the State Department suggested that the court initially stay his deposition and direct the plaintiffs to first exhaust other reasonable channels of gathering the information available under Colombian law. Koh Letter on Uribe, *supra* note 181, at 1.

184. Koh Letter on Uribe, *supra* note 181, at 1.

185. *Id.* at 1–2.

186. *See* Uribe Suggestion, *supra* note 183, at 2–4 (citing to *Samantar v. Yousuf*, *Republic of Mexico v. Hoffman*, and *Ludecke v. Watkins* as evidence that a deferential judicial posture is rooted in the Constitutional separation of powers). "[C]ourts today must continue to defer to Executive determinations of foreign official immunity, just as they deferred to determinations of foreign state immunity before the enactment of the FSIA." *Id.* at 4.

187. *Id.* at 5 (quoting Letter from Gabriel Silva, Colom. Ambassador to the U.S., to Hillary Clinton, U.S. Sec'y of State (Nov. 12, 2010), Uribe Suggestion, Exhibit 1).

The district court accepted the State Department's suggestion of conduct-based immunity for Uribe and further clarified the scope of such immunity. First, the court noted that "mere allegations of illegality do not serve to render an action unofficial for purposes of foreign official immunity."[188] Second, the court rejected the plaintiffs' contention that illegal acts are not immune, finding that "such a rule would eviscerate the protection of foreign official immunity and would contravene federal law on foreign official immunity."[189] The court also deferred to the Government's suggestion that comity and foreign relations require not deposing Uribe unless all other reasonably available means of acquiring the needed information were exhausted.[190] Finally, the court found that even *jus cogens* violations do not defeat conduct-based foreign official immunity because such a rule would strain diplomatic relations and render hollow any protection afforded by foreign official immunity.[191]

3. Josie Senesie & Foday Sesay, Insurance Commissioners, Liberia

The State Department offered a similarly limited conduct-based immunity suggestion for the past and current Insurance Commissioners of the Republic of Liberia, Josie Senesie and Foday Sesay.[192] The case centered on protracted litigation begun in 1991 concerning insurance coverage for property that was damaged in the Liberian civil war.[193] The Republic of Liberia formally requested immunity for both Senesie and Sesay, renewing the request four times before the Statement of Interest was eventually filed.[194]

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188. *Giraldo*, 808 F. Supp. 2d at 249.

189. *Id.* at 250.

190. *Id.* at 252.

191. *Id.* at 250. A *jus cogens* exception would merge the merits of the underlying claim with the issue of immunity such that "[a]s soon as a party alleged a violation of a *jus cogens* norm, a court would have to determine whether such a norm was indeed violated in order to determine immunity . . . ." *Id.* Moreover, the court notes that even the Supreme Court has suggested that even *jus cogens* violations are still official actions if conducted in an official capacity. *Id.* at 251; *see also* Saudi Arabia v. Nelson, 507 U.S. 349, 361 (1993) ("[H]owever monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police . . . [is] peculiarly sovereign in nature.").

192. Statement of Interest of the U.S. at 1, Abi Jaoudi & Azar Trading Corp. v. CIGNA Worldwide Ins. Co., No. 2:91-cv-06785-PD (E.D. Penn. Dec. 5, 2011) (No. 290) [hereinafter Senesie/Sesay Statement].

193. *Id.* at 2.

194. Letter from Harold Hongju Koh to Tony West at 2, Abi Jaoudi & Azar Trading Corp. v. CIGNA Worldwide Ins. Co., No. 2:91-cv-06785-PD (E.D. Pa. Dec. 5, 2011) (No. 290-1) [hereinafter Koh Letter on Senesie/Sesay] ("The Republic of Liberia, by diplomatic note dated August 17, 2010, requested a Statement of Interest suggesting immunity for the Respondents. Liberia

This determination was unique, however, in that the State Department afforded immunity to Senesie and Sesay only "to the extent the District Court finds that, under Liberian law, they acted in their official capacities as Liberia's Commissioner of Insurance."[195] The Department determined that as Commissioners of Insurance at the time of the conduct, Senesie and Sesay were officials of the Republic of Liberia and were "generally entitled to immunity while acting in that capacity."[196] The Department noted that whether or not the acts in question could be deemed official in nature would turn on their characterization under Liberian law, leaving such analysis for the district court.[197] The Department recognized that "Liberian law may treat acts taken in the Insurance Commissioner's capacity as representative of the estate as acts taken in his official capacity, in which event he would not be acting solely in his capacity as representative of the estate."[198]

4. Ernesto Zedillo, Former President, Mexico

The immunity entitlement of a former head of state was again raised in a lawsuit filed against Ernesto Zedillo Ponce de Leon, a former President of Mexico, under the TVPA alleging that Zedillo was legally responsible for a 1997 massacre of local villagers by paramilitary groups in Acteal, Chiapas.[199] The State Department determined that President Zedillo was immune from the suit under conduct-based foreign official immunity after Mexico formally requested a suggestion of immunity.[200] The State Department explained that it "generally presumes that actions taken by a foreign official exercising the powers of his office were taken in his official capacity."[201] This presumption is strongest when a former head of

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renewed its request by diplomatic notes dated October 12, 2010, November 15, 2010, and August 8, 2011, and by note verbale on March 2, 2011.").

195. *Id.* at 1. As an aside, the Department also extended extremely limited immunity to Samuel Lohman, an American citizen Senesie retained as counsel the same day he was appointed receiver of the CWW estate. Senesie/Sesay Statement, *supra* note 192, at 1–2. The Department determined that any immunity claimed by Lohman derives from, and cannot extend beyond, the immunity Senesie enjoys for those acts deemed to be taken in his official capacity. Koh Letter on Senesie/Sesay, *supra* note 194, at 1.

196. Koh Letter on Senesie/Sesay, *supra* note 194, at 3.

197. *Id.* (acknowledging the fact that "the character of an act under the law of the foreign state is not the only relevant factor in making immunity determinations").

198. *Id.*

199. Letter from Harold Hongju Koh to Stuart F. Delery at 1, Doe v. Zedillo, No. 3:11-cv-01433-AWT (D. Conn. Sept. 7, 2012) (No. 38-1) [hereinafter Koh Letter on Zedillo].

200. *Id.*

201. *Id.*

state is sued "because holders of a country's highest office may be expected to be on duty at all times and to have wide-ranging responsibilities," particularly when the foreign government asserts that acts were taken in an official capacity, as Mexico did.[202] Unless the plaintiff then rebuts this presumption, the State Department will generally conclude that immunity is appropriate.[203]

In this case, the State Department determined that the plaintiffs' complaint was predicated on actions taken by Zedillo when he was President and that the plaintiffs did not provide a sufficient basis for the Department to question its initial presumption of immunity for the former head of state.[204] In the Suggestion of Immunity, the Executive Branch asserted that its determination is "controlling and is not subject to judicial review."[205] After the Suggestion was submitted, the district court issued an order to show cause, allowing the plaintiffs to submit their objections.[206] Both parties filed multiple responses to the Order, but the district court ultimately dismissed the case after oral argument.[207]

5. Ahmed Shuja Pasha & Nadeem Taj, Former Officials, Pakistan

The State Department submitted its most recent conduct-based immunity determination in connection with the 2008 Mumbai terrorist attacks. In a Statement of Interest and Suggestion of Immunity filed in December 2012, the State Department determined that two former Directors General of Pakistan's Inter-Services Intelligence Directorate ("ISI"), Ahmed Shuja Pasha and Nadeem Taj, were immune from suit based on residual conduct-based immunity.[208]

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202. *Id.* at 1–2.

203. *Id.* at 2.

204. *Id.* ("Plaintiffs allegations seeking to hold former President Zedillo liable simple because he was serving as President when lower level officials allegedly committed tortious acts do not provide the Department with a sufficient reason to question its preliminary assessment described above.").

205. Suggestion of Immunity Submitted by the United States of America at 2, Doe v. Zedillo, No. 3:11-cv-01433-AWT (D. Conn. Sept. 7, 2012) (No. 38).

206. Order to Show Cause at 2, Doe v. Zedillo, No. 3:11-cv-01433-AWT (D. Conn. Sept. 25, 2012) (No. 39).

207. Order Dismissing Case at 6, Doe v. Zedillo, No. 3:11-cv-01433-AWT (D. Conn. July 18, 2013) (No. 83).

208. Letter from Harold Hongju Koh to Stuart F. Delery at 1, Rosenberg v. Lashkar-e-Taiba at 1, No. 1:10-cv-05381-DLI-CLP (E.D.N.Y. Dec 17, 2012) (No. 35-1) [hereinafter Koh Letter on Pasha/Taj]. The Statement included both an analysis determining immunity for the ISI under the FSIA and an analysis determining immunity for the former Directors General under common-law principles of conduct-based foreign official immunity. The same letter was filed with the Statement of Interest and Suggestion of Immunity in three other associated cases, Scherr v. Lashkar-e-Taiba, No. 1:10-cv-05382 (E.D.N.Y. Dec. 17, 2012) (No. 25); Chroman v. Lashkar-e-

After Pakistan made a formal request for immunity,[209] the Department of State found that the complainant challenged "Pasha's and Taj's exercise of their official powers as Directors General of the ISI," thereby challenging the "exercise of their official powers as officials of the Government of Pakistan."[210] The State Department asserted that "[o]n their face, acts of defendant foreign officials who are sued for exercising the powers of their office are treated as acts taken in an official capacity."[211] Because the allegations of the complaint were "bound up with plaintiffs' claims that the former Directors General were in full command and control of the ISIS and allegedly acted entirely within that official capacity," Pasha and Taj were entitled to complete conduct-based foreign official immunity.[212]

While this Suggestion came on the immediate heels of the Fourth Circuit's holding that courts should consider but not completely defer to State Department determinations of conduct-based immunity, the State Department still asserted that its determinations in this area are in fact controlling on courts. The Suggestion argued that "the common law governing foreign official immunity is a 'rule of substantive law' requiring courts to 'accept and follow the executive determination' concerning a foreign official's immunity from suit."[213] Finally, the State Department attempted to reserve for the Executive Branch the authority to determine whether particular acts were taken in the official capacity of a foreign official: "it is for the Executive Branch, not the courts, to determine whether the conduct alleged was taken in a foreign official's official capacity."[214]

Taiba, No. 1:10-cv-05448 (E.D.N.Y. Dec. 17, 2012) (No. 28); Ragsdale v. Lashkar-e-Taiba, No. 1:11-cv-03893 (E.D.N.Y. Dec. 17, 2012) (No. 19).

209. Statement of Interest and Suggestion of Immunity at 10, Rosenberg v. Lashkar-e-Taiba, No. 1:10-cv-05381 (E.D.N.Y. Dec. 17, 2012) (No. 35) [hereinafter Pasha/Taj SOI].

210. Koh Letter on Pasha/Taj, *supra* note 208, at 1.

211. *Id.* at 2.

212. *Id.* at 1.

213. Pasha/Taj SOI, *supra* note 209, at 8 (quoting Republic of Mexico v. Hoffman, 324 U.S. 30, 36 (1945)). The Suggestion cites the Second Circuit's determination "that separation of powers requires courts to defer to the Executive Branch's determination regarding foreign official immunity." *Id.* (citing Matar v. Dichter, 563 F.3d 9, 15 (2d Cir. 2009)). It also notes the Seventh Circuit's observation "that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs . . . by assuming an antagonistic jurisdiction." *Id.* (quoting Ye v. Zemin, 383 F.3d 620, 626 (7th Cir. 2004)).

214. *Id.* at 9–10 (citing *Hoffman*, 324 U.S. at 35 ("It is . . . 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.")).

The plaintiffs and defendants filed responses to the Statement for Pasha and Taj.[215] The Eastern District of New York, citing Second Circuit precedent, accepted the State Department's Statement as conclusive and dismissed the claims against Pasha and Taj.[216]

V. NEW RULES: A FRAMEWORK FOR COURTS MOVING FORWARD

Through its Suggestions and Statements, the State Department has developed a consistent set of standards for determining foreign official immunity in the post-*Samantar* age. Accordingly, these standards provide a workable rubric for courts to apply should the State Department remain silent on the question of immunity in a particular case moving forward. Of course, it is unlikely that the State Department will remain silent in cases involving head-of-state immunity, given the prominence of leaders of foreign nations.[217] However, for more routine cases, outgoing State Department Legal Advisor Koh has made clear that "the more the State Department establishes an official immunity policy over time, the more silent we can afford to be in most cases."[218]

A key element of foreign official immunity after *Samantar* is the district court's ability to "decide for itself whether all the requisites for such immunity exist[ ]" should the State Department

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215. *See* Plaintiffs' Response to the Statement of Interest and Suggestion of Immunity, Rosenberg v. Lashkar-E-Taiba, No. 1:10-cv-05381 (E.D.N.Y. Feb. 15, 2013) (No. 40) (arguing Pasha and Taj should not receive statutory immunity until their alleged human rights violations are investigated since individuals who violate internationally accepted *jus cogens* norms are not entitled to foreign officer immunity); Defendant's Memorandum of Law in Opposition to Plaintiffs' Response to the Statement of Interest and Suggestion of Immunity, Rosenberg v. Lashkar-E-Taiba, No. 1:10-cv-05381 (E.D.N.Y. Feb. 20, 2013) (No. 41) (arguing that despite plaintiff's claim of alleged *jus cogens* norm violations, immunity should still apply because plaintiff offers no explanation as to why the Court should treat the Department of State's determination of immunity as a mere recommendation).

216. Opinion and Order at 10, 12, Rosenberg v. Lashkar-e-Taiba, No. 1:10-cv-05381 (E.D.N.Y. Sept. 30,2013) (No. 43):

> It is the position of the Executive Branch that defendants Pasha and Taj, former Directors General of the ISI, are entitled to foreign sovereign immunity under the common law as foreign officials who were sued in their official capacity for acts conducted in their official capacity. Under the common law on sovereign immunity, the Court's inquiry ends here.

(citing Matar v. Dichter, 563 F.3d 9, 14 (2d Cir. 2009)).

217. This was also the case in the pre-*Samantar* age of foreign official immunity determinations. The State Department generally notified the district court and asserted immunity as soon as it became aware of a case against a sitting head of state or foreign minister. For lower-level officials, and by negative implication former high level officials, the Department did not file suggestions of immunity unless requested by the court. Bellinger, *supra* note 99, at 823 n.17.

218. Koh, *supra* note 11, at 1161.

remain silent in a particular case.[219] Thus, when determining an official immunity question, the court should apply the same policies that the State Department employs, which are best explained in those Suggestions of Immunity and Statements of Interest that the Department does issue.[220] The State Department considers, for example, whether the foreign government has requested a finding of immunity, the current status of the official including his or her residential status, and the nature of the acts involved.[221] Providing courts with a consistent framework to make their own independent determinations of foreign official immunity will lessen the burden on the State Department to submit suggestions in every case and make judicial determinations more consistent and credible.[222]

Finally, the Fourth Circuit's most recent ruling in *Yousuf v. Samantar* raised important questions about the appropriate level of deference that courts should afford the State Department's foreign official immunity determinations.[223] This Note agrees with the State Department that the interests of foreign policy and comity counsel in favor of absolute judicial deference to the State Department's determinations of head-of-state immunity. However, determinations of conduct-based official immunity should not receive absolute deference from the courts. Instead, a rebuttable presumption of immunity should attach in such cases, and the court should then invite the parties to file responses on the propriety of the State Department's immunity determination.

A. Judicial Determinations of Immunity

In either head-of-state or conduct-based immunity cases, a court cannot award immunity to foreign officials unless their government first requests it. Ultimately, under the principles of customary international law, sovereign immunity belongs to the foreign state, not the official.[224] The immunity of the state is extended

219. *Yousuf III*, 560 U.S. 305, 311 (2010) (quoting *Ex parte* Republic of Peru, 318 U.S. 578, 587 (1943)).

220. *Id.*

221. *See supra* Part IV.A (discussing the State Department's post-*Samantar* Suggestions of Immunity for heads of state).

222. Overburdening the State Department with immunity requests was a primary concern of Koh's immediate predecessor as Legal Advisor, John B. Bellinger. For a taste of Bellinger's concerns about how the *Samantar* ruling would impact the workflow of the State Department, see Bellinger, *supra* note 99, at 827–33.

223. *Yousuf VI*, 699 F.3d 763, 772–73 (4th Cir. 2012).

224. *See supra* Part II.A (discussing immunity as a privilege of the state); Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.), 2008 I.C.J. 177, ¶ 188 (June 4)

to the official for the protection of the state itself, to keep foreign courts from questioning, or even punishing, its official conduct, which can only be performed through its government officials. Therefore, a foreign state's decision to waive the immunity of its officials should be conclusive.[225] In all but three cases discussed above, foreign governments expressly requested that the State Department intervene in the proceedings and extend immunity to their officials.[226]

The *Samantar* and *Magan* Statements of Interest recognized this principle of state ownership of immunity. Both Statements grounded the State Department's findings of no immunity in the fact that Samantar and Magan were former officials of a state with no recognized government that could request immunity on their behalf.[227] The State Department therefore rightly refused to extend immunity where no (recognized) government explicitly requested it for its foreign officials. Likewise, since there is no foreign sovereign to be harmed as a result of litigation involving its former officials, there is no need for the extension of immunity to protect the sovereign.[228]

However, the State Department also justified its decisions on the grounds that both Samantar and Magan had become residents of the United States and thus should be subject to the jurisdiction of

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(determining that Djibouti's claim of functional immunity for their officials was essentially a claim of immunity for the Djiboutian State); *see also* Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 61 (Feb. 14) (stating that officials do not have criminal immunity in their own state and that they will cease to have criminal immunity in foreign jurisdictions if their state waives it).

225. Ingrid Wuerth, *Foreign Official Immunity: Invocation, Purpose, Exceptions*, 23 SWISS R. INT'L & EUR. L. 207, 214–15 (2013). It is important to note that an individual official's invocation of immunity is insufficient to claim immunity protection because the immunity belongs exclusively to the state and would allow an individual to avoid prosecution even "when the facilitative values underlying immunity are not being served." *Id.* at 215. Moreover, the basis of foreign official immunity lies in protecting an official from punishment for conduct that is only properly attributable to the state, not the official himself. *Id.* at 215–16.

226. The only governments that did not request a finding of immunity on behalf of their officials were Somalia and Yemen in the cases of Samantar, Magan, and President Ali Abdullah Saleh. *See supra* Part IV.

227. *Supra* notes 78, 79, 166, 168 and accompanying text. This justification of the State Department has been complicated due to recent foreign relations developments. On January 17, 2013, Secretary of State Hillary Rodham Clinton announced "that for the first time since 1991, the United States is recognizing the government of Somalia." U.S. Dep't of State, *Secretary Clinton Delivers Remarks with President of Somalia Hassan Sheikh Mohamud*, YOUTUBE (Jan. 17, 2013), http://www.youtube.com/watch?v=HlUBFui-U-8 (transcript available at http://www.state.gov/secretary/rm/2013/01/202998.htm). The government of Somalia has requested immunity on behalf of Samantar. *See* John B. Bellinger III, *Samantar Petitions for Cert After Fourth Circuit Denial of Foreign Official Immunity for Alleged* Jus Cogens *Violations*, LAWFARE (Mar. 6, 2013, 11:24 PM), http://www.lawfareblog.com/2013/03/samantar-petitions-for-cert-after-fourth-circuit-denial-of-foreign-official-immunity-for-alleged-jus-cogens-violations/.

228. This is not to suggest that the United States would be able to "de-recognize" an established, functioning government and thereby strip its officials of immunity protection.

domestic courts—a novel justification in the official immunity context.[229] This justification is seemingly at odds with state ownership of immunity and could cause significant problems if a foreign government asserted immunity on behalf of a former official who took up residence in the United States.[230] It is unclear, based on the developing position of the State Department, whether the former official under that scenario would be entitled to immunity. If the State Department continues to consider U.S. residency in its immunity determinations, it must consider whether former U.S. officials will reciprocally be stripped of immunity should they decide to reside abroad after leaving their positions.

When a court is considering immunity for a foreign head of state, the determination is fairly clear cut. Because governments can be structured in many different ways, courts should utilize *Restatement* § 66 to identify if the foreign official before the court is truly the head of state.[231] If identification proves difficult, the court should utilize the State Department to properly identify the official's position. Once a head of state is identified, head-of-state immunity should be afforded if the official is the current, sitting head of a foreign state.[232] The court should then dismiss the case or, in the alternative, dismiss any motions to bring a head of state under the jurisdiction of the court (e.g., for a deposition). Most importantly, the court should not accept the State Department's silence as conclusive evidence that a potential head of state is not entitled to immunity, so long as the individual's position is confirmed.[233]

Conduct-based immunity, on the other hand, requires courts to perform a more nuanced balancing of various circumstances. As a threshold matter, only actions taken in an official capacity are entitled to conduct-based immunity, whether the individual is a current or

229. *Supra* notes 75, 166, and accompanying text.

230. Now that the recognized government of Somalia has requested immunity on behalf of Samantar, we will potentially see how this scenario plays out.

231. *See, e.g.*, Hassen v. Sheikh Khalifa Bin Zayed Al Nahyan, No. CV 09-01106 DMG (MANx), 2010 U.S. Dist. LEXIS 144819, at *14–15 (C.D. Cal. Sept. 17, 2010) (discussing certain titles of officials to which foreign immunity extends). United States courts would not be alone in extending head-of-state immunity to a foreign minister. In 2002, the International Court of Justice extended head-of-state immunity to Abdulaye Yerodia Ndombasi, Minister of Foreign Affairs of the Democratic Republic of the Congo. *See* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 54 (Feb. 14) (determining that head-of-state immunity applies to a Minister of Foreign Affairs throughout the duration of his or her office).

232. *See, e.g.*, Kagame SOI, *supra* note 122, at 6 (stating President Kagame enjoys head-of-state immunity since he is the sitting head of a foreign state).

233. *Contra Hassen*, 2010 U.S. Dist. LEXIS 144819, at *16–17. Of course, the foreign state must also assert immunity on behalf of its official.

former official of the foreign government.[234] If the alleged actions were taken in a personal or non-official capacity, then the former official is not entitled to immunity regardless of the circumstances.

If the foreign government attests that the acts in question were taken in an official capacity, its determination should be afforded a strong presumption of correctness.[235] The same presumption should attach if the law of the foreign nation characterizes the acts in question as official in nature.[236] Without one of these indications, courts should generally presume that actions taken by a foreign official exercising the powers of his office were taken in an official capacity, particularly if the actions were taken by a foreign head of state while in office.[237] This is especially true when the foreign official is being sued precisely for exercising the powers of their office.[238] Together, these factors create a strong presumption that the foreign official was acting within the scope of his or her official capacity when performing the alleged conduct and is therefore entitled to conduct-based foreign official immunity.

B. Judicial Deference for State Department Suggestions of Immunity

Under the holding of the Fourth Circuit's most recent decision in *Samantar*, head-of-state immunity determinations submitted by the State Department are "entitled to absolute deference,"[239] while determinations regarding conduct-based immunity are not controlling but "carr[y] substantial weight."[240]

For cases of head-of-state immunity, the Fourth Circuit's holding seems to reflect the practice of the majority of district courts which have dealt with such cases. Only the Southern District of New York waffled on whether or not the State Department's suggestion of head-of-state immunity controlled.[241] However, the absolute deference

234. *See* OPPENHEIM'S INTERNATIONAL LAW, *supra* note 5, § 456, at 1043–44 (stating a deposed or abdicated head of state enjoys continuing immunity only for his official acts after he is out of the position).

235. Koh Letter on Zedillo, *supra* note 199, at 2.

236. *See* Koh Letter on Senesie/Sesay, *supra* note 194, at 3 (stating that "[a]lthough the character of an act under the law of the foreign state is not the only relevant factor in making immunity determinations," the defendants in this case are immune to the extent that the court finds that their acts were taken in their official capacities under the law of the foreign state).

237. Koh Letter on Zedillo, *supra* note 199, at 1.

238. *Id.* at 1–2.

239. *Yousuf VI*, 699 F.3d 763, 772 (4th Cir. 2012).

240. *Id.* at 773.

241. *See* Tawfik v. Al-Sabah, No. 11 Civ. 6455 (ALC)(JCF), 2012 WL 3542209, at *2–3 (S.D.N.Y. Aug. 16, 2012) (agreeing that the State Department's Suggestion of Immunity results

that courts afford to the State Department's determinations of head-of-state immunity is rooted in the constitutional assignment of the power to "receive Ambassadors and other public Ministers" to the Executive Branch.[242] The Fourth Circuit in *Samantar* noted that this power "includes, by implication, the power to accredit diplomats and recognize foreign heads of state."[243] Absolute deference is proper for determinations of head-of-state immunity because it involves the "quintessentially executive function" of "a formal act of recognition."[244] Moreover, it is a longstanding principle of customary international law that a head of state is immune from suit in foreign jurisdictions while in office.[245] The proper functioning of any government requires constant attention from its head of state. Allowing a sitting head of state to be drawn into litigation around the world distracts them from running his or her country and could have serious reciprocal implications for the U.S. President as well. Because the Executive Branch is charged by the Constitution to be "the guiding organ in the conduct of our foreign affairs,"[246] and the Department of State is the knowledge base of the Executive Branch regarding the status and conduct of the nation's foreign affairs, suggestions by the Department of head-of-state immunity should receive absolute deference from the courts of the United States.

As the Fourth Circuit pointed out, however, "there is no equivalent constitutional basis suggesting that the views of the Executive Branch control questions of foreign official immunity."[247] The doctrine of foreign official immunity is derived from the sovereign immunity traditionally afforded to foreign states.[248] Conduct-based immunity attaches to actions by foreign officials because of the official nature of such actions.[249] It is now a well-established principle of international law, embraced by U.S. courts, that a foreign state's

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in dismissal in this case but refusing to hold that the executive branch's determination of immunity is binding and not subject to judicial review).

242. U.S. CONST. art. II, § 3.

243. *Yousuf VI*, 699 F.3d at 772.

244. Rutledge, *supra* note 93, at 606.

245. *See* OPPENHEIM'S INTERNATIONAL LAW, *supra* note 5, § 137, at 460 (stating that international law gives every state a right to claim exemption from local jurisdiction for its head of state).

246. Magan Statement, *supra* note 161, at 3 (quoting Ludecke v. Watkins, 335 U.S. 160, 173 (1948)).

247. *Yousuf VI*, 699 F.3d at 773.

248. HAZEL FOX, THE LAW OF STATE IMMUNITY 455 (2d ed. 2008).

249. Chimène I. Keitner, *The Forgotten History of Foreign Official Immunity*, 87 N.Y.U. L. REV. 704, 709 (2012).

sovereign immunity "extends to an individual *official* acting on behalf of that foreign state."[250]

It is instructive that the Executive Branch has shifted its position on the level of deference that courts should afford to its suggestions on conduct-based immunity. At the time of the U.S.'s founding, foreign officials were considered to be "on the same 'footing' with 'every other foreigner' who came within" the territory of the United States.[251] Therefore, conduct-based immunity offered no protection for foreign officials, and the Executive Branch did not believe that it had "constitutional authority to instruct a court to dismiss a private suit on conduct-based immunity grounds," even for current officials.[252] The Executive Branch set a precedent in the eighteenth century of leaving the determination of conduct-based immunity to the assessment of the courts.[253]

Judicial deference to Executive Branch suggestions of immunity did not become routine until the 1930s, in the context of title proceedings against foreign ships.[254] Today, the State Department considers the Supreme Court's decisions in *Ex parte Peru* and *Republic of Mexico v. Hoffman* as definitive evidence that courts must afford absolute deference to its conduct-based immunity determinations. The Department cites the principles of separation of powers and urges the courts not to "embarrass" the United States in the foreign policy arena by contradicting the branch charged with maintaining the nation's international affairs.[255]

The State Department's point is well-taken. While courts are certainly capable of deciding questions of foreign official immunity and even the potential foreign policy implications of their decisions, the State Department is simply in a better position to make these

250. *Yousuf VI*, 699 F.3d at 774 (emphasis in original). *See also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE U.S. § 66(f) (1965) ("The immunity of a foreign state . . . extends to . . . any . . . public minister, official, or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state.").

251. Keitner, *supra* note 249, at 709–10.

252. *Id.* at 710.

253. *See id.* at 758 (explaining that the Executive believed that certain types "of intervention in a civil suit against a foreign official would be constitutionally prohibited").

254. *Id.* at 759. *See also* Republic of Mexico v. Hoffman, 324 U.S. 30, 34–35 (1945) (dealing with in rem possession of a foreign ship and asserting that courts must defer to executive branch suggestions of immunity when submitted); *Ex parte* Republic of Peru, 318 U.S. 578, 588–89 (1943) (like *Hoffman*, dealing with in rem possession of a ship and asserting courts must defer to executive branch suggestions of immunity).

255. *See supra* note 213 (discussing a Suggestion of Immunity in which the Department notes a Seventh Circuit observation that the courts should not act in a way that embarrasses the executive branch in its conduct of foreign affairs).

determinations. The State Department is the locus of expertise on foreign affairs and can provide the most up-to-date information on the state of the world and the implications of submitting a foreign official, current or former, to the jurisdiction of U.S. courts. Courts should take advantage of the State Department instead of trying to conduct these delicate international investigations itself. Moreover, foreign states will naturally expect to deal with the State Department when matters of official immunity are concerned and submit their requests for determinations of immunity to the State Department.

While the State Department may be overstepping in claiming that its conduct-based immunity Suggestions are entitled to absolute deference, the Fourth Circuit's determination that its Suggestions should only carry substantial weight also misses the mark. Instead, the best approach likely lies somewhere in the middle. If the State Department submits a Suggestion finding conduct-based immunity, that Suggestion should create a rebuttable presumption of immunity for the foreign official. The case would then proceed in a similar fashion to the current case of former President Zedillo. The court would issue an order for the plaintiffs to show cause why the immunity should not be upheld. The defendant foreign official would then have an opportunity to reply to the plaintiff's submission, and the court would ultimately decide whether or not the presumption of immunity has been rebutted.

In a case where the State Department submits a determination that the foreign official is not entitled to conduct-based immunity, the process would work the same. The official would then have the opportunity to show cause why the court should not adopt the determination by demonstrating that he or she acted within the scope of his or her official capacity. This approach provides the proper level of deference to the State Department's expertise while still allowing the parties to present extenuating evidence of why the determination may be unjust. As long as the State Department acts reasonably in its determinations, grounding them in a close examination of the facts and careful consideration of the relevant law, courts should conclude that the initial presumption of immunity afforded to the State Department should be the controlling determination in the case.[256]

VI. STATE OF PLAY: CONCLUSION

The *Samantar* decision ushered in a return to the pre-FSIA two-step process utilized in cases requiring a determination of head-of-

256. Koh, *supra* note 11, at 1161.

state or conduct-based official immunity for foreign officials. In the years following that decision, the State Department has penned eleven Suggestions of Immunity or Statements of Interest expounding on whether sitting and former heads of state and other foreign officials were entitled to immunity.[257] The State Department has chosen not to issue a general statement of principles articulating its view on these immunities—a veritable "Koh Letter."[258] However, these Suggestions and Statements provide courts with relatively clear, well-developed factors to consider when faced with determining the immunity entitlement of a head of state or foreign official in the face of State Department silence.

These factors can be summarized as follows. First, immunity should only be extended to an official if the relevant foreign state formally requests it.[259] Once the foreign state makes a formal request for immunity, courts should consider the type of official in question. In the case of a head of state, immunity should be extended once the court confirms that the individual is in fact the current, sitting head of state.[260] For other foreign officials, the court should extend immunity only for acts taken in their official capacity, as determined by the foreign state's assertions, the law of the foreign nation, and the basic nature of the acts involved.[261]

Furthermore, if the State Department weighs in, courts should afford the Department's determination a certain amount of deference, depending on the type of official in question. For head-of-state immunity, the court should accord absolute judicial deference to the State Department's determination of immunity.[262] In cases of conduct-based immunity, the State Department's grant or refusal of immunity should be afforded a rebuttable presumption of correctness.[263] As long as the State Department's determination is reasonably grounded in principles of customary international law, courts should defer to the Executive Branch's expertise. In this way, both the Executive and Judicial branches will contribute to the development of consistent

257. *See* discussion *supra* Part IV (discussing post-*Samantar* cases where the State Department submitted Suggestions of Immunity).

258. *See* Bellinger, *supra* note 99, at 829 (recommending that the State Department issue just such a general statement of principles comparable to the Tate Letter of 1952).

259. *See* discussion *supra* Part V.A (asserting that since immunity belongs to the foreign state, not the foreign official, the foreign state's invocation or waiver of immunity on behalf of its official should be conclusive).

260. *Id.*

261. *Id.*

262. *See* discussion *supra* Part V.B (discussing the holding in *Samantar* that State Department determinations of head-of-state immunity are entitled to absolute deference).

263. *Id.*

rules for official immunity in the United States, ensuring that foreign states will not be laid bare to litigation due to the conduct of their officials. In turn, the consistent enforcement of immunity in the United States will help protect our own officials abroad.

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