Symposium Epilog: Foreign Sovereign Immunity at Home and Abroad

*Ingrid Wuerth**

Orhan Pamuk, in one of his early novels, describes a Turkish mannequin maker from the mid-twentieth century. The artisan crafts expressive, individual figures with distinctive faces and hand gestures. Unfortunately, however, there is no demand for his mannequins. The large department stores fashionable in Istanbul favored foreign-looking human forms, lacking Turkish features, with identical, fake smiles. The hundreds of life-like Turkish mannequins that he continues to make are crowded, gesturing to each other, in his dank basement that leads to an intricate set of underground passageways beneath Istanbul.[1]

For Pamuk, mannequins obviously serve as a metaphor for national and personal identity, but we can also use this metaphor for foreign state immunity. If the international law of immunity once purported to make foreign states, their rulers, their officials, and their boats all identical in some sense—the sovereign equality of states—today immunity distinguishes and differentiates between the state's commercial and private features, its tortious and non-tortious conduct committed in the forum state, and sometimes even the torture, war crimes, and acts of terrorism carried out in its name. Of course, sovereign equality has diminished in general as human rights have grown, but even as nation-states accept treaty-based obligations toward their own citizens, they refuse to make themselves explicitly accountable in the national courts of other countries and usually refuse to hold other states accountable in their own courts. Immunity often remains the stylized equalizer.

But there are exceptions. If we imagine those who claim immunity as a party of mannequins, we would encounter the true-to-life forms of those who have been denied immunity wandering amongst the many stylized, featureless, immunity-protected entities. The individualized figures would include Augusto Pinochet,[2] up from the dark basement of the national and personal psyche, along with

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1. ORHAN PAMUK, DAS SCHWARZE BUCH 70–73 (Fischer, 13th ed. 2008).

2. R v. Bow St. Metro. Stipendiary Magistrate *ex parte* Pinochet (No. 3), [2000] 1 A.C. 147 (H.L.) (Eng.) (holding that Augusto Pinochet, the former President of Chile, could be extradited to Spain to face charges of torture).

the German government and its military officials with their acts of brutality in Italy and Greece at the end of the Second World War.[3] We would find state-owned vessels engaged in commercial trading,[4] along with pin-striped Hugo Boss-clad representatives of state-owned banks.[5] Stripped of immunity, they are subjected to the possibility of individual scrutiny in a foreign forum that threatens to lay bear the specifics of their alleged human rights violations, commercial duplicity, or contractual malfeasance. We would not meet Donald Rumsfeld,[6] but depending on how we define things—and much depends on this—we might meet Charles Taylor (no immunity before a hybrid court)[7] or Omar al Bashir (arguably no immunity before the International Criminal Court).[8]

What would and should this grim, imagined gathering look like five, twenty or fifty years from now? And who should decide? The accomplished authors for this symposium issue consider these questions in detail in the pages that follow.

The keynote address for the Vanderbilt conference was delivered by the distinguished Harold Hongju Koh, Legal Adviser of the U.S. Department of State, the former Dean of Yale Law School, and a leading scholar of international and foreign relations law. His ground-breaking remarks focused on the U.S. government's approach to foreign official immunity.[9] The Supreme Court's 2010 decision in *Samantar v. Yousuf*[10] held that the Foreign Sovereign Immunities Act does not apply to claims against individual foreign officials and that common law applies instead. Legal Adviser Koh provides the reader with an invaluable discussion of the State Department's understanding of the *Samantar* decision, and the process that the

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3. Cass., sez. un., 11 marzo 2004, n. 5044, Giust. Civ. 2004 II, 1191 (It.), *translated in* Ferrini v. Germany, 128 I.L.R. 658 (2004) (upholding jurisdiction of Italian civil courts over a claim by an individual deported to Germany during World War II and forced to work in munitions factory); Protodikeia Polymele Livadia [Pol. Pr. Liv.] [Three-Member District Court in Livadia] 137/1997 (Greece) (holding that state immunity did not apply to actions *jure gestionis* and denying Germany's claim to immunity for a massacre committed by its soldiers in 1944), *aff'd*, Areios Pagos [A.P.] [Supreme Court] 11/2000 (Greece). The Supreme Court case is translated into English and is available as *Prefecture of Voiotia v. Federal Republic of Germany*, 129 I.L.R. 514 (2000).

4. International Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels, Apr. 10, 1926, 179 L.N.T.S. 199.

5. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 483 (1983) (denying immunity in a suit against the Central Bank of Nigeria).

6. *See* Katherine Gallagher, *Universal Jurisdiction in Practice*, 7 J. INT'L CRIM. JUST. 1087, 1110 (2009).

7. Prosecutor v. Charles Taylor, Case No. SCSL-2003-01-I (30314-3039), Decision on Immunity from Jurisdiction, ¶ 38 (Spec. Ct. Sierra Leone May 31, 2004).

8. Cherif Bassiouni, *Perspectives on International Criminal Justice*, 50 VA. J. INT'L L. 269, 316 (2010).

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

10. Samantar v. Yousuf, 130 S. Ct. 2278 (2010).

government is putting in place to consider official immunity issues as they arise in the U.S. courts. He defends the role of the Executive Branch in making individual immunity determinations[11] based on the language of the *Samantar* opinion itself and on the Executive Branch's expertise in a variety of areas, including international law, the traditional principles of immunity recognized by the United States, the human rights records of countries around the world, and the diplomatic implications of particular immunity determinations.

Five tenets animate the State Department's approach to official immunity going forward: (1) courts must defer to the State Department on particular immunity issues; (2) the general principles of immunity as articulated by the State Department govern in the federal courts as a matter of federal common law; (3) official immunities are for the protection of the foreign state not the individual official; (4) conduct based immunities attach only to official acts (generally not including conduct that violates both international and domestic law); and (5) many cases involving foreign officials can be resolved based on "non-*Samantar*" issues like status-based immunities or procedural grounds.[12] These important principles may well provide the initial basis for a "Koh Letter," like the famous "Tate Letter," that would formally articulate official immunity principles to the benefit of litigants, courts, foreign states, and future administrations.

Several other writers for this symposium also focus on immunity determinations in the United States after *Samantar*. John Bellinger, the former Legal Adviser of the State Department and now a partner at Arnold & Porter, traces the position taken by the State Department in the cases leading up to the *Samantar* decision and outlines the burdens that the Department faces now that the Court has adopted its position; in particular, the Department will be put under political pressure from foreign states, will have to develop positions on various kinds of individual official immunity (official act, diplomatic and consular, head of state, and special missions immunity), and may need to put a process in place to hear from parties on both sides of immunity disputes.[13] Professor Chimène Keitner articulates several considerations that courts and the Executive Branch should use to make determinations of conduct-

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11. Koh, *supra* note 9, at 18–40. *Contra* Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT'L L. 915 (2011) (arguing that federal common law, rather than executive branch determinations, is the best source of law for immunity determinations).

12. Koh, *supra* note 9.

13. 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. 825 (2011).

based immunity,[14] which generally presents more contested issues than status-based immunity. Professor David Bederman develops the argument that there are other pockets of potentially important federal common law that are significant after FSIA, in particular the actual possession rule in admiralty cases, which he argues continues to apply today.[15]

Every author writing on U.S. law for this symposium notes that the extent to which the Executive Branch can make binding immunity determinations is an important issue going forward. In addition to Legal Adviser Koh, two other authors address this issue directly. Professor Peter Rutledge provides a typology of the various roles that the Executive Branch might play in immunity (and other) cases, distinguishing in particular between views articulated by the Executive Branch independently of ongoing litigation, and those expressed with respect to particular pending cases.[16] And Lewis Yelin of the Department of Justice has contributed a major, comprehensive article defending the power of the Executive Branch to make binding head of state (status-based) immunity determinations as a matter of constitutional law.[17]

Reading these articles together, one can see certain areas of convergence (particularly in the area of status-based immunity), but also areas of clear disagreement, particularly with respect to the control the Executive can and should exert over immunity determinations that arise in U.S. courts. In other words, the composition of our imagined immunity party will depend in part on the extent to which the views of the Executive Branch are followed, how those views are formulated, the scope of conduct-based immunity, and the existence of other potential areas of federal common law in the immunity context.

A second grouping of authors focuses more generally on the international law of immunity.[18] Professor Roger O'Keefe argues that there is no human rights exception to the immunity of states and that indeed foreign states (which confer such immunity) are not really the correct target for human rights advocates; instead more pressure should be brought to bear on the states that actually commit the violations and on the states of the victims' nationality that do not

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14. Chimène I. Keitner, *Foreign Official Immunity After* Samantar, 44 VAND. J. TRANSNAT'L L. 843 (2011).

15. David J. Bederman, *The "Common Law Regime" of Foreign Sovereign Immunity: The Actual Possession Rule in Admiralty*, 44 VAND. J. TRANSNAT'L L. 859 (2011).

16. Peter B. Rutledge, Samantar *and Executive Power*, 44 VAND. J. TRANSNAT'L L. 891 (2011).

17. Lewis S. Yelin, *Head of State Immunity as Sole Executive Law Making*, 44 VAND. J. TRANSNAT'L L. 917 (2011).

18. HAZEL FOX, THE LAW OF STATE IMMUNITY 20–25 (2d ed. 2008).

adequately intercede with the responsible state.[19] Professor Beth Stephens argues that immunity itself is a dynamic doctrine that has developed over time to reflect the needs of states. In light of the dramatic changes in international law, which now make individuals accountable for many serious human rights violations, states can no longer use the immunity doctrines to protect their own officials from such accountability.[20] Professor David Stewart, a former member of the State Department's legal team specializing in immunity and now a professor at Georgetown, analyzes the history and current significance of the 2004 UN Convention on Jurisdictional Immunities of States and Their Property. He argues that the Convention includes no general human rights exception to state immunity, but should not necessarily be seen as foreclosing a development of international law in that direction.[21]

The third group of authors considers national courts and the development of international immunity law, with a focus on the *Germany v. Italy* case which is currently pending before the International Court of Justice. Professor Lori Damrosch examines several questions fundamental to the role of national courts and argues that customary international law does not "freeze" the law, but instead that national courts are forging important exceptions to immunity, as examples from both the United States and Italy demonstrate.[22] Consistent with some of the arguments advanced by Professors Damrosch and Stephens, Professor Elena Sciso explores the role of the Italian national courts in developing the international law of immunity; these courts have accepted the argument that states themselves are not entitled to immunity for certain egregious human rights violations, especially violations of *jus cogens* norms.[23] Offering a cautionary note on *jus cogens* norms, Professor Paul Stephan argues that they can act as a shield to protect the sovereign interests of states, or they can act as sword to impose obligations on states toward individuals, especially in the human rights context. The latter function may work well if the world is comprised of liberal, democratic nation states, but authoritarian regimes (like China) may use them as shield, following in the footsteps of the former Soviet

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19. Roger O'Keefe, *State Immunity and Human Rights:. Heads and Walls, Hearts and Minds*, 44 VAND. J. TRANSNAT'L L. 1005 (2011).

20. Beth Stephens, *Abusing the Authority of the State: Denying Foreign Official Immunity for Egregious Human Rights Abuses*, 44 VAND. J. TRANSNAT'L L. (forthcoming Nov. 2011).

21. David P. Stewart, *The Immunity of State Officials Under the UN Convention on Jurisdictional Immunities of States and Their Property*, 44 VAND. J. TRANSNAT'L L. 1051 (2011).

22. Lori Fisler Damrosch, *Changing the International Law of Sovereign Immunity Through National Decisions*, 44 VAND. J. TRANSNAT'L L. (forthcoming Nov. 2011).

23. Elena Sciso, *Italian Judges' View on Foreign States' Immunity*, 44 VAND. J. TRANSNAT'L L. (forthcoming Nov. 2011).

Union.[24] Professor Christian Tomuschat counters directly the argument that states lack immunity from suits based on *jus cogens* violations.[25] His article also provides a detailed background of the case brought by Germany against Italy before the International Court of Justice, and argues that Italian national courts violated international law by denying immunity to Germany for World War II era war crimes that took place partly on Italian territory.

The optimal composition of our strange, imagined mannequin party is deeply contested. Perhaps immunity is becoming obsolete for individual officials who violate fundamental norms of international law. And maybe the same holds for the immunity of states themselves. If so, the stylized mannequins will pale beside the individualized figures. But these developments are contested—as our authors demonstrate—and the outcome may depend in part on where such decisions are made: national courts, offices of the foreign minister, or international tribunals. In Pamuk's novel, the personalized mannequins remain in their moldy underground labyrinth, reminders of national events and a national identity that people prefer not to confront in their forward looking efforts to become something new, different, and better as a nation.

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24. Paul B. Stephan, *The Political Economy of* Jus Cogens, 44 VAND. J. TRANSNAT'L L. 1077 (2011).

25. Christian Tomuschat, *The International Law of State Immunity and Its Development by National Institutions*, 44 VAND. J. TRANSNAT'L L. 1109 (2011).