No. ___

IN THE

Supreme Court of the United States

MOHAMED ALI SAMANTAR,

Petitioner,

v.

BASHE ABDI YOUSUF ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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March 4, 2013

QUESTION PRESENTED

In *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010), this Court held that the common law, rather than the Foreign Sovereign Immunities Act (FSIA), governs the immunity of individual foreign officials who are sued for their official acts. The Fourth Circuit's decision on remand nullifies common-law immunity, and allows plaintiffs to circumvent the FSIA's immunity for foreign states, whenever plaintiffs sue foreign officials and allege that their official acts violate *jus cogens* norms of international law. The question presented is:

Whether a foreign official's common-law immunity for acts performed on behalf of a foreign state is abrogated by plaintiffs' allegations that those official acts violate *jus cogens* norms of international law.

PARTIES TO THE PROCEEDING

The Petitioner is Mohamed Ali Samantar. Respondents are Bashe Abdi Yousuf, Aziz Mohamed Deria (in his capacity as Personal Representative of the Estates of Mohamed Deria Ali, Mustafa Mohamed Deria, James Doe I, and James Doe II), John Doe I, Jane Doe I, John Doe II, John Doe III, and John Doe IV.

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PETITION FOR WRIT OF CERTIORARI

Mohamed Ali Samantar respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 699 F.3d 763.

The district court's order denying Petitioner's motion to dismiss the second amended complaint (Pet. App. 29a) is unreported but is available electronically at 2011 WL 7445583. An order denying Petitioner's motion to reconsider that dismissal (Pet. App. 30a-32a) is unreported.

JURISDICTION

Petitioner seeks review of a final decision of the Fourth Circuit entered on November 2, 2012. On January 16, 2013, the Chief Justice granted Petitioner's application for an extension of time to file a petition for writ of certiorari until March 4, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1602-1606, 1608 (Pet. App. 76a, 79a), the Alien Tort Statute (ATS), 28 U.S.C. § 1350 (Pet. App. 76a, 79a-90a), and the Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. § 1350 note (Pet. App. 77a-78a).

STATEMENT OF THE CASE

In *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010), this Court held that the FSIA does not govern the immunity of individual officials who are sued for acts taken on behalf of a foreign state. The Court emphasized that this interpretation would not allow plaintiffs to circumvent the FSIA because the immunity of foreign officials who are sued for their official acts is "properly governed by the common law . . . ." *Id.* at 2292.

But on remand, the Fourth Circuit created an exception to common-law immunity that swallows the rule. The court held that a foreign official is not entitled to common-law immunity for acts performed in an official capacity if plaintiffs in a civil suit allege that those acts violate *jus cogens* norms of international law, such as norms prohibiting torture. Because almost all ATS and TVPA suits allege violations of *jus cogens* norms, this rule will allow plaintiffs to pursue such claims simply by suing the responsible officer instead of the state itself. This result conflicts with the holdings of other circuits, opens the floodgates to claims concerning extraterritorial conduct by foreign nations, disrupts international comity, and risks reciprocal treatment of U.S. officials by other countries.

A. *Samantar I*

1. District Court Proceedings

Petitioner Mohamed Ali Samantar was the First Vice President, Minister of Defense, and Prime Minister of the Democratic Republic of Somalia during the 1980s and 1990s. *Yousuf v. Samantar*, No. 1:04CV1360, 2007 WL 2220579, at *1 (E.D. Va. Aug. 1, 2007). Respondents sued Samantar under

the TVPA and the ATS for actions taken in his official capacity on behalf of Somalia. *Id.*

Respondents filed their complaint in November 2004 in the United States District Court for the Eastern District of Virginia. The district court stayed proceedings so that the State Department could file a statement of interest regarding Samantar's entitlement to sovereign immunity. After waiting two years without receiving a statement of interest from the State Department, the court reinstated the case to the active docket. *Id.* at *6. Respondents filed a second amended complaint, which Samantar moved to dismiss, arguing that the district court lacked subject matter jurisdiction because Samantar was entitled to immunity under the FSIA, 28 U.S.C. §§ 1602-1611. *Id.* at *6-7. No party argued that any of the exceptions to FSIA immunity applied. *Id.* at *7.

The district court held that Samantar was entitled to FSIA immunity and dismissed the complaint. *Id.* at *15. The court explained that Samantar was entitled to immunity because "'claims against the individual in his official capacity are the practical equivalent of claims against the foreign state.'" *Id.* at *8 (quoting *Velasco v. Gov't of Indon.*, 370 F.3d 392, 398 (4th Cir. 2004)). Moreover, even though Respondents did not raise the issue, the court noted that "violations of *jus cogens* norms [do not] constitute[] an implied waiver of [FSIA] immunity." *Id.* at *14 (citations omitted).

2. Fourth Circuit Proceedings

The Fourth Circuit reversed, concluding that FSIA immunity does not apply to foreign officials at all, and in any event does not apply to officials who had

left office by the time of suit. *Yousuf v. Samantar*, 552 F.3d 371, 381 (4th Cir. 2009). The court did not reach the question whether Samantar was entitled to common-law immunity. *Id.* at 383-84.

3. Supreme Court Proceedings

This Court affirmed, holding that the FSIA does not govern the immunity of individual officials who are sued for acts taken on behalf of a foreign state. *Samantar*, 130 S. Ct. at 2292-93. The Court explained that this "reading of the FSIA will not 'in effect make the statute optional,' as some Courts of Appeals have feared, by allowing litigants through 'artful pleading to take advantage of the Act's provisions or, alternatively, choose to proceed under the old common law.'" *Id.* (quoting *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1102 (9th Cir. 1990)). That is because "[e]ven if a suit is not governed by the Act, it may still be barred by foreign sovereign immunity under the common law." *Id.* Thus, this Court was "not persuaded that [its] construction of the statute's text should be affected by the risk that plaintiffs may use artful pleading" to circumvent immunity doctrine. *Id.*

"[E]mphasiz[ing] . . . the narrowness of [its] holding," this Court remanded for the lower courts to consider in the first instance "[w]hether [Samantar] may be entitled to immunity under the common law . . . ." *Id.* at 2292-93.

B. *Samantar II*

1. District Court Proceedings

On remand from this Court, Samantar moved to dismiss the second amended complaint, arguing that he was entitled to common-law immunity because

"any actions for which the plaintiffs sought to hold him responsible were taken in the course and scope of his official duties." Pet. App. 4a. He also argued that he was entitled to head-of-state immunity because at least some of the alleged wrongdoing occurred while he was Prime Minister. *Id.*

The Government opposed immunity for Samantar. Pet. App. 33a. While the Government acknowledged that "[t]he immunity of a foreign state was . . . generally understood to extend not only to the state, heads of state, and diplomatic officials, but also to other officials acting in an official capacity," Pet. App. 36a, it claimed that Samantar was not entitled to common-law immunity for two reasons.[1] *First*, "Samantar [was] a former official of a state with no currently recognized government." Pet. App. 40a. The Government argued that, "[i]n the absence of a recognized government authorized either to assert or waive Defendant's immunity or to opine on whether Defendant's alleged actions were taken in an official capacity . . . immunity should not be recognized." Pet. App. 42a. *Second*, the Government argued that Samantar was not entitled to immunity because he is now a U.S. resident. *Id.* However, the Government stressed that "a former official's decision to permanently reside in the United States is not, in itself, determinative of the former official's immunity from suit." Pet. App. 43a.

The Government did not recommend that the court deny Samantar immunity on the basis of an exception for alleged violations of *jus cogens* norms.

[1] The Government did not distinguish between head-of-state and foreign official immunity when discussing these two factors. *See* Pet. App. 35a-39a.

Nor did it discuss whether such an exception to immunity would ever be appropriate.

The district court denied Samantar's motion to dismiss, explaining that "[t]he government has determined that the defendant does not have foreign official immunity. Accordingly, defendant's common-law sovereign immunity defense is no longer before the Court." Pet. App. 29a. The court denied Samantar's motion for reconsideration, finding that "the status of the government of Somalia" and "the residency of the defendant" were "sound" rationales for denying immunity. Pet. App. 32a.

2. Fourth Circuit Proceedings

The Fourth Circuit affirmed for different reasons. Pet. App. 27a-28a.[2] It concluded that foreign officials are not entitled to common-law immunity for acts committed in an official capacity if plaintiffs in a civil suit allege violations of *jus cogens* norms of international law. *Id.*

The court rejected the Government's view that it should receive "absolute deference [as to] whether a

[2] The Fourth Circuit noted that the denial of immunity was immediately appealable under the collateral-order exception to the final judgment rule. *See* Pet. App. 26a n.1 (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); *Rux v. Republic of Sudan*, 461 F.3d 461, 467 n.1 (4th Cir. 2006)). After the district court and the Fourth Circuit denied Samantar's motions to stay proceedings in the district court while the appeal on common-law immunity was pending, Samantar defaulted in the district court. The district court entered a default judgment, *Yousuf v. Samantar*, No. 1:04cv1360, 2012 WL 3730617 (E.D. Va. Aug. 28, 2012), which Samantar appealed to the Fourth Circuit on jurisdictional grounds. That appeal has not yet been fully briefed in the Fourth Circuit. No. 12-2178 (appeal docketed Sept. 24, 2012).

foreign official is entitled to sovereign immunity" for official acts.[3] Pet. App. 10a. The court also ignored the Government's argument that "the Court need not—and should not—address" plaintiffs' contention that immunity is unavailable for alleged *jus cogens* violations. Pet. App. 68a n.3 (citing Appellees' Br. at 14-15, 2011 WL 4577137); *see also* Appellees' Br. at 14-15 (arguing "that extrajudicial killing and torture cannot be considered authorized or 'official acts' because they are contrary to longstanding and universally recognized principles of international law").

The panel instead announced its own rule of law governing the scope of common-law foreign sovereign immunity for official acts. The panel acknowledged that this Court and lower courts have "embraced the international law principle that sovereign immunity, which belongs to a foreign *state*, extends to an individual *official* acting on behalf of that foreign state." Pet. App. 20a (citing *Underhill v. Hernandez*, 168 U.S. 250, 252, (1897); Restatement (Second) of Foreign Relations Law § 66(f) (1965); *Belhas v. Ya'alon*, 515 F.3d 1279, 1285 (D.C. Cir. 2008); *Chuidian,* 912 F.2d at 1106; *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1472 (9th Cir. 1994); *Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir. 2009)). Nevertheless, it held that alleged acts that violate *jus cogens* norms can never be sovereign acts attributable to the foreign state. *See* Pet. App. 22a-26a. In particular,

[3] The panel concluded that Samantar was not entitled to head-of-state immunity because the Government's determination as to head-of-state immunity, in contrast with its views about common-law immunity for official acts, "is entitled to absolute deference." Pet. App. 12a-16a.

the panel characterized a "*jus cogens* norm" as one "'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.'" Pet. App. 22a (quoting Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331). Examples of such norms include "[p]rohibitions against . . . torture, summary execution and prolonged arbitrary imprisonment." Pet. App. 22a. In the panel's view, foreign officials sued for alleged *jus cogens* violations are not entitled to immunity.

To support its finding of a *jus cogens* exception to immunity in *civil* litigation, the panel noted that "[a] number of decisions from foreign national courts have reflected a willingness to deny official-act immunity in the *criminal* context for alleged *jus cogens* violations." Pet. App. 24a (citing *Regina v. Bartle, ex parte Pinochet*, 38 I.L.M. 581, 593–95 (H.L. 1999); *Ferrini v. Germany*, Oxford Rep. Int'l in Dom. Cts. 19 (Italian Ct. of Cassation 2004)) (emphasis added). But the panel acknowledgwed that "the *jus cogens* exception appears to be less settled in the civil context." Pet. App. 25a (citing *Jones v. Saudi Arabia*, 129 I.L.R. 713, at ¶ 24 (H.L. 2006) (rejecting *jus cogens* exception to foreign official immunity in civil context)).

The panel cited three U.S. court decisions that, in its view, showed that "American courts have generally followed the foregoing trend, concluding that *jus cogens* violations are not legitimate official acts and therefore do not merit foreign official immunity." Pet. App. 25a (citing *Sarei v. Rio Tinto,*

PLC, 487 F.3d 1193, 1209 (9th Cir. 2007); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 718 (9th Cir. 1992); *Enahoro v. Abubakar*, 408 F.3d 877, 893 (7th Cir. 2005) (Cudahy, J., dissenting)). The panel also found "Congress's enactment of the TVPA, and the policies it reflects, to be both instructive and consistent with our view of the common law regarding these aspects of *jus cogens*." Pet. App. 26a.

Thus, because this case involves alleged *jus cogens* violations, the panel held that "Samantar is not entitled to conduct-based official immunity under the common law . . . ." *Id.*

The panel devoted less than a page of discussion at the very end of its opinion to the Government's views. After already "conclud[ing] that . . . officials from other countries are not entitled to foreign official immunity for *jus cogens* violations," the panel noted that the two factors identified by the Government—which played no role in the court's earlier discussion of a *jus cogens* exception—"suppl[y] us with additional reasons to support" the denial of immunity. Pet. App. 28a. But the panel never indicated that foreign official immunity could be denied solely on the basis of the non-recognition of a government and the residency of the defendant. Pet. App. 25a-28a.

C. The United States' Recognition Of The Somali Government

Since the Fourth Circuit issued its opinion below, the United States has formally recognized the government of Somalia. *See* Hillary Rodham Clinton, Secretary of State, Remarks With President of Somalia Hassan Sheikh Mohamud After Their Meeting, Jan. 17, 2013, http://www.state.gov/

secretary/rm/2013/01/202998.htm ("I am delighted to announce that for the first time since 1991, the United States is recognizing the Government of Somalia. . . . I believe that our job now is to listen to the Government and people of Somalia, who are now in a position to tell us, as well as other partners around the world, what their plans are, how they hope to achieve them."); U.S. Department of State, Somalia President Hassan Sheikh Mohamud's Visit to Washington, DC, Jan. 17, 2013, http://www.state.gov/r/pa/prs/ps/2013/01/202997.htm ("President Hassan Sheikh's visit and the U.S. decision to recognize his government are evidence of the great strides toward stability Somalia has made over the past year. These steps also demonstrate the strong relationship between the Government of Somalia, its people, and the United States of America.").

Moreover, contrary to one of the two grounds for denying immunity previously asserted by the United States—that Somalia had no recognized government to assert or waive immunity—the newly recognized Prime Minister of Somalia has formally requested that the State Department recognize Samantar's immunity from suit in this case. In a letter to Secretary of State Kerry dated February 26, 2013, the Prime Minister of Somalia requested that Secretary Kerry "use [his] good offices to obtain immunity for" Samantar, whose alleged "acts in question were all undertaken in his official capacity with the Government of Somalia . . . ." Pet. App. 70a The Prime Minister further "reject[ed] the notion that [Samantar's alleged] action[s] were contrary to the law of Somalia or the law of nations . . . ." *Id.*

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S DECISION CREATES A CIRCUIT SPLIT OVER THE IMPORTANT QUESTION OF WHETHER ALLEGED *JUS COGENS* VIOLATIONS DEFEAT FOREIGN OFFICIAL IMMUNITY

A. The Fourth Circuit's Decision Conflicts With The Decisions Of Other Circuits

The Fourth Circuit's decision creates a circuit split about whether the common law recognizes a *jus cogens* exception to foreign official immunity in civil suits. The Fourth Circuit held that foreign officials accused of violating *jus cogens* norms of international law are not entitled to such immunity, *see* Pet. App. 1a, Pet. App. 21a-25a., while the Second, Seventh, and D.C. Circuits have reached the opposite conclusion, *see Matar*, 563 F.3d at 15 (rejecting the argument that a foreign official "should be deemed to have forfeited [his] sovereign immunity whenever [he] engages in conduct that violates fundamental humanitarian standards" (emphasis and citation omitted)); *Belhas*, 515 F.3d at 1287 (rejecting the argument "that *jus cogens* violations can never be authorized by a foreign state and so can never cloak foreign officials in immunity"), *abrogated on other grounds by Samantar*, 130 S. Ct. at 2282; *Ye v. Zemin*, 383 F.3d 620, 625 (7th Cir. 2004) (rejecting the argument that "a head of state (*or any person for that matter*) [is not entitled to immunity] for acts that violate *jus cogens* norms of international law" (emphasis added)); *see also* Brief of the United States as Amicus Curiae Supporting Appellee at 7-8, *Giraldo v. Drummond Co.*, No. 11-7118 (D.C. Cir. Oct. 23, 2012), 2012 WL 3152126 (U.S. Amicus Br. in *Giraldo*)

(explaining that *Belhas*, *Matar*, and *Ye* "expressly" rejected a *jus cogens* exception to foreign official immunity).

As explained above, officials acting on behalf of a foreign state are generally entitled to common-law foreign official immunity. *See, e.g.*, *Samantar*, 130 S. Ct. at 2290, (citing Restatement (Second) of Foreign Relations Law § 66(f)); *Matar,* 563 F.3d at 14 (same). That is because official acts taken by agents of a foreign state have long been understood to be "those of the sovereign itself," *Heaney v. Gov't of Spain*, 445 F.2d 501, 504 (2d Cir. 1971), and permitting plaintiffs to challenge the propriety of such acts in U.S. courts would undermine the "power and [the] dignity" of a foreign state. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 144 (1812).

The Fourth Circuit created an exception to common-law immunity whenever a plaintiff alleges acts that, if proven, would violate *jus cogens* norms of international law, such as "[p]rohibitions against . . . torture, summary execution and prolonged arbitrary imprisonment." Pet. App. 21a-27a (citations omitted). And because "*jus cogens* violations are, by definition, acts that are not officially authorized by the Sovereign," the panel reasoned that foreign officials who allegedly commit such acts cannot be acting on behalf of a foreign state, and therefore cannot be entitled to the state's immunity. Pet. App. 23a.

By contrast, the Second, Seventh, and D.C. Circuits have refused to recognize such an exception to foreign official immunity.

1. The Fourth Circuit's holding directly conflicts with the Second Circuit's decision in *Matar*, 563 F.3d

at 15. There, plaintiffs sued the former head of the Israeli Security Agency under the ATS and TVPA, alleging that he authorized various war crimes in an Israeli military operation in Gaza City. *Id.* at 10-11. Moreover, plaintiffs claimed that he was not entitled to foreign official immunity because these acts allegedly violated *jus cogens* norms of international law.

The Government filed a statement of interest explaining that the common law does not recognize any exception to foreign sovereign immunity for alleged *jus cogens* violations. *See* Statement of Interest of the United States of America, *Matar v. Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007) (No. 05-10270), http://www.state.gov/documents/organization/98806.pdf (U.S. SOI in *Matar*); Brief for the United States of America as Amicus Curiae in Support of Affirmance at 27-33, *Matar*, 563 F.3d 9 (2d Cir. 2007) (No. 07-2579), 2007 WL 6931924 (U.S. Amicus in *Matar*). As the Government explained, a foreign official is entitled to immunity for his "official acts." U.S. SOI in *Matar* at 2. And official acts are acts "performed on the state's behalf, such that they are attributable to the state itself—as opposed to constituting private conduct." *Id.* at 24. Because "the complaint itself makes plain that the challenged conduct was performed on Israel's behalf," the Government argued that the defendant was entitled to foreign official immunity. *Id.* at 26.

Moreover, the Government specifically rejected the plaintiffs' argument that acts that allegedly violate *jus cogens* norms are not "official acts" or acts taken in an "official capacity." *See id.* at 23-33. As the Government explained, even assuming that the

defendant's conduct violated *jus cogens* norms, he was still entitled to foreign official immunity because "the violation would remain attributable to the state itself." *Id.* at 27. Furthermore, recognizing such an exception "would allow circumvention of the state's immunity for the same conduct," given that "[a] foreign state's immunity is not subject to any general exception for *jus cogens* violations under the FSIA." *Id.* at 28. Finally, a *jus cogens* exception to foreign official immunity "would also be out of step with customary international law," *id.* at 29, and "could prompt reciprocal limitations by foreign jurisdictions, exposing U.S. officials to suit abroad on that basis," U.S. Amicus in *Matar* at 4.

The Second Circuit agreed with the Government's well-founded views and expressly rejected the plaintiffs' argument that "there can be no immunity . . . for violations of *jus cogens* . . . norms." 563 F.3d at 14. "A claim premised on the violation of *jus cogens*," the court held, "does not withstand foreign sovereign immunity." *Id.* at 15. Thus, the defendant was entitled to common-law "immunity for 'acts performed in his official capacity.'" *Id.* (quoting Restatement (Second) of Foreign Relations Law § 66(f) & citing *Heaney*, 445 F.2d at 504).

To be sure, in the present case, the Government recommended that Samantar not be granted immunity, *see* Pet. App. 51a, while in *Matar*, the Government suggested that the defendant be immunized from suit, *see* U.S. Amicus in *Matar* at 2. But in both cases, the Government argued against a *jus cogens* exception to immunity. *See* Pet. App. 68a n.3 (arguing that "the Court need not—and should not—address plaintiffs' contention that their

allegations against Samantar cannot constitute 'official acts' or acts taken in an 'official capacity.'"). Indeed, the Government has consistently explained to courts that the common law of foreign official immunity does not recognize a *jus cogens* exception. *See also* Brief for the United States as Amicus Curiae Supporting Affirmance at 27-34, *Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004) (No. 03-3989), http://www.state.gov/documents/organization/78379.pdf (U.S. Amicus in *Ye*); Further Statement of Interest of the United States in Support of the United States' Suggestion of Immunity at 14-15, *Weixum v. Xilai*, 566 F. Supp. 2d 35 (D.D.C. 2008) (No. 04-0649), http://www.state.gov/documents/organization/98772.pdf.

In *Matar*, the Second Circuit followed the Government's well-established position on this issue, *see* 563 F.3d at 14-15, while in the present case, the Fourth Circuit adopted an exception to foreign official immunity that conflicts with the law of other circuits and threatens to "intrude on core aspects of the foreign state's sovereignty and give rise to serious diplomatic tensions," U.S. Amicus in *Matar* at 25.

2. The Fourth Circuit's decision also conflicts with the D.C. Circuit's decision in *Belhas*, 515 F.3d at 1286-88.

There, plaintiffs sued the former general of the Israeli Defense Forces under the ATS and TVPA, alleging that he authorized certain war crimes and extrajudicial killings that occurred during Israeli military operations in Lebanon. *Id.* at 1281-82. In concluding that the defendant was entitled to foreign sovereign immunity, the D.C. Circuit rejected the plaintiffs' argument that alleged "*jus cogens*

violations can never be authorized by a foreign state and so can never cloak foreign officials in immunity." *Id.* at 1287. As the court stressed, recognizing such an exception to foreign official immunity "would likely place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with any number of foreign nations." *Id.* (quoting *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1174 n.1 (D.C. Cir. 1994)). And, as Judge Williams further explained in his concurrence, a *jus cogens* exception would make foreign official immunity "irrelevant" because such an exception "merges the merits of the underlying claim with the issue of immunity." *See id.* at 1291-93 (Williams, J., concurring).

Belhas, which was decided before this Court's first decision in *Samantar*, considered whether a *jus cogens* exception applied to an individual official's immunity under the FSIA. *See id.* at 1286-88. But, as *Belhas* explained, the "'well-recognized' purpose of the FSIA was the 'codification of international law at the time of the FSIA's enactment,'" *id.* at 1285 (quoting *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 197 (2007)). Moreover, given that rules developed for foreign official immunity under the FSIA also "may be correct as a matter of common-law principles," *Samantar*, 130 S. Ct. at 2291 n.17, the rationale and result of *Belhas* continue to apply after this Court's holding in *Samantar* that individual immunity is governed by the common law directly, rather than by the common law as codified by the FSIA. *See Giraldo v. Drummond Co.*, 808 F. Supp. 2d 247, 251 (D.D.C. 2011) (applying *Belhas* and concluding that "plaintiffs' allegations of *jus cogens* violations do not

defeat" a foreign official's entitlement to common-law immunity), *aff'd*, No. 11–7118, 2012 WL 5882566 (D.C. Cir. Oct. 23, 2012) (unpublished); *see also* Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 Sup. Ct. Rev. 213, 263-64 (arguing that the FSIA is relevant to the development of common-law foreign official immunity).

3. Finally, the decision below is also at odds with the Seventh Circuit's decision in *Ye*, 383 F.3d at 625. There, the plaintiffs sued the former President of China under the ATS, alleging that he authorized torture, genocide, and the arbitrary arrest and imprisonment of Falun Gong practitioners. *Id.* at 622. The plaintiffs argued that because these alleged acts violated *jus cogens* norms, the defendant was not entitled to immunity. *Id.* at 624.

The Government urged the Seventh Circuit not to recognize a *jus cogens* exception—either to head-of-state immunity or to conduct-based foreign official immunity. *See* U.S. Amicus in *Ye* at 27-34. The Seventh Circuit agreed, rejecting the plaintiffs' argument that "the Executive Branch has no power to immunize a head of state (*or any person for that matter*) for acts that violate *jus cogens* norms of international law." *Ye*, 383 F.3d at 625 (emphasis added). The Government has since characterized *Ye* as rejecting a *jus cogens* exception in both the head-of-state and foreign official immunity contexts. *See* U.S. Amicus in *Giraldo* at 8 (explaining that the Seventh Circuit in *Ye* "expressly h[eld] that allegations of *jus cogens* violations cannot overcome

the Executive Branch's determination of foreign official immunity" (emphasis added)).

B. This Important Question Warrants This Court's Immediate Review

The circuit split that the Fourth Circuit created involves an exceptionally important question that warrants this Court's immediate intervention. If the decision of the court below is allowed to stand, it will undermine the comity between the United States and other sovereigns that the doctrine of foreign sovereign immunity was meant to protect, *see, e.g.*, *Republic of Austria v. Altmann*, 541 U.S. 677, 688 (2004) (citing *Schooner Exchange*, 11 U.S. at 136), and open the floodgates to "countless" cases in U.S. courts challenging extraterritorial conduct in foreign nations, including close allies of the United States, *see, e.g.*, *Belhas*, 515 F.3d at 1287 (suit alleging *jus cogens* violations by former Israeli general in connection with military operations in Lebanon). Indeed, the Fourth Circuit will become a magnet for suits against foreign officials, who may be served whenever they pass through Northern Virginia to reach Washington, D.C. *Cf. Ye*, 383 F.3d at 623 (process served while President Jiang was staying at a hotel in Chicago); Mem. of P. & A. in Supp. of Avraham Dichter's Mot. To Dismiss the Compl. at 1, 500 F. Supp. 2d 284 (S.D.N.Y. 2007) (No. 05 Civ.10270), 2005 WL 3881690 (process served while former Director of Israel's Security Agency was appearing in New York for a speech); *see also Mwani v. bin Laden*, 417 F.3d 1, 10-11 (D.C. Cir. 2005) (concluding that Federal Rule of Civil Procedure 4(k)(2) effectively served as a nationwide long-arm statute that "eliminate[d] the need to employ the

forum state's long arm statute" in an action brought under the Alien Tort Statute).

The Fourth Circuit's decision nullifies foreign sovereign immunity in the vast majority of ATS and TVPA cases. The *jus cogens* exception "merges the merits of the underlying the claim with the issue of immunity." 515 F.3d at 1292-93 (Williams, J., concurring). Thus, every time a plaintiff even alleges a *jus cogens* violation by a foreign official, "there will effectively be no immunity." *Giraldo*, 808 F. Supp. 2d at 250; *see also Heaney*, 445 F.2d at 504 ("[T]o condition a foreign sovereign's immunity on the outcome of a preliminary judicial evaluation of the propriety of its political conduct, with the attendant risks of embarrassment at the highest diplomatic levels, would frustrate the very purpose of the doctrine itself.").

Many ATS and TVPA suits against foreign states and their officials, including some close allies of the United States, already involve allegations of *jus cogens* violations.[4] Indeed, based on a Westlaw

[4] *See, e.g.*, *Matar*, 563 F.3d at 10 (alleging former director of Israeli Security Agency authorized extrajudicial killing and other war crimes in military operations in Gaza City); *Belhas*, 515 F.3d at 1281-82 (alleging former Israeli Head of Army Intelligence authorized extrajudicial killing and other war crimes in military operations in Lebanon); *Enahoro*, 408 F.3d at 878-79 (alleging Nigerian general authorized torture and extrajudicial killing); *Ye*, 383 F.3d at 622 (alleging President of China authorized torture and genocide); *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 96-97 (D.D.C. 2005) (alleging Israeli officials authorized torture and genocide); *Doe v. Qi*, 349 F. Supp. 2d 1258, 1266-70 (N.D. Cal. 2004) (alleging Chinese officials tortured and arbitrarily detained plaintiffs); *Paul v. Avril*, 812 F. Supp. 207, 209 (S.D. Fla. 1993) (alleging former head of Haitian military authorized torture and arbitrary detention).

search of cases published between March 1, 2010 and March 1, 2013 involving ATS and TVPA claims against foreign states and/or foreign officials, 91% (31 out of 34 cases) involved alleged conduct that would violate *jus cogens* norms, as the Fourth Circuit defined that term. The Fourth Circuit's opinion invites even more such suits. By opening the floodgates to "countless" suits challenging foreign conduct, the Fourth Circuit's decision will "place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with any number of foreign nations." *Belhas*, 515 F.3d at 1287 (citation and internal quotation marks omitted).

Further exacerbating the problem created by the court below, there is not even a limit to what constitutes a *jus cogens* violation. As courts, commentators, and the Government have recognized, "controversy surrounds the question of which norms—if any—qualify as *jus cogens*." *See* U.S. SOI in *Matar* at 27 n.23 (emphasis added); *see also, e.g.*, Sean D. Murphy, Principles of International Law 96 (2d ed. 2012) ("[T]here is often disagreement on which norms are *jus cogens*."); Bradley & Helfer, *supra*, at 237 n.115 ("The *jus cogens* category of international law is not free from controversy."); A. Mark Weisburd, *The Emptiness of the Concept of* Jus Cogens, *As Illustrated by the War in Bosnia-Herzegovina*, 17 Mich. J. Int'l L. 1, 21 (1995) ("[M]ore authority exists for the category of *jus cogens* than exists for its particular content." (citation omitted)); I Oppenheim's International Law 7 (Robert Jennings & Arthur Watts, eds.) (9th ed. 1992) ("Such a category of rules of *jus cogens* is a comparatively recent development and there is no general

agreement as to which rules have this character."); *Jones v. Ministry of Interior of Saudi Arabia*, [2007] 1 A.C. 270, 289 (H.L. 2006) ("[T]his area of international law is 'in a state of flux.'"). Without any clear guidance on what norms satisfy this standard, courts are free to assert—as the Fourth Circuit did here—that "[p]rohibitions against the acts involved in th[e] case . . . are among these universally agreed-upon norms." Pet. App. 22a.

The *jus cogens* exception recognized by the court below also effectively "make[s] the [FSIA] optional,'" *Samantar*, 130 S. Ct. at 2292 (quoting *Chuidian*, 912 F.2d at 1102), contrary to this Court's decision in *Samantar*, *see id.* Every court to consider the question has held that there is no *jus cogens* exception to a foreign state's immunity under the FSIA. *See Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1156 (7th Cir. 2001) (noting that a *jus cogens* exception "would allow for a major, open-ended expansion of our jurisdiction into an area with substantial impact on the United States' foreign relations"); *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 242-45 (2d Cir. 1996) (rejecting argument that "a foreign state should be deemed to have forfeited its sovereign immunity [under the FSIA] whenever it engages in conduct that violates fundamental humanitarian standards" (emphasis omitted)); *Siderman de Blake*, 965 F.2d at 719 (holding that "[t]he fact that there has been a violation of *jus cogens* does not confer jurisdiction" over a foreign state under the FSIA); *Princz*, 26 F.3d at 1174 & n.1 (finding no *jus cogens* exception to FSIA immunity). Under the Fourth Circuit's rule, however, "litigants through 'artful pleading,'" *Samantar*, 130 S. Ct. at 2292, will easily circumvent

FSIA immunity by suing the responsible officer instead of the foreign state itself, *id.*

Finally, because international law does not recognize a *jus cogens* exception to foreign sovereign immunity, *see infra* 25-29, the decision below risks triggering reciprocal treatment for U.S. officials sued in foreign courts—whether those officials are former Bush Administration officials sued for allegedly authorizing "torture," or Obama Administration officials sued for allegedly authorizing "illegal" drone attacks. For this reason, the common law "does not recognize any exception to a foreign official's immunity for civil suits alleging *jus cogens* violations." U.S. Amicus in *Matar* at 4 (explaining that such an exception "would be out of step with international law and could prompt reciprocal limitations by foreign jurisdictions, exposing U.S. officials to suit abroad on that basis"). Indeed, "[g]iven the global leadership role of the United States," U.S. officials "are at special risk of being subjected to politically driven lawsuits abroad in connection with controversial U.S. military operations." *Id.* at 25.

The Fourth Circuit's erroneous decision thus creates a circuit split on a significant and recurring issue, and warrants this Court's immediate review.

C. This Case Presents A Compelling Vehicle

This case presents a compelling vehicle to resolve this important question. The lower court's decision provides a detailed—albeit incorrect—analysis of this issue. Moreover, the panel's holding directly conflicts with the well-reasoned decisions of other circuit courts, and courts outside the United States, that have uniformly rejected a *jus cogens* exception to

foreign official immunity. *See supra* 11-18 and *infra* 25-29.

Additionally, the decision below directly conflicts with the United States' interpretation of customary international law. The United States thoroughly analyzed this issue in previous litigation and concluded that "the recognition of [a *jus cogens*] exception by the United States would be out of step with international law and could prompt reciprocal limitations by foreign jurisdictions, exposing U.S. officials to suit abroad on that basis." U.S. Amicus in *Matar* at 4; U.S. SOI in *Matar* at 27-33; U.S. Amicus in *Ye* at 27-34; (rejecting argument that "former heads of state are not immune in cases alleging torture or *jus cogen*s violations"). Likewise, in the present case, the United States urged the court not to reach Respondents' argument that *jus cogens* allegations categorically defeat immunity. Pet. App. 68a n.3. Yet the Fourth Circuit denied Samantar immunity on just that basis. Pet. App. 21a-28a.

To be sure, the panel briefly acknowledged that the Government "has supplied us with additional reasons to support" the denial of immunity. Pet. App. 28a. But the panel never indicated that the two factors identified by the Government provided a sufficient basis for denying immunity, nor could it have. Both grounds are meritless, and neither precludes this Court's review of the rule of law adopted by the Fourth Circuit regarding a *jus cogens* exception to foreign sovereign immunity.

First, the Government argued that immunity should be denied because "Samantar is a former official of a state with no currently recognized government." Pet. App. 40a. But the United States

has since recognized the government of Somalia. *See* Hillary Rodham Clinton, Secretary of State, Remarks With President of Somalia Hassan Sheikh Mohamud After Their Meeting, Jan. 17, 2013, http://www.state.gov/secretary/rm/2013/01/202998.htm; U.S. Department of State, Somalia President Hassan Sheikh Mohamud's Visit to Washington, DC, Jan. 17, 2013, http://www.state.gov/r/pa/prs/ps/2013/01/202997.htm. The duly recognized Prime Minister of Somalia has now reaffirmed that Samantar's alleged actions were taken "in his official capacity with the Government of Somalia," and that denying him immunity in this case would be "injurious to the historic, ongoing process of peace and reconciliation . . . within Somalia." Pet. App. 71a.

Second, the Government urged that immunity be denied because Samantar now resides in the United States. Pet. App. 55a. But, as even the Government conceded, "a former official's decision to permanently reside in the United States is not, in itself, determinative of the former official's immunity from suit." Pet. App. 56a. Moreover, to Petitioner's knowledge, no case has ever held that a current or former foreign official may lose immunity for official acts on the basis of his residency, further confirming that this factor is not a sufficient basis for denying immunity, and therefore that the Government is not entitled to deference on this ground. *See First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 623, 628-29, 633-34 & n.27 (1983), (declining to defer to the Executive's interpretation of what factors dictate when "the normally separate juridical status of a government instrumentality is to be disregarded" for purposes of

the FSIA—an issue that was governed by "both international law and federal common law"—because the Executive's interpretation was contrary to these "controlling principles").

II. THE FOURTH CIRCUIT'S DECISION IS WRONG

The Fourth Circuit erroneously held that "under international and domestic law, officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity." Pet. App. 26a.

A. The Panel's Decision Is Contrary To International Law

As the Fourth Circuit properly recognized, "international law has shaped the development of the common law of foreign sovereign immunity." Pet. App. 18a. Indeed, it is critical that courts interpreting the common law not "disturb th[e] international consensus" concerning foreign official immunity since "[s]uch a deviation from the international norm would create an acute risk of reciprocation by foreign jurisdictions." U.S. Amicus in *Matar* at 24-25. As this Court explained in a related context, "in light of the concept of reciprocity that governs much of international law in this area, we have a more parochial reason to protect foreign diplomats in this country. Doing so ensures that similar protections will be accorded those that we send abroad to represent the United States, and thus serves our national interest in protecting our own citizens." *Boos v. Barry*, 485 U.S. 312, 323-24 (1988) (citation omitted).

By inventing a *jus cogens* exception to foreign official immunity, the Fourth Circuit contravened customary international law. Courts in other jurisdictions have consistently refused to recognize a similar exception in civil cases—whether a foreign state or its officials are sued. *See, e.g.*, *Zhang v. Zemin*, [2010] NSWCA 255, at ¶¶ 121, 153 (C.A.) (Australia); *Fang v. Jiang*, [2006] NZAR 420, 433-35 (H.C.) (New Zealand); *Jones*, 1 A.C. at 291-306 (Lord Hoffman) (U.K.); *Bouzari v. Islamic Republic of Iran*, [2004] 71 O.R.3d 675, 695 (C.A.) (Canada); *Al-Adsani v. United Kingdom*, App. No. 35763/97, ¶ 61, 34 Eur. H.R. Rep. H. (2001) (European Court of Human Rights).

Indeed, the International Court of Justice recently rejected a *jus cogens* exception to immunity in civil suits brought in an Italian court against Germany and German officials for war crimes that occurred in Italy during World War II. *See* Jurisdictional Immunities of the State (Ger. v. Italy), Judgment, ¶¶ 85-97 (Feb. 3, 2012), *available at* http://www.icj-cij.org/docket/files/143/16883.pdf. The ICJ found that "there is almost no State practice which might be considered to support the proposition that a State is deprived of its entitlement to immunity in such a case," *id.* ¶ 83, and emphasized that the national courts of the United Kingdom, Canada, Poland, New Zealand, and Greece, as well as the European Court of Human Rights have rejected such an exception "in each case after careful consideration," *id.* ¶ 96 (citing cases). Moreover, the ICJ warned that if "the mere allegation that the State had committed such wrongful acts were to be sufficient to deprive the State of its entitlement to immunity, immunity could, in effect be negated simply by skilful construction of

the claim." *Id.* ¶ 82. Therefore, "under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict." *Id.* ¶ 91.

The UN Convention on Jurisdictional Immunities of States and Their Properties similarly confirms that a *jus cogens* exception to immunity in civil cases contravenes customary international law. This proposed multilateral treaty, which the UN General Assembly endorsed in 2004, does not recognize such an exception. *See Fang*, NZAR at 434; *Jones*, 1 A.C. at 289 (Lord Bingham) "In fact, the Convention's drafters twice rejected proposals to adopt such an exception, both because there was no settled state practice to support it and because any attempt to include such a provision would almost certainly have jeopardized the conclusion of the Convention." Bradley & Helfer, *supra*, at 246 (citation and internal quotation marks omitted).

To be sure, the Fourth Circuit cited authorities recognizing a *jus cogens* exception to immunity in *criminal* cases where the Convention Against Torture (CAT) applies. *See, e.g.*, *Regina v. Bartle, ex parte Pinochet*, 38 I.L.M. 581, 593–95 (H.L. 1999). While parties to the CAT have agreed to *criminal* jurisdiction over extraterritorial torture in certain circumstances, the CAT does not abrogate immunity in civil cases. *See* Jurisdictional Immunities of the State (Ger. v. Italy) ¶ 87 ("The Court does not consider that the United Kingdom judgment in *Pinochet* . . . is relevant" because *inter alia* "the rationale for the judgment in *Pinochet* was based

upon the specific language of the 1984 United Nations Convention against Torture."); *see also Fang*, NZAR at 433-34; *Jones*, 1 A.C. at 286-87, 289-91, 293, 296-306; *Bouzari*, 71 O.R.3d at 691-96; *Status of the CAT*, at 21, UN Doc. CAT/C/2/Rev.5 (Jan. 22, 1998); 136 Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990) (the CAT "requires a State party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State," not for alleged torture abroad).

For at least two reasons, "international law clearly distinguishes between the civil and criminal immunity of officials." U.S. SOI in *Matar* at 30; *see also, e.g.*, Jurisdictional Immunities of the State (Ger. v. Italy) ¶ 87 ("the distinction between criminal and civil proceedings [w]as 'fundamental to the decision'" in *Pinochet* (quoting *Jones*, 1 A.C. at 290 (Lord Bingham)). *First*, "officials are accorded immunity [from civil suits] in part because states themselves are responsible for their officials' acts [while] [o]n the criminal side, . . . international law holds individuals personally responsible for their international crimes, and does not recognize the concept of state criminal responsibility." U.S. SOI in *Matar* at 30. Thus, because states cannot be held criminally liable for their acts, "the [criminal] sanction can be imposed on the individual without subjecting one state to the jurisdiction of another." *Bouzari*, 71 O.R.3d at 695; *Jones*, 1 A.C. at 290 ("A state is not criminally responsible in international or English law, and therefore cannot be directly impleaded in criminal proceedings.") (Lord Bingham).

Second, private civil litigation over *jus cogens* claims, to which states have not consented, lacks the

prosecutorial safeguards and state-to-state direct accountability of a criminal proceeding initiated by the government. *See* U.S. SOI in *Matar* at 30 ("critically, there is the check of prosecutorial discretion in the criminal context"); *Fang*, NZAR at 433 ("Criminal proceedings may only be brought . . . by the state [while] civil proceedings . . . may be brought by private persons."); *Zhang*, NSWCA 255, at ¶ 159 ("Litigation of a criminal character can ultimately be controlled by the powers and capacities of the Attorney-General and the prosecuting authorities."); Curtis A. Bradley & Jack L. Goldsmith, Pinochet *and International Human Rights Litigation*, 97 Mich. L. Rev. 2129, 2181 (1999).

As these authorities demonstrate, no international consensus supports a *jus cogens* exception to foreign official immunity in civil cases. Instead, the Fourth Circuit's decision dramatically departs from customary international law and creates a significant risk of reciprocal treatment of U.S. officials by foreign nations.

B. The Panel's Decision Is Contrary To Domestic Law

The Fourth Circuit also erroneously decided that domestic law recognizes a *jus cogens* exception to foreign official immunity because "violation[s] of *jus cogens* norms cannot constitute official sovereign acts." Pet. App. 25a (quoting *Sarei*, 487 F.3d at 1209).

Not only have other circuits rejected that conclusion in the context of foreign official immunity, but this Court squarely rejected the Fourth Circuit's premise in *Saudi Arabia v. Nelson*. There, the plaintiff sued the Saudi government, alleging that

Saudi officials tortured him in retaliation for complaining about unsafe conditions at a Saudi hospital. 507 U.S. 349, 351-54 (1993). In deciding that the commercial-activities exception to the FSIA did not apply, the Court concluded that these alleged acts (which undoubtedly would violate *jus cogens* norms, as defined by the Fourth Circuit) were nevertheless sovereign acts of a foreign state. *Id.* at 361. As this Court explained, "a foreign state's exercise of the power of its police[,] . . . however monstrous such abuse undoubtedly may be . . . [is] peculiarly sovereign in nature." *Id.*

In reaching this conclusion, this Court relied in part on cases applying the common-law sovereign immunity principles that the FSIA codified. *See, e.g.*, *id.* (citing *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964)). And just as it is appropriate for this Court to rely on the common law to determine the scope of FSIA immunity, *see Permanent Mission*, 551 U.S. at 200-01, it is similarly appropriate to rely on the FSIA to interpret the scope of common-law immunity, *see* Bradley & Helfer, *supra*, at 263-64; *Matar*, 563 F.3d at 14-15 (relying in part on case applying the FSIA to determine whether there is a *jus cogens* exception to common-law foreign official immunity). Indeed, this Court in *First National City Bank* relied in part on the policies underlying the FSIA to fashion a common-law rule governing when it is appropriate to pierce the veil of a corporation owned by a foreign state. 462 U.S. at 627-28; *see also Boyle v. United Techs. Corp.*, 487 U.S. 500, 511-12 (1988) (relying in part on the policies underlying the Federal Tort Claims Act to determine the scope of common-law contractor immunity).

The cases on which the Fourth Circuit relied do not support its position. In *Siderman de Blake*, the Ninth Circuit *held* that the FSIA does not allow any *jus cogens* exception to the immunity of a foreign state. 965 F.2d at 719. The House of Lords relied in part on this holding in support of its own conclusion that customary international law does not recognize a *jus cogens* exception to foreign official immunity. *See Jones*, 1 A.C. at 297 (Lord Hoffman) ("While *Siderman* turned upon the terms of national legislation, the legislation itself is evidence against a state practice of having an exception to state immunity in torture cases."). And while the Ninth Circuit noted that "the prohibition against official torture has attained the status of a *jus cogens* norm," it provided no explanation or support for its statement in *dicta* that a *jus cogens* norm necessarily "trump[s]" sovereign immunity. *Siderman de Blake*, 965 F.2d at 716-18.

The Ninth Circuit's opinion in *Sarei* does not support the Fourth Circuit's decision because it recognized a *jus cogens* exception to the *act-of-state doctrine*, *see* 487 F.3d at 1209-10, which this Court has explained is "distinct from immunity," *Samantar*, 130 S. Ct. at 2290. Moreover, the only authority that the Ninth Circuit cited in support of that conclusion was its own unfounded *dicta* in *Siderman de Blake*. *See Sarei*, 487 F.3d at 1209-10.

The Fourth Circuit's reliance on the *Enahoro dissent* is also misplaced. *See Enahoro*, 408 F.3d at 893 (Cudahy, J., dissenting). Not only does this *dissent* not represent Seventh Circuit law, but it relies on inapposite cases, such as those recognizing a *jus cogens* exception in *criminal* cases, *see Regina v.*

Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte (No. 3), [2000] 1 A.C. 147 (1999), or finding that former foreign officials may be prosecuted for "private acts," *see* Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), I.C.J., February 14, 2002, at ¶ 55).

Of course, if these cases did support a *jus cogens* exception to foreign official immunity, they would only deepen the circuit split and underscore the need for this Court to resolve the important question presented by this petition.

Finally, contrary to the Fourth Circuit's passing suggestion, the TVPA also does not establish a *jus cogens* exception to foreign official immunity. Pet. App. 25a. Because the text of the TVPA is silent as to whether it abrogates the immunities of foreign officials, *see* U.S. Amicus in *Matar* at 26, "it must be read in harmony with relevant immunity rules," *id.* "'rather than in derogation of them,'" *Malley v. Briggs*, 475 U.S. 335, 339 (1986). As this Court explained in *Schooner Exchange*, courts may not infer an abrogation of foreign sovereign immunity unless expressed by the political branches "in a manner not to be misunderstood." 11 U.S. at 146. A statute, like the TVPA, that creates a cause of action without mentioning immunity does not waive either domestic immunity, *see Dellmuth v. Muth*, 491 U.S. 223, 231 (1989) (citing *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 246 (1985)), or foreign sovereign immunity, *see Matar*, 563 F.3d at 15; *Belhas*, 515 F.3d at 1288-89.

To the extent the Fourth Circuit suggested that the terms "'actual or apparent authority'" and "'color of

law'" in the TVPA invoke domestic-immunity cases permitting personal-capacity suits against government officials, *see* Pet. App. 26a, the court erroneously conflated liability and immunity. Under 42 U.S.C. § 1983, this language concerns the circumstances in which an individual's actions are sufficiently tied to the state to create liability. *See Hafer v. Melo*, 502 U.S. 21, 28 (1991); *see also West v. Atkins*, 487 U.S. 42, 52 n.10 (1988) (even private parties may act under color of law if acting under state direction). An official's entitlement to immunity, by contrast, is "'predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.'" *Hafer*, 502 U.S. at 28-29.

The legislative history of the TVPA *confirms* that Congress did not abrogate foreign official immunity or presume a *jus cogens* exception. Indeed, the legislative history reflects Congress's understanding that TVPA suits would be subject to foreign official immunity doctrines. *See* H.R. Rep. No. 102-367(I), at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 88; S. Rep. No. 102-249, at 7 (1991).

Nor does this reading of the TVPA nullify the statute. TVPA claims may be brought, consistent with immunity principles, when a foreign state disclaims a foreign official's actions. *See, e.g.*, *Hilao*, 25 F.3d at 1472; *Doe I v. Qi*, 349 F. Supp. 2d 1258, 1285-87 (N.D. Cal. 2004); *cf.* S. Rep. No. 102-249, at 8 (an official could "avoid liability by invoking the FSIA" if he could "prove an agency relationship to a state, which would require that the state 'admit some knowledge or authorization of relevant acts'"). Here,

by contrast, the recognized Somali government has asserted immunity on Samantar's behalf.

In sum, by creating a *jus cogens* exception to foreign official immunity in civil cases, the Fourth Circuit substantially departed from well-established domestic and international law.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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March 4, 2013

APPENDIX

APPENDIX A

United States Court of Appeals,
Fourth Circuit.

Bashe Abdi YOUSUF; John Doe 1; John Doe 2; Aziz Deria, Plaintiffs-Appellees,
and
John Doe 3; John Doe 4; Jane Doe 1, Plaintiffs,
v.
Mohamed Ali SAMANTAR, Defendant-Appellant.
United States of America, Amicus Supporting Appellees.

No. 11-1479.
Argued: May 16, 2012.
Decided: November 2, 2012.

ARGUED: Joseph Peter Drennan, Alexandria, Virginia, for Appellant. James Edward Tysse, Akin, Gump, Strauss, Hauer & Feld, LLP, Washington, D.C., for Appellees. Lewis Yelin, United States Department of Justice, Washington, D.C., for Amicus Supporting Appellees. **ON BRIEF:** Natasha E. Fain, Center for Justice & Accountability, San Francisco, California; Patricia A. Millett, Steven H. Schulman, Akin, Gump, Strauss, Hauer & Feld, LLP, Washington, D.C., for Appellees. Harold Hongju Koh, Legal Adviser, Department of State, Washington, D.C.; Tony West, Assistant Attorney General, Douglas N. Letter, United States Department of Justice, Washington, D.C.; Neil H. MacBride, United States Attorney, Alexandria, Virginia, for Amicus Supporting Appellees.

Before TRAXLER, Chief Judge, and KING and DUNCAN, Circuit Judges.

OPINION

TRAXLER, Chief Judge:

For the second time in this case, we are presented with the question of whether Appellant Mohamed AN Samantar enjoys immunity from suit under the Torture Victim Protection Act of 1991 ("TVPA"), *see* Pub.L. 102-256, 106 Stat. 73 (1992), 28 U.S.C. § 1350 note, and the Alien Tort Statute ("ATS"), *see* 28 U.S.C. § 1350. In the previous appeal, we rejected Samantar's claim to statutory immunity under the Foreign Sovereign Immunities Act ("FSIA"), *see* 28 U.S.C. § 1602-1611, but held open the possibility that Samantar could "successfully invoke an immunity doctrine arising under pre-FSIA common law." *Yousuf v. Samantar*, 552 F.3d 371, 383-84 (4th Cir.2009). The Supreme Court affirmed our reading of the FSIA and likewise suggested Samantar would have the opportunity to assert common law immunity on remand. *See Samantar v. Yousuf*, ____U.S. ____, 130 S.Ct. 2278, 2293, 176 L.Ed.2d 1047 (2010) (noting that the viability of a common law immunity defense was a "matter[] to be addressed in the first instance by the District Court").

On remand to the district court, Samantar sought dismissal of the claims against him based on common law immunities afforded to heads of state and also to other foreign officials for acts performed in their official capacity. The district court rejected his claims for immunity and denied the motion to dismiss. *See Yousuf v. Samantar*, *2011 WL 7445583* (E.D.Va. Feb. 15, 2011). For the reasons that follow,

we agree with the district court and affirm its decision.

I.

Because our previous opinion recounted the underlying facts at length, *see Samantar*, 552 F.3d at 373-74, we will provide only a brief summary here. Samantar was a high-ranking government official in Somalia while the military regime of General Mohamed Barre held power from about 1969 to 1991. Plaintiffs are natives of Somalia and members of the "prosperous and well-educated Isaaq clan, which the [Barre] government viewed as a threat." *Id.* at 373. Plaintiffs allege that they, or members of their families, were subjected to "torture, arbitrary detention and extra-judicial killing" by government agents under the command and control of Samantar, who served as "Minister of Defense from January 1980 to December 1986, and as Prime Minister from January 1987 to September 1990." *Id.* at 374 (internal quotation marks omitted). Following the collapse of the Barre regime in January 1991, Samantar fled Somalia for the United States. He now resides in Virginia as a permanent legal resident. Two of the plaintiffs also reside in the United States, having become naturalized citizens.

Plaintiffs brought a civil action against Samantar under the TVPA and the ATS. *See* 28 U.S.C. § 1350 and note. Samantar moved to dismiss plaintiffs' claims on the ground that he was immune from suit under the FSIA, and the district court dismissed the case. This court reversed, however, concluding that the FSIA applies to sovereign states but not "to individual foreign government agents." *Samantar*, 552 F.3d at 381. We remanded the case for the

district court to consider whether Samantar could "successfully invoke an immunity doctrine arising under pre-FSIA common law." *Id.* at 383-84.

The Supreme Court granted Samantar's petition for certiorari and affirmed our decision, holding that the FSIA — based on its text, purpose and history — governs only foreign state sovereign immunity, not the immunity of individual officials. *See Samantar*, 130 S.Ct. at 2289 ("Reading the FSIA as a whole, there is nothing to suggest we should read 'foreign state' in § 1603(a) to include an official acting on behalf of the foreign state, and much to indicate that this meaning was not what Congress enacted."). It is now clear after *Samantar* that the common law, not the FSIA, governs the claims to immunity of individual foreign officials. *See id.* at 2292 ("[W]e think this case, in which respondents have sued [Samantar] in his personal capacity and seek damages from his own pockets, is properly governed by the common law because it is not a claim against a foreign state as the [FSIA] defines that term.").

On remand, Samantar renewed his motion to dismiss based on two common law immunity doctrines. First, Samantar alleged he was entitled to head-of-state immunity because at least some of the alleged wrongdoing occurred while Samantar was Prime Minister. Second, Samantar sought foreign official immunity on the basis that any actions for which the plaintiffs sought to hold him responsible were taken in the course and scope of his official duties.

The district court renewed its request to the State Department for a response to Samantar's immunity claims. Despite having remained silent during

Samantar's first appeal, the State Department here took a position expressly opposing immunity for Samantar. The United States submitted to the district court a Statement of Interest (SOI) announcing that the Department of State, having considered "the potential impact of such a[n] [immunity] decision on the foreign relations interests of the United States," J.A. 73, had determined that Samantar was not entitled to immunity from plaintiffs' lawsuit. The SOI indicated that two factors were particularly important to the State Department's determination that Samantar should not enjoy immunity. First, the State Department concluded that Samantar's claim for immunity was undermined by the fact that he "is a former official of a state with no currently recognized government to request immunity on his behalf," or to take a position as to "whether the acts in question were taken in an official capacity." J.A. 71. Noting that "[t]he immunity protecting foreign officials for their official acts ultimately belongs to the sovereign rather than the official," J.A. 71, the government reasoned that Samantar should not be afforded immunity "[i]n the absence of a recognized government . . . to assert or waive [Samantar's] immunity," J.A. 73. Second, Samantar's status as a permanent legal resident was particularly relevant to the State Department's immunity determination. According to the SOI, "U.S. residents like Samantar who enjoy the protections of U.S. law ordinarily should be subject to the jurisdiction of our courts, particularly when sued by U.S. residents" or naturalized citizens such as two of the plaintiffs. J.A. 71.

The district court denied Samantar's motion to dismiss, apparently viewing the Department of

State's position as controlling and surrendering jurisdiction over the issue to the State Department: "The government has determined that the defendant does not have foreign official immunity. Accordingly, defendant's common law sovereign immunity defense is no longer before the Court, which will now proceed to consider the remaining issues in defendant's Motion to Dismiss." *Samantar, 2011 WL 7445583*, at *1. But, in denying Samantar's subsequent motion to reconsider, the district court implied that it performed its own analysis and merely took the State Department's view into account: "The Executive Branch has spoken on this issue and . . . [is] entitled to a great deal of deference. *They don't control but they are entitled to deference in this case*." J.A. 81 (emphasis added). The district court noted that both "the residency of the defendant" and "the lack of a recognized government" were factors properly considered in the immunity calculus. J.A. 82.

Samantar immediately appealed the district court's denial of common law immunity.[1] Samantar advances a two-fold argument. First, he contends that the order denying him immunity cannot stand because the district court improperly deferred to the Department of State and abdicated its duty to

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[1] A pretrial order denying sovereign immunity is immediately appealable under the collateral-order exception to the final judgment rule. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). This court has previously determined that an order denying a claim of sovereign immunity under the FSIA is immediately appealable. *See Rux v. Republic of Sudan*, 461 F.3d 461, 467 n. 1 (4th Cir.2006). We see no reason to draw a distinction in this regard for orders denying claims of sovereign immunity under the common law.

independently assess his immunity claim. In contrast to the view offered by the United States in its amicus brief that the State Department is owed absolute deference from the courts on any question of foreign sovereign immunity, Samantar claims that deference to the Executive's immunity determination is appropriate only when the State Department recommends that immunity be granted. Second, Samantar argues that under the common law, he is entitled to immunity for all actions taken within the scope of his duties and in his capacity as a foreign government official, and that he is immune to any claims alleging wrongdoing while he was the Somali Prime Minister. We address these arguments below.

II.

Before proceeding further, we must decide the appropriate level of deference courts should give the Executive Branch's view on case-specific questions of individual foreign sovereign immunity. The FSIA displaced the common law regime for resolving questions of foreign state immunity and shifted the Executive's role as primary decision maker to the courts. *See Samantar*, 130 S.Ct. at 2285. After *Samantar*, it is clear that the FSIA did no such thing with respect to the immunity of *individual* foreign officials; the common law, not the FSIA, continues to govern foreign official immunity. *See id.* at 2292. And, in light of the continued viability of the common law for such claims, the Court saw "no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity" under the common law. *Id.* at 2291. The extent of the State Department's role, however,

depends in large part on what kind of immunity has been asserted.

A.

In this case, Samantar claims two forms of immunity: (1) head-of-state immunity and (2) "foreign official" or "official acts" immunity. "Head-of-state immunity is a doctrine of customary international law" pursuant to which an incumbent "head of state is immune from the jurisdiction of a foreign state's courts." *In re Grand Jury Proceedings*, 817 F.2d 1108, 1110 (4th Cir.1987). "Like the related doctrine of sovereign [state] immunity, the rationale of head-of-state immunity is to promote comity among nations by ensuring that leaders can perform their duties without being subject to detention, arrest or embarrassment in a foreign country's legal system." *Id.*

"A head-of-state recognized by the United States government is absolutely immune from personal jurisdiction in United States courts unless that immunity has been waived by statute or by the foreign government recognized by the United States." *Lafontant v. Aristide*, 844 F.Supp. 128, 131-32 (E.D.N.Y.1994). Although all forms of individual immunity derive from the State, head-of-state immunity is tied closely to the sovereign immunity of foreign states. *See Restatement (Second) of Foreign Relations Law § 66(b)* ("The immunity of a foreign state . . . extends to . . . its head of state"). Indeed, head-of-state immunity "is premised on the concept

that a state and its ruler are one for purposes of immunity." *Lafontant*, 844 F.Supp. at 132.[2]

Samantar also seeks immunity on the separate ground that all of the actions for which plaintiffs seek to hold him liable occurred during the course of his official duties within the Somali government. *See Restatement (Second) of Foreign Relations Law § 66(f)* (stating that "[t]he 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"); *Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir.2009) ("At the time the FSIA was enacted, the common law of foreign sovereign immunity recognized an individual official's entitlement to immunity for acts performed in his official capacity.") (internal quotation marks omitted); *Samantar*, 130 S.Ct. at 2290-91 ("[W]e do not doubt that in some circumstances the immunity of the foreign state extends to an individual for acts taken in his official capacity."). This is a conduct-based immunity that applies to current and former foreign officials. *See Matar*, 563 F.3d at 14 ("An immunity based on acts — rather than status — does not depend on tenure in office.").

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[2] "Under customary international law, head of state immunity encompasses the immunity of not only the heads of state but also of other 'holders of high-ranking office in a State' such as "the Head of Government and Minister of Foreign Affairs.'" Lewis S. Yelin, *Head of State Immunity As Sole Executive Lawmaking*, 44 Vand. J. Transnat'l L. 911, 921 n. 42 (2011).

B.

The United States, participating as *amicus curiae*, takes the position that federal courts owe absolute deference to the State Department's view of whether a foreign official is entitled to sovereign immunity on either ground. According to the government, under long-established Supreme Court precedent, the State Department's opinion on any foreign immunity issue is binding upon the courts. The State Department's position allows for the federal courts to function as independent decision makers on foreign sovereign immunity questions in only one instance: when the State Department remains silent on a particular case.[3] Thus, the United States contends that the State Department resolved the issues once it presented the district court with its view that Samantar was not entitled to immunity.

Samantar, by contrast, advocates the view that deference to the Executive's immunity determination is required *only when the State Department explicitly recommends that immunity be granted*. Samantar argues that when the State Department concludes, as it did in this case, that a foreign official is not entitled to immunity or remains silent on the issue, courts can and must decide independently whether to grant immunity. And, the plaintiffs offer yet a third view, suggesting that the State Department's position on foreign sovereign immunity does not completely control, but that courts must

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[3] Even then, however, the State Department insists that the courts must fashion a decision based on principles that it has articulated. *See Samantar*, 130 S.Ct. at 2284. In making this argument, the government fails to distinguish between status-based and conduct-based immunity.

defer "to the reasonable views of the Executive Branch" regardless of whether the State Department suggests that immunity be granted or denied. Appellees' Response Brief at 20. In this case, plaintiffs contend the State Department's rationale for urging denial of immunity, as set forth in its SOI, was reasonable and that the district court properly deferred to it.

1. Executive's Pre-FSIA Role in Foreign State Immunity

We begin by observing that, although the doctrine of foreign sovereign immunity has well-established roots in American jurisprudence, the Executive Branch's assumption of the role of primary decisionmaker on various foreign sovereign immunity matters is of a more recent vintage. Foreign sovereign immunity, insofar as American courts are concerned, has its doctrinal roots in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 3 L.Ed. 287 (1812), which ushered in nearly a century of "absolute" or "classical" immunity, "under which a sovereign [could not], without his consent, be made a respondent in the courts of another sovereign." *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199, 127 S.Ct. 2352, 168 L.Ed.2d 85 (2007) (internal quotation marks omitted); *see Samantar*, 130 S.Ct. at 2284 (explaining *The Schooner Exchange* "was interpreted as extending virtually absolute immunity to foreign sovereigns as a matter of grace and comity") (internal quotation marks omitted).[4] "Absolute" immunity for

[4] For nearly a century, "foreign sovereigns in national courts enjoyed a high level of immunity and exceptions, if any, were not widely recognized." Wuerth, Ingrid, *Foreign Official*

the foreign sovereign, however, is not to be confused with absolute judicial deference to the Executive Branch. In fact, during the lengthy period of absolute immunity, courts did not necessarily consider themselves obliged to follow executive pronouncements regarding immunity. In *The Schooner Exchange* itself, for example, the Court received and considered the view of the Executive Branch on the immunity claim but conducted its own independent review of the relevant international law doctrines. *See* 11 U.S. (7 Cranch) at 132-35, 136-47. As late as the 1920s, the Court still did not necessarily view questions of foreign sovereign immunity as matters solely for the Executive Branch. For example, the Court in *Berizzi Bros. Co. v. Steamship Pesaro*, 271 U.S. 562, 576, 46 S.Ct. 611,70 L.Ed. 1088 (1926), concluded that a steamship owned by a foreign sovereign was entitled to immunity despite the fact that the Secretary of State had expressed the opposite view earlier in the litigation. *See The Pesaro*, 277 F. 473, 479 n. 3 (S.D.N.Y.1921).

It was not until the late 1930s — in the context of in rem actions against foreign ships — that judicial deference to executive foreign immunity determinations emerged as standard practice. *See Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74, 58 S.Ct. 432, 82 L.Ed. 667 (1938) ("If the claim is recognized and allowed by the executive branch of the government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his

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Immunity Determinations in U.S. Courts: The Case Against the State Dep't, 51 Va. J. Int'l Law 915, 925(2011).

direction."); *Ex parte Republic of Peru*, 318 U.S. 578, 587-89, 63 S.Ct. 793, 87 L.Ed. 1014 (1943); *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34-36, 65 S.Ct. 530, 89 L.Ed. 729 (1945). Citing a line of cases involving ships owned by foreign sovereigns, Samantar explained that

> a two-step procedure developed for resolving a foreign state's claim of sovereign immunity, typically asserted on behalf of seized vessels. *See, e.g., Republic of Mexico v. Hoffman*, 324 U.S. 30, 34-36, 65 S.Ct. 530, 89 L.Ed. 729 (1945); *Ex parte Peru*, 318 U.S. 578, 587-589, 63 S.Ct. 793, 87 L.Ed. 1014 (1943); *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74-75, 58 S.Ct. 432, 82 L.Ed. 667 (1938). Under that procedure, the diplomatic representative of the sovereign could request a "suggestion of immunity" from the State Department. *Ex parte Peru*, 318 U.S. at 581, 63 S.Ct. 793. If the request was granted, the district court surrendered its jurisdiction. Id. at 588, 63 S.Ct. 793; *see also Hoffman*, 324 U.S. at 34, 65 S.Ct. 530. But "in the absence of recognition of the immunity by the Department of State," a district court "had authority to decide for itself whether all the requisites for such immunity existed." *Ex parte Peru*, 318 U.S. at 587, 63 S.Ct. 793; *see also Compania Espanola*, 303 U.S. at 75, 58 S.Ct. 432 (approving judicial inquiry into sovereign immunity when the "Department of State . . . declined to act"); *Heaney v. Government of Spain*, 445 F.2d 501, 503, and n. 2 (2d Cir. 1971) (evaluating sovereign

> immunity when the State Department had not responded to a request for its views). In making that decision, a district court inquired "whether the ground of immunity is one which it is the established policy of the [State Department] to recognize." *Hoffman*, 324 U.S. at 36, 65 S.Ct. 530.

Samantar, 130 S.Ct. at 2284 (citations omitted; alteration in original). Subsequently, there was a shift in State Department policy from a theory of absolute immunity to restrictive immunity, but this shift "had little, if any, impact on federal courts' approach to immunity analyses . . . and courts continued to abide by that Department's suggestions of immunity." *Republic of Austria v. Altmann*, 541 U.S. 677, 690, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004) (internal quotation marks and alteration omitted).[5] Thus, at the time that Congress enacted the FSIA, the clearly established practice of judicial deference to executive immunity determinations had been expressed largely in admiralty cases.

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[5] Interestingly, even at this point the State Department expressed uncertainty about the relationship between the executive and judicial branches on questions of foreign sovereign immunity. The State Department announced its change in policy through a 1952 letter to the Attorney General from Jack B. Tate, Legal Adviser to the State Department. The "Tate Letter," as it has come to be known, stated that "[i]t is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so." *See* Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952), 26 Dep't St. Bull. 984-85 (1952), *reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 714 app. 2, 96 S.Ct 1854, 48 L.Ed.2d 301 (1976).

In this pre-FSIA era, decisions involving claims of *individual* foreign sovereign immunity were scarce. *See Samantar*, 130 S.Ct. at 2291 (noting that "questions of official immunity . . . in the pre-FSIA period . . . were few and far between"). But, to the extent such individual claims arose, they generally involved status-based immunities such as head-of-state immunity, *see, e.g., Ye v. Zemin*, 383 F.3d 620, 624-25 (7th Cir.2004), or diplomatic immunity arising under international treaties, *see* Vienna Convention on Consular Relations art. 43, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261; Vienna Convention on Diplomatic Relations art. 31, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95. The rare cases involving immunity asserted by lower-level foreign officials provided inconsistent results. *See generally* Chimene I. Keitner, *The Common Law of Foreign Official Immunity*, 14 Green Bag2d 61 (2010) [hereinafter Keitner].

2. Executive Power

The Constitution assigns the power to "receive Ambassadors and other public Ministers" to the Executive Branch, U.S. Const, art. II, § 3, which includes, by implication, the power to accredit diplomats and recognize foreign heads of state. Courts have generally treated executive "suggestions of immunity" for heads of state as a function of the Executive's constitutional power and, therefore, as controlling on the judiciary. *See, e.g.*, *Ye*, 383 F.3d at 626 ("[A] determination by the Executive Branch that a foreign head of state is immune from suit is conclusive and a court must accept such a determination without reference to the underlying claims of a plaintiff."); *Doe v. State of Israel*, 400

F.Supp.2d 86, 111 (D.D.C.2005) ("When, as here, the Executive has filed a Suggestion of Immunity as to a recognized head of a foreign state, the jurisdiction of the Judicial Branch immediately ceases."); *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir.1997) (deferring to the Executive Branch where it "manifested its clear sentiment that Noriega should be denied head-of-state immunity"); *see generally* Keitner, 14 *Green Bag 2d* at 71 (reasoning that "[c]ourts should treat Executive representations about status-based immunity as conclusive because they are a function of the Executive's power under Article II, section 3 of the Constitution"). Like diplomatic immunity, head-of-state immunity involves "a formal act of recognition," that is "a quintessentially executive function" for which absolute deference is proper. Peter B. Rutledge, *Samantar, Official Immunity & Federal Common Law*, 15 Lewis & Clark L.Rev. 589, 606 (2011).

Accordingly, consistent with the Executive's constitutionally delegated powers and the historical practice of the courts, we conclude that the State Department's pronouncement as to head-of-state immunity is entitled to absolute deference. The State Department has never recognized Samantar as the head of state for Somalia; indeed, 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. The district court properly deferred to the State Department's position that Samantar be denied head-of-state immunity.

Unlike head-of-state immunity and other status-based immunities, there is no equivalent

constitutional basis suggesting that the views of the Executive Branch control questions of foreign official immunity. Such cases do not involve any act of recognition for which the Executive Branch is constitutionally empowered; rather, they simply involve matters about the scope of defendant's official duties.

This is not to say, however, that the Executive Branch has no role to play in such suits. These immunity decisions turn upon principles of customary international law and foreign policy, areas in which the courts respect, but do not automatically follow, the views of the Executive Branch. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n. 21, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004) (noting that "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of [a] case's impact on foreign policy"); *Altmann*, 541 U.S. at 702, 124 S.Ct. 2240 (suggesting that with respect to foreign sovereign immunity, "should the State Department choose to express its opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy") (footnote omitted). With respect to foreign official immunity, the Executive Branch still informs the court about the diplomatic effect of the court's exercising jurisdiction over claims against an official of a foreign state, and the Executive Branch may urge the court to grant or deny official-act immunity based on such considerations. "That function, however, concerns the general assessment of a case's impact on the foreign relations of the United States,"

Rutledge, 15 Lewis & Clark L.Rev. at 606, rather than a controlling determination of whether an individual is entitled to conduct-based immunity.

In sum, we give absolute deference to the State Department's position on status-based immunity doctrines such as head-of-state immunity. The State Department's determination regarding conduct-based immunity, by contrast, is not controlling, but it carries substantial weight in our analysis of the issue.

III.

A.

We turn to the remaining question of whether Samantar is entitled to foreign official immunity under the common law. In considering the contours of foreign official immunity, we must draw from the relevant principles found in both international and domestic immunity law, as well as the experience and judgment of the State Department, to which we give considerable, but not controlling, weight.

From the earliest Supreme Court decisions, international law has shaped the development of the common law of foreign sovereign immunity. *See The Schooner Exchange*, 11 U.S. (7 Cranch) at 136, 145-46 (noting that "a principle of public law" derived from "common usage" and "common opinion" 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"); *Restatement (Third) of the Foreign Relations Law* part IV, ch. 5, subch. A intro. note ("The immunity of a state from the jurisdiction of the courts of another state is an undisputed principle of customary international law."). Indeed, an important

purpose of the FSIA was the "codification of international law at the time of the FSIA's enactment." *Samantar*, 130 S.Ct. at 2289 (internal quotation marks omitted); *see id.* ("[O]ne of the primary purposes of the FSIA was to codify the restrictive theory of sovereign immunity, which Congress recognized as consistent with extant international law."). Even after the FSIA was enacted, international law continued to be relevant to questions of foreign sovereign immunity as the Court interpreted the FSIA in light of international law. *See Permanent Mission of India*, 551 U.S. at 200-01, 127 S.Ct. 2352.

As previously noted, customary international law has long distinguished between status-based immunity afforded to sitting heads-of-state and conduct-based immunity available to other foreign officials, including former heads-of-state. With respect to conduct-based immunity, foreign officials are immune from "claims arising out of their official acts while in office." *Restatement (Third) of Foreign Relations Laiv § 464*, reprt. note 14; *Matar*, 563 F.3d at 14 ("An immunity based on acts — rather than status — does not depend on tenure in office."). This type of immunity stands on the foreign official's actions, not his or her status, and therefore applies whether the individual is currently a government official or not. *See* Chimene I. Keitner, *Officially Immune? A Response to Bradley and Goldsmith*, 36 Yale J. Int'l L. Online 1, *9 (2010) ("Conduct-based immunity is both narrower and broader than status-based immunity: it is narrower, because it only provides immunity for specific acts . . . but it is also broader, because it endures even after an individual has left office."). This conduct-based immunity for a

foreign official derives from the immunity of the State: "The doctrine of the imputability of the acts of the individual to the State . . . in classical law . . . imputes the act solely to the state, who alone is responsible for its consequence. In consequence any act performed by the individual as an act of the State enjoys the immunity which the State enjoys." Hazel Fox, *The Law of State Immunity* at 455 (2d ed. 2008).

At least as early as its decision in *Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S.Ct. 83, 42 L.Ed. 456 (1897), the Supreme Court embraced the international law principle that sovereign immunity, which belongs to a foreign *state*, extends to an individual official acting on behalf of that foreign state. By the time the FSIA was enacted, numerous domestic courts had embraced the notion, stemming from international law, that "[t]he 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." *Restatement (Second) of Foreign Relations Law* § 66(f). Although the context for these cases was different — almost all involved the erroneous (pre-Samantar) application of the FSIA to individual foreign officials claiming immunity — these decisions are instructive for post-*Samantar* questions of common law immunity. *See, e.g., Belhas v. Ya'alon*, 515 F.3d 1279, 1285 (D.C.Cir.2008) (observing that the FSIA had incorporated the well-settled principle of international law that former officials could still claim immunity for acts performed on behalf of the government); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1106 (9th Cir.1990) (recognizing that an individual is not "entitled to

sovereign immunity for acts not committed in his official capacity" and explaining that where "the officer purports to act as an individual and not as an official, a suit directed against that action is not a suit against the sovereign") (internal quotation marks omitted); *Hilao v. Estate of Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation)*, 25 F.3d 1467, 1472 (9th Cir.1994) (stating that "[i]mmunity is extended to an individual only when acting on behalf of the state because actions against those individuals are the practical equivalent of a suit against the sovereign directly" and that "[a] lawsuit against a foreign official acting outside the scope of his authority does not implicate any of the foreign diplomatic concerns involved in bringing suit against another government in United States courts") (internal quotation marks omitted); *Matar*, 563 F.3d at 14 (concluding that even if Dichter was not entitled to statutory immunity under the FSIA, he was "nevertheless immune from suit under common-law principles [i.e., conduct-based foreign official immunity] that pre-date, and survive, the enactment of that statute").

These cases sketch out the general contours of official-act immunity: a foreign official may assert immunity for official acts performed within the scope of his duty, but not for private acts where "the officer purports to act as an individual and not as an official, [such that] a suit directed against that action is not a suit against the sovereign." *Chuidian*, 912 F.2d at 1106 (internal quotation marks omitted). A foreign official or former head-of-state will therefore not be able to assert this immunity for private acts that are not arguably attributable to the state, such as drug possession or fraud. *See, e.g.*, *In re Doe*, 860 F.2d 40,

45 (2d Cir. 1988) ("[W]ere we to reach the merits of the issue, we believe there is respectable authority for denying head-of-state immunity to a former head-of-state for private or criminal acts in violation of American law.").

B.

In response, plaintiffs contend that Samantar cannot raise this immunity as a shield against atrocities such as torture, genocide, indiscriminate executions and prolonged arbitrary imprisonment or any other act that would violate a *jus cogens* norm of international law. A *jus cogens* norm, also known as a "peremptory norm of general international law," can be defined as "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. 331; *see Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir.1992) (adopting same definition). Prohibitions against the acts involved in this case — torture, summary execution and prolonged arbitrary imprisonment — are among these universally agreed-upon norms. *See, e.g.*, Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 Yale J. Int'l L. 331, 331 (2009) (explaining that "*jus cogens* . . . include[s], at a minimum, the prohibitions against genocide; slavery or slave trade; murder or disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention"); *Tel-Oren v. Libyan Arab*

Republic, 726 F.2d 774, 791 n. 20 (D.C.Cir.1984) (Edwards, J., concurring) ("On the basis of international covenants, agreements and declarations, commentators have identified at least four acts that are now subject to unequivocal international condemnation: torture, summary execution, genocide and slavery."); *Restatement (Third) of Foreign Relations Law* § 702 and cmt. n (identifying murder, torture and "pro-longed arbitrary detention" as *jus cogens* violations). Unlike private acts that do not come within the scope of foreign official immunity, *jus cogens* violations may well be committed under color of law and, in that sense, constitute acts performed in the course of the foreign official's employment by the Sovereign. However, as a matter of international and domestic law, *jus cogens* violations are, by definition, acts that are not officially authorized by the Sovereign. *See, e.g., Siderman de Blake*, 965 F.2d at 718 ("International law does not recognize an act that violates *jus cogens* as a sovereign act."); *Paul v. Avril*, 812 F.Supp. 207, 212 (S.D.Fla.1993) ("[A]cts . . . [of torture, cruel, inhuman and degrading treatment, and arbitrary detention in violation of customary international law] hardly qualify as official public acts.").[6]

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[6] In spite of this, allegations of jus cogens violations do not overcome head-of-state or any other status-based immunity. *See, e.g.*, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium) (2002)* ICJ 3 (concluding that the sitting foreign minister of the Democratic Republic of Congo was entitled to status-based immunity against alleged *jus cogens* violations).

There has been an increasing trend in international law to abrogate foreign official immunity for individuals who commit acts, otherwise attributable to the State, that violate *jus cogens* norms — *i.e.*, they commit international crimes or human rights violations:

> Over the last decade . . . a growing number of domestic and international judicial decisions have considered whether a foreign official acts as an arm of the state, and thus is entitled to conduct immunity, when that official allegedly violates a *jus cogens* norm of international law or commits an international crime.

Curtis A. Bradley & Laurence R. Heifer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 Sup.Ct. Rev. 213, 236-37 (2011). A number of decisions from foreign national courts have reflected a willingness to deny official-act immunity in the criminal context for alleged *jus cogens* violations, most notably the British House of Lords' *Pinochet* decision denying official-acts immunity to a former Chilean head of state accused of directing widespread torture. *See Regina v. Bartle, ex parte Pinochet*, 38 I.L.M. 581, 593-95 (H.L.1999) (concluding that official-acts immunity is unavailable to shield foreign officials from prosecution for international crimes because acts of torture do not constitute officially-approved acts). "In the decade following *Pinochet*, courts and prosecutors across Europe and elsewhere . . . commenced criminal proceedings against former officials of other nations for torture and other violations of *jus cogens*." Bradley & Heifer, 2010

Sup. Ct. Rev. at 239. Some foreign national courts have pierced the veil of official-acts immunity to hear civil claims alleging *jus cogens* violations, but the *jus cogens* exception appears to be less settled in the civil context. *Compare Ferrini v. Germany*, Oxford Rep. Int'l in Dom. Cts. 19 (Italian Ct. of Cassation 2004) (denying "the functional immunity of foreign state organs" for *jus cogens* violations in criminal context), *with Jones v. Saudi Arabia*, 129 I.L.R. 713, at ¶ 24 (H.L.2006) (rejecting *jus cogens* exception to foreign official immunity in civil context).

American courts have generally followed the foregoing trend, concluding that *jus cogens* violations are not legitimate official acts and therefore do not merit foreign official immunity but still recognizing that head-of-state immunity, based on status, is of an absolute nature and applies even against *jus cogens* claims. *Compare Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1209 (9th Cir.2007) (recognizing that acts in "violation" of *jus cogens* norms . . . cannot constitute official sovereign acts"); *Siderman de Blake*, 965 F.2d at 718 ("International law does not recognize an act that violates *jus cogens* as a sovereign act."); *Enahoro v. Abubakar*, 408 F.3d 877, 893 (7th Cir.2005) (Cudahy, J., dissenting) ("[Officials receive no immunity for acts that violate international *jus cogens* human rights norms (which by definition are not legally authorized acts)."), *with Ye*, 383 F.3d at 626-27 (deferring to Executive's suggestion that head-of-state immunity be allowed for individual accused of international crimes); *Devi v. Rajapaksa, No. 11 Civ. 6634, 2012 WL 3866495*, at *3 (S.D.N.Y. Sept. 4, 2012) (holding that a sitting head of state is entitled to immunity, even in the context of alleged *jus cogens* violations). We conclude that, under

international and domestic law, officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity.

Moreover, we find Congress's enactment of the TVPA, and the policies it reflects, to be both instructive and consistent with our view of the common law regarding these aspects of *jus cogens*. Plaintiffs asserted claims against Samantar under the TVPA which authorizes a civil cause of action against "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture" or "extrajudicial killing." Pub.L. 102-256, *§ 2(a)*, 28 U.S.C. 1350 note. "The TVPA thus recognizes explicitly what was perhaps implicit in the Act of 1789 — that the law of nations is incorporated into the law of the United States and that a violation of the international law of human rights is (at least with regard to torture) *ipso facto* a violation of U.S. domestic law." *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105 (2d Cir.2000). Thus, in enacting the TVPA, Congress essentially created an express private right of action for individuals victimized by torture and extrajudicial killing that constitute violations of *jus cogens* norms. *See* S.Rep. No. 102-249, at 8 (1991) ("[B]ecause no state officially condones torture or extrajudicial killings, few such acts, if any, would fall under the rubric of 'official actions' taken in the course of an official's duties.").

C. SOI from the State Department

In its SOI, the State Department submitted a suggestion of non-immunity. The SOI highlighted the fact that Samantar "is a former official of a state

with no currently recognized government to request immunity on his behalf or to take a position as to "whether the acts in question were taken in an official capacity." J.A. 71. Noting that "[t]he immunity protecting foreign officials for their official acts ultimately belongs to the sovereign rather than the official," J.A. 71, the government reasoned that Samantar should not be afforded immunity "[i]n the absence of a recognized government . . . to assert or waive [Samantar's] immunity," J.A. 73. The second major basis for the State Department's view that Samantar was not entitled to immunity was Samantar's status as a permanent legal resident. According to the SOI, "U.S. residents like Samantar who enjoy the protections of U.S. law ordinarily should be subject to the jurisdiction of the courts, particularly when sued by U.S. residents" or naturalized citizens such as two of the plaintiffs. J.A. 71.

Both of these factors add substantial weight in favor of denying immunity. Because the State Department has not officially recognized a Somali government, the court does not face the usual risk of offending a foreign nation by exercising jurisdiction over the plaintiffs' claims. Likewise, as a permanent legal resident, Samantar has a binding tie to the United States and its court system.

Because this case involves acts that violated *jus cogens* norms, including torture, extrajudicial killings and prolonged arbitrary imprisonment of politically and ethnically disfavored groups, we conclude that Samantar is not entitled to conduct-based official immunity under the common law, which in this area incorporates international law. Moreover, the SOI

has supplied us with additional reasons to support this conclusion. Thus, we affirm the district court's denial of Samantar's motion to dismiss based on foreign official immunity.

IV.

For the foregoing reasons, we affirm the district court's denial of both head-of-state and foreign official immunity to Samantar.

AFFIRMED

APPENDIX B

United States District Court, E.D. Virginia,
Alexandria Division.
Bashe Abdi YOUSUF, et al., Plaintiffs,
v.
Mohamed Ali SAMANTAR, Defendant.

No. 1:04cv1360 (LMB/JFA).

Feb. 15,2011.

Joseph Leon Decker, Joseph William Whitehead, Jonah Eric McCarthy, Akin Gump Strauss Hauer & Feld LLP, Washington, DC, for Plaintiffs.

Joseph Peter Drennan, Alexandria, VA, for Defendant.

ORDER

LEONIE M. BRINKEMA, District Judge.

The government has determined that the defendant does not have foreign official immunity. Accordingly, defendant's common law sovereign immunity defense is no longer before the Court, which will now proceed to consider the remaining issues in defendant's Motion to Dismiss. Accordingly, it is hereby

ORDERED that the parties select a mutually agreeable Friday at 10:00 a.m. to argue the Motion to Dismiss and file a notice of that date by the close of business, Friday, February 18, 2011.

The Clerk is directed to forward copies of this Order to counsel of record.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

BASHE ABDI YOUSUF, et al., Plaintiffs, vs. MOHAMED ALI SAMANTAR, Defendant.	Civil Action No. 1:04cvl360 Alexandria, Virginia April 1, 2011 10:40 a.m.

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS:	NATASHA ELISA FAIN, ESQ. Center for Justice and Accountability 870 Market Street, Suite 680 San Francisco, CA 94102
FOR THE DEFENDANT:	JOSEPH PETER DRENNAN, ESQ.

	218 North Lee Street, Third Floor Alexandria, VA 22314
ALSO PRESENT:	AZIZ DERIA
OFFICIAL COURT REPORTER:	ANNELIESE J. THOMSON, RDR, CRR U.S. District Court, Fifth Floor 401 Courthouse Square Alexandria, VA 22314 (703) 299-8595

(Pages 1 - 15)

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

PROCEEDINGS

THE CLERK: Civil Action 04-1360, Bashe Abdi Yousuf, et al. v. Mohamed Ali Samantar. Would counsel please note their appearances for the record.

THE COURT: All right, counsel, please identify yourselves.

MR. DRENNAN: Yes, Your Honor. Good morning. Joseph Peter Drennan on behalf of defendant Mohamed Ali Samantar.

THE COURT: All right.

MS. FAIN: Good morning, Your Honor. Natasha Fain from the Center for Justice and Accountability, on behalf of the plaintiffs. Plaintiff Aziz Deria is here with us today.

THE COURT: All right. We have before us the defendant's motion to dismiss and the defendant's

motion for reconsideration. I want to address the last motion first.

Mr. Drennan, again, as you know, courts seldom reverse themselves. I'm not — I've certainly reversed myself in the past, but it's not a common practice, and I have considered with care your motion for reconsideration, but I'm satisfied that it ought not to be granted. The Executive Branch has spoken on this issue and that they are entitled to a great deal of deference. They don't control but they are entitled to deference in this case.

The rationale for finding — for the government's position on sovereign immunity, I think, is sound. As you know, they looked upon among other things the status of the government of Somalia at this point, and unless anything's changed in the last couple of weeks, I don't think there's any new situation going on there.

Has the government changed in any respect in the last two or three weeks?

MS. FAIN: No, Your Honor.

THE COURT: No. And the residency of the defendant has also been taken properly into consideration. In the past, at least the Second Circuit has found that the lack of a recognized government is a factor in the sovereignty determination, and I'm going to go with that, so we're not going to hear any argument on that. All right?

MR. DRENNAN: We, we understand the Court's ruling, but we would respectfully note our exception.

THE COURT: All right, that's fine.

* * *

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

BASHE ABDI YOUSUF, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 1:04
	)	CV 1360 (LMB)
	)	
	)	
MOHAMED ALI SAMANTAR,	)	
	)	
	)	
Defendant.	)	

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

Pursuant to 28 U.S.C. § 517, the United States respectfully submits this Statement of Interest to convey to the Court the Department of State's determination that Defendant Mohamed Ali Samantar is not immune from this suit. The various principles that underlie the foreign official immunity

doctrine and the determination in this case are set forth below.[1]

Procedural Background

1. Defendant Samantar, a U.S. resident, served in various high-ranking positions within the Somali government between 1980 and 1990, including as Minister of Defense and as Prime Minister. *See* Second Am. Compl., ¶¶ 6-7. Plaintiffs, who include U.S. citizens, allege that Samantar, while in office, exercised "command responsibility over, conspired with, or aided and abetted members of the Armed Forces of Somalia" and related entities in committing acts of extrajudicial killings, torture, crimes against humanity, war crimes, arbitrary detention, and cruel, inhuman, or degrading treatment. *Id.* ¶ 2. The complaint further asserts that Samantar "had knowledge of and was an active participant in the enforcement of [the] system of repression and ill-treatment against members of the Isaaq clan." *Id.* ¶ 79. Plaintiffs brought this suit under the Torture Victim Protection Act of 1991, Pub. L. No. 102-256,106 Stat. 73 (codified at 28 U.S.C. § 1350 note), and the Alien Tort Statute, 28 U.S.C. § 1350.

2. This Court dismissed Plaintiffs' Second Amended Complaint on the ground that Samantar was immune from suit under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330,1602-1611. *See* Mem. & Op., Doc. #106 (Aug. 1, 2007). Plaintiffs appealed, the Fourth Circuit reversed, and the Supreme Court affirmed the reversal and

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[1] The United States expresses no view on the merits of Plaintiffs' claims and takes no position on the other issues raised in Defendant's renewed motion to dismiss.

remanded the case for further proceedings. *Samantar v. Yousuf,* 130 S. Ct. 2278 (2010). Defendant filed a renewed motion to dismiss in which he argues, among other things, that Samantar is entitled to foreign official immunity. *See* Def.'s Mem., at 7-13, Doc. #139 (Nov. 29, 2010). The motion has now been fully briefed and awaits this Court's adjudication. Pls.' Opp'n, at 2-11, Doc. #143 (Dec. 14, 2010); Def.'s Reply, at 6-11, Doc. #144 (Dec. 22, 2010).

Foreign Official Immunity Doctrine

3. The Executive Branch's authority to determine the immunity of foreign officials from suit in United States courts is rooted in the general doctrine of foreign sovereign immunity, first enunciated in American jurisprudence in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). There, the Supreme Court held that, under the law and practice of nations, a foreign sovereign is generally immune from suits in the territory of another sovereign. *Id.* at 145-46; *see Republic of Austria v. Altmann*, 541 U.S. 677, 688 (2004). To determine whether a foreign sovereign is immune from suit in any particular case, "Chief Justice Marshall introduced the practice since followed in the federal courts" of deferring to Executive Branch suggestions of immunity. *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34 (1945); *see Schooner Exchange*, 11 U.S. at 134. Thus, until the enactment of the FSIA in 1976, courts routinely "surrendered" jurisdiction over suits against foreign sovereigns "on recognition, allowance and certification of the asserted immunity by the political branch of the government charged with the conduct of foreign affairs when its certificate to that effect is presented to the court by the Attorney General."

Hoffman, 324 U.S. at 34; *see Samantar*, 130 S. Ct. at 2284; *Exparte Peru*, 318 U.S. 578, 587-89 (1943). The 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." *Hoffman*, 324 U.S. at 35.

4. This deferential judicial posture was not merely discretionary, but was rooted in the separation of powers. Under the Constitution, the Executive is "the guiding organ in the conduct of our foreign affairs." *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948). Given the Executive's leading foreign-policy role, it was "an accepted rule of substantive law governing the exercise of the jurisdiction of the courts that they accept and follow the executive determination" on questions of foreign sovereign immunity. *Hoffman*, 324 U.S. at 36; *see also Spacil v. Crowe*, 489 F.2d 614, 618 (5th Cir. 1974) ("[W]e are analyzing here the proper allocation of functions of the branches of government in the constitutional scheme of the United States. We are not analyzing the proper scope of sovereign immunity under international law.").

5. The immunity of a foreign state was, early on, generally understood to extend not only to the state, heads of state, and diplomatic officials, but also to other officials acting in an official capacity. For example, in *Underhill v. Hernandez*, 168 U.S. 250 (1897), the Supreme Court rejected a suit against a Venezuelan general for actions taken in his official capacity, holding that the defendant was protected by "[t]he immunity of individuals from suits brought in foreign tribunals for acts done within their own

states, in the exercise of governmental authority, whether as civil officers or as military commanders." *Id.* at 252.

6. In earlier proceedings in this case, the Supreme Court addressed whether the FSIA codifies the law of foreign official immunity, or instead whether it leaves the law of individual official immunity in the hands of the Executive Branch, as it was before the FSIA was passed. *Samantar*, 130 S. Ct. at 2291. The United States filed an amicus brief taking the position that the FSIA should not govern the immunity of individual foreign officials. The United States argued that the text, history, and purpose of the FSIA make clear that the Act relates principally to state, not individual, immunity. U.S. Br. at 13-24, *available at* 2010 WL 342031. And the government further argued that the conclusion that the FSIA does not govern the immunity of individual officials is reinforced by the "number of complexities that could attend the immunity determination," and the number of considerations that the Executive "might find it appropriate to take into account," *id.* at 24-25—"complexities that could not be accommodated under the rigid and ill-fitting statutory regime of the FSIA." *Id.* at 24.[2]

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[2] The relevant paragraph stated in full:

> The conclusion that the FSIA does not govern foreign official immunity is reinforced by the number of complexities that could attend the immunity determination in this and other cases—complexities that could not be accommodated under the rigid and ill-fitting statutory regime of the FSIA. Even in an ordinary case, in considering whether to recognize immunity of a foreign official under the generally applicable principles of immunity discussed above, the Executive might find it appropriate to take into account issues of reciprocity,

7. The Supreme Court ultimately agreed with the government's proffered reading of the FSIA. The Court explained that, "[although Congress clearly intended to supersede the common-law regime for claims against foreign states, we find nothing in the statute's origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity." *Samantar*, 130 S. Ct. at 2291. In so

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(…continued)

customary international law and state practice, the immunity of the state itself, and, when appropriate, domestic precedents. But in this case, the Executive may also find the nature of the acts alleged—and whether they should properly be regarded as actions in an official capacity—to be relevant to the immunity determination. Respondents have not only relied on the ATS to assert a federal common law cause of action, but have also invoked the statutory right of action in the TVPA for damages based on torture and extrajudicial killing. And respondents, some of whom are United States citizens, have brought that action against a former Somali official who now lives in the United States, not Somalia.

U.S. Br. at 24-25. The government also noted the potential relevance of "the foreign state's position on whether the alleged conduct was in an official capacity" and whether "a foreign state [has sought] to waive the immunity of a current or former official, because immunity is accorded to foreign officials not for their personal benefit, but for the benefit of the foreign state." *Id.* at 25-26. The identification of certain considerations that the Executive could or might find it appropriate to take into account served to underscore the range of discretion properly residing in the Executive under the Constitution to make immunity determinations in particular cases. It did not reflect a judgment by the Executive that the considerations mentioned were exhaustive or would necessarily be relevant to any particular immunity determination if, as the United States argued to the Supreme Court, the responsibility for doing so was vested in the Executive and not governed by the FSIA. The present filing reflects the basis for the Executive's immunity determination in this case.

concluding, the Court found "no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity." *Id.* Thus, the Executive Branch continues to play 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. Accordingly, courts 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.

8. In *Samantar*, the Supreme Court explained that if the Department of State recognized and accepted the foreign government's request for a suggestion of immunity, "the district court surrendered its jurisdiction." 130 S. Ct. at 2284. The Executive's role traditionally has encompassed acknowledging that certain foreign government officials enjoy immunity because of their particular status as well as acknowledging whether the officials should be immune from suit for the conduct at issue. *See, e.g., Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1200 (2d Cir. 1971) (deferring to State Department's determination that alleged conduct was "of a public, as opposed to a private/commercial nature"). Taking into account the relevant principles of customary international law, the Department of State has made the attached determination on immunity in this case, and we explain below certain critical factors underlying the Executive's determination here. Because the Executive Branch is taking an express position in this case, the Court should accept and defer to the

determination that Defendant is not immune from suit. *See Samantar*, 130 S. Ct. at 2284; *Isbrandtsen Tankers*, 446 F.2d at 1201 ("[O]nce the State Department has ruled in a matter of this nature, the judiciary will not interfere.").

Grounds for Determination in this Case

9. Upon consideration of the facts and circumstances in this case, as well as the applicable principles of customary international law, the Department of State has determined that Defendant enjoys no claim of official immunity from this civil suit. *See* State Dep't Letter, attached as Ex. 1. Particularly significant among the circumstances of this case and critical to the present Statement of Interest are (1) that Samantar is a former official of a state with no currently recognized government to request immunity on his behalf, including by expressing a position on whether the acts in question were taken in an official capacity, and (2) the Executive's assessment that it is appropriate in the circumstances here to give effect to the proposition that U.S. residents like Samantar who enjoy the protections of U.S. law ordinarily should be subject to the jurisdiction of our courts, particularly when sued by U.S. residents.

10. The immunity protecting foreign officials for their official acts ultimately belongs to the sovereign rather than the official. *See, e.g., Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belgium)*, 2002 1.C.J. 3, ¶ 61 (Feb. 14) (Merits) (a foreign official "will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity"). Former officials generally enjoy residual immunity for acts taken in

an official capacity while in office. *Id.* Because the immunity is ultimately the state's, a foreign state may waive the immunity of a current or former official, even for acts taken in an official capacity. *See 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. The typical practice is for a foreign state to request a suggestion of immunity from the Department of State on behalf of its officials. *See Samantar*, 130 S. Ct. at 2284 (citing *Hoffman*, 324 U.S. at 34-36); Exparte Peru, 318 U.S. 578; *Compania Espanola De Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68 (1938). Because the immunity belongs to the state, and not the individual, and because only actions by former officials taken in an official capacity are entitled to immunity under customary international law, the Executive Branch takes into account whether the foreign state understood its official to have acted in an official capacity in determining a former official's immunity or non-immunity.

12. This case presents a highly unusual situation because the Executive Branch does not currently recognize any government of Somalia. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) ("Political recognition [of a foreign sovereign] is exclusively a function of the Executive."). Two competing putative governmental entities have sought to opine regarding the application of immunity to Samantar: the Transitional Federal Government ("TFG"), which has sought to assert

residual immunity on behalf of Samantar; and the government of the "Republic of Somaliland," which has sought to waive any possible residual immunity. *See* Ex. 1. However, the United States does not currently recognize the TFG or any other entity as the government of Somalia. Absent a decision by the Executive Branch formally to recognize either entity as the government of Somalia or otherwise to recognize either of those competing assertions, neither entity is capable of waiving or asserting a claim of immunity on behalf of a former Somali official or of taking a position on whether Defendant's alleged acts were taken in an official capacity.

13. As noted, a former official's residual immunity is not a personal right. It is for the benefit of the official's state. In the absence of a recognized government authorized either to assert or waive Defendant's immunity or to opine on whether Defendant's alleged actions were taken in an official capacity, the Department of State has determined that such immunity should not be recognized here. That determination has taken into account the potential impact of such a decision on the foreign relations interests of the United States. *See* Ex. 1. 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.

14. The Executive's conclusion that Defendant is not immune is further supported by the fact that Defendant has been a resident of the United States

since June 1997. *See* Br. in Support of Def.'s Mot. to Dismiss, Doc. #139, at 1 (Nov. 29, 2010). A foreign official's immunity is for the protection of the foreign state. Thus, 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. Basic principles of sovereignty, nonetheless, provide that a state generally has a right to exercise jurisdiction over its residents. *See, e.g., Schooner Exchange*, 11 U.S. at 136. In the absence of a recognized government that could properly ask the Executive Branch to suggest the immunity of its former official, the Executive has determined in this case that the interest in permitting U.S. courts to adjudicate claims by and against U.S. residents warrants a denial of immunity.

Conclusion

For the foregoing reasons, the United States has determined that Defendant Samantar is not entitled to official immunity in the circumstances of this case.

Dated: February 14, 2011

Respectfully submitted,

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/s/ Lauren A. Wetzler

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EXHIBIT 1

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

February 11, 2011

The Honorable Tony West, Esq.
Assistant Attorney General
Civil Division
United States Department of Justice
950 Pennsylvania Ave. N.W.
Washington D.C. 20530

Re: *Yousuf v. Samantar*, Civil Action No 01-13760 (E.D. Va.)

Dear Assistant Attorney General West:

I write to request that the Department of Justice convey to the U.S. District Court for the Eastern District of Virginia in the above-referenced case the determination of the Department of State that Defendant Mohamed Ali Samantar does not enjoy immunity from the jurisdiction of U.S. courts with respect to this action.

The Department of State has reviewed this matter carefully and has concluded that Defendant Mohamed Ali Samantar is not immune from the Court's jurisdiction in the circumstances of this case. Defendant Samantar, a U.S. resident, is being sued by U.S. citizen and Somali plaintiffs in the United States District Court for the Eastern District of Virginia under the Torture Victim Protection Act (TVPA) and the Alien Tort Claims Act (ATCA) for alleged responsibility for torture, extrajudicial killings, and other atrocities. 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.

Defendant Samantar served as First Vice President, Minister of Defense, and later as Prime Minister for the now-defunct Somali government of Mohamed Siad Barre during the 1980s. In January 1991, armed opposition factions drove the Barre regime from power, resulting in the complete collapse of Somalia's central government. Thereafter, Samantar fled Somalia, and according to plaintiffs, has been living in Virginia since 1997. Following the collapse of the Barre regime, reconciliation conferences among warring Somali factions have resulted in the creation of a transitional Somali government, the Transitional Federal Government (TFG). Although the United States recognized the Barre regime, since the fall of that government, the United States has not recognized any entity as the government of Somalia. The United States continues to recognize the State of Somalia, and supports the efforts of the TFG to establish a viable central government, but does not recognize the TFG or any other entity as the government of Somalia. The TFG has sought to assert immunity for Samantar, while a competing entity, the putative government of the "Republic of Somaliland," has sought to waive any possible immunity. No recognized foreign government is thus available either to assert or waive any immunity Samantar might enjoy.

In light of these circumstances, taking into account the relevant principles of customary international law, and considering the overall impact of this matter on the foreign policy of the United States, the

Department of State has determined that Defendant Samantar does not enjoy immunity from the jurisdiction of U.S. courts with respect to this action. Accordingly, the Department of State requests that the Department of Justice submit to the district court an appropriate filing setting forth this immunity determination.

Sincerely,
/s/ Harold Hongju Koh
Harold Hongju Koh
The Legal Adviser

APPENDIX E

No. 11-1479

In the
United States Court of Appeals
for the Fourth Circuit

BASHE ABDI YOUSUF, et al.,
Plaintiffs-Appellees,
v.

MOHAMED ALI SAMANTAR,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES

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* * *

In the United States Court of Appeals
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BASHE ABDI YOUSUF, et al.,
Plaintiffs-Appellees,

v.

MOHAMED ALI SAMANTAR,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES

INTRODUCTION AND INTERESTS OF THE UNITED STATES

We file this *amicus curiae* brief to reaffirm the formally stated position of the United States that, under the specific circumstances of this case, defendant-appellant Mohamed Samantar is not entitled to immunity from suit as a former Somali government official. The district court properly recognized that the State Department's immunity determination is binding and thus correctly denied Samantar's motion to dismiss based on his flawed claim of immunity. In an earlier phase of this case,

the Supreme Court held that the system established by Congress and the President in the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1441(d), 1602-1611 (2006 & Supp. II 2008), governs immunity from civil suit of foreign states and their agencies or instrumentalities, but that system does *not* control the immunity of foreign government officials, such as that asserted by Samantar here. *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010). The Supreme Court ruled that, in enacting the FSIA, Congress left unchanged the existing common law regime under which — based on constitutional separation of powers principles — the courts give full effect to the Executive Branch's immunity determinations concerning foreign officials in suits in U.S. courts.

On remand of this case, the United States presented the district court with the State Department's determination, conveyed by the Legal Adviser, that Samantar is not entitled to immunity from suit as a former official of a foreign state. The U.S. filing cited as "[p]articularly significant among the circumstances of this case and critical to the present Statement of Interest" that: (1) there is no currently-recognized Somali government to request immunity on Samantar's behalf or to express a position on whether Samantar's relevant acts were taken in an official capacity; and (2) it is appropriate in the circumstances here to permit U.S. courts to exercise jurisdiction over U.S. residents such as Samantar, particularly when sued by other U.S. residents.

Consistent with the Supreme Court's mandate in this case, the district court gave full effect to this

determination by the State Department and denied Samantar's motion to dismiss based on claimed foreign official immunity. For the reasons we describe below, the district court's order denying dismissal should be affirmed.[1]

STATEMENT

1. The facts, background, and course of this litigation are fully addressed in the parties' briefs. The principal allegations rest on the fact that Samantar is a former high-ranking official of the Barre regime in Somalia. *See Samantar*, 130 U.S. at 2282. Plaintiffs-appellees allege that, in the 1980s, they or their family members were subjected to systematic torture, extrajudicial killing, and other atrocities committed by military and intelligence agencies of the governing Supreme Revolutionary Council in Somalia. *Ibid.*; *see* JA 26-64. Plaintiffs

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[1] Although we are aware of no precedent directly on point, in our view, a district court's denial of a defendant's motion to dismiss on the basis of foreign official immunity is immediately appealable under the collateral order doctrine. *See Mamani v. Berzain*, 654 F.3d 1148, No. 09-16246, 2011 WL 3795468, at *2 n.3 (11th Cir. Aug. 29, 2011) (holding, without explanation, that defendants appeal "as of right" from denial of motion to dismiss based on foreign official immunity); *see also Johnson v. Jones*, 515 U.S. 304, 311 (1995) (appealable collateral order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment" (quotation marks omitted)); *see also id.* at 311-12 (denial of qualified immunity turning on legal determinations subject to interlocutory appeal); *Mitchell v. Forsyth*, 472 U.S. 511, 527-30 (1985) (denial of U.S. official's claim of qualified immunity subject to interlocutory appeal); *Rux v. Republic of Sudan*, 461 F.3d 461, 467 n.1 (4th Cir.2006) (denial of foreign state immunity under the FSIA subject to interlocutory appeal).

further allege that Samantar exercised command and effective control over agents of the Somali government during his tenure as Minister of Defense from 1980 to 1986, and as Prime Minister from 1987 to 1990. *See, e.g.*, JA 51.

In January 1991, armed opposition factions drove the Barre regime from power, resulting in the complete collapse of Somalia's central government. Bureau of African Affairs, U.S. Dep't of State, *Background Note*: *Somalia* (September 26, 2011), *available at* http://www.state.gov/r/pa/ei/bgn/2863.htm. In the wake of that government's collapse, Samantar fled the country and has been a resident of the United States since 1997. *Samantar*, 130 S. Ct. at 2283.

2. As the parties have described, this case returned to the district court after the Supreme Court affirmed this Court's ruling that Samantar's claim of immunity is not governed by the Foreign Sovereign Immunities Act. Among other points, Samantar argued in the district court that he is entitled to immunity from this suit under the doctrines of foreign official and head of state immunity. Samantar argued that, under the common law, foreign officials cannot be civilly sued for acts taken in an official capacity. Samantar further argued that former foreign officials enjoy immunity for acts that were taken in an official capacity, because the immunity of foreign officials assertedly arises from the official character of their acts and not from the official's status at the time of suit. Samantar claimed that the acts he is alleged to have taken in Somalia against the plaintiffs were done in an official capacity and that he therefore enjoys common law immunity

from this suit. *See generally* Br. in Supp. of Mot. to Dismiss, *Yousuf v. Samantar*, No. 04-1360 (Nov. 29, 2010) (D. Ct. Docket No. 139).

The United States responded to Samantar's immunity claim by filing a Statement of Interest in the district court, stating clearly that the State Department had determined that Samantar is not immune from this suit. In that Statement, the United States explained that, in reaching this conclusion, the State Department had taken "into account the relevant principles of customary international law." JA 70. The Government further explained that two factors were "[p]articularly significant among the circumstances of this case and critical to" the Statement of Interest:

"(1) that Samantar is a former official of a state with no currently recognized government to request immunity on his behalf, including by expressing a position on whether the acts in question were taken in an official capacity"; and

"(2) the Executive's assessment that it is appropriate in the circumstances here to give effect to the proposition that U.S. residents like Samantar who enjoy the protections of U.S. law ordinarily should be subject to the jurisdiction of our courts, particularly when sued by U.S. residents." JA 71.

The Government's Statement of Interest made clear that it was essential to the first point that a foreign official's immunity belongs to the sovereign and not to the individual official. *Ibid.* (citing *Arrest Warrant of 11 Apr. 2000* (*Dem. Rep. Congo v. Belgium*), 2002 I.C.J. 3, ¶61 (Feb. 14) (Merits)). Because the official's immunity belongs to the foreign state, and because former officials enjoy immunity

only for acts taken in an official capacity, the Government explained that the State Department typically considers the foreign government's understanding of whether the alleged conduct was in an official capacity in determining whether to recognize the foreign official's immunity. JA 72.

Significantly, the Government pointed out that the United States has not recognized any entity as the government of Somalia since the fall of the Barre regime. Thus, while Samantar has relied in this litigation on a letter from the Somali Transitional Federal Government ("TFG") as confirming the official character of the alleged acts, and thus supporting his immunity, the Supreme Court has noted that "the United States does not recognize the TFG (or any other entity) as the government of Somalia." *Samantar*, 130 S. Ct. at 2283, n.3 (citing Brief for United States as Amicus Curiae 5, *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010) (No. 08-1555)). Accordingly, there is no recognized government to speak on behalf of the Somali state. And, in the absence of a recognized government to assert or waive immunity, the State Department determined that Samantar's claim of immunity should not be recognized in this case. JA73.

The United States further explained in its Statement of Interest that, because "[a] foreign official's immunity is for the protection of the foreign state * * * 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." JA 73. Nevertheless, "[b]asic principles of sovereignty * * * provide that a state generally has a right to exercise

jurisdiction over its residents." *Ibid.* Thus, in the absence of a recognized government to assert immunity, the State Department determined that the United States' interest in permitting U.S. residents to litigate claims against another U.S. resident "further support[s]" its decision not to recognize Samantar's immunity. *Ibid.*

3. In light of the position expressed by the United States, the district court denied Samantar's motion to dismiss: "The government has determined that the defendant does not have foreign official immunity. Accordingly, defendant's common law sovereign immunity defense is no longer before the Court, which will now proceed to consider the remaining issues in defendant's motion to dismiss." JA 98.

Samantar filed this appeal and sought a stay of the district court proceedings pending appeal, which the district court and this Court denied. JA 21 (Docket No. 168), 24 (Docket No. 198). In denying a stay, the district court concluded that "[p]laintiffs correctly argue that Samantar's appeal is frivolous. Only the Executive Branch can determine whether a former foreign government official is entitled to common law immunity. *See Samantar v. Yousuf*, 130 S. Ct. 2278, 2284 (2010). In this case, the State Department determined that Samantar is not entitled to common law immunity. Samantar has not cited any statute or binding precedent that would allow this Court to ignore the State Department's finding." Order Denying Stay, *Yousuf v. Samantar*, No. 04-1360 (May 18, 2011) (D. Ct. Docket No. 168).

The district court has set a hearing on December 22, 2011, concerning pre-trial motions; trial is scheduled to begin February 21, 2012. Minute Entry,

Yousuf v. Samantar, No. 04-1360 (Oct. 20, 2011) (D. Ct. Docket No. 233).

ARGUMENT

BECAUSE THE STATE DEPARTMENT DETERMINED THAT SAMANTAR IS NOT IMMUNE FROM THIS CIVIL SUIT, THE DISTRICT COURT PROPERLY DENIED SAMANTAR'S MOTION TO DISMISS.

After the Government informed the district court that the State Department had determined that Samantar is not immune from this suit, the district court properly denied Samantar's motion to dismiss.

1. In holding that the FSIA does not govern Samantar's claim of foreign official immunity, the Supreme Court described the courts' historic deference to Executive Branch foreign sovereign immunity determinations before Congress enacted the FSIA. *Samantar*, 130 S. Ct at 2284. The Supreme Court explained that "[t]he doctrine of foreign sovereign immunity developed as a matter of common law long before the FSIA was enacted in 1976." *Samantar*, 130 S. Ct. at 2284. The Court first recognized the doctrine in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch.) 116 (1812). *Samantar*, 130 S. Ct. at 2284. "Following *Schooner Exchange*, a two-step procedure developed for resolving a foreign state's claim of sovereign immunity." *Ibid.* A foreign state facing suit in our courts could request a "suggestion of immunity" from the State Department. *Ibid.* (quotation marks omitted). If the State Department accepted the request and filed a suggestion of immunity, the district court "surrendered its jurisdiction." *Ibid.* But if the State Department took no position in the suit, "a district court had authority to decide for itself

whether all the requisites for such immunity existed." *Ibid.* (quotation marks omitted). In such a circumstance, the district court was to apply "the established policy of the [State Department]" to determine whether the foreign state was entitled to immunity. *Ibid.* (quotation marks omitted).

Of considerable significance to this case, the Supreme Court further explained that, "[a]lthough cases involving individual foreign officials as defendants were rare, the same two-step procedure was typically followed when a foreign official asserted immunity." *Id.* at 2284-85 (citing cases). Accepting the Government's argument as *amicus curiae*, the *Samantar* Court explained that "[t]he immunity of officials simply was not the particular problem to which Congress was responding when it enacted the FSIA." *Id.* at 2291. Accordingly, the Court could discern "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." *Ibid.* And, as the Supreme Court explained, the State Department's role was to determine whether a foreign state or official was immune from suit and courts would look to principles articulated by the State Department when determining foreign official immunity in suits in which the State Department did not participate. *Id.* at 2284.

At the time this suit was before the Supreme Court, the State Department had made no determination concerning Samantar's immunity. Accordingly, the Court left open the question whether Samantar "may be entitled to immunity under the common law," and it remanded the suit "for further

proceedings consistent with this opinion." *Id.* at 2292-93. On remand, the Government informed the district court that the State Department had determined that Samantar is not immune from this suit, for the reasons described above. Under the Supreme Court's decision in this case, that determination was binding, and the district court properly gave it effect.

2.a. In attacking the district court's order, Samantar principally argues that the common law of foreign official immunity impels courts to defer only to Executive Branch determinations that a foreign official is immune from suit, but not to determinations that the official lacks immunity. Opening Br. 8-13. But Samantar's argument is contrary to the Supreme Court's explanation of the State Department's role in foreign official immunity determinations.

First, Samantar focuses on the Supreme Court's statement, describing pre-FSIA practice, that "'in the absence of recognition of the immunity by the Department of State, a district court had authority to decide for itself whether all the requisites for such immunity existed.'" *Ibid.* (quoting *Samantar*, 130 S. Ct. at 2284 (emphasis omitted)). Samantar's reliance on this sentence is misplaced. As plaintiffs argue in their appellee brief (Response Br. 25), in context, it is clear that the Supreme Court did not suggest that courts had authority before the FSIA was enacted to disregard the State Department's determination that a foreign sovereign was not immune from suit. Rather, the Supreme Court explained that, when the State Department made no immunity determination, the district court should make the determination, by

considering "'*whether the ground of immunity is one which it is the established policy of the [State Department] to recognize*.'" *Samantar*, 130 S. Ct. at 2284 (quoting *Republic of Mexico v. Hoffman*, 324 U.S. 30, 36 (1945)) (emphasis added). Thus, the Supreme Court recognized that the State Department's immunity principles govern the courts' determinations regarding foreign official immunity.

This rule is confirmed by the pre-FSIA immunity decisions cited by the Court in *Samantar*. In *Ex Parte Peru*, for example, the Supreme Court held that in suits against foreign governments, "'the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.'" 318 U.S. 578, 588 (1943) (quoting *United States v. Lee*, 106 U.S. 196, 209 (1882)). In that case, involving an *in rem* action against a foreign state-owned vessel, the Supreme Court unambiguously stated "that courts are required to accept and follow the executive determination that the vessel is immune." *Ibid.*

More importantly, the Supreme Court shortly thereafter noted that "[e]very judicial action *exercising or relinquishing* jurisdiction over the vessel of a foreign government has its effect upon our relations with that government." *Hoffman*, 324 U.S. at 35 (emphasis added). For that reason, the Court instructed that — in words that directly rebut Samantar's argument — 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*." *Ibid* (emphasis added). The Supreme Court added

that "recognition by the courts of an immunity upon principles which the political department of government has not sanctioned may be equally embarrassing to it in securing the protection of our national interests and their recognition by other nations." *Id.* at 36.

In sum, the law that developed in various Supreme Court opinions — and that the Court in *Samantar* held had not been displaced by Congress when it enacted the FSIA — stated unequivocally that the courts should not either deny or recognize immunity for a foreign official contrary to determinations of the State Department. Samantar's argument that a district court may disregard the State Department's determination that a specific former foreign official is not immune from suit is contrary to the Supreme Court's decision in this case. In a case like this one in which the Government has clearly stated the State Department's conclusion that Samantar is not entitled to foreign official immunity, and pointed to the particularly significant circumstances underlying the Government's Statement of Interest, a court would obviously not be following the "established policy of the State Department" (*Samantar*, 130 S. Ct. at 2284 (quotation and alternation marks omitted)), if it chose to overrule the State Department and grant immunity anyway.

In addition, Samantar's contention that courts are free to override the State Department's determination that a foreign official is not immune from suit misunderstands the respective roles of the Executive Branch and the courts. Before the FSIA was enacted, the Supreme Court, this Court, and other courts of appeals recognized that judicial

deference to Executive Branch determinations of foreign sovereign immunity was supported by the constitutional separation of powers. The Supreme Court grounded judicial deference to Executive Branch determinations of foreign sovereign immunity on the Executive's constitutional responsibility to conduct the Nation's foreign relations. *See Ex Parte Peru*, 318 U.S. at 588 ("That principle is that courts may not so exercise their jurisdiction [over foreign sovereigns] as to embarrass the executive arm of the government in conducting foreign relations"); *accord Hoffman*, 324 U.S. at 35-36.

By referring to the Executive Branch's constitutional authority over the conduct of foreign relations, this Court has similarly rejected the notion that courts may ignore the State Department's immunity determinations. *Rich v. Naviera Vacuba, S.A.*, 295 F.2d 24, 26 (4th Cir. 1961) ("Despite these contentions, we conclude that the certificate and grant of immunity issued by the Department of State should be accepted by the court without further inquiry. We think that the doctrine of the separation of powers under our Constitution requires us to assume that all pertinent considerations have been taken into account by the Secretary of State in reaching his conclusion"). Other Circuits have done likewise. *See, e.g., Southeastern Leasing Corp. v. Stern Dragger Belogorsk*, 493 F.2d 1223, 1224 (1st Cir. 1974) (rejecting argument that district court "erred * * * in accepting the executive suggestion of immunity without conducting an independent judicial inquiry"); *Spacil v. Crowe*, 489 F.2d 614, 618 (5th Cir. 1974) ("[W]e are analyzing here the proper allocation of functions of the branches of government in the constitutional scheme of the United States.

We are not analyzing the proper scope of sovereign immunity under international law."); *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1201 (2d Cir. 1971) ("The State 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.").

The Executive Branch's constitutional authority over the conduct of foreign affairs continues as a foundation for the State Department's authority to determine the immunity of foreign officials and for the courts' duty to follow its determinations. *See Samantar*, 130 S. Ct. at 2291 ("We have 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."); *Mistretta v. United States*, 488 U.S. 361, 401 (1989) ("[T]raditional ways of conducting government * * * give meaning to the Constitution." (quotation marks omitted)). In the absence of a governing statute, it is the State Department's role to determine the principles governing foreign official immunity from suit.

b. Samantar appears to make a distinct argument that courts may properly defer to the State Department's determination of a foreign official's immunity only where the State Department has identified some foreign policy harm that would follow if the court fails to abide by the determination. Opening Br. 10-11. That argument is mistaken; it confuses the rule of judicial deference to State Department immunity determinations with the

Supreme Court's explanation for the reasons underlying the rule.

As explained above, before the FSIA was enacted, the Supreme Court held that courts must give effect to the State Department's determinations of foreign official immunity because, among other reasons, the failure to defer to the State Department's decision could undermine the Executive Branch's conduct of foreign relations. *See, e.g., Hoffman*, 324 U.S. at 35-36. But the Supreme Court never required the State Department to specifically articulate any foreign policy harm, let alone suggest, as does Samantar (Opening Br. 11), that courts should review the State Department's foreign policy judgments. As plaintiffs persuasively argue, such a requirement would conflict with the separation-of-powers principles underlying the requirement of judicial deference to determinations of foreign official immunity by the State Department. Response Br. 25-27.

Moreover, Samantar's proposed requirement is foreclosed by Circuit precedent. *Rich*, 295 F.2d at 26 ("[T]he doctrine of the separation of powers under our Constitution requires us to assume that all pertinent considerations have been taken into account by the Secretary of State in reaching his conclusion."); *accord Hoffman*, 324 U.S. at 36; *Ex Parte Peru*, 318 U.S. at 588-89; *Southeastern Leasing Corp.*, 493 F.2d at 1224; *Isbrandtsen Tankers*, 446 F.2d at 1201; *see also Smith v. Reagan*, 844 F.2d 195, 198 (4th Cir. 1988) ("Plaintiffs seek in this suit to investigate and evaluate the executive branch's conduct of foreign policy, an area traditionally reserved to the political branches and removed from judicial review.").

3. The United States largely agrees with plaintiffs' arguments in support of the district court's order denying Samantar's motion to dismiss. However, plaintiffs' brief makes misstatements of fact and law, some of which we briefly address.

a. Plaintiffs argue that Samantar is not entitled to head of state immunity because "[t]he United States never recognized Samantar as the head of state of Somalia" (Response Br. 13), and because the Somali Constitution designates the President, not the Prime Minister, as the head of state (*id.* at 14). Although Samantar is not entitled to head of state immunity from this suit, it is not for these reasons.

The State Department has determined that Samantar is not immune from this suit under any immunity doctrine. As explained above, that determination controls.[2] *See also United States v. Noriega*, 117 F.3d 1206, 1211-12 (11th Cir. 1997) (declining to recognize defendant's claim to head of

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[2] Under current customary international law, head of state immunity encompasses the immunity not only of heads of state but also of other "holders of high-ranking office in a State" such as "the Head of Government and Minister for Foreign Affairs." *Arrest Warrant of 11 Apr. 2000*, 2002 I.C.J. ¶ 51. The Executive Branch has suggested head of state immunity for, among others, heads of state, such as kings (*see, e.g., Alicog v. Kingdom of Saudi Arabia*, 860 F. Supp. 379 (S.D. Tex. 1994) (Saudi King)); heads of government, such as prime ministers (*see, e.g.*, *Saltany v. Reagan*, 702 F. Supp. 319 (D.D.C. 1988) (British Prime Minister)); and foreign ministers (*see, e.g., Rhanime v. Solomon*, No. 01-1479 (D.D.C. May 15, 2002) (Moroccan Foreign Minister)). Accordingly, under the principles accepted by the Executive Branch, a Prime Minister is not categorically ineligible for head of state immunity. Nevertheless, the State Department has determined that Samantar is not immune from this suit under any immunity doctrine.

state immunity where Executive Branch made clear that the defendant did not enjoy such immunity).

b. Regarding Samantar's claim to foreign official immunity (as distinct from his claim to head of state immunity), plaintiffs correctly argue that foreign official immunity is not an individual right of the official, but instead is for the benefit of the foreign state. Response Br. 16. But plaintiffs further contend that the State of Somalia "does not exist in the eyes of the United States government." *Id.* at 17. And plaintiffs argue that, under the "governing legal standard" (*id.* at 13 n.2) — which plaintiffs identify as Section 66(f) of the Restatement (Second) of the Foreign Relations Law of the United States (*ibid.*) — "the common-law basis for asserting [foreign official] immunity largely evaporates" (*id.* at 17). This argument and its factual premise are mistaken.

The United States does not currently recognize any entity as the *government* of Somalia. But the United States continues to recognize Somalia as an independent state of the world. *See* Bureau of Intelligence and Research, U.S. Dep't of State, *Independent States of the World* (Oct. 11, 2011), http://www.state.gov/s/inr/rls/4250.htm (listing Somalia among independent states recognized by the United States). The fact that the United States does not currently recognize a government of Somalia is relevant to Samantar's immunity, but not because of anything in the Second Restatement. Rather, the absence of a recognized Somali government is relevant to Samantar's immunity because the Executive Branch identified it as a factor "critical" to the State Department's immunity determination in

this case. JA 71. It is that determination that controls.[3]

CONCLUSION

For the foregoing reasons, the order of the district court denying Samantar's motion to dismiss should be affirmed.

Respectfully submitted,

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[3] Because the State Department has determined that Samantar is not entitled to immunity from this suit, the Court need not — and should not — address plaintiffs' contention that their allegations against Samantar cannot constitute "official acts" or acts taken in an "official capacity." *See* Response Br. 14-15.

Washington, D.C. 20530-0001

OCTOBER 2011

APPENDIX F

Jamhuuuryadda Soomaaliya
Xukuumadda Federaaliga ee Soomaaliya
Xafiiska Ra'iisul Wasaaraha

جمهورية الصومال
الحكومة الانتقالية
مكتب رئيس الوزراء

The Federal Government of the Somali Republic
Office of the Prime Minister

Ref: OPM/00128/13 Date: 26.02.2013

The Honorable John Forbes Kerry
United States Secretary of State
United States Department of State
2201 "C" Street Northwest
Washington, District of Columbia 20520
United States of America

Dear Secretary of State Kerry:

The Federal Republic of Somalia presents its compliments to the Department of State. On behalf of the Government of the Federal Republic of Somalia, I, Abdi Farah Shirdon, Prime Minister of Somalia, have the distinct honor and high privilege, by this letter, of requesting, urgently, pursuant to the powers vested in me by the Federal Republic of Somalia Provisional Constitution, adopted 1 August 2012, that you use your good offices to obtain immunity for Mohamed Ali Samantar, the former Prime Minister of Somalia, from 1987 – 1990, and the

Defense Minister and First Vice President of Somalia, from 1982 – 1986, in respect of certain civil litigation brought against him before the United States District Court for the Eastern District of Virginia, styled as *Bashe Abdi Yousuf et alii, versus Mohamed Ali Samantar*, Civil Action No. 04-1360 ("the Litigation").

The Litigation was brought in 2004, by plaintiffs who have claimed that they or their family members were wrongly killed or injured by members of the Somali Armed Forces who were alleged to have been, intermittently, subordinates of Mr. Samantar, operating under his command and control. The Government of the Federal Republic of Somalia is of the considered view that the Litigation is injurious to the historic, ongoing process of peace and reconciliation among clans and political factions within Somalia, which is being fostered by the Government of Somalia, the United Nations, and other governments, including, not least, the United States, which has recently accorded formal recognition to the Federal Republic of Somalia.

I am advised that the Litigation has had a long history in the courts, and that, in the course of the Litigation, the Supreme Court of the United States determined that Mr. Samantar cannot assert statutory immunity, under the Foreign Sovereign Immunities Act, 28 U.S.C., § 1604, as that statute only addresses the immunity of governments, not claims of immunity by individual government officials. *Samantar v. Yousuf*, 130 S.Ct. 2278, 176 L.Ed. 2d (2010), and that, in proceedings subsequent to the aforesaid Supreme Court decision, Samantar's common law immunity claims were rejected after the

United States filed a Statement of Interest with the District Court, on 14 February 2011, requesting that Samantar's claim of common law immunity from suit be denied, critically, because, among other things, at that time, Mr. Samantar was said to be "... a formal official of a state with no currently recognized government to request immunity on his behalf, including by expressing a position on whether the acts in question were taken in an official capacity . . . ." (Statement of Interest at ¶ 9), and that such rejection of the District Court's denial of Mr. Samantar's claim of common law immunity from suit was affirmed, on appeal, by the United States Court of Appeals for the Fourth Circuit. *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012). I am further advised that, whilst Mr. Samantar's common law immunity from suit defense was under appellate review, the District Court continued to allow the Litigation to proceed, with Mr. Samantar electing to take a default on 23 February 2012, with the District Court then proceeding to conduct a default damages hearing, and, thereafter, entering a default judgment against Mr Samantar, *Yousuf v. Samantar*, 2012 WL 3730617 (E.D. Va. August 28, 2012), and that, at this writing, Mr. Samantar has a pending appeal, on jurisdictional grounds, to the Fourth Circuit, from the said default judgment, *Yousuf v. Samantar*, Record No. 12-2178, and that, on 16 January 2013, the Supreme Court of the United States granted Mr. Samantar an extension of time to 4 March 2013, within which to file a petition for a writ of *certiorari* from the above-referenced 2 November 2012, appellate decision denying Mr. Samantar's common law claim for immunity from suit *Samantar v. Yousuf, et al.*, Application No. 12A707.

As adverted to above, by this letter, the Federal Republic of Somalia hereby affirms and ratifies Mr. Samantar's plea of common law immunity from suit, finding that Mr. Samantar's acts in question were all undertaken in his official capacity with the Government of Somalia, and would hasten to add that the Federal Republic of Somalia rejects the notion that Mr. Samantar's action were contrary to the law of Somalia or the law of nations, much less that he may be fairly said to be liable under any of the theories propounded in the Second Amended Complaint filed in the District Court.

It is of more than passing significance that Mr. Samantar elected to default in the District Court at a hearing on 23 February 2012, as that was the date at which the Honorable David Cameron, the Prime Minister of the United Kingdom of Great Britain and Northern Ireland, convened the London Somalia Conference, in which over 50 governments, including the United States, and officials from various international organizations, participated, a fact noted by Mr. Samantar's counsel, Joseph Peter Drennan, Esquire, at the said hearing, who also indicated to the District Court that Mr. Samantar concurred with the following remarks of The Honorable Hillary Rodham Clinton, at the commencement of the London Somalia Conference: "For decades, the world has focused on what we could prevent from happening in Somalia, be it conflict, famine, or other disasters. Now we are focused on what we can build. The opportunity is real." (Transcript of District Court Proceedings, 23 February 2012, at page 16)

The good will of the family of nations represented at the London Somalia Conference has served as a

catalyst to the strengthening of the Federal Republic of Somalia and of the Somali civil society, the rule of law, and the Somali economy, whereas the Litigation, which, interestingly, was filed, literally, one month to the day following the formation of the Transitional Federal Government of Somalia, under the auspices of the United Nations, in Nairobi, Kenya, in 2004, hearkens to the era of inter-clan conflict and strife, which has devastated Somalia in recent decades and poses a real threat to the progress that has been made.

The recognition of the Federal Republic of Somalia by the United States, just last month, represents an important milestone in the relations between our nations. Indeed, as the Honorable Hilary Clinton stated, in summing up her remarks at the press conference held after the meeting between Secretary Clinton and the Honorable Hassan Sheikh Mohamud, President of Somalia, in Washington, D.C., on 17 January 2013, as follows: "So we have moved into a normal sovereign nation to sovereign nation position, and we have moved into an era where we're going to be a good partner, a steadfast partner, to Somalia as Somalia makes the decisions for its own future."

To that end, the Federal Republic of Somalia specifically understands that this designation of immunity for Mr. Samantar should come in the form of a Statement of Interest of the United States, to be submitted to the United States Supreme Court, the United States Court of Appeals for the Fourth Circuit, and the District Court, by the Attorney General, or his designee, pursuant to 28 U.S.C., § 517, and that the Department of State should move with dispatch to take all steps necessary to validate

the immunity from suit to which Mr. Samantar is entitled, as a former government official of Somalia, and obtain a dismissal of the subject civil proceedings against him.

On behalf of the Federal Republic of Somalia, I wish to stress the critical importance of the instant request, and our deep appreciation of the prompt attention of the Department of State.

Respectfully yours,

/s/ Abdi Farah Shirdon

Abdi Farah Shirdon, Prime Minister of the Federal Republic of Somalia

cc: Joseph Peter Drennan, Esquire, Counsel for Mohamed Ali Samantar; Shay Dvoretsky, Esquire, Supreme Court Counsel for Mohamed Ali Samantar

APPENDIX G

28 U.S.C. § 1330 provides:

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

28 U.S.C. § 1350 provides:

§ 1350. Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. § 1350 note provides:

Note

Section 1. Short Title.

This Act may be cited as the "Torture Victim Protection Act of 1991".

Sec. 2. Establishment of Civil Action."

(a) Liability.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) Exhaustion of Remedies.—A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) Statute of Limitations.—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

Sec. 3. Definitions.

(a) Extrajudicial Killing.—For the purposes of this Act, the term 'extrajudicial killing' means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) Torture.—For the purposes of this Act—

(1) the term 'torture' means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

28 U.S.C. § 1602 provides:

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C. § 1603 provides:

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose

shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1604 provides:

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605 provides:

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in

immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards,

(C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(7) Repealed. Pub.L. 110-181, Div. A, § 1083(b)(1)(A)(iii), Jan. 28, 2008, 122 Stat. 341

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was

involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e), (f) Repealed. Pub.L. 110-181, Div. A, Title X, § 1083(b)(1)(B), Jan. 28, 2008, 122 Stat. 341

(g) Limitation on discovery.—

(1) In general.—

(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.—

(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or

order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence.—The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

28 U.S.C. § 1606 provides:

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like

circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

28 U.S.C. § 1608 provides:

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services--and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to

give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by

evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.