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FOREIGN SOVEREIGN IMMUNITY—FOURTH CIRCUIT DISREGARDS CONGRESSIONAL INTENT BY HOLDING THAT THE FOREIGN SOVEREIGN IMMUNITIES ACT DOES NOT APPLY TO INDIVIDUALS ACTING WITHIN THE SCOPE OF THEIR OFFICIAL DUTIES

*Elizabeth Mills Viney**

IN *Yousuf v. Samantar*, the Fourth Circuit concluded that the Foreign Sovereign Immunities Act (FSIA),[1] which protects foreign states and their agencies or instrumentalities from suits in U.S. courts, does not extend immunity to individual foreign officers acting within the scope of their official state duties.[2] The Fourth Circuit reached this holding by erroneously concluding that individual foreign officers do not fall within the definition of agencies or instrumentalities of a foreign state for purposes of the FSIA.[3] The court improperly strayed from the circuit majority view on sovereign immunity and ignored legislative intent, thereby clouding this area of law, politicizing immunity decisions, and thickening district court dockets.[4]

Following a Somalian coup d'état led by General Mohamed Barre in 1969, Mohamed Ali Samantar became a top official in the then-new Somali government.[5] For many years following the coup, the Supreme Revolutionary Council (SRC) and its Army Officers, including Samantar, wielded power in Somalia and outlawed other political parties; in particular, the SRC "brutally oppressed the generally prosperous and well-educated Isaaq clan" because the clan was a potential threat to SRC power.[6] To further squelch opposition, government agents "engaged in the wide-

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1. 28 U.S.C. §§1602-1611 (2006).
2. Yousuf v. Samantar, 552 F.3d 371, 381 (4th Cir. 2009).
3. *See id.*
4. *See id.* at 378.
5. *Id.* at 373.
6. *Id.*

spread and systematic use of torture, arbitrary detention and extrajudicial killing against the civilian population."[7] Samantar, as "Minster of Defense from January 1980 to December 1986, and as Prime Minister from January 1987 to September 1990," allegedly gave "tacit approval" for much of the brutality inflicted upon Somali civilians.[8] After many years of oppression, the Barre regime finally collapsed in 1991 and many top officials fled the country.[9] Samantar eventually moved to Fairfax, Virginia.[10]

On November 10, 2004, Bashe Abdi Yousuf and other natives of Somalia brought a civil action in the United States to impose liability upon and recover damages from Samantar, as former Minister of Defense and Prime Minister of Somalia, for "alleged acts of torture and human rights violations committed against them by the government agents commanded by Samantar."[11] Plaintiffs, all of whom are affiliated with the Isaaq clan, alleged either that they were "personally subjected to [Samantar's] brutality" or that they represented family members who were killed by his government agents.[12] "Plaintiffs do not allege that Samantar personally" executed or directly involved himself in these crimes; rather, he gave "tacit approval" to those who committed the atrocities.[13] Due to such approval, Plaintiffs argued that Samantar was liable for damages under both the Alien Tort Statute (ATS) and the Torture Victims Protection Act (TVPA).[14] The ATS grants federal subject-matter jurisdiction when "an alien sues . . . for a tort . . . committed in violation of the law of nations."[15] The TVPA, on the other hand, provides that the victim may bring "a civil action for damages" against the individual who committed the torture while acting under apparent or actual authority of a foreign state.[16] Plaintiffs argue that Samantar violated international law because he "knew or should have known that his subordinates . . . were committing . . . extrajudicial killings, . . . torture, crimes against humanity, war crimes, [and] cruel, inhuman, or degrading treatment."[17]

On August 1, 2007, the district court dismissed the action due to lack of subject-matter jurisdiction because the FSIA, which provides that "a *foreign state* shall be immune from the jurisdiction of the courts of the

7. *Id.* at 374 (internal quotation marks omitted).

8. *Id.*

9. *Id.* General Mohamed Barre was the head of state of Somalia from 1969 to 1991. *See* Richard Greenfield, *Obituary: Mohamed Said Barre*, INDEP., Jan. 3, 1995, at 12.

10. Yousuf v. Samantar, No. 1:04cv1360, 2007 WL 2220579, at *6 (E.D. Va. Aug. 1, 2007).

11. *Yousuf*, 552 F.3d at 373; *Yousuf*, 2007 WL 2220579, at *6.

12. *Yousuf*, 552 F.3d at 374. Plaintiffs Bashe Abdi Yousuf, Jane Doe, and John Doe II brought this action alleging that they were personally subject to Barre regime brutality. *Id.* Plaintiffs Aziz Mohamed Deria and John Doe I brought this action "as personal representatives of the estates of family members." *Id.*

13. *Id.*

14. *Id.* at 374-75; *see* Alien Tort Claims Act, 28 U.S.C. § 1350 (2006); Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 2(a), 106 Stat. 73, 73 (1992).

15. Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995).

16. *Yousuf*, 552 F.3d at 375.

17. *Id.* (internal quotation marks omitted).

United States,"[18] entitled Samantar to immunity from suit.[19] In a memorandum opinion, the district court held that Samantar was shielded by the FSIA because "[t]he allegations in the complaint clearly describe Samantar, at all relevant times, as acting upon the directives of the then-Somali government in an official capacity, and not for personal reasons or motivation."[20] In so ruling, the district court followed the majority of federal circuits, holding that individuals acting in an official capacity are immune from suit under the FSIA.[21] Plaintiffs appealed the dismissal, arguing, *inter alia*, that "Congress did not intend for individual foreign officials to claim sovereign immunity under the FSIA," but only intended that foreign states themselves be able to claim such immunity.[22]

In 1976, Congress enacted the FSIA to codify the common-law "restrictive theory of foreign sovereign immunity."[23] The common-law restrictive theory "permitted 'foreign states [to] be sued in United States courts for their commercial acts, but not for their public acts.'"[24] Under this theory, the Executive Branch decided the questions of sovereign immunity for foreign states and their officials, which resulted in "'foreign nations . . . plac[ing] diplomatic pressure'" on the Executive Branch regarding immunity.[25] Therefore, Congress enacted the FSIA to "shift[ ] responsibility . . . from the Executive Branch to the Judicial Branch . . . '[and] to clarify the governing standards'" of sovereign immunity, which were not clear under the common law.[26] The text of the FSIA, however, does not specifically include individuals acting within the scope of their official government capacities as part of a foreign state or its agency or instrumentality.[27] This lack of specificity regarding individuals in the statutory text has engendered varying interpretations of the FSIA.[28]

The Fourth Circuit's *Yousuf* opinion, written by Judge Traxler, went against the majority of circuits by limiting the language of the FSIA and holding that individuals are not covered by the Act; the court reversed the district court's judgment and remanded it for further proceedings on

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18. *Id.* (quoting 28 U.S.C. § 1604 (2006)).

19. Yousuf v. Samantar, No. 1:04cv1360, 2007 WL 2220579, at *15 (E.D. Va. Aug. 1, 2007).

20. *Yousuf*, 552 F.3d at 376 (internal quotations marks omitted).

21. *See* Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1103 (9th Cir. 1990) (holding that an individual foreign official acting within the scope of his official duties qualifies as an "agency or instrumentality of a foreign state"); *see also In re* Terrorist Attacks on Sept. 11, 2001, 538 F.3d 71, 83 (2d Cir. 2008); Keller v. Cent. Bank of Nig., 277 F.3d 811, 815-16 (6th Cir. 2002); Byrd v. Corporacion Forestal y Industrial de Olancho S.A., 182 F.3d 380, 388-89 (5th Cir. 1999); El-Fadl v. Cent. Bank of Jordan, 75 F.3d 668, 671 (D.C. Cir. 1996).

22. *Yousuf*, 552 F.3d at 377.

23. *Id.*; *see* Velasco v. Gov't of Indon., 370 F.3d 392, 397 (4th Cir. 2004) (citing Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434-39 (1989)).

24. *Yousuf*, 552 F.3d at 377 (quoting *Amerada Hess*, 488 U.S. at 431 n.1).

25. *Id.* (quoting Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 487 (1983)).

26. *Id.* at 377-78 (quoting *Verlinden B.V.*, 461 U.S. at 488).

27. *Id.* at 378.

28. *See, e.g.*, *id.* at 380; Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1103 (9th Cir. 1990).

the merits.[29] The *Yousuf* court reached its holding by first looking at the text of the FSIA:

> "[A]gency 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 . . . .[30]

The court determined that, because the words "individuals or natural persons" are not in the text, it is unclear whether Congress intended individuals to be covered.[31] Quoting the Seventh Circuit, the court determined that the phrase "separate legal person" has the "ring of the familiar legal concept that corporations are persons," and "[i]f Congress meant to include individuals . . . in the scope of the FSIA, it would have done so in clear and unmistakable terms."[32] The court concluded, therefore, that "the phrase 'separate legal person' suggests that corporations or other business entities, but *not* natural persons, may qualify as agencies or instrumentalities."[33] The court supported its holding by quoting a House Committee Report on the FSIA, which explains that the phrase "'separate legal person' was 'intended to include a corporation, association, foundation, or any other entity which . . . can sue or be sued in its own name.'"[34]

Under the Fourth Circuit's holding, Samantar, as an individual, is not shielded under the FSIA from suit in the United States.[35] In reaching this conclusion, the court made no distinction between individuals acting for personal reasons and those acting in an official government capacity—both are outside the reach of the FSIA. The court, however, did refine its holding by noting that it only excluded Samantar from immunity under the FSIA, and "whether he can successfully invoke an immunity doctrine arising under pre-FSIA common law is an open question."[36]

The Fourth Circuit's holding in *Yousuf* is incorrect for three reasons. The holding goes against the Fourth Circuit precedent in *Velasco v. Government of Indonesia*,[37] it disregards the legislative history and intent of the FSIA, and it duplicates the efforts of federal district courts in sover-

29. *Yousuf*, 552 F.3d at 383-84.
30. 28 U.S.C. § 1603(b) (2006).
31. *Yousuf*, 552 F.3d at 378.
32. *Id.* at 380 (quoting Enahoro v. Abubakar, 408 F.3d 877, 881-82 (7th Cir. 2005)).
33. *Id.* (emphasis added).
34. *Id.* at 381 (quoting H.R. REP. NO. 94-1487, at 15 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6614).
35. *Id.*
36. *Id.* at 383-84.
37. 370 F.3d 392 (4th Cir. 2004).

eign immunity claims.[38] The *Velasco* court noted that "[c]laims against the individual in his . . . capacity [as a state official] are the practical equivalent of claims against the foreign state."[39] The *Yousuf* court, however, concluded that "*Velasco* was not about whether an individual government official was entitled to sovereign immunity . . . . Rather, it was about whether the [foreign] government was bound, through *agency principles*, by the unauthorized acts of individual government officials."[40] Yet, according to agency law, an individual may bind an entity only if he is an agent of that entity.[41] Therefore, if the *Velasco* court found that an individual could bind his government through agency principles, then it de facto held that such an individual, by his ability to bind the government, is an *agent* of that government.[42] As an agent of the government, such an individual would necessarily fall under the umbrella of the FSIA,[43] making the analysis and holding in *Velasco* directly applicable and precedential to the *Yousuf* case. Because *Velasco* is precedential, the *Yousuf* holding goes against both the majority of its sister circuits, as well as its *own* circuit, in order to support an incorrect interpretation of the FSIA.[44]

The court in *Yousuf* incorrectly interpreted the FSIA because it disregarded legislative intent by taking away the certainty that the FSIA was intended to instate, failing to look at the pre-1976 sovereign immunity law that the FSIA codified, and transferring the job of determining immunity back to the Executive Branch.[45] First, the *Yousuf* holding re-introduced uncertainty regarding foreign sovereign immunity law that Congress intended the FSIA to eradicate. The House Committee Report on the FSIA states that it was enacted because "[a]t present, there are no *comprehensive* provisions in our law available to inform parties when they can have recourse to the courts to assert a legal claim against a foreign state."[46] If government officials acting in their official capacity are not included in the FSIA, it is unclear whether or in what circumstances government officials have sovereign immunity. This lack of clarity is precisely what Congress intended to eliminate by enacting the FSIA, and what the Fourth Circuit reinstated with its interpretation of the statute.

Second, the court failed to recognize that the FSIA, when enacted, codified the existing common law of sovereign immunity, which—according to the Restatement (Second) of Foreign Relations Law—extended to the "head of state . . . [or] any other public minister, official, or agent of

38. *See* Sarah Wappett-Kendall, *4th Circuit Removes FSIA Hurdle to Most Torture Suits*, GEO. L. CENTER ON NAT'L SECURITY & L., Feb., 11, 2009, http://www.securitylawbrief.com/commentary/2009/02/4th-circuit-removes-fsia-hurdle-to-most-torture-suits.html.

39. *Velasco*, 370 F.3d at 399.

40. *Yousuf*, 552 F.3d at 379.

41. *See* United States v. Ferber, 966 F. Supp. 98, 100 (D. Mass. 1997).

42. *See id.*

43. *See* 28 U.S.C. § 1603(a) (2006) ("A 'foreign state' . . . includes . . . an agency or instrumentality of a foreign state . . . .")

44. *See Yousuf*, 552 F.3d at 378-79.

45. *See* H.R. REP. NO. 94-1487, at 1-2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605-06; *see also* Wappett-Kendall, *supra* note 38.

46. H.R. REP. NO. 94-1487, at 1 (emphasis added).

the state with respect to acts performed in his official capacity."[47] Since the FSIA was intended to codify the prevailing common law, it must include some individuals within its sweep.[48] Otherwise, the FSIA would not have codified, but seriously altered, preceding common law.[49] The *Yousuf* court itself recognizes that Samantar could "successfully invoke an immunity doctrine arising under pre-FSIA common law."[50] If the FSIA codified the pre-FSIA common law immunity doctrine, then why would Samantar need to go back to that same common law to find sovereign immunity?

Third, Congress intended that the FSIA "discontin[ue] the practice of judicial deference to suggestions of immunity from the executive branch;" interpretation of the FSIA is "a pure question of statutory construction."[51] By holding that the FSIA does not encompass individuals acting within the scope of their official duties, the court brings the Executive Branch back into the determination of sovereign immunity. Under the *Yousuf* holding, "Samantar and future defendants will have to rely on [pre-FSIA] 'common law immunities,'" meaning that immunity will be "subject to the opinion of the Executive Branch as articulated by the State Department as to whether [common-law] act of state or head of state immunity should apply."[52] This is contrary to the congressional intent that the FSIA "depoliticize sovereign immunity decisions."[53]

Further, the *Yousuf* holding will substantially increase suits in district courts. The *Yousuf* rule "will encourage more suits against properly immune defendants . . . and force them to litigate on the merits in order to avail themselves of common law immunities."[54] As the Fourth Circuit admitted, defendants such as Samantar and other foreign top officials may very well gain immunity under common law.[55] Therefore, excluding from the FSIA such individuals acting within the scope of their official duties does not serve to "punish" those who would otherwise evade justice, but rather serves only to clog federal district courts with civil litigation on the merits against defendants who likely have immunity through other avenues.

Even if individuals acting in their official capacities do have immunity under the FSIA, they are by no means escaping recompense for their wrongdoings. There are other means by which plaintiffs may reach these

47. Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1099-1100 (9th Cir. 1990); *see* H.R. REP. NO. 94-1487, at 2; RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 66 (1965).

48. *Chuidian*, 912 F.2d at 1101.

49. *Id.*

50. Yousuf v. Samantar, 552 F.3d 371, 383-84 (4th Cir. 2009).

51. H.R. REP. NO. 94-1487, at 6 (internal citations omitted); *see* Republic of Austria v. Altmann, 541 U.S. 677, 701 (2004) (internal citations omitted).

52. Wappett-Kendall, *supra* note 38.

53. Jack Alan Levy, *As Between* Princz *and King: Reassessing the Law of Foreign Sovereign Immunity as Applied to* Jus Cogens *Violators*, 86 GEO. L.J. 2703, 2709 (1998).

54. Wappett-Kendall, *supra* note 38.

55. *Yousuf*, 552 F.3d at 383-84.

defendants: courts may certainly conclude that government officials, by committing acts of torture, are not within the scope of their official state duties and are thereby unprotected under the FSIA.[56] Further, as the Second Circuit noted, "[d]eterrence (or punishment) does not begin and end with civil litigation" because "[o]ur government has other means at its disposal—sanctions, trade embargos, diplomacy, military action—to . . . deter (or punish) foreign sovereigns."[57]

In *Yousuf v. Samantar*, the Fourth Circuit should not have excluded individuals acting within the scope of their official duties from immunity under the FSIA, disregarding both its sister circuits and its own circuit's precedent. The Fourth Circuit ignored legislative history by clouding an area of law that the FSIA meant to clarify, by disregarding the common law that the FSIA codified, and by politicizing an area of law that Congress intended the FSIA to depoliticize.[58] By overlooking the key difference between individuals acting for personal reasons and those acting pursuant to official duties, the Fourth Circuit substantially departed from the legislative intent of the FSIA and will promote further litigation for defendants, who may already be immune under the common law and who should be forced to provide redress for their wrongdoings by alternative methods.[59] While individuals such as Samantar should indeed pay recompense to the civilians they harmed, excluding individuals acting within the scope of their official duties from the FSIA is not the proper avenue.

56. S. REP. NO. 102-249, at 7 (1991) (discussing the scope of liability under the TVPA and noting that "because 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").

57. *In re* Terrorist Attacks on Sept. 11, 2001, 538 F.3d 71, 90 (2d Cir. 2008).

58. *See* H.R. REP. NO., 94-1487, at 1-2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605-06; Wappett-Kendal, *supra* note 38.

59. *See* S. REP. NO. 102-249, at 7; *see also In re Terrorist Attack on Sept. 11, 2001*, 538 F.3d at 90.