SAMANTAR V. YOUSUF: A FALSE SUMMIT IN AMERICAN HUMAN RIGHTS CIVIL LITIGATION

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Abstract: The quest to bring human rights abusers to justice is a challenge wrought with legal obstacles. One such obstacle is the common law principle of sovereign immunity, under which a foreign nation cannot be sued in a court outside of its own jurisdiction. In 1976, Congress sought to eliminate inconsistent application of such immunity by passing the Foreign Sovereign Immunities Act (FSIA). The inconsistency remained, however, as some circuit courts interpreted the FSIA immunity as applying to both foreign government officials, as well as foreign states. The U.S. Supreme Court settled the issue in 2010 in *Samantar v. Yousuf,* a civil suit against a former Somali general charged with torture, when it held that FSIA immunity does not apply to foreign officials sued in their individual capacity. While some lauded the decision as a landmark in human rights litigation, such optimism appears misplaced. Because of the various avenues of common law immunity still available to foreign officials, the possibility that the precedent of *Samantar* will prove to be a valuable tool in bringing justice to abuse victims remains highly remote.

INTRODUCTION

On June 1, 2010, the U.S. Supreme Court issued a decision praised by human rights groups worldwide.[1] In *Samantar v. Yousuf,* the Court held that the Foreign Sovereign Immunities Act (FSIA) did not apply to individual foreign officials but only to foreign states.[2] The doctrine of sovereign immunity is a long-held common law principle that waives U.S. jurisdiction over the activities of foreign states, "extending virtually absolute immunity to foreign sovereigns as 'a matter of grace and comity.'"[3] In 1976 Congress passed the FSIA with the intent of codifying the

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[1] *See US Supreme Court Allows Suit to Proceed Against Former Somali Minister of Defense,* HUMAN RIGHTS WATCH (June 1, 2010), http://www.hrw.org/en/news/2010/06/01/us-supreme-court-allows-suit-proceed-against-former-somali-minister-defense.

[2] *See* Samantar v. Yousuf, 130 S. Ct. 2278, 2292 (2010).

[3] *Id.* at 2284. (quoting Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983)).

complicated application of common law sovereign immunity.[4] Before *Samantar,* federal courts were split over the extent of immunity offered under the FSIA, most notably whether the Act covered the actions of foreign officials acting within their official capacity.[5] By stripping foreign officials of FSIA immunity, it appeared that the Supreme Court had taken a major step towards ensuring that legal recourse would be available to those harmed by foreign government officials.[6] Human rights advocates worldwide lauded the decision as a landmark opportunity to bring justice to those who had suffered torture, persecution and other abuses at the hands of foreign officers.[7]

Although *Samantar* clarified the various district courts' interpretations of the FSIA, given the various other means of immunity still available to foreign officials the decision will likely have less of an impact than some have anticipated.[8] There are two obstacles that will prevent *Samantar* from significantly influencing suits against foreign officials.[9] First, the district courts will likely find that the common law extends immunity to foreign officials for acts performed within their official capacity.[10] Second, because the State Department has the power to make immunity determinations when the FSIA does not apply, only individuals of no strategic importance will be found liable under the *Samantar* ruling.[11]

Part I of this Comment examines the factual and procedural background of the *Samantar* case. Part II discusses the legal framework of sovereign immunity and the Supreme Court's opinion. Finally, Part III examines the potential impact of *Samantar* on sovereign immunity and human rights abuse litigation in America, paying particular attention to the remaining avenues of immunity available to government officials.

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[4] *See* Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 (2006); *Samantar,* 130 S. Ct. at 2285.

[5] *Compare* Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1103 (9th Cir. 1990) (holding that FSIA immunity extends to foreign officials acting within their official capacity), *with* Abiola v. Abubakar, 267 F. Supp. 2d 907, 915 (N.D. Ill. 2003) (holding that FSIA immunity does not extend to heads of state).

[6] *See US Supreme Court Allows Suit to Proceed Against Former Somali Minister of Defense, supra* note 1.

[7] *See, e.g., id.*

[8] *See Samantar,* 130 S. Ct. at 2292 (emphasizing the narrowness of the holding).

[9] *See id.* at 2290–91 (holding both that immunity of the foreign state can extend to official capacity actions and that Congress did not intend to eliminate State Department immunity determinations under the FSIA).

[10] *See Chuidian,* 912 F.2d at 1103.

[11] *See Samantar,* 130 S. Ct. at 2291 n.19; *see also* John Bellinger, *Ruling Burdens State Department,* Nat'l L.J., June 28, 2010, at 47 (stating that the Department of Defense will be reluctant to expose foreign defense ministers to liability).

I. Background

In October 1969, Major General Mohamed Siad Barre and the Supreme Revolutionary Council (SRC) assumed power in Somalia following a socialist coup.[12] Following the rise of Barre's dictatorship, Mohamed Ali Samantar served as Somalia's First Vice President and Minister of Defense from 1980–1986, and then as Prime Minister from 1987–1990.[13] During the 1970s and early 1980s, the SRC government began to discriminate and marginalize members of the Issaq clan, restricting their access to land, jobs and business opportunities.[14] In response, the Issaq launched a campaign of violent government resistance known as the Somali Nationalist Movement (SNM).[15] Clashes between the Barre regime and the SNM resulted in the Somali military, under Samantar's leadership, targeting Issaq civilians and subjecting them to various human rights abuses—including the massacre of tens of thousands of Issaq clan members, many of who were civilians.[16] The Barre regime collapsed in 1991 after the withdrawal of U.S. and international support, and Samantar eventually settled into civilian life in Virginia.[17]

The plaintiffs originally brought suit in November 2004 in the Eastern District of Virginia under the Torture Victim Protection Act and Alien Tort Statute.[18] In this civil action, they alleged that while serving as the Somali Minister of Defense, Samantar had commanded and controlled military forces that tortured, killed, or arbitrarily detained them or their family members.[19] After a lengthy inquiry, the district court dismissed the suit in 2007 for lack of subject matter jurisdiction, accepting the defense that the FSIA applied to Samantar for "acts he undertook on behalf of the Somali government."[20] The Fourth Circuit Court of Appeals reversed the district court's decision in 2009, holding that the FSIA did not apply to individuals—even those who had acted in an official capacity—and rejected the majority view among the dis-

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[12] *See Background Note: Somalia,* U.S. State Department (May 14, 2010), http://www.state.gov/r/pa/ei/bgn/2863.htm.

[13] *See* Yousuf v. Samantar, No. 1:04cv1360, 2007 WL 2220579, at *6 (E.D. Va. Aug. 1, 2007), *rev'd,* 532 F.3d 371 (4th Cir. 2009), *aff'd,* 130 S. Ct. 2278 (2009).

[14] *See* Richard H. Shultz, Jr., *State Disintegration and Ethnic Conflict: A Framework for Analysis,* 541 Annals Am. Acad. Pol. & Soc. Sci. 75, 85 (1995).

[15] *See id.*

[16] *See* Marc Michelson, *Somalia: The Painful Road to Reconciliation,* 40 Africa Today 53, 55 (1993).

[17] *See* Samantar v. Yousuf, 130 S. Ct. 2278, 2283 (2010).

[18] *See id.* at 2282–83.

[19] *See id.* at 2282.

[20] *Samantar,* 2007 WL 2220579 at *15.

trict courts that those individuals were immune from such lawsuits.[21] After remanding the case to the district court to determine whether common law immunity might be available to Samantar, the U.S. Supreme Court granted *certiorari* to address whether the FSIA provided immunity to individuals acting within their official capacity.[22] In a six-justice opinion, with a unanimous concurrence in the judgment, the Supreme Court held that under both the language and intent of the FSIA, immunity protections only extended to states themselves and did not extend to government officials.[23]

II. Discussion

Prior to 1976, the U.S. law governing sovereign immunity was a complicated patchwork of common law, executive branch authority, and realpolitik.[24] In *Schooner Exchange v. McFaddon,* the Supreme Court held that no statutory or common law granted U.S. jurisdiction over foreign sovereigns absent their express consent. [25] The scope of immunity established by *Schooner Exchange* eventually extended near-absolute immunity to friendly sovereigns upon recommendation by the State Department.[26] In the absence of such a recommendation, the district courts have the authority to decide whether sovereign immunity should apply.[27] The stated purpose of the FSIA was to codify a more restrictive policy of sovereign immunity and to transfer determinations of immunity from the State Department to the courts.[28]

The FSIA explicitly states that "a foreign state shall be immune from the jurisdiction of the courts of the United States."[29] Because the FSIA still operates under *Schooner Exchange*'s broad application of sovereign immunity, rather than codifying where immunity exists, it instead codifies the specific exceptions and waivers to sovereign immunity.[30] These exceptions embody the "restrictive" theory of immunity, granting

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[21] *See* Yousuf v. Samantar, 552 F.3d 371, 378, 381 (4th Cir. 2009), *aff'd,* 130 S. Ct. 2278 (2009).

[22] *See Samantar,* 130 S. Ct. at 2283–84.

[23] *See id.* at 2282, 2286.

[24] Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486–87 (1983).

[25] *See* Schooner Exchange v. McFaddon, 11 U.S. (1 Cranch) 116, 125 (1812).

[26] *See* Samantar v. Yousuf, 130 S. Ct. 2278, 2284 (2010).

[27] *See id.*

[28] *See* 28 U.S.C. § 1602 (2006) (declaring the purpose of the FSIA to be the placement of immunity determinations within the federal courts, with no sovereign immunity granted for commercial activity of foreign states).

[29] *See id.* § 1604.

[30] *See id.* § 1605.

jurisdiction over suits against foreign states that involve solely commercial activity, property loss, or tort claims that occurred in the United States.[31]

In 2008, Congress expanded the FSIA beyond such commercial concerns by including a terrorism exception to sovereign immunity.[32] Under this provision, foreign states designated as state sponsors of terrorism are subject to liability for "torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support . . . if such an act is engaged in by an official employee, or agent of such a foreign state while acting within the scope of his or her office."[33]

Even though the FSIA remains largely silent on offering immunity to individual officials of a foreign state, many district courts extended FSIA immunity to foreign officials who had been sued in their individual capacities.[34] In *Chuidian v. Philippine National Bank,* the Ninth Circuit Court of Appeals ruled that the FSIA provided immunity to a Philippine anti-corruption agent who was sued by a California resident for stopping payment on a potentially corrupt letter of credit.[35] The Ninth Circuit held that failure to apply immunity to government officials acting in their official capacity would simply allow "litigants to accomplish indirectly what the act barred them from doing directly."[36]

Nevertheless, not all courts were satisfied with the reasoning put forth in *Chuidian.*[37] In *Enahoro v. Abubakar,* the Seventh Circuit Court of Appeals upheld a district court's refusal to extend blanket FSIA immunity to foreign government officials pursuant to *Chuidian.*[38] The suit was factually similar to *Samantar,* and the court found that FSIA immunity was not available to the former military leader of Nigeria against allegations of wrongful death, torture, and abuse.[39] Contrary to *Chuidian,* the court held that the FSIA only applied to suits against foreign states themselves and did not grant immunity to former heads of

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[31] *See Samantar,* 130 S. Ct. at 2285.
[32] *See* 28 U.S.C. § 1605A(a)(1) (Supp. II 2008).
[33] *Id.*
[34] *See* Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1103 (9th Cir. 1990).
[35] *See id.* at 1106.
[36] *Id.* at 1102.
[37] *See, e.g.,* Enahoro v. Abubakar, 408 F.3d 877, 882 (7th Cir. 2005).
[38] *See id.*
[39] *See Samantar,* 130 S. Ct. at 2282; *Enahoro,* 408 F.3d at 879.

state.[40] It was these divergent interpretations and applications of sovereign immunity that the Supreme Court hoped to clarify in *Samantar.*[41]

Perhaps the most interesting aspect of *Samantar* was the unexpected alignment of parties that provided amicus briefs to the Court.[42] The U.S. government's brief encouraged the Court to rule that FSIA immunity does not apply to individuals and argued that any determinations of a foreign official's immunity remained the province of the Executive Branch.[43] Similarly, a coalition of Holocaust survivors and nonprofits dedicated to ending the crisis in Darfur also supported the plaintiffs' interpretation of the FSIA as excluding individual immunity.[44] These groups argued that the Supreme Court's decision must be consistent with the international legal principles established by the Nuremberg trials, which ensured that human rights violators could not "escape liability by hiding behind a cloak of sovereign immunity."[45] Ironically, there was also considerable support for Samantar's claim for immunity from both the American Jewish Congress and the Kingdom of Saudi Arabia.[46] Both parties supported Samantar's contention that the immunity of foreign officials must be preserved under the FSIA as a matter of established international law.[47] Because Israel and Saudi Arabia both face constant accusations of human rights abuses and war crimes, they likely felt that any other interpretation could expose visiting government officials to civil liability for such alleged acts in U.S. Courts.[48]

Justice Stevens' opinion, with which six other justices joined, provided a thorough examination of both the text of the FSIA as well as

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[40] *See Enahoro,* 408 F.3d at 881 (disagreeing with the interpretation of the FSIA in *Chuidian*).

[41] *See Samantar,* 130 S. Ct. at 2285.

[42] Jacob Victor, *Why Are Jewish Groups Backing a Somali War Criminal?*, Jewish Week (Mar. 18, 2010), http://www.thejewishweek.com/editorial_opinion/opinion/why_are_jewish_groups_backing_somali_war_criminal (describing the surprising makeup of parties that submitted *amicus* briefs in *Samantar*).

[43] *See* Brief for the United States as Amicus Curiae Supporting Affirmance at 7, *Samantar,* 130 S. Ct. 2278 (No 08–1555), 2010 WL 342031 at *6.

[44] *See* Brief of Amici Curiae Martin Weiss et al. in Support of Respondents at 1, *Samantar,* 130 S. Ct. 2278 (No. 08–1555), 2010 WL 342040, at *5–6.

[45] *See id.*

[46] *See* Brief for the Kingdom of Saudi Arabia as Amicus Curiae for Petitioner at 3, *Samantar,* 130 S. Ct. 2278 (No. 08–1555), 2009 WL 4693842, at *4; Amicus Curiae Brief of the American Jewish Congress in Support of Petitioner at 3, *Samantar,* 130 S. Ct. 2278 (No. 08–1555), 2009 WL 4709540, at *4.

[47] *See* Brief for the Kingdom of Saudi Arabia as Amicus Curiae for Petitioner at 3, *Samantar,* 130 S. Ct. 2278 (No. 08–1555); Amicus Curiae Brief of the American Jewish Congress in Support of Petitioner at 3, *Samantar,* 130 S. Ct. 2278 (No. 08–1555).

[48] *See* Victor, *supra* note 42.

the legislative intent in determining the extent of immunity provided by the Act.[49] The Court noted that the FSIA was intended to embody the "restrictive theory" of sovereign immunity, which did not provide immunity to foreign governments in suits that were strictly commercial in nature.[50] As a result, the language of the FSIA is also distinctly commercial in its terminology.[51] While the FSIA applies immunity to "any agency or instrumentality" of a foreign government, because Congress chose to employ corporate terminology, using words such as "entity" and "separate legal person," the Court viewed such language as restricting the immunity to only government entities rather than individuals.[52]

Furthermore, the Supreme Court explained that there was no Congressional intent to apply FSIA to individuals with its enactment.[53] Because the stated purpose of the FSIA was to codify immunity in a modern world where foreign states act as everyday market participants, the Supreme Court was unwilling to apply the *Chuidian* interpretation that also extends immunity to individual officials.[54]

The Court also stated that the Ninth Circuit's fears of "artful pleading[s]"—creating an avenue around the immunity principles the FSIA aimed to enforce—were unfounded.[55] While the FSIA does not expressly bar suits against foreign officials, the Court noted that the Federal Rules of Civil Procedure, as well as common law principles of immunity, remain in place to dismiss many such actions.[56] Because a state would likely be a necessary party in a suit against a foreign officer for his or her official actions, Federal Rule of Civil Procedure 19(b) would require dismissal if FSIA immunity rendered that state party unavailable.[57] Similarly, even if a state is not a required party, common law immunity may still be available to government officials regardless of the application of the FSIA.[58] While the Supreme Court remanded the case to the district court for determination of the availability of common law immunity to Samantar, it refused to address the question in its opin-

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[49] *See Samantar,* 130 S. Ct. at 2292.

[50] *Id.* at 2285.

[51] *See* 28 U.S.C. § 1603(b) (using corporate language such as "separate legal person" to define an "agency and instrumentality of a foreign state"); *see also Samantar,* 130 S. Ct. at 2286.

[52] *See Samantar,* 130 S. Ct. at 2287 (stating that even if the list in § 1603 is merely illustrative, a "foreign state" cannot include its officials, because the types of defendants listed are all entities).

[53] *Id.* at 2289.

[54] *See id.* at 2291.

[55] *Id.* at 2292.

[56] *See* FED. R. CIV. P. 19(1)(b); *Samantar,* 130 S. Ct. at 2292.

[57] *Samantar,* 130 S. Ct. 2292.

[58] *See id.*

ion.[59] The Court did, however, make mention of the historic, common law role of the government in suggesting immunity for foreign officials.[60] Finally, the Court also noted that the challenge of gaining personal jurisdiction over a foreign official still poses a significant barrier to such suits, even if FSIA immunity does not apply.[61]

III. Analysis

In *Samantar,* the Supreme Court unanimously held that government officials do not qualify for sovereign immunity as "foreign state[s]" under the FSIA.[62] The Court did, however, acknowledge the potential availability of common law sovereign immunity to foreign officials.[63] While *Samantar* helped to clarify the scope of the FSIA, the common law offers considerable immunity to foreign officials, either for acts performed in an "official capacity" or upon a recommendation by the State Department.[64] Because these avenues of immunity remain available, the *Samantar* holding simply represents a narrowed interpretation of the FSIA, rather than a meaningful change in the law that will help bring human rights abusers to justice.[65]

While the Supreme Court declined to address the issue in *Samantar,* recent circuit court opinions indicate that the common law immunity available to foreign officials is extensive.[66] In a recent case, *Abi Jaoudi & Azar Trading Corp. v. Cigna Worldwide Insurance Co.*, the Third Circuit Court of Appeals followed *Samantar* and remanded the case for a determination of any common law immunity available to the Insurance Commissioner of Liberia from a contempt finding against him.[67] In its opinion, the Third Circuit referenced *Samantar*'s language that there may be a possible connection "between the FSIA analysis in [those circuit courts that granted FSIA immunity to foreign officials] and the

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[59] *See id.* at 2290 n.15.

[60] *See id.* at 2290 (describing the historic practice of the government suggesting immunity for individuals, even when the foreign state did not qualify).

[61] *See id.* at 2292–93.

[62] Samantar v. Yousuf, 130 S. Ct. 2278, 2286 (2010).

[63] *See id.* at 2293.

[64] *See id.* at 2290–91 (stating that in some circumstances the immunity of the foreign state extends to official capacity actions); *see also* Jennifer Elsea, Cong. Research Serv., R41379, *Samantar v. Yousef*: The Foreign Sovereign Immunities Act and Foreign Officials 12 (2010) (stating that *Samantar* likely allows for the Executive Branch to dictate immunity in foreign relations matters).

[65] *See Samantar,* 130 S. Ct. at 2292 (emphasizing the narrowness of the holding).

[66] *See* Abi Jaoudi & Azar Trading Corp. v. Cigna Worldwide Ins. Co., Nos. 09–1297, 09–1298, 2010 WL 3279173, at *5 (3d Cir. Aug. 20, 2010).

[67] *See id.* at *1.

common law immunity inquiry."[68] The FSIA analysis the court refers to involves the application of FSIA immunity to instances where a foreign official acts within his or her "official capacity."[69] Under this analysis, the district courts were so protective of sovereign immunity that they even included official acts committed in violation of *jus cogens*[70]—principles of international law, such as torture and extra-judicial killings.[71] Therefore, should this official capacity test have any bearing on common law immunity determinations, as the Third Circuit suggests, it is unlikely that foreign officials will more readily face liability for their official actions, including human rights abuses.[72] This is especially true given the extra immunity protection the common law affords to a foreign state's military actions.[73]

There is a great deal of both domestic and international support for the contention that common law immunity extends to a foreign officer's official acts. The American Law Institute's Restatement (Second) of Foreign Relations Law in the United States § 66 states that "immunity of a foreign state . . . extends to . . . any other 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."[74] Should the district courts apply the view of the Restatement in their common law inquiry, foreign officials will likely remain immune from suits regarding actions taken by them in their governmental capacity.[75] While the Supreme Court declined to consider the authority of the Restatement on this issue, such authority may factor into common law immunity considerations.[76]

The 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property also indicates that international com-

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[68] *Id.* at *5 n.5.

[69] *See Samantar,* 130 S. Ct. at 2291 n.17.

[70] *Black's Law Dictionary* defines *jus cogens* as "[a] mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted." Black's Law Dictionary 937 (9th ed. 2009).

[71] *See* Hazel Fox, The Law of State Immunity 336 (2d ed. 2008).

[72] *See id.*

[73] *See* Victory Transp. v. Comisaria Gen., 336 F.2d 354, 360 (2d Cir. 1964) (describing "acts concerning the armed forces" as a category of activity generally requiring sovereign immunity).

[74] *See* Restatement (Second) of Foreign Relations Law § 66 (1962).

[75] *See id.*

[76] *See Samantar,* 130 S. Ct. at 2290.

mon law extends immunity to an individual's official acts.[77] The Convention, which, like the FSIA, codifies the "restrictive theory" of immunity, specifically defines a "State" as including "representatives of the State acting in that capacity."[78] In this regard, the Convention reflects classic international sovereign immunity principles, imputing any act of a foreign official as an act of the state "who alone is responsible for its consequence."[79] While the Convention is not yet in force, and U.S. courts are not obligated to follow it, it nonetheless indicates considerable international consensus that sovereign immunity extends to official capacity actions.[80] It does remain unclear, however, whether violations of controversial *jus cogens* principles of international law, such as torture and extrajudicial killings, will override immunity considerations.[81] Recent decisions indicate that in civil proceedings for such crimes, requiring the exhaustion of local remedies remains the preferred means of disposal, which could leave many of these cases outside of U.S. courts.[82] Therefore, given the prominence of official capacity immunity in both U.S. and international law, it seems that *Samantar* will do little to make justice more accessible to victims of acts committed by foreign officials within the scope of their government duties.[83]

Even if the district courts do not find sovereign immunity under an official capacity application, the traditional role of the State Department in making immunity recommendations still limits the significance of the *Samantar* holding.[84] Although the FSIA was intended to shift state immunity determinations away from the Executive, the common law still provides for input from the Executive Branch in determining immunity of individuals.[85] Therefore, under *Samantar,* diplomatic and strategic concerns will still play a role in the application of

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[77] *See* United Nations Convention on Jurisdictional Immunities of States and Their Property part I art. 2, Dec. 2, 2004, 44 I.L.M. 803 (requiring that a representative of a state acting in his or her official capacity be incorporated into the definition of a state).

[78] *Id.*

[79] *See* Fox, *supra* note 71, at 455.

[80] *See id.* at 35 (stating that the U.N. convention on Jurisdictional Immunities of States and their Property codifies the restrictive theory of immunity in international law, providing immunity for official public actions).

[81] *See id.* at 156.

[82] *See id.*

[83] *See* Elsea, *supra* note 64, at 11; Fox, *supra* note 71, at 156.

[84] *See Samantar,* 130 S. Ct. at 2291 n.19.

[85] *See* Elsea, *supra* note 64, at 12 (stating that under common law the courts should defer to the Executive Branch's immunity recommendations because of foreign relations implications); *see also Samantar,* 130 S. Ct. at 2292 (stating that the FSIA was never intended to supersede the common law of foreign official immunity).

immunity to individual foreign agents.[86] While the State Department declined to intervene in the case of Mohamed Ali Samantar, an aging relic of failed U.S. foreign policy, the courts are still likely to defer to any Executive requests for immunity.[87]

In *Belhas v. Ya'alon,* the D.C. District Court applied FSIA immunity to a suit against Moshe Ya'alon, the former head of Israeli Army Intelligence, for war crimes against Lebanese civilians in the 1996 shelling of Qana.[88] While *Samantar* would have rendered FSIA immunity unavailable to Ya'alon individually, Israel's status as a close military ally would have likely encouraged the Executive Branch to intervene and ensure Ya'alon's immunity under its common law role.[89] In order for *Samantar* to require that a human rights abuser be held accountable in U.S. courts, the Executive Branch must also deem that individual unworthy of diplomatic intervention.[90] Because human rights abuses often occur in countries closely allied with the United States, any foreign officials sued for such abuses are more likely to be granted immunity by the State Department.[91] While Samantar may be of little concern to the State Department, the Executive Branch has recently demonstrated that it is willing to intervene in suits against diplomatically important individuals, such as members of the Saudi royal family.[92] While *Samantar* does strip individual human rights abusers of FSIA immunity, because the Executive Branch still possesses the power to make immunity recommendations under the common law, it seems unlikely that *Sa-*

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[86] *See* Bellinger, *supra* note 11, at 47.

[87] *See* Yousuf v. Samantar, No. 1:04cv1360, 2007 WL 2220579, at *6 (E.D. Va. Aug. 1, 2007), *rev'd,* 532 F.3d 371 (4th Cir. 2009), *aff'd,* 130 S. Ct. 2278 (2009); Elsea, *supra* note 64, at 12; Bellinger, *supra* note 11, at 47.

[88] See Belhas v. Ya'alon, 515 F.3d 1279, 1281, 1284 (D.C. Cir. 2007).

[89] *See* Bellinger, *supra* note 11, at 47(describing other presidential requests for immunity, such as for Israeli intelligence chief Avi Dichter for alleged war crimes).

[90] *See* Elsea, *supra* note 64, at 12 (describing the deference owed to the Executive Branch in immunity considerations); Bellinger, *supra* note 11, at 47 (describing the balance of diplomatic interests required by the State Department in making immunity recommendations).

[91] *See* Bellinger, *supra* note 11, at 47; Todd S. Purdum, *U.S. Report Criticizes Allies in Anti-terror Campaign for Human Rights Abuses,* N.Y. Times, Mar. 5, 2002, at A14, *available at* http://query.nytimes.com/gst/fullpage.html?res=980CE5DC1730F936A35750C0A9649C8B63.

[92] *See, e.g.,* Eric Lichtblau, *Justice Dept. Backs Saudi Royal Family on 9/11 Lawsuit,* N.Y. Times, May 29, 2009, at A9, *available at* http://www.nytimes.com/2009/05/30/us/politics/30families.html (stating that the Justice Department requested immunity based on "potentially significant foreign relations consequences").

mantar will profoundly increase the accountability of human rights abusers in U.S. courts.[93]

Conclusion

In *Samantar,* the Supreme Court sought to correct conflicting methods of application of a federal immunity statute. In doing so, the Court defined the appropriate scope of the FSIA and ensured a more consistent application of the sovereign immunity doctrine in the district courts. However, while the FSIA may no longer offer immunity to foreign officials individually, the *Samantar* ruling will do little to lessen the challenge of bringing justice to the victims of human rights abuses in U.S. courts. *Samantar* is hardly effective in ensuring that human rights abusers can no longer escape liability for their reprehensible actions, due to the avenues of common law immunity still available to foreign officials. Rather, *Samantar* simply clarified the means that would-be defendants must use to continue to escape liability. In instances where the officials responsible committed abuses within their official capacity and remain diplomatically important to U.S. interests, the prospects of justice for victims of such abuse remain as illusory as they were under the previous application of FSIA immunity.

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[93] *See Samantar,* 130 S. Ct. at 2292; Elsea, *supra* note 64, at 11; Bellinger, *supra* note 11, at 47; *see also* Lichtblau, *supra* note 92.