# RECENT DEVELOPMENT

## *Yousuf v. Samantar*: Establishing the Judicial Firewall in Common Law Individual Foreign Sovereign Immunity Determinations



### I. OVERVIEW

Left with a seemingly incomplete answer from the United States Supreme Court, the United States Court of Appeals for the Fourth Circuit heard for the second time in three years the question of whether Mohamed Ali Samantar was entitled to immunity from suit under the Torture Victim Protection Act of 1991 (TVPA) and the Alien Tort Statute (ATS).[1] The Fourth Circuit's original conclusion that the Foreign Sovereign Immunities Act (FSIA) did not apply to Samantar's claims of immunity was affirmed, but the question of whether Samantar was entitled to immunity under common law had been left unanswered and remanded to the district court.[2] Without the protections of the FSIA, Samantar renewed his motion to dismiss based on two common law immunity doctrines: head-of-state immunity and foreign-official immunity.[3]

At the district level, the United States Department of State took the opportunity to submit a Statement of Interest (SOI) with the court,

1. Yousuf v. Samantar (*Samantar V*), 699 F.3d 763, 766 (4th Cir. 2012). Mohamed Ali Samantar served as the First Vice President and Minister of Defense of Somalia from 1980 to 1986 and as the Prime Minister from 1986 to 1990 under the government of the Supreme Revolutionary Council. Members of the Isaaq Clan, a prosperous community based out of Somaliland, asserted claims against Samantar including torture, murder, war crimes, and crimes against humanity under the TVPA and ATS. Specifically, the plaintiffs asserted that Samantar, in his capacity as a high-ranking official, was knowingly responsible for the extrajudicial killing of the plaintiffs' relatives during an attack on the city of Hargesia, Somalia. Yousuf v. Samantar (*Samantar I*), No. 05-110(RBW), 2005 WL 1523385, at *1 n.3 (D.D.C. May 3, 2005), *rev'd and remanded*, 451 F.3d 248 (D.C. Cir. 2006).

2. Samantar v. Yousuf (*Samantar III*), 130 S. Ct. 2278, 2293 (2010).

3. *Samantar V*, 699 F.3d at 768.

concluding that Samantar should not be entitled to immunity from the plaintiffs' lawsuit.[4] The district court agreed and rejected Samantar's claims of immunity, denying his motion to dismiss.[5] Samantar immediately appealed, contending that the court incorrectly adopted the State Department's position as a matter of absolute deference and that he was due immunity for actions conducted in his capacity as a foreign government official.[6] The Fourth Circuit held that (1) in determining common law inquiries of individual foreign sovereign immunity, the State Department's determinations as to status-based immunity (head-of-state immunity) are entitled to absolute deference, but State Department determinations as to conduct-based immunity (foreign-official immunity) are only entitled to substantial weight; and (2) in cases of *jus cogens* violations, conduct-based immunity is unavailable for foreign officials acting on behalf of a foreign sovereign. Yousuf v. Samantar (*Samantar V*), 699 F.3d 763 (4th Cir. 2012).

## II. BACKGROUND

The relationship between the Executive and Judicial Branches in determinations of foreign sovereign immunity has a long and developed history in the common law of the United States, established as a part of the principle of comity to other sovereigns.[7] In the nineteenth century case *Schooner Exchange v. McFaddon*, "Chief Justice Marshall concluded that . . . the United States had impliedly waived jurisdiction over certain activities of foreign sovereigns,"[8] which has been interpreted by successive courts as essentially granting absolute immunity to all foreign states.[9] Subsequent decisions followed the absolute immunity doctrine established in *Schooner Exchange* for more than a century and a half, deferring to the decisions of the Executive Branch as a matter of

4. *Id.* at 767. The State Department submitted an SOI to the district court, taking the position that immunity should be denied because Samantar was a former official of a government that the United States no longer recognized as the official government of Somalia, and his permanent status as a legal resident of the United States should subject him to the jurisdiction of U.S. courts. The State Department also took the position that its determinations were binding on the court. *Id.*

5. *Id.* at 768.

6. *Id.*

7. *Samantar III*, 130 S. Ct. at 2284.

8. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1985) (quoting Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116 (1812)).

9. *See id.*; *Samantar III*, 130 S. Ct. at 2284.

grace and comity.[10] With few exceptions, the State Department normally requested immunity in all actions against friendly foreign sovereigns.[11]

During this absolute immunity period of foreign sovereign immunity, a two-step procedure developed for resolving a foreign state's claim of immunity that relied on both the Executive Branch and the courts.[12] If the State Department issued an SOI in a case of foreign-state immunity, then the district court would defer to the determinations within the SOI.[13] However, if the State Department declined the request or was silent on the matter, the district court would independently decide the matter.[14]

It was not until 1952 that the practice of absolute immunity was abandoned in favor of the restrictive form of sovereign immunity, a practice more consistent with the prevailing trends in international law at the time.[15] Although the restrictive theory was a significant shift in policy, the change itself had little effect on the federal approach to immunity analysis, with the State Department continuing to play a primary role in the outcome of immunity determinations.[16] However, the restrictive theory of immunity proved difficult to apply consistently by the State Department due to the diplomatic pressures involved, prompting Congress in 1976 to codify the restrictive theory within the FSIA.[17] Since the enactment of the FSIA, the statute has, without question, governed cases of sovereign immunity as applied to foreign states.[18] Until very recently, however, the question as to precisely how the enactment of the FSIA affected claims of foreign sovereign immunity as applied to individuals was left largely unresolved, leaving the role of the State Department in such determinations unresolved as well.[19]

A key question that persisted to plague the courts was whether the FSIA's codification of the restrictive theory of sovereign immunity

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10. *See Verlinden*, 461 U.S. at 486.
11. *Id.*
12. *Samantar III*, 130 S. Ct. at 2284.
13. *Id.*
14. *Id.*
15. Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1099 (9th Cir. 1990). Under the restrictive theory, immunity is confined to suits involving actions considered as a part of its exclusive role as the sovereign and does not extend to the sovereign's strictly commercial acts or private acts. *Verlinden*, 461 U.S. at 487.
16. *Verlinden*, 461 U.S. at 486.
17. Yousuf v. Samantar (*Samantar II*), 552 F.3d 371, 377 (4th Cir. 2009). The State Department's adoption of the restrictive theory of immunity provided the opportunity for foreign nations to place diplomatic pressure on the Executive Branch, sometimes forcing the State Department to file suggestions of immunity where it otherwise would not have. *Id.*
18. *Samantar III*, 130 S. Ct. at 2285.
19. *Id.* at 2293; *see also Chuidian*, 912 F.2d at 1102.

extended to individual foreign sovereign immunity claims and, if not, whether common law immunity could be available for such claims.[20] The Supreme Court addressed this issue directly in *Samantar v. Yousuf* (*Samantar III*), holding that the construction of the FSIA does not extend to cases of individual foreign sovereign immunity and implicitly holding that the common law governs such cases by leaving open the possibility that the defendant may be entitled to common law immunity.[21] What this common law analysis would entail was left almost completely undetermined.[22]

When the Supreme Court first heard the case, the issue of the applicability of the FSIA was not immediately obvious.[23] Up until that point in time, the jurisprudential landscape of the U.S. courts of appeals had been divided between those in the majority view and those in the minority view.[24] In *Chuidian v. Philippine National Bank*, the leading case of the majority view, the United States Court of Appeals for the Ninth Circuit reasoned that the language within the statute, specifically the use of "legal person" within the definition of "agency or instrumentality," did not necessarily exclude natural persons within its meaning and that legislative history showed no evidence that Congress intended otherwise.[25] Furthermore, the court felt that leaving natural persons outside of the scope of the FSIA deprived the statute of much of its force and purpose because the State Department would remain the conclusive arbiter on common law determinations.[26] In short, the Ninth Circuit found the FSIA to be ambiguous on the matter and concluded, as a matter of judicial policy, that its application should not be limited on the basis of ambiguous evidence.[27]

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20. *See* Ye v. Zemin, 383 F.3d 620, 627 (7th Cir. 2004); *In re* Terrorist Attacks on Sept. 11, 2001, 538 F.3d 71, 83 (2d Cir. 2008).

21. 130 S. Ct. at 2289 n.12. The Court concluded, "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." *Id.* at 2289. Footnote 12 explained, in contrast to the reasoning in *Chuidian*, the legislative history did in fact show evidence that individual officials were excluded from the scope of the statute. *Id.*; *Chuidian*, 912 F.2d at 1101.

22. *Samantar III*, 130 S. Ct. at 2293.

23. *Id.* at 2285; *Samantar II*, 552 F.3d 371, 378 (4th Cir. 2009).

24. *Samantar II*, 552 F.3d at 378; *see, e.g.*, *Chuidian*, 912 F.2d 1095 (majority view); *Ye*, 383 F.3d 620 (minority view).

25. 912 F.2d at 1101.

26. *See id.* at 1102. The Ninth Circuit held the view that a suit against an individual in his official capacity was generally recognized as the practical equivalent of a suit against the sovereign directly. Thus, through artful pleading, a plaintiff could effectively bring suit against a sovereign and benefit from conclusive determinations by the State Department grounded more in diplomatic realities than the letter of the law. *See id.*

27. *Id.* (referencing Foreign Sovereign Immunities Act, 28 U.S.C. § 1603 (b)(1) (2006)).

The pre-*Samantar III* views held by the majority were not unanimously shared among the circuit courts.[28] In one particularly significant opinion that helped develop the minority view, the United States Court of Appeals for the Seventh Circuit found in *Ye v. Zemin* that all natural persons could not be covered by the FSIA because the statute does not address the immunity of foreign heads of state.[29] In footnote 7 of the opinion, the court makes a point to highlight that the FSIA does not recognize the classical concept that a head of state is the embodiment of the state itself.[30] The court held that because the FSIA does not mention heads of state, "the decision concerning the immunity of foreign heads of states remains vested where it was prior to 1976—with the Executive Branch."[31] Therefore, the pre-FSIA common law must apply in at least one instance, with the Executive Branch retaining its prerogative to decide highly political foreign policy determinations of who is entitled to head-of-state immunity.[32]

Thus, on the eve of the Supreme Court's *Samantar III* decision, there stood two primary schools of thought regarding the FSIA's applicability to foreign individuals: courts that followed the *Chuidian* reasoning that the FSIA's purpose could only be fulfilled by relieving the Executive Branch of individual foreign sovereign immunity determinations,[33] and those in the minority view that reasoned that the inconsistencies and omissions in the express language of the FSIA called for judicial restraint on expanding its applicability.[34] After the Supreme Court's *Samantar III* decision, the minority view that the common law, not the FSIA, governed individual foreign sovereign immunity clearly won out.[35]

Upon remand, however, questions remained concerning how the courts should carry out the Supreme Court's *Samantar III* decision. The

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28. *See Ye*, 383 F.3d at 625.

29. *Id.*

30. *Id.* at 625 n.7. *But see In re* Terrorist Attacks on Sept. 11, 2001, 538 F.3d 71, 81, 83-84 (2d Cir. 2008). In *In re Terrorist Attacks*, the United States Court of Appeals for the Second Circuit did not distinguish between head-of-state immunity or foreign-official immunity, but instead assumed that all sovereign immunities were governed under the same common law principles before the FSIA was enacted. *See* 538 F.3d at 83 ("Moreover, the FSIA's 'legislative history' does not even hint of an intent to exclude individual officials; but does contain 'numerous statements [suggesting] that Congress intended the Act to codify the existing common law principles of sovereign immunity.'").

31. *Ye*, 383 F.3d at 625.

32. *Id.*

33. *See* Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1102 (9th Cir. 1980); *In re Terrorist Attacks*, 538 F.3d at 81.

34. *See Ye*, 383 F.3d. at 625.

35. *Samantar III*, 130 S. Ct. 2278, 2292 (2010).

district court appeared to rely on the State Department's SOI, without any further reasoning or explanation, in its denial of Samantar's motion to dismiss.[36] On appeal, Samantar contended that the district court inappropriately deferred to the State Department's determinations and renewed his claim of immunity for his actions as a foreign government official.[37] Thus, it was left to the Fourth Circuit to make sense of the Supreme Court's decision and to give texture to the standards that would be applied in common law individual foreign sovereign immunity determinations in post-*Samantar III* jurisprudence.

## III. THE COURT'S DECISION

In the noted case, the Fourth Circuit relied on the principles articulated in *Ye* to establish a common law standard for individual foreign sovereign immunity that distinguishes between the Executive Branch's authority to make conclusive determinations for status-based immunity and its authority to make nonconclusive determinations for conduct-based immunity.[38] Furthermore, upon determining that the State Department's position is not controlling for conduct-based immunity under the common law, the court applied principles of international law to hold that conduct-based immunity cannot be provided in cases of *jus cogens* violations.[39] In cases of head-of-state immunity, the predominant type of status-based immunity, the Executive Branch derives its authority from the constitutional assignment to "receive Ambassadors and other public Ministers" and its implicit authority to recognize the status of certain individuals as heads of state.[40] In contrast, the Executive Branch does not have an equivalent constitutional basis by which to assert its views conclusively on conduct-based immunity, but the contextual

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36. Yousuf v. Samantar (*Samantar IV*), No. 1:04CV1360(LMB/JFA), 2011 WL 7445583, at *1 (E.D. Va. Feb. 15, 2011).

37. *Samantar V*, 699 F.3d 763, 768 (4th Cir. 2012).

38. *Id.* at 772-73. The Fourth Circuit further explained the difference between status-based and conduct-based immunity:

> [C]ustomary international law has long distinguished between status-based immunity afforded to sitting heads-of-states 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." [Conduct-based] 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.

*Id.* at 774 (citations omitted) (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 464, report n.4 (1987)).

39. *Id.* at 777.

40. *Id.* at 772.

considerations of international law and foreign policy give substantial weight to these views nonetheless.[41] However, even if conduct-based immunity may otherwise be available, such immunity is unavailable for foreign officials in cases of *jus cogens* crimes as a matter of international and domestic law, because *jus cogens* violations cannot be regarded as recognized acts of a sovereign.[42]

From the outset, the Fourth Circuit reaffirmed that the State Department's role as the primary decision maker had not been displaced in cases of individual foreign sovereign immunity because the FSIA does not apply to individuals and had left the old common law regime untouched.[43] Furthermore, "the [c]ourt 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."[44] The court concluded that because it was clear the common law continues to govern individual foreign sovereign immunity, the remaining issue to be determined was whether the Judiciary was obligated to defer to the Executive Branch's immunity determinations and, if not, what weight such determinations should be afforded.[45]

In deciding the appropriate level of deference courts should give the State Department regarding case-specific questions of individual foreign sovereign immunity, the court emphasized the history behind foreign sovereign immunity and its basis in the principles of comity and reciprocity between sovereign nations.[46] The court went on to make a distinction between cases of status-based immunity, such as head-of-state or diplomatic immunity, and the rare cases of conduct-based immunity, such as foreign-official or official-acts immunity.[47] For status-based immunity under the common law, the Executive Branch has an implicit right derived from the United States Constitution to recognize heads of states.[48] The Executive Branch is essentially exercising its ability to recognize heads of states in these determinations and, therefore, must be afforded absolute deference by the Judiciary.[49] Because the State Department had expressed that head-of-state immunity was not

41. *Id.* at 773.
42. *Id.* at 776.
43. *Id.* at 768.
44. *Id.* (quoting *Samantar III*, 130 S. Ct. 2278, 2291 (2010)).
45. *Id.*
46. *Id.* at 770.
47. *Id.* at 772.
48. *Id.*
49. Ye v. Zemin, 383 F.3d 620, 626 (7th Cir. 2004).

warranted and should be denied, the court deferred to the Executive's determination and denied head-of-state immunity for Samantar.[50]

Foreign-official immunity, on the other hand, does not implicate a constitutional right by which the State Department can make conclusory determinations.[51] Nonetheless, the sensitive nature of the issue necessitates the consideration of the practical consequences that any decision to grant or deny immunity may have, particularly in light of customary international law and foreign policy.[52] Because decisions concerning conduct-based immunity have immediate consequences between the foreign relations of nations, the State Department's expertise affords it substantial weight, but is not controlling, in such determinations.[53] The court held that the State Department may inform the court of "the general assessment of a case's impact on the foreign relations of the United States,"[54] but it is the Judicial Branch's prerogative to make foreign-official immunity determinations.[55]

The court, in determining whether Samantar was entitled to foreign-official immunity under the common law, first inquired whether the acts in question were performed within the scope of his duty as a government official, and were not private acts, such that the suit against those acts was properly considered a suit against the sovereign.[56] The plaintiffs argued that Samantar could not claim foreign-official immunity because his acts constituted *jus cogens* crimes, which violated peremptory norms of general international law.[57] The Fourth Circuit agreed, concluding that *jus cogens* crimes cannot be attributed to the sovereign as official acts of a government agent.[58] The court did note, however, that *jus cogens* violations could not serve as a bar against status-based immunity because of the de jure position a head of state holds in relation to a sovereign.[59] Taking into consideration the State Department's SOI and the alleged *jus*

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50. *Samantar V*, 699 F.3d at 773.

51. *Id.* ("[Cases of foreign-official] immunity 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.").

52. *Id.* (citing Sosa v. Alvarez-Machan, 542 U.S. 692, 733 n.12 (2004)).

53. *Id.*

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

55. *Id.*

56. *Id.* at 775.

57. *Id.* ("A *jus cogens* norm, also known as a peremptory norm of general international law, can be defined as a norm accepted by the international community of States as a whole as a norm from which no derogation is permitted . . . ." (citation omitted)).

58. *Id.* at 777.

59. *Id.* at 776.

*cogens* violations, the court denied Samantar conduct-based immunity on the basis of its own findings.[60]

The Fourth Circuit, being satisfied that the defendant was entitled to neither head-of-state immunity nor foreign-official immunity, affirmed the district court's denial of Samantar's motion to dismiss.[61]

## IV. ANALYSIS

Though certainly a conservative opinion on its own, the approach taken by the Fourth Circuit in the noted case reflects something of a practical endgame to a journey that was started in 2010 with the decision that the FSIA did not apply to individual foreign sovereign immunity.[62] The decision quietly continued where *Ye* left off and produced a coherent solution to the problems brought up in *Chuidian*, a case whose reasoning was, in a way, more attention-grabbing.[63] *Ye* subtly pointed out that though *Chuidian* could find no reason that foreign officials should not be included, there was no clear way that heads of state could be covered under the FSIA in the manner that *Chuidian* had found sovereign officials were covered under the FSIA.[64] The language within the FSIA just was not vague enough.[65] The Fourth Circuit also recognized it made sense to clearly distinguish heads of state from foreign sovereign officials, making immunity determinations for the former an exercise of Executive government recognition, and making determinations nonbinding for the latter.[66] By doing so, *Chuidian*'s artful pleading and forum-shopping problems do not seem that worrisome anymore.[67]

An important aspect of the court's opinion is that the policy choices within the decision have the opportunity to be effective and pragmatic. In *Sosa v. Alvarez-Machain*, the Supreme Court cautioned against inferring intent to provide private rights of action where a statute does not

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60. *Id.* at 778.
61. *Id.*
62. *Samantar III*, 130 S. Ct. 2278 (2010).
63. *See* Ye v. Zemin, 383 F.3d. 624, 625 (7th Cir. 2004). *But see* Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1102 (9th Cir. 1990) (concluding that reading congressional intention as excluding natural persons from the FSIA would amount to "a blanket abrogation of foreign sovereign immunity by allowing litigants to accomplish indirectly what the Act barred them from doing directly").
64. *Ye*, 383 F.3d. at 625.
65. *Id.*
66. *Samantar V*, 699 F.3d at 774.
67. *See* 912 F.2d at 1102 (noting that if a litigant is doubtful of his adversary's diplomatic influence, the litigant will choose to bring claims against the official directly to secure the State Department's support).

supply one expressly.[68] In seeing the statute through the looking glass of *Verlinden*, the FSIA actually takes away a foreign policy determination and governs the types of actions that foreign sovereigns may rigidly be held liable for under the statute.[69] By keeping individual foreign sovereign immunity under the determinations of both the State Department and the Judiciary, highly contentious political suits may be avoided because a clear and determined path for litigation becomes less certain when both the Executive and Judicial Branches are involved.

Furthermore, it is worth noting that the court's decision strengthened the alignment between U.S. sovereign immunities law and prevailing customary international law.[70] Though the court cited Congress's enactment of the TVPA as an explicit recognition that "a violation of the international law of human rights [regarding torture] is *ipso facto* a violation of U.S. domestic law," the court first recognized the more recent trends of foreign national courts' willingness to deny "[foreign-official] immunity in the criminal context for alleged *jus cogens* violations" as instructive.[71] The court's holding not only established the standard and procedure by which future courts would decide cases of individual foreign sovereign immunity, but it also made the point to underline the operative importance of recognizing customary international law as incorporated within the law of the United States[72] and being mindful of these important international trends.

Finally, the opinions made by the Fourth Circuit in the 2009 case and in the noted case both stand as excellent examples of judicial restraint prevailing over second-guessing legislative intent to create a pragmatic, workable legal framework. These decisions were much in line with the general policy reasoning of *Doe v. Bin Laden*.[73] In *Doe*, the United States Court of Appeals for the Second Circuit was asked to resolve whether the addition of the terrorism exception to the FSIA worked to amend the statute in a way to make the terrorism exception and the noncommercial tort exception mutually exclusive, despite the clear existence of circumstances where both could be read to apply.[74] The Second Circuit found, analogous in principle with the noted case, that amending and repealing by implication should be avoided except where

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68. 542 U.S. 692, 727 (2004).
69. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 496-97 (1983).
70. *Samantar V*, 699 F.3d at 776.
71. *Id.* at 776-77 (citing R v. Bartle *ex parte* Pinochet, [1999] 38 I.L.M. 581, 593–95 (H.L.) (appeal taken from Eng.)).
72. *Id.* at 777.
73. 663 F.3d 64, 70 (2d Cir. 2011).
74. *Id.*

two provisions are irreconcilable.[75] The noted case, in choosing to stick by the pre-FSIA immunity regime, established that the common law framework could provide a sound and perhaps superior platform by which U.S. courts could make immunity determinations for individuals without actively skewing legislative intent or distorting judicial policy.[76]

The noted case is not perfect. Having the foreign policy expertise of the State Department to advise on immunity determinations is a huge benefit to the courts. However, this is traded off with the possibility that the Executive may become bogged down with these requests or that results may become too inconsistent once more. Nonetheless, the highly context-dependent determinations involved in individual foreign sovereign immunity claims that arise in today's increasingly international and institutionalized world are not the same as the questions of state sovereign immunity of the Tate Letter era.[77] The expertise of the State Department may be exactly what the job calls for.

## V. CONCLUSION

After nearly forty years of uncertainty relating to individual foreign sovereign immunity, the noted case finally brings some clarity and finality to the subject. Though not binding on all courts, the case fills many of the gaps left in the framework and gives a more coherent picture to the current state of foreign sovereign immunity. In hindsight, the added assistance of expert opinions from State Department immunity determinations may be exactly what is needed in the twenty-first century, when the lines between state official, war criminal, and sponsor of terrorism have all become real-world definition problems in increasingly complex political environments.

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75. *Id. But see In re* Terrorist Attacks on Sept. 11, 2011, 538 F.3d 71, 90 (2d Cir. 2008) ("But the Terrorism Exception applies 'in any case not otherwise covered by this chapter.' In other words, the Terrorism Exception stands alone. If acts of terrorism are considered torts for the purposes of the Torts Exception, then any claim that could be brought under the Terrorism Exception could also be brought under the Torts Exception.").

76. *Cf. Samantar V*, 699 F.3d at 768. The case suggests that the old adage "if it ain't broke, don't fix it" is perfectly applicable in continuing to use the resources of the State Department for common law sovereign immunity determinations. *Id.*

77. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 487 (1983). The Tate Letter announced the State Department's adoption of the restrictive theory of foreign sovereign immunity. *Id.*

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