FILED

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

[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.

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 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; *Ex parte 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 (continued...)

7. The Supreme Court ultimately agreed with the government's proffered reading of the FSIA. The Court explained that, "[a]lthough 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 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

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[2](...continued)
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, 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.

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 I.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); *Ex parte 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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CERTIFICATE OF SERVICE

I hereby certify, this 14th day of February, 2011, that a true copy of the foregoing was sent via U.S. Mail and electronic mail to the following counsel of record in this matter:

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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.

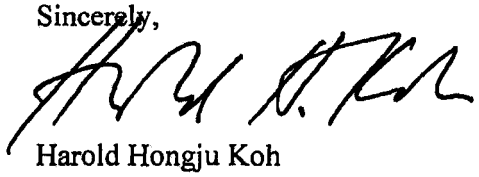
The Department of State has reviewed this matter carefully and has concluded that Defendant Mohamed Ali Samantar is not immune from the Court's jurisdiction in the circumstances of this case. Defendant Samantar, a U.S. resident, is being sued by U.S. citizen and Somali plaintiffs in the United States 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,



Harold Hongju Koh
The Legal Adviser