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No More Free Passes: Yousuf v. Samantar and the Foreign Sovereign Immunities Act

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INTRODUCTION

The atrocities experienced by the victims at the hands of their torturers are difficult to comprehend. A wounded man survived execution by his torturers only because the pile of bodies of those executed before him shielded him from view.[1] Assailants tortured and raped a woman to the point that she was left immobile.[2] Torturers electrically shocked a man while he lay helpless, his extremities bound.[3] The men and women who survive these cruel acts of violence often arrive in the United States in search of a new life, and, sometimes, in search of a way to hold liable those responsible for this brutality.[4] However, a problem arises when the individuals responsible do not deny their part in the violent acts, but instead claim that they acted in their capacities as government officials, thus entitling them to immunity from prosecution.

The Fourth Circuit had previously accepted that individuals are entitled to immunity under the Foreign Sovereign Immunities Act ("FSIA"),[5] a law that gives foreign states and their agencies or instrumentalities immunity in the United States subject to certain exceptions.[6] In January 2009, however, the Fourth Circuit held in *Yousuf v. Samantar*[7] that the FSIA's umbrella of immunity does not cover individual persons.[8] The court specifically found that the FSIA did not apply to Mohamed Ali Samantar, a former Somalian government official accused of "acts of torture and human rights

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1. *See* Yousuf v. Samantar, 552 F.3d 371, 374 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 49 (U.S. Sept. 30, 2009) (No. 08-1555).

2. *Id.*

3. *Id.*

4. *See, e.g., id.*; Enahoro v. Abubakar, 408 F.3d 877, 880 (7th Cir. 2005), *cert. denied*, 546 U.S. 1175 (2006).

5. *See* Velasco v. Gov't of Indon., 370 F.3d 392, 402 (4th Cir. 2004) (presuming without analysis that individuals are entitled to immunity under the Foreign Sovereign Immunities Act ("FSIA") when acting in an official capacity).

6. *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602–1611 (2006).

7. 552 F.3d 371 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 49 (U.S. Sept. 30, 2009) (No. 08-1555).

8. *Id.* at 373.

violations" under the Torture Victim Protection Act ("TVPA").[9] Because the United States Supreme Court has held that the FSIA is the "sole basis for obtaining jurisdiction over a foreign state,"[10] the ramifications of the Fourth Circuit's denial of immunity to the defendant reverberate far beyond the confines of this specific case. The court's decision eliminates the FSIA as a potential avenue of immunity for foreign officials sued in the Fourth Circuit, and thus allows foreign officials to be held liable in the United States under various laws including the TVPA.[11]

Five circuit courts in the United States have disagreed with the Fourth Circuit and have held that the FSIA does grant immunity to individual persons acting in their capacities as government officials.[12] This Recent Development, however, argues that the Fourth Circuit correctly held that the FSIA does not apply to individuals. Part I of this Recent Development presents a background of *Yousuf*. Part II subsequently discusses the FSIA and the circuit split on individual immunity under the FSIA. Following this foundation, Part III analyzes whether individual immunity exists under the FSIA. Specifically, this Recent Development argues that, based on the congressional intent implied by both the language of the statute and its legislative history, the FSIA was not meant to cover individuals. Next, Part IV addresses the possibility that *Yousuf* could have been resolved on even narrower grounds under the TVPA alone. This Recent Development suggests that this narrower holding under the

9. *Id.*; Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2006)).

10. *See* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989). *See generally* Michael A. Rosenhouse, Annotation, *Construction and Application of Foreign Sovereign Immunities Act*, 16 A.L.R. FED. 2D 563 (2007) (discussing generally the provisions of the FSIA).

11. *See Yousuf*, 552 F.3d at 381.

12. *See, e.g.*, *In re* Terrorist Attacks on Sept. 11, 2001, 538 F.3d 71, 75 (2d Cir. 2008) ("[T]he FSIA applies to individual officials of foreign governments in their official capacities . . . ."); Keller v. Cent. Bank of Nig., 2002 FED App. 0019P, ¶ 7, 277 F.3d 811, 815 (6th Cir.) ("[F]oreign sovereign immunity extends to individuals acting in their official capacities . . . ."); Byrd v. Corporacion Forestal y Industrial de Olancho S.A., 182 F.3d 380, 388 (5th Cir. 1999) ("Normally, the FSIA extends to protect individuals acting within their official capacity as officers of corporations considered foreign sovereigns."); El-Fadl v. Cent. Bank of Jordan, 75 F.3d 668, 671 (D.C. Cir. 1996) ("An individual can qualify as an 'agency or instrumentality of a foreign state.' " (quoting Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1603(b) (2006))); Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1103 (9th Cir. 1990) (concluding that FSIA protection "include[s] individuals sued in their official capacity"). *But see* Enahoro v. Abubakar, 408 F.3d 877, 881–82 (7th Cir. 2005), *cert. denied*, 546 U.S. 1175 (2006) (holding that the FSIA does not apply to individuals and that Congress would have explicitly stated that they were included if they had intended for them to be protected).

TVPA would have been appropriate. Finally, Part V considers the implications of no individual immunity under the FSIA and the possibility of an increase in litigation for foreign officials seeking immunity. This Recent Development concludes that—despite potential litigation increases and the possibility of a narrower TVPA-based holding—in light of the congressional intent suggested by the specific statutory language and legislative history of the FSIA, the Fourth Circuit's decision in *Yousuf* was proper.

I. *YOUSUF V. SAMANTAR*

In *Yousuf*, members of Somalia's Isaaq clan filed suit against a former Prime Minister and Minister of Defense of Somalia now living in the United States, Mohamed Ali Samantar, for "alleged acts of torture and human rights violations."[13] In the late 1960s, General Mohamed Barre and his Supreme Revolutionary Council ("SRC") seized power in Somalia by way of a socialist coup.[14] The defendant, Samantar, was an "[o]fficer[] who had supported and participated in the coup."[15] General Barre and the SRC tormented all clans but their own and reserved particular cruelty for the best-educated—and therefore, most threatening—clan, the Isaaq clan.[16] After a decade in power, a movement in opposition to Barre and the SRC developed.[17] In order to quiet the dissenters, the SRC "impos[ed] harsh control measures against government opponents" and "terrorize[d] the civilian population."[18] The SRC used "torture, arbitrary detention and extrajudicial killing against the civilian population of Somalia."[19] Among the victims were three of the plaintiffs in *Yousuf*, Isaaq clan members whom the SRC tortured, raped, shot, subjected to unthinkable atrocities, and left for dead.[20] The remaining plaintiffs were family members of those killed by the SRC.[21]

The plaintiffs alleged that Samantar should be liable because in his capacity as either Prime Minister or Minister of Defense, "he knew or should have known about this conduct and, essentially, gave tacit approval for it."[22] Plaintiffs brought suit against Samantar in the

13. *Yousuf*, 552 F.3d at 373.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 374.
20. *See id.*
21. *See id.*
22. *Id.*

United States, where he fled in 1991 after the oppressive Barre regime fell.[23] The plaintiffs alleged specifically that Samantar violated international law through his involvement in the torture and killings.[24] They argued that these violations made him liable under the Alien Tort Statute[25] and TVPA and that the FSIA did not provide him with immunity from this liability.[26] The Fourth Circuit agreed with the plaintiffs and reversed the district court,[27] holding that individuals are not protected by the FSIA.[28]

II. THE FOREIGN SOVEREIGN IMMUNITIES ACT AND THE CIRCUIT SPLIT ON INDIVIDUAL IMMUNITY

A. *The Foreign Sovereign Immunities Act of 1976*

In 1976 Congress enacted the Foreign Sovereign Immunities Act with the goals of (1) "provid[ing] when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States;" and (2) "provid[ing] when a foreign state is entitled to sovereign immunity."[29] The FSIA generally provides immunity to foreign states from jurisdiction in the courts of the United States with certain limited exceptions.[30] The FSIA defines the terms used in its

23. *Id.* at 374–75.

24. *Id.* at 375.

25. Alien Tort Statute, 28 U.S.C. § 1350 (2006).

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

27. Yousuf v. Samantar, No. 1:04cv1360, 2007 U.S. Dist. LEXIS 56227, at *19 (E.D. Va. Aug. 1, 2007), *rev'd*, 552 F.3d 371 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 49 (2009) (U.S. Sept. 30, 2009) (No. 08-1555). The plaintiffs filed the original complaint in November of 2004. *Id.* In January of 2005, the Eastern District Court of Virginia stayed the proceedings pending the State Department's submission of a statement of interest as to whether the Department would support Samantar's argument that he was entitled to immunity. *Id.* at *19–20. The court reinstated the case in 2007 after two years without comment from the State Department and, following a hearing, granted the defendant's motion to dismiss for lack of subject matter jurisdiction. *Id.* at *20–21. The district court specifically found that individuals are entitled to immunity under the FSIA and that Samantar is thus immune to jurisdiction in the United States. *Id.* at *46.

28. *Yousuf*, 552 F.3d at 373.

29. H.R. REP. NO. 94-1487, at 6 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6604. Note that the language of the Senate Report, S. REP. NO. 94-1310 (1976), is nearly identical to the language used in the House Report in most instances. The House Report was selected for primary discussion because the House Report was passed by Congress and is most commonly cited in case law. *See* H.R. REP. NO. 94-1487, at 1, *as reprinted in* 1976 U.S.C.C.A.N. at 6604. This Recent Development will therefore only include citation to the House Report when discussing the legislative history of the FSIA.

30. *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605 (2006) (detailing exceptions to immunity under the FSIA). Note that 28 U.S.C. § 1605(a)(7), formerly the exception to immunity under the FSIA if a foreign state engaged in an act of terrorism, was deleted and replaced with 28 U.S.C. § 1605A (2006). *See* National Defense

provisions, including a definition of "foreign state" that extends immunity to an "agency or instrumentality of a foreign state."[31] Under the FSIA, an "agency or instrumentality" is further defined as

> 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 . . . nor created under the laws of any third country.[32]

Thus, the FSIA's umbrella of immunity includes not only the foreign state itself but entities connected to the state deemed agencies or instrumentalities by statute.[33]

In the FSIA's definition of what constitutes an "agency or instrumentality," however, it is unclear, at first blush, whether an individual person may constitute an "agency or instrumentality."[34] The FSIA does not explicitly state whether the term "person" refers to a natural person or a "person" in the corporate sense of the word.[35] For this reason, courts have had to interpret whether individuals are entitled to immunity under the FSIA. It is this ambiguity that gave rise to the issue addressed by the Fourth Circuit in *Yousuf.*

B. Background on the Fourth Circuit's Split from Other Circuit Courts

In *Yousuf*, the Fourth Circuit broke from the holding of several other circuit courts and joined the Seventh Circuit in holding that the

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Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338–44. This new terrorism exception is inapplicable in the context of *Yousuf*, as it states that it applies only if the foreign state at issue has been "designated as a state sponsor of terrorism at the time the act described . . . occurred." 28 U.S.C.A § 1605A(a)(2)(A)(i)(I) (West 2008). Currently, only four countries have been designated as state sponsors of terrorism by the United States government: Cuba, Iran, Sudan, and Syria. *See* U.S. Department of State, State Sponsors of Terrorism, http://www.state.gov/s/ct/c14151.htm (last visited Mar. 2, 2010).

31. 28 U.S.C. § 1603(b).

32. *Id.*

33. *Id.*

34. *Id.*

35. *See id.*; Enahoro v. Abubakar, 408 F.3d 877, 881 (7th Cir. 2005), *cert. denied*, 546 U.S. 1175 (2006) (noting that it is unclear whether Congress intended "legal person" to mean an individual as opposed to a corporate person). In *Enahoro*, the court noted that the phrase " 'separate legal person' " suggests the "familiar legal concept that corporations are persons, which are subject to suit." *Id.*

FSIA does not grant immunity to individuals.[36] Until 2005, when the Seventh Circuit in *Enahoro v. Abubakar*[37] became the first circuit court to hold that the FSIA does not apply to individuals,[38] circuit courts generally followed the Ninth Circuit's decision in *Chuidian v. Philippine National Bank*.[39] In *Chuidian*, the court found the terms used in the FSIA to be "ambiguous as to its extension to individual foreign officials."[40] Thus, the court "decline[d] to limit its application."[41]

In *Chuidian*, the Ninth Circuit held that a Philippine citizen's actions while working in his capacity as a member of the Philippine Commission on Good Government were entitled to "be analyzed under the framework of the [FSIA]," meaning that if he qualified for immunity, he was entitled to it under the FSIA in his individual capacity.[42] Much like the Fourth Circuit in *Yousuf*,[43] the court based its decision largely on the legislative history of the FSIA—but reached an entirely different result.

The Ninth Circuit relied on a portion of the FSIA's legislative history which states that one objective of the law is to "transfer" from the executive branch to the judicial branch the ability to make

36. *See* Yousuf v. Samantar, 552 F.3d 371, 380 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 49 (U.S. Sept. 30, 2009) (No. 08-1555) (stating that it finds "the Seventh Circuit's view" interpreting the phrase "separate legal person" as referring to corporate persons "especially persuasive"); *see also Enahoro*, 408 F.3d at 881–82 (stating that Congress would have been more clear had it meant to include individuals).

37. 408 F.3d 877 (7th Cir. 2005), *cert. denied*, 546 U.S. 1175 (2006).

38. *Id.* at 881–82.

39. 912 F.2d 1095 (9th Cir. 1990); *see infra* note 41 and accompanying text.

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

41. *Id.*; *see also* Keller v. Cent. Bank of Nig., 2002 FED App. 0019P, ¶ 7, 277 F.3d 811, 815 (6th Cir.) (citing *Chuidian* and concluding that the defendants were individuals covered by FSIA immunity); Byrd v. Corporacion Forestal y Industrial de Olancho S.A., 182 F.3d 380, 389 (5th Cir. 1999) (adopting the reasoning in *Chuidian*). In *Byrd*, the Fifth Circuit focused more on whether individuals were acting in their official capacities and less on whether FSIA immunity extended to those individuals to begin with. *See Byrd*, 182 F.3d at 388. The court in *Byrd* accepted and adopted *Chuidian* without much analysis. *See id.*; *see also* El-Fadl v. Cent. Bank of Jordan, 75 F.3d 668, 671 (D.C. Cir. 1996) (citing *Chuidian* in finding that an individual qualifies for immunity). In *El-Fadl*, the D.C. Circuit accepted as a rule that individuals may fall under the FSIA. *El-Fadl*, 75 F.3d at 671; *see Chuidian*, 912 F.2d at 1103 ("[S]ection 1603(b) can fairly be read to include individuals sued in their official capacity." (citation omitted)).

42. *Chuidian*, 912 F.2d at 1103.

43. The Fourth Circuit based its decision in *Yousuf* largely on the legislative history of the Foreign Sovereign Immunities Act. *See* Yousuf v. Samantar, 552 F.3d 371, 381 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 49 (U.S. Sept. 30, 2009) (No. 08-1555). Contrary to the Ninth Circuit in *Chuidian*, the Fourth Circuit found that the legislative history of the FSIA suggests that Congress intended it to apply to only corporate and other entities and not to individual persons. *Id.*

immunity decisions.[44] The court stated that the FSIA was enacted "largely [to codify] the existing common law of sovereign immunity.... [and to] remove the role of the State Department in determining immunity."[45] Common law immunity prior to the FSIA reflected a "restrictive view of sovereign immunity" that included within its umbrella of protection individuals performing in their official capacities.[46] Thus, the Ninth Circuit concluded, the FSIA must protect individuals.[47]

This reasoning, however, ultimately ignores both the substantive section of the FSIA that defines the terms "agency or instrumentality" in corporate terms and the section of the legislative history that expounds on that definition by giving examples of corporations and entities that would qualify as agencies or instrumentalities without mentioning a single example of a qualifying individual person.[48] The Ninth Circuit did acknowledge the "significant support" for excluding individuals from FSIA immunity drawn from that section of the legislative history, but dismissed it.[49] The court stated that while individuals may not have been expressly included within Congress's definitions of "agency or instrumentality," neither were they expressly excluded.[50] The court then expressed the inference that "[i]t would be illogical to conclude that Congress would have enacted such a sweeping alteration of existing law implicitly and without comment."[51] Without factual support, the court assumed that simply because something was not explicitly excluded from the FSIA it was therefore implicitly included under the FSIA's protection. This logical jump was made in the face of the explicit language in the legislative history listing corporate entities as the only examples of agencies or instrumentalities, and thus the Ninth's Circuit's logic must be read with the caveat that there exists evidence supporting an alternate outcome. The court further stated that "[t]he most that can

44. H.R. REP. NO. 94-1487, at 7 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6606 ("A principal purpose of this bill is to transfer determination of sovereign immunity from the executive branch to the judicial branch ....").

45. *Chuidian*, 912 F.2d at 1100.

46. *Id.* at 1099–100; *see also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 66 (1965) (including individuals such as officials and agents of the state under the immunity umbrella).

47. *Chuidian*, 912 F.2d at 1103 (concluding that FSIA protection "include[s] individuals sued in their official capacity").

48. H.R. REP. NO. 94-1487, at 15, *as reprinted in* 1976 U.S.C.C.A.N. at 6614.

49. *Chuidian*, 912 F.2d at 1100.

50. *Id.* at 1101.

51. *Id.* at 1102 (referencing how, under the *Restatement (Second) of Foreign Relations Law*, individuals acting in their official capacity were entitled to immunity).

be concluded . . . is that the Act is ambiguous as to its extension to individual foreign officials," and thus the court refused to "limit its application."[52]

The government in *Chuidian* contended that declining to extend to individuals FSIA protection would not result in "sweeping alteration[s]" to the landscape of sovereign immunity because such individuals would still be covered by common law immunity.[53] The Ninth Circuit rejected the government's argument and, in doing so, once again emphasized the legislative history and Congress's stated intent to minimize the State Department's role in immunity decisions.[54] The court noted that the application of common law immunity to such individuals would involve State Department decision making,[55] a result seemingly contrary to Congress's stated purpose of transferring decision making "from the executive branch to the judicial branch."[56] Contrary to the government's contention, the Ninth Circuit did not believe common law immunity—which required State Department intervention—provided the same protection as judicially-policed FSIA immunity.[57]

Thus, the Ninth Circuit's decision essentially holds that the terms in the FSIA are "ambiguous" as to the issue of individuals based on (1) the absence of explicit language excluding individuals and a finding that it defies logic that Congress would alter common law immunity principles for the FSIA; and (2) Congress's intent to relieve the State Department of its role in immunity decisions. The circuit split set the stage for the Fourth Circuit's consideration of individual immunity under the FSIA and its ultimate rejection of the Ninth Circuit's analysis.

III. THE FOURTH CIRCUIT'S DECISION IN *YOUSUF* WAS PROPER

Yousuf provided the Fourth Circuit with the opportunity to examine the same statutory language and legislative history explored by the other circuits and come to its own conclusions regarding the existence of individual immunity under the FSIA. The language and legislative history of the FSIA show that the Fourth Circuit properly

52. *Id.* at 1101.

53. *Id.* at 1102.

54. *Id.*; *see also* H.R. REP. NO. 94-1487, at 7 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6606 (stating that a primary purpose of the bill is to "reduc[e] the foreign policy implications of [executive branch] immunity determinations").

55. *See Chuidian*, 912 F.2d at 1102.

56. H.R. REP. NO. 94-1487, at 7, *as reprinted in* 1976 U.S.C.C.A.N. at 6606.

57. *See Chuidian*, 912 F.2d at 1102–03.

decided that the FSIA does not protect individuals. First, the phrase "separate legal person," selected by Congress as part of its definition of the term "agency or instrumentality," signals a corporate meaning as opposed to an individual meaning, and the term's placement in a corporate context in the text is a further indication of the corporate connotation of the word.[58] Second, the legislative history states in explicit terms what falls under the definition of a "separate legal person," including examples of corporate organizations and similar entities, but not mentioning natural persons.[59] Thus, the Fourth Circuit was correct to hold in *Yousuf* that the FSIA does not apply to individuals.[60]

A. Language and Structure of Statute

In *Enahoro*, the court placed significant weight on the use of the phrase "separate legal person, corporate or otherwise" in the FSIA and noted that the phrase brings to mind only corporate connotations, as opposed to references to individual persons.[61] The Fourth Circuit found the Seventh Circuit's decision in *Enahoro* to be persuasive.[62] After reviewing the Seventh Circuit's interpretation, the Fourth Circuit then delved even further into the statutory language than the court in *Enahoro* by considering the FSIA requirement that the " 'entity' " not be "*created* under the laws of any third country"[63] and, in agreement with the court in *Enahoro*, concluding that such

58. *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1603(b) (2006).

59. H.R. REP. NO. 94-1487, at 15–16, *as reprinted in* 1976 U.S.C.C.A.N. at 6613–14.

60. It is important to note that in making its decision in *Yousuf*, the Fourth Circuit distinguished its prior decision in *Velasco v. Government of Indonesia* where it stated, but did not explicitly hold, that "[c]laims against the individual in his official capacity are the practical equivalent of claims against the foreign state." 370 F.3d 392, 399 (4th Cir. 2004) (citing *Chuidian*, 912 F.2d at 1101). The Fourth Circuit distinguished its decision in *Velasco* from *Yousuf* by stating that, in *Velasco*, the court was concerned with whether "the acts of an individual operate to *bind* a foreign sovereign claiming immunity under the FSIA" as opposed to whether the FSIA applies to individual government officials. Yousuf v. Samantar, 552 F.3d 371, 379 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 49 (U.S. Sept. 30, 2009) (No. 08-1555). In *Velasco*, the court accepted, without much discussion or consideration, that individuals are entitled to immunity under the FSIA when acting in an "official capacity." *Velasco*, 370 F.3d at 398 ("[C]ourts have construed foreign sovereign immunity to extend to an individual acting in his official capacity on behalf of a foreign state."). After making that assumption, the court then held that "the act of an agent beyond what he is legally empowered to do is not binding upon the government." *Id.* at 399. The court did *not* hold that individuals are entitled to FSIA immunity. *See id.* at 402.

61. Enahoro v. Abubakar, 408 F.3d 877, 881–82 (7th Cir. 2005), *cert. denied*, 546 U.S. 1175 (2006).

62. *Yousuf*, 552 F.3d at 380.

63. *Id.* (quoting 28 U.S.C. § 1603(b)(3)).

language, like the phrase "separate legal person," " 'ring[s]' " of a corporation and not of a natural person.[64]

From the Supreme Court down to district courts, opinions regarding various areas of law have commonly used the term "separate legal person" in a corporate context.[65] Courts have also referred to individual, natural persons as "separate legal persons" in certain non-corporate contexts.[66] However, in the FSIA, the likelihood that "separate legal persons" was meant to refer to corporate persons is further corroborated by the phrase that follows in § 1603(b)(1): "separate legal person, *corporate* or otherwise."[67] The placement of the phrase "separate legal persons" in an explicit corporate context makes a strong case for the conclusion that Congress intended a corporate meaning for the phrase. Further, while no appellate court has addressed the plain meaning of "separate legal person," the Southern District of New York has held that the phrase's plain meaning references an entity.[68] It is commonly used in reference

64. *Id.* (quoting *Enahoro*, 408 F.3d at 881–82).

65. *See, e.g.*, Schenley Distillers Corp. v. United States, 326 U.S. 432, 437 (1946) ("[N]o violence to the legislative purpose is done by treating the corporate entity as a separate legal person."); Riverdale Cotton Mills v. Ala. & Ga. Mfg. Co., 198 U.S. 188, 199 (1905) (stating that two corporations remained "two separate legal persons"); State Farm Mutual Auto. Ins. Co. v. Newburg Chiropractic, P.S.C., No. 3:06-CV-281-S, 2010 U.S. Dist. LEXIS 4589, at *18 (W.D. Ky. Jan. 21, 2010) (indicating that after incorporated entities began doing business, they no longer existed as the defendant owner himself, but issued bills as separate legal "persons"); Shady Records, Inc. v. Source Enters., 351 F. Supp. 2d 74, 78 (S.D.N.Y. 2004) ("It is elementary that a corporation is a separate legal person from its officers.").

66. *See* Braga v. Genlyte Group, Inc., 420 F.3d 35, 39 (1st Cir. 2005) (using "separate legal person" to refer to an individual within the very specific context of the definition of the "dual persona doctrine," whereby in an employment context an employee can have a separate persona unrelated to that of his employer); *see also* Gordon Sel-Way, Inc. v. United States, 2001 FED App. 0382P, ¶ 35, 270 F.3d 280, 290 (6th Cir.) (using "separate legal person" in a specific bankruptcy construct whereby a debtor can wear dual hats as "debtor" and "debtor-in-possession" in the context of the debtor–creditor relationship). Note that each of these "individual" uses of the phrase "separate legal person" retains a corporate undertone though they are being used in an individual context (i.e., the separation of a person from his employing company and the separation of a person into both a debtor and a debtor-in-possession).

67. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1603(b)(1) (2006) (emphasis added).

68. *See* Hyatt Corp. v. Stanton, 945 F. Supp. 675, 684 (S.D.N.Y. 1996) ("The plain meaning of [separate legal person] is an entity that can function legally independent of the state."). The plain meaning definition of separate legal person arose in the context of determining whether a Finnish Bank qualified as an agency or instrumentality of the government of Finland under the FSIA. *Id.*

to corporate entities,[69] and here, that common use is bolstered by the placement of explicit corporate references directly following the phrase "separate legal person" in the FSIA.[70]

Additionally, while neither the FSIA's legislative history nor case law provide any explicit guidance regarding the meaning of the phrase "or otherwise" on its own, in *Dole Food Co. v. Patrickson*,[71] the Supreme Court considered whether the FSIA's language allows for disregarding corporate formalities when determining if an entity is entitled to immunity.[72] The Court noted in *Dole* that the entire phrase "separate legal person, corporate or otherwise" as a whole is indicative that "Congress had corporate formalities in mind" and concluded that "[t]he text of the FSIA gives no indication that Congress intended us to depart from the general rules regarding corporate formalities."[73] This suggests that the Court did not consider the phrase "or otherwise" to have a meaning separate from and beyond its corporate and organizational meaning. Thus, based on the language and structure of the statute, the Fourth Circuit properly found the phrase "separate legal person" suggestive of corporations and not natural persons.

B. Legislative History and Purpose of the Statute

The legislative history[74] of § 1603 of the FSIA is rife with corporate references while at the same time completely devoid of

69. *See, e.g.*, *Schenley Distillers Corp.*, 326 U.S. at 437; *Riverdale Cotton Mills*, 198 U.S. at 199; Mazda Motors of Am., Inc. v. M/V Cougar Ace, 565 F.3d 573, 577 (9th Cir. 2009).

70. *See* 28 U.S.C. § 1603(b) ("An 'agency or instrumentality of a foreign state' means any entity . . . which is a separate legal person, *corporate or otherwise* . . . ." (emphasis added)).

71. 538 U.S. 468 (2003).

72. *Id.* at 474. As will be discussed in Part III.B *infra*, the legislative history includes a list of examples of qualifying agencies or instrumentalities that consists solely of different corporate entities, organizations, and agencies. When Congress uses the phrase "corporate or otherwise" in this context, it appears to reference these different types of entities—"corporate or otherwise." For example, in the House Report, one example of a qualifying entity is a "ministry which acts and is suable in its own name." *See* H.R. REP. NO. 94-1487, at 15–16 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6614. Such a government ministry would likely not be an *incorporated* entity, but is still an entity covered under the FSIA. *See id.*

73. *Dole Food Co.*, 538 U.S. at 474, 476.

74. *See* H.R. REP. NO. 94-1487, at 15–16, *as reprinted in* 1976 U.S.C.C.A.N. at 6613–14. The legislative history of the FSIA includes Congress's purposes for the FSIA and additional definitions of terms used in it, including a definition of "agency or instrumentality" that consists entirely of corporate references. *See id.*

references to individual natural persons.[75] In the House Report addressing the history, purposes, and intent of the FSIA, the House explicitly defined "separate legal persons" as various types of corporate entities and organizations.[76] According to the House Report:

> The first criterion, that an entity be a separate legal person, is intended to include a corporation, association, foundation, or other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name or hold property in its own name.[77]

The report gave a list of examples of "entities which meet the definition of an 'agency or instrumentality of a foreign state.' "[78] Each and every example listed is a corporate entity, organization, or agency.[79] The House legislative history further states that "[a]n entity which does not fall within the definitions [in § 1603 of the FSIA] . . . would not be entitled to sovereign immunity in any case."[80]

The notion that with its chosen language Congress intended immunity solely for governmental corporate entities and organizations is further supported by the legislative history for the TVPA, in which the Senate Report references the FSIA in determining who may be liable under the related TVPA.[81] The FSIA and TVPA are related because the TVPA provides for a cause of action for acts of torture that applies only to individuals, and if individuals are included under the FSIA's immunity umbrella, they could potentially be immune from prosecution under the TVPA.[82] As such, in its report, the Senate plainly makes a critical distinction between the TVPA and the FSIA.[83] The Senate states that

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75. *See generally id.* (addressing 28 U.S.C. § 1603 of the FSIA solely in corporate contexts).

76. *Id.* at 15, *as reprinted in* 1976 U.S.C.C.A.N. at 6614.

77. *Id.*

78. *Id.* at 15–16, *as reprinted in* 1976 U.S.C.C.A.N. at 6614.

79. *Id.* The list of entities protected under the FSIA includes: "a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name." *Id.*; *see also* Enahoro v. Abubakar, 408 F.3d 877, 882 (7th Cir. 2005), *cert. denied*, 546 U.S. 1175 (2006) (addressing how the court was "troubled" by the holding in *Chuidian* that Congress, by not excluding individuals, "therefore . . . included" them).

80. H.R. REP. NO. 94-1487, at 15, *as reprinted in* 1976 U.S.C.C.A.N. at 6614.

81. S. REP. NO. 102-249, at 7 (1991).

82. *See id.*

83. *Id.*

> [t]he [TVPA] uses the term "individual" to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances: only *individuals* may be sued. Consequently, the TVPA is not meant to override the Foreign Sovereign Immunities Act . . . which renders *foreign governments* immune from suits in U.S. courts . . . .[84]

This shows that Congress understands the FSIA to *not* apply to individuals, as Congress distinguished the TVPA, which explicitly *does* apply to individuals,[85] from the FSIA on that exact basis. Thus, based on two separate legislative histories, it appears Congress intended the FSIA to apply only to corporate-type entities, and not to individual persons.

C. *The Ninth Circuit Ignored Probative Evidence in Holding that the FSIA Applies to Individuals*

While the Ninth Circuit declined to limit the FSIA's application to only corporate entities and organizations, it also declined to hold explicitly that the FSIA applies to individuals.[86] In declining to explicitly hold that the FSIA applies to individuals, and by stating that, at best, it could conclude only that "the Act is ambiguous as to its extension to individual foreign officials," the court is hedging on its conclusion.[87] The court diluted its holding by finding the FSIA "ambiguous" and finding that limiting the FSIA to corporate organizations and similar entities would be "inconsistent with the purposes of the Act."[88] As the Fourth Circuit disagrees with the Ninth Circuit and the circuit courts that joined it, and as several circuit courts relied on the Ninth Circuit's holding in coming to their respective conclusions, it is significant that the Ninth Circuit qualified its conclusion in this way.[89]

The Ninth Circuit made two main arguments in finding that the FSIA applies to individuals.[90] The first argument involved a finding that the FSIA's legislative history does not explicitly state that individuals are excluded from its protection—thus meaning that they

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84. *Id.* (emphasis added).

85. *See* Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2006)) (stating that the TVPA applies to "[a]n individual").

86. Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1101 (9th Cir. 1990).

87. *Id.*

88. *Id.*

89. *See, e.g.*, Byrd v. Corporacion Forestal y Industrial de Olancho S.A., 182 F.3d 380, 389 (5th Cir. 1999) (adopting the *Chuidian* reasoning).

90. *See Chuidian*, 912 F.2d at 1101–02.

must be included—and concluded that for Congress to have intended otherwise would be "illogical."[91] This reasoning is weakened by the fact that the legislative history explicitly includes *only* non-individuals.[92] While the Ninth Circuit is correct that the FSIA is ambiguous in the sense that it does not explicitly define "separate legal person," the legislative history clarifies this ambiguity by couching the phrase in entirely corporate terms.[93] The Ninth Circuit itself, in fact, correctly rejected the defendant's argument in *Yousuf*—that the FSIA's reference to "separate legal persons" includes individuals[94]—by accepting that "Congress was primarily concerned with *organizations*."[95]

The Ninth Circuit's second argument, that Congress intended to shift immunity decision-making power from the executive branch to the judicial branch, is more persuasive than its first argument.[96] Unlike its first argument, the logic behind its second argument is based on a stated purpose of the FSIA as illuminated by the legislative history.[97] The legislative history does suggest that Congress intended to minimize the role of the State Department in immunity decisions and that leaving such decisions to common law immunity—where the State Department assists the court in determining immunity by filing statements of interest—would give the State Department a role in determining whether to confer immunity on individuals.[98] The Ninth Circuit considered the fact that the State Department would still have a dispositive role in deciding that the FSIA must also apply to individuals.[99] However, in removing the State Department from immunity decisions regarding business entities and organizations, Congress delegated a significant portion of the State Department's former immunity decision making to the

91. *Id.*

92. *See* H.R. REP. NO. 94-1487, at 15–16 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6614 (citing only non-individual entities as examples of things protected under the FSIA).

93. *See supra* Part III.B (addressing in detail the legislative history that defines "separate legal person" in entirely corporate terms).

94. *See* Brief for Defendant-Appellee at 17, Yousuf v. Samantar, 552 F.3d 371 (4th Cir. 2009) (No. 07-1893) (arguing that the FSIA applies to individuals), *cert. granted*, 130 S. Ct. 49 (U.S. Sept. 30, 2009) (No. 08-1555) *see also Yousuf*, 552 F.3d at 375 (discussing defendant's argument for individual immunity under the FSIA).

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

96. *Id.* at 1101–02.

97. *See* H.R. REP. NO. 94-1487, at 7, *as reprinted in* 1976 U.S.C.C.A.N. at 6605–06.

98. *See id.* ("A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch.").

99. *Chuidian*, 912 F.2d at 1102–03.

courts under the FSIA, which is consistent with the purpose of the FSIA emphasized in *Chuidian*. Further, in 2004, the Supreme Court held in *Republic of Austria v. Altmann*[100] that in the context of FSIA immunity decision making, "nothing in [its] holding prevents the State Department from filing statements of interest."[101] The Court further stated that if the State Department chose to express its opinion, "that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy."[102]

Additionally, the State Department has not been entirely removed from immunity decisions. First, and most important, the State Department has continued to issue statements of interest to the courts with regard to whether persons should receive immunity even after the FSIA was enacted.[103] Second, the State Department is still tasked with making all decisions regarding diplomatic and consular immunity, in addition to being responsible for requesting waivers of immunity where necessary.[104] Finally, both the State Department and the Department of Justice have asserted that the FSIA does not apply to individuals and that, instead, individual, natural persons can find immunity under pre-FSIA common law.[105] Thus, while it should be acknowledged that Congress intended the FSIA to reduce the State Department's role in immunity decision making, it does not necessarily follow that this intent required that individuals be included in the FSIA. As such, in focusing on Congress's intent to reduce the State Department's role, the Ninth Circuit dismissed other probative evidence in the legislative history that points toward the opposite conclusion that Congress did not intend for individuals to be protected by the FSIA.

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100. 541 U.S. 677 (2004).

101. *Id.* at 701.

102. *Id.* at 702; *see also* Mark J. Chorazak, Note, *Clarity and Confusion: Did* Republic of Austria v. Altmann *Revive State Department Suggestions of Foreign Sovereign Immunity?*, 55 DUKE L.J. 373, 390 (2005) (noting the Supreme Court's recognition in *Altmann* of the State Department's ability to submit statements of interest).

103. *See* Erin Nelson, Comment, *Does an Individual Foreign Official Qualify as a Foreign State for Purposes of the Foreign Sovereign Immunities Act?*, 57 CATH. U. L. REV. 853, 875 & n.141 (2008) (citing recent State Department statements of interest regarding FSIA immunity decisions).

104. *See generally* U.S. DEP'T OF STATE, DIPLOMATIC AND CONSULAR IMMUNITY: GUIDANCE FOR LAW ENFORCEMENT AND JUDICIAL AUTHORITIES (1998) (providing, through an instructional manual, guidance with regard to the intricacies of diplomatic and consular immunity).

105. *See* Nelson, *supra* note 103, at 875.

IV. THE FOURTH CIRCUIT'S HOLDING COULD HAVE BEEN EVEN NARROWER

The Fourth Circuit, in holding that Samantar was not entitled to immunity, based its decision on its view that the FSIA does not apply to individuals. However, had it so chosen, the Fourth Circuit could have come to the same result on even narrower grounds. In *Yousuf*, the plaintiffs sued Samantar under the TVPA.[106] The Fourth Circuit could have found Samantar liable based solely on the TVPA, a law providing a cause of action for torture victims against their assailants, as even if Samantar had successfully argued that individuals acting in their official capacity are protected under the FSIA, Somalia has no recognized central government capable of sanctioning his actions as official state actions.[107] This provides further support for the argument that the FSIA does not protect Samantar and defendants like him since they can be brought to justice on narrower grounds without having to show that the FSIA does not apply.

The TVPA was enacted with the goal of creating "a Federal cause of action against any individual who, under actual or apparent authority, or color of law, of any foreign nation, subjects any individual to torture or extrajudicial killing."[108] The TVPA generally "authorizes the Federal courts to hear cases brought by or on behalf of a victim" subjected to such torture or killing.[109] While it is not a jurisdictional statute,[110] it derives original jurisdiction from the Alien Tort Statute, of which it is a part.[111] The Alien Tort Statute states that

106. Yousuf v. Samantar, 552 F.3d 371, 373 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 49 (U.S. Sept. 30, 2009) (No. 08-1555).

107. *See infra* notes 128–35 and accompanying text.

108. H.R. REP. NO. 102-367, at 2 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 84, 84–85. The TVPA was Congress's way of "legislatively ratif[ying] the judicial decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), which recognized federal subject matter jurisdiction over claims by aliens under the Alien Tort Claims Act for official torture or extrajudicial killings committed in violation of the law of nations." James L. Buchwalter, Annotation, *Construction and Application of Torture Victim Protection Act of 1991*, 199 A.L.R. FED. 389, 403 (2005) (discussing the provisions of the TVPA generally). The Alien Tort Claims Act is also known as the Alien Tort Statute. 28 U.S.C. § 1350 (2006).

109. H.R. REP. NO. 102-367, at 4, *as reprinted in* 1992 U.S.C.C.A.N at 87.

110. A jurisdictional statute is one that provides for jurisdiction itself, as opposed to deriving jurisdiction from another source. *See, e.g.*, Landgraf v. Usi Film Prods., 511 U.S. 244, 274 (1994) (Thomas, J., concurring) ("[J]urisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.' " (quoting Republic Nat'l Bank v. United States, 506 U.S. 80, 100 (1992))).

111. 28 U.S.C. § 1350; *see also* Kadic v. Karadži, 70 F.3d 232, 246 (2d Cir. 1995) ("Though the Torture Victim Act creates a cause of action for official torture, this statute, unlike the Alien Tort Act, is not itself a jurisdictional statute. The Torture Victim Act permits the appellants to pursue their claims of official torture under the jurisdiction

"[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[112] The question is whether the TVPA provides a cause of action for victims of torture against a defendant like Samantar that FSIA immunity cannot override.[113]

In its opinion, the Fourth Circuit mentioned the TVPA only twice: (1) when it noted that the plaintiffs allege Samantar's liability under it, and (2) when it briefly addressed jurisdictional issues.[114] The TVPA was enacted to "provid[e] a civil cause of action in U.S. courts for torture committed abroad."[115] The House Report *does* state that the TVPA must abide by the FSIA.[116] However, it continues further and states that while the TVPA must comply with the FSIA, "sovereign immunity would not generally be an available defense."[117] The Senate Report expounds on this by stating that "the committee does not intend these immunities to provide former officials with a defense to a lawsuit brought under this legislation."[118] Further, because no foreign states officially endorse torture or extrajudicial killing, the Senate Report concludes that "the FSIA should normally provide no defense to an action taken under the TVPA against a former official."[119] Thus, although the TVPA must comply with the FSIA by virtue of the subject matter that the TVPA concerns—torture committed overseas—the FSIA will in all likelihood provide no immunity for former officials that commit acts of torture. Hypothetically, even if the FSIA did apply to former officials—or even individuals more broadly—in order to be covered by the FSIA, the individual's actions would have to be sanctioned by the foreign

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conferred by the Alien Tort Act and also under the general federal question jurisdiction . . . ."). *See generally* Philip Mariani, Comment, *Assessing the Proper Relationship Between the Alien Tort Statute and the Torture Victim Protection Act*, 156 U. PA. L. REV. 1383, 1437 (2008) ("[I]t is most appropriate for courts to interpret . . . [the] interaction between the two statutes as fundamentally supplemental rather than preclusive.").

112. 28 U.S.C. § 1350.

113. *See* S. REP. NO. 102-249, at 7 (1991). The Senate Report acknowledges that "the TVPA is not meant to override the Foreign Sovereign Immunities Act . . . except in certain instances." *Id.* However, it continues further to state that in spite of this, "the committee does not intend [head of state or FSIA immunity] to provide former officials with a defense to a lawsuit brought under this legislation." *Id.* at 8.

114. *See* Yousuf v. Samantar, 552 F.3d 371, 375 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 49 (U.S. Sept. 30, 2009) (No. 08-1555).

115. S. REP. NO. 102-249, at 4.

116. H.R. REP. NO. 102-367, at 5 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 84, 88.

117. *Id.* Note that both head of state and diplomatic immunity would still be available. *Id.*

118. S. REP. NO. 102-249, at 8.

119. *Id.*

state to which he or she is connected, and, at least according to the Senate Report, all states oppose torture.[120]

In *Yousuf*, the plaintiffs alleged that Samantar, a former government official, was liable for approving—or at the very least implicitly approving—the torture and killings that occurred in Somalia.[121] The TVPA provides the cause of action.[122] In the appellee's brief, Samantar does discuss letters that the Acting Prime Minister of Somalia of the Somali Transitional Federal Government ("TFG") wrote on his behalf stating that Samantar acted in his official capacity.[123] Plaintiff-Appellants in their brief questioned the validity of such letters and argued that the TFG was not in a position to "ratify" Samantar's actions to avoid liability.[124] The district court nonetheless found these letters to be dispositive and dismissed the case on the theory that these letters provided Samantar with immunity under the FSIA.[125] However, in doing so, the district court recognized the TFG—a government that has not been officially recognized by the United States because Somalia has not had a central government since 1991.[126] The Fourth Circuit did not mention the letters and instead came to the broader holding that the FSIA does not apply to individuals in general.[127] The court's broader holding that the FSIA does not apply to individuals regardless of the presence of ratification letters allowed it to avoid addressing the issue of the transitional government and the letters.

Had the Fourth Circuit been forced to consider the issue of whether the letters on Samantar's behalf qualified him for immunity under the FSIA, instability and the lack of any true, recognized

120. *Id.*

121. *See* Yousuf v. Samantar, 552 F.3d 371, 373 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 49 (U.S. Sept. 30, 2009) (No. 08-1555).

122. *See* Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2006)) ("An individual who, under actual or apparent authority, or color of law, of any foreign nation—(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.").

123. *See* Brief for Defendant-Appellee, *supra* note 94, at 2–3.

124. *See* Brief of Appellants at 22–23, *Yousuf*, 552 F.3d 371 (No. 07-1893).

125. Yousuf v. Samantar, No. 1:04cv1360, 2007 U.S. Dist. LEXIS 56227, at *35 (E.D. Va. Aug. 1, 2007) ("These letters are entitled to 'great weight' and persuade the Court that dismissal is appropriate."), *rev'd*, 552 F.3d 371 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 49 (U.S. Sept. 30, 2009) (No. 08-1555).

126. U.S. Department of State, Background Note: Somalia, http://www.state.gov/r/pa/ei/bgn/2863.htm (last visited Mar. 31, 2010).

127. *See Yousuf*, 552 F.3d at 381.

central government in Somalia would have made it difficult for the court to consider the letters that came from the TFG as dispositive of the issue. In 2005 the Supreme Court affirmed an Eighth Circuit decision that specifically recognized the fact that "Somalia lacks a central functioning government."[128] The United States also has no official representation in the country.[129] Somalia's transitional government does not satisfy the *Restatement (Third) of Foreign Relations Law*'s definition of a "foreign state," which courts have stated is the proper test for determining foreign statehood.[130]

According to the *Restatement (Third)*, "a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities."[131] The TFG, created in 2004, was Somalia's fourteenth attempt at creating a central government in the last decade.[132] It was ultimately unsuccessful, as there are currently two "regional administrations" in existence in northern Somalia in addition to the TFG—the "Republic of Somaliland" and "Puntland."[133] Each region even has its own president.[134] Thus, the *Restatement (Third)*'s definition of a "foreign state" is not satisfied—the TFG does not have government control of the "defined territory" or "permanent population" of Somalia as required by the *Restatement (Third)*'s definition.[135]

The failure of Somalia to qualify as a foreign state would have allowed the Fourth Circuit to find—based solely on the TVPA—that Samantar was not entitled to immunity. Even assuming that the FSIA applies to individuals, the letters written on Samantar's behalf claiming to ratify his actions as official state actions came from one unrecognized transitional government in a country with multiple

128. *See* Jama v. INS, 329 F.3d 630, 634 (8th Cir. 2003), *aff'd*, 543 U.S. 335 (2005).

129. U.S. Department of State, *supra* note 126.

130. *See, e.g.*, Ungar v. Palestine Liberation Org., 402 F.3d 274, 283 (1st Cir. 2005) (stating that since the FSIA has not defined "foreign state," it must determine the meaning of the term, and concluding that the *Restatement (Third)*'s definition is proper and universally accepted); Kadic v. Karadži, 70 F.3d 232, 244 (2d Cir. 1995) (citing the *Restatement (Third)* and stating that the definition of a foreign state is "well established in international law").

131. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 201 (1987).

132. U.S. Department of State, *supra* note 126.

133. *Id.*

134. *Id.*

135. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 201; *see also Ungar*, 402 F.3d at 289–92 (finding that defendants failed to prove that Palestine is a foreign state under the "*Restatement* test" because the government in power did not have sufficient governmental control over the territory).

governments. Such letters, which seem unlikely to constitute a foreign-state sanction under the FSIA, would be insufficient to qualify Samantar for immunity from prosecution.

V. IMPLICATIONS OF NO INDIVIDUAL IMMUNITY UNDER THE FSIA

If immunity for individual actors no longer attaches under the FSIA, foreign officials responsible for horrific acts of torture will not be able to hide behind a cloak of immunity under the FSIA. Victims like the individuals in *Yousuf* who were subjected to unbearable tragedies will have the ability to pursue causes of action against those responsible for the crimes against them. Without FSIA immunity, foreign officials who would otherwise have easily been granted immunity under the FSIA will have to revert to avenues of immunity used prior to the codification of the FSIA, such as relying on the State Department for immunity and engaging in litigation while they wait for the State Department's decision.[136] For example, in its pre-FSIA decision in *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*,[137] the Second Circuit stated:

> A claim of sovereign immunity may be presented to the court by either of two procedures. The foreign sovereign may request its claim of immunity be recognized by the State Department, which will normally present its suggestion to the court through the Attorney General or some law officer acting under his direction. Alternatively, the accredited and recognized representative of the foreign sovereign may present the claim of sovereign immunity directly to the court.[138]

If applied to individuals in post-FSIA cases, *Victory Transport* would suggest that, if the FSIA provides no immunity to individuals—removing the possibility of a "representative of the foreign sovereign . . . present[ing] the claim" via a letter or otherwise—the remaining option for claiming immunity lies with the State Department.[139]

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136. *See* Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 358 (2d Cir. 1964).

137. 336 F.2d 354 (2d Cir. 1964).

138. *Id.* at 358. *See generally* E. H. Schopler, Annotation, *Modern Status of the Rules as to Immunity of Foreign Sovereign from Suit in Federal or State Courts*, 25 A.L.R. 3D 322, 330 (2008) ("[C]ourts have quite naturally deferred to the policy pronouncements of the State Department.").

139. *See Victory Transport*, 336 F.2d at 358; *see also* Compania Espanola De Navegacion Maritima, S.A. v. The Navemar, 303 U.S. 68, 75 (1938) ("This Court has explicitly declined to give [suggestions of immunity that do not come from the State Department] the force of proof or the status of a like suggestion coming from the executive department of our government.").

Two recent cases provide examples of individuals who, without the individual protection of the FSIA, would be required to wait for a State Department decision on their qualifications for immunity.[140] In *Belhas v. Ya'Alon*,[141] the court found that an Israeli general was "entitled to the FSIA presumption of immunity" when the government of Israel wrote a letter on the defendant's behalf stating that he had taken part in "state-approved attacks" that occurred during a conflict with Hezbollah.[142] In *Matar v. Dichter*,[143] the court found that the defendant, the former director of an Israeli government security organization, was "entitled to sovereign immunity under the FSIA" because of a letter from the Israeli government stating that he was acting in the "furtherance of official policies of the State of Israel."[144] Because the courts in both these cases operated under the assumption that the FSIA applied to individuals, the letters from the Israeli government, a recognized central government, were sufficient to apply immunity to the defendants under the FSIA and to dispose of the causes of action against them.[145] However, if immunity for individuals no longer existed under the FSIA, these individuals would have had to take part in litigation and await the decision of the State Department to grant them immunity.[146] Thus, without the protection of the FSIA, defendants such as those in *Belhas* and *Matar* would be required to pursue this alternate manner of seeking immunity.

Disallowing individual immunity under the FSIA eliminates an avenue of escape for individuals whose victims want to sue for often

140. *See* Belhas v. Ya'Alon, 466 F. Supp. 2d 127, 129 (D.D.C. 2006) (discussing a letter written on defendant's behalf by the Israeli government ratifying the defendant's actions), *aff'd*, 515 F.3d 1279 (D.C. Cir. 2008); *see also* Matar v. Dichter, 500 F. Supp. 2d 284, 291 (S.D.N.Y. 2007) (discussing a letter written again by the Israeli government ratifying the defendant's actions), *aff'd*, 563 F.3d 9 (2d Cir. 2009). From these facts, it appears that the individuals involved in each case were participating in clear government-sanctioned actions and were rightfully granted immunity.

141. 466 F. Supp. 2d 127 (D.D.C. 2006), *aff'd*, 515 F.3d 1279 (D.C. Cir. 2008).

142. *Id.* at 131.

143. 500 F. Supp. 2d 284 (S.D.N.Y. 2007), *aff'd*, 563 F.3d 9 (2d Cir. 2009).

144. *Id.* at 291.

145. *See Belhas*, 466 F. Supp. 2d at 129; *see also Matar*, 500 F. Supp. 2d, at 291 (holding that the defendant was entitled to immunity as his actions were sanctioned by the Israeli government).

146. *See* Compania Espanola De Navegacion Maritima, S.A. v. The Navemar, 303 U.S. 68, 74–75 (1938) (addressing the State Department's role in immunity decisions); *see also* Matar v. Dichter, 563 F.3d 9, 15–16 (2d Cir. 2009) (acknowledging the court's prior holding that the FSIA applies to individuals and affirming the district court's ruling that the government official in this case was immune, but noting that it did not have to decide whether the FSIA applies to former government officials because they might be entitled to immunity "under common-law principles that pre-date, and survive . . . the FSIA").

abhorrent and detestable actions. Instead of automatically being granted immunity under the FSIA, such individuals would have to request immunity from the State Department.[147] This avenue by no means guarantees success. First, the State Department might decline immunity.[148] Second, it can elect not to respond to requests for Statements of Interest on immunity issues, effectively denying immunity.[149] Third, the State Department can request that immunity be waived for individuals who should qualify but whose actions warrant prosecution.[150] Thus, eliminating FSIA immunity would make it more difficult for such individuals to escape prosecution and more likely that individuals who deserve to be prosecuted would have to face the consequences of their actions under the laws of the United States.

CONCLUSION

The Fourth Circuit properly held in *Yousuf v. Samantar* that the FSIA does not apply to individuals. The language of the statute and its legislative history point to Congress's intent that the FSIA apply only to corporate entities and other such organizations.[151] Had the Fourth Circuit so chosen, it could have held on narrower grounds that—even assuming that the FSIA applies to individuals—the TVPA on its own was sufficient to bring a cause of action against the defendant.[152] This potential for a narrower holding not only bolsters the argument that the FSIA must not apply to individuals, but it also keeps open an important avenue of litigation for torture victims who hope to bring their tormenters to justice under the TVPA.[153] The exclusion of individuals from immunity under the FSIA, while proper, will likely result in an increase in litigation as foreign officials who may have been granted immunity under the FSIA will have to pursue claims of immunity through other avenues, such as through the State Department, and in the interim, participate in litigation of the matters

147. *Compania Espanola De Navegacion Maritima, S.A.*, 303 U.S. at 74–75.

148. *See* Republic of Austria v. Altmann, 541 U.S. 677, 702 n.22 (2004) ("We note that the United States Government has apparently indicated to the Austrian Federal Government that it will not file a statement of interest in this case.").

149. *See* Yousuf v. Samantar, No. 04-1360, 2007 U.S. Dist. LEXIS 56227, at *20 (E.D. Va. Aug. 1, 2007) (discussing the two years that proceedings were stayed in the district court while awaiting a State Department statement of interest that never came), *rev'd*, 552 F.3d 371 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 49 (U.S. Sept. 30, 2009) (No. 08-1555).

150. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 456 (1987).

151. *See supra* Part III.

152. *See supra* Part IV.

153. *See supra* Part IV.

related to their actions abroad.[154] However, the Fourth Circuit's decision is preferable and worth the cost of additional litigation in certain situations, as it gives victims of heinous crimes the chance to hold their tormenters accountable for their actions while at the same time preserving a means of seeking immunity for those who are truly entitled to it.

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154. *See supra* Part V.