Record No. 07-1893

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BASHE ABDI YOUSUF, AZIZ MOHAMED DERIA (IN HIS CAPACITY AS PERSONAL REPRESENTATIVE OF THE ESTATES OF MOHAMED DERIA ALI, MUSTAFA MOHAMED DERIA, JAMES DOE I AND JAMES DOE II), JOHN DOE I, JANE DOE, AND JOHN DOE II,

Appellants,

versus

MOHAMED ALI SAMANTAR,

Appellee.

On Appeal From the United States District Court
for the Eastern District of Virginia, Alexandria Division
The Honorable Leonie M. Brinkema
District Court Case No. 1:04 CV 1360

BRIEF OF APPELLANTS

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JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. § 1350 (the Alien Tort Statute ("ATS")), and 28 U.S.C. § 1331. The district court dismissed the case in a judgment entered on August 1, 2007, and Plaintiffs timely filed their notice of appeal on August 30, 2007. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

(1) Whether a former official of a foreign country that has not been a recognized sovereign state since 1991 is protected by the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1608-11.

(2) Whether a district court may dismiss a case without allowing jurisdictional discovery based on an assertion of immunity from an alleged representative of a non-sovereign-entity not recognized by the Executive Branch, when that assertion is made in unauthenticated letters that have been ignored by the State Department.

(3) Whether, in dismissing on immunity grounds, the district court adopted an unreasonable interpretation of the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 (note), that failed to give it effect.

STATEMENT OF THE CASE

The underlying suit is a civil action for compensatory and punitive damages by citizens of the United States and the former Somalia[1] against Defendant Mohamed Ali Samantar ("Samantar") for torts in violation of international and domestic law. (Joint Appendix, served herewith, at p. 29-30, hereafter "J.A. _"). Specifically, the Plaintiffs seek recovery for Samantar's responsibility for acts of extrajudicial killing, attempted extrajudicial killing, torture, crimes against humanity, war crimes, arbitrary detention, and cruel, inhumane, or degrading treatment or punishment. (J.A. 30).

On November 10, 2004, Plaintiffs filed their original Complaint in the United States District Court for the Eastern District of Virginia. (J.A. 3). On December 1, 2004, Samantar filed a Motion to Dismiss. (J.A. 3).[2] On January 7, 2005, without ruling on the Motion to Dismiss, the district court stayed the case to allow the United States Department of State ("State Department") to provide a Statement of Interest regarding Samantar's immunity claim.[3] (J.A. 209). The district court directed counsel for Samantar to contact the State Department and to

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[1] Plaintiffs use the term "former Somalia" to refer to the Democratic Republic of Somalia that existed under the regime of Siad Barre from 1969 to 1991.

[2] In his initial Motion to Dismiss Samantar did not rely on the FSIA, on which the district court ultimately based its dismissal.

[3] The district court's January 7, 2005 order stayed all discovery except previously-served discovery requests directed to agencies of the federal government. (J.A. 5). The district court never lifted this stay.

report every 30 days to the district court regarding the State Department's position. (J.A. 5, 209-10).

Between February 2005 and April 2007 three officials of the putative Somali Transitional Federal Government ("TFG") and two officials of the putative Republic of Somaliland[4] submitted separate letters to the State Department, and the parties each submitted letter briefs to the State Department, all advocating their positions on the immunity issues. (J.A. 15-16, 105-07, 188, 192, 193, 194-95, 196-97). The State Department did not file a Statement of Interest with the district court or respond in any way to any of the letters. (J.A. 210). Every month until January of 2007, Samantar reported to the district court that the State Department still had the matter "under consideration". (J.A. 5-9).

On January 22, 2007, the district court reactivated the case. (J.A. 9). With leave of court, Plaintiffs filed a Second Amended Complaint. (J.A. 10). Samantar moved to dismiss, attaching one of the letters from the TFG to his motion, and presenting another TFG letter at the hearing. (J.A. 11).

On August 1, 2007, the court granted Samantar's Motion to Dismiss Plaintiffs' Second Amended Complaint. (J.A. 13). Plaintiffs timely noticed this appeal.

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[4] Somaliland is a self-governing region in the northwest region of former Somalia. *See* I.C. of Statement of Facts, *infra*.

STATEMENT OF FACTS

I. HISTORICAL BACKGROUND

A. The Creation of Somalia

The region now known as Somalia was formed in 1960 by a merger of two former colonial territories: British Somaliland in the north, and Italian Somaliland in the South. (Motion for Judicial Notice, at para. 1, hereafter "J.N. ¶__").[5] British Somaliland gained its independence on June 16, 1960. (J.N. ¶1). Italian Somaliland gained its independence on July 1, 1960. (J.N. ¶1). The two former protectorates united on July 1, 1960 to form the Democratic Republic of Somalia. (J.N. ¶1). From 1960 to 1991 the two countries existed as one independent sovereign republic. (J.N. ¶1).

A Somali Constitution was first ratified in 1961, and a new Constitution was ratified in 1979. (J.N. ¶¶1, 3). The Somali Constitution, which was in force at the time of the events described in the Complaint, prohibited the types of human rights abuses at issue in this case. (J.A. 140, 170). That Constitution also required Somalia to follow customary international law, (J.A. 145), and prohibited torture, extrajudicial killings and arbitrary detention. (J.A. 145).

[5] In a Motion for Judicial Notice served herewith, Plaintiffs request that the Court take judicial notice of certain facts related to country conditions in Somalia as of the current date and relevant historical background of Somalia. Specific sources for each of those facts are set forth in the motion for judicial notice, and those sources essentially mirror those cited in the district court opinion.

B. Human Rights Abuses in Somalia By the Barre Regime

In October 1969, less than ten years after Somalia became an independent nation, a coup led by Major General Mohamed Siad Barre ushered in an authoritarian socialist rule to Somalia. (J.A. 199). Barre named himself President and created the Supreme Revolutionary Council ("SRC"), a group which consisted primarily of the Army officers who had supported and participated in the coup, to assume control over the country. (J.A. 170, 199).

The Barre government initially allied itself with the Soviet Union. (J.N. ¶1). Following its 1978 defeat in the Ogaden War with Soviet-backed Ethiopia, the Barre regime severed its ties to the Soviet Union and turned to the West for support. (J.N. ¶1). From 1982 through 1988, the United States viewed Somalia as a partner in the Cold War. (J.N. ¶1).

Over time, opposition to the Barre regime grew. After the Ogaden War, the government took increasingly fierce measures against perceived opponents. (J.A. 199). Beginning in the early 1980s, the military committed numerous atrocities against ordinary citizens in an attempt to deter the growing opposition movements. (J.A. 199). During this time, Samantar, a General in the Somalia Armed Forces, served first as Minister of Defense and later as Prime Minister. (J.A. 200). Security forces, acting in coordination with or under the control of the Samantar-led military forces, were together responsible for the widespread and systematic

use of torture, arbitrary detention, and extrajudicial killing against the civilian population of Somalia. (J.A. 199).

Members of the Isaaq clan in the northwest region formerly known as British Somaliland were a special target of the Barre government. (J.A. 200). In the 1970s, the government relied primarily upon economic measures to weaken the Isaaq clan. (J.A. 200). During the 1980s, however, when Samantar held command over military and security forces, the government altered its approach and began utilizing the Armed Forces to eliminate Isaaq clan opposition. (J.A. 200). In response to this campaign, some members of the Isaaq clan established the Somali National Movement ("SNM"), which began a violent resistance. (J.A. 200).

In response to SNM attacks, and in an attempt to assert control over the northwest region of the country, the Somali military increased its incidents of human rights abuses and war crimes. (J.A. 200). The Somali Armed Forces initiated a counter-insurgency campaign that involved killing and looting livestock, destroying water reservoirs, destroying homes, torturing and detaining alleged SNM supporters, and eventually, conducting mass killings of civilians. (J.A. 200). Violent confrontations between SNM and the Somali Armed Forces lasted from 1983 to 1990. (J.A. 200).

As reports of human rights abuses spread to the United States, the United States stepped up pressure on the Barre government to bring an end to the

atrocities. (J.A. 35). The United States ultimately withdrew its support of the Barre government in 1990. (J.A. 35, 200). It was during the violence of the 1980s, when Samantar controlled Somalia's brutal military forces, that the Plaintiffs suffered the injuries at issue in this case. (J.A. 200).

C. The Post-Siad Barre "Somalia"

Somalia has been without a government since 1991 when the dictator Siad Barre fled the country amid protests against his rule. (J.A. 201). With his departure, the central government collapsed and the country descended into turmoil. (J.A. 170, 201).

Today there is no functioning government in Somalia. (J.A. 171). The United States does not officially recognize a government of Somalia and has no official presence there. (J.N. ¶2). There have been approximately 14 failed attempts to form a government of Somalia since 1991. (J.N. ¶1).

In 2004, at the conclusion of a two-year peace process led by the government of Kenya, Abdullahi Yusuf Ahmed was named President of the TFG. (J.A. 201). The TFG was established with a five year mandate for the purpose of guiding Somalia through a transitional process designed to result in a permanent government with a new constitution after elections in 2009. (J.N. ¶2).

Since 2004, the TFG has been deeply divided, and has only been able to exert control over a very small part of the country. (J.A. 201.) The TFG is still

struggling to exert control over Mogadishu, and is embattled in violent conflict with clan-based warlords and armed opposition factions. (J.A. 201-02, J.N. ¶3). While the United States supports a process of reconciliation that could lead to the formation of an inclusive government within the framework of the Transitional Federal Charter, the United States has never recognized the TFG as the government of Somalia. (J.N. ¶4).

In 1991, after the fall of the Barre regime, the northwestern region of the country (the region that formerly comprised the British colony of Somaliland) proclaimed itself the Republic of Somaliland.[6] (J.A. 171-72). The Republic of Somaliland now has its own regional governing authority. (J.A. 172). Although Somaliland is not formally recognized by any nation, including the United States, the region has enjoyed relative stability compared to the rest of Somalia. (J.A. 172).

D. Letters Submitted to the State Department by Representatives of the TFG and of the Republic of Somaliland

While the district court awaited a Statement of Interest from the State Department, individuals claiming to represent the TFG sent letters to the United States Secretary of State offering their support for Samantar. (J.A. 15, 105). The

[6] The human rights abuses that give rise to the Plaintiffs' suit occurred in the territory that is now the Republic of Somaliland, but was under the control of Defendant Samantar's military subordinates during the timeframe of the Complaint.

district court quoted heavily from two of these letters in its opinion.[7] (J.A. 218-19). Plaintiffs objected to the force and validity of these letters, and raised the concern that they purported to come from a foreign government not officially recognized by the United States. (J.A. 181).

On June 26, 2007, in a supplemental filing, Plaintiffs alerted the district court to two letters that had been submitted to the State Department from officials of the Republic of Somaliland, expressing support for the Plaintiffs' claims. (J.A. 187-88). Those letters challenge the letters from the TFG, and express the Somaliland government's views that this case, by seeking to hold Samantar accountable for his actions, would "promote reconciliation in the region, rather than hinder those efforts."[8] (J.A. 192, 193). Referencing the April 26, 2007 letter offered by Samantar, Mr. Abdillahi M. Duale of Somaliland also explained that Prime Minister Gedi of the TFG has been a longtime political ally of Samantar and

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[7] On February 17, 2007, Salim Alio Ibro, purportedly then Deputy Prime Minister and Acting Prime Minister of the TFG, wrote to the State Department expressing support for Samantar. (J.A. 105). On April 26, 2007, Ali Mohammed Gedi, purportedly then Prime Minister of the TFG, also wrote to the State Department expressing support for Samantar. (J.A. 196). An earlier letter, substantially similar to the two described in the district court's order, was also submitted by Samantar in February 2005 to the Secretary of State, from yet another professed official of the TFG, a Mr. Abdulahhi Sheikh Ismail, purportedly then Foreign Minister. (J.A. 15).

[8] The first letter, dated March 3, 2005, was from Edna Adan Ismail, the then-Foreign Minister of the Republic of Somaliland. (J.A. 192). The second letter, dated June 2, 2007, was from the current Minister of Foreign Affairs for the Republic of Somaliland, Abdillahi M. Duale. (J.A. 193).

declared that Gedi's statements do not reflect a general consensus of the Somali government. (J.A. 193).[9] Like the TFG letters, these letters were also submitted to the State Department while this case was stayed awaiting a Statement of Interest. (J.A. 189). The State Department neither responded to any of the letters nor forwarded them to the district court. (J.A. 209-10).

II. THE PLAINTIFFS

The Plaintiffs all survived unspeakable human rights abuses during the brutal period of military dictatorship of the 1980s. They allege that Defendant Samantar was responsible for the abuses they and their families members suffered at the hands of his military and security forces.

A. Bashe Abdi Yousuf

As a young businessman in Hargeisa, Somalia, Bashe Abdi Yousuf helped form the UFFO, an organization dedicated to improving education and health care in Hargeisa. (J.A. 203). On or about November 19, 1981, three National Security Service ("NSS") agents abducted Yousuf and took him to a detention center. (J.A. 203). At one point during his detention, the agents blindfolded him, handcuffed him, forced him to the ground, and tightly tied his hands and feet together behind his back so that his body was arched backward in a slightly-tilted "U" shape, with his arms and legs in the air. (J.A. 204). This form of torture was known as the

[9] Ali Mohammed Gedi has recently lost his position within the TFG. (J.N. ¶1).

"Mig" because it placed the prisoner's body in a shape that resembled the Somali Air Force's MIG aircraft. (J.A. 204). The agents placed a heavy rock on his back, causing him excruciating pain, while continuing to tighten the ropes, causing deep cuts in his arms and legs. (J.A. 204). Yousuf was interrogated about the members and activities of the UFFO and was told that the torture would end if he confessed to anti-government crimes. (J.A. 204).

After approximately three months of detention marked by at least eight sessions of water torture (in which Yousuf 's mouth was forced and held open while water was poured over his face to simulate drowning until he passed out) and two sessions of electric shock treatment, Yousuf and other detained members of the UFFO were taken before a special military court and, in a sham trial, sentenced to twenty years in prison. (J.A. 204).

Yousuf was sent to Labaatan Jirow, a notorious maximum security prison for political prisoners. (J.A. 204). He remained in solitary confinement, in a small cell in near total darkness, for approximately six and a half years. (J.A. 204). He was released from prison in May 1989 and fled Somalia. (J.A. 204). He arrived in the United States in 1991, and later became a naturalized citizen. (J.A. 204, 30).

B. Aziz Mohamed Deria, in His Capacity as Personal Representative of the Estates of Mohamed Deria Ali and Mustafa Mohamed Deria

In 1983, Plaintiff Aziz Mohamed Deria fled Somalia to the United States because of persecution for his political activities on behalf of the Isaaq clan. (J.A. 205). Many of his family members remained in Somalia, including his father, Mohamed Deria Ali, a successful businessman, and his younger brother, Mustafa Mohamed Deria. (J.A. 205).

In mid-June 1988, during the bombardment of Hargeisa, a group of approximately twenty members of the Somali Armed Forces forcibly entered the Deria family's home and stated that they were going to kill all the members of the Isaaq clan that day. (J.A. 205). They grabbed Mohamed Deria Ali and dragged him out of the house. (J.A. 205). Later that afternoon, the same group of soldiers returned to the family's home and reported that Mohamed Deria Ali had been killed. (J.A. 205). They then abducted Mustafa Mohamed Deria, only twenty-two years old, who has not been seen again. (J.A. 205).

C. John Doe I and Aziz Mohamed Deria, in his Capacity as Personal Representative of the Estates of James Doe I and James Doe II

In December 1984, Plaintiff John Doe I was tending camels in a rural area around Burao, a small city in the north of Somalia, with two of his brothers. (J.A. 205). A large group of Somali soldiers approached and interrogated the brothers about recent SNM activity. (J.A. 205). The brothers denied having any knowledge

of SNM activities, and they were forced into a military truck and taken to the military installation in the village of Megaaloyar. (J.A. 205-06). There they were tied in the "Mig" position, beaten, and kicked. (J.A. 206). The soldiers eventually threw the three brothers in the back of an Army truck, still tied in the "Mig" position, and transported them to the military base in Burao, where they were further interrogated. (J.A. 206).

The next day, they were taken to the local military court with thirteen other prisoners. (J.A. 206). Two of the soldiers who had detained the brothers testified that the brothers had hidden SNM fighters and probably were themselves members of the SNM. (J.A. 206). The brothers were convicted and then sentenced four days later to death, along with forty-two other prisoners. (J.A. 206). The condemned prisoners were directed to Army trucks outside the courthouse. (J.A. 206). As John Doe I and his brothers climbed into one of the trucks, a sympathetic guard asked if the three men were indeed brothers; when they said yes, the guard released John Doe I. (J.A. 206). As John Doe I escaped down the road, the truck passed by, carrying his two brothers. (J.A. 206). The truck was heading towards the nearby Burao airport, a well-known execution site. (J.A. 206). Soon after, John Doe I heard the sound of gunshots and saw people running toward the airport. (J.A. 206). James Doe I and James Doe II were among the men executed that day. (J.A. 206).

D. Jane Doe

One night in or around July 1985, while Plaintiff Jane Doe was at home with her family in Hargeisa, several NSS agents broke into her house and took her and other family members to NSS headquarters, where they were detained for a week. (J.A. 206). Jane Doe, who was a student, was accused of being a "subversive leader" for her alleged support of the SNM. (J.A. 206-07). A few days later, she was taken to the regional military headquarters and put in a small cell with one other woman. (J.A. 207). Her arms were tied behind her back with wire and then chained to the wall, and her left leg was chained to the floor. (J.A. 207). She was detained in this manner for three months. (J.A. 207).

While imprisoned, Jane Doe was regularly interrogated and tortured. (J.A. 207). She was raped at least fifteen times in a locked, dark room by a man in a camouflage uniform.[10] (J.A. 207). She suffered constant and severe physical pain, but she never received medical attention for her injuries. (J.A. 207).

Months later, Jane Doe was brought to the National Security Court for trial. (J.A. 207). She was not permitted defense counsel and no evidence was presented against her, but she was sentenced to life in prison. (J.A. 207). Soldiers immediately took her outside and beat her severely. (J.A. 207). Because of this

[10] As a child, Jane Doe was subjected to infibulation, a procedure commonly performed on Somali girls. (J.A. 207). Her vagina was sewn closed except for a very tiny hole. (J.A. 207). Jane Doe's rapist opened her vagina by cutting her with fingernail clippers. (J.A. 207).

beating, she could not stand or walk for months. (J.A. 207). Jane Doe was taken to Hargeisa Central prison, where she was held alone in a cell measuring approximately three-and-a-half feet by five-and-a-half feet with her hands tied together in front of her at all times. (J.A. 207). She remained in solitary confinement for the next three-and-a-half years. (J.A. 207). After her release, Jane Doe fled Somalia and later immigrated to the United Kingdom. (J.A. 208).

E. John Doe II

During the Spring of 1988, Plaintiff John Doe II, a non-commissioned Isaaq officer in the Somali Armed Forces, was arrested by an Army officer and immediately taken to the headquarters of the 26th Military Sector where he was detained with other men he recognized as Isaaq Army officers. (J.A. 208).

The next afternoon, Army soldiers began taking prisoners four at a time and executing them at Malko Dur-Duro, a well-known execution site. (J.A. 208). Later that evening, Army soldiers took John Doe II and three other Isaaq officers from their cells and drove them to Malko Dur-Duro. (J.A. 208). An Army officer ordered Red Beret soldiers to shoot the prisoners. (J.A. 208). The Red Berets shot at the men and all four fell backward into the riverbed. (J.A. 208). John Doe II received only flesh wounds and briefly fell unconscious. (J.A. 208). When he awoke, he found himself lying among the dead bodies. (J.A. 208). He remained there, covered by dead bodies, until the mass execution was completed and the

soldiers had left the area. (J.A. 208). He subsequently fled Hargeisa and did not return until 1991. (J.A. 208).

III. SAMANTAR'S AUTHORITY OVER THE SOMALI MILITARY

From about January 1980 to December 1986 Samantar served as First Vice President and Minister of Defense of the Democratic Republic of Somalia. (J.A. 209). On or about January 1987, he was appointed Prime Minister of Somalia, a position he held until approximately September 1990. (J.A. 209). He served as a General in the Somali Armed Forces throughout this time. (J.A. 209).

At all relevant times between 1980 and 1990, Samantar, as a General, as Minister of Defense, and as Prime Minister, possessed and exercised command and effective control over the Somali military, including the NSS and the Red Berets. (J.A. 209). At all relevant times Samantar failed or refused to take necessary measures to investigate and prevent these abuses, or to punish personnel under his command for committing such abuses. (J.A. 209).

The acts of torture, including rape, extrajudicial killing, attempted extrajudicial killing, arbitrary detention, cruel, inhuman or degrading treatment or punishment, war crimes, and crimes against humanity described herein were natural and foreseeable consequences of a common, shared design and joint criminal enterprise on the part of the leaders of the Barre regime and the Somali Armed Forces. (J.A. 45-46). Samantar was a part of that joint criminal enterprise

and shared its common intent to rid the northern region of Somalia of members of the Isaaq clan, and to systematically attack the Isaaq civilian population. (J.A. 49).

After the Barre regime fell in 1991, Samantar fled Somalia. He went first to Italy, and then came to the United States. (J.A. 103). He has lived in Fairfax, Virginia since June 1997. (J.A. 103).

SUMMARY OF THE ARGUMENT

The district court's dismissal is based on a flawed application of the FSIA. As a threshold matter, the FSIA cannot apply where there is currently no foreign sovereign state from which the Defendant can derive foreign sovereign immunity. Relying upon unauthenticated letters to the State Department from a putative but unrecognized government currently but unsuccessfully trying to gain control over Somalia, despite the State Department's considered decision not to intervene in the matter, the district court improperly afforded sovereign immunity to Samantar. The district court also relied on its own factual research outside of the Complaint and failed to permit jurisdictional discovery before reaching its ruling.

Additionally, the FSIA does not apply to Samantar because it cannot apply where a defendant was not an agent or instrumentality of the state at the time of suit, because it does not properly apply to individuals, and because he cannot be immune for acts that were outside his legal authority under international law.

The flawed interpretation of the FSIA by the district court also contradicts both Congressional intent and a long line of cases applying the TVPA. By adopting a rationale that would require a case to satisfy one of the narrow exceptions to the FSIA, the ruling of the district court would effectively eviscerate the TVPA.

In sum, the district court's extension of FSIA immunity to a former official of a long-defunct regime creates a precedent that brushes aside a long line of ATS cases and practically nullifies the TVPA. Worse yet, in doing so, its reliance on unauthenticated letters from self-professed officials of an unrecognized foreign government potentially hands a sweeping dismissal power to even non-governmental political allies of future ATS/TVPA defendants.[11]

STANDARD OF REVIEW

The grant of a Rule 12(b) Motion to Dismiss is subject to de novo review. *New Beckley Mining Corp. v. Int'l Union*, 18 F.3d 1161 (4th Cir. 1994), *Bass v. E.I. Dupont de Nemours & Co.*, 324 F.3d 761, 764 (4th Cir. 2003).

[11] None of the other potential grounds for dismissal argued by Defendant Samantar, such as head of state immunity, exhaustion of remedies, and statute of limitations, warrant dismissal of this case.

ARGUMENT

I. THE DISTRICT COURT MISAPPLIED THE FSIA BY AFFORDING IMMUNITY TO SAMANTAR .

A. There Is Not Now and Was Not at the Time of the Suit Any "Foreign State" of Somalia for Purposes of the FSIA.

The FSIA grants immunity from suit only to "foreign states." 28 U.S.C. § 1604. It is based on principles of comity:

> Foreign sovereign immunity … is not meant to avoid chilling foreign states or their instrumentalities in the conduct of their business but to give foreign states and their instrumentalities some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns.

Dole Food Co. v. Patrickson, 538 U.S. 468, 479 (2003), citing *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).

There is not currently, and has not been since 1991, a Somali governmental entity that is entitled to comity as a "foreign state" under the FSIA. Though "foreign state" is not defined in the FSIA, "courts consistently have concluded that the meaning of the term 'foreign state,' as it relates to a sovereign power, should be derived by application of the standard set forth in the Restatement (Third) of the Foreign Relations Law of the United States." *Estate of Klieman v. Palestinian Auth.*, 424 F. Supp. 2d 153, 158 (D.D.C. 2006); *see also Ungar v. Palestine Liberation Org.*, 402 F.3d 274, 283 (1st Cir. 2005); *Kadic v. Karadzic*, 70 F.3d 232, 244 (2d Cir. 1995). The Restatement defines a state as 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." *Klieman*, 424 F. Supp. 2d at 159; *Ungar*, 402 F.3d at 283; *Kadic*, 70 F.3d at 244, citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 201 (1987).

The current TFG does not satisfy the definition of a state under the Restatement and is not a successor sovereign entity to the former Barre regime. First, the TFG has never had a defined territory nor permanent population under its control. Second, and perhaps more importantly, the TFG lacks governmental control over the former Somalia. Governmental control has been recognized as the most significant of the Restatement factors. *See Ungar*, 402 F.3d at 288 (government control is the "most salient factor in the statehood calculus"); JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW, 55 (2d Ed. Clarendon Press 2006) ("The requirement that a putative State have an effective government might be regarded as central to its claim to statehood"). It is widely recognized, however, that Somalia has "no permanent national government," but only a "transitional" entity which "continues to struggle to establish effective governance in the country."[12] (J.N. ¶3). To date, the TFG does not even control the Somali capital, Mogadishu. (J.A. 202, J.N. ¶3). In fact, by September of 2007,

[12] At least one circuit court has even so held, and been affirmed by the U.S. Supreme Court. *Jamal v. I.C.E.*, 329 F.3d 630, 634 (8th Cir. 2003) ("Somalia lacks a functioning central government"), *aff'd by Jamal v. I.C.E.*, 534 U.S. 335 (2005).

a mere month after the district court's opinion, United States Special Envoy to Somalia John M. Yates expressed concern over the inability of the TFG to provide services and the widespread "lack of confidence in the [TFG] in its capacity to carry forward." (J.N. ¶5). Clearly the TFG does not satisfy the governmental control factors.

As to the last factor in the test for statehood, the TFG does not have formal relations with the United States and the United States has no diplomatic presence in any part of Somalia. (J.N. ¶2). In sum, there is no entity representing the former Somalia that passes the prevailing test for statehood.

As an alternative test for statehood, courts resolving questions of sovereign immunity have also noted that sovereign immunity is only granted to governments that have been impliedly or officially "recognized" by the United States as "states." *See, e.g.*, *Knox v. Palestine Liberation Org.*, 306 F. Supp 2d 424, 444 (S.D.N.Y. 2004); *Estates of Ungar v. Palestinian Auth.*, 315 F.Supp.2d 164, 186 (D.R.I. 2004). The TFG has clearly *not* been recognized by the United States as the government of Somalia. (J.N. ¶5). Thus, the TFG also fails the alternate "recognition" test for statehood.

By any measure of statehood, there is not currently, and was not at the time of the filing of the Complaint, a foreign sovereign state of Somalia to which comity is owed.

1. The District Court Improperly Gave Credence to Letters From the TFG When the State Department had Declined to do so.

a. A District Court May Not "Recognize" a Foreign Government.

"Under the Constitution of the United States, the president has exclusive authority to recognize or not to recognize a foreign state or government, and to maintain or not to maintain diplomatic relations with a foreign government." *Jones v. United States*, 137 U.S. 202, 212 (1890). Recognition is not a determination to be made by the court, but rather by the executive branch. *Guaranty Trust Co. v. United States*, 304 U.S. 126, 137 (1938) ("What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government."); *Knox*, 306 F. Supp 2d at 440 (the courts may take judicial notice whether a regime has been recognized, but the courts *may not* judicially recognize a regime or state).

Nonetheless, the district court here explicitly held that "the Somali Transitional Federal Government . . . is supported and recognized by the United States as the governing body in Somalia." (J.A. 218). The district court also implicitly recognized the TFG by giving "great weight" to the TFG's statements that Defendant's actions were taken "in his official capacity" and by specifically

relying, as a basis for its FSIA ruling, on the fact that the TFG "has not disavowed the actions of the defendant." (J.A. 219).[13]

This reliance was improper and it effectively permitted the TFG to speak for the non-existent state of Somalia, and for the long-defunct Barre regime, for the purposes of asserting FSIA immunity. The district court's explicit and implicit rulings to the effect that the United States has "recognized" the non-sovereign-entity TFG were error.[14]

b. The Court Should Not Have Deferred to the Views of a Government When the State Department Had Chosen to Ignore Those Views.

Even if the TFG were a legitimate government officially recognized by the United States, the district court should not have heeded the TFG's calls for dismissal. In this case, the district court afforded the State Department two years to submit a Statement of Interest in this matter, yet it declined to do so – despite monthly inquiries made on behalf of the district court. Notwithstanding the State

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[13] In holding that the TFG letters are sufficient to "shield [Samantar's] actions under the cloak of immunity" provided by the FSIA, and by allowing the TFG to "ratify" Samantar's acts as official, the district court also failed to consider whether the defendant's actions were legal in the first place under international and domestic law and thus within Samantar's lawful authority. *See* Part I.E., *infra*.

[14] The court's action is particularly troublesome given that two different unrecognized regimes, the TFG and the Republic of Somaliland, are currently competing to be recognized as the government of the region of northwestern Somalia, where the underlying events of the Complaint occurred.

Department's purposeful and considered silence, the district court allowed the TFG letters to "persuade the Court that dismissal is appropriate."

An evaluation of a foreign government's attitudes toward a case is not a matter for the district court. "Federal judges cannot dismiss a case because a foreign government finds it irksome, nor can they . . . tailor their rulings to accommodate the expressed interests of a foreign nation that is not even a party." *Patrickson v. Dole Food Co.*, 251 F.3d 795, 803 (9th Cir. 2001), *affirmed in part on other grounds*, 538 U.S. 468 (2003). Instead, federal judges "are bound to decide cases before them according to the rule of law." *Id.* "If a foreign government finds the litigation offensive, it may lodge a protest with our government; our political branches can then respond in whatever way they deem appropriate—up to and including passing legislation." *Id*. Here, the United States government's political branches did not ask the district court to honor a foreign government's request for dismissal, thus the district court ought not to have done so on its own.

These principles are illustrated in *Rep. of Mexico v. Hoffman*, 324 U.S. 30, 38 (1945), where the Supreme Court held that, in the absence of a Statement of Interest by the Executive Branch, a court may not rely on a statement by the Mexican Ambassador as a basis for conferring immunity on a maritime vessel. The Court stated, "we think controlling . . . is the fact that, despite numerous

opportunities . . . to recognize immunity from suit of a vessel owned and not possessed by a foreign government, this [United States] government has failed to do so." 324 U.S. at 38.

Certainly, if the State Department believed this case would interfere with United States foreign relations, it would have so informed the district court. *See Patrickson*, 251 F.3d at 803, n.7; *In re Tobacco Litigation*, 100 F. Supp. 2d 31, 38 (D.D.C. 2000). It was error for the district court to defer to the non-state-entity TFG's assertions of potential foreign policy implications.

2. The District Court Should Have Permitted Jurisdictional Discovery.

The district court compounded these errors by failing to allow jurisdictional discovery before relying on the purported letters from the TFG in reaching its ruling. Sovereign immunity implicates the court's jurisdiction, and when a defendant questions a court's subject-matter jurisdiction, the court must satisfy itself of its authority to hear the case, and must allow the nonmoving party "an ample opportunity to secure and present evidence relevant to the existence of jurisdiction." *Prakash v. American Univ.,* 727 F.2d 1174, 1180 (D.C. Cir. 1984). Plaintiffs are entitled to jurisdictional discovery "[a]t the very least . . . to verify allegations of specific facts crucial to an immunity determination." *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir. 1992). "[S]ince entitlement of a party to immunity from suit is such a critical preliminary determination, the parties

have the responsibility, and must be afforded a fair opportunity . . . to submit evidence necessary to the resolution of the issues." *Gould v. Pechiney Ugine Kuhlmann & Trefimetaux*, 853 F.2d 445, 451 (6th Cir. 1988).

Moreover, even if the court is engaged in preliminary fact finding to assure itself of its authority to hear a case, it must still "accept all of the factual allegations in [the] complaint as true." *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005) (quoting *United States v. Gaubert*, 499 U.S. 315, 327 (1991)). *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999). Here, despite the fact that there was not even a factual dispute to resolve,[15] the district court engaged in its own internet search to accomplish preliminary fact-finding on the jurisdictional question. Neither side had the opportunity to conduct the preliminary discovery contemplated by the cases cited above.

The discovery stay in this case meant that Plaintiffs were not given the opportunity to conduct discovery on the validity or authenticity of the TFG letters or other factual issues relevant to jurisdiction. Nothing in this record supports the

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[15] Plaintiff's complaint alleged that Somalia has lacked a central government since the collapse of the Barre regime in 1991 and that Somalia "remains under the de facto control of competing clan leaders." (J.A. 170-71). Defendant Samantar agreed that Somalia lacks a central government, submitting several affidavits averring that chaos and tribal warring that characterized Somalia in 1991 continues to describe current conditions. (J.A. 111, 120). Rather than accepting those facts, or opening discovery to resolve the jurisdictional question, the district court concluded from its own research that the TFG should be considered Somalia's government.

notion that the TFG is a legitimate successor government to the former regime of Siad Barre which, despite its faults and declining support from the United States, was the last regime officially recognized by our government. In addition, it is far from clear that the letters relied upon by the district court were in fact properly authorized by the TFG. It was error for the district court to make rulings recognizing a non-sovereign entity as a "foreign state" and relying on unauthenticated letters purportedly from the TFG without affording Plaintiffs at least some limited jurisdictional discovery.

B. FSIA Does Not Apply to Persons Who Are Not Agents or Instrumentalities of the State at the Time of the Suit.

Not only was there no legitimate "state" of Somalia at the time of suit, but Samantar had absolutely no official status at the time of suit. This defeats his claim to immunity under the FSIA.

In *Dole Food Co. v. Patrickson,* 538 U.S. 468, 480 (2003), the Supreme Court held that for purposes of the FSIA, the date as of which courts should assess a defendant's status is the complaint's filing date. Noting that the FSIA defines an agency or instrumentality as any "entity" that "is an organ of a foreign state or political subdivision thereof," the Supreme Court held that the present tense of this phrase "requires that instrumentality status be determined *at the time suit is filed*." *Patrickson,* 538 U.S. at 478 (emphasis added), *citing* 28 U.S.C. § 1603(b)(2).

Thus, "the legal concept of sovereign immunity, as traditionally applied, is about a defendant's *status* at the time of suit, not about a defendant's *conduct* before the suit." *Republic of Austria v. Altmann,* 541 U.S. 677, 708 (2004) (Breyer, J., concurring). *See also Abrams v. Society National Des Chains De Far François*, 389 F.3d 61, 64 (2d Cir. 2004) (citing *Patrickson* for the principle that an "entity's status as an instrumentality of a foreign state should be 'determined at the time of the filing of the complaint'").

This core holding of *Patrickson* is consistent with the doctrinal underpinnings of sovereign immunity. Sovereign immunity grows out of notions of "grace and comity." *Republic of Austria*, 541 U.S. at 688-689, citing *Schooner Exchange v. McFaddon,* 11 U.S. 116 (1812). As a principle of comity between acting governments, sovereign immunity is designed to protect current governments and their treasuries, not to address the nature of the underlying conduct of the defendant. *See Republic of Austria*, 541 U.S. at 696 (noting that foreign sovereign immunity "reflects current political realities and relationships") (quoting *Patrickson*, 538 U.S. at 479).

That the doctrine of sovereign immunity protects a current foreign government, not its former officials, is also apparent from this Court's decision in *In re Grand Jury Proceedings*, 817 F.2d 1108 (4th Cir. 1987). There, a grand jury investigating possible corruption in arms sales to the Philippines issued a subpoena

to former Philippine President Marcos and his wife. The Marcoses resisted the subpoenas on the grounds of head of state immunity,[16] but the then-current Philippine government as recognized by the United States, headed by President Corazon Aquino and considered a successor government to that of the former President Marcos, issued a diplomatic note waiving any residual head of state or diplomatic immunity that might otherwise protect the Marcoses. 817 F.2d at 1110. This Court held that the current government of the Philippines had the power to waive any immunity that might be possessed by the former Philippine President. *Id*. at 1110.

The reasoning of *Grand Jury Proceedings* confirms that sovereign immunity is designed to avoid interference with duties performed by a *sitting* governmental official, not to address whether the defendant's *conduct* was performed in some official capacity. "Like the related doctrine of sovereign immunity, the rationale of head-of-state immunity is to promote comity among nations by ensuring that leaders can perform their duties without being subject to detention, arrest or embarrassment in a foreign country's legal system." *Id*. at 1110. In accordance with the rationale of *Republic of Austria* and *Patrickson*, this Court reasoned, "[o]ur view is that head-of-state immunity is primarily an attribute of state sovereignty, not an individual right." *Id*. at 1111.

[16] The Marcoses did not claim immunity under the FSIA.

The district court cited to *Velasco v. Go's of Indonesia*, 370 F.3d 392, 398 (4th Cir. 2004), for the principle that foreign sovereign immunity extends "to an individual acting in his official capacity on behalf of a foreign state." *Id.* But *Velasco* did not hold that a *former* governmental official may be considered an "agency or instrumentality" of a foreign state and therefore entitled to FSIA immunity. That issue was never raised in *Velasco* and has been conclusively resolved by *Patrickson*.

At the time that Plaintiffs filed their suit in November 2004, Samantar had not been an official of the Somali government since 1991, when the Barre regime was toppled. Moreover, any recovery by the Plaintiffs will be satisfied from Samantar's personal assets, not from the treasury of Somalia or from the operating budget of any Somali government. Samantar was not an agent or instrumentality of the state of Somalia at the time the suit was filed, and he is not entitled to immunity under the FSIA.

C. The FSIA Does Not Apply to Individuals.

Plaintiffs acknowledge that this Court has extended the protection of the FSIA to individuals, holding that a natural person may be considered an "agency or instrumentality" of a foreign state. *Velasco*, 370 F.3d at 398-99. Since *Velasco*, however, the federal government has taken the position that the FSIA does not

apply to individuals. (J.N. ¶7).[17] Also, since *Velasco*, the Second Circuit has expressed skepticism about whether the FSIA applies to individuals. *See Kensington Int'l Ltd. v. Itoua*, 2007 WL 3024817 (2d Cir. 2007); *Tachiona v. United States,* 386 F.3d 205, 221 (2d Cir. 2004) (reasoning that the FSIA defines "agencies and instrumentalities" in terms *not usually used to describe natural persons* and that "the only references to heads of state or other foreign officials in the FSIA's legislative history suggest that their immunity is not governed by the Act") (emphasis added). And, in another post-*Velasco* decision, the Seventh Circuit has directly addressed this question and squarely held that FSIA does not apply to individuals. *Enahoro v. Abubakar*, 408 F.3d 877, 881 (7th Cir. 2005).

Plaintiffs also note that *Velasco* accepted the reasoning of courts that have extended immunity to individuals acting in their official capacities. 370 F.3d at 398, relying on *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101-03 (9th Cir. 1990). In *Chuidian*, the Ninth Circuit reasoned that the FSIA's failure to expressly *exclude* individuals creates an ambiguity that may be resolved by *including* within the scope of the Act individuals *acting in official capacities*. *Chuidian*, 912 F.2d at 1101. The court in *Enahoro* found this logic to be "upside

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[17] In addition to noting that the phrase "agency or instrumentality" does not, by its terms, naturally encompass an individual, the government has noted that such an interpretation may lead to anomalous results under related provisions of the FSIA governing the attachment of property and punitive damages. (J.N., Ex. G).

down" and in tension with the traditional burden of proof on immunity issues under the FSIA. 408 F.3d at 882.

Plaintiffs submit that *Enaharo's* reasoning is persuasive, and that when properly construed, the FSIA does not apply to individuals at all.[18] In light of the intervening decisions from other circuits and the position asserted by the federal government in its *Kensington* amicus brief, this Court may wish to reconsider the portion of the *Velasco* holding that applies FSIA immunity to individuals.[19]

D. Samantar's Human Rights Abuses Are Outside the Scope of Authority of Foreign Officials And Therefore Not Entitled to Immunity.

The district court found that human rights abusers, such as Samantar, are entitled to FSIA immunity when "the foreign government has expressly ratified the defendant's actions and affirmed that the defendant was acting pursuant to his official duties." *Samantar* at 20, citing to *Matar*, 500 F. Supp. 2d at 292. This holding fails to take into account the well-established precedent that human rights abuses are outside the scope of authority of foreign officials and therefore are not protected by the FSIA.

[18] Indeed, it appears that when Congress passed the TVPA in 1991, it did not consider the FSIA to apply to natural persons. *See* II.B. of this Argument, *infra*.

[19] This Court does not need to reconsider *Velasco* at all in this case, however. Regardless whether the FSIA applies to individuals, Samantar is not entitled to immunity for the separate reasons that the FSIA cannot apply where there is no foreign state owed comity at the time of suit, and because FSIA protects neither *former* governmental officials *nor* officials accused of committing serious human rights violations.

When this Court decided *Velasco*, a case not involving human rights abuses, it relied on the Ninth Circuit's *Chuidian* analysis which distinguishes between acts taken in an official capacity, for which there may be immunity, and acts "beyond the scope of . . . authority," for which there is no immunity. 370 F.3d 392, 399 (4th Cir. 2004), citing *Chuidian*, 912 F.2d at 1101. Other circuits have applied the same reasoning. *See Jungquist v. Al Nahyan* 115 F.3d 1020, 1028 (D.C. Cir. 1997) (The inquiry as to whether an act falls within an official's lawful authority is two-part, "focus[ing] on the nature of the individual's alleged actions . . . [and] whether the [official] was authorized in his official capacity"); *Byrd v. Corporacion Forestal y Indus. de Olancho S.A.*, 182 F.3d 380, 388-389 (5th Cir. 1999) ("The FSIA's protections cease, however, when the individual officer acts beyond his official capacity"). The scope of an official's authority to act is limited (1) by the powers granted to the official by his government, and (2) by customary international law. Samantar's conduct exceeded both limits, and he is not entitled to immunity.

A plenitude of case law establishes that Samantar is not immune if his acts were illegal under Somali law. *See Phaneuf v. Republic of Indon.*, 106 F.3d 302, 308 (9th Cir. 1997) ("If the foreign state has not empowered its agent to act, the agent's unauthorized act cannot be attributed to the foreign state; there is no 'activity of the foreign state'" for FSIA purposes); *Chuidian*, 912 F.2d at 1106

(quoting *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949) ("'[W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions.'"); *Doe v. Qi,* 349 F.Supp. 2d 1258, 1287 (N.D. Cal. 2004) (no immunity where China "appears to have covertly authorized but publicly disclaimed the alleged human rights violations..."); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1198 (S.D.N.Y. 1996) (FSIA inapplicable because acts of torture fall "outside the scope" of defendant's official authority); *Xuncax v. Gramajo*, 886 F. Supp. 162, 175-76 (D. Mass. 1995) (FSIA inapplicable because acts of torture, summary execution, arbitrary detention, disappearance and cruel, inhuman or degrading treatment "exceed anything that might be considered to have been lawfully within the scope of Gramajo's official authority").

Somali law in effect during the time period alleged in the Complaint clearly prohibited torture, extrajudicial killing and arbitrary detention. The Constitution of the Democratic Republic of Somalia explicitly prohibited these types of abuses. (J.A. 140).[20] Samantar's acts, and especially the purposeful targeting of Isaaq civilians as victims, cannot be within his official mandate under Somali law.

[20] Article 27.1 of the Somali Constitution prohibited the use of torture. (J.A. 145.) Article 25.2 prohibited extrajudicial killings. (J.A. 145). Articles 26.2 and 26.3 prohibited arbitrary detention. (J.A. 145). Article 19 required Somalia to follow customary international law. (J.A. 144).

Second, United States courts have recognized torture as a violation of established norms of international law. *Filartiga v. Peña-Irala*, 630 F.2d at 890 (cited with approval in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004)). Extrajudicial killing has been afforded the same recognition. *See Kadic*, 70 F.3d at 243 ("*official* torture is prohibited by universally accepted norms of international law, and the Torture Victim Act confirms this holding and extends it to cover summary execution"). The other allegations of crimes against humanity, war crimes and cruel, inhuman, or degrading treatment or punishment in the Complaint have also been recognized by United States courts as violations of customary international law. *See*, *e.g.*, *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, *repub. at* 414 F.3d 233, 244 n.18 (2d Cir. 2003); *Kadic*, 70 F.3d at 232; *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1154 (11th Cir. 2005).[21] There is clearly a long line of cases recognizing that Samantar's alleged acts violate customary international law. As Samantar's actions were beyond the authority of both Somali and international law, Samantar is not entitled to immunity from this suit.

[21] Indeed Justice Breyer's concurring opinion in *Sosa* acknowledges that crimes against humanity are among the offenses that are both "universally condemned" and for which there is "agreement that universal jurisdiction exists to prosecute" such conduct, therefore supporting the exercise of jurisdiction under the ATS. *Sosa*, 542 U.S. at 762; *see also Meiotic v. Bucolic*, 198 F. Supp. 2d 1322, 1352 (N.D. Ga. 2002); *Quinn v. Robinson*, 783 F.2d 776, 799-800 (9th Cir. 1986); *In re Extradition of Demjanjuk*, 612 F. Supp. 544, 566-8 (N.D. Ohio 1985).

The district court's attempt to distinguish the Ninth Circuit's decisions in *Trajano* and *Hilao* on the "scope of authority" issue is not persuasive. *Trajano* and *Hilao* both are ATS/TVPA cases that were brought for human rights abuses that occurred in the Philippines under the Marcos dictatorship. *Trajano v. Marcos (In re Estate of Ferdinand Marcus, Human Rights Litigation),* 978 F.2d 493 (9th Cir. 1992); *Hilao v. Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation),* 25 F.3d 1467 (9th Cir. 1994). The district court distinguished *Trajano* because, having defaulted, the defendant was deemed to have conceded that she acted outside the scope of her authority.[22] (J.A. 222). The district court distinguished *Hilao* because the Philippine government had affirmed that Marcos acted outside the scope of his authority. (J.A. 222).

The district court failed to recognize, however, that both the *Trajano* and *Hilao* courts analyzed whether the acts of which Marcos was accused (torture and extrajudicial killing) could have been taken within "any official mandate." *Trajano*, 978 F.2d at 498; *Hilao*, 25 F.3d 1467 at 1470. In *Trajano*, the court found that Marcos' acts (the torture and extrajudicial killing of Trajano's son) "[could not] have been taken within any official mandate and therefore cannot

[22] Of course, there is no validity to this distinction here because, on the Motion to Dismiss, the district court was obligated to accept as true the Plaintiffs' allegations that Samantar's actions were beyond the scope of his authority. *See*, *e.g.*, *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999).

have been acts of an agent or instrumentality of a foreign state within the meaning of the FSIA." *Trajano,* 978 F.2d at 498.

In *Hilao*, the Ninth Circuit found that the FSIA does not immunize a foreign official engaged in acts outside of his authority *prior* to considering whether the government of the Philippines found that Marcos had acted outside the scope of his authority. 25 F.3d at 1470-1472. Thus, both *Hilao* and *Trajano* stand for the principle that the district court must analyze whether Samantar's alleged acts were outside the scope of his authority and official mandate before granting FSIA immunity. Here, the district court improperly avoided the legal analysis of that issue by deferring instead to the opinion of the non-sovereign, non-successor TFG. Doing so was error.

Because Samantar's acts fell outside the scope of his legal authority under domestic and international law, he should not be afforded immunity.[23]

E. The District Court Should Not Have Followed the FSIA Immunity Applications of *Belhas v. Ya'Alon* and *Matar v. Dichter.*

In concluding that this case was barred by the FSIA, the district court relied principally on two district court cases from other circuits, *Belhas v. Ya'Alon*, 466 F. Supp. 2d 127 (D.D.C. 2006), and *Matar v. Dichter*, 500 F. Supp. 2d 284

[23] Again, this is an area where the district court deferred to the expressed preference and opinion of the TFG, rather than applying case-law-supported legal analysis. The district court compared the disavowal of Marcos's actions by the successor Filipino government. (J.A. 222). The TFG, however, is not a successor regime entitled to so decide.

(S.D.N.Y. 2007). Each case involved claims for damages based on military actions taken by the Israeli government as part of the long-running crisis in the Middle East.

Matar involved the July 22, 2002 bombing by the Israeli military of an apartment building in Gaza City, in the Occupied Palestinian territory, which was intended to kill (and did kill) Saleh Mustafa Shehadeh, an alleged leader of Hamas.[24] *Matar*, 500 F. Supp. 2d at 286. *Belhas* involved the April 18, 1996 bombing by the Israeli military of Qana in Southern Lebanon as a result of the conflict between Israel and Hezbollah.[25] *Belhas*, 466 F.Supp. 2d at 129.

Both cases are distinguishable. Although the district court described *Belhas* and *Matar* as "involving facts that closely parallel the facts of the instant action," in fact both cases follow a fact pattern quite distinguishable from the present case. The underlying claims in both dealt with a single incident of allegedly indiscriminate bombings of a specific military target and related extrajudicial killing claims. *Belhas*, 466 F. Supp. 2d at 129; *Matar*, 500 F. Supp. 2d at 286. In the present action, the claims involved multiple counts of torture (including rape), extrajudicial killing, arbitrary detention, war crimes and crimes against humanity that were widespread and systematic, occurring over a period of at least nine years.

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[24] As the district court noted, because of the timing of the *Matar* opinion, neither party here had the opportunity to brief that case before the district court.

Additionally, at the time of the alleged acts, Somalia was governed by a military dictatorship. The district courts in *Belhas* and *Matar* based their rulings on statements urging dismissal from a sitting, recognized government representing a stable, democratically elected United States ally. *Belhas*, 466 F. Supp. 2d at 129; *Matar*, 500 F. Supp. 2d at 287. Here, as discussed in Section I.A. of this Argument, the TFG is none of those things (not sitting, not recognized, not stable, and not democratically elected).

Belhas and *Matar* are also distinguishable because in both cases Israel claimed that the suits were, in fact, suits against the State of Israel.[26] *See Belhas*, 466 F. Supp. 2d at 129; *Matar*, 500 F. Supp. at 286. This reasoning has no application to this case: Samantar cannot and does not contend that the prosecution of this suit can be equated to an action against present day Somalia.[27]

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[26] The *Belhas* decision relied upon a letter from the Ambassador of Israel, which stated, "[t]o allow a suit against these former officials is to allow a suit against Israel itself." 466 F. Supp. 2d at 129.

[27] The district court's extension of *Belhas* is also inconsistent with the reasoning of *Estate of Klieman v. Palestinian Auth.*, 424 F. Supp. 2d 153, 158-161 (D.D.C. 2006), authored by the same district judge, Judge Friedman, as *Belhas.* The opinion in *Estate of Klieman* includes a lengthy explication of why neither the Palestinian Authority ("PA") nor the Palestine Liberation Organization ("PLO") have been able to satisfy the "foreign state" requirement for raising the foreign state immunity shield. As Judge Friedman notes in *Klieman*, though the United States supports the cause for Palestinian statehood (much like the United States hopes that the TFG's nascent processes may one day lead to stability and recognition for Somalia), no court has ever granted FSIA immunity in response to a letter from the PLO or the PA. *Id.* Following that reasoning, the district court should not have granted immunity in response to a letter from the TFG.

Matar is further distinguishable from the present case because the United States intervened and urged that the *Matar* case be dismissed on sovereign immunity grounds. 500 F. Supp. at 295-96. Here, the State Department has explicitly chosen not to intervene. Indeed, the United States government's views on the foreign policy implications of a lawsuit against Israel were the principal foundation for the *Matar* court's alternative holding that the case was barred by the political question doctrine. *Id.* Foreign policy concerns involving Samantar, a former official from a displaced and defunct regime, are not comparable to the concerns raised by the *Matar* court. The court in *Matar* found that "[the] Plaintiffs bring this action against a foreign official for implementing the anti-terrorist policy of a strategic United States ally in a region where diplomacy is vital, despite requests for abstention by the State Department and the ally's government." *Id.* Here, however, the United States government has remained *silent* in the face of two years' worth of consecutive monthly requests for an opinion and despite extensive letter briefings from both sides. Unlike in *Matar*, there is no risk here of conflict with the Executive Branch as the State Department has studiously avoided taking any position.

In addition to being distinguishable from the matter at hand, the opinions in *Belhas* and *Matar* are both wrongly decided to the extent that they improperly equated the concept of "color of law" with "official capacity." *Belhas,* 466 F.

Supp. 2d 127 (D.D.C. 2005); *Matar,* 500 F. Supp. 2d 284. Both courts granted immunity under the FSIA without analyzing whether a defendant acted *within the scope of his legal authority,* perhaps because that distinction was not relevant in the same way in those cases as it is here. The FSIA does not apply to former foreign officials accused of torture or extrajudicial killing because these acts fall outside the scope of their legal authority. *See infra*, Section I.D. of this Argument. By presuming immunity applies to all acts taken under color of law and failing to consider whether the defendant acted within the scope of his lawful authority, the district court ruled in contravention of case law analyzing the FSIA in the context of allegations of gross human rights abuses.

II. THE DISTRICT COURT'S APPLICATION OF THE FSIA CONTRADICTS THE CONGRESSIONAL INTENT EXPRESSED IN THE TVPA AND, IF UPHELD, WOULD EVISCERATE THE TVPA.

The district court's holding bestows immunity upon former state officials responsible for torture or extrajudicial killing in a broad class of cases where none of the narrow exceptions to the FSIA applies. The vast majority of the survivors for whom Congress intended to offer redress would lose TVPA access to the courts if, following the district court's opinion, statutory sovereign immunity were to extend to any former foreign official who operated under the color of law even though he committed acts that fall outside the scope of his legal authority.

A. The District Court's Ruling Violates Rules of Statutory Construction.

The district court's broad application of FSIA in this case renders the TVPA, enacted after the FSIA, a virtual nullity. As this Court stated in *Anderson v. Fed. Deposit Ins. Corp.,* 918 F.2d 1139, 1143 (4th Cir. 1990), "a court should, if possible, construe statutes harmoniously." (*Citing* 2A N. Singer, *Sutherland Statutory Construction* § 53.01, at 550 (4th ed. 1984)). "This is especially true if the statutes deal with the same subject matter, even if an apparent conflict exists." *Anderson,* 918 F.2d at 1143. The later enacted statute should be given precedence over the earlier statute because it is the later expression of the legislature. *Id.* at n.4. Also, "[i]t is an elementary tenet of statutory construction that where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one." *S.C. Dept. of Health & Envtl. Control v. Commerce*, 372 F.3d 245, 258 (4th Cir. 2004). In the event of conflict or ambiguity, the more specific statute should be given precedence over a general one. *See, e.g. United States v. Roper,* 462 F.3d 336, 340 (4th Cir. 2006).

Because the later-enacted TVPA addresses a far more narrow set of circumstances than the FSIA, the FSIA should not be read to preclude TVPA suits against former governmental officials for customary international law violations when those former governmental officials have taken up residence in the United States.

B. The District Court's Ruling Violates Congressional Intent.

Congress did not intend that the FSIA act as a bar to TVPA claims against former foreign government officials responsible for torture and extrajudicial killings. When it enacted the TVPA in 1991, Congress was fully aware of the existence and scope of the FSIA. *See* S. Rep. No. 102-249, at 7-8 (1991); *see also* H.R. Rep. No. 102-367, at 4-5 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 84, 87-88 ("Only 'individuals,' not foreign states, can be sued under the bill."). Congress did not intend the TVPA to abrogate the purpose of the FSIA, nor did it see the FSIA as a bar to suits under the TVPA:

> The legislation 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 [FSIA] of 1976, which renders foreign governments immune from suits in U.S. courts, except in certain instances . . . . *[T]he committee does not intend these immunities [sovereign, diplomatic, and head of state] to provide former officials with a defense to a lawsuit brought under this legislation . . . . [T]he FSIA should normally provide no defense to an action under the TVPA against a former official*.

S. Rep. No. 102-249, at 7-8 (emphasis added). *See also* H.R. Rep. No. 102-367, at 5 ("[S]overeign immunity would not generally be an available defense" to a claim brought under the TVPA.). The district court misinterpreted the legislative history when it noted and relied upon the fact that the TVPA was not intended to "override traditional diplomatic immunities" or head of state immunity. (J.A. 220). As the

language quoted above makes clear, these common law immunities are separate and distinct from sovereign immunity under the FSIA, which would not apply to TVPA suits like this one.

Congress expressly provided in the TVPA that those who act under "the color of law" would be subject to the TVPA. 28 U.S.C. § 1350 note. The "color of law" requirement shows that Congress wanted to exclude "purely private criminal acts by individuals or nongovernmental organizations" from coverage. S. Rep. No. 102-249, at 8; *See Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 9 (D.D.C. 1998) (quoting H.R. Rep. No. 102-367, at 5) ("[T]he TVPA contains explicit language requiring state action. The legislative history clearly indicates that 'The bill does not attempt to deal with torture or killing by purely private groups.'").[28] In the district court's estimation, the purported TFG letter endorsing Samantar's actions as taken in his "official capacity" differentiates them from those committed for "personal reasons or motivation." (J.A. at 219). This statement from the TFG, however, does nothing more than confirm that Samantar was operating under the requisite "color of law," thus supporting the state action

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[28] The district court also erroneously relied on the signing statement made by President George H.W. Bush when he signed the TVPA into law. 1992 U.S.C. C.A.N. 91. First, to consider a signing statement part of a law's "legislative history," as did the district court, contravenes the Presentment Clause of the Constitution, U.S. Const. Art. I, § 7, which only allows a President to "approve all the parts of a Bill, or reject it in toto." *Clinton v. City of New York*, 524 U.S. 417, 439-440 (1988). Also, nothing in the signing statement speaks to the FSIA or any other type of immunity.

element necessary for bringing claims for torture and extrajudicial killing under the TVPA.

Congress directed the courts to look to interpretations of 42 U.S.C. § 1983 when construing "color of law." H.R. Rep. No. 102-367, at 5; S. Rep. No. 102-249, at 8. By doing so, Congress agreed with the courts' analysis that certain actions—although they must be committed by government officials—are nonetheless outside the powers granted by any sovereign, and therefore sovereign immunity does not shield an individual from answering for those actions. *See Williams v. United States*, 341 U.S. 97, 99 (1951) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)) ("'Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law.'"). Congress clearly viewed acts performed under "color of law" as distinct from, and not equivalent to, the sovereign status that confers immunity. The district court in this case, however, conflates "color of law" and "official capacity" by stating: "[t]he allegations in the complaint clearly describe Samantar, at all relevant times, as acting upon the directives of the then-Somali government in an official capacity, and not for personal reasons or motivation." (J.A. 217-219, 223). Essentially, the district court improperly held that any individual defendant acting under "color of

law" is always acting in an "official capacity" and is therefore entitled to immunity.

In enacting the TVPA, Congress took the view that torture and extrajudicial killing cannot be within the scope of a foreign official's authority. This is because both crimes "violate standards accepted by virtually every nation. This universal consensus condemning these practices has assumed the status of customary international law." S. Rep. No. 102-249, at 3. The lower court's determination that it is proper for the TFG to "ratify" acts such as torture and extrajudicial killing for which Samantar is accused, goes against the Congressional assumption that "no state officially condones torture or extrajudicial killings" and therefore "few such acts, if any, would fall under the rubric of 'official actions' taken in the course of an official's duties." S. Rep. No. 102-249, at 8.

Congress also never intended that application of the FSIA would be dependent on whether succeeding governments approve or disapprove of a defendant's actions; to the contrary, the FSIA was designed to standardize the application of immunity and remove immunity decisions from diplomatic considerations. *See Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 488 (1983) ("In 1976, Congress passed the [FSIA] in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to '[assure] litigants that . . . decisions are made on purely legal grounds and under

procedures that insure due process.'"). In derogation of these principles, the district court afforded much weight to the statement by an alleged representative of the TFG asserting the legal conclusion that Samantar is entitled to sovereign immunity. (J.A. 218-19, quoting letter from Salim Alio Ibro).

C. If Upheld, The District Court's Decision Would Unjustifiably Narrow the Application of the TVPA and Deny Many Survivors of Torture Access to the Courts.

The district court ruled that for a TVPA claim to go forward, one of the exceptions to the FSIA must apply. (J.A. 212). This reasoning would wipe out the TVPA, rendering it almost meaningless from its inception, because the statutory exceptions to the FSIA are narrow and almost completely inapplicable to cases brought under the TVPA.

The TVPA is limited to cases involving torture or extrajudicial killing. 28 U.S.C. § 1350 note. Thus, most of the exceptions to immunity will have no application -- such as the exceptions for waiver,[29] commercial activity,

[29] To our knowledge the only human rights cases for which immunity was arguably waived are *Paul v. Avril*, 812 F.Supp. 207, 210 (S.D. Fla. 1993) where Haiti's first democratically-elected government waived immunity for the former dictator Prosper Avril and those against the family of former Filipino President Marcos, where the successor government of Corazon Aquino formally waived sovereign immunity. *Hilao v. Marcos*, 25 F.3d 1467, 1472 (9th Cir. 1994); *Trajano v. Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation*), 978 F.2d 493 (9th Cir. 1992). Common sense instructs that such a waiver will generally not occur absent a regime change, but clearly Congress intended that the TVPA would apply even if the defendant's governing regime remains in power. S. Rep. No. 102-249 at 3 (1991) ("The purpose of this legislation is to provide a

enforcement of certain property rights, enforcement of arbitration agreements, enforcement of maritime liens, or foreclosure of mortgages. *See* 28 U.S.C. § 1605(a)(1), (a)(2), (a)(3), (a)(4) and (a)(6); *id.,* § 1605(b); *id.,* § 1605(c); and *id.,* § 1605(d). Similarly, the exception for actions "for personal injury or death, or damage to or loss of property, *occurring in the United States*," 28 U.S.C. § 1605(a)(5), does not apply because Congress explicitly intended the TVPA to apply to conduct *outside* the United States. S. Rep. 102-249, at 3-4. [T]he [TVPA] is designed to . . . [provide] a civil cause of action in U.S. courts for torture committed *abroad*.") (emphasis added).

The exception to sovereign immunity for abuses committed by state sponsors of terrorism, 28 U.S.C. § 1605(a)(7), does not apply because it only permits suits against foreign states themselves – not against individuals – and therefore cannot authorize a TVPA suit (which only applies to individuals). *See*, *e.g.*, *Enahoro v. Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005). Finally, the "state sponsor of terrorism" exception was not passed until 1996. Therefore, if a

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Federal cause of action against any individual who, under actual or apparent authority or under color of law of any foreign nation, subjects any individual to torture or extrajudicial killing").

TVPA action must satisfy this exception to be viable, then the TVPA would have been unusable for the first four years of its existence.[30]

As can be seen, the enumerated exceptions under the FSIA are so narrow that if courts analyzing TVPA claims are required to find an exception under the FSIA, the TVPA would essentially be rendered a nullity. If applied in other cases, the district court's ruling would immunize all former officials responsible for acts under a corrupt and entrenched regime that has not waived immunity for its officials.

If the district court's opinion here is affirmed, cases such as *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (a case in which the government at the time of the torture and the time of the case was the same regime), would not be allowed to go forward today. Yet *Filartiga* is the celebrated case whose holding Congress endorsed when it passed the TVPA. Congress intended the TVPA to "establish an unambiguous basis for a cause of action that [had] been successfully maintained" in *Filartiga*. S. Rep. No. 102-249 at 4 (1991). In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 (2004), the Supreme Court specifically noted *Filartiga's* influence on Congress's enactment of the TVPA, which it referred to as

[30] Also, only five governments have been designated by the State Department as state sponsors of terrorism – Cuba, Iran, North Korea, Sudan and Syria. (J.N. ¶6).

a "clear mandate" allowing federal courts to enforce "claims of torture and extra-judicial killing." *Id.* at 728.[31]

III. THE OTHER ARGUMENTS THAT SAMANTAR RAISED IN THE DISTRICT COURT DO NOT WARRANT DISMISSAL.

Samantar raised additional arguments in support of his Motion to Dismiss which the district court did not address. None of these arguments have merit, and they should be rejected by this Court. Alternatively, this Court may remand the case to the district court for consideration of these arguments in the first instance.[32]

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[31] Indeed, acceptance of the district court's rationale would mean that in addition to *Filartiga,* the courts in the following cases lacked jurisdiction over the actions: *Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006) (Federal jury awarded $54.6 million to three torture survivors who brought suit against two former generals, both former Ministers of Defense, from El Salvador retired and living in South Florida; *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005) (family brought suit against member of Pinochet's Caravan of Death who killed their brother, son then fled to the United States); *Jean v. Dorelien*, 431 F.3d 776 (11th Cir. 2005) (former colonel from Haiti's brutal military dictatorship of 1991-1994 found liable by federal jury for extrajudicial killing and torture); *Chavez v. Carranza*, 2006 WL 2434934 (W.D. Tenn. 2006) (former Salvadoran colonel and Vice-Minister of Defense held liable by a federal jury for extrajudicial killing and torture after living in the United States for over 20 years). *Xuncax v. Gramajo,* 886 F. Supp. 162 (D. Mass. 1995) (American nun brought suit for her torture suffered in Guatemala), *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (suit against torturer from military dictatorship in Ethiopia).

[32] *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below").

A. Samantar Is Not Protected by Head of State or Any Other Common Law Immunity.

As a matter of law Samantar is not entitled to head of state immunity. Samantar never served as head of state of Somalia. During the relevant time President Siad Barre was the Somali head of state pursuant to Article 79 of the Somali Constitution. (J.A. 170, 157.) *See*, *e.g.*, *United States v. Noriega*, 746 F. Supp. 1506, 1519 (S.D. Fla. 1990) (denying head of state immunity to General Noriega because the head of state of Panama recognized by the United States was President Delvalle).[33]

Moreover, even if Samantar had served as head of state of Somalia (which he did not), he still lacks immunity because head of state immunity is reserved for *sitting* heads of state. *First American Corp.,* 948 F. Supp. at 1121; *El-Haddam v. Embassy of United Arab Emirates*, 69 F. Supp. 2d 69, 82 n. 10; *In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988).

Samantar also argued in the district court that he was subject to a common law "official acts" immunity. As set forth in the briefing submitted to the district

[33] Cabinet members or other high ranking officials do not enjoy head of state immunity. *First American Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1121 (D.D.C. 1996) (denying head of state immunity to Minister of Defense and any other officer of United Arab Emirates); *Republic of Philippines v. Marcos*, 665 S. Supp. 793, 798 (N.D. Cal 1987) (denying head of state immunity to Solicitor General of Philippines, Minister of Defense and another officer of United Arab Emirates.

court, this type of immunity is neither defined nor recognized, and Samantar remains subject to suit.

B. The Statute of Limitations Does Not Bar Plaintiffs' Claims.

As a matter of law, Plaintiffs' claims are not barred by the statute of limitations. Courts apply a ten-year statute of limitations to claims under the TVPA and the ATS. It is well-established that the ten-year statute of limitations of the Torture Victims Protection Act ("TVPA") applies to ATCA claims. *See, e.g., Papa v. United States,* 281 F.3d 1004, 1012 (9th Cir. 2002); *Cabiri v. Assasie-Gyimah,*, 921 F. Supp. 1189, 1195-96 (S.D.N.Y. 1996). *Manliguez v.* Joseph, 226 F. Supp. 2d 377, *386 (E.D.N.Y. 2002). Under principles of equitable tolling, the statute is tolled until the defendant is subject to the jurisdiction of courts in the United States. *Arce v. Garcia*, 434 F.3d 1254, 1264 (11th Cir. 2006).

By his own admission, Samantar did not reside in the United States until 1997,[34] as such, before then no United States court had personal jurisdiction over

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[34] During the period between 1991 and 1997, Samantar lived in Italy. (J.A. 103). Samantar's argument that Plaintiffs could have brought this case in Italy during the period that Samantar lived there fails because Samantar does not and cannot show that Italy provided adequate and available remedies to Plaintiffs as required to prevent equitable tolling to apply under the TVPA. S. Rep. No. 102-249 at 10-11 (1991); *Arce*, 434 F.3d at 1262. At best, Samantar's submission of an affidavit from a purported expert on Italian law begs for discovery into the availability of a private cause of action for torture and other alleged human rights abuses in Italian courts from 1991 to 1997.

him. (J.A. 103.) At the time this suit was filed on November 10, 2004, Samantar had been in the United States for less than ten years. The complaint was timely.

In addition, the chaotic and dangerous conditions that persist in Somalia, including the inability to conduct the investigation necessary to bring this case and fears of reprisal, are extraordinary circumstances that mandate equitable tolling until at least 1997. *Rouse v.* Lee, 339 F.3d 238, 246 (4th Cir. 2003). The Court may take judicial notice of the unstable situation in Somalia, or alternatively, allow this issue to be developed in discovery (if necessary). *See*, *e.g.*, *Arriba*, 962 F.2d at 534.

C. The Doctrine of Exhaustion of Remedies Does Not Bar Plaintiffs' Claims.

Under the ATS, Plaintiffs are not required to exhaust their remedies in the country in which the alleged violations of customary international law occurred. *Jean v. Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005); *Enahoro v. Abubakar*, 408 F.3d 877, 889-90 (7th Cir. 2005) (Cudahy, J., dissenting in part); *Kadic v. Karadzic*, 70 F.3d 776, 243-44 (2d Cir. 1995). Plaintiffs' ATS claims, therefore, are not subject to dismissal on this ground.

The TVPA does require Plaintiffs to exhaust remedies in the country where the abuses occurred, but only if those remedies are "adequate and available." 25 U.S.C. § 1350. The exhaustion requirement under the TVPA "was not intended to create a prohibitively stringent precedent to recovery under the statute." *Xuncax v.*

Gramajo, 886 F. Supp. 162, 178 (D. Mass. 1995). Congress's intended operation of the exhaustion requirement is set forth in the TVPA's legislative history:

> [T]orture victims bring suits in the United States against their alleged torturers only as a last resort. . . . Therefore, as a general matter, the committee recognizes that in most instances the initiation of litigation under this legislation will be virtually prima facie evidence that the claimant has exhausted his or her remedies in the jurisdiction in which the torture occurred. The committee believes that courts should approach cases brought under the proposed legislation with this assumption.

S. Rep. No. 102-249, at 9-10 (1991).

Because no remedies are available in the regions of former Somalia, including Somaliland, Plaintiffs have met their obligations under the TVPA. While some progress toward the respect for rule of law has been made in Somaliland, the rest of the former Somalia remains without a functioning national judicial system in which victims of human rights abuses committed by the military government of the 1980s could bring their claims. (J.A. 170-71). Samantar does not reside within the borders of Somaliland, and there is serious doubt whether he is within the jurisdictional reach of Somaliland courts. Plaintiffs' claims are not barred by their failure to exhaust remedies.[35]

[35] At the very least, the Court should not have dismissed these claims for lack of exhaustion without affording Plaintiffs discovery into the remedies available in Somalia or Somaliland.

CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court reverse the district court's decision and remand the case to the district court.

Plaintiffs request oral argument. This appeal raises important issues of first impression and at least two other circuits are currently considering cases raising similar issues.

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CERTIFICATE OF SERVICE

I certify that on November 30, 2007, copies of the foregoing PLAINTIFFS' MOTION FOR JUDICIAL NOTICE IN SUPPORT OF PLAINTIFFS' BRIEF was served by ____________________:

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