

IN THE UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

BASHE ABDI YOUSUF, ET AL.

Plaintiffs,

v.

MOHAMED ALI SAMANTAR

Defendant

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Civil Action No. 1:04 CV 1360

**MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION,  
FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED,  
AND LACK OF SUBJECT MATTER JURISDICTION**

Pursuant to Rule 12 (b)(1) of the Federal Rules of Civil Procedure, Defendant Mohamed Ali Samantar (“Defendant”), by and through undersigned counsel, Spirer and Goldberg, P.C. and Shaughnessy, Volzer & Gagner, P.C. hereby moves this court to dismiss the First Amended Complaint of Plaintiffs Bashe Abdi Yousuf, Aziz Deria, John Doe I, Jane Doe, John Doe II, John Doe III, and John Doe IV (“collectively, “Plaintiffs”)<sup>1</sup> for lack of personal jurisdiction over the Defendant pursuant to the common law head-of-state doctrine.

Pursuant to Federal Rule 12 (b)(6), Defendant further moves this Court to dismiss Plaintiffs’ claims for failure to state a claim upon which relief can be granted, as Plaintiffs failed to comply with the requirement of exhaustion of remedies in the Torture Victims Protection Act (“TVPA”), 28 U.S.C. § 1350 note, § 2 (b), and failed to bring this action within the TVPA’s ten-year statute of limitations provided in 28 U.S.C. § 1350 note, § 2 (c).

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<sup>1</sup> Although Plaintiffs requested Defendant’s consent to amend the complaint to remove references to the names of the anonymous plaintiffs and their family members, Plaintiffs did not request consent to amend the complaint to include Aziz Deria as a plaintiff.


Pursuant to Federal Rule 12(b)(2), Defendant moves this Court to dismiss the claims brought by plaintiff Bashe Abdi Yousuf and plaintiff Aziz Deria pursuant to the Alien Tort Claims Act, 28 U.S.C. § 1350, as they are naturalized citizens of the United States of America and therefore fail to provide this Court subject matter jurisdiction over their claims made pursuant to the Alien Tort Claims Act, 28 U.S.C. § 1350.

A Memorandum of Law in Support of Defendant's Motion to Dismiss and a form of Order accompany this Motion.

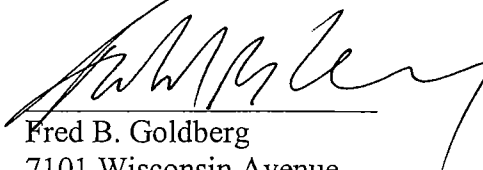
WHEREFORE, Defendant respectfully requests that this Court enter an ORDER DISMISSING Plaintiff's Complaint pursuant to Federal Rules of Civil Procedure 12 (b)(1), 12(b)(2), and 12(b)(6).

Respectfully submitted,

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**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S  
MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION,  
FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED,  
AND LACK OF SUBJECT MATTER JURISDICTION**

**INTRODUCTION**

Defendant Mohamed Ali Samantar ("Defendant"), by and through undersigned counsel, Spirer and Goldberg, P.C. and Shaughnessy, Volzer & Gagner, P.C. moves this Court to dismiss the claims asserted in the First Amended Complaint.

Defendant adopts and incorporates by reference his Motion to Dismiss for Lack of Personal Jurisdiction and for Failure To State a Claim Upon Which Relief Can Be Granted ("Motion to Dismiss"), filed December 1, 2004, and his Reply in Support of Defendant's Motion To Dismiss for Lack of Personal Jurisdiction and for Failure To State a Claim Upon Which Relief Can Be Granted ("Reply in Support of Motion to Dismiss"), filed December 30, 2004 (corrected), as they apply to all plaintiffs listed in the First Amended Complaint.

Defendant adds further support to his position that, pursuant to Federal Rule 12(b)(1), this Court lacks personal jurisdiction over him because he is entitled to head-of-state immunity

for the period during which he served as the Minister of Defense of Somalia, i.e., from 1971 to 1980 and from 1982 to 1986.

In addition, Defendant moves this Court to dismiss the allegations brought by plaintiffs Bashe Abdi Yousuf and Aziz Deria pursuant to Fed. R. Civ. P. 12(b)(2) as they are naturalized citizens of the United States of America and therefore fail to provide this Court subject matter jurisdiction over their claims pursuant to the Alien Tort Claims Act, 28 U.S.C. §1350 ("ATCA").

### ARGUMENT

#### **THE COURT LACKS PERSONAL JURISDICTION OVER DEFENDANT**

##### **The Head-of-State Immunity Doctrine Provides the Defendant With Absolute Immunity from Suit**

In addition to the arguments set forth in his Motion To Dismiss and his Reply in Support of Motion to Dismiss as they apply to all plaintiffs listed in the First Amended Complaint, Defendant further supports his position that he is entitled to head-of-state immunity for the period during which he served as the Minister of Defense of Somalia, i.e., from 1971 to 1980 and from 1982 to 1986.

The same considerations that support the grant of immunity to a foreign minister apply with equal force to making such immunity available to a defense minister in general and to Defendant in particular. In The Schooner Exchange v. M'Faddon, 11 U.S. 116, 138 (1812), the Supreme Court reasoned that a foreign minister is entitled to immunity because "we consider him as in the place of the sovereign he represents, or by a political fiction suppose him to be extra-territorial." A defense minister in the sphere of military affairs, no less than the foreign minister in the realm of diplomatic affairs, represents the sovereign in the state's relations with foreign sovereigns. Each acts, in his particular arena, "in the place of the sovereign he represents." Id.

This analysis recently found support in the only decision of which Defendant is aware that has considered explicitly the availability to a defense minister of the functional immunity traditionally accorded a foreign minister. In this decision in February 2004, the Bow Street Magistrates Court in London rejected an application for a warrant for the arrest of General Shaul Mofaz, the Israeli minister of defense, regarding allegations of torture and war crimes. Bow St. Mag. Ct. Feb. 12, 2004) (per Pratt, Dist. J.), reprinted in 53 Int'l & Comp. L.Q. 769, 771. Ruling that the responsibilities of the defense minister made Mr. Mofaz eligible for head-of-state immunity, the court stated:

The function of various Ministers will vary enormously depending upon their sphere of responsibility. I would think it very unlikely that ministerial appointments such as Home Secretary, Employment Minister, Environment Minister, Culture Media and Sports Minister would automatically acquire a label of State immunity. However, I do believe that the Defence Minister may be a different matter.... It strikes me that the roles of defence and foreign policy are very much intertwined, in particular in the Middle East.... I recognize that I am working in somewhat uncharted waters but having given the matter very considerable consideration overnight and today I conclude that a Defence Minister would automatically acquire [S]tate immunity in the same way as that pertaining to a Foreign Minister.

Id. at 773.

It is evident that Defendant, as Somali Defense Minister, played a significant role in the conduct of Somali's affairs with other states. In his capacity as Defense Minister, as he recites in his affidavit in support of his Motion to Dismiss, Defendant made an official visit to the United States in 1983. During that visit, Defendant not only met with the Secretary of Defense Casper Weinberger and the Chairman of the Joint Chiefs of Staff, but he also met with then Vice President George Bush, the Undersecretary of State, and the Director of the Central Intelligence Agency. See Affidavit of Mohamed Ali Samantar (Motion to Dismiss, exhibit 1) at ¶ 8.

Defendant should accordingly receive, respectfully, the same immunity granted foreign ministers and others who, in representing the sovereign, are traditionally accorded head-of-state immunity.

**THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER THE CLAIMS OF  
BASHE ABDI YOUSUF AND AZIZ DERIA PURSUANT TO THE ALIEN TORT  
CLAIMS ACT**

The ATCA provides that “[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.” 28 U.S.C. § 1350. Three conditions must be met in order for there to be subject matter jurisdiction under the ATCA: (1) the plaintiff must be an alien; (2) the cause of action must be for a tort; and (3) the tort must be committed in violation of the law of nations or a treaty of the United States. Doe v. Islamic Salvation Front, 993 F. Supp. 3, 9 (D.D.C. 1998) (citing Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995)).

The subject matter jurisdiction of this Court for claims raised under the ATCA requires that a plaintiff not be a citizen of the United States of America. Where a plaintiff is not an alien, there can be no federal jurisdiction under the ATCA, and any claims brought thereunder must be dismissed. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985) (plaintiffs who are citizens of the United States do not meet the alienage requirement of § 1350 and must seek other law under which their action might arise); Miner v. Begum, 8 F. Supp. 2d 643, 644 (S.D. Tex. 1998); Estate of Cabello v. Fernandez-Larios, 157 F. Supp. 2d 1345 (S.D. Fla. 2001) (while only aliens have standing to sue under the ATCA, the court retained subject matter jurisdiction of claims by U.S. citizens based on the federal question of a separate federal statute).

Plaintiff Bashe Abdi Yousuf and plaintiff Aziz Deria are naturalized citizens of the United States. Amended Complaint at ¶¶ 8, 9. Both plaintiffs assert claims against Defendant for violations of the ATCA. Amended Complaint at ¶¶ 95, 111. The Court therefore lacks subject matter jurisdiction over the claims alleged by Bashe Abdi Yousuf and Aziz Deria pursuant to the ATCA and should dismiss those claims.

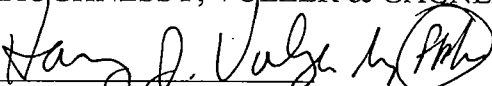
### CONCLUSION

For the foregoing reasons, this Court should dismiss Plaintiffs' First Amended Complaint.


WHEREFORE, Defendant respectfully requests that this Court enter an ORDER DISMISSING Plaintiffs' First Amended Complaint pursuant to Federal Rules of Civil Procedure 12 (b)(1), (b)(2), and 12(b)(6).

Respectfully submitted,

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**Civil Action No. 1:04W1360**

**ORDER**

Upon consideration of Defendant's Motion to Dismiss and the accompanying Memorandum of Law, and any opposition thereto, it is this \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_\_\_, hereby :

ORDERED Defendant's Motion to Dismiss is GRANTED and that

- pursuant to Federal Rules of Civil Procedure 12(b)(1)
- pursuant to Federal Rules of Civil Procedure 12(b)(2)
- pursuant to Federal Rules of Civil Procedure 12(b)(6)

the claims of Plaintiffs, Bashe Abdi Yousuf, Aziz Deria, John Doe I, Jane Doe, John Doe II, John Doe III, and John Doe IV are DISMISSED.

IT IS SO ORDERED

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

At Alexandria

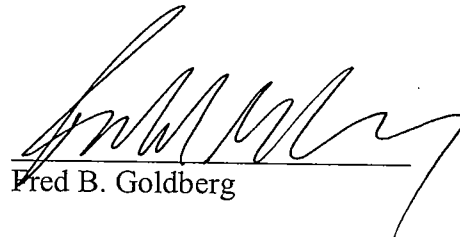


**CERTIFICATE OF SERVICE**

I, Fred B. Goldberg, hereby certify that on this 8<sup>th</sup> day of February, 2005, I caused to be served a true and correct copy of the foregoing Defendant's Motion To Dismiss for Lack of Personal Jurisdiction, Failure To State a Claim Upon Which Relief Can Be Granted, and Lack of Subject Matter Jurisdiction, the Memorandum of Law in support thereof, and a proposed Order, by first-class U.S. Mail, postage pre-paid, on the following:

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Fred B. Goldberg