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

ALEXANDRIA DIVISION

BASHE ABDI YOUSUF, ET AL.,	*	
	*	
Plaintiffs,	*	
	*	
v.	*	**Civil Action No. 1:04 CV 1360 (LMB)**
	*	
MOHAMED ALI SAMANTAR,	*	
	*	
Defendant.	*	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT SAMANTAR'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

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EXHIBIT 1

IN THE EASTERN DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

BASHE ABDI YOUSUF, et al.	*	
Plaintiffs,	*	Civil Action No. 1:04W1360
v.	*	
MOHAMED ALI SAMANTAR	*	
Defendant.	*	

AFFIDAVIT OF MOHAMED ALI SAMANTAR

I, Mohamed Ali Samantar, under oath, do hereby state as follows:

1. I am over eighteen years of age and am otherwise qualified to testify to the facts and opinions set forth below. All of the facts and opinions rendered herein are based on my personal knowledge.

2. From 1971 to 1980, and again from 1982 to 1986, I served as Minister of Defense for Somalia.

3. From 1976 to 1986, I served as First Vice-President of Somalia.

4. From 1987 to September 1990, I served as Prime Minister of Somalia.

5. During my tenure as Prime Minister, the position also required that I act as the Co-Chairman of the Council of Ministers. In this position, I supervised the activities of several ministries, including, but not limited to, agriculture, transportation, health, and communication.

6. As First Vice President, I also was required to serve as Acting President in the event that the President was absent from the country while performing official visits or because of

health-related incapacity. I served as Acting President on several occasions.

7. At all times during my official service to Somalia, the government of the United States recognized the government of Somalia and maintained diplomatic relations. In fact, I was received by high-ranking officials during my state visits to the United States.

8. My first official visit was in 1983, during which I met with Secretary of Defense Caspar Weinberger and with Vice-President George Bush and, during that same visit, also was received by the Undersecretary of Foreign Affairs, the Director of the Central Intelligence Agency, and the Chairman of the Joint Chiefs of Staff. Again, in 1989, as Somalia's Prime Minister, I was received by Vice-President Dan Quayle and Secretary of State James Baker.

9. From February 20, 1991 to June 25, 1997, I lived in Italy and was readily known to be living there. I was not in hiding. In Italy, my telephone number and home address were listed, and I never used a pseudonym. There also were articles published about me that disclosed my residence in Italy, and I was in frequent correspondence with the United States and Italian consulates.

10. From June 26, 1997 to the present I have been living in Fairfax, Virginia. Again, my contact information is readily obtainable, as my telephone number and address are listed, and the Immigration and Naturalization Service documented my entry into the United States.

11. Many of the witnesses and documents relevant to the preparation of my defense are located in Somaliland or historic Somalia.

I declare under penalty of perjury that the foregoing is true and correct.

Mohamed Ali Samantar

State of VA
County of Fairfax

Sworn to and subscribed before me on
the 1st day of December, 2004

Notary Public's Signature
My Commission Expires 05/31/08

EXHIBIT 2

Jamhuuriyadda Soomaaliya
Xukuumadda Federaalka KMG ah
Xafiiska Ra'iisul Wasaaraha

جمهورية الصومال
الحكومة الاتحادية الانتقالية
مكتب رئيس الوزراء

The Transitional Federal Government of the Somali Republic
Office of the Prime Minister

Ref: ODPM/020/07

February 17, 2007

The Honorable Dr. Condoleezza Rice
Secretary of State
U. S. Department of State
2201 C Street, NW
Washington, D. C. 20520

Dear Madame Secretary:

By letter to you dated February 10, 2005, then Foreign Minister Hon. Abdullahi Sheikh Ismail had the honor of conveying to you the thanks of the Transitional Federal Government for the support given by the Government of the United States towards our efforts to reestablish order and legitimacy in Somalia after so many years of civil war and anarchy.

We write now to renew those thanks in view of the difficult two years which have elapsed during which time the continued support of the Government of the United States has given great encouragement and has proven critical to our recent successes. We note specially our gratitude to Assistant Secretary Dr. Jendayi Frazer for her singular efforts on our behalf.

In the previous letter, our Government also expressed its concern over the prosecution in a U. S. court of a lawsuit against a former Prime Minister and Head of Government Mohamed Ali Samantar. We requested that your Department initiate a statement of interest to request that the court dismiss this lawsuit as a violation of Mr. Samantar's immunity and as a threat to the reconciliation efforts then underway in Somalia.

We recently learned that the court is placing the lawsuit (*Yousuf v. Samantar*, No. 1:04 CV 1360, US Dist. Ct. for the E. Dist. Of Va.) back on its active docket. This event makes an expression of such interest that much more important.

We wish to indicate that the actions attributed to Mr. Samantar in the lawsuit in connection with the quelling of the insurgencies from 1981 to 1989 would have been taken by Mr. Samantar in his official capacities and to reaffirm Mr. Samantar's entitlement to sovereign immunity from prosecution for those actions.

We also wish to reemphasize the potential danger to the reconciliation process in Somalia of a lawsuit that would hold a flame to past events and revive old hostilities.

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Email: premiersom@wanarchi.com

Let me underscore again our Government's debt of gratitude for the extraordinary work done by the U. S. Government in helping to restore stability to our country and add the prayer and belief that this process finally leads to the achievement of security and well being for all Somalis.

Sincerely,

Salim Alio Ibro
Acting Prime Minister

cc: **Hon.Dr. Jendayi Frazar**
Assistant Secretary of State for African Affairs

DEPUTY PRIME MINISTER

Tel: +2521-593134, Fax: +2524-367627, Baidoa - Somalia
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EXHIBIT 3

IN THE EASTERN DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

BASHI ABDI YOUSUF, et al.	*	
Plaintiffs,	*	**Civil Action No 1:04 CV 1360**
v.	*	
MOHAMED ALI SAMANTAR	*	
Defendant.	*	

AFFIDAVIT OF ALESSANDRO CAMPO

I, Alessandro Campo, under oath, do hereby state as follows:

1. I am over eighteen years of age and am otherwise qualified to testify to the facts and opinions set forth below. All of the facts and opinions rendered herein are based upon my personal knowledge.

2. I am a graduate of the University of Rome 'La Sapienza' and hold a M.A. degree in law.

3. From March 1999 to December 2001, I served as the Legal Expert for the United Nations ("UN") and the Italian Embassy to Somalia. I also served as program officer for the UN 'Oil-for-Food' Program for Iraq from March to November 2003. I am currently working as short-term expert (justice and home affairs sector) with several European Community projects in the Balkans.

4. Between September 23 to October 9, 1999, I participated in a mission of the United Nations Development Office for Somalia ("UNDOS") to assess the courts and judicial authorities in Somaliland. My trip resulted in the publication of "Assessment of the

Judiciary System of Somaliland" for UNDOS.

5. I also am the co-author of a paper entitled "The Evolution and Integration of Different Legal Systems in the Horn of Africa: The Case of Somaliland" published in Global Jurist Topics.

6. In addition to my previous affidavit dated December 1, 2004 concerning the case Bashi Abdi Yousuf v. Mohamed Ali Samantar, I wish to outline the following issues relating to Somaliland's legal system and supplement my previous testimony:

(a) Somaliland's Charter (Constitution) recognizes all UN Conventions, Treaties and international human rights instruments (including the UN Convention against torture, cruel or inhuman punishment or treatment) and Somaliland law provides causes of action for damages to victims of torture, prisoner abuse, and crimes against humanity.

(b) Since 1991, in Somaliland there is a relatively stable, independent and functioning judiciary that receives international support from several donors including USAID, EC, UN, and UN Office of the High Commissioner for Human Rights (UNOHCHR).

(c) Somaliland's judiciary is competent to hear claims such as these, for torture and crimes against humanity, and could do so relatively independent of political influence. In this regard, the UNOHCHR has been established in Somaliland to monitor the human rights situation in the country and to support the judicial authorities to be compliant with their human rights obligations.

(d) Numerous human rights abuse cases have been brought in Somaliland's courts. Although I do not have access to Somali case law at the moment (as I am currently stationed elsewhere), the UNOHCHR for Somalia and the UN independent expert of the UN Office of the High Commissioner for Human Rights closely monitored a case

with which I am familiar and which illustrates the competency and independence of Somaliland's courts to hear human rights abuse cases.

(e) The case involves three 'Somalilanders' (plaintiffs) and the Total Oil Plant in Barbera (Somaliland) that took place in 1991 and was brought to the court of Berbera and the Supreme Court in Hargeisa (Somaliland). The plaintiffs were recognized to be victims of inhuman treatment because they were forced to work in oil containers, painting them with toxic colors without having any protection (gloves, masks, uniforms, etc). The Somaliland Supreme Court found the Total Oil Plant responsible for the illnesses that the plaintiffs suffered and for the violation of their civil and human rights and awarded about US$ 500,000 to the three Somalilanders.

(f) After the fall of the Barre administration in 1991, a Somali bringing a claim for victimization against a former official of the Barre administration would have had little or no fear of reprisal for himself or family members still residing in Somaliland, the rest of Somalia, or outside of the area. The remnants of the Barre Administration do not exist in an organized fashion and would be incapable of taking retaliatory action against Plaintiffs or their families.

(g) The clan system of Somalia assures protection to its clan members. As Mr. Samantar belongs to a minor clan, which has no significant power in any part of the country, after his forcible departure from Somalia, he would have had no power to exact acts of revenge upon Plaintiffs or anyone in Somalia and particularly in Somaliland.

(h) A Somali bringing a claim for victimization in the U.S. or elsewhere against a former member of the Barre administration would have no appreciably greater difficulty conducting an investigation of his/her claim in 1991 than today. It should also be noted

that risks of retaliation against him/her or his/her family would not have been substantially greater than it is today.

(i) The year 1997 marks no particular change in the situation outside of Somaliland (as chaotic conditions continue to exist to date) or in Somaliland (where relatively stable conditions have existed since 1991).

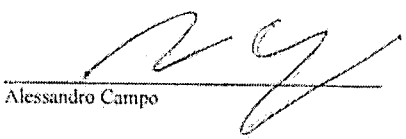
(j) My direct work experience with the UN in Somalia/Somaliland and Iraq allow me to compare the judicial systems of these countries and to note that the international community recognizes the possibility of bringing a human rights case in a court in Iraq (a notoriously war torn country), and similarly, that a Somali could have brought a human rights case to the court in Somaliland. Considering the far superior level of peace and stability in Somaliland and that it has had a functioning judicial system since 1991, it is clear that Somaliland presents an available and adequate forum for Plaintiffs' claims.

7. With regard to the status of Italian law, I wish also to add that according to Art. 5 of the UN Convention against torture, cruel or inhuman punishment or treatment (which Italy has ratified), a Somali could have brought an action against Mr. Samantar in an Italian court at a time during the period from February 20, 1991 (when Mr. Samantar moved to Italy) to November 9, 1997 (when Mr. Samantar left Italy).

I declare under penalty of perjury that the foregoing is true and correct.

_____

Alessandro Campo



Alessandro Campo

EXHIBIT 4

IN THE EASTERN DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

BASHI ABDI YOUSUF, et al.	*	
Plaintiffs,	*	Civil Action No. 1:04W1360
V.	*	
MOHAMED ALI SAMANTAR	*	
Defendant.	*	

AFFIDAVIT OF ALESSANDRO CAMPO

I, Alessandro Campo, under oath, do hereby state as follows:

1. I am over eighteen years of age and am otherwise qualified to testify to the facts and opinions set forth below. All of the facts and opinions rendered herein are based upon my personal knowledge.

2. I am a graduate of the University of Rome 'La Sapienza' and hold a M.A. degree in law.

3. From March 1999 to December 2001, I served as the Legal Expert for the United Nations and the Italian Embassy to Somalia. I currently am employed as short-term expert (justice and home affairs sector) with an EC project in Albania.

4. Between September 23 to October 9, 1999, I participated in a mission of the United Nations Development Office for Somalia ("UNDOS") to assess the courts and judicial authorities in Somaliland. My trip resulted in the publication of "Assessment of the Judiciary System of Somaliland" for UNDOS.

5. I also am the co-author of a paper entitled "The Evolution and Integration of Different Legal Systems in the Horn of Africa: The Case of Somaliland" published in Global Jurist

Topics.

6. From my assessment of Somaliland's judiciary, and based upon information generated by the Somaliland Government that I deem to be reliable, there has been a relatively independent and functioning judiciary within Somaliland since 1991. This judiciary also receives international support, as do other of Somaliland's institutions.

7. Somaliland's judiciary is competent to hear claims such as these, for torture and crimes against humanity, and could do so relatively independent of political influence.

8. A Somali bringing a claim for victimization against a former member of the Barre administration could bring such a claim in Somaliland for events that took place in Somaliland,in 'Puntland' for the events that took place in North East Somalia, and in Mogadishu for the events that took place in Benadir Region that is the district around Mogadishu. Somalia is to be considered as a de facto federal State with three national authorities (including their own judicial systems and law enforcement agencies) that control different areas of the country, i.e. Somaliland for NW Somalia, Puntland for NE Somalia and the Transitional National Government for Benadir Region.

9. Somaliland's law provides causes of action for damages to victims of torture, prisoner abuse, and crimes against humanity.

10. In the event of a judgment, Somaliland's judicial system provides adequate mechanisms for enforcement.

11. After the fall of the Barre administration in 1991, a Somali bringing a claim for victimization against a former official of the Barre administration would have had little or no fear of reprisal for himself or family members still residing in Somaliland, the rest of Somalia, or outside of the area. The remnants of the Barre Administration do not exist in

Somalia, or outside of the area. The remnants of the Barre Administration do not exist in an organized fashion and would be incapable of taking retaliatory action against Plaintiffs or their families.

12. A Somali bringing a claim for victimization in the U.S. or elsewhere against a former member of the Barre administration would have no appreciably greater difficulty collecting information for that claim in 1991 than today.

13. The year 1997 marks no particular change in the situation outside of Somaliland (as chaotic conditions continue to exist to date) or in Somaliland (where relatively stable conditions have existed since 1991).

I declare under penalty of perjury that the foregoing is true and correct.

Alessandro Campo

EXHIBIT 5

IN THE EASTERN DISTRICT COURT FOR THE EASTER DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

BASHI ABDI YOUSUF, et al	*	
Plaintiffs,	*	**Civil Action No. 1:04W1360**
MOHAMED ALI SAMANTAR	*	
Defendant.	*	

AFFIDAVIT OF MAHMOUD HAJI NUR

I, Mahmoud Haji Nur under oath, do herby state as follows:

1. I am over eighteen years of age and am otherwise qualified to testify to the facts and opinions set forth below. All of the opinions rendered herein are based on my personal knowledge, information, or belief.
2. From 1973-1978, and again in 1980, I represented Somalia as the Somali Ambassador to the Sudan.
3. From 1978-1980, I represented Somalia as the Somali Ambassador to Kenya.
4. From 1981-1986, I represented Somalia as the Somali Ambassador to the United States.
5. From 1987-1990, I served as the Chairman of the Somali Ports Authority.
6. From 1991 through the present I have resided in the United States.
7. I am originally from an area now forming part of Somaliland, which was formed from the northern part of Somalia after the fall of the Barre administration in 1991.

8. I closely follow the developments in Somaliland and the rest of Somalia, and I am knowledgeable about Somaliland's government and judiciary and the general state of affairs in the rest of Somalia.
9. A Somali bringing a claim for victimization against a former member of the Barre administration could have brought such a claim in Somaliland for events that took place in Somaliland or the rest of Somalia.
10. Somaliland's law provides cause of action for damages to victims of torture, prisoner abuse, and crimes against humanity.
11. After the fall of the Barre administration in 1991, a Somali bringing a claim for victimization against a former official of the Barre administration would have had no fear of reprisal for himself or family members still residing in Somaliland, the rest of Somalia, or outside of Somalia.
12. Conditions in Somalia, outside of Somaliland, since 1991 have been chaotic and characterized by tribal warfare. However, this situation should have no impact on the Plaintiff's ability to bring a claim against former Barre officials. The remnants of the Barre Administration do not exist in an organize fashion and would be incapable of taking retaliatory action against Plaintiffs or their families.
13. The year 1997 marks no particular change in Somalia's situation outside of Somaliland, as chaotic conditions continue to exist to date.
14. A Somali bringing a claim for victimization in the U.S. or elsewhere against a former member of the administration would have been able to collect information about his case since 1991.

I solemnly affirm under the penalties of perjury that the contents of the foregoing Affidavit are true to the best of my knowledge, information and belief.

Mahmoud Haji Nur

I, Anise Anni, a Notary Public in and for the State of VA, do hereby certify that Mahmoud Haji Nur subscribed his name to the foregoing document and made oath that the statements contained therein are true and correct to the best of his knowledge, before me on this 1st day December, 2004.

My commission expires:
05/31/08

Notary Public

EXHIBIT 6

IN THE EASTERN DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

BASHI ABDI YOUSUF, et al.	*	
Plaintiffs,	*	**Civil Action No. 1:04W1360**
v.	*	
MOHAMED ALI SAMANTAR	*	
Defendant.	*	

AFFIDAVIT OF MOHAMED ABDIRIZAK

I, Mohamed Abdirizak, under oath, do hereby state as follows:

1. I am over eighteen years of age and am otherwise qualified to testify to the facts and opinions set forth below. All of the facts and opinions rendered herein are based on my personal knowledge.

2. I was born and raised in Mogadishu, Somalia.

3. I left Somalia in 1986 to pursue higher education in the Pakistan, but I returned to Somalia in the summers of 1987 and 1988.

4. In 2000, I obtained a Masters Degree from the Johns Hopkins School of Advanced International Studies in Washington, DC.

5. In 2001-2002 I served with the United Nations Development Program for Somalia, operating out of Nairobi, Kenya.

6. During my tenure with the United Nations Development Program for Somalia, I made several missions into the Northwest region of Somalia, referred to as Somaliland.

7. Following the collapse of the Somali government in 1991, Somaliland unilaterally proclaimed its secession from the rest of Somalia and formed its own government and judiciary system over the following years. Somaliland has enjoyed stability from 1991 until the present, except for a brief period in 1994.

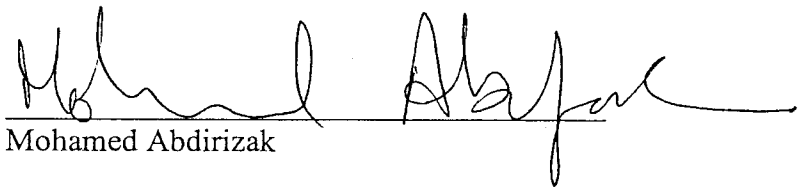
8. From my tenure with the United Nations Development Program's Somalia Country Office, I am aware that the United Nations funded and implemented a Rule of Law program with several components, including strengthening the Somaliland judiciary system and law enforcement.

9. Since 1991, Somaliland has been the only consistently stable region in Somalia. There have been brief periods of stability in other parts of Somalia since 1991, except perhaps Mogadishu, which experienced clan warfare. However, for over ten years, a Somali living in Somaliland, or another stable area of Somalia, would have been able to gather the necessary information to bring a claim against a former government official no differently than today.

10. I do not believe that a Somali would have a reasonable fear of reprisal for bringing claims against a former government official because the former members of the government did not have a unified political interest. The government was comprised of individuals from various clans with different political beliefs. Today, the remaining members of the government do not exist in an organized fashion and would be incapable of taking retaliatory action against Plaintiffs or their families.

11. The year 1997 marks no particular change in Somalia's situation.

I declare under penalty of perjury that the foregoing is true and correct.



Mohamed Abdirizak

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PRELIMINARY STATEMENT

Defendant Mohamed Ali Samantar ("Defendant") is immune from suit in the United States courts for the claims asserted. At the time that Plaintiffs allege that they were victimized by members of the Somali Armed Forces and others, from approximately 1981 through 1989, Defendant was serving the Somali government in various senior capacities within the executive branch of government, as Minister of Defense, First Vice President, Acting President, and Prime Minister. The Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1332, 1391, and 1602-1611 (2004) and the common law doctrines of official act immunity and head of state immunity bar the courts of the United States from exercising personal jurisdiction over the officials of foreign countries for non-commercial actions taken in their official capacities. Accordingly, these principles require dismissal of this action pursuant to Federal Rule of Civil Procedure 12(b)(1).

Plaintiffs also have failed to state a claim upon which relief can be granted as to Samantar's alleged liability for participation in a joint criminal enterprise.

Plaintiffs' claims additionally are time barred, in that the events alleged took place no later than 1989, and the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350 note, requires that actions be brought within a ten-year limitations period. 28 U.S.C. § 1350 note, § 2(c). The same limitations period applies to human rights claims made under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, the alternative basis for jurisdiction in this action.

Finally, because Plaintiffs could have brought an action in the functioning court system of Northern Somalia (Somaliland), this Court should dismiss the Complaint for failure to exhaust judicial remedies, as required by the TVPA, 28 U.S.C. § 1350 note, § 2 (b) and the ATS.

BACKGROUND

Defendant served as First Vice President and, in the President's absence, as Acting President of Somalia from January 1976 to December 1986. Affidavit of Defendant, Mohamed Ali Samantar ("Samantar Affidavit") at ¶¶ 3, 6 (attached hereto as Exhibit 1). He also served concurrently as Minister of Defense from 1971 to 1980 and from 1982 to 1986. Samantar Affidavit at ¶ 2. During his tenure as Vice President and Defense Minister, Defendant performed various duties as a member of Somalia's executive authority, including conducting an official state visit to the United States during which he met with then Vice President George Bush, among other high-ranking officials. Samantar Affidavit at ¶ 8. In January 1987, Defendant was appointed Prime Minister and served in that position until approximately September 1990. Samantar Affidavit at ¶ 4. Again, he traveled to the United States in his official capacity, meeting in 1989 with Vice President Dan Quayle and Secretary of State James Baker. Samantar Affidavit at ¶ 8.

During the period that Defendant held these positions within the Somali government, the United States maintained diplomatic relations with Somalia. Samantar Affidavit at ¶ 7. Defendant served Somalia in an official capacity and as a representative of Somalia's executive throughout the years during which Plaintiffs allegedly were victimized. In addition, Somalia has never been designated a state-sponsor of terrorism under 50 U.S.C. App. § 2405 (j) or 22 U.S.C. § 2371 or otherwise been placed on a U.S. enemies list.

In 1990, Defendant stepped down as Prime Minister. The following year, after the collapse of the regime of President Muhammad Siad Barre, Defendant sought temporary asylum in Kenya and then emigrated to Italy. In June 1997, Defendant moved to the United States and took up his current residence in Fairfax, Virginia. Samantar Affidavit at ¶¶ 9-10.

ARGUMENT

I. SAMANTAR IS ENTITLED TO IMMUNITY

Whether Samantar's immunity is determined under the FSIA or under the common law, Samantar enjoys immunity from suit for the claims asserted. As explained below, both the FSIA and the common law confer on Samantar and all other foreign officials immunity for actions such as those alleged here taken by the officials in their official capacities. This result is not altered by the legality or illegality of those actions under local or international law.

A. Defendant Samantar Enjoys Immunity under the FSIA

1. The FSIA Confers Immunity upon Samantar for his Official Acts

Samantar enjoys immunity under the FSIA for his official acts. It is undisputed that the FSIA provides the sole source of subject matter jurisdiction in suits against a foreign state. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434-39 (1989). The term "foreign state" is defined under the FSIA to include "a political subdivision of a foreign state." 28 U.S.C. § 1603(a). By expansion of this definition, numerous courts, including the Fourth Circuit, "have construed foreign sovereign immunity to extend to an individual acting in his official capacity on behalf of a foreign state." Velasco v. Indonesia, 370 F.3d 392, 398 (4th Cir. 2004).

Under the FSIA, "if none of the exceptions to sovereign immunity applies, district courts lack jurisdiction in suits against a foreign state, or an agency or instrumentality thereof" regardless of the nature of the substantive claim. Foremost-McKesson, Inc. v. Iran, 905 F.2d 438, 442 (D.C. Cir.1990). The FSIA contains no exception for torts committed outside the territory of the United States. Amerada Hess, 488 U.S. at 439-40. The FSIA accordingly

confers immunity upon Samantar for the actions alleged against him taken in his official as opposed to private capacity.

2. Samantar's Actions Were Taken in His Official Capacity

It can hardly be contended that Samantar's actions were not taken in the course of his official duties. Plaintiffs acknowledge, as they must to assert Samantar's liability under the TVPA, that the abuses allegedly suffered by the Plaintiffs were committed "under authority or color of law of the government of Somalia," and they assert that, for these abuses, "Defendant Samantar, acting as Minister of Defense, and later as Prime Minister, bears responsibility." Second Amended Complaint ¶ 65. If there were any question that Samantar's actions were taken in his public and not private capacity, the transitional Somali government has confirmed the official character of any actions taken. Letter from Acting Prime Minister Salim Alio Ibro to Secretary of State Rice, February 17, 2007 (attached hereto as Exhibit 2).

Plaintiffs have argued, however, that, for purposes of immunity under the FSIA, human rights abuses, as violations of law, cannot be deemed to be official acts. Plaintiffs' Opposition to Motion to Dismiss ("Plaintiffs' Opposition") at 12. This argument is logically flawed, runs counter to the principle underlying official act immunity, and gains no force from the assertion that Samantar's actions might have violated customary international norms.

a. An Unlawful Act Exception Would Vitiate the Principle of Official Act Immunity

There is a serious failure of logic in the claim that an official cannot have immunity for unlawful acts. A civil lawsuit against a foreign official will almost always challenge the lawfulness of the official's acts. Hence, the official's immunity would be rendered meaningless if it could be overcome by such allegations alone. See Waltier v. Thomson, 189 F. Supp. 319, 321 n.6 (S.D.N.Y. 1960) (rejecting argument that foreign official's allegedly false statements

could not be considered within the scope of his duties based simply on the premise that "wrongdoing is never authorized"); see also Herbage v. Meese, 747 F. Supp. 60, 67 (D.D.C. 1990) (rejecting argument that officials lost immunity by virtue of "acting illegally," finding that conduct was within the scope of their official capacities); Kline v. Kaneko, 685 F. Supp. 386, 390 (S.D.N.Y. 1988) (holding that plaintiff's claim that Mexican immigration official expelled her without due process "is in no way inconsistent with [the official] having acted in his official capacity").

b. An Official Act is One Taken on Behalf of the State, Whether Lawful or Not

The official capacity test properly turns on whether the acts in question were performed on the state's behalf, and are therefore attributable to the state itself – as opposed to constituting private conduct. This test flows directly from the principle underlying immunity for foreign officials. An official acting in an official capacity is a manifestation of the state, and the official's acts are attributable to the state rather than to the official personally. If an official's actions "were taken in an official capacity, he therefore was acting as an agency or instrumentality of the foreign state, and is immune from suit under the FSIA." Belhas v. Ya'alon, 466 F. Supp. 2d 127, 130 (D.D.C. 2006); see also Doe I v. Israel, 400 F. Supp. 2d 86, 104 (D.D.C. 2005) ("[a] suit against an individual officer of a nation who has acted on behalf of that nation is the functional equivalent of a suit against the state itself"); El-Fadl v. Cent. Bank of Jordan, 75 F.3d 668, 671 (D.C. Cir. 1996) (defendant's activities were immune in that they "were neither personal nor private, but were undertaken only on behalf of the Central Bank [of Jordan]"); cf. Park v. Shin, 313 F.3d 1138 (9th Cir. 2002) (Korean official being sued by a personal family employee was not immune because he was not acting within the scope of his

official duties). As the Supreme Court held in finding that alleged police torture was "sovereign" rather than commercial activity, and thus protected by sovereign immunity:

> [H]owever monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature. . . . Exercise of the powers of police and penal officers is not the sort of action by which private parties can engage in commerce. "[S]uch acts as legislation, or the expulsion of an alien, or a denial of justice, cannot be performed by an individual acting in his own name. They can be performed only by the state acting as such."

Saudi Arabia v. Nelson, 507 U.S. 349, 361-62 (1993) (citations omitted).

Any contrary rule would invite an end-run around the immunity of the state. The immunity of a foreign state is not subject to any vague "unlawfulness" exception. It is subject only to those immunity exceptions specifically set forth in the FSIA. See Amerada Hess, 488 U.S. at 433-35; Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 242-45 (2d Cir. 1997); Princz v. Germany, 26 F.3d 1166, 1173-75 (D.C. Cir. 1994). If a foreign state's immunity under the FSIA does not dissolve upon mere assertions that its acts were unlawful, the immunity of the officials through whom the state acts must be similarly indestructible. Otherwise "litigants [might] accomplish indirectly what the Act barred them from doing directly." Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1102 (9th Cir. 1990); see also Park v. Shin, 313 F.3d at 1144 (in determining whether acts at issue were performed in an official capacity, courts should "consider whether [the] action against the foreign official is merely a disguised action against the nation that he or she represents" and "ask whether [the] action against the official would have the effect of interfering with the sovereignty of the foreign state that employs the official").

In Amerada Hess, the Supreme Court held that a foreign state's immunity was not subject to any general exception for alleged violations of international law brought under the Alien Tort

Statute. 488 U.S. at 435-43. By Plaintiffs' reasoning, the litigants in Amerada Hess, which involved the bombing of a neutral ship by the Argentine military, could have avoided dismissal simply by naming the defense minister as defendant rather than the Argentine government itself. This is the very circumvention Plaintiffs seek here by naming Defense Minister and Prime Minister Samantar as defendant to answer for alleged actions ascribable to the Somali government.

Samantar is, after all, named as defendant only by virtue of his alleged complicity as a senior government official. See Second Amended Complaint at ¶ 74 (Samantar allegedly "failed or refused to take all necessary measures to investigate and prevent these abuses, or to punish personnel under his command for committing such abuses"); id. at ¶ 77 ("Defendant Samantar, both as Minister of Defense and as Prime Minister, conspired with, or aided and abetted members of the Armed Forces or persons or groups acting in coordination with the Armed Forces or under their control to commit [abuses] . . . and to cover up these abuses"). The Somali government's letter to the U.S. State Department confirms that the challenged conduct was performed on Somalia's behalf. See Exhibit 2. This document is entitled to "great weight" as to the scope of Samantar's responsibilities. See In re Terrorist Attacks, 392 F. Supp. 2d 539, 551 (S.D.N.Y. 2005) (quoting Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah, 184 F. Supp. 2d 277, 287 (S.D.N.Y. 2001)).

Accordingly, the actions alleged were clearly undertaken in Samantar's official capacity and cannot form the basis for a suit against Samantar personally. See Doe I v. Israel, 400 F. Supp. 2d at 104-05 ("Plaintiffs do not present legitimate claims against the individual . . . defendants in their personal capacities. . . . All allegations stem from actions taken on behalf of

the state and, in essence, the personal capacity suits amount to suits against the officers for being . . . government officials").

c. No Exception to the Immunity of Individual Officials Exists for Alleged Violations of Customary International Norms

Contrary to Plaintiffs' contentions, nothing in the foregoing analysis is changed by the fact that Plaintiffs allege that Defendant's conduct violated customary international norms. This is a variation on the international scale of the argument that "wrongdoing is never authorized." Waltier, 189 F. Supp. at 321 n.6. Any violation would remain attributable to the state itself rather than to Samantar personally – because the conduct at issue was not private in nature but rather was officially authorized by the state. See Herbage, 747 F. Supp. at 67 (individuals acting in their official capacities as agents of a foreign government are entitled to immunity "no matter how heinous the alleged illegalities"); Doe I v. Israel, 400 F. Supp. 2d at 105 (rejecting customary international law exception given that no such exception is found in the FSIA, stating that "even assuming that the . . . defendants have engaged in jus cogens violations, . . . [j]us cogens violations, without more, do not constitute an implied waiver of FSIA immunity").

The lack of an immunity exception for civil suits alleging customary international violations does not mean that such violations, when they actually occur, will necessarily be beyond the reach of the courts. There are several statutory exceptions to the FSIA, including, among others, certain actions by state sponsors of terrorism (28 U.S.C. § 1605(a)(7)), disputes arising from commercial activities of a foreign state (28 U.S.C. § 1605(a)(2)), and disputes arising from certain tortious acts committed within the United States (28 U.S.C. § 1605(a)(5)). In a case where an FSIA exception applies, a foreign state official acting in his official capacity could be sued consistent with the FSIA. See Price v. Socialist People's Libyan Arab Jamahiriya,

294 F.3d 82, 88-89 (D.C. Cir. 2002) (analyzing claims against Libya under the state sponsored terrorism exception to the FSIA); Doe I v. Israel, 400 F. Supp. 2d at 104-05 (analyzing ATS and TVPA claims against individuals acting in an official capacity under specific statutory exceptions to the FSIA). Conversely, where no such exception applies, the courts of the United States lack jurisdiction to consider claims of abuse by foreign officials in foreign states. See Austria v. Altmann, 541 U.S. 677, 691 (2004); Doe I v. Israel, 400 F. Supp. 2d at 104-05.

A government may also waive the protections of the FSIA accorded to it and to its officials. 28 U.S.C. § 1605(a)(1). The immunity protecting foreign officials for their official acts ultimately belongs to the sovereign and can be waived by the sovereign – as has happened, for example, where former officials have been removed from power and the new government has distanced itself from past abuses. See In re Doe, 860 F.2d 40, 45 (2d Cir. 1988) ("Because it is the state that gives the power to lead and the ensuing trappings of power – including immunity – the state may therefore take back that which it bestowed upon its erstwhile leaders. . . . [B]y issuing the waiver, the Philippine government has declared its decision to revoke an attribute of [the Marcoses'] former political positions; namely, head-of-state immunity").

Similarly, the circumstances of a case may create a question whether the conduct was performed on behalf of the state or was instead performed in the official's private capacity, in which case immunity would not attach in the first place. See Kadic v. Karadzic, 70 F.3d 232, 250 (2d Cir. 1995) ("we doubt that the acts of even a state official, taken in violation of a nation's fundamental law and wholly unratified by that nation's government, could properly be characterized as an act of state") (emphasis added); Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980) ("Where reports of torture elicit some credence, a state usually responds by denial or,

less frequently, by asserting that the conduct was unauthorized or constituted rough treatment short of torture").

Indeed, if the Congress believed that FSIA immunity would typically be unavailable in a rights abuse case (at least for former officials), this belief was based not on the idea that the nature of the allegations would trump the individual defendant's immunity, but rather on the idea that the defendant would have difficulty establishing immunity because the state would disown the conduct at issue. The Senate report on the TVPA offered the following explanation:

> To avoid liability by invoking the FSIA, a former official would have to prove an agency relationship to a state, which would require that the state "admit some knowledge or authorization of relevant acts." 28 U.S.C. § 1603(b) [FSIA's "agency or instrumentality" definition]. Because all states are officially opposed to torture and extrajudicial killing, however, the FSIA should normally provide no defense to an action taken under the TVPA against a former official.

S. Rep. No. 249, 102d Cong., 1st Sess., at 8 (1991) (emphasis added). In essence, Congress expected that where an individual official is accused of conduct representing violations of customary international norms, foreign states would not normally assert that the conduct was within the scope of the official's authority. See Kadic, 70 F.3d at 250; Filartiga, 630 F.2d at 884.

Moreover, even where sovereign immunity is validly invoked by a foreign official for an alleged international law violation, and not waived in any manner by the parent government, remedies may still exist outside the civil setting. International criminal proceedings might be brought. Alternatively, governments may pursue sanctions or apply other forms of pressure in the diplomatic sphere – which is, of course, the usual forum for addressing objectionable conduct by foreign states. See Hazel Fox QC, The Law of State Immunity 525 (2002) ("State immunity . . . does not contradict a prohibition contained in a jus cogens norm but merely diverts any breach of it to a different method of settlement").

But where, as here, there is no doubt that the official's conduct was performed on the state's behalf and his immunity has not been waived, the official is entitled to immunity under the FSIA.

B. Samantar Enjoys Immunity under Common Law Principles of Foreign Official Act and Head of State Immunity

Even if Samantar should somehow not qualify for immunity under the FSIA, he would be entitled to immunity under the common law doctrines of foreign official act and head of state immunity. These immunity doctrines extend deep into American jurisprudence and apply to immunize one who, like Samantar, is accused of actions taken in his official capacity and operate with particular force where that capacity consists of service in the most senior positions of government. [1]

The seminal expression of the these immunity doctrines was set forth nearly 200 years ago by Chief Justice Marshall in The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812), which "came to be regarded as extending virtually absolute immunity to foreign sovereigns." Verlinden v. B.V. Central Bank of Nigeria, 461 U.S. 480, 486 (1983).

The "absolute" immunity of the sovereign was, even prior to the Schooner Exchange case, generally understood to encompass not only the state and the head of state, but also other individual officials insofar as they acted on the sovereign's behalf. Statements recognizing immunity for foreign officials as to their official acts appear in the earliest opinions of the Attorney General. See 1 Op. Att'y Gen. 45, 46 (1794) (as to civil suit brought against governor of French island for seizure of a ship: "I am inclined to think, if the seizure of the vessel is admitted to have been an official act, done by the defendant by virtue, or under color, of the

[1] For a recent application of these principles by the Justice and State Departments in support of official act immunity for a former Director of the Israeli General Security Service, see Statement of Interest of the United States

powers vested in him as governor, that it will of itself be a sufficient answer to the plaintiff's action; that the defendant ought not to answer in our courts for any mere irregularity in the exercise of his powers; and that the extent of his authority can, with propriety or convenience, be determined only by the constituted authorities of his own nation"); 1 Op. Att'y Gen. 81 (1797) (as to suit brought against British official: "it is as well settled in the United States as in Great Britain, that a person acting under a commission from the sovereign of a foreign nation is not amenable for what he does in pursuance of his commission, to any judiciary tribunal in the United States").

Expressions of official act immunity likewise appear in subsequent federal case law. In Underhill v. Hernandez, 168 U.S. 250 (1897), as to a suit brought against a Venezuelan general for acts undertaken in his official capacity in Venezuela, the Supreme Court held that the defendant was protected by "[t]he immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of governmental authority, whether as civil officers or as military commanders." 168 U.S. at 252; see also Lyders v. Lund, 32 F.2d 308, 309 (N.D. Cal. 1929) ("in actions against the officials of a foreign state not clothed with diplomatic immunity, it can be said that suits based upon official, authorized acts, performed within the scope of their duties on behalf of the foreign state, and for which the foreign state will have to respond directly or indirectly in the event of a judgment, are actions against the foreign state"); Heaney v. Spain, 445 F.2d 501, 504 (2d Cir. 1971) (noting in dicta that the immunity of a foreign state extends to any official or agent of the state with respect to their official acts); United States v. Noriega, 117 F.3d 1206, 1212 (11th Cir.1997) ("head-of-state immunity could

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of America in Matar v. Dichter, Case No. 05 Civ. 10270 (S.D.N.Y.) (Nov. 17, 2006). The reasoning and language of the instant analysis owes much to that Statement of Interest.

attach in cases, such as this one, only pursuant to the principles and procedures outlined in The Schooner Exchange and its progeny").

The rationale for this immunity is broadly stated: "[A] suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly." Chuidian, 912 F.2d at 1101; accord, e.g., Velasco, 370 F.3d at 399; In re Terrorist Attacks, 392 F. Supp. 2d at 551 (S.D.N.Y. 2005); Doe I v. Israel, , 400 F. Supp. 2d at 104 (D.D.C. 2005); see also Herbage, 747 F. Supp. at 66 (finding sovereign immunity to protect individual officers on the ground that "a government does not act but through its agents").

Such official act immunity has, understandably, particular force when applied to officials who occupy senior positions such as those held by Defendant Samantar, in that those officials may be construed for these purposes to be a head of state. See In re Grand Jury Proceedings, 817 F.2d 1108 (4th Cir. 1987), cert. denied, 484 U.S. 890 (1987); In re Doe, 860 F.2d at 45; We Ye v. Jiang Zemin, 383 F.3d 620 (7th Cir. 2004); Lafontant v. Aristide, 844 F. Supp. 128 (E.D.N.Y. 1994); Abiola v. Abubakar, 267 F. Supp. 2d 907 (N.D. Ill. 2003); Kilroy v. Windsor, Civ. No. C-78-291 (N.D. Ohio 1978); cf. First American Corp. v. Al-Nahyan, 948 F. Supp. 1107, 1121 (D.D.C. 1996) (Defendants were denied head of state status on the basis of their membership in the ruling family of Dubai, not their governmental positions).

Such immunity extends not only to such officials after their tenure in office has expired but as well as during that tenure. We Ye, 383 F.3dat 881-83; Lafontant, 844 F. Supp. at 133-34; cf. In re Grand Jury Proceedings, 817 F.2d at 1111 (denying head of state immunity to former Philippine President Marcos because new government waived his immunity).

There can be little doubt that Samantar is entitled to head of state immunity for the period during which he served as Prime Minister (1987 to September 1990). See Saltany v. Reagan,

702 F. Supp. 319 (D.D.C. 1988), order aff'd in part, rev'd in part on other grounds, 886 F.2d 438 (D.C. Cir. 1989), cert. denied, 495 U.S. 932 (1990) (granting head of state immunity to English Prime Minister Margaret Thatcher against claims by Libyan residents); see also Restatement (Third) of Foreign Relations § 464 n. 14. As Prime Minister of Somalia, Defendant acted as the head of a government recognized by the United States and is entitled to the protections accorded to one in his position.

Similarly, case law and the principles undergirding head of state immunity support the award of such immunity to Samantar during his tenure as Defense Minister and First Vice President. The actions of a Defense Minister and First Vice President are closely identified with the actions of the sovereign itself and must enjoy the immunity accorded the state itself. See Schooner Exchange, 11 U.S. at 138 (under international law, "all civilized nations allow to foreign ministers" the same immunities as provided to the sovereign); Kim v. Kim Young Shik, Civ. No. 125656 (Cir. Ct. 1st Cir., Haw. 1963), excerpted in 58 Am.J.Int'l L. 186 (1964) (recognizing immunity of foreign minister). "The foreign minister – someone who is a cabinet member, perhaps, and enjoys top status in the government – generally seems to be accorded the same status as the head of state." Remarks at the Eighty-Fifth Annual Meeting of the American Society of International Law, "Foreign Governments in United States Courts Proceedings," April 19, 1991, reported in 85 Am. Soc'y Int'l L. Proc. 251, 276 (1991).

Accordingly, this suit should be dismissed on common law immunity grounds.

II. PLAINTIFFS FAIL TO STATE A CLAIM FOR SECONDARY LIABILTY ON THE BASIS OF SAMANTAR'S PARTICIPATION IN A JOINT CRIMINAL ENTERPRISE

Plaintiffs' claims against Samantar for participation in a joint criminal enterprise assert a right to relief under international law heretofore unrecognized by any United States court. The

single court decision applying such a theory of secondary liability, as cited by the Plaintiffs in their memorandum in support of including this claim in the second amended complaint, was a criminal conviction before the International Criminal Tribunal for the former Yugoslavia. Plaintiffs' Memorandum in Support of Their Motion for Leave to File the Second Amended Complaint, at 4. For the reasons set forth below, this decision does not and cannot establish a new cause of action cognizable by a United States Court for participation in a joint criminal enterprise.

First, the decision cited by Plaintiffs, Prosecutor v. Tadic, Judgement, ICTY Appeals Chamber, Case No. IT-94-1-A (July 15, 1999), was based upon a strict reading of the statute that created the tribunal and not on any statute or common law principle applicable to this Court. See ¶ 233.

Second, the claim was recognized by a criminal tribunal and implied no private cause of action. A court must exercise great caution in inferring a private right of action from a criminal statute, since civil enforcement does not benefit from "the check imposed by prosecutorial discretion." Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004).

Third, the absence of any international consensus as to the existence of this norm of participation in a joint criminal enterprise even in a criminal context prevents its being applied by United States courts. "We think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world." Id. at 725 (holding that a claim for "arbitrary detention" does not reflect such an established norm despite the existence of international agreements arguably proscribing such action).

Finally, even a norm of established international validity is recognizable in a United States court only if it is defined with great specificity. Id. (holding that enforceable norms must

be defined with a specificity comparable to the offenses against ambassadors, violations of safe conduct, and piracy previously recognized by the Court). The claim of participation in a joint criminal enterprise has none of this specificity and has, indeed, been criticized as representing potentially an "enormous transfer of power from international judges to prosecutors, who have enormous discretion to decide how much wrongdoing to tie to any particular defendant" and as being "so loose, [it] approaches dangerously close to guilt by association." Allison M.Danner, Accountability for War Crimes: What Roles for National, International and Hybrid Tribunals?, 98 Am. Soc'y Int'l L. Proc. 181, 186 (2004).

The assertion of a claim against Defendant Samantar of participation in a joint criminal enterprise, accordingly, fails to state a claim upon which relief could be granted.

III. PLAINTIFFS' CLAIMS ARE TIME BARRED

Plaintiffs have brought suit pursuant to the TVPA and ATS, 28 U.S.C. § 1350. For suits brought upon either basis, the federal courts have uniformly held the TVPA's ten-year statute of limitations governs questions of timeliness. See Van Tu v. Koster, 364 F.3d 1196, 1199 (10th Cir. 2004); Deutsch v. Turner Corp., 317 F.3d 1005 (9th Cir. 2003); Hilao v. Marcos, 103 F.3d 767, 773 (9th Cir. 1996).

Plaintiffs allege that they suffered injuries and death at the hands of the Somali Armed Forces and others between 1981 and 1989. According to the TVPA and cases interpreting the ATS, these actions should have been brought no later than 1999. Plaintiffs maintain, however, that equitable tolling should extend the limitations period for an additional eight years. The facts alleged do not satisfy the requirements for equitable tolling.

The Fourth Circuit determines whether to apply equitable tolling according to the "extraordinary circumstances" test, which requires the petitioner to present (1) extraordinary

circumstances, (2) beyond his control or external to his own conduct, (3) that prevented him from filing on time. Rouse v. Lee, 339 F.3d 238, 246 (4th Cir. 2003), citing Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000). This high standard for establishing a basis for equitable tolling applies equally to cases brought under the TVPA. See, e.g., Van Tu, 364 F.3d at 1199-1200 (in spite of "plaintiffs' poverty, their status as subjects of a Communist government, the Vietnam War, and their inability to travel, plaintiffs have made no showing sufficient to justify tolling"). The Plaintiffs bear the burden of adducing facts that warrant application of equitable tolling. Hall v. Johnson, 332 F. Supp. 2d 904 (E.D. Va. 2004).

Although Plaintiffs in the present action attempt to offer proof of extraordinary circumstances warranting tolling, they fail to justify application of the doctrine. Plaintiffs' opposition to Samantar's original motion to dismiss asserts two circumstances warranting tolling until 1997: (a) Defendant's establishment of residence in the United States in 1997; and (b) the "chaos and anarchy that pervaded Somalia until at least 1997," which prevented "investigation necessary to bring a case under these statutes." Plaintiffs' Opposition at 13. Plaintiffs' first argument misreads the TVPA's tolling rules in disregarding the opportunity that the Plaintiffs had to bring this suit in Italy, and the second is unpersuasive on the basis of the facts set forth in the Second Amended Complaint.

The Plaintiffs acknowledge that, under the TVPA and, by extension, the ATS, the ten-year limitation is subject to "all equitable tolling principles." Plaintiffs' Opposition at 15, quoting S. Rep. No. 249, 102d Cong., 1st Sess., at 10-11. Samantar has no quarrel with this analysis. However, he disagrees with Plaintiffs' assertion that, "the statute of limitations is tolled until the defendant enters the United States and is subject to the jurisdiction of the federal courts." Plaintiffs' Opposition at 16. This simply is not the case, if outside of the United States

there exists "any jurisdiction in which the same or a similar action arising from the same facts may be maintained by the plaintiff, provided that the remedy in that jurisdiction is adequate and available." Plaintiffs' Opposition at 15-16, quoting S. Rep. No. 249, 102d Cong., 1st Sess., at 11.

Defendant lived openly in Italy from 1991 to 1997. Samantar Affidavit at ¶ 9. According to Alessandro Campo, a licensed Italian lawyer, who has been employed as the Legal Expert for the United Nations and the Italian Embassy to Somalia, Plaintiffs could have brought an action similar to that before this Court in Italy during this entire period. Campo Affidavit, submitted December 16, 2004 ("Second Campo Affidavit") (attached hereto as Exhibit 3). Mr. Campo confirms that:

> according to Art. 5 of the UN Convention against torture, cruel or inhuman punishment or treatment (which Italy has ratified), a Somali could have brought an action against Mr. Samantar in an Italian court at a time during the period from February 20, 1991 (when Mr. Samantar moved to Italy) to November 9, 1997 (when Mr. Samantar left Italy).

Second Campo Affidavit, at ¶ 7.[2] In light of the above, it is undeniable that Plaintiffs could have initiated an action in Italy that would have been "adequate and available," as Congress envisaged. See S. Rep. No. 249, 102d Cong., 1st Sess., at 11.

Moreover, Mr. Campo, who also is an expert on Somali law and served as a participant in a United Nations Development Office mission to assess Somaliland's courts and judicial authorities, is of the opinion that "adequate and available" remedies also have been available in Somaliland since approximately 1991.

> From my assessment of Somaliland's judiciary, and based upon information generated by the Somaliland Government that I deem to be reliable, there has

[2] While a ruling on a motion for dismissal based upon the running of the statute of limitations may be deferred in order to allow the parties to engage in discovery if facts beyond the complaint must be adduced, Plaintiffs' counsel has indicated that Plaintiffs do not require discovery on this matter.

> been a relatively independent and functioning judiciary within Somaliland since 1991 . . . . Somaliland's judiciary is competent to hear claims such as these, for torture and crimes against humanity.

Campo Affidavit, submitted December 1, 2004 ("First Campo Affidavit") (attached hereto as Exhibit 4) at ¶¶ 6-7.

Mr. Campo also disputes Plaintiffs' second basis for equitable tolling – that "fear of reprisal from the military by both plaintiffs and potential witnesses justifies tolling the limitations period in ACTA and TVPA cases." Plaintiffs' Opposition at 17. Mr. Campo believes that conditions in Somalia since the fall of the Barre administration have not precluded investigation and have not presented a risk of reprisal.

> After the fall of the Barre administration in 1991, a Somali bringing a claim for victimization against a former official of the Barre administration would have had little or no fear of reprisal for himself or family members still residing in Somaliland, the rest of Somalia, or outside of the area. The remnants of the Barre Administration do not exist in an organized fashion and would be incapable of taking retaliatory action against Plaintiffs or their families.

First Campo Affidavit, at ¶ 11.

Moreover, contrary to what Plaintiffs stated in their Opposition, it appears that few Plaintiffs or their family members live (or have lived) in the part of Somalia that they describe as suffering from "chaos and clan-based warfare." Plaintiffs' Opposition at 18. A brief summary of the Plaintiffs' allegations in the Second Amended Compliant with respect to the whereabouts of the parties in interest and their families illustrates the point.

Party	Allegation dates	Where party resides	Where family resides
Bashe Abdi Yousuf	1981-1982; 1982-1989 (Second Amended Complaint at ¶¶ 25-37)	Fled Somalia in or around May 1989; resides in US and is a naturalized US citizen; (Second Amended Complaint at ¶ 37, ¶ 8)	No information

Mohamed Deria Ali	1988 (Second Amended Complaint at ¶¶ 38-42)	Reported to be deceased (Second Amended Complaint at ¶ 42)	Son has resided in California since 1988 (Second Amended Complaint at ¶ 38)
Mustafa Mohamed Deria	1988 (Second Amended Complaint at ¶¶ 38-42)	Assumed to be deceased (Second Amended Complaint at ¶ 42)	Brother has resided in California since 1988 (Second Amended Complaint at ¶ 38)
John Doe I	1984 (Second Amended Complaint at ¶ 43)	Remains in N. Somalia (Second Amended Complaint ¶ 51, ¶ 9)	Extended family moved to Ethiopia (Second Amended Complaint at ¶ 51)
James Doe I	1984 (Second Amended Complaint at ¶ 43)	Deceased (Second Amended Complaint at ¶ 50)	Brother remains in N. Somalia; extended family moved to Ethiopia (Second Amended Complaint at ¶ 51)
James Doe II	1984 (Second Amended Complaint at ¶ 43)	Deceased (Second Amended Complaint at ¶ 50)	Brother remains in N. Somalia; extended family moved to Ethiopia (Second Amended Complaint at ¶ 51)
Jane Doe I	1985-89 (Second Amended Complaint at ¶¶ 52-60)	Fled Somalia in 1989; with family in Ethiopia from 1989-1991; returned to Somalia in 1991 (unclear where) and later moved to United Kingdon (unclear when) (Second Amended Complaint at ¶ 60, ¶ 11)	Family was in refugee camp in Ethiopia from 1989-1991 (Second Amended Complaint at ¶60)
John Doe II	1988 (Second Amended Complaint at ¶¶ 61-64)	Fled Hargeisa and returned to Somalia in 1991 (unclear where) (Second Amended Complaint ¶ 64, ¶ 12)	No information

From the above, it is clear that Plaintiff Bashe Abdi Yousuf has alleged no facts supporting his position that fear of reprisal warrants equitable tolling, as he does not reside in Somalia and neither has alleged that family members reside (or resided) in Somalia after Barre was overthrown. Indeed, none of the Plaintiffs states where in Somalia he, she, or his or her

family resides and under what circumstances (e.g., in hiding in Somalia or living openly in Somaliland, an area dominated by Plaintiffs' own Isaaq clan).

In Hilao v. Marcos, the court confronted the argument that the statute of limitations for an action against President Marcos of the Phillipines should be tolled because of fear of intimidation or reprisals. The court ruled that "[a]ny action against Marcos [for torture, summary execution, and disappearances] . . . was tolled during the time Marcos was president" because of fear of intimidation and reprisals, but no longer. 103 F.3d at 773; see also Deutsch, 317 F.3d at 1028-2 (affirming application of TVPA's ten-year statute of limitations for actions involving abuses committed by German and Japanese corporate interests during World War II and denying request for equitable tolling). Similarly, here, Plaintiffs' circumstances might justify the tolling of the statute of limitations until 1990, when Samantar left office, or even 1991, when the Barre administration ended. The allegations in the complaint as to the events thereafter do not meet the exacting standards to warrant equitable tolling after such dates and certainly not after February 20, 1991, when Samantar might readily have been sued in Italy for the same claims as are advanced in this lawsuit. At various times since, Somaliland, Italy, and the United States all have been available to serve as a forum for this action.

Finally, Plaintiffs maintain that, until 1997, it would have been impossible to collect information to mount an action without fear of reprisal. Second Amended Complaint at ¶¶ 83-87. Again, this argument lacks support. Any chaos and tribal warring that characterized Somalia in 1991 continues to describe current conditions. Second Campo Affidavit at ¶ 13; Affidavit of Mohammed Haji Nur ("Nur Affidavit") (attached hereto as Exhibit 5) at ¶¶ 12-13; Affidavit of Mohamed Abdirizak ("Abdirizak Affidavit") (attached hereto as Exhibit 6) at 9-11. Why the Plaintiffs point to 1997 as the first possible date after which they could bring suit and,

presumably, conduct discovery is inexplicable, as the situation in Somalia did not change dramatically between 1991 and 1997. Second Campo Affidavit at ¶¶ 12-13; Nur Affidavit at ¶¶ 12-13; Abdirizak Affidavit at ¶¶ 9, 11. At a minimum, 1997 did not mark any particular turning point after which discovery would have been more feasible. Furthermore, Plaintiffs' delay only makes discovery more difficult; with the passage of time, paperwork is lost or destroyed and witnesses' memories fade.

In sum, the Plaintiffs' victimization allegedly took place between 1981 and 1989. The ten-year statute of limitations expired in 1999 or, at the latest, assuming the availability of equitable tolling, in 2001, ten years after the Barre administration collapsed, thereby ending any legitimate fear of reprisal from Samantar, and ten years after Samantar had moved to Italy where he could readily have been sued by the Plaintiffs. Plaintiffs' claims now are time barred and must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

IV. PLAINTIFFS' CLAIMS SHOULD BE DISMISSED FOR FAILURE TO EXHAUST LEGAL REMEDIES

The TVPA requires that "[a] court shall decline to hear a claim under this section if the clamant has not exhausted adequate and available remedies in the place in which the conduct giving rise to acclaim occurred." 28 U.S.C. § 1350 note, § 2(c). This requirement is "not intended to create a prohibitively stringent condition precedent to recovery under the statute." Xuncax v. Granajo, 886 F. Supp. 162, 178 (D. Mass. 1995). Nevertheless, before bringing suit in the United States, the Plaintiffs first must have exhausted their legal remedies in Somalia or Somaliland. [3]

[3] While the exhaustion requirement is by its terms applicable to the allegations under the TVPA, claims based on a violation of international norms under the ATS also may be subject to the same exhaustion obligation. Sosa v. Alvarez-Machain, 542 U.S. at 733; see also Doe v. Exxon Mobil, 393 F. Supp. 2d 20, 25 (D.D.C. 2005) (assuming, without deciding, that the ATS imposes an exhaustion requirement).

Once a defendant raises failure to exhaust local remedies and "makes a showing of remedies abroad which have not been exhausted, the burden shifts to the plaintiff to rebut by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile." Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345 (S.D. Fla. 2003). The Sinaltrainal court also considers exhaustion of remedies to be a jurisdictional requirement subject to challenge in a motion to dismiss. 256 F. Supp. 2d at 1357; but see Barrueto v. Larios, 291 F. Supp. 2d 1360 (S.D. Fla. 2003) (failure to exhaust remedies is an affirmative defense under TVPA).

In the case at bar, as the Plaintiffs admit in their Second Amended Complaint, Somaliland has a functioning government with a court system, where Plaintiffs' claims should have been brought. Second Amended Complaint at ¶¶ 88-89. The Somaliland judicial system is adequate and functions well free of political influence for claims of this nature. Second Campo Affidavit at ¶¶ 6-7; Nur Affidavit at ¶¶ 8-10. According to the U.S. State Department, a functioning judicial system has existed from 1991 to the date of original filing of this action: "Somaliland's Government included . . . a functioning civil court system." Department of State 2003 Country Report on Human Rights Practices in Somalia (February 25, 2004). Furthermore, Somaliland would permit a lawsuit to be brought there for events that took place in part in Mogadishu, which remains part of Somalia. Moreover, the laws of Somaliland have provided a cause of action for victims of torture and killing. Second Campo Affidavit at ¶¶ 6-9. Given the availability of an adequate remedy in Somaliland prior to the time Plaintiffs filed this action, Plaintiffs' claims must be dismissed.

CONCLUSION

Samantar is entitled to FSIA and common law immunity as to all claims against him. Among those claims, the allegation of participation in a joint criminal enterprise fails to state a claim as to which relief can be granted. In addition, Plaintiff's claims must be dismissed as untimely. Moreover, Plaintiffs failed to exhaust appropriate local remedies in Somaliland. Samantar respectfully requests that this Court enter an order dismissing the Second Amended Complaint.

Respectfully submitted,

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