No. 15-1345

IN THE

Supreme Court of the United States

YUSUF ABDI ALI,

Petitioner,

v.

FARHAN MOHAMOUD TANI WARFAA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals properly held that Petitioner Yusuf Abdi Ali was not entitled to common law immunity as to claims under the Torture Victim Protection Act where the Executive Branch never requested a finding of immunity from the District Court; where the crimes Ali committed included torture and attempted extrajudicial killing, in clear violation of domestic and international law; and where Ali is a U.S. resident enjoying the protections of U.S. law.

PARTIES AND CORPORATE DISCLOSURE STATEMENT

Respondent Farhan Mohamoud Tani Warfaa ("Warfaa") is the Plaintiff in the proceeding in the District Court. Warfaa brought claims for war crimes, crimes against humanity, torture, and attempted extrajudicial killing against Petitioner Yusuf Abdi Ali ("Ali") under the Torture Victim Protection Act and the Alien Tort Statute. Warfaa has also filed a conditional cross-petition in No. 15-1464 with regard to the District Court's dismissal of Warfaa's Alien Tort Statue claims. Ali and Warfaa are not corporate entities.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Farhan Mohamoud Tani Warfaa respectfully opposes the Petition for a Writ of Certiorari filed by Petitioner Yusuf Abdi Ali to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case. Should this Court grant Ali's petition, Warfaa respectfully requests that the Court grant Warfaa's conditional cross-petition filed in Case No. 15-1464.

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 53a-88a)[1] is reported at 811 F.3d 653. The memorandum opinion of the District Court (Pet. App. 26a-50a) is reported at 33 F. Supp. 3d 653.

JURISDICTION

The judgment of the Court of Appeals was entered on February 1, 2016. Ali filed an initial petition for writ of certiorari with this Court, which was docketed on May 4, 2016, as No. 15-1345. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note (the "TVPA"), the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1606 and 1608 (the "FSIA"), and the Alien Tort Statute, 28 U.S.C. § 1350 (the "ATS"), were reproduced in Ali's Appendix. *See* Pet. App. 91a-92a.

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[1] References to "Pet. App." are to the appendix to the petition for certiorari of Yusuf Abdi Ali.

STATEMENT OF THE CASE

This appeal concerns the brutal torture and attempted extrajudicial killing of an unarmed civilian in Somalia at the hands of Ali. The District Court properly denied Ali common law immunity as to Warfaa's TVPA claims – a reasonable and proper exercise of the court's independent judgment in light of the Executive Branch's repeated refusal to weigh in on the issue and given Ali's residence in the United States rather than Somalia, and the nature of the acts alleged, among others. There is no reason for this Court to grant certiorari here.

First, this is not a proper vehicle to review the question of whether a *per se* bar to immunity is proper when a case involves allegations of *jus cogens* violations. Here, the District Court denied common law immunity for Ali only after the Executive refused to weigh in on the matter. The District Court – and later the Court of Appeals – followed the Fourth Circuit's previous decision in *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012) ("*Samantar II*"), *cert. denied*, 134 S. Ct. 897 (2014), which also denied common law immunity for universal crimes such as torture where the Executive Branch had declined to request immunity. Notably, in *Samantar II*, the Fourth Circuit indicated that the Executive Branch is entitled to deference with regard to immunity, stating that "[t]he State Department's determination regarding conduct-based immunity . . . carries substantial weight in our analysis of the issue." *Id.* at 773. This is a case where the District Court properly exercised its independent judgment after the Executive refused to weigh in and the Fourth Circuit properly affirmed that decision.

Second, the "circuit split" Ali claims is simply nonexistent. There is no disagreement among the circuits as to the question presented – namely, whether a District Court may exercise its independent judgment to deny common law immunity as to torture and extrajudicial killing where the Executive Branch has not requested such immunity for a former foreign official living in the United States. In fact, the cases cited by Ali, if applicable at all, support the lower court's decision. *See, e.g.*, *Matar v. Dichter*, 563 F.3d 9, 15 (2d Cir. 2009) ("because the extension of common-law immunity is discretionary, the TVPA will apply to any individual official whom the Executive declines to immunize.").

Third, Ali presents no important issue for this Court's review. There is no risk of judicial interference with the Executive Branch's control over foreign relations, as the District Court and Court of Appeals rendered their decisions only after the Executive Branch declined to request immunity for Ali. Further, a denial of immunity is in line with the Executive Branch's policy to deny safe haven to torturers. And Ali's attempt to rely on the FSIA to obtain immunity for his crimes ignores this Court's decision in *Samantar v. Yousuf*, 560 U.S. 305 (2010) ("*Samantar I*"), which held that common law, not the FSIA, governs the claims to immunity of individual foreign officials.

Finally, the decision of the Court of Appeals was proper under both federal and international law. Ample authority holds that universal crimes such as torture, extrajudicial killing, crimes against humanity or other international crimes are not shielded by foreign official immunity, and numerous courts in other countries have held that foreign officials can be civilly liable for injuries caused by international

crimes. There is no requirement in international law that states must immunize foreign officials—other than sitting heads of state—for the kind of conduct at issue in the instant case. The Executive Branch plainly declined to suggest immunity here, and the court properly exercised its independent judgment in denying immunity for Ali in the absence of a State Department request. Accordingly, the petition should be denied.

A. Factual Background

In late 1987, Respondent Warfaa was a teenager, living and farming alongside his parents and siblings in a small village near Gebiley, Somalia. (First Am. Compl., *Warfaa v. Ali*, No. 1:05-cv-00701, ECF No. 89, ¶ 16 (E.D. Va. May 9, 2014) ("*Warfaa*")). At that time, Ali was a colonel in the Somali National Army. *Id.* at ¶ 15. He commanded soldiers stationed near Gebiley, where Warfaa lived. *Id.* In December 1987, without cause and on Ali's orders, soldiers carrying AK-47 machine guns entered Warfaa's family hut while he was asleep and abducted him, along with other men and boys from his village. *Id.* at ¶¶ 17-18. They took Warfaa to Ali's headquarters and put him in a prison cell, without charge. *Id.* at ¶ 19, 45. Over the course of three months, Warfaa was kept in jail, interrogated, brutalized, and humiliated by the soldiers and by Ali himself. *Id.* at ¶¶ 20-24, 61. On several occasions, Warfaa was stripped naked and tied in a position called the "Mig," with his hands and feet tied behind his back so that his body was tied in a U shape high in the air, causing him excruciating pain. *Id.* at ¶ 21, 61. In that position, soldiers kicked Warfaa in the head, and beat him with the butt of a gun. *Id.* Ali was present on more than one occasion while Warfaa was tortured. *Id.* at ¶ 25.

In March 1988, Warfaa was taken one final time into Ali's office for interrogation. Ali attempted to kill Warfaa by firing five bullets into him. *Id.* at ¶ 26. Assuming Warfaa was dead, Ali ordered his guards to bury Warfaa's body. *Id.* But remarkably, and unbeknownst to Ali, Warfaa survived the attack. *Id.* at ¶ 27. After discovering Warfaa was alive, the guards released Warfaa on the promise of payment. *Id*. Ali committed numerous other atrocities as part of a vicious counterinsurgency campaign directed at civilians and combatants alike. *Id.* at ¶¶ 10, 13, 14, 15.

In 1990, Ali fled to Canada. *Id.* ¶ 7. In 1992, he was deported from Canada for gross human rights violations in Somalia and has been living in the United States since 1996 as a lawful permanent resident. *Id.* ¶ 8. Ali lives in Alexandria, Virginia. *Id.* ¶ 5.

B. Procedural Background

Warfaa originally brought suit against Ali in November 2004 under the TVPA and the ATS, based on the atrocities Ali committed against Warfaa in Somalia in violation of the law of nations. (Compl., *Does v. Ali*, No. 1:04-cv-01361, ECF No. 1 (E.D. Va. Nov. 10, 2004)). Pursuant to the District Court's April 29, 2005 order, that complaint was voluntarily dismissed and the action was refiled on June 13, 2005.[2]

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[2] The original complaint included two Plaintiffs, John Doe – now identified as Farhan Mohamoud Tani Warfaa – and Jane Doe. On April 25, 2014, counsel informed the District Court that the Jane Doe plaintiff had decided not to continue with her claims against Ali. Status Conf. Hr'g Tr., Apr. 25, 2014, *Warfaa*, ECF No. 88. With the court's permission, Order, Apr. 25, 2014, *Warfaa*, ECF No. 87, Counsel filed an amended complaint that removed Jane Doe as a plaintiff and identified John Doe's real name.

Warfaa brought six causes of action against Ali: (1) attempted extrajudicial killing; (2) torture; (3) cruel, inhuman, or degrading treatment or punishment; (4) arbitrary detention; (5) crimes against humanity; and (6) war crimes. Warfaa asserted claims under both the ATS and the TVPA, 28 U.S.C. § 1350, note.

For most of the past decade, this action has been stayed for a variety of reasons, including (but not limited to) this Court's consideration of FSIA immunity in *Samantar I*, 560 U.S. 305 (2010), a case alleging similar violations against a general in the same Somali National Army as Ali, including for all relevant time periods in the instant case. General Samantar was denied FSIA immunity by this Court, subsequently denied immunity under the common law by the Fourth Circuit, *Samantar II*, 699 F.3d 763 (4th Cir. 2012), *cert. denied*, 134 S. Ct. 897 (2014), and ultimately found liable and ordered to pay the plaintiffs $21 million in damages. *Yousuf v. Samantar*, No. 1:04 CV 1360 (E.D. Va. Aug. 28, 2012) (Order and Memorandum Opinion). After Samantar exhausted all of his appeals, the District Court again delayed the instant case while waiting for this Court's opinion in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), which issued on April 17, 2013. After that, the District Court extended an additional stay for 120 days in order to give "the State Department an opportunity to advise it as to whether allowing this litigation to proceed would have any negative effect on the foreign relations of the United States." Minute Entry, May 17, 2013, *Warfaa*, ECF No. 65; Letter from the Ct. to U.S. Dep't of State, June 21, 2013, Pet. App. 1a-3a. On September 19, 2013, the United States informed the District Court that it "respectfully decline[d] to express views on the subject of the Court's inquiry." Pet. App. 4a-7a. The next day the District

Court extended the stay for an additional 120 days. Order, Sept. 20, 2013, *Warfaa*, ECF No. 77. On January 24, 2014, the District Court again extended the stay for 120 days "to allow counsel to seek a response from the United States Department of State regarding the diplomatic letter sent by the Federal Republic of Somalia on November 11, 2013, in which the Prime Minister request[ed] 'foreign official' immunity for defendant Yusuf Abdi Ali." Order, Jan. 24, 2014, *Warfaa*, ECF No. 82; see also Pet. App. 8a-16a. On April 24, 2014, the United States declined to issue a suggestion of immunity in favor of Ali and instead informed the District Court that it was "not in a position to present views to the Court concerning this matter at this time." *Warfaa*, ECF No. 85.

On April 25, 2014, the District Court lifted the stay and ordered Warfaa to file an amended complaint. Order, Apr. 25, 2014, *Warfaa*, ECF No. 87. He did so on May 9, 2014. *Warfaa*, ECF No. 89. Ali filed his motion to dismiss on May 30, 2014, and his memorandum in support thereof the following day. Defendant's Motion and Mem. in Supp. of Mot. to Dismiss, *Warfaa*, ECF Nos. 90, 91. Although Ali made no argument as to the potential effect of this Court's *Kiobel* decision on the outcome of this action in his motion to dismiss, the District Court dismissed Warfaa's ATS claims, holding that "the extraterritoriality analysis set forth in *Kiobel* appears to turn on the location of the relevant conduct, not the present location of the defendant." Pet. App. 31a. However, the court's ruling left intact the remainder of Warfaa's claims under the TVPA. Of relevance to the Petition, the court held that Ali was not entitled to "official acts" immunity from the TVPA claims because, under the Fourth Circuit's ruling in *Samantar II*, 699 F.3d 763 (4th Cir. 2012), he exceeded the scope of his authority

and violated *jus cogens* norms of international law against extrajudicial killing and torture. In other words, because his actions against Warfaa were not official acts performed within the scope of Ali's authority, nor could they have been ratified as such, Ali could not invoke common law immunity.[3] Pet. App. at 40a-42a.

Ali noticed an interlocutory appeal as to the District Court's rejection of Ali's "plea of common law immunity from suit" on August 13, 2014. Warfaa, ECF No. 108. By agreement of the parties, the District Court entered final judgment in favor of Ali on all of Warfaa's ATS claims. *Warfaa*, ECF No. 118. Warfaa appealed the District Court's dismissal of the ATS claims on September 5, 2014. *Warfaa*, ECF No. 119.

C. The Court of Appeals' Decision

The Fourth Circuit affirmed the District Court's dismissal of Warfaa's ATS claims, with Judge Gregory dissenting from that ruling but joining the majority opinion on the issue of immunity. *Warfaa*, 811 F.3d at 660-62; Pet. App. 53a-88a. Relying on its previous decision in *Samantar II*, the Court of Appeals affirmed the District Court's denial of Ali's motion to dismiss on the basis of common law immunity. Pet. App. at 78a-79a. In *Samantar II*, the Fourth Circuit held that a former high-ranking government official in Somalia was not entitled to foreign official immunity for claims under the TVPA or the ATS, when the State Department had denied all immunities from suit (both

[3] The District Court similarly held that Warfaa's TVPA claims were not barred by the political question (Pet. App. 33a-37a) or act of state doctrines (Pet. App. at 37a-40a), and that that the statute of limitations did not bar Warfaa's TVPA claims because the doctrine of equitable tolling applied. Pet. App. at 42a-47a.

head-of-state immunity and official acts immunity) and where the acts in question violated *jus cogens* norms. There, the State Department submitted a suggestion of *non-immunity* from suit for two reasons: (1) the government requesting immunity was not officially recognized; and (2) Samantar was a U.S. resident, who enjoyed the protection of U.S. laws and should be subject to the jurisdiction of U.S. courts. *Samantar II*, 699 F.3d at 777; *see* Statement of Interest of the United States, ¶ 9, *Yousuf v. Samantar*, No. 1:04 CV 1360 (E.D. Va. Feb. 14, 2011).

In analyzing the lower court's dismissal of official acts immunity for Samantar, the Fourth Circuit relied on this Court's decision in *Samantar I* and held that "common law, not the FSIA, governs the claims to immunity of individual foreign officials." *Samantar II*, 699 F.3d at 767 (citing *Samantar I*, 560 U.S. 305). The Fourth Circuit noted the "increasing trend" in American and international law "to abrogate foreign official immunity for individuals who commit acts, otherwise attributable to the State, that violate *jus cogens* norms," acts such as the universally recognized, specific, and obligatory norms against torture, genocide, indiscriminate executions and prolonged arbitrary imprisonment. *Id.* at 776; *see also Sosa v. Alvarez Machain*, 542 U.S. 692, 732-33 (2004) (instructing lower courts to create common law causes of action for only those norms of international law that are "specific, universal, and obligatory" such as torture and extrajudicial killing). As the court explained, this trend included Congress's creation, through the TVPA, of "an express private right of action for individuals victimized by torture and extrajudicial killing that constitute violations of *jus cogens* norms." *Samantar II* at 777. Because the State Department opposed immunity and because "*jus cogens* violations

are, by definition, acts that are not officially authorized by the Sovereign," the *Samantar II* court held that common law immunity could not apply. *Id.* at 776-78.

Accordingly, absent any suggestion of immunity by the Executive Branch, the court below in this case analyzed Petitioner's claim of official acts immunity under the common law. Noting that "Ali does not contest that the misdeeds alleged in the complaint violate *jus cogens* norms; he concedes that they do," the court relied on *Samantar II* to hold that foreign official immunity was not applicable in this case. *Warfaa*, 811 F.3d at 661; Pet. App. at 78a.

REASONS FOR DENYING THE PETITION

The Petition should be denied because this case is a poor vehicle for reviewing the question as Ali presents it. Ali's suggestion that the Court of Appeals applied a *per se* bar to common law immunity for his crimes and thereby jeopardized the interests of the United States fails to recognize that the Executive Branch did not weigh in, despite multiple opportunities to do so. In the absence of any suggestion of immunity by the Executive Branch, the lower court properly and reasonably exercised its independent judgment to deny immunity for acts of torture and extrajudicial killing under the TVPA. As in *Samantar II*, in which the Solicitor General urged denial of certiorari and suggested that the denial of immunity for a high ranking former Somali official residing in the United State was proper, there is no conflict between the lower court's decision and the Executive's position on immunity here. As a result, Ali essentially seeks error correction of the Fourth Circuit's decision below, which was not in error under these facts.

Review likewise is not warranted in this case because there is no disagreement among the circuits as to the question presented – namely, whether a District Court may exercise its independent judgment to deny common law immunity as to torture and extrajudicial killing where the Executive Branch has not requested such immunity for a former foreign official living in the United States. In fact, the cases cited by Ali, if applicable at all, support the lower court's decision. *See, e.g.*, *Matar v. Dichter*, 563 F.3d 9, 15 (2d Cir. 2009) ("because the extension of common-law immunity is discretionary, the TVPA will apply to any individual official whom the Executive declines to immunize."). But Petitioner's authorities are entirely inapt, since any confirmation of immunity by those courts was based on grounds and conditions not present here (*i.e.*, state sovereign immunity under the FSIA, status-based immunity for a head of state, or an Executive Branch request for conduct-based immunity).

This case also does not present an important question of federal law because the negative consequences that Ali warns of, such as the proliferation of suits against foreign officials and foreign policy repercussions, are easily mitigated by the limited nature of the ruling and the ability of the Executive Branch to request immunity for foreign officials. In fact, since this Court's denial of immunity in *Samantar I*, no such deluge has reached our courts.

In any event, the Court of Appeals' decision was proper and reasonable. The prohibition of torture and extrajudicial killing is well recognized under both international and federal law, and both recognize that civil suits may be brought against foreign officials for such violations. In short, there is no reason for this

Court's intervention in this case, and the Petition should be denied.

I. This Court's Review Is Not Warranted.

This Court's review is not warranted. First, this case is a poor vehicle for this Court to review whether the Fourth Circuit improperly applies a *per se* rule to deny common law immunity for *jus cogens* violations because, here, no such rule was applied. The lower court declined to apply immunity for Petitioner's acts of torture and attempted extrajudicial killing only after repeated invitations to the Executive Branch to weigh in. Given that the Executive Branch declined to intervene with a suggestion of immunity, the lower court's decision to provide jurisdiction over claims clearly defined by statutory mandate does not conflict with the interests of the United States.

Second, the split alleged by Ali is illusory. The cases on which he relies are inapposite because they involve either individual immunity determinations under the FSIA – which are no longer valid under this Court's ruling in *Samantar I* – or a deferral to the Executive Branch's request for common law immunity or status-based immunity, such as head-of-state immunity.

Third, there is no "exceptionally important question" meriting this Court's immediate review because the concerns Ali raises regarding U.S. foreign relations are entirely hypothetical and not shared by either of the political branches. Specifically, the Legislative Branch has granted Warfaa and other victims the right to bring claims for torture and extrajudicial killing in federal courts, and the Executive Branch has expressed no concern over the pursuit of the instant litigation since it commenced in 2004. Thus, Petitioner would have this Court disregard the considered

judgment of the political branches in favor of his own hypothetical concerns regarding U.S. foreign relations. By contrast, the law of the Fourth Circuit is clear that the Executive Branch's determinations regarding conduct-based immunity carry "substantial weight," *Samantar II*, 699 F.3d at 773. And, the Court of Appeals' decision below is in line with the policies of the Executive and Legislative Branches to deny safe haven to torturers, as evinced in the plain language and legislative history of the TVPA.

A. This Case Is a Poor Vehicle for the Question Ali Presents Because the State Department Never Requested Immunity for Ali.

This case presents a poor vehicle for reviewing the issue of whether the Fourth Circuit would impose "a categorical exception to common-law immunity" for *jus cogens* violations (Pet. at 7a) because a categorical bar was not applied in this case. The Executive Branch never requested immunity for Ali in spite of numerous invitations by the lower court to weigh in on the foreign policy implications of the case. Had there been such a request and had the District Court and the Court of Appeals rejected it because of the *jus cogens* violations, this case might have presented the issue of a *per se* rule denying immunity for *jus cogens* violations. But those are not the circumstances here; rather, the Court of Appeals held that immunity did not apply only *after* the State Department declined to request immunity. Had the court made its decision on the basis of a *per se* rule based solely on the nature of the claims, no such request would have been necessary. Nor would such a rule be consistent with the Fourth Circuit's holding in *Samantar II*, which

recognized that the Executive Branch's determinations regarding conduct-based immunity carry "substantial weight" and not, as the Petitioner implies, no weight at all. *Samantar II*, 699 F.3d at 773.[4]

The Solicitor General previously argued, in its amicus brief in *Samantar*, that this Court's review was not warranted because the District Court and the Court of Appeals' determination of non-immunity was "in accord with the Executive Branch's determination" and therefore those courts "properly disposed of the immunity issue." Am. Br. of the United States, *Yousuf v. Samantar*, No. 13-1361 (Jan. 30, 2015), at 21. Similarly here, there is no conflict between the lower court's decision and the position of the Executive. This Court should await a vehicle that squarely presents the issue of a *per se* bar, assuming *arguendo* there could ever be one in light of the Fourth Circuit's position that the Executive's determination is entitled to substantial weight, to review the issue Ali presents. That is not the present case.

B. The Decision Below is Not in Conflict with Other Circuits.

The split alleged by Ali is illusory. Ali characterizes the Fourth Circuit's ruling as a "categorical judicial

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[4] In *Samantar II*, the Fourth Circuit explicitly left open the door to the political branch to weigh in on the diplomatic effect of a case. *Samantar II*, 699 F. 3d at 773 ("With respect to foreign official immunity, the Executive Branch still informs the court about the diplomatic effect of the court's exercising jurisdiction over claims against an official of a foreign state, and the Executive Branch may urge the court to grant or deny official-act immunity based on such considerations").

exception to conduct-based immunity for cases involving alleged violations of *jus cogens* norms" (Pet. at 7), which he claims conflicts with decisions by the Second, Seventh, and D.C. Circuits. Pet. at 8. Specifically, Ali cites *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009), *Belhas v. Ya'alon*, 515 F.3d 1279 (D.C. Cir. 2008), and *Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004). Yet the Circuit Courts are aligned on the issue presented here – whether courts may exercise their independent judgment to allow or deny conduct-based immunity in the absence of Executive action. *See, e.g.*, *Matar*, 563 F.3d at 15 ("because the extension of common-law immunity is discretionary, the TVPA will apply to any individual official whom the Executive declines to immunize."). Moreover, the authorities on which Petitioner relies from the Second, Seventh, and D.C. Circuits are inapt because all three of those cases turned on grounds unavailable in the instant case, such as statutory immunity under the FSIA, status-based head-of-state immunity, or deference to an Executive Branch suggestion of immunity.[5]

First, the Fourth Circuit's decision below accords with the Second Circuit's decision in *Matar*. In fact, the *Matar* court specifically stated that "because the extension of common-law immunity is discretionary, the TVPA will apply to any individual official whom the Executive declines to immunize." *Matar*, 563 F.3d at 15; *see*, *in accord, Giraldo v. Drummond Co.*, 808 F. Supp. 2d 247, 249 (D.D.C. 2011) ("If, however, the

[5] In fact, the Fourth Circuit previously recognized that "the context for [those] cases was different," as "almost all involved the erroneous (pre-*Samantar I*) application of the FSIA to individual foreign officials claiming immunity[.]" *Samantar II*, 699 F.3d at 774 (citing, *inter alia*, *Matar*, 563 F.3d at 14; *Belhas*, 515 F.3d at 1285).

State Department takes no action, "a District Court ha[s] authority to decide for itself whether all the requisites for such immunity exist[ ].") (internal quotation marks omitted). The immunity decision in *Matar*, unlike here, was a matter of deference. There, the Executive Branch urged the court to decline jurisdiction, arguing that immunity should apply. The Second Circuit agreed, "under [its] traditional rule of deference to such Executive determinations." *Matar*, 563 F.3d at 15.[6] That reasoning does not apply to these circumstances because the Executive Branch took no position to which the lower court should defer.[7]

Second and similarly, the Fourth Circuit's decision below is not in conflict with the D.C. Circuit's decision in *Belhas v. Ya'alon*, 515 F.3d 1279 (D.C. Cir. 2008). In *Belhas*, the D.C. Circuit held that the FSIA provided individual immunity to former officials, a

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[6] Ali also cites the Second Circuit's decision in *Rosenberg v. Pasha*, 577 F. App'x 22 (2d Cir. 2014), which addressed claims arising from the 2008 Mumbai terror attacks. However, in *Rosenberg*, as in *Matar* and unlike here, the Executive Branch filed a statement requesting immunity for the defendants; accordingly, the court held that "in light of the Statement of Interest filed by the State Department recommending immunity for Pasha and Taj, the action must be dismissed." *Id.* at 24.

[7] Ali cites the Brief of the United States as Amicus Curiae in *Yousuf v. Samantar*, No. 13-1361, in support of his circuit split theory. Pet. at 7. The Solicitor General argued that *Samantar II* created a split with *Matar* over the level of deference to be accorded to the Executive's immunity determinations in cases of *jus cogens* violations. U.S. Amicus Brief, No. 13-1361, at 20. For the reasons articulated herein, the Fourth Circuit's decision below does not conflict with *Matar* and, in fact, does not even present the question of deference because the Executive took no position. The District Court requested the opinion of the Executive Branch, which the State Department declined to provide.

decision that has subsequently been abrogated by this Court's ruling in *Samantar I*. *See Samantar I*, 560 U.S. at 305. In any event, *Belhas* said nothing at all about the role of *jus cogens* principles in applying common law official-acts immunity. The D.C. Circuit itself has acknowledged that the question of *jus cogens* violations in other official-acts immunity circumstances remains an open question in the D.C. Circuit. *See Giraldo v. Drummond Co.*, 493 F. App'x 106, 107 (D.C. Cir. 2012) (unpublished) (in denying motion to compel third-party testimony of former President of Colombia, "[w]e need not decide whether a factual record supporting claims of illegal acts or *jus cogens* violations could ever lead to a different result[]"), *cert. denied*, 133 S. Ct. 1637 (2013).[8]

Finally, the Fourth Circuit's decision below does not conflict with the Seventh Circuit's decision in *Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004). In that case, which involved head-of-state immunity (*i.e.*, a status-based immunity different from the conduct-based immunity at issue here), the court held that "[j]ust as the FSIA is the Legislative Branch's determination that a nation should be immune from suit in the courts of this country, the immunity of foreign leaders remains the province of the Executive Branch." *Ye v.*

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[8] Relatedly, Ali's argument that the decision below conflicts with this Court's ruling in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), ignores this Court's distinction between FSIA immunity and common law immunity as expressed in *Samantar I*. In *Nelson*, this Court held that jurisdiction was improper because the activity in question was not a commercial activity within the meaning of the FSIA, and that there was "no dispute" that the defendants fell under the FSIA definition of a foreign state. *Nelson*, 507 U.S. at 351, 356. Therefore, *Nelson* does not conflict with, nor does it "squarely reject[]" the Court of Appeals' decisions below and in *Samantar II*.

Zemin, 383 F.3d at 627; *accord*, *Samantar II*, 699 F.3d at 772 ("Like diplomatic immunity, head-of-state immunity involves a formal act of recognition, that is a quintessentially executive function for which absolute deference is proper") (internal quotations omitted). Accordingly, the Seventh Circuit held, "[t]he Executive Branch's determination that a foreign leader should be immune from suit even when the leader is accused of acts that violate *jus cogens* norms is established by a suggestion of immunity." *Ye*, 383 F.3d at 627. There is no suggestion that Ali is in any way entitled to head-of-state immunity, and neither has there been any such determination by the Executive in this case.

For these reasons, there is no split. Neither the Court of Appeals in this case nor any other circuit has recognized *jus cogens* as a basis for overriding the Executive Branch's articulated position on immunity. In the absence of a suggestion of immunity from the State Department – which repeatedly declined to intervene here – both the District Court and the Court of Appeals properly held that common law immunity did not apply under the specific circumstances presented. Because the lower court's decision does not conflict with any other circuit, the Petition does not provide any basis for this Court's review.

C. The Petition Does Not Present An "Exceptionally Important Question" Warranting This Court's Review.

Nor is there an "exceptionally important question" meriting this Court's immediate review, as Ali contends. Pet. at 12. Ali fails to cite to a single case in which a court failed to defer to the Executive on the issue of common law immunity. Thus, the concerns Ali presents regarding negative consequences to

foreign relations (Pet. at 12) are not present here and likely will not ever present themselves because of the ability of the Executive Branch to request a finding for common law immunity, which Courts of Appeals agree should be given deference. *See Samantar II*, 699 F.3d at 773 ("The State Department's determination regarding conduct-based immunity . . . carries substantial weight in our analysis of the issue"); *Matar*, 563 F.3d at 15 (declining jurisdiction "under our traditional rule of deference to such Executive determinations"); *Ye*, 383 F.3d at 627 ("the immunity of foreign leaders remains the province of the Executive Branch."). Here, the Executive Branch was given significant time and numerous opportunities to weigh in on Ali's immunity and declined to do so. Pet. at 12. Had the Executive Branch been concerned in this case about "negative consequences for the United States' foreign-relations interests," it would have expressed them, just as it would be able to do in any other similar matter.

Moreover, the Court of Appeals' decision to deny common law immunity for TVPA claims under these circumstances in the absence of a pronouncement by the Executive Branch comports with the policies of the Executive and Legislative Branches to deny safe haven to torturers.[9] *See, e.g.*, S. REP. 102-249, at 8 (1991) (legislative history of TVPA) ("Because all states are officially opposed to torture and extrajudicial killing . . . the FSIA should normally provide no defense to an action taken under the TVPA against a

[9] Indeed, the TVPA *requires* a showing that the defendant acted "under actual or apparent authority, or color of law, of any foreign nation." 28 U.S.C. § 1350, note, § 2(a). If an act committed in an individual's official capacity is a prerequisite for TVPA liability, then it cannot also be a complete defense.

former official."); S. Rep. No. 102-249, at 3 (1991) (stating Congressional intent in passing the TVPA to "mak[e] sure the torturers and death squads will no longer have a safe haven in the United States."); Statement of Interest of the United States, ¶ 9, *Yousuf v. Samantar*, No. 1:04 CV 1360 (E.D. Va. Feb. 14, 2011) ("U.S residents like Samantar who enjoy the protections of U.S. law ordinarily should be subject to the jurisdiction of our courts."); Statement of Interest of the United States, ¶ 9, *Ahmed v. Magan*, No. 2:10 CV 00342 (S.D. Ohio March 15, 2011) (applying the same reasoning to recommend denial of immunity for a high ranking Somali official from suit alleging torture and extrajudicial killing). Given that the United States denied immunity to Samantar, a foreign official ranked higher than Ali from the same government regime, for the same violations, the lower court's exercise of jurisdiction over Ali creates no new risk of political friction.[10]

Finally, Ali's claim that the *jus cogens* exception to common law immunity "makes the [FSIA] optional" is misplaced. Pet. at 14. Petitioner's concern was addressed and extinguished by this Court in *Samantar I*. In that case, this Court was presented with the same argument that Ali presents here –

[10] Ali's suggestion that this suit somehow lacks "safeguards" and "accountability" is entirely unsupported. The U.S. Government's Statement of Interest in this case expressed no such concerns. Statement of Interest by the U.S. ¶¶ 2, 5, *Warfaa v. Ali*, No. 1:05-cv-701-LMB-JFA (E.D. Va.), Apr. 24, 2014, ECF No. 85. Indeed, in *Samantar I*, the State Department urged the courts to deny official acts immunity for such conduct, and uphold its "strong foreign policy interest in promoting the protection of human rights" and denying safe haven to torturers. Br. for the U.S. as Amicus Curiae Supporting Affirmance, *Samantar v. Yousuf*, 2010 WL 342031 (U.S. 2010).

namely, that allowing for individual immunity without application of the FSIA would encourage suits against individuals rather than sovereigns, thus circumventing the FSIA. This Court rejected that argument, noting "[w]e are . . . not persuaded that our construction of the statute's text should be affected by the risk that plaintiffs may use artful pleading to attempt to select between application of the FSIA or the common law." *Samantar I*, 560 U.S. at 325. Accordingly, this Court held that a suit against an individual foreign official is "properly governed by the common law because it is not a claim against a foreign state as the Act defines that term." *Id.* Thus, there is nothing in the Court of Appeals' decision that is contrary to this Court's decision in *Samantar I*, as Ali incorrectly contends. Review of the Court of Appeals' decision is therefore unwarranted.

II. Both the District Court and the Court of Appeals Properly Denied Ali Common Law Immunity.

Ali's argument that the Fourth Circuit's ruling is wrong as a matter of U.S. and international law is meritless, fact-bound, and seeks error correction, making it unworthy of this Court's review. Pet. at 16-22. The lower court reasonably exercised its independent judgment in denying Ali immunity for claims under the TVPA, consistent with the principles articulated by this Court and by the Executive Branch. Ali cites no case, nor can he, affirming immunity of foreign officials for torture and extrajudicial killing in the absence of a suggestion of immunity by the Executive Branch.

The lower court's denial of common law immunity was reasonable and in line with the precedent of this Court. Foreign sovereign immunity is a matter of

"grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). As such, immunity should attach "only when it serves th[e] goals" of comity and respect for foreign sovereignty. *In re Grand Jury Proceedings, Doe No. 700*, 817 F.2d 1108, 1110-1111 (4th Cir. 1987). As this Court held in *Samantar I*, "foreign sovereign immunity extends to an individual official 'for acts committed in his official capacity' but not to 'an official who acts beyond the scope of his authority.'" *Samantar I*, 560 U.S. at 322 n.17 (citing *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1103, 1106 (9th Cir. 1990)). The Executive Branch submission in that case additionally explained that "the Executive reasonably could find it appropriate to take into account petitioner's residence in the United States rather than Somalia, the nature of the acts alleged, respondents' invocation of the statutory right of action in the TVPA against torture and extrajudicial killing, and the lack of any recognized government of Somalia that could opine on whether petitioner's alleged actions were taken in an official capacity or that could decide whether to waive any immunity that petitioner otherwise might enjoy." Br. for the U.S. as Amicus Curiae Supporting Affirmance, *Samantar v. Yousuf*, 2010 WL 342031 (U.S. 2010). Applying these principles here, a denial of immunity was reasonable and proper.[11] *Samantar II*, 699 F.3d at 776–77. In any

[11] Ali's argument would also render the TVPA a nullity, because the TVPA requires a showing that the defendant acted "under actual or apparent authority, or color of law, of any foreign nation." 28 U.S.C. § 1350, note, § 2(a). If such authority were enough to convey immunity, then the TVPA would never apply. *See Hui v. Castaneda*, 559 U.S. 799, 812 (2010) (a court must "read the statute according to its text."); *Mamani v. Berzain*, Case

event, because Ali is a long-term resident of the United States, this personal-capacity damages suit would not serve the goals of the common law immunity doctrine. *See Doe No. 700*, 817 F.2d at 1110-1111.

As many federal courts before it recognized, the Fourth Circuit found that acts such as torture, extra-judicial killing, crimes against humanity or other international crimes are not shielded by foreign official immunity.[12] *Samantar II*, 699 F.3d at 777 ("[U]nder international and domestic law, officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity."); *see also Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 753 (D. Md. 2010) ("[T]here is no contradiction in finding that Defendant[] acted under color of law but that [his] actions were individual and not official actions."). The prohibitions against torture and extra-judicial killing are universally recognized norms in both domestic and international law, that are well-defined, and obligatory. *See Sosa*, 542 U.S. at 732-33 (citing three cases prohibiting torture and extra-judicial killing as examples of actionable norms in U.S.

No 14-15128 (11th Cir. Jun. 16, 2016), at 16 ("We will not presume that Congress intended to imply a meaning that undercuts the explicit words it chose to use.")

[12] Domestic authority agrees that a foreign officer who violates clear international and foreign law is no more entitled to immunity than a domestic officer who violates the U.S. Constitution. *See Ex Parte Young*, 209 U.S. 123, 159–60 (1908) (an official acting against the Constitution is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949) (where official's powers "are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions.").

courts). Therefore, any conduct amounting to torture or extrajudicial killing is, by definition, *ultra vires*, as demonstrated by numerous opinions from U.S. courts. *See Samantar II*, 699 F.3d at 775 ("A *jus cogens* norm . . . can be defined as 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.") (quoting *Vienna Convention on the Law of Treaties* art. 53, May 23, 1969, 1155 U.N.T.S. 331); *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1198 (9th Cir. 2007) (adopting same definition); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992) (same). As the Fourth Circuit has accurately recognized, "[p]rohibitions against the acts involved in this case—torture, summary execution and prolonged arbitrary imprisonment—are among these universally agreed-upon norms." *Samantar II*, 699 F.3d at 775; *see also United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1261 (11th Cir. 2012) (torture); *Mireskandari v. Mayne*, No. CV123861JGBMRWX, 2016 WL 1165896, at *17 (C.D. Cal. Mar. 23, 2016) (arbitrary imprisonment).

Ample authority supports the principle that torture and extrajudicial killing cannot be officially "authorized" by a state. For example, in *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1472 (9th Cir. 1994), the court held that "acts of torture, execution, and disappearance were clearly acts outside of [defendant's] authority as President and that acts "not taken within any official mandate" are "not the acts of . . . a foreign state." *Accord Siderman de Blake*, 965 F.2d at 717 (9th Cir. 1992) ("[N]o state claims a sovereign right to torture its own citizens."); *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir.

1995) (doubting "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."); *Xuncax v. Gramajo*, 886 F. Supp. 162, 176 (D. Mass. 1995) (rejecting plea of FSIA immunity, and holding that torture and summary execution "exceed anything that might be considered to have been lawfully within the scope of [a Guatemalan officer's] official authority."); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1198 (S.D.N.Y. 1996) (denying FSIA immunity because defendant's acts of torture fell beyond the scope of his authority as Deputy Chief of National Security of Ghana); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993) (acts of torture, cruel, inhuman and degrading treatment, and arbitrary detention in violation of customary international law "hardly qualify as official public acts.").

Ali does not claim that his acts were authorized by Somali law—nor could he. The Somali Constitution, adopted in 1979 and in effect throughout Ali's service in the Somali National Army, outlawed torture and extrajudicial killing. *See* Somali Const. Art. 26.1 ("Every person shall have the right to personal integrity."); *id.* Art. 27 ("A detained person shall not be subjected to physical or mental torture."); *see also id.* Art. 19 (recognizing the Universal Declaration of Human Rights and "generally accepted rules of international law"). Further, as an admitted officer of the Somali National Army, Ali was subject to the strict dictates of military law, including the Geneva Conventions of 1949, to which Somalia acceded on December 7, 1962.[13] Nothing in the Somali Constitution or the

[13] *See* Int'l Comm. of the Red Cross, *States Party to the following International Humanitarian Law and other Related*

Geneva Conventions authorized Ali to empty five rounds from his firearm into Warfaa's body during a custodial interrogation, without charge, trial, or sentence. Am. Compl. ¶ 26, *Warfaa v. Ali*, No. 1:05-cv-701-LMB-JFA (E.D. Va.), May 9, 2014, ECF No. 89; *see also* Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Art. 3(1)(a), Aug. 12, 1949, 75 U.N.T.S. 287 (prohibiting "murder . . . cruel treatment and torture" against persons taking no active part in hostilities).

Nor is there any credence to Ali's suggestion that the new Federal Republic of Somalia—which did not exist in 1987—has ratified his conduct decades later.[14] First, only the U.S. Executive Branch has the authority to intervene with a suggestion of immunity in these matters, and foreign sovereigns are not afforded any deference by our courts. *See Republic of Mexico v.*

Treaties as of 4-Jun-2014, at 5, http://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=SO.

[14] In his Statement of the Case, Ali alludes to a letter requesting immunity from former Prime Minister Shirdon. Pet. at 5. That letter was found unreliable by the State Department, and the U.S. Government noted in its Statement of Interest that Shirdon's authority to submit such a request was in question because "[o]n December 2, 2013, the Parliament of Somalia passed a vote of no confidence in the government of Prime Minister Shirdon; Prime Minister Shirdon was soon replaced." *Warfaa*, ECF No. 85 at 2. The SOI further explains that the State Department received a number of communications concerning Ali's immunity, and as further noted by a letter from the Solicitor General to the Clerk of this Court in *Samantar*, there was "uncertainty surrounding the legal status and legitimacy" of some of those communications." *See* Letter from Donald B. Verrilli, Jr., Solicitor General, to the Hon. Scott S. Harris, Clerk, Supreme Court of the United States (No. 12-1078, Jan. 8, 2014). Thus, both the District Court and the Court of Appeals correctly disregarded these communications.

Hoffman, 324 U.S. 30, 34-35 (1945) (cited in *Samantar I*, 560 U.S. at 311-312). In *Hoffman*, this Court denied immunity to a merchant vessel owned by the Mexican government after the State Department declined to weigh in on the immunity of the ship, in spite of the Mexican government's request to both the court and the state department to dismiss the claims on immunity grounds. *Hoffman*, 324 U.S. at 31-32. The potential for political friction was recognized as a valid concern, yet this Court found that "[i]n the absence of recognition of the claimed immunity by the political branch of the government, the courts may decide for themselves whether all the requisites of immunity exist." *Id.* at 34. Notably, and most relevant to the facts in the instant case, the Court found that despite the numerous opportunities for the political branch to weigh in, the government's failure to do so indicated that it was not U.S. policy to extend immunity in that case and that it was not proper for the Court to "enlarge an immunity to an extent which the government, although often asked, has not seen fit to recognize." *Id.* at 38.

In the absence of a suggestion of immunity from the Executive Branch, this Court's precedent and the Legislature's enactment of the TVPA dictate that torturers should not be immunized for their actions and foreign states cannot cloak such actions with official authorization. *See id.* at 32*; see also Samantar I*, 560 U.S. at 311-12 (citing *Hoffman*, and *Ex parte Republic of Peru*, 318 U.S. 578, 587 (1943) (same)); *Samantar II*, 699 F.3d at 776; *accord Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. at 701–02. In sum, the actions Ali undertook were "not legitimate official acts and therefore do not merit foreign official immunity," *id.* at 776, and accordingly, both the District Court and the Court of Appeals

properly exercised their independent judgment in denying Ali's claim of common law immunity.

Ali's attempt to portray an "international consensus" regarding civil immunity for government officials for torture and extrajudicial killing also fails.[15] First, just as the Court of Appeals ruled below and in *Samantar II*, numerous courts in other countries have held that foreign officials can be civilly liable for injuries caused by international crimes, even if the defendant held office at the time. Second, as with the domestic authorities he cites, the international authorities on which Ali relies draw on grounds for immunity not applicable in the instant case.

Foreign courts have routinely denied civil immunity for violations such as those at issue here. For example, in July 2012, a Swiss court specifically denied "official acts" immunity to a former Algerian Minister of Defense against whom victims had lodged criminal and civil complaints for torture, on the ground that international law does not give such protection to universally-recognized crimes.[16] In March 2012, a Dutch court awarded a Palestinian plaintiff one million euros in a civil suit against former Libyan officials for

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[15] Ali implies that the status of the doctrine of *jus cogens* is uncertain, and is therefore insufficient to override common law immunity because of remarks by a State Department employee in a UN committee. Pet. at 16. Ali does not otherwise specify the content of those remarks, or explain how they have any bearing on this case.

[16] *A v. Ministère Public de la Confédération, B and C*, (Khaled Nezzar), Fed. Crim. Ct. of Switzerland, B.2011.140, at 2 ¶B, 25–26 ¶¶ 5.4.3 (July 25, 2012), *available in French at* http://bstger.weblaw.ch/pdf/20120725_BB_2011_140.pdf.

torture committed in Libya,[17] and in March 2011, the Tribunal de Grande Instance de Paris held former Bosnian Serb leaders Radovan Karadzic and Biljana Plavsic liable in a civil suit for injuries suffered by a Bosnian family during the war, awarding 200,000 euros in damages to the victims.[18] Similarly, in July 2007, the Belgian Court of Assizes for Brussels entered a criminal and civil judgment against former Rwandan Major Bernard Ntuyahaga, awarding compensatory damages to his victims.[19] While none of these foreign precedents are binding on U.S. courts, each supports the conclusion in *Samantar II* that "under international and domestic law, officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity." 699 F.3d at 777. The examples Ali relies on from courts in Australia, New Zealand, the United Kingdom, Canada, and the European Commission on Human Rights (Pet. at 17) are distinguishable because those decisions apply immunity to sovereign states or heads of state, or on the basis of a foreign immunity statute. *See Zhang v. Zemin*, [2010] NSWCA 255, at ¶¶ 121, 153 (C.A.) (Australia); *Fang v. Jiang*, [2006] NZAR 420, 433-35 (H.C.) (New Zealand); *Jones v. Saudi Arabia*, [2007], 1 A.C. 270, 291-306 (H.L. 2006) (U.K.); *Bouzari v. Islamic Republic of Iran*, [2004] 71 O.R.3d

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[17] *Ashraf Ahmed El-Hojouj v. Harb Amer Derbal, et al.*, LJN BV9748, Rechtbank's-Gravenhage, 400882 / HA ZA 11-2252 (March 21, 2012), *available in Dutch at* http://jure.nl/bv9748.

[18] *Kovac et al. v. Karadžic et al.*, Tribunal de Grande Instance de Paris, Judgment of March 14, 2011, No. 05/10617.

[19] *Affaire Bernard Ntuyahaga*, Cour d'Assises de Bruxelles, 005417 (July 5, 2007), https://competenceuniverselle.files.wordpress.com/2011/07/arret-5-juillet-2007.pdf.

675, 695 (C.A.) (Canada); *Al-Adsani v. United Kingdom*, App. No. 35763/97, ¶ 61, 34 Eur. H.R. Rep. H. (2001) (European Court of Human Rights).

Moreover, Ali's reliance on the International Court of Justice case *Jurisdictional Immunities of State* (Ger. v. Italy), 2012 I.C.J. 99 (Feb. 3), provides another example of Ali's conflation of state immunity and individual immunity.[20] Pet. at 17-18. In *Jurisdictional Immunities*, the ICJ examined the relationship between *jus cogens* violations committed during World War II by Germany and the doctrine of state immunity. The court held that, even assuming *arguendo* such violations existed, "state immunity" still stands under international law. *Id*. at ¶ 97. In reaching its decision, the court looked to the law of various nations—including the FSIA. *Id*. at ¶ 88. But nowhere in *Jurisdictional Immunities* was individual immunity addressed, nor does Ali explain how it conflicts with *Samantar* in any way. Nor does the treaty cited by Ali, the UN Convention on Jurisdictional Immunities of States and Their Property, apply here. Pet. at 18-19. This treaty has not gone into effect, and the United States has neither signed nor ratified it.[21]

Indeed, international law does not require states to immunize foreign officials—other than sitting heads of state—for the kind of conduct at issue in the instant case. *See* Judgment and Opinion, International Military Tribunal at Nuremberg (Oct. 1, 1946), *reprinted in* 41 Am. J. Int'l L. 172, 220–21 (1947) ("He

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[20] And, in any event, ICJ opinions are not binding on U.S. courts. *Medellin v. Texas*, 552 U.S. 491 (2008).

[21] *See* UN Convention on Jurisdictional Immunities of States, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-13&Chapter=3&lang=en.

who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law."). To the contrary, the Court of Appeals' decision is in harmony with relevant international and foreign authority, in which abrogation of civil immunity for crimes such as torture and extrajudicial killing is common.

CONCLUSION

For the reasons discussed above, Petitioner Yusuf Abdi Ali's Petition for a Writ of Certiorari should be denied. In the alternative, should this Court grant Ali's petition, it should also grant Respondent and Cross-Petitioner Farhan Mohamoud Tani Warfaa's conditional cross-petition for a writ of certiorari as to the issue of jurisdiction under the ATS.

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